

<p>1 Monday, 3 April 2017 2 (10.30 am) 3 LADY JUSTICE GLOSTER: The first question we have is: to 4 what extent are the arguments going to be affected, or 5 the issues going to be affected, by any decision that 6 the Supreme Court may give in relation to the previous 7 Waterfall appeal? 8 Obviously, as I understand it, the Waterfall 2B 9 appeal, dealing with the releases, is going to be 10 affected, if the concurrency conversion claims go. 11 MR DICKER: I think, depending on the outcome of the appeal, 12 it may well impact on both part A and part B. 13 LADY JUSTICE GLOSTER: Because of general statements which 14 the Supreme Court may make? 15 MR DICKER: For two reasons: one, there are some issues, in 16 part A, which effectively assume the existence of 17 currency conversion claims and then ask, for example, do 18 you have to offset statutory interest when calculating 19 the amount of the currency conversion claim. 20 If the Supreme Court were to hold that there is no 21 such thing as a currency conversion claim, then that 22 issue obviously disappears. 23 I think broadly, depending on the approach that the 24 Supreme Court takes, the decision could impact on all of 25 the issues in relation to part A. For example, if the</p> <p style="text-align: center;">Page 1</p>	<p>1 looking for a further opportunity to make submissions in 2 the light of that judgment? 3 MR DICKER: The answer is: yes, that would seem to be 4 a sensible course. 5 LADY JUSTICE GLOSTER: And simply in writing or will -- it 6 may depend. I mean, because it's always difficult to 7 get the same constitution together again. 8 MR DICKER: The answer is: it may depend, but I suspect 9 there will certainly be a keenness on the part of the 10 parties to have an opportunity to make oral submissions 11 if they think that is necessary. 12 LADY JUSTICE GLOSTER: Yes. Okay. You are all agreed about 13 that, are you? Yes, fine. 14 Then we'll start and see where we get to. 15 Thank you for the issues paper, that was extremely 16 helpful, apart from the typo -- which amused me -- in 17 the first articulation of issue 2. 18 Submissions by MR DICKER 19 MR DICKER: Just a brief word in relation to that. There 20 are obviously various ways in which you can order the 21 issues. We've tried to order them in a way which we 22 think makes some sort of logical sense. They plainly 23 interrelate, and it's useful to see how the arguments 24 fly in relation to each of them before, obviously, 25 forming a view on any of them.</p> <p style="text-align: center;">Page 3</p>
<p>1 Supreme Court expressed certain views about the general 2 effect of the statutory scheme, creditors first, members 3 last, for example, that may in turn have an influence on 4 how this court approaches questions like Bower v Marris, 5 non-provable claims of interest, things of that sort. 6 LADY JUSTICE GLOSTER: But, obviously, everybody is agreed 7 that this court should go ahead nonetheless; that we 8 shouldn't all back up and go home and wait for the 9 judgment. 10 MR DICKER: I don't think anyone -- as far as I'm aware -- 11 has suggested the latter. 12 LADY JUSTICE GLOSTER: Yes. 13 MR DICKER: I'm afraid -- 14 LORD JUSTICE PATTEN: That would, in fact, have been the 15 sensible course. I'm not criticising you. It's 16 unfortunate that we haven't had the judgment from the 17 Supreme Court given it would have been plainly more 18 sensible for this hearing to have taken place after the 19 judgment had been handed down. 20 MR DICKER: And I certainly see -- if I may say -- the force 21 in that. I think it's fair to say that we had hoped we 22 would have received -- 23 LADY JUSTICE GLOSTER: But, anyway, you are all agreed that 24 we should crack on now. What is going to happen when we 25 do get the judgment from the Supreme Court? Are you</p> <p style="text-align: center;">Page 2</p>	<p>1 The other document which I hope the court has is 2 a proposed timetable. The general idea in relation to 3 that is that I should start and I should deal with all 4 the part A issues, and whether or not I'm strictly the 5 appellant or the respondent; that seemed to us to be 6 a sensible course. But Mr Zacaroli on behalf of 7 Wentworth will then respond. If the administrators have 8 anything to add, they will do so at the start of 9 replies. 10 Mr Smith, on behalf of York, is keen to open his two 11 appeals. We've added those at the end of the part A 12 section. 13 LADY JUSTICE GLOSTER: Yes. 14 MR DICKER: So for as part B is concerned, again, it's the 15 same as the general approach, so the order is reversed. 16 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli will go first. 17 LORD JUSTICE BRIGGS: That is the reason the supplemental 18 issues have been pull out. 19 MR DICKER: That is the only reason. 20 LORD JUSTICE BRIGGS: Because otherwise seems quite clearly 21 connected with the As and Bs from which they derive. 22 MR DICKER: They are. We didn't think it was practical to 23 deal with each issue on its own. We will deal with them 24 in the normal order. We've managed to achieve agreement 25 on that in the main. Your Lordship observed Mr Smith is</p> <p style="text-align: center;">Page 4</p>

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

Page 5

1 number of reasons. In short, that's not how things had  
 2 operated in a liquidation between 1869 and 1986.  
 3 Prior to 1986, in the event of a surplus in  
 4 a liquidation, interest was calculated by notionally  
 5 treating the dividends as having been paid first in  
 6 respect of interest; that was also the position in  
 7 relation to bankruptcy between at least 1743 and 1883.  
 8 No party has been able to find an authority in  
 9 bankruptcy indicating that the position changed after  
 10 1883.  
 11 The same approach has actually been taken in every  
 12 single other Commonwealth jurisdiction that the parties  
 13 have been able to identify which have considered it.  
 14 There is no case in any other jurisdiction where the  
 15 principle has been criticised, let alone rejected.  
 16 LORD JUSTICE PATTEN: The issue is whether the 1986 Act  
 17 changed the position, isn't it?  
 18 MR DICKER: Your Lordship is absolutely right. We say in  
 19 short: your Lordship can't reach a view on that without  
 20 seeing the context and what in one case has been  
 21 referred to as the "intellectual freight" provided by  
 22 the prior regime.  
 23 My Lady, in each case the courts have applied the  
 24 equitable principle in Bower v Marris describing it as  
 25 both a fair and a just approach. None of the material

Page 6

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

Page 7

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

Page 8

<p>1 reaching the conclusion he did, and to make our 2 submissions, shortly, as to what we say they mean. 3 Thirdly, then to spend a little time, not too long, 4 looking at the position prior to 1986, both in relation 5 to bankruptcy and liquidation, to show your Lordships 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 relied arose 9 equally in relation to the earlier statutory schemes 10 and, indeed, were 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 Chitty in 15 a case called Whittingstall 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: 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</p> <p style="text-align: center;">Page 9</p>	<p>1 appropriation, which the judge held was a necessary part 2 of the principle. 3 So, subject to the court, I was proposing to start 4 with the first topic, which is to say a few words about 5 how the principle in Bower v Marris operates. 6 We say it's helpful to start by reminding oneself of 7 why the issue arises. Interest accrues on principle not 8 unless it's compound interest on interest, a creditor 9 will therefore want to ensure that any payment is 10 applied first to discharge interest, rather than 11 principal. In other words, so as to discharge the 12 non-interest bearing part of the debt so that what 13 remains continued to accrue interest. 14 LADY JUSTICE GLOSTER: What happens if, under the terms of 15 the contract, compound interest is payable; what happens 16 in liquidation? 17 MR DICKER: Then, I think, in the main, subject to another 18 issue which the judge dealt with, the principle in 19 Bower v Marris is less important. 20 LADY JUSTICE GLOSTER: Right. 21 MR DICKER: Issue 3, which you will see next, considered the 22 position in relation compound interest. One conclusion 23 the judge came to was that on the basis of the rules you 24 are entitled to compound interest only -- 25 LADY JUSTICE GLOSTER: Under the contract.</p> <p style="text-align: center;">Page 11</p>
<p>1 failed to correctly analyse the changes which were made 2 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 bankruptcy. 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 namely 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 bankruptcy and liquidation, were 12 combined. In analysing the rules, it's important to 13 appreciate that combination of the two streams and the 14 prior approaches. 15 A fifth, to say something about principle and 16 policy. 17 Sixth, then to return to the wording of rule 2.88, 18 to construe it in the light of the statutory history and 19 the principles and policies underlying the statutory 20 regime, and to make our submissions in relation to the 21 wording in slightly more detail. As I say, in our 22 submission, it's easiest to do that once one has seen 23 the prior position. 24 Seventhly, and finally, to deal with various points 25 made by Wentworth in relation to the concept of</p> <p style="text-align: center;">Page 10</p>	<p>1 MR DICKER: If you are entitled to it under the contract, 2 yes, but only until the relevant part of the proved 3 debt, ie the principal, has been paid -- 4 LADY JUSTICE GLOSTER: I remember that now. 5 MR DICKER: -- at which point, he said compound interest 6 stops running. 7 So, even at that stage, if you have an accrued claim 8 to interest, which as a matter of contract would itself 9 carry further interest, nevertheless, that right to 10 interest stops. The judge said that's issue 3, and 11 I will come to that -- 12 LADY JUSTICE GLOSTER: Okay, well, don't let me take you 13 off -- 14 MR DICKER: You are quite right, there is an issue between 15 Bower v Marris, on the one hand, compound interest, on 16 the other. Bower v Marris essentially applies where you 17 are dealing with a right to simple interest, and its 18 importance is that in an insolvency it treats the 19 payments which have been made as notionally paid first 20 in respect of interest, so that the underlying principle 21 for the purposes of principal debt, for the purposes of 22 calculating interest, can continue to accrue interest. 23 Now, in a commercial context, this is often dealt 24 with by express terms of an agreement, the agreement 25 will provide that any payments are to be applied first</p> <p style="text-align: center;">Page 12</p>

<p>1 to interest or least permit the creditor to control the 2 order in way payments are made.</p> <p>3 We say, it's useful to have that image in mind when 4 considering how the rule should operate.</p> <p>5 Why does insolvency potentially raise an issue?</p> <p>6 We say, it's important to understand it stems from 7 the basic nature of bankruptcy or liquidation for this 8 reason and in this way: 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 ascertained 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 bankruptcy or the 18 administration.</p> <p>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</p> <p style="text-align: center;">Page 13</p>	<p>1 principle operates as a way of calculating how much 2 interest should be paid to creditors in the event of 3 a surplus.</p> <p>4 There's a good explanation, your Lordship's will see 5 in due course, in Re Lines Brothers No2, which is the 6 last judgment to apply the principle prior to the 7 enactment of the 1986 Act. It was decided in 1984, but 8 it involves a notional approach. Dividends are paid in 9 respect of principal because that's what the statutory 10 scheme has always required. Nevertheless, in the event 11 of a surplus, the authorities said you calculate the 12 amount of interest to be paid, by notionally treating 13 the dividends as if they had been paid first in respect 14 of interest.</p> <p>15 So that's topic number 1. Topic number 2 --</p> <p>16 LORD JUSTICE BRIGGS: Before you move on, the effect of that 17 might be if the surplus is only a small one but under 18 the recalculator, the Bower v Marris recalculation, 19 principal can be paid in full.</p> <p>20 MR DICKER: Correct. That's absolutely right, and that 21 relates to one issue which Mr Justice Mervin Davies 22 initially had difficulty with in Re Lines Brothers 2. 23 He said, essentially, once principal has been repaid, 24 there's no room for the operation of Bower v Marris, 25 because if it does apply beyond that, then, effectively,</p> <p style="text-align: center;">Page 15</p>
<p>1 what's required to achieve pari passu distribution.</p> <p>2 One can immediately see how the issue arises.</p> <p>3 Before you get to the stage of calculating how interest 4 should be paid in the event of a surplus, the office 5 holder has already paid dividends in respect of 6 principal. If that's what's required for the pari passu 7 regime, then how in those circumstances someone might 8 ask can interest be calculated on basis that payment is 9 instead applied first to interest.</p> <p>10 So the starting point is: this is an issue which has 11 necessarily existed ever since the origins of both 12 bankruptcy and liquidation.</p> <p>13 The answer has consistently been provided by the 14 application of the principle in Bower v Marris. As your 15 Lordships will see, prior to 1986, in our submission, 16 the courts consistently held that in the event of 17 a surplus interest is to be calculated on the basis that 18 any dividends that were previously made in respect of 19 principal are regarded as having been made on account 20 and notionally treated as having been paid in respect of 21 interest first and then principal.</p> <p>22 LADY JUSTICE GLOSTER: When you say, "Paid on account", you 23 mean paid generally on account?</p> <p>24 MR DICKER: Yes.</p> <p>25 We also say it's important to understand the</p> <p style="text-align: center;">Page 14</p>	<p>1 you still have principal outstanding and that can't be 2 right. Submissions were made to him by both parties in 3 that case, to the effect that that's incorrect. That's 4 not how the principle works and (Inaudible). Your 5 Lordships will see that later.</p> <p>6 So, my second topic is to identify the various 7 aspects of the wording of the rule Mr Justice David 8 Richards considered significant.</p> <p>9 Now, you have rule 2.88 in the authorities bundle, 10 bundle 1, tab 174. You also have -- if you would prefer 11 it -- a copy of the rules in the form that they were in 12 when LBIE went into administration, which is the 13 relevant rules in the form of the copy of the 14 Butterworths Insolvency Handbook, which I hope you have.</p> <p>15 LADY JUSTICE GLOSTER: You have handed it up recently, have 16 you?</p> <p>17 MR DICKER: I think three copies were handed up.</p> <p>18 LORD JUSTICE BRIGGS: Yes, thank you.</p> <p>19 LADY JUSTICE GLOSTER: Oh right, I thought this was mine, 20 sorry. Yes.</p> <p>21 MR DICKER: I'm afraid it's only on loan.</p> <p>22 LORD JUSTICE BRIGGS: I hope it has the owner's name on it.</p> <p>23 LADY JUSTICE GLOSTER: "Mark Phillips", I have. Convey my 24 undying thanks to him.</p> <p>25 LORD JUSTICE BRIGGS: I think I was only sent three copies</p> <p style="text-align: center;">Page 16</p>

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

<p>1 been paid by process of law without any appropriation, 2 so generally on account, which leaves the authorities 3 said scope for notionally reallocating, notionally 4 treating the dividends which have been paid, as if they 5 were paid first to interest.</p> <p>6 So, essentially, you have two stages: the first one 7 to achieve pari passu distribution is you pay everyone 8 pari passu in respect of their proved debts. That's 9 what the scheme requires, has always required.</p> <p>10 You then get to a stage when there is a surplus and 11 you are no longer concerned with pari passu 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.</p> <p>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.</p> <p>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 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</p> <p style="text-align: center;">Page 21</p>	<p>1 of his judgment, is:</p> <p>2 "The direction given to the administrator is to pay 3 interest on those debts in respect of periods during 4 which they have been outstanding since the company 5 entered administration."</p> <p>6 Now, we say, this wording simply confirms creditors 7 are entitled to interest on their debts for the period 8 after the company went into administration, taking into 9 account the payments which they have received. It 10 doesn't tell you how you do the calculation. It simply 11 says you get interest for the period for which your 12 debts were outstanding. One still has the 13 question: how, in calculating interest, do you work out 14 when the debts are outstanding?</p> <p>15 LORD JUSTICE PATTEN: Do I have this right: this whole 16 problem only arises on the assumption, doesn't it, that, 17 in the case of a insolvent liquidation, you don't have 18 a single payment of a dividend which discharges 19 100 per cent the principal and accrued interest at the 20 date of the liquidation or administration?</p> <p>21 MR DICKER: I think your Lordship is --</p> <p>22 LORD JUSTICE PATTEN: Because, otherwise, you wouldn't have 23 this problem, would you? Because you would have paid 24 100 per cent, all the accrued interest, at the date of 25 liquidation and the whole of principal, so you wouldn't</p> <p style="text-align: center;">Page 23</p>
<p>1 for shareholders.</p> <p>2 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.</p> <p>9 The second point he makes, in 135, is --</p> <p>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.</p> <p>15 MR DICKER: Yes. Absolutely --</p> <p>16 LADY JUSTICE GLOSTER: Don't let me take you --</p> <p>17 MR DICKER: I will come on in due course, because the 18 1986 Act obviously makes a substantial number of changes 19 to insolvency regimes. It did make change to the regime 20 in relation to post-insolvency interest, but one needs 21 to be very careful identifying what those changes were. 22 None of those changes, we say, had anything to do with, 23 or leads one to the conclusion, that the principle in 24 Bower v Marris has been disapplied.</p> <p>25 The second point the judge makes, in paragraph 135</p> <p style="text-align: center;">Page 22</p>	<p>1 be concerned with asking the question: which is paid 2 first? Because the answer is: they've both been paid 3 first.</p> <p>4 MR DICKER: I think that's absolutely right but, obviously, 5 in practice --</p> <p>6 LORD JUSTICE PATTEN: No, I understand in practice that is 7 not how it works. You are likely to have, probably, 8 a series of payments, depending on the realisations and 9 so on.</p> <p>10 MR DICKER: Yes, and if one thinks about how it operated in 11 this case, a series of interim dividends were made, 12 starting I think in 2012, the last one, final dividend, 13 in April 2014. But, on the judge's approach, when the 14 first dividend payment was made, some 25 per cent of 15 that repaid, 25 per cent of the principal. So there may 16 have been accrued interest up to the date of that 17 dividend in 2012 but, on the judge's approach, because 18 Bower v Marris doesn't apply, principal that carries 19 interest has been repaid. The accrued interest hasn't 20 and still has not been paid. One now has, four or 21 five years later, a sum of interest accrued in 2012, not 22 worth what it was then and the creditor not receiving 23 what he would have received if one had done the 24 calculation the other way.</p> <p>25 LORD JUSTICE PATTEN: Yes. I mean, if you are in</p> <p style="text-align: center;">Page 24</p>

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

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

Page 29

1 apart from the administration. No reason why that  
 2 should disapply the principle.  
 3 Put another way, when one focuses on the phrase:  
 4 "The rate applicable to the debt apart from the  
 5 administration."  
 6 We say, that was simply intended to ensure creditors  
 7 received interest to which they were otherwise entitled  
 8 before any distribution is made to shareholders. The  
 9 mere fact the statute says that, can't be a reason for  
 10 disapplying Bower v Marris. If it applies outside the  
 11 administration, the statute says you should get what you  
 12 would have outside administration --  
 13 LADY JUSTICE GLOSTER: If there isn't a contract you apply  
 14 the judgment rate?  
 15 MR DICKER: Yes, well, there's a number -- I will come on --  
 16 there's a number of ways in which -- and situations in  
 17 which Bower v Marris may apply. One is in relation to  
 18 an underlying contractual right.  
 19 LADY JUSTICE GLOSTER: Yes.  
 20 MR DICKER: A second is in relation to an underlying right  
 21 which is not contractual but, say, statutory, like  
 22 judgment rate, where we say the principle also applies  
 23 unless the statute expressly provides for the contrary.  
 24 And, thirdly, in relation to the other limb of 2.88(9),  
 25 2.889 gives you interest at a rate which is the greater

Page 30

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

Page 31

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

Page 32



1 LADY JUSTICE GLOSTER: That's to be kind to what is assumed  
 2 to be a small-time debtor, presumably.  
 3 MR DICKER: That may well be the explanation.  
 4 LADY JUSTICE GLOSTER: Yes. I see, thank you.  
 5 MR DICKER: So that's the third point.  
 6 Again, this reflection of an underlying contractual  
 7 right in the statutory scheme, you will also see was  
 8 a feature of the Bankruptcy Act 1825. Section 132 had  
 9 a materially similar provision.  
 10 Now, the fourth point the judge makes is in  
 11 paragraph 137, where he says:  
 12 "Not only does rule 2.88 contain no suggestion that  
 13 the principal in Bower v Marris should be applied in my  
 14 view its whole tenor is contrary to it. It is  
 15 a direction to apply the surplus in the payment of  
 16 interest, it is not a direction to apply the surplus  
 17 towards an element of the principal debt through  
 18 a process of reallocation."  
 19 This, as I understand it, is essentially making the  
 20 same point as his first point. You have a dividend in  
 21 respect of principal. Principal has been repaid. When  
 22 you come to 2.88, 2.88 is concerned with payment  
 23 post-insolvency interest. If you apply the principle in  
 24 Bower v Marris, then notionally, at least, because the  
 25 payments that were previously made were applied first to

Page 33

1 interest, you will necessarily have some notional  
 2 principle left outstanding and, therefore, you will have  
 3 a notional payment, the judge said, in respect  
 4 principal. That is simply not what the rules say.  
 5 That, as we understand it, is the judge's point.  
 6 We say, it is essentially the same as the first  
 7 point he was making. It's focusing on the fact that  
 8 dividends have been paid in respect of principal,  
 9 following that reasoning through, it's saying that  
 10 fact -- unless you are allowed a notional  
 11 reallocation -- necessarily is inconsistent with now  
 12 making the payments you want to make because some of  
 13 those payments will necessarily be treated as being made  
 14 in respect of principle.  
 15 LORD JUSTICE BRIGGS: It might be said that the more  
 16 fundamental point is that -- because his first point is  
 17 based upon an assumption, whereas this is simply based  
 18 upon what the ruling says you are actually doing, which  
 19 is paying interest.  
 20 MR DICKER: But the premise of both arguments, we say, is  
 21 essentially the same. It's focusing on the first stage  
 22 of the liquidation process and following the logic of  
 23 that through. My Lord is right in the way you have  
 24 expressed it, but we say the answer to that is -- again,  
 25 this is a feature you will find in the previous

Page 34

1 statutory regimes. If you go back to section 132, there  
 2 was a section which said:  
 3 "In the event of a surplus you will pay interest."  
 4 The cases held: well, that doesn't prevent you from  
 5 calculating such interest in accordance with the  
 6 principle in Bower v Marris.  
 7 LORD JUSTICE PATTEN: Just in terms of statutory  
 8 construction, which I suppose in the end this is  
 9 a question of, what words in 2.88(7) does the judge  
 10 actually rely on as indicating that you have to treat  
 11 the dividend as being used to pay the principal part of  
 12 the debt as opposed to any accrued interest?  
 13 Because, I mean, 7 doesn't, in terms, talk about  
 14 principal and interest, it just talks about payments of  
 15 the debts proved, which as we all know include both. So  
 16 what's the judge fastening on as giving him that order  
 17 of priority?  
 18 MR DICKER: The way we understand it is: the judge was  
 19 essentially working out what the consequences of the  
 20 first stage of the insolvency process is and he says,  
 21 "Right, so the first stage is you pay prove debts", and  
 22 those are essentially principal. There may be  
 23 an element of pre-insolvency interest, but for practical  
 24 purposes, the important distinction is between that sum  
 25 and, on the other hand, post-insolvency interest.

Page 35

1 I think his approach is to say, "Well, work out what  
 2 has so far happened in the insolvency, proved debts have  
 3 been paid, and that's what the first bit of 2.88(7)".  
 4 So the starting point of the analysis is you've  
 5 already paid proved debts, then the judge says, "Well,  
 6 you are paying interest on those debts, that's the  
 7 proved debts for the period in which they were  
 8 outstanding". Then, what he says is, "Well, when the  
 9 dividends were paid, they were no long outstanding".  
 10 Then, he says, "This is a statutory right which only  
 11 comes into existence when you conceive what is surplus",  
 12 which is the third point I mentioned.  
 13 The fourth point, he says, is the rule talks about  
 14 paying interest, as, my Lord, Lord Justice Briggs said,  
 15 if you apply Bower v Marris, then, notionally, because  
 16 you are treating the dividends as having paid interest  
 17 first, necessarily, by the time you get to this stage,  
 18 you will at least notionally you be saying, "I still  
 19 have some principal outstanding, some of the money  
 20 I have so far used to pay proved debts in full because  
 21 it has been used to notionally pay interest means I  
 22 can't have notionally paid my proved debts in full".  
 23 LORD JUSTICE BRIGGS: The judge says, consistent with the  
 24 second line of 2.887, "What you do is pay interest on  
 25 this debt. Not principal".

Page 36

<p>1 MR DICKER: Yes, and, we say, there's nothing in the rules 2 that compels the conclusion that he reached. We say 3 that if you look at the previous regimes, you look at 4 the way the 1986 Act was intended to change those 5 regimes, absolutely no indication that the legislature 6 intended, essentially, to disapply <i>Bower v Marris</i>. 7 Nothing in the rule that does so. No indication that it 8 intended to do so.</p> <p>9 One way of approaching this is -- your Lordships 10 will see the phrase in case shortly -- intellectual 11 freight, but there are, as your Lordships know, numerous 12 provisions of the Insolvency Act which, at first blush, 13 don't appear to provide what authorities have 14 consistently held they do in fact provide. Even at the 15 most basic level, if one looks 107 and 143, one talks 16 about payments of proved debts and distribution to the 17 surplus to the members. That leaves out the whole 18 category of non-provable liabilities. But the courts 19 have said, ever since 1743: well, there is that category 20 and they do need to be paid before the surplus is 21 returned to --</p> <p>22 LADY JUSTICE GLOSTER: What, so there's no reference in the 23 rules to the concept of non-provable debts?</p> <p>24 MR DICKER: Non-provable debts are simply not dealt with in 25 the rules. Even if one looks at the basic provisions,</p> <p style="text-align: center;">Page 37</p>	<p>1 ranking equally?</p> <p>2 MR DICKER: I think the answer is yes. Although, I might 3 express it in a slightly different way.</p> <p>4 Our submission would be: when you get to the stage 5 of calculating and paying interest, under rule 2.88, 6 what you do is you do the calculation required by the 7 rule, including applying the principle in 8 <i>Bower v Marris</i>, and you work out how much interest is 9 due to each creditor on that basis. You compare it with 10 the amount of the surplus you have, and if there is 11 a shortfall, and you divide it up rateably as you 12 otherwise would --</p> <p>13 LORD JUSTICE BRIGGS: So even if the part of what's due to 14 a particular creditor because of the <i>Bower v Marris</i> 15 approach is principal, you treat it as interest for that 16 purpose?</p> <p>17 MR DICKER: Yes. It's not principal, it's simply that when 18 you are calculating how much interest they are owed, 19 that's the basis of the calculation.</p> <p>20 LORD JUSTICE BRIGGS: I'm still not quite sure I understand 21 that. You may get to it in due course, but the effect 22 of the calculation for some particular creditor means 23 that by applying dividends first, the interest -- he's 24 had all his interest, but he hasn't had all his 25 principal, then what you are paying him is principal,</p> <p style="text-align: center;">Page 39</p>
<p>1 107 and 143, talking about distribution of claims, 2 distribution in respect of distribution of assets and 3 the return of the surplus to members. That's all it 4 says.</p> <p>5 What the court is essentially saying, as early as 6 1743, is: you don't hand the surplus back to the 7 bankrupt if, at the time you do so, creditors are still 8 owed some money, whether it's provable or not.</p> <p>9 LADY JUSTICE GLOSTER: But that actual concept isn't founded 10 in an express provision of the Act or in an express 11 provision of the rules.</p> <p>12 MR DICKER: It's essentially the result of judge-made law. 13 Interpretation of the logic of the statutory scheme.</p> <p>14 LORD JUSTICE BRIGGS: Can I just follow your last submission 15 through to 2.88(8) and ask you to assume that there is 16 insufficient to pay <i>Bower v Marris</i> payments in full, all 17 interest payable under paragraph 7 impacts(?) equally 18 whether or not the debts (inaudible) rank equally. 19 I quite see it has a fundamental application and 20 levelling up, a want of priority between the underlying 21 debts. But you would say that means all interest and 22 principal being paid under the <i>Bower v Marris</i> 23 calculation ranks equally, do you?</p> <p>24 So if there was a shortfall of the <i>Bower v Marris</i> 25 stage, you would treat the principal and the interest as</p> <p style="text-align: center;">Page 38</p>	<p>1 isn't it? But I think you have to (inaudible) interest 2 to make 2.88(8) work.</p> <p>3 MR DICKER: Yes. I think was being slow.</p> <p>4 As I understand it, your Lordship's point is 5 essentially that the fourth point the judge made, this 6 is in respect of interest --</p> <p>7 LORD JUSTICE BRIGGS: Yes.</p> <p>8 MR DICKER: -- to which our --</p> <p>9 LORD JUSTICE BRIGGS: Just following through, the judge is 10 pointing to a sub-rule which I don't think he needed to 11 look at.</p> <p>12 MR DICKER: We say the sub-rule doesn't raise an additional 13 issue. Your Lordship's raised the question of what 14 happens if there is a shortfall. We say you do the 15 calculation that's required by the rule, applying 16 <i>Bower v Marris</i>, you work out how much should be owed to 17 each creditor, one has that bar on the basis of the 18 submissions I've made so far and, then, if there's 19 a shortfall --</p> <p>20 LORD JUSTICE BRIGGS: You just treat that as interest even 21 if it's in relation to a particular creditor, it's all 22 personal(?).</p> <p>23 MR DICKER: Yes, because, actually, you have already passed 24 stage 1 which is payment proved debts in full. You have 25 done the <i>pari passu</i> distribution, and now we are just</p> <p style="text-align: center;">Page 40</p>

<p>1 concerned with what happens to the surplus.                  2 There's one other point made by Mr Justice David                  3 Richards. I should mention, at this stage, we also need                  4 to deal with in due course, and it concerns the                  5 relationship in Bower v Marris, the rules of                  6 appropriation. The judge dealt with this in                  7 paragraphs 144 to 150.                  8 LADY JUSTICE GLOSTER: Sorry, the relationship between                  9 Bower v Marris and?                  10 MR DICKER: The rules of appropriation.                  11 LADY JUSTICE GLOSTER: Yes.                  12 MR DICKER: He dealt with this, as I said, in 144 to 150.                  13 Just identifying the points he was making, in 144, he                  14 says:                  15 "There's a further strong factor suggesting that                  16 Bower v Marris does not apply to the payment of post                  17 insolvency interest under the 1986 legislation. I                  18 earlier discussed the principle in this case is derived                  19 from the legal rules as to appropriation of payments                  20 towards debts. It's a basic part of the application of                  21 those rules that the date when a payment is made, there                  22 are two outstanding debts payable by the debtor to the                  23 creditor."                  24 He goes on to say:                  25 "The source of the debt may be but need not be</p> <p style="text-align: center;">Page 41</p>	<p>1 So the logic of the judge's approach just focuses on                  2 2.88(9) and the reference to the rate applicable to the                  3 debt apart from the administration.                  4 Imagine a creditor with a contractual claim to                  5 interest and a right to appropriate payments, first, to                  6 interest and, secondly, to principal. Such a creditor                  7 would satisfy the judge's requirement for two debts.                  8 Interest would have been accruing on the contract, at                  9 the date of any dividend, and you could subsequently                  10 say, "Right, I know they were paid in respect of proved                  11 debts but we can now notionally treat them as having                  12 been paid in respect accrued interest because there                  13 would have been such accrued interest".                  14 The judge says that analysis is no longer possible                  15 because the statute has essentially replaced your                  16 contractual right to interest with a statutory right to                  17 interest, albeit one which reflects what you would have                  18 as a matter of contract. That statutory right to                  19 interest only arises if and when there is a surplus,                  20 with the result that he says it follows you couldn't                  21 have had any interest accruing during the prior period.                  22 Your right to interest only comes into existence as and                  23 when there's a surplus, because he says Bower v Marris                  24 requires there to have been two accrued debts at the                  25 relevant date, there aren't, as a result of 2.88.</p> <p style="text-align: center;">Page 43</p>
<p>1 a contract, it may be a judgment carrying interest or                  2 some other basis of obligation."                  3 So the first point is, according to the judge,                  4 Bower v Marris is derived from the legal rules as to                  5 appropriation of payments, and that requires there to                  6 have been two outstanding debts as at the date of                  7 notional appropriation. He says that in 145:                  8 "In applying the rules as to appropriation of                  9 payments to the administration of estates, the                  10 foundation remains that at the date of payment from the                  11 estate, which is treated as being made on account, there                  12 are two debts payable by the estate to the creditor."                  13 Then, the important point is at 149, where he says:                  14 "The rights to interest out of a surplus under                  15 rule 2.88 is not a right to the payment of interest                  16 accruing due from time to time during a period between                  17 the commencement of the administration and the payment                  18 of the dividend, or dividends, on proved debts. The                  19 dividends cannot be appropriated between proved debts                  20 and interest accruing due under rule 2.88, because at                  21 the date of the dividends, no interest was payable at                  22 that time pursuant to rule 2.88. Entitlement under                  23 rule 2.88 to interest is a purely statutory entitlement                  24 arising once there is a surplus and payable only out of                  25 that surplus."</p> <p style="text-align: center;">Page 42</p>	<p>1 Therefore, there's no room for the notional reallocation                  2 because the underlying requirement is missing.                  3 Now, again, we say that's wrong for a number of                  4 reasons.                  5 Your Lordships will also see in due course this was                  6 also a feature of the previous bankruptcy regime. It                  7 didn't stop the principle in Bower v Marris applying.                  8 LORD JUSTICE PATTEN: I suppose you could have                  9 an alternative system which I think, to some extent --                  10 don't ask me which of the issues it is but I think it is                  11 raised in one of the issues here -- is that if the judge                  12 is right and you simply treat 2.88 as applying only --                  13 you operate 2.88 on the basis that the dividends are                  14 applied to pay off the proved debts which, for the most                  15 part, are going to be principal. Then you are simply                  16 calculating statutory interest in respect of the                  17 relevant periods up to those payments. That any further                  18 loss that you can say arises by reason of the fact that                  19 you are treating the dividends as payment of principal,                  20 first, rather than of statutory interest, could be                  21 compensated by reversion to your contractual rights at                  22 the very end of the insolvency process, just by analogy                  23 to the currency conversion claims. But the judge,                  24 I think, rejected that, didn't he, on the basis you                  25 couldn't have -- I think he said you can't have interest</p> <p style="text-align: center;">Page 44</p>

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

Page 45

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

Page 46

1 Thirdly, the right under the rule is a statutory  
 2 right. This is the case even if it simply reflects  
 3 creditors' underlying right whether contractual or  
 4 otherwise.  
 5 Fourthly, the rule is concerned with payment of  
 6 interest. His conclusion is also based, as I mentioned,  
 7 on his views in relation to rules as to appropriation.  
 8 So those are the points which, essentially, I ask  
 9 the court to have in mind when we go through the  
 10 pre-1986 materials, because that was the next topic  
 11 I was going to turn to.  
 12 I'm aware we have a transcriber. I don't know  
 13 whether or not --  
 14 LADY JUSTICE GLOSTER: Do you want a break, shorthand  
 15 writer? Would that be a convenient time --  
 16 MR DICKER: It would.  
 17 LADY JUSTICE GLOSTER: -- to take a break? Right, five  
 18 minutes.  
 19 (11.45 am)  
 20 (A short break)  
 21 (11.55 am)  
 22 LADY JUSTICE GLOSTER: Yes, Mr Dicker.  
 23 MR DICKER: The third topic is to look at the position prior  
 24 to 1986 both in bankruptcy and liquidation to see how  
 25 and why the principle operated. We entirely accept the

Page 47

1 effective rules, 2.88(7) and 9, obviously depends on  
 2 their construction. But we do say those rules need to  
 3 be construed in the light of the statutory regime as  
 4 a whole, and the principles and policies which underlie  
 5 it and also in light of the regimes that existed before  
 6 1986.  
 7 There is an approach along these lines, as your  
 8 Lordships will know from Lord Justice Briggs' judgment  
 9 in Waterfall 1. Just to give you the reference, 138 to  
 10 147. Also, by Lord Justice Moore-Bick, at 248.  
 11 Nothing surprising in this, we refer to some further  
 12 authorities to similar effect in our skeleton argument  
 13 on part A. Again, just so you have the references,  
 14 paragraphs 23 to 26.  
 15 There is one additional case not referred to in our  
 16 skeleton argument. I think it would be worth quickly  
 17 looking at it. It's in the authorities bundle, tab 67A.  
 18 LADY JUSTICE GLOSTER: Which paragraph of your skeleton are  
 19 we looking at, so I can link --  
 20 MR DICKER: 23 to 26. It's the skeleton in A1, tab 12.  
 21 LADY JUSTICE GLOSTER: Yes.  
 22 MR DICKER: Pages 10 and 11.  
 23 LORD JUSTICE BRIGGS: Cadbury Schweppes?  
 24 MR DICKER: Yes. Unless you would prefer that I read it,  
 25 could I just ask you to read paragraphs 23 and 24 --

Page 48

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

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

<p>1 before the 1883 Act, the Court of Appeal essentially 2 endorsed the principle and applied it for the first time 3 in relation to liquidation as well.</p> <p>4 In addition, shortly after the 1883 Act, indeed 5 three years later in 1886, the principle in Bower 6 v Marris was applied by Mr Justice Chitty in case called 7 Whittingstall v Grover in the context of the 8 administration of a deceased insolvent estate. Again, 9 I'll show you that.</p> <p>10 So that's the broad outline of the development in 11 both liquidation and bankruptcy. What I now want to do 12 is just show you the critical statutory sections and 13 authorities. There are many and I'm not proposing to 14 take you to all. What I'm proposing to do is limit 15 myself to seven and they are firstly, Bromley v Goodere, 16 where it all started.</p> <p>17 LADY JUSTICE GLOSTER: Seven authorities, is this? 18 MR DICKER: Yes, seven authorities or statutory provisions 19 firstly Bromley v Goodere. 20 LORD JUSTICE PATTEN: Where's that. 21 LADY JUSTICE GLOSTER: You're just giving us the last. 22 LORD JUSTICE PATTEN: Oh, you're giving us a list at the 23 moment. 24 MR DICKER: Secondly, section 132 of the Bankruptcy Act 25 1825; thirdly, Bower v Marris; fourthly, Humber</p> <p style="text-align: center;">Page 57</p>	<p>1 approach in relation to one authority, certainly 2 Whittingstall v Grover. We also say that he 3 misunderstood the way in which the principle in 4 Bower v Marris works when he said it essentially depends 5 on the rules of appropriation. We say it didn't. So 6 there are differences.</p> <p>7 LORD JUSTICE PATTEN: All right. 8 MR DICKER: Can I start -- and forgive me if I go right back 9 to beginning but it is interesting in my submission to 10 see how this started the first case is 11 Bromley v Goodere. It's volume 1, tab 1 and it's 1743. 12 For your note, the judge dealt with this case at 13 paragraphs 47 to 49 of his judgment. So at this stage 14 we have no express statutory provision dealing with 15 post-insolvency interest. The issue in the case was 16 that: ie, are creditors who were entitled to interest in 17 the event of a surplus entitled to payment of the 18 interest they are owed before it is distributed to the 19 bankrupt, and the answer is yes. The order which was 20 made required such interest to be calculated in the 21 manner which subsequently became known as the rule of 22 principle in Bower v Marris. 23 Just -- 24 LORD JUSTICE BRIGGS: This was a surplus in a personal 25 bankrupt estate.</p> <p style="text-align: center;">Page 59</p>
<p>1 Ironworks; fifthly, section 40 and section 65 of the 2 1883 Act; sixth --</p> <p>3 LADY JUSTICE GLOSTER: You are just going a bit too quickly. 4 MR DICKER: Then Whittingstall v Grover and seventhly Re 5 Lines Brothers 2 No 2.</p> <p>6 LORD JUSTICE PATTEN: I'm not suggesting for a minute that 7 you don't take us through the authorities, because we 8 obviously need to understand what they do and don't say. 9 But you don't, I think, criticise the summary of the 10 legislative and judicial, so to speak, history that's 11 set out in the judgment, do you? Because, I mean, the 12 judge accepted that the principle applied for the 13 relevant period. I mean, you may have a query about 14 what the 1883 Act did but that's about it, isn't it? 15 MR DICKER: And it's a very fair summary. What we would say 16 is that a number of the points which we would want to 17 stress, in particular the way in which the judge's 18 points on the wording of 86 were pre-configured prior to 19 1986 aren't as clearly identified in his judgment as 20 perhaps we say they should have been and that may be the 21 reason why in our submission enough of the intellectual 22 freight wasn't carried over when he came to consider the 23 wording of the rule. 24 LORD JUSTICE PATTEN: All right. 25 MR DICKER: I'm reminded, we do criticise the judge's</p> <p style="text-align: center;">Page 58</p>	<p>1 MR DICKER: Yes. The judgment of the Lord Chancellor, who 2 at that stage was Lord Hardwicke, starts at the bottom 3 of page 49. I was going to pick it up two-thirds of the 4 way down on page 50. Just below the second hole punch 5 he says --</p> <p>6 LORD JUSTICE BRIGGS: My electronic copy doesn't have hole 7 punches. 8 MR DICKER: Two-thirds of the way down. 9 LORD JUSTICE BRIGGS: Is it where you've marked it, or 10 somebody has marked it? 11 MR DICKER: It's the paragraph beginning "having laid these 12 things out". 13 LADY JUSTICE GLOSTER: I thought on the death of the king 14 a commission may be renewed sounded rather interesting, 15 but maybe not. Would you like us to read the marked 16 passage? 17 MR DICKER: It may be quickest if I were just to point out 18 the points which we say are relevant. As I say, he 19 starts two-thirds of way down 50 by saying: 20 "I come now to the main question whether creditors 21 for debts carrying interest by contract are entitled to 22 have subsequent interest and I think they are." 23 Missing out a paragraph, he says: 24 "I will consider this case first upon the old Act 25 previous to the fourth and fifth Queen Anne and then</p> <p style="text-align: center;">Page 60</p>

<p>1 upon that statute."                  2 So just what one sees, what the previous statutory                  3 regime was, and the way it's developed, in last sentence                  4 on that page he says:                  5 "The next direction in the Act is what the                  6 Commissioner should do this regard to the debts. They                  7 directed to pay to every of the creditors a portion rate                  8 like according to the quantity of his or her debts."                  9 So that's pari passu distribution, and he says:                  10 "And the question is what debts are here meant and                  11 I am of the opinion it means debts due at the time of                  12 the bankruptcy or when the commission issued, which is                  13 same."                  14 So essentially the introduction the judge-made law                  15 of the cut off date. Then he says at the end of the                  16 paragraph:                  17 "But This construction must be confined to cases                  18 where there is a deficiency, for it is then only the                  19 creditors are to have a portion rate alike."                  20 And then in the next paragraph he says:                  21 "The Act goes on take notice of the surplus which it                  22 directs to be paid to the bankrupt and it leaves full                  23 power to the creditor to recover the residue of his debt                  24 in like manner and form as he should and might have done                  25 before the making of this Act."</p> <p style="text-align: center;">Page 61</p>	<p>1 rule that you can't prove a post insolvency interest and                  2 he goes on in the next paragraph to say:                  3 "There's no direction in the Act for that purpose                  4 and it has been used only as the best method of settling                  5 the proportion among the creditors they might have                  6 a rate like satisfaction and its founded upon the extra                  7 power given them by the Act."                  8 And then at the bottom of the page he says:                  9 "I now come to consider it on the fourth and fifth                  10 of Anne 17 which was insisted upon as a strength of the                  11 case and the material parts to be considered are..."                  12 This introduced the concept discharge in bankruptcy.                  13 And he considers the effect of that over the page.                  14 Page 52 he says:                  15 "Consider therefore the effect of the discharge that                  16 the certificate is not to operate as a discharge of the                  17 fund before vested in the assignees but to extend only                  18 to any remedy to be take against the person of the                  19 bankrupt or his future debts. True it will be                  20 a discharge of the bankrupt not only as to debts proved                  21 but also as to creditors who have not come in but that                  22 is nothing as to present fund for such creditor who has                  23 not yet come in, may come in if he has not lapsed his                  24 time, which is a question between the creditors singly                  25 and therefore I am of the opinion it was meant to</p> <p style="text-align: center;">Page 63</p>
<p>1 Obviously at this stage there was no concept of                  2 discharge in a bankruptcy. That was introduced                  3 subsequently. Dropping to the next paragraph, what he                  4 says is:                  5 "This shows the surplus to be paid over to the                  6 bankrupt is only the surplus after payment of the whole                  7 debts, for it would be vain to pay any other surplus                  8 when it might have been recovered from him again by the                  9 creditors."                  10 So, prior to a concept discharge, no point paying                  11 the bankrupt surplus if creditors are just going to sue                  12 the bankrupt. So part of the role of the Commissioners                  13 in bankruptcy at this stage, pay all sums which were                  14 due, ensure creditors paid by full entitlement before                  15 returning the surplus to the bankrupt. Then he deals                  16 with the subsequent statutory development of the scheme.                  17 Dropping to the page reference 79, which is about                  18 two-thirds of the way down, he says:                  19 "But then it is said the practice has been for the                  20 Commissioners to ascertain the debts by computing                  21 interest only to the time of issuing the commission and                  22 that being the contemporanea exposito as to be relied                  23 on."                  24 So that's essentially the introduction again and                  25 originally it seems as a matter of practice with the</p> <p style="text-align: center;">Page 62</p>	<p>1 discharge the person of bankrupt and his estate                  2 subsequently accrued and not the estate in the hands of                  3 the assignee."                  4 So discharge has no effect on the estate or on the                  5 treatment of the surplus in the hands of the                  6 Commissioners. Then dropping two paragraphs he says:                  7 "But suppose there is a surplus, it does not amount                  8 to 5 per cent and I think so much should be taken out of                  9 the creditors 20 shillings in the pound to make it up to                  10 5 per cent. Then it may be objected that here is a case                  11 where the bankrupt should have a surplus upon the debt                  12 as stated by the commissioners without paying the                  13 subsequent interest. If I am right and the bankrupt is                  14 being entitled to that equity, it is not the case, for                  15 then it comes again to the rateable proportion."                  16 And he makes the point, again dropping a paragraph:                  17 "Suppose that, from the difficulty of getting in the                  18 bankrupt's effects and by his estate carrying interest                  19 there should be a surplus, it would be absurd to say the                  20 creditor should not have interest likewise."                  21 I will come back to the example, but he is                  22 essentially saying imagine the bankrupt has assets                  23 consisting of debts which carried interest, that                  24 interest has continued to accrue for the benefit of the                  25 bankrupt during the course of the bankruptcy, it would</p> <p style="text-align: center;">Page 64</p>



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

<p>1 LORD JUSTICE BRIGGS: No. I just didn't feel I knew what 2 that bit meant. 3 MR DICKER: No, and on reflection I -- we'll think. 4 LORD JUSTICE BRIGGS: Okay. 5 LADY JUSTICE GLOSTER: Isn't it just debts owed to him, 6 Mr Dicker? Just that category of assets. After that he 7 is entitled to sue but not until all these people have 8 been paid. 9 LORD JUSTICE BRIGGS: It looks like it. Anyway. 10 LADY JUSTICE GLOSTER: That's why it doesn't say all the 11 other assets. That may be this -- 12 MR DICKER: I mean, again, for present purposes, I'm not 13 sure it matters in the sense -- 14 LORD JUSTICE BRIGGS: There's a reference back to some 15 earlier section we haven't looked at, I rather suspect. 16 But there we are. 17 MR DICKER: Just seven points in relation to this. Firstly, 18 this is -- it's obviously an express statutory provision 19 dealing with proposed insolvency interest, effectively 20 codifying previous judge-made law which you saw in 21 Bromley v Goodere. Secondly, the right to interest only 22 arose after all proved debts had been paid in full. 23 Indeed it expressly so stated. It said it applied 24 "after the creditors who had proved have been paid." 25 Thirdly, "the right ranked in priority to payment of</p> <p style="text-align: center;">Page 69</p>	<p>1 updated, but the substance remains materially the same. 2 So in construing section 132, and we say in turn 3 rule 2.88, it's obviously important to see how it was 4 applied. 5 That takes me to the next authority which is 6 Bower v Marris itself. Authorities bundle 1, tab 6 -- 7 LORD JUSTICE BRIGGS: Just before you go, it talks about 8 creditors whose debts are now by law entitled to carry 9 interest. Does that mean that would be contractual 10 interest and judgment interest? 11 MR DICKER: I don't think it could have meant judgment 12 interest because the Judgment Act obviously only came in 13 in 1838, but there appear -- and we can dig this out if 14 it's necessary -- to have been other provisions prior to 15 that date which in certain circumstances entitled 16 creditors to interest and I think there may always have 17 been a right to interest under the law of merchants. 18 LORD JUSTICE BRIGGS: And because there are possibly 19 provisions on the previous prohibition on interest as a 20 form of usury(?). Just as it is as are now by law 21 entitled to interest, I wondered what the mischief 22 behind all that was. 23 MR DICKER: My Lord, we'll have another look. There was 24 some material on this I think in front of the judge at 25 first instance.</p> <p style="text-align: center;">Page 71</p>
<p>1 the surplus to the bankrupt". No surprise there: 2 "Fourthly it entitled creditors who had an 3 underlying right to interest to interest at the rate 4 applicable to the debt apart from the insolvency." 5 Expressly used the phrase "rate of interest": 6 "Fifthly, it also entitled creditors not otherwise 7 entitled to interest, interest at 4 per cent." 8 We say essentially that was reflecting what was 9 subsequently introduced in the Judgments Act itself, 10 namely entitlement to interest. For some reason it 11 seems to have originated in bankruptcy first. The view 12 was obviously you should be entitled to compensation for 13 delay. The rate selected was 4 per cent and that was 14 subsequently effectively adopted when the Judgments Act 15 was introduced. 16 Six, it entitled such creditors to interest from the 17 date of commission of bankruptcy and it would obviously 18 necessary to take account of any dividends that they had 19 received since that date. 20 Seventh, we say in substance it differed from the 21 1986 rules only in that section 132 gave creditors 22 an underlying right to interest priority over payment of 23 the 4 per cent to creditors. With that exception, in 24 substance we say this section is essentially doing the 25 same as rule 2.88. The wording has changed, it's been</p> <p style="text-align: center;">Page 70</p>	<p>1 Sorry, Bower v Marris, which is bundle 1, tab 6. It 2 was decided in 1841, some 15 years after the 3 introduction of section 132, although the bankruptcy in 4 that case had commenced as early as 1805. So it was 5 a very long-running bankruptcy. Again, for your note, 6 the judge dealt -- 7 LORD JUSTICE BRIGGS: Sorry, can I just be difficult and ask 8 again did the Bankruptcy Act therefore apply to this 9 bankruptcy or not? 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 12 certainly clear and indeed common ground that 13 Bower v Marris applied to the bankruptcy regime between 14 1825 and 1883. There were a number of other authorities 15 in front of the judge below, some of which are in the 16 bundle by no means all. 17 Again, just for your note, the judge dealt with 18 Bower v Marris, paragraphs 44 to 45 and 58 to 65 of his 19 judgment. Now, as the judge observed, although the 20 issue in the case arose between the debtor and a joint 21 obligee, the same analysis applied as between a debtor 22 and his creditor. You can see that reflected in the 23 headnote, the held, just at the bottom of 351, where it 24 says: 25 "The amount due to the obligee in respect of such</p> <p style="text-align: center;">Page 72</p>

<p>1 claim was to be computed by treating the dividends as                  2 ordinary payments on account, that is by applying each                  3 dividend in the first place to the payment of the                  4 interest due and the date of such dividend and the                  5 surplus, if any, in reduction of the principal and the                  6 same principle of computation is applicable in                  7 bankruptcy as between the bankrupt and the creditors                  8 where there is a surplus of the estate after payment of                  9 20 shillings in the pound upon all the debts proved."                  10 Now, the order below you will see at 352, the last                  11 half of the paragraph at the top of the page, the                  12 sentence beginning in the middle of that paragraph:                  13 "In the year 1840, the Master made a separate report                  14 on a claim of Jonathan Marris under the decree by which                  15 he found that 15 guineas still remain due under bond                  16 having arrived at that result by treating the dividends                  17 which been received under the bankruptcy as ordinary                  18 payments on account, that is to say by applying each                  19 dividend in the first place to the payment of the                  20 interest which would have been due at the date of such                  21 dividend if no bankruptcy had occurred and the surplus                  22 only, if any, in reduction of the principal which                  23 according to that mode of applying the dividends from                  24 time to time remained due."                  25 So the Master notionally applying prior payments</p> <p style="text-align: center;">Page 73</p>	<p>1 is to the principal money and interest due thereon at                  2 the date of commission."                  3 And the judgment of the Lord Chancellor begins at                  4 354, the Lord Chancellor at this stage being                  5 Lord Cottenham. Five points to note. On page 355,                  6 having referred to calculating the interest by applying                  7 amount of dividends from time to time received in                  8 discharge of the interest then due and the surplus of                  9 any in discharge pro tanto of the principal, four lines                  10 down from the top at 355, he says:                  11 "This no doubt is the ordinary mode of calculation                  12 and is the general course of dealing in cases of                  13 mortgages, bonds and other securities as the principal                  14 does and the interest does not carry interest. No                  15 creditor would apply any payment to the discharge of                  16 part of the principal while any interest remained due."                  17 Then the last sentence of that paragraph, starting                  18 just after I've just read, refers to the argument:                  19 "But It is said on behalf of the obligor's estate                  20 that payments by way of dividend under the bankruptcy of                  21 the co-obligor were appropriated and were paid to and                  22 received by the obligee on account of so much principal                  23 money and therefore that interest from that time ceased                  24 upon the amount of such principal money, although large                  25 sums were due interest at that time."</p> <p style="text-align: center;">Page 75</p>
<p>1 first to interest, then:                  2 "The assignee's argument [so this is the trustee].                  3 The defendants, the assignees, carried in objections to                  4 the draft of that report by which they had insisted in                  5 substance that, inasmuch as the debt in respect of which                  6 dividends were declared in bankruptcy was the amount of                  7 principal and interest due at the date of the                  8 commission, the receipt of such dividend by the creditor                  9 operated as an extinguishment of such principal and                  10 interest respectively to the extent of the portion of                  11 dividend which was attributable to each and consequently                  12 that in computing what was due upon the bond from the                  13 estate of Joseph Marris the Master ought to confine                  14 himself to a calculation of interest upon the principal                  15 from time to time remaining."                  16 So the argument was precisely, we say, essentially                  17 the same as the one made to Mr Justice David Richards,                  18 and, 353, the middle paragraph:                  19 "The Master, having overruled these objections,                  20 having made his report to the effect aforementioned the                  21 defendants (the assignees) presented a petition praying                  22 that it might be referred back to the Master to review                  23 his report with a declaration that each successive                  24 dividend under the bankruptcy when declared and paid was                  25 to be attributed to the amount of the debt proved, that</p> <p style="text-align: center;">Page 74</p>	<p>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?                  7 MR DICKER: I think this is his view. He identifies in the                  8 previous paragraph the question, which he then                  9 summarises, and, certainly as I read the judgment,                  10 bottom of 355, onwards, is essentially expressing his                  11 view. He says:                  12 "In the first place, as this mode of payment is                  13 regulated by Acts of Parliament, the doctrine of                  14 appropriation which is founded upon the intention,                  15 expressed or implied, of the debtor of creditor, cannot                  16 have any place in the consideration of the present                  17 question."                  18 And he points out dropping some eight lines at the                  19 end of a line, sentence beginning "if therefore". He                  20 says:                  21 "If therefore he is bound because those payment are                  22 made under a bankruptcy to apply them towards discharge                  23 of part of the principal which bears interest and                  24 thereby to leave interest due which does not bear                  25 interest, he is a loser by the bankruptcy, although the</p> <p style="text-align: center;">Page 76</p>

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

<p>1 particularly by Lord Cranworth at pages 362 to 365.                  2 Just to summarise, what Lord Cranworth said was,                  3 until the 1862 Act, certainly from 1844 onwards, the                  4 creditors were obliged in the first instance to proceed                  5 against the company. But if they failed to recover                  6 against the company, they could go directly against the                  7 shareholders and recover the full amount that they were                  8 owed. Now, 1862 changed that, because the concept of                  9 limited liability was introduced. Lord Cranworth                  10 explains that that wasn't intended to affect who were                  11 ultimately liable, it was intended to affect who were                  12 shareholders. Nor was it intended to affect how much                  13 a creditor would receive, subject only to the cap                  14 imposed by the introduction of limited liability. So in                  15 other words creditors should still be entitled to                  16 receive as much after 1862 as they could have received                  17 before if there were assets available to do so and                  18 obviously, before 1862, creditors were able to go                  19 against shareholders directly and recover in full.                  20 The principle in Bower v Marris was adopted in                  21 liquidation in a series of four celebrated decisions of                  22 the Court of Appeal in 1869 and 1870.                  23 LADY JUSTICE GLOSTER: So is this your fifth point or still                  24 your fourth?                  25 MR DICKER: Yes, involving the liquidation of the Humber --</p> <p style="text-align: center;">Page 81</p>	<p>1 Dropping two lines, he says:                  2 "It is surprising that after the number of years                  3 during which winding up proceedings have been going on                  4 in this court, and considering that this question must                  5 have continually arisen, the point has never yet been,                  6 so far as I am aware, the subject of judicial decision.                  7 It now comes before us upon the recommendation of the                  8 Master of the Rolls that we may decide, so far as the                  9 authority of this court can decide, what is to be the                  10 rule applicable to such cases for the future.                  11 Satisfactorily, then in forming the decision, we are not                  12 fettered by rule which obliges us to depart from what                  13 appears to be the justice of the case."                  14 And then dropping to the next paragraph, he says:                  15 "In the present case, we have to consider what are                  16 the positions of the creditors of the company when, as                  17 here, there are some creditors who have a right to                  18 receive interest and others having debts not bearing                  19 interest."                  20 Then he says:                  21 "In the first place, it appears to me we must                  22 consider the case under two aspect: first, where there                  23 is and next where there is not a surplus."                  24 He deals with surplus first. He says:                  25 "I apprehend that in whatever manner the payments</p> <p style="text-align: center;">Page 83</p>
<p>1 LADY JUSTICE GLOSTER: Sorry, Mr Dicker are you on your                  2 fourth point or on your fifth? Maybe it doesn't matter                  3 but --                  4 MR DICKER: I'm on my fourth point. Four decisions of the                  5 Court of Appeal in 1869 and 1870 involving the                  6 litigation of Humber Ironworks and Shipbuilding Company                  7 and the Joint Stock Discount Company. I'm just going to                  8 take you to one of those, which is Humber Ironworks.                  9 It's volume 1, tab 16. The case concerns the treatment                  10 of interest in the event of a liquidation and it                  11 essentially decided two things. Firstly, creditors can                  12 only prove interest in respect of the period down to the                  13 commencement of the liquidation, ie you can't prove for                  14 post insolvency interest. But, secondly, in the event                  15 of a surplus, interest is paid and calculated in                  16 accordance with the principle in Bower v Marris. So the                  17 second part of the decision essentially introduces the                  18 principle in Bower v Marris into liquidation.                  19 The first judgment is Lord Justice Selwyn, which                  20 starts at 644, and, again, just identifying the relevant                  21 points, he starts by saying:                  22 "Several times considered the case, for the judge's                  23 met together with a view, if possible, of laying down                  24 some general rule. The result of that meeting was there                  25 appeared to be no uniform practice."</p> <p style="text-align: center;">Page 82</p>	<p>1 have been made, originally they may have been made in                  2 respect of capital or in respect of interest. Still,                  3 inasmuch as they've all been paid in process of law                  4 without any contract or agreement between the parties,                  5 the account must in the event of there being an ultimate                  6 surplus be taken as between the company and the                  7 creditors in the ordinary way, that is in the manner                  8 point out in Bower v Marris. By treating the dividends                  9 as ordinary payments on account and applying each                  10 dividend in the first place to the payment of interest                  11 due at the date of such dividend and the surplus, if                  12 any, to the reduction of the principal. That disposes                  13 of the question where there is a surplus as to which                  14 there is no doubt or difficulty."                  15 He then deals with the position where the estate is                  16 insolvent and you are not directly concerned with that.                  17 But what effectively he says is you can't prove for post                  18 insolvency interest and two-thirds of the way down he                  19 says:                  20 "Justice, I think, requires that that course of                  21 proceeding should be followed. No person should be                  22 prejudiced by the accidental delay which in consequence                  23 of the necessary forms and proceedings of the court                  24 actually takes place in realising the assets; but that,                  25 in the case of an insolvent estate, all the money being</p> <p style="text-align: center;">Page 84</p>

<p>1 realised as speedily as possible should be applied 2 equally and ratably in payment to the debts as they 3 existed at the date of the winding up." 4 The consequence being you can't prove the 5 post-insolvency interest. Five lines from bottom he 6 says: 7 "But of course I have already guarded myself from 8 being supposed to say the court takes upon itself to 9 alter the rights of the creditors to any further extent 10 or to deprive them of the right they have to interest at 11 the full rate, 20 per cent if and when there is 12 a surplus to pay it. 13 I think the tree must lie as it falls. It must be 14 ascertained what are the debts as they exist at the date 15 of the winding up. All dividends in the case of 16 an insolvent estate must be declared in respect of the 17 debt so ascertained. Of course, it will be understood 18 that we are laying down this rule as applicable to all 19 cases under the recent Act where creditors actions are 20 stayed." 21 So the tree must lie as it falls, essentially 22 everybody's divided pari passu by reference to the 23 position as at that date. It follows you can't prove 24 for post insolvency interest. But in the event there is 25 a surplus, you do get interest calculated in accordance</p> <p style="text-align: center;">Page 85</p>	<p>1 (2.00 pm) 2 LADY JUSTICE GLOSTER: Yes, Mr Dicker. 3 MR DICKER: Can I deal with one short point arising from 4 this morning. I think I said I couldn't remember 5 whether Bower v Marris, whether section 132 applied in 6 the case of Bower v Marris or not. The answer to that 7 is it didn't. There was a decision in the bundles 8 called ex parte Sammon 1851, authorities, volume 1, 9 tab 5, which held that the effect of section 132 was not 10 retrospective, and it didn't apply to commissions which 11 already existed by the date it was introduced. 12 LORD JUSTICE PATTEN: Sorry, what was the case called? 13 MR DICKER: Ex parte Sammon. S-A-M-M-O-N. 14 As we say, it doesn't matter because it's common 15 ground that Bower v Marris did apply at all times 16 between 1743 and at least 1883. It's the 1883 Act which 17 I want to turn to next. 18 LADY JUSTICE GLOSTER: Yes. 19 MR DICKER: There are two separate issues in relation to the 20 1883 Act. There is a question as to whether or not it 21 limited creditors solely to 4 per cent interest. The 22 judge held that it did. We say he was wrong about that. 23 But, in any event, there is a separate question as 24 to whether or not the principle in Bower v Marris 25 continued to apply after the 1883 Act, and we say every</p> <p style="text-align: center;">Page 87</p>
<p>1 with Bower v Marris. 2 I see the time. I wonder whether that would be a -- 3 LADY JUSTICE GLOSTER: Yes, and the other 4 Lord Justice agrees with that, does he? 5 MR DICKER: Yes, he does. 6 LADY JUSTICE GLOSTER: Does he actually say -- 7 MR DICKER: That I think is two-thirds of the way down 647. 8 He says: 9 "As to rule which my learned brother has laid down, 10 it is the rule bankruptcy. The rule was, as has been 11 said, judge-made law. It was made after great 12 consideration and no doubt because it works with 13 equality and fairness between the parties." 14 LORD JUSTICE PATTEN: Just remind me. Under the Act, there 15 were no express provisions dealing with statutory 16 interest, were there? 17 MR DICKER: Correct. So no express provision dealing with 18 statutory interest. Therefore, at this stage, no 19 provision equivalent to entitlement to the Judgment Act 20 rate. That's why the case discusses it entirely in 21 terms of contractual rights. 22 LADY JUSTICE GLOSTER: Is that convenient moment? 2.00 then 23 thank you very much. 24 (1.02 pm) 25 (The short adjournment)</p> <p style="text-align: center;">Page 86</p>	<p>1 indication is that it did. 2 Now, just dealing with, firstly, the issue in 3 relation to the 4 per cent, again, for your note, the 4 judge dealt with the 1883 Act at paragraphs 53 to 56 and 5 paragraphs 139 to 142. Just to remind you of the 6 priority position under the 1825 Act, creditors with 7 an underlying right to interest were paid first. In the 8 event, there was a surplus remaining, creditors had 9 interest at 4 per cent. 10 Now, we say that what the 1883 Act was intended to 11 do was to alter that priority, essentially to provide 12 that interest was payable to all creditors in the first 13 instance at 4 per cent. 14 LORD JUSTICE BRIGGS: Only if there was a surplus. 15 MR DICKER: Only if there was a surplus. With the balance 16 being payable before any distribution could be made to 17 the bankrupt. So no longer giving priority to those who 18 had an underlying right to interest, everyone had 19 4 per cent. Anyone with a greater right was entitled to 20 recover it before a distribution was made to 21 shareholders. We say, you get that from a combination 22 of two sections -- 23 LORD JUSTICE BRIGGS: Sorry, you don't mean distribution to 24 shareholders in this context. 25 MR DICKER: Sorry, the bankrupt. I have failed to move from</p> <p style="text-align: center;">Page 88</p>

<p>1 liquidation to bankruptcy, I'm sorry.                  2 The two sections in the 1883 Act applicable in                  3 bankruptcy, you will find in the authorities volume 4,                  4 tabs 145A and 146. Starting volume 145A, you will see                  5 a section 40 of the 1883 Act, 40(1):                  6 "In the distribution of the property of a bankrupt                  7 there shall be paid in priority to all other debts."                  8 And there are various, at that stage, preferential                  9 claims. Subsection (4):                  10 "Subject to the provisions of this Act, all debts                  11 proved in the bankruptcy shall be paid <i>pari passu</i>."                  12 So that's the general distribution in respect of                  13 proved debts, <i>pari passu</i>. Then, 5:                  14 "If there is any surplus after payment of                  15 the foregoing debts, it shall be applied in payment of                  16 interest from the date of the receiving order at the                  17 rate of £4 per centum per annum on all debts in proved                  18 in the bankruptcy."                  19 Pay your proved debts in full, then everyone gets                  20 4 per cent on their proved debts.                  21 The other provision that's relevant is section 65,                  22 which is at tab 146. Section 65 states:                  23 "The bankrupt shall be entitled to any surplus                  24 remaining after payment in full of its creditors, with                  25 interest, as by this Act provided and of the costs</p> <p style="text-align: center;">Page 89</p>	<p>1 Then you come to 65, which has a different turn of                  2 phrase. Section 65 talks, in our submission, as one                  3 would expect it to say:                  4 "The bankrupt only gets the surplus after payment in                  5 full of his creditors."                  6 You need to include the words "with interest",                  7 because the Act itself provides under section 40(5) for                  8 payment of interest at 4 per cent.                  9 If you think about section 65, you can trace                  10 section 65, effectively, all the way back to the statute                  11 of Elizabeth referred to by Lord Hardwicke in                  12 <i>Bromley v Goodere</i>, which uses the phrase "in full                  13 satisfaction". So one starts with a statutory scheme                  14 which has always provided that creditors have to be paid                  15 if full before the surplus is returned to bankrupt.                  16 So, in a sense, one starts with section 65. That is                  17 a section which has been there right from the start.                  18 That reflects the very basic principles of the regime.                  19 Namely, creditors first, bankrupts last.                  20 Now, that section can remain simply saying:                  21 "Bankrupt shall be entitled to any surplus remaining                  22 after payment in full of his creditors, for so long as                  23 the Act doesn't, itself, provide for a payment of                  24 interest."                  25 But once you include a right to interest at</p> <p style="text-align: center;">Page 91</p>
<p>1 charges and expenses of the proceedings under the                  2 Bankruptcy Act."                  3 Just focussing on the wording of section 65, the                  4 critical phrase, we say, is the phrase "after payment in                  5 full of his creditors". A creditor who is not entitled                  6 to payment in full, of the interest that he is owed, has                  7 not been paid in full.                  8 LADY JUSTICE GLOSTER: Did authority decide that?                  9 MR DICKER: No, you can't -- neither party has been able to                  10 find any authority post-1883 on this issue or on whether                  11 the principle in <i>Bower v Marris</i> continued to apply. So                  12 this is question, as far as the bank has been able to                  13 identify, as to the construction. The only indication                  14 you will get -- and from my point of view I accept it's                  15 potentially unhelpful -- is in the Cork Report.                  16 LORD JUSTICE BRIGGS: But the core phrase is:                  17 "After payment in full of his credits with interest,                  18 as by this act provided", which sort of says to me: you                  19 go back to section 40.                  20 MR DICKER: We would say no. You have payment in full of                  21 proved debts, you have 4 per cent under section 40(5)                  22 which makes it plain that it's surplus after payment of                  23 the foregoing debt. At that stage, you have only paid                  24 proved debts and what you get is interest at 4 per cent                  25 on all debts proved.</p> <p style="text-align: center;">Page 90</p>	<p>1 4 per cent, then obviously you need to tinker with                  2 section 65 to make it plain that it's not merely payment                  3 in full, ie of the underlying claims, but it's payment                  4 in full, plus interest, as by this Act provided.                  5 LORD JUSTICE PATTEN: I mean, before considering the                  6 previous incarnations of it -- I'm just looking at 65 as                  7 drawn -- it might be said, I suppose, that the phrase                  8 "after payment in full" didn't comprehend the payment of                  9 interest because it's a bit odd to talk about "in                  10 payment in full with interest".                  11 MR DICKER: In one sense, I see that. But, again, if one                  12 just thinks how this ended up being bolted together, and                  13 the way it arose. We have, essentially, a provision                  14 equivalent to section 65: bankrupt gets surplus but                  15 after everyone's been paid in full.                  16 We then think -- and that goes back to                  17 <i>Bromley v Goodere</i> -- it means payment in full both of                  18 principal and of interest. In other words, before you                  19 get to distributing surplus, you have to make sure every                  20 creditor has been paid in full.                  21 You then introduce a regime of payment of interest                  22 to everyone at 4 per cent, that goes in as                  23 section 40(5). That's where the right is granted. You                  24 then need to amend section 65 because, otherwise, if it                  25 simply said, "Payment in full", at least according to</p> <p style="text-align: center;">Page 92</p>

<p>1 prior law, you wouldn't have covered the right to 2 interest which you've just introduced. 3 LORD JUSTICE PATTEN: Let's assume the word "with" means 4 including. What do the words "as by this Act" refer to, 5 then; just simply the rate? 6 MR DICKER: Well, it refers to all rights under the 7 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 comma both before and -- 12 LORD JUSTICE PATTEN: Well, I know. 13 MR DICKER: So you get payment in full -- comma -- as by 14 this act provided. We say, that's essentially 15 meaning: as you would expect. Everyone gets paid what 16 they're owed, in full, before anything goes back to the 17 bankrupt. That's how the regime has worked since 1743. 18 LORD JUSTICE BRIGGS: What happens to a post cut-off date 19 debt under a modern bankruptcy 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 liquidation. Post-commencement 23 tort claims, cases like RR Realisations and Re T&amp;N, 24 holds the mere fact they arose after the commencement of 25 the liquidation did not arise by reason of an obligation</p> <p style="text-align: center;">Page 93</p>	<p>1 section 30(2) and you can pursue the bankrupt, in any 2 event. 3 LADY JUSTICE GLOSTER: As of 1883, there was no discharge of 4 his debt. 5 MR DICKER: There was a discharge. There had been 6 a discharge ever since statute of -- 7 LADY JUSTICE GLOSTER: Why are you saying he would have to 8 pay post bankruptcy debt? 9 MR DICKER: Because the discharge only discharges in respect 10 of provable debts and the post insolvency interest isn't 11 provable. 12 LADY JUSTICE GLOSTER: Yes, I see. 13 LORD JUSTICE BRIGGS: So it would be an administrative 14 inconvenience but not an injustice if one read 15 section 60 as giving him the estate back, subject only 16 to what the Act provides should be paid to his 17 creditors? 18 MR DICKER: It depends on how efficacious it would be to 19 hand the surplus back to the bankrupt and to leave 20 creditors to recover from the bankrupt. 21 If one assumes that, subject only to the cost and 22 expense of different proceedings, the money would end up 23 with creditors anyway and -- 24 LADY JUSTICE GLOSTER: He might be just about to make 25 a quick departure from the UK.</p> <p style="text-align: center;">Page 95</p>
<p>1 incurred before, is irrelevant. The cut off date is 2 intended to achieve pari passu distribution. The issue 3 when you get to the stage of non-provable claims 4 is: have you, at this stage, a claim which needs to be 5 paid before you hand the money back to -- 6 LORD JUSTICE BRIGGS: I think I understand in relation to 7 insolvency because, generally speaking, once you have 8 completed the adding up the company is dissolved; is 9 that also correct in relation to personal bankruptcy? 10 MR DICKER: So far as the estate is concerned, yes. The 11 bankrupt is obviously discharged. So far as the 12 discharge is concerned, that only discharges him in 13 respect of -- 14 LORD JUSTICE BRIGGS: Pre-cut off date. 15 MR DICKER: Correct. 16 LORD JUSTICE BRIGGS: That's what I thought, so if he gets 17 the estate back he still has to pay the correct -- 18 MR DICKER: Correct, that's why, as Lord Hardwicke said in 19 Bromley v Goodere, in bankruptcy, in a sense, it's a bit 20 of a non-issue because, you know, if you give it to him 21 back, he then has the pay it anyway; that's one of the 22 points that doesn't make sense to construe the 1883 Act 23 in the way suggested. Because if you are talking about 24 a post-insolvency right to interest which is not 25 provable, then it's not discharged by what's now</p> <p style="text-align: center;">Page 94</p>	<p>1 MR DICKER: In practice, one can't guarantee that the result 2 would be the same. 3 LADY JUSTICE GLOSTER: But are you saying the position would 4 have been different if the comma had been removed after 5 "interest"? 6 MR DICKER: No. 7 LADY JUSTICE GLOSTER: I mean, are you relying on the fact 8 that there is a comma there? 9 MR DICKER: The comma helps our submission, but it's not 10 necessary. 11 LADY JUSTICE GLOSTER: It's not necessary. 12 LORD JUSTICE BRIGGS: Sorry, if I could help you: if the 13 comma's there, so that as by this Act provided applies 14 to both payments of his creditors and with interest, you 15 could find somewhere in the Act that provides for 16 a payment out of his estate to a creditor from whom he 17 gets it back. All you could go back to is section 40. 18 I know that's not what Bromley v Goodere says. 19 MR DICKER: Well, if by "as by this Act provided" you mean 20 you have to find an express provision, your Lordship is 21 right. If "by this Act provided" means the Act in the 22 way that it's been interpreted to operate by the courts 23 ever since 1743, then the answer is no. It's one of the 24 oddities I mentioned earlier about section 107 and 143. 25 If one reads those and asks: where a non-provable</p> <p style="text-align: center;">Page 96</p>



<p>1 claims, liabilities? They don't refer to them.  2 LORD JUSTICE BRIGGS: No.  3 MR DICKER: These sections have been there for ever. If one  4 approached them from an entirely clean slate, you might  5 construe them in one particular way but, if you did so,  6 you would be construing them contrary to 300 years of  7 authority.  8 Now, section 65 is essentially just the reflection  9 of that overarching position with, as I say, the  10 addition of express reference to the right to interest  11 which has been inserted and is now found in  12 section 40(5).  13 LADY JUSTICE GLOSTER: Are you saying section 65, is,  14 itself, a provision that can be relied upon, within  15 section 65 --  16 MR DICKER: Yes.  17 LADY JUSTICE GLOSTER: -- because it is providing the  18 payment in full for its creditors? It's a bit  19 self-serving.  20 MR DICKER: Self-referential reference but that's what it  21 says: you have to pay everyone in full.  22 Unlike subsection (5), which refers to interest on  23 your proved debts, section 65, the language is  24 different. It's not just talking about payment in full  25 of proved debts, it's talking about payment in full of</p> <p style="text-align: center;">Page 97</p>	<p>1 debts you have a cut-off date as at the date of  2 commencement of the bankruptcy or liquidation. You  3 don't when you come to distributing the surplus.  4 The example I gave a few minutes ago about  5 post-insolvency tort claims, any claim which was for  6 whatever reason not provable, because it post-dated the  7 cut-off date, nevertheless has to be paid before the  8 surplus is returned. It's less important in bankruptcy,  9 on one view, if the bankrupt isn't discharged, you can  10 pursue him. It's obviously extremely important in  11 liquidation.  12 LADY JUSTICE GLOSTER: So trustee has to go round and work  13 out if, in the intervening period, there's been any  14 incurring of debts by the bankrupt?  15 MR DICKER: The answer to that is yes. The Australian cases  16 actually have a phrase of a second round of proofs to  17 give it a slightly more sort of formal element to it.  18 LADY JUSTICE GLOSTER: Right.  19 MR DICKER: But a liquidator and a trustee has always been  20 under an obligation to discharge extant debts out of the  21 estate before handing anything back to bankrupt or to  22 shareholders. It's just the way the system has always  23 worked. Not, as Lord Justice Briggs explained in  24 the Waterfall I judgment, something which has ever been  25 covered, and certainly not something that's ever been</p> <p style="text-align: center;">Page 99</p>
<p>1 creditors. We say, if one approaches that as one would  2 have previously, as one naturally would, you test it in  3 each case by asking: has the creditor been paid in full?  4 LORD JUSTICE BRIGGS: Is there a predecessor to section 65,  5 in the 1832 Act, or was the practice reflected in  6 Bromley v Goodere, whereby the courts in certain  7 situations didn't just hand the property back, but made  8 sure all the other debtors paid as well something that  9 was judge-made and operated outside the statute.  10 MR DICKER: I need to check the answer to that.  11 LORD JUSTICE BRIGGS: You say -- I understand where you are  12 coming from -- section 65 merely replicates what has  13 been going on for centuries, but I'm not sure it has  14 been in the Act for centuries.  15 MR DICKER: I need to check. If one remembers what I was  16 referring to, it's the reference by Lord Hardwicke to --  17 I think it's from a statute Elizabeth picks up or King  18 James' statute, full satisfaction, which was certainly  19 in the Act, at that stage, and which he interpreted as  20 meaning: everyone is being paid in full a loan(?).  21 LADY JUSTICE GLOSTER: But creditors, there, can't include  22 post-bankruptcy creditors, can they, if they're not  23 creditors at the date of proof?  24 MR DICKER: Except that's exactly how the surplus is  25 applied, go back to Bromley v Goodere. For provable</p> <p style="text-align: center;">Page 98</p>	<p>1 covered in detail in the statute. But that's how --  2 LADY JUSTICE GLOSTER: Was it so unlikely?  3 MR DICKER: That's how the authorities have --  4 LORD JUSTICE BRIGGS: Surpluses aren't that unlikely in a  5 bankruptcies context. They are pretty unusual in  6 a corporate context.  7 MR DICKER: Sorry, I missed that.  8 LORD JUSTICE BRIGGS: I think you were saying surpluses are  9 so rare that they don't become an issue.  10 MR DICKER: Forgive me, I think the point I was trying to  11 make -- and maybe I am misunderstanding what  12 your Lordship is referring to -- if, in bankruptcy, the  13 bankrupt isn't discharged and the creditor can proceed  14 against the bankrupt, then subject to the possibility  15 the bankrupt may have just spent the money in the  16 meantime, it all comes out in the wash. In a  17 liquidation where the money is returned to shareholders,  18 that's not possible because the general law is: once  19 a distribution has been made to shareholders, it's  20 irrecoverable. So once it's gone out of window, it has  21 gone. That's why liquidators need to discharge debts  22 out of a surplus before saying to the shareholders,  23 "This is the balance of your investment as at today's  24 date. Here it is".  25 LADY JUSTICE GLOSTER: Right.</p> <p style="text-align: center;">Page 100</p>

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

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

<p>1 his judgment. What he said was:                  2 "A decree for the administration of an estate                  3 operates as a judgment in equity, and that the orders of                  4 1841 were intended to bring a judgment in equity into                  5 line with a judgment at law on which interest was                  6 payable under the Judgments Act. Interest on a judgment                  7 debt accrues due whilst it is outstanding just as much                  8 as does interest under a contract."                  9 In other words, he said Whittingstall v Grover is                  10 effectively a case in which you have a judgment, you                  11 therefore have interest accruing day-by-day, and there                  12 is, therefore, no difficulty in applying Bower v Marris.                  13 Now, we say this case is in fact, in substance,                  14 indistinguishable from the nature of the right under                  15 rule 2.88(9), where it refers to the Judgment Acts rate.                  16 The distinction that the judge sought to draw within                  17 Whittingstall v Grover is incorrect. It is correct that                  18 a decree for the administration of estate does operate                  19 as a judgment in equity, but it's obviously not                  20 a judgment for the payment of any sum of money. So it                  21 doesn't, itself, entitle creditors to interest on                  22 decrees or orders in equity under section 18 of the                  23 Judgments Act. If it was, then this order,                  24 paragraph 46, would have been unnecessary. So you may                  25 have a decree, maybe a judgment in equity, but it</p> <p style="text-align: center;">Page 109</p>	<p>1 need to be read in its entirety -- is on page 217. If                  2 I can just identify the points which we rely on. Just                  3 picking it up at the top, Mr Justice Chitty says:                  4 "It is only now, when further assets of the testator                  5 have become available for distribution, the question has                  6 arisen. The next question which arises relates to                  7 interest. After payment of 20 shillings in the pound to                  8 the joint and separate creditors of the testator                  9 a surplus will remain. The question is left open by the                  10 order of 1861 already stated. It declared generally the                  11 priority of the testator's separate creditors to his                  12 joint creditors. This declaration was, I think,                  13 confined to the principal of the debts. The declaration                  14 as to interest was confined to negating any claim of                  15 the testator's separate creditors whose debts did not by                  16 law or special contract carry interest."                  17 Then, if you drop to about a third of the way down,                  18 in the middle of the column 1, there's a sentence                  19 beginning, "But the question is ..."                  20 LADY JUSTICE GLOSTER: Yes.                  21 MR DICKER: "But the question is between the joint creditors                  22 of the testators, on the one hand, and the separate                  23 creditors whose debts do not, by law, carry interest, on                  24 the other hand. All these creditors have received or                  25 will now receive 20 shillings in the pound out of the</p> <p style="text-align: center;">Page 111</p>
<p>1 doesn't, itself, carry interest. The interest arises as                  2 a result of paragraph 46 of the order.                  3 Second point, we say paragraph 46 of the order is                  4 effectively structured in the same way as rule 2.88 in                  5 the sense that it says: if there's a surplus, everyone                  6 is entitled to interest at 4 per cent whether or not                  7 they otherwise have it.                  8 The justification for that right your Lordship sees                  9 from the judgment of Mr Justice Chitty. It is                  10 essentially because there was a similar moratorium in                  11 this situation and, given the existence of the                  12 moratorium, it was only fair to treat creditors as if                  13 they have a judgment. So it may be the rule says: you                  14 only get interest if there a surplus, but the rationale                  15 for it is: you ought to essentially get interest as if                  16 you had a judgment.                  17 Importantly, the case applied principle in                  18 Bower v Marris. They were calculating the amount of the                  19 interest which was due.                  20 Can I just show you a couple of points from the                  21 judgment. Before I get there, you will note, at the top                  22 of 216, column 1. A reference both to Bower v Marris                  23 and to Humber Iron Works. Humber Iron Works having been                  24 decided a little less than 20 years previously.                  25 The relevant part of the judgment -- and it does</p> <p style="text-align: center;">Page 110</p>	<p>1 principal of their debts. Separate creditors contend                  2 for priority, the joint creditors contend for a                  3 distribution of the surplus pari passu. Admitted there                  4 is no decision on the point, which quite possibly has                  5 never arisen until this time. The question must be                  6 decided on principle."                  7 Then, this:                  8 "Previously to orders of 1841, the court of Chancery                  9 did not give interest to a creditor coming in under                  10 a decree for the administration the estate of a deceased                  11 person where the debts did not, by law, carry interest."                  12 So rather like prior to section 132 of the 1825 Act:                  13 "The orders of 1841 relating to interest --                  14 LADY JUSTICE GLOSTER: Can I just interrupt and stop you                  15 there to clarify my mind. The orders aren't limited to                  16 interest in the administration of an estate, are they?                  17 MR DICKER: No.                  18 LADY JUSTICE GLOSTER: Or are they? It's not clear from the                  19 previous paragraph 45.                  20 MR DICKER: I need to check, precisely, the position in                  21 relation to that. Our submission is, simply, that they                  22 do apply in the context of the administration.                  23 LADY JUSTICE GLOSTER: I accept that. I'm just not                  24 understanding whether they're wider, "any equitable                  25 claim".</p> <p style="text-align: center;">Page 112</p>

<p>1 MR DICKER: I need to provide with you an answer to that.                  2 LADY JUSTICE GLOSTER: Sorry, go back to --                  3 MR DICKER: "The question which must be decided on                  4 principle, previously to the orders of 1841 the court of                  5 Chancery did not give interest to a creditor coming in                  6 under a decree for the administration of the estate of a                  7 deceased person where the debts did not accrue or carry                  8 interest. The orders of 1841 relating to interest were                  9 in substance repeated in the consolidated orders of 1861                  10 now embodied in the subsisting rules of court order 65.                  11 The rules of 1841 were founded on the 17th section of                  12 the statute previously to that enactment...(Reading to                  13 the words)... to recover judgment for his debt.                  14 Consequently, after the passing of the statute, the                  15 court of equity, while interfering with this legal right                  16 for the common benefit all the creditors, was bound on                  17 equitable principles to put him in the same position as                  18 if he had exercised it, hence the order of 1841."                  19 So there is a moratorium, you therefore should be                  20 entitled to interest as if you had a judgment:                  21 "Lord Romilly explained the matter in                  22 The Herefordshire Banking Company that the court allowed                  23 interest at 4 per cent from the date of its decree,                  24 because the decree is a judgment in equity for the                  25 benefit of all the creditors and prevents them for</p> <p style="text-align: center;">Page 113</p>	<p>1 case."                  2 That's another name for Humber Iron Works:                  3 "By treating the dividends as ordinary payments on                  4 account and applying each dividend in the first place to                  5 the payment of interest calculated to the day of such                  6 dividend and the surplus, if any, to the reduction of                  7 the principle."                  8 So, just stepping back, essentially two                  9 points: first of all, if one looks at paragraph 46 of                  10 the order, it says: if there is a surplus, everyone is                  11 entitled to interest of 4 per cent. Very much like                  12 rule 2.88(9).                  13 The second point is: Mr Chitty appears to have not                  14 regarded that as any problem in applying Bower v Marris,                  15 despite the fact in this context, as well, payments will                  16 already have been made.                  17 Now, there are a series of cases to similar effect.                  18 I'm not going to take you to them at this stage, but                  19 just for your note, in the bundles they are a case                  20 called Garrard v Lord Dinorben, volume 1, tab 7,                  21 Aitchinson v Lee 1, tab 10, Hadfield's Patent Cask                  22 Company, 1, tab 12, Herefordshire Banking Company, 1,                  23 tab 13, and a more recent case Re Bracey decide in 1936,                  24 1, tab 36.                  25 LADY JUSTICE GLOSTER: Are those are all administration of</p> <p style="text-align: center;">Page 115</p>
<p>1 getting a judgment at law which would give them                  2 interest. The right of the creditor whose debt does not                  3 carry interest by law is therefore based on the                  4 provisions of the statute and the orders of 1841 and the                  5 existing rules of court would give effect to such                  6 right."                  7 Just dropping to about a third of the way down,                  8 sentence in the middle of the paragraph, says:                  9 "Nor I can find any reason which in regard to                  10 subsequent interest would justify the drawings of any                  11 distinction between creditors whose debts carry interest                  12 by law and those whose debts carry interest under the                  13...(Reading to the words)... which appears on the face                  14 of the general orders themselves. The sound rule,                  15 therefore, appears to be that as between a joint and                  16 separate creditors, the question of interest should be                  17 decided in accordance with established rules as to the                  18 principal."                  19 Then, he says this:                  20 "The remaining question relates to the manner in                  21 which the dividends received ought to be accounted for                  22 in ascertaining the amount of interest due, all the                  23 dividends have been paid in process of law, and the                  24 account ought to be taken in the manner pointed out in                  25 Bower v Marris and the warrant to finance companies</p> <p style="text-align: center;">Page 114</p>	<p>1 estate cases?                  2 MR DICKER: They are, but they all essentially -- well, not                  3 all of them. Herefordshire is the winding up of                  4 a partnership, banking partnership.                  5 The importance of those cases is that they set out,                  6 in a similar way to Mr Justice Chitty, a basic rationale                  7 that if you are prevented from obtaining a judgment by                  8 a moratorium, you really ought to be treated as if you                  9 had a judgment. That's what we say, essentially,                  10 section 132 was originally doing, and 2.88(9) is now                  11 doing.                  12 Mr Justice Chitty said in the context of a provision                  13 like that, which only applies in the event of a surplus,                  14 applies to creditors who have no other right to                  15 interest. Nevertheless, there's no difficulty in                  16 applying the principle in Bower v Marris.                  17 There's one other point which I ought to simply                  18 mention, at this stage, which is Mr Justice David                  19 Richards' judgment does appear to produce an anomaly                  20 now, between the administration of a deceased's estate                  21 which considered to be solvent, on the one hand, and the                  22 administration of a deceased's estate which is                  23 considered to be insolvent, which subsequently turns out                  24 to have a surplus.                  25 The reason for the anomaly are the rules that</p> <p style="text-align: center;">Page 116</p>

<p>1 Mr Justice Chitty was referring to, can be found in 2 similar terms, now, in CPR 64.2B and 40A Practice 3 Direction 14. So if you have an administration 4 a deceased estate which is solvent, presumably the same 5 regime operates as operated in Whittingstall v Grover. 6 Conversely, if you have an administration which is 7 considered insolvent, that's administered in accordance 8 with the Insolvency Act. The judge's judgment therefore 9 applies, on his basis Bower v Marris doesn't operate. 10 So whether Bower v Marris applies in relation to the 11 administration of the deceased estate, it appears to 12 turn on whether or not it was thought to be solvent, in 13 which case it does. Or merely is subsequently realised 14 is solvent, in which case it doesn't. 15 Now, the final authority I wanted to refer to -- 16 English authority -- was Lines Brothers Number 2. 17 LORD JUSTICE BRIGGS: Are the rules and references to that 18 in your skeleton? You have quoted from CPR. 19 MR DICKER: Can I just give you the references? 20 LORD JUSTICE BRIGGS: Thank you. 21 MR DICKER: Sorry. CPR 64.2B. 22 LORD JUSTICE BRIGGS: Which is that; solvent or insolvent? 23 MR DICKER: These are both dealing with the solvent position 24 because the insolvent position is dealt with -- 25 LORD JUSTICE BRIGGS: Is of the Act.</p> <p style="text-align: center;">Page 117</p>	<p>1 "In these circumstances, there remained for decision 2 some question about the claims enforceable against the 3 liquidation of surplus in respect of post liquidation 4 interest. It's common ground that since there is a 5 surplus it should be used so far as it will go 6 ... (Reading to the words)... the interest due to the 7 bank is said to be [sums given]." 8 The calculation of the sum appears in appendix A, 9 which is an agreed document. 10 Now, there was then an issue which 11 Mr Justice Mervyn Davis raised and you can see that at 12 453D. Just above E, he says: 13 "In saying that appendix A applies, I desire to add 14 this caveat: Appendix A includes interest in the sum of 15 £173,000-odd for the periods 20 June 1978 to 16 31 December 1978 which was brought up to date by adding 17 to that figure interest for the figure from 18 21 December 1982 to the date of payment. In other 19 words, Appendix A proceeds on footing that interest has 20 continued to run since the payment of the final dividend 21 on 20 June 1978. It is supposed, as I understand, that 22 interest continues to run on a notionally unpaid capital 23 of 589,000-odd thrown up by the Bower v Marris 24 calculations." 25 Then he says this:</p> <p style="text-align: center;">Page 119</p>
<p>1 MR DICKER: The Act. 64.2B. You also need to look at CPR 2 40A, Practice Direction 14. 3 LADY JUSTICE GLOSTER: Can you speak up? 40A? 4 MR DICKER: I'm sorry, 40A, Practice Direction 14. 5 LORD JUSTICE BRIGGS: In other words, APD14? 6 MR DICKER: Yes. 7 So Lines Brothers Number 2, I can show you that. 8 It's volume 1, tab 48. There were, as you know, 9 a series of Re Lines Brothers cases. This occurred 10 after the decision of the Court of Appeal dealing with 11 currency conversion claims. The issue that then arose, 12 essentially was: it having been established that the 13 post insolvency interest is payable first, upon what 14 basis is that interest payable? 15 Bower v Marris was cited in the earlier decisions, 16 but this is the decision in which its operation was 17 considered. The other element is: it was decided after 18 the Cork Report but before the White Paper, and that may 19 have a significance that you'll see when we come to the 20 White Paper. 21 It was common ground between the counsel involved 22 that Bower v Marris applied. You'll see the counsel 23 involved identified at 440F and at 442 between E and F, 24 on any basis distinguished insolvency counsel. 25 Mr Justice Mervyn Davis said, at 446, between D and F:</p> <p style="text-align: center;">Page 118</p>	<p>1 "I am not satisfied that interest ought to be 2 charged in respect of the period after 20 June 1978. 3 I say that because all principal was in fact paid off on 4 20 June 1978, so that, thereafter, there was no 5 principal owing that could carry interest. The capital 6 sum of 589,000-odd is to my mind merely a notional 7 figure not capable of supporting an interest claim." 8 So, essentially, the judge was saying: you can apply 9 the principle in Bower v Marris, but only until 10 principal has been repaid because from that date, 11 essentially, there's nothing on which interest could 12 follow. 13 LORD JUSTICE BRIGGS: You mean only until principal was in 14 fact repaid by way of dividends on improvements. 15 MR DICKER: Yes. Then, there are further submissions which 16 your Lordships will see starting at 456F. 17 LADY JUSTICE GLOSTER: So the case comes back then, as the 18 judge says he's going to deal with other submissions? 19 MR DICKER: Yes. Comes back on a later date, which looks to 20 be -- if one goes back to start -- about a week later: 21 "The calculations of both sides have been effected 22 in conformity with what both sides had assumed to be the 23 principles announced in Bower v Marris. Calculations 24 proceed by applying the dividends received in the first 25 instance towards satisfying interest accruing at the</p> <p style="text-align: center;">Page 120</p>

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

<p>1 He says, in fact, it's a powerful -- he dealt with it at 2 123 -- 3 LADY JUSTICE GLOSTER: I have that. But, at 128, he says 4 they're powerful, the submissions are powerful support, 5 but he doesn't say why they're wrong, does he? 6 MR DICKER: He says the wording of the section is not in 7 identical terms to rule 2.8 -- 8 LADY JUSTICE GLOSTER: It's 127 where he gives his reason. 9 MR DICKER: What he essentially does, having dealt with the 10 background, is then move on in his judgment, as I said, 11 in four relatively short paragraphs, to look at the 12 wording of 2.88. We say insufficiently taking into 13 account the intellectual freight provided by the prior 14 position and concludes that whatever the position may 15 have been before 1986, it had changed. That was simply 16 a consequence of the wording of the rules. 17 The next topic I wanted to deal with concerns 18 preparatory materials leading up to the introduction of 19 the 1986 Act. 20 LADY JUSTICE GLOSTER: Shorthand writer, would you like 21 a break? 22 THE SHORTHAND WRITER: 20 past. 23 LADY JUSTICE GLOSTER: We will go till 120 past. 24 MR DICKER: The judge dealt with the prior materials, again 25 for your note, in paragraphs 93 to 95 of his judgment.</p> <p style="text-align: center;">Page 125</p>	<p>1 liquidation. But it's important to know what was not 2 ultimately enacted from the Cork Report. The 3 Cork Report suggested that creditors should receive post 4 insolvency interest at the Judgment Act rate. That's 5 all they expressly referred to, which the judge regarded 6 as, effectively, an adoption of previous the regime in 7 the 1883 Act. So the judge regarded the Cork Report as 8 essentially saying, "Let's look to bankruptcy, that 9 provides interest at the Judgment Act rate that's what 10 creditors should be entitled to". 11 Now, we say it's not actually clear that is what the 12 Cork Report intended. Regardless of that, it's 13 important to note that recommendation was not adopted. 14 What one then gets is the White Paper, and that 15 recommended that creditors who had an underlying right 16 to interest should be entitled to interest at that rate. 17 I think you should just probably see the reference in 18 White Paper. It's authorities bundle 5, tab 212. 19 Volume 5, paragraph 212. Paragraph 88: 20 "If there is a surplus in a winding up or 21 bankruptcy, once all the creditors have been paid in 22 full, including claims for pre-insolvency interest, the 23 surplus will be used to pay on a pro rata basis post 24 insolvency interest to all creditors whether or not 25 interest was previously reserved on their debt at a</p> <p style="text-align: center;">Page 127</p>
<p>1 We say he made three errors in dealing with that 2 material. 3 Firstly, he placed too much weight on the 4 Cork Report and ignored the effect of the White Paper. 5 Secondly, he assumed that the effect of the 6 recommendations in the Cork Report necessarily involved 7 the rejection of <i>Bower v Marris</i>, when they didn't. 8 Thirdly, he failed to, in our respectful submission, 9 appreciate precisely what alteration was the legislature 10 intended to make to the previous regimes and why. 11 Now, as far as the first point is concerned, as 12 I said, the judge approached the 1986 Act on the basis 13 it largely gave effect to the recommendations of the 14 Cork Report and essentially adopted the previous 15 position in bankruptcy. 16 Now, we say it's important to be clear here: the 17 Cork Report did make a number of recommendations in 18 relation to the treatment of interest, both prior to and 19 after the commencement date. In particular, it 20 suggested there should be a common code for bankruptcy 21 and liquidation. So the same regime should apply in 22 both and hadn't previously been the case. It also 23 recommended that post insolvency interest should be 24 specifically dealt with in the Act, that had been the 25 case in bankruptcy but it had not been the case in</p> <p style="text-align: center;">Page 126</p>	<p>1 minimum rate equivalent to that applicable at the date 2 of the relevant order to judgment debts. 3 "If, however, a higher contractual rate applies to 4 the debt insolvency interest will be chargeable at that 5 rate subject to the discretion of the court as to 6 excessive agreements." 7 So what the White Paper did was essentially insert 8 the reference to the rate applicable to the debt apart 9 from the administration. 10 Now, when one asks: what was the White Paper doing? 11 We say there's no reason why the word "rate" should 12 mean anything different than it did in the context, say, 13 of section 132 of the 1825 Act. Essentially, the 14 intention was to ensure creditors would be entitled to 15 receive interest which they otherwise would have 16 received, absent the insolvency. In other words, saying 17 you are not just going to get 4 per cent -- or you are 18 not going get, rather, the Judgment Act rate, you are 19 also entitled to interest that you would have been 20 entitled to receive as a matter of contract. 21 Interestingly, perhaps I could just refer you to one 22 reference to Mr Justice Richard's supplemental judgment, 23 where he described what the phrase "the rate applicable 24 to the debt" in rule 2.88 was in substance seeking to 25 achieve. You will find it in part A, core bundle</p> <p style="text-align: center;">Page 128</p>



1 volume 2. It's tab 1, the relevant paragraph is  
 2 paragraph 34. It's the last five lines of paragraph 34,  
 3 where he says:  
 4 "It was discussed in my judgment in Waterfall 2A,  
 5 the purpose of providing the alternative of interest at  
 6 the rate applicable apart from the administration is to  
 7 ensure the creditor received what it would have receive  
 8 if there had been no administration, if that would be  
 9 more than interest at the Judgment Act rate."  
 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 full entitlement by way of  
 13 interest before any surplus is distributed to the  
 14 bankrupt or to shareholders.  
 15 LORD JUSTICE BRIGGS: You have to read that in the context,  
 16 don't you, it's addressing a granular submission?  
 17 MR DICKER: He used the phrase in a way that we say that's  
 18 what it naturally means, that indeed at one stage is how  
 19 the judge himself explained the provision.  
 20 The important point is the judge said, "We have the  
 21 Cork Report that says you adopt the regime in  
 22 bankruptcy. Everyone gets judgment at rate interest".  
 23 We say not so. It's essentially a melding of two  
 24 streams. The White Paper said they should be entitled  
 25 to receive the rate applicable to the debt apart from

Page 129

1 the insolvency, and both of those were included.  
 2 What does that phrase mean?  
 3 We agree with the judge, what it naturally means is  
 4 you should get what you otherwise would have been  
 5 entitled to get. Now, pre-1986, the common ground that  
 6 in liquidation what that meant was entitled to get  
 7 applying the principle in Bower v Marris. So how on  
 8 earth did Bower v Marris suddenly disappear when this  
 9 phrase which was designed to capture creditors' full  
 10 entitlement, was inserted on the recommendation of the  
 11 White Paper into the legislation?  
 12 The second point and, briefly, before --  
 13 LADY JUSTICE GLOSTER: We will take the second point before  
 14 you rise.  
 15 MR DICKER: It will take, I hope, no more than a minute.  
 16 The judge appears to have assumed that entitling  
 17 creditors to interest at the Judgment Act rate is  
 18 inconsistent with the principle in Bower v Marris.  
 19 LADY JUSTICE GLOSTER: What paragraph of which judgment are  
 20 you referring to?  
 21 MR DICKER: It's part of his --  
 22 LADY JUSTICE GLOSTER: General analysis.  
 23 MR DICKER: It's part of the four points he made. It's  
 24 essentially premised on -- what you now have is  
 25 a statutory right, which only gives you right to

Page 130

1 interest in the event of a surplus. Therefore,  
 2 Bower v Marris simply doesn't work.  
 3 We say, to the extent that is his reasoning, it's  
 4 flawed. The rationale for giving creditors interest at  
 5 the Judgments Act rate is simple. We've made the point  
 6 already: there a moratorium, it's only fair they should  
 7 be treated as if they had a judgment. Just as the judge  
 8 held that if you have an actual judgment the principle  
 9 in Bower v Marris can apply, subject to the county court  
 10 oddity, there's no reason why the position should be  
 11 different if rather than having an actual judgment,  
 12 essentially, the statute treats you as if you had  
 13 a judgment.  
 14 So the judge, we say, said: if you have a judgment,  
 15 Bower v Marris can apply. That was the basis on which  
 16 he distinguished Whittingstall v Grover. He also  
 17 referred to an authority, Tahore Holdings to similar  
 18 effect. We say it can't make a difference whether you  
 19 have an actual judgment or the statute says you ought to  
 20 be entitled to interest, effectively, as if you had  
 21 a judgment. Bower v Marris can apply in first case, so  
 22 too in the second.  
 23 LADY JUSTICE GLOSTER: Would that be a convenient moment?  
 24 We will take a break of five minutes.  
 25 (3.22 pm)

Page 131

1 (A short break)  
 2 (3.28 pm)  
 3 LADY JUSTICE GLOSTER: Yes, Mr Dicker.  
 4 MR DICKER: There is a third and final point on the three  
 5 statutory materials. It's simply this: when reading the  
 6 Cork Report the White Paper, it's also important to know  
 7 what is not discussed. There's no criticism anywhere of  
 8 the principle in Bower v Marris, let alone any  
 9 suggestion that it should not apply.  
 10 If the judge is right, we do respectfully submit  
 11 that is surprising, take the position in liquidation, we  
 12 know it applied between 1969 and 1986, introduced by  
 13 Humber Iron Works, a case which every solvency  
 14 practitioner worth his salt knows, Selwyn's comment  
 15 about the tree lying where it falls. It's not as if  
 16 that part of the judgment had been lost sight of, when  
 17 one gets to Lines Brothers number 2, two years before  
 18 the Act, it's common ground before all the insolvency  
 19 counsel involved that Bower v Marris applied.  
 20 LADY JUSTICE GLOSTER: There is no mention in Cork about it?  
 21 MR DICKER: Absolutely none at all. If the consequence is  
 22 the creditors end up with less interest then they  
 23 otherwise would, that is something which appears to have  
 24 been achieved without any discussion. More  
 25 interestingly, in a sense, if you go back from 1743

Page 132

<p>1 onwards, there is no criticism of the principle at all.                  2 Every case in every Commonwealth jurisdiction that has                  3 considered it, has applied it. They have all described                  4 it as a matter of fairness and justice, common sense.                  5 Indeed, the judge himself, his judgment, doesn't                  6 contain any criticism of the principle, doesn't seem to                  7 provide any explanation of why the legislature might                  8 have wanted to get rid of it. He moves from prior                  9 history, essentially stops. He looks at the wording, he                  10 deals with the effect of construction of rule 2.88 and                  11 that's essentially an end of it.                  12 We do respectfully say, as a matter of policy and                  13 principle his judgment has a number of consequences                  14 which the legislature simply could not have intended,                  15 and certainly could not have intended to achieve without                  16 at least there having been some prior discussion of                  17 those issues. I have made the point all ready,                  18 creditors first, members last. That's no longer the                  19 case.                  20 It also doesn't make any commercial sense in a more                  21 general way. If the legislature's intention is that you                  22 should be compensated by receiving interest at                  23 a particular rate, it doesn't make any sense to disapply                  24 Bower v Marris. Imagine a situation in which the                  25 creditor is owed a thousand pounds and accruing interest</p> <p style="text-align: center;">Page 133</p>	<p>1 whilst the administrators take steps to recover the                  2 assets, the debts that are owed continue to accrue                  3 interest and will be received. But at the time he                  4 receives a sum, he pays it out to creditors essentially                  5 their interest stops running at that stage. So you                  6 effectively end up with a situation in which part of the                  7 money which the debtor is receiving is being siphoned                  8 off at each stage, isn't ultimately used to pay the                  9 matching liabilities to creditors but ends up being paid                  10 to subordinated creditors or shareholders. Again, it                  11 simply doesn't make any sense.                  12 Again, a point I made right at the start. The                  13 Court of Appeal decided, in Waterfall I, the way the                  14 statute works is that foreign currency creditors should                  15 be entitled to be paid in full before any distribution                  16 is made to shareholders. Why are foreign currency                  17 creditors in a better position with creditors in a right                  18 to interest. Policies in relation to that we say should                  19 apply equally in relation to a claim to interest. It                  20 doesn't mean for some reason rule 2.88 hasn't abolished                  21 such an entitlement but, in our submission, it should                  22 mean one looks very closely at rule 2.88 before deciding                  23 that is indeed its effect.                  24 So that, as it were, all by way of precursor to                  25 coming back to the judge's points on construction and</p> <p style="text-align: center;">Page 135</p>
<p>1 at 10 per cent. One year on, he's paid that thousand                  2 pounds, by which stage a hundred pounds of interest has                  3 accrued. It doesn't make any sense for the legislature                  4 to say, at that stage: we now don't care how long it                  5 takes the debtor to pay that hundred pounds worth of                  6 interest. Whether it's one year, or ten years, we are                  7 happy with whatever value creditor eventually receives.                  8 If the legislature intended creditors to receive the                  9 contractual rate to which they were entitled, again                  10 Bower v Marris should apply. If you focus on the                  11 Judgment Act rate of 8 per cent, and say, "Oh, the                  12 legislature intended creditors to be compensated by                  13 receiving interest at an effective rate of 8 per cent",                  14 you don't achieve that by saying, "We'll allow interest                  15 to accrue until the principal has been repaid. Then if                  16 the debtor takes ten years to pay whatever that amount                  17 of interest is, it doesn't matter. It doesn't make any                  18 commercial sense.                  19 It also doesn't make any commercial sense if one                  20 looks at the position more widely. Imagine a situation,                  21 perhaps not a million miles from that in relation to                  22 LBIE, where the insolvent company's assets are claims                  23 which carry interest, and their liabilities are debts                  24 which carry matching entitlements to interest. On the                  25 judge's approach, effectively throughout this period,</p> <p style="text-align: center;">Page 134</p>	<p>1 appropriation. I hope, at this stage -- again, I can do                  2 this now fairly quickly. I start by summarising our                  3 submissions on the meaning effect that the rules in                  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                  9 he?                  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                  14 different.                  15 Secondly, it also introduced an express statutory                  16 provision dealing with post insolvency interest. That's                  17 another change. Not from bankruptcy where such                  18 a provision did exist, but from liquidation where it                  19 didn't.                  20 The third point, the statutory provision expressly                  21 dealt with the priority of post insolvency interest in                  22 the statutory Waterfall, as you would expect. It                  23 provided it was payable after proved debts had been paid                  24 in full and before any surplus was used for any other                  25 purpose.</p> <p style="text-align: center;">Page 136</p>

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

1 generally on account. The question then is: you have  
 2 a surplus, how do you approach things now?  
 3 We say in that situation you are not in any way  
 4 subverting the effect of the statute in applying  
 5 Bower v Marris. What the statute does is effectively  
 6 say: look, if there is a shortfall everyone has to  
 7 receive 100 pence in the pound on their approved debts  
 8 and they have. The question now --  
 9 LORD JUSTICE PATTEN: Why isn't that a rule? I mean, what's  
 10 the magic in talking about rules by analogy, rules of  
 11 appropriation? Because that's a form of appropriation,  
 12 it's just a different rule, that's all.  
 13 MR DICKER: Yes, and we agree with that.  
 14 I think, as I understand the argument, the argument  
 15 is that if you go back to the cases, when you read  
 16 Bower v Marris and later cases, and they describe what's  
 17 happening, they often describe the calculation as  
 18 involving a notional reallocation of dividends, interest  
 19 due. It's the word my learned friend focuses on. He  
 20 says, "It only works if at the date of the dividend  
 21 there was in fact interest which was due, and there  
 22 isn't under the statute rules because it comes in for  
 23 the first time when there's a surplus".  
 24 We say, the short reason for that is you have to  
 25 read the comments in context. Those cases were all

Page 141

1 talking about cases where the creditor did have  
 2 an underlying right to interest. So if you want to  
 3 describe what's going on, it would be perfectly natural  
 4 to say, "I'm appropriating it to interest which was due  
 5 at that stage". It doesn't necessarily mean it's  
 6 a necessary requirement for the principle to operate.  
 7 We say it isn't. Whittingstall v Grover is one  
 8 indication where they couldn't find a debt which was  
 9 due, find interest which was due. Attorney General of  
 10 Canada v Confederation Trust is another example. So  
 11 there's no magic in interest having been due at the  
 12 relevant date. The most one can say is, "That is a fair  
 13 description of how the principle operates in a case  
 14 where, whether by contract or statute, interest was due  
 15 as at that date".  
 16 It's also important, we say, to bear in mind that  
 17 even in a contractual situation, the operation of the  
 18 principle involves what might be called something of  
 19 a fiction. The payments are treated as having been made  
 20 in respect of accrued interest, although they were in  
 21 fact paid in respect of principle.  
 22 Now, if that's right, the only question is really  
 23 the extent of the fiction or the deeming. If the  
 24 principle entitles you to say, "You have made a payment  
 25 in respect of a proved debt, that is in respect

Page 142

1 principal, nevertheless we can notionally treat it as  
 2 having been applied first in relation to interest". Why  
 3 is that deeming permissible that a further deeming or  
 4 fiction of saying, "And if necessary we'll treat the  
 5 interest as having been due at the relevant date", why  
 6 is the former permissible and the latter not? Again, we  
 7 say: no reason.  
 8 So, in our respectful submission, the judge was  
 9 wrong in the conclusion he reached on issue 2. And in  
 10 the consequential declaration, at 3. Correct answer is:  
 11 interest is to be calculated in accordance with  
 12 principle in Bower v Marris, treating dividends which  
 13 have been paid as having been applied, first, in the  
 14 payment of interest and, second, to principal.  
 15 That's all subject to your Lordships that I was  
 16 proposing to say on Bower v Marris.  
 17 LADY JUSTICE GLOSTER: Thank you.  
 18 MR DICKER: I reassure you, although I have now only dealt  
 19 with one out of the total of 17 issues in this appeal,  
 20 I am, I think, pretty much where I expected to be at  
 21 this the point.  
 22 LADY JUSTICE GLOSTER: You are up to speed, are you?  
 23 MR DICKER: Yes, so it will follow that some of the others  
 24 are rather shorter.  
 25 Can I turn next to deal with connected issue which

Page 143

1 concerns compound interest. It's the next one on the  
 2 list of issues. It's declaration 8 and issue 3. You  
 3 can see, from the list of issues, the declaration the  
 4 judge made was:  
 5 "Where statutory interest is payable at a rate  
 6 applicable to the debt apart from the administration and  
 7 such rate is a compounding rate accrued statutory  
 8 interest does not continue to compound following the  
 9 payment in full of the principal amount through  
 10 dividends."  
 11 It has echos of the issue which, at one point,  
 12 troubled Mr Justice Mervyn Davis in Lines Brothers 2,  
 13 although it's arising in a different context. The  
 14 context is compound interest.  
 15 The judge -- again, for your note -- dealt with this  
 16 in his judgment, paragraphs 19 to 26. Perhaps if you  
 17 turn that up. It's in part of core bundle 1, tab 2. 23  
 18 is 19 to 26. The sub-issue we are concerned with is in  
 19 paragraph 26. Just to explain the context, issue 3  
 20 concerned the reference to the rate applicable to the  
 21 debt apart from the administration. In particular, the  
 22 reference to the word "rate". The main issue raised by  
 23 issue 3 was: did the word "rate" refer just to the  
 24 numerical percentage rate or also to the mode of  
 25 calculating the rate at which interest accrued on

Page 144

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

<p>1 produce a rather odd result. I mean if one goes back to                  2 the point he makes in paragraph 24, "unprincipled middle                  3 ground", the consequence of his judgment is that there                  4 is essentially, we would submit, an unprincipled 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. But the way he applies it                  8 doesn't actually give you the compound interest that                  9 that right would otherwise entitle you to. Because --                  10 LORD JUSTICE PATTEN: Go on.                  11 MR DICKER: -- you continue to get compound interest for                  12 a period, but only until you've repaid the principal --                  13 for whatever reason it's frozen. Outside of insolvency,                  14 as I say, you would be entitled to say: I've got                  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 rules.                  18 LORD JUSTICE PATTEN: But I mean it is being paid as                  19 statutory interest, yes? It's compound, because that's                  20 the appropriate rate to apply to statutory interest?                  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 it; namely that                  25 2.88(7) only gives you something when there is some part</p> <p style="text-align: center;">Page 149</p>	<p>1 So one has this bizarre situation which, according                  2 to the judge, that will say are you entitled to compound                  3 interest. It does not work in the way compound interest                  4 normally work, in the sense that it stops running not                  5 when principal and interest is repaid, it stops running                  6 just when principal is repaid. But for some reason if                  7 you leave £1 outstanding it's continuing to compound.                  8 Again, with the greatest respect to the learned                  9 judge he has treated this as essentially a consequence                  10 of his construction of the wording of 2.88(9). He                  11 hasn't sought to address issues like this. He doesn't                  12 appear to have considered why the legislature might have                  13 wanted to give you half of the rights you were entitled                  14 to by way of compound interest, or why the legislature                  15 would have wanted compound interest to continue to run,                  16 provided £1 of principal was still outstanding but not                  17 if that final pound is --                  18 LADY JUSTICE GLOSTER: Could you give us -- I'm not saying                  19 now -- but tomorrow, just one page of some worked                  20 examples on this. Because that would I think illustrate                  21 the point, certainly for me. Because the differences                  22 could be quite extreme, couldn't they?                  23 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</p> <p style="text-align: center;">Page 151</p>
<p>1 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                  4 slug(?) of interest, you wouldn't fail to get compound                  5 interest because of any other defect to the formula,                  6 save for it just not being a period when there is any                  7 right to statutory interest.                  8 MR DICKER: And it does lead to this oddity: the judge says                  9 interest does not compound following the payment in full                  10 of the principle amount:                  11 "... because under the terms of rule 2.88(7)                  12 interest whether simple or compound is payable only for                  13 the period proved ..."                  14 So imagine the situation, according to the judge,                  15 dividend payments are made and they pay off proved debts                  16 principal in full. There's an amount of interest                  17 outstanding which stops running. Now assume that you                  18 haven't paid proved debts in full, there's £1 of                  19 principal still outstanding. On the judge's approach,                  20 at that stage still owed £1 of principal, so the                  21 shutters haven't come down. In addition to the £1 of                  22 principal you are entitled -- you haven't yet been                  23 paid -- compound interest up to that date, and compound                  24 interest will then continue to run on the £1 plus the                  25 accrued interest unless and until it is paid.</p> <p style="text-align: center;">Page 150</p>	<p>1 there's one issue in relation to leap year, you take,                  2 whether it's 365 days or whatever, which, I think, at                  3 one stage the judge asked, "Do I really need to decide                  4 this? Is there much involved?" and was told, I think                  5 it's tens of millions, turn on the one day.                  6 LORD JUSTICE BRIGGS: I'm not sure my Lady is asking for                  7 a worked example which was raised months ago.                  8 (Inaudible) just a simple one.                  9 MR DICKER: We will try to.                  10 LADY JUSTICE GLOSTER: And if there are different                  11 situations, depending on when precisely you are paid in                  12 the history, that would just illustrate it for me.                  13 MR DICKER: I'm sure we could do that.                  14 LADY JUSTICE GLOSTER: Nothing too complicated.                  15 LORD JUSTICE PATTEN: I'm not absolutely clear what you are                  16 contending for as being the correct application of the                  17 rule in relation to a case where compound interest is in                  18 full(?). I mean, this is all on the hypothesis you are                  19 wrong about the first issue we've just dealt with. So                  20 that the judge's construction of 2.88(7), so far as                  21 Bower v Marris at least is concerned is correct,                  22 principal first.                  23 MR DICKER: I think this issue is still relevant even if I'm                  24 right on Bower v Marris, because compound interest would                  25 give you additional sums as well. I think, although no</p> <p style="text-align: center;">Page 152</p>

<p>1 doubt those more mathematically inclined behind me will                  2 tell me if I'm wrong, but I think the other way round                  3 may matter less; in other words, if someone is entitled                  4 to compound interest, it may be he doesn't need                  5 Bower v Marris. If someone gets Bower v Marris they                  6 still have an additional benefit if he's entitled to                  7 compound interest --                  8 LADY JUSTICE GLOSTER: It seems to me the judge is deciding                  9 it on both scenarios in paragraph 26, that he's right                  10 and that he's wrong. So I would be interested to have                  11 one example on the hypothesis that he was right, and one                  12 on the hypothesis that he was wrong, explaining why this                  13 point still matters to you.                  14 MR DICKER: Yes. I'm sure we can produce that in time for                  15 tomorrow.                  16 On the construction point, I've made the point in                  17 relation to (inaudible) and doesn't make sense. From                  18 a construction point of view, we say that the judge is                  19 right in terms of the wording of the rule, it says you                  20 receive interest in respect of your debts for the period                  21 they are outstanding. When you apply those words in the                  22 context of compound interest, you need to take into                  23 account the logic of compound interest, which is                  24 essentially that interest is effectively treated as it's                  25 capitalised, it's treated as if it was part of the</p> <p style="text-align: center;">Page 153</p>	<p>1 purposes of this rule for what period the debt is                  2 outstanding, during which they ought to be entitled to                  3 compound interest, we say the answer is easy, because                  4 given the nature of compound interest the debt                  5 effectively only ceases to be outstanding when both                  6 principal and interest has been paid. The contrary                  7 conclusion, as we say, doesn't make any sense. There is                  8 no sense in the legislature saying: we'll give you this                  9 right but for a period only which does not reflect the                  10 underlying right. And certainly no sense in the                  11 legislature saying: you can continue to have compound                  12 interest mounting up on the interest which has so far                  13 accrued provided only liquidator keeps back £1 of                  14 principal and ensures that he doesn't pay all debts in                  15 full.                  16 LORD JUSTICE PATTEN: Speaking myself I'm not sure this                  17 isn't just another example, if you like, of why you say                  18 the principle in Bower v Marris ought to apply in this                  19 situation. I mean, once you are working on the                  20 hypothesis it doesn't apply and the judge has that point                  21 right, I think as a matter of construction of the rule                  22 it becomes much more difficult for the reasons my Lord                  23 has indicated to run this argument.                  24 MR DICKER: There a separate argument of construction which                  25 I've made. Can I put it this way: I accept that if we</p> <p style="text-align: center;">Page 155</p>
<p>1 principal. It doesn't make sense in that context to                  2 say: you've been paid everything so your debt is no                  3 longer outstanding, therefore no further interest should                  4 run. If you do say that then you are necessarily                  5 negating the right to compound interest which you have                  6 essentially just said is reflected in the rules.                  7 LORD JUSTICE PATTEN: But I mean, those debts in the                  8 relevant rules I think we all accept are the debts that                  9 you are able to prove for. So they're not going to                  10 include this claim for interest.                  11 MR DICKER: Well, the debt which is proved for will not                  12 include post-insolvency interest, that's right.                  13 LORD JUSTICE PATTEN: Exactly.                  14 MR DICKER: If you say that the creditor is nevertheless                  15 entitled to compound interest on that debt, then when                  16 you get to the stage of distributing the surplus you                  17 look at what has happened since the date of                  18 administration. You have principal -- let's assume no                  19 accrued interest up to the date of administration --                  20 principal proved. From that date, apart from the                  21 administration, compound interest accruing on the                  22 principal.                  23 LORD JUSTICE PATTEN: Yes.                  24 MR DICKER: Is that interest effectively being treated as                  25 capitalised? When you try and determine for the</p> <p style="text-align: center;">Page 154</p>	<p>1 are right on Bower v Marris then this obviously becomes                  2 a lot easier. I don't accept if we're wrong on                  3 Bower v Marris this issue necessarily goes as well.                  4 And as I say, issue 3 is important for those                  5 creditors with the right to compound interest because                  6 Bower v Marris even if it does apply doesn't give them                  7 as much as compound interest would.                  8 LADY JUSTICE GLOSTER: Right. So that's section J of your                  9 skeleton.                  10 MR DICKER: Yes. There's a further question the judge                  11 refers to right at the end of 26, is the one I want to                  12 turn to next, where he says in the last sentence, second                  13 half:                  14 "This sub-issue does not therefore arise. In any                  15 event, for the reasons given in relation to issue 2A                  16 I will hold that a creditor will not have a non-provable                  17 claim of the type identified."                  18 So the next pair of issues are issue 2A, which                  19 involves declarations 5 and 6. Dealing with each of                  20 these in turn, starting with declaration 5, one looks at                  21 that on the list of issues:                  22 "If and to an extent the statutory interest paid for                  23 a creditor on his proved debt under 2.88(7) is less than                  24 the amount of interest to which that creditor would                  25 otherwise have been entitled in respect of that debt,</p> <p style="text-align: center;">Page 156</p>

1 the creditor does not have a non-provable claim for the  
 2 difference."  
 3 So the issue arises in this way: we say that  
 4 rule 2.88 is intended to reflect creditors' full  
 5 entitlement, whether in respect of Bower v Marris,  
 6 whether in respect of compound interest or otherwise.  
 7 But assume we are wrong about one or all of those  
 8 aspects, the question is whether or not the shortfall in  
 9 the interest which a creditor is owed constitutes  
 10 a non-provable claim payable after interest under 2.88,  
 11 but before any distribution is made to the subordinated  
 12 debt or the shareholders, potentially along with every  
 13 other non-provable claim.  
 14 LADY JUSTICE GLOSTER: You say this arises even if you have  
 15 lost down the line previously?  
 16 MR DICKER: Yes. The issue only arises if I'm --  
 17 LADY JUSTICE GLOSTER: I can see that.  
 18 MR DICKER: If I have lost then we say we have  
 19 a non-provable claim to the balance --  
 20 LADY JUSTICE GLOSTER: Even though the judge has said the  
 21 statutory scheme foreclose you -- or precludes you.  
 22 MR DICKER: Our submission, and the reason why we say we  
 23 have such a claim, is because the judge was wrong to  
 24 hold that 2.88 was an exclusive code. There are two  
 25 issues in a sense: what does 2.88 mean? The judge could

Page 157

1 have been right in relation to that. The other question  
 2 is: is it an exclusive code? And the judge could have  
 3 been wrong on that question.  
 4 LADY JUSTICE GLOSTER: And if it's not an exclusive code  
 5 even if he's right on Bower v Marris you have this  
 6 non-provable claim.  
 7 MR DICKER: Correct. It does make a difference in the sense  
 8 at this stage of the argument it only matters to  
 9 a creditor with something that would rank as  
 10 a non-provable claim. So if he has a contractual right  
 11 to interest, he's not paid in full under 2.88, he may  
 12 have a non-provable claim. If he has an underlying  
 13 statutory right to interest not paid in full, again he  
 14 may have a non-provable claim.  
 15 But the one group who this stage of the argument  
 16 does not assist are creditors who have no underlying  
 17 rights to interest. His only right to interest is under  
 18 2.88(9); namely, at the Judgment Act rate, whether or  
 19 not they have a claim to interest.  
 20 LORD JUSTICE PATTEN: So this a reversion to your  
 21 contractual rights, essentially, at the tail end of the  
 22 distribution process.  
 23 MR DICKER: Yes. This operates actually very like the  
 24 regime that used to operate in liquidation prior to 1986  
 25 where the court held if you don't get paid in full

Page 158

1 through the process of proof, you reverted to your  
 2 contractual rights, you are then paid in full. The only  
 3 difference is you now have, in addition to payment of  
 4 proved debts, you have an express provision dealing with  
 5 post-insolvency interest, which comes out first before  
 6 you get to non-provable claims.  
 7 LORD JUSTICE BRIGGS: Is it common ground that if you have  
 8 one it's on the same step of the Waterfall as the  
 9 currency conversion claim, for example?  
 10 MR DICKER: I don't know whether it's common ground. It's  
 11 certainly our submission that it is. We're not  
 12 suggesting that there is any ranking of non-provable  
 13 claims. I mean there obviously was in section 132, but  
 14 you would need, I think, to have an express statutory  
 15 provision for that to occur. Otherwise, it's simply  
 16 something that hasn't been paid through the process of  
 17 proof and --  
 18 LORD JUSTICE BRIGGS: In general principle would (inaudible  
 19 words).  
 20 MR DICKER: Yes.  
 21 LADY JUSTICE GLOSTER: So this is issues 2A, declarations 5  
 22 and 4, looking at your list of issues.  
 23 MR DICKER: Yes.  
 24 LADY JUSTICE GLOSTER: I'm not sure I understand the  
 25 difference -- because it's 4.15 -- between declaration 5

Page 159

1 and declaration 4.  
 2 MR DICKER: I've outlined five, which is essentially a claim  
 3 by a creditor with an underlying right to interest to  
 4 a non-provable claim of the first. The second is to try  
 5 and deal with the position of a creditor who doesn't  
 6 have an underlying claim to interest, who's only  
 7 entitled to interest at the Judgment Act rate under  
 8 2.88(9). And the question is if the office-holder  
 9 essentially takes ten years or so to pay that amount of  
 10 interest provided for in the rules, is there any other  
 11 way essentially of getting interest on that sum? I can  
 12 deal with the second declaration 4 very shortly.  
 13 LORD JUSTICE PATTEN: So he has to get it out of the  
 14 statutory provisions or nothing else, because he has no  
 15 residual contractual right he can rely on.  
 16 MR DICKER: Correct. So it's a way of trying to build on to  
 17 the right which 2.88(9) gives him, and says there are  
 18 circumstances in which on the construction of 2.88(9) he  
 19 is entitled to actually interest on interest.  
 20 LORD JUSTICE PATTEN: On interest.  
 21 MR DICKER: It's a short point and I can deal with it  
 22 shortly.  
 23 LORD JUSTICE PATTEN: And the judge dealt with it quite  
 24 shortly.  
 25 LADY JUSTICE GLOSTER: Yes. I think we meet deal with that

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  
18 Submissions by MR DICKER .....3  
19  
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21  
22  
23  
24  
25

A				
<b>A1</b> 48:20	142:20 144:7,25	131:5 132:18	129:6,8 137:8,14	<b>allowed</b> 34:10
<b>abandon</b> 145:8	146:17 150:25	134:11 136:12	137:22 138:4	113:22
<b>able</b> 6:8,13 32:21	154:19 155:13	138:10,17 158:18	144:6,21 145:12	<b>alludes</b> 53:17
32:25 55:18 56:11	<b>accrues</b> 11:7 109:7	160:7	146:12,24 147:12	<b>alter</b> 85:9 88:11
81:18 90:9,12	145:15	<b>acted</b> 79:10	154:18,19,21	<b>alteration</b> 126:9
102:17 103:7	<b>accruing</b> 29:6	<b>actions</b> 85:19	<b>administrative</b>	<b>alternative</b> 10:7
154:9	42:16,20 43:8,21	<b>acts</b> 76:5,13 106:9	95:13	44:9 129:5 137:18
<b>abolished</b> 135:20	109:11 120:25	109:15	<b>administrator</b>	<b>amend</b> 92:24
<b>absent</b> 128:16	133:25 154:21	<b>actual</b> 31:25 38:9	17:18 23:2 25:8	<b>amended</b> 56:2
<b>absolutely</b> 6:18	<b>achieve</b> 4:24 14:1	104:22 131:8,11	<b>administrators</b> 4:7	<b>amount</b> 1:19 7:23
15:20 22:15 24:4	19:3,4 20:23 21:7	131:19 136:5	8:12 101:12 135:1	8:12 15:12 20:21
31:15 37:5 66:2	26:20 94:2 128:25	139:3	145:21 146:10	26:10 39:10 45:24
132:21 152:15	133:15 134:14	<b>add</b> 4:8 25:25	<b>admission</b> 122:6	46:2 51:23 64:7
<b>absurd</b> 64:19 65:1	<b>achieved</b> 20:13	65:19 119:13	<b>Admitted</b> 112:3	72:25 74:6,25
<b>accept</b> 45:12 47:25	132:24 149:5	<b>added</b> 4:11	<b>adopt</b> 129:21	75:7,24 81:7
90:14 104:9	<b>act</b> 6:16 7:1 9:24	<b>adding</b> 94:8 119:16	<b>adopted</b> 10:4 56:24	110:18 114:22
112:23 154:8	15:7 22:18 31:17	<b>addition</b> 57:4 97:10	70:14 81:20	121:11 122:14
155:25 156:2	31:19 33:8 37:4	150:21 159:3	101:20 126:14	134:16 139:12
<b>accepted</b> 7:15	37:12 38:10 50:16	<b>additional</b> 31:15	127:13	144:9 146:18,22
58:12	51:18,20 53:2,12	40:12 45:22 48:15	<b>adoption</b> 127:6	147:3,5,20 148:18
<b>accidental</b> 84:22	53:23 54:3 56:5,7	152:25 153:6	<b>affect</b> 81:10,11,12	150:10,16 151:23
<b>account</b> 14:19,22	56:9,17 57:1,4,24	<b>address</b> 138:22	<b>affords</b> 79:21	151:24 156:24
14:23 20:16 21:2	58:2,14 60:24	151:11	<b>aforementioned</b>	160:9
23:9 29:7 32:17	61:5,21,25 63:3,7	<b>addressed</b> 22:7	74:20	<b>amounts</b> 52:3
42:11 65:7 70:18	66:17 70:9,14	<b>addressing</b> 103:19	<b>afraid</b> 2:13 16:21	<b>amused</b> 3:16
73:2,18 75:22	71:12 72:8,11	129:16	<b>ago</b> 28:5 99:4 152:7	<b>analogous</b> 9:12
84:5,9 108:12	78:9,23 80:23	<b>adhere</b> 122:3	<b>agree</b> 25:23 130:3	<b>analogy</b> 44:22
114:24 115:4	81:3 85:19 86:14	<b>adjourned</b> 161:15	141:13	141:10
121:15 125:13	86:19 87:16,20,25	<b>adjournment</b> 86:25	<b>agreed</b> 2:6,23 3:12	<b>analyse</b> 10:1
137:11,15 139:10	88:4,6,10 89:2,5	<b>adjudication</b> 79:11	119:9 145:10,11	140:23
139:22 141:1	89:10,25 90:2,18	<b>administered</b> 117:7	146:11	<b>analysing</b> 10:12
153:23	91:7,23 92:4 93:4	<b>administration</b>	<b>agreement</b> 4:24	<b>analysis</b> 36:4 43:14
<b>accounted</b> 114:21	93:7,10,14 94:22	9:13,21 10:9	12:24,24 84:4	72:21 104:7
<b>accounting</b> 20:17	95:16 96:13,15,19	13:18 16:12 23:5	<b>agreements</b> 128:6	130:22
150:2	96:21,21 98:5,14	23:8,20 25:2,5	<b>agrees</b> 86:4 121:25	<b>Anne</b> 60:25 63:10
<b>accrue</b> 11:13 12:22	98:19 101:17	26:16 28:19,23	<b>ahead</b> 2:7 51:5	<b>annum</b> 89:17
64:24 113:7	102:17,19,24	29:21 30:1,5,11	52:21	124:13
134:15 135:2	103:9 104:24	30:12 31:19 42:9	<b>aid</b> 79:20	<b>annunciated</b>
147:13	106:9 109:6,23	42:17 43:3 46:25	<b>aims</b> 121:12	120:23
<b>accrued</b> 12:7 23:19	112:12 117:8,25	50:15 57:8 78:15	<b>Aitchinson</b> 115:21	<b>anomaly</b> 116:19,25
23:24 24:16,19,21	118:1 122:20	106:12 108:3	<b>akin</b> 123:17	<b>answer</b> 3:3,8 5:20
26:2 29:9 35:12	123:18 125:19	109:2,18 112:10	<b>albeit</b> 43:17	14:13 24:2 34:24
43:12,13,24 64:2	126:12,24 127:4,7	112:16,22 113:6	<b>alike</b> 61:19	39:2 59:19 68:25
78:2 108:23 134:3	127:9 128:13,18	115:25 116:20,22	<b>allocating</b> 146:15	87:6 96:23 98:10
	129:9 130:17	117:3,6,11 128:9	<b>allow</b> 134:14	99:15 103:19

113:1 140:9 143:10 146:13 147:8 148:25 155:3 <b>answered</b> 27:16,17 27:20 <b>answers</b> 27:11 <b>anyone's</b> 56:11 <b>anyway</b> 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 <b>APD14</b> 118:5 <b>apparent</b> 25:2 <b>appeal</b> 1:7,9,11 8:11 56:23 57:1 81:22 82:5 102:5 118:10 135:13 143:19 146:9 <b>appeals</b> 4:11 <b>appear</b> 37:13 71:13 116:19 151:12 <b>appearance</b> 49:22 <b>appeared</b> 82:25 <b>appears</b> 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 <b>appellant</b> 4:5 <b>appendix</b> 119:8,13 119:14,19 122:5 <b>applicable</b> 10:8 28:19,23 29:20,25 30:4 31:18 43:2 50:14 53:22 70:4	73:6 83:10 85:18 89:2 128:1,8,23 129:6,25 137:21 138:4,14 144:6,20 145:11 146:12,23 148:5 149:6 <b>application</b> 14:14 25:7 38:19 41:20 152:16 161:6 <b>applied</b> 6:23 7:2,12 9:6 11:10 12:25 14:9 17:20 20:7 33:13,25 44:14 54:16 55:9,16,21 55:23,24 57:2,6 58:12 65:9 66:12 69:23 71:4 72:13 72:21 85:1 87:5 89:15 98:25 102:11 103:17 108:2 110:17 118:22 123:3,22 124:12 132:12,19 133:3 143:2,13 <b>applies</b> 12:16 30:10 30:22 31:25 32:13 65:25 96:13 104:2 104:12,21 116:13 116:14 117:9,10 119:13 124:18 128:3 140:10 149:7 <b>apply</b> 8:15 15:6,25 24:18 30:13,17 33:15,16,23 36:15 41:16 56:19,19,20 72:8 75:15 76:22 80:11,15,17 87:10 87:15,25 90:11 103:17 104:4,22 107:21 108:18,22 112:22 120:8 122:5 126:21 131:9,15,21 132:9 134:10 135:19	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 <b>apprehend</b> 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 <b>approached</b> 97:4 126:12 <b>approaches</b> 2:4 10:14 98:1 <b>approaching</b> 37:9 <b>appropriate</b> 21:21 32:11,16 43:5 149:20 <b>appropriated</b> 29:8 29:12 32:23 42:19 75:21 121:16 139:21,25 140:4 <b>appropriating</b> 142:4 <b>appropriation</b> 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 <b>approval</b> 56:24 <b>approved</b> 104:4 124:14 141:7	<b>improvements</b> 120:14 <b>April</b> 1:1 24:13 <b>Arden</b> 122:24 <b>argued</b> 145:5 <b>argument</b> 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 <b>arguments</b> 1:4 3:23 34:20 <b>arisen</b> 83:5 111:6 112:5 <b>arises</b> 8:22 11:7 14:2 23:16 31:16 43:19 44:18 110:1 111:6 148:21 157:3,14,16 <b>arising</b> 42:24 87:3 144:13 <b>arose</b> 9:8 22:6 69:22 72:20 92:13 93:24 118:11 <b>arrangement</b> 77:24 <b>arrived</b> 73:16 <b>articulation</b> 3:17 <b>ascertain</b> 62:20 <b>ascertained</b> 13:13 85:14,17 <b>ascertaining</b> 114:22 <b>aside</b> 32:15 104:14 <b>asked</b> 152:3 <b>asking</b> 24:1 98:3 152:6 <b>asks</b> 96:25 128:10 <b>aspect</b> 7:8 17:23 83:22 149:24 <b>aspects</b> 8:24 16:7 46:20 50:2 157:8 <b>assets</b> 13:9 26:18	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 <b>assignee's</b> 74:2 <b>assignees</b> 63:17 74:3,21 <b>assigns</b> 101:12 <b>assist</b> 158:16 <b>assume</b> 1:16 25:25 38:15 93:3 150:17 154:18 157:7 <b>assumed</b> 33:1 80:10 120:22 126:5 130:16 <b>assumes</b> 95:21 <b>assuming</b> 25:14 146:13,23 <b>assumption</b> 17:20 23:16 34:17 <b>attempted</b> 77:11 <b>Attorney</b> 123:11 142:9 <b>attributable</b> 74:11 <b>attributed</b> 74:25 <b>attributing</b> 78:19 <b>Australia</b> 123:6 <b>Australian</b> 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
---	---	---	--	--

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

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

107:7 118:19 150:21 <b>comes</b> 13:21 19:15 28:7 36:11 43:22 46:16 49:16 64:15 83:7 100:16 120:17,19 141:22 159:5 <b>coming</b> 98:12 112:9 113:5 135:25 <b>comma</b> 93:11,13 96:4,8,9 <b>comma's</b> 96:13 <b>commenced</b> 72:4 <b>commencement</b> 13:17,24 42:17 82:13 93:24 99:2 124:12 126:19 137:7,14 <b>comment</b> 132:14 <b>comments</b> 141:25 <b>commercial</b> 12:23 133:20 134:18,19 <b>commission</b> 60:14 61:12 62:21 67:3 67:6,17,23,25 68:5 70:17 74:8 75:2 77:17,19,20 78:2,12,16 <b>Commissioner</b> 61:6 <b>commissioners</b> 62:12,20 64:6,12 101:9 <b>commissions</b> 87:10 <b>common</b> 13:13 51:21 55:8 72:12 80:16 87:14 113:16 118:21 119:4 126:20 130:5 132:18 133:4 136:12 145:9 159:7,10 <b>Commonwealth</b> 6:12 9:16 123:4 133:2	<b>companies</b> 80:22 80:23 101:22 114:25 <b>company</b> 23:4,8 81:5,6 82:6,7 83:16 84:6 94:8 113:22 115:22,22 <b>company's</b> 134:22 <b>compare</b> 39:9 <b>compels</b> 37:2 <b>compensate</b> 26:6 <b>compensated</b> 44:21 133:22 134:12 <b>compensation</b> 31:22 51:15 70:12 <b>complete</b> 49:22 <b>completed</b> 94:8 <b>complicated</b> 52:7 152:14 <b>compound</b> 11:8,15 11:22,24 12:5,15 46:15 144:1,8,14 145:3 146:5,13,17 146:21,25 147:1,2 147:6,12,19,21 148:4,10,13,17 149:7,8,11,16,19 150:4,9,12,23,23 151:2,3,7,14,15 152:17,24 153:4,7 153:22,23 154:5 154:15,21 155:3,4 155:11 156:5,7 157:6 <b>compounding</b> 144:7 145:15 <b>comprehend</b> 92:8 <b>computation</b> 73:6 <b>computed</b> 73:1 121:4,8 <b>computing</b> 62:20 74:12 <b>conceive</b> 36:11 <b>concept</b> 10:25 22:13 37:23 38:9	62:1,10 63:12 65:12 81:8 <b>concepts</b> 51:13 <b>concerned</b> 4:14 21:11 24:1 33:22 41:1 47:5 55:11 84:16 94:10,12 106:11,19 123:2 126:11 144:18,20 152:21 <b>concerns</b> 5:8 41:4 54:5 82:9 125:17 139:10 144:1 <b>conclude</b> 138:20 <b>concludes</b> 125:14 <b>conclusion</b> 5:3,25 7:9 9:1 11:22 22:23 29:3 37:2 46:3,4,19 47:6 143:9 150:2 155:7 <b>concurrency</b> 1:10 <b>Confederation</b> 123:12 142:10 <b>conferred</b> 54:13 <b>confine</b> 74:13 <b>confined</b> 61:17 111:13,14 <b>confirmed</b> 18:21 <b>confirming</b> 18:1 <b>confirms</b> 23:6 <b>conformity</b> 120:22 <b>connected</b> 4:21 143:25 <b>consent</b> 107:3 <b>consequence</b> 13:14 13:19 84:22 85:4 125:16 132:21 149:3 151:9 <b>consequences</b> 7:18 35:19 133:13 <b>consequential</b> 143:10 <b>consequently</b> 74:11 113:14 <b>consider</b> 58:22	60:24 63:9,15 83:15,22 147:18 <b>consideration</b> 76:16 80:12 86:12 <b>considered</b> 6:13 11:21 16:8 63:11 79:19 82:22 116:21,23 117:7 118:17 122:2 123:5 133:3 140:21 151:12 <b>considering</b> 13:4 65:21 83:4 92:5 123:24 <b>considers</b> 63:13 <b>consistent</b> 32:6 36:23 <b>consistently</b> 14:13 14:16 37:14 <b>consisting</b> 64:23 <b>consists</b> 68:19 <b>consolidated</b> 113:9 <b>constitutes</b> 157:9 <b>constitution</b> 3:7 <b>construction</b> 17:13 22:3,4 27:11 35:8 46:6 48:2 61:17 90:13 133:10 135:25 148:21,24 149:24 151:10 152:20 153:16,18 155:21,24 160:18 <b>construe</b> 10:18 94:22 97:5 <b>construed</b> 8:9 48:3 101:23 102:9 <b>construing</b> 71:2 97:6 <b>contain</b> 33:12 133:6 <b>contains</b> 66:25 106:18 123:16 <b>contemporanea</b> 62:22 <b>contend</b> 112:1,2	<b>contending</b> 152:16 <b>context</b> 6:20 12:23 22:7 26:23 46:17 55:21 57:7 67:20 88:24 93:22 100:5 100:6 107:20 112:22 115:15 116:12 128:12 129:15 141:25 144:13,14,19 148:10,23 153:22 154:1 <b>continually</b> 83:5 <b>continue</b> 12:22 121:8 135:2 144:8 147:6,13 149:11 150:24 151:15 155:11 <b>continued</b> 11:13 26:11 64:24 87:25 90:11 103:17 119:20 146:21 <b>continues</b> 78:1 119:22 121:22 122:9 <b>continuing</b> 146:17 151:7 <b>contract</b> 11:15,25 12:1,8 27:2 28:14 29:17 30:13 31:5 31:6,9 42:1 43:8 43:18 60:21 84:4 109:8 111:16 121:21 128:20 142:14 <b>contractual</b> 21:21 26:24 28:21 30:18 30:21 33:6 43:4 43:16 44:21 47:3 51:11,13 71:9 86:21 102:24 104:7 106:2,3 121:1,20 122:10 128:3 134:9 142:17 145:25
--	--	--	--	--

146:4,6,21 158:10 158:21 159:2 160:15 <b>contrary</b> 30:23 33:14 97:6 122:18 155:6 <b>control</b> 13:1 <b>convenience</b> 77:25 <b>convenient</b> 47:15 86:22 131:23 <b>Conversely</b> 117:6 <b>conversion</b> 1:10,17 1:19,21 44:23 45:11 118:11 159:9 <b>Convey</b> 16:23 <b>copies</b> 16:17,25 <b>copy</b> 16:11,13 60:6 <b>core</b> 17:11 90:16 128:25 144:17 <b>Cork</b> 9:24 10:4 90:15 118:18 126:4,6,14,17 127:2,3,7,12 129:21 132:6,20 <b>corporate</b> 50:25 100:6 136:13 137:2 <b>correct</b> 7:17 15:20 25:10 50:2 80:1 86:17 94:9,15,17 94:18 102:23 109:17 143:10 152:16,21 158:7 160:16 <b>correctly</b> 10:1 136:8 <b>corresponding</b> 8:17 <b>cost</b> 95:21 <b>costs</b> 89:25 107:10 <b>Cottenham</b> 75:5 <b>counsel</b> 118:21,22 118:24 132:19 145:21	<b>country</b> 145:22 <b>county</b> 32:22 104:14 131:9 <b>couple</b> 110:20 <b>course</b> 2:15 3:4 4:6 9:10 13:14 15:5 19:9 22:17 32:8 32:19 39:21 41:4 44:5 55:22 64:25 75:12 78:14 84:20 85:7,17 104:6 122:13 137:12 <b>court</b> 1:6,14,20,24 2:1,4,7,17,25 4:1 7:25,25 11:3 38:5 47:9 51:22 56:23 57:1 81:22 82:5 83:4,9 84:23 85:8 102:5 104:14 106:22 108:6,15 112:8 113:4,10,15 113:22 114:5 118:10 128:5 131:9 135:13 158:25 161:1 <b>courts</b> 6:23 7:16 14:16 20:8 21:12 32:22 37:18 96:22 98:6 <b>covered</b> 93:1 99:25 100:1 <b>CPR</b> 117:2,18,21 118:1 <b>crack</b> 2:24 <b>Cranworth</b> 81:1,2 81:9 <b>creativity</b> 49:23 <b>creditor</b> 11:8 13:1 21:20 24:22 32:11 32:16 39:9,14,22 40:17,21 41:23 42:12 43:4,6 55:16 61:23 63:22 64:20 72:22 74:8 75:15 76:15 78:18	78:20 81:13 90:5 92:20 96:16 98:3 100:13 107:6 108:19 112:9 113:5 114:2 121:13,19 129:7 133:25 134:7 139:24,25 142:1 145:23 146:19 154:14 156:16,23 156:24 157:1,9 158:9 160:3,5 <b>creditors</b> 2:2 7:18 7:22 8:1,5,6,7,13 8:16 13:9 15:2 20:13 23:6 25:12 25:20 26:6,19 30:6 31:22 32:3,5 38:7 46:7 51:9,14 52:2,23 53:23,25 54:7,8,18 55:10 56:8 59:16 60:20 61:7,19 62:9,11 62:14 63:5,21,24 64:9 65:2,8,18 67:2,6,13,23 68:4 68:16 69:24 70:2 70:6,16,21,23 71:8,16 73:7 77:21,25 78:11,14 79:4 81:4,15,18 82:11 83:16,17 84:7 85:9,19 87:21 88:6,8,12 89:24 90:5 91:5 91:14,19,22 95:17 95:20,23 96:14 97:18 98:1,21,22 98:23 101:13 102:21,24 104:10 104:17 105:11 109:21 110:12 111:8,11,12,15,21 111:23,24 112:1,2 113:16,25 114:11	114:16 116:14 123:19 127:3,10 127:15,21,24 128:14 129:11 130:17 131:4 132:22 133:18 134:8,12 135:4,9 135:10,14,17,17 137:6,17,25 138:11 140:4 147:11 156:5 158:16 <b>creditors'</b> 47:3 130:9 157:4 <b>credits</b> 90:17 <b>critical</b> 57:12 90:4 <b>criticise</b> 7:5 58:9,25 <b>criticised</b> 6:15 7:1 <b>criticising</b> 2:15 <b>criticism</b> 132:7 133:1,6 <b>currency</b> 1:17,19 1:21 8:1,5 44:23 45:10 118:11 135:14,16 159:9 <b>cut</b> 61:15 65:14 94:1 <b>cut-off</b> 13:11 93:18 99:1,7 <b>cuts</b> 45:4	94:14 98:23 99:1 99:1,7 100:24 107:8 113:23 119:16,18 120:10 120:19 126:19 128:1 141:20 142:12,15 143:5 147:5 150:23 154:17,19,20 <b>David</b> 5:10 8:25 9:8 9:25 16:7 17:11 41:2 74:17 108:24 116:18 123:25 <b>Davies</b> 15:21 <b>Davis</b> 118:25 119:11 122:1,17 144:12 <b>day</b> 115:5 121:18 152:5 161:16 <b>day-by-day</b> 109:11 <b>days</b> 152:2 <b>deal</b> 4:3,23,23 5:12 7:8 9:12 10:24 41:4 55:21 56:5 65:17 77:15 78:8 87:3 120:18 124:21 125:17 143:25 160:5,12 160:21,25 <b>dealing</b> 1:9 12:17 17:9 25:4 26:17 46:13 50:9 51:2 52:11,18 53:18 59:14 68:10,21 69:19 75:12 86:15 86:17 88:2 107:23 107:24 117:23 118:10 124:2 126:1 136:16 156:19 159:4 <b>deals</b> 17:13 62:15 83:24 84:15 133:10 <b>dealt</b> 5:10 11:18 12:23 26:18 32:9
<b>D</b>				
<b>D</b> 118:25				
<b>date</b> 13:11,13,24 23:20,24 24:16 25:2 26:1,3,6 41:21 42:6,10,21 43:9,25 46:25 61:15 65:14 66:9 67:17,24 70:17,19 71:15 73:4,20 74:7 75:2 77:17 78:12,16 84:11 85:3,14,23 87:11 89:16 93:18 94:1				

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



148:1,9,20,23 149:11,22 150:8 151:23 152:9,13 152:23 153:14 154:11,14,24 155:24 156:10 157:16,18,22 158:7,23 159:10 159:20,23 160:2 160:16,21 161:2 161:10,17 <b>differed</b> 70:20 <b>difference</b> 9:21 54:5,23 105:2 106:4 131:18 148:16,19 157:2 158:7 159:3,25 <b>differences</b> 54:17 59:6 151:21 <b>different</b> 18:25 19:2 22:13 26:22 39:3 50:24 78:6 91:1 95:22 96:4 97:24 103:16 128:12 131:11 136:14 141:12 144:13 148:23,25 152:10 <b>difficult</b> 3:6 72:7 155:22 <b>difficulty</b> 15:22 64:17 84:14 109:12 116:15 <b>dig</b> 71:13 <b>diminution</b> 121:2 <b>Dinorben</b> 115:20 <b>direct</b> 108:15 <b>directed</b> 61:7 <b>direction</b> 17:18 23:2 33:15,16 61:5 63:3 106:21 107:2 117:3 118:2 118:4 <b>directly</b> 81:6,19 84:16	<b>directs</b> 61:22 <b>disagrees</b> 124:20 <b>disappear</b> 106:5 130:8 138:7 <b>disappears</b> 1:22 <b>disapplied</b> 22:24 <b>disapply</b> 7:7 30:2 37:6 133:23 138:20 <b>disapplying</b> 30:10 <b>discharge</b> 11:10,11 62:2,10 63:12,15 63:16,20 64:1,4 75:8,9,15 76:22 94:12 95:3,5,6,9 99:20 100:21 122:10,14 <b>discharged</b> 94:11 94:25 99:9 100:13 103:5 <b>discharges</b> 23:18 94:12 95:9 <b>Discount</b> 82:7 <b>discretion</b> 128:5 <b>discussed</b> 41:18 129:4 132:7 <b>discusses</b> 86:20 <b>discussion</b> 79:1 132:24 133:16 <b>dismissed</b> 80:3 <b>displace</b> 20:18 <b>disposes</b> 84:12 <b>dissolved</b> 94:8 <b>distinction</b> 8:4 22:11 29:16 35:24 50:13 78:25 109:16 114:11 <b>distinguished</b> 118:24 131:16 <b>distribute</b> 13:9 19:25 <b>distributed</b> 7:21 26:18 59:18 129:13 <b>distributing</b> 92:19	99:3 154:16 <b>distribution</b> 8:2 14:1 18:20 20:24 21:7,11 30:8 37:16 38:1,2,2 40:25 61:9 65:13 88:16,20,23 89:6 89:12 94:2 100:19 111:5 112:3 135:15 140:24 157:11 158:22 <b>distributions</b> 26:21 27:2 51:6 52:4,15 <b>divide</b> 39:11 <b>divided</b> 85:22 <b>dividend</b> 23:18 24:12,14,17 29:11 33:20 35:11 42:18 43:9 73:3,4,19,21 74:8,11,24 75:20 77:22 84:10,11 108:23 115:4,6 119:20 121:5,7,18 140:4 141:20 150:15 <b>dividends</b> 5:12,14 5:18,21 6:5 13:21 14:5,18 15:8,13 21:4 24:11 25:9 25:15,22 27:19 34:8 36:9,16 39:23 42:18,19,21 44:13,19 51:25 65:8 70:18 73:1 73:16,23 74:6 75:7 77:12 78:19 84:8 85:15 114:21 114:23 115:3 120:14,24 121:14 122:13 137:11,15 140:23 141:18 143:12 144:10 146:15,19 148:2 148:15 <b>division</b> 77:21	<b>doctrine</b> 29:4 76:13 <b>document</b> 4:1 119:9 <b>doing</b> 8:19 9:6 20:9 34:18 70:24 104:15,16 116:10 116:11 128:10 129:11 <b>doubt</b> 75:11 79:18 84:14 86:12 153:1 <b>draft</b> 74:4 <b>draftsman</b> 138:15 <b>draw</b> 109:16 <b>drawings</b> 114:10 <b>drawn</b> 8:4 78:25 92:7 <b>drive</b> 105:21 <b>drop</b> 111:17 <b>dropping</b> 62:3,17 64:6,16 76:18 77:5 83:1,14 114:7 <b>due</b> 15:5 19:9 22:17 32:8,19 39:9,13 39:21 41:4 42:16 42:20 44:5 55:22 61:11 62:14 68:6 68:18 72:25 73:4 73:15,20,24 74:7 74:12 75:1,8,16 75:25 76:24 77:18 78:20 84:11 104:6 108:23 109:7 110:19 114:22 119:6 141:19,21 142:4,9,9,11,14 143:5	72:4 <b>earth</b> 20:6 130:8 <b>easier</b> 104:7 156:2 <b>easiest</b> 10:22 17:9 <b>easy</b> 103:3 139:17 155:3 <b>echoes</b> 148:10 <b>echos</b> 144:11 <b>effect</b> 2:2 15:16 16:3 28:5 39:21 48:12 51:3 52:2 52:12,19 56:4,10 56:12 63:13,15 64:4 74:20 77:7 77:15 78:6 87:9 102:24 103:9,13 114:5 115:17 126:4,5,13 131:18 133:10 135:23 136:3 140:15 141:4 <b>effected</b> 120:21 <b>effective</b> 48:1 134:13 <b>effectively</b> 1:16 13:23 15:25 18:17 28:20 45:5 51:19 69:19 70:14 84:17 91:10 106:7 108:6 109:10 110:4 127:6 131:20 134:25 135:6 137:22 140:25 141:5 153:24 154:24 155:5 <b>effects</b> 64:18 <b>efficacious</b> 95:18 <b>eight</b> 76:18 <b>either</b> 7:13 27:20 <b>electronic</b> 60:6 <b>element</b> 19:12,24 32:1 33:17 35:23 99:17 118:17 <b>Elizabeth</b> 91:11 98:17 101:5
<b>E</b>				
			<b>E</b> 118:23 119:12 <b>earlier</b> 9:9 22:14 41:18 49:18 68:1 69:15 96:24 118:15 <b>early</b> 38:5 65:11	

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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



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

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

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

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

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

119:23 120:6 122:8				
<hr/> <b>6</b> <hr/>				
<b>6</b> 71:6 72:1 139:7 156:19 <b>60</b> 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				
<hr/> <b>7</b> <hr/>				
<b>7</b> 25:17 27:6 35:13 38:17 50:12 54:4 115:20 <b>79</b> 62:17				
<hr/> <b>8</b> <hr/>				
<b>8</b> 134:11,13 144:2 <b>86</b> 58:18 136:12 <b>88</b> 127:19				
<hr/> <b>9</b> <hr/>				
<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				