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1	Monday, 3 April 2017	1	looking for a further opportunity to make submissions in
2	(10.30 am)	2	the light of that judgment?
3	LADY JUSTICE GLOSTER: The first question we have is: to	3	MR DICKER: The answer is: yes, that would seem to be
4	what extent are the arguments going to be affected, or	4	a sensible course.
5	the issues going to be affected, by any decision that	5	LADY JUSTICE GLOSTER: And simply in writing or will it
6	the Supreme Court may give in relation to the previous	6	may depend. I mean, because it's always difficult to
7	Waterfall appeal?	7	get the same constitution together again.
8	Obviously, as I understand it, the Waterfall 2B	8	MR DICKER: The answer is: it may depend, but I suspect
9	appeal, dealing with the releases, is going to be	9	there will certainly be a keenness on the part of the
10	affected, if the concurrency conversion claims go.	10	parties to have an opportunity to make oral submissions
11	MR DICKER: I think, depending on the outcome of the appeal,	11	if they think that is necessary.
12	it may well impact on both part A and part B.	12	LADY JUSTICE GLOSTER: Yes. Okay. You are all agreed about
13	LADY JUSTICE GLOSTER: Because of general statements which	13	that, are you? Yes, fine.
14	the Supreme Court may make?	14	Then we'll start and see where we get to.
15	MR DICKER: For two reasons: one, there are some issues, in	15	Thank you for the issues paper, that was extremely
16	part A, which effectively assume the existence of	16	helpful, apart from the typo which amused me in
17	currency conversion claims and then ask, for example, do	17	the first articulation of issue 2.
18	you have to offset statutory interest when calculating	18	Submissions by MR DICKER
19	the amount of the currency conversion claim.	19	MR DICKER: Just a brief word in relation to that. There
20	If the Supreme Court were to hold that there is no	20	are obviously various ways in which you can order the
21	such thing as a currency conversion claim, then that	21	issues. We've tried to order them in a way which we
22	issue obviously disappears.	22	think makes some sort of logical sense. They plainly
23	I think broadly, depending on the approach that the	23	interrelate, and it's useful to see how the arguments
24	Supreme Court takes, the decision could impact on all of	24	fly in relation to each of them before, obviously,
25	the issues in relation to part A. For example, if the	25	forming a view on any of them.
	Page 1		Page 3
1	Supreme Court expressed certain views about the general	1	The other document which I hope the court has is
2	effect of the statutory scheme, creditors first, members	2	a proposed timetable. The general idea in relation to
3	last, for example, that may in turn have an influence on	3	that is that I should start and I should deal with all
4	how this court approaches questions like Bower v Marris,	4	the part A issues, and whether or not I'm strictly the
5	non-provable claims of interest, things of that sort.	5	appellant or the respondent; that seemed to us to be
6	LADY JUSTICE GLOSTER: But, obviously, everybody is agreed	6	a sensible course. But Mr Zacaroli on behalf of
7	that this court should go ahead nonetheless; that we	7	Wentworth will then respond. If the administrators have
8	shouldn't all back up and go home and wait for the	8	anything to add, they will do so at the start of
9	judgment.	9	replies.
10	MR DICKER: I don't think anyone as far as I'm aware	10	Mr Smith, on behalf of York, is keen to open his two
11	has suggested the latter.	11	appeals. We've added those at the end of the part A
12	LADY JUSTICE GLOSTER: Yes.	12	section.
13	MR DICKER: I'm afraid	13	LADY JUSTICE GLOSTER: Yes.
14	LORD JUSTICE PATTEN: That would, in fact, have been the	14	MR DICKER: So for as part B is concerned, again, it's the
15	sensible course. I'm not criticising you. It's	15	same as the general approach, so the order is reversed.
16	unfortunate that we haven't had the judgment from the	16	LADY JUSTICE GLOSTER: Yes, Mr Zacaroli will go first.
17	Supreme Court given it would have been plainly more	17	LORD JUSTICE BRIGGS: That is the reason the supplemental
18	sensible for this hearing to have taken place after the	18	issues have been pull out.
19	judgment had been handed down.	19	MR DICKER: That is the only reason.
20	MR DICKER: And I certainly see if I may say the force	20	LORD JUSTICE BRIGGS: Because otherwise seems quite clearly
21	in that. I think it's fair to say that we had hoped we	21	connected with the As and Bs from which they derive.
22	would have received	22	MR DICKER: They are. We didn't think it was practical to
23	LADY JUSTICE GLOSTER: But, anyway, you are all agreed that	23	deal with each issue on its own. We will deal with them
24	we should crack on now. What is going to happen when we	24	in the normal order. We've managed to achieve agreement
25	do get the judgment from the Supreme Court? Are you	25	on that in the main. Your Lordship observed Mr Smith is
	as get the judgment from the supreme court: The you	23	on that if the frame. I out Lordship observed the billion is
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1	the one exception.	1	leading up to enactment of the 1986 Act criticised the
2	LORD JUSTICE BRIGGS: Yes.	2	operation of the principle. Indeed, although applied as
3	LADY JUSTICE GLOSTER: Unless we come to the conclusion that	3	recently as 1984, it was not even referred to in those
4	we're not happy with your order, at the moment, proceed	4	materials.
5	on the basis that we'll go with your order.	5	The judge, in his judgment, didn't criticise it or
6	MR DICKER: Thank you. I was going to start, then, with	6	suggest any reason why the legislature might have
7	issue 2, which we have called: the issue in relation to	7	decided to disapply the principle. His judgment simply
8	the principle in Bower v Marris. It concerns	8	doesn't deal with that aspect of things. Instead, he
9	declaration 3, subscribed in the judgment as issue 2,	9	reached his conclusion based on the wording of
10	and dealt with by Mr Justice David Richards in his main	10	rule 2.88(7) and (9).
11	judgment at paragraphs 13 to 164.	11	What we say in relation to that is: all of the
12	The issue here is how you deal with dividends which	12	points on the wording that he relied on applied just as
13	have been paid when calculating interest under	13	much to the prior statutory schemes, either in
14	rule 2.88; do you proceed on the basis that dividends	14	liquidation or in bankruptcy. Indeed, the points which
15	have been paid in respect of principal, the principal	15	he accepted had been raised in argument and rejected by
16	has therefore been repaid, and calculate interest	16	the courts in relation to those prior statutory schemes.
17	accordingly; or do you notionally reallocate the	17	Now, if the judge is correct, we say the
18	dividends first to interest, and calculate interest on	18	consequences are remarkable. Creditors will not receive
19	that basis?	19	the interest that they were entitled to receive outside
20	Now, the judge held that the answer was the former.	20	of insolvency. Instead, all or part of the surplus will
21	You calculate interest on the basis the dividends have	21	be distributed to shareholders, despite the fact
22	been paid in respect of proved debts, essentially	22	creditors haven't been paid and will never be paid the
23	principal, and the rule doesn't permit any notional	23	full amount they are owed.
24	reallocation in the event of a surplus. We say that was	24	We know, subject to the decision of the Supreme
25	a surprising conclusion for him to have reached for	25	Court, from the judgment of this court in Waterfall 1,
20	a surprising contrastor for min to have reacted to:	23	Court, from the judgment of this court in waterfall 1,
	Page 5		Page 7
1	number of reasons. In short, that's not how things had	1	that foreign currency creditors are entitled to be paid
2	operated in a liquidation between 1869 and 1986.	2	what they are owed before any distribution is made to
3	Prior to 1986, in the event of a surplus in	3	shareholders, and in our submission there isn't a
4	a liquidation, interest was calculated by notionally	4	sensible reason why a distinction is to be drawn
5	treating the dividends as having been paid first in	5	between, on the one hand, foreign currency creditors
6	respect of interest; that was also the position in	6	and, on the other hand, creditors entitled to interest.
7	relation to bankruptcy between at least 1743 and 1883.	7	The general rule is: creditors first, members last; you
8	No party has been able to find an authority in	8	would expect that to be reflected in the statutory
9	bankruptcy indicating that the position changed after	9	scheme and, we say, properly construed, it is.
10	1883.	10	Now, as your Lordships know, this issue like most
11	The same approach has actually been taken in every	11	of issues on the appeal is one which involves
12	single other Commonwealth jurisdiction that the parties	12	a substantial amount of money. The administrators have
13	have been able to identify which have considered it.	13	estimated the unsecured creditors would end up receiving
14	There is no case in any other jurisdiction where the	14	some 1.3 billion sterling less by way of interest
15	principle has been criticised, let alone rejected.	15	because the principle in Bower v Marris does not apply
16	LORD JUSTICE PATTEN: The issue is whether the 1986 Act	16	and subordinated creditors and, financially, the
17	changed the position, isn't it?	17	shareholders would receive a corresponding windfall. We
18	MR DICKER: Your Lordship is absolutely right. We say in	18	say, again, that would be an extraordinary result.
19	short: your Lordship can't reach a view on that without	19	I was proposing to develop my submissions by doing
20	seeing the context and what in one case has been	20	seven things. First, to say a little bit about how the
21	referred to as the "intellectual freight" provided by	21	principle in Bower v Marris operates and why the issue
22	the prior regime.	22	arises.
23	My Lady, in each case the courts have applied the	23	Secondly, to look at the terms of rule 2.88(7) and
24	equitable principle in Bower v Marris describing it as	24	(9), at this stage, to identify the various aspects of
25	both a fair and a just approach. None of the material	25	the rule that Mr Justice David Richards referred to in
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abmissions, shorth, as to what we say they mean.  Thirty, then to speral at lite time, not too long, to be be be be be been to the principle.  To hardly, then to speral at lite time, not too long, to be be be be been to the principle.  Be booking at the postton prior to 1986, both in relation to to be written to the bearing stant with the first topic, which is to say a few words about be brown the principle in Bower valuraris operates.  Be points on which Mr Justice David Richards Carbon and indeed, were raised in agument during the coarse of various authorities on those schemes.  I also want to deal with the analogous position in relation to the earlier statutory solvents of the Commonwealth authorities.  I also want to deal with the analogous position in relation to the difference britteen the wording that is a case called Whitingstall v Grover and to refer to one of the Commonwealth authorities.  MR DICKER: There is an interesting question depending on a decreased insolvent estatic.  MR DICKER: There is an interesting question depending on a decreased insolvent estatic.  MR DICKER: There is an interesting question depending on a decreased insolvent estatic.  MR DICKER: There is an interesting question depending on a decreased insolvent estatic.  MR DICKER: There is an interesting question depending on a decreased insolvent estatic.  The furth, to look at the materials leading up to the 1986 Act, in particular the Cork report and the common and the properties of th				
Thirdly, then to spend a little time, not too long.  to boking at the position prior to 1986, both in relation to bankrupevy and liquidation, to showy your Lordships how Bower v Marris was applied and as part of doing that, to show your Lordships that, as I said, all of the points on which Mr. Instice David Richards relied arose equally in relation to the earlier statutory schemes of various authorities on those schemes.  If all own and to deal with the analogous position in relation to the administration of the deceased mosherat estate, a particular decision of Mr. Justice Chita's in a case called Whittingsfall v Grover and to refer to one of the Cormonovedial laudstorities.  REPART OF SERVICE GLOSTER: Deceased and insolvent estates?  MR DICKER: There is an interesting question depending on the difference between the two, but the administration of a deceased insolvent estate.  MR DICKER: There is an interesting question depending on the difference between the two, but the administration of a deceased insolvent estate.  Page: 9  The fourth, to look at the materials leading up to the 1986 Act, in particular, he was wrong to say that rules simply implemented the recommendations of the Cork Report and adopted the prior position in prior approaches.  A fifth, to say something about principle and policy.  New York the first tope, which is to say a few words about blook be principle in Bower v Marris operates.  We say 15 helpful to sure by Funding onesel of why the sase arise interest across on rinciple or why the sare arise interest across on rincrest, a creditor white first to discharge the analyse will the course unless 4's compound interest on interest, a creditor while save arise interest and supposition in treation to the administration of a deceased insolvent estate.  MR DICKER: Then, I think, in the main, subject to another save which be used and to meet basis of the rules you are emitted to compound interest in you will see next, considered the position in relation compound interest and you the prior positio	1	reaching the conclusion he did, and to make our	1	appropriation, which the judge held was a necessary part
4 booking at the position prior to 1986, both in relation 5 to bankruptcy and liquidation, to show your Lordships 6 how Dower V Marris was applied and, as part of doing 7 that, to show your Lordships that, as part of doing 8 points on which Mr Justice David Richards relation to the earlier statutory schemes 9 cqually in relation to the earlier statutory schemes 10 and, indeed, were rateal for any agreement of any payment is any payment is any payment is of various authorities on these schemes. 11 also want to deal with the antalogous position in relation to the administration of the deceased insolvent estates a particular decision of Mr Justice Chitty in a case called Whitingstally Grover and to refer to one of the Commonwealth authorities. 12 LADY JUSTICE GLOSTER: Doceased and insolvent estates? 13 LADY JUSTICE GLOSTER: Doceased and insolvent estates? 14 LADY JUSTICE GLOSTER: Doceased and insolvent estates? 15 White Paper, because we say Mr Justice David Richards 16 David Mr Dicker, the relation of the two but the administration of the furth, to look at the materials leading up to the difference between the two, but the administration of the furth, to look at the materials leading up to the furth, to look at the materials leading up to the furth of the proof and the subject of an adversarial seading up to the furth of the proof and the subject of an adversarial seading up to the furth of the proof and the subject of an adversarial seading up to the furth of the proof and the subject of an adversarial seading up to the furth of the proof and the subject of an adversarial seading up to the furth of the proof and the subject of an adversarial seading up to the furth of the proof and the proof and the proof and the proof and adopted the prior position in the judge came to was that on the basis of the rules you are subject to another sisses which the judge came to was that on the basis of the rules you are subject to another sisses which the judge came to was that on the basis of the rules you are subject to anothe	2	submissions, shortly, as to what we say they mean.	2	of the principle.
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6 how Bower v Marris was applied and, as part of doing 7 that, to show your Lordships that, as I said, all of the 8 points on which Mr Justice David Richards 9 capally in relation to the cardier stantory schemes 10 and, indeed, were reside in argument during the course 11 of various authorities on those schemes. 12 I also want to deal with the analogous position in 13 relation to the administration of the deceased insolvent 14 estate, a particular decision of Mr Justice Chitty in 15 a case called Whitingstall V Grover and to refer to one 16 of the Commonweith authorities. 17 LADY JUSTICE GLOSTER. Deceased and insolvent estates? 18 MR DICKER. Yes. 19 I LADY JUSTICE GLOSTER. Or ones flipping in and out? 20 MR DICKER. There is an interesting question depending on 21 the difference between the two, but the administration 22 of a deceased insolvent estate. 23 The Fourth, to look at the materials leading up to 24 the 1986 Act, in particular the Cork report and the 25 White Paper, because we say Mr Justice David Richards 26 in 1986. In particular, he was wrong to say that rules 3 simply implemented the recommendations of the 4 Cork Report and adopted the prior position in 5 bankruptey. That, with respect to him, is not right. 6 There was a significant change introduced by the White 7 Paper which introduced an alternative entitlement, 8 anamely the rate applicable to the debt apart from the 9 administration. 10 What we say in fact happened in 1986 was that the 11 two streams, both bankruptey and liquidation, were 12 combined. In analysing the rules, it's important to 13 approaches. 14 A fifth, to say something about principle and 15 policy in principles and policies underlying the statutory 16 regime, and to make our submissions in relation to the 17 work from the administration to the 18 voor the same and the 29 prior position. 20 responsible to the debt apart from the 20 aministration. 21 LADY JUSTICE GLOSTER: Only we an accrued claim 22 the principles and policies underlying the statutory 23 the principles and polic	4	looking at the position prior to 1986, both in relation	4	with the first topic, which is to say a few words about
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9 will berefive want to ensure that any payment is 10 and, indeed, where raised in argument during the course 11 of various authorities on those schemes 12 I also want to deal with the analogous position in 13 relation to the administration of the deceased insolvent 14 estate, a particular decision of Mr Justice Chitry in 15 a case called Whitingstall v Grover and to refer to one 16 of the Commonwealth authorities. 17 LADY JUSTICE GLOSTER. Deceased and insolvent estates? 18 MR DICKER. Yes. 19 LADY JUSTICE GLOSTER. Deceased and insolvent estates? 20 MR DICKER. There is an interesting question depending on 21 the difference between the two, but the administration 22 of a deceased insolvent estate. 23 The fourth, to look at the materials leading up to 24 the 1986 Act, in particular the Curk report and the 25 White Paper, because we say Mr Justice David Richards 26 in 1986. In particular, he was wrong to say that rules 27 simply implemented the recommendations of the 28 correctly analyse the changes which were made 29 in 1986. In particular, he was wrong to say that rules 29 simply implemented the recommendations of the 29 doministration. 20 MR DICKER: Then, I think, in the mair, subject to another 21 issue which the judge dealt with, the principle in 22 the 1986 Act, in particular, he was wrong to say that rules 23 simply implemented the recommendations of the 24 Cork Report and adopted the prior position in 25 bunkruptey. That, with respect to him, is not right. 26 There was a significant change introduced by the White 27 Paper which introduced an alternative entitlement, 28 namely the rate applicable to the debt apart from the 29 administration. 20 A fifth, to say something about principle and 21 policy. 22 Sixth, then to return to the wording of rule 2.88, 23 to construe it in the light to fine statutory history and 24 prior approaches. 25 Sixth, then to return to the wording of rule 2.88, 26 to construe it in the light of the statutory regime, and to make our submissions in relation to the 27 wording in slight	7	that, to show your Lordships that, as I said, all of the	7	why the issue arises. Interest accrues on principle not
and, indeed, were raised in argument during the coarse of various authorities on those schemes.  11	8	points on which Mr Justice David Richards relied arose	8	unless it's compound interest on interest, a creditor
11 a relation to the administration of the deceased insolvent estate, a particular decision of Mr Justice Chitry in a care called Whittingsally Crower and to refer to one of the Commonwealth authorities.  12 LADY JUSTICE GLOSTER: Deceased and insolvent estates?  13 MR DICKER: There is an interesting question depending on of a deceased insolvent estate.  14 Early Mr DICKER: There is an interesting question depending on of a deceased insolvent estate.  15 The Durith, to look at the materials leading up to the 1986 Act, in particular the Cork report and the 25 White Paper, because we say Mr Justice David Richards  15 Dankruptey. That, with respect to him, is not right. There was a significant change introduced by the White Paper which introduced an alternative entitlement, namely the rate applicable to the debt apart from the administration.  16 What we say in fact happened in 1986 was that the prior approaches.  17 LADY JUSTICE GLOSTER: Isoacrated by the White Paper which introduced an alternative entitlement, and the prior approaches.  18 Simply implemented the recommendations of the contract, with the prior approaches.  19 LADY JUSTICE GLOSTER: Under the contract, with the prior position in the debt apart from the administration.  10 What we say in fact happened in 1986 was that the prior approaches.  11 LADY JUSTICE GLOSTER: Then, I think, in the main, subject to another issue which the judge dealt with, the principle in Bower v Marris is less important.  12 LADY JUSTICE GLOSTER: Checords the prior position in the light of the contract would interest only—  12 LADY JUSTICE GLOSTER: Checords the prior position in the late of the prior position in the prior position in the late of the prior position in the debt and the prior position in the debt and the prior position in the	9	equally in relation to the earlier statutory schemes	9	will therefore want to ensure that any payment is
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4 There's a good explanation, your Lordship's will see  5 Why does insolvency potentially raise an issue?  6 We say, it's important to understand it sterns from  7 the basic nature of hankrapticy or fluidation for this  8 reason and in this ways in an insolvency the first task  9 is to distribute the assets equally amongst creditors in  10 accordance with the pari passu principle. That  11 necessarily requires the existence of a cut-off date for  12 provable claims, to ensure that all provable claims can  13 be assertantiand and valued by reference to a common date.  14 One consequence of that, of course, is that you can't  15 prove for post insolvency interest. In other words,  16 interest for the period after the making of the winding  17 up order, commencement of the binscriptcy or the  18 administration.  19 The necessary consequence of those two basic  19 factures of the insolvency regime is that when an office  10 followed the commencement of the insolvency, and not in  12 respect of any post-insolvency interest. That's simply  10 accordance see how the issue arises.  11 what's required to achieve pari passu distribution.  12 Trespect of any post-insolvency interest. That's simply  12 Trespect of any post-insolvency interest. That's simply  13 what's required to achieve pari passu distribution.  14 What's required to achieve pari passu distribution.  15 Drove page 15  1 what's required to achieve pari passu distribution.  16 principal can be quild in supplement of the insolvency, and not in  17 regime, then how in those creambility and that in the center of the part of a supplement of the insolvency interest. That's simply  10 accordance on the provided on the same and the principal low interest of page 15  11 what's required to achieve pari passu distribution.  12 Treambility and difficulty with in Re Lines Brothers 2.  13 Belove you get to the stage of calculating how interest  14 Should be paid in three event of a supplus, the office  15 bolider has already paid dividends in respect of  16 principal ar	2		2	interest should be paid to creditors in the event of
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6 We say, it's important to understand it stems from the basic nature of bankruptcy or liquidation for this reason and in this way; in an insolvency the first task is to distribute the assets equally amongst creditors in accordance with the part passay principle. That 11 necessarily requires the existence of a cut-off date for provable claims, to ensure that all provable claims can 12 provable claims, to ensure that all provable claims can 13 be ascertained and valued by reference to a common date. 14 One consequence of that, of course, is that you can't provable claims, to ensure that all provable claims can 15 prove for post insolvency interest. In other words, 16 interest for the period after the making of the winding up order, commencement of the bankruptcy or the administration. 19 The necessary consequence of those two basic 12 necessarily making payments in respect of prove debts, 23 effectively principal, up to, and any interest up to the date of the commencement of the insolvency, and not in respect of any post-insolvency interest. That's simply 12 proves a post-of any post-insolvency interest. That's simply 12 proves of any post-insolvency interest. That's simply 14 proves of any post-insolvency interest in the control of a surplay, the office 15 bolder has already paid dividends in respect of principal in the dividends as if they had been praid in full. 18 proves of the insolvency interest and office of the commencement of the insolvency and not in respect of any post-insolvency interest in other to the season of dividends, he is necessarily making aparts in respect of principal in the dividends in respect of principal in the dividends in respect of principal in the dividends in respect of the commencement of the insolvency and not in respect of a proper insolvency principal and the principle works of a small new full respect of principal in the dividends in respect of principal and the principle works of a small new full respect of principal in the dividends in respect of principal in the dividends	4	considering how the rule should operate.	4	There's a good explanation, your Lordship's will see
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8 reason and in this way; in an insolvency the first task is to distribute the assets equally amongst creditors in accordance with the part passus principle. That in eccessarily requires the existence of a cut-off date for provide claims, to ensure that all provable claims to ensure that all provable claims and the existence of a cut-off date for provide claims, to ensure that all provable claims and the existence of a cut-off date for provide claims, to ensure that all provable claims and the existence of a common date. The third proves for post insolvency interest, is that you can't prove for post insolvency interest, is that you can't prove for post insolvency interest, is that you can't prove for post insolvency interest, is that you can't prove for post insolvency interest to other words, interest for the period after the making of the winding up order, commencement of the banktruptcy or the administration.  16 The necessary consequence of those two basic features of the insolvency regime is that when an office in bolder comes to make payments of dividends, he is effectively principal, up to, and any interest up to the date of the commencement of the insolvency, and not in respect of any post-insolvency interest. That's simply  20 Page 13  11 what's required to achieve pair passu distribution.  21 Page 13  22 London and provide day have defined a provided by the principal time that is a missue arises.  32 Before you get to the stage of calculating how interest should be paid in the event of a surplus, the office of principal. If that's what's required for the pair passu for the operation of the principal way and the principal way and dividends in respect of principal. If that's what's required to have a pay and the principal way and that the principal way and the principal way and that the principal way and the principal way and that the principal	6	We say, it's important to understand it stems from	6	last judgment to apply the principle prior to the
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accordance with the pari passu principle. That necessarily requires the existence of a cut-off date for provable claims, to ensure that all provable claims can be ascertained and valued by reference to a common date. The consequence of that, of course, is that you can't prove for post insolvency interest. In other words, interest for the period after the making of the winding up order, commencement of the bankruptey or the administration The necessary consequence of those two basic features of the insolvency regime is that when an office holder comes to make payments in respect of proved debts, end after the missing payments in respect of proved debts, end after the insolvency ragime is that when an office holder comes to make payments of dividends, he is necessarily making payments in respect of proved debts, end after of the commencement of the insolvency, and not in respect of any post-insolvency interest up to the date of the commencement of the insolvency, and not in respect of any post-insolvency interest. That's simply  Page 13  what's required to achieve pari passu distribution.  Page 13  what's required to achieve pari passu distribution.  provide the paid in the event of a surplus, the office bloder has already paid dividends in respect of principal. If that's what's required for the pair passu ask can interest be calculated on basis that payment is instead applied first to interest.  block has a leady paid dividends in respect of regime, then how in those circumstances common might ask can interest be paid in the event of recessarily existed over since the origins of both  considered in the common content of the pair passu restricted by the part of the pair passu restricted by the part of the pair passu ask can interest be paid on the pass that any officed does have a pass of the wording of the rule Mr Justice David Richards considered significant.  The answer has consistently been provided by the application of the principal in Bower v Marris. As your the courts consistently been provided by the any	8	reason and in this way: in an insolvency the first task	8	it involves a notional approach. Dividends are paid in
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provable claims, to ensure that all provable claims can be ascertained and valued by reference to a common date.  10	10	accordance with the pari passu principle. That	10	scheme has always required. Nevertheless, in the event
be ascertained and valued by reference to a common date.  One consequence of that, of course, is that you can't prove for post insolvency interest. In other words, interest for the period after the making of the winding up order, commencement of the bankruptey or the administration.  The necessary consequence of those two basic features of the insolvency regime is that when an office blodler comes to make payments of dividends, he is necessarily making payments in respect of proved debts, effectively principal, up to, and any interest up to the date of the commencement of the insolvency, and not in respect of any post-insolvency interest. That's simply  Page 13  Page 15  what's required to achieve pari passu distribution.  One can immediately see how the issue arises.  Before you get to the sales of chieved y particular of the insolvency, and not in respect of any post-insolvency interest. That's simply  Page 13  what's required to achieve pari passu distribution.  One can immediately see how the issue arises.  bolder has already paid dividends in respect of principal. If that's what's required for the part passu  regime, then how in those circumstances someone might ask can interest be calculated on basis that payment is instead applied first to interest.  So that's topic namber 1. Topic number 2 - LORD JUSTICE BIRGGS: Refere you move on, the effect of that might be if the surplus is only a small one but under the recalculator, the Bower V Marris recalculation, principal can be paid in full.  MR DICKER: Ves.  We also say it's important to understand the  the recalculated as is if the before on the making of the warding of the rule Mr Justice David there's no room for the operation of Bower v Marris, because if it does apply beyond that, then, effectively,  you shall have principal outstanding and that can't be right. Submissions were made on thin by oth parties in the dividends in respect of principal. If that's what's required of the parties in the advised of the principal outstanding and that can't be right	11	necessarily requires the existence of a cut-off date for	11	of a surplus, the authorities said you calculate the
14 One consequence of that, of course, is that you can't 15 prove for post insolvency interest. In other words, 16 interest for the period after the making of the winding 17 up order, commencement of the bankruptcy or the 18 administration. 19 The necessary consequence of those two basic 20 features of the insolvency regime is that when an office 21 holder comes to make payments of dividends, he is 22 necessarily making payments in respect of proved debts, 23 effectively principal, up to, and any interest up to the 24 date of the commencement of the insolvency, and not in 25 respect of any post-insolvency interest. That's simply 26 page 13  17 what's required to achieve pair passu distribution. 27 Page 13  18 what's required to achieve pair passu distribution. 28 One can immediately see how the issue arises. 39 Before you get to the stage of calculating how interest 40 should be paid in the event of a surptus, the office 41 should be paid in the event of a surptus, the office 42 principal. If that's what's required for the pari passu 43 issued applied first to interest. 45 instead applied first to interest. 46 principal. If that's what's required for the pari passu 47 regime, then how in those circumstances someone might 48 ask can interest be calculated on basis that payment is 49 instead applied first to interest. 40 So the starting point is: this is an issue which has 40 increase the calculated on hasis that payment is 41 any dividends that were previously made in respect of 42 the town of the part passu 43 band to principal to grant and the principal are regarded as having been made on account 44 the courts consistently held that in the event of 45 principal are regarded as having been made on account 46 the courts consistently held that in the event of 47 a surplus interest is to be calculated on the basis that 48 any dividends that were previously made in respect of 49 principal are regarded as having been made on account 40 principal are regarded as having been made on account 41 principal are regarded a	12	provable claims, to ensure that all provable claims can	12	amount of interest to be paid, by notionally treating
prove for post insolvency interest. In other words, interest for the period after the making of the winding up order, commencement of the bankruptcy or the administration.  The necessary consequence of those two basic for the experiment of the bankruptcy or the administration.  The necessary consequence of those two basic for the experiment of the bankruptcy or the holder comes to make payments of dividends, he is necessarily making payments of dividends, he is necessarily making payments of dividends, he is necessarily making payments in respect of proved debts, and of the commencement of the insolvency, and not in respect of any post-insolvency interest. That's simply  Page 13  What's required to achieve pari passu distribution.  What's required to achieve pari passu distribution.  Done can immediately see how the issue arises.  So that a stready paid dividends in respect of proved debts, and the principal. If that's what's required for the pari passu of the pari pari pari pari pari pari pari pari	13	be ascertained and valued by reference to a common date.	13	the dividends as if they had been paid first in respect
interest for the period after the making of the winding up order, commencement of the bankruptcy or the administration.  In administration.  In the necessary consequence of those two basic features of the insolvency regime is that when an office holder comes to make payments of dividends, he is necessarily making payments in respect of proved debts, effectively principal, up to, and any interest up to the ded of the commencement of the insolvency and not in respect of any post-insolvency interest. That's simply  Page 13  What's required to achieve pari passu distribution.  Done can immediately see how the issue arises.  Before you get to the stage of calculating how interest should be paid in the event of a surplus, the office principal. If that's what's required for the pari passu fregime, then how in those circumstances someone might as ack can interest be calculated on basis that payment is instead applied first to interest.  So the starting point is: this is an issue which has instead peptide first to interest.  The answer has consistently been provided by the application of the principal in Bower to Marris. As your the courts consistently help that in respect of principal are regarded as having been paid in respect of interest in the courts consistently help that in respect of interest in the courts consistently help that in the event of interest consistently help that in the event of interest in the courts of the participal on the besis that any dividends that were previously made in respect of interest first and then principal.  LORD JUSTICE BRIGGS: Haink I was only sent three copies were handed up.  LADY JUSTICE GLOSTER: When you say, "Paid on account", you undying thanks to him.  LORD JUSTICE BRIGGS: I think I was only sent three copies were handed up.  LADY JUSTICE BRIGGS: I think I was only sent three copies.	14	One consequence of that, of course, is that you can't	14	of interest.
up order, commencement of the bankruptcy or the administration.  The necessary consequence of those two basic features of the insolvency regime is that when an office holder comes to make payments of dividends, he is necessarily making payments in respect of proved debts, effectively principal, up to, and any interest up to the date of the commencement of the insolvency, and not in respect of any post-insolvency interest. That's simply  Page 13  **Before you get to the stage of calculating how interest should be paid in the event of a surplus, the office bolder has already paid dividends in respect of principal. If that's what's required for the pari passu should be paid in the event of a surplus, the office bolder has already paid dividends in respect of principal. If that's what's required for the pari passu regime, then how in those circumstances someone might ask can interest be calculated on basis that payment is instead applied first to interest.  So the starting point is: this is an issue which has necessarily existed ever since the origins of both chase any dividends that were previously made in respect of interest first and then principal are regarded as having been made on account' the principal are regarded as having been made on account', you might be if the surplus is only a small one but under the recalculator, the Bower' v Marris and that can the the recalculator, the Bower's Marris and that and that craft be related to holder the surplus in the form that the part in the form that then, effectively,  Page 15  **Beside even principal are regarded as having been paid in respect of principal. If hard's what's required for the pari passu that case, to the effect that that's incorrect. That's not how the principal outstanding and that can't be right. Submissions were made to him by both parties in that case, to the effect that that's incorrect. That's not how the principal outstanding and that can't be right. Submissions were made to him by both parties in that case, to the effect that that's incorrec	15	prove for post insolvency interest. In other words,	15	So that's topic number 1. Topic number 2
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24 MR DICKER: Yes. 25 We also say it's important to understand the 26 LORD JUSTICE BRIGGS: I think I was only sent three copies	22	LADY JUSTICE GLOSTER: When you say, "Paid on account", you	22	LORD JUSTICE BRIGGS: I hope it has the owner's name on it.
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Page 14 Page 16	25	We also say it's important to understand the	25	LORD JUSTICE BRIGGS: I think I was only sent three copies
Page 14 Page 10		D 14		D 1/
		Page 14		Page 10

		11	*
1	in about 2009.	1	the rule says and what the judge says?
2	MR DICKER: It's also in the form in which I'm going to use	2	MR DICKER: It's not different. The question is: why are
3	it. It is in volume 4, tab 174 of the authorities.	3	those words there and what are they intended to achieve?
4	I think	4	We say, what they're intended to achieve is simply
5	LADY JUSTICE GLOSTER: Could you just give that reference	5	to make it plain that proved debts are paid first, in
6	again?	6	priority to post-insolvency interest. Then,
7	MR DICKER: I'm sorry, it's volume 4, tab 174.	7	post-insolvency interest is paid and that needs to occur
8	LADY JUSTICE GLOSTER: Thank you.	8	before the surplus is used for any other purpose.
9	MR DICKER: I think the easiest way of dealing with this	9	Now, what your Lordships will see in due course is
10	part of my submissions is if you turn up the judgment of	10	there was a similar statutory provision in bankruptcy
11	Mr Justice David Richards, which is part A, core bundle	11	from 1825 onwards. Prior to 1986 in a liquidation, this
12	A, volume 1, tab 2.	12	priority element of the statutory scheme was a matter of
13	He deals with the question of construction in four	13	judge-made law. It wasn't the subject of an express
14	short paragraphs, paragraphs 134 to 137. At this stage,	14	provision. The authorities had held that
15	just identifying the points he makes in giving you our	15	post-insolvency interest obviously comes after proved
16	short submission on them. 134, the first point he makes	16	debts, but it also came before anything else. What we
17	•	17	say this did was essentially to carry on what had
18	is: "Rule 2.88(7) is a direction to the administrator as	18	previously been expressly provided for in bankruptcy,
19	to how any surplus remaining after payment of the debt	19	and codified the previous judge-made law in relation to
20	is proved is to be applied. The assumption for the	20	1 5 0
21	purposes of the rule is that debts proved have been	21	a litigation. So that's the first point.  Just in relation to that, as I said, the priority of
22	paid."	22	proved debt over post insolvency interest had obviously
23	Now, we say, this aspect of the rule simply provides	23	been a feature of the statutory scheme since their
24	the proved debts are to be paid in priority to	24	origins. This element of the statutory scheme in
25	post-insolvency interest. In other words, it's	25	other words, that by the time you get to distribute
23	post-insorvency interest. In other words, it's	23	other words, that by the time you get to distribute
	Page 17		Page 19
1	confirming the priority of proved debts over	1	surplus in respect of post insolvency interest, you have
2	post-insolvency interest and, in turn, the priority of	2	already paid proved debts. That point was a point made
3	post-insolvency interest after any other purpose.	3	in argument, repeatedly, in the cases.
4	If one looks at	4	The argument was essentially: well, the statutory
5	LORD JUSTICE PATTEN: Are you saying the judge is I'm not	5	scheme requires you to pay proved debts first, ie
6	quite clear what you are saying; are you saying that the	6	principal, how on earth can you proceed now on the basis
7	judge's starting point is wrong or what?	7	that they notionally haven't been applied?
8	MR DICKER: We say, the phrase he's focusing on, which is	8	The courts repeatedly said, both in bankruptcy and
9	the phrase:	9	in relation to liquidation, that what you are doing is
10	"Any surplus remaining after payment of the	10	essentially a notional calculation to work out how much
11	pre-debt."	11	interest you pay and, at that stage, although the proved
12	That is his first point.	12	debts have been paid in full, to ensure pari passu
13	LORD JUSTICE PATTEN: That's just what the rule says.	13	treatment of creditors has been achieved, nevertheless,
14	MR DICKER: That is what the rule says. We say what that	14	for the purposes of calculated interest, you have
15	was intended to ensure is simply that proved debts have	15	a notional reallocation of the payments which were made,
16	priority to post insolvency interest. This is	16	to treat it as having been made generally on account
17	effectively setting out the statutory Waterfall.	17	LADY JUSTICE GLOSTER: So it's just an accounting exercise,
18	We know proved debts are paid after preferential	18	it doesn't displace the premise that the proved debts,
19	debts. We know they're paid in priority to any	19	ie the principal, has been paid.
20	distribution to shareholders. This provision	20	MR DICKER: The principal has been paid. This is simply
21	essentially confirmed	21	a matter of how you calculate the amount of interest
22	LORD JUSTICE PATTEN: It's only a surplus if they've	22	paid. Essentially, you treat the payments as having
23	actually been paid.	23	been made, as having been made, essentially, to achieve
24	MR DICKER: Yes.	24	pari passu distribution, because you can't, at that
25	LORD JUSTICE PATTEN: So why is that any different from what	25	stage, pay post-insolvency interest. But, as having
	D 40		D 20
<u> </u>	Page 18		Page 20

been paid by process of law without any appropriation, so generally on account, which leaves the authorities sa ad scope for notionally realizeding, nationally teating the dividends which have been paid, as if they were paid first to interes.  So, essentially, you have two stages: the first one so cachieve part passa distribution is you nay everyone part passa in respect of their proved dobb. That's what the scheme requires, has always required. You then get to a stage when there is a surplus and you are no longer concerned with part passa distribution in respect proved debts, when there is a surplus and you are no longer concerned with part passa distribution in Essentially to say; we will treat them in calculating how much interest should be paid, as if they had been paid first in relation to interest paid first in relation to interest ene takes the example of the creditor who has a contrained relationally to any we will treat them in calculating how much interest should be paid, as if they had been paid first in relation to interest ene takes the example of the creditor who has a contrained relationally to any we will treat them in calculating how much interest should be paid, as if they had been paid first in relation to interest ene takes the example of the creditor who has a single payment of a dividend which discharges through the interest calculation, he actually gists his full enutlement and docen't out up as a windfall  Page 21  Page 23  The second point the makes, in 125, is—  And DICKER: I wink that's absolutely right but, obviously, in practice that there is no measure of the context of those regimes.  The second point the makes, in 125, is—  And DICKER: I wink that's absolutely right but, obviously, in practice that there is no measure of second measure, on what has a brobately right but, obviously, in practice that different the concerns of the relate on the context of those relevant wording. Although the wording may be iffered.  And provided that there is no measure of second payment was made, s				
said scope for notionally reallocating, notionally the rearing the dividends which have been paid, as if they were paid first to interest.  So, essentially, you have two stages: the first one to so chieve part passed institution is you pay everyone part passu in respect of first proved doths. That's what the scheme requires, has always required. You then get to a stage when there is a surplus and you are no longer concerned with part passed distribution in payments were made, but they were made by processor flaw without any appropriation. That gives us room the payments were made, but they were made by processor flaw without any appropriation. That gives us room the paid first in relation to interest.  Essentially to say; we will test them in calculating. The reason they do that is obviously to ensure— one takes the example of the creditor who has a fine through the interest calculation, he actually gots his right interest and that shortful doesn't suffer a shortful, and to get a contractual right to appropriate payments, first, in respect of interest, to ensure that doesn't suffer a shortful, and to get a contractual right to appropriate payments, first, in respect of interest, to ensure that doesn't suffer a shortful, and to get a contractual right to appropriate payments, first, in respect of interest calculation, he actually gots his of or shareholders.  In the second point the makes, in 125, is— He second point the makes, in 125, is— We say it is striking that each of the points he reided on anose in relation to previous statutory regimes and were addressed and rejected in the context of those regimes.  Reason for the conclusion, that the regime in relation to provious statutory regimes and were addressed and rejected in the context of those regimes.  Reason for payments, depending on the realisations and so on.  In the case of a insolvent liquidation, you don't have a single payment of a dividend which discharges a first Recause the answer is traylocated through the interest calculation, the payment of a	1	been paid by process of law without any appropriation,	1	of his judgment, is:
treating the dividends which have been paid, as if they were paid first to interest.  See centrality, you have two stages: the first one to achieve part passe distribution is you pay everyone and the state of the part of the stage in	2	so generally on account, which leaves the authorities	2	"The direction given to the administrator is to pay
5 were paid first to interest. 6 So, essentially, you have two stages: the first one 7 to achieve pair passa distribution is you preveyone 8 pair passa in respect of their proved debts. That's 9 what the scheme requires, has always required. 10 You then get to a stage when there is a surplus and 11 you are no longer concended with pair passa distribution 12 in respect proved debts, where the courts say: the 13 payments were made, but they were made by process of law 14 without any appropriation. That gives us room for 15 a notional calculation, a notional re-allocation. 16 Essentially to say; we will treat them in calculating 17 how much interest should be paid, as if they had been 18 paid first in relation to interest. 19 The reason they do that is obviously to ensure - 20 one takes the example of the creditor who has 21 a contractual right to appropriate payments, first, in 22 respect of interest, to ensure that once you've been 23 through the interest excludation, he actually gets his 24 full entitlement and doesn't suffer a shortfall, and to 25 cream that that shortfall doesn't end up as a windfall 26 on arose in relation to previous statutory regimes and 27 a vere addressed and rejected in the context of those 28 regimes. 29 The second point the makes, in 135, is – 20 LADY JUSTICE GLOSTER: Sorry, just stopping there, and you 31 submit that there is no material distinction in the 32 release the concept, as it were, is there in the 33 earlier of the residency in the context of those 34 registration of the residency in the relation of post-insolvency interest, but one needs 35 of looks provided that the principle in 36 relation to post-insolvency interest, but one needs 37 through the different, the concept, as it were, is there in the 38 registration of the residency in the residual number of changes 39 to insolvency regimes. It did make change to the regime 30 to look you do the table so for the principle and accurate interest, and the date of laquidation and the whole of principal. So you wouldn't have thi	3	said scope for notionally reallocating, notionally	3	interest on those debts in respect of periods during
So, essentially, you have two stages; the first one on achieve pari passu in respect of their proved debts. That's what the scheme requires, has always required.  You then get to a stage when there is a surplus and you are no longer concerned with part passus distribution to respect proved debts, where the courts say: the payments were made, but they were made by process of law without any appropriation. That gives us room for a notonal calculation, a notonal re-allocation.  Essentially to say, we will treat them in calculating to a notonal calculation, a notonal re-allocation.  Essentially to say, we will treat them in calculating to problem only arises on the assumption, doesn't it, that, in the case of a insolvent liquidation, you don't have a surple payment of a dividend which discharges a surple payment of a dividend which discharges a contractual right to appropriate payments, first, in a contractual right to appropriate payments, first, in through the interest calculation, he actually gets his through the interest calculation, he actually gets his through the interest calculation, he actually gets his full entitlement and doesn't suffer a shortfall, and to the payment of a dividend which discharges this problem, would you? Because you would have paid first.  Page 21  Page 23  Fage 23  Page 23  Page 23  Page 23  Page 23  Page 23  Page 24  Page 25  Page 25  Page 26  Page 27  Page 27  Page 27  Page 28  Page 29  Page 29  Page 29  Page 29  Page 29  Page 29  Page 20  Page	4	treating the dividends which have been paid, as if they	4	which they have been outstanding since the company
to achieve part passu distribution is you pay everyone part passu in respect of their proved debts. That's what the scheme requires, has always required.  You then get to a stage when there is a surplus and you are no longer concended with pair passu distribution in respect proved debts, where the courts say: the payments were made, but they were made by process of law without any appropriation. That gives us room for a notional calculation, a notional re-allocation. Essentially to say; we will treat them in calculating how much interest should be paid, as if they had been paid first in relation to interest.  The reason they do that is obviously to ensure— one takes the example of the creditor who has cone takes the example of the creditor who has through the interest calculation, he actually gets his of construction which they were made by process of law through the interest calculation, a calculating through the interest calculation, a calculating through the interest calculation, he actually gets his of construction which they were made by process of law through the interest calculation, he actually gets his of construction which the judge relied on because, plainly, this is ultimately a question of construction.  The second point he makes, in 135, is—  The second point he makes, in 135, is—  The second point he makes, in 135, is—  LADY JUSTICE GLOSTIER. Surry, just stopping there, and you submit the tree is no material distinction in the relevant wording. Although the wording may be to involvently regimes. If did make changes to the regime in relation to previous statutory regimes and to first place and rejected in the counter, because to the provision statutory regimes and the place of the provision statutory regimes and through the interest and context of those regimes.  The second point he makes, in 135, is—  The second point he makes, in 135, is—	5	were paid first to interest.	5	entered administration."
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Vou then get to a stage when there is a surplus and you are no longer concerned with part passu distribution in respect proved debts, where the courts say: the payments were made, but they were made by process of law without any appropriation. That gives us room for display the payments were made, but they were made by process of law without any appropriation, a notional re-allocation.  Essentially to say: we will treat them in calculating how much interest should be paid, as if they had been paid first in relation to interest.  The reason they do that is obviously to ensure — one takes the example of the creditor who has a contractual right to appropriate payments, first, in expect of interest, to ensure that once you've been the title ensure that doesn't suffer a shortfall, and to the interest calculation, the actually gets his full entitlement and doesn't suffer a shortfall, and to play 21  for shareholders.  Page 21  for shareholders.  I mean, I wanted to tsart by identifying the points of construction which the judge relied on because, plainly, this is ultimately a question of construction. We say it is striking that each of the points for construction which the judge relied on because, regimes.  The second point he makes, in 135, is —  LADY JUSTICE FATTEN: Sory, just stropping there, and you submit that there is no material distinction in the relevant wording. Although the wording may be to insolvency regimes. It did make you— MR DICKER: I think fixe to have, probably, a series of payments, depending on the realisations and so on.  MR DICKER: Yes, and if one thinks about how it operated in this case, a series of interin dividends were made, the carlier legislation.  MR DICKER: I vest and if one thinks about how it operated in this case, a series of payments, depending on the realisations and so on.  MR DICKER: I vest, and if one thinks about how it operated in this case, a series of payments, depending on the realisations and so on.  MR DICKER: I vest, and if one thinks about how it operated in this case,	8	pari passu in respect of their proved debts. That's	8	after the company went into administration, taking into
syou are no longer concerned with pair jassas distribution in respect proved debts, where the courts say; the interest proved debts, where the courts as yet in respect proved debts, where the courts as yet in the case of a insolvent liquidation, you don't have been much interest should be paid, as if they had been paid first in relation to interest.  In the case of a insolvent liquidation, you don't have problem only arises on the assumption, doesn't it, that, in the case of a insolvent liquidation, you don't have in the case of a insolvent liquidation of a dividend with should have had in the problem, you day of the liquidation of a dividend with short liquidation and the whole of principal, so yo	9	what the scheme requires, has always required.	9	account the payments which they have received. It
12 m respect proved debts, where the courts say: the 13 payments were made, but they were made by process of law 14 without any appropriation. That gives us troom for 15 a notional calculation, a notional re-allocation. 16 Essentially to say: we will treat them in calculating 17 how much interest should be paid, as if they had been 18 paid first in relation to interest. 19 The reason they of that is obviously to ensure— 20 one takes the example of the creditor who has 21 a contractual right to appropriate payments, first, in 22 respect of interest, to ensure that once you've been 23 through the interest calculation, he actually gets his 24 full entitlement and doesn't suffer a shortfall, and to 25 ensure that that shortfall doesn't end up as a windfall 26 I mean, I wanted to start by identifying the points 3 of construction which the judge relied on because, 4 plainly, this is ultimately a question of construction. 5 We say it is striking that each of the points he relied 6 on arose in relation to previous statutory regimes and 7 were addressed and rejected in the context of those 8 regimes. 9 The second point he makes, in 135, is— 1 LADY JUSTICE GLOSTER: Surry, just stopping there, and you 11 submit that there is no material distinction in the 12 relevant wording. Although the wording may be 13 in relation to previous statutory regimes and 14 plainly, this is ultimately a question or post-insolvency, as it were, is there in the 14 earlier legislation. 15 In MR DICKER: Yes, Alsolutely— 16 LADY JUSTICE GLOSTER: Don't let me take you— 17 MR DICKER: Yes, and if one thinks about how it operated in the cardier legislation. 18 MR DICKER: Yes in the concept, as it were, is there in the 19 in relation to post-insolvency interest, but one needs 20 in relation to post-insolvency interest, but one needs 21 to be very careful identifying what those changes were. 22 a relation to post-insolvency interest, but one needs 23 in leas once the cancelusion, that the principle in 24 Bower v Marris has been disapplied. 25 the payme	10	You then get to a stage when there is a surplus and	10	doesn't tell you how you do the calculation. It simply
payments were made, but they were made by process of law without any appropriation. That gives us room for 14 when the debts are outstanding and the paid, as if they had been 15 a notional calculation, a notional reallocation. 15 LORD JUSTICE PATTEN: Do I have this right this whole Fassentially to say, we will treat them in calculating 16 problem only arises on the assumption, doesn't it, that, 17 how much interest should be paid, as if they had been 17 in the case of a insolvent liquidation, you don't have a single payment of a dividend which discharges 19 to per cent they do that is obviously to ensure — 19 to per cent the principal and accrued interest at the date of the liquidation or administration? 21 a contractual right to appropriate payments, first, in 22 through the interest calculation, he actually gets his 23 through the interest calculation, he actually gets his 24 full entitlement and doesn't suffer a shortfall, and to 25 ensure that that shortfall doesn't end up as a windfall 25 ensure that that shortfall doesn't end up as a windfall 26 for shareholders. 1 Iman, I wanted to start by identifying the points 3 of construction which the judge relied on because, 4 plainly, this is ultimately a question of construction. 4 plainly, this is ultimately a question of construction. 4 plainly, this is ultimately a question of construction. 4 were addressed and rejected in the context of those regimes. 8 regimes. 8 the second point the makes, in 135, is — 9 so on. 14 to the provision statiotry regimes and 6 LORD JUSTICE PATTEN: No, I understand in practice that is not how it works. You are likely to have, probably, a series of payments, depending on the realisations and so of the second point the makes, in 135, is — 9 so on. 14 to the provision statiotry regimes and 6 to the concept, as it were, is there in the 11 this case, a series of irrealism dividends were made in April 2014. But, on the judge's approach, when the 12 relevant wording. Although the wording may be 12 strainly think in 2012 but, on the judg	11	you are no longer concerned with pari passu distribution	11	says you get interest for the period for which your
without any appropriation. That gives us room for a notional calculation, a notional calculation, an other and re-allocation.  15 a notional calculation, an other and re-allocation.  16 Essentially to say we will treat them in calculating how much interest should be paid, as if they had been paid first in relation to interest.  18 paid first in relation to interest.  19 The reason they do that is obviously to ensure — one takes the example of the creditor who has 20 one takes the example of the creditor who has 21 a contractual right to appropriate payments, first, in 22 respect of interest, to ensure that once you've been through the interest calculation, he actually gets his 23 trill entitlement and doesn't suffer a shortfall, and to 24 full entitlement and doesn't suffer a shortfall, and to 25 censure that that shortfall doesn't end up as a windfall 25 inquition and the whole of principal, so you wouldn't page 21  1 for shareholders.  2 I mean, I wanted to start by identifying the points of construction which the judge relied on because, 4 plaink, this is ultimately a question of construction which the judge relied on because, 5 pregimes. 8 regimes. 8 The second point the makes, in 135, is — 10 LADY JUSTICE GLOSTER: Sorry, just stopping there, and you submit that there is no material distinction in the 21 relevant wording. Although the wording may be 21 to be very careful identifying what hose changes were. 21 to be very careful identifying what those changes were. 21 to be very careful identifying what those changes were. 21 to be very careful identifying what those changes were. 22 to be very careful identifying what those changes were. 23 to show the problem only arises on the associated which discharges 100 prevent the principal in a distill has not been qualted and the drive dividend the wording and the whole of principal and accrued interest hat the date of flux of the construction which the pudge relied on because to the conduction of the context of those 10 past in the careful representation of the p	12	in respect proved debts, where the courts say: the	12	debts were outstanding. One still has the
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how much interest should be paid, as if they had been paid first in relation to interest.  18 paid first in relation to interest.  19 The reason they do that is obviously to ensure— 20 one takes the example of the creditor who has a contractual right to appropriate payments, first, in a contractual right to appropriate payments, first, in a contractual right to appropriate payments, first, in through the interest calculation, he actually gets his full entitlement and doesn't suffer a shortfall, and to the full entitlement and doesn't suffer a shortfall, and to the sure that that shortfall doesn't end up as a windfall to ensure that one construction which the judge relied on because, plainly, this is ultimately a question of construction.  10 per cent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't have this problem, would you? Because you wouldn't have this problem, would you? Because you would have paid 100 per cent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't have this problem, would you? Because you would have paid 100 per cent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't have this problem, would you? Because you would have paid 100 per cent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't have the special payment was made to the points of first? Because the answer is: they've both been paid first.  10 be concerned with asking the question: which is paid first.  11 be concerned with asking the question: which is paid first.  12 first? Because the answer is: they've both been paid first.  13 first.  14 MR DICKER: I think bat's absolutely right but, obviously, in practice -  15 In practice -  16 on arose in relation to previous statutory regimes and the context of those regimes.  18 regimes.  19 The second point the makes, in 135, is -  10 LADY JUSTICE GLOSTER: Sorty, just stopping there, and you will be prov	15	a notional calculation, a notional re-allocation.	15	LORD JUSTICE PATTEN: Do I have this right: this whole
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The reason they do that is obviously to ensure — one takes the example of the creditor who has a contractual right to appropriate payments, first, in 22 respect of interest, to ensure that once you've been 23 through the interest calculation, he actually gets his 24 full entitlement and doesn't suffer a shortfall, and to 25 ensure that shortfall doesn't end up as a windfall 26 ensure that shortfall doesn't end up as a windfall 27 I mean, I wanted to start by identifying the points 28 of construction which the judge relied on because, 4 plainly, this is ultimately a question of construction. 4 Page 21  1 be concerned with asking the question: which is paid 6 first? Because the answer is: they've both been paid 7 were addressed and rejected in the context of those 8 regimes. 9 The second point he makes, in 135, is — 10 LADY JUSTICE GLOSTER: Sorry, just stopping there, and you 11 submit that there is no material distinction in the 12 relevant wording. Although the wording may be 13 different, the concept, as it were, is there in the 14 earlier legislation. 15 MR DICKER: I will come on in due course, because the 16 MR DICKER: Yes, Absolutely — 17 MR DICKER: Yes, Absolutely — 18 1986 Act obviously makes a substantial number of changes 19 100 per cent the principal and accrued interest at the 21 date of the liquidation or administration? 22 LORD JUSTICE PATTEN: Because, otherwise, you wouldn't have 23 this problem, would you? Because, otherwise, you wouldn't have this problem, would you? Because, otherwise, you wouldn't have this problem, would you? Because, otherwise, you wouldn't have this problem, would you? Because, otherwise, you wouldn't have this problem, would you? Because, otherwise, you wouldn'the whole of principal, so the top of that of full date of the liquidation or administration?  1 DOED CENTER: Because, otherwise, you wouldn't have this problem, under this problem, under the principal and accrued interest at the date of the liquidation or administration?  1 DOED CENTER: I think your Lordship is — 1 D	17	how much interest should be paid, as if they had been	17	in the case of a insolvent liquidation, you don't have
a contractual right to appropriate payments, first, in respect of interest, to ensure that once you've been through the interest calculation, he actually gets his full entitlement and doesn't suffer a shortfall, and to ensure that that shortfall doesn't end up as a windfall page 21  1 for shareholders. 2 I mean, I wanted to start by identifying the points of construction which the judge relied on because, a plainly, this is ultimately a question of construction. We say it is striking that each of the points he relied on arose in relation to previous statutory regimes and regiered in the context of those regimes.  9 The second point he makes, in 135, is — I LADY JUSTICE GLOSTER: Sorry, just stopping there, and you submit that there is no material distinction in the relevant wording. Although the wording may be 11 darger first, the concept, as it were, is there in the earlier legislation. 11 MR DICKER: Yes, and if one thinks about how it operated in this case, a series of interim dividend, in April 2014. But on the judge's approach, when the first dividend payment was made, some 25 per cent of that dividend in 2012 but, on the judge's approach, when the 1986 Act obviously makes a substantial number of changes to insolvency regimes. It did make change to the regime in relation to post-insolvency interest, but one needs on to be very careful identifying what those changes were. 2 None of those changes, we say, had anything to do with, 25 The second point the judge makes, in paragraph 135  2 date of the liquidation or administration?  4 MR DICKER: think your Lordship is 2 this problem, would you? Because you wouldn't have this problem, would you? Because you wouldn'	18	paid first in relation to interest.	18	a single payment of a dividend which discharges
a contractual right to appropriate payments, first, in respect of interest, to ensure that once you've been through the interest calculation, he actually gets his full entitlement and doesn't suffer a shortfall, and to ensure that that shortfall doesn't end up as a windfall  Page 21  1 for shareholders.  2 I mean, I wanted to start by identifying the points of construction which the judge relied on because, plainly, this is ultimately a question of construction.  3 of construction which the judge relied on because, plainly, this is ultimately a question of construction.  5 We say it is striking that each of the points he relied on arose in relation to previous statutory regimes and were addressed and rejected in the context of those regimes.  9 The second point he makes, in 135, is —  10 LADY JUSTICE GLOSTER: Sorry, just stopping there, and you submit that there is no material distinction in the earlier legislation.  11 adifferent, the concept, as it were, is there in the earlier legislation.  12 The second point was a substantial number of changes to to be very careful identifying what those changes were to toe very careful identifying what those changes were a fixed point he principal.  21 The second point the judge makes, in paragraph 135  22 LORD JUSTICE PATTEN: Because, otherwise, you wouldn't have the fix problem, would you? Because you would have paid to poet cent, all the accured interest, at the date of first individend would have paid 100 per cent, all the accured interest, at the date of first.  24 Day 23  25 LORD JUSTICE PATTEN: Because, on would have paid 10 per cent, all the accured interest, at the date of first.  26 In the accured interest, at the date of first.  27 Day 28  28 Day 28  29 The second point he makes, in 135, is —  10 LADY JUSTICE GLOSTER: Don't let me take you —  11 this case, a series of payments, depending on the realisations and so on.  12 MR DICKER: Yes, and if one thinks about how it operated in this case, a series of payments, depending on the realisations and so on.  12 MR D	19	The reason they do that is obviously to ensure	19	100 per cent the principal and accrued interest at the
respect of interest, to ensure that once you've been through the interest calculation, he actually gets his full entitlement and doesn't suffer a shortfall, and to ensure that that shortfall doesn't end up as a windfall  Page 21  Page 23  for shareholders.  I mean, I wanted to start by identifying the points of construction which the judge relied on because, a plainly, this is ultimately a question of construction. We say it is striking that each of the points he relied on arose in relation to previous statutory regimes and were addressed and rejected in the context of those regimes.  LADY JUSTICE GLOSTER: Sorry, just stopping there, and you submit that there is no material distinction in the relevant wording. Although the wording may be different, the concept, as it were, is there in the earlier legislation.  MR DICKER: I will come on in due course, because the I 1986 Act obviously makes a substantial number of changes in relation to post-insolvency regimes. It did make change to the regime in relation to post-insolvency interest, but one needs in relation to post-insolvency interest, but one needs in relation to post-insolvency interest, but one needs or leads one to the conclusion, that the principle in Power v Marris has been disapplied.  LORD JUSTICE PATTEN: Because, otherwise, you wouldn't have this problem, would you? Because you would have paid 100 per cent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't whole of principal, so you wouldn't be a tibo prevent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't be a liquidation and the whole of principal, so you wouldn't be a tibo prevent, all the accrued interest, at the date of liquidation and the whole of principal, so you wouldn't be a liquidation and the whole of principal, so you wouldn't be a liquidation and the whole of principal, so you wouldn't be concerned with asking the question: a first.  I mean, I wanted to start by identifying the points of first	20	one takes the example of the creditor who has	20	date of the liquidation or administration?
through the interest calculation, he actually gets his full entitlement and doesn't suffer a shortfall, and to ensure that that shortfall doesn't end up as a windfall  Page 21  Page 23  for shareholders.  I mean, I wanted to start by identifying the points of construction which the judge relied on because, plainly, this is utilimately a question of construction. We say it is striking that each of the points he relied on arose in relation to previous statutory regimes and were addressed and rejected in the context of those regimes.  The second point he makes, in 135, is —  LADY JUSTICE GLOSTER: Sorry, just stopping there, and you submit that there is no material distinction in the submit that there is no material distinction in the different, the concept, as it were, is there in the different, the concept, as it were, is there in the ARD JUCKER: Ves. Absolutely —  LADY JUSTICE GLOSTER: Don't let me take you —  MR DICKER: Think that's about thow it works. You are likely to have, probably, a series of payments, depending on the realisations and so on.  MR DICKER: Yes, and if one thinks about how it operated in this case, a series of interim dividends were made, starting I think in 2012, the last one, final dividend, different, the concept, as it were, is there in the darlier legislation.  MR DICKER: Ves. Absolutely —  LADY JUSTICE GLOSTER: Don't let me take you —  MR DICKER: Twill come on in due course, because the 1986 Act obviously makes a substantial number of changes to insolvency regimes. It did make change to the regime in relation to post-insolvency interest, but one needs to be very careful identifying what those changes were. No of those changes, we say, had anything to do with, or leads one to the conclusion, that the principle in  MR DICKER: Yes, alm of in one thinks about how it operated in this case, a series of interim dividends were made, starting I think in 2012, the last one, final dividend, in April 2014. But, on the judge's approach, because Bower v Marris doesn't apply, principal that carries p	21	a contractual right to appropriate payments, first, in	21	MR DICKER: I think your Lordship is
full entitlement and doesn't suffer a shortfall, and to ensure that that shortfall doesn't end up as a windfall  Page 21  Page 23  I for shareholders.  I mean, I wanted to start by identifying the points of construction which the judge relied on because, plainly, this is ultimately a question of construction on arose in relation to previous statutory regimes and were addressed and rejected in the context of those regime.  The second point he makes, in 135, is —  LADY JUSTICE GLOSTER: Sorry, just stopping there, and you different, the concept, as it were, is there in the electant wording. Although the wording may be different, the concept, as it were, is there in the electant wording. Although the wording may be to place the concept, as it were, is there in the electant wording. Although the wording may be to place the concept, as it were, is there in the electant wording. Although the wording may be to place the concept, as it were, is there in the electant wording. Although the wording may be to place the place to the concept, as it were, is there in the electant wording. Although the wording may be to place the place to the principal by the concept, as it were, is there in the electant wording. Although the wording may be to place the place to the principal by the place to the date of that dividend in 2012 but, on the judge's approach, when the flat the place to the date of that dividend in 2012 but, on the judge's approach, when the flat the place to the place	22	respect of interest, to ensure that once you've been	22	LORD JUSTICE PATTEN: Because, otherwise, you wouldn't have
Page 21  Page 23  I mean, I wanted to start by identifying the points of construction which the judge relied on because, plainly, this is ultimately a question of construction. We say it is striking that each of the points he relied on arose in relation to previous statutory regimes and were addressed and rejected in the context of those regimes.  The second point he makes, in 135, is  LADY JUSTICE GLOSTER: Sorry, just stopping there, and you submit that there is no material distinction in the relevant wording. Although the wording may be different, the concept, as it were, is there in the earlier legislation.  MR DICKER: Yes, Absolutely  LADY JUSTICE GLOSTER: Don't let me take you  MR DICKER: Yes, Absolutely  LADY JUSTICE GLOSTER: Don't let me take you  MR DICKER: Yes, Absolutely  LADY JUSTICE GLOSTER: Don't let me take you  MR DICKER: Twill come on in due course, because the 1986 Act obviously makes a substantial number of changes to insolvency regimes. It did make change were.  None of those changes, we say, had anything to do with, or leads one to the conclusion, that the principle in 24 Bower v Marris has been disapplied.  The second point the judge makes, in paragraph 135  I iquidation and the whole of principal, so you wouldn't Page 23    Deconcerned with asking the question: which is paid first? Because the answer is: they've both been paid first?    Deconcerned with asking the question: which is paid first?    Deconcerned with asking the question: which is paid first?    Deconcerned with asking the question: which is paid first?    Deconcerned with asking the question: first?    MR DICKER: I think that's absolutely right but, obviously, in practice -  LORD JUSTICE PATTEN: No, I understand in practice that is not how it works. You are likely to have, probably, a series of payments, depending on the realisations and so on.  MR DICKER: Yes, and if one thinks about how it operated in the concerned with asking the question of this is case, a series of payments, depending on the realisat	23	through the interest calculation, he actually gets his	23	this problem, would you? Because you would have paid
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None of those changes, we say, had anything to do with, or leads one to the conclusion, that the principle in Bower v Marris has been disapplied.  The second point the judge makes, in paragraph 135  None of those changes, we say, had anything to do with, worth what it was then and the creditor not receiving what he would have received if one had done the calculation the other way.  LORD JUSTICE PATTEN: Yes. I mean, if you are in	20	in relation to post-insolvency interest, but one needs	20	and still has not been paid. One now has, four or
or leads one to the conclusion, that the principle in  Bower v Marris has been disapplied.  The second point the judge makes, in paragraph 135  what he would have received if one had done the calculation the other way.  LORD JUSTICE PATTEN: Yes. I mean, if you are in	21	to be very careful identifying what those changes were.	21	five years later, a sum of interest accrued in 2012, not
24 Bower v Marris has been disapplied. 25 The second point the judge makes, in paragraph 135 26 Calculation the other way. 27 LORD JUSTICE PATTEN: Yes. I mean, if you are in	22	None of those changes, we say, had anything to do with,	22	worth what it was then and the creditor not receiving
The second point the judge makes, in paragraph 135 25 LORD JUSTICE PATTEN: Yes. I mean, if you are in	23	or leads one to the conclusion, that the principle in	23	what he would have received if one had done the
	24	Bower v Marris has been disapplied.	24	calculation the other way.
Page 22 Page 24	25	The second point the judge makes, in paragraph 135	25	LORD JUSTICE PATTEN: Yes. I mean, if you are in
Page 22 Page 24		D 22		D 24
		Page 22		Page 24

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1	a position, two or three years down the line from the	1	to get, and plainly you should get, what, as a matter of
2	date of administration, and it then becomes apparent, as	2	contract, you are entitled to before any distributions
3	a result of realisations, that you are going to, in	3	are made to shareholders".
4	fact, be dealing with solvent liquidation or	4	LORD JUSTICE PATTEN: Yes, but, I mean, what I put to you is
5	administration in which this is a significant surplus,	5	a rather long way of simply making the point: when
6	it's only at that point that these rules have any	6	sub-rule 7 kicks in I mean, the judge is right that
7	application because, up to that point, the	7	it presupposes and it has to, because otherwise the
8	administrator, presumably, is going to be paying	8	question doesn't arise that there's been payment of
9	dividends on the basis that there's a shortfall.	9	the proved debts which would, in the case we are talking
10	MR DICKER: Correct.	10	about, would be principal plus interest. But what
11	LORD JUSTICE PATTEN: As you've explained, on a pari passu	11	it's a question of construction, whether it answers
12	basis, in which all the creditors will take an equal	12	how the statutory interest, in respect of the relevant
13	share of the hit.	13	periods, falls to be calculated.
14		14	MR DICKER: Yes.
	But once that's no longer the position, and assuming	15	
15	that there have been, probably, payments of dividends		LORD JUSTICE PATTEN: That's the real issue.
16	properly so-called over that period of time, when you	16	MR DICKER: Yes, and we say that isn't answered by the first
17	get to the point of which sub-rule 7 kicks in, which is	17	point he makes. It's not answered simply by pointing to
18	that there is going to be a surplus and therefore	18	the way in which the statutory regime works. Pointing
19	statutory interest becomes relevant, at that point in	19	to the fact that dividends have to be paid in respect of
20	time, one has to do a calculation of what the creditors	20	proved debts first. It's not answered, either, by the
21	have are still owed if I can put it that way	21	second point he makes, in 135, that you are paying post
22	notwithstanding the dividends which have been paid.	22	insolvency interest in respect of the periods for which
23	MR DICKER: My Lord, we would agree with that.	23	the debts were outstanding, because you then have to
24	LORD JUSTICE PATTEN: If you've a scheduled series of	24	work out: how in the world, in which we are now in, do
25	payments or let's assume that they eventually add up	25	you calculate for how long the debts have been
	Page 25		Page 27
1	to a hundred new cent of data of liquidation debts	1	outstanding?
1	to a hundred per cent of date of liquidation debts,	1	
2	that's to say accrued interest and principal at that	2	LORD JUSTICE PATTEN: Yes.
3	date, then, as I understand it, this principle is really	3	MR DICKER: Now, again, the wording in 135 the learned judge refers to, you will find similar language to similar
4	trying to work out the order of payment because there	4	, ,
5	hasn't been a single hundred per cent payment at the	5	effect in statutory provisions in bankruptcy as long ago
6	date of liquidation in order to compensate creditors in	6	as 1825. Again, you'll see that.
7	the position of your clients	7	The third point he makes comes in 136. 136, he
8	MR DICKER: Yes	8	says:
9	LORD JUSTICE PATTEN: for the fact that they haven't	9	"2.88(9) specifies the rate at which interest, under
10	received the total amount of their indebtedness, having	10	2.88(7), is to be paid. Insofar as interest is payable
11	regard to fact that interest has continued to roll on in	11	at the rate(Reading to the words) because it is
12	respect of the principal.	12	higher than judgment rate. It is, in my view, clear
13	MR DICKER: My Lord, so one starts, as your Lordship said,	13	that the interest is nonetheless not been paid pursuant
14	with a (Inaudible) in this case, which for a long time	14	to the contract. The interest remains payable pursuant
15	everyone thought was going to be insolvent	15	to rule 2.88, rule 2.88(9) does no more than specify the
16	administration, no question of a surplus. The cases	16	rate at which statutory interest is payable."
17	say: well, we do have rules dealing with how a shortfall	17	Now, the learned judge seemed to have thought that
18	needs to be dealt with. Obviously, assets distributed	18	it was important that when 2.88(9) referred to the rate
19	pari passu amongst creditors, but those rules were	19	applicable to the debt, apart from the administration,
20	essentially designed to achieve pari passu	20	it wasn't effectively saying, "You can now have your
21	distributions. When you suddenly realise you have	21	contractual interest". What it was saying was, "Here is
22	a surplus, then, essentially, you are in a different	22	a statutory right which gives you interest at the rate
23	world. Some of the cases pre-1986, in the context of	23	which was applicable apart from the administration".
24	liquidation, talk about remission to contractual rights,	24	The learned judge seems to have thought that was one
25	essentially a way of saying, "Well, you really now ought	25	reason why the principle in Bower v Marris could not
	D 24		D 20
	Page 26		Page 28

Pile come on to precisely why he reached that Children on the precisely why he reached that Children of appropriation. He said part of Chockison later, but it's essentially to do with the doctrine of appropriation. He said part of Bower v Marris requires keep the law been interest carning throughout, so when one gets to this stage of saying. "Payments were made generally on account", we can now wrk, out how they should be appropriated, that requires, essentially, interest to have accrued during the relevant period so that, when you look look, you find a sum of interest against which dividend can now notified. The precise of the post of the operation of the principal. If come to that later. Dust focusing on the point he makes in 136, the distriction between, on the one hand, being entitled to your interest as a matter of contract underlying rights and, on the other hand, the rule says, (b):  "You will have statutory right to interest at the rate applicable to the debt apart from the administration."  "We say, ther's no sensible reason why that should because the statutory rule essentially reflects your anderlying right to interest at the rule applicable because the statutory rule essentially reflects your anderlying right to interest at the rule applicable to interest essentially compensation to all creditors for the delay cannot have page 10  Page 20  Page 31  I apart from the administration. No reason why that should disapply the principle also parties administration."  Page 20  Page 31  LADY LUSTICE GLOSTER. Less can the form the administration and the statute or special to the contract.  The statute synthem on the same fact that the statute essentially reflects your administration."  Page 20  Page 31  LADY LUSTICE GLOSTER. Less can be a statutory used as statutey regime.  A many that is contract and be a statute expended to the statute and the statute and the administration of the cannot be administration."  End of Toward the administration of the page.  Page 31  LADY LUSTICE GLOSTER. Fact and a statute or s				
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6 accruing throughout, so when one gels to this stage of saying, "Payments were made generally on account", we can now work out how they should be appropriated, that requires, essentially, interest to have accrued during the requires, essentially, interest to have accrued during the requires, essentially, interest to have accrued during the the relevant period so that, when you do be back, you find a sum of interest against which dividend can now notionally be appropriated.  11			5	
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8 can now work out how they should be appropriated, that requires, essentially, interest to have accrued during the requires, essentially, interest to have accrued during the theorems of the contract. I'm saying that the mere fact that the statute essentially reflects your underlying rights, can't be a reason why, when previously you are entitled to statute essentially reflects your underlying rights.  13 Now, we say, that's not part of the operation of the principle. I'll come to that later.  14 LADY JUSTICE GLOSTER: I'd here a sunther -1 will come on the principle in the darministration. I'll administration is made to sharcholders. The mere fact the statute says, that was in relation to the reason of the principle and profession. No reason why that should disapply the principle.  15 Agont from the administration. No reason why that should disapply the principle.  16 We say, that was simply intended to ensure creditors received interest to which they were otherwise entitled before any distribution is made to sharcholders. The mere fact the statute says that, can't be a reason for distance and the statute control of the principle.  17 Again, if that's how the raile is metaded to operate, it administration, the statute says that, can't be a reason for distance and the statute says that, can't be a reason for distance and the statute says that, can't be a reason for the principle.  18 Agont from the administration. No reason why that should disapply the principle.  29 Agont from the administration. No reason why that should disapply the principle.  20 Agont from the administration. No reason why that should disapply the principle.  21 Agont from the administration. No reason why that should disapply the principle.  22 Agont from the administration. The statute says that, can't be a reason for disapplying Bower w Marris. If it applies outside the administration, the statute says that, can't be a reason for disapplying Bower w Marris. If it applies outside the administration, the statute says that, can't be a reaso	7		7	
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14   LADY JUSTICE GLOSTER: I see. I see.			13	
Just focusing on the point he makes in 136, the distinction between, on the one hand, being entitled to your interest as a matter of contract underlying rights and, on the other hand, the rule says, (b):  "You will have statutory right to interest at the rate applicable to the debt apart from the administration."  We say, there's no sensible reason - mainly because the statutory rule essentially reflects your underlying right to interest at the rate applicable reason - mainly because the statutory rule essentially reflects your underlying right to interest at the rate applicable reason why that should disapply the principle.  Page 29  Page 31  I apart from the administration. No reason why that should disapply the principle.  Page 39  Page 31  I apart from the administration. No reason why that should disapply the principle.  Page 49  Page 31  I element of the rules does is say, "We should treat you as if you had a judgment, because the moratorium has in general prevented creditors from obtaining a judgment."  We say, that was simply intended to ensure creditors received interest to which they were otherwise entitled before any distribution is made to shareholders. The mere fact the statute says that, cam be a reason for disapplying Bower v Marris. If it applies outside the administration, the statute says that, cam be a reason for disapplying Bower v Marris. If it applies outside the administration, the statute says you should get what you will awould have outside administration to the reference to the contract, you apply the blow outside administration to the debt apart from the an underlying contractual right.  LADY JUSTICE GLOSTER: If there is neaton for there's a number of ways in which — and situations in which Bower v Marris may apply. One is in relation to an underlying contractual but, say, statutory, like judgment rede's a number of ways in which — and situations in the form of the parties of the contract, and the provides that a nunderlying contractual but, say, statutory, like judgment rate, where w			14	
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And, thirdly, in relation to the other limb of 2.88(9), 24 interest. That appears to be a specific exception. As 25 2.889 gives you interest at a rate which is the greater 26 1 say, for reasons which no one has been able to	22	judgment rate, where we say the principle also applies	22	position in county courts expressly provides that
25 2.889 gives you interest at a rate which is the greater 25 I say, for reasons which no one has been able to	23	unless the statute expressly provides for the contrary.	23	payments made are appropriated first to principal not
	24	And, thirdly, in relation to the other limb of 2.88(9),	24	interest. That appears to be a specific exception. As
Page 30 Page 32	25	2.889 gives you interest at a rate which is the greater	25	I say, for reasons which no one has been able to
Page 30 Page 32		D 20		D 22
		Page 30		Page 32

1	LADY JUSTICE GLOSTER: That's to be kind to what is assumed	1	statutory regimes. If you go back to section 132, there
2	to be a small-time debtor, presumably.	2	was a section which said:
3	MR DICKER: That may well be the explanation.	3	"In the event of a surplus you will pay interest."
4	LADY JUSTICE GLOSTER: Yes. I see, thank you.	4	The cases held: well, that doesn't prevent you from
5	MR DICKER: So that's the third point.	5	calculating such interest in accordance with the
6	Again, this reflection of an underlying contractual	6	principle in Bower v Marris.
7	right in the statutory scheme, you will also see was	7	LORD JUSTICE PATTEN: Just in terms of statutory
8	a feature of the Bankruptcy Act 1825. Section 132 had	8	construction, which I suppose in the end this is
9	a materially similar provision.	9	a question of, what words in 2.88(7) does the judge
10	Now, the fourth point the judge makes is in	10	actually rely on as indicating that you have to treat
11	paragraph 137, where he says:	11	the dividend as being used to pay the principal part of
12	"Not only does rule 2.88 contain no suggestion that	12	the debt as opposed to any accrued interest?
13	the principal in Bower v Marris should be applied in my	13	
	• •	1	Because, I mean, 7 doesn't, in terms, talk about
14	view its whole tenor is contrary to it. It is	14	principal and interest, it just talks about payments of
15	a direction to apply the surplus in the payment of	15	the debts proved, which as we all know include both. So
16	interest, it is not a direction to apply the surplus	16	what's the judge fastening on as giving him that order
17	towards an element of the principal debt through	17	of priority?
18	a process of reallocation."	18	MR DICKER: The way we understand it is: the judge was
19	This, as I understand it, is essentially making the	19	essentially working out what the consequences of the
20	same point as his first point. You have a dividend in	20	first stage of the insolvency process is and he says,
21	respect of principal. Principal has been repaid. When	21	"Right, so the first stage is you pay prove debts", and
22	you come to 2.88, 2.88 is concerned with payment	22	those are essentially principal. There may be
23	post-insolvency interest. If you apply the principle in	23	an element of pre-insolvency interest, but for practical
24	Bower v Marris, then notionally, at least, because the	24	purposes, the important distinction is between that sum
25	payments that were previously made were applied first to	25	and, on the other hand, post-insolvency interest.
			70 44
	Page 33		Page 35
1	interest, you will necessarily have some notional	1	I think his approach is to say, "Well, work out what
2	principle left outstanding and, therefore, you will have	2	has so far happened in the insolvency, proved debts have
3	a notional payment, the judge said, in respect	3	been paid, and that's what the first bit of 2.88(7)".
4	principal. That is simply not what the rules say.	4	So the starting point of the analysis is you've
5	That, as we understand it, is the judge's point.	5	already paid proved debts, then the judge says, "Well,
6	We say, it is essentially the same as the first	6	you are paying interest on those debts, that's the
7	point he was making. It's focusing on the fact that	7	proved debts for the period in which they were
8	dividends have been paid in respect of principal,	8	outstanding". Then, what he says is, "Well, when the
9	following that reasoning through, it's saying that	9	dividends were paid, they were no long outstanding".
10	fact unless you are allowed a notional	10	Then, he says, "This is a statutory right which only
11	reallocation necessarily is inconsistent with now	11	comes into existence when you conceive what is surplus",
12	making the payments you want to make because some of	12	which is the third point I mentioned.
13	those payments will necessarily be treated as being made	13	The fourth point, he says, is the rule talks about
14	in respect of principle.	14	paying interest, as, my Lord, Lord Justice Briggs said,
15	LORD JUSTICE BRIGGS: It might be said that the more	15	if you apply Bower v Marris, then, notionally, because
16	fundamental point is that because his first point is	16	you are treating the dividends as having paid interest
17	based upon an assumption, whereas this is simply based	17	first, necessarily, by the time you get to this stage,
18	upon what the ruling says you are actually doing, which	18	you will at least notionally you be saying, "I still
19	is paying interest.	19	have some principal outstanding, some of the money
20	MR DICKER: But the premise of both arguments, we say, is	20	I have so far used to pay proved debts in full because
21	essentially the same. It's focusing on the first stage	21	it has been used to notionally pay interest means I
		21 22	
22	of the liquidation process and following the logic of	23	can't have notionally paid my proved debts in full".
23	that through. My Lord is right in the way you have	1	LORD JUSTICE BRIGGS: The judge says, consistent with the
24	expressed it, but we say the answer to that is again,	24 25	second line of 2.887, "What you do is pay interest on
25	this is a feature you will find in the previous	23	this debt. Not principal".
	Page 34		Page 36
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1	MR DICKER: Yes, and, we say, there's nothing in the rules	1	ranking equally?
2	that compels the conclusion that he reached. We say	2	MR DICKER: I think the answer is yes. Although, I might
3	that if you look at the previous regimes, you look at	3	express it in a slightly different way.
4	the way the 1986 Act was intended to change those	4	Our submission would be: when you get to the stage
5	regimes, absolutely no indication that the legislature	5	of calculating and paying interest, under rule 2.88,
6	intended, essentially, to disapply Bower v Marris.	6	what you do is you do the calculation required by the
7	Nothing in the rule that does so. No indication that it	7	rule, including applying the principle in
8	intended to do so.	8	Bower v Marris, and you work out how much interest is
9	One way of approaching this is your Lordships	9	due to each creditor on that basis. You compare it with
10	will see the phrase in case shortly intellectual	10	the amount of the surplus you have, and if there is
11	freight, but there are, as your Lordships know, numerous	11	a shortfall, and you divide it up rateably as you
12	provisions of the Insolvency Act which, at first blush,	12	otherwise would
13	don't appear to provide what authorities have	13	LORD JUSTICE BRIGGS: So even if the part of what's due to
14	consistently held they do in fact provide. Even at the	14	a particular creditor because of the Bower v Marris
15	most basic level, if one looks 107 and 143, one talks	15	approach is principal, you treat it as interest for that
16	about payments of proved debts and distribution to the	16	purpose?
17	surplus to the members. That leaves out the whole	17	MR DICKER: Yes. It's not principal, it's simply that when
18	category of non-provable liabilities. But the courts	18	you are calculating how much interest they are owed,
19	have said, ever since 1743: well, there is that category	19	that's the basis of the calculation.
20	and they do need to be paid before the surplus is	20	LORD JUSTICE BRIGGS: I'm still not quite sure I understand
21	returned to	21	that. You may get to it in due course, but the effect
22	LADY JUSTICE GLOSTER: What, so there's no reference in the	22	of the calculation for some particular creditor means
23	rules to the concept of non-provable debts?	23	that by applying dividends first, the interest he's
24	MR DICKER: Non-provable debts are simply not dealt with in	24	had all his interest, but he hasn't had all his
25	the rules. Even if one looks at the basic provisions,	25	principal, then what you are paying him is principal,
23	the rules. Even if one looks at the basic provisions,	23	principal, then what you are paying min is principal,
	Page 37		Page 39
1	107 and 143, talking about distribution of claims,	1	isn't it? But I think you have to (inaudible) interest
2	distribution in respect of distribution of assets and	2	to make 2.88(8) work.
3	the return of the surplus to members. That's all it	3	MR DICKER: Yes. I think was being slow.
4	says.	4	As I understand it, your Lordship's point is
5	What the court is essentially saying, as early as	5	essentially that the fourth point the judge made, this
6	1743, is: you don't hand the surplus back to the	6	is in respect of interest
7	bankrupt if, at the time you do so, creditors are still	7	LORD JUSTICE BRIGGS: Yes.
8	owed some money, whether it's provable or not.	8	MR DICKER: to which our
9	LADY JUSTICE GLOSTER: But that actual concept isn't founded	9	LORD JUSTICE BRIGGS: Just following through, the judge is
10	in an express provision of the Act or in an express	10	pointing to a sub-rule which I don't think he needed to
11	provision of the rules.	11	look at.
12	MR DICKER: It's essentially the result of judge-made law.	12	MR DICKER: We say the sub-rule doesn't raise an additional
13	Interpretation of the logic of the statutory scheme.	13	issue. Your Lordship's raised the question of what
14	LORD JUSTICE BRIGGS: Can I just follow your last submission	14	happens if there is a shortfall. We say you do the
15	through to 2.88(8) and ask you to assume that there is	15	calculation that's required by the rule, applying
16	insufficient to pay Bower v Marris payments in full, all	16	Bower v Marris, you work out how much should be owed to
17	interest payable under paragraph 7 impacts(?) equally	17	each creditor, one has that bar on the basis of the
18	whether or not the debts (inaudible) rank equally.	18	submissions I've made so far and, then, if there's
19	I quite see it has a fundamental application and	19	a shortfall
20	levelling up, a want of priority between the underlying	20	LORD JUSTICE BRIGGS: You just treat that as interest even
21	debts. But you would say that means all interest and	21	if it's in relation to a particular creditor, it's all
22	principal being paid under the Bower v Marris	22	personal(?).
23	calculation ranks equally, do you?	23	MR DICKER: Yes, because, actually, you have already passed
24	So if there was a shortfall of the Bower v Marris	24	stage 1 which is payment proved debts in full. You have
25	stage, you would treat the principal and the interest as	25	done the pari passu distribution, and now we are just
	Page 38		Page 40

1	concerned with what happens to the surplus.	1	So the logic of the judge's approach just focuses on
2	There's one other point made by Mr Justice David	2	2.88(9) and the reference to the rate applicable to the
3	Richards. I should mention, at this stage, we also need	3	debt apart from the administration.
4	to deal with in due course, and it concerns the	4	Imagine a creditor with a contractual claim to
5	relationship in Bower v Marris, the rules of	5	interest and a right to appropriate payments, first, to
6	appropriation. The judge dealt with this in		
		6	interest and, secondly, to principal. Such a creditor
7	paragraphs 144 to 150.	7	would satisfy the judge's requirement for two debts.  Interest would have been accruing on the contract, at
8	LADY JUSTICE GLOSTER: Sorry, the relationship between	8	•
9	Bower v Marris and?	9	the date of any dividend, and you could subsequently
10	MR DICKER: The rules of appropriation.	10	say, "Right, I know they were paid in respect of proved
11	LADY JUSTICE GLOSTER: Yes.	11	debts but we can now notionally treat them as having
12	MR DICKER: He dealt with this, as I said, in 144 to 150.	12	been paid in respect accrued interest because there
13	Just identifying the points he was making, in 144, he	13	would have been such accrued interest".
14	says:	14	The judge says that analysis is no longer possible
15	"There's a further strong factor suggesting that	15	because the statute has essentially replaced your
16	Bower v Marris does not apply to the payment of post	16	contractual right to interest with a statutory right to
17	insolvency interest under the 1986 legislation. I	17	interest, albeit one which reflects what you would have
18	earlier discussed the principle in this case is derived	18	as a matter of contract. That statutory right to
19	from the legal rules as to appropriation of payments	19	interest only arises if and when there is a surplus,
20	towards debts. It's a basic part of the application of	20	with the result that he says it follows you couldn't
21	those rules that the date when a payment is made, there	21	have had any interest accruing during the prior period.
22	are two outstanding debts payable by the debtor to the	22	Your right to interest only comes into existence as and
23	creditor."	23	when there's a surplus, because he says Bower v Marris
24	He goes on to say:	24	requires there to have been two accrued debts at the
25	"The source of the debt may be but need not be	25	relevant date, there aren't, as a result of 2.88.
	Page 41		Page 43
1	a contract, it may be a judgment carrying interest or	1	Therefore, there's no room for the notional reallocation
1 2	a contract, it may be a judgment carrying interest or	1 2	Therefore, there's no room for the notional reallocation
2	some other basis of obligation."	2	because the underlying requirement is missing.
2 3	some other basis of obligation."  So the first point is, according to the judge,	2 3	because the underlying requirement is missing.  Now, again, we say that's wrong for a number of
2 3 4	some other basis of obligation."  So the first point is, according to the judge, Bower v Marris is derived from the legal rules as to	2 3 4	because the underlying requirement is missing.  Now, again, we say that's wrong for a number of reasons.
2 3 4 5	some other basis of obligation."  So the first point is, according to the judge, Bower v Marris is derived from the legal rules as to appropriation of payments, and that requires there to	2 3 4 5	because the underlying requirement is missing.  Now, again, we say that's wrong for a number of reasons.  Your Lordships will also see in due course this was
2 3 4 5 6	some other basis of obligation."  So the first point is, according to the judge, Bower v Marris is derived from the legal rules as to appropriation of payments, and that requires there to have been two outstanding debts as at the date of	2 3 4 5 6	because the underlying requirement is missing.  Now, again, we say that's wrong for a number of reasons.  Your Lordships will also see in due course this was also a feature of the previous bankruptcy regime. It
2 3 4 5 6 7	some other basis of obligation."  So the first point is, according to the judge, Bower v Marris is derived from the legal rules as to appropriation of payments, and that requires there to have been two outstanding debts as at the date of notional appropriation. He says that in 145:	2 3 4 5 6 7	because the underlying requirement is missing.  Now, again, we say that's wrong for a number of reasons.  Your Lordships will also see in due course this was also a feature of the previous bankruptcy regime. It didn't stop the principle in Bower v Marris applying.
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	some other basis of obligation."  So the first point is, according to the judge, Bower v Marris is derived from the legal rules as to appropriation of payments, and that requires there to have been two outstanding debts as at the date of notional appropriation. He says that in 145:  "In applying the rules as to appropriation of payments to the administration of estates, the foundation remains that at the date of payment from the estate, which is treated as being made on account, there are two debts payable by the estate to the creditor."  Then, the important point is at 149, where he says:  "The rights to interest out of a surplus under rule 2.88 is not a right to the payment of interest accruing due from time to time during a period between the commencement of the administration and the payment of the dividend, or dividends, on proved debts. The dividends cannot be appropriated between proved debts and interest accruing due under rule 2.88, because at the date of the dividends, no interest was payable at	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Now, again, we say that's wrong for a number of reasons.  Your Lordships will also see in due course this was also a feature of the previous bankruptcy regime. It didn't stop the principle in Bower v Marris applying.  LORD JUSTICE PATTEN: I suppose you could have an alternative system which I think, to some extent don't ask me which of the issues it is but I think it is raised in one of the issues here is that if the judge is right and you simply treat 2.88 as applying only you operate 2.88 on the basis that the dividends are applied to pay off the proved debts which, for the most part, are going to be principal. Then you are simply calculating statutory interest in respect of the relevant periods up to those payments. That any further loss that you can say arises by reason of the fact that you are treating the dividends as payment of principal, first, rather than of statutory interest, could be compensated by reversion to your contractual rights at
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	So the first point is, according to the judge, Bower v Marris is derived from the legal rules as to appropriation of payments, and that requires there to have been two outstanding debts as at the date of notional appropriation. He says that in 145:  "In applying the rules as to appropriation of payments to the administration of estates, the foundation remains that at the date of payment from the estate, which is treated as being made on account, there are two debts payable by the estate to the creditor."  Then, the important point is at 149, where he says:  "The rights to interest out of a surplus under rule 2.88 is not a right to the payment of interest accruing due from time to time during a period between the commencement of the administration and the payment of the dividend, or dividends, on proved debts. The dividends cannot be appropriated between proved debts and interest accruing due under rule 2.88, because at the date of the dividends, no interest was payable at that time pursuant to rule 2.88. Entitlement under rule 2.88 to interest is a purely statutory entitlement	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Now, again, we say that's wrong for a number of reasons.  Your Lordships will also see in due course this was also a feature of the previous bankruptcy regime. It didn't stop the principle in Bower v Marris applying.  LORD JUSTICE PATTEN: I suppose you could have an alternative system which I think, to some extent don't ask me which of the issues it is but I think it is raised in one of the issues here is that if the judge is right and you simply treat 2.88 as applying only you operate 2.88 on the basis that the dividends are applied to pay off the proved debts which, for the most part, are going to be principal. Then you are simply calculating statutory interest in respect of the relevant periods up to those payments. That any further loss that you can say arises by reason of the fact that you are treating the dividends as payment of principal, first, rather than of statutory interest, could be compensated by reversion to your contractual rights at the very end of the insolvency process, just by analogy to the currency conversion claims. But the judge,

Page 42

		1.1	*
1	on interest.	1	Thirdly, the right under the rule is a statutory
2	MR DICKER: He rejected it, your Lordship is quite right.	2	right. This is the case even if it simply reflects
3	He rejected it because he held that 2.88, is, he said,	3	creditors' underlying right whether contractual or
4	an exclusive code. It cuts across your existing rights	4	otherwise.
5	and, effectively, he treated it as if whatever	5	Fourthly, the rule is concerned with payment of
6	underlying rights you may have had, they've been	6	interest. His conclusion is also based, as I mentioned,
7	extinguished somehow.	7	on his views in relation to rules as to appropriation.
8	LORD JUSTICE BRIGGS: In relation to proved debts?	8	So those are the points which, essentially, I ask
9	MR DICKER: In relation the proved debts.	9	the court to have in mind when we go through the
10	LORD JUSTICE BRIGGS: He wasn't backtracking on the currency	10	pre-1986 materials, because that was the next topic
11	conversion?	11	I was going to turn to.
12	MR DICKER: I'm not sure he would accept "backtracking", but	12	I'm aware we have a transcriber. I don't know
13	your Lordship is right.	13	whether or not
14	So 2.88 is exclusive code for interest in respect of	14	LADY JUSTICE GLOSTER: Do you want a break, shorthand
15	proved debt, the judge said. So there's no room for	15	writer? Would that be a convenient time
16	a non-provable claim to the shortfall because,	16	MR DICKER: It would.
17	essentially, in respect of your proved debt statute, he	17	LADY JUSTICE GLOSTER: to take a break? Right, five
18	said, "I don't care what your underlying rights are,	18	minutes.
19	this is all you are going to get. If it's less than you	19	(11.45 am)
20	would otherwise have had, hard luck". Whatever the	20	(A short break)
21	balance is, that goes to the shareholders.	21	(11.55 am)
22	One point the judge made, an additional point, was	22	LADY JUSTICE GLOSTER: Yes, Mr Dicker.
23	that he said it would be rather odd for the legislature	23	MR DICKER: The third topic is to look at the position prior
24	to have said, "You will get this amount of interest	24	to 1986 both in bankruptcy and liquidation to see how
25	under 2.88", and to have said, "If there is a shortfall,	25	and why the principle operated. We entirely accept the
	Page 45		Page 47
1	you can pick up that shortfall as a non-provable claim".	1	effective rules, 2.88(7) and 9, obviously depends on
2	One can see a certain amount of force in that. The	2	their construction. But we do say those rules need to
3	question is: what's the conclusion that follows?	3	be construed in the light of the statutory regime as
4	We say the conclusion that follows is: if it's odd,	4	a whole, and the principles and policies which underlie
5	the natural reaction should be to go back to 2.88 to try	5	it and also in light of the regimes that existed before
6	and work out a construction of 2.88 that permits	6	1986.
7	creditors to get their full entitlement so that oddity	7	There is an approach along these lines, as your
8	doesn't arise. But if that's impossible, for whatever	8	Lordships will know from Lord Justice Briggs' judgment
9	reason, then we say the shortfall is picked up as	9	in Waterfall 1. Just to give you the reference, 138 to
10	a non-provable claim in the way that every other claim	10	147. Also, by Lord Justice Moore-Bick, at 248.
11	which cannot be proved gives rise to a non-provable	11	Nothing surprising in this, we refer to some further
12	claim.	12	authorities to similar effect in our skeleton argument
13	Just so you know how I will be dealing with this,	13	on part A. Again, just so you have the references,
14	first topic, as you know, is Bower v Marris. Second is	14	paragraphs 23 to 26.
15	compound interest. The third is non-provable claims.	15	There is one additional case not referred to in our
16	So all the issues in relation to that then comes in that	16	skeleton argument. I think it would be worth quickly
17	context.	17	looking at it. It's in the authorities bundle, tab 67A.
18	So just to recap at this stage: the judge's	18	LADY JUSTICE GLOSTER: Which paragraph of your skeleton are
19	conclusion appears to been based essentially on four	19	we looking at, so I can link
20	aspects of the wording of the rules. Firstly, proved	20	MR DICKER: 23 to 26. It's the skeleton in A1, tab 12.
21	debts have priority over post insolvency interest. They	21	LADY JUSTICE GLOSTER: Yes.
22	have to be paid first.	22	MR DICKER: Pages 10 and 11.
23	Secondly, interest is paid out of the surplus in	23	LORD JUSTICE BRIGGS: Cadbury Schweppes?
24	respect of the periods for which the debts have been	24	MR DICKER: Yes. Unless you would prefer that I read it,
25	outstanding since the date of the administration.	25	could I just ask you to read paragraphs 23 and 24
	7		D 40
	Page 46		Page 48

1	LADY JUSTICE GLOSTER: Give me the reference again. It's	1	liquidation was relatively simple. Before 1986, there
2	the authorities bundle.	2	was no statutory provision expressly dealing with
3	MR DICKER: Volume 2, tab 67A, Cadbury Schweppes, judgment	3	post-insolvency interest. However, the basic effect of
4	of Lord Justice Robert Walker, the relevant paragraphs	4	the regime was exactly as you would expect: proved debts
5	are 23 and 24.	5	ranked ahead of post insolvency interest which had to be
6	(Pause)	6	paid before any distributions could be made to
7	LORD JUSTICE BRIGGS: Is it a sort of intellectual freight	7	shareholders. That was essentially the result of
8	(Inaudible) sort of.	8	judge-made law.
9	MR DICKER: Yes.	9	In the event of a surplus, creditors were entitled
10	LADY JUSTICE GLOSTER: Do you want us to read any more than	10	to receive the interest they were entitled to on their
11	that?	11	underlying claims, whether that right was contractual or
12	MR DICKER: Just 23 and 24. Just emphasising two points,	12	statutory, and the authorities often expressed this in
13	one at the end Mr Justice Hoffmann's from his	13	terms of concepts like remission to contractual rights.
14	judgment in Re A Debtor:	14	Creditors who did not have any underlying rights to
15	"It does not, however, mean the language(Reading	15	interest were, however, not entitled to any compensation
16	to the words) comes to one entirely free depending on	16	for delay. In other words, prior to 1986, in
17	intellectual freight carried by word and phrases in	17	a liquidation, there was no general right to Judgment
18	earlier bankruptcy or other legislation."	18	Act rate interest in the event of a surplus. So limb 1,
19	The emphasis that Lord Justice Robert Walker gives	19	2.889, effectively existed, and, then, 2, the Judgment
20	to the fact:	20	Act rate limb did not.
21	"Although the English law of bankruptcy now has the	21	It's common ground that at all times between 1869,
22	appearance of a complete statutory code it is built on	22	which are the origins of court winding up, and 1986, the
23	foundations that show much to past judicial creativity	23	amount of interest payable in the event of a surplus was
24	in development of far more meagre statutory material	24	calculated in accordance with the principle in
25	going back to Elizabethan times."	25	Bar v Marris, ie, notionally treating dividends paid as
	8. 8		Dai v Mario, ie, nouvilling a radina para as
	Page 49		Page 51
1	With the greatest of respect to the learned judge,	1	having been paid first in respect of interest.
2	whilst it's correct that aspects of the 1986 are new, we	2	The effect of this was that creditors who were
3	say he failed to understand the changes that were	3	entitled to interest would receive the full amounts that
4	intended to be made in relation to post-insolvency	4	they were owed before any distributions were made to
5	interest in the way the new provisions related to the	5	shareholders, so that's liquidation.
6	old. Put shortly, he didn't carry with him enough of	6	The position in bankruptcy was slightly more
7	the intellectual freight that, in our respectful	7	complicated and changed over time. Just to outline the
8	submission, he should have done.	8	position in bankruptey: firstly, prior to 1824, the
9	Now, just before turning to and dealing with	9	position in bankruptcy was essentially the same as the
10	a limited number of authorities and statutory	10	position in a liquidation, that I've just described. No
11	provisions, it's helpful to start with a feature of	11	statutory provision expressly dealing with
12	rule 2.88, 7 and 9, which I've already mentioned, that	12	post-insolvency interest. The general effect of the
13	is the distinction between the 2.88(9), the reference	13	statutory regime was held to be that proved debts ranked
14	to, on the one hand, the rate applicable to the debt	14	head of post-insolvency interest, which had to be paid
15	apart from the administration and, on the other hand,	15	before any distributions were made
16	the Judgment Act rate. 2.88(9) says you are entitled to	16	LORD JUSTICE BRIGGS: Is it prior to 1824, did you say?
17	the greater of the two. So there are two separate	17	MR DICKER: Prior to 1824. Between at least 1743 and 1824,
18	strands in 2.88(9).	18	no statutory provision dealing expressly with
19	It's helpful just to outline, before I turn to the	19	post-insolvency interest. The general effect of the
20	authorities and the statutes, how the two strands	20	statutory regime was held to be proved debts ranked
21	feature in the prior regimes, essentially to give you	21	ahead of post insolvency interest which had to be held
22	a quick overview of the way it's worked both in	22	before any surplus could be returned to the bankrupt.
23	liquidation and in bankruptcy, because prior to 1986,	23	In event of a surplus, creditors are entitled to receive
24	the two regimes were different.	24	the interest they were entitled to receive on their
25	The position in relation to corporate insolvency	25	underlying claims. So that's pre-1824.
	Page 50		Page 52

1	The second point, the position changed in 1825 with	1	section 132, if you had an underlying right to interest,
2	the introduction of section 132 of the Bankruptcy Act.	2	you were paid first out of the surplus.
3	This introduced a specific	3	• •
	LADY JUSTICE GLOSTER: Sorry, 1865 or 55?		LORD JUSTICE BRIGGS: It wasn't just a matter of rate, was
4	• *	4	it, I think the underlying right might have given
5	MR DICKER: Section 132 of the 1825.	5	(Inaudible).
6	LADY JUSTICE GLOSTER: 1825, sorry.	6	MR DICKER: Yes, again, we will see the way it's expressed
7	MR DICKER: I'll speak up.	7	it's entitled to interest but more.
8	LORD JUSTICE BRIGGS: Was there a funny sort of (inaudible)	8	The third point, between 1825 and 1883, it's common
9	in 1825?	9	ground that Bower v Marris applied to the calculation of
10	MR DICKER: The provision initially came in in 1824, but,	10	interest under section 132, at least so far as creditors
11	I'm sorry, slight shorthand, but section 132 of the 1825	11	with an underlying right to interest is concerned. We
12	Act is	12	say in respect of both limbs. We'll come to that.
13	LADY JUSTICE GLOSTER: It's not outcome determinative as to	13	The judge himself at paragraph 65 refers to, he
14	whether it's 24 or 25.	14	describes as, a very long line of cases, including
15	MR DICKER: Which is why I wasn't going to trouble you with	15	Bower v Marris itself, that held that the principle
16	the detail. The judge, I think in his judgment, briefly	16	applied in the case of a creditor who had an underlying
17	alludes to 1824 and 1825 position.	17	right to interest.
18	Section 132 introduced a specific provision dealing	18	Now, although at this stage no one's been able to
19	with the payment post-insolvency interest in the event	19	find a case which expressly dealt with right to interest
20	of a surplus. At this stage, it incorporated both	20	at 4 per cent, in our submission Bower v Marris also
21	strands of rule 2.88(9), if I can put it that way. Both	21	applied in that context. I'll deal with that issue in
22	the rate applicable to the debt, apart from the	22	due course. We say between 1825 and 1883,
23	insolvency and Judgment Act rate interest. Creditors	23	Bower v Marris certainly applied to the first limb,
24	were entitled to receive the interest they were entitled	24	section 132, and in our submission applied to the second
25	to receive on their underlying claims. Creditors who	25	as well.
	Page 53		Page 55
1	were not otherwise entitled to interest were entitled to	1	The fourth stage is this. The statutory provisions
2	interest at 4 per cent, being the rate which shortly	2	in bankruptcy were amended at various stages. But the
3	afterwards was introduced in the Judgments Act.	3	significant change, if there was one, occurred in 1883.
4	Now, section 132, wasn't identical to rule 2.88, 7	4	There's an issue as to precisely the effect of the 1883
5	and 9. One difference concerns priority. 2.88(9),	5	Act, which I'll need to deal with in more detail later,
6	ranks two strands equally. Section 132, provided that	6	although it may not ultimately matter. But, put
7	creditors with an underlying right to interest had	7	shortly, the judge held the 1883 Act limited all
8	priority over creditors with a right to interest at	8	creditors, in the event of a surplus, to post insolvency
9	4 per cent. So if you had an underlying right, you had	9	interest at the Judgment Act rate.
10	to be paid first. If there was anything left over, then	10	Now, we say it's far from clear this was the effect.
11	everyone had interest at 4 per cent. Subject to that,	11	There is no case that anyone's been able to find between
12	as you will see, it's very similar.	12	1883 and 1986 which indicates that that is the effect it
13	LADY JUSTICE GLOSTER: But they conferred the Bower v Marris	13	had and it seems to have been regarded as an open issue
14	benefit?	14	as late as 1984 but in any event it's a separate
15	MR DICKER: Yes. The cases held that Bower v Marris	15	question. What is important in our submission is
16			-
17	applied.  LORD JUSTICE BRIGGS: You say there were two differences, so	16	there's no suggestion in any of the legislative
	•	17	materials leading up to the 1883 Act, or any subsequent
18	creditors with an underlying right had priority. What	18	authority which indicates Bower v Marris ceased to
19	is the other bit?	19	apply. So it did apply between 1743 and 1883 and no
20	MR DICKER: I said two	20	authority to indicate it ceased to apply at that stage.
21	LORD JUSTICE BRIGGS: Between 2.88(9) and the 1825 regime	21	Indeed, we say extraordinary if it had been, because,
22	for bankruptcy.	22	shortly before, in 1869, as you'll see, the
23	MR DICKER: That's the significant difference.	23	Court of Appeal in Re Humber Ironworks referred to the
24	LORD JUSTICE BRIGGS: Okay.	24	position in bankruptcy with approval and adopted the
25	MR DICKER: So under 2.88(9) they rank equally. Under	25	same position in relation to liquidation. So, shortly
	Page 54		Page 56
	1 use of		1 1150 30

1	before the 1883 Act, the Court of Appeal essentially	1	approach in relation to one authority, certainly
2	endorsed the principle and applied it for the first time	2	Whittingstall v Grover. We also say that he
3	in relation to liquidation as well.	3	misunderstood the way in which the principle in
4	In addition, shortly after the 1883 Act, indeed	4	Bower v Marris works when he said it essentially depends
5	three years later in 1886, the principle in Bower	5	on the rules of appropriation. We say it didn't. So
6	v Marris was applied by Mr Justice Chitty in case called	6	there are differences.
7	Whittingstall v Grover in the context of the	7	LORD JUSTICE PATTEN: All right.
8	administration of a deceased insolvent estate. Again,	8	MR DICKER: Can I start and forgive me if I go right back
9	I'll show you that.	9	to beginning but it is interesting in my submission to
10	So that's the broad outline of the development in	10	see how this started the first case is
11	both liquidation and bankruptcy. What I now want to do	11	Bromley v Goodere. It's volume 1, tab 1 and it's 1743.
12	is just show you the critical statutory sections and	12	For your note, the judge dealt with this case at
13	authorities. There are many and I'm not proposing to	13	paragraphs 47 to 49 of his judgment. So at this stage
14	take you to all. What I'm proposing to do is limit	14	we have no express statutory provision dealing with
15	myself to seven and they are firstly, Bromley v Goodere,	15	post-insolvency interest. The issue in the case was
16	where it all started.	16	that: ie, are creditors who were entitled to interest in
17	LADY JUSTICE GLOSTER: Seven authorities, is this?	17	the event of a surplus entitled to payment of the
18	MR DICKER: Yes, seven authorities or statutory provisions	18	interest they are owed before it is distributed to the
19	firstly Bromley v Goodere.	19	bankrupt, and the answer is yes. The order which was
20	LORD JUSTICE PATTEN: Where's that.	20	made required such interest to be calculated in the
21	LADY JUSTICE GLOSTER: You're just giving us the last.	21	manner which subsequently became known as the rule of
22	LORD JUSTICE PATTEN: Oh, you're giving us a list at the	22	principle in Bower v Marris.
23	moment.	23	Just
24	MR DICKER: Secondly, section 132 of the Bankruptcy Act	24	LORD JUSTICE BRIGGS: This was a surplus in a personal
25	1825; thirdly, Bower v Marris; fourthly, Humber	25	bankrupt estate.
	Page 57		Page 59
1	Ironworks: fifthly goation 40 and coation 65 of the	1	MR DICKER: Yes. The judgment of the Lord Chancellor, who
1 2	Ironworks; fifthly, section 40 and section 65 of the 1883 Act; sixth	2	at that stage was Lord Hardwicke, starts at the bottom
3	LADY JUSTICE GLOSTER: You are just going a bit too quickly.	3	of page 49. I was going to pick it up two-thirds of the
4	MR DICKER: Then Whittingstall v Grover and seventhly Re	4	way down on page 50. Just below the second hole punch
5	Lines Brothers 2 No 2.	5	he says
6	LORD JUSTICE PATTEN: I'm not suggesting for a minute that	6	LORD JUSTICE BRIGGS: My electronic copy doesn't have hole
7	you don't take us through the authorities, because we	7	punches.
8	obviously need to understand what they do and don't say.	8	MR DICKER: Two-thirds of the way down.
9	But you don't, I think, criticise the summary of the	9	LORD JUSTICE BRIGGS: Is it where you've marked it, or
10	legislative and judicial, so to speak, history that's	10	somebody has marked it?
11	set out in the judgment, do you? Because, I mean, the	11	MR DICKER: It's the paragraph beginning "having laid these
	bet out in the judgment, as you. Because, I mean, the	1	
12	judge accepted that the principle applied for the	12	
12 13	judge accepted that the principle applied for the relevant period. I mean, you may have a query about	12	things out".
13	relevant period. I mean, you may have a query about	13	things out".  LADY JUSTICE GLOSTER: I thought on the death of the king
13 14	relevant period. I mean, you may have a query about what the 1883 Act did but that's about it, isn't it?	13 14	things out".  LADY JUSTICE GLOSTER: I thought on the death of the king a commission may be renewed sounded rather interesting,
13 14 15	relevant period. I mean, you may have a query about what the 1883 Act did but that's about it, isn't it?  MR DICKER: And it's a very fair summary. What we would say	13 14 15	things out".  LADY JUSTICE GLOSTER: I thought on the death of the king a commission may be renewed sounded rather interesting, but maybe not. Would you like us to read the marked
13 14 15 16	relevant period. I mean, you may have a query about what the 1883 Act did but that's about it, isn't it?  MR DICKER: And it's a very fair summary. What we would say is that a number of the points which we would want to	13 14	things out".  LADY JUSTICE GLOSTER: I thought on the death of the king a commission may be renewed sounded rather interesting,
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13 14 15 16	relevant period. I mean, you may have a query about what the 1883 Act did but that's about it, isn't it?  MR DICKER: And it's a very fair summary. What we would say is that a number of the points which we would want to	13 14 15 16 17	things out".  LADY JUSTICE GLOSTER: I thought on the death of the king a commission may be renewed sounded rather interesting, but maybe not. Would you like us to read the marked passage?
13 14 15 16 17 18	relevant period. I mean, you may have a query about what the 1883 Act did but that's about it, isn't it?  MR DICKER: And it's a very fair summary. What we would say is that a number of the points which we would want to stress, in particular the way in which the judge's points on the wording of 86 were pre-configured prior to	13 14 15 16 17 18	things out".  LADY JUSTICE GLOSTER: I thought on the death of the king a commission may be renewed sounded rather interesting, but maybe not. Would you like us to read the marked passage?  MR DICKER: It may be quickest if I were just to point out the points which we say are relevant. As I say, he
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upon that statute." 1 1 rule that you can't prove a post insolvency interest and 2 2 So just what one sees, what the previous statutory he goes on in the next paragraph to say: 3 3 regime was, and the way it's developed, in last sentence "There's no direction in the Act for that purpose 4 on that page he says: 4 and it has been used only as the best method of settling 5 "The next direction in the Act is what the 5 the proportion among the creditors they might have 6 6 Commissioner should do this regard to the debts. They a rate like satisfaction and its founded upon the extra 7 7 directed to pay to every of the creditors a portion rate power given them by the Act." 8 like according to the quantity of his or her debts." 8 And then at the bottom of the page he says: 9 So that's pari passu distribution, and he says: 9 "I now come to consider it on the fourth and fifth 10 "And the question is what debts are here meant and 10 of Anne 17 which was insisted upon as a strength of the 11 I am of the opinion it means debts due at the time of 11 case and the material parts to be considered are..." 12 the bankruptcy or when the commission issued, which is 12 This introduced the concept discharge in bankruptcy. 13 same." 13 And he considers the effect of that over the page. 14 So essentially the introduction the judge-made law 14 Page 52 he says: 15 of the cut off date. Then he says at the end of the 15 "Consider therefore the effect of the discharge that 16 16 the certificate is not to operate as a discharge of the paragraph: 17 "But This construction must be confined to cases 17 fund before vested in the assignees but to extend only 18 where there is a deficiency, for it is then only the 18 to any remedy to be take against the person of the 19 creditors are to have a portion rate alike." 19 bankrupt or his future debts. True it will be 20 And then in the next paragraph he says: 20 a discharge of the bankrupt not only as to debts proved 21 "The Act goes on take notice of the surplus which it 21 but also as to creditors who have not come in but that 22 22 directs to be paid to the bankrupt and it leaves full is nothing as to present fund for such creditor who has 23 power to the creditor to recover the residue of his debt 23 not yet come in, may come in if he has not lapsed his 24 in like manner and form as he should and might have done 24 time, which is a question between the creditors singly 25 25 before the making of this Act." and therefore I am of the opinion it was meant to Page 61 Page 63 Obviously at this stage there was no concept of 1 discharge the person of bankrupt and his estate 1 2 discharge in a bankruptcy. That was introduced 2 subsequently accrued and not the estate in the hands of 3 3 the assignee." subsequently. Dropping to the next paragraph, what he 4 4 So discharge has no effect on the estate or on the says is: 5 "This shows the surplus to be paid over to the 5 treatment of the surplus in the hands of the 6 bankrupt is only the surplus after payment of the whole 6 Commissioners. Then dropping two paragraphs he says: 7 debts, for it would be vain to pay any other surplus 7 "But suppose there is a surplus, it does not amount 8 8 when it might have been recovered from him again by the to 5 per cent and I think so much should be taken out of q 9 creditors." the creditors 20 shillings in the pound to make it up to 10 So, prior to a concept discharge, no point paying 10 5 per cent. Then it may be objected that here is a case 11 the bankrupt surplus if creditors are just going to sue 11 where the bankrupt should have a surplus upon the debt 12 12 the bankrupt. So part of the role of the Commissioners as stated by the commissioners without paying the 13 in bankruptcy at this stage, pay all sums which were 13 subsequent interest. If I am right and the bankrupt is 14 due, ensure creditors paid by full entitlement before 14 being entitled to that equity, it is not the case, for 15 returning the surplus to the bankrupt. Then he deals 15 then it comes again to the rateable proportion." 16 16 with the subsequent statutory development of the scheme. And he makes the point, again dropping a paragraph: 17 17 Dropping to the page reference 79, which is about "Suppose that, from the difficulty of getting in the 18 two-thirds of the way down, he says: 18 bankrupt's effects and by his estate carrying interest 19 19 "But then it is said the practice has been for the there should be a surplus, it would be absurd to say the 20 Commissioners to ascertain the debts by computing 20 creditor should not have interest likewise." 21 interest only to the time of issuing the commission and 21 I will come back to the example, but he is 22 that being the contemporanea exposito as to be relied 22 essentially saying imagine the bankrupt has assets 23 23 consisting of debts which carried interest, that 24 So that's essentially the introduction again and 24 interest has continued to accrue for the benefit of the 25 25 originally it seems as a matter of practice with the bankrupt during the course of the bankruptcy, it would Page 62 Page 64

1	be absurd in that situation for the bankrupt to receive	1	the bankrupt. That's lines 3 and 4. But secondly:
2	the interest but not have to pay creditors who have	2	"Only after the creditors who have proved under the
3	essentially a matching claim to interest.	3	commission shall have been paid."
4	Then at 53, this is the order which has essentially	4	So proved debts have to be paid first. Three:
5	subsequently been described as the rule of principle in	5	"But the assignee shall not pay such surplus until
6	Bower v Marris. First of all:	6	all creditors who have proved under the commission shall
7	"The Master to take an account of what has been paid	7	have received interest upon their debts."
8	to such creditors by way of dividends, what has been so	8	So the next requirement after you've paid proved
9	paid to be applied in the first place to keep down the	9	debts in full is to pay interest and that has to be paid
10	interest and afterwards in sinking the principal."	10	before the surplus goes to the bankrupt. Then that's to
11	So we are at a relatively early stage in the	11	be paid at the rate and in the order following, that is
12	bankruptcy regime. There is a concept of pari passu	12	to say the fourth point is:
13	distribution in the statute. At this stage the position	13	"All creditors whose debts are now by law entitled
14	in relation to the cut off date and post-insolvency	14	to carry interest in the event of a surplus shall first
15	interest appears to be matter of judge-made law rather	15	receive interest on such debts at a rate of interest
16	than in the statute.	16	reserved or by law payable there on to be calculated
17	LORD JUSTICE PATTEN: But this doesn't deal as such with the	17	from the date of the commission."
18	Bower v Marris issue, namely the fact that the creditors	18	Just to emphasise, at this stage the reference to
19	are entitled to add interest to the bankruptcy debt	19	the rate of interest, because the judge made a point in
20	before the surplus is returned to the	20	relation to that word "rate" in the context of
21	MR DICKER: Well, it does in the sense that he's considering	21	rule 2.88. Then finally:
22	are they entitled to be paid the interest they are owed	22	"After such interest shall have been paid, all other
23	out of the surplus before it goes back to the bankrupt.	23	creditors who have proved under the commission shall
24	LORD JUSTICE PATTEN: Yes.	24	receive interest on the debts from the date of the
25	LORD JUSTICE BRIGGS: He also applies interest before	25	commission at the rate of £4 per cent."
	Page 65		Page 67
1	principal.	1	LORD JUSTICE BRIGGS: Can you help me on some earlier words.
2	MR DICKER: Absolutely.	2	It talks about the payment of the surplus to the
3	LORD JUSTICE BRIGGS: In that paragraph you've just	3	bankrupt and I think we are in line 5:
4	described.	4	"Every such bankrupt after the creditors who have
5	MR DICKER: And the order that is eventually made is, when	5	proved under the commission shall have been paid shall
6	you calculate how much, even though at this stage the	6	be entitled to recover the remainder of the debts due to
7	statute did say, well, you have to pay everyone ratably,	7	him."
8	ie pari passu. So it logically followed, whatever had	8	What is this remainder of the debts?
9	been paid to date must have been paid in relation to	9	LADY JUSTICE GLOSTER: Those are book debts, aren't they?
10	pre-insolvency interest. Nevertheless, the order he	10	MR DICKER: In other words, if we're dealing with
11	ends up making says I don't mind, you've calculated by	11	a situation where proved debts have been paid in full.
12	treating the payments as having been applied first to	12	LORD JUSTICE BRIGGS: Yes.
13	interest.	13	MR DICKER: The bankrupt is entitled then to recover
14	LADY JUSTICE GLOSTER: So that's the first emergence of the	14	anything which isn't required for that purpose subject
15	rule, is it?	15	to payment of the surplus in respect of interest to
16	MR DICKER: That is. The second thing I wanted to show you	16	creditors.
17	was section 132 of the Bankruptcy Act, which you will	17	LORD JUSTICE BRIGGS: I just wonder what the words the
18	find in volume 4 at tab 118. It's section 132, which is	18	"remainder of the debts due to him" are a reference to.
19	over the page. There should be a line ruled against it.	19	Is it some part of the estate which consists of unpaid
20	Again, it would be quickest if you would just read 132	20	debts?
21	to yourselves and then perhaps I can make my submissions	21	LADY JUSTICE GLOSTER: I thought I saw this was dealing with
22	in relation to it. (Pause)	22	book debts somewhere.
23	LADY JUSTICE GLOSTER: Yes.	23	MR DICKER: At this stage obviously the estate had vested in
24	MR DICKER: Five points on the wording. Firstly, it	24	the trustee as assignee. I'm not sure off hand what the
25	contains an obligation to pay the surplus, if any, to	25	answer to your Lordship's point is.
	Page 66		Page 68

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1	LORD JUSTICE BRIGGS: No. 1 just didn't feel I knew what	1	updated, but the substance remains materially the same.
2	that bit meant.	2	So in construing section 132, and we say in turn
3	MR DICKER: No, and on reflection I we'll think.	3	rule 2.88, it's obviously important to see how it was
4	LORD JUSTICE BRIGGS: Okay.	4	applied.
5	LADY JUSTICE GLOSTER: Isn't it just debts owed to him,	5	That takes me to the next authority which is
6	Mr Dicker? Just that category of assets. After that he	6	Bower v Marris itself. Authorities bundle 1, tab 6
7	is entitled to sue but not until all these people have	7	LORD JUSTICE BRIGGS: Just before you go, it talks about
8	been paid.	8	creditors whose debts are now by law entitled to carry
9	LORD JUSTICE BRIGGS: It looks like it. Anyway.	9	interest. Does that mean that would be contractual
10	LADY JUSTICE GLOSTER: That's why it doesn't say all the	10	interest and judgment interest?
11	other assets. That may be this	11	MR DICKER: I don't think it could have meant judgment
12	MR DICKER: I mean, again, for present purposes, I'm not	12	interest because the Judgment Act obviously only came in
13	sure it matters in the sense	13	in 1838, but there appear and we can dig this out if
14	LORD JUSTICE BRIGGS: There's a reference back to some	14	it's necessary to have been other provisions prior to
15	earlier section we haven't looked at, I rather suspect.	15	that date which in certain circumstances entitled
16	But there we are.	16	creditors to interest and I think there may always have
17	MR DICKER: Just seven points in relation to this. Firstly,	17	been a right to interest under the law of merchants.
18	this is it's obviously an express statutory provision	18	LORD JUSTICE BRIGGS: And because there are possibly
19	dealing with proposed insolvency interest, effectively	19	provisions on the previous prohibition on interest as a
20	codifying previous judge-made law which you saw in	20	form of usury(?). Just as it is as are now by law
21	Bromley v Goodere. Secondly, the right to interest only	21	entitled to interest, I wondered what the mischief
22	arose after all proved debts had been paid in full.	22	behind all that was.
23	Indeed it expressly so stated. It said it applied	23	MR DICKER: My Lord, we'll have another look. There was
24	"after the creditors who had proved have been paid."	24	some material on this I think in front of the judge at
25	Thirdly, "the right ranked in priority to payment of	25	first instance.
	Page 69		Page 71
1	the surplus to the bankrupt". No surprise there:	1	Sorry, Bower v Marris, which is bundle 1, tab 6. It
2	"Fourthly it entitled creditors who had an	2	was decided in 1841, some 15 years after the
3	underlying right to interest to interest at the rate	3	introduction of section 132, although the bankruptcy in
4	applicable to the debt apart from the insolvency."	4	that case had commenced as early as 1805. So it was
5	Expressly used the phrase "rate of interest":	5	a very long-running bankruptcy. Again, for your note,
6	"Fifthly, it also entitled creditors not otherwise	6 7	the judge dealt LORD JUSTICE BRIGGS: Sorry, can I just be difficult and ask
7 8	entitled to interest, interest at 4 per cent."	8	
9	We say essentially that was reflecting what was	9	again did the Bankruptcy Act therefore apply to this bankruptcy or not?
10	subsequently introduced in the Judgments Act itself, namely entitlement to interest. For some reason it	10	MR DICKER: Well, it's not entirely clear but the judge
	•	11	referred to the 1832 Act and you'll see that. It's
11	seems to have originated in bankruptcy first. The view	12	certainly clear and indeed common ground that
12 13	was obviously you should be entitled to compensation for delay. The rate selected was 4 per cent and that was	13	Bower v Marris applied to the bankruptcy regime between
14	subsequently effectively adopted when the Judgments Act	14	1825 and 1883. There were a number of other authorities
15	was introduced.	15	in front of the judge below, some of which are in the
16	Six, it entitled such creditors to interest from the	16	bundle by no means all.
17	date of commission of bankruptcy and it would obviously	17	Again, just for your note, the judge dealt with
18	necessary to take account of any dividends that they had	18	Bower v Marris, paragraphs 44 to 45 and 58 to 65 of his
19	received since that date.	19	judgment. Now, as the judge observed, although the
20	Seventh, we say in substance it differed from the	20	issue in the case arose between the debtor and a joint
21	1986 rules only in that section 132 gave creditors	21	obligee, the same analysis applied as between a debtor
22	an underlying right to interest priority over payment of	22	and his creditor. You can see that reflected in the
23	the 4 per cent to creditors. With that exception, in	23	headnote, the held, just at the bottom of 351, where it
24	substance we say this section is essentially doing the	24	says:
25	same as rule 2.88. The wording has changed, it's been	25	"The amount due to the obligee in respect of such
	and the moraling has bladinged, its seem		
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claim was to be computed by treating the dividends as ordinary payments on account, that is by applying each dividend in the first place to the payment of the interest due and the date of such dividend and the surplus, if any, in reduction of the principal and the same principle of computation is applicable in bankruptcy as between the bankrupt and the creditors where there is a surplus of the estate after payment of 20 shillings in the pound upon all the debts proved."

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

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

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

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

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

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

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

## Page 73

first to interest, then:

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

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

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

Page 75

1 And the next paragraph also summarises the argument. 2 Then at the bottom of 355, third point, he says 3 essentially appropriation is irrelevant. He says:

4 "In the first place, there is this mode of payment 5 that is regulated by acts of Parliament.

6 LADY JUSTICE GLOSTER: Is this argument or his view? MR DICKER: I think this is his view. He identifies in the previous paragraph the question, which he then

8 9 summarises, and, certainly as I read the judgment, 10 bottom of 355, onwards, is essentially expressing his 11 view. He says:

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

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

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

Page 76

whole of principal and interest is ultimately paid and 1 discussion of section 132 between the two limbs of 1 2 2 what is more extraordinary the co-obligor will, as in section 132 and indeed, in the second line of that paragraph, he refers to bankrupt not to receive the 3 the present case, be a gainer by it in the same 3 4 proportion." 4 surplus until all creditors have received interest on 5 Then again dropping six lines, he says: 5 their debts." "This would be to give to this mode of payment in 6 He then over the page, 358, refers to the 6 7 7 authorities. He says four lines down: bankruptcy the effect of depriving the obligee of part 8 8 of his debt and relieving the obligor from the liability "I find from the year 1745, to the case of ex parte 9 9 which he had by his bond subjected himself, being Higginbottom, a succession of cases in which this 10 manifestly most unreasonable and unjust, and has 10 principle was acted upon, although it was not in all matter of adjudication they proved that such was the 11 attempted to be supported only by the supposed 11 12 appropriation of the dividends to the payment of so much 12 recognised rule so well understood as not to be the 13 of the principal that in fact there is no such 13 subject in question." 14 appropriation." 14 He says: 15 He then goes on to deal with the effect of the 15 "It appears to have been carefully established by Lord Harwicke in Bromley v Goodere. The order indeed 16 16 scheme. He says: 17 "The interest stops at the date of commission and, 17 appears to have been framed by himself and so expressed 18 18 as to leave no doubt of its having been most carefully though subsequent interest becomes due, it is not 19 provable under the commission. The bankrupt's estate is 19 considered. This was the opinion of that great judge of 20 20 taken from him by the commission and the law in order to the justice of the case without the aid which the 21 make an equal division amongst the creditors, pays to 21 statute now affords." 22 22 each a dividend upon the debt proved ..." There is then a reference to various other 23 23 Then says this: authorities and he ends, I think we can just go straight 24 "But this is merely an arrangement for the 24 to the last paragraph on page 360, by saying: 25 convenience of the debtor's creditors. The bankrupt 25 "I am of the opinion that upon principle and Page 77 Page 79 1 authority the Master's report was correct and therefore 1 continues indebted for the principal and the interest 2 accrued since the commission, although his certificate, 2 the Vice-Chancellor's order must be reversed and the 3 petition excepting to the report dismissed." 3 if he obtains one, protects him against the liability to 4 4 LADY JUSTICE GLOSTER: What does the notation WW by the the debt and, being so indebted, payments are made out 5 5 of his estate to the obligee. Why should such payments side --6 MR DICKER: I think that means Wentworth, Mr Zacaroli's 6 have a different effect than they would have if made by 7 7 clients would like him to -a solvent obligor?" 8 LADY JUSTICE GLOSTER: Okay. Thank you. 8 Then the bottom half of the page, he turns to deal 9 LORD JUSTICE BRIGGS: So he treats it as a matter of the 9 with section 132 of the 1825 Act, where he says: 10 10 "The bankrupt is not to receive the surplus until assumed intention of the legislation in section 132. 11 11 all creditors have received interest on their debts to MR DICKER: Yes. It may be that section 132 didn't apply in 12 12 Bower v Marris, but there is a consideration of be calculated from the date of the commission. This 13 13 section 132, and no suggestion that the rule he ends up provision obviously intended to make good to the 14 making or the decision he ends up making in 14 creditors that interest which by the course of 15 administration in bankruptcy they had lost. Interest is 15 Bower v Marris would not apply now that section 132 has 16 been enacted and, as I said, it's common ground from 16 stopped at the date of the commission because it is 17 1825 onwards until at least 1883 it did apply. 17 supposed the estate would be deficient. It proves to be Now the next stage is to turn from the bankruptcy to 18 18 more than sufficient. Why is the creditor to suffer and 19 19 the bankrupt to benefit by attributing the dividends to the origins of liquidation. LADY JUSTICE GLOSTER: Humber, is it? 20 20 principal instead of to the interest due. The creditor 21 21 MR DICKER: As your Lordships know, the winding up of in that case will not have received interest upon his 22 22 debt at the same extent as he would if there had been no companies began for present purposes with the 23 23 Companies Act 1962. There is in our submission a very bankruptcy and yet the Act must have been intended to 24 24 useful explanation of its origins by the House of Lords place him in as favourable a position." 25 25 in Oakes v Turquand, which is in volume 1, tab 13, Just pausing there, no distinction drawn here in the Page 78 Page 80

			1
1	particularly by Lord Cranworth at pages 362 to 365.	1	Dropping two lines, he says:
2	Just to summarise, what Lord Cranworth said was,	2	"It is surprising that after the number of years
3	until the 1862 Act, certainly from 1844 onwards, the	3	during which winding up proceedings have been going on
4	creditors were obliged in the first instance to proceed	4	in this court, and considering that this question must
5	against the company. But if they failed to recover	5	have continually arisen, the point has never yet been,
6	against the company, they could go directly against the	6	so far as I am aware, the subject of judicial decision.
7	shareholders and recover the full amount that they were	7	It now comes before us upon the recommendation of the
8	owed. Now, 1862 changed that, because the concept of	8	Master of the Rolls that we may decide, so far as the
9	limited liability was introduced. Lord Cranworth	9	authority of this court can decide, what is to be the
10	explains that that wasn't intended to affect who were	10	rule applicable to such cases for the future.
11	ultimately liable, it was intended to affect who were	11	Satisfactorily, then in forming the decision, we are not
12	shareholders. Nor was it intended to affect how much	12	fettered by rule which obliges us to depart from what
13	a creditor would receive, subject only to the cap	13	
14	imposed by the introduction of limited liability. So in	14	appears to be the justice of the case."
15	other words creditors should still be entitled to	15	And then dropping to the next paragraph, he says:  "In the present case, we have to consider what are
16 17	receive as much after 1862 as they could have received before if there were assets available to do so and	16 17	the positions of the creditors of the company when, as
			here, there are some creditors who have a right to
18	obviously, before 1862, creditors were able to go	18	receive interest and others having debts not bearing
19	against shareholders directly and recover in full.	19	interest."
20	The principle in Bower v Marris was adopted in	20	Then he says:
21	liquidation in a series of four celebrated decisions of	21	"In the first place, it appears to me we must
22	the Court of Appeal in 1869 and 1870.	22	consider the case under two aspect: first, where there
23	LADY JUSTICE GLOSTER: So is this your fifth point or still	23	is and next where there is not a surplus."
24	your fourth?	24	He deals with surplus first. He says:
25	MR DICKER: Yes, involving the liquidation of the Humber	25	"I apprehend that in whatever manner the payments
	Page 81		Page 83
	O		O
1	LADY JUSTICE GLOSTER: Sorry, Mr Dicker are you on your	1	have been made, originally they may have been made in
2	fourth point or on your fifth? Maybe it doesn't matter	2	respect of capital or in respect of interest. Still,
3	but	3	inasmuch as they've all been paid in process of law
4	MR DICKER: I'm on my fourth point. Four decisions of the	4	without any contract or agreement between the parties,
5	Court of Appeal in 1869 and 1870 involving the	5	the account must in the event of there being an ultimate
6	litigation of Humber Ironworks and Shipbuilding Company	6	surplus be taken as between the company and the
7	and the Joint Stock Discount Company. I'm just going to	7	creditors in the ordinary way, that is in the manner
8	take you to one of those, which is Humber Ironworks.	8	point out in Bower v Marris. By treating the dividends
9	It's volume 1, tab 16. The case concerns the treatment	9	as ordinary payments on account and applying each
10	of interest in the event of a liquidation and it	10	dividend in the first place to the payment of interest
11	essentially decided two things. Firstly, creditors can	11	due at the date of such dividend and the surplus, if
12	only prove interest in respect of the period down to the	12	any, to the reduction of the principal. That disposes
13	commencement of the liquidation, ie you can't prove for	13	of the question where there is a surplus as to which
14	post insolvency interest. But, secondly, in the event	14	there is no doubt or difficulty."
15	of a surplus, interest is paid and calculated in	15	He then deals with the position where the estate is
16	accordance with the principle in Bower v Marris. So the	16	insolvent and you are not directly concerned with that.
17	1 . 01 1	17	But what effectively he says is you can't prove for post
	second part of the decision essentially introduces the	1	
18	second part of the decision essentially introduces the principle in Bower v Marris into liquidation.	18	insolvency interest and two-thirds of the way down he
18 19	*	18 19	insolvency interest and two-thirds of the way down he says:
	principle in Bower v Marris into liquidation.	18	insolvency interest and two-thirds of the way down he says:  "Justice, I think, requires that that course of
19	principle in Bower v Marris into liquidation.  The first judgment is Lord Justice Selwyn, which	18 19 20 21	insolvency interest and two-thirds of the way down he says:  "Justice, I think, requires that that course of proceeding should be followed. No person should be
19 20 21 22	principle in Bower v Marris into liquidation.  The first judgment is Lord Justice Selwyn, which starts at 644, and, again, just identifying the relevant points, he starts by saying:  "Several times considered the case, for the judge's	18 19 20 21 22	insolvency interest and two-thirds of the way down he says:  "Justice, I think, requires that that course of proceeding should be followed. No person should be prejudiced by the accidental delay which in consequence
19 20 21	principle in Bower v Marris into liquidation.  The first judgment is Lord Justice Selwyn, which starts at 644, and, again, just identifying the relevant points, he starts by saying:	18 19 20 21	insolvency interest and two-thirds of the way down he says:  "Justice, I think, requires that that course of proceeding should be followed. No person should be prejudiced by the accidental delay which in consequence of the necessary forms and proceedings of the court
19 20 21 22 23 24	principle in Bower v Marris into liquidation.  The first judgment is Lord Justice Selwyn, which starts at 644, and, again, just identifying the relevant points, he starts by saying:  "Several times considered the case, for the judge's met together with a view, if possible, of laying down some general rule. The result of that meeting was there	18 19 20 21 22 23 24	insolvency interest and two-thirds of the way down he says:  "Justice, I think, requires that that course of proceeding should be followed. No person should be prejudiced by the accidental delay which in consequence of the necessary forms and proceedings of the court actually takes place in realising the assets; but that,
19 20 21 22 23	principle in Bower v Marris into liquidation.  The first judgment is Lord Justice Selwyn, which starts at 644, and, again, just identifying the relevant points, he starts by saying:  "Several times considered the case, for the judge's met together with a view, if possible, of laying down	18 19 20 21 22 23	insolvency interest and two-thirds of the way down he says:  "Justice, I think, requires that that course of proceeding should be followed. No person should be prejudiced by the accidental delay which in consequence of the necessary forms and proceedings of the court
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1	realised as speedily as possible should be applied	1	(2.00 pm)
2	equally and ratably in payment to the debts as they	2	LADY JUSTICE GLOSTER: Yes, Mr Dicker.
3	existed at the date of the winding up."	3	MR DICKER: Can I deal with one short point arising from
4	The consequence being you can't prove the	4	this morning. I think I said I couldn't remember
5	post-insolvency interest. Five lines from bottom he	5	whether Bower v Marris, whether section 132 applied in
6	says:	6	the case of Bower v Marris or not. The answer to that
7	"But of course I have already guarded myself from	7	is it didn't. There was a decision in the bundles
8	being supposed to say the court takes upon itself to	8	called ex parte Sammon 1851, authorities, volume 1,
9	alter the rights of the creditors to any further extent	9	tab 5, which held that the effect of section 132 was not
10	or to deprive them of the right they have to interest at	10	retrospective, and it didn't apply to commissions which
11	the full rate, 20 per cent if and when there is	11	already existed by the date it was introduced.
12	a surplus to pay it.	12	LORD JUSTICE PATTEN: Sorry, what was the case called?
13	I think the tree must lie as it falls. It must be	13	MR DICKER: Ex parte Sammon. S-A-M-M-O-N.
14	ascertained what are the debts as they exist at the date	14	As we say, it doesn't matter because it's common
15	of the winding up. All dividends in the case of	15	ground that Bower v Marris did apply at all times
16	an insolvent estate must be declared in respect of the	16	between 1743 and at least 1883. It's the 1883 Act which
17	debt so ascertained. Of course, it will be understood	17	I want to turn to next.
18	that we are laying down this rule as applicable to all	18	LADY JUSTICE GLOSTER: Yes.
19	cases under the recent Act where creditors actions are	19	MR DICKER: There are two separate issues in relation to the
20	stayed."	20	1883 Act. There is a question as to whether or not it
21	So the tree must lie as it falls, essentially	21	limited creditors solely to 4 per cent interest. The
22	everybody's divided pari passu by reference to the	22	judge held that it did. We say he was wrong about that.
23	position as at that date. It follows you can't prove	23	But, in any event, there is a separate question as
24	for post insolvency interest. But in the event there is	24	to whether or not the principle in Bower v Marris
25	a surplus, you do get interest calculated in accordance	25	continued to apply after the 1883 Act, and we say every
23	a surprus, you do get interest carculated in accordance	23	continued to apply after the 1005 Feet, and we say every
	Page 85		Page 87
1	with Rower v Marris	1	indication is that it did
1	with Bower v Marris.	1	indication is that it did.
2	I see the time. I wonder whether that would be a	2	Now, just dealing with, firstly, the issue in
2 3	I see the time. I wonder whether that would be a LADY JUSTICE GLOSTER: Yes, and the other	2 3	Now, just dealing with, firstly, the issue in relation to the 4 per cent, again, for your note, the
2 3 4	I see the time. I wonder whether that would be a LADY JUSTICE GLOSTER: Yes, and the other Lord Justice agrees with that, does he?	2 3 4	Now, just dealing with, firstly, the issue in relation to the 4 per cent, again, for your note, the judge dealt with the 1883 Act at paragraphs 53 to 56 and
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	I see the time. I wonder whether that would be a LADY JUSTICE GLOSTER: Yes, and the other Lord Justice agrees with that, does he? MR DICKER: Yes, he does. LADY JUSTICE GLOSTER: Does he actually say MR DICKER: That I think is two-thirds of the way down 647. He says:  "As to rule which my learned brother has laid down, it is the rule bankruptcy. The rule was, as has been said, judge-made law. It was made after great consideration and no doubt because it works with equality and fairness between the parties."  LORD JUSTICE PATTEN: Just remind me. Under the Act, there were no express provisions dealing with statutory interest, were there?  MR DICKER: Correct. So no express provision dealing with statutory interest. Therefore, at this stage, no provision equivalent to entitlement to the Judgment Act rate. That's why the case discusses it entirely in terms of contractual rights.  LADY JUSTICE GLOSTER: Is that convenient moment? 2.00 then thank you very much.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Now, just dealing with, firstly, the issue in relation to the 4 per cent, again, for your note, the judge dealt with the 1883 Act at paragraphs 53 to 56 and paragraphs 139 to 142. Just to remind you of the priority position under the 1825 Act, creditors with an underlying right to interest were paid first. In the event, there was a surplus remaining, creditors had interest at 4 per cent.  Now, we say that what the 1883 Act was intended to do was to alter that priority, essentially to provide that interest was payable to all creditors in the first instance at 4 per cent.  LORD JUSTICE BRIGGS: Only if there was a surplus.  MR DICKER: Only if there was a surplus. With the balance being payable before any distribution could be made to the bankrupt. So no longer giving priority to those who had an underlying right to interest, everyone had 4 per cent. Anyone with a greater right was entitled to recover it before a distribution was made to shareholders. We say, you get that from a combination of two sections —

1	liquidation to bankruptcy, I'm sorry.	1	Then you come to 65, which has a different turn of
2	The two sections in the 1883 Act applicable in	2	phrase. Section 65 talks, in our submission, as one
3	bankruptcy, you will find in the authorities volume 4,	3	would expect it to say:
4	tabs 145A and 146. Starting volume 145A, you will see	4	"The bankrupt only gets the surplus after payment in
5	a section 40 of the 1883 Act, 40(1):	5	full of his creditors."
6	"In the distribution of the property of a bankrupt	6	You need to include the words "with interest",
7	there shall be paid in priority to all other debts."	7	because the Act itself provides under section 40(5) for
8	And there are various, at that stage, preferential	8	payment of interest at 4 per cent.
9	claims. Subsection (4):	9	If you think about section 65, you can trace
10	"Subject to the provisions of this Act, all debts	10	section 65, effectively, all the way back to the statute
11	proved in the bankruptcy shall be paid pari passu."	11	of Elizabeth referred to by Lord Hardwicke in
12	So that's the general distribution in respect of	12	Bromley v Goodere, which uses the phrase "in full
13	proved debts, pari passu. Then, 5:	13	satisfaction". So one starts with a statutory scheme
14	"If there is any surplus after payment of	14	which has always provided that creditors have to be paid
15	the foregoing debts, it shall be applied in payment of	15	if full before the surplus is returned to bankrupt.
16	interest from the date of the receiving order at the	16	So, in a sense, one starts with section 65. That is
17	rate of £4 per centum per annum on all debts in proved	17	a section which has been there right from the start.
18	in the bankruptcy."	18	That reflects the very basic principles of the regime.
19	Pay your proved debts in full, then everyone gets	19	Namely, creditors first, bankrupts last.
20	4 per cent on their proved debts.	20	Now, that section can remain simply saying:
21	The other provision that's relevant is section 65,	21	"Bankrupt shall be entitled to any surplus remaining
22	which is at tab 146. Section 65 states:	22	after payment in full of his creditors, for so long as
23	"The bankrupt shall be entitled to any surplus	23	the Act doesn't, itself, provide for a payment of
24	remaining after payment in full of its creditors, with	24	interest."
25	interest, as by this Act provided and of the costs	25	But once you include a right to interest at
	<b>D</b> 00		D 04
	Page 89		Page 91
1	charges and expenses of the proceedings under the	1	4 per cent, then obviously you need to tinker with
2	Bankruptcy Act."	2	section 65 to make it plain that it's not merely payment
3	Just focussing on the wording of section 65, the	3	in full, ie of the underlying claims, but it's payment
4	critical phrase, we say, is the phrase "after payment in	4	in full, plus interest, as by this Act provided.
5	full of his creditors". A creditor who is not entitled	5	LORD JUSTICE PATTEN: I mean, before considering the
6	to payment in full, of the interest that he is owed, has	6	previous incarnations of it I'm just looking at 65 as
7	not been paid in full.	7	drawn it might be said, I suppose, that the phrase
8	LADY JUSTICE GLOSTER: Did authority decide that?	8	"after payment in full" didn't comprehend the payment of
9	MR DICKER: No, you can't neither party has been able to	9	interest because it's a bit odd to talk about "in
10	find any authority post-1883 on this issue or on whether	10	payment in full with interest".
11	the principle in Bower v Marris continued to apply. So	11	MR DICKER: In one sense, I see that. But, again, if one
12	this is question, as far as the bank has been able to	12	just thinks how this ended up being bolted together, and
13	identify, as to the construction. The only indication	13	the way it arose. We have, essentially, a provision
14	you will get and from my point of view I accept it's	14	equivalent to section 65: bankrupt gets surplus but
15	potentially unhelpful is in the Cork Report.	15	after everyone's been paid in full.
16	LORD JUSTICE BRIGGS: But the core phrase is:	16	We then think and that goes back to
17	"After payment in full of his credits with interest,	17	Bromley v Goodere it means payment in full both of
18	as by this act provided", which sort of says to me: you	18	principal and of interest. In other words, before you
19	go back to section 40.	19	get to distributing surplus, you have to make sure every
20	MR DICKER: We would say no. You have payment in full of	20	creditor has been paid in full.
21	proved debts, you have 4 per cent under section 40(5)	21	You then introduce a regime of payment of interest
22	which makes it plain that it's surplus after payment of	22	to everyone at 4 per cent, that goes in as
	the foregoing debt. At that stage, you have only paid	23	section 40(5). That's where the right is granted. You
23			
	proved debts and what you get is interest at 4 per cent	24	then need to amend section 65 because, otherwise, if it
23	proved debts and what you get is interest at 4 per cent on all debts proved.	24 25	then need to amend section 65 because, otherwise, if it simply said, "Payment in full", at least according to
23 24		1	

prior law, you wouldn't have covered the right to interest which you've, just introduced.  interest which proviee, just introduced.  I LORD JUSTICE FATTEN 148 assume the word "with" means metuding. What do the words "as by this Act" refer to, then, just aimply the rate?  MR DICKER. Well, it effects to all rights under the section 405.  I LORD JUSTICE FATTEN: Are you asying that the words, "As by this Act", don't qualify only the words, "with interest" this NR DICKER. There's a comma both before and—  I LORD JUSTICE FATTEN: Well know.  MR DICKER. So you get payment in fall—comma—as by the hard provided. We say, that's several what he hard you would expect. Everyone gets paid what the backyter. Dark how the regime has worked strong to a backyter graine?  MR DICKER. They's accommand the before and—backyter. There's have done backyter to a command the paid in his don't another backyter. The Act of the backyter. Dark how the regime has worked strong to a back to the backyter. Dark how the regime has worked strong to a back to the land that another backyter graine?  MR DICKER. They have to be paid, in fall, before the backyter graine?  MR DICKER. They have to be paid, in fall, before the backyter, cases like RR Backistons and Re TAR), and the context of flouidation. Post-commencement of the liquidation of article by reason of an obligation.  Page 93.  I incurred before, is irrelevant. The cut off date is incurred before, is irrelevant. The cut off date is incurred before, is irrelevant. The cut off date is incurred before, is irrelevant. The same when you get to the stage of non-provable claims.  A page 95.  MR DICKER. They have to be paid, in fall, before the backyter you get to be stage of non-provable claims.  A page 95.  MR DICKER. They have to be paid, in fall, before the backyter of the context of flouidation. Post-commencement of the liquidation of date arise by reason of an obligation of the stage of non-provable claims.  A province of the stage of non-provable claims.  A province of the stage of non-provable				
Source Part Electric Section 4   Source Part Page 93	1	prior law, you wouldn't have covered the right to	1	section 30(2) and you can pursue the bankrupt, in any
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ben, just simply the rate?  MR DICKER: Well, it refers to all rights under the section 4(5).  ISBN Act, which obviously include, now, the right under section 4(5).  IORD JUSTICE PATTEN: Are you saying that the words, "As by this Act," don't quality only the words "with interest?"  MR DICKER: There's a common both before and—  LORD JUSTICE PATTEN: Well, I know.  MR DICKER: So go aget payment in fall—comma—as by this Act, which convoided. We say, that's essentially the sentence of provible debts and the post insolvency interest sin't provide.  LORD JUSTICE PATTEN: Well, I know.  MR DICKER: So go aget payment in fall—comma—as by the sentence of provible debts and the post insolvency interest sin't provible.  LORD JUSTICE PATTEN: Well, I know.  MR DICKER: So go aget payment in fall—comma—as by the sentence of provible debts and the post insolvency interest sin't provible.  LORD JUSTICE BRIGGS: Not should be an administrative interest in the sentence of the sentence of provible debts and the post insolvency interest sin't provible.  LORD JUSTICE BRIGGS: Not should be an administrative interest in the sentence of provible debts and the post insolvency interest sin't provible.  LORD JUSTICE BRIGGS: Not should be an administrative interest in the sentence of provible debts and the post insolvency interest sin't provible.  LORD JUSTICE BRIGGS: Not should be an administrative interest sentence of provible debts and the post insolvency interest sin't provible.  LORD JUSTICE BRIGGS: Not should be an administrative interest sentence of provible debts and the post insolvency interest sin't provible.  LORD JUSTICE BRIGGS interest and the commander of provible debts and the post insolvency interest sin't prov	3	LORD JUSTICE PATTEN: Let's assume the word "with" means	3	LADY JUSTICE GLOSTER: As of 1883, there was no discharge of
6 MR DICKER. World, it refers to all rights under the 7 section 49(5). 9 LORD JUSTICE ATTEN: Are you saying that the words, "As by 9 this Act," don't qualify only the words "with interest?" 11 MR DICKER. There's a comma both before and— 12 LORD JUSTICE PATTEN: Well, I know. 13 MR DICKER. There's a comma both before and— 14 this act provided. We say, that's essentially 15 meaning as you would sepect. Everyone gets paid what 16 they're word, in fall, before anything goes back to the 17 benkrupt. That's how the regime has worked since 1743. 18 LORD JUSTICE BRIGGS: What happens to a post cut-off date debt under a modern bankruptsy regime? 19 debt under a modern bankruptsy regime? 20 MR DICKER. They have to be paid, in fall, before the 21 surplus is returned. There's a number of examples of 22 this in the context of liquidation. Post-commencement 23 tort claims, cases like RR Realisations and Re T&N. 24 holds the mere fact they arose after the commencement of 25 the liquidation did not arise by reason of an obligation 26 the liquidation did not arise pair piasus distribution. The issue 27 when you get to the stage of non-provable claims 28 when you get to the stage of non-provable claims 29 the location of the stage of non-provable claims 30 when you get to the stage of non-provable claims 41 is have you, at this stage, a claim which honds to be paid to be completed the adding up the company is dissolved; is 42 that there is a comma help so us submission, but if not not mission to the context of liquidation of hot names a claim which honds to be paid before you hand the money back to —  13 MR DICKER: Roy have be the bankingth and to have creditors?  14 Incorred before, is irrelevant. The cut off date is 15 intended to achieve pair piasus distribution. The issue 26 the liquidation did not arise pair piasus distribution. The issue 27 the paid before you hand the money back to —  18 MR DICKER: In meaning the position would be the same.  28 completed the adding up the company is dissolved; is 29 that also correct, Incat	4	including. What do the words "as by this Act" refer to,	4	his debt.
1883 Act, which obviously include, now, the right under 8 section 40(5). 9 LORD JUSTICE PATTEN: Are you saying that the words, "As by 10 this Act", don't qualify only the words "with interest"? 11 MR DICKER: There's a common both before and— 12 LORD JUSTICE PATTEN: Well, I know. 13 MR DICKER: So you get payment in lift—comma — as by 14 this act provided. We say, that's essentially 15 meaning: any ow would expect. Everymone gets paid what the theyer would, in full, before anything goes back to the 16 they're would. Find the fore anything goes back to the 17 bankrupt. That's how the regime has worked since 1743. 18 LORD JUSTICE RIGKGS: What happens to a post cut-off date debt under a modern bankrupts regime? 20 MR DICKER: They have to be paid, in full, before the 21 surplus is returned. There's a number of examples of 22 this in the context of hipudation. Post-commencement of 23 the liquidation did not arise by reason of an obligation 21 the liquidation did not arise by reason of an obligation 22 the liquidation did not arise by reason of an obligation 23 when you get to the stage of non-provable cleatins shall be paid to his creditors? 24 the lotted the adding up the company is dissolved is a completed the adding up the company is dissolved is a few and the money back to — 1 LORD JUSTICE BRIGGS: The concerned, yes. The bankrupt is loviously discharged. So far as the control that addition to personal bankruptcy? 25 MR DICKER: No great and the result would be the same. 26 complete the adding up the company is dissolved is a feet and in the control of the control of the discharge is concerned, that only discharges him in respect of first and the paid to his creditors? 26 MR DICKER: No far as the estate is concerned, yes. The bankrupt is loviously discharged. So far as the estate back he still has to pay the correct — 1 LORD JUSTICE BRIGGS: That's what I thought, so if he gets the estate back he still has to pay the correct — 1 LORD JUSTICE BRIGGS: That's what I thought, so if he gets the estate back he still has to	5	then; just simply the rate?	5	MR DICKER: There was a discharge. There had been
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9 LORD JUSTICE PATTEN: Are you saying that the words, "As by this Act", don't qualify only the words "with interest"? 10 MR DICKER: There's a comma both before and — 11 INRED JUSTICE PATTEN: Well, I know. 13 MR DICKER: So you get spament in full — comma — as by the this act provided. We say, that's essentially 14 meaning: as you would expect. Everyone gets paid what 15 meaning: as you would expect. Everyone gets paid what 15 meaning: as you would expect. Everyone gets paid what 16 they're word, in full, before anything goes back to the 17 bankrupt. That's how the regime has worked since 1743. 14 LORD JUSTICE BRIGGS: What happens to a post cut-off date 18 debt under a modern bankrupte regime? 19 MR DICKER: They have to be paid, in full, before the 20 supplies returned. There's a number of examples of 21 surplus is returned. There's a number of examples of 22 this in the context of liquidation. Post-commencement 22 the liquidation did not arise by reason of an obligation 25 the liquidation did not arise by reason of an obligation 25 paid before, is irrelevant. The cut off date is 3 when you get to the stage of non-provable claims 4 is: have you, at this stage, a claim which needs to be 20 paid before you hand the money back to - 1 LORD JUSTICE BRIGGS: It misk lunderstand in relation to 24 insolvency because, generally speaking, once you have completed the adding up the company is dissolved, is 6 that also correct in relation to personal bankruptcy? 14 MR DICKER: So far as the estate is concerned, yes. The 16 bankrupt is obviously discharged. So far as the estate back she still has to pay the correct 16 LORD JUSTICE BRIGGS: Pre-cut off date. 17 MR DICKER: The provided meaning the position would have been different if the comma had been removed after interest. The control had been some short the correct and such that the result would be the same. 15 LORD JUSTICE BRIGGS: Pre-cut off dat	7	1883 Act, which obviously include, now, the right under	7	LADY JUSTICE GLOSTER: Why are you saying he would have to
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18 LORD JUSTICE BRIGGS: What happens to a post cut-off date debt under a modern bankruptey regime? 29 MR DICKER: They have to be paid, in full, before the surplus is returned. There's a number of examples of this in the context of liquidation. Post-commencement of the liquidation. Post-commencement of the liquidation did not arise by reason of an obligation 20 the liquidation did not arise by reason of an obligation 21 incurred before, is irrelevant. The cut off date is intended to achieve pari passu distribution. The issue when you get to the stage of non-provable claims is: have you, at this stage, a claim which needs to be paid before you hand the money back to — 25 paid before you hand the money back to — 26 LORD JUSTICE BRIGGS: I think I understand in relation to insolvency because, generally speaking, once you have completed the adding up the company is dissolved, is that also correct in relation to personal bankruptey? 29 that also correct in relation to personal bankruptey? 30 MR DICKER: So far as the estate is concerned, yes. The labskrape is concerned, that only discharges him in respect of — 31 LORD JUSTICE BRIGGS: That's what I thought, so if he gets the estate back he still has to pay the correct — 32 MR DICKER: Correct, that's why, as Lord Hardwicke said in Bromley v Goodere, in bankrupt, that's not hash gown it and the surplus sone of the part of the creditors and with increase.  32 In the order they arose after the commencement of the liquidation did not arise by eason and a post-insolvency that and the surplus and the assurplus creditors and with increditors anyoxy and a post-insolvency regime?  32 In the active they are a surplus and the surplus and the surplus and the reditors anyoxy and a squick departure from the UK.  33 Page 95  34 In ADICKER: In practice, one can't guarantee that the result would be the same.  35 LADY JUSTICE GLOSTER: But are you saying the position would have been different if the comma had been removed after interest.?  36 MR DICKER: So far as the estate is concerned, y	16	they're owed, in full, before anything goes back to the	16	to what the Act provides should be paid to his
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	24		24	oddities I mentioned earlier about section 107 and 143.
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Page 94 Page 96		7.00		7
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1	claims, liabilities? They don't refer to them.	1	debts you have a cut-off date as at the date of
2	LORD JUSTICE BRIGGS: No.	2	commencement of the bankruptcy or liquidation. You
3	MR DICKER: These sections have been there for ever. If one	3	don't when you come to distributing the surplus.
4	approached them from an entirely clean slate, you might	4	The example I gave a few minutes ago about
5	construe them in one particular way but, if you did so,	5	post-insolvency tort claims, any claim which was for
_		6	whatever reason not provable, because it post-dated the
6	you would be construing them contrary to 300 years of	7	cut-off date, nevertheless has to be paid before the
7 8	authority.	8	surplus is returned. It's less important in bankruptcy,
9	Now, section 65 is essentially just the reflection	9	1 1 2
	of that overarching position with, as I say, the	10	on one view, if the bankrupt isn't discharged, you can
10	addition of express reference to the right to interest		pursue him. It's obviously extremely important in
11	which has been inserted and is now found in	11	liquidation.
12	section 40(5).	12	LADY JUSTICE GLOSTER: So trustee has to go round and work
13	LADY JUSTICE GLOSTER: Are you saying section 65, is,	13	out if, in the intervening period, there's been any
14	itself, a provision that can be relied upon, within	14	incurring of debts by the bankrupt?
15	section 65	15	MR DICKER: The answer to that is yes. The Australian cases
16	MR DICKER: Yes.	16	actually have a phrase of a second round of proofs to
17	LADY JUSTICE GLOSTER: because it is providing the	17	give it a slightly more sort of formal element to it.
18	payment in full for its creditors? It's a bit	18	LADY JUSTICE GLOSTER: Right.
19	self-serving.	19	MR DICKER: But a liquidator and a trustee has always been
20	MR DICKER: Self-referential reference but that's what it	20	under an obligation to discharge extant debts out of the
21	says: you have to pay everyone in full.	21	estate before handing anything back to bankrupt or to
22	Unlike subsection (5), which refers to interest on	22	shareholders. It's just the way the system has always
23	your proved debts, section 65, the language is	23	worked. Not, as Lord Justice Briggs explained in
24	different. It's not just talking about payment in full	24	the Waterfall 1 judgment, something which has ever been
25	of proved debts, it's talking about payment in full of	25	covered, and certainly not something that's ever been
	Page 97		Page 99
	rage 97		rage 99
1	creditors. We say, if one approaches that as one would	1	covered in detail in the statute. But that's how
2	have previously, as one naturally would, you test it in	2	LADY JUSTICE GLOSTER: Was it so unlikely?
3	each case by asking: has the creditor been paid in full?	3	MR DICKER: That's how the authorities have
4	LORD JUSTICE BRIGGS: Is there a predecessor to section 65,	4	LORD JUSTICE BRIGGS: Surpluses aren't that unlikely in a
5	in the 1832 Act, or was the practice reflected in	5	bankruptcies context. They are pretty unusual in
6	Bromley v Goodere, whereby the courts in certain	6	a corporate context.
7	situations didn't just hand the property back, but made	7	MR DICKER: Sorry, I missed that.
8	sure all the other debtors paid as well something that	8	LORD JUSTICE BRIGGS: I think you were saying surpluses are
9	was judge-made and operated outside the statute.	9	so rare that they don't become an issue.
10	MR DICKER: I need to check the answer to that.	10	MR DICKER: Forgive me, I think the point I was trying to
11	LORD JUSTICE BRIGGS: You say I understand where you are	11	make and maybe I am misunderstanding what
12	coming from section 65 merely replicates what has	12	your Lordship is referring to if, in bankruptcy, the
13	been going on for centuries, but I'm not sure it has	13	bankrupt isn't discharged and the creditor can proceed
14	been in the Act for centuries.	14	against the bankrupt, then subject to the possibility
15	MR DICKER: I need to check. If one remembers what I was	15	the bankrupt may have just spent the money in the
16	referring to, it's the reference by Lord Hardwicke to	16	meantime, it all comes out in the wash. In a
17	I think it's from a statute Elizabeth picks up or King	17	liquidation where the money is returned to shareholders,
18	James' statute, full satisfaction, which was certainly	18	that's not possible because the general law is: once
19	in the Act, at that stage, and which he interpreted as	19	a distribution has been made to shareholders, it's
20	meaning: everyone is being paid in full a loan(?).	20	irrecoverable. So once it's gone out of window, it has
21	LADY JUSTICE GLOSTER: But creditors, there, can't include	21	gone. That's why liquidators need to discharge debts
22	post-bankruptcy creditors, can they, if they're not	22	out of a surplus before saying to the shareholders,
23	creditors at the date of proof?	23	"This is the balance of your investment as at today's
24	MR DICKER: Except that's exactly how the surplus is	24	date. Here it is".
25	applied, go back to Bromley v Goodere. For provable	25	LADY JUSTICE GLOSTER: Right.
	Page 98		Page 100

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1	MR DICKER: It may just be worth reminding you of the	1	significant; money goes back to the bankrupt, the
2	passage I had in mind in Bromley v Goodere. Forgive me,	2	bankrupt spends it, they don't get paid in full.
3	if you go back to authorities bundle 1, tab 1. It's	3	Third point, I've already made. Not enormously easy
4	page 51. It's the third full paragraph beginning:	4	to see why, as a matter of policy, the decision should
5	"Thus it stands upon the 13th of Elizabeth. The	5	have been made, anyway, if the bankrupt isn't discharged
6	next is the statute of first Jac 1, cap 15, that has not	6	from post-insolvency debts, anyway.
7	much in it, but the expression of full satisfaction in	7	The fourth point is certainly no one's been able to
8	the clause which gives the bankrupt the surplus and is	8	find any authority post-1883 that holds that this was
9	penned these words: that the Commissioners shall make	9	indeed the effect of the 1883 Act. This point, in
10	payment of the overplus of the lands and goods et cetera	10	a sense, goes both ways. We say it's a slightly
11	if any such shall be to the bankrupt, his executors,	11	surprising change, not reflected in any pre-legislation
12	administrators and assigns, and that the bankrupt after	12	legislative materials and no authority subsequently
13	the full satisfaction of his creditors, shall have full	13	saying it did have that effect.
14	power and authority to recover and receive the residue	14	But, in any event, we say that actually is just not
15	and remained of the debt to him owing."	15	the issue, in a sense, in this case. The issue in this
16	We will try and identify how that was tracked	16	case is a different one, which is whether or not
17	through into the 1832 Act.	17	Bower v Marris continued to apply. It certainly applied
18	Just so your Lordships know, this interpretation of	18	up to 1883. We say there's no reason, regardless of the
19	section 40(5), and section 65, is not so outlandish as	19	answer to the point I've just been addressing, why it
20	being incapable of being adopted. Again, I won't take	20	
21			fell away in 1883.
22	you to it, but there's an Irish decision called Re Hibernian Transport Companies Limited, where	21	So that's point 5 in my list of seven.
23		22	Six is an authority called Whittingstall v Grover,
24	Mrs Justice Carroll, page 269, construed the equivalent	23	which you will find
25	legislation	24	LORD JUSTICE BRIGGS: Just before you go there, are you
23	LADY JUSTICE GLOSTER: Could you give the tab number?	25	saying that on (Inaudible) under section 40 of
	Page 101		Page 103
1	MR DICKER: Authorities 2, tab 55.	1	Bower v Marris, when it's already under section 60(5)?
2	LADY JUSTICE GLOSTER: Thank you.	2	MR DICKER: No, we say Bower v Marris applies to both.
3	MR DICKER: It's page 269. It's the second paragraph to the	3	LORD JUSTICE BRIGGS: At the moment, you get surplus over
4	end of the page.	4	approved debts, then you apply Bower v Marris. I just
5	I won't take you to that. The Court of Appeal	5	want to be sure.
6	essentially held the issue didn't arise.	6	MR DICKER: I will come to this in due course but, in a way,
7	Mr Justice Richards said the authority, therefore,	7	the contractual analysis is easier.
8	wasn't of enormous value but, you will see from that, he	8	LORD JUSTICE BRIGGS: Yes.
9	construed legislation in materially the same terms in	9	MR DICKER: We accept that because you simply say, "Well,
10	the way that I've just described. I'm reminded,	10	creditors are obviously entitled to be paid in full, and
11	sotto voce, from behind: and applied Bower v Mariss.	11	this is what's necessary to ensure that they are".
12	LADY JUSTICE GLOSTER: That's a modern case, isn't it?	12	But the same, we say, applies in relation to
13	MR DICKER: Sorry.	13	underlying statutory rights to interest, for example,
14	LADY JUSTICE GLOSTER: That's a modern case. It was in the	14	a judgment debt. Leaving aside the county court oddity.
15	1990s.	15	If all that section 45 is essentially doing, as we say
16	MR DICKER: Yes. Four further points in relation to the	16	it is doing, is saying, "Look, we have a moratorium, the
17	1838 Act. First of all, no one has been able to find	17	moratorium prevents creditors from getting a judgment,
18	any indication whatsoever in the materials leading up to	18	given that they're prevented from getting a judgment,
19	the 1883 Act, that the legislature intended to change	19	it's only fair that they ought to be entitled to
20	the regime so as to mean that the bankrupt would get	20	interest at the judgment at rate".
21	part of the assets back even though certain creditors	21	Now, if Bower v Marris applies normally in the case
22	have not been paid in full.	22	of an actual judgment, why doesn't it apply in a case
23	Secondly, if the judge was correct in relation to	23	where the statute says you ought to be treated as if you
24	the 1883 Act, the effect on creditors with a contractual	24	had a judgment and get interest at the Judgment Act
25	right to interest above 4 per cent could have been	25	rate. As I say, I'll come to that.
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	Page 102		Page 104

1	LORD JUSTICE PATTEN: Are you saying if it becomes	1	MR DICKER: Paragraph 46, just looking at the wording
2	relevant there's any material difference between	2	LORD JUSTICE BRIGGS: It's a Chancery practice direction,
3	whatever they mean between section 40(5), well, (4)	3	which then needed consent from the Lord Chancellor and
4	and (5) perhaps, and rule 2.88(7)? It looks to me as if	4	the Master of the Rolls.
5	the relevant parts of the language is very similar,	5	MR DICKER: 46:
6	isn't it?	6	"A creditor whose debt does not carry interest shall
7	MR DICKER: What has changed throughout this period is,	7	come in and establish the same before the Master and
8	essentially, a sub-issue. Namely, what's the priority	8	(Reading to the words) from the date of the
9	for payment of interest?	9	decree, out of any assets which may remain after
10	Section 132 says you ought to get your underlying	10	satisfying the costs of pursuit, the debts established
11	creditors with an underlying right to interest should	11	and the interest of such debts as by law carry
12	paid first. Then, 4 per cent.	12	interest."
13	1883 said: no, everyone should get 4 per cent.	13	LORD JUSTICE BRIGGS: Sorry, where are you?
14	In our submission, if there was an excess, it should	14	MR DICKER: I'm reading at 46. It's on the second page.
15	be paid that.	15	LORD JUSTICE BRIGGS: Thank you. Yes.
16	The 1986 rules say: no, it ought to be treated,	16	MR DICKER: So it might be said to be similar to the second
17	essentially, pari passu.	17	limb of section 132.
18	As your Lordship says: in substance, what's going on	18	LORD JUSTICE PATTEN: What is this? I mean, this is a sort
19	in all of these provisions is the same and the wording	19	of general provision, is it, about debts? It's not in
20	reflects that. You have to pay proved debts in full.	20	any particular context. I was just looking through the
21	So the question is: does that drive the calculation of	21	other paragraphs which obviously apply to proceedings in
22	interest or not?	22	equity, generally.
23	Prior to 1986, everyone has held that it didn't,	23	LADY JUSTICE GLOSTER: It's not dealing with insolvency,
24	judge says, "Not so". If you have to pay debts for so	24	it's dealing with any old question.
25	long in respect of periods that are outstanding. It's	25	MR DICKER: It's not a provision in bankruptcy.
	Page 105		Page 107
	- 40		
1	blindingly obvious, we say. The mere fact you reduce	1	LORD JUSTICE PATTEN: No.
2	underlying contractual right into an express statutory	2	MR DICKER: It's a provision which certainly applied in the
3	provision, reflecting that underlying contractual right	3	administration of a deceased estate.
4	can't make a difference. No reason why Bower v Marris	4	Now, I'm not sure
5	should disappear, at that stage.	5	LADY JUSTICE GLOSTER: It's a precursor to section 35(a), is
6	The point about the provision being in payment of	6	it, effectively? Which gives the court the power to
7	interest, Bower v Marris effectively saying it's in	7	award interest.
8	payment of principle. Exactly same point could be made	8	MR DICKER: Except it's not. Can we just
9	in relation to the 1825 Act and all the subsequent Acts.	9	LADY JUSTICE GLOSTER: You make your submissions, Mr Dicker.
10	Now, Whittingstall v Grover is not a bankruptcy	10	I'm sorry.
11	case. It's not a liquidation case. It's concerned with	11	MR DICKER: Mr Smith suggests you just note 45:
12	the administration of the deceased insolvent. But it is	12	"Every decree for an account of the personal estate
13	interesting, because there's a similar provision for	13	(Reading to the words) or parts of any of such
14	payment of interest to those who aren't otherwise	14	personal estate are outstanding or undisposed of, unless
15	entitled to interest. It's bundle 1, tab 24.	15	the court shall otherwise direct."
16	Just before I go to the detail of the judgment,	16	We say Whittingstall v Grover is the authority for
17	could I just ask you to turn up bundle 4, tab 122,	17	two propositions. First, it demonstrates the principle
18	because that contains the relevant order of 1841 that	18	in Bower v Marris can apply in circumstances where
19	the case is concerned with.	19	a creditor is given a right to interest only in the
20	LADY JUSTICE GLOSTER: So general order, is it a Practice	20	event of a surplus.
21	Direction?	21	Secondly, it follows that it also demonstrates that
22	MR DICKER: Yes, it's an order of the court.	22	Bower v Marris can apply, even where at the time of any
23	LADY JUSTICE GLOSTER: It's sort of that, isn't it?	23	dividend no interest had accrued due.
24	MR DICKER: The provision, at bundle 4/122.	24	The learned judge Mr Justice David Richards rejected
25	LADY JUSTICE GLOSTER: Paragraph 46.	25	the second proposition. He did so in paragraph 112 of
	Page 106		Page 108
	1 age 100		1 age 100

1	his judgment. What he said was:	1	need to be read in its entirety is on page 217. If
2	"A decree for the administration of an estate	2	I can just identify the points which we rely on. Just
3	operates as a judgment in equity, and that the orders of	3	picking it up at the top, Mr Justice Chitty says:
4	1841 were intended to bring a judgment in equity into	4	"It is only now, when further assets of the testator
5	line with a judgment at law on which interest was	5	have become available for distribution, the question has
6	payable under the Judgments Act. Interest on a judgment	6	arisen. The next question which arises relates to
7	debt accrues due whilst it is outstanding just as much	7	interest. After payment of 20 shillings in the pound to
8	as does interest under a contract."	8	the joint and separate creditors of the testator
9	In other words, he said Whittingstall v Grover is	9	a surplus will remain. The question is left open by the
10	effectively a case in which you have a judgment, you	10	order of 1861 already stated. It declared generally the
11	therefore have interest accruing day-by-day, and there	11	priority of the testator's separate creditors to his
12	is, therefore, no difficulty in applying Bower v Marris.	12	joint creditors. This declaration was, I think,
13	Now, we say this case is in fact, in substance,	13	confined to the principal of the debts. The declaration
14	indistinguishable from the nature of the right under	14	as to interest was confined to negativing any claim of
15	rule 2.88(9), where it refers to the Judgment Acts rate.	15	the testator's separate creditors whose debts did not by
16	The distinction that the judge sought to draw within	16	law or special contract carry interest."
17	Whittingstall v Grover is incorrect. It is correct that	17	Then, if you drop to about a third of the way down,
18	a decree for the administration of estate does operate	18	in the middle of the column 1, there's a sentence
19	as a judgment in equity, but it's obviously not	19	beginning, "But the question is"
20	a judgment for the payment of any sum of money. So it	20	LADY JUSTICE GLOSTER: Yes.
21	doesn't, itself, entitle creditors to interest on	21	MR DICKER: "But the question is between the joint creditors
22	decrees or orders in equity under section 18 of the	22	of the testators, on the one hand, and the separate
23	Judgments Act. If it was, then this order,	23	creditors whose debts do not, by law, carry interest, on
24	paragraph 46, would have been unnecessary. So you may	24	the other hand. All these creditors have received or
25	have a decree, maybe a judgment in equity, but it	25	will now receive 20 shillings in the pound out of the
23	have a decree, maybe a judgment in equity, but it	23	will now receive 20 simmings in the pound out of the
	Page 109		Page 111
1	doesn't itself carry interest. The interest arises as	1	principal of their debts. Separate creditors contend
1	doesn't, itself, carry interest. The interest arises as	1 2	principal of their debts. Separate creditors contend
2	a result of paragraph 46 of the order.	2	for priority, the joint creditors contend for a
2 3	a result of paragraph 46 of the order.  Second point, we say paragraph 46 of the order is	2 3	for priority, the joint creditors contend for a distribution of the surplus pari passu. Admitted there
2 3 4	a result of paragraph 46 of the order.  Second point, we say paragraph 46 of the order is effectively structured in the same way as rule 2.88 in	2 3 4	for priority, the joint creditors contend for a distribution of the surplus pari passu. Admitted there is no decision on the point, which quite possibly has
2 3 4 5	a result of paragraph 46 of the order.  Second point, we say paragraph 46 of the order is effectively structured in the same way as rule 2.88 in the sense that it says: if there's a surplus, everyone	2 3 4 5	for priority, the joint creditors contend for a distribution of the surplus pari passu. Admitted there is no decision on the point, which quite possibly has never arisen until this time. The question must be
2 3 4 5 6	a result of paragraph 46 of the order.  Second point, we say paragraph 46 of the order is effectively structured in the same way as rule 2.88 in the sense that it says: if there's a surplus, everyone is entitled to interest at 4 per cent whether or not	2 3 4 5 6	for priority, the joint creditors contend for a distribution of the surplus pari passu. Admitted there is no decision on the point, which quite possibly has never arisen until this time. The question must be decided on principle."
2 3 4 5 6 7	a result of paragraph 46 of the order.  Second point, we say paragraph 46 of the order is effectively structured in the same way as rule 2.88 in the sense that it says: if there's a surplus, everyone is entitled to interest at 4 per cent whether or not they otherwise have it.	2 3 4 5 6 7	for priority, the joint creditors contend for a distribution of the surplus pari passu. Admitted there is no decision on the point, which quite possibly has never arisen until this time. The question must be decided on principle."  Then, this:
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2 3 4 5 6 7 8 9	a result of paragraph 46 of the order.  Second point, we say paragraph 46 of the order is effectively structured in the same way as rule 2.88 in the sense that it says: if there's a surplus, everyone is entitled to interest at 4 per cent whether or not they otherwise have it.  The justification for that right your Lordship sees from the judgment of Mr Justice Chitty. It is	2 3 4 5 6 7 8 9	for priority, the joint creditors contend for a distribution of the surplus pari passu. Admitted there is no decision on the point, which quite possibly has never arisen until this time. The question must be decided on principle."  Then, this:  "Previously to orders of 1841, the court of Chancery did not give interest to a creditor coming in under
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1	MR DICKER: I need to provide with you an answer to that.	1	case."
2	LADY JUSTICE GLOSTER: Sorry, go back to	2	That's another name for Humber Iron Works:
3	MR DICKER: "The question which must be decided on	3	"By treating the dividends as ordinary payments on
4	principle, previously to the orders of 1841 the court of	4	account and applying each dividend in the first place to
5	Chancery did not give interest to a creditor coming in	5	the payment of interest calculated to the day of such
6	under a decree for the administration of the estate of a	6	dividend and the surplus, if any, to the reduction of
7	deceased person where the debts did not accrue or carry	7	the principle."
8	interest. The orders of 1841 relating to interest were	8	So, just stepping back, essentially two
9	in substance repeated in the consolidated orders of 1861	9	points: first of all, if one looks at paragraph 46 of
10	now embodied in the subsisting rules of court order 65.	10	the order, it says: if there is a surplus, everyone is
11	The rules of 1841 were founded on the 17th section of	11	entitled to interest of 4 per cent. Very much like
12	the statute previously to that enactment(Reading to	12	rule 2.88(9).
13	the words) to recover judgment for his debt.	13	The second point is: Mr Chitty appears to have not
14	Consequently, after the passing of the statute, the	14	regarded that as any problem in applying Bower v Marris,
15	court of equity, while interfering with this legal right	15	despite the fact in this context, as well, payments will
16	for the common benefit all the creditors, was bound on	16	already have been made.
17	equitable principles to put him in the same position as	17	Now, there are a series of cases to similar effect.
18	if he had exercised it, hence the order of 1841."	18	I'm not going to take you to them at this stage, but
19	So there is a moratorium, you therefore should be	19	just for your note, in the bundles they are a case
20	entitled to interest as if you had a judgment:	20	called Garrard v Lord Dinorben, volume 1, tab 7,
21	"Lord Romilly explained the matter in	21	Aitchinson v Lee 1, tab 10, Hadfield's Patent Cask
22	The Herefordshire Banking Company that the court allowed	22	Company, 1, tab 12, Herefordshire Banking Company, 1,
23	interest at 4 per cent from the date of its decree,	23	tab 13, and a more recent case Re Bracey decide in 1936,
24	because the decree is a judgment in equity for the	24	1, tab 36.
25	benefit of all the creditors and prevents them for	25	LADY JUSTICE GLOSTER: Are those are all administration of
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	Page 113		Page 115
1	getting a judgment at law which would give them	1	estate cases?
2	interest. The right of the creditor whose debt does not	2	MR DICKER: They are, but they all essentially well, not
3	carry interest by law is therefore based on the	3	all of them. Herefordshire is the winding up of
4	provisions of the statute and the orders of 1841 and the	4	a partnership, banking partnership.
5	existing rules of court would give effect to such	5	The importance of those cases is that they set out,
6	right."	6	in a similar way to Mr Justice Chitty, a basic rationale
7	Just dropping to about a third of the way down,	7	that if you are prevented from obtaining a judgment by
8	sentence in the middle of the paragraph, says:	8	a moratorium, you really ought to be treated as if you
9	"Nor I can find any reason which in regard to	9	had a judgment. That's what we say, essentially,
10	subsequent interest would justify the drawings of any	10	section 132 was originally doing, and 2.88(9) is now
11	distinction between creditors whose debts carry interest	11	doing.
12	by law and those whose debts carry interest under the	12	Mr Justice Chitty said in the context of a provision
13	(Reading to the words) which appears on the face	13	like that, which only applies in the event of a surplus,
14	of the general orders themselves. The sound rule,	14	applies to creditors who have no other right to
15	therefore, appears to be that as between a joint and	15	interest. Nevertheless, there's no difficulty in
16	separate creditors, the question of interest should be	16	applying the principle in Bower v Marris.
17	decided in accordance with established rules as to the	17	There's one other point which I ought to simply
18	principal."	18	mention, at this stage, which is Mr Justice David
19	Then, he says this:	19	Richards' judgment does appear to produce an anomaly
20	"The remaining question relates to the manner in	20	now, between the administration of a deceased's estate
21	which the dividends received ought to be accounted for	21	which considered to be solvent, on the one hand, and the
22	in ascertaining the amount of interest due, all the	22	administration of a deceased's estate which is
23	dividends have been paid in process of law, and the	23	considered to be insolvent, which subsequently turns out
24	account ought to be taken in the manner pointed out in	24	to have a surplus.
25	Bower v Marris and the warrant to finance companies	25	The reason for the anomaly are the rules that
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	Page 114		Page 116

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1	Mr Justice Chitty was referring to, can be found in	1	"In these circumstances, there remained for decision
2	similar terms, now, in CPR 64.2B and 40A Practice	2	some question about the claims enforceable against the
3	Direction 14. So if you have an administration	3	liquidation of surplus in respect of post liquidation
4	a deceased estate which is solvent, presumably the same	4	interest. It's common ground that since there is a
5	regime operates as operated in Whittingstall v Grover.	5	surplus it should be used so far as it will go
6	Conversely, if you have an administration which is	6	(Reading to the words) the interest due to the
7	considered insolvent, that's administration which is	7	bank is said to be [sums given]."
8		8	
9	with the Insolvency Act. The judge's judgment therefore	9	The calculation of the sum appears in appendix A,
-	applies, on his basis Bower v Marris doesn't operate.		which is an agreed document.
10	So whether Bower v Marris applies in relation to the	10	Now, there was then an issue which
11	administration of the deceased estate, it appears to	11	Mr Justice Mervyn Davis raised and you can see that at
12	turn on whether or not it was thought to be solvent, in	12	453D. Just above E, he says:
13	which case it does. Or merely is subsequently realised	13	"In saying that appendix A applies, I desire to add
14	is solvent, in which case it doesn't.	14	this caveat: Appendix A includes interest in the sum of
15	Now, the final authority I wanted to refer to	15	£173,000-odd for the periods 20 June 1978 to
16	English authority was Lines Brothers Number 2.	16	31 December 1978 which was brought up to date by adding
17	LORD JUSTICE BRIGGS: Are the rules and references to that	17	to that figure interest for the figure from
18	in your skeleton? You have quoted from CPR.	18	21 December 1982 to the date of payment. In other
19	MR DICKER: Can I just give you the references?	19	words, Appendix A proceeds on footing that interest has
20	LORD JUSTICE BRIGGS: Thank you.	20	continued to run since the payment of the final dividend
21	MR DICKER: Sorry. CPR 64.2B.	21	on 20 June 1978. It is supposed, as I understand, that
22	LORD JUSTICE BRIGGS: Which is that; solvent or insolvent?	22	interest continues to run on a notionally unpaid capital
23	MR DICKER: These are both dealing with the solvent position	23	of 589,000-odd thrown up by the Bower v Marris
24	because the insolvent position is dealt with	24	calculations."
25	LORD JUSTICE BRIGGS: Is of the Act.	25	Then he says this:
	Page 117		Page 119
1	MR DICKER: The Act. 64.2B. You also need to look at CPR	1	"I am not satisfied that interest ought to be
2	40A, Practice Direction 14.	2	charged in respect of the period after 20 June 1978.
3	LADY JUSTICE GLOSTER: Can you speak up? 40A?	3	I say that because all principal was in fact paid off on
4	MR DICKER: I'm sorry, 40A, Practice Direction 14.	4	20 June 1978, so that, thereafter, there was no
5	LORD JUSTICE BRIGGS: In other words, APD14?	5	principal owing that could carry interest. The capital
6	MR DICKER: Yes.	6	sum of 589,000-odd is to my mind merely a notional
7	So Lines Brothers Number 2, I can show you that.	7	figure not capable of supporting an interest claim."
8	It's volume 1, tab 48. There were, as you know,	8	So, essentially, the judge was saying: you can apply
9	a series of Re Lines Brothers cases. This occurred	9	the principle in Bower v Marris, but only until
10	after the decision of the Court of Appeal dealing with	10	principal has been repaid because from that date,
11	currency conversion claims. The issue that then arose,	11	essentially, there's nothing on which interest could
12	essentially was: it having been established that the	12	follow.
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13	post insolvency interest is payable first, upon what	13	LORD JUSTICE BRIGGS: You mean only until principal was in
13 14	post insolvency interest is payable first, upon what basis is that interest payable?	13 14	LORD JUSTICE BRIGGS: You mean only until principal was in fact repaid by way of dividends on approvements.
14	basis is that interest payable?	14	fact repaid by way of dividends on approvements.
14 15	basis is that interest payable?  Bower v Marris was cited in the earlier decisions,	14 15	fact repaid by way of dividends on approvements.  MR DICKER: Yes. Then, there are further submissions which
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14 15 16 17 18 19 20 21 22 23 24	basis is that interest payable?  Bower v Marris was cited in the earlier decisions, but this is the decision in which its operation was considered. The other element is: it was decided after the Cork Report but before the White Paper, and that may have a significance that you'll see when we come to the White Paper.  It was common ground between the counsel involved that Bower v Marris applied. You'll see the counsel involved identified at 440F and at 442 between E and F, on any basis distinguished insolvency counsel.	14 15 16 17 18 19 20 21 22 23 24	fact repaid by way of dividends on approvements.  MR DICKER: Yes. Then, there are further submissions which your Lordships will see starting at 456F.  LADY JUSTICE GLOSTER: So the case comes back then, as the judge says he's going to deal with other submissions?  MR DICKER: Yes. Comes back on a later date, which looks to be if one goes back to start about a week later:  "The calculations of both sides have been effected in conformity with what both sides had assumed to be the principles annunciated in Bower v Marris. Calculations proceed by applying the dividends received in the first

Now, that's all I was going to show you so far as contractual rate and the outstanding principle and 1 2 2 thereafter in diminution of principal." English authority is concerned. I mentioned the 3 3 Then, over the page, 457B: principal in Bower v Marris appears to have been applied 4 "As to whether interest falls to be computed after 4 in every Commonwealth jurisdiction where the issue 5 5 appears to be considered. That includes Scotland, the final dividend payment on the principle sum deemed 6 Ireland, Australia, Canada and even the United States. 6 under Bower v Marris remained standing upon such final 7 7 dividend being paid. The view of the liquidators and of The judge dealt with those decisions in his 8 8 the bank is interest does continue to be computed on the judgment. I wasn't going to say any more in relation to 9 principal deemed outstanding until further payments have 9 them, save this: one authority the learned judge cited 10 been made satisfying in full that deemed outstanding 10 an extract from at length was the decision of 11 amount of principal. The reason is the principle in 11 Mr Justice Blair in the case called Attorney General of 12 Bower v Marris aims to bring about payment to the 12 Canada v Confederation Trust. 13 creditor of precisely that sum she would have received 13 He held that in his judgment, at paragraph 123 to 14 had no liquidation taken place by treating dividends 14 128 15 paid as ordinary payments on account falling to be 15 The importance of this case is that it is another 16 16 case which contains some express statutory provision appropriated in the first instance to keeping down interest and thereafter to capital. The Bower v Marris 17 which we say is essentially akin to a second limb in 17 18 calculator stops on the day of the final dividend, the 18 section 132, or the reference to the Judgments Act rate 19 creditor does not get payment in full of his debt and 19 in rule 2.88. In other words, giving creditors a right 20 20 to interest, in the event of a surplus, regardless of contractual interest and is thus not remitted to his 21 contract in the full sense. Plain from the authorities, 21 whether or not they were otherwise entitled to interest. 22 22 interest continues to be calculated --" Mr Justice Blair held Bower v Marris applied. All 23 LADY JUSTICE GLOSTER: This all Mr Potts submissions. 23 I wanted to show you was the relevant section that he 24 MR DICKER: This is all Mr Pot's submissions. Mr Stubbs 24 was considering. As I say, the judgment, itself, was 25 25 agrees with them at the top of 458, and Mr Justice cited at length by Mr Justice David Richards and I don't Page 121 Page 123 Mervyn Davis says, in the last paragraph: 1 want to waste time going back through it. But the 1 2 "Having considered the submissions made to me, I am 2 relevant provision he was dealing with is in bundle 2, 3 satisfied I should not adhere to the suggestion made in 3 tab 69 --4 my judgment. I propose to say no more than 4 LORD JUSTICE PATTEN: You are talking about section 95, are 5 5 this: I think it would be right to apply Appendix A in 6 the admission of this liquidation in the way it is 6 MR DICKER: Yes. 7 7 suggested. That is to say on the footing of notional LORD JUSTICE PATTEN: It's just in the judgment. I was just unpaid capital of 589,000-odd, notionally owing on 8 8 wondering whether there is --9 9 20 June 1978, continues to bear interest at the MR DICKER: Maybe I don't need to -- just for your reference 10 10 contractual rate until there has been a full discharge it's paragraphs 16 and 17: 11 11 of that notional principal by the liquidator." "Any surplus referred to in (1) shall first be 12 So it's right that because Bower v Marris notionally 12 applied in payment of interest from the commencement of 13 reallocates dividends to interest, of course the same 13 the winding up at the rate of 5 per cent per annum on 14 sum can't discharge the same amount of principal, so 14 all claims approved in the winding up according to their 15 there must still be some principal outstanding. But 15 priority." 16 that doesn't stop the principle in Bower v Marris 16 So you have a right to interest, whether or not you 17 applying. Mr Justice Mervyn Davis initially thought it 17 had any underlying right payable to a surplus. It 18 did persuaded to the contrary by Mr Potts and Mr Stubbs. 18 doesn't matter, Bower v Marris applies. 19 19 LADY JUSTICE GLOSTER: The judge doesn't give any reasons This is the last word on subject before the White Paper 20 20 and the introduction of the 1986 Act. for why he disagrees with this, 128. 21 LADY JUSTICE GLOSTER: If there had been a point there, you 21 MR DICKER: The judge did deal with the prior history, the 22 say Mr Stubbs or Mr Pots certainly would have taken it. 22 intellectual framework, if I may say, at length and, in 23 Or Mr Graham. 23 24 MR DICKER: She now is Lady Justice Arden, or any of the 24 LADY JUSTICE GLOSTER: But with this particular case. 25 others. 25 MR DICKER: He dealt with this particular case at length. Page 122 Page 124

He says, in flort, it's a powerful – he dealt with it at 2   123 -			T .	
2 LADY JUSTICE GLOSTER: Have that, But, at 128, he says 4 they've powerful, the submissions are powerful support, 5 but he doesn't say why they've wrong, does he? 5 but he doesn't say why they've wrong, does he? 6 MR DICKER. He say the weeking of the section is not in identical terms to the? 3.5  LADY JUSTICE GLOSTER: it's 127 where he gives his reason. MR DICKER. What he essentially does, having dealt with the but but form, it is in four relatively short paragraphs, to look at the understand in four relatively short paragraphs, to look at the understand account he intellectual freight provided by the prior 13 account he intellectual freight provided by the prior 14 position and concludes that whatever the position may 14 aconsequence of the wording of the niles. 16 a consequence of the wording of the niles. 17 The next topic lowarise to deal with concerns 17 The 1986 Act 2 LADY JUSTICE GLOSTER: Shorthand writer, would you like 2 a break? 21 LADY JUSTICE GLOSTER: Shorthand writer, would you like 2 a break? 22 LADY JUSTICE GLOSTER: We will go till 20 past. 23 LADY JUSTICE GLOSTER: We will go till 20 past. 24 LADY JUSTICE GLOSTER: We will go till 20 past. 25 For your note, in panagraphs 93 to 95 of his judgment. 26 We say he made three certors in dealing with that material. 27 The SHORTHAND WRITER: 20 past. 28 LADY JUSTICE GLOSTER: We will go till 20 past. 29 Till Short hand writer, would you like 2 interest and the creditors have been paid in full, including claims for pre-insolvency interest, the ambients of the rejection of Hower v Marris, when they didn't, 7 the commendations in the Cork Report necessarily involved the rejection of Hower v Marris, when they didn't, 7 the commendations in the Cork Report necessarily involved to the recommendations in the Cork Report necessarily involved to the received of make to the previous regimes and why. 29 Now, as far as the first point is concerned, as 11 increasing any the relation to the treatment of interest, both prior to and after the commendations in the Cork Repo	1	He says, in fact, it's a powerful he dealt with it at	1	liquidation. But it's important to know what was not
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volume 2. If S tab 1, the relevant paragraph is paragraph 34. If ste hast five lines of paragraph 34, where he says:  "It was discussed in my judgment in Waterfull 2A, the purpose of providing the alternative of interest at the an applicable apart from the administration is to the ante applicable apart from the administration is to ensure the creditor received what it would have receive if there also been no administration, if that would be more than interest at the Judgment Act rate."  So we say that's right. So what this part of 10 So we say that's right. So what this part of 11 2.88(9) was doing was essentially saying creditors 12 should be entitled to their flue intellement by way of 13 interest hefore any surplus is distributed to the 14 bankrupt or to shareholdens.  LORN DUSTICE BRIGGS: You have to read that in the context, don't you, it is addressing a granular ashimistion?  18 We say on it, if a directing a granular ashimistion?  19 The important point is the judge said, "We have the 20 Evaluation of the third point in the part of the judge said," We have the 21 Cork Report that says you adopt the regime in 22 bankruptey. Everyone gest judgment at raie unterest". 23 We say not so. It's essentially a median of You 24 streams. The while Paper and they should be entitled 25 to receive the ruie applicable to the debt apart from 26 carchide to get. Now, per-1066, the common ground that 27 report that says you adopt the regime in 28 carchide to get. Now, per-1066, the common ground that 29 report that says the said they should be entitled 30 to receive the ruie applicable to the debt apart from 31 LADY JUSTICE GLOSTER. Ve, Mr Dicker 32 We say roa to. It's essentially a median of you 33 report that says the possible to the debt apart from 34 report that says they should be entitled 35 to receive the ruie applicable to the debt apart from 36 report that says the proper is the provision. 37 Page 120 38 We say roa to. It's essentially a median go frow 39 report that says the proper is the provision of the provisi	,		11	1
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25 a statutory right, which only gives you right to 25 interestingly, in a sense, if you go back from 1743	20 21 22	MR DICKER: It's part of his LADY JUSTICE GLOSTER: General analysis.	21 22	the creditors end up with less interest then they
	20 21 22 23	MR DICKER: It's part of his LADY JUSTICE GLOSTER: General analysis. MR DICKER: It's part of the four points he made. It's	21 22 23	the creditors end up with less interest then they otherwise would, that is something which appears to have
Page 130 Page 132	20 21 22 23 24	MR DICKER: It's part of his LADY JUSTICE GLOSTER: General analysis.  MR DICKER: It's part of the four points he made. It's essentially premised on what you now have is	21 22 23 24	the creditors end up with less interest then they otherwise would, that is something which appears to have been achieved without any discussion. More
- "o	20 21 22 23 24	MR DICKER: It's part of his LADY JUSTICE GLOSTER: General analysis.  MR DICKER: It's part of the four points he made. It's essentially premised on what you now have is a statutory right, which only gives you right to	21 22 23 24	the creditors end up with less interest then they otherwise would, that is something which appears to have been achieved without any discussion. More interestingly, in a sense, if you go back from 1743

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onwards, there is no criticism of the principle at all. Every case in every Commonwealth jurisdiction that has considered it, has applied it. They have all described it as a matter of fairness and justice, common sense. Indeed, the judge himself, his judgment, doesn't

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

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

It also doesn't make any commercial sense in a more general way. If the legislature's intention is that you should be compensated by receiving interest at a particular rate, it doesn't make any sense to disapply Bower v Marris. Imagine a situation in which the creditor is owed a thousand pounds and accruing interest whilst the administrators take steps to recover the assets, the debts that are owed continue to accrue interest and will be received. But at the time he receives a sum, he pays it out to creditors essentially their interest stops running at that stage. So you effectively end up with a situation in which part of the money which the debtor is receiving is being siphoned off at each stage, isn't ultimately used to pay the matching liabilities to creditors but ends up being paid to subordinated creditors or shareholders. Again, it simply doesn't make any sense.

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

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

## Page 133

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

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

Page 134

Page 135

1 appropriation. I hope, at this stage -- again, I can do 2 this now fairly quickly. I start by summarising our

submissions on the meaning effect that the rules in 3

4 principle changes it was intended should be made.

5 LADY JUSTICE GLOSTER: Lord Justice Briggs wants the actual 6 provision.

7 MR DICKER: It's 174.

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

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10 MR DICKER: Yes. So the changes in the wording. The first

11 point. One change that was obviously made was that the 12

86 Act introduced common regime for bankruptcy in

13 corporate insolvency. Previously, they had been

different.

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

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

25 purpose.

1 Now, that reflected the position in both bankruptcy 1 We have five points in relation to this. The first 2 2 and corporate insolvency prior to 1986. Although in point is: the principle in Bower v Marris does not 3 3 relation to liquidation, it was a matter of judge-made depend on the actual or implied intention of the 4 law, because we didn't have a specific statutory 4 relevant parties and rules of appropriation are 5 5 irrelevant. That's what the Lord Chancellor expressly provision. The fourth point, creditors are entitled to interest 6 6 stated, as you've seen in Bower v Marris itself. The 7 7 for the period after the commencement of the reference authorities 1, tab 6, it's page 355, at the 8 8 administration for so long as their debts are bottom. 9 outstanding. What that does is identify the period for 9 Instead, the rule is an equitable rule of fairness 10 which post-insolvency interest is paid and requires the 10 which concerns the taking of an account, for the 11 calculation to take into account any dividends received 11 purposes of calculating interest. It's a fund 12 during the course of the insolvency. 12 calculation rule. It's a way of calculating the amount 13 In other words, the period starts with the 13 of interest to be paid. Appropriation has nothing to do 14 commencement of the administration, and you have to take 14 with the principle. Indeed, principle operates where 15 into account the dividends which had been paid, the rule 15 there has been no appropriation because the payments 16 16 doesn't seem to have. have been made by operation of law. 17 Fifth, as you know, creditors were entitled to 17 In a sense, it's easy to hold that the rules of 18 18 post-insolvency interest on two alternative bases. We appropriation are irrelevant. If they were relevant--19 say, essentially combining previous bankruptcy and 19 the principle would operate in this way: essentially, it 20 20 liquidation regimes. would say payments have been paid by process of law, 21 Sixth, reference to the rate applicable to the debt 21 therefore they haven't been appropriated, they've been 22 22 apart from the administration was intended effectively paid generally on account. 23 to reflect, to preserve, the prior position in 23 The question then of what happens is for the 24 a liquidation. To codify it. In other words, to ensure 24 creditor to decide. You would then have to ask each 25 that creditors were entitled to a full entitlement 25 creditor: how have you appropriated the payments? Page 137 Page 139 1 before the surplus was paid for any other purpose. 1 Wentworth's argument is it all depends on 2 The judge relied on the fact that we now have 2 appropriation. So you have to look at and apply those 3 3 an express statutory rule which refers to the rate rules, which logically would mean, as I say, you have to 4 4 applicable to the debt apart from the administration. ask creditors: so how have you appropriated dividend 5 We say, a process essentially of reflecting in a statute 5 payments that you received? 6 the underlying entitlement to payment in full can't 6 Because only then would you know how much interest 7 7 somehow cause Bower v Marris to disappear. If you were 8 entitled to it, the fact that it's now been codified, 8 That was a suggestion which Wentworth actually made 9 9 reflected in the rules, can't change that. at one stage, not pursued now. The simple answer is: 10 Seventh point, the reference to the Judgments Act 10 it's a general equitable rule and it applies regardless. 11 rate was intended to ensure that creditors received 11 It's a general equitable rule which operates because 12 interest as if they had a judgment, which -- unless 12 it's regarded as fair and just, and that's the long and 13 statutes expressly provides otherwise -- permits the 13 the short of it. 14 14 LADY JUSTICE GLOSTER: It couldn't be said against you, applicable of the principal in Bower v Marris. 15 So, we say, if one has in mind a draftsman who is 15 could it, that the rule provides, in effect, a statutory 16 familiar with prior regime, familiar with section 132, 16 appropriation? It's a principle rather than an 17 familiar with the 1883 Act, familiar with the prior 17 interest. 18 18 position in liquidation, there's nothing in the wording MR DICKER: That is indeed what the judge held. 19 of rule 2.88(7) and (9) that one can see that enables 19 LADY JUSTICE GLOSTER: I mean, in essence. 20 one to conclude that he intended to disapply the 20 MR DICKER: What's interesting is: if you go back to every 21 21 single case that has ever considered this point before principle. 22 Now, the final point I want to address is the 22 his, says, "Well, no, actually, that's not in fact how 23 23 relevance or irrelevance of appropriation. The judge you analyse it". The dividends were paid to ensure 24 dealt with this in his judgment, at paragraphs 144 to 24 pari passu distribution but they were paid by operation 25 150. 25 of law. So you treat them, effectively, as having paid Page 138 Page 140

1	generally on account. The question then is: you have	1	principal, nevertheless we can notionally treat it as
2	a surplus, how do you approach things now?	2	having been applied first in relation to interest". Why
3	We say in that situation you are not in any way	3	is that deeming permissible that a further deeming or
4	subverting the effect of the statute in applying	4	fiction of saying, "And if necessary we'll treat the
5	Bower v Marris. What the statute does is effectively	5	interest as having been due at the relevant date", why
6	say: look, if there is a shortfall everyone has to	6	is the former permissible and the latter not? Again, we
7	receive 100 pence in the pound on their approved debts	7	say: no reason.
8	and they have. The question now	8	So, in our respectful submission, the judge was
9	LORD JUSTICE PATTEN: Why isn't that a rule? I mean, what's	9	wrong in the conclusion he reached on issue 2. And in
10	the magic in talking about rules by analogy, rules of	10	the consequential declaration, at 3. Correct answer is:
11	appropriation? Because that's a form of appropriation,	11	interest is to be calculated in accordance with
12	it's just a different rule, that's all.	12	principle in Bower v Marris, treating dividends which
13	MR DICKER: Yes, and we agree with that.	13	have been paid as having been applied, first, in the
14	I think, as I understand the argument, the argument	14	payment of interest and, second, to principal.
15	is that if you go back to the cases, when you read	15	That's all subject to your Lordships that I was
16	Bower v Marris and later cases, and they describe what's	16	proposing to say on Bower v Marris.
17	happening, they often describe the calculation as	17	LADY JUSTICE GLOSTER: Thank you.
18	involving a notional reallocation of dividends, interest	18	MR DICKER: I reassure you, although I have now only dealt
19	due. It's the word my learned friend focuses on. He	19	with one out of the total of 17 issues in this appeal,
20	says, "It only works if at the date of the dividend	20	I am, I think, pretty much where I expected to be at
21	there was in fact interest which was due, and there	21	this the point.
22	isn't under the statute rules because it comes in for	22	LADY JUSTICE GLOSTER: You are up to speed, are you?
23	the first time when there's a surplus".	23	MR DICKER: Yes, so it will follow that some of the others
24	We say, the short reason for that is you have to	24	are rather shorter.
25	read the comments in context. Those cases were all	25	Can I turn next to deal with connected issue which
23	read the comments in context. Those cases were an	23	Can't turn next to dear with connected issue which
	Page 141		Page 143
1	talking about cases where the creditor did have	1	concerns compound interest. It's the next one on the
2	an underlying right to interest. So if you want to	2	list of issues. It's declaration 8 and issue 3. You
3	describe what's going on, it would be perfectly natural	3	can see, from the list of issues, the declaration the
4	to say, "I'm appropriating it to interest which was due	4	judge made was:
5	at that stage". It doesn't necessarily mean it's	5	"Where statutory interest is payable at a rate
6	a necessary requirement for the principle to operate.	6	applicable to the debt apart from the administration and
7	We say it isn't. Whittingstall v Grover is one	7	such rate is a compounding rate accrued statutory
8	indication where they couldn't find a debt which was	8	interest does not continue to compound following the
9	due, find interest which was due. Attorney General of	9	payment in full of the principal amount through
10	Canada v Confederation Trust is another example. So	10	dividends."
11	there's no magic in interest having been due at the	11	It has echos of the issue which, at one point,
12	relevant date. The most one can say is, "That is a fair	12	troubled Mr Justice Mervyn Davis in Lines Brothers 2,
13	description of how the principle operates in a case	13	although it's arising in a different context. The
14	where, whether by contract or statute, interest was due	14	context is compound interest.
15	as at that date".	15	The judge again, for your note dealt with this
16	It's also important, we say, to bear in mind that	16	in his judgment, paragraphs 19 to 26. Perhaps if you
17	even in a contractual situation, the operation of the	17	turn that up. It's in part of core bundle 1, tab 2. 23
18	principle involves what might be called something of	18	is 19 to 26. The sub-issue we are concerned with is in
19	a fiction. The payments are treated as having been made	19	paragraph 26. Just to explain the context, issue 3
20	in respect of accrued interest, although they were in	20	concerned the reference to the rate applicable to the
21	fact paid in respect of principle.	20	debt apart from the administration. In particular, the
22	Now, if that's right, the only question is really	22	reference to the word "rate". The main issue raised by
23	the extent of the fiction or the deeming. If the	22 23	issue 3 was: did the word "rate" refer just to the
24	principle entitles you to say, "You have made a payment	23	numerical percentage rate or also to the mode of
25	in respect of a proved debt, that is in respect	25	calculating the rate at which interest accrued on
23	in respect of a proved dest, that is in respect	23	calculating the rate at which interest accruca on
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Page 144

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1	a debt.	1	what period are you entitled to compound interest? Does
2	LADY JUSTICE GLOSTER: What, rest and things?	2	the right to compound interest essentially stop, and
3	MR DICKER: Yes, or compound interest or anything else which	3	does the amount of your interest become frozen when
4	could be encompassed in the word "rate". So Wentworth	4	proved debts have been repaid in full? Or if the full
5	initially argued: the reference to rate was simply to	5	amount hasn't been paid by that date, which it won't
6	the numerical percentage rate.	6	have done, will interest continue to compound
7	The judge held that wasn't right, and he gave and	7	thereafter?
8	in fairness to Wentworth, by this stage they abandon	8	The judge held the answer was the former, not the
9	this stance, so it was common ground that the judge	9	latter. So this was another situation in which he said
10	agreed. He said, in 20:	10	the way in which the rules operate essentially mean that
11	"The parties are agreed the rate applicable to the	11	creditors don't get their full entitlement.
12	debt apart from the administration in 2.88(9) refers not	12	Outside of administration, compound interest would
13	only to a numerical percentage rate of interest but,	13	obviously continue to accrue until the whole principal
14	also, to the mode of calculating the rate which interest	14	and interest had been paid. Not so, the judge said,
15	accrues on a debt, including the compounding of	15	under the rules.
16	interest."	16	The reason he gave, summarised at the end of 26, he
17	He set out his reasons.	17	says:
18	Just picking up one of those reasons, because it	18	"I consider [some seven lines up] interest does not
19	will be relevant to the sub-issue, the third reason he	19	compound following the payment in full of the principal
20	gave, in paragraph 24, was that:	20	amount, because under the terms of rule 2.8 itself,
21	"As counsel for the administrators put it in their	21	interest, whether simple or compound, is payable only
22	skeleton argument, the country approach results in	22	for the period that the proved debt, or part of it, is
23	a creditor receiving a sum by way of interest that is	23	outstanding."
24	neither one thing nor the other. It's neither the	24	LADY JUSTICE GLOSTER: So that's very similar reasoning to
25	judgment rate nor the full contractual entitlement, but	25	what he said in relation to the previous issue.
23	judgment rate nor the run contractual entitiement, but	23	what he said in relation to the previous issue.
	Page 145		Page 147
1	is rather an unprincipled middle ground with no	1	MR DICKER: Yes. Essentially, you have to work out what's
2	foundation in logic or law."	2	happened so far, and what's happened so far is dividends
3	So, in other words, if you say someone can have	3	have been made which are paid, proved debts in full.
4	interest at 10 per cent but deny him his contractual	4	His rules provide for compound interest at the rate
5	right to compound interest, then you are not ending up	5	applicable. It is essentially only for the period
6	with the full contractual entitlement, you are ending up	6	whilst the proved debt was outstanding.
7	with an unprincipled middle ground with no foundation in	7	LORD JUSTICE PATTEN: Is this Re Lines without
8	logic or law. The sub-issue is dealt with in 26. This	8	Bower v Marris?
9	is issue that is relevant on this appeal. 26:	9	MR DICKER: It's a variant on Re Lines. It has written
10	"The administrators raised a sub-issue on which the	10	echoes of but obviously in the context of compound
11	parties are not agreed. On the basis the rate	11	interest, rather than Bower v Marris.
12	applicable to the debt apart from the administration	12	LORD JUSTICE PATTEN: Yes. But does that matter that it's
13	includes a compound rate and assuming the answer to	13	compound interest? If Bower v Marris doesn't apply, so
14	issue 2 is that statutory interest is calculated on the	14	you are looking at a requirement under the rules that
15	basis of allocating dividends first to the production of	15	you apply the dividends, firstly to the payment of the
16	principle, [in other words I'm wrong on Bower v Marris]	16	principal, as the judge found, then what difference does
17	does accrued statutory interest continuing to compound	17	it matter whether it's simple or compound interest?
18	following the payment in full of the principal amount	18	I mean obviously it matters in amount, but what's the
19	through dividends. If not, does the creditor have	19	difference in principle?
20	a non-provable claim in respect interest that would have	20	MR DICKER: There's not. The same, I think, issue of
21	continued to compound on a contractual basis following	21	construction arises essentially in both.
22	payment in full of the principal amount."	22	LORD JUSTICE PATTEN: Yes.
23	So this is essentially assuming rate applicable to	23	MR DICKER: Obviously the context is slightly different, and
24	the debt, apart from the administration, includes	24	the points one can make on construction are slightly
25	a right to compound interest. The question is: over	25	different. The answer the judge came up with does
	Page 146		Page 148

produce a rather old result. I mean if one goes back to the point he makes in paragraph 24, "unprincipled middle aground the less consequence of his judgment is that there is essentially, we would submit, an unprincipled middle ground that his poligenest has where M. He says to be ground that his poligenest has sheeved. He says to be ground that his poligenest has sheeved. He says to be phrase 'the rate applicable to the debt' includes a ground interest for a right to compound interest. But the way he applies it doesn't actually give sou the compound interest that it says unaming and their pits would otherwise centre you to. Because — 1 LORD IUSTICE PATTEN: 60 on 1 The policy of the principle and the market of the policy of the principal ways and the market of the seemand of the wording of 28%. He has to suggest the principal is repaid to compound interest for a princip that only unit you've peril the principal — 1 to fine whether reason if brocen. Outside of insolvency, as a say, you would be entitled to compound interest for whether reason if brocen. Outside of insolvency, as a say, you would be entitled to compound interest to a second the wording of the surface debuts, yes?  13 LORD IUSTICE PATTEN: 80 as a princip with the principal was stated to compound interest for a princip with the principal was stay to would be entitled to compound interest for a principal was stay to would be entitled to compound interest to would be well as a say you would be entitled to compound interest to would be well as a say to would be entitled to compound interest to would be well as a principal was stall containing to the principal was stall containin				*
ground," the consequence of his judgment is that there 4 is essentially, we would submit, an apprincipled middle 5 ground that his judgment has achieved. He says the 6 phrase "the rate applicable to the debt" includes 7 a right to compound interest fact 8 doesn't actually give you the compound interest that 9 that right would offerevise eartilet you to. Because— 10 LORD JUSTICE PATIEN: Go on. 11 MR DICKER.— you continue to go compound interest for 12 a peried, but only until you've repaid the principal— 13 for whatever reason it's frozen. Outside of insolvency, 14 as 1 says, you would be entitled to say. Fve gas 15 interest outstanding, which has not yet been paid, on 16 which I would be entitled to compound interest, the 17 judge says not under the rule. 18 LORD JUSTICE FATTEN. But I mean it is being paid as 19 satuatory interest, yet of you haven't yet been 20 do the approprinter rate to apply to statutory interest? 21 lifs the same debate, yes? 22 MR DICKER. By very similar, yes. 23 LORD JUSTICE BRIGGS. But his argument hange everything on 24 one appear of his construction, doesn't it, ranney that 25 2 s8(7) only gives you something when there is some part 26 of the principal constrainfung. So if 27 of the principal constrainfung. So if 28 a non-hower v Marris accompliance is a principal in full. There's an amount of interest 29 interest does not compound following the payment in full 20 of the principal constrainfung. So if 21 a non-hower v Marris accompliance is any 22 right to statutory interest. 23 interest does not compound following the payment in full 24 of the principal constrainfung. So if 25 a non-hower v Marris accompliance in the conduction of the principal mount. 26 save for it just not being a period when there is any 27 right to statutory interest. 28 MR DICKER: And it does lead to this oddity; the judge, says 39 interest does not compound following the payment in full 30 of the principal in full. There's an amount of interest 31 the principal in full. There's an amount of interest 32 dividend	1	produce a rather odd result. I mean if one goes back to	1	So one has this bizarre situation which, according
3 ground", the consequence of his judgment is that there 4 is essentially, we would adom't, an auprincipled middle 5 ground that his judgment has schieved. He says the 6 phrase "the rate applicable to the debt" includes 7 a right to compound interest that 8 doesn't actually give you the compound interest that 9 doesn't actually give you the compound interest that 9 doesn't actually give you the compound interest that 1 Again, with the greatest respect to the learned 1 floor DINSTICE PATTEN. Go on 1 DRD DISTICE PATTEN. Go on 1 Again, with the greatest respect to the learned 1 a speriod, but only until you've repaid the principal — 1 a period, but only until you've repaid the principal — 2 a period, but only until you've repaid the principal — 3 as laws, you would be entitled to laws. Per gas 1 as laws, you would be entitled to laws. Per gas 1 as laws, you would be entitled to laws. Per gas 1 as laws, you would be entitled to laws. Per gas 1 as laws, you would be entitled to laws. Per gas 1 as laws, you would be entitled to laws. Per gas 1 as laws, you would be entitled to sup; Per gas 1 as laws, you would be entitled to some pound interest, the 1 judge says not under the rules. 1 as laws, you would be entitled to some pound interest, the 2 judge says not under the rules. 2 life the same debate, yes? 2 life the proproprinte rate to apply to statutory interest? 2 life the same debate, yes? 3 lord DINSTICE PATTEN: But mean it is being paid as 3 stantary interest, yes? It is compound, because that's 4 suge?) of interest, you would be reliable to a compound interest? 2 a none-box meet debate, yes? 3 lord DINSTICE FREGOS. But his argument hangs everything on 2 one aspect of his construction, doesn't it namely that 3 there was no principle outstanding, but quite a big 4 slug?) of interest, you would? Tabli to get compound 5 there was no principle outstanding, but quite a big 5 serve for it just not being a period when there is any 7 right to statutory interest. 4 So imagine the situation, according to the judge, 8 divi	2	the point he makes in paragraph 24, "unprincipled middle	2	to the judge, that will say are you entitled to compound
se essentially, we would submit, an ungrincipled middle for growth that his judgment has schleved. He says the for phrase 'the rate applicable to the debt' includes for a right to enompound interest. But the way he applies it doesn't actually give you the compound interest that for the rate applicable to the debt' includes for what actually give you the compound interest that for the rate of the compound interest that for the rate of	3		3	interest. It does not work in the way compound interest
places the rate applicable to the dath includes a right to compound interest. But the way he applies it doesn't actually give you the compound interest that doesn't actually give you the compound interest that 18 Again, with the greatest respect to the learned 19 Jidge he has treated this as essentially a consequence of that right would otherwise entitle you to. Recause — 10 of his construction of the wording of 2 889. He has treated this as essentially a consequence of the principal — 2 apriced, but only until you've repaid the principal — 13 for whatever reason if S forcan. Outside of innolvency, 13 as I say, you would be entitled to say; the got 14 as I say, you would be entitled to say; the got 15 interest outstanding, which as not yet been paid, on 16 word have wanted compound interest, or why the legislature might have which I would be entitled to compound interest, the 16 judge says not under the rules. 17 judge says not under the rules. 18 LORD JUSTICE PATTEN. But I mean it is being paid as statistory interest, yes? 18 compound, because that's 20 the appropriate rate to apply to statutory interest? 21 first the same debate, yes? 22 MR DICKER. It's very similar, yes. 22 MR DICKER. It's very similar, yes. 23 LORD JUSTICE BRIGGS. But his argument hangs everything on one aspect of his construction, doesn't it ananely that 24 sug(7) or interest, you wouldn't fail to get compound a server to be a seed of any other defect to the formula, 5 interest west to being a period when there is some part 19 page 151  1 of the principal outstanding, sho if a some part 29 page 15 interest whether simple or compound is payable only for 16 interest whether simple or compound is payable only for 18 the principal in full. There's compound, 19 principal fill. 11 there's at 10 interest whether simple or compound is payable only for 19 principal situation or in the full of the principal amount. 19 principal situation to the Li of principal, so the 20 principal you are entitled — you haven't yeb been 20 principal you are entitled	4		4	normally work, in the sense that it stops running not
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21 It's the same debate, yes? 22 MR DICKER: It's very similar, yes. 23 LORD JUSTICE BRIGGS: But his argument hangs everything on 24 one aspect of his construction, doesn't; namely that 25 2.88(7) only gives you something when there is some part  24 of the principal outstanding. So if 2 a non-Bower v Marris accounting led to a conclusion 3 there was no principle outstanding, but quite a big 5 save for it just not being a period when there is any 7 right to statutory interest.  25 MR DICKER: They can be. And given the amount of money and 24 the amount of time involved in this case, the sums in 25 relation to almost all of these issues are huge. I mean  Page 149  1 Intere was no principle outstanding, but quite a big 5 slug(?) of interest, you wouldn't fail to get compound 4 this? Is there much involved? and was told, I think it's 16 shere much involved? and was told, I think it's 16 shere and was right to statutory interest.  MR DICKER: they can be. And given the amount of money and 24 the amount of time involved in this case, the sums in relation to almost all of these issues are huge. I mean  Page 151  1 there's one issue in relation to leap year, you take, whether it's 365 days or whatever, which, I think, at one stage the judge asked, "Do I really need to decide this? Is there much involved?" and was told, I think it's 18 there much involved? and was told, I think it's 18 there much involved? and was told, I think it's 18 there much involved? and was told, I think it's 18 there are influent as whether it's 365 days or whatever, which, I think, at one stage the judge asked, "Do I really need to decide this? Is there much involved?" and was told, I think it's 18 there much involved? and was told, I think it's 18 there much involved? and was told, I think it's 4 there's 6 in it's 4 the proposed for it judge asked, "Do I really need to decide this? Is there much involved?" and was told, I think it's 4 the judge asked, "Do I really need to decide this? Is there much involved?" and was told, I think it's 4 there ar				
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interest will then continue to run on the £1 plus the accrued interest unless and until it is paid.  24 right on Bower v Marris, because compound interest would 25 give you additional sums as well. I think, although no	22	principal you are entitled you haven't yet been	22	principal first.
25 accrued interest unless and until it is paid.  25 give you additional sums as well. I think, although no	23	paid compound interest up to that date, and compound	23	MR DICKER: I think this issue is still relevant even if I'm
, , ,	24	interest will then continue to run on the £1 plus the	24	right on Bower v Marris, because compound interest would
Page 150 Page 152	25	accrued interest unless and until it is paid.	25	give you additional sums as well. I think, although no
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1	doubt those more mathematically inclined behind me will	1	purposes of this rule for what period the debt is
2	tell me if I'm wrong, but I think the other way round	2	outstanding, during which they ought to be entitled to
3	may matter less; in other words, if someone is entitled	3	compound interest, we say the answer is easy, because
4	to compound interest, it may be he doesn't need	4	given the nature of compound interest the debt
5	Bower v Marris. If someone gets Bower v Marris they	5	effectively only ceases to be outstanding when both
6	still have an additional benefit if he's entitled to	6	principal and interest has been paid. The contrary
7	compound interest	7	conclusion, as we say, doesn't make any sense. There is
8	LADY JUSTICE GLOSTER: It seems to me the judge is deciding	8	no sense in the legislature saying: we'll give you this
9	it on both scenarios in paragraph 26, that he's right	9	right but for a period only which does not reflect the
10	and that he's wrong. So I would be interested to have	10	underlying right. And certainly no sense in the
11	one example on the hypothesis that he was right, and one	11	legislature saying: you can continue to have compound
12	on the hypothesis that he was wrong, explaining why this	12	interest mounting up on the interest which has so far
13	point still matters to you.	13	accrued provided only liquidator keeps back £1 of
14	MR DICKER: Yes. I'm sure we can produce that in time for	14	principal and ensures that he doesn't pay all debts in
15	tomorrow.	15	full.
16	On the construction point, I've made the point in	16	LORD JUSTICE PATTEN: Speaking myself I'm not sure this
	relation to (inaudible) and doesn't make sense. From	17	
17 18	a construction point of view, we say that the judge is	18	isn't just another example, if you like, of why you say
19	right in terms of the wording of the rule, it says you	19	the principle in Bower v Marris ought to apply in this situation. I mean, once you are working on the
	receive interest in respect of your debts for the period		
20	1 2 1	20	hypothesis it doesn't apply and the judge has that point
21	they are outstanding. When you apply those words in the	21	right, I think as a matter of construction of the rule
22	context of compound interest, you need to take into	22	it becomes much more difficult for the reasons my Lord
23	account the logic of compound interest, which is	23	has indicated to run this argument.
24	essentially that interest is effectively treated as it's	24	MR DICKER: There a separate argument of construction which
25	capitalised, it's treated as if it was part of the	25	I've made. Can I put it this way: I accept that if we
	Page 153		Page 155
1	principal. It doesn't make sense in that context to	1	are right on Bower v Marris then this obviously becomes
2	say: you've been paid everything so your debt is no	2	a lot easier. I don't accept if we're wrong on
3	longer outstanding, therefore no further interest should	3	Bower v Marris this issue necessarily goes as well.
4	run. If you do say that then you are necessarily	4	And as I say, issue 3 is important for those
5	negating the right to compound interest which you have	5	creditors with the right to compound interest because
6	essentially just said is reflected in the rules.	6	Bower v Marris even if it does apply doesn't give them
7	LORD JUSTICE PATTEN: But I mean, those debts in the	7	as much as compound interest would.
8	relevant rules I think we all accept are the debts that	8	LADY JUSTICE GLOSTER: Right. So that's section J of your
9	you are able to prove for. So they're not going to	9	skeleton.
10	include this claim for interest.	10	MR DICKER: Yes. There's a further question the judge
11	MR DICKER: Well, the debt which is proved for will not	11	refers to right at the end of 26, is the one I want to
12	include post-insolvency interest, that's right.	12	turn to next, where he says in the last sentence, second
13	LORD JUSTICE PATTEN: Exactly.	13	half:
14	MR DICKER: If you say that the creditor is nevertheless	14	"This sub-issue does not therefore arise. In any
15	entitled to compound interest on that debt, then when	15	event, for the reasons given in relation to issue 2A
16	you get to the stage of distributing the surplus you	16	I will hold that a creditor will not have a non-provable
17	look at what has happened since the date of	17	claim of the type identified."
18	administration. You have principal let's assume no	18	So the next pair of issues are issue 2A, which
19	accrued interest up to the date of administration	19	involves declarations 5 and 6. Dealing with each of
20	principal proved. From that date, apart from the	20	these in turn, starting with declaration 5, one looks at
21	administration, compound interest accruing on the	21	that on the list of issues:
22	principal.	22	"If and to an extent the statutory interest paid for
23	LORD JUSTICE PATTEN: Yes.	23	a creditor on his proved debt under 2.88(7) is less than
24	MR DICKER: Is that interest effectively being treated as	24	the amount of interest to which that creditor would
25	capitalised? When you try and determine for the	25	otherwise have been entitled in respect of that debt,
	emphanised. When you ary und determine for the		
	Page 154		Page 156
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1	the creditor does not have a non-provable claim for the	1	through the process of proof, you reverted to your
2	difference."	2	contractual rights, you are then paid in full. The only
3	So the issue arises in this way: we say that	3	difference is you now have, in addition to payment of
4	rule 2.88 is intended to reflect creditors' full	4	proved debts, you have an express provision dealing with
5	entitlement, whether in respect of Bower v Marris,	5	post-insolvency interest, which comes out first before
6	whether in respect of compound interest or otherwise.	6	you get to non-provable claims.
7	But assume we are wrong about one or all of those	7	LORD JUSTICE BRIGGS: Is it common ground that if you have
8	aspects, the question is whether or not the shortfall in	8	one it's on the same step of the Waterfall as the
9	the interest which a creditor is owed constitutes	9	currency conversion claim, for example?
10	a non-provable claim payable after interest under 2.88,	10	MR DICKER: I don't know whether it's common ground. It's
11	but before any distribution is made to the subordinated	11	certainly our submission that it is. We're not
12	debt or the shareholders, potentially along with every	12	suggesting that there is any ranking of non-provable
13	other non-provable claim.	13	claims. I mean there obviously was in section 132, but
14	LADY JUSTICE GLOSTER: You say this arises even if you have	14	you would need, I think, to have an express statutory
15	lost down the line previously?	15	provision for that to occur. Otherwise, it's simply
16	MR DICKER: Yes. The issue only arises if I'm	16	something that hasn't been paid through the process of
17	LADY JUSTICE GLOSTER: I can see that.	17	proof and
18	MR DICKER: If I have lost then we say we have	18	LORD JUSTICE BRIGGS: In general principle would (inaudible
19	a non-provable claim to the balance	19	words).
20	LADY JUSTICE GLOSTER: Even though the judge has said the	20	MR DICKER: Yes.
21	statutory scheme foreclose you or precludes you.	21	LADY JUSTICE GLOSTER: So this is issues 2A, declarations 5
22	MR DICKER: Our submission, and the reason why we say we	22	and 4, looking at your list of issues.
23	have such a claim, is because the judge was wrong to	23	MR DICKER: Yes.
24	hold that 2.88 was a an exclusive code. There are two	24	LADY JUSTICE GLOSTER: I'm not sure I understand the
25	issues in a sense: what does 2.88 mean? The judge could	25	difference because it's 4.15 between declaration 5
	Page 157		Page 159
1	have been right in relation to that. The other question	1	and declaration 4.
2	is: is it an exclusive code? And the judge could have	2	MR DICKER: I've outlined five, which is essentially a claim
3	been wrong on that question.	3	by a creditor with an underlying right to interest to
4	LADY JUSTICE GLOSTER: And if it's not an exclusive code	4	a non-provable claim of the first. The second is to try
5	even if he's right on Bower v Marris you have this	5	and deal with the position of a creditor who doesn't
6	non-provable claim.	6	have an underlying claim to interest, who's only
7	MR DICKER: Correct. It does make a difference in the sense	7	entitled to interest at the Judgment Act rate under
8	at this stage of the argument it only matters to	8	2.88(9). And the question is if the office-holder
9	a creditor with something that would rank as	9	essentially takes ten years or so to pay that amount of
10	a non-provable claim. So if he has a contractual right	10	interest provided for in the rules, is there any other
11	to interest, he's not paid in full under 2.88, he may	11	way essentially of getting interest on that sum? I can
12	have a non-provable claim. If he has an underlying	12	deal with the second declaration 4 very shortly.
13	statutory right to interest not paid in full, again he	13	LORD JUSTICE PATTEN: So he has to get it out of the
14	may have a non-provable claim.	14	statutory provisions or nothing else, because he has no
15	But the one group who this stage of the argument	15	residual contractual right he can rely on.
16	does not assist are creditors who have no underlying	16	MR DICKER: Correct. So it's a way of trying to build on to
17	rights to interest. His only right to interest is under	17	the right which 2.88(9) gives him, and says there are
18	2.88(9); namely, at the Judgment Act rate, whether or	18	circumstances in which on the construction of 2.88(9) he
19	not they have a claim to interest.	19	is entitled to actually interest on interest.
20	LORD JUSTICE PATTEN: So this a reversion to your	20	LORD JUSTICE PATTEN: On interest.
21	contractual rights, essentially, at the tail end of the	21	MR DICKER: It's a short point and I can deal with it
22	distribution process.	22	shortly.
23	MR DICKER: Yes. This operates actually very like the	23	LORD JUSTICE PATTEN: And the judge dealt with it quite
24	regime that used to operate in liquidation prior to 1986	24	shortly.
25	where the court held if you don't get paid in full	25	LADY JUSTICE GLOSTER: Yes. I think we meet deal with that
	D 450		D 470
	Page 158		Page 160

1	tomorrow morning. Because this court rises at 4.15.	
2	MR DICKER: Sorry, I had understood we were sitting till	
3	4.30.	
4	LADY JUSTICE GLOSTER: We will not be sitting until 4.30.	
5	Thank you very much. Not before 10.30. There is no	
6	single judge application. There is simply a hand-down	
7	of the judgment. So everybody should be prepared to	
8	start at 10.30 although you have been listed not before	
9	10.30.	
10	MR DICKER: We will need to find 15 minutes of my	
11	submissions to excise before tomorrow but I am sure	
12	I can do that.	
13	LADY JUSTICE GLOSTER: Thank you very much.	
14	(4.15 pm)	
15	(The hearing was adjourned until	
16	the following day at 10.30 am)	
17	Culmining by MD DICKED	
18	Submissions by MR DICKER3	
19		
20		
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22		
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25		
	Page 161	

<b>A</b>	142:20 144:7,25	131:5 132:18	129:6,8 137:8,14	allowed 34:10
$\frac{1}{A148:20}$	146:17 150:25	134:11 136:12	137:22 138:4	113:22
<b>abandon</b> 145:8	154:19 155:13	138:10,17 158:18	144:6,21 145:12	alludes 53:17
able 6:8,13 32:21	accrues 11:7 109:7	160:7	146:12,24 147:12	alter 85:9 88:11
32:25 55:18 56:11	145:15	acted 79:10	154:18,19,21	alteration 126:9
81:18 90:9,12	accruing 29:6	actions 85:19	administrative	alternative 10:7
102:17 103:7	42:16,20 43:8,21	acts 76:5,13 106:9	95:13	44:9 129:5 137:18
154:9	109:11 120:25	109:15	administrator	amend 92:24
abolished 135:20	133:25 154:21	actual 31:25 38:9	17:18 23:2 25:8	amended 56:2
absent 128:16	achieve 4:24 14:1	104:22 131:8,11	administrators 4:7	amount 1:19 7:23
absolutely 6:18	19:3,4 20:23 21:7	131:19 136:5	8:12 101:12 135:1	8:12 15:12 20:21
15:20 22:15 24:4	26:20 94:2 128:25	139:3	145:21 146:10	26:10 39:10 45:24
31:15 37:5 66:2	133:15 134:14	add 4:8 25:25	admission 122:6	46:2 51:23 64:7
132:21 152:15	achieved 20:13	65:19 119:13	Admitted 112:3	72:25 74:6,25
absurd 64:19 65:1	132:24 149:5	added 4:11	adopt 129:21	75:7,24 81:7
accept 45:12 47:25	act 6:16 7:1 9:24	adding 94:8 119:16	adopted 10:4 56:24	110:18 114:22
90:14 104:9	15:7 22:18 31:17	<b>addition</b> 57:4 97:10	70:14 81:20	121:11 122:14
112:23 154:8	31:19 33:8 37:4	150:21 159:3	101:20 126:14	134:16 139:12
155:25 156:2	37:12 38:10 50:16	additional 31:15	127:13	144:9 146:18,22
accepted 7:15	51:18,20 53:2,12	40:12 45:22 48:15	adoption 127:6	147:3,5,20 148:18
58:12	53:23 54:3 56:5,7	152:25 153:6	affect 81:10,11,12	150:10,16 151:23
accidental 84:22	56:9,17 57:1,4,24	address 138:22	affords 79:21	151:24 156:24
account 14:19,22	58:2,14 60:24	151:11	aforementioned	160:9
14:23 20:16 21:2	61:5,21,25 63:3,7	addressed 22:7	74:20	amounts 52:3
23:9 29:7 32:17	66:17 70:9,14	addressing 103:19	afraid 2:13 16:21	amused 3:16
42:11 65:7 70:18	71:12 72:8,11	129:16	ago 28:5 99:4 152:7	analogous 9:12
73:2,18 75:22	78:9,23 80:23	adhere 122:3	agree 25:23 130:3	analogy 44:22
84:5,9 108:12	81:3 85:19 86:14	adjourned 161:15	141:13	141:10
114:24 115:4	86:19 87:16,20,25	adjournment 86:25	agreed 2:6,23 3:12	analyse 10:1
121:15 125:13	88:4,6,10 89:2,5	adjudication 79:11	119:9 145:10,11	140:23
137:11,15 139:10	89:10,25 90:2,18	administered 117:7	146:11	analysing 10:12
139:22 141:1	91:7,23 92:4 93:4	administration	agreement 4:24	analysis 36:4 43:14
153:23	93:7,10,14 94:22	9:13,21 10:9	12:24,24 84:4	72:21 104:7
accounted 114:21	95:16 96:13,15,19	13:18 16:12 23:5	agreements 128:6	130:22
accounting 20:17	96:21,21 98:5,14	23:8,20 25:2,5	agrees 86:4 121:25	<b>Anne</b> 60:25 63:10
150:2	98:19 101:17	26:16 28:19,23	ahead 2:7 51:5	<b>annum</b> 89:17
accrue 11:13 12:22	102:17,19,24	29:21 30:1,5,11	52:21	124:13
64:24 113:7	103:9 104:24	30:12 31:19 42:9	aid 79:20	annunciated
134:15 135:2	106:9 109:6,23	42:17 43:3 46:25	aims 121:12	120:23
147:13	112:12 117:8,25	50:15 57:8 78:15	Aitchinson 115:21	anomaly 116:19,25
accrued 12:7 23:19	118:1 122:20	106:12 108:3	akin 123:17	answer 3:3,8 5:20
23:24 24:16,19,21	123:18 125:19	109:2,18 112:10	<b>albeit</b> 43:17	14:13 24:2 34:24
26:2 29:9 35:12	126:12,24 127:4,7	112:16,22 113:6	<b>alike</b> 61:19	39:2 59:19 68:25
43:12,13,24 64:2	127:9 128:13,18	115:25 116:20,22	allocating 146:15	87:6 96:23 98:10
78:2 108:23 134:3	129:9 130:17	117:3,6,11 128:9	allow 134:14	99:15 103:19
	<u> </u>	<u> </u>	<u> </u>	<u> </u>

3 April 2017

112 1 140 0
113:1 140:9
143:10 146:13
147:8 148:25
155:3
answered 27:16,17
27:20
answers 27:11
anyone's 56:11
anyway 2:23 69:9
94:21 95:23 103:5
103:6
<b>apart</b> 3:16 10:8
28:19,23 29:20
30:1,4 31:18 43:3
50:15 53:22 70:4
128:8 129:6,25
137:22 138:4
144:6,21 145:12
146:12,24 154:20
APD14 118:5
apparent 25:2
appeal 1:7,9,11
8:11 56:23 57:1
81:22 82:5 102:5
118:10 135:13
143:19 146:9
appeals 4:11
appear 37:13 71:13
116:19 151:12
appearance 49:22
appeared 82:25
appears 32:24
46:19 65:15 79:15
79:17 83:13,21
114:13,15 115:13
117:11 119:8
123:3,5 130:16
132:23
appellant 4:5
appendix 119:8,13
119:14,19 122:5
applicable 10:8
28:19,23 29:20,25
30:4 31:18 43:2
50:14 53:22 70:4
30.11.23.22 70.1
Ī

140:2 148:13,15 149:20 153:21 155:18,20 156:6 <b>applying</b> 32:7 39:7 39:23 40:15 42:8 44:7,12 73:2,18 73:23,25 75:6 84:9 109:12 115:4 115:14 116:16 120:24 122:17 130:7 141:4 <b>appreciate</b> 10:13 126:9
apprehend 83:25
<b>approach</b> 1:23 4:15
6:11,25 15:8
24:13,17 36:1
39:15 43:1 48:7
59:1 134:25 141:2
145:22 150:19
approached 97:4
126:12
approaches 2:4
10:14 98:1
approaching 37:9
appropriate 21:21
32:11,16 43:5
149:20
appropriated 29:8
29:12 32:23 42:19
75:21 121:16
139:21,25 140:4
appropriating
142:4
appropriation 11:1
21:1,14 29:4 41:6
41:10,19 42:5,7,8
47:7 59:5 76:3,14
77:12,14 136:1
138:23 139:4,13
139:15,18 140:2
140:16 141:11,11
approval 56:24
approved 104:4
124:14 141:7

approvements
120:14
<b>April</b> 1:1 24:13
Arden 122:24
argued 145:5
argument 7:15
9:10 20:3,4 48:12
48:16 74:2,16
75:18 76:1,6
140:1 141:14,14
145:22 149:23
155:23,24 158:8
158:15
arguments 1:4 3:23
34:20
arisen 83:5 111:6
112:5
arises 8:22 11:7
14:2 23:16 31:16
43:19 44:18 110:1
111:6 148:21
157:3,14,16
arising 42:24 87:3
144:13
arose 9:8 22:6
69:22 72:20 92:13 93:24 118:11
arrangement 77:24
arrived 73:16 articulation 3:17
ascertain 62:20 ascertained 13:13
85:14,17
ascertaining
114:22
aside 32:15 104:14
asked 152:3
asking 24:1 98:3
152:6
asks 96:25 128:10
asks 90.23 128.10 aspect 7:8 17:23
83:22 149:24
aspects 8:24 16:7
46:20 50:2 157:8
assets 13:9 26:18
assets 13.7 20.10

1 age 103
20 2 (4 22 (0 (
38:2 64:22 69:6
69:11 81:17 84:24
102:21 107:9
111:4 134:22
135:2
<b>assignee</b> 64:3 67:5
68:24
assignee's 74:2
assignees 63:17
74:3,21
assigns 101:12
assist 158:16
assume 1:16 25:25
38:15 93:3 150:17
154:18 157:7
assumed 33:1
80:10 120:22
126:5 130:16
assumes 95:21
assuming 25:14
146:13,23
assumption 17:20
23:16 34:17
attempted 77:11
<b>Attorney</b> 123:11 142:9
attributable 74:11
attributed 74:25
attributing 78:19
Australia 123:6
Australian 99:15
<b>authorities</b> 9:11,16
15:11 16:9 17:3
19:14 21:2 37:13
48:12,17 49:2
50:10,20 51:12
57:13,17,18 58:7
71:6 72:14 79:7
79:23 87:8 89:3
100:3 101:3 102:1
121:21 127:18
139:7
<b>authority</b> 6:8 56:18
56:20 59:1 71:5
80:1 83:9 90:8,10

Day 1

				1 456 101
97:7 101:14 102:7	68:3,4,13 70:1	basic 13:7,19 37:15	<b>bound</b> 76:21	125:21 131:24
103:8,12,22	73:7 77:25 78:10	37:25 41:20 51:3	113:16	132:1
108:16 117:15,16	78:19 79:3 88:17	91:18 116:6	Bower 2:4 5:8 6:24	<b>brief</b> 3:19
123:2,9 131:17	88:25 89:6,23	basis 5:5,14,19,21	8:15,21 9:6 11:5	briefly 53:16
available 81:17	91:4,15,21 92:14	11:23 14:8,17	11:19 12:15,16	130:12
111:5	93:17 94:11 95:1	20:6 25:9,12 39:9	14:14 15:18,24	<b>Briggs</b> 4:17,20 5:2
award 108:7	95:19,20 99:9,14	39:19 40:17 42:2	22:24 24:18 28:25	15:16 16:18,22,25
aware 2:10 47:12	99:21 100:13,14	44:13,24 117:9	29:5 30:10,17	34:15 36:14,23
83:6	100:15 101:8,11	118:14,24 126:12	31:13,25 32:7,14	38:14 39:13,20
	101:12 102:20	127:23 131:15	33:13,24 35:6	40:7,9,20 45:8,10
В	103:1,2,5 129:14	146:11,15,21	36:15 37:6 38:16	48:23 49:7 52:16
<b>b</b> 1:12 4:14 29:18	bankrupt's 64:18	bear 76:24 122:9	38:22,24 39:8,14	53:8 54:17,21,24
back 2:8 29:10 31:5	77:19	142:16	40:16 41:5,9,16	55:3 59:24 60:6,9
31:6,8 35:1 38:6	bankruptcies 100:5	bearing 11:12	42:4 43:23 44:7	65:25 66:3 68:1
46:5 49:25 59:8	-	83:18	46:14 54:13,15	
64:21 65:23 69:14	<b>bankruptcy</b> 6:7,9	bears 76:23	· · · · · · · · · · · · · · · · · · ·	68:12,17 69:1,4,9
74:22 90:19 91:10	7:14 9:5 10:5,11 13:7,17 14:12		55:9,15,20,23 56:18 57:5 25	69:14 71:7,18 72:7 80:9 88:14
92:16 93:16 94:5	,	began 80:22	56:18 57:5,25	
94:17,21 95:15,19	19:10,18 20:8	<b>beginning</b> 59:9	59:4,22 65:6,18	88:23 90:16 93:18
96:17,17 98:7,25	28:5 33:8 44:6	60:11 73:12 76:19	71:6 72:1,13,18	94:6,14,16 95:13
99:21 101:3	47:24 49:18,21	101:4 111:19	80:12,15 81:20	96:12 97:2 98:4
102:21 103:1	50:23 52:6,8,9	begins 75:3	82:16,18 84:8	98:11 99:23 100:4
113:2 115:8	53:2 54:22 56:2	behalf 4:6,10 75:19	86:1 87:5,6,15,24	100:8 103:24
	56:24 57:11,24	benefit 54:14 64:24	90:11 102:11	104:3,8 107:2,13
120:17,19,20	61:12 62:2,13	78:19 113:16,25	103:17 104:1,2,4	107:15 117:17,20
124:1 132:25	63:12 64:25 65:12	153:6	104:21 106:4,7	117:22,25 118:5
135:25 140:20	65:19 66:17 70:11	best 63:4	108:18,22 109:12	120:13 129:15
141:15 149:1	70:17 72:3,5,8,9	better 135:17	110:18,22 114:25	136:5 149:23
155:13	72:13 73:7,17,21	beyond 15:25	115:14 116:16	152:6 159:7,18
background	74:6,24 75:20	<b>big</b> 150:3	117:9,10 118:15	<b>Briggs'</b> 48:8
125:10	76:22,25 77:7	billion 8:14	118:22 119:23	<b>bring</b> 109:4 121:12
backtracking	78:15,23 80:18	<b>bit</b> 8:20 36:3 54:19	120:9,23 121:6,12	<b>broad</b> 57:10
45:10,12	86:10 89:1,3,11	58:3 69:2 92:9	121:17 122:12,16	broadly 1:23
balance 45:21	89:18 90:2 93:19	94:19 97:18	123:3,22 124:18	<b>Bromley</b> 57:15,19
88:15 100:23	94:9,19 95:8 99:2	bizarre 151:1	126:7 130:7,8,18	59:11 69:21 79:16
157:19	99:8 100:12	<b>Blair</b> 123:11,22	131:2,9,15,21	91:12 92:17 94:19
<b>bank</b> 90:12 119:7	106:10 107:25	blindingly 106:1	132:8,19 133:24	96:18 98:6,25
121:8	126:15,20,25	<b>blush</b> 37:12	134:10 138:7,14	101:2
banking 113:22	127:8,21 129:22	<b>bolted</b> 92:12	139:2,6 141:5,16	brother 86:9
115:22 116:4	136:12,17 137:1	<b>bond</b> 73:15 74:12	143:12,16 146:16	<b>Brothers</b> 15:5,22
bankrupt 38:7	137:19	77:9	148:8,11,13	58:5 117:16 118:7
52:22 59:19,25	bankrupts 91:19	<b>bonds</b> 75:13	152:21,24 153:5,5	118:9 132:17
61:22 62:6,11,12	bar 40:17 51:25	book 68:9,22	155:18 156:1,3,6	144:12
62:15 63:19,20	based 7:9 34:17,17	<b>bottom</b> 60:2 63:8	157:5 158:5	<b>brought</b> 119:16
64:1,11,13,22,25	46:19 47:6 114:3	72:23 76:2,10	<b>Bracey</b> 115:23	Bs 4:21
65:1,23 67:1,10	bases 137:18	78:8 85:5 139:8	break 47:14,17,20	<b>build</b> 160:16
			, ., .	

				1 450 100
<b>built</b> 49:22	87:8,12 101:21	106:19 109:10,13	certainly 2:20 3:9	146:20 154:10
<b>bundle</b> 16:9,10	103:22 115:20	110:17 115:1,19	55:23 59:1 72:12	156:17 157:1,10
17:11 48:17 49:2	123:11 142:18	115:23 117:13,14	76:9 81:3 98:18	157:13,19,23
71:6 72:1,16	Canada 123:6,12	120:17 123:11,15	99:25 103:7,17	158:6,10,12,14,19
101:3 106:15,17	142:10	123:16 124:24,25	108:2 122:22	159:9 160:2,4,6
106:24 124:2	cap 81:13 101:6	126:22,25,25	133:15 151:21	claims 1:10,17 2:5
127:18 128:25	capable 120:7	131:21 132:13	155:10 159:11	13:12,12 38:1
144:17	capital 84:2 119:22	133:2,19 140:21	certificate 63:16	44:23 46:15 51:11
bundles 87:7	120:5 121:17	142:13 151:24	78:2	52:25 53:25 89:9
115:19	122:8	152:17	cetera 101:10	92:3 93:23 94:3
Butterworths	capitalised 153:25	cases 20:3 26:16,23	Chancellor 60:1	97:1 99:5 118:11
16:14	154:25	35:4 54:15 55:14	75:3,4 107:3	119:2 124:14
	capture 130:9	61:17 75:12 79:9	139:5	127:22 134:22
C	care 45:18 134:4	83:10 85:19 93:23	Chancery 107:2	159:6,13
Cadbury 48:23	careful 22:21	99:15 115:17	112:8 113:5	clarify 112:15
49:3	carefully 79:15,18	116:1,5 118:9	<b>change</b> 10:6 22:19	clause 101:8
calculate 5:16,18	carried 49:17 58:22	141:15,16,25	29:23 37:4 56:3	clean 97:4
5:21 15:11 20:21	64:23 74:3	142:1	102:19 103:11	clear 18:6 28:12
27:25 66:6	carries 24:18	Cask 115:21	136:11,17 138:9	56:10 72:10,12
calculated 6:4 14:8	Carroll 101:23	category 37:18,19	<b>changed</b> 6:9,17	112:18 126:16
14:17 20:14 27:13	carry 12:9 19:17	69:6	52:7 53:1 70:25	127:11 152:15
31:12 51:24 59:20	50:6 67:14 71:8	cause 138:7	81:8 105:7 125:15	clearly 4:20 58:19
66:11 67:16 78:12	75:14 107:6,11	caused 31:22	changes 10:1 22:18	clients 26:7 80:7
82:15 85:25 115:5	110:1 111:16,23	caveat 119:14	22:21,22 50:3	closely 135:22
121:22 143:11	112:11 113:7	ceased 56:18,20	136:4,10	co-obligor 75:21
146:14	114:3,11,12 120:5	75:23	chargeable 128:4	77:2
calculating 1:18	134:23,24	ceases 155:5	charged 120:2	code 45:4,14 49:22
5:13 12:22 14:3	carrying 42:1	celebrated 81:21	charges 90:1	126:20 157:24
15:1 21:16 23:13	60:21 64:18	cent 23:19,24 24:14	check 98:10,15	158:2,4
35:5 39:5,18	case 6:14,20,23	24:15 26:1,5 54:2	112:20	codified 19:19
44:16 75:6 110:18	9:15 16:3 23:17	54:9,11 55:20	<b>Chitty</b> 9:14 57:6	138:8
139:11,12 144:25	24:11 26:14 27:9	64:8,10 67:25	110:9 111:3	<b>codify</b> 137:24
145:14	37:10 41:18 47:2	70:7,13,23 85:11	115:13 116:6,12	codifying 69:20
calculation 20:10	48:15 55:16,19	87:21 88:3,9,13	117:1	<b>column</b> 110:22
21:15,23 23:10	56:11 57:6 59:10	88:19 89:20 90:21	circumstances 14:7	111:18
24:24 25:20 38:23	59:12,15 60:24	90:24 91:8 92:1	71:15 108:18	combination 10:13
39:6,19,22 40:15	63:11 64:10,14	92:22 102:25	119:1 160:18	88:21
55:9 74:14 75:11	72:4,20 77:3	105:12,13 110:6	cited 118:15 123:9	combined 10:12
105:21 119:8	78:21 79:8,20	113:23 115:11	123:25	combining 137:19
137:11 139:12	82:9,22 83:13,15	124:13 128:17	claim 1:19,21 12:7	come 5:3 12:11
141:17	83:22 84:25 85:15	134:1,11,13 146:4	43:4 45:16 46:1	22:17 29:2,14
calculations 119:24	86:20 87:6,12	<b>centum</b> 89:17	46:10,10,12 65:3	30:15 33:22 55:12
120:21,23	98:3 102:12,14	<b>centuries</b> 98:13,14	73:1,14 94:4 99:5	60:20 63:9,21,23
calculator 121:18	103:15,16 104:21	<b>certain</b> 2:1 46:2	111:14 112:25	63:23 64:21 91:1
<b>called</b> 5:7 9:15 57:6	104:22 106:11,11	71:15 98:6 102:21	120:7 135:19	99:3 104:6,25

				Page 100
107:7 118:19	companies 80:22	62:1,10 63:12	60:24 63:9,15	contending 152:16
150:21	80:23 101:22	65:12 81:8	83:15,22 147:18	contenting 132.10 context 6:20 12:23
comes 13:21 19:15	114:25		consideration	22:7 26:23 46:17
		concepts 51:13		
28:7 36:11 43:22	company 23:4,8	concerned 4:14	76:16 80:12 86:12	55:21 57:7 67:20
46:16 49:16 64:15	81:5,6 82:6,7	21:11 24:1 33:22	considered 6:13	88:24 93:22 100:5
83:7 100:16	83:16 84:6 94:8	41:1 47:5 55:11	11:21 16:8 63:11	100:6 107:20
120:17,19 141:22	113:22 115:22,22	84:16 94:10,12	79:19 82:22	112:22 115:15
159:5	company's 134:22	106:11,19 123:2	116:21,23 117:7	116:12 128:12
coming 98:12 112:9	compare 39:9	126:11 144:18,20	118:17 122:2	129:15 141:25
113:5 135:25	compels 37:2	152:21	123:5 133:3	144:13,14,19
comma 93:11,13	compensate 26:6	<b>concerns</b> 5:8 41:4	140:21 151:12	148:10,23 153:22
96:4,8,9	compensated 44:21	54:5 82:9 125:17	considering 13:4	154:1
comma's 96:13	133:22 134:12	139:10 144:1	65:21 83:4 92:5	continually 83:5
commenced 72:4	compensation	conclude 138:20	123:24	continue 12:22
commencement	31:22 51:15 70:12	concludes 125:14	considers 63:13	121:8 135:2 144:8
13:17,24 42:17	complete 49:22	conclusion 5:3,25	consistent 32:6	147:6,13 149:11
82:13 93:24 99:2	completed 94:8	7:9 9:1 11:22	36:23	150:24 151:15
124:12 126:19	complicated 52:7	22:23 29:3 37:2	consistently 14:13	155:11
137:7,14	152:14	46:3,4,19 47:6	14:16 37:14	continued 11:13
comment 132:14	<b>compound</b> 11:8,15	143:9 150:2 155:7	consisting 64:23	26:11 64:24 87:25
comments 141:25	11:22,24 12:5,15	concurrency 1:10	consists 68:19	90:11 103:17
commercial 12:23	46:15 144:1,8,14	Confederation	consolidated 113:9	119:20 146:21
133:20 134:18,19	145:3 146:5,13,17	123:12 142:10	constitutes 157:9	continues 78:1
commission 60:14	146:21,25 147:1,2	conferred 54:13	constitution 3:7	119:22 121:22
61:12 62:21 67:3	147:6,12,19,21	confine 74:13	construction 17:13	122:9
67:6,17,23,25	148:4,10,13,17	confined 61:17	22:3,4 27:11 35:8	continuing 146:17
68:5 70:17 74:8	149:7,8,11,16,19	111:13,14	46:6 48:2 61:17	151:7
75:2 77:17,19,20	150:4,9,12,23,23	confirmed 18:21	90:13 133:10	contract 11:15,25
78:2,12,16	151:2,3,7,14,15	confirming 18:1	135:25 148:21,24	12:1,8 27:2 28:14
Commissioner 61:6	152:17,24 153:4,7	confirms 23:6	149:24 151:10	29:17 30:13 31:5
commissioners	153:22,23 154:5	conformity 120:22	152:20 153:16,18	31:6,9 42:1 43:8
62:12,20 64:6,12	154:15,21 155:3,4	connected 4:21	155:21,24 160:18	43:18 60:21 84:4
101:9	154:13,21 155:5,4	143:25	construe 10:18	109:8 111:16
commissions 87:10	157:6	consent 107:3	94:22 97:5	121:21 128:20
common 13:13	compounding	consequence 13:14	construed 8:9 48:3	142:14
51:21 55:8 72:12	144:7 145:15	13:19 84:22 85:4	101:23 102:9	contractual 21:21
80:16 87:14	comprehend 92:8	125:16 132:21	construing 71:2	26:24 28:21 30:18
113:16 118:21	comprehend 92.8 computation 73:6	149:3 151:9	97:6	30:21 33:6 43:4
	<b>1</b>		97:0 contain 33:12	43:16 44:21 47:3
119:4 126:20	computed 73:1	consequences 7:18		
130:5 132:18	121:4,8	35:19 133:13	133:6	51:11,13 71:9
133:4 136:12	computing 62:20	consequential	contains 66:25	86:21 102:24
145:9 159:7,10	74:12	143:10	106:18 123:16	104:7 106:2,3
Commonwealth	conceive 36:11	consequently 74:11	contemporanea	121:1,20 122:10
6:12 9:16 123:4	concept 10:25	113:14	62:22	128:3 134:9
133:2	22:13 37:23 38:9	consider 58:22	<b>contend</b> 112:1,2	142:17 145:25
	<u> </u>	<u> </u>	<u> </u>	<u> </u>

				1 age 107
146:4,6,21 158:10	<b>country</b> 145:22	78:20 81:13 90:5	114:16 116:14	94:14 98:23 99:1
158:21 159:2	county 32:22	92:20 96:16 98:3	123:19 127:3,10	99:1,7 100:24
160:15	104:14 131:9	100:13 107:6	127:15,21,24	107:8 113:23
contrary 30:23	couple 110:20	108:19 112:9	128:14 129:11	119:16,18 120:10
33:14 97:6 122:18	course 2:15 3:4 4:6	113:5 114:2	130:17 131:4	120:19 126:19
155:6	9:10 13:14 15:5	121:13,19 129:7	132:22 133:18	128:1 141:20
control 13:1	19:9 22:17 32:8	133:25 134:7	134:8,12 135:4,9	142:12,15 143:5
convenience 77:25	32:19 39:21 41:4	139:24,25 142:1	134.8,12 133.4,9	147:5 150:23
	44:5 55:22 64:25	145:23 146:19	, , ,	
<b>convenient</b> 47:15			137:6,17,25	154:17,19,20
86:22 131:23	75:12 78:14 84:20	154:14 156:16,23	138:11 140:4	David 5:10 8:25 9:8
Conversely 117:6	85:7,17 104:6	156:24 157:1,9	147:11 156:5	9:25 16:7 17:11
conversion 1:10,17	122:13 137:12	158:9 160:3,5	158:16	41:2 74:17 108:24
1:19,21 44:23	court 1:6,14,20,24	creditors 2:2 7:18	creditors' 47:3	116:18 123:25
45:11 118:11	2:1,4,7,17,25 4:1	7:22 8:1,5,6,7,13	130:9 157:4	<b>Davies</b> 15:21
159:9	7:25,25 11:3 38:5	8:16 13:9 15:2	credits 90:17	<b>Davis</b> 118:25
Convey 16:23	47:9 51:22 56:23	20:13 23:6 25:12	critical 57:12 90:4	119:11 122:1,17
<b>copies</b> 16:17,25	57:1 81:22 82:5	25:20 26:6,19	<b>criticise</b> 7:5 58:9,25	144:12
<b>copy</b> 16:11,13 60:6	83:4,9 84:23 85:8	30:6 31:22 32:3,5	criticised 6:15 7:1	day 115:5 121:18
core 17:11 90:16	102:5 104:14	38:7 46:7 51:9,14	criticising 2:15	152:5 161:16
128:25 144:17	106:22 108:6,15	52:2,23 53:23,25	criticism 132:7	day-by-day 109:11
Cork 9:24 10:4	112:8 113:4,10,15	54:7,8,18 55:10	133:1,6	days 152:2
90:15 118:18	113:22 114:5	56:8 59:16 60:20	<b>currency</b> 1:17,19	deal 4:3,23,23 5:12
126:4,6,14,17	118:10 128:5	61:7,19 62:9,11	1:21 8:1,5 44:23	7:8 9:12 10:24
127:2,3,7,12	131:9 135:13	62:14 63:5,21,24	45:10 118:11	41:4 55:21 56:5
129:21 132:6,20	158:25 161:1	64:9 65:2,8,18	135:14,16 159:9	65:17 77:15 78:8
corporate 50:25	courts 6:23 7:16	67:2,6,13,23 68:4	cut 61:15 65:14	87:3 120:18
100:6 136:13	14:16 20:8 21:12	68:16 69:24 70:2	94:1	124:21 125:17
137:2	32:22 37:18 96:22	70:6,16,21,23	<b>cut-off</b> 13:11 93:18	143:25 160:5,12
correct 7:17 15:20	98:6	71:8,16 73:7	99:1,7	160:21,25
25:10 50:2 80:1	covered 93:1 99:25	77:21,25 78:11,14	cuts 45:4	<b>dealing</b> 1:9 12:17
86:17 94:9,15,17	100:1	79:4 81:4,15,18		17:9 25:4 26:17
94:18 102:23	<b>CPR</b> 117:2,18,21	82:11 83:16,17	<b>D</b>	46:13 50:9 51:2
109:17 143:10	118:1	84:7 85:9,19	<b>D</b> 118:25	52:11,18 53:18
152:16,21 158:7	crack 2:24	87:21 88:6,8,12	date 13:11,13,24	59:14 68:10,21
160:16	Cranworth 81:1,2	89:24 90:5 91:5	23:20,24 24:16	69:19 75:12 86:15
correctly 10:1	81:9	91:14,19,22 95:17	25:2 26:1,3,6	86:17 88:2 107:23
136:8	creativity 49:23	95:20,23 96:14	41:21 42:6,10,21	107:24 117:23
corresponding	creditor 11:8 13:1	97:18 98:1,21,22	43:9,25 46:25	118:10 124:2
8:17	21:20 24:22 32:11	98:23 101:13	61:15 65:14 66:9	126:1 136:16
cost 95:21	32:16 39:9,14,22	102:21,24 104:10	67:17,24 70:17,19	156:19 159:4
costs 89:25 107:10	, ,	102.21,24 104.10	71:15 73:4,20	deals 17:13 62:15
	40:17,21 41:23		74:7 75:2 77:17	
Cottenham 75:5	42:12 43:4,6	109:21 110:12	78:12,16 84:11	83:24 84:15
counsel 118:21,22	55:16 61:23 63:22	111:8,11,12,15,21	85:3,14,23 87:11	133:10
118:24 132:19	64:20 72:22 74:8	111:23,24 112:1,2	89:16 93:18 94:1	dealt 5:10 11:18
145:21	75:15 76:15 78:18	113:16,25 114:11	07.10 73.10 77.1	12:23 26:18 32:9
	l ————————————————————————————————————	l	I	I

				Page 168
	1	1	l I	
37:24 41:6,12	21:12 23:3,7,12	115:23 139:24	<b>depend</b> 3:6,8 139:3	33:3,5 34:20
55:19 59:12 72:6	23:14 26:1 27:9	152:3	depending 1:11,23	35:18 37:1,24
72:17 88:4 117:24	27:20,23,25 35:15	<b>decided</b> 7:7 15:7	9:20 24:8 49:16	38:12 39:2,17
123:7 124:25	35:21 36:2,5,6,7	72:2 82:11 110:24	152:11	40:3,8,12,23
125:1,9,24 126:24	36:20,22 37:16,23	112:6 113:3	<b>depends</b> 48:1 59:4	41:10,12 45:2,9
136:21 138:24	37:24 38:18,21	114:17 118:17	95:18 140:1	45:12 47:16,22,23
143:18 144:15	40:24 41:20,22	135:13	deprive 85:10	48:20,22,24 49:3
146:8 152:19	42:6,12,18,19	deciding 135:22	depriving 77:7	49:9,12 52:17
160:23	43:7,11,24 44:14	153:8	derive 4:21	53:5,7,10,15
<b>death</b> 60:13	45:8,9 46:21,24	decision 1:5,24	derived 41:18 42:4	54:15,20,23,25
<b>debate</b> 149:21	51:4 52:13,20	7:24 9:14 80:14	describe 141:16,17	55:6 57:18,24
debt 10:8 11:12	60:21 61:6,8,10	82:17 83:6,11	142:3	58:4,15,25 59:8
12:3,21 17:19	61:11 62:7,20	87:7 101:21 103:4	described 52:10	60:1,8,11,17
19:22 28:19 29:20	63:19,20 64:23	112:4 118:10,16	65:5 66:4 102:10	65:21 66:2,5,16
30:4 33:17 35:12	67:4,7,9,13,15,24	119:1 123:10	128:23 133:3	66:24 68:10,13,23
36:25 41:25 43:3	68:6,8,9,11,18,20	decisions 81:21	describes 55:14	69:3,6,12,17
45:15,17 50:14	68:22 69:5,22	82:4 118:15 123:7	describing 6:24	71:11,23 72:10
53:22 61:23 64:11	71:8 73:9 78:11	declaration 5:9	description 142:13	76:7 80:6,11,21
65:19 70:4 74:5	79:5 83:18 85:2	74:23 111:12,13	designed 26:20	81:25 82:1,4 86:5
74:25 77:8,22	85:14 89:7,10,13	143:10 144:2,3	130:9	86:7,17 87:2,3,13
78:4,22 85:17	89:15,17,19,20	156:20 159:25	desire 119:13	87:19 88:15,25
90:23 93:19 95:4	90:21,24,25 95:10	160:1,12	despite 7:21 115:15	90:9,20 92:11
95:8 101:15	97:23,25 99:1,14	declarations	detail 10:21 53:16	93:6,11,13,20
104:14 107:6	99:20 100:21	156:19 159:21	56:5 100:1 106:16	94:10,15,18 95:5
109:7 113:13	103:6 104:4	declared 74:6,24	determinative	95:9,18 96:1,6,9
114:2 121:19	105:20,24 107:10	85:16 111:10	53:13	96:19 97:3,16,20
127:25 128:4,8,24	107:11,19 111:13	decree 73:14 107:9	determine 154:25	98:10,15,24 99:15
129:25 137:21	111:15,23 112:1	108:12 109:2,18	develop 8:19	99:19 100:3,7,10
138:4 142:8,25	112:11 113:7	109:25 112:10	developed 61:3	101:1 102:1,3,13
144:6,21 145:1,12	114:11,12 128:2	113:6,23,24	development 49:24	102:16 104:2,6,9
145:15 146:12,24	134:23 135:2	decrees 109:22	57:10 62:16	105:7 106:22,24
147:22 148:6	136:23 137:8	deemed 121:5,9,10	Dicker 1:11,15	107:1,5,14,16,25
149:6 154:2,11,15	141:7 147:4 148:3	deeming 142:23	2:10,13,20 3:3,8	108:2,8,9,11
155:1,4 156:23,25	150:15,18 153:20	143:3,3	3:18,19 4:14,19	111:21 112:17,20
157:12	154:7,8 155:14	defect 150:5	4:22 5:6 6:18	113:1,3 116:2
<b>debtor</b> 32:17 33:2	159:4	defendants 74:3,21	9:18,20 11:17,21	117:19,21,23
41:22 49:14 72:20	deceased 9:13,17	deficiency 61:18	12:1,5,14 14:24	118:1,4,6 120:15
72:21 76:15 134:5	9:22 57:8 106:12	deficient 78:17	15:20 16:17,21	120:19 121:24
134:16 135:7	108:3 112:10	delay 31:22 51:16	17:2,7,9 18:8,14	122:24 124:6,9,21
debtor's 77:25	113:7 117:4,11	70:13 84:22	18:24 19:2 20:20	124:25 125:6,9,24
debtors 98:8	deceased's 116:20	demonstrates	22:15,17 23:21	129:17 130:15,21
debts 5:22 13:22	116:22	108:17,21	24:4,10 25:10,23	130:23 132:3,4,21
17:21,24 18:1,15	<b>December</b> 119:16	deny 146:4	26:8,13 27:14,16	136:7,10 140:18
18:18,19 19:5,16	119:18	deny 140.4 depart 83:12	28:3 30:15,20	140:20 141:13
20:2,5,12,18 21:8	decide 83:8,9 90:8	departure 95:25	31:8,15 32:13,18	143:18,23 145:3
20.2,3,12,10 21.0	ucciuc 03.0,7 70.0	ucparture 33.23	31.0,13 34.13,10	143.10,43 143.3
	·		·	

				Page 109
148:1,9,20,23	directs 61:22	99:3 154:16	<b>doctrine</b> 29:4 76:13	72:4
148:1,9,20,23	disagrees 124:20	distribution 8:2	document 4:1	earth 20:6 130:8
151:23 152:9,13	disappear 106:5	14:1 18:20 20:24	119:9	easier 104:7 156:2
152:23 153:14	130:8 138:7	21:7,11 30:8	doing 8:19 9:6 20:9	easiest 10:22 17:9
154:11,14,24	disappears 1:22	37:16 38:1,2,2	34:18 70:24	easy 103:3 139:17
155:24 156:10	disapplied 22:24	40:25 61:9 65:13	104:15,16 116:10	155:3
157:16,18,22	disapplied 22.24 disapply 7:7 30:2	88:16,20,23 89:6	116:11 128:10	echoes 148:10
158:7,23 159:10	37:6 133:23	89:12 94:2 100:19	129:11	echos 144:11
159:20,23 160:2	138:20	111:5 112:3	<b>doubt</b> 75:11 79:18	effect 2:2 15:16
160:16,21 161:2	disapplying 30:10	135:15 140:24	84:14 86:12 153:1	16:3 28:5 39:21
161:10,17	discharge 11:10,11	157:11 158:22	draft 74:4	48:12 51:3 52:2
differed 70:20	62:2,10 63:12,15	distributions 26:21	draftsman 138:15	52:12,19 56:4,10
difference 9:21	63:16,20 64:1,4	27:2 51:6 52:4,15	draw 109:16	56:12 63:13,15
54:5,23 105:2	75:8,9,15 76:22	divide 39:11	drawings 114:10	64:4 74:20 77:7
106:4 131:18	94:12 95:3,5,6,9	divided 85:22	drawn 8:4 78:25	77:15 78:6 87:9
148:16,19 157:2	99:20 100:21	divided 83.22 dividend 23:18	92:7	102:24 103:9,13
158:7 159:3,25	122:10,14	24:12,14,17 29:11	drive 105:21	114:5 115:17
differences 54:17	discharged 94:11	33:20 35:11 42:18	drop 111:17	126:4,5,13 131:18
59:6 151:21	94:25 99:9 100:13	43:9 73:3,4,19,21	dropping 62:3,17	133:10 135:23
different 18:25	103:5	74:8,11,24 75:20	64:6,16 76:18	136:3 140:15
19:2 22:13 26:22	discharges 23:18	77:22 84:10,11	77:5 83:1,14	141:4
39:3 50:24 78:6	94:12 95:9	108:23 115:4,6	114:7	effected 120:21
91:1 95:22 96:4	<b>Discount</b> 82:7	119:20 121:5,7,18	due 15:5 19:9 22:17	effective 48:1
97:24 103:16	discretion 128:5	140:4 141:20	32:8,19 39:9,13	134:13
128:12 131:11	discussed 41:18	150:15	39:21 41:4 42:16	effectively 1:16
136:14 141:12	129:4 132:7	<b>dividends</b> 5:12,14	42:20 44:5 55:22	13:23 15:25 18:17
144:13 148:23,25	discusses 86:20	5:18,21 6:5 13:21	61:11 62:14 68:6	28:20 45:5 51:19
152:10	discussion 79:1	14:5,18 15:8,13	68:18 72:25 73:4	69:19 70:14 84:17
difficult 3:6 72:7	132:24 133:16	21:4 24:11 25:9	73:15,20,24 74:7	91:10 106:7 108:6
155:22	dismissed 80:3	25:15,22 27:19	74:12 75:1,8,16	109:10 110:4
difficulty 15:22	displace 20:18	34:8 36:9,16	75:25 76:24 77:18	127:6 131:20
64:17 84:14	disposes 84:12	39:23 42:18,19,21	78:20 84:11 104:6	134:25 135:6
109:12 116:15	dissolved 94:8	44:13,19 51:25	108:23 109:7	137:22 140:25
dig 71:13	distinction 8:4	65:8 70:18 73:1	110:19 114:22	141:5 153:24
diminution 121:2	22:11 29:16 35:24	73:16,23 74:6	119:6 141:19,21	154:24 155:5
<b>Dinorben</b> 115:20	50:13 78:25	75:7 77:12 78:19	142:4,9,9,11,14	effects 64:18
direct 108:15	109:16 114:11	84:8 85:15 114:21	143:5	efficacious 95:18
directed 61:7	distinguished	114:23 115:3		eight 76:18
direction 17:18	118:24 131:16	120:14,24 121:14	E	either 7:13 27:20
23:2 33:15,16	distribute 13:9	122:13 137:11,15	E 118:23 119:12	electronic 60:6
61:5 63:3 106:21	19:25	140:23 141:18	earlier 9:9 22:14	element 19:12,24
107:2 117:3 118:2	distributed 7:21	143:12 144:10	41:18 49:18 68:1	32:1 33:17 35:23
118:4	26:18 59:18	146:15,19 148:2	69:15 96:24	99:17 118:17
directly 81:6,19	129:13	148:15	118:15	Elizabeth 91:11
84:16	distributing 92:19	division 77:21	early 38:5 65:11	98:17 101:5
310				70.17 101.5

				Page 1/0
THE 1 40.25	(0 ( 12 (0 7 7 2	120.1	70 5 17 04 15 25	157.04.150.0.4
Elizabethan 49:25	68:6,13 69:7 70:2	128:1	78:5,17 84:15,25	157:24 158:2,4
embodied 113:10	70:6,7,12,16 71:8	errors 126:1	85:16 94:10,17	executors 101:11
emergence 66:14	71:15,21 81:15	essence 140:19	95:15 96:16 99:21	exercise 20:17
emphasis 49:19	88:19 89:23 90:5	essentially 5:22	108:3,12,14 109:2	exercised 113:18
emphasise 67:18	91:21 104:10,19	12:16 15:23 18:21	109:18 112:10,16	exist 85:14 136:18
emphasising 49:12	106:15 110:6	19:17 20:4,10,22	113:6 116:1,20,22	existed 14:11 48:5
enables 138:19	113:20 115:11	20:23 21:6,16	117:4,11	51:19 85:3 87:11
enacted 80:16	123:21 127:10,16	26:20,22,25 29:3	estates 9:17 42:9	existence 1:16
127:2	128:14,19,20	29:9,24 31:10,21	estimated 8:13	13:11 36:11 43:22
enactment 7:1 15:7	129:12,24 130:5,6	33:19 34:6,21	et 101:10	110:11
113:12	131:20 134:9	35:19,22 37:6	event 5:24 6:3 14:4	existing 45:4 114:5
encompassed 145:4	135:15 137:6,17	38:5,12 40:5	14:16 15:2,10	expect 8:8 51:4
ended 92:12	137:25 138:8	43:15 45:17 46:19	35:3 51:9,18,23	91:3 93:15 136:22
endorsed 57:2	147:1 149:14,16	47:8 50:21 51:7	52:23 53:19 56:8	expected 143:20
ends 66:11 79:23	150:22 151:2,13	52:9 57:1 59:4	56:14 59:17 67:14	expense 95:22
80:13,14 135:9	153:3,6 154:15	61:14 62:24 64:22	82:10,14 84:5	expenses 90:1
enforceable 119:2	155:2 156:25	65:3,4 70:8,24	85:24 87:23 88:8	explain 144:19
English 49:21	160:7,19	74:16 76:3,10	95:2 103:14	explained 25:11
117:16 123:2	entitlement 10:7	82:11,17 85:21	108:20 116:13	99:23 113:21
enormous 102:8	21:24 42:22,23	88:11 92:13 93:14	123:20 131:1	129:19
enormously 103:3	46:7 62:14 70:10	97:8 102:6 104:15	156:15	explaining 153:12
ensure 11:9 13:12	86:19 129:12	105:8,17 110:10	eventually 25:25	explains 81:10
18:15 20:12 21:19	130:10 135:21	110:15 115:8	66:5 134:7	explanation 15:4
21:22,25 30:6	137:25 138:6	116:2,9 118:12	everybody 2:6	32:21 33:3 80:24
62:14 104:11	145:25 146:6	120:8,11 123:17	161:7	133:7
128:14 129:7	147:11 157:5	125:9 126:14	everybody's 85:22	exposito 62:22
137:24 138:11	entitlements	127:8 128:7,13	everyone's 92:15	express 12:24
140:23	134:24	129:11,23 130:24	ex 79:8 87:8,13	19:13 38:10,10
ensures 155:14	entitles 142:24	131:12 133:9,11	exactly 51:4 98:24	39:3 59:14 69:18
entered 23:5	entitling 130:16	135:4 137:19	106:8 154:13	86:15,17 96:20
<b>entirely</b> 31:6 47:25	equal 25:12 77:21	138:5 139:19	<b>example</b> 1:17,25	97:10 106:2
49:16 72:10 86:20	equality 86:13	146:23 147:2,10	2:3 21:20 64:21	123:16 136:15
97:4	<b>equally</b> 9:9 13:9	148:1,5,21 149:4	99:4 104:13	138:3 159:4,14
entirety 111:1	38:17,18,23 39:1	151:9 153:24	142:10 152:7	expressed 2:1
entitle 109:21	54:6,25 85:2	154:6 158:21	153:11 155:17	34:24 51:12 55:6
149:9	135:19	160:2,9,11	159:9	76:15 79:17
<b>entitled</b> 7:19 8:1,6	equitable 6:24	establish 107:7	examples 93:21	expressing 76:10
11:24 12:1 23:7	112:24 113:17	established 79:15	151:20	expression 101:7
27:2 29:16 30:7	139:9 140:10,11	107:10 114:17	excepting 80:3	expressly 19:18
31:11,17,21 50:16	equity 64:14	118:12	<b>exception</b> 5:1 32:20	30:23 32:22 51:2
51:9,10,15 52:3	107:22 109:3,4,19	estate 9:14,22	32:24 70:23	52:11,18 55:19
52:23,24 53:24,24	109:22,25 113:15	42:11,12 57:8	excess 105:14	69:23 70:5 127:5
54:1,1 55:7 59:16	113:24	59:25 64:1,2,4,18	excessive 128:6	136:20 138:13
59:17 60:21 64:14	equivalent 86:19	68:19,23 73:8	excise 161:11	139:5
65:19,22 67:13	92:14 101:23	74:13 75:19 77:19	exclusive 45:4,14	<b>extant</b> 99:20
			<u> </u>	<u> </u>

Day 1

				Page 171
1.62.17	e 120 17 17	12 10 25 12 0	. 10.020.15	(0.25 (2.0 (5.12
extend 63:17	familiar 138:16,16	12:19,25 13:8	focusing 18:8 29:15	60:25 63:9 67:12
extent 1:4 44:9	138:17,17	14:9,21 15:13	34:7,21	81:24 82:2,4
74:10 78:22 85:9	far 2:10 36:2,20	17:16 18:12 19:5	focussing 90:3	103:7 137:6
131:3 142:23	40:18 49:24 55:10	19:20 20:5 21:5,6	follow 38:14	<b>fourthly</b> 47:5 57:25
156:22	56:10 83:6,8	21:18,21 24:2,3	120:12 143:23	70:2
extinguished 45:7	90:12 94:10,11 119:5 123:1	24:14 27:16,20	<b>followed</b> 66:8 84:21	framed 79:17
extinguishment		32:23 33:20,25		framework 124:22
74:9 extra 63:6	126:11 148:2,2 152:20 155:12	34:6,16,21 35:20 35:21 36:3,17	<b>following</b> 34:9,22	free 49:16
		37:12 39:23 42:3	40:9 67:11 144:8	freight 6:21 37:11
extract 123:10	fastening 35:16 favourable 78:24	43:5 44:20 46:14	146:18,21 147:19 150:9 161:16	49:7,17 50:7 58:22 125:13
extraordinary 8:18				
56:21 77:2	<b>feature</b> 19:23 33:8	46:22 52:1 54:10	follows 43:20 46:3	friend 141:19
extreme 151:22	34:25 44:6 50:11 50:21	55:2,23 57:2 59:10 60:24 65:6	46:4 85:23 108:21	front 71:24 72:15
<b>extremely</b> 3:15 99:10	features 13:20		<b>footing</b> 119:19 122:7	<b>frozen</b> 147:3 149:13
77.10	feel 69:1	65:9 66:12,14	force 2:20 46:2	full 7:23 15:19
F	fell 103:20	67:4,14 70:11 71:25 73:3,19	force 2:20 46:2 foreclose 157:21	20:12 21:24 36:20
F 118:23,25	<b>fettered</b> 83:12	74:1 76:4,12 81:4		36:22 38:16 40:24
face 114:13	fiction 142:19,23	82:19 83:21,22,24	<b>foregoing</b> 89:15 90:23	46:7 52:3 61:22
fact 2:14 7:21	143:4	84:10 88:7,12	foreign 8:1,5	62:14 67:9 68:11
10:10 25:4 26:9	fifth 10:15 60:25	91:19 101:6	135:14,16	69:22 81:7,19
26:11 27:19 30:9	63:9 81:23 82:2	102:17 105:12	forgive 59:8 100:10	85:11 89:19,24
31:9 34:7,10	137:17	102.17 103.12	101:2	90:5,6,7,17,20
37:14 44:18 49:20	fifthly 58:1 70:6	118:13 120:24	form 16:11,13 17:2	91:5,12,15,22
65:18 77:13 93:24	figure 119:17,17	121:16 124:11	61:24 71:20	92:3,4,8,10,15,17
96:7 106:1 109:13	120:7	126:11 131:21	141:11	92:3,4,8,10,13,17
115:15 120:3,14	final 24:12 117:15	133:18 136:10	formal 99:17	93:20 97:18,21,24
125:1 138:2,8	119:20 121:5,6,18	139:1 141:23	former 5:20 143:6	97:25 98:3,18,20
140:22 141:21	132:4 138:22	143:2,13 146:15	147:8	101:4,7,13,13
142:21	151:17	152:19,22 159:5	forming 3:25 83:11	102:22 103:2
<b>factor</b> 41:15	finally 10:24 67:21	160:4	forms 84:23	104:10 105:20
fail 150:4	finance 114:25	firstly 46:20 52:8	formula 150:5	121:10,19,21
<b>failed</b> 10:1 50:3	financially 8:16	57:15,19 66:24	<b>found</b> 73:15 97:11	122:10 127:22
81:5 88:25 126:8	find 6:8 28:4 29:11	69:17 82:11 88:2	117:1 148:16	129:12 130:9
fair 2:21 6:25 58:15	32:21 34:25 55:19	126:3 148:15	foundation 42:10	135:15 136:24
104:19 110:12	56:11 66:18 79:8	five 24:21 47:17	146:2,7	137:25 138:6
131:6 140:12	89:3 90:10 96:15	66:24 75:5 85:5	foundations 49:23	144:9 145:25
142:12	96:20 102:17	129:2 131:24	<b>founded</b> 38:9 63:6	146:6,18,22 147:4
<b>fairly</b> 136:2	103:8,23 114:9	139:1 160:2	76:14 113:11	147:4,11,19 148:3
fairness 86:13	128:25 142:8,9	flawed 131:4	four 17:13 24:20	150:9,16,18
124:23 133:4	161:10	flipping 9:19	46:19 75:9 79:7	152:18 155:15
139:9 145:8	fine 3:13	fly 3:24	81:21 82:4 102:16	157:4 158:11,13
<b>falling</b> 121:15	first 1:3 2:2 3:17	focus 134:10	125:11 130:23	158:25 159:2
falls 27:13 85:13,21	4:16 5:18 6:5 8:7	focuses 30:3 43:1	<b>fourth</b> 9:23 33:10	<b>fund</b> 63:17,22
121:4 132:15	8:20 11:4,10	141:19	36:13 40:5 56:1	139:11
		-		

fundamental 34:16	155:4 156:15	136:5,8 140:14,19	granular 129:16	139:23
38:19	gives 21:14 28:22	143:17,22 145:2	great 79:19 86:11	happy 5:4 134:7
<b>funny</b> 53:8	30:25 46:11 49:19	147:24 151:18	greater 30:25 31:18	hard 45:20
<b>further</b> 3:1 12:9	101:8 108:6 125:8	152:10,14 153:8	50:17 88:19	Hardwicke 60:2
41:15 44:17 48:11	130:25 149:25	156:8 157:14,17	greatest 50:1 151:8	91:11 94:18 98:16
85:9 102:16 111:4	160:17	157:20 158:4	ground 51:21 55:9	Harwicke 79:16
120:15 121:9	giving 17:15 35:16	159:21,24 160:25	72:12 80:16 87:15	head 52:14
143:3 154:3	57:21,22 88:17	161:4,13	118:21 119:4	headnote 72:23
156:10	95:15 123:19	<b>go</b> 1:10 2:7,8 4:16	130:5 132:18	hearing 2:18
<b>future</b> 63:19 83:10	131:4	5:5 31:8 35:1	145:9 146:1,7	161:15
	<b>GLOSTER</b> 1:3,13	46:5 47:9 59:8	149:3,5 159:7,10	held 5:20 11:1
G	2:6,12,23 3:5,12	71:7 79:23 81:6	group 158:15	14:16 19:14 32:18
gainer 77:3	4:13,16 5:3 9:17	81:18 90:19 96:17	Grover 9:15 57:7	35:4 37:14 45:3
Garrard 115:20	9:19 11:14,20,25	98:25 99:12 101:3	58:4 59:2 103:22	52:13,20,21 54:15
general 1:13 2:1	12:4,12 14:22	103:24 106:16	106:10 108:16	55:15 56:7 72:23
4:2,15 8:7 31:24	16:15,19,23 17:5	113:2 119:5	109:9,17 117:5	87:9,22 102:6
32:3,14 51:17	17:8 20:17 22:10	125:23 132:25	131:16 142:7	105:23 123:13,22
52:12,19 75:12	22:16 30:13,19	140:20 141:15	guarantee 96:1	131:8 140:18
82:24 89:12	31:2,14 32:10,15	149:10	guarded 85:7	145:7 147:8
100:18 106:20			S	158:25
107:19 114:14	33:1,4 37:22 38:9	goes 41:24 45:21	guineas 73:15	
123:11 130:22	41:8,11 47:14,17	61:21 63:2 65:23	$\mathbf{H}$	help 68:1 96:12
133:21 140:10,11	47:22 48:18,21	67:10 77:15 92:16	Hadfield's 115:21	helpful 3:16 11:6
142:9 159:18	49:1,10 53:4,6,13	92:22 93:16 103:1	half 73:11 78:8	50:11,19
generally 14:23	54:13 57:17,21	103:10 120:20	151:13 156:13	helps 96:9
20:16 21:2 29:7	58:3 60:13 66:14	149:1 156:3	hand 8:5,6 12:15	Herefordshire
94:7 107:22	66:23 68:9,21	going 1:4,5,9 2:24	*	113:22 115:22
	69:5,10 76:6 80:4	5:6 17:2 25:3,8,18	29:16,18 35:25	116:3
111:10 139:22	80:8,20 81:23	26:15 31:5,6	38:6 50:14,15	Hibernian 101:22
141:1	82:1 86:3,6,22	44:15 45:19 47:11	68:24 94:5 95:19	Higginbottom 79:9
getting 31:7 64:17	87:2,18 90:8 95:3	49:25 53:15 58:3	98:7 111:22,24	higher 28:12 128:3
104:17,18 114:1	95:7,12,24 96:3,7	60:3 62:11 82:7	116:21	<b>history</b> 10:18 58:10
160:11	96:11 97:13,17	83:3 98:13 105:18	hand-down 161:6	124:21 133:9
give 1:6 17:5 48:9	98:21 99:12,18	115:18 120:18	Handbook 16:14	152:12
49:1 50:21 77:6	100:2,25 101:25	123:1,8 124:1	handed 2:19 16:15	hit 25:13
94:20 99:17	102:2,12,14	128:17,18 142:3	16:17	Hoffmann's 49:13
101:25 112:9	106:20,23,25	154:9	handing 99:21	hold 1:20 139:17
113:5 114:1,5	107:23 108:5,9	good 15:4 78:13	hands 64:2,5	156:16 157:24
117:19 124:19	111:20 112:14,18	<b>Goodere</b> 57:15,19	hangs 149:23	holder 13:21 14:5
149:8 151:13,18	112:23 113:2	59:11 69:21 79:16	happen 2:24	Holdings 131:17
152:25 155:8	115:25 118:3	91:12 92:17 94:19	happened 10:10	holds 93:24 103:8
156:6	120:17 121:23	96:18 98:6,25	36:2 148:2,2	hole 60:4,6
given 2:17 23:2	122:21 124:19,24	101:2	154:17	home 2:8
55:4 63:7 104:18	125:3,8,20,23	goods 101:10	happening 141:17	hope 4:1 16:14,22
108:19 110:11	130:13,19,22	Graham 122:23	happens 11:14,15	130:15 136:1
119:7 151:23	131:23 132:3,20	granted 92:23	40:14 41:1 93:18	hoped 2:21
	102.0,20	8		- F
DTI		DTIC1-1-1	0.1	D1 1/5 D1+ C+

				1 age 173
<b>House</b> 80:24	132:6 142:16	109:14	intended 18:15	43:13,16,17,19,21
huge 151:25	156:4	influence 2:3	19:3,4 30:6 32:4	43:22 44:16,20,25
Humber 56:23	Importantly	initially 15:22	37:4,6,8 50:4	45:1,14,24 46:15
57:25 80:20 81:25	110:17	53:10 122:17	78:13,23 81:10,11	46:21,23 47:6
82:6,8 110:23,23	imposed 81:14	145:5	81:12 88:10 94:2	50:5 51:3,5,10,15
115:2 132:13	imposed 81.14 impossible 46:8	injustice 95:14	102:19 109:4	51:18,23 52:1,3
hundred 26:1,5	inasmuch 74:5 84:3	insert 128:7	126:10 127:12	52:12,14,19,21,24
134:2,5		inserted 97:11		
,	inaudible 16:4 26:14 38:18 40:1		133:14,15 134:8	53:19,23,24 54:1
hypothesis 152:18		130:10	134:12 136:4	54:2,7,8,11 55:1,7
153:11,12 155:20	49:8 53:8 55:5	insisted 63:10 74:4	137:22 138:11,20	55:10,11,17,19
I	103:25 152:8	Insofar 28:10	157:4	56:9 59:15,16,18
idea 4:2	153:17 159:18	insolvency 7:20	<b>intention</b> 76:14	59:20 60:21,22
	incapable 101:20	12:18 13:5,8,15	80:10 128:14	62:21 63:1 64:13
identical 54:4	incarnations 92:6	13:20,24 16:14	133:21 139:3	64:18,20,23,24
125:7	inclined 153:1	18:16 19:22 20:1	<b>interest</b> 1:18 2:5	65:2,3,10,15,19
identified 58:19	<b>include</b> 35:15 91:6	22:19 27:22 31:23	5:13,16,18,18,21	65:22,25 66:10,13
118:23 156:17	91:25 93:7 98:21	32:15 35:20 36:2	6:4,6 7:19 8:6,14	67:7,9,14,15,15
identifies 76:7	154:10,12	37:12 41:17 44:22	11:7,8,8,10,13,15	67:19,22,24 68:15
identify 6:13 8:24	included 130:1	46:21 50:25 51:5	11:22,24 12:5,8,9	69:19,21 70:3,3,5
16:6 90:13 101:16	includes 119:14	52:21 53:23 56:8	12:10,15,17,20,22	70:7,7,10,16,22
111:2 137:9	123:5 146:13,24	63:1 69:19 70:4	12:22 13:1,15,16	71:9,10,10,12,16
identifying 17:15	149:6	82:14 84:18 85:24	13:23,25 14:3,8,9	71:17,19,21 73:4
22:2,21 41:13	including 39:7	94:7 95:10 107:23	14:17,21 15:2,12	73:20 74:1,7,10
82:20	55:14 93:4 127:22	117:8 118:13,24	15:14 17:25 18:2	74:14 75:1,6,8,14
ignored 126:4	145:15	126:23 127:4,24	18:3,16 19:6,7,15	75:14,16,23,25
illustrate 151:20	inconsistent 34:11	128:4,16 130:1	19:22 20:1,11,14	76:23,24,25 77:1
152:12	130:18	132:18 136:13,16	20:21,25 21:5,17	77:17,18 78:1,11
image 13:3	inconvenience	136:21 137:2,12	21:18,22,23 22:20	78:14,15,20,21
imagine 43:4 64:22	95:14	149:13	23:3,7,11,13,19	79:4 82:10,12,14
133:24 134:20	incorporated 53:20	<b>insolvent</b> 9:13,17	23:24 24:16,19,19	82:15 83:18,19
150:14	incorrect 16:3	9:22 23:17 26:15	24:21 25:19 26:2	84:2,10,18 85:5
immediately 14:2	109:17	57:8 84:16,25	26:11 27:10,12,22	85:10,24,25 86:16
impact 1:12,24	incurred 94:1	85:16 106:12	28:9,10,13,14,16	86:18 87:21 88:7
impacts 38:17	incurring 99:14	116:23 117:7,22	28:21,22 29:5,9	88:9,12,18 89:16
implemented 10:3	indebted 78:1,4	117:24 134:22	29:11,17,19,25	89:25 90:6,17,24
implied 76:15	indebtedness 26:10	instance 71:25 81:4	30:7,25 31:12,21	91:6,8,24,25 92:4
139:3	indicate 56:20	88:13 120:25	32:24 33:16,23	92:9,10,18,21
importance 12:18	indicated 155:23	121:16	34:1,19 35:3,5,12	93:2,10 94:24
116:5 123:15	indicates 56:12,18	insufficient 38:16	35:14,23,25 36:6	95:10 96:5,14
important 10:12	indicating 6:9	insufficiently	36:14,16,21,24	97:10,22 102:25
11:19 13:6 14:25	35:10	125:12	38:17,21,25 39:5	104:13,20,24
28:18 35:24 42:13	indication 37:5,7	intellectual 6:21	39:8,15,18,23,24	105:9,11,22 106:7
56:15 71:3 99:8	88:1 90:13 102:18			, , ,
99:10 126:16	142:8	37:10 49:7,17	40:1,6,20 41:17	106:14,15 107:6
127:1,13 129:20		50:7 58:21 124:22	42:1,14,15,20,21	107:11,12 108:7
127.1,13 127.20	indistinguishable	125:13	42:23 43:5,6,8,12	108:19,23 109:5,6
	ı	ı ————————————————————————————————————	ı	

				1 age 174
109:8,11,21 110:1	155:3,4,6,12,12	Ironworks 56:23	judge 5:20 7:5,17	7:5,7,25 15:6
110:1,6,14,15,19	156:5,7,22,24	58:1 82:6,8	11:1,18,23 12:10	17:10 23:1 28:12
111:7,14,16,23	157:6,9,10 158:11	irrecoverable	18:5 19:1 22:3,25	30:14,22 31:17,19
112:9,11,13,16	158:13,17,17,19	100:20	27:6 28:3,17,24	31:25 32:2,3,5,10
113:5,8,8,20,23	159:5 160:3,6,7	irrelevance 138:23	31:4 32:18 33:10	32:11,15,16 42:1
			34:3 35:9,16,18	48:8 49:3,14
114:2,3,10,11,12	160:10,11,19,19	irrelevant 76:3	, ,	
114:16,22 115:5	160:20	94:1 139:5,18	36:5,23 40:5,9	50:16 51:17,19
115:11 116:15	interested 153:10	issue 1:22 3:17 4:23	41:6 42:3 43:14	53:16,23 56:9
118:13,14 119:4,6	interesting 9:20	5:7,7,9,12 6:16	44:11,23 45:15,22	58:11,19 59:13
119:14,17,19,22	59:9 60:14 106:13	8:10,21 11:7,18	50:1 53:16 55:13	60:1 71:10,11,12
120:1,5,7,11,25	140:20	11:21 12:10,14	56:7 58:12 59:12	72:19 75:3 76:9
121:4,8,17,20,22	interestingly	13:5 14:2,10	67:19 71:24 72:6	82:19 86:19 99:24
122:9,13 123:20	128:21 132:25	15:21 27:15 32:8	72:10,15,17,19	104:14,17,18,20
123:21 124:12,16	interfering 113:15	40:13 55:21 56:4	79:19 87:22 88:4	104:22,24,24
126:18,23 127:4,9	interim 24:11	56:13 59:15 65:18	102:23 105:24	106:16 109:1,3,4
127:16,16,22,24	interpretation	72:20 88:2 90:10	108:24 109:16	109:5,6,10,15,19
127:25 128:4,15	38:13 101:18	94:2 100:9 102:6	120:8,18 123:7,9	109:20,25 110:9
128:19 129:5,9,13	interpreted 96:22	103:15,15 118:11	124:19,21 125:24	110:13,16,21,25
129:22 130:17	98:19	119:10 123:4	126:12 127:5,7	113:13,20,24
131:1,4,20 132:22	interrelate 3:23	143:9,25 144:2,11	129:19,20 130:3	114:1 116:7,9,19
133:22,25 134:2,6	interrupt 112:14	144:19,22,23	130:16 131:7,14	117:8 122:4 123:8
134:13,14,17,23	intervening 99:13	146:9,14 147:25	132:10 133:5	123:13,24 124:7
134:24 135:3,5,18	introduce 92:21	148:20 152:1,19	136:8 138:2,23	125:10,25 127:4,9
135:19 136:16,21	introduced 10:6,7	152:23 156:3,4,15	140:18 143:8	128:2,18,22 129:4
137:6,10,18	53:3,18 54:3 62:2	156:18 157:3,16	144:4,15 145:7,9	129:9,22 130:17
138:12 139:11,13	63:12 70:9,15	issued 61:12	147:8,14 148:16	130:19 131:7,8,11
140:6,17 141:18	81:9 87:11 93:2	issues 1:5,15,25	148:25 149:17	131:13,14,19,21
141:21 142:2,4,9	132:12 136:12,15	3:15,21 4:4,18	150:8,14 151:2,9	132:16 133:5,13
142:11,14,20	introduces 82:17	8:11 44:10,11	152:3 153:8,18	134:11 138:12,24
143:2,5,11,14	introduction 53:2	46:16 87:19	155:20 156:10	144:16 145:25
144:1,5,8,14,25	61:14 62:24 72:3	133:17 143:19	157:20,23,25	149:3,5 158:18
145:3,13,14,16,23	81:14 122:20	144:2,3 151:11,25	, ,	160:7 161:7
146:4,5,14,17,20	125:18	156:18,21 157:25	161:6	Judgments 54:3
146:25 147:1,2,3	investment 100:23	159:21,22	judge's 18:7 24:13	70:9,14 109:6,23
147:6,12,14,18,21	involved 118:21,23	issuing 62:21	24:17 34:5 43:1,7	123:18 131:5
148:4,11,13,17	126:6 132:19		46:18 58:17,25	138:10
149:7,8,11,15,16	151:24 152:4	J	82:22 117:8	judicial 49:23
149:19,20 150:4,5	involves 8:11 15:8	J 156:8	134:25 135:25	58:10 83:6
150:7,9,12,16,23	142:18 156:19	Jac 101:6	150:19 152:20	June 119:15,21
150:24,25 151:3,3	involving 81:25	James' 98:18	judge-made 19:13	120:2,4 122:9
150.24,25 151.5,5	82:5 141:18	joint 72:20 82:7	19:19 38:12 51:8	jurisdiction 6:12
151.3,14,15	1reland 123:6	111:8,12,21 112:2	61:14 65:15 69:20	6:14 123:4 133:2
153:20,22,23,24	Irish 101:21	114:15	86:11 98:9 137:3	justice 1:3,13 2:6
		Jonathan 73:14		· /
154:3,5,10,12,15	Iron 110:23,23	Joseph 74:13	judgment 2:9,16,19	2:12,14,23 3:5,12
154:19,21,24	115:2 132:13	oosepii / r.15	2:25 3:2 5:9,11	4:13,16,17,20 5:2
		<u> </u>	<u> </u>	'

				Page 175
5010616005	101 00 05 100 0 5	1,., 25,15,25,6	1.10.00.110.0	1, 10001504
5:3,10 6:16 8:25	101:23,25 102:2,7	kicks 25:17 27:6	112:23 113:2	learned 28:3,17,24
9:8,14,17,19,25	102:12,14 103:24	kind 33:1	115:25 118:3	50:1 86:9 108:24
11:14,20,25 12:4	104:3,8 105:1	king 60:13 98:17	120:17 121:23	123:9 141:19
12:12 14:22 15:16	106:20,23,25	knew 69:1	122:21,24 124:19	151:8
15:21 16:7,15,18	107:2,13,15,18,23	know 7:24 8:10	124:24 125:3,8,20	leave 76:24 79:18
16:19,22,23,25	108:1,5,9,24	18:18,19 35:15	125:23 130:13,19	95:19 151:7
17:5,8,11 18:5,13	110:9 111:3,20	37:11 43:10 46:13	130:22 131:23	leaves 21:2 37:17
18:22,25 20:17	112:14,18,23	46:14 47:12 48:8	132:3,20 136:5,8	61:22
22:10,16 23:15,22	113:2 115:25	80:21 93:12 94:20	140:14,19 143:17	Leaving 32:15
24:6,25 25:11,24	116:6,12,18 117:1	96:18 101:18	143:22 145:2	104:14
26:9 27:4,15 28:2	117:17,20,22,25	118:8 127:1 132:6	147:24 151:18	led 150:2
30:13,19 31:2,14	118:3,5,25 119:11	132:12 137:17	152:6,10,14 153:8	Lee 115:21
32:10,15 33:1,4	120:13,17 121:23	140:6 159:10	156:8 157:14,17	<b>left</b> 34:2 54:10
34:15 35:7 36:14	121:25 122:17,21	known 59:21	157:20 158:4	111:9
36:23 37:22 38:9	122:24 123:11,22	knows 132:14	159:21,24 160:25	legal 41:19 42:4
38:14 39:13,20	123:25 124:4,7,19		161:4,13	113:15
40:7,9,20 41:2,8	124:24 125:3,8,20	L	Ladyship 31:15	legislation 22:14
41:11 44:8 45:8	125:23 128:22	Lady 1:3,13 2:6,12	laid 60:11 86:9	41:17 49:18 80:10
45:10 47:14,17,22	129:15 130:13,19	2:23 3:5,12 4:13	lands 101:10	101:24 102:9
48:8,10,18,21,23	130:22 131:23	4:16 5:3 6:23	language 28:4	130:11
49:1,4,7,10,13,19	132:3,20 133:4	9:17,19 11:14,20	49:15 97:23 105:5	legislative 56:16
52:16 53:4,6,8,13	136:5,5,8 140:14	11:25 12:4,12	lapsed 63:23	58:10 103:12
54:13,17,21,24	140:19 141:9	14:22 16:15,19,23	large 75:24	legislature 7:6 37:5
55:3 57:6,17,20	143:17,22 144:12	17:5,8 20:17	largely 126:13	45:23 102:19
57:21,22 58:3,6	145:2 147:24	22:10,16 30:13,19	late 56:14	126:9 133:7,14
58:24 59:7,24	148:7,12,22	31:2,14 32:10,15	law 19:13,19 21:1	134:3,8,12 151:12
60:6,9,13 65:17	149:10,18,23	33:1,4 37:22 38:9	21:13 38:12 49:21	151:14 155:8,11
65:24,25 66:3,14	151:18 152:6,10	41:8,11 47:14,17	51:8 61:14 65:15	legislature's 133:21
66:23 68:1,9,12	151:18 152:0,10	47:22 48:18,21	67:13,16 69:20	length 123:10,25
68:17,21 69:1,4,5	154:7,13,23	49:1,10 53:4,6,13	71:8,17,20 77:20	124:22,25
69:9,10,14 71:7	154.7,15,25	54:13 57:17,21	84:3 86:11 93:1	let's 25:25 93:3
71:18 72:7 74:17	157:14,17,20	58:3 60:13 66:14	100:18 107:11	127:8 154:18
	, ,	66:23 68:9,21		level 37:15
76:6 79:20 80:4,8	158:4,20 159:7,18	69:5,10 76:6 80:4	109:5 111:16,23	
80:9,20 81:23	159:21,24 160:13	80:8,20 81:23	112:11 114:1,3,12	levelling 38:20
82:1,19 83:13	160:20,23,25	82:1 86:3,6,22	114:23 137:4	liabilities 37:18
84:20 86:3,4,6,14	161:4,13	87:2,18 90:8 95:3	139:16,20 140:25	97:1 134:23 135:9
86:22 87:2,12,18	justification 110:8	95:7,12,24 96:3,7	146:2,8	liability 77:8 78:3
88:14,23 90:8,16	<b>justify</b> 114:10	96:11 97:13,17	laying 82:23 85:18	81:9,14
92:5 93:3,9,12,18	K	· · · · · · · · · · · · · · · · · · ·	LBIE 16:12 134:22	liable 81:11
94:6,14,16 95:3,7		98:21 99:12,18	lead 150:8	lie 85:13,21
95:12,13,24 96:3	keen 4:10	100:2,25 101:25	leading 7:1 9:23	<b>light</b> 3:2 10:18 48:3
96:7,11,12 97:2	keenness 3:9	102:2,12,14	56:17 102:18	48:5
97:13,17 98:4,11	keep 65:9	106:20,23,25	125:18	likes 32:16
98:21 99:12,18,23	keeping 121:16	107:23 108:5,9	leads 22:23	likewise 64:20
100:2,4,8,25	keeps 155:13	111:20 112:14,18	leap 152:1	<b>limb</b> 30:24 51:18
	<u> </u>	<u> </u>	<u> </u>	l

				Page 176
51:20 55:23	<b>listed</b> 161:8	35:7 36:14,14,23	<b>Lordships</b> 8:10 9:5	55:23 56:18 57:6
107:17 123:17	litigation 19:20	38:14 39:13,20	9:7 14:15 16:5	57:25 59:4,22
limbs 55:12 79:1	82:6	40:7,9,20 44:8	19:9 37:9,11 44:5	65:6,18 71:6 72:1
limit 57:14	little 8:20 9:3	45:8,10 48:8,10	48:8 80:21 101:18	72:13,18 73:14
limited 50:10 56:7	110:24	48:23 49:4,7,19	120:16 143:15	74:13 80:12,15
81:9,14 87:21	loan 16:21 98:20	52:16 53:8 54:17	loser 76:25	81:20 82:16,18
101:22 112:15	logic 34:22 38:13	54:21,24 55:3	loss 44:18	84:8 86:1 87:5,6
line 25:1 36:24	43:1 146:2,8	57:20,22 58:6,24	lost 78:15 132:16	87:15,24 90:11
55:14 66:19 68:3	153:23	59:7,24 60:1,2,6,9	157:15,18	103:17 104:1,2,4
76:19 79:2 109:5	logical 3:22	65:17,24,25 66:3	lot 156:2	104:21 106:4,7
157:15	logically 66:8 140:3	68:1,12,17 69:1,4	luck 45:20	108:18,22 109:12
lines 15:5,22 48:7	long 9:3 26:14 27:5	69:9,14 71:7,18	lying 132:15	110:18,22 114:25
58:5 67:1 75:9	27:25 28:5 36:9	71:23 72:7 75:3,4	lying 132.13	115:14 116:16
76:18 77:5 79:7	55:14 91:22	75:5 79:16 80:9	M	117:9,10 118:15
83:1 85:5 117:16	105:25 134:4	81:1,2,9 82:19	magic 141:10	118:22 119:23
118:7,9 129:2	137:8 140:12	86:4,14 87:12	142:11	120:9,23 121:6,12
132:17 144:12	long-running 72:5	88:14,23 90:16	main 4:25 5:10	121:17 122:12,16
147:18 148:7,9	longer 21:11 25:14	91:11 92:5 93:3,9	11:17 60:20	123:3,22 124:18
link 48:19	31:13 43:14 88:17	93:12,18 94:6,14	144:22	126:7 130:7,8,18
liquidation 6:2,4	133:18 154:3	94:16,18 95:13	making 13:16,22	131:2,9,15,21
7:14 9:5 10:11	look 8:23 9:23	96:12 97:2 98:4	27:5 33:19 34:7	132:8,19 133:24
11:16 13:7 14:12	29:10 37:3,3	98:11,16 99:23	34:12 41:13 61:25	134:10 138:7,14
19:11 20:9 23:17	40:11 47:23 71:23	100:4,8 103:24	66:11 80:14,14	139:2,6 141:5,16
23:20,25 25:4	104:16 118:1	104:3,8 105:1	managed 4:24	143:12,16 146:16
26:1,6,24 34:22	125:11 127:8	107:2,3,13,15,18	manifestly 77:10	148:8,11,13 150:2
47:24 50:23 51:1	140:2 141:6	108:1 113:21	manner 59:21	152:21,24 153:5,5
51:17 52:5,10	154:17	115:20 117:17,20	61:24 83:25 84:7	155:18 156:1,3,6
56:25 57:3,11	looked 69:15	117:22,25 118:5	114:20,24	157:5 158:5
80:19 81:21,25	looking 3:1 9:4	120:13 124:4,7	<b>Mariss</b> 102:11	Master 65:7 73:13
82:10,13,18 89:1	48:17,19 92:6	129:15 136:5	Mark 16:23	73:25 74:13,19,22
93:22,25 99:2,11	107:1,20 148:14	139:5 141:9 148:7	marked 60:9,10,15	83:8 107:4,7
100:17 106:11	159:22	148:12,22 149:10	Marris 2:4 5:8 6:24	Master's 80:1
119:3,3 121:14	looks 18:4 37:15,25	149:18,23 152:6	8:15,21 9:6 11:5	matching 65:3
122:6 126:21	69:9 105:4 115:9	152:15 154:7,13	11:19 12:15,16	134:24 135:9
127:1 130:6	120:19 133:9	154:23 155:16,22	14:14 15:18,24	material 6:25 22:11
132:11 136:18	134:20 135:22	158:20 159:7,18	22:24 24:18 28:25	49:24 63:11 71:24
137:3,20,24	156:20	160:13,20,23	29:5 30:10,17	105:2 126:2
138:18 158:24	Lord 2:14 4:17,20	Lords 80:24	31:13,25 32:7,14	materially 33:9
liquidator 99:19	5:2 6:16 15:16	<b>Lordship</b> 4:25 6:18	33:13,24 35:6	71:1 102:9
122:11 155:13	16:18,22,25 18:5	6:19 23:21 26:13	36:15 37:6 38:16	materials 7:4 9:23
liquidators 100:21	18:13,22,25 23:15	45:2,13 96:20	38:22,24 39:8,14	47:10 56:17
121:7	23:22 24:6,25	100:12 105:18	40:16 41:5,9,16	102:18 103:12
list 57:22 103:21	25:11,23,24 26:9	110:8	42:4 43:23 44:7	125:18,24 132:5
144:2,3 156:21	26:13 27:4,15	Lordship's 15:4	46:14 51:25 54:13	mathematically
159:22	28:2 34:15,23	40:4,13 68:25	54:15 55:9,15,20	153:1
	ĺ	,		

				1 480 177
matter 12:8 19:12	mentioned 36:12	Monday 1:1	159:14 161:10	33:24 36:15,18,21
20:21 27:1 29:17	47:6 50:12 96:24	money 8:12 36:19	needed 40:10 107:3	36:22 43:11 51:25
43:18 55:3 56:6	123:2	38:8 75:1,23,24	needs 19:7 22:20	73:25 119:22
62:25 65:15 79:11	merchants 71:17	84:25 94:5 95:22	26:18 94:4	122:8,12 143:1
80:9 82:2 87:14	mere 30:9 31:9	100:15,17 103:1	negating 154:5	notwithstanding
103:4 113:21	93:24 106:1	109:20 135:7	negativing 111:14	25:22
124:18 128:20	merely 77:24 92:2	151:23	neither 90:9 145:24	number 6:1 15:15
133:4,12 134:17	98:12 117:13	months 152:7	145:24	15:15 22:18 30:15
137:3 148:12,17	120:6	Moore-Bick 48:10	never 7:22 83:5	30:16 44:3 50:10
153:3 155:21	Mervin 15:21	moratorium 32:2	112:5	58:16 72:14 83:2
matters 69:13	Mervyn 118:25	104:16,17 110:10	nevertheless 12:9	93:21 101:25
148:18 153:13	119:11 122:1,17	110:12 113:19	15:10 20:13 66:10	117:16 118:7
158:8	144:12	116:8 131:6	99:7 116:15 143:1	126:17 132:17
meagre 49:24	met 82:23	morning 87:4	154:14	133:13
mean 3:6 9:2 14:23	method 63:4	161:1	new 50:2,5	numerical 144:24
22:2 24:25 27:4,6	middle 73:12 74:18	mortgages 75:13	No2 15:5	145:6,13
35:13 49:15 58:11	111:18 114:8	mounting 155:12	non-Bower 150:2	numerous 37:11
58:13 69:12 71:9	146:1,7 149:2,4	move 15:16 88:25	non-interest 11:12	
88:23 92:5 96:7	miles 134:21	125:10	non-issue 94:20	0
96:19 102:20	million 134:21	moves 133:8	non-provable 2:5	Oakes 80:25
105:3 107:18	millions 152:5		37:18,23,24 45:16	objected 64:10
120:13 128:12	mind 13:3 47:9	N	46:1,10,11,15	objections 74:3,19
130:2 135:20,22	66:11 101:2	name 16:22 115:2	94:3 96:25 146:20	obligation 42:2
140:3,19 141:9	112:15 120:6	natural 46:5 142:3	156:16 157:1,10	66:25 93:25 99:20
142:5 147:10	138:15 142:16	naturally 98:2	157:13,19 158:6	obliged 81:4
148:18 149:1,18	mine 16:19	129:18 130:3	158:10,12,14	<b>obligee</b> 72:21,25
151:25 152:18	minimum 128:1	nature 13:7 109:14	159:6,12 160:4	75:22 77:7 78:5
154:7 155:19	minute 58:6 130:15	155:4	normal 4:24 32:11	obliges 83:12
157:25 159:13	minutes 47:18 99:4	necessarily 13:11	normally 32:10	<b>obligor</b> 77:8 78:7
meaning 93:15	131:24 161:10	13:22 14:11 34:1	104:21 151:4	obligor's 75:19
98:20 136:3	mischief 71:21	34:11,13 36:17	notation 80:4	observed 4:25
means 36:21 38:21	missed 100:7	126:6 142:5 154:4	note 59:12 72:5,17	72:19
39:22 61:11 72:16	missing 44:2 60:23	156:3	75:5 88:3 108:11	obtaining 32:3
80:6 92:17 93:3	misunderstanding	necessary 3:11 11:1	110:21 115:19	116:7
96:21 129:18	100:11	13:19 70:18 71:14	125:25 127:13	obtains 78:3
130:3	misunderstood	84:23 96:10,11	144:15	obvious 106:1
meant 61:10 63:25	59:3	104:11 142:6	<b>notice</b> 61:21	obviously 1:8,22
69:2 71:11 130:6	mode 73:23 75:11	143:4	notional 5:23 15:8	2:6 3:20,24 19:15
meet 160:25	76:4,12 77:6	need 37:20 41:3,25	20:10,15 21:15,15	19:22 21:19 22:18
meeting 82:24	144:24 145:14	48:2 56:5 58:8	34:1,3,10 42:7	24:4 26:18 48:1
melding 129:23	modern 93:19	91:6 92:1,24	44:1 120:6 122:7	58:8 62:1 68:23
members 2:2 8:7	102:12,14	98:10,15 100:21	122:11 141:18	69:18 70:12,17
37:17 38:3 133:18	moment 5:4 57:23	111:1 112:20	notionally 5:17 6:4	71:3,12 78:13
mention 41:3	86:22 104:3	113:1 118:1 124:9	12:19 14:20 15:12	81:18 92:1 93:7
116:18 132:20	131:23	152:3 153:4,22	20:7 21:3,3 29:12	94:11 99:10
122.20				

·				Page 178
104 10 107 21	15 1 100 2 117 5	7 10 20 10	17.24.10.10.10.22	55 12 (0 11 22
104:10 107:21	15:1 109:3 117:5	outside 7:19 30:10	17:24 18:18,19,23	55:13 60:11,23
109:19 136:11	139:14 140:11	30:12 98:9 147:12	19:5,7 20:2,12,19	61:16,20 62:3
147:13 148:10,18	142:13 158:23	149:13	20:20,22 21:1,4,5	63:2 64:16 66:3
148:23 156:1	operation 7:2 15:24	outstanding 16:1	21:17,18 23:23	73:11,12 74:18
159:13	29:13 118:16	23:4,12,14 27:23	24:1,2,20 25:22	75:17 76:1,8 79:3
occur 19:7 159:15	139:16 140:24	28:1 34:2 36:8,9	27:19 28:10,13	79:24 83:14 101:4
occurred 56:3	142:17	36:19 41:22 42:6	34:8 36:3,5,9,16	102:3 106:25
73:21 118:9	opinion 61:11	46:25 105:25	36:22 37:20 38:22	107:1 108:25
odd 45:23 46:4	63:25 79:19,25	108:14 109:7	43:10,12 46:22,23	109:24 110:2,3
92:9 149:1	opportunity 3:1,10	121:1,9,10 122:15	51:6,25 52:1,14	112:19 114:8
oddities 96:24	opposed 35:12	137:9 147:23	54:10 55:2 61:22	115:9 122:1
<b>oddity</b> 46:7 104:14	oral 3:10	148:6 149:15	62:5,14 65:7,9,22	123:13 127:19,19
131:10 150:8	<b>order</b> 3:20,21 4:15	150:1,3,17,19	66:9,9 67:3,4,8,9	129:1,2,2 130:19
<b>office</b> 13:20 14:4	4:24 5:4,5 13:2,17	151:7,16 153:21	67:11,22 68:5,11	144:19 145:20
office-holder 160:8	26:4,6 35:16	154:3 155:2,5	69:8,22,24 74:24	149:2 153:9
offset 1:18	59:19 65:4 66:5	overarching 97:9	75:21 77:1 82:15	paragraphs 5:11
<b>Oh</b> 16:19 57:22	66:10 67:11 73:10	overplus 101:10	84:3 88:7 89:7,11	17:14,14 41:7
134:11	77:20 79:16 80:2	overruled 74:19	90:7,23 91:14	48:14,25 49:4
Okay 3:12 12:12	89:16 106:18,20	overview 50:22	92:15,20 93:15,20	59:13 64:6 72:18
54:24 69:4 80:8	106:22 109:23	owed 7:23 8:2	94:5 95:16 98:3,8	88:4,5 107:21
old 50:6 60:24	110:2,3 111:10	25:21 38:8 39:18	98:20 99:7 102:22	124:10 125:11,25
107:24	113:10,18 115:10	40:16 52:4 59:18	103:2 104:10	138:24 144:16
once 10:22 15:23	128:2	65:22 69:5 81:8	105:12,15 114:23	<b>pari</b> 13:10 14:1,6
21:22 25:14 42:24	orders 109:3,22	90:6 93:16 133:25	120:3 121:7,15	20:12,24 21:7,8
91:25 94:7 100:18	112:8,13,15 113:4	135:2 150:20	127:21 134:1	21:11 25:11 26:19
100:20 127:21	113:8,9 114:4,14	157:9	135:9,15 136:23	26:20 40:25 61:9
155:19	<b>ordinary</b> 73:2,17	owing 101:15 120:5	137:10,15 138:1	65:12 66:8 85:22
one's 55:18 103:7	75:11 84:7,9	122:8	139:13,20,22	89:11,13 94:2
ones 9:19	115:3 121:15	owner's 16:22	140:23,24,25	105:17 112:3
oneself 11:6	originally 62:25		142:21 143:13	140:24
onwards 19:11	84:1 116:10	P	147:5,14 148:3	Parliament 76:5,13
76:10 80:17 81:3	originated 70:11	page 60:3,4 61:4	149:15,18 150:18	part 1:12,12,16,25
133:1	origins 14:11 19:24	62:17 63:8,13,14	150:23,25 152:11	3:9 4:4,11,14 7:20
open 4:10 56:13	51:22 80:19,24	66:19 73:11 75:5	154:2 155:6	9:6 11:1,12 12:2
111:9	ought 26:25 74:13	78:8 79:6,24	156:22 158:11,13	17:10,11 29:4,13
operate 13:4 29:1	104:19,23 105:10	101:4,23 102:3,4	158:25 159:2,16	35:11 39:13 41:20
32:4,6 44:13	105:16 110:15	107:14 111:1	pair 156:18	44:15 48:13 62:12
63:16 96:22	114:21,24 116:8	121:3 139:7	paper 3:15 9:25	68:19 75:16 76:23
109:18 117:9	116:17 120:1	151:19	10:7 118:18,20	77:7 82:17 102:21
139:19 142:6	131:19 155:2,18	pages 48:22 81:1	122:19 126:4	110:25 128:25
147:10 158:24	outcome 1:11 53:13	paid 5:13,15,22 6:5	127:14,18 128:7	129:10 130:21,23
operated 6:2 24:10	outlandish 101:19	7:22,22 8:1 12:3	128:10 129:24	132:16 135:6
47:25 74:9 98:9	outline 50:19 52:7	12:19 14:4,5,20	130:11 132:6	144:17 147:22
117:5	57:10	14:22,23 15:2,8	paragraph 22:25	149:25 153:25
operates 8:21 11:5	outlined 160:2	15:12,13,19 17:22	33:11 38:17 48:18	parte 79:8 87:8,13
peraces 0.21 11.3	34411134 100.2		33.11 30.17 10.10	Parec 17.0 01.0,13

Г				1 age 177
particular 9:14,24	160:13,20,23	97:18,24,25	105:25 119:15	25:19 27:5,17,21
10:2 39:14,22	Pause 49:6 66:22	101:10 105:9	permissible 143:3,6	28:7 29:15 33:5
40:21 58:17 97:5	pausing 78:25	106:6,8,14 109:20	permit 5:23 13:1	33:10,20,20 34:5
107:20 124:24,25	pay 20:5,11,25 21:7	111:7 115:5	permits 46:6	34:7,16,16 36:4
126:19 133:23	23:2 35:3,11,21	119:18,20 121:5	138:13	36:12,13 40:4,5
144:21	36:20,21,24 38:16	121:12,19 124:12	person 63:18 64:1	41:2 42:3,13
particularly 81:1	44:14 61:7 62:7	138:6 142:24	84:21 112:11	45:22,22 53:1
parties 3:10 6:12	62:13 65:2 66:7	143:14 144:9	113:7	55:8 60:17 62:10
16:2 32:20 84:4	66:25 67:5,9	146:18,22 147:19	personal 40:22	64:16 67:12,19
86:13 139:4	85:12 89:19 94:17	148:15 150:9	59:24 94:9 108:12	68:25 76:2 81:23
145:11 146:11	94:21 95:8 97:21	159:3	108:14	82:2,4 83:5 84:8
partnership 116:4	105:20,24 127:23	payments 12:19,25	persuaded 122:18	87:3 90:14 100:10
116:4	134:5,16 135:8	13:2,21,22 20:15	<b>petition</b> 74:21 80:3	103:3,7,9,19,21
parts 63:11 105:5	140:7 150:15	20:22 21:13,21	Phillips 16:23	106:6,8 110:3
108:13	155:14 160:9	23:9 24:8 25:15	phrase 18:8,9 30:3	112:4 115:13
party 6:8 90:9	payable 11:15	25:25 29:7 32:17	37:10 70:5 90:4,4	116:17 122:21
passage 60:16	28:10,14,16 38:17	32:23 33:25 34:12	90:16 91:2,12	126:11 129:20
101:2	41:22 42:12,21,24	34:13 35:14 37:16	92:7 99:16 128:23	130:12,13 131:5
passed 40:23	51:23 67:16 88:12	38:16 41:19 42:5	129:17 130:2,9	132:4 133:17
passing 113:14	88:16 109:6	42:9 43:5 44:17	149:6	135:12 136:11,20
passu 13:10 14:1,6	118:13,14 124:17	66:12 73:2,18,25	phrases 49:17	137:6 138:10,22
20:12,24 21:7,8	136:23 144:5	75:20 78:4,5	pick 46:1 60:3	139:2 140:21
21:11 25:11 26:19	147:21 150:12	83:25 84:9 96:14	picked 46:9	143:21 144:11
26:20 40:25 61:9	157:10	115:3,15 121:9,15	picking 111:3	149:2 151:21
65:12 66:8 85:22	paying 25:8 27:21	139:15,20,25	145:18	153:13,16,16,18
89:11,13 94:2	34:19 36:6,14	140:5 142:19	picks 98:17	155:20 160:21
105:17 112:3	39:5,25 62:10	150:15	place 2:18 65:9	pointed 114:24
140:24	64:12	pays 77:21 135:4	73:3,19 76:4,12	pointing 27:17,18
Patent 115:21	payment 11:9 14:8	pence 141:7	76:16 78:24 83:21	40:10
<b>PATTEN</b> 2:14 6:16	17:19 18:10 23:18	penned 101:9	84:10,24 115:4	points 7:12,14 9:8
18:5,13,22,25	24:14 26:4,5 27:8	people 69:7	121:14	10:24 17:15 22:2
23:15,22 24:6,25	33:15,22 34:3	percentage 144:24	placed 126:3	22:5 31:8 41:13
25:11,24 26:9	40:24 41:16,21	145:6,13	<b>plain</b> 19:5 90:22	47:8 49:12 58:16
27:4,15 28:2 35:7	42:10,15,17 44:19	perfectly 142:3	92:2 121:21	58:18 60:18 66:24
44:8 57:20,22	47:5 53:19 59:17	period 13:16 23:7	<b>plainly</b> 2:17 3:22	69:17 75:5 76:18
58:6,24 59:7	62:6 68:2,15	23:11 25:16 29:10	22:4 27:1	82:21 94:22
65:17,24 86:14	69:25 70:22 73:3	36:7 42:16 43:21	plus 27:10 92:4	102:16 110:20
87:12 92:5 93:3,9	73:8,19 75:15	58:13 82:12 99:13	150:24	111:2 115:9
93:12 105:1	76:4,12,21 77:6	105:7 120:2	<b>pm</b> 86:24 87:1	130:23 135:25
107:18 108:1	77:12 84:10 85:2	134:25 137:7,9,13	131:25 132:2	139:1 148:24
124:4,7 141:9	89:14,15,24 90:4	147:1,22 148:5	161:14	<b>policies</b> 10:19 48:4
148:7,12,22	90:6,17,20,22	149:12 150:6,13	<b>point</b> 12:5 14:10	135:18
149:10,18 152:15	91:4,8,22,23 92:2	153:20 155:1,9	17:16 18:7,12	<b>policy</b> 10:16 103:4
154:7,13,23	92:3,8,8,10,17,21	periods 23:3 27:13	19:20 20:2,2 22:9	133:12
155:16 158:20	92:25 93:13 96:16	27:22 44:17 46:24	22:25 25:6,7,17	<b>portion</b> 61:7,19

				Page 180
74.10	50 10 14 10 50 10	100.5	20 10 20 22 10 25	101 1 5 11 100 16
74:10	52:12,14,19 53:19	precursor 108:5	20:19,20 23:19,25	121:1,5,11 122:16
<b>position</b> 6:6,9,17	59:15 65:14 85:5	135:24	24:15,18 26:2,12	130:7,18 131:8
9:4,12 10:4,23	94:24 99:5 103:6	predecessor 98:4	27:10 32:23 33:13	132:8 133:1,6,13
11:22 25:1,14	137:10,18 154:12	<b>prefer</b> 16:10 48:24	33:17,21,21 34:4	136:4 138:21
26:7 29:23 32:22	159:5	preferential 18:18	34:8 35:11,14,22	139:2,14,14,19
47:23 50:25 52:6	Pot's 121:24	89:8	36:19,25 38:22,25	140:16 142:6,13
52:8,9,10 53:1,17	potentially 13:5	prejudiced 84:22	39:15,17,25,25	142:18,21,24
56:24,25 65:13	90:15 157:12	premise 20:18	43:6 44:15,19	143:12 146:16
78:24 84:15 85:23	Pots 122:22	34:20	65:10 66:1 73:5	148:19 150:3,10
88:6 96:3 97:9	Potts 121:23	premised 130:24	73:22 74:7,9,14	155:18 159:18
112:20 113:17	122:18	preparatory	75:1,9,13,16,22	principles 10:19
117:23,24 125:14	pound 64:9 73:9	125:18	75:24 76:23 77:1	48:4 91:18 113:17
125:14 126:15	111:7,25 141:7	prepared 161:7	77:13 78:1,20	120:23
131:10 132:11	151:17	present 63:22	84:12 92:18	prior 6:3,22 7:13
134:20 135:17	pounds 133:25	69:12 76:16 77:3	111:13 112:1	7:16 9:4 10:4,14
137:1,23 138:18	134:2,2,5	80:22 83:15	114:18 120:3,5,10	10:23 14:15 15:6
160:5	power 61:23 63:7	presented 74:21	120:13 121:2,9,11	19:11 43:21 47:23
<b>positions</b> 83:16	101:14 108:6	-	′ ′	50:21,23 51:16
1 -		preserve 137:23	122:11,14,15	,
possibility 100:14	powerful 125:1,4,4	presumably 25:8	123:3 134:15	52:8,16,17 58:18
possible 43:14	practical 4:22	33:2 117:4	138:14 143:1,14	62:10 71:14 73:25
82:23 85:1 100:18	35:23	presupposes 27:7	144:9 146:18,22	93:1 105:23
possibly 71:18	practice 24:5,6	<b>pretty</b> 100:5 143:20	147:13,19 148:16	112:12 124:21
112:4	62:19,25 82:25	prevent 35:4	149:12 150:1,16	125:13,24 126:18
post 13:15 18:16	96:1 98:5 106:20	prevented 32:3	150:19,20,22	133:8,16 137:2,23
19:22 20:1 27:21	107:2 117:2 118:2	104:18 116:7	151:5,6,16 152:22	138:16,17 158:24
32:10 41:16 46:21	118:4	prevents 104:17	154:1,18,20,22	priority 17:24 18:1
51:5 52:21 56:8	practitioner 132:14	113:25	155:6,14	18:2,16,19 19:6
63:1 82:14 84:17	praying 74:21	<b>previous</b> 1:6 19:19	<b>principle</b> 5:8 6:15	19:12,21 35:17
85:24 93:18 95:8	pre-1824 52:25	22:6 34:25 37:3	6:24 7:2,7 8:15,21	38:20 46:21 54:5
95:10 118:13	pre-1986 26:23	44:6 60:25 61:2	10:15 11:2,5,7,18	54:8,18 69:25
119:3 126:23	47:10 130:5	69:20 71:19 76:8	12:20 13:10 14:14	70:22 88:6,11,17
127:3,23 136:16	pre-configured	92:6 112:19	15:1,6 16:4 22:23	89:7 105:8 111:11
136:21	58:18	126:10,14 127:6	26:3 28:25 29:14	112:2 124:15
post-1883 90:10	Pre-cut 94:14	137:19 147:25	30:2,22 33:23	136:21
103:8	pre-debt 18:11	previously 14:18	34:2,14 35:6 39:7	pro 75:9 127:23
post-bankruptcy	pre-insolvency	19:18 31:11 33:25	41:18 44:7 47:25	probably 24:7
98:22	35:23 66:10	98:2 110:24 112:8	51:24 55:15 57:2	25:15 127:17
Post-commence	127:22	113:4,12 126:22	57:5 58:12 59:3	<b>problem</b> 23:16,23
93:22	pre-legislation	127:25 136:13	59:22 65:5 73:6	115:14
post-dated 99:6	103:11	157:15	79:10,25 81:20	proceed 5:4,14
post-insolvency	precisely 29:2 56:4	<b>principal</b> 5:15,15	82:16,18 87:24	20:6 81:4 100:13
13:25 17:25 18:2	74:16 112:20	5:23 11:11 12:3	90:11 106:8	120:24
18:3 19:6,7,15	121:13 126:9	12:21 13:23 14:6	108:17 110:17	proceeding 84:21
20:25 22:20 33:23	152:11	14:19,21 15:9,19	112:6 113:4 115:7	proceedings 83:3
35:25 50:4 51:3	precludes 157:21	15:23 16:1 20:6	116:16 120:9	84:23 90:1 95:22
	l			

				1 age 101
107:21	46:11,20 51:4	37:12,25 50:5,11	139:23 141:1,8	123:18 124:13
proceeds 119:19	52:13,20 63:20	56:1 57:18 71:14	142:22 146:25	127:4,9,16 128:1
process 21:1,13	67:2,4,6,8,23 68:5	71:19 86:15 89:10	156:10 157:8	128:3,5,8,11,18
33:18 34:22 35:20	68:11 69:22,24	105:19 114:4	158:1,3 160:8	128:23 129:6,9,22
44:22 84:3 114:23	73:9 74:25 77:22	160:14	questions 2:4	129:25 130:17
138:5 139:20	79:11 89:11,13,17	pull 4:18	quick 50:22 95:25	131:5 133:23
158:22 159:1,16	89:19,20 90:21,24	pun 4.18 punch 60:4	quick 50.22 93.23 quickest 60:17	134:9,11,13
produce 116:19	90:25 97:23,25	punches 60:7	66:20	137:21 138:3,11
149:1 153:14	105:20 136:23	_ <del>_</del>		,
		purely 42:23	quickly 48:16 58:3 136:2	144:5,7,7,20,22
production 146:15	142:25 147:4,22	purpose 18:3 19:8		144:23,24,25
<b>prohibition</b> 71:19	148:3,6 150:13,15	39:16 63:3 68:14	quite 4:20 12:14	145:4,5,6,11,13
<b>proof</b> 98:23 159:1	150:18 154:11,20	129:5 136:25	18:6 38:19 39:20	145:14,25 146:11
159:17	156:23 159:4	138:1	45:2 112:4 150:3	146:13,23 148:4
proofs 99:16	proves 78:17	purposes 12:21,21	151:22 160:23	149:6,20 158:18
properly 8:9 25:16	provide 12:25	17:21 20:14 35:24	<b>quoted</b> 117:18	160:7
<b>property</b> 89:6 98:7	37:13,14 88:11	69:12 80:22	R	rateable 64:15
proportion 63:5	91:23 113:1 133:7	139:11 155:1		rateably 39:11
64:15 77:4	148:4	pursuant 28:13,14	raise 13:5 40:12 raised 7:15 9:10	rationale 110:14
propose 122:4	provided 6:21	42:22		116:6 131:4
<b>proposed</b> 4:2 69:19	14:13 19:18 54:6	<b>pursue</b> 95:1 99:10	40:13 44:11	re-allocation 21:15
proposing 8:19	89:25 90:18 91:14	pursued 140:9	119:11 144:22	<b>reach</b> 6:19
11:3 57:13,14	92:4 93:14 96:13	pursuit 107:10	146:10 152:7	reached 5:25 7:9
143:16	96:19,21 125:13	<b>put</b> 25:21 27:4 30:3	rank 38:18 54:25	29:2 37:2 143:9
proposition 108:25	136:23 151:16	50:6 53:21 56:6	158:9	reaching 9:1
propositions	155:13 160:10	113:17 145:21	ranked 51:5 52:13	reaction 46:5
108:17	provides 17:23	155:25	52:20 69:25	read 48:24,25
protects 78:3	30:23 32:22 91:7		ranking 39:1	49:10 60:15 66:20
<b>provable</b> 13:12,12	95:16 96:15 127:9	Q	159:12	75:18 76:9 95:14
38:8 77:19 94:25	138:13 140:15	qualify 93:10	ranks 38:23 54:6	111:1 129:15
95:10,11 98:25	providing 97:17	quantity 61:8	rare 100:9	141:15,25
99:6	129:5	<b>Queen</b> 60:25	rata 127:23	reading 28:11
<b>prove</b> 13:15 35:21	provision 18:20	<b>query</b> 58:13	ratably 66:7 85:2	49:15 107:8,14
63:1 82:12,13	19:10,14 33:9	<b>question</b> 1:3 9:20	rate 10:8 28:9,11	108:13 113:12
84:17 85:4,23	38:10,11 51:2	17:13 19:2 22:4	28:12,16,18,22	114:13 119:6
154:9	52:11,18 53:10,18	23:13 24:1 26:16	29:20,25 30:4,14	132:5
proved 5:22 12:2	59:14 69:18 78:13	27:8,11 31:16	30:22,25 31:18,19	reads 96:25
13:22 17:20,21,24	86:17,19 89:21	35:9 40:13 46:3	43:2 50:14,16	ready 133:17
18:1,15,18 19:5	92:13 96:20 97:14	56:15 60:20 61:10	51:18,20 53:22,23	real 27:15
19:15,22 20:2,5	106:3,6,13,24	63:24 76:8,17	54:2 55:3 56:9	realisations 24:8
20:11,18 21:8,12	107:19,25 108:2	79:13 83:4 84:13	61:7,19 63:6	25:3 93:23
27:9,20 35:15	116:12 123:16	87:20,23 90:12	67:11,15,19,20,25	realise 26:21
36:2,5,7,20,22	124:2 129:19	105:21 107:24	70:3,5,13 85:11	realised 85:1
37:16 40:24 42:18	136:6,16,18,20	111:5,6,9,19,21	86:20 89:17 93:5	117:13
42:19 43:10 44:14	137:5 159:4,15	112:5 113:3	104:20,25 109:15	realising 84:24
45:8,9,15,17	provisions 28:5	114:16,20 119:2	121:1 122:10	reallocate 5:17
, , - , -	1			

				Page 182
	l	l	1	l
reallocates 122:13	67:7 70:19 73:17	145:5	129:21 136:12	29:10 43:25 44:17
reallocating 21:3	75:7,22 78:11,21	references 48:13	138:16 158:24	49:4 58:13 60:18
reallocation 5:24	79:4 81:16 111:24	117:17,19	regimes 22:6,8,19	82:20 89:21 105:2
20:15 33:18 34:11	114:21 120:24	<b>referred</b> 6:21 7:3	35:1 37:3,5 48:5	105:5 106:18
44:1 141:18	121:13 128:16	8:25 28:18 48:15	50:21,24 126:10	110:25 123:23
really 26:3,25	129:7 135:3	56:23 72:11 74:22	137:20	124:2 128:2 129:1
116:8 142:22	137:11 138:11	75:6 91:11 124:11	regulated 76:5,13	139:4 142:12
152:3	140:5	127:5 131:17	rejected 6:15 7:15	143:5 145:19
reason 4:17,19 7:6	receives 134:7	referring 98:16	22:7 44:24 45:2,3	146:9 152:23
8:4 13:8 21:19	135:4	100:12 117:1	108:24	154:8
28:25 29:22,23	receiving 8:13	130:20	rejection 126:7	relevant 139:18
30:1,9 31:11	24:22 89:16	refers 28:4 55:13	related 50:5	relied 7:12 9:8 22:3
44:18 46:9 58:21	133:22 134:13	75:18 79:3,6 93:6	relates 15:21 111:6	22:5 62:22 97:14
70:10 93:25 99:6	135:7 145:23	97:22 109:15	114:20	138:2
103:18 106:4	recognised 79:12	138:3 145:12	relating 112:13	relieving 77:8
114:9 116:25	recommendation	156:11	113:8	rely 35:10 111:2
121:11 125:8	83:7 127:13	<b>reflect</b> 137:23	<b>relation</b> 1:6,25 3:19	160:15
128:11 131:10	130:10	155:9 157:4	3:24 4:2 5:7 6:7	relying 96:7
135:20 141:24	recommendations	reflected 8:8 72:22	7:11,16 9:4,9,13	remain 73:15 91:20
143:7 145:19	10:3 126:6,13,17	98:5 103:11 137:1	10:20,25 11:22	107:9 111:9
147:16 149:13	recommended	138:9 154:6	19:19,21 20:9	remainder 68:6,8
151:6 157:22	126:23 127:15	reflecting 70:8	21:18 22:6,20	68:18
reasoning 34:9	recover 61:23 68:6	106:3 138:5	30:17,20,24 31:16	remained 73:24
131:3 147:24	68:13 81:5,7,19	<b>reflection</b> 33:6 69:3	32:9 40:21 45:8,9	75:16 101:15
reasons 1:15 6:1	88:20 95:20	97:8	46:16 47:7 50:4	119:1 121:6
32:25 44:4 124:19	101:14 113:13	reflects 29:24 31:10	50:25 56:25 57:3	remaining 17:19
145:17,18 155:22	135:1	43:17 47:2 91:18	59:1 65:14 66:9	18:10 74:15 88:8
156:15	recovered 62:8	105:20	66:22 67:20 69:17	89:24 91:21
reassure 143:18	reduce 106:1	regard 26:11 61:6	87:19 88:3 94:6,9	114:20
recalculation 15:18	reduction 73:5,22	114:9	102:16,23 104:12	remains 11:13
recalculator 15:18	84:12 115:6	regarded 14:19	106:9 112:21	28:14 42:10 71:1
recap 46:18	refer 9:15 48:11	56:13 115:14	117:10 123:8	remarkable 7:18
receipt 74:8	93:4 97:1 117:15	127:5,7 140:12	126:18 134:21	remedy 63:18
receive 7:18,19	128:21 144:23	regardless 103:18	135:18,19 137:3	remember 12:4
8:17 51:10 52:3	reference 13:13	123:20 127:12	139:1 143:2	87:4
52:23,24 53:24,25	17:5 31:16 37:22	140:10	147:25 151:25	remembers 98:15
65:1 67:15,24	43:2 48:9 49:1	regime 6:22 10:20	152:1,17 153:17	remind 86:14 88:5
78:10 79:3 81:13	50:13 62:17 67:18	13:20 14:7 22:19	156:15 158:1	reminded 58:25
81:16 83:18	68:18 69:14 79:22	27:18 31:3,5 44:6	relationship 41:5,8	102:10
101:14 111:25	85:22 97:10,20	48:3 51:4 52:13	relatively 51:1	reminding 11:6
127:3 128:15,20	98:16 110:22	52:20 54:21 61:3	65:11 125:11	101:1
129:7,25 134:8	123:18 124:9	65:12 72:13 91:18	releases 1:9	remission 26:24
141:7 153:20	127:17 128:8,22	92:21 93:17,19	relevance 138:23	51:13
received 2:22 23:9	137:21 138:10	102:20 117:5	relevant 12:2 16:13	remitted 121:20
24:23 26:10 30:7	139:7 144:20,22	126:21 127:6	22:12 25:19 27:12	removed 96:4
225 20.10 50.7	107.7111.20,22	120.21 127.0	22.12 23.17 27.12	20110,0470.1

				1 age 103
renewed 60:14	84:2,2 85:16	34:23 35:21 36:10	Romilly 113:21	117:17 125:16
repaid 5:16 15:23	89:12 94:13 95:9	42:15 43:5,10,16	room 15:24 21:14	136:3 138:9 139:4
24:15,19 33:21	105:25 119:3	43:16,18,22 44:12	44:1 45:15	139:17 140:3
120:10,14 134:15	120:2 142:20,21	45:2,13 47:1,2,3	round 99:12,16	141:10,10,22
147:4 149:12	142:25,25 146:20	47:17 51:11,17	153:2	147:10,15 148:4
151:5,6	151:8 153:20	54:7,8,9,18 55:1,4	RR 93:23	148:14 149:17
repeated 113:9	156:25 157:5,6	55:11,17,19 58:24	rule 5:14,23 7:10	154:6,8 160:10
repeatedly 20:3,8	respectful 50:7	59:7,8 64:13	8:7,23,25 10:17	ruling 34:18
replaced 43:15	126:8 143:8	69:21,25 70:3,22	13:4 16:7,9 17:18	run 119:20,22
replicates 98:12	respectfully 132:10	71:17 83:17 85:10	17:21,23 18:13,14	150:24 151:15
replies 4:9	133:12	88:7,18,19 91:17	17.21,23 18.13,14	150.24 151.15
report 9:24 10:4	respectively 74:10	91:25 92:23 93:1	29:18,24 32:4,14	running 12:6 135:5
		93:7 94:24 96:21	33:12 36:13 37:7	150:17 151:4,5
73:13 74:4,20,23	respond 4:7			130.17 131.4,3
80:1,3 90:15	respondent 4:5	97:10 99:18	39:5,7 40:15	<u> </u>
118:18 126:4,6,14	rest 145:2	100:25 102:25	42:15,20,22,23	S-A-M-M-O-N
126:17 127:2,3,7	result 8:18 25:3	105:11 106:2,3	47:1,5 50:12	87:13
127:12 129:21	38:12 43:20,25	108:19 109:14	53:21 54:4 58:23	salt 132:14
132:6	51:7 73:16 82:24	110:8 113:15	59:21 63:1 65:5	Sammon 87:8,13
required 14:1,6	96:1 110:2 149:1	114:2,6 116:14	66:15 67:21 70:25	satisfaction 63:6
15:10 21:9 39:6	results 145:22	122:5,12 123:19	71:3 79:12 80:13	91:13 98:18 101:7
40:15 59:20 68:14	retrospective 87:10	124:16,17 127:15	82:24 83:10,12	101:13
requirement 43:7	return 10:17 38:3	129:10 130:25,25	85:18 86:9,10,10	
44:2 67:8 142:6	returned 37:21	132:10 135:12,17	105:4 109:15	Satisfactorily
148:14	52:22 65:20 91:15	142:2,22 145:7	110:4,13 114:14	83:11
requires 13:11 20:5	93:21 99:8 100:17	146:5,25 147:2	115:12 123:19	satisfied 120:1
21:9 29:5,9 42:5	returning 62:15	149:7,9 150:7	125:7 128:24	122:3
43:24 84:20	reversed 4:15 80:2	152:24 153:9,11	133:10 135:20,22	satisfy 43:7
137:10	reversion 44:21	153:19 154:5,12	137:15 138:3,19	satisfying 107:10
reserved 67:16	158:20	155:9,10,21 156:1	139:9,9,12 140:10	120:25 121:10
127:25	reverted 159:1	156:5,8,11 158:1	140:11,15 141:9	save 123:9 150:6
residual 160:15	review 74:22	158:5,10,13,17	141:12 147:20	saw 68:21 69:20
residue 61:23	Richard's 128:22	160:3,15,17	150:11 152:17	saying 18:5,6,6
101:14	<b>Richards</b> 5:10 8:25	rights 26:24 29:17	153:19 155:1,21	26:25 28:20,21
respect 5:15,22 6:6	9:8,25 16:8 17:11	31:10 42:14 44:21	157:4	29:7 31:4,8,9 34:9
10:5 12:20 13:22	41:3 74:17 102:7	45:4,6,18 51:13	ruled 66:19	36:18 38:5 60:19
13:25 14:5,18,20	108:24 123:25	51:14 85:9 86:21	rules 10:2,12 11:23	64:22 79:24 82:21
15:9,13 20:1 21:8	<b>Richards'</b> 116:19	93:6 104:13	16:11,13 25:6	91:20 93:9 95:7
21:12,22 23:3	rid 133:8	151:13 158:17,21	26:17,19 32:1	96:3 97:13 100:8
26:12 27:12,19,22	<b>right</b> 6:18 10:5	159:2	34:4 37:1,23,25	100:22 103:13,25
33:21 34:3,8,14	11:20 12:9,14,17	rise 46:11 130:14	38:11 41:5,10,19	104:16 105:1
38:2 40:6 43:10	15:20 16:2,19	rises 161:1	41:21 42:4,8	106:7 119:13
43:12 44:16 45:14	21:21 23:15 24:4	<b>Robert</b> 49:4,19	46:20 47:7 48:1,2	120:8 127:8
45:17 46:24 50:1	27:6 28:22 29:19	role 62:12	59:5 70:21 105:16	128:16 129:11
52:1 55:12 68:15	29:25 30:18,20	roll 26:11	113:10,11 114:5	134:14 143:4
72:25 74:5 82:12	31:15,17,20 33:7	Rolls 83:8 107:4	114:17 116:25	151:18 155:8,11

				1 age 10+
says 18:13,14 19:1	55:24 60:4 66:16	32:8,19 33:4,7	25:24 81:21	123:1,23
19:1 23:11 28:8	79:2 82:17 99:16	37:10 38:19 44:5	115:17 118:9	shows 62:5
29:18 30:9,11	102:3 107:14,16	46:2 47:24 54:12	set 58:11 116:5	shutters 150:21
31:17 33:11 34:18	108:25 110:3	55:6 56:22 59:10	136:8 145:17	side 80:5
35:20 36:5,8,10	115:13 123:17	71:3 72:11,22	setting 18:17	sides 120:21,22
36:13,23 38:4	130:12,13 131:22	73:10 86:2 89:4	settling 63:4	sight 132:16
41:14 42:7,13	143:14 156:12	92:11 95:12 102:8	seven 8:20 57:15,17	significance 118:19
43:14,20,23 50:16	160:4,12	103:4 118:19,22	57:18 69:17	significant 10:6
60:5,23 61:4,9,15	secondly 8:23 43:6	119:11 120:16	103:21 147:18	16:8 25:5 54:23
61:20 62:4,18	46:23 57:24 67:1	127:17 138:19	Seventh 70:20	56:3 103:1
63:8,14 64:6	69:21 82:14	144:3 157:17	138:10	similar 19:10 28:4
66:11 72:24 75:10	102:23 108:21	seeing 6:20	seventhly 10:24	28:4 33:9 48:12
76:2,3,11,20 77:5	126:5 136:15	seeking 128:24	58:4	54:12 105:5
77:16,23 78:9	section 4:12 33:8	seen 10:22 139:6	share 25:13	106:13 107:16
79:7,14 83:1,14	35:1,2 53:2,5,11	sees 61:2 110:8	shareholders 7:21	110:10 115:17
83:20,24 84:17,19	53:18 54:4,6 55:1	selected 70:13	8:3,17 18:20 22:1	116:6 117:2
85:6 86:8 90:18	55:10,24 57:24	Self-referential	27:3 30:8 45:21	131:17 147:24
96:18 97:21	58:1,1 66:17,18	97:20	51:7 52:5 81:7,12	149:22
104:23 105:10,18	69:15 70:21,24	self-serving 97:19	81:19 88:21,24	simple 12:17 51:1
105:24 110:5,13	71:2 72:3 78:9	<b>Selwyn</b> 82:19	99:22 100:17,19	131:5 140:9
111:3 114:8,19	79:1,2 80:10,11	Selwyn's 132:14	100:22 129:14	147:21 148:17
115:10 119:12,25	80:13,15 87:5,9	sense 3:22 65:21	135:10,16 157:12	150:12 152:8
120:18 122:1	89:5,21,22 90:3	69:13 91:16 92:11	<b>shillings</b> 64:9 73:9	simply 3:5 7:7 10:3
125:1,3,6 129:3	90:19,21 91:2,7,9	94:19,22 103:10	111:7,25	13:25 17:23 18:15
129:21 131:19	91:10,16,17,20	103:15 110:5	Shipbuilding 82:6	19:4 20:20 23:6
140:22 141:20	92:2,14,23,24	121:21 132:25	<b>short</b> 6:1,19 17:14	23:10 27:5,17
147:17 149:5,17	93:8 95:1,15	133:4,20,23 134:3	17:16 47:20 86:25	30:6 34:4,17
150:8 153:19	96:17,24 97:8,12	134:18,19 135:11	87:3 125:11 132:1	37:24 39:17 44:12
156:12 160:17	97:13,15,23 98:4	139:17 151:4	140:13 141:24	44:15 47:2 91:20
scenarios 153:9	98:12 101:19,19	153:17 154:1	160:21	92:25 93:5 104:9
scheduled 25:24	103:25 104:1,15	155:7,8,10 157:25	shorter 143:24	112:21 116:17
scheme 2:2 8:9	105:3,10 107:17	158:7	shortfall 21:24,25	125:15 131:2
15:10 19:12,23,24	108:5 109:22	sensible 2:15,18 3:4	25:9 26:17 38:24	132:5 133:14
20:5 21:9 33:7	112:12 113:11	4:6 8:4 29:22,23	39:11 40:14,19	135:11 145:5
38:13 62:16 77:16	116:10 123:18,23	sent 16:25	45:16,25 46:1,9	159:15 161:6
91:13 157:21	124:4 125:6	sentence 61:3 73:12	141:6 157:8	single 6:12 23:18
schemes 7:13,16	128:13 138:16	75:17 76:19	shorthand 47:14	26:5 140:21 161:6
9:9,11	156:8 159:13	111:18 114:8	53:11 125:20,22	singly 63:24
Schweppes 48:23	sections 57:12	156:12	shortly 9:2 37:10	sinking 65:10
49:3	88:22 89:2 97:3	separate 50:17	50:6 54:2 56:7,22	siphoned 135:7
scope 21:3	securities 75:13	56:14 73:13 87:19	56:25 57:4 160:12	<b>sitting</b> 161:2,4
Scotland 123:5	see 2:20 3:14,23	87:23 111:8,11,15	160:22,24	situation 65:1
second 16:6 22:9	11:21 14:2,15	111:22 112:1	show 9:5,7 49:23	68:11 110:11
22:25 27:21 30:20	15:4 16:5 19:9	114:16 155:24	57:9,12 66:16	133:24 134:20
36:24 46:14 53:1	28:6 31:14,14	series 24:8,11	110:20 118:7	135:6 141:3
	<u> </u>	<u> </u>		<u> </u>

				Page 185
142 17 147 0	111414	171.0	122 17 120 25	02 ( 00 10 05 15
142:17 147:9	sound 114:14	161:8	123:16 130:25	83:6 89:10 95:15
150:14 151:1	sounded 60:14	started 57:16 59:10	132:5 136:15,20	95:21 100:14
155:19	source 41:25	starting 14:10 18:7	136:22 137:4	122:19 128:5
situations 30:16	speak 53:7 58:10	24:12 36:4 75:17	138:3 140:15	131:9 143:15
98:7 152:11	118:3	89:4 120:16	144:5,7 146:14,17	subjected 77:9
six 70:16 77:5	speaking 94:7	156:20	149:19,20 150:7	submission 8:3
103:22	155:16	starts 26:13 60:2	156:22 157:21	10:22 14:15 17:16
sixth 10:17 58:2	special 111:16	60:19 82:20,21	158:13 159:14	38:14 39:4 50:8
137:21	specific 32:24 53:3	91:13,16 137:13	160:14	55:20,24 56:15
skeleton 48:12,16	53:18 137:4	stated 64:12 69:23	stayed 85:20	58:21 59:9 80:23
48:18,20 117:18	specifically 126:24	111:10 139:6	stems 13:6	91:2 96:9 105:14
145:22 156:9	specifies 28:9	statements 1:13	step 159:8	112:21 126:8
slate 97:4	specify 28:15	states 89:22 123:6	stepping 115:8	129:16 135:21
<b>slight</b> 53:11	speed 143:22	statute 30:9,11,23	steps 135:1	143:8 157:22
<b>slightly</b> 10:21 39:3	speedily 85:1	31:10 32:13 43:15	sterling 8:14	159:11
52:6 99:17 103:10	spend 9:3	45:17 61:1 65:13	Stock 82:7	submissions 3:1,10
148:23,24	spends 103:2	65:16 66:7 79:21	stop 44:7 112:14	3:18 8:19 9:2
slow 40:3	<b>spent</b> 100:15	91:10 95:6 98:9	122:16 147:2	10:20 16:2 17:10
slug 150:4	<b>stage</b> 8:24 12:7	98:17,18 100:1	stopped 78:16	40:18 66:21 108:9
small 15:17	14:3 17:14 20:11	101:6 104:23	stopping 22:10	120:15,18 121:23
small-time 33:2	20:25 21:10 29:6	113:12,14 114:4	<b>stops</b> 12:6,10 77:17	121:24 122:2
<b>Smith</b> 4:10,25	34:21 35:20,21	131:12,19 135:14	121:18 133:9	125:4 136:3
108:11	36:17 38:25 39:4	138:5 141:4,5,22	135:5 150:17	161:11,17
so-called 25:16	40:24 41:3 46:18	142:14	151:4,5	<b>submit</b> 22:11
solely 87:21	53:20 55:18 56:1	statutes 50:20	straight 79:23	132:10 149:4
solvency 132:13	56:20 59:13 60:2	138:13	strands 50:18,20	subordinated 8:16
solvent 25:4 78:7	62:1,13 65:11,13	<b>statutory</b> 1:18 2:2	53:21 54:6	135:10 157:11
116:21 117:4,12	66:6 67:18 68:23	7:13,16 8:8 9:9	streams 10:11,13	subscribed 5:9
117:14,22,23	75:4 80:18 86:18	10:18,19 15:9	129:24	subsection 89:9
somebody 60:10	89:8 90:23 94:3,4	18:17 19:10,12,23	strength 63:10	97:22
sorry 16:20 17:7	98:19 106:5	19:24 20:4 22:6	stress 58:17	subsequent 56:17
22:10 41:8 53:4,6	115:18 116:18	25:19 27:12,18	strictly 4:4	60:22 62:16 64:13
53:11 72:1,7 82:1	129:18 134:2,4	28:5,16,22 29:19	striking 22:5	77:18 106:9
87:12 88:23,25	135:5,8 136:1	29:24 30:21 31:3	<b>strong</b> 41:15	114:10
89:1 96:12 100:7	140:9 142:5 145:8	31:5 33:7 35:1,7	structured 110:4	subsequently 43:9
102:13 107:13	150:20 152:3	36:10 38:13 42:23	<b>Stubbs</b> 121:24	59:21 62:3 64:2
108:10 113:2	154:16 158:8,15	43:16,18 44:16,20	122:18,22	65:5 70:9,14
117:21 118:4	stages 21:6 56:2	47:1 48:3 49:22	sub-issue 105:8	103:12 116:23
161:2	stance 145:9	49:24 50:10 51:2	144:18 145:19	117:13
sort 2:5 3:22 49:7,8	standing 121:6	51:12 52:11,13,18	146:8,10 156:14	subsisting 113:10
53:8 90:18 99:17	stands 101:5	52:20 56:1 57:12	<b>sub-rule</b> 25:17 27:6	<b>substance</b> 70:20,24
106:23 107:18	start 3:14 4:3,8 5:6	57:18 59:14 61:2	40:10,12	71:1 74:5 105:18
sotto 102:11	11:3,6 22:2 50:11	62:16 69:18 86:15	<b>subject</b> 7:24 11:3	109:13 113:9
sought 109:16	59:8 91:17 120:20	86:18 91:13	11:17 19:13 54:11	128:24
151:11	135:12 136:2	104:13 106:2	68:14 79:13 81:13	substantial 8:12

				Page 180
22:18	7:24	surprise 70:1	talks 35:14 36:13	94:6 98:17 100:8
subverting 141:4	sure 39:20 45:12	surprising 5:25	37:15 68:2 71:7	100:10 111:12
succession 79:9	68:24 69:13 92:19	48:11 83:2 103:11	91:2	122:5 127:17
successive 74:23	98:8,13 104:5	132:11	tanto 75:9	141:14 143:20
suddenly 26:21	108:4 152:6,13	suspect 3:8 69:15	task 13:8	148:20 151:20
130:8	153:14 155:16	system 44:9 99:22	tell 23:10 153:2	152:2,4,23,25
sue 62:11 69:7	159:24 161:11		ten 134:6,16 160:9	153:2 154:8
suffer 21:24 78:18	surplus 5:24 6:3	T	tenor 33:14	155:21 159:14
sufficient 78:18	7:20 14:4,17 15:3	<b>T&amp;N</b> 93:23	tens 152:5	160:25
suggest 7:6	15:11,17 17:19	tab 16:10 17:3,7,12	terms 8:23 11:14	thinks 24:10 92:12
suggested 2:11	18:10,22 19:8	48:17,20 49:3	12:24 35:7,13	third 28:7 33:5
94:23 122:7	20:1 21:10 25:5	59:11 66:18 71:6	51:13 86:21 102:9	36:12 46:15 47:23
126:20 127:3	25:18 26:16,22	72:1 80:25 82:9	117:2 125:7	55:8 76:2 101:4
suggesting 41:15	33:15,16 35:3	87:9 89:22 101:3	147:20 150:11	103:3 111:17
58:6 159:12	36:11 37:17,20	101:25 102:1	153:19	114:7 132:4
suggestion 33:12	38:3,6 39:10 41:1	106:15,17 115:20	test 98:2	136:20 145:19
56:16 80:13 122:3	42:14,24,25 43:19	115:21,22,23,24	testator 111:4,8	thirdly 9:3 30:24
132:9 140:8	43:23 46:23 51:9	118:8 124:3	testator's 111:11	47:1 57:25 69:25
suggests 108:11	51:18,23 52:22,23	127:18 129:1	111:15	126:8
sum 24:21 29:11	53:20 55:2 56:8	139:7 144:17	testators 111:22	thought 16:19
35:24 109:20	59:17,24 61:21	tabs 89:4	thank 3:15 5:6	26:15 28:17,24
119:8,14 120:6	62:5,6,7,11,15	<b>Tahore</b> 131:17	16:18 17:8 33:4	60:13 68:21 94:16
121:5,13 122:14	64:5,7,11,19	tail 158:21	80:8 86:23 102:2	117:12 122:17
135:4 145:23	65:20,23 66:25	take 12:12 22:16	107:15 117:20	thousand 133:25
160:11	67:5,10,14 68:2	25:12 47:17 57:14	143:17 161:5,13	134:1
summarise 81:2	68:15 70:1 73:5,8	58:7 61:21 63:18	thanks 16:24	three 16:17,25 25:1
summarised	73:21 75:8 78:10	65:7 70:18 82:8	thereon 75:1	57:5 67:4 126:1
147:16	79:4 82:15 83:23	101:20 102:5	thing 1:21 66:16	132:4
summarises 76:1,9	83:24 84:6,11,13	115:18 130:13,15	145:24	thrown 119:23
summarising 136:2	85:12,25 88:8,14	131:24 132:11	things 2:5 6:1 7:8	till 125:23 161:2
summary 58:9,15	88:15 89:14,23	135:1 137:11,14	8:20 60:12 82:11	time 9:3 19:25
sums 62:13 75:25	90:22 91:4,15,21	152:1 153:22	141:2 145:2	25:16,20 26:14
119:7 151:24	92:14,19 93:21	taken 2:18 6:11	think 1:11,23 2:10	36:17 38:7 42:16
152:25	95:19 98:24 99:3	64:8 77:20 84:6	2:21 3:11,22 4:22	42:16,22 47:15
supplemental 4:17	99:8 100:22 101:8	114:24 121:14	11:17 16:17,25	52:7 57:2 61:11
128:22	104:3 108:20	122:22	17:4,9 23:21 24:4	62:21 63:24 73:24
support 125:4	110:5,14 111:9	takes 1:24 21:20	24:12 36:1 39:2	73:24 74:15,15
supported 77:11	112:3 115:6,10	71:5 84:24 85:8	40:1,3,10 44:9,10	75:7,7,23,25 86:2
supporting 120:7	116:13,24 119:3,5	134:5,16 160:9	44:24,25 48:16	108:22 112:5
suppose 35:8 44:8	123:20 124:11,17	talk 26:24 35:13	53:16 55:4 58:9	124:1 135:3
64:7,17 92:7	127:20,23 129:13	92:9	60:22 64:8 68:3	141:23 151:24
supposed 77:11	131:1 136:24	talking 27:9 38:1	69:3 71:11,16,24	153:14
78:17 85:8 119:21	138:1 141:2,23	94:23 97:24,25	76:7 79:23 80:6	times 49:25 51:21
Supreme 1:6,14,20	154:16	124:4 141:10	84:20 85:13 86:7	82:22 87:15
1:24 2:1,17,25	surpluses 100:4,8	142:1	87:4 91:9 92:16	timetable 4:2
1.212.1,11,23	Sai piases 100.7,0		07.171.772.10	mileanic T.2

				1 490 107
tinker 92:1	142:10	33:6 38:20 44:2	usury 71:20	134:10 138:7,14
today's 100:23	trustee 68:24 74:2	45:6,18 47:3		139:2,6 141:5,16
told 152:4	99:12,19	51:11,14 52:25	V	142:7,10 143:12
tomorrow 151:19	try 46:5 101:16	53:25 54:7,9,18	v 2:4 5:8 6:24 8:15	143:16 146:16
153:15 161:1,11	152:9 154:25	55:1,4,11,16 70:3	8:21 9:6,15 11:5	148:8,11,13 150:2
top 73:11 75:10	160:4	70:22 88:7,18	11:19 12:15,16	152:21,24 153:5,5
110:21 111:3	trying 26:4 100:10	92:3 104:13	14:14 15:18,24	155:18 156:1,3,6
121:25	160:16	105:10,11 106:2,3	22:24 24:18 28:25	157:5 158:5
topic 11:4 15:15,15	turn 2:3 17:10 18:2	124:17 127:15	29:5 30:10,17	vain 62:7
16:6 46:14 47:10	47:11 50:19 71:2	138:6 142:2	31:13,25 32:7,14	value 102:8 134:7
47:23 125:17	80:18 87:17 91:1	155:10 158:12,16	33:13,24 35:6	valued 13:13
tort 93:23 99:5	106:17 117:12	160:3,6	36:15 37:6 38:16	variant 148:9
total 26:10 143:19	143:25 144:17	understand 1:8	38:22,24 39:8,14	various 3:20 8:24
trace 91:9	152:5 156:12,20	13:6 14:25 24:6	40:16 41:5,9,16	9:11 10:24 16:6
tracked 101:16	turning 50:9	26:3 33:19 34:5	42:4 43:23 44:7	56:2 79:22 89:8
transcriber 47:12	turns 78:8 116:23	35:18 39:20 40:4	46:14 51:25 54:13	vested 63:17 68:23
Transport 101:22	Turquand 80:25	50:3 58:8 94:6	54:15 55:9,15,20	Vice-Chancellor's
treat 20:16,22	two 1:15 4:10 9:21	98:11 119:21	55:23 56:18 57:6	80:2
21:16 32:1,5	10:11,13 13:19	141:14 159:24	57:7,15,19,25	view 3:25 6:19
35:10 38:25 39:15	21:6 25:1 31:8	understanding	58:4 59:2,4,11,22	28:12 33:14 70:11
40:20 43:11 44:12	41:22 42:6,12	112:24	65:6,18 69:21	76:6,7,11 82:23
110:12 140:25	43:7,24 49:12	understood 79:12	71:6 72:1,13,18	90:14 99:9 121:7
143:1,4	50:17,17,20,24	85:17 161:2	79:16 80:12,15,25	153:18
treated 14:20 34:13	54:6,17,20 64:6	undisposed 108:14	81:20 82:16,18	views 2:1 47:7
42:11 45:5 104:23	79:1 82:11 83:1	undying 16:24	84:8 86:1 87:5,6	voce 102:11
105:16 116:8	83:22 87:19 88:22	unfortunate 2:16	87:15,24 90:11	<b>volume</b> 17:3,7,12
131:7 142:19	89:2 108:17 115:8	unhelpful 90:15	91:12 92:17 94:19	49:3 59:11 66:18
151:9 153:24,25	129:23 132:17	uniform 82:25	96:18 98:6,25	80:25 82:9 87:8
154:24	137:18 157:24	United 123:6	101:2 102:11	89:3,4 115:20
treating 6:5 15:12	two-thirds 60:3,8	unjust 77:10	103:17,22 104:1,2	118:8 127:19
21:4 36:16 44:19	60:19 62:18 84:18	unnecessary	104:4,21 106:4,7	129:1
51:25 66:12 73:1	86:7	109:24	106:10 108:16,18	
73:16 84:8 115:3	type 156:17	<b>unpaid</b> 68:19	108:22 109:9,12	W
121:14 143:12	typo 3:16	119:22 122:8	109:17 110:18,22	wait 2:8
treatment 20:13		unprincipled 146:1	114:25 115:14,20	<b>Walker</b> 49:4,19
64:5 82:9 126:18	U	146:7 149:2,4	115:21 116:16	want 9:12 11:9
treats 12:18 80:9	UK 95:25	unreasonable	117:5,9,10 118:15	34:12 38:20 47:14
131:12	ultimate 84:5	77:10	118:22 119:23	49:10 57:11 58:16
tree 85:13,21	ultimately 22:4	unsecured 8:13	120:9,23 121:6,12	87:17 104:5 124:1
132:15	56:6 77:1 81:11	unusual 100:5	121:17 122:12,16	138:22 142:2
tried 3:21	127:2 135:8	updated 71:1	123:3,12,22	156:11
trouble 53:15	underlie 48:4	use 17:2	124:18 126:7	wanted 22:2 66:16
troubled 144:12	underlying 10:19	useful 3:23 13:3	130:7,8,18 131:2	117:15 123:23
<b>True</b> 63:19	12:20 29:17,25	80:24	131:9,15,16,21	125:17 133:8
<b>Trust</b> 123:12	30:18,20 31:10	uses 91:12	132:8,19 133:24	151:13,15

				1 age 100
wants 136:5	131:5 152:19	136:10 138:18	153:2,10,12 156:2	11 48:22
warrant 114:25	week 120:20	151:10 153:19	157:7,23 158:3	<b>11.45</b> 47:19
wash 100:16	weight 126:3	words 11:4,11	<b>WW</b> 80:4	<b>11.55</b> 47:21
wasn't 19:13 28:20	weight 120.3 went 16:12 23:8	13:15 17:25 19:3	<b>** **</b> 60.4	<b>11.</b> 33 47.21 <b>112</b> 108:25
45:10 53:15 54:4	Wentworth 4:7	19:25 28:11 35:9	X	<b>112</b> 108.23 <b>118</b> 66:18
55:3 58:22 81:10	10:25 80:6 140:8	49:16 51:16 68:1	Y	<b>12</b> 48:20 115:22
102:8 123:8 145:7	145:4,8	68:10,17 81:15	year 73:13 79:8	<b>120</b> 125:23
waste 124:1	Wentworth's 140:1	91:6 92:18 93:4,9	134:1,6 152:1	<b>122</b> 106:17
<b>Waterfall</b> 1:7,8	weren't 31:20	93:10 101:9 107:8	years 24:21 25:1	<b>123</b> 123:13 125:2
7:25 18:17 48:9	whatsoever 102:18	108:13 109:9	57:5 72:2 83:2	<b>127</b> 125:8
99:24 129:4	whilst 50:2 109:7	113:13 114:13	97:6 110:24	<b>128</b> 123:14 124:20
135:13 136:22	135:1 148:6	118:5 119:6,19	132:17 134:6,16	125:3
159:8	<b>White</b> 9:25 10:6	123:19 128:16	160:9	<b>13</b> 5:11 80:25
way 3:21 8:14 13:2	118:18,20 122:19	137:13,24 146:3	York 4:10	115:23
13:8 15:1 17:9	126:4 127:14,18	146:16 153:3,21	10fk 4.10	<b>132</b> 33:8 35:1 53:2
24:24 25:21 26:25	128:7,10 129:24	159:19	$\overline{\mathbf{z}}$	53:5,11,18 54:4,6
27:5,18 30:3 32:6	130:11 132:6	work 20:10 23:13	<b>Zacaroli</b> 4:6,16	55:1,10,24 57:24
32:11 34:23 35:18	Whittingstall 9:15	26:4 27:24 29:8	Zacaroli's 80:6	66:17,18,20 70:21
37:4,9 39:3 46:10	57:7 58:4 59:2	36:1 39:8 40:2,16	Zacaron 8 00.0	71:2 72:3 78:9
50:5,22 53:21	103:22 106:10	46:6 99:12 131:2	0	79:1,2 80:10,11
55:6 58:17 59:3	108:16 109:9,17	148:1 151:3,4		80:13,15 87:5,9
60:4,8,19 61:3	117:5 131:16	worked 50:22	1	105:10 107:17
62:18 65:8 75:20	142:7	93:17 99:23	<b>1</b> 7:25 15:15 16:10	112:12 116:10
84:7,18 86:7	widely 134:20	151:19 152:7	17:12 40:24 48:9	123:18 128:13
91:10 92:13 94:23	wider 112:24	working 35:19	51:18 59:11,11	138:16 159:13
96:22 97:5 99:22	windfall 8:17 21:25	155:19	71:6 72:1 80:25	<b>134</b> 17:14,16
102:10 104:6	winding 13:16	works 16:4 24:7	82:9 87:8 99:24	<b>135</b> 22:9,25 27:21
110:4 111:17	51:22 80:21 83:3	27:18 59:4 86:12	101:3,3,6 106:15	28:3
114:7 116:6	85:3,15 116:3	110:23,23 115:2	110:22 111:18	<b>136</b> 28:7,7 29:15
120:14 122:6	124:13,14 127:20	132:13 135:14	115:20,21,22,22	<b>137</b> 17:14 33:11
129:12,17 133:21	window 100:20	141:20	115:24 118:8	<b>138</b> 48:9
135:13,24 139:12	wonder 68:17 86:2	world 26:23 27:24	124:11 129:1	<b>139</b> 88:5
139:19 141:3	wonder od:17 od:2	worth 24:22 48:16	135:13 139:7	<b>13th</b> 101:5
145:23 147:10	wondering 124:8	101:1 132:14	144:17 150:18,20	<b>14</b> 117:3 118:2,4
149:7 151:3,14	word 3:19 49:17	134:5	150:21,24 151:7	<b>14</b> 117.5 116.2, <b>4 142</b> 88:5
153:2 155:25	67:20 93:3 122:19	wouldn't 23:22,25	· · · · · · · · · · · · · · · · · · ·	<b>143</b> 37:15 38:1
157:3 160:11,16	128:11 141:19	93:1 150:4	151:16 155:13	96:24
ways 3:20 30:16	144:22,23 145:4	writer 47:15	<b>1.02</b> 86:24	144 41:7,12,13
	· · · · · · · · · · · · · · · · · · ·		<b>1.3</b> 8:14	<i>''</i>
103:10	wording 7:9,12	125:20,22	10 48:22 115:21	138:24
we'll 3:14 5:5 55:12	10:17,21 16:7	writing 3:5	134:1 146:4	<b>145</b> 42:7
69:3 71:23 134:14	22:12,12 23:6	written 148:9	<b>10.30</b> 1:2 161:5,8,9	145A 89:4,4
143:4 155:8	28:3 46:20 58:18	wrong 10:2 18:7	161:16	146 89:4,22
we're 5:4 68:10	58:23 66:24 70:25	31:4 44:3 87:22	<b>100</b> 23:19,24 141:7	147 48:10
156:2 159:11	90:3 105:19 107:1	125:5 143:9	<b>107</b> 37:15 38:1	<b>149</b> 42:13
we've 3:21 4:11,24	125:6,12,16 133:9	146:16 152:19	96:24	<b>15</b> 72:2 73:15 101:6
	I	I	l	I

				1 486 107
161:10	57:1,4 58:2,14	45:3,14,25 46:5,6	<b>26</b> 48:14,20 144:16	159:22 160:1,12
<b>150</b> 41:7,12 138:25	72:14 80:17 87:16	50:12 54:4 67:21	144:18,19 146:8,9	<b>4.15</b> 159:25 161:1
<b>16</b> 82:9 124:10	87:16,20,25 88:4	70:25 71:3 110:4	147:16 153:9	161:14
<b>164</b> 5:11	88:10 89:2,5 93:7	123:19 125:12	156:11	<b>4.30</b> 161:3,4
<b>17</b> 63:10 124:10	94:22 95:3 102:19	128:24 133:10	<b>269</b> 101:23 102:3	<b>4/122</b> 106:24
143:19	102:24 103:9,18	135:20,22 157:4	<b>2A</b> 129:4 156:15,18	<b>40</b> 58:1 89:5 90:19
173,000-odd	103:20 105:13	157:10,24,25	159:21	96:17 103:25
119:15	127:7 138:17	158:11	<b>2B</b> 1:8	40(1) 89:5
<b>174</b> 16:10 17:3,7	<b>1886</b> 57:5	<b>2.88(7)</b> 7:10 8:23		<b>40(5)</b> 90:21 91:7
136:7	<b>19</b> 144:16,18	17:18 28:10 35:9	3	92:23 93:8 97:12
<b>1743</b> 6:7 37:19 38:6	<b>1936</b> 115:23	36:3 48:1 105:4	<b>3</b> 1:1 5:9 11:21	101:19 105:3
52:17 56:19 59:11	<b>1962</b> 80:23	138:19 149:25	12:10 67:1 143:10	<b>40A</b> 117:2 118:2,3
87:16 93:17 96:23	<b>1969</b> 132:12	150:11 152:20	144:2,19,23 156:4	118:4
132:25	<b>1978</b> 119:15,16,21	156:23	161:17	<b>44</b> 72:18
<b>1745</b> 79:8	120:2,4 122:9	<b>2.88(8)</b> 38:15 40:2	<b>3.22</b> 131:25	<b>440F</b> 118:23
17th 113:11	<b>1982</b> 119:18	<b>2.88(9)</b> 28:9,15,18	<b>3.28</b> 132:2	<b>442</b> 118:23
<b>18</b> 109:22	<b>1984</b> 7:3 15:7 56:14	30:24 31:17 43:2	<b>30(2)</b> 95:1	<b>446</b> 118:25
<b>1805</b> 72:4	<b>1986</b> 6:2,3,16 7:1	50:13,16,18 53:21	<b>300</b> 97:6	<b>45</b> 72:18 104:15
<b>1824</b> 52:8,16,17,17	9:4,24 10:2,10	54:5,21,25 109:15	<b>31</b> 119:16	108:11 112:19
53:10,17	14:15 15:7 19:11	115:12 116:10	<b>34</b> 129:2,2	<b>453D</b> 119:12
<b>1825</b> 19:11 28:6	22:18 37:4 41:17	129:11 145:12	<b>35(a)</b> 108:5	<b>456F</b> 120:16
33:8 53:1,5,6,9,11	47:24 48:6 50:2	151:10 158:18	<b>351</b> 72:23	<b>457B</b> 121:3
53:17 54:21 55:8	50:23 51:1,16,22	160:8,17,18	<b>352</b> 73:10	<b>458</b> 121:25
55:22 57:25 72:14	56:12 58:19 70:21	<b>2.887</b> 36:24	<b>353</b> 74:18	<b>46</b> 106:25 107:1,5
78:9 80:17 88:6	105:16,23 122:20	<b>2.889</b> 30:25 51:19	<b>354</b> 75:4	107:14 109:24
106:9 112:12	125:15,19 126:12	<b>20</b> 64:9 73:9 85:11	<b>355</b> 75:5,10 76:2,10	110:2,3 115:9
128:13	132:12 137:2	110:24 111:7,25	139:7	<b>47</b> 59:13
<b>1832</b> 72:11 98:5	158:24	119:15,21 120:2,4	<b>358</b> 79:6	<b>48</b> 118:8
101:17	1990s 102:15	122:9 125:22	<b>36</b> 115:24	<b>49</b> 59:13 60:3
<b>1838</b> 71:13 102:17		145:10	<b>360</b> 79:24	
<b>1840</b> 73:13	2	<b>2009</b> 17:1	<b>362</b> 81:1	5
<b>1841</b> 72:2 106:18	<b>2</b> 3:17 5:7,9 15:15	<b>2012</b> 24:12,17,21	<b>365</b> 81:1 152:2	<b>5</b> 64:8,10 68:3 87:9
109:4 112:8,13	15:22 17:12 49:3	<b>2014</b> 24:13		89:13 97:22
113:4,8,11,18	51:19 58:5,5	<b>2017</b> 1:1	4	103:21 105:4
114:4	102:1 117:16	<b>21</b> 119:18	<b>4</b> 17:3,7 54:2,9,11	124:13 127:18,19
<b>1844</b> 81:3	118:7 124:2 129:1	<b>212</b> 127:18,19	55:20 66:18 67:1	156:19,20 159:21
<b>1851</b> 87:8	132:17 143:9	<b>216</b> 110:22	67:25 70:7,13,23	159:25
<b>1861</b> 111:10 113:9	144:12,17 146:14	<b>217</b> 111:1	87:21 88:3,9,13	<b>50</b> 60:4,19
<b>1862</b> 81:3,8,16,18	<b>2.00</b> 86:22 87:1	<b>23</b> 48:14,20,25 49:5	88:19 89:3,9,17	<b>51</b> 101:4
<b>1865</b> 53:4	<b>2.8</b> 125:7 147:20	49:12 144:17	89:20 90:21,24	<b>52</b> 63:14
<b>1869</b> 6:2 51:21	<b>2.88</b> 5:14 10:17	<b>24</b> 48:25 49:5,12	91:8 92:1,22	<b>53</b> 65:4 88:4
56:22 81:22 82:5	16:9 28:15 33:12	53:14 106:15	102:25 105:3,12	<b>55</b> 53:4 102:1
<b>1870</b> 81:22 82:5	33:22,22 39:5	145:20 149:2	105:13 106:17	<b>56</b> 88:4
<b>1883</b> 6:7,10 55:8,22	42:15,20,22,23	<b>248</b> 48:10	110:6 113:23	<b>58</b> 72:18
56:3,4,7,12,17,19	43:25 44:12,13	<b>25</b> 24:14,15 53:14	115:11 128:17	589,000-odd
, _ , _ , _ , _ , _ , _ , _ , _ ,				

			Page 190
119:23 120:6			1
122:8			
6			
<b>6</b> 71:6 72:1 139:7			
156:19			
60 95:15			
<b>60(5)</b> 104:1 <b>64.2B</b> 117:2,21			
118:1			
<b>644</b> 82:20			
<b>647</b> 86:7			
<b>65</b> 55:13 58:1 72:18 89:21,22 90:3			
91:1,2,9,10,16			
92:2,6,14,24 97:8			
97:13,15,23 98:4 98:12 101:19			
113:10			
<b>67A</b> 48:17 49:3			
<b>69</b> 124:3			
7			
7 25:17 27:6 35:13			
38:17 50:12 54:4 115:20			
<b>79</b> 62:17			
8			
<b>8</b> 134:11,13 144:2			
<b>86</b> 58:18 136:12			
<b>88</b> 127:19			
9			
<b>9</b> 7:10 8:24 48:1			
50:12 54:5 138:19			
<b>93</b> 125:25 <b>95</b> 124:4 125:25			
	<u> </u>		