

<p>1 Wednesday, 5 April 2017 2 (10.30 am) 3 Submissions by MR ZACAROLI (continued) 4 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli. 5 MR ZACAROLI: My Lords, my Lady, I was turning now to the 6 second of my broad topics, which was the rule in 7 Bower v Marris and what it means and what it's meant 8 over the years. 9 Can I ask my Lords then to turn up bundle 1, tab 6, 10 which is the case itself. I'm well aware the courts 11 have seen this before and no doubt at some length, but 12 there are a number of points I want to draw out of it 13 because we say that the precise reading of this decision 14 is actually very important to understanding the 15 principle. 16 Looking at the headnote first of all, just to make 17 good the point that actually this case was in fact about 18 the rights of the creditor against the co-obligor, and 19 it's common ground that whatever the position may be 20 between the creditor and the bankrupt, whatever may have 21 happened there, nothing affects the contractual rights 22 as against the co-obligor, just to park that point. 23 That's what the case was about. So when the case was 24 concerning rights for the bankrupt and the creditor, it 25 was actually all obiter, although obviously fully</p> <p style="text-align: center;">Page 1</p>	<p>1 what the interest of the parties are: 2 "No creditor would apply any payment of the 3 discharge of part of the principal whilst any interest 4 remained due." 5 It is the common-sense position is that is what 6 creditors would do. 7 The argument that was advanced appears in the next 8 paragraph, at the end of the second line after the 9 colon: 10 "The proposition rests upon this: that the payments 11 consisted of dividends of so many schillings in the 12 pound, and that the sum upon which such dividends were 13 made being the debt proved consisted, except for the 14 small part ...(Reading to the words)... consisted of was 15 upon each payment discharged." 16 So that's the argument, that the payments that had 17 been made had already discharged principal. 18 The response to that is in the next paragraph: 19 "In the first place, as this mode of payment is 20 regulated by acts of Parliament, the doctrine of 21 appropriation, which is founded upon the ...(Reading to 22 the words)... debtor or creditor cannot have any place 23 in the consideration of the present question." 24 Now, the present question is the one he's just 25 identified: were the payments that were made in</p> <p style="text-align: center;">Page 3</p>
<p>1 reasoned. 2 The second point just to remember is that this is 3 not a case in which section 132 of the 1825 Act in fact 4 applied. 5 Turning then to judgment of the Lord Chancellor, 6 picking it up at the bottom of 354. 7 LADY JUSTICE GLOSTER: Yes. 8 MR ZACAROLI: The claim was: 9 "... a claim for payment of what he has not received 10 from the estate of the bankrupt, and insists that the 11 amount is to be calculated by applying the amount of 12 dividends from time to time received and discharge of 13 interest then due and the surplus, if any ...(Reading to 14 the words)... calculation and is the general course of 15 dealing in cases of mortgages, bonds and other 16 securities." 17 What the Lord Chancellor is referring to there is 18 the ordinary law of appropriation, that is the right of 19 that creditor to appropriate towards interest before 20 principal. So the starting point is that's the ordinary 21 mode of calculation under the general rule. Nothing to 22 do with the states, just to do with the general law of 23 appropriation between two parties. 24 He then, in the next sentence, identifies the point 25 of presumption which we say is important in determining</p> <p style="text-align: center;">Page 2</p>	<p>1 discharge of dividends actually -- 2 LADY JUSTICE GLOSTER: To appropriate as against the 3 co-obligor. 4 MR ZACAROLI: In other words, did it effect an appropriation 5 by the debtor? And the answer is no, because at that 6 stage appropriation has nothing to do with it. 7 He goes on in the next few lines to show that what 8 he is then considering is very much the principle of 9 appropriation thereafter, because he says: 10 "The estate of obligor under administration is 11 liable to pay all that ...(Reading to the words)... 12 before he would be bound to apply any part of it towards 13 the discharge of principal." 14 He is referring there to entitlement of the creditor 15 to exercise a right of appropriation. Very clear from 16 the reference to "entitled". 17 That that is clear is also confirmed by the fact 18 that later in judgment the Lord Chancellor refers to the 19 position being exactly the same as with a solvent 20 debtor. That is, for example, on page 357. At the top 21 he says: 22 "The bankrupt continues indebted for the principal 23 and interest since the commission ...(Reading to the 24 words)... why should such payments have a different 25 effect than they would if paid by a solvent obligor?"</p> <p style="text-align: center;">Page 4</p>

1 In the case of solvent obligor, one is only
 2 concerned with the ordinary principles of appropriation.
 3 LADY JUSTICE GLOSTER: It's interesting because I did a bit
 4 of research, or got my judicial assistant to do a bit
 5 research yesterday evening, and Bower v Marris has
 6 appeared in all the editions of Rowlatt on surety, which
 7 is interesting because it's there that one sees it.
 8 MR ZACAROLI: Yes. We accept this is a principle, in terms
 9 of appropriation, that arises throughout the law, and
 10 I'll come to some other cases --
 11 LADY JUSTICE GLOSTER: Whether it is or isn't appropriation,
 12 Bower v Marris, if there is a principle, appears in that
 13 context, which is your submission.
 14 MR ZACAROLI: Yes. It applies --
 15 LADY JUSTICE GLOSTER: I don't think it's referred to as
 16 a principle -- well (inaudible) been able to check.
 17 I don't think it's referred to as a principle even in
 18 Rowlatt.
 19 MR ZACAROLI: Indeed.
 20 LADY JUSTICE GLOSTER: It is just a citation. So that's
 21 your point basically on --
 22 MR ZACAROLI: Yes. The other point to note on this is that
 23 it's essential to the reasoning that the court was
 24 dealing with an interest-bearing debt. It's not just
 25 a passing reference. There are six points, six

Page 5

1 references, to the fact that interest continues accruing
 2 due under the debt, and that's the important part. In
 3 a sense, that had to be the case because if you are
 4 dealing with a co-obligor, a statutory right to interest
 5 that may exist against the bankrupt has no possible
 6 relevance to the claim against the co-obligor. But the
 7 point that interest continues accruing due occurs in six
 8 places. First of all, page 356, the sixth line:
 9 "It is important that the creditor is entitled to
 10 apply all such payments on account to the interest due."
 11 Then at the bottom of that page, about eight lines
 12 up:
 13 "The interest stops at the date of permission, and
 14 though subsequent interest becomes due, it is not
 15 provable under the commission."
 16 And it talks about this being an arrangement of
 17 convenience for the debtors/creditors. The bankrupt
 18 continues indebted for the principal and interest.
 19 That's the third reference.
 20 Then 357, five lines down, a point I've mentioned:
 21 "Why should such payments have a different effect
 22 than they would if made by a solvent obligor?"
 23 Ie, with a solvent obligor there must be a right to
 24 interest before you can have any question of
 25 appropriation.

Page 6

1 The point is repeated a few lines further on:
 2 "Suppose the bankrupt does not obtain a certificate
 3 but afterwards...(Reading to the words)... if there had
 4 not been any bankruptcy."
 5 And the last four lines of that same page, 357:
 6 "The creditor in that case would not have received
 7 interest upon his debt to the same extent as he would as
 8 if there had been no bankruptcy."
 9 LADY JUSTICE GLOSTER: Might it not be said against you that
 10 the concept of discharge of the principal debt is not
 11 being recognised here as against the co-surety? I mean,
 12 it could be said on behalf of the co-obligor: well,
 13 actually, the principal debt's been discharged here by
 14 reason of the bankruptcy, and what Bower v Marris is
 15 saying is, no, it isn't, and isn't that an argument that
 16 could be put against you in his context?
 17 MR ZACAROLI: I don't think so, because whatever happens
 18 between the bankrupt and the creditor has no effect --
 19 it doesn't discharge any rights against the co-obligor.
 20 Payments under a bankruptcy or liquidation do not
 21 discharge a third party. The creditor's rights remains
 22 extant against the third party, irrespective of the
 23 bankruptcy. There may be questions -- it depends on the
 24 nature of the contract. There might be obligations
 25 where payment by one discharges the payment by the

Page 7

1 other, or discharge by one --
 2 LORD JUSTICE BRIGGS: But the argument that was rejected in
 3 Bower v Marris must have proceeded on the assumption
 4 that if the bankrupt was to have been taken as having
 5 discharged the principal out of the estate in the hands
 6 of his commissioner, it pro tanto as to principal also
 7 discharged the co-obligor, because the principal is
 8 simply gone and no longer was a principal debt.
 9 LADY JUSTICE GLOSTER: That's the point I was making.
 10 LORD JUSTICE BRIGGS: That's the underlying premise for the
 11 argument which the court then wrestled with and
 12 rejected. I'm not sure it rejected the underlying
 13 premise, it just said the argument based on it doesn't
 14 work.
 15 MR ZACAROLI: Perhaps there was a shorter answer in the
 16 case, which is whatever you get from the bankrupt
 17 doesn't operate -- if there a discharge against the
 18 bankrupt, it in any event isn't a discharge against the
 19 co-obligor, which I think is what they are saying
 20 anyway, in fact.
 21 LORD JUSTICE BRIGGS: They are saying there isn't even
 22 a discharge against a surplus in the bankrupt's estate.
 23 MR ZACAROLI: No, no, indeed. I accept fully that insofar
 24 as the case is considering the position as against the
 25 bankrupt, that is the conclusion, that there's no

Page 8

<p>1 appropriation because it's been paid in process of law 2 as against the bankrupt as well. I'm not denying that's 3 what the court says. The context was one where there 4 was a much easier solution in a way against the 5 co-obligor, an obvious solution against the co-obligor, 6 but I accept that, as against the bankrupt, that is the 7 point being made; it is being said that the payment in 8 process of law does not operate as an appropriation to 9 discharge the principal. 10 I have to deal with the paragraph at the bottom of 11 page 357 which refers to the 1825 Act. The assumption 12 that the Lord Chancellor is making here, or his 13 interpretation of the Act, appears from two sentences. 14 The second sentence in the paragraph: 15 "This provision [132] obviously intended to make 16 good to the creditors that interest which, by the course 17 of administration in the bankruptcy, was lost." 18 And the last sentence: 19 "The creditor in that case will not have received 20 interest upon his debt to the same extent as he would 21 have if there had been no bankruptcy, and yet the Act 22 must have intended to place him in as favourable 23 a situation." 24 So the Lord Chancellor is interpreting section 132 25 as intending to give the creditor those rights that it</p> <p style="text-align: center;">Page 9</p>	<p>1 yesterday or over the last two days that it is common 2 ground that Bower v Marris applied in bankruptcy prior 3 to 1883. That phrase needs a little bit of unpacking. 4 It is absolutely not common ground that Bower v Marris 5 applied to section 132 insofar as it gave a right to 6 4 per cent to creditors. That is absolutely not 7 accepted, and there's no case which ever decided that it 8 did. 9 So far as the first part of section 132 is 10 concerned, the only case to have considered it is this 11 passage in the judgment of Lord Cottenham in 12 Bower v Marris. The judgment proceeds on the basis that 13 what the section is doing there is giving the creditors 14 their contractual rights. It's not clear to what extent 15 any argument was advanced to the court about that in 16 this case. It wasn't particularly relevant. It wasn't 17 applicable. 18 LORD JUSTICE BRIGGS: It wasn't relevant provided that the 19 contractual rate of interest was higher than 4 per cent. 20 MR ZACAROLI: I'm saying the Act wasn't relevant to the 21 decision. 22 LORD JUSTICE BRIGGS: Okay, the Act wasn't relevant, but 23 none of this looked to the Act. I see, you say there 24 would be no argument on the Act because it didn't apply. 25 MR ZACAROLI: Yes.</p> <p style="text-align: center;">Page 11</p>
<p>1 would have had but for the bankruptcy. 2 Now, that can only be a reference to the first half 3 of section 132. You will recall that section 132 -- 4 there are two parts to it. Part of it -- and it is the 5 priority part, so first you pay creditors the rate they 6 would be entitled to absent -- their rate of law under 7 their contracts, and then any surplus after that will be 8 used to pay interest at 4 per cent to everybody. 9 Nothing the Lord Chancellor says in that paragraph can 10 possibly have been addressing that latter part of it, 11 because such creditors don't have any, didn't have any 12 right, outside the bankruptcy to interest at all. 13 Then when the Lord Chancellor looks for authority, 14 over the page, to his conclusion that he has reached as 15 matter of principle, he lands on essentially 16 Lord Hardwicke in Bromley v Goodere, which we've seen. 17 That is a case which is premised upon whatever 18 contractual rights the creditors had before the 19 bankruptcy being respected out of the surplus, which 20 shows that even though he was referring to a section of 21 the Act, which did contain a right to 4 per cent for 22 creditors who didn't have interest-bearing debts, 23 nothing in this judgment has any relevance to that part 24 of the section. 25 It was said a number of times by my learned friend</p> <p style="text-align: center;">Page 10</p>	<p>1 LORD JUSTICE BRIGGS: I don't know. What was the 2 contractual rate of interest in this case? 3 MR ZACAROLI: In this case? I'm not sure we're told. 4 LORD JUSTICE BRIGGS: Did section 132 say, "Your contractual 5 rate but 4 per cent if you" -- did it say, "The greater 6 of your contractual rate and 4 per cent" or did it just 7 say, "Your contractual rate if you have one and 8 otherwise 4 per cent"? 9 MR ZACAROLI: I think the latter. I'll just turn it up. 10 LORD JUSTICE BRIGGS: I can't remember now and I can't 11 remember what the reference is in the authorities 12 bundle. 13 MR ZACAROLI: It is bundle 4, tab 118. I think it's the 14 latter; it's just whatever rate was applicable by law 15 prior to the bankruptcy. It's definitely not 16 a provision like 2.88(9)), which applies a contractual 17 rate only if it's higher. It's a priority section that 18 gives you whatever contractual rates you have and 19 thereafter -- 20 LORD JUSTICE BRIGGS: It's a waterfall provision, isn't it? 21 MR ZACAROLI: Yes. I can't see anywhere in the judgment or 22 the report of Bower v Marris what the rate of interest 23 was. It might be possible that someone could work it 24 out from the amount that is claimed and the time at 25 which it is payable, but I'm not able to do that here.</p> <p style="text-align: center;">Page 12</p>

<p>1 LORD JUSTICE BRIGGS: The way the section is phrased, it may 2 be if you were a 2 per cent contractual creditor, you 3 did rather badly. You got 2 per cent but then you 4 didn't share at all in the 4 per cent because you were 5 not another creditor.</p> <p>6 MR ZACAROLI: That's right. That's the plain reading of it.</p> <p>7 LORD JUSTICE BRIGGS: Yes.</p> <p>8 MR ZACAROLI: Going back to the common ground, what we 9 accept is that Bower v Marris has been referred to in 10 other cases, and in company cases. For example, in 11 Humber Ironworks it is referred to as being applicable. 12 But it's always referred to as applicable in the context 13 where there's a remission to contractual rights for 14 interest, and that is indeed the way it's understood in 15 Bower v Marris itself, as I have just pointed out, and 16 no other case said anything different, apart from the 17 two cases I'll come to more recently, which are foreign 18 cases we say are wrong.</p> <p>19 I mentioned Bromley v Goodere. Could we turn that 20 up quickly, two references in it, tab 1 of bundle 1.</p> <p>21 The point I made was when Lord Cottenham was applying 22 this decision, what he was applying was a decision which 23 effectively says if a creditor had rights against the 24 bankrupt before bankruptcy to interest, then they should 25 be respected afterwards. That is at page 51, second</p> <p style="text-align: center;">Page 13</p>	<p>1 edition of Williams over its 120-year history. There 2 are two textbook references which have been relied upon 3 by my learned friends and are referred to the judgment 4 at paragraph 142.</p> <p>5 LORD JUSTICE PATTEN: Sorry, I didn't catch what you --</p> <p>6 MR ZACAROLI: I'm sorry, 142, the judgment of the judge 7 below.</p> <p>8 LORD JUSTICE PATTEN: Yes.</p> <p>9 MR ZACAROLI: It might be best if my Lords just simply read 10 paragraph 142. (Pause)</p> <p>11 LORD JUSTICE PATTEN: Had Mr Justice David Richards himself 12 ever heard of Bower v Marris? I can't quite work out 13 from his judgment whether ...</p> <p>14 LADY JUSTICE GLOSTER: Teatime conversation at Erskine 15 Chambers.</p> <p>16 MR ZACAROLI: None of us are in Erskine Chambers, so we 17 can't answer that. The impression we got was he hadn't. 18 At the first directions hearing, the only question on 19 this long list of questions which were posed -- and 20 I think there were 37 questions in Waterfall II, it was 21 split into three parts at that stage -- the only 22 question he raised an issue about, "Therefore what's the 23 problem?" was the one which didn't refer to 24 Bower v Marris, but the one which said interest under 25 2.88(7) should be applied towards interest before</p> <p style="text-align: center;">Page 15</p>
<p>1 paragraph. You have seen it so you need not read it 2 again, but just to point out where that is.</p> <p>3 To pick up a point on the previous page, page 50, in 4 passing, it's a paragraph that's set out in the judgment 5 below, the paragraph beginning:</p> <p>6 "All bankrupts are considered in some degree as 7 offenders ..."</p> <p>8 It is about four paragraphs from the end of page 50. 9 I just note that for present purposes. I will come back 10 to it when considering questions of principle and 11 policy, but it is worth noting at that stage, that was 12 the attitude towards bankrupts.</p> <p>13 LORD JUSTICE BRIGGS: Indeed. There is a famous saying of 14 Lord Cooke right back in 1582, I think, to that effect, 15 about the then bankrupt.</p> <p>16 MR ZACAROLI: Yes. It is a point I made in passing to the 17 judge below, at the time of Bower v Marris, the debtors 18 prison where Dickens's father had been imprisoned had 19 only just closed -- either opened or just closed, but 20 that was the attitude towards bankruptcy at the time we 21 are looking at.</p> <p>22 So far as textbook references are concerned, I have 23 already made the point, as the judge recorded at 24 paragraph 141 of his judgment, that it's remarkable that 25 there's no reference at all to Bower v Marris in any</p> <p style="text-align: center;">Page 14</p>	<p>1 principal. He thought, why was that there? It seemed 2 obviously wrong. That was his reaction at the first 3 directions hearing, but we didn't ask him the question.</p> <p>4 LORD JUSTICE PATTEN: I just wondered whether it had 5 cropped -- I mean, he deals with how familiar it was. 6 I just wondered whether he'd ever given any clue in 7 argument whether he -- it doesn't matter.</p> <p>8 MR ZACAROLI: All you have is --</p> <p>9 LADY JUSTICE GLOSTER: Was it referred to in any of the old 10 versions of the companies textbooks, like Palmer or 11 Buckley, or is it just there under whatever the company 12 case is.</p> <p>13 MR ZACAROLI: There was a reference to it in a Gore-Browne 14 edition since 1986. It was referred to below, but it's 15 not been relied on since. In fact, we pointed out that 16 it was clearly referring to the same point, it wasn't 17 referring to post-liquidation interest at all at that 18 stage. So apart from that, I cannot recall -- we did 19 look at all those textbooks, but of course, if it had 20 been mentioned, it would have been mentioned in the 21 context of an application in an area we accept it 22 applies in, which is where there is no statutory regime 23 for interest.</p> <p>24 LORD JUSTICE BRIGGS: And there is no dispute that it 25 applied to corporate insolvency up until 1986, right</p> <p style="text-align: center;">Page 16</p>

<p>1 through since corporate insolvency was invented. 2 MR ZACAROLI: Yes, because there was no statutory right to 3 interest in corporate insolvency until 1986, but I can't 4 recall now -- if my Lady wants to know the answer, we 5 can go and -- 6 LADY JUSTICE GLOSTER: I'm just interested, that's all. 7 It's up to you whether you go and look or send some 8 minion to go and look for it. 9 MR ZACAROLI: Going back to paragraph 142 of judgment, 10 merely two references: one a footnote, which is 11 diminished in importance by the obvious error in it, as 12 the judge points out, and also apparently referring to 13 old law, and the second one is this book from 1904 by 14 Mr Henry Wace, which is put in very tentative terms, "It 15 is conceived that". We will come back to that because, 16 as the judge noted in the last sentence, this is the 17 passage repeated in the report of the Irish bankruptcy 18 law committee, which is what was relied upon in the 19 Irish case, and all that was relied on in Irish case, 20 but we will come back to that. 21 There are, we accept, a number of references and 22 applications of the principle in <i>Bower v Marris</i> in cases 23 from other jurisdictions. My learned friend mentioned 24 them but didn't take you to them. I don't propose to 25 take you to them either. They are summarised, we say</p> <p style="text-align: center;">Page 17</p>	<p>1 orders of 1841 were made in order to bring a judgment in 2 equity into line with the Judgment Act law on which 3 interest was payable. Interest on a judgment debt 4 accrues due whilst it's outstanding just as much as 5 interest under a contract. 6 At 114, the last three lines: 7 "In the light of the analysis of an administration 8 decree as a judgment in equity in favour of all 9 creditors analogous to a judgment at law, the decision 10 does not, as it seems to me, support the submissions of 11 the SCG and York." 12 We submit the judge was right in his conclusion for 13 the reasons contained in those paragraphs. 14 Turning to the case itself, which is in bundle 1 at 15 tab 24, my Lords will have picked up by now, I think, 16 that the case was actually dealing principally with 17 a question of priority between the joint and the 18 separate estates of the partners. The first thing that 19 happened in terms of chronology was that the first 20 partner, Mr Whittingstall, died, and you will see on 21 page 214, right-hand column, halfway down: 22 "By the decree made in the first of such actions, 23 the usual accounts and inquiries were directed to be 24 taken and made in January 1857." 25 So there was an order for the accounts and inquiries</p> <p style="text-align: center;">Page 19</p>
<p>1 accurately, in the judgment. So for example, cases from 2 Australia are cited at paragraphs 80 to 83. The 3 important point from those cases is that, in each 4 instance, the relevant statutory regime essentially 5 mirrored pre-1986 regime for companies in England, so 6 they don't take the debate any further forward. 7 LORD JUSTICE BRIGGS: Yes. 8 MR ZACAROLI: We agree with judge's analysis of all those 9 cases from foreign jurisdictions that he refers to. My 10 learned friend didn't take you to them. I don't see the 11 need to, unless you particularly want to. I'm going to 12 pass over that and say the judgment stands as it is and 13 is an accurate record of those cases. None of it takes 14 the debate any further forward because in each case, 15 other than the ones I'm going to come to in Ireland and 16 Canada, the relevant regime reflected the pre-1986 17 corporate regime. 18 The one case that is relied upon very heavily by the 19 SCG is the case dealing with a deceased's estate. That 20 is <i>Whittingstall v Grover</i>. The judge dealt with this at 21 length at paragraphs 108 to 114 of his judgment. At 22 paragraph 112, the judge noted that Mr Justice Chitty in 23 that case proceeds -- the middle of paragraph 112 -- on 24 the basis that the decree for the administration of 25 an estate operates as a judgment in equity, and that the</p> <p style="text-align: center;">Page 18</p>	<p>1 in 1857. That is critical step in the analysis, as 2 Mr Justice Chitty found at page 217, because such 3 judgment operated as a judgment in favour of creditors, 4 which itself gave right to interest. And the passage is 5 217, left-hand column, two-thirds of the way down: 6 "The orders of 1841 relating to interest were in 7 substance repeated in consolidated orders of 1861 and 8 are now embodied in the subsisting Rules of Court." 9 My learned friend Mr Smith took you to the Rules of 10 Court, but we say he missed out an important sentence in 11 those Rules of Court, so can we turn them up. They are 12 at ... 13 LORD JUSTICE BRIGGS: Are we coming back to 217, I assume we 14 are, when we looked at the orders? 15 MR ZACAROLI: We are indeed. 16 It's 151 of bundle 4. 17 LORD JUSTICE BRIGGS: 151 or 151A? 18 MR ZACAROLI: 151. 19 LADY JUSTICE GLOSTER: Which rule do you want us to look at, 20 Mr Zacaroli? 21 MR ZACAROLI: It's rule 62, and this is the one -- 22 LORD JUSTICE BRIGGS: This is the 1883 Rules of the Supreme 23 Court. 24 MR ZACAROLI: That's right. 25 LADY JUSTICE GLOSTER: We looked at this yesterday.</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 MR ZACAROLI: We did, that's right, and my learned friend 2 Mr Smith cited rule 62 and referred to the first four 3 lines of it. The point he made was that 62 relates only 4 to creditors with a contractual right to interest, but 5 in fact it doesn't. As you will see, it goes on. The 6 first part relates to creditors with a right to 7 interest. Then it goes on, on the fourth line at the 8 end: 9 "... and as to all others are for the rate of 10 4 per cent per annum from date of the judgment or 11 order." 12 So rule 62 is the rule which provides that there is 13 interest accruing both for creditors with a right to 14 interest and also creditors without interest bearing -- 15 LORD JUSTICE BRIGGS: That's almost the same, isn't it, as 16 section 132 of the 1825 Bankruptcy Act? 17 MR ZACAROLI: Well, it then goes on in 63 to refer to -- 18 where a creditor whose debt does not carry interest, it 19 comes out of the surplus, which is the point that my 20 learned friend Mr Smith made. But this works in two 21 parts. The right to interest is conferred by 62, then 22 where it comes from is dealt with in 63. 23 My Lord, Lord Justice Briggs is right in the sense 24 that it operates in a way which gives priority to 25 creditors with interest bearing debts. That point, that</p> <p style="text-align: center;">Page 21</p>	<p>1 rule 63. 2 MR ZACAROLI: Correct, yes. But it expressly refers back to 3 1B, ie where interest is calculated on 1B, it's paid out 4 of the surplus. So there's a priority rule here. 5 What really matters, in our submission, is 6 Mr Justice Chitty's interpretation of all this, because 7 Whittingstall v Grover is the only case where the 8 principle in Bower v Marris has been applied to the rule 9 in question. And he interprets it very clearly on the 10 left-hand column of page 217 back in 11 Whittingstall v Grover -- 12 LADY JUSTICE GLOSTER: Yes. 13 MR ZACAROLI: -- as giving rise to a judgment in equity. 14 You see that from the bottom five lines: 15 "Interest (inaudible) at 4 per cent from the date of 16 the decree because the decree is a judgment ...(Reading 17 to the words)... a judgment of law which would give them 18 interest. The right of the creditor whose debt does not 19 carry interest by law is therefore based on the 20 provisions of the statute 1 and 2 Victoria(?), chapter 21 110." 22 That's the Judgments Act, which gives interest on 23 judgments for the first time. It's based on that and 24 the orders of 1841. So the 1841 orders apply in equity 25 to the Judgments Act.</p> <p style="text-align: center;">Page 23</p>
<p>1 the rule works in two ways, is made perhaps most clearly 2 by the modern equivalent of the rule, which is at the 3 same bundle, tab 192A. It's Practice Direction 40, 4 paragraph 14 in the CPR. 5 LADY JUSTICE GLOSTER: 192C, thank you. 6 LORD JUSTICE BRIGGS: Where are we? 7 MR ZACAROLI: What I'm trying to look at is Practice 8 Direction 40A. 9 LORD JUSTICE BRIGGS: 192C is Practice Direction -- 10 MR ZACAROLI: It's 192A in my bundle. I'm told it's 11 somewhere else. 192A -- 12 LADY JUSTICE GLOSTER: 192A, okay. 13 LORD JUSTICE BRIGGS: PD40A. 14 MR ZACAROLI: Yes. On page 6 -- 15 LORD JUSTICE BRIGGS: It's 40APD. 16 MR ZACAROLI: That's right the relevant paragraph is 17 40APD.14, it is on page 6. It appears in two sub-rules, 18 sub-rule 1: 19 "Where an account of the debts of a deceased person 20 is directed by any judgment ...(Reading to the words)... 21 and on any other debt from date of the judgment of the 22 rate payable on judgment debts at that rate." 23 LADY JUSTICE GLOSTER: At that date, not rate. 24 MR ZACAROLI: Yes. The judgment rate at that date, yes. 25 LORD JUSTICE BRIGGS: And then sub-rule 2 replicates the old</p> <p style="text-align: center;">Page 22</p>	<p>1 "The existing Rules of Court merely give effect to 2 such right." 3 Is what he says. 4 LADY JUSTICE GLOSTER: So the point you are making is? 5 MR ZACAROLI: Interest accrues throughout the period because 6 you have a judgment at the beginning on which interest 7 accrues. 8 LADY JUSTICE GLOSTER: Right. 9 MR ZACAROLI: It is pointed out to me I have missed 10 a sentence on the left-hand paragraph which makes the 11 point clearer. It's unhelpfully just by second 12 hole punch, so that's about two-thirds of the way down. 13 You will see a reference to order 15, rules 62 and 63. 14 The sentence immediately afterwards: 15 "The rules of 1841 were founded on the 17th section 16 of the statute." 17 That is the section giving a right to interest on 18 judgments. The 1838 Act, that is. 19 So when at the end of his judgment Mr Justice Chitty 20 comes to apply Bower v Marris, it's on the basis that 21 there has been a judgment effectively in equity in 22 favour of the creditors, giving them a right to 23 interest, as at the date of the decree, the decree for 24 administration, and therefore he is able to say in the 25 last five lines -- this is very brief passage:</p> <p style="text-align: center;">Page 24</p>

<p>1 "You apply Bower v Marris in the Warrant Finance 2 Companies(?) case by treating the dividends as ordinary 3 payments on account and applying each dividend in first 4 place to the payment of interest it calculates to the 5 day of such dividend, that is interest that's due and 6 accruing during that period to the date of the 7 dividend." 8 You'll have seen on the left-hand column again that 9 Mr Justice Chitty relies on a decision of Lord Romilly 10 in the Herefordshire Banking Company case. There are 11 two cases I want to take you to, both referred to by 12 Mr Dicker yesterday, on this point, which make good the 13 point that -- in fact three cases -- the position in 14 relation to the deceased's estate was always treated 15 fundamentally differently from winding up. 16 The first is called Hadfield Patent, and that is at 17 tab 12 of this bundle. 18 LADY JUSTICE GLOSTER: What bundle, 1? 19 MR ZACAROLI: Bundle 1, yes. The case involved an attempt 20 by a creditor, who had a simple contract debt that 21 didn't give rise to a claim for interest, to require 22 a call to be made by the liquidator on shareholders of 23 an unlimited company to pay up enough to pay that 24 interest and claim -- the interest he claimed due to 25 him. He didn't have an interest-bearing debt. The</p> <p style="text-align: center;">Page 25</p>	<p>1 "Though in the administration of assets the court 2 does allow, by its own authority, interest of 4 per cent 3 from the date of decree, that is because the decree is 4 a judgment in equity in favour all the creditors and 5 prevents them from getting a judgment at law which would 6 give them interest. But though a winding up order is 7 a decree in equity, and therefore a judgment, it is 8 a judgment and decree of a different character 9 ...(Reading to the words)... or entitle them to any 10 interest in respect of it." 11 He then goes on to note that therefore, though he 12 was a party to that order, it's undoubtedly an 13 ultra vires. 14 And the third reference is in Humber Ironworks 15 itself, bundle 1, tab 16. Lord Justice Gifford at 16 page 67 explains why deceaseds' estates have always been 17 treated differently in the first paragraph. About six 18 lines in, he says: 19 "For some reason or other dead men's estates have 20 been assumed to be solvent and they have been wound up 21 on that footing, but so unjust has that been found that 22 it has been necessary to give a positive enactment to 23 give interest from the date of the decree to simple 24 contract creditors whose debts did not bear interest." 25 So he ultimately finds that dead men's estate</p> <p style="text-align: center;">Page 27</p>
<p>1 decision, a very short decision of the Lord Chancellor 2 over the page: 3 "An administration decree made by the Court of 4 Chancery, to which reference has been made ...(Reading 5 to the words)... date of the decree as if they had been 6 judgment debts." 7 And he goes on to say that in the winding up 8 context, there was no ability to allow interest on 9 simple contract debts after the date at all. He makes 10 reference in the penultimate paragraph: 11 "Reference has been made to the 26th rule of the 12 order of 11 November 1862." 13 That was rule I referred to in passing yesterday, 14 which purported to give a right to interest after the 15 date of liquidation to creditors, and he notes there: 16 "It must be questioned whether it was not 17 ultra vires unauthorised." 18 We come to see later it is undoubtedly held to be 19 ultra vires. 20 The next case is in the next tab, tab 13, the 21 Herefordshire Banking Company case. A judgment of 22 Lord Romilly, and at page 252 the judgment begins. He 23 says, referring to the distinction that's been point out 24 to him yesterday between administration of estate and 25 winding up:</p> <p style="text-align: center;">Page 26</p>	<p>1 principles are of no use when looking at the different 2 contexts of winding up. 3 LORD JUSTICE BRIGGS: I'm so sorry, I was writing a note, 4 are we still in Hereford? 5 MR ZACAROLI: No, we have moved to Humber Ironworks. 6 Tab 16, page 647, Lord Justice Gifford, explaining why 7 dead men's estates are always treated differently 8 because they are always assumed to be solvent. 9 Essentially, you need a special rule for 10 non-interest-bearing debts because it was otherwise 11 unfair because the estate was deemed to be solvent and 12 interest ran from the date of the decree, unlike in a 13 winding up context, where no interest runs beyond the 14 date of the winding up. 15 So we say that in Whittingstall v Grover, the right 16 analysis is the decree in equity is a judgment which 17 does in fact give a right to interest from the date of 18 the decree and, more importantly, that was how it was 19 treat by Mr Justice Chitty and why he therefore felt 20 able to apply the law in Bower v Marris. In fact, there 21 is very little analysis as to why the rule in 22 Bower v Marris might apply in those circumstances, the 23 only case that has applied it at all. But insofar as 24 it's applicable, it's because interest was accruing. 25 The SCG place heavy reliance, as I said, on</p> <p style="text-align: center;">Page 28</p>

<p>1 Whittingstall v Grover. They contend that because 2 in administration, liquidation and bankruptcy creditors 3 are precluded from taking proceedings against the 4 company, then you should treat creditors as if they had 5 a judgment. At one point, he said that rule 2.88 6 affords to creditors the rights they would have had if 7 they had a judgment. That is not what rule 2.88 says. 8 The most that can be said about it is that the rate of 9 interest which is to be applicable to the debts 10 post-administration, liquidation or bankruptcy is the 11 rate that applies to judgments. As the learned judge 12 below said, one can understand that on the basis that 13 you are precluded from getting a judgment, therefore 14 that is the rate that should apply, but the rule does no 15 more. It does not treat you as judgment creditors. It 16 doesn't give you any of the other advantages as if you 17 had a judgment. It simply applies the rate. 18 There's no basis, we say, for saying that the 19 statutory right to interest which only applies in the 20 future if and when a surplus arises is an equivalent to 21 a right to interest which is accruing due during the 22 period after the date of administration until such 23 surplus arises. There is simply nothing due unless and 24 until a surplus arises, then the new statutory right 25 cuts in and gives you that new right to interest as at</p> <p style="text-align: center;">Page 29</p>	<p>1 interest rule in bankruptcy or liquidation or 2 administration because it is a waterfall; it provides 3 for a rate of interest at the contractual rate, in any 4 event, and it's only the 4 per cent of the Judgments Act 5 rate which is postponed to the surplus. 6 So there is, in the administration of estates, 7 a very different approach in any event. So to say that 8 if Bower v Marris applies there that means it would be 9 different takes us nowhere, because it's already 10 different. 11 To the extent that it might be said, well, 12 a judgment in insolvency should be treated in the same 13 way as a judgment decree in equity, Lord Romilly, in the 14 Herefordshire Bank case shows why that is not true, but 15 in any event, insolvency proceedings are very often 16 commenced without any court involvement at all. 17 An administrator can be appointed out of court. CVLs, 18 NVLs, involve no court input to the commencement. So 19 there's no question of a judgment in insolvency in very 20 many cases, and these rules apply across the board. 21 So those are my submissions on the principle of 22 Bower v Marris, and what it actually is. As I say, 23 essentially a rule of appropriation. 24 The third topic was then partially linked to that, 25 because we say that if it does apply at all in the</p> <p style="text-align: center;">Page 31</p>
<p>1 that point. There's no basis, we say, for saying that 2 that right is accruing in any sense before that. 3 I have already explained why the administration of 4 deceaseds' estate cases are different. It was said, oh, 5 well, if Bower v Marris were to apply there and not 6 here, there would be anomalies. Well, other than 7 Whittingstall v Grover, that's the only case which says 8 that Bower v Marris does apply in that context. 9 Assuming that it does, but that may be up for argument 10 on another day, the fact is there are in any event 11 substantial -- 12 LADY JUSTICE GLOSTER: Sorry, are you saying it's wrong or 13 not? 14 MR ZACAROLI: I'm accepting it's right as decided -- 15 LORD JUSTICE BRIGGS: Otherwise we would have to go through 16 a trawl of all the books on administration of estates. 17 MR ZACAROLI: The point I'm making is there are actually 18 differences between the two regimes anyway. They are 19 fundamentally different regimes. If they have different 20 effects, different consequences, so be it; that is 21 because they are different regimes dealing with 22 different circumstances. 23 As I pointed out when I took you to rule at 24 tab 192A, the current version of the administration of 25 estates rules, it is fundamentally different from the</p> <p style="text-align: center;">Page 30</p>	<p>1 insolvency context, it in fact could only ever applied 2 to creditors with interest-bearing debts, because those 3 are the only ones, if we lose everything so far, which 4 might be said to have an accruing right to interest 5 because the statute recognises they get the rate under 6 their contract. So if it were to apply at all, it's 7 only to that group of creditors. 8 Now, for reasons I've hinted at at the beginning, we 9 say if that is the court's conclusion, the right answer 10 is not to disturb the simplicity of rule 2.88, but 11 actually to say if you have contractual rights based 12 upon Bower v Marris which aren't respected by the 13 scheme, then you come back in at a later stage with your 14 non-provable claim to the shortfall. But I am focusing 15 here on the question of the interpretation of rule 2.88 16 itself. 17 There we say the rule of appropriation undoubtedly 18 requires two current debts, and I say this is linked 19 because this relies on my previous submission that the 20 right to interest under the statute is simply not 21 accruing until such time as the surplus arises and the 22 statute says that the right itself arises. So there is 23 no possibility of an accruing right to interest for a 24 non-interest-bearing debt upon which the principle in 25 Bower v Marris could have any application.</p> <p style="text-align: center;">Page 32</p>

1 And then to pick up a point I've already made, the
 2 rationale for the application of the principle in
 3 Bower v Marris in Humber Ironworks, in Re Lines Brothers
 4 is all about ensuring that creditors with a right to
 5 interest get the same treatment they ultimately would
 6 have done had there been no bankruptcy. That does not
 7 apply to someone without an interest-bearing debt.
 8 LORD JUSTICE PATTEN: On that alternative approach, namely
 9 Bower v Marris only applies to people with
 10 a pre-existing right to interest, whether, I suppose,
 11 that's under a judgment or a contractual right, what
 12 impact does that have -- I'm not asking you to give me
 13 a figure, but, I mean, are there a significant number of
 14 creditors that would fall out?
 15 MR ZACAROLI: Yes, I think it's common ground that's true in
 16 this case.
 17 LADY JUSTICE GLOSTER: What type was contracts? I mean --
 18 MR ZACAROLI: Prime brokerage.
 19 LORD JUSTICE PATTEN: So they are primarily the people who
 20 would be affected.
 21 MR ZACAROLI: Yes. I'm being told -- I think it's right --
 22 it's in the billions, as everything is in this case.
 23 LORD JUSTICE BRIGGS: That's people represented by York?
 24 MR ZACAROLI: Yes.
 25 LORD JUSTICE PATTEN: So it affects Mr Smith's clients more

Page 33

1 than Mr Dicker's.
 2 MR ZACAROLI: I think it affect his clients as well.
 3 LORD JUSTICE PATTEN: Right. Okay. So it's a real point.
 4 MR ZACAROLI: It's a real point, yes.
 5 We suggest, however, that such differential
 6 treatment ought not to be allowed within rule 2.88,
 7 which is why we say, if anything, this goes to
 8 a non-provable claim. And itself, if it could only
 9 apply to creditors with interest-bearing debts, we say
 10 it is a conclusion why it shouldn't apply at all. It
 11 would first of all create differential treatment between
 12 creditors within rule 2.88 who otherwise are supposed to
 13 be treated pari passu. It would result in different
 14 periods of interest outstanding as between them. It
 15 would mean that the available pot in any case other than
 16 where there's enough to pay everybody would be eroded by
 17 those with a Bower v Marris right at the expense of
 18 those without. It would also create complications that
 19 would be inconsistent with we say the Cork Committee's
 20 plea for simplicity and certainty.
 21 And there are two points here. One is that to allow
 22 Bower v Marris at all within 2.88 imports such
 23 complications, but to import it for only some creditors
 24 doubles those complications. The most obvious is that
 25 every time a slug of surplus arose to pay some interest,

Page 34

1 there would need to be a recalculation of the
 2 proportionate claims of all the creditors to interest.
 3 The simplicity of the solution that the rule, we say,
 4 dictates is when interest stops running at the date of
 5 final dividend, thereafter the administrator, liquidator
 6 or trustee knows exactly how much interest is due to
 7 every creditor and it doesn't change over time, so that
 8 when a 10 per cent dividend is paid on outstanding
 9 interest, it's very easy to work out what that is for
 10 everybody. It's very easy to reserve, because you know
 11 what everybody is claiming.
 12 Complications undoubtedly arise if you introduce
 13 Bower v Marris, which means that interest continues
 14 running, particularly if only for some but actually if
 15 for all, because the proportionate share of each
 16 creditor changes over time.
 17 LADY JUSTICE GLOSTER: It's not an insuperable problem with
 18 the computer, is it?
 19 MR ZACAROLI: It's not an insuperable problem.
 20 LADY JUSTICE GLOSTER: If we are talking in general terms,
 21 why should that -- it's easier to calculate it this
 22 way -- trump the broad merits point on which the
 23 appellants rely? I mean, I understand your arguments of
 24 law, but okay, it is complicated to have to recalculate
 25 all the time, but --

Page 35

1 MR ZACAROLI: We say it's contrary to the intention behind
 2 the rule, which is one of creating a simple and certain
 3 regime. There is a reference in one of the Australian
 4 cases which is worth looking at, which explains why it
 5 is that interest was cut-off at the date of bankruptcy
 6 or liquidation. And partially it was for this very
 7 reason: because of the complications it causes if you
 8 allow interest to keep accruing during the bankruptcy or
 9 administration liquidation period. The case is
 10 Mackenzie v Rees. It's bundle 1 of the authorities
 11 tab 38. The case was concerned with whether a creditor
 12 without a contractual right to interest was entitled to
 13 interest under the relevant statutory regime, and the
 14 relevant passage is in the judgment of Mr Justice Dixon.
 15 It's at page 8 to 9 of the report.
 16 Page 8, the last paragraph towards the bottom of the
 17 page, he refers to:
 18 "The principle of English bankruptcy law since the
 19 time, at all events, of Lord King that no ...(Reading to
 20 the words)... could not obtain a surplus until interest
 21 accruing had been met."
 22 Referring to Bromley v Goodere:
 23 "The rule and the qualification had their origin
 24 ...(Reading to the words)... for the purpose of proof."
 25 Dropping down to the next paragraph:

Page 36

<p>1 "The principle rule, namely ...(Reading to the 2 words)... among creditors where there was a deficiency." 3 He quotes Lord Justice Lindley in Ex parte Ador: 4 "The rule which prevents ...(Reading to the 5 words)... the administration of the estate would be 6 seriously complicated." 7 LORD JUSTICE BRIGGS: But I mean, on any view 8 section 2.88(9) is going to have to cope with varying 9 rates of interest, because some people would be in at 10 the judgment rate; others would be in at fixed 11 contractual rate; others, if it's the interest which 12 will payable apart from the administration, will be in 13 at whatever is the current floating rate in a floating 14 interest rate contract. 15 MR ZACAROLI: Never during the period of distribution, 16 because you don't distribute any interest until all 17 dividends have been paid, by which point all those 18 fluctuations have stopped because interest only accrues 19 until the date of payment to the final dividend. 20 LORD JUSTICE BRIGGS: Oh, is this your point about it not 21 running on past -- 22 MR ZACAROLI: That's right. If it runs on past then, which 23 is what Bower v Marris would require, then you run into 24 this problem, but during the period you are actually 25 distributing the surplus, on a pari passu basis,</p> <p style="text-align: center;">Page 37</p>	<p>1 been made pre-1986 in relation to the Act simply saying 2 nothing about interest and therefore reverting creditors 3 to their contractual rights, because it's in a sense 4 a free-for-all there. There is no provision under 5 statute which deals with it, and therefore it would be 6 correct that interest would keep running on and that any 7 claim to interest that a creditor made would vary over 8 time and the proportionate share would vary over time on 9 the same basis. I accept that. 10 The point I'm making here is it was the purpose and 11 objective of the court committee to introduce a simple 12 and certain code or provision for interest across the 13 board across all insolvencies, and that that objective 14 of simplicity is to some extent -- we say to quite 15 a great extent -- affected if you don't stop the 16 interest running at the date of the final dividend, in 17 the way that the judge, Mr Justice Dixon, refers to on 18 the previous page. That is a rationale for a cut-off. 19 As to post-administration interest at all, we say the 20 same rationale applies to there being another cut-off, 21 which is the date of final dividend recommended by the 22 court committee, we say implemented by the reference to 23 debts outstanding in 2.88(7). 24 Introduction of Bower v Marris into the rule also 25 has this effect, the date upon which the proved debts</p> <p style="text-align: center;">Page 39</p>
<p>1 although the Act doesn't say it -- oh, no, it does say 2 it in terms, the rules said it. It's a pari passu 3 distribution, both those points we say would apply. It 4 would affect that pari passu distribution because the 5 amounts would change over time and it makes it much more 6 complicated in process of distributing, unless you wait 7 until you have enough to pay everybody, in which case 8 it's just one distribution. 9 The other point to note is that if Bower v Marris 10 applies to the creditors who have contractual rights -- 11 LADY JUSTICE GLOSTER: Are you leaving Mackenzie now? 12 MR ZACAROLI: Yes, I am. 13 LADY JUSTICE GLOSTER: Just explain to me the last few lines 14 of that paragraph where it refers to the Humber case. 15 The principle which stops interest upon debts for the 16 purpose of proof upon assets, that allows it to run on 17 as a claim upon a surplus. Just explain to me what he's 18 saying there in the context of what he said previously. 19 I quite see all these considerations while the 20 estate is insolvent. 21 MR ZACAROLI: Yes. 22 LADY JUSTICE GLOSTER: But what's he saying there, if he's 23 not saying the position is different when you get to 24 surplus? 25 MR ZACAROLI: It is true the point I'm making could have</p> <p style="text-align: center;">Page 38</p>	<p>1 cease to be outstanding, which is a question of 2 construction of rule 2.88(7), would have a different 3 meaning, depending on whether you were a creditor with 4 right to interest and, therefore, right to appropriate 5 on the basis of Bower v Marris, or you are not. Because 6 if you're not, there's no difficulty; a right to simple 7 interest ends at the date of final dividend that's 8 outstanding until that date. You need to adjust the 9 meaning of that word to cater for the concept of 10 contractors brought in with contractual right. 11 LADY JUSTICE GLOSTER: Did the judge deal with Mackenzie? 12 If so, which paragraph, please? 13 MR ZACAROLI: He didn't, I think. At least not in 14 paragraphs dealing with the Australian cases. 15 LADY JUSTICE GLOSTER: He didn't deal with it at all? 16 MR ZACAROLI: Can I get somebody to run a check on that 17 whilst I continue, my Lady? 18 LADY JUSTICE GLOSTER: Yes. 19 MR ZACAROLI: The point I'm making is about the construction 20 of rule 2.88(7), the meaning of the word "outstanding". 21 It requires it to be given a different meaning, but to 22 be given a different meaning because of something being 23 brought into the rule by 2.88(9), because it's only 24 through 2.88(9) that creditors with an interest-bearing 25 debt will be brought into the equation at all, otherwise</p> <p style="text-align: center;">Page 40</p>

<p>1 everyone would be restricted to the Judgment Acts rate. 2 We say it would be very odd construction to require 3 2.88(7) to have a different meaning for the word 4 "outstanding" depending on type of creditor because of a 5 rule, the only purpose of which was to identify which 6 was higher of two rates, the contract rate or the 7 Judgment Act rate. 8 It's there for one purpose only, not to identify 9 some different meaning of the word "outstanding" in 10 rule 2.88(7). 11 LORD JUSTICE BRIGGS: Would there be any insuperable problem 12 in taking a reasonably literal construction of 2.88(7) 13 about when interest ceases to accrue, the one you are 14 propounding, and yet nonetheless say you can operate 15 Bower v Marris up until then? 16 MR ZACAROLI: Well, is my Lord thinking it's the date of 17 final dividend? 18 LORD JUSTICE BRIGGS: Yes. 19 MR ZACAROLI: The problem with that is the reference to word 20 "periods", not "period". It was common ground below 21 that "periods" is there to cater for the fact there will 22 be interim distributions, and so -- 23 LORD JUSTICE BRIGGS: Interim distributions by way of 24 principal. 25 MR ZACAROLI: Of principal.</p> <p style="text-align: center;">Page 41</p>	<p>1 point of it is to extend the period which interest is 2 payable. I think that's right. Because if it stops 3 running at the date of any dividend on that portion, the 4 only point of Bower v Marris is to say up to that point 5 we've been actually addressing -- appropriating this as 6 interest rather than principal, so we are treating the 7 rump of principal remaining outstanding thereafter. 8 LORD JUSTICE BRIGGS: You say it is inconsistent with the 9 primary effect of Bower v Marris, which is to postpone 10 the date of payment of principal? 11 MR ZACAROLI: That's right. I don't think Bower v Marris 12 gives you a higher rate during any particular period, it 13 just keeps it running longer. 14 LORD JUSTICE PATTEN: If the judge was right and the proper 15 construction of sub-rule 7 is that you pay principal 16 first through the dividends, you can't operate 17 Bower v Marris. 18 MR ZACAROLI: Correct, yes. 19 LORD JUSTICE BRIGGS: There can't be a halfway house. You 20 just can't operate it because you are inevitably then 21 going all the time paying off capital which gives rise 22 to an immediate calculation of what interest is payable 23 up to those dates. 24 MR ZACAROLI: Yes. 25 LORD JUSTICE PATTEN: And because principal is paid first,</p> <p style="text-align: center;">Page 43</p>
<p>1 LORD JUSTICE BRIGGS: By way of proof. 2 MR ZACAROLI: Exactly. Very simple case, after a couple of 3 years you have to pay £50, another couple --you get the 4 other 52 years later. The point is that interest 5 accrues on the £50 portion for the period that's 6 outstanding, and for the remainder for the period that's 7 outstanding. So -- 8 LORD JUSTICE BRIGGS: I'm not sure that really addresses my 9 question. I think you are saying it's an inevitable 10 consequence of applying Bower v Marris that you had to 11 go on accruing interest right up until the date 12 effectively of payment of interest and there's no basis 13 upon which you could apply any more restrictive 14 interpretation of "periods" in 2.88(7). I'm just 15 asking: is that an inevitable outcome? Do you have to 16 bin Bower v Marris altogether if you are right about 17 what "periods" means in 2.88(7)? 18 MR ZACAROLI: We would say yes. 19 LORD JUSTICE BRIGGS: Well, why? 20 MR ZACAROLI: Again, perhaps I'm misunderstanding my Lord's 21 question. Are you refer referring to the possibly of 22 them applying in the period? 23 LORD JUSTICE BRIGGS: Yes. 24 MR ZACAROLI: Because the only point -- I'm not sure it 25 makes any difference if you do that because the only</p> <p style="text-align: center;">Page 42</p>	<p>1 there can't be any elongation of the period. 2 MR ZACAROLI: Yes. We undoubtedly agree with that, my Lord. 3 LORD JUSTICE PATTEN: But I think that's -- yes. 4 MR ZACAROLI: At the moment I'm addressing the possibility 5 as it applies to some only, which is we say is a reason 6 why it shouldn't apply at all. 7 LORD JUSTICE PATTEN: Yes. It's a straight choice between 8 the two methods I think. 9 MR ZACAROLI: My Lords, the next point I'm moving on to is 10 question of whether rate in 2.88(9) encompasses 11 Bower v Marris. If that's a convenient moment, I can 12 stop there. 13 LADY JUSTICE GLOSTER: Yes, we will take five minutes. 14 (11.45 am) 15 (A short break) 16 (11.50 am) 17 LADY JUSTICE GLOSTER: Yes, Mr Zacaroli. 18 MR ZACAROLI: It's a short point on question whether 19 2.88(9), the word "rate", incorporates Bower v Marris 20 the short point is this: rate is a fundamentally 21 different concept to applying Bower v Marris 22 calculation, both in economic effect and in how it 23 works. It is very different, for example, to applying 24 a compound rate. A compound rate of interest is still 25 a rate of interest, but to the contrary, Bower v Marris</p> <p style="text-align: center;">Page 44</p>

<p>1 is about identifying the order in which payments are to 2 have been made or treated as being made. To know what 3 amount of interest is outstanding, to make the choice 4 between whether you appropriate towards interest or 5 principal in what amount, you have to know the rate to 6 start with, ie the rate is a pre-existing requirement 7 for the operation of -- 8 LORD JUSTICE PATTEN: But you are talking about the 9 incorporation of a rate greater than the judgment 10 debt -- than the -- 11 MR ZACAROLI: Yes. 12 LORD JUSTICE PATTEN: But we know what the source of that 13 is; it's the White Paper, isn't it? 14 MR ZACAROLI: Yes, it is. 15 LORD JUSTICE PATTEN: That -- doesn't have a reference in 16 that to Bower v Marris. 17 MR ZACAROLI: No, in fact it's just a contractual rate it 18 refers to. I said it was a short point; perhaps shorter 19 than I thought. 20 LORD JUSTICE PATTEN: Well, I don't know. 21 MR ZACAROLI: I adopt that entirely, that's all it's doing. 22 But the other point is you need to identify a rate 23 before you can ever apply Bower v Marris. It's 24 a different thing. Fundamentally different concept. 25 I want to just move on to -- it's a sidestep</p> <p style="text-align: center;">Page 45</p>	<p>1 If I can take my Lords to that. It's tab 29 of 2 bundle 1. It's a case involving a debenture trustee, as 3 you will see from first page of the headnote: 4 "The deed provides that the trustee should 5 appropriate the proceeds of the realisation of the 6 securities in the first place towards payment of all 7 arrears of interest ...(Reading to the words)... action 8 was brought on behalf of the debenture holders to 9 enforce their security." 10 There were some prior orders in this case and, in 11 particular, you will see about two-thirds of the way 12 through the first paragraph of the headnote: 13 "Subsequent orders for payment to the debenture 14 holders directed that ...(Reading to the words)... 15 attributable to principal, they would be insufficient to 16 discharge the full amount." 17 The case involved the question of tax, and it was in 18 the interest of the debenture holders for it to be 19 appropriated toward principal: 20 "The court held that when making the earlier orders 21 ...(Reading to the words)... how the appropriation 22 should be made and consequently income tax ought not to 23 be deducted." 24 Turning to the judgment, first of all the first 25 instance judgment, just to note a point at page 571 of</p> <p style="text-align: center;">Page 47</p>
<p>1 slightly and it's something which I omitted in turning 2 the page earlier, but it's a slightly self-contained 3 topic, which is concept of appropriation and the 4 importance of that as it lies behind both Bower v Marris 5 and all the cases thereafter. 6 The judge at paragraphs 40 to 42 of the judgment set 7 us out the core principles of appropriation, which I am 8 sure are well-known to the court. In particular, he 9 makes the point -- a point I made in opening -- that 10 Bower v Marris operates on the basis of a presumption as 11 to the interest or intentions of the creditor. It says 12 that payments from the debtor's estate don't constitute 13 an appropriation as made in process of law, therefore 14 the creditor's entitlement remains, but we presume the 15 creditor would want to be paid interest first because 16 that's what's in his interests. 17 There is a case the judge cites at 42, which is the 18 Smith v Law Guarantee & Trust Society case, which is an 19 example of the opposite conclusion being reached by the 20 court, namely that in that case the creditors couldn't 21 possibly want anything other than the payments being 22 appropriated towards principal first rather than 23 interest and, therefore, the court would do that without 24 bothering to ask them because you would know what the 25 answer was.</p> <p style="text-align: center;">Page 46</p>	<p>1 the report, bottom paragraph of 571: 2 "Mr Justice Byrne held that the provision of the 3 trust deed for payment of interest in the first place 4 was inserted for the benefit of the debenture holders 5 and could be waived by them in the absence of 6 ...(Reading to the words)... whether in their hands it 7 would thereafter be treated differently." 8 Turning to Court of Appeal judgment, first of all 9 Lord Justice Vaughan Williams at page 575, dealing with 10 the question of the order in which payment should be 11 appropriated. He says in the first paragraph: 12 "I think the view accords with what Mr Justice Byrne 13 said. Nothing to say except to refer to what 14 Mr Justice Byrne said in dealing with question of what 15 ...(Reading to the words)... that the payment should now 16 be attributed to capital." 17 And to like effect, Lord Justice Romer, bottom of 18 page 578. The necessity he is referring to is the 19 necessity to decide which orders the payments are to be 20 appropriated in. He says: 21 "The debenture holders are entitled now to say 22 ...(Reading to the words)... it is clearly to their 23 interest that the order should be made in this form." 24 A final reference on the same point is back to 25 Bower v Marris itself at tab 6, the penultimate</p> <p style="text-align: center;">Page 48</p>

<p>1 paragraph of Bower v Marris, showing that Lord Cottenham 2 was absolutely well aware of the principles of 3 appropriation and their derivation: 4 "It has been suggested that the case of ...(Reading 5 to the words)... and are derived from the civil law." 6 The key point I'm making here is it's a matter of 7 presumption, or it's a matter of entitlement, in the 8 first instance, for the creditor, and then the reason 9 the court has assumed that payments are to interest 10 first in an insolvency case normally is because that's 11 what would be in the creditor's interests, not because 12 they have actually chosen but because you presume they 13 would. 14 And it will always be subject to contrary agreement 15 between the creditor and the debtor. So it would be 16 entirely possible for a creditor to have agreed with the 17 administrators that it wished to appropriate payments 18 a different way. So, for example, if there was 19 a particular tax issue which related or arose in respect 20 of one particular creditor, it could always say, "I am 21 choosing to elect these payments in different way" under 22 the Bower v Marris principle, if it applied. 23 The senior creditor group in paragraph 9 of their 24 skeleton for this appeal, which is in core bundle A at 25 tab 12, they state four ways in which they say the judge</p> <p style="text-align: center;">Page 49</p>	<p>1 MR ZACAROLI: That's this one really. 2 The first point to make is that the question is put 3 as: why would it have been Parliament's intention to 4 abolish Bower v Marris which had existed for so long? 5 Well, I hope I've dealt thoroughly enough with that one; 6 there was no such principle in Bower v Marris that 7 applied generally throughout insolvent states. It was 8 merely an aspect of contractual rights if you remitted 9 to them. 10 The second point is that the 1986 Act operates or 11 the rules operate by providing creditors with a new 12 bundle of rights. I've already been through the ways in 13 which that bundle of rights affects the pre-existing 14 rights of creditors, both in beneficial ways and 15 sometimes non-beneficial ways. But essentially it's 16 a new bundle of rights. 17 The broad merits answer is this was a new provision 18 entitled to provide certainty and simplicity and most 19 importantly uniformly among creditors, with the one 20 nuance, only the one nuance, that if you had an existing 21 contractual rate which was higher, you could still have 22 that. But that's the only concession made to otherwise 23 a pari passu and uniform solution for all creditors, 24 recognising that that operates to the benefit of 25 creditors generally, and to the detriment of the company</p> <p style="text-align: center;">Page 51</p>
<p>1 erred in reaching his conclusion on Bower v Marris. 2 The first is that he gave improper consideration to 3 the pre-1986 law, or rather he didn't given proper 4 consideration to it. We have been through that. Our 5 submission is that he gave absolutely correct 6 consideration to the pre-1986 law, identified precisely 7 what the principle was, how it applied and how the rule 8 in 2.88 was fundamentally different. 9 Secondly, they criticise the judge in holding that 10 the language of 2.88 was inconsistent with the 11 Bower v Marris. I have dealt with that and will come 12 back to it at the end in a very short worked example. 13 They say the judge was wrong in relying on the 14 pre-legislative materials for his conclusion. They say 15 the Cork Report indicated a (inaudible) bankruptcy 16 approach, which for over a hundred years had not 17 recognised any remission to contractual rights. He was 18 wrong in that respect. 19 Fourthly, and most importantly for present purposes, 20 they say he was wrong as a matter of principle and 21 policy. Lady Justice Gloster pointed out there was a 22 sort of broad merits point put against us, which is why 23 should people be deprived of what they would be 24 entitled -- 25 LADY JUSTICE GLOSTER: Yes, and that is this one, yes.</p> <p style="text-align: center;">Page 50</p>	<p>1 generally, in the sense that where it's paid more 2 interest, others who have a claim on the assets of the 3 company will have less to claim against. 4 In any case where the company is still insolvent, 5 those who will be prejudiced by giving some creditors 6 greater rights would be the other creditors who are 7 still claiming. Even if the company is solvent enough 8 to pay all statutory interest, there are others down the 9 waterfall who are being prejudiced to the extent that 10 more interest is being paid to some creditors under 2.88 11 than others. So the idea of this being a creditors 12 versus members debate is one we fundamentally disagree 13 with. 14 Dealing with that -- 15 LORD JUSTICE PATTEN: I mean, are the points you are making 16 now about the merits of it, if you like, as a scheme, 17 are the submissions you just made to some extent 18 parasitic upon accepting the judge's other conclusion, 19 which is that it's an exhaustive regime? Because it 20 seems to me you can't really consider the merits of it 21 except in the context of both points. If the creditors 22 like York never had a look-in under Bower v Marris 23 because, if you are right, you have to have 24 a pre-liquidation right to interest to qualify for that 25 treatment, they're out, so the merits argument doesn't</p> <p style="text-align: center;">Page 52</p>

1 go anywhere in relation to them. I mean, they can't say
 2 they're worse off because they never had
 3 a Bower v Marris.
 4 MR ZACAROLI: Yes.
 5 LORD JUSTICE PATTEN: But in relation to creditors who
 6 either had a judgment or a contractual right to
 7 interest, in relation to proved debts it doesn't matter
 8 if they have a right to revert to their contractual
 9 rights at the end of the process. I mean, it might be
 10 slightly more inconvenient to do it that way, but in
 11 money terms it shouldn't make any difference. So the
 12 question of whether the merits of excluding
 13 Bower v Marris, I think, are a bit difficult to assess
 14 until you decide whether or not you are also dealing
 15 with an exhaustive regime.
 16 MR ZACAROLI: We have to deal with both possibilities --
 17 LORD JUSTICE PATTEN: Well, of course. But, I mean, I think
 18 the two are very closely linked in relation -- because
 19 I mean, at the end of the day what you are asking
 20 yourself is, well, you know, what sort of regime did
 21 Parliament introduce through the insolvency rules?
 22 MR ZACAROLI: My answer to that is in short that we say --
 23 assuming there was a complete code in first instance,
 24 and these arguments obviously have, as it were, global
 25 force about -- respond to the merits point, but if we

Page 53

1 are wrong about the complete code, the proper response
 2 is not to adjust or to interfere with the simplicity of
 3 rule 2.88 and the very clear calculation required by it,
 4 but that if my arguments and response to merits don't
 5 find traction, to say there's a non-provable claim at
 6 the end of it. That's the way I think I opened it.
 7 I stick with that. That is the correct answer to this.
 8 If we are wrong in saying that the code was a complete
 9 code and it has merit, the merit essentially being
 10 one-size-fits-all for all creditors, which operates to
 11 the detriment of the company and benefit of the
 12 creditors, or vice versa, on a global collective basis,
 13 and that's all you get -- you come in, you get the
 14 benefits but also take burden of statutory scheme, and
 15 the broad merit of that is -- well, there's a number of
 16 points, but essentially it's a common misfortune point.
 17 Once the company enters into an insolvency process, all
 18 creditors thereafter are treated equally so far as the
 19 delay in payment of their debts is concerned. 2.88(8)
 20 says pari passu payment of interest, even if you didn't
 21 have pari passu rights in respect of your debts.
 22 And the reason for that is that -- and this falls
 23 into my next point, which was the broad point that it's
 24 creditors first, members last, we say is a vast
 25 simplification of the reality and really doesn't take

Page 54

1 you anywhere in terms of where the merits lie. There
 2 are, as I've shown the court, statements to that effect
 3 in the old bankruptcy cases, certainly, at a time when
 4 debtors were regarded as offenders and where it really
 5 was a competition between the debtor and its creditors.
 6 The modern world, we say, certainly in the corporate
 7 context, looks very different. What you have is
 8 a priority waterfall, and there are a number of levels
 9 below proving creditors and those entitled to statutory
 10 interest as proving creditors. You have the possibility
 11 of subordinated debt. You have the possibility of
 12 whatever non-provable claims exist. The Insolvency Act
 13 itself identifies as a possibility categories of
 14 non-provable claim and categories of postponed claim.
 15 My learned friend Mr Dicker referred to it in passing
 16 yesterday it's rule 12.3. Now, they are relatively
 17 limited, but they exist nonetheless.
 18 So matters which are not provable are contained in
 19 sub-rule 2. In bankrupts, they include any fine imposed
 20 for an offence, et cetera, in administration, winding up
 21 or bankruptcy, obligations arising under those criminal
 22 statutes.
 23 And then sub-rule 2(a) -- insert a new 2(a) -- has
 24 certain claims which are not provable except for the
 25 time when all other claims and creditors in insolvency

Page 55

1 proceedings have been paid in full. So postponed
 2 claims, including claims arising under section 382(1)(a)
 3 of the Financial Services and Markets Act.
 4 And then 3, nothing in the rule prejudices any
 5 enactment or rule of law under which a particular kind
 6 of debt is not provable, whether on grounds of public
 7 policy or otherwise. So there is undoubtedly a class of
 8 claim which are either statutory recognised as not
 9 provable or recognised by the common law as not
 10 provable, for example currency conversion claims, at
 11 least pending the Supreme Court decision.
 12 And then beyond that, you have various levels of
 13 equity, preferred equity and finally ordinary equity.
 14 Now, none of those, we would say, including the very
 15 bottom of the waterfall, none of them are to be equated
 16 with the debtor for the purposes of the 18th and 19th
 17 century cases saying it is really about the debtor
 18 versus its creditors. We are really talking about
 19 a whole range of investors in a corporation that have
 20 chosen to invest at different of a priority waterfall,
 21 and the delay in the administration of an estate effects
 22 all of those investors in the same way, because those
 23 entitled to distribution as shareholders at the end of
 24 the day themselves are affected by delay in the
 25 administration of the estate. They, of course, don't

Page 56

<p>1 get a right to interest at all, but the delay affects 2 everyone above them equally.</p> <p>3 It's wrong to assume, therefore, we say, that the 4 delay in payment of dividends to creditors is really 5 down to the fault of the debtor, as there isn't a debtor 6 anymore. What you have is an insolvency estate, 7 administered by an administrator or liquidator, for the 8 benefit of creditors. The delay over payment of 9 dividends or interest could be down to a number of 10 factors.</p> <p>11 For example, disputes between the creditors as to 12 their respective rights, which is indeed the reason we 13 are here some years after the dividends have been paid 14 in full, still waiting for interest to be distributed. 15 Blaming no one, there are 37, 49 whatever it is, 16 questions the court has been asked to resolve, because 17 one group of creditors or another takes the view that 18 they can maximise their recovery if they can succeed in 19 argument A, B or C. This a debate between creditors as 20 to the rights of priority out of the estate. In no way 21 can it be said that this is the debtor's fault that this 22 delay is continuing.</p> <p>23 That all reinforces the broad merits point. One is 24 looking at equality here amongst all creditors in 25 relation to the period between the start of the</p> <p style="text-align: center;">Page 57</p>	<p>1 administration, is merely improving the lot of the 2 debtor. It's not.</p> <p>3 I don't think we need turn it up, but my Lord --</p> <p>4 LORD JUSTICE BRIGGS: How far does that go? On any view, 5 and I think you accept there are different ways of 6 looking at 2.88, will swell or reduce the size of any 7 surplus after payment of all statutory interest, if 8 there is any. It may mean that there's a shortage of 9 statutory interest or it may mean that the surplus after 10 payment for the next people down the waterfall is 11 greater or lesser.</p> <p>12 Now, Mr Dicker said, well, at the bottom you have 13 the wicked shareholders, but in terms of -- we are not 14 really talking about wickedness, but if a particular 15 group are lower down the waterfall for some good reason 16 than creditors with the right to interest, there is 17 a point that if one particular interpretation gives 18 creditors the right to interest less than their, quotes, 19 theoretical full entitlement, it's the people down the 20 waterfall who benefit. Whether those people are 21 deferred creditors or non-provable claimants or 22 shareholders in their various own internal waterfall 23 positions, does that really make such difference to the 24 argument?</p> <p>25 MR ZACAROLI: It makes a difference to argument put against</p> <p style="text-align: center;">Page 59</p>
<p>1 insolvency and when they actually get paid, in terms of 2 interest. They're all being suffering the same 3 misfortune insofar as they have claims against the 4 estate and therefore should be ordered in the same way 5 for the delay -- compensated for the delay.</p> <p>6 Now, certainly in relation to the complete code 7 world, the right question is not, oh, this is creditors 8 versus debtor and that's the sole answer to this. The 9 right answer is that there is a waterfall with different 10 levels, and at each level the only question is: as 11 a matter of construction of the Act and the rules, what 12 is payable at this level? The answer to that question 13 will impact on others within that level if there's 14 an insolvency within that waterfall, and will impact on 15 how much is left for the next level in the waterfall 16 below it, which could be another level of creditors. 17 For example, what we are talking about here is rights to 18 interest, statutory interest. Any increase in the 19 amounts payable by way of statutory interest will impact 20 on the next level in the waterfall being non-provable 21 claims, in whatever order those are to be paid, which is 22 so far unclear.</p> <p>23 So it's far too simplistic to say a construction of 24 rule 2.88(7), which diminishes the rights of creditors 25 otherwise than what they would have achieved outside of</p> <p style="text-align: center;">Page 58</p>	<p>1 us that this is really all about creditors first, 2 members last. It is put in that broad way many times. 3 I'm really responding to that broad merits point. And 4 it does make a complete difference to that because one 5 isn't talking about creditors first, members last, 6 because we are not just talking about members being 7 impacted by any decision at any level of the waterfall.</p> <p>8 LORD JUSTICE PATTEN: It is where it comes into the order of 9 priority that matters. If it comes in after statutory 10 interest as an non-provable claim, it only impacts on 11 the members.</p> <p>12 MR ZACAROLI: Oh, I see, the extra-contractual rights which 13 may not be -- yes.</p> <p>14 LORD JUSTICE PATTEN: The problem about it adversely 15 affecting other creditors proved in the liquidation -- 16 I mean, of course it always ultimately depends on how 17 much money there is, but assuming that there's quite 18 a lot of money but perhaps not quite enough money to pay 19 everybody, it may be quite important on what -- I mean, 20 it would obviously preserve the rights of people in your 21 clients' position more if -- for the excepts, if I can 22 call it that, the (inaudible), they come in after 23 statutory interest because that then impacts on the 24 members, but it wouldn't impact on the other creditors, 25 would it?</p> <p style="text-align: center;">Page 60</p>

<p>1 MR ZACAROLI: Well, it would. Obviously it always depends 2 on how much there is. 3 LORD JUSTICE PATTEN: Of course. 4 MR ZACAROLI: If there is enough to pay everybody, by that 5 I mean all non-provable claims as well, then the only 6 person it impacts on will be then the subdebt or the 7 shareholders, my clients. But my Lord's making 8 an assumption that just because there's enough to pay 9 all statutory interest it therefore falls into 10 non-provable pot and, if it comes in there, it impacts 11 only on the members. Well, no, it depends on what other 12 non-provable claims there are and how much there is 13 available to pay them. So, for example, you may end up 14 with a competition between those claiming currency 15 conversion claims and those claiming interest shortfall 16 claims. 17 LORD JUSTICE PATTEN: Of course. 18 MR ZACAROLI: So it never is, except in the rare case where 19 there is enough to pay absolutely any claim of any 20 possible sort, both provable or non-provable, plus 21 interest in full, that the members ever will see 22 anything. It may be this is that case, but it's a very 23 rare case. One can't adjudicate upon the construction 24 of the rule by reference to the facts of this case, 25 obviously, because this applies across the board,</p> <p style="text-align: center;">Page 61</p>	<p>1 a similar place, where they have a low rate of 2 contractual interest, but what they will be getting out 3 of this result is an uplift to 8 per cent, calculated by 4 applying all dividends towards interest at 8 per cent 5 first, in circumstances where in no case would they ever 6 have achieved that because, as a foreign currency 7 creditor, even if they got a judgment, it would have 8 been at a commercial rate of interest, not the Judgments 9 Act rate. 10 We have authority for that if it's not a proposition 11 that my Lords are well aware of, but I'm sure they are. 12 But a foreign currency claim does not get Judgment Act 13 rates as a right, they get a commercial rate relevant to 14 currency in which your debt was owed. 15 So there are ways in which the result contended for 16 by the SCG and York results in astonishingly great 17 uplift in the amount of interest they would get, greater 18 than they could ever have got outside of insolvency 19 process. And you might say, well, every case of 20 insolvency involves swings and roundabouts or benefits 21 and burdens, some people do better, some people do 22 worse, but it goes back to my fundamental point that 23 Parliament has decided with rule 2.88 to implement a 24 code for the purposes of compensating everyone kept out 25 of their money after the date of the commencement of the</p> <p style="text-align: center;">Page 63</p>
<p>1 including in relation to bankruptcy in liquidation. 2 On the broad fairness point, it is worth pointing 3 out that it isn't just a question of people with no 4 contractual rights claiming a right to Bower v Marris 5 through the statutory process and therefore getting 6 uplift to 8 per cent that they wouldn't otherwise have. 7 It is worth remembering -- this is straying from 8 facts of this case a little but it's an example of 9 something which may well occur more broadly -- interest 10 rates have been historically low since 2008, 11 0.5 per cent, around there, since soon after that. But 12 a creditor with a LIBOR-related rate of interest would 13 have something like that but still way below the 14 judgment. What they are contending for is a right to 15 uplift their contractual rate to the 8 per cent, and 16 apply Bower v Marris on that. They are trying to apply 17 a contractual right which would have applied only to 18 their lower rate of interest, the right of 19 appropriation, to actually -- well, no, now we have 20 8 per cent, we want to apply the Bower v Marris 21 principle to that, which gives us an astonishingly 22 higher rate of interest, or higher sum by way of 23 interest, than we would ever have got outside this 24 insolvency process. And then you have foreign 25 creditors, or creditors in a foreign currency, in</p> <p style="text-align: center;">Page 62</p>	<p>1 insolvency on a uniform pari passu basis. 2 Remembering, of course, that -- 3 LORD JUSTICE BRIGGS: Just remind me, Mr Zacaroli, could a 4 judgment creditor, a foreign currency claimant judgment 5 creditor, nonetheless elect to take a sterling judgment 6 and then the judgment rate? 7 MR ZACAROLI: Can I come back to you on that? 8 LORD JUSTICE BRIGGS: Yes. 9 MR ZACAROLI: Of course they would not have wanted to 10 because, if they had done so, they would have scuppered 11 their chances of a currency conversion. 12 LORD JUSTICE BRIGGS: They might want to take a bet. 13 MR ZACAROLI: I was just going to make the point that it's 14 important to remember that, so far as bankruptcy is 15 concerned, the one-size-fits-all approach had been 16 implemented as long ago as 1883 without any nuance 17 allowing creditors with a contractual rate to a higher 18 rate if they had one. 19 And the final point on merits is this: leaving aside 20 the foreign currency creditor who could never get 21 a judgment with 8 per cent rate of interest, leaving 22 aside those, it is an important part of the background 23 that a creditor who would have been entitled to a County 24 Court judgment would never have been entitled under the 25 judgment to appropriate payments towards interest first.</p> <p style="text-align: center;">Page 64</p>

<p>1 My learned friend accepts this but dismisses it as, oh, 2 it's a small corner and we needn't worry about it. 3 These are rules intended to apply across all insolvency 4 proceedings in a uniform way, the same way. In relation 5 to the vast majority of bankruptcies, and I suspect many 6 liquidations, which don't trouble this court very often, 7 we are talking about relatively low sums of money and 8 relatively low amount claims, where the claims would 9 otherwise be County Court claims County Court judgments. 10 In that whole arena, creditors would not, apart from the 11 bankruptcy or insolvency, have been entitled to 12 appropriate interest in a Bower v Marris way because by 13 statute they are prevented from doing so, they can only 14 appropriate towards principle first. 15 So broad statement, well, we should do this because 16 if they have judgments, they could always apply the 17 Bower v Marris principle, not so, and not so in relation 18 to the vast proportion of claims that we would be 19 concerned with across the whole range of insolvencies. 20 So coming back to the terms of the rule, 2.88(7), in 21 summary, we say it's a direction to the officeholder to 22 pay from surplus interest on defined sum at a defined 23 rate for a defined period. It's a new rule imposed in 24 1986. It's the first time you see a rule in that form. 25 It bears a strong resemblance to the bankruptcy rule</p> <p style="text-align: center;">Page 65</p>	<p>1 Now, that, we say, contradicts the operations of the 2 rule in two important ways. First of all, it involves 3 the surplus being used to discharge an element of 4 principal. Now, if it's said against us that's just 5 a notional matter, it's a question calculation, the 6 second point is far more substantive. It requires 7 interest to be paid, it requires the surplus to be used 8 to pay interest for a period long after the proved debt 9 has ceased to be outstanding. That is completely 10 contrary to the requirement in 2.88(7) that it's payable 11 for the period the debts have been outstanding, periods 12 the debts have been outstanding, since the date of 13 administration, implementing the Cork Committee's 14 recommendation, put in terms of interest should be 15 payable for the period until declaration of the final 16 dividend, mirrors that, we say accurately mirrors that. 17 As I think I said at the beginning, this begins and 18 ends the short point of construction, and Bower v Marris 19 is rather a red herring in all of this. But insofar as 20 the question of Bower v Marris needs to be addressed, we 21 say that the important point is this does not operate by 22 remission to creditors of any rights they had outside 23 the bankruptcy. No part of the operation of the rule to 24 do that, which is an essential prerequisite of operation 25 of that principle. And it's not an abrogation or repeal</p> <p style="text-align: center;">Page 67</p>
<p>1 that applied before, with a nuance relating to 2 a creditor's right of interest under a contract, if 3 higher. It affects substantive changes to the 4 creditor's rights and the companies' obligations 5 collectively, and contains all the ingredients necessary 6 to calculate how much interest is due to every creditor. 7 Picking up on my Lord, Lord Justice Patten's 8 question of yesterday about, isn't this just really 9 a question of construction and how do the terms of the 10 rule not allow for the Bower v Marris way of 11 calculating? Just to give a very simple example. Let's 12 say you have a proved debt of £100 that's outstanding 13 for five years. It would now be due interest of £40 at 14 8 per cent for five years. The proved debt is then paid 15 in full. After a further two years there comes enough 16 money to pay £20 towards the interest that's accrued 17 due. On the SCG's case, that £100 would be treated as 18 discharging the £40 of interest and only £60 of 19 principal, leaving a further £40 of principal unpaid. 20 So over the ensuing two years you have an 8 per cent 21 right accruing on that. That's a further £6 of interest 22 accruing after the date of final dividend. So the £20 23 that's now available goes as to £6.40 to pay interest 24 accruing, and the rest of it goes to discharge the 25 remaining principal still said to be outstanding.</p> <p style="text-align: center;">Page 66</p>	<p>1 or removal or getting rid of Bower v Marris. It is 2 simply that Bower v Marris is an aspect of a creditor's 3 rights outside of insolvency to appropriate payments 4 when two debts are accruing to it, which has no function 5 here because those essential prerequisites for its 6 operation just don't apply anymore because they didn't 7 in bankruptcy for the hundred years before anyway. 8 My Lords, my Lady, those are my submissions on the 9 issue 2, Bower v Marris. 10 I was going to turn very briefly, although perhaps, 11 given I have to deal with an example, slightly longer, 12 with the question of compounding. We accept that 13 compound interest as a rate is payable within the rule, 14 but we say the judge was again right -- for my Lady's 15 note, it's declaration 8, issue 3. 16 LADY JUSTICE GLOSTER: Thank you. 17 MR ZACAROLI: Yes, number 3 on the current list. 18 LORD JUSTICE BRIGGS: What issue number is it? 19 LADY JUSTICE GLOSTER: So it's issue 2A? 20 MR ZACAROLI: I'm sorry, it is issue 3, I got that wrong. 21 It's number 2 on the current list. 22 LORD JUSTICE BRIGGS: Yes, genuine issue 3, item 2. 23 MR ZACAROLI: I will deal with this shortly because we say 24 it is very much covered by my submissions to date on the 25 construction of rule 2.88(7), in particular because the</p> <p style="text-align: center;">Page 68</p>

<p>1 effect of compounding after the date of the final 2 dividend has been paid, or any dividend has been paid in 3 relation to that part, would be to require interest to 4 be paid for a period after the proved debts have ceased 5 to be outstanding. 6 LORD JUSTICE PATTEN: It's the same point. 7 MR ZACAROLI: It's the same point, yes, that's why I deal 8 with it shortly in that sense. 9 LORD JUSTICE PATTEN: Yes. 10 MR ZACAROLI: The points I made as to slightly broader 11 merits about why it would contradict the simplicity 12 that's meant to be incorporated by the new rules equally 13 apply here because you have compound and continuing, you 14 have readjustment of various creditors, proportionate 15 share to interest during the period you are supposed to 16 be distributing interest, which creates problems. They 17 also apply here. Principal argument of construction is 18 that it would be offend the rule because it would 19 require interest to be in fact paid relative to a period 20 which the rule does not allow interest to be paid for. 21 LADY JUSTICE GLOSTER: Could I ask you something, and it may 22 be in the evidence, in which case I haven't picked up on 23 it. Under sub-rule 8, all interest payable ranks 24 equally, that's the position, is it, notwithstanding the 25 terms of any contractual subordination agreement?</p> <p style="text-align: center;">Page 69</p>	<p>1 result we say should apply is leave a pound outstanding 2 for as long as you want to keep interest compounding 3 until the pound is paid. 4 LADY JUSTICE GLOSTER: If you are going to give us different 5 arithmetic, I'd rather have it on paper. 6 MR ZACAROLI: I will have it -- in fact, let's hand up that 7 now. (Handed) 8 My Lords had two hand-ups yesterday, hand-ups in two 9 parts, the first dealing with issue 2. I'll be 10 corrected from behind if I'm wrong -- 11 LORD JUSTICE PATTEN: Is it the third sheet -- have I got 12 this wrong? No, that's compound. 13 LADY JUSTICE GLOSTER: Yours goes to issue 3 on the -- 14 MR ZACAROLI: It does, yes. 15 LORD JUSTICE PATTEN: The last page. 16 MR ZACAROLI: It is the last page, but I'll come to the 17 point in a moment. We don't -- let me deal straight 18 with it. We disagree with the reasoning that lies 19 behind the third and fourth examples on the issue 3 20 pages. So let me deal with those head-on. Our example 21 deals with the fourth example, so it corresponds to 22 that. 23 The way we say it works, and this picks up 24 importantly on the word "periods" plural in 25 rule 2.88(7), is that interest is payable for the</p> <p style="text-align: center;">Page 71</p>
<p>1 MR ZACAROLI: No, it's always possible to contract out of. 2 LADY JUSTICE GLOSTER: It is possible to contract out. 3 MR ZACAROLI: That's correct. That's probably dealing with 4 preferential liabilities primarily. It may be dealing 5 with subordinated liabilities that haven't covered this 6 point, but it depends on the terms of the contract -- 7 LADY JUSTICE GLOSTER: And the terms of the contract of the 8 subordinated debt here has or has not contracted out? 9 MR ZACAROLI: That's a question the Supreme Court is 10 considering. 11 LADY JUSTICE GLOSTER: Is it? 12 MR ZACAROLI: The extent of the subordination is being 13 considered generally in the Supreme Court. I'm not 14 involved in those proceedings. We can find out 15 precisely what the question is there if my Lady is 16 interested. 17 LADY JUSTICE GLOSTER: So I should go and read Waterfall I 18 in relation to that? 19 MR ZACAROLI: I can provide my Lady with the answer after 20 the short adjournment. 21 LADY JUSTICE GLOSTER: Okay. 22 MR ZACAROLI: The one point of detail I need to deal with is 23 the worked examples that were handed up yesterday. And 24 in particular, I need to deal with the contention that 25 our case is absurd because all you need to defeat the</p> <p style="text-align: center;">Page 70</p>	<p>1 periods a debt is outstanding, which means in respect of 2 each part of that debt for the period it was outstanding 3 until it was paid by an interim dividend. So looking at 4 our example, the debt's £100, it's paid in three 5 tranches, £50, £49 and the £1 is left outstanding, so 6 that totals £100. As to that £50 was outstanding for 7 two years, because it was paid by an interim dividend of 8 £50 after two years. Compound interest on that sum over 9 the two years equals £10.50, which is number on 10 right-hand side of diagram. 10 per cent -- I should say 11 these adopt the same rates of interest as in their 12 example. 13 What you do after that is, well, interest ceases to 14 compound on the part that's been paid when it's paid. 15 So you park £10.50. That's interest that will be due on 16 that sum if and when a surplus arises. The £49 is then 17 paid after four years. The £49 is compounded at 18 10 per cent for the entire period of time it's 19 outstanding -- that's four years -- at the end of which 20 that results in the sum of £22.74. That's parked. 21 The £1 has been outstanding for the entire period of 22 six years, and as to £1, interest is compounded at 23 10 per cent over the period, resulting in the £0.77. 24 The total is £34.01. 25 Now, that differs from the way it's put in the</p> <p style="text-align: center;">Page 72</p>

<p>1 fourth example, in that in the fourth example what 2 continues to compound after the end of year 2 is the 3 entirety of the interest that has so far compounded on 4 the £50 that's now been paid. 5 LADY JUSTICE GLOSTER: You are comparing yours with their 6 fourth example. 7 MR ZACAROLI: Yes. 8 LADY JUSTICE GLOSTER: So you are saying they have their 9 calculations wrong. 10 MR ZACAROLI: The numbers are correct on the way they have 11 done it. We say that the flaw -- and the difference 12 between us is this: we say paying interest for the 13 periods those debts are outstanding requires you to look 14 at each slug of the principal that is paid separately 15 and work out what interest is due on that period from 16 the time it was outstanding. 17 Now, just to contrast that with a perhaps absurd 18 example of an attempt to gain the system. So after 19 two years let's say -- if after two years the whole £100 20 had been paid, then you would have your -- 21 LORD JUSTICE BRIGGS: You mean a single dividend at the end 22 of two years of the whole year? 23 MR ZACAROLI: Single dividend is paid in one go, you have 24 compound interest in this example of £21 for those 25 two years on the £100. Let's assume that rather than</p> <p style="text-align: center;">Page 73</p>	<p>1 LADY JUSTICE GLOSTER: No, you don't agree with the third 2 for the similar reasons -- 3 MR ZACAROLI: That's right. So that's our response to the 4 contention -- 5 LORD JUSTICE BRIGGS: Does the same criticism affect their 6 second example? 7 MR ZACAROLI: I think their second example is on the 8 assumption they are right, I think. 9 LORD JUSTICE BRIGGS: Yes. 10 MR ZACAROLI: So we disagree with it for the reasons 11 fundamentally -- 12 LADY JUSTICE GLOSTER: The arithmetic -- 13 MR ZACAROLI: We don't take issue with the arithmetic. 14 LADY JUSTICE GLOSTER: Yes, and obviously on 1 as well. 15 MR ZACAROLI: Yes, we accept the arithmetic but we have a 16 different approach. 17 LADY JUSTICE GLOSTER: You don't accept the principle. 18 MR ZACAROLI: That's right. 19 LADY JUSTICE GLOSTER: Thank you. 20 MR ZACAROLI: Turning then to the question of non-provable 21 claim for interest. 22 LORD JUSTICE PATTEN: Where are we in terms of the -- is 23 this -- this is another issue now? 24 MR ZACAROLI: Yes, this is now a combination of two issues 25 actually. I'll actually pick up some more in a moment.</p> <p style="text-align: center;">Page 75</p>
<p>1 paying £100, £99 was paid and left £1 outstanding for 2 the remainder of the period. If you were to bring into 3 account the £21 that's continuing to compound after the 4 date you paid £99, you would then be applying a rate of 5 interest on the remaining £1 for the remaining period at 6 an extortionately high amount. 7 The only economic difference between the first 8 example and the second is £1. Otherwise the debt is no 9 longer outstanding as to 99 per cent of it. And that's 10 why we say the logic of this works, that in that example 11 of £99 being paid, after two years, and £1 being left 12 outstanding thereafter, interest will continue to accrue 13 on a compounding basis in relation to the £1 that's 14 outstanding, including the two years which is 15 outstanding until the £99 was paid. So this way picks 16 up perfectly the notion of interest compounding during 17 the period for which interest is payable. 18 LADY JUSTICE GLOSTER: Yes. 19 MR ZACAROLI: So that's our response to the fourth example. 20 We haven't produced an example to contradict the 21 third example, but exactly the same error, we say, 22 exists in that example, although it's not done without 23 the pound outstanding. So we don't agree with the -- if 24 my Lords want us to produce an example that contradicts 25 expressly the third, we can.</p> <p style="text-align: center;">Page 74</p>	<p>1 LADY JUSTICE GLOSTER: Can you give us the item number first 2 of all? 3 MR ZACAROLI: Yes. So the item number first of all is 4 number 4. 5 LADY JUSTICE GLOSTER: That's the left-hand column. 6 MR ZACAROLI: The left-hand column, item 4, which is 7 essentially interest -- compensating for the late 8 payment of interest. 9 LADY JUSTICE GLOSTER: Yes. This is declaration 4. 10 MR ZACAROLI: It is, yes. And then the second -- 11 LADY JUSTICE GLOSTER: What was issue 2A? 12 MR ZACAROLI: These are all within issue 2A, it was a broad 13 issue. And the second point I have to deal with is the 14 non-provable claim to a shortfall, which is item 15 number 3, declaration 5. 16 LADY JUSTICE GLOSTER: I'm going to ask you at the end of 17 this hearing for your issues list to be updated with 18 references in the transcripts, please, because that 19 would be extremely helpful to me. So there would be 20 another column. 21 MR ZACAROLI: I'm going to deal first with the question of 22 interest because you've been paid interest late. So 23 interest on interest. The judge dealt with this at 24 paragraphs 165 to 167 of the judgment. The essential 25 claim is identified at 165, fourth sentence:</p> <p style="text-align: center;">Page 76</p>

<p>1 "The SCG and York submit that creditors are entitled 2 to compensation in respect of the loss caused by the 3 time taken to distribute the surplus." 4 That's the surplus in respect to interest. And 5 there are two fundamental obstacles to this. The judge 6 identifies them in the next two paragraphs. 7 Paragraph 166 he says: 8 "First obstacle is that whilst statutory interest 9 ... (Reading to the words)... the rule does not stipulate 10 the time at which such payment is to be made." 11 In other words, there's no foundation for a claim 12 that the payment has been made late because there's no 13 obligation to pay it by any particular time. In the 14 absence of that obligation, it's impossible to identify 15 a cause of action which would entitle you to claim for 16 the loss you say you suffered by interest not being paid 17 at any particular date. We say the judge is right for 18 the reasons there given. It's hard to improve on that 19 paragraph. 20 The second point, obstacle, in 167 is that the 21 legislation makes no provision for the payment of 22 interest on statutory interest. That is obviously true. 23 Rule 2.88(7) is concerned solely with paying interest on 24 proved debts. Had it been in the mind of the legislator 25 to provide a third round of proofs in relation to late</p> <p style="text-align: center;">Page 77</p>	<p>1 There is no cause of action because there is no date by 2 which interest is to be paid. It would give rise to 3 a whole host of questions and complications if there 4 were, because it's payable out of a surplus. Does that 5 mean only when it is surplus cash, or when there is 6 surplus in asset which is yet to be realised? You 7 obviously can't pay interest out of that until you have 8 realised it. At what point does this date arise? There 9 is no date, there is just an identification of a payment 10 out of a surplus. 11 LORD JUSTICE PATTEN: The judge's treatment of this is all 12 on the premise which he's dealt with already that it's 13 a complete code. So he's shut out any question of 14 remission to contractual rights because obviously if he 15 hadn't then presumably delays in payment -- the clock 16 would still be ticking, wouldn't it? 17 MR ZACAROLI: I think as my learned friend Mr Dicker 18 accepted yesterday, in relation to -- if it's not 19 a complete code, and so contractual rights remain, and 20 you have a right under contract to apply money towards 21 interest before principal, then there's no need for this 22 claim because you are always compensated. 23 LORD JUSTICE PATTEN: No, if Bower v Marris applies, 24 I think he accepts that this doesn't. 25 MR ZACAROLI: That's what I'm saying, yes.</p> <p style="text-align: center;">Page 79</p>
<p>1 payment of interest, it would have been the simplest 2 thing to state in the Act. The absence of it in the 3 Act, the absence of it in the Cork Report or the White 4 Paper suggest it was clearly no part of the legislative 5 intention to create a further claim for interest upon 6 interest. Generally speaking, that would be an odd 7 conclusion, particularly if one's comparing the rates 8 under the Judgment Act because Judgment Act interest is 9 simple only. That is regarded as being enough. 10 A very short reference, perhaps we needn't turn it 11 up, but Novoship v Mikhaylyuk, paragraphs 140 to 141, is 12 where Lord Justice Longmore refers to the concept of 13 interest under the Judgment Act being regarded as enough 14 is enough. You don't get any more than that. It's 15 simple, not compound. 16 In their skeleton argument, the SCG place reliance 17 on the case of Sempra Metals. We say that's irrelevant. 18 I don't think this point was pursued orally; if it was, 19 it was very shortly pursued. Essentially, whilst it's 20 possible to claim interest as damages for the late 21 payment under Sempra Metals as a head of loss, the 22 essential prerequisite is a cause of action, the payment 23 by a particular time, and without that fundamental 24 prerequisite, you don't get such a claim off the ground. 25 So it's just irrelevant to refer to Sempra Metals.</p> <p style="text-align: center;">Page 78</p>	<p>1 LORD JUSTICE PATTEN: But if Bower v Marris doesn't apply 2 but it's not a complete code, then you would be able to 3 get the money on the basis that time was still running, 4 wouldn't you. 5 MR ZACAROLI: There are two classes of creditor, one with 6 a contractual right to which -- 7 LORD JUSTICE PATTEN: I'm assuming now you have 8 a contractual right to interest, or contractual or other 9 right to interest. 10 MR ZACAROLI: Yes. 11 LORD JUSTICE PATTEN: I'm just trying to make sure I've 12 understood the context in which this point is 13 a possibility. 14 MR ZACAROLI: I think there are two particular circumstances 15 in which it remains a possibility. First of all, there 16 is a complete code, in which case this argument would be 17 necessary. 18 LORD JUSTICE PATTEN: Well then you would to, as you were 19 about to say to us, you would have to identify a 20 separate cause of action. 21 MR ZACAROLI: Yes, correct. 22 LORD JUSTICE PATTEN: Yes. 23 MR ZACAROLI: It arises then. 24 LORD JUSTICE PATTEN: Yes. 25 MR ZACAROLI: It also arises if it's not a complete code,</p> <p style="text-align: center;">Page 80</p>

1 I think I'm right in saying this, in relation to
 2 a creditor who has no interest bearing debt. Because
 3 their only right is to -- on any view is to payment of
 4 statute.
 5 LORD JUSTICE PATTEN: But then because they don't have
 6 a contractual or other pre-existing right they also have
 7 to identify a cause of action, haven't they?
 8 MR ZACAROLI: Yes, indeed. That's why this point arises in
 9 both contexts. They have to identify cause of action in
 10 both contexts.
 11 LORD JUSTICE PATTEN: Yes.
 12 LORD JUSTICE BRIGGS: But the two declarations -- we are
 13 really looking at a grey area between declarations 4 and
 14 5, aren't we? Declaration 4 is all about whether you
 15 have a specific claim for delay in payment of statutory
 16 interest.
 17 MR ZACAROLI: Yes.
 18 LORD JUSTICE BRIGGS: Declaration 5 is all about whether if
 19 you get less statutory interest than you would if you've
 20 been reverted to your contractual rights you have
 21 a non-provable claim for the difference.
 22 MR ZACAROLI: Yes. But I think we are therefore dealing
 23 with only the first of those for the moment.
 24 LORD JUSTICE BRIGGS: Yes.
 25 MR ZACAROLI: We say the judge was right for the reasons he

Page 81

1 gave, I have amplified a little, but we say actually
 2 there's not much to add. But his reasoning is perfectly
 3 cogent and is the right answer.
 4 LADY JUSTICE GLOSTER: Yes.
 5 MR ZACAROLI: Turning then to the slightly larger topic of
 6 declaration 5, that is where there is a non-provable
 7 claim to interest. There are two other declarations
 8 which go hand-in-hand with this. Because on the judge's
 9 reading the complete code argument prevented both of
 10 these claims arising, and they are declarations 18 and
 11 19 on the list, that's numbers -- I believe it's 9 and
 12 10.
 13 LADY JUSTICE GLOSTER: So it's items 9 and 10.
 14 MR ZACAROLI: Items 9 and 10.
 15 LADY JUSTICE GLOSTER: Sorry, declarations.
 16 MR ZACAROLI: They are declarations 17 and 19.
 17 LORD JUSTICE PATTEN: Why couldn't we have had the issues
 18 and the items lined up? I mean, all this supplementary
 19 issue 3 and so on.
 20 LADY JUSTICE GLOSTER: Byzantine, isn't it?
 21 MR ZACAROLI: It is.
 22 LADY JUSTICE GLOSTER: You would have thought that between
 23 you you could have come up with some simplified
 24 formulation with appropriate references in the judgment,
 25 but there we go.

Page 82

1 MR ZACAROLI: On behalf of all of us I think we apologise
 2 that we haven't.
 3 LADY JUSTICE GLOSTER: Not sure I will accept it. Anyway,
 4 we are where we are.
 5 LORD JUSTICE PATTEN: So we are now on items 9 and 10,
 6 issues 29 and 30.
 7 MR ZACAROLI: Yes. I mentioned those because those are
 8 important to consider in this context. I don't think my
 9 learned friend dealt with those separately as such, and
 10 again if he did it was very swift. Those are the issues
 11 which say there isn't a currency conversion claim where
 12 the interest you get, once converted into sterling at
 13 the date of payment, is less than your contractual right
 14 to interest under your foreign currency denominated
 15 contract. That's issues 18 and 19, put in two different
 16 ways depending on whether it's statutory interest or
 17 contractual rates you're entitled to -- Judgments Act
 18 rate or contractual rate. The reason they go
 19 hand-in-hand with this is the judge's conclusion that
 20 there is a complete code ruled out in itself the
 21 possibly of there being a currency conversion claim in
 22 relation to interest accruing post-administration,
 23 because you don't have a contractual right to it against
 24 which it could be compared. Currency conversion claim
 25 is all about comparing your contractual right to

Page 83

1 dollars -- with the dollars you get out of the scheme.
 2 And if there's a complete code, his reasoning was it
 3 means that there can't be a claim -- remaining
 4 contractual entitlement to interest in dollars or in
 5 sterling, or whatever, because it's gone as a result of
 6 the complete code. And therefore the possibility of
 7 a currency conversion claim in relation to your receipts
 8 in dollars by way of interest is simply cut off.
 9 So if he's wrong about the complete code, we say it
 10 would follow that those conclusions also have to be
 11 reversed.
 12 LORD JUSTICE PATTEN: I'm sorry, I'm being very slow.
 13 I mean, a currency conversion claim is an unprovable
 14 claim.
 15 MR ZACAROLI: Yes.
 16 LORD JUSTICE PATTEN: So why does the fact that rule 2.88 is
 17 a complete code, which is primarily directed to provable
 18 claims, it's interest on provable claims, cut out
 19 a claim for interest on an unprovable claim?
 20 MR ZACAROLI: That goes to the heart of many of the issues
 21 about off-set --
 22 LORD JUSTICE BRIGGS: That bring on board off-set.
 23 MR ZACAROLI: Because it's the same debt. You only have one
 24 debt. I'm entitled to be paid \$100. I will be coming
 25 to this and going to the detail later, but fundamentally

Page 84

<p>1 there's one debt on which it's converted and then you 2 get interest. 3 LORD JUSTICE PATTEN: I understand that. 4 MR ZACAROLI: The judge says well if there is a complete 5 code it rules out any right to interest beyond the date 6 of administration. So you can't argue about the 7 difference between the interest you would have received 8 by contract and the issue you get out of the estate. 9 LORD JUSTICE PATTEN: But you can have a non-provable claim 10 for the loss you suffered. 11 MR ZACAROLI: It's not loss. It's not a loss. 12 LORD JUSTICE PATTEN: No, you can have a currency conversion 13 claim, which is a non-provable claim, for the loss you 14 suffered by reason of the conversion of the -- 15 LADY JUSTICE GLOSTER: Which is a damages claim, isn't it? 16 MR ZACAROLI: My Lady no, it's not. 17 LADY JUSTICE GLOSTER: It's a debt claim, is it? 18 MR ZACAROLI: It's a debt claim, that's the way it's been 19 analysed by the Court of Appeal in Waterfall I. It is 20 simply you are remitted to the right to come back for 21 the rest of the debt in dollars that you didn't get 22 through the statutory process. 23 LORD JUSTICE PATTEN: Because you are worse off than you 24 would have been had there been no liquidation process. 25 But that one gets through because that's not affected on</p> <p style="text-align: center;">Page 85</p>	<p>1 waste of time. 2 MR ZACAROLI: It could. The moving parts I was referring to 3 were moving parts within the appeal. 4 LORD JUSTICE BRIGGS: Speaking for-myself I think it would 5 be certainly be easier for me to look, as it were, 6 distinctly at declaration 5, which is where I thought 7 we'd got to -- 8 MR ZACAROLI: Yes. 9 LORD JUSTICE BRIGGS: -- without getting too distracted by 10 declarations, whatever they are, 18 and 19. 11 MR ZACAROLI: Certainly I'm happy to do that. 12 LORD JUSTICE BRIGGS: Forget about foreign currency claims, 13 assume it's a purely UK problem with a sterling contract 14 debt which carried a rate of interest which, had there 15 not been an insolvency process, would have got you more 16 by the end of the day than you get under statutory 17 interest under 2.88. That's a relatively, even for me, 18 comprehensible question. 19 MR ZACAROLI: Indeed I was going to do that. It's important 20 to note that this -- 21 LORD JUSTICE BRIGGS: There's some nasties lurking behind 22 the arrows but let's go and deal with them once we've 23 got rid of vanilla one. 24 MR ZACAROLI: That's where I am going next. Would that be 25 a convenient moment?</p> <p style="text-align: center;">Page 87</p>
<p>1 the judge's reasoning by anything that 2.88 is doing. 2 MR ZACAROLI: Yes. There's a great number of moving parts 3 here. 4 LORD JUSTICE PATTEN: Yes, there are. 5 LADY JUSTICE GLOSTER: Particularly while we are waiting for 6 the Supreme Court judgment. 7 MR ZACAROLI: Indeed. I'm afraid this is an area which is 8 very much impacted by what the Supreme Court say about 9 whether they exist, and if they do, how. 10 LORD JUSTICE PATTEN: How they work. I mean, it's worse 11 than that, isn't it? Because you have to argue this 12 appeal on the basis that Waterfall 1 in this court is 13 rightly decided. 14 MR ZACAROLI: Yes. I accept that, yes. 15 LORD JUSTICE PATTEN: So we're not able to entertain 16 arguments that proceed on any different premise. 17 MR ZACAROLI: I'm not doing that. 18 LORD JUSTICE PATTEN: I'm not saying you are. The trouble 19 is that once one gets into this, I mean it's very 20 tempting -- but you are going to tell me we have to 21 resist it -- to actually look at the matter much more 22 broadly. We have to wait to see what the Supreme Court 23 says about it. 24 MR ZACAROLI: Well. 25 LORD JUSTICE PATTEN: Which could make all this a complete</p> <p style="text-align: center;">Page 86</p>	<p>1 LADY JUSTICE GLOSTER: Yes, it would. Can you just give me 2 an example of the sort of contractual provision that you 3 have in mind in relation to declaration 5. Just a real 4 life one rather than as is described here. 5 MR ZACAROLI: A contractual provision which entitles you 6 to -- 7 LADY JUSTICE GLOSTER: More than -- 8 MR ZACAROLI: Yes, say a 10 per cent right -- 9 LADY JUSTICE GLOSTER: It's as simple as that. 10 MR ZACAROLI: Yes. But in particular, it's the -- in fact 11 what we are concerned with here is whatever wouldn't 12 have been picked up by rule 2.88, 10 per cent would have 13 been. So what we are really concerned with here is the 14 right to appropriate payments to interest first rather 15 than principal. 16 LORD JUSTICE BRIGGS: And to go on accruing interest after 17 the final payment of principal by way of dividend. 18 MR ZACAROLI: Or, as I am being reminded, repeatedly 19 compounding it. 20 LADY JUSTICE GLOSTER: Yes. Thank you very much, 2.00. 21 (1.00 pm) 22 (The short adjournment) 23 (2.00 pm) 24 LADY JUSTICE GLOSTER: Mr Zacaroli, before you go any 25 further, the court would just like to be clear about the</p> <p style="text-align: center;">Page 88</p>

<p>1 waterfall and how it flows down. Is it agreed that as 2 at present in the light of Waterfall I, the decision of 3 this court in Waterfall I, that the priority flows down 4 as follows after a fixed charge, prefs(?), expenses, 5 et cetera, and floating charge creditors, unsecured 6 provable debts, statutory interest, non-provable 7 liabilities, subordinated debt, interest on subordinated 8 debt shareholders, or in the light of the majority in 9 Waterfall I are you saying it flows down differently? 10 Should I repeat that? 11 MR ZACAROLI: I have it, my Lady. 12 LADY JUSTICE GLOSTER: We just want to be clear that we're 13 all agreed or understood as to what both parties agree 14 is the right -- 15 MR ZACAROLI: I believe that is the right order. 16 LORD JUSTICE PATTEN: Because I think I put to you a point 17 before the adjournment on what might be a false 18 assumption. I have looked at part of the judgment. 19 It's all a question of where you rank in relation to 20 an non-provable liabilities. Because a point we're on 21 makes no difference to you unless you are after them. 22 You are sandwiched between them and members, isn't that 23 right? 24 MR ZACAROLI: It depends on other issues. 25 LORD JUSTICE PATTEN: It may do.</p> <p style="text-align: center;">Page 89</p>	<p>1 LORD JUSTICE PATTEN: I see, right. 2 MR ZACAROLI: But also, my Lord, in a sense, where the 3 interest of my client might lie is one thing, but of 4 course there might well be other cases where 5 a subordinated claim is not subordinated to interest but 6 just to provable debt. 7 LORD JUSTICE PATTEN: Well, it depends what the terms are, 8 obviously. 9 MR ZACAROLI: It does indeed. 10 LORD JUSTICE BRIGGS: But a subordinated debt could be 11 provable and carry statutory interest. 12 MR ZACAROLI: Yes. 13 LORD JUSTICE PATTEN: But I assume you'd come here because 14 your clients had some material interest in the outcome. 15 MR ZACAROLI: Yes. 16 LORD JUSTICE PATTEN: Rather than just arguing points of 17 general public interest. 18 MR ZACAROLI: Indeed, my Lord. 19 LADY JUSTICE GLOSTER: Yes. I mean, that makes the 20 assumption that subordinated debt is subordinated to 21 everything else, doesn't it? 22 MR ZACAROLI: Yes, the current Court of Appeal decision is 23 that it's subordinated, I think, to everything. 24 LORD JUSTICE BRIGGS: It's a fact sensitive decision on the 25 basis upon which that debt was incurred.</p> <p style="text-align: center;">Page 91</p>
<p>1 MR ZACAROLI: I can't give a straight answer to that in 2 terms of where our interest lies, but that rather 3 complicates it, but -- 4 LORD JUSTICE PATTEN: We are looking at in more simple terms 5 at the moment. 6 MR ZACAROLI: Simple terms, yes. 7 LORD JUSTICE PATTEN: As to how much comes out at each 8 stage. 9 LADY JUSTICE GLOSTER: And that's agreed. So subordinated 10 debt, well, I have it here as 8, then interest on 11 subordinated debt at 9, and members at 10. 12 MR ZACAROLI: Yes. 13 LADY JUSTICE GLOSTER: So there's no argument that, for 14 example, subordinated debt, statutory interest, would be 15 pari passu with 6, statutory interest. 16 MR ZACAROLI: Not as the current Court of Appeal decision 17 stands. 18 LADY JUSTICE GLOSTER: Yes. 19 MR ZACAROLI: That is an issue dealt with -- it's one of the 20 questions my Lady asked me to look at -- at 21 paragraphs 58 and 59 of the Court of Appeal judgment. 22 That is an issue -- 23 LADY JUSTICE GLOSTER: In Waterfall I. 24 MR ZACAROLI: Waterfall I. That is an issue which is live 25 in front of the Supreme Court.</p> <p style="text-align: center;">Page 90</p>	<p>1 MR ZACAROLI: On that piece of debt, on that particular 2 contract. 3 LADY JUSTICE GLOSTER: Yes. I suppose it might vary if 4 there was no contractual provision subordinating it to 5 non-provable liability. 6 MR ZACAROLI: Yes. 7 LADY JUSTICE GLOSTER: Or not subordinating it to, I don't 8 know, statutory interest where there's apparently in the 9 rules a pari passu provision. 10 MR ZACAROLI: Yes. 11 LADY JUSTICE GLOSTER: So it does depend on the 12 Court of Appeal's decision and the terms of the 13 particular contract. 14 MR ZACAROLI: Yes. 15 LADY JUSTICE GLOSTER: Right. But here, so long as it 16 stands at any rate, your particular claim, Wentworth's 17 claim, is governed by the Court of Appeal's decision. 18 MR ZACAROLI: That is correct. 19 LADY JUSTICE GLOSTER: Thank you. 20 MR ZACAROLI: My Lord, there is another question I was asked 21 to check which was question of whether Mackenzie v Rees 22 was referred to in the judgment. It is not referred to 23 in the judgment by name. The judge refers to Australian 24 cases to which he was referred. It was one of them and 25 he was referred to it, but he doesn't make reference to</p> <p style="text-align: center;">Page 92</p>

<p>1 it in the judgment. 2 LADY JUSTICE GLOSTER: Thank you. 3 MR ZACAROLI: I have my Lord, Lord Justice Briggs's question 4 in mind. I don't have a definite answer yet. Can 5 I postpone that a little longer? 6 Turning then to the question of non-provable claims 7 to interest. The judge dealt with this at 8 paragraphs 156 to 164 of his judgment. The arguments 9 made to him were essentially those made to this court by 10 the SCG, which the judge rejected and we respectfully 11 suggest the judge got the right answer for the reasons 12 he there gave. In particular, paragraph 164 is the 13 essence of it. On the fifth line, he says: 14 "Rule 2.88 is not a partial measure for dealing with 15 post-insolvency interest. If it was only a partial 16 measure, why provide that interest is payable at the 17 rate applicable apart from the administration 18 ...(Reading to the words)... Payment of further 19 post-insolvency interest as a non-provable debt out of 20 the surplus remaining." 21 We submit that that conclusion is supported by five 22 propositions: first, the construction of the rule; 23 second, the pre-legislative materials; thirdly, by 24 reference to the regime which had been applicable in 25 bankruptcy prior to 1986; fourth, that the substantial</p> <p style="text-align: center;">Page 93</p>	<p>1 so if it is for any other purpose it supports the view 2 that this is the only route to interest for this 3 post-administration period. 4 LADY JUSTICE GLOSTER: Yes. 5 MR ZACAROLI: There is -- 6 LADY JUSTICE GLOSTER: So the purpose is interest. 7 MR ZACAROLI: Yes, exactly. 8 LADY JUSTICE GLOSTER: And it can't be applied for any 9 interest purpose. 10 MR ZACAROLI: That's right, because that's covered by the 11 rule. 12 Textual support for that is provided by section 189 13 of the Act, which is the mirror image provision in 14 relation to winding up. The oddity about this aspect is 15 that some of these rules are in the Act, some 16 procedures, some in the rules. The interest provision 17 for winding up is in section 189, and it's materially 18 the same, we suggest, as the Cork Committee proposed. 19 There should be no difference between the different 20 regimes, but there is an additional word in 21 section 189(2). It says: 22 "Any surplus remaining after payment of proved debts 23 in full before being applied for any other purpose ..." 24 We say the same word must be implied into rule 2.88. 25 LADY JUSTICE GLOSTER: Yes.</p> <p style="text-align: center;">Page 95</p>
<p>1 changes to the rights of creditors as against the debtor 2 introduced by those rules are inconsistent with 3 a remission to contractual rights thereafter; and, 4 fifthly, a reference again to points of principle and 5 policy which I will deal with very shortly. 6 LORD JUSTICE BRIGGS: Sorry, what was your second one? 7 MR ZACAROLI: The second one was the pre-legislative 8 materials. 9 LORD JUSTICE BRIGGS: Thank you. 10 MR ZACAROLI: So far as the first point is concerned, 11 construction, rule 2.88(7) requires the surplus to be 12 used or applied before being applied for any purpose 13 towards paying interest on the debts. We say that in 14 context, that means any other purpose, ie than paying 15 interest on the debts. The rule is about compensating 16 creditors for loss of the time value of money after 17 administration. This is the way it's to be done, by 18 paying interest, and therefore the purpose there 19 mentioned must be any other purpose. 20 LADY JUSTICE GLOSTER: Is there any dispute about that? Or 21 is there any difference between any purpose and any 22 other purpose? 23 MR ZACAROLI: We say this a nuance because any other 24 purpose, ie other than compensating creditors for the 25 time value of money for the period after administration,</p> <p style="text-align: center;">Page 94</p>	<p>1 MR ZACAROLI: We say that's a construction which is 2 supported by what one might impute to be the intentions 3 of the draftsman here. The draftsman has tried to cater 4 for the proposition that creditors are being kept out of 5 their money, some compensation needs to be paid. We say 6 it would be an odd intention to impute the draftsman to 7 do that only partially through a rule which relates to 8 that period, and that he didn't intend the creditors to 9 come back for any more afterwards. 10 Secondly, the pre-legislative materials I mentioned, 11 really this is the Cork Report. We have seen it before. 12 The only point to make is there's nothing in the Cork 13 Report that suggests that the new rule was supposed to 14 be a partial solution to the issue. If it was intended 15 for there to be a further round of proofs or interest 16 claims, that would have been easy to state. 17 Third point is the pre-existing position in 18 bankruptcy. Again, I have already dealt with the 19 substance of this, that in the 1883 Act there is no room 20 under the Act for any remission to contractual rights to 21 interest between creditors being paid in interest under 22 this Act provided, and it going back to the debtor. 23 Now, my Lord, Lord Justice Briggs, asked yesterday 24 about the discharge provisions in the 1883 Act, whether 25 there was any magic in them, relating to (inaudible).</p> <p style="text-align: center;">Page 96</p>

1 There are two sections to look at. The first is
 2 section 30 of the 1883 Act.
 3 LORD JUSTICE PATTEN: So this is in bundle --
 4 MR ZACAROLI: Bundle 4, 145.
 5 LADY JUSTICE GLOSTER: Section 30.
 6 MR ZACAROLI: Section 30, yes. Tab 145. So there's
 7 a subsection 1 is a whole series of things that are not
 8 released by the discharge of the bankrupt. A variety of
 9 specific matters set out there. And then 2 is the
 10 important one:
 11 "An order of discharge shall release the bankrupt
 12 from all other debts provable in the bankruptcy."
 13 And then the definition of provable debts is to be
 14 found at section 37, 145B that is. So subsection 1 is
 15 an exclusion of unliquidated damages claim. There's
 16 a exclusion of debts that are contracted after the
 17 notice of an act of bankruptcy, and then subsection 3:
 18 "Save as aforesaid, all debts and liabilities,
 19 present or future, certain or contingent, to which the
 20 debtor is subject at the date of the receiving order or
 21 to which he may become subject before his discharge by
 22 reason of an obligation incurred before that date, shall
 23 be deemed to be debts provable in the bankruptcy."
 24 Now, it's a judge-made rule at this time that
 25 interest which accrues after the date of the

Page 97

1 commencement of the bankruptcy is not provable but is
 2 deferred, and there is no section in the Act which says
 3 you can't get interest beyond the date of bankruptcy.
 4 So we would say the short point is this: the Act
 5 does discharge the bankrupt himself, the person, the
 6 bankrupt, from a claim for further interest because it's
 7 covered by the definition of provable debts in the Act
 8 from which he is released on his discharge. So there is
 9 no room for a creditor to come against the bankrupt
 10 person after discharge. The creditor is limited to
 11 whatever rights he has against the estate, and those
 12 rights include a right to interest at 4 per cent out of
 13 any surplus, if there is one. But the bankrupt himself
 14 is discharged.
 15 We say that makes absolute sense when you consider
 16 that, otherwise, a creditor who didn't get any interest
 17 from the estate because there never was a surplus would
 18 be able to pursue the bankrupt for interest accruing
 19 after the date of bankruptcy. If the bankrupt was not
 20 released, in his person, from any interest accruing
 21 after the date of bankruptcy, it would mean a creditor
 22 could go against the bankrupt for that interest, whether
 23 or not the estate remained insolvent, and that would be
 24 an absurd proposition.
 25 Under the modern attitude towards bankruptcy,

Page 98

1 utterly inconsistent with the rehabilitation approach.
 2 Maybe in 1883 that wasn't quite the same, there was
 3 a discharge but not for all things, but we say the logic
 4 remains the same.
 5 LORD JUSTICE BRIGGS: There are all sorts of liabilities
 6 that didn't fall within 37(3) in those days.
 7 MR ZACAROLI: Yes, for example --
 8 LORD JUSTICE BRIGGS: -- from which he would not be
 9 discharged. Discharge from provable debts you say
 10 includes, by implication, and from any interest accruing
 11 on those debts.
 12 MR ZACAROLI: Yes. Well, because it's a future liability
 13 arising out of an obligation (inaudible) bankruptcy
 14 within the definition of 37(3).
 15 LORD JUSTICE BRIGGS: Although you said that it was
 16 a judge-made rule that interest wasn't provable.
 17 MR ZACAROLI: Yes. As matter of convenience, as we saw
 18 in --
 19 LORD JUSTICE BRIGGS: Do you mean before the Act or do you
 20 mean it was provable after the act?
 21 MR ZACAROLI: No, no, no --
 22 LORD JUSTICE BRIGGS: Not provable at all.
 23 MR ZACAROLI: It's not provable as a matter of judge-made
 24 law, but that doesn't necessarily effect the definition
 25 within here of what the bankrupt is being discharged

Page 99

1 from, when you look at 30 and 37(3) together. It would
 2 be very surprising conclusion that he is released from
 3 debt but interest accruing on that debt post-bankruptcy
 4 he is not released from. That doesn't make any sense.
 5 The first answer would be it's as a matter of
 6 construction the release extends to the interest of
 7 debt, and the second would be in 1883 it's a complete
 8 code, so the creditor's rights are altered by the
 9 provision allowing them interest for the post-bankruptcy
 10 period to the extent that takes away any other
 11 contractual right they might have had.
 12 The fourth point is the linked one I just made about
 13 the substantial change in creditors' rights that are
 14 affected by rule 2.88 itself. First of all, sub-rule 1
 15 precludes proof for interest, that means you can't claim
 16 against the company for interest beyond the date of
 17 bankruptcy, and in place there's a whole series of
 18 rights, some of which cut across your otherwise
 19 entitlement under contract, some of which give you much
 20 greater rights than you would have had under your
 21 contract.
 22 Now, another point put to me yesterday by my Lady,
 23 Lady Justice Gloster, was the question about what
 24 happens in administration if, at the end of all
 25 distributions, there remains a surplus or a surplus

Page 100

<p>1 arises for some reason, and the creditor who had 2 a provable claim comes out of the woodwork and says, 3 "Well, I want to claim against this". I think the 4 question you were asking me was, well -- 5 LADY JUSTICE GLOSTER: But he doesn't prove, I think I put 6 it on that hypothesis. I may not need to put it on that 7 hypothesis, but I did. 8 MR ZACAROLI: Let's leave it as he comes in to make a claim 9 against the company that is still in administration, 10 this surplus having appeared. The answer to that is if 11 he wants to claim at all, he must prove. 12 LADY JUSTICE GLOSTER: Even though all the debts had been 13 paid and there's a surplus? 14 MR ZACAROLI: Yes, because there's a statutory provision, 15 regime, that is meant to treat all creditors equally. 16 It doesn't matter when you come in, what date you come 17 into the scheme, provided that what you come in with is 18 a debt that was provable, you must abide by the 19 statutory scheme. So just take a very simple example. 20 Let's assume we are right about Bower v Marris on 21 rule 2.88 and this creditor had a contractual claim to 22 interest which would, absent any insolvency, have 23 entitled him to calculate interest on a Bower v Marris 24 basis. So there's a slug of interest he's not getting 25 out the regime. We would say he is treated like anybody</p> <p style="text-align: center;">Page 101</p>	<p>1 an administration order with nothing more happening. 2 LORD JUSTICE BRIGGS: At any stage in theory, I suppose. 3 MR ZACAROLI: At any stage, and there is no distinction here 4 made between a distributing administration and a 5 non-distributing administration. As a concept, it can 6 be terminated through a series of statutory -- 7 LADY JUSTICE GLOSTER: So theoretically it could go back to 8 the company under its previous Board of Directors. 9 MR ZACAROLI: It could. At that stage, I don't know what 10 the answer is. It's never arisen. That couldn't occur 11 in any other insolvency process. The liquidation can't 12 be brought to an end in that way. 13 Let's imagine a liquidation which is brought to end 14 because the liquidator thinks he has distributed 15 everything. He would then seek dissolution of the 16 company. Let's say years later -- well, there would 17 have to be limitation period, but sometime later, 18 a creditor comes forward and says, "I think this company 19 has an asset and I have a claim which I deliberately 20 stayed out of the proof process for". What would happen 21 then is the company is restored to the register, but it 22 gets restored to the register in the form or under the 23 proceedings that it was under at the time it was 24 dissolved. It doesn't cease to be in liquidation. 25 There would be no a liquidator. You would need to put</p> <p style="text-align: center;">Page 103</p>
<p>1 else who is a provable creditor, at whatever date they 2 come in. 3 We say, again, it would be slightly absurd if you 4 had any different answer, because it would just mean 5 creditors, if they thought there was going to be a 6 surplus -- 7 LADY JUSTICE GLOSTER: Would hang on until the end. 8 MR ZACAROLI: Would sit back and wait. If you want to make 9 a claim against the company in an insolvency process, 10 you must -- what you are doing is proving. You can't 11 avoid the necessary characterisation of that as a proof. 12 LADY JUSTICE GLOSTER: What happens at the end of 13 an administration where the administrators have 14 distributed? Is it always the case that the company 15 will go into liquidation or not necessarily? 16 MR ZACAROLI: I need to correct something I said yesterday. 17 LADY JUSTICE GLOSTER: Yes, I thought you told me it always 18 went into liquidation if it was a distributing 19 administrator. 20 MR ZACAROLI: I don't know a case where that hasn't 21 happened. It would be most unusual for the court to 22 start construing the rules on the basis of that real 23 outlying possibility. 24 LADY JUSTICE GLOSTER: But it is possible. 25 MR ZACAROLI: It is possible because you can just discharge</p> <p style="text-align: center;">Page 102</p>	<p>1 a new liquidator in place to gather in the asset and 2 then that creditor is a proving creditor who can only 3 get what the statutory scheme gives him. 4 LADY JUSTICE GLOSTER: What's the provision that says in 5 relation to -- is it in the Companies Act or is it in 6 the Insolvency Act, which says a member can't claim in 7 his capacity as such before a creditor? Or is that just 8 the general distribution provisions which you showed -- 9 MR ZACAROLI: It's in 74(2)(f) of the Insolvency Act. I say 10 that as if I know it off by heart -- I heard it 11 whispered to my left. It's preventing the member 12 competing with creditors for that claim. 13 LADY JUSTICE GLOSTER: And it's just that one -- any sum 14 due. 15 MR ZACAROLI: Yes. It's not a right to a distribution for a 16 member because clearly that cannot compete with 17 creditors. 18 LADY JUSTICE GLOSTER: Thank you. 19 MR ZACAROLI: I have made my submissions on the nature of 20 the changes to creditors' rights. I don't need to 21 repeat those. 22 LADY JUSTICE GLOSTER: No. 23 MR ZACAROLI: And the last point I've really made before, 24 which is the question of principle and policy, which as 25 my Lord, Lord Justice Patten, pointed out, comes in at</p> <p style="text-align: center;">Page 104</p>

<p>1 two stages, and it comes in at this stage again on the 2 question whether there is a complete code, and we say 3 there should be, and that the reasons of principle and 4 policy that we identified before support that 5 conclusion. 6 Essentially the statute was intended to provide 7 a simple route procedure for paying interest in relation 8 to the post-insolvency period that treated all creditors 9 equally because they suffered a common misfortune, and 10 that members come last is not a good point because even 11 at this stage the competition isn't necessarily between 12 interest and members, it's interest and other 13 non-provable claims or a subordinated creditor who 14 doesn't have the provisions that we have as interpreted 15 by the Court of Appeal. 16 There's an additional issue now which is best dealt 17 with at this point and it's a point on which we are 18 appealing, it's the first issue -- I think the first 19 issue I've come across that we're actually appealing. 20 That is item 7 on the list, declaration 6, whether there 21 is a non-provable claim to interest on a currency 22 conversion claim. 23 Now, remembering the judge held that there were no 24 non-provable claims to interest, post-insolvency 25 interest generally, but he did find at paragraphs 168 to</p> <p style="text-align: center;">Page 105</p>	<p>1 conversion claim. What is a currency conversion claim? 2 Probably best summarised at paragraphs -- it's the 3 Waterfall I Court of Appeal judgment, which we had open 4 before. It's bundle 3, tab 101, paragraphs 136 to 137. 5 Can I ask my Lords to read paragraphs 136 and 137. 6 LADY JUSTICE GLOSTER: This is in Lord Justice Briggs's 7 judgment? 8 MR ZACAROLI: Yes, it is, yes. 9 LADY JUSTICE GLOSTER: Sorry, the second paragraph. (Pause) 10 MR ZACAROLI: What it is is the balance of the underlying 11 proved debt expressed in the foreign currency. There's 12 only one debt here. In order to prove your debt you 13 need to convert it into sterling. But there is still 14 only ever one debt. I'm owed \$100 under my contract 15 with the company. That is my claim. In order to make 16 a claim in the insolvency estate, I have to submit to 17 the conversion of that claim into sterling. But it 18 remains one unitary claim. 19 We deal with this in our skeleton. It may be 20 sensible to have that open. It is tab -- 21 LADY JUSTICE GLOSTER: And his claim isn't -- I know I have 22 raised this point before lunch -- for breach of 23 contract, for failing to pay -- 24 MR ZACAROLI: No, it's not. 25 LADY JUSTICE GLOSTER: Why not?</p> <p style="text-align: center;">Page 107</p>
<p>1 170 of the judgment that there was a non-provable claim 2 on a currency conversion claim. The essence of his 3 reason is at paragraph 169, and that is that rule 2.88 4 is a complete code only in relation to provable or 5 proved debts. 6 LORD JUSTICE BRIGGS: That, if you like, must be read into 7 164, where he talks about complete code. He means in 8 relation to provable debts. 9 MR ZACAROLI: Yes. We say in fact his conclusion at 164 is 10 inconsistent with this and he can't read it in that way, 11 but that's our argument here. 12 First of all he said it's a non-provable debt. We 13 would accept that a truly non-provable debt, that is 14 debt that has nothing to do with the proved debt 15 itself -- so we say a currency conversion claim is 16 merely part of the proved debt. We'll come on to that, 17 but think of a completely different debt, a tort claim 18 that arises subsequent to the administration. That 19 stands completely outside the statutory scheme. That is 20 a non-provable debt. There is no way we could argue 21 that such a claim could not be subject to an interest 22 claim, that stands outside the Act. It stands outside 23 the Act wholly because it's nothing to do with the proof 24 process. 25 But that is different, we say, from a currency</p> <p style="text-align: center;">Page 106</p>	<p>1 MR ZACAROLI: Because the short answer -- 2 LADY JUSTICE GLOSTER: Apart from the fact that my Lords -- 3 MR ZACAROLI: That's what the Court of Appeal said, yes. 4 LADY JUSTICE GLOSTER: Yes, I see. It's not a claim for 5 damages for failing to pay in the right currency or to 6 pay enough sterling the meet the -- 7 MR ZACAROLI: We did -- 8 LADY JUSTICE GLOSTER: You went into all that. 9 MR ZACAROLI: -- run an argument along those lines before 10 the judge which failed, but we don't repeat that here. 11 LORD JUSTICE BRIGGS: It's a purer version to contract claim 12 where the statutory process for pari passu distribution 13 hasn't paid you in full. 14 MR ZACAROLI: Yes. 15 LORD JUSTICE BRIGGS: I hope I'm not redefining an earlier 16 definition but it's shorter. 17 MR ZACAROLI: It's a remission to your provable -- I think I 18 said proved then -- claim. The provable claim is the 19 \$100. To prove it, you must have it converted. 20 So we go to this at paragraph 8 of our skeleton. It 21 is core bundle A, volume 1, tab 13, paragraph 8. It's 22 really a very short point. There is one single 23 obligation, a debt of \$100. It is proved and converted 24 thereby into sterling. Statutory interest is paid on 25 the whole of that proved debt. Expressed in sterling,</p> <p style="text-align: center;">Page 108</p>

<p>1 but paid on the whole of it. 2 At paragraph 228 of the judgment, the judge held 3 that: 4 "The only right of a creditor, whether its debt is 5 expressed in sterling or a foreign currency, is to 6 receive interest in accordance with rule 2.88." 7 Because for post-administration interest that's 8 a complete code. 9 Now, we are here obviously working on the premise 10 that he was right in respect of the complete code there. 11 We say that in that circumstance there cannot be a claim 12 to interest because it contradicts his conclusion that 13 the only right to any interest accruing 14 post-administration, irrespective of which currency your 15 debt is denominated in, is under the statute under 16 rule 2.88. 17 It's an argument from first principle. It's shortly 18 stated. There are no cases to support it because this 19 is an entirely new area of law, the whole concept of 20 currency conversion claims is new, and that's it. 21 There are two subsidiary points that arise. The 22 first is that if I'm wrong about this and the currency 23 conversion claim does exist, then we say it should only 24 run from the date of payment of the final dividend in 25 respect of the proved debt. And the second point I'll</p> <p style="text-align: center;">Page 109</p>	<p>1 LORD JUSTICE BRIGGS: Yes. It's not like contract debt with 2 an interest, with an interest coupon attached to it. 3 MR ZACAROLI: What I do need to deal with at slightly 4 greater length is the question of the date interest runs 5 from if there is a claim, a non-provable claim to 6 interest on a currency conversion claim. This we deal 7 with at paragraphs 13 to 17 of our skeleton, same tab, 8 13. The core point here is that until the date of 9 a final dividend in respect of the proved debt, we say 10 there isn't a currency conversion claim because the 11 currency conversion claim is the shortfall, if any, 12 between the underlying foreign currency entitlement and 13 the foreign currency equivalent of the sum of all 14 sterling dividends paid at the time each of them is 15 paid. 16 Now, although there's no outward claim by the 17 company against the creditor for a currency conversion 18 claim where the creditor does better by reason of the FX 19 rates -- that is established, there's no such right, 20 it's a one-way bed, this -- we submit, I think no 21 objection is taken to this, that in relation to each of 22 the dividends that are paid during the period of paying 23 those dividends, at the time of payment, some may give 24 rise to excess of dollars, some may give rise to 25 a shortfall. It's only the aggregate amount at the end</p> <p style="text-align: center;">Page 111</p>
<p>1 deal with very shortly. The declaration identifies all 2 non-provable debts. It relates to all non-provable 3 debts and says that if there's a claim for interest on 4 them, it's a non-provable claim. 5 Now, as I said, we fully accept that that is right 6 with respect to the sort of provable debts that we could 7 conceive, like a tort claim, which stands outside the 8 statutory process altogether. 9 The short point is this: we submitted to the judge 10 it wasn't necessary to go that far in the declaration to 11 encompass all non-provable claims. We don't know what 12 other non-provable claims may subsequently be held to 13 exist. There was no need to do it. There's no claims 14 that have been identified in the administrations falling 15 within this declaration other than a currency conversion 16 claim, and therefore it was unnecessary to say that. 17 It's a very short point. So it should be limited to 18 currency conversion claims, which is all we are really 19 talking about. 20 LORD JUSTICE BRIGGS: It is very hard to see how a 21 post-cut-off date tort claim could, on a reversion to 22 rights principle, attract any interest. 23 MR ZACAROLI: Oh, I see. Well, it depends -- 24 LORD JUSTICE BRIGGS: Until you get a judgment. 25 MR ZACAROLI: Then there might be delay.</p> <p style="text-align: center;">Page 110</p>	<p>1 of the period that matters, because any shortfall could 2 be made up by an excess of a later dividend. 3 So we say no currency conversion claim actually 4 exists until the final dividend, because it's only once 5 you have aggregated all the payments made that you know 6 whether the creditor has received less by way of dollars 7 than he is entitled to. 8 LADY JUSTICE GLOSTER: And at what date you ascertain once 9 the final payment has been made in sterling. 10 MR ZACAROLI: Yes, the shortfall would only exist once the 11 creditors received that sterling and converted it back 12 into declaration. 13 LADY JUSTICE GLOSTER: Yes. 14 MR ZACAROLI: So to take a simple example, imagine that 15 there's \$100 debt at the date of administration which 16 equals a £100. There are two dividends of £50 each. 17 The first one gives the creditor, let's say, \$60 -- £50 18 equals \$60 at that stage. The later one equals only 19 \$30. The is a currency conversion claim, but there is 20 no sense at all in which you can say that the creditor 21 was out of the pocket in dollars until the date of the 22 final dividend. 23 LORD JUSTICE BRIGGS: It sounds awfully like an argument 24 that was floated by their Lordships but failed to 25 persuade at the end of the day in (inaudible) credit</p> <p style="text-align: center;">Page 112</p>

1 number 2, where it is suggested that you couldn't suffer
 2 a loss on a secured lending transaction until you
 3 realised the security property, because you wouldn't
 4 know whether it was going to be worth more or less than
 5 the debt. Therefore, interest couldn't run on your loss
 6 at any earlier date until you realised the security.
 7 But that, I'm afraid, didn't prevail.
 8 MR ZACAROLI: This isn't so much that you don't know you
 9 suffered loss; it's that you hadn't suffered a loss.
 10 Because --
 11 LORD JUSTICE BRIGGS: That's what was suggested, but I think
 12 you'll find that they repented of that view.
 13 MR ZACAROLI: Perhaps I will have a look at that, but in the
 14 meantime we would say whatever the position may be in
 15 relation to secured transactions, in this novel world of
 16 currency conversion claims, the question is: have you
 17 suffered a shortfall? That's the only question, and you
 18 have not suffered any shortfall between your dollar
 19 entitlement and your sterling dividends at the date of
 20 the interim dividend in my example. So there's no sense
 21 in which you've been kept out of the your money at that
 22 point and therefore shouldn't be having interest. The
 23 judge's conclusion is that you get interest on your
 24 subsequently arising currency conversion claim at the
 25 date of final dividend from the date of administration.

Page 113

1 So being compensated from the date of administration in
 2 circumstances where you have suffered no loss.
 3 LORD JUSTICE BRIGGS: There might be a middle ground, might
 4 there not? Let's suppose that the currencies diverge in
 5 a straight line, so that on day 1 -- that's the date of
 6 the administration -- there is simply no divergence. So
 7 there's no immediate -- if you got paid on the date of
 8 the cut-off date, you wouldn't suffer any currency
 9 conversion loss because would be paid at the then
 10 prevailing conversion. And suppose that then they
 11 diverge in a straight line, and you are paid your final
 12 dividend in year 4, and you get a 50 per cent dividend
 13 in year 2. So you had been paid for half your claim in
 14 year 2, by which time sterling has fallen by, say,
 15 20 per cent against the dollar, and then the other half,
 16 by which time it's fallen 40 per cent against the
 17 dollar. You could surely say at the interim stage,
 18 "Subject to sterling getting better again I've suffered
 19 a loss thus far".
 20 MR ZACAROLI: I would say you potentially suffered a loss
 21 because you will not have suffered a loss until the
 22 currency conversion when you have aggregated all the
 23 different -- all the dividends. So take the reverse of
 24 my example, so that after the first dividend you are
 25 suffering a currency loss, which is wholly made good by

Page 114

1 the date of the final dividend, although you don't have
 2 a currency conversion claim.
 3 LORD JUSTICE BRIGGS: No, I can see that.
 4 MR ZACAROLI: No one is suggesting you should have interest
 5 in the interim because you potentially have one at the
 6 date of the first dividend.
 7 LADY JUSTICE GLOSTER: Anyway, you make the point, I think,
 8 in 14 and 15.
 9 MR ZACAROLI: We have, and again, it's a short point. It
 10 doesn't bear repetition.
 11 With that, I now turn to the question of offset.
 12 Not set-off, but offset.
 13 LADY JUSTICE GLOSTER: Sorry, just before you do that, in
 14 relation to other non-provable claims, such as a tort
 15 claim, the date from which a tort claimant might be
 16 entitled to interest could vary depending on the
 17 particular facts of the case, couldn't it?
 18 MR ZACAROLI: Yes. Yes, if a tort didn't arise until --
 19 LADY JUSTICE GLOSTER: The date when it's -- in
 20 a professional negligence claim, the date on which the
 21 claimant might have recovered against the third party,
 22 for example.
 23 MR ZACAROLI: Yes.
 24 So turning to the question of offset. This is the
 25 part where there are, I'm afraid, some other moving

Page 115

1 parts to consider. There are two issues which we need
 2 to consider here. The first is item 6, declaration 7,
 3 and that is whether in calculating a currency conversion
 4 claim, account should be taken of and offset should be
 5 made by statutory interest already received.
 6 The second area is supplemental declaration 4, item
 7 number 8. That is whether there should be -- assuming
 8 that I'm wrong on the previous issue, and there is
 9 a claim to interest on a currency conversion claim,
 10 whether that claim should take account and be offset
 11 against statutory interest received.
 12 Now, dealing with item number 6, that is the broader
 13 question, first, we are --
 14 LADY JUSTICE GLOSTER: Item number 7 or ... You've just
 15 said you are dealing with declaration 6, item 7.
 16 MR ZACAROLI: No, I may have got it wrong. Declaration 7.
 17 LORD JUSTICE BRIGGS: You got the declaration number wrong.
 18 Declaration 17.
 19 MR ZACAROLI: I'm sorry. That's right, it is, yes.
 20 LADY JUSTICE GLOSTER: My note is -- which may well be
 21 wrong -- declaration 6, item 7.
 22 MR ZACAROLI: What I meant to say was item 6 --
 23 LORD JUSTICE BRIGGS: Declaration 17.
 24 MR ZACAROLI: -- declaration 17.
 25 LADY JUSTICE GLOSTER: So we're on item 6.

Page 116

<p>1 LORD JUSTICE PATTEN: Issue 10. 2 LADY JUSTICE GLOSTER: Okay. And we're still dealing with 3 item 8, supplementary declaration 4, are we? 4 MR ZACAROLI: Yes, but I'm going to park that for a moment. 5 I will deal first of all with the broader question of 6 a currency conversion claim being offset against 7 statutory interest. 8 LORD JUSTICE BRIGGS: Really they are terribly close, these 9 two: one is do you offset against non-provable 10 principal, and the other is against non-provable 11 interest, aren't they? 12 MR ZACAROLI: They are. 13 LORD JUSTICE BRIGGS: They are not terribly far apart. 14 MR ZACAROLI: No. But the first one actually involves both 15 issues as well, depending on the complete code. That's 16 the point. In relation to the broader argument, the 17 argument is different depending upon whether rule 2.88 18 is a complete code, or whether, on issue 2, rule 2.88 19 effectively allows all your contractual rights into the 20 calculation of interest, in the sense -- either way we 21 say there's a different approach to this, because the 22 critical question is: does the statutory scheme permit 23 you a claim based upon your contractual rights to 24 interest post-administration, whether through 2.88 or 25 whether by reason of a non-provable claim thereafter?</p> <p style="text-align: center;">Page 117</p>	<p>1 there isn't a single composite claim; there is one claim 2 for the principal and a separate claim for interest, the 3 assumption being that if you've made a loss on one, in 4 terms of foreign currency, there isn't to be set against 5 that a gain made from the other. That's where we say he 6 got it wrong. 7 So to make our submission clear, we say that the 8 calculation of this currency conversion claim in this 9 world, what I'm considering here, should be to compare 10 the totality of your contractual rights expressed in 11 dollars with a totality of the receipts from the 12 administration estate once converted to dollars at the 13 date of receipt. 14 LADY JUSTICE GLOSTER: Well, you say that's logical because 15 you say you calculate the currency conversion claim at 16 the end of the day when you've received everything in 17 sterling. 18 MR ZACAROLI: Yes. 19 LADY JUSTICE GLOSTER: That's the point. 20 MR ZACAROLI: That's part of the point yes. There's 21 a little bit of development, if I may, but that's the 22 essence of it. 23 LORD JUSTICE BRIGGS: I think you are saying it doesn't make 24 any sense to look at these two in separate compartments. 25 You just say add up everything you get under the</p> <p style="text-align: center;">Page 119</p>
<p>1 Because in those circumstances, we say the prerequisite 2 for a currency conversion claim exists in relation to 3 that, and it follows, we say, that there should be 4 a broad aggregation set/offset, everything you are 5 entitled to by way of contract is on one side of the 6 equation, on the other side is everything you are 7 entitled to pursuant to statute, converted back into 8 dollars. And if at the end of the process you have 9 fewer dollars than you are entitled to, you have 10 a claim. 11 LORD JUSTICE BRIGGS: You get the difference. 12 MR ZACAROLI: I'm going to start dealing with that broad 13 proposition, that the statutory scheme permits claims 14 based upon your contractual rights post-administration. 15 The easiest way to imagine it is through the 16 non-provable claim, so there is no complete code. 17 The judge's conclusions on this are at 18 paragraphs 228 to 230 of the judgment. We've already 19 looked at 228, which is his conclusion that because 20 there's a complete code, it bars any right to interest, 21 whether under your foreign currency or in sterling, any 22 claim to post-administration interest is precluded. So 23 that's if there is a complete code. 24 He deals with the question if there isn't a complete 25 code at 229 and 230 very shortly. In essence, he says</p> <p style="text-align: center;">Page 118</p>	<p>1 statute, add up everything you would have got under 2 contract if there'd been no insolvency, and if B equals 3 more than A, you get the difference. 4 MR ZACAROLI: That is right. 5 LADY JUSTICE GLOSTER: And you have to convert at the same 6 time. 7 MR ZACAROLI: Yes. Exactly. The reason you are getting 8 interest in sterling is only because of the conversion 9 of the principal claim itself, the proof claim. It 10 follows on necessarily that you get interest in sterling 11 because your debt was converted into sterling. 12 LADY JUSTICE GLOSTER: To work out what you've lost, you say 13 you have to do that at the end of the day. 14 MR ZACAROLI: Not only that. As has been made clear by the 15 Court of Appeal judgment in Waterfall I, currency 16 conversion claims are not payable until all creditors 17 have otherwise been dealt with through proof and 18 statutory interest. So the claim can only ever be paid 19 if there's a surplus remaining after that process, and 20 the reasoning for that was, in essence, that the 21 currency conversion claim doesn't exist whilst the 22 creditor is in competition with other creditors, because 23 it's all part of a pari passu distribution; you can't 24 claim the debtor for not having paid your full foreign 25 currency amount. But once you are not in competition</p> <p style="text-align: center;">Page 120</p>

1 with creditors, it's just you and the debtor, you are
 2 remitted to your rights in contract to get the
 3 difference. That's a very short summary of it, but
 4 that's the essence of it, we say.
 5 LADY JUSTICE GLOSTER: But your rights under the contract,
 6 if you're remitted to them, would be the right to be
 7 paid in the foreign currency at a certain date, wouldn't
 8 they?
 9 MR ZACAROLI: That's correct. That's why your contractual
 10 claim gives you a right to interest.
 11 LORD JUSTICE BRIGGS: Yes, but on any given day you can
 12 produce a figure.
 13 MR ZACAROLI: Between?
 14 LORD JUSTICE BRIGGS: If you receive your final payment
 15 under the statutory scheme on a particular day, you can
 16 calculate what on that day you would have got under your
 17 foreign currency conversion claim. So once you get to
 18 that stage, you can do your conversion of currencies as
 19 at that date -- probably should do, because it's up to
 20 you whether you do or don't change currencies from then
 21 on in.
 22 MR ZACAROLI: Yes.
 23 LORD JUSTICE BRIGGS: And they have a figure, all sorted.
 24 MR ZACAROLI: That's a figure for part of the claim. There
 25 may be --

Page 121

1 LORD JUSTICE BRIGGS: For the difference.
 2 MR ZACAROLI: But there may a multiple claimants. We may be
 3 at cross-purposes. Each time you get a payment, a
 4 dividend or a distribution of interest --
 5 LORD JUSTICE BRIGGS: You said you could only do it at the
 6 end when there's been a final dividend or a --
 7 MR ZACAROLI: No, the claim.
 8 LORD JUSTICE BRIGGS: -- final payment of statutory
 9 interest.
 10 MR ZACAROLI: No currency conversion is payable until after
 11 payment of all proved debts and statutory interest.
 12 That's all I was saying.
 13 LORD JUSTICE BRIGGS: That's what I understood. So you
 14 don't look to see what the conversion rate is to
 15 calculate your currency conversion claim until, at the
 16 earliest, the date the last payment comes out under the
 17 statutory scheme above you in the waterfall.
 18 MR ZACAROLI: Well, you don't bother to work out whether you
 19 have one perhaps until then, but the currency conversion
 20 claim is based on the conversion rate at the date of
 21 each payment you've received, not at the end of the day.
 22 LORD JUSTICE BRIGGS: No, because you could convert that
 23 back on that date.
 24 MR ZACAROLI: Exactly. There could be five dividends and
 25 five distributions of interest. That's ten payments

Page 122

1 made to you. To work out whether you have a currency
 2 conversion claim, you must look at each payment
 3 separately and work out what the dollar rate was at that
 4 date.
 5 LADY JUSTICE GLOSTER: Because you are deemed to have
 6 converted at that date. Thereafter, the risk is yours.
 7 MR ZACAROLI: That's right, yes. That, I think, is how it's
 8 put in the Court of Appeal, it's a -- yes.
 9 LADY JUSTICE GLOSTER: But the obligation to pay would have
 10 been on the due payment date under the contract.
 11 MR ZACAROLI: Yes.
 12 LADY JUSTICE GLOSTER: To pay in the foreign currency.
 13 MR ZACAROLI: That's correct.
 14 LADY JUSTICE GLOSTER: You are entitled to claim for that,
 15 that amount. If that is 1.5 million in the foreign
 16 currency, you are entitled to claim that, but in order,
 17 you say, to calculate what you've lost, you have to
 18 calculate what you have in sterling, and you say you can
 19 only do that at the end of the day.
 20 MR ZACAROLI: Yes.
 21 LADY JUSTICE GLOSTER: But you have to assume, going along
 22 the track, that you would have converted your dividends
 23 into the foreign currency.
 24 MR ZACAROLI: Absolutely.
 25 LADY JUSTICE GLOSTER: So there are about three different

Page 123

1 dates which you have to use for the purposes of this
 2 calculation.
 3 MR ZACAROLI: Multiple dates to work out whether you have
 4 a currency conversion claim. But the essence of
 5 a currency conversion claim is just the loss, although
 6 it's not a claim for loss, caused by reason of
 7 conversion. So we are solely focusing on whether, in
 8 your pocket, the pounds you've received equal the same,
 9 at the end of the day, when totted up, dollars you were
 10 ultimately entitled to under your contract.
 11 Like in the case of dividends, where an earlier
 12 dividend gives you a surplus of dollars and a later one
 13 gives you a deficit, it's ironed out in deciding whether
 14 you have a currency conversion claim at all, which is
 15 the same should apply across the process of principal
 16 and interest. So if the interest you get is worth
 17 double in your hands, once converted, the actual dollar
 18 amount that you are entitled to that date, that should
 19 be offset against a shortfall that arose on an earlier
 20 dividend of principal. Or vice versa, or any
 21 combination of the two.
 22 There's a small element of support for that in the
 23 fact that when one's talking about principal and
 24 interest, one is not necessarily talking in exactly the
 25 same terms as proved debt and interest on the proved

Page 124

1 debt, because as we know, the proved debt can already
 2 include interest. So it already must be accepted that
 3 insofar as the underlying proved claim includes rolled
 4 up interest, you are offsetting gains in relation to the
 5 interest part of that debt against principal parts, that
 6 already happens because it's all part of your proved
 7 debt currency conversion claim. We say --
 8 LORD JUSTICE BRIGGS: You roll up the interest in your
 9 foreign currency and only convert it on the date of the
 10 cut-off date.
 11 MR ZACAROLI: That's right, yes.
 12 LORD JUSTICE BRIGGS: Yes.
 13 MR ZACAROLI: We say this is an approach -- the aggregating
 14 approach is one which more accurately reflects the
 15 purpose of a currency conversion claim, that is to
 16 compensate creditors for the shortfall arising from the
 17 fact that their claim was converted into sterling.
 18 So while we have to accept for the moment that the
 19 currency conversion claim arises only one way, you can't
 20 claim against the creditor. We say it would be wholly
 21 unfair if gains made by the creditor under the same
 22 contractual right in relation to some of the payments in
 23 relation to interest were not to be offset against
 24 losses suffered by that creditor under the same
 25 contractual umbrella.

Page 125

1 That deals with a creditor who has a contractual
 2 right to interest.
 3 The next category to deal with is a creditor who has
 4 a contractual right to interest but it's less than
 5 8 per cent, so they get under the statute an uplift
 6 between, let's say, a 2 per cent contractual right up to
 7 8 per cent. So it might be said against us, well, you
 8 are then comparing apples and oranges because the
 9 statutory interest is a statutory right given to all
 10 creditors who have been kept out of their money for the
 11 period after administration.
 12 We say that's right and, very importantly, we are
 13 not suggesting any part of the statutory interest should
 14 be withheld from the creditor. This is no part of our
 15 argument. The argument only relates to the calculation
 16 of the currency conversion claim which comes afterwards.
 17 We say the same principle should apply because the only
 18 reason that creditor is getting the uplifted rate to
 19 8 per cent, which is a judgment rate applied to
 20 judgments in sterling, is because it's underlying
 21 foreign currency claim has been converted. He comes
 22 into the statutory process, he gets a package of
 23 benefits and burdens. A burden potentially, depending
 24 on the way currency movements work, is that he has to
 25 suffer the conversion of his claim to sterling at the

Page 126

1 outset and be paid sterling dividends. A corresponding
 2 benefit is that the rate of interest that that debt
 3 attracts is one which is specifically attributable or
 4 aligned to a judgment debt in sterling.
 5 So we say, actually, on analysis, the same broad
 6 aggregating approach should apply. Ultimately, if,
 7 after that statutory process has run its course, that
 8 creditor is sitting on, once converted back into
 9 dollars, the same dollars or more dollars than it was
 10 ever contractually entitled to, it can't come back and
 11 say, "Oh, I'm suffering a currency shortfall".
 12 LADY JUSTICE GLOSTER: Where does the judge disagree with
 13 this point?
 14 MR ZACAROLI: Paragraphs 229 and 230. The whole argument
 15 was condensed into two paragraphs, or the whole decision
 16 was condensed into two paragraphs in the judgment.
 17 He rejected it for the reason that they're two
 18 different rights: the right to principal under the
 19 proved process and the right to a statutory interest.
 20 Now, to take it one step further, we say the same
 21 applies in the case of a creditor with no contractual
 22 right to interest. Again, still living in the world of
 23 there not being a complete code. Because in same way as
 24 the previous one, that creditor comes in to a package of
 25 benefits and burdens and takes the benefit or burden of

Page 127

1 its claim being converted into sterling, but because
 2 it's converted into sterling, it gets an interest rate
 3 that it would not otherwise have been entitled to.
 4 LORD JUSTICE BRIGGS: In a sense, that's just reducing your
 5 contractual interest rate to zero.
 6 MR ZACAROLI: Yes. The same point applies.
 7 LORD JUSTICE BRIGGS: Yes.
 8 MR ZACAROLI: So those are our submissions in relation to
 9 the way you calculate a currency conversion claim and
 10 offset interest in the world where there is no complete
 11 code or where the contractual rights to interest are
 12 brought within 2.88.
 13 I want to deal with the corner next which is offset
 14 of statutory interest against the claim to interest on
 15 a currency conversion claim. So just picking up on if
 16 there is a claim to interest on a currency conversion
 17 claim, which we say there shouldn't be, but if there is,
 18 we say that the statutory interest received should be
 19 offset against that claim.
 20 LADY JUSTICE GLOSTER: And which item --
 21 LORD JUSTICE BRIGGS: Is this a fall-back submission from
 22 your -- stick it all in a pot and see which pot is
 23 bigger argument?
 24 MR ZACAROLI: It would be because I think it's unnecessary
 25 if we are right so far.

Page 128

<p>1 LADY JUSTICE GLOSTER: Which item are we on now? 2 MR ZACAROLI: Item number 8 now. 3 LORD JUSTICE BRIGGS: Thus far you have really been dealing 4 with both items together, as I understand it. You are 5 saying it is wrong to split them out, you should take an 6 overall approach (inaudible). 7 MR ZACAROLI: Yes, that's correct. This is now if we are 8 wrong, if the judge is right that there a complete 9 code -- 10 LORD JUSTICE BRIGGS: And you probably accept that 11 Bower v Marris would probably apply to the calculation 12 of your contractual claims. 13 MR ZACAROLI: I can't see a way of avoiding it. 14 LORD JUSTICE BRIGGS: And, indeed, the creditor could 15 probably appropriate. 16 MR ZACAROLI: Yes. In the foreign currency. 17 LORD JUSTICE BRIGGS: Yes. 18 MR ZACAROLI: Yes. 19 I am now turning to supplemental declaration 4 and 20 item number 8. What we say here is that in this event, 21 the claim for interest on the currency conversion claim 22 for the post-administration period should be offset by 23 statutory interest received so that if and to the extent 24 that the total amount of interest received by that 25 creditor in relation to the post-administration period</p> <p style="text-align: center;">Page 129</p>	<p>1 portion of the proved debt which is not satisfied by the 2 payment of dividends. The proved debt is the sterling 3 sum and has been satisfied in full by dividends. 4 Now, the essence of our submission is really not 5 that it's the proved or the provable debt; it is the 6 debt which the creditor has claimed. It's a foreign 7 currency debt -- I have made this submission before -- 8 which is converted into sterling for the purposes of 9 proof. There is only one claim, it's just expressed in 10 two ways: one is in dollars, one is in sterling; it is 11 still a unitary debt. 12 Echoing my previous submission in relation to 13 whether this claim for interest exists at all on 14 a currency conversion claim, we say that statutory 15 interest has been paid on the whole of that underlying 16 debt, interest has been paid under the statute for being 17 kept out of that debt for the period after the date of 18 administration. 19 The judge's conclusion that there is a claim for 20 interest on a currency conversion claim assumes to 21 a limited extent -- as my Lord pointed out, his 22 conclusion in paragraph 228 that there's no continuing 23 right to interest because of the complete code, is 24 subject to an exception in relation to currency 25 conversion claims.</p> <p style="text-align: center;">Page 131</p>
<p>1 converted into dollars is equal to or greater than its 2 entitlement, so he can't come back for more. Let's 3 assume he has post-administration interest, under the 4 statute which, converted into dollars, is as much as he 5 would be entitled to by way of interest on his foreign 6 currency claim. We say you can't come back for more and 7 say, well, he has an interest claim on the currency 8 conversion claim and, therefore, can claim that even 9 now. We say there's a cap, and the cap is when you have 10 your contractual entitlement. 11 The judge disagreed, and he deals with that in the 12 supplemental judgment, core bundle A, volume 2, tab 1, 13 paragraphs 48 to 54. In particular, at paragraph 52 he 14 refers back to his conclusion that rule 2.88 is 15 a complete code for proved debts which is unconnected 16 with any right to interest under the contract. 17 We say there's a very close connection between the 18 two, because the statutory interest is payable in 19 respect of the creditor being kept out of its money from 20 the date of administration onwards. The only money it's 21 being kept out of is that due to it under its contract. 22 There is a very obvious connection between the two. 23 At paragraph 53, the judge specifically rejected our 24 submission -- this is the last two lines -- in reply 25 that the currency conversion claim represents that</p> <p style="text-align: center;">Page 130</p>	<p>1 LORD JUSTICE BRIGGS: Yes. Well, in relation to anything 2 it's not a proved debt. 3 MR ZACAROLI: Yes, but in particular for this purpose, 4 currency conversion rates. 5 Unless and until all dividends are paid, it is 6 impossible to identify which part, if any, of that claim 7 which is being proved and converted into sterling has 8 not been discharged by way of dividends. I think 9 Lord Justice Briggs made the point on Monday that you 10 don't know which part interest is attributed to until 11 long down the road. It's being paid on the whole of 12 that \$100 claim, conversion to sterling as at the date 13 of administration, and interest immediately is running 14 on the whole amount undoubtedly. It's only when 15 currency fluctuations cut in and go this way or that 16 that you begin to work out whether there was in fact 17 interest paid on part of it. 18 LORD JUSTICE BRIGGS: May it not depend on how, or at least 19 how the judge thought, an interest on a currency 20 conversation claim was going to be presented as a claim? 21 If the currency conversion creditor says, "Well, I get 22 a payment of 20 per cent of my debt in sterling at the 23 end of year 2, had I had it in dollars then" -- indeed, 24 you assert this, I think -- "I would have been X dollars 25 better off, I only got so many cents for my dollar, and</p> <p style="text-align: center;">Page 132</p>

1 I want interest from that shortfall from that date",
 2 would that not, as it were, build in a credit for having
 3 had interest, albeit not necessarily at the same rate,
 4 on that part for which he was paid?
 5 So he is suffering a shortfall of, say, 20 cents in
 6 the dollar at that date. He is not claiming interest on
 7 the 80 cents for which he has had a sterling payment
 8 and sterling interest is running. He is only claiming
 9 interest for the shortfall.
 10 I don't know how these currency conversion claims
 11 and particularly the interest element are being
 12 presented or how the judge thought they were being
 13 presented.
 14 MR ZACAROLI: I don't think the judge went into that level
 15 of detail or it's an issue that's yet been resolved by
 16 the parties.
 17 LORD JUSTICE BRIGGS: No. Whereas if you present your
 18 currency conversion claim for interest as simply being
 19 all the dollar interest which you would have earned if
 20 there had not been an administration, then I can see
 21 your submission gains force. It just depends how the
 22 claim is presented.
 23 MR ZACAROLI: It does, but going back to the answer to my
 24 Lord's question earlier, you couldn't -- in the case of
 25 a shortfall having been suffered at the point dividend A

Page 133

1 being made up wholly by later dividends, you don't have
 2 a currency conversion claim at all, and therefore could
 3 never claim for interest you say you lost because in
 4 an interim period you got fewer dollars than you --
 5 LORD JUSTICE BRIGGS: No, but you yourself said that when
 6 you get to the end of the day, you then look back, see
 7 what you got on those various days and notionally
 8 convert them to dollars on those dates.
 9 MR ZACAROLI: I'm not saying you only do in an exercise at
 10 the end. You only have a claim at the end --
 11 LORD JUSTICE BRIGGS: Yes, but when you are calculating --
 12 MR ZACAROLI: You are looking back.
 13 LORD JUSTICE BRIGGS: -- you have to look back, work out
 14 what your dollar shortfall was every time you got
 15 a sterling payment, and if you only claim interest on
 16 the difference, this is all a storm in a teacup, isn't
 17 it? The only difference will be if the interest rates
 18 are different. But if you are only claiming your
 19 interest on the shortfall from each date when you
 20 received a sterling payment converted into dollars,
 21 well, then, you will have been paid interest on that bit
 22 in respect of which you are not claiming, namely the
 23 extent to which you did get sufficient dollars for your
 24 sterling. And you will have had statutory interest on
 25 that, but you won't have had any interest on the

Page 134

1 shortfall. And if you present your claim in that way,
 2 it matches the judge's thinking. I'm reading what the
 3 judge says as assuming that that is how the interest
 4 claim would be presented. It would only be presented on
 5 the shortfall element, not on the whole of the dollar
 6 claim.
 7 MR ZACAROLI: Well, that must be right. No doubt that's
 8 right, that it's a claim for interest on your currency
 9 conversion claim, ie the shortfall you suffered.
 10 LORD JUSTICE BRIGGS: Yes. Not on what you've received, for
 11 which you've had statutory interest instead.
 12 MR ZACAROLI: I accept that. The short point I want to
 13 finish with -- I will think about that question over the
 14 break -- is this: we say that however you characterise
 15 it in those terms, you are essentially getting interest
 16 on the same underlying contractual right for the same
 17 purpose. That is to compensate you for being kept out
 18 of that contractual right for the period after
 19 administration. And that therefore from the premise it
 20 should follow that where you have already received,
 21 because of sterling payments in relation to statutory
 22 interest and in relation to that period, the same as or
 23 more than you would have been entitled to by way of
 24 contract for that period, in this area at the very least
 25 there should be a cap, and you can't claim more by way

Page 135

1 of coming back for a second bite of the cherry to claim
 2 more by way of interest on a currency conversion claim
 3 when, in fact, you have the dollars already. It is a
 4 subset of the broader point I made earlier in relation
 5 to the broad answer.
 6 I think that point remains good irrespective of the
 7 way in which the claim is to be calculated, as my Lord,
 8 Lord Justice Briggs --
 9 LADY JUSTICE GLOSTER: I'm not sure I understand this point
 10 about the difference of the claim being calculated,
 11 because the claim will be calculated from -- the foreign
 12 currency claim at its maximum is what you are entitled
 13 to at the date of contractual payment. Right?
 14 MR ZACAROLI: Yes.
 15 LADY JUSTICE GLOSTER: The due date for payment under the
 16 contract. And that will be a figure in dollars and you
 17 are entitled notionally to interest while that remains
 18 unpaid. During the course of the administration, you
 19 will have to prove, as at the date of proof, in
 20 sterling, whatever that is, you say as I understand it,
 21 you then have to work out what you've received in the
 22 interim, you calculate as at the date of each dividend
 23 what the notional figure in dollars is, and you do
 24 likewise in relation to interest, and at the end of the
 25 day you put one against the maximum of the original

Page 136

1 contractual claim in dollars. You set one off against
 2 the other.
 3 MR ZACAROLI: Yes.
 4 LADY JUSTICE GLOSTER: I'm not sure that there is any
 5 variable in how the claim is put. How else could the
 6 claim be put?
 7 MR ZACAROLI: Yes. That's how we say the aggregated
 8 approach works, but I'm here --
 9 LORD JUSTICE BRIGGS: You're here working on a fall-back.
 10 MR ZACAROLI: I am.
 11 LORD JUSTICE BRIGGS: If you're not right on your aggregated
 12 claim, on your disaggregated claim, how does it all
 13 work?
 14 LADY JUSTICE GLOSTER: How does it work on a disaggregated
 15 claim?
 16 MR ZACAROLI: The judge said you have no claim for currency
 17 conversion loss in relation to any post-administration
 18 interest, there's a bar because of the complete code.
 19 So the judge was only dealing with a principal claim.
 20 In the alternative, he said that if there is no complete
 21 code -- this is paragraph 229 and 230 -- there are two
 22 separate calculations. You have to look at the
 23 principal, ie the proved debt, and work out whether you
 24 have a currency conversion claim based on shortfall and
 25 payments in dollars because of the proved debt

Page 137

1 dividends. And then secondly, and as a separate matter,
 2 you look at the receipts you had by way of statutory
 3 interest and work out whether those translate into the
 4 right amount of dollars in accordance with your
 5 contractual right to dollars. So there are two
 6 different claims, on his view.
 7 LADY JUSTICE GLOSTER: You say that's wrong.
 8 MR ZACAROLI: We say that's wrong, yes. And if we are right
 9 about that, none of this matters. If we are wrong about
 10 that, and the judge -- this point works if the judge is
 11 right on the complete code. The real purchase of this
 12 point is if there is a complete code, so there's no
 13 claim to interest beyond the date of administration, and
 14 yet, as the judge held, there is a right to claim
 15 interest on a currency conversion claim in the
 16 post-administration period, and that's the real issue
 17 here. So it's complete code, but with this exception,
 18 that you can claim interest on that portion of your
 19 claim that was provable but did not get satisfied in
 20 dollars in full. Then we say that it must follow, in
 21 order to avoid overcompensating the creditor, that to
 22 the extent he has had interest under the code, statutory
 23 interest --
 24 LADY JUSTICE GLOSTER: He has to get credit.
 25 MR ZACAROLI: He has to get credit for it.

Page 138

1 LORD JUSTICE BRIGGS: You can either do that by doing an
 2 overall calculation or you can do it by only claiming
 3 interest on the shortfall.
 4 MR ZACAROLI: Our preferred position obviously is the broad
 5 aggregated approach. This is very much a fall-back.
 6 Is that a convenient moment?
 7 LADY JUSTICE GLOSTER: Yes. Five minutes.
 8 (3.22 pm)
 9 (A short break)
 10 (3.28 pm)
 11 MR ZACAROLI: Just one final point on this aspect.
 12 The essence of any non-provable claim, as we know
 13 from Humber Ironworks and the Court of Appeal in
 14 Waterfall IA, is all about reversion to contractual
 15 rights. That's what's happening here. We say that if
 16 you are remitted to your contractual rights, it makes
 17 absolute sense that you look at the contractual rights
 18 as a whole and compare those contractual rights with
 19 what you get out of the scheme.
 20 That deals with everything except one other corner
 21 of this, and that is if the judge is right on the
 22 complete code argument, so if he is right that there is
 23 no right to interest at all on your contractual basis
 24 following the date of administration, and I dealt with
 25 the position in relation to interest on currency

Page 139

1 conversion, let's park that for the moment, just
 2 a general offset argument, that even in that situation
 3 there ought to be an offset between globally the
 4 creditors rights in dollars, to get whatever he is
 5 entitled to by way of contract as compared to everything
 6 he gets under the statutory scheme.
 7 LORD JUSTICE BRIGGS: That's the underpinning for your main
 8 submission, I thought.
 9 MR ZACAROLI: I was working then in the world where there
 10 isn't a complete code. Now, we say very broadly, and
 11 it's a very short point to add, that in this world as
 12 well, the same results should be arrived at, that is
 13 that you simply --
 14 LADY JUSTICE GLOSTER: Just remind me which world we're in.
 15 MR ZACAROLI: We're in the world now where the judge is
 16 correct. The judge is right that there is a complete
 17 code.
 18 LADY JUSTICE GLOSTER: So there is a complete code.
 19 MR ZACAROLI: And on his reasoning, there is no right to
 20 interest, there's no remaining contractual right to
 21 interest, remaining after the date of administration.
 22 And this is where those other two --
 23 LORD JUSTICE BRIGGS: On provable debts.
 24 MR ZACAROLI: On provable debts, correct.
 25 LORD JUSTICE BRIGGS: By which I think he meant that part of

Page 140

<p>1 a foreign currency debt which you can prove in sterling. 2 MR ZACAROLI: Yes. 3 LADY JUSTICE GLOSTER: Then you say broadly -- 4 MR ZACAROLI: We say broadly then the same answer should 5 apply, that is that if a creditor's claim has been 6 converted into sterling, it gets the benefits the Act 7 gives it, which includes the right to 8 per cent because 8 it's debt has been converted to sterling, which 9 otherwise it wouldn't have had, and therefore you are 10 entitled to look at its global contractual rights as 11 against the global receipts from the insolvency estate. 12 We would say all distributions from the statutory 13 scheme are ultimately referable to that creditor's 14 contractual rights, even where it didn't have a claim to 15 interest -- let's say it didn't have a claim to interest 16 at all and therefore statutory interest is compensation 17 for being kept out of your money. The sole focus of the 18 question here is not did you get more interest than you 19 should have been entitled to, the question is: did you 20 get fewer dollars at the end of the day than you were 21 entitled to? The currency conversion is solely focusing 22 on the dollars in the back pocket of the creditor, it 23 having converted the pounds it received into dollars and 24 put into its back pocket. 25 That's all I propose to say, my Lords, on offset</p> <p style="text-align: center;">Page 141</p>	<p>1 applicable to the debt apart from the administration." 2 That's the context. 3 First, the SCG say that within that rule, if you 4 actually get a foreign judgment after the date of 5 administration, you can substitute that foreign 6 Judgments Act higher rate in the rule. Secondly, they 7 say even if you don't get a judgment, then you can say 8 that the rate applicable apart from administration is 9 a Judgment Act rate you might, could or would have got 10 post-administration. And thirdly, and I think I'm right 11 in saying for the first time before the court today, it 12 wasn't a point raised below or in their skeleton, they 13 say there's a non-provable claim in relation to 14 a judgment obtained after administration. Not entirely 15 clear what that non-provable claim is for, it has not 16 been developed in any argument in the skeleton and it's 17 not dealt with in the judgment. I will deal with that 18 at the end. 19 LADY JUSTICE GLOSTER: So we're looking at a situation where 20 the currency of payment is dollars, and interest is 21 obtained contractually at, say, 10 per cent in dollars, 22 but in the foreign Judgment Act, say 12 per cent of 23 dollars. We are looking at that sort of situation. 24 MR ZACAROLI: I think the only point in that that matters is 25 that it's obtained under a foreign judgment, where the</p> <p style="text-align: center;">Page 143</p>
<p>1 between the two. 2 LADY JUSTICE GLOSTER: Yes. 3 MR ZACAROLI: There are two topics left. One is interest 4 under 2.88(9) at a rate applicable to a foreign 5 judgment. That is -- 6 LADY JUSTICE GLOSTER: Item? 7 MR ZACAROLI: Item number 11, declaration 10. 8 LORD JUSTICE BRIGGS: Issue? 9 MR ZACAROLI: Issue 4. 10 LADY JUSTICE GLOSTER: Yes. 11 MR ZACAROLI: There are three propositions presented by the 12 SCG. The first is that a creditor is entitled to 13 a foreign Judgments Act rate in respect of a judgment it 14 actually obtains after the date of administration, and 15 that that rate is the rate applicable apart from 16 administration within rule 2.88(9). It might be helpful 17 just to go back to the rules to remind us what we are 18 dealing with -- 19 LADY JUSTICE GLOSTER: This is now -- you're responding? 20 MR ZACAROLI: Yes, I'm responding to an appeal made by SCG. 21 If we pick up rule 2.88(9) again, just to put the 22 point in context, this is the rule which says: 23 "The rate of interest payable under paragraph 7 is 24 whichever is the greater of the rates specified under 25 paragraph 6 [the Judgment's Act rate] or the rate</p> <p style="text-align: center;">Page 142</p>	<p>1 rate of interest is greater than 8 per cent. It doesn't 2 matter what the contractual rate was, it only arises if 3 you get a judgment, let's say, in the New York court and 4 you claim a right of interest under the judgments rate 5 there at 9 per cent. 6 LORD JUSTICE BRIGGS: Yes. 7 MR ZACAROLI: That's how it arises. 8 LORD JUSTICE BRIGGS: Correct me if I'm wrong, it having 9 been common ground that a foreign judgment with 10 an interest rate attached that came before the cut-off 11 date would be usable. 12 MR ZACAROLI: Yes, because that's your right at the date of 13 administration. 14 LORD JUSTICE BRIGGS: Quite apart from accumulating the 15 interest due under it up until the cut-off date, you can 16 go on using that rate for post-cut-off date interest. 17 MR ZACAROLI: Yes. 18 LORD JUSTICE BRIGGS: Yes. 19 MR ZACAROLI: Can I deal first with the shorter of them, 20 which is the hypothetical judgment, so this is at the 21 date of administration they say that the rate applicable 22 to the debt apart from administration is that which they 23 might get under some future judgment. In their 24 skeleton, or I think in the judgment, this is noted as 25 their preferred position, no doubt because in fact there</p> <p style="text-align: center;">Page 144</p>

<p>1 are very, very few cases where anyone did in fact go and 2 get a judgment debt most surprising actually in the 3 circumstances of the LBIE administration. 4 The judge dealt with this at paragraph 177 of the 5 judgment. We're back in the main judgment below. In 6 essence, the words, "The rate applicable to the debt 7 apart from administration" are intended to refer to the 8 rate in fact applicable to the debt proved. He notes in 9 this paragraph the difficulties that would arise, and 10 I repeat them, I made the point a moment ago, but what 11 is the precise counter-factual one has to give effect to 12 here? Is it any judgment rate the creditor could have 13 gone and got judgment for? Is it the rate that he would 14 have gone and got judgment for? What do you do if the 15 creditor can pick between multiple jurisdictions with 16 different rates? 17 The counter-factuals that are given rise to by this 18 issue are multifarious and totally undealt with by the 19 rule. If the draft of the rule had intended to include 20 the possibility you could substitute a rate of the 21 judgment in a foreign jurisdiction -- 22 LADY JUSTICE GLOSTER: Where you haven't obtained judgment. 23 MR ZACAROLI: Where you haven't obtained judgment, on the 24 basis that you might do or would do or could do, there 25 would have to have been some rules defining how that was</p> <p style="text-align: center;">Page 145</p>	<p>1 a sterling rate. 2 LADY JUSTICE GLOSTER: Why is that odd per se? Because if 3 you are looking at a rate applicable to the debt apart 4 from the administration, you are bound in some cases to 5 be looking at a foreign rate, possibly under a judgment. 6 LORD JUSTICE BRIGGS: You've sold the (inaudible) anyway by 7 not fighting a pre-cut-off date -- 8 MR ZACAROLI: Yes, I accept that. In order for this to be 9 right, we say -- the wording doesn't exclude a foreign 10 contractual right. So we see -- 11 LADY JUSTICE GLOSTER: Why should it exclude a foreign 12 judgment rate? 13 MR ZACAROLI: Well, it doesn't include -- we say it doesn't 14 even begin to include a rate in a judgment that hasn't 15 yet been obtained. We don't say it excludes a judgment 16 that has already been obtained because that would be the 17 rate that is applicable at the date of administration. 18 The question is here: should it be extended to include 19 the possibly of a judgment that has not yet been 20 obtained under some foreign jurisdiction, which we say 21 would require the draftsman to consider that possibility 22 and intended to include it within the rule. That, we 23 say, is a remarkable proposition. 24 LADY JUSTICE GLOSTER: Once it has been obtained during the 25 course of the administration -- I am leaving to one side</p> <p style="text-align: center;">Page 147</p>
<p>1 supposed to work. It is clearly, we say, not intended 2 to be covered by the sub-rule. 3 LADY JUSTICE GLOSTER: What about A, where judgment has been 4 obtained? 5 MR ZACAROLI: Before I move to that, may I just deal with 6 one other point the judge made? 7 Paragraph 182, there is a suggestion that a right to 8 a future judgment is some sort of contingent right, and 9 the judge dealt with that at paragraph 182. We say it 10 bears reading. We would support the conclusions he 11 reaches there for the reasons he gives and, again, 12 I can't really improve on what the judge said there. 13 LADY JUSTICE GLOSTER: No. 14 MR ZACAROLI: There is one further point on this, which is 15 actually -- it covers quite a lot of this area, 16 whichever way you put it. We say it would be a highly 17 odd intention to have imputed to the draftsman that he 18 was to permit a rate under rule 2.88(9) under a foreign 19 judgment, because this would have required the draftsman 20 to have considered that this wording was sufficient to 21 cover some future judgment obtained elsewhere in world. 22 Very odd to impute that when the starting point is this 23 is a rate of interest on sterling debts. Everything is 24 converted into sterling, you are providing rates of 25 interest from sterling debts. The judgment rate is</p> <p style="text-align: center;">Page 146</p>	<p>1 the B situation which you've just been addressing, 2 there's a sort of hypothetical possibility of a foreign 3 judgment, but where during the intervening period 4 between the date of administration and the arising of 5 a surplus there has been a foreign judgment, why in that 6 situation shouldn't it be -- as is the foreign 7 contractual rate, why shouldn't the foreign judgment 8 rate -- 9 MR ZACAROLI: Yes. 10 LADY JUSTICE GLOSTER: That seems to me to be the point. 11 MR ZACAROLI: I'm going to turn to that next. The creditor 12 has in fact obtained a judgment after administration. 13 LADY JUSTICE GLOSTER: Before the surplus has arisen. 14 MR ZACAROLI: Yes. The key point, we say, is that -- 15 LADY JUSTICE GLOSTER: Given that you have conceded 16 pre-admin. 17 MR ZACAROLI: Yes. The key point is in paragraph 179 of the 18 judgment, which I don't think my learned friend 19 Mr Dicker took you to specifically. He took the judge's 20 conclusion in the next paragraph as being a single 21 cut-off date as really being the essence of this. We 22 say the essence of this is paragraph 179, bolstered by 23 the propositions 180. But the first sentence of 179: 24 "The rate applicable to the debt apart from 25 administration refers to the rate applicable to the debt</p> <p style="text-align: center;">Page 148</p>

<p>1 by reason of the rights of the creditor as at the 2 commencement of the administration." 3 LADY JUSTICE GLOSTER: Why, in circumstances where you are 4 looking at something that has necessarily happened after 5 the administration date, namely the arising of 6 a surplus? 7 MR ZACAROLI: That's where the five reasons come in to 8 bolster that. First of all, there is the single cut-off 9 date point, which is an important point. I won't take 10 you to the cases, you've been referred to them. 11 Wight v Eckhardt is one of them, Dynamics is the other. 12 There is a single cut-off date for claims. Statutory 13 interest is payable only on the proved debts, we know 14 that, and the date of administration is undoubtedly 15 an important cut-off date for the purposes of statutory 16 interest. You don't get interest accruing after that 17 date by way of proof, that's the date for the 18 distinction, and statutory interest is payable from that 19 date, from the commencement of the administration. 20 So that's the first point. There is importance in 21 that being the cut-off date generally, as much for 22 interest as for provable claims. 23 Secondly, that is bolstered by the fact that the 24 default position under section 2.88(9) is the Judgments 25 Act rate, but not just the Judgments Act rate, the</p> <p style="text-align: center;">Page 149</p>	<p>1 recommended a nuance to that which was: 2 "The minimum rate should be that applicable to the 3 date of the relevant order which applied to judgment 4 debts. If, however, a higher contractual rate applies 5 to the debt post-insolvency interest will be chargeable 6 at that rate." 7 Sorry, this is tab 212 of bundle 5, I'm sure you are 8 aware of the provision. 9 Their intention was to introduce the possibility of 10 a contractual rate. So no intention in the Cork Report 11 or the White Paper that they should be extended to some 12 sort of future judgment that might be obtained. 13 LADY JUSTICE GLOSTER: Sorry, Mr Zacaroli, can I just ask 14 about that. Say the contractual rate, the rate 15 applicable to the debt, is a moving rate, so it goes up 16 and it flexes by reference to some other underlying rate 17 or a reference to the period of time at which the debt 18 hasn't been paid. Are you saying that that has to be 19 looked at? 20 MR ZACAROLI: No, no. If you have the right to a rate of 21 interest at the date of administration -- 22 LADY JUSTICE GLOSTER: That moves. 23 MR ZACAROLI: -- that fluctuated, it's the fluctuating rate 24 throughout the period. 25 LORD JUSTICE BRIGGS: Yes. Because that's a right you have</p> <p style="text-align: center;">Page 151</p>
<p>1 Judgment Acts rate at the date of administration. So if 2 the Judgment Act rate was increased after the date of 3 administration, that's irrelevant. So if the creditor 4 with an English debt, which is perfectly possible, got 5 permission to proceed in the action because it was more 6 convenient to determine the issues in an action rather 7 than in administration -- 8 LORD JUSTICE BRIGGS: And the Judgment Act rate went up in 9 the meantime he wouldn't get it. 10 MR ZACAROLI: He wouldn't get it, no. So the SCG's argument 11 here would draw a distinction between a foreign judgment 12 and an English judgment, which we say is simply 13 unwarranted. 14 LORD JUSTICE BRIGGS: The judge makes that point somewhere. 15 MR ZACAROLI: He does. 16 LADY JUSTICE GLOSTER: 177. 17 LORD JUSTICE BRIGGS: Yes. 18 LADY JUSTICE GLOSTER: 177 he makes it. 19 MR ZACAROLI: Yes. The third point -- and these are 20 following the numbered points in paragraph 180 of the 21 judgment -- is this is consistent with the Cork Report 22 and the White Paper. The Cork Report, as you know, 23 recommended the judgment rate for all. The White Paper, 24 and it's perhaps worth just reminding ourselves what 25 that said -- it's only a sentence -- the White Paper</p> <p style="text-align: center;">Page 150</p>	<p>1 at the cut-off date. 2 MR ZACAROLI: Exactly. It's about rights. 3 LORD JUSTICE BRIGGS: And the judge says so. 4 MR ZACAROLI: He does, yes. 5 LORD JUSTICE PATTEN: I thought one of the judge's main 6 points was that it's the subsequently obtained judgment 7 isn't the debt you are proving. 8 MR ZACAROLI: It is one of the points, yes. 9 LORD JUSTICE PATTEN: If you haven't got the judgment at the 10 time the company goes into administration you can't 11 prove in respect of the judgment, you prove in respect 12 of the judgment debt, you prove in respect of the debt. 13 And therefore, the provisions of (9) have to relate back 14 to the date to which you proved. So if you obtained 15 subsequent judgments, it is irrelevant. 16 MR ZACAROLI: My Lord is absolutely correct. It's the fifth 17 point in paragraph 180. The last sentence in particular 18 notes that if you get a judgment, where you have, say, 19 an unliquidated claim, what the judgment does is 20 ascertain the value of the claim. But it's not the 21 judgment that is subject to proof, it's the debt 22 underlying it which is subject to proof. And rule 23 2.88(9) says you will get interest on the proved debts. 24 And exactly right, my Lord, the proved debt is the 25 underlying claim, not the subsequently obtained</p> <p style="text-align: center;">Page 152</p>

1 judgment. That's another of his reasons for concluding
 2 you just can't --
 3 LADY JUSTICE GLOSTER: So what, the higher foreign judgment
 4 rate interest comes in as part of the conversion claim,
 5 does it?
 6 MR ZACAROLI: No.
 7 LADY JUSTICE GLOSTER: You can't seek out conversion claim.
 8 MR ZACAROLI: No.
 9 LADY JUSTICE GLOSTER: But why not?
 10 MR ZACAROLI: Because it's not a right you are entitled to
 11 at the date of administration. You've proved for your
 12 underlying claim. I mean in theory -- and I say this
 13 just in theory -- you might envisage a creditor --
 14 LADY JUSTICE GLOSTER: Sorry, why doesn't it come in as
 15 a non-provable claim down the track?
 16 MR ZACAROLI: That's one of my points in relation to the way
 17 it's put now; that's double accounting. You've already
 18 proved your claim, you can't prove twice for the same
 19 claim, once in relation to the underlying claim; second
 20 in relation to the judgment you then get on it. And the
 21 claim is what you are proving for. You are not proving
 22 for the interest, remember, you are just proving for the
 23 claim. And statutory interest then gives you interest
 24 on that claim. But it's on the proved debt. So you
 25 can't prove twice and get the Judgments Act rate on the

Page 153

1 basis, that's now my (inaudible).
 2 LORD JUSTICE BRIGGS: Of course, if the floating rate was
 3 the judgment rate from time to time, you could get that.
 4 MR ZACAROLI: Yes, but that's because the contract gave you
 5 a right at the date of administration. But that's
 6 completely different circumstance. I think what the
 7 statute is recognising, it's rights that you have at the
 8 date of administration because those are the rights that
 9 apply to your proved debt. And it's the rate applicable
 10 to the proved debt that is crucial. And that was indeed
 11 the fifth point.
 12 LORD JUSTICE PATTEN: It's because the rate of interest that
 13 (9) specifies is the rate payable under paragraph 7.
 14 That's the link, isn't it?
 15 MR ZACAROLI: That is right, my Lord, yes. And the rate
 16 under (7) is the rate payable on the debts proved.
 17 LORD JUSTICE BRIGGS: And even if periods in respect of
 18 different parts of the payment of the principal by
 19 dividend end on different dates they all start on the
 20 cut-off date.
 21 MR ZACAROLI: Yes.
 22 LADY JUSTICE GLOSTER: So your point is that this is all
 23 going back to debts proved.
 24 MR ZACAROLI: Yes.
 25 LADY JUSTICE GLOSTER: So whatever is payable under (9) has

Page 154

1 to link to that.
 2 MR ZACAROLI: My Lady, yes.
 3 LADY JUSTICE GLOSTER: And that's why you're stuck and why
 4 Mr Dicker's clients are stuck with the date of the
 5 administration, yes.
 6 MR ZACAROLI: Yes. Just as an advert for what's coming down
 7 the line, there is an appeal by Mr Smith on behalf of
 8 York that relates to this issue, as to what is the rate
 9 applicable to the debt at the date of administration in
 10 a contractual sense, but I'll leave him to develop that
 11 later on. I will be returning to this issue.
 12 But our case in relation to this point is that you
 13 are looking at the rights as they existed in the
 14 creditor at the date of administration. That's all.
 15 I was going through the judge's reasons and the
 16 third one was the consistency with the pre-legislative
 17 materials. Under the pre-1986 law it's right to point
 18 out that it had never been suggested, so far as we can
 19 see, that a creditor who had not obtained a judgment
 20 pre-insolvency could in some way have interest as if it
 21 had obtained a judgment. You'll see that particularly
 22 in a case called Fine Industrial Commodities, a case
 23 I referred to in passing this morning, bundle 1, tab 41.
 24 It's a decision of Mr Justice Vaisey in 1955 and is the
 25 decision I was referring to in passing that decided that

Page 155

1 if a company had been in insolvent liquidation -- a
 2 surplus arose, the cross-reference in the company's
 3 legislation to the bankruptcy provisions on interest no
 4 longer applied because it was no longer an insolvent
 5 company.
 6 So the main point in the case can be seen from the
 7 first five lines of the headnote:
 8 "The court has no power either by statute or under
 9 its general jurisdiction in the winding up of a company
 10 ...(Reading to the words)... in full is left with
 11 surplus assets."
 12 It's just one passage in the judgment. It's on the
 13 penultimate page of the report, page 263. There's
 14 a quote from something we've seen before from
 15 Lord Justice Gifford in Humber Ironworks. If my Lords
 16 could read the paragraph beginning, "I rather hoped that
 17 I should find ..."
 18 (Pause)
 19 So there had never been pre-1986 a right to treat
 20 them as if they had a judgment.
 21 And as the judge notes in his third point in
 22 paragraph 180 over on page 44 of the bundle, in
 23 reference to the pre-legislative materials:
 24 "They suggest it was not intended to include rates
 25 of interest for which no right ...(Reading to the

Page 156

<p>1 words)... commencement of the relevant insolvency 2 proceeding." 3 We say that's justified by the fact that there never 4 had been -- the point, the date of liquidation rather 5 had always been their cut-off date. 6 And the fourth point he makes -- 7 LADY JUSTICE GLOSTER: Just stopping with this for 8 the moment, quite interesting, I don't know how it 9 impacts, at page 262 Mr Justice Vaisey says: 10 "Although for some purposes during the winding up 11 proceedings this company must have deemed to have been 12 insolvent, it seems to me that when the time comes for 13 dealing with the surplus it is no longer deemed to be 14 an insolvent company but has to be treated as a company 15 which is and was and always has been insolvent." 16 Quite an interesting concept, isn't it? 17 MR ZACAROLI: It is. 18 LADY JUSTICE GLOSTER: I don't know whether it impacts on 19 anything we have to think about. 20 MR ZACAROLI: What he is construing there is a section in 21 the Companies Act, which I think is the one quoted on 22 the previous page 261, section -- I think it's 23 section 317: 24 "In the winding up of an insolvent company, the same 25 rule shall prevail and be observed with regard to the</p> <p style="text-align: center;">Page 157</p>	<p>1 that is not extra-territorial in effect, at least that's 2 the accepted position at first instance. I think it's 3 first instance, in relation to administration. It's the 4 Court of Appeal in liquidation anyway. It's the 5 accepted position. The reason for that is simply 6 because the restraint of the English court show about 7 interpreting statutes intended to interfere with foreign 8 proceedings. It doesn't evidence a legislative 9 intention that: oh yes, we are quite happy for people to 10 go and get judgments abroad. Indeed anyone who gets 11 a judgment abroad and seeks to enforce the rights under 12 that judgment would find themselves subject to 13 an injunction, or at least they wouldn't be able to 14 enforce those claims in English liquidation and could 15 well be enjoined against taking steps in relation to 16 foreign assets. 17 So the starting point is the Act is assuming there 18 won't be people getting judgments after the date of 19 administration because they are not supposed to. 20 Certainly not the opposite, that well if they do, they 21 can get a higher rate of interest, because that would 22 simply incentivise them to breach the moratorium. 23 That deals with the question of a creditor actually 24 getting a judgment post-insolvency and the rate then 25 becoming a rate within 2.88(9).</p> <p style="text-align: center;">Page 159</p>
<p>1 respective rights as secured and unsecured creditors and 2 debts provable as are in force for the time being under 3 the law of bankruptcy in England in respect of the 4 estates of persons adjudged bankrupt." 5 So what he is saying is he is accruing that section 6 saying that for the purposes of that section it is not 7 now to be regarded as an insolvent company. 8 LORD JUSTICE BRIGGS: No, and nor ever was. 9 MR ZACAROLI: Nor ever was. But I would say nothing of any 10 greater import arises from that. 11 LORD JUSTICE BRIGGS: But I'm assuming that the creditors in 12 this case had no contractual right to interest. 13 LADY JUSTICE GLOSTER: No, they didn't. 14 MR ZACAROLI: They didn't. They may have had a simple 15 contract, I think that's a shorthand for no 16 interest-bearing debt. 17 LADY JUSTICE GLOSTER: Thank you. 18 MR ZACAROLI: The fourth point the judge made, which we 19 support in paragraph 180, is that if the rule was to be 20 construed as permitting creditors to incorporate into 21 sub-rule (9) a foreign Judgment Act rate at a higher 22 rate it would incentivise an unseemly rushed judgment 23 which cannot have been the intention. Indeed, the 24 starting point is there is supposed to be a moratorium 25 on anybody obtaining a judgment. Now it's true that</p> <p style="text-align: center;">Page 158</p>	<p>1 The last point my learned friend raised on this, as 2 I say the (inaudible) point, was whether there's some 3 sort of non-provable claims. My Lady raised this 4 a moment ago. 5 LADY JUSTICE GLOSTER: Yes. 6 MR ZACAROLI: We say this is fundamentally flawed because 7 one is dealing with a creditor who has proved for the 8 underlying claim. And you cannot prove again for the 9 judgment which simply ascertains the value of your 10 pre-existing claim. It's not a new debt in the same way 11 as someone who comes in, wholly after the 12 administration, with a non-provable claim and gets 13 a judgment. That's an utterly different matter, because 14 they stand outside the proof process entirely. 15 LORD JUSTICE BRIGGS: This is a non-provable claim for 16 interest on a proved debt. 17 MR ZACAROLI: Yes. Well, I'm not sure what this claim is 18 for. It may be for the judgment or it may be for the 19 interest accruing on the judgment. I don't think it was 20 made clear. It's for the interest alone. 21 LORD JUSTICE BRIGGS: That's what I thought. 22 MR ZACAROLI: Yes. It is in that section of his argument. 23 LADY JUSTICE GLOSTER: Well, it's interest on the judgment 24 debt that you might have got in a foreign jurisdiction. 25 MR ZACAROLI: You did get.</p> <p style="text-align: center;">Page 160</p>

<p>1 LADY JUSTICE GLOSTER: That you did get. 2 MR ZACAROLI: Yes. We say that's interest on -- you are 3 entitled to interest on your proved claim. That is 4 statutory interest on the claim that exists at the date 5 of administration. It cannot be right that, having got 6 that, you then go and get a judgment in relation to the 7 proved claim which you are not supposed to get because 8 of the moratorium, for the purpose of incurring or 9 acquiring a higher Judgments Act rate, and then say, 10 "Well, I will have that as well or I will have the 11 uplift between statutory interest and that" as some form 12 of non-provable claim. Certainly in an English context, 13 where you cannot do that without the leave of the court, 14 I submit you would never get the leave of the court if 15 that was your purpose. 16 LORD JUSTICE PATTEN: But I mean, isn't this curtailed by 17 the -- don't ask me which of the points it is by number 18 we've already had, which is whether or not the 19 provisions of 2.88 effectively cut away any residual 20 contractual rights you might have to interest. It seems 21 very odd that a different result would apply if the 22 source of the interest was a judgment. I mean, I can't 23 see in principle why that would be any different. 24 MR ZACAROLI: Yes. If 2.88 stands as a complete code -- 25 LORD JUSTICE PATTEN: Exactly.</p> <p style="text-align: center;">Page 161</p>	<p>1 LORD JUSTICE BRIGGS: So you would end up with 2 a post-cut-off date claim, and your pre-cut-off date 3 claim would have been somehow subsumed. 4 MR ZACAROLI: Yes. That cannot have been any part of the 5 intention of the legislature here. It is all about 6 bringing in the claims as at the date of administration. 7 So unless I can assist further, those are our 8 submissions on the question of foreign judgment rates, 9 and that leaves just the question of contingent debts. 10 This is item 5. 11 LORD JUSTICE BRIGGS: And future or are we just looking at 12 contingent? 13 MR ZACAROLI: Well, there's no appeal in relation to future. 14 I have no doubt the question will come up in the course 15 of my submissions, but there's no appeal on it. 16 It's item 5, declaration 14, issue 7. At the 17 outset, I acknowledge the outcome of the discussions 18 between my Lord and Mr Dicker yesterday. There are 19 variety of possibilities when one's talking about a 20 contingent debt, and it may well be there isn't 21 one-size-fits-all solution here because this is an area 22 which is complicated and the rule is rather simple. 23 Can I focus in the first instance, however, if only 24 for forensic purposes, on the wholly contingent debt. 25 That is a debt contingent both as to time, and</p> <p style="text-align: center;">Page 163</p>
<p>1 MR ZACAROLI: -- then I don't think there would be -- it's 2 difficult to see how this -- although -- well, that's 3 right, because this is still interest relative to a 4 proved debt. 5 LORD JUSTICE PATTEN: It has to come in, one would have 6 expected, if it can come in at all, through the gateway 7 of 2.88 and (9). But if it can't do that, it's 8 difficult to see on what basis it can come in. 9 MR ZACAROLI: I would agree with that. We find it difficult 10 to see how this could ever arise. The only theoretical 11 possibility is a creditor who decides not to prove at 12 all, but take its chance that there will be a surplus 13 and get a judgment afterwards instead, having not 14 proved. But the problem with that is it's still coming 15 in with its claim that it always had, ie it is a 16 provable claim. I don't think it can -- 17 LADY JUSTICE GLOSTER: Well, that's my creditor, that's my 18 foreign creditor. 19 MR ZACAROLI: That's right. It can't avoid the fact that if 20 you claim, you are in fact proven within the meaning of 21 the Act and therefore subject to the rules. 22 LORD JUSTICE BRIGGS: Even though, if the foreign law in 23 question is like our law, your claim would have been 24 subsumed in the judgment. 25 MR ZACAROLI: Yes.</p> <p style="text-align: center;">Page 162</p>	<p>1 existence, and indeed amount. 2 So the classic case would be the insurance claim and 3 the fire. Pre-occurrence of the contingency, the 4 creditor is entitled to have an estimated value put upon 5 that claim and prove for it. We say pre-occurrence of 6 the contingency there is no sensible basis on which the 7 creditor can estimate on the basis of a discount for 8 futurity, because you simply do not know when that's 9 going to fall in. So there's no sensible basis for any 10 part of that estimation taking into account the date on 11 which the debt will be paid. You just do not know. 12 Once the contingency has occurred, then, according 13 to the judge, there is no discounting of the sum. You 14 look at what in fact amount -- the amount occurred back 15 then, let's say it is £100, which is the claim 16 five years after the administration. That sum is 17 substituted for the proof or in the proof, so you have 18 a claim for 100. 19 On the judge's conclusion you get interest on that 20 at 8 per cent from date of administration. 21 LADY JUSTICE GLOSTER: And that's illogical. 22 MR ZACAROLI: Exactly. 23 LORD JUSTICE BRIGGS: He says, well, that's just tough, the 24 rules aren't perfect. 25 MR ZACAROLI: There are two possible responses to that.</p> <p style="text-align: center;">Page 164</p>

1 LADY JUSTICE GLOSTER: That doesn't happen in an ordinary
 2 liquidation. Tell me if I'm wrong, but does that
 3 happen? When you got an insurance -- in an insurance
 4 company liquidation?
 5 MR ZACAROLI: I'm pretty sure the rules have changed in
 6 relation to insurance.
 7 LADY JUSTICE GLOSTER: Maybe they changed after my time, as
 8 it were, but --
 9 LORD JUSTICE BRIGGS: This supposes, does it not --
 10 I suppose it does suppose it's an insurance company,
 11 yes.
 12 MR ZACAROLI: It does, but leaving aside an insurance
 13 company, it could be any other contingent --
 14 LADY JUSTICE GLOSTER: Well, in a general insurance company
 15 you are going to get this sort of situation all the
 16 time.
 17 MR ZACAROLI: Yes.
 18 LADY JUSTICE GLOSTER: Are there special rules for winding
 19 up insurance companies?
 20 MR ZACAROLI: There are.
 21 LADY JUSTICE GLOSTER: Is that why this is all a bit
 22 useless, this debate, because I'll need to look at the
 23 rules?
 24 MR ZACAROLI: The example may be useless but -- it used to
 25 be the case that it was and it's just that it's like --

Page 165

1 it's an example. But there are other types of
 2 contingency which still obviously exist.
 3 LADY JUSTICE GLOSTER: They're valuation rules, or at least
 4 they used to be, aren't they?
 5 MR ZACAROLI: I'm not sitting here able to recite what the
 6 rules are, but there are rules in relation to that sort
 7 of case, but in this case there are all sorts of
 8 contingent claims, arising out of ISDA agreements, for
 9 example, contingent on a default, or rather a closeout.
 10 The creditor would have had a contractual right to
 11 terminate; it may not have done. So it's a very real
 12 issue in this case, there are claims which arose that
 13 were crystallised only subsequently, and there's a
 14 number that we put on that claim and the big question
 15 is: do they get that number, notwithstanding it only
 16 arose two or three years later, plus all the interest at
 17 8 per cent in the intervening period? So it's a real
 18 issue, it's not a hypothetical one.
 19 Logically there are two responses to the conundrum
 20 or the illogical position I put forward. One is that we
 21 are right and that statutory interest should run only
 22 from the date of the occurrence of the contingency. The
 23 other is if the court were to conclude that on the
 24 occurrence of the contingency there is indeed to be
 25 a discounting back for valuation purposes. Either way

Page 166

1 gets rid of the illogicality, and if the court were to
 2 conclude against the judge, and actually in accordance
 3 with the submissions made by the SCG to the judge, that
 4 there is discounting back once you know the number --
 5 once the contingency has occurred, then my arguments
 6 pretty much fall away in those circumstances.
 7 LORD JUSTICE BRIGGS: That's their fall-back position.
 8 MR ZACAROLI: Yes, and if that's correct then there's
 9 undoubtedly far less force in my submissions, which are
 10 essentially based upon the unfairness in a creditor
 11 receiving interest at a Judgments Act rate of
 12 8 per cent, or any rate, for a potentially long period
 13 during which it was not kept out of its money at all.
 14 LORD JUSTICE BRIGGS: Do you discount back in fixing a proof
 15 so he gets paid less for his proof plus interest, or do
 16 you discount back for the purpose of working out what
 17 interest to pay? Because there will be a priority issue
 18 in the sense that interest only comes into play one step
 19 down the waterfall. I think the alternative fall-back
 20 position is you discount back for the proof as well as
 21 the --
 22 MR ZACAROLI: That's right, because the question here is you
 23 discount back to the proof, so you get paid 100 less --
 24 LORD JUSTICE BRIGGS: You get paid less.
 25 MR ZACAROLI: -- X per cent, and you get paid X per cent to

Page 167

1 get you back up to speed.
 2 LORD JUSTICE BRIGGS: If there's a surplus.
 3 MR ZACAROLI: If there's a surplus, yes, that's right.
 4 LORD JUSTICE BRIGGS: But if there's no surplus, do you
 5 still discount back for the proof?
 6 MR ZACAROLI: You must do because it's a single solution.
 7 LORD JUSTICE BRIGGS: Yes, because you do the proofs before
 8 the interest.
 9 MR ZACAROLI: Yes. There would be a fall-back fall-back
 10 position, where you just discount back for the purposes
 11 of calculating interest.
 12 LORD JUSTICE BRIGGS: The difficulty is fitting either of
 13 those solutions into the rules, isn't it?
 14 MR ZACAROLI: Yes. In a sense, the rule is pretty vague on
 15 valuing contingencies. It says you have to value a debt
 16 that is uncertain --
 17 LORD JUSTICE BRIGGS: No, but where the contingency occurs
 18 before dividend.
 19 MR ZACAROLI: Yes. The problem there is, as the judge
 20 said -- well, not the problem, the answer is, as the
 21 judge said, it's no longer an uncertain debt at that
 22 point.
 23 LORD JUSTICE BRIGGS: Yes.
 24 MR ZACAROLI: The answer may be it's still uncertain -- it's
 25 uncertain in the sense of valuation because you need to

Page 168

<p>1 know what it was valued at at the date of 2 administration. So that question of uncertainty 3 remains, it's just you now have a better answer. 4 The argument is premised, we say, on giving 5 rule 2.88 a purposive construction, because we accept 6 the literal problem that we arrive at here, which is 7 that we're looking at the meaning of the word 8 "outstanding" in rule 2.88(7) for a different purpose 9 now, that is when does the debt start to be outstanding? 10 We accept the literal construction is that refers to 11 proved debts, and there is a proved debt in sense that 12 you've proved for an estimated value, that's your proved 13 debt, at the date of administration. So literally 14 speaking, there is a (inaudible). So we say you have to 15 apply a purposive approach to rule 2.88(7), the purpose 16 of which is to compensate creditors for the loss of the 17 time value of their money in the period between the date 18 of administration and the date that they are paid. 19 Contrastingly, the necessity for equality which 20 drives the single date rule for the purposes of proof 21 and the requirement to estimate the purposes of proof is 22 not the driving force or the purpose behind the giving 23 interest. We accept that obviously you have to estimate 24 both a future and contingent debt as at the date of 25 administration because that's what the rules require,</p> <p style="text-align: center;">Page 169</p>	<p>1 value the contingency in terms of taking account or 2 whether you can value the contingency in terms of taking 3 into account the time before which the contingency will 4 mature. 5 MR ZACAROLI: Yes. 6 LADY JUSTICE GLOSTER: Isn't it a sort of job for the 7 administrators to work out rather than for the courts to 8 say you always have to do it or you never do it? 9 MR ZACAROLI: Do what, discount back or apply -- 10 LADY JUSTICE GLOSTER: Work out how long -- well, working 11 out the periods during which they've been outstanding. 12 MR ZACAROLI: Well, we would be content with such 13 an approach but it's not the approach the judge ruled. 14 LADY JUSTICE GLOSTER: No, but you are going for the 15 absolute opposite of this, aren't you? I'm just 16 wondering whether there isn't a halfway house. 17 MR ZACAROLI: Well, I think if there were, we would be 18 content with a halfway house, that you actually look at 19 the reality to see when in fact they were kept out of 20 their money and apply interest from that date. 21 LADY JUSTICE GLOSTER: That depends on the type of 22 contingency. So it's a sort of valuation exercise 23 between the creditor and the administrator. 24 MR ZACAROLI: And problem is the rule -- 25 LORD JUSTICE BRIGGS: I'm just looking -- your first</p> <p style="text-align: center;">Page 171</p>
<p>1 and they require that so that you are able to apply a 2 pari passu rateable distribution to all creditors, even 3 though you don't yet know what people's actual claims 4 are going to be, and it's for the efficient 5 administration of the estate so that it doesn't have to 6 remain open for everyone(?) whilst you wait to see if 7 contingencies arise. That is purpose behind giving 8 people a proof in an estimated value. 9 But the purpose of the interest rule, we say, is 10 different, to compensate for being kept out of your 11 money, and in any real sense the creditor is not being 12 kept out of its money in the sense of what it was 13 entitled to under its contractual rights, until such 14 time as the contingency falls in. 15 LADY JUSTICE GLOSTER: Just to pick you up on this, doesn't 16 this depend on the nature of the contractual terms that 17 inform the contingency? So actually, you have to look 18 at quite a nuanced way in which you value the contingent 19 debt. 20 MR ZACAROLI: The valuation of the right certainly depends 21 upon the particular -- 22 LADY JUSTICE GLOSTER: Whether or not interest is payable 23 from the date of the administration or not may depend on 24 the particular category of contingent debt, what are the 25 factors that feed in to the contingency, whether you</p> <p style="text-align: center;">Page 170</p>	<p>1 solution is the special meaning of "outstanding", 2 because generally speaking 7 says: 3 "During periods during which they have been 4 outstanding since the company entered into 5 administration." 6 I think probably one's first blush reading of that 7 is that they have all since been outstanding since the 8 company entered into administration, you just have an 9 uncertainty as to how far forward the period goes, not 10 how far back it goes. I think you're saying you could 11 read: 12 "During the period in which they have been 13 outstanding but only since the company entered into 14 administration." 15 MR ZACAROLI: Yes. 16 LORD JUSTICE BRIGGS: Yes. So that would accommodate 17 a later start date for your period, where, because it 18 was only contingent at the date of the administration, 19 it wasn't outstanding. 20 MR ZACAROLI: Yes. 21 LADY JUSTICE GLOSTER: When you say "outstanding", you say 22 that's payable, don't you, you don't say it's 23 an obligation. If we're getting into the distinction 24 between debts where there is an existing obligation, but 25 not as yet a payment obligation -- do we get into that?</p> <p style="text-align: center;">Page 172</p>

1	MR ZACAROLI: If we do, we say it's a latter, that is the	1	
2	date on which a payment --	2	
3	LADY JUSTICE GLOSTER: It's when it's payable not when the		Submissions by MR ZACAROLI1
4	debt actually --	3	(continued)
5	MR ZACAROLI: Well, except that we will say there is nothing	4	
6	due or payable until such time as the contingency	5	
7	occurs. If I will pay you a £100 if it rains on Sunday,	6	
8	until Sunday there's no question of any debt other than	7	
9	a contingent one, in the sense that the debt itself is	8	
10	contingent, its existence is contingent on it raining on	9	
11	Sunday.	10	
12	LORD JUSTICE BRIGGS: The trouble with this is that the	11	
13	basic scheme in relation to the debt itself is that if	12	
14	the administration could all be done over a long	13	
15	weekend, you would have got the payment immediately in	14	
16	relation to that contingency but only at the reduced	15	
17	amount.	16	
18	MR ZACAROLI: Yes. Although you say if it's all done in	17	
19	a weekend and then --	18	
20	LORD JUSTICE BRIGGS: But what's changed, where the	19	
21	contingency occurs, as I understand it, is not, as it	20	
22	were, a wholly different attitude to when you should	21	
23	have got paid, it's just a change in the valuation	22	
24	amount. I think Mr Dicker said it changed only for the	23	
25	purpose of dividend and not even for purpose of proof or	24	
		25	
	Page 173		Page 175

1	something.		
2	MR ZACAROLI: I think he was talking about future debts.		
3	LORD JUSTICE BRIGGS: I will have to have a look, but --		
4	MR ZACAROLI: Yes.		
5	LADY JUSTICE GLOSTER: The time it's after 4.15. I'm afraid		
6	we have to rise. You are up to time, are you?		
7	MR ZACAROLI: I shall only be five or ten minutes.		
8	LADY JUSTICE GLOSTER: Despite the fact we've been		
9	interrupting.		
10	MR ZACAROLI: Yes, I only have this bit to finish and that's		
11	it, so I'm way ahead of time.		
12	LADY JUSTICE GLOSTER: Thank you very much indeed. 10.30		
13	tomorrow morning.		
14	(4.18 pm)		
15	(The hearing was adjourned until		
16	the following day at 10.30 am)		
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23			
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	Page 174		

A				
abide 101:18	accrued 66:16	81:7,9 150:5,6	150:7 151:21	agreements 166:8
ability 26:8	accrues 19:4 24:5,7 37:18 42:5 97:25	actions 19:22	152:10 153:11	ahead 174:11
able 5:16 12:25 24:24 28:20 80:2 86:15 98:18 159:13 166:5 170:1	accruing 6:1,7 21:13 25:6 28:24 29:21 30:2 32:4 32:21,23 36:8,21 42:11 66:21,22,24 68:4 83:22 88:16 98:18,20 99:10 100:3 109:13 149:16 158:5 160:19	acts 3:20 41:1 150:1	154:5,8 155:5,9 155:14 159:3,19 160:12 161:5 163:6 164:16,20 169:2,13,18,25 170:5,23 172:5,8 172:14,18 173:14	albeit 133:3
abolish 51:4	accumulating 144:14	actual 124:17 170:3	administrations 110:14	aligned 127:4
abroad 159:10,11	accurate 18:13	add 82:2 119:25 120:1 140:11	administrator 31:17 35:5 57:7 102:19 171:23	allow 26:8 27:2 34:21 36:8 66:10 69:20
abrogation 67:25	accurately 18:1 67:16 125:14	additional 95:20 105:16	administrators 49:17 102:13 171:7	allowed 34:6
absence 48:5 77:14 78:2,3	achieved 58:25 63:6	addressed 67:20	adopt 45:21 72:11	allowing 64:17 100:9
absent 10:6 101:22	acknowledge 163:17	addresses 42:8	Ador 37:3	allows 38:16 117:19
absolute 98:15 139:17 171:15	acquiring 161:9	addressing 10:10 43:5 44:4 148:1	advanced 3:7 11:15	altered 100:8
absolutely 11:4,6 49:2 50:5 61:19 123:24 152:16	act 2:3 9:11,13,21 10:21 11:20,22,23 11:24 19:2 21:16 23:22,25 24:18 31:4 38:1 39:1 41:7 51:10 55:12 56:3 58:11 63:9 63:12 78:2,3,8,8 78:13 83:17 95:13 95:15 96:19,20,22 96:24 97:2,17 98:2,4,7 99:19,20 104:5,6,9 106:22 106:23 141:6 142:13,25 143:6,9 143:22 149:25,25 150:2,8 153:25 157:21 158:21 159:17 161:9 162:21 167:11	adjudged 158:4	advantages 29:16	alternative 33:8 137:20 167:19
absurd 70:25 73:17 98:24 102:3	administration 4:10 9:17 18:24 19:7 24:24 26:3 26:24 27:1 29:2 29:22 30:3,16,24 31:2,6 36:9 37:5 37:12 55:20 56:21 56:25 59:1 67:13 85:6 93:17 94:17 94:25 100:24 101:9 102:13 103:1,4,5 106:18 112:15 113:25 114:1,6 119:12 126:11 130:20 131:18 132:13 133:20 135:19 136:18 138:13 139:24 140:21 142:14,16 143:1,5 143:8,14 144:13 144:21,22 145:3,7 147:4,17,25 148:4 148:12,25 149:2,5 149:14,19 150:1,3	adjudicate 61:23	adversely 60:14	altogether 42:16 110:8
accept 5:8 8:23 9:6 13:9 16:21 17:21 39:9 59:5 68:12 75:15,17 83:3 86:14 106:13 110:5 125:18 129:10 135:12 147:8 169:5,10,23	accepted 11:7 79:18 125:2 159:2 159:5	administered 57:7	advert 155:6	amount 2:11,11 12:24 45:3,5 47:16 63:17 65:8 74:6 111:25 120:25 123:15 124:18 129:24 132:14 138:4 164:1,14,14 173:17,24
accepting 30:14 52:18	accepts 65:1 79:24	administration 4:10 9:17 18:24 19:7 24:24 26:3 26:24 27:1 29:2 29:22 30:3,16,24 31:2,6 36:9 37:5 37:12 55:20 56:21 56:25 59:1 67:13 85:6 93:17 94:17 94:25 100:24 101:9 102:13 103:1,4,5 106:18 112:15 113:25 114:1,6 119:12 126:11 130:20 131:18 132:13 133:20 135:19 136:18 138:13 139:24 140:21 142:14,16 143:1,5 143:8,14 144:13 144:21,22 145:3,7 147:4,17,25 148:4 148:12,25 149:2,5 149:14,19 150:1,3	affect 34:2 38:4 75:5	amounts 38:5 58:19
accommodate 172:16	accommodate 172:16	adjudicate 61:23	affords 29:6	amplified 82:1
accords 48:12	accord 6:10 22:19 25:3 74:3 116:4 116:10 164:10 171:1,3	adjust 40:8 54:2	afraid 86:7 113:7 115:25 174:5	analogous 19:9
account 6:10 22:19 25:3 74:3 116:4 116:10 164:10 171:1,3	accounting 153:17	administered 57:7	aggregate 111:25	analysed 85:19
accounts 19:23,25	action 47:7 77:15 78:22 79:1 80:20	administration 4:10 9:17 18:24 19:7 24:24 26:3 26:24 27:1 29:2 29:22 30:3,16,24 31:2,6 36:9 37:5 37:12 55:20 56:21 56:25 59:1 67:13 85:6 93:17 94:17 94:25 100:24 101:9 102:13 103:1,4,5 106:18 112:15 113:25 114:1,6 119:12 126:11 130:20 131:18 132:13 133:20 135:19 136:18 138:13 139:24 140:21 142:14,16 143:1,5 143:8,14 144:13 144:21,22 145:3,7 147:4,17,25 148:4 148:12,25 149:2,5 149:14,19 150:1,3	aggregated 112:5 114:22 137:7,11 139:5	analysis 18:8 19:7 20:1 28:16,21 127:5
accrue 41:13 74:12		adjudicate 61:23	aggregating 125:13 127:6	annum 21:10
		adjudicate 61:23	aggregation 118:4	anomalies 30:6
		administered 57:7	ago 64:16 145:10 160:4	answer 4:5 8:15 15:17 17:4 32:9 46:25 51:17 53:22 54:7 58:8,9,12 70:19 82:3 90:1 93:4,11 100:5 101:10 102:4 103:10 108:1 133:23 136:5

141:4 168:20,24 169:3 anybody 101:25 158:25 anymore 57:6 68:6 anyway 8:20 30:18 68:7 83:3 115:7 147:6 159:4 apart 13:16 16:18 37:12 65:10 93:17 108:2 117:13 142:15 143:1,8 144:14,22 145:7 147:3 148:24 apologise 83:1 apparently 17:12 92:8 appeal 48:8 49:24 85:19 86:12 87:3 90:16,21 91:22 105:15 107:3 108:3 120:15 123:8 139:13 142:20 155:7 159:4 163:13,15 Appeal's 92:12,17 appealing 105:18 105:19 appeared 5:6 101:10 appears 3:7 5:12 9:13 22:17 appellants 35:23 apples 126:8 applicable 11:17 12:14 13:11,12 28:24 29:9 93:17 93:24 142:4,15 143:1,8 144:21 145:6,8 147:3,17 148:24,25 151:2 151:15 154:9 155:9 application 16:21 32:25 33:2	applications 17:22 applied 2:4 11:2,5 15:25 16:25 23:8 28:23 32:1 49:22 50:7 51:7 62:17 66:1 94:12,12 95:8,23 126:19 151:3 156:4 applies 5:14 12:16 16:22 29:11,17,19 31:8 33:9 38:10 39:20 44:5 61:25 79:23 127:21 128:6 151:4 apply 3:2 4:12 6:10 11:24 23:24 24:20 25:1 28:20,22 29:14 30:5,8 31:20,25 32:6 33:7 34:9,10 38:3 42:13 44:6 45:23 62:16,16,20 65:3 65:16 68:6 69:13 69:17 71:1 79:20 80:1 124:15 126:17 127:6 129:11 141:5 154:9 161:21 169:15 170:1 171:9,20 applying 2:11 13:21,22 25:3 42:10,22 44:21,23 63:4 74:4 appointed 31:17 approach 31:7 33:8 50:16 64:15 75:16 99:1 117:21 125:13,14 127:6 129:6 137:8 139:5 169:15 171:13,13 appropriate 2:19 4:2 40:4 45:4 47:5 49:17 64:25 65:12,14 68:3	82:24 88:14 129:15 appropriated 46:22 47:19 48:11 48:20 appropriating 43:5 appropriation 2:18 2:23 3:21 4:4,6,9 4:15 5:2,9,11 6:25 9:1,8 31:23 32:17 46:3,7,13 47:21 49:3 62:19 April 1:1 area 16:21 81:13 86:7 109:19 116:6 135:24 146:15 163:21 arena 65:10 argue 85:6 86:11 106:20 arguing 91:16 argument 3:7,16 7:15 8:2,11,13 11:15,24 16:7 30:9 52:25 57:19 59:24,25 69:17 78:16 80:16 82:9 90:13 106:11 108:9 109:17 112:23 117:16,17 126:15,15 127:14 128:23 139:22 140:2 143:16 150:10 160:22 169:4 arguments 35:23 53:24 54:4 86:16 93:8 167:5 arisen 103:10 148:13 arises 5:9 29:20,23 29:24 32:21,22 72:16 80:23,25 81:8 101:1 106:18 125:19 144:2,7	158:10 arising 55:21 56:2 82:10 99:13 113:24 125:16 148:4 149:5 166:8 arithmetic 71:5 75:12,13,15 arose 34:25 49:19 124:19 156:2 166:12,16 arrangement 6:16 arrears 47:7 arrive 169:6 arrived 140:12 arrows 87:22 ascertain 112:8 152:20 ascertains 160:9 aside 64:19,22 165:12 asked 57:16 90:20 92:20 96:23 asking 33:12 42:15 53:19 101:4 aspect 51:8 68:2 95:14 139:11 assert 132:24 assess 53:13 asset 79:6 103:19 104:1 assets 27:1 38:16 52:2 156:11 159:16 assist 163:7 assistant 5:4 assume 20:13 57:3 73:25 87:13 91:13 101:20 123:21 130:3 assumed 27:20 28:8 49:9 assumes 131:20 assuming 30:9 53:23 60:17 80:7 116:7 135:3	158:11 159:17 assumption 8:3 9:11 61:8 75:8 89:18 91:20 119:3 astoundingly 62:21 63:16 attached 111:2 144:10 attempt 25:19 73:18 attitude 14:12,20 98:25 173:22 attract 110:22 attracts 127:3 attributable 47:15 127:3 attributed 48:16 132:10 Australia 18:2 Australian 36:3 40:14 92:23 authorities 12:11 36:10 authority 10:13 27:2 63:10 available 34:15 61:13 66:23 avoid 102:11 138:21 162:19 avoiding 129:13 aware 1:10 49:2 63:11 151:8 awfully 112:23
<hr/> B <hr/>				
B 57:19 120:2 148:1 back 13:8 14:9,14 17:9,15,20 20:13 23:2,10 32:13 48:24 50:12 63:22 64:7 65:20 85:20 96:9,22 102:8 103:7 112:11 118:7 122:23				

127:8,10 130:2,6 130:14 133:23 134:6,12,13 136:1 141:22,24 142:17 145:5 152:13 154:23 164:14 166:25 167:4,14 167:16,20,23 168:1,5,10 171:9 172:10 background 64:22 badly 13:3 balance 107:10 Bank 31:14 Banking 25:10 26:21 bankrupt 1:20,24 2:10 4:22 6:5,17 7:2,18 8:4,16,18 8:25 9:2,6 13:24 14:15 97:8,11 98:5,6,9,13,18,19 98:22 99:25 158:4 bankrupt's 8:22 bankruptcies 65:5 bankruptcy 7:4,8 7:14,20,23 9:17 9:21 10:1,12,19 11:2 12:15 13:24 14:20 17:17 21:16 29:2,10 31:1 33:6 36:5,8,18 50:15 55:3,21 62:1 64:14 65:11,25 67:23 68:7 93:25 96:18 97:12,17,23 98:1,3,19,21,25 99:13 100:17 156:3 158:3 bankrupts 14:6,12 55:19 bar 137:18 bars 118:20 based 8:13 23:19 23:23 32:11	117:23 118:14 122:20 137:24 167:10 basic 173:13 basically 5:21 basis 11:12 18:24 24:20 29:12,18 30:1 37:25 39:9 40:5 42:12 46:10 54:12 64:1 74:13 80:3 86:12 91:25 101:24 102:22 139:23 145:24 154:1 162:8 164:6 164:7,9 bear 27:24 115:10 bearing 21:14,25 81:2 bears 65:25 146:10 becoming 159:25 bed 111:20 beginning 14:5 24:6 32:8 67:17 156:16 begins 26:22 67:17 behalf 7:12 47:8 83:1 155:7 believe 82:11 89:15 beneficial 51:14 benefit 48:4 51:24 54:11 57:8 59:20 127:2,25 benefits 54:14 63:20 126:23 127:25 141:6 best 15:9 105:16 107:2 bet 64:12 better 63:21 111:18 114:18 132:25 169:3 beyond 28:13 56:12 85:5 98:3 100:16 138:13 big 166:14	bigger 128:23 billions 33:22 bin 42:16 bit 5:3,4 11:3 53:13 119:21 134:21 165:21 174:10 bite 136:1 Blaming 57:15 blush 172:6 board 31:20 39:13 61:25 84:22 103:8 bolster 149:8 bolstered 148:22 149:23 bonds 2:15 book 17:13 books 30:16 bother 122:18 bothering 46:24 bottom 2:6 6:11 9:10 23:14 36:16 48:1,17 56:15 59:12 bound 4:12 147:4 Bower 1:7 5:5,12 7:14 8:3 11:2,4,12 12:22 13:9,15 14:17,25 15:12,24 17:22 23:8 24:20 25:1 28:20,22 30:5,8 31:8,22 32:12,25 33:3,9 34:17,22 35:13 37:23 38:9 39:24 40:5 41:15 42:10 42:16 43:4,9,11 43:17 44:11,19,21 44:25 45:16,23 46:4,10 48:25 49:1,22 50:1,11 51:4,6 52:22 53:3 53:13 62:4,16,20 65:12,17 66:10 67:18,20 68:1,2,9 79:23 80:1 101:20	101:23 129:11 breach 107:22 159:22 break 44:15 135:14 139:9 brief 24:25 briefly 68:10 Briggs 8:2,10,21 11:18,22 12:1,4 12:10,20 13:1,7 14:13 16:24 18:7 20:13,17,22 21:15 21:23 22:6,9,13 22:15,25 28:3 30:15 33:23 37:7 37:20 41:11,18,23 42:1,8,19,23 43:8 43:19 59:4 64:3,8 64:12 68:18,22 73:21 75:5,9 81:12,18,24 84:22 87:4,9,12,21 88:16 91:10,24 94:6,9 96:23 99:5 99:8,15,19,22 103:2 106:6 108:11,15 110:20 110:24 111:1 112:23 113:11 114:3 115:3 116:17,23 117:8 117:13 118:11 119:23 121:11,14 121:23 122:1,5,8 122:13,22 125:8 125:12 128:4,7,21 129:3,10,14,17 132:1,9,18 133:17 134:5,11,13 135:10 136:8 137:9,11 139:1 140:7,23,25 142:8 144:6,8,14,18 147:6 150:8,14,17 151:25 152:3	154:2,17 158:8,11 160:15,21 162:22 163:1,11 164:23 165:9 167:7,14,24 168:2,4,7,12,17 168:23 171:25 172:16 173:12,20 174:3 Briggs's 93:3 107:6 bring 19:1 74:2 84:22 bringing 163:6 broad 1:6 35:22 50:22 51:17 54:15 54:23 57:23 60:2 60:3 62:2 65:15 76:12 118:4,12 127:5 136:5 139:4 broader 69:10 116:12 117:5,16 136:4 broadly 62:9 86:22 140:10 141:3,4 brokerage 33:18 Bromley 10:16 13:19 36:22 Brothers 33:3 brought 40:10,23 40:25 47:8 103:12 103:13 128:12 Buckley 16:11 build 133:2 bundle 1:9 12:12 12:13 13:20 19:14 20:16 22:3,10 25:17,18,19 27:15 36:10 47:2 49:24 51:12,13,16 97:3 97:4 107:4 108:21 130:12 151:7 155:23 156:22 burden 54:14 126:23 127:25 burdens 63:21 126:23 127:25
--	---	--	---	---

Byrne 48:2,12,14	38:7,14 42:2	114:12,15,16	Chitty 18:22 20:2	116:9,9,10 117:6
Byzantine 82:20	46:17,18,20 47:2	126:5,6,7,19	24:19 25:9 28:19	117:23,25 118:2
C	47:10,17 49:4,10	132:22 141:7	Chitty's 23:6	118:10,16,22
C 57:19	52:4 61:18,22,23	143:21,22 144:1,5	choice 44:7 45:3	119:1,1,2,8,15
calculate 35:21	61:24 62:8 63:5	164:20 166:17	choosing 49:21	120:9,9,18,21,24
66:6 101:23	63:19 66:17 69:22	167:12,25,25	chosen 49:12 56:20	121:10,17,24
119:15 121:16	70:25 78:17 80:16	cents 132:25 133:5	chronology 19:19	122:7,15,20 123:2
122:15 123:17,18	102:14,20 115:17	133:7	circumstance	123:14,16 124:4,5
128:9 136:22	124:11 127:21	century 56:17	109:11 154:6	124:6,14 125:3,7
calculated 2:11	133:24 155:12,22	certain 36:2 39:12	circumstances	125:15,17,19,20
23:3 63:3 136:7	155:22 156:6	55:24 97:19 121:7	28:22 30:22 63:5	126:16,21,25
136:10,11	158:12 164:2	certainly 55:3,6	80:14 114:2 118:1	128:1,9,14,15,16
calculates 25:4	165:25 166:7,7,12	58:6 87:5,11	145:3 149:3 167:6	128:17,19 129:21
calculating 66:11	cases 2:15 5:10	159:20 161:12	citation 5:20	129:21 130:6,7,8
116:3 134:11	13:10,10,17,18	170:20	cited 18:2 21:2	130:8,25 131:9,13
168:11	17:22 18:1,3,9,13	certainty 34:20	cites 46:17	131:14,19,20
calculation 2:14,21	25:11,13 30:4	51:18	civil 49:5	132:6,12,20,20
43:22 44:22 54:3	31:20 36:4 40:14	certificate 7:2	claim 2:8,9 6:6	133:18,22 134:2,3
67:5 117:20 119:8	46:5 55:3 56:17	cetera 55:20 89:5	25:21,24 32:14	134:10,15 135:1,4
124:2 126:15	91:4 92:24 109:18	Chambers 15:15	34:8 38:17 39:7	135:6,8,9,25
129:11 139:2	145:1 147:4	15:16	52:2,3 54:5 55:14	136:1,2,7,10,11
calculations 73:9	149:10	chance 162:12	55:14 56:8 60:10	136:12 137:1,5,6
137:22	cash 79:5	Chancellor 2:5,17	61:19 63:12 75:21	137:12,12,15,16
call 25:22 60:22	catch 15:5	4:18 9:12,24 10:9	76:14,25 77:11,15	137:19,24 138:13
called 25:16 155:22	categories 55:13,14	10:13 26:1	78:5,20,24 79:22	138:14,15,18,19
Canada 18:16	category 126:3	Chancery 26:4	81:15,21 82:7	139:12 141:5,14
cap 130:9,9 135:25	170:24	chances 64:11	83:11,21,24 84:3	141:15 143:13,15
capacity 104:7	cater 40:9 41:21	change 35:7 38:5	84:7,13,14,19,19	144:4 152:19,20
capital 43:21 48:16	96:3	100:13 121:20	85:9,13,13,15,17	152:25 153:4,7,12
carried 87:14	cause 77:15 78:22	173:23	85:18 91:5 92:16	153:15,18,19,19
carry 21:18 23:19	79:1 80:20 81:7,9	changed 165:5,7	92:17 97:15 98:6	153:21,23,24
91:11	caused 77:2 124:6	173:20,24	100:15 101:2,3,8	160:8,10,12,15,17
case 1:10,17,23,23	causes 36:7	changes 35:16 66:3	101:11,21 102:9	161:3,4,7,12
2:3 5:1 6:3 7:6	cease 40:1 103:24	94:1 104:20	103:19 104:6,12	162:15,16,20,23
8:16,24 9:19	ceased 67:9 69:4	chapter 23:20	105:21,22 106:1,2	163:2,3 164:2,5
10:17 11:7,10,16	ceases 41:13 72:13	character 27:8	106:15,17,21,22	164:15,18 166:14
12:2,3 13:16	cent 10:8,21 11:6	characterisation	107:1,1,15,16,17	claimant 64:4
16:12 17:19,19	11:19 12:5,6,8	102:11	107:18,21 108:4	115:15,21
18:14,18,19,23	13:2,3,4 21:10	characterise	108:11,18,18	claimants 59:21
19:14,16 23:7	23:15 27:2 31:4	135:14	109:11,23 110:3,4	122:2
25:2,10,19 26:20	35:8 62:6,11,15	charge 89:4,5	110:7,16,21 111:5	claimed 12:24
26:21 28:23 30:7	62:20 63:3,4	chargeable 151:5	111:5,6,10,11,16	25:24 131:6
31:14 33:16,22	64:21 66:14,20	check 5:16 40:16	111:18 112:3,19	claiming 35:11
34:15 36:9,11	72:10,18,23 74:9	92:21	113:24 114:13	52:7 61:14,15
	88:8,12 98:12	cherry 136:1	115:2,15,20 116:4	62:4 133:6,8

134:18,22 139:2 claims 35:2 55:12 55:24,25 56:2,2 56:10 58:3,21 61:5,12,15,16 65:8,8,9,18 82:10 84:18,18 87:12 93:6 96:16 105:13 105:24 109:20 110:11,12,13,18 113:16 115:14 118:13 120:16 129:12 131:25 133:10 138:6 149:12,22 159:14 160:3 163:6 166:8 166:12 170:3 class 56:7 classes 80:5 classic 164:2 clear 4:15,17 11:14 54:3 88:25 89:12 119:7 120:14 143:15 160:20 clearer 24:11 clearly 16:16 22:1 23:9 48:22 78:4 104:16 146:1 client 91:3 clients 33:25 34:2 61:7 91:14 155:4 clients' 60:21 clock 79:15 close 117:8 130:17 closed 14:19,19 closely 53:18 closeout 166:9 clue 16:6 co-obligor 1:18,22 4:3 6:4,6 7:12,19 8:7,19 9:5,5 co-surety 7:11 code 39:12 53:23 54:1,8,9 58:6 63:24 79:13,19	80:2,16,25 82:9 83:20 84:2,6,9,17 85:5 100:8 105:2 106:4,7 109:8,10 117:15,18 118:16 118:20,23,25 127:23 128:11 129:9 130:15 131:23 137:18,21 138:11,12,17,22 139:22 140:10,17 140:18 161:24 cogent 82:3 collective 54:12 collectively 66:5 colon 3:9 column 19:21 20:5 23:10 25:8 76:5,6 76:20 combination 75:24 124:21 come 5:10 13:17 14:9 17:15,20 18:15 26:18 32:13 50:11 54:13 60:22 64:7 71:16 82:23 85:20 91:13 96:9 98:9 101:16,16,17 102:2 105:10,19 106:16 127:10 130:2,6 149:7 153:14 162:5,6,8 163:14 comes 21:19,22 24:20 60:8,9 61:10 66:15 90:7 101:2,8 103:18 104:25 105:1 122:16 126:16,21 127:24 153:4 157:12 160:11 167:18 coming 20:13 65:20 84:24 136:1 155:6 162:14	commenced 31:16 commencement 31:18 63:25 98:1 149:2,19 157:1 commercial 63:8 63:13 commission 4:23 6:15 commissioner 8:6 committee 17:18 39:11,22 95:18 Committee's 34:19 67:13 Commodities 155:22 common 1:19 11:1 11:4 13:8 33:15 41:20 54:16 56:9 105:9 144:9 common-sense 3:5 companies 16:10 18:5 25:2 104:5 157:21 165:19 companies' 66:4 company 13:10 16:11 25:10,23 26:21 29:4 51:25 52:3,4,7 54:11,17 100:16 101:9 102:9,14 103:8,16 103:18,21 107:15 111:17 152:10 156:1,5,9 157:11 157:14,14,24 158:7 165:4,10,13 165:14 172:4,8,13 company's 156:2 compare 119:9 139:18 compared 83:24 140:5 comparing 73:5 78:7 83:25 126:8 compartments 119:24	compensate 125:16 135:17 169:16 170:10 compensated 58:5 79:22 114:1 compensating 63:24 76:7 94:15 94:24 compensation 77:2 96:5 141:16 compete 104:16 competing 104:12 competition 55:5 61:14 105:11 120:22,25 complete 53:23 54:1,8 58:6 60:4 79:13,19 80:2,16 80:25 82:9 83:20 84:2,6,9,17 85:4 86:25 100:7 105:2 106:4,7 109:8,10 117:15,18 118:16 118:20,23,24 127:23 128:10 129:8 130:15 131:23 137:18,20 138:11,12,17 139:22 140:10,16 140:18 161:24 completely 67:9 106:17,19 154:6 complicated 35:24 37:6 38:6 163:22 complicates 90:3 complications 34:18,23,24 35:12 36:7 79:3 composite 119:1 compound 44:24 44:24 68:13 69:13 71:12 72:8,14 73:2,24 74:3 78:15 compounded 72:17	72:22 73:3 compounding 68:12 69:1 71:2 74:13,16 88:19 comprehensible 87:18 computer 35:18 conceded 148:15 conceive 110:7 conceived 17:15 concept 7:10 40:9 44:21 45:24 46:3 78:12 103:5 109:19 157:16 concerned 5:2 11:10 14:22 36:11 54:19 64:15 65:19 77:23 88:11,13 94:10 concerning 1:24 concession 51:22 conclude 166:23 167:2 concluding 153:1 conclusion 8:25 10:14 19:12 32:9 34:10 46:19 50:1 50:14 52:18 78:7 83:19 93:21 100:2 105:5 106:9 109:12 113:23 118:19 130:14 131:19,22 148:20 164:19 conclusions 84:10 118:17 146:10 condensed 127:15 127:16 conferred 21:21 confirmed 4:17 connection 130:17 130:22 consequence 42:10 consequences 30:20
--	---	---	---	--

<p>consequently 47:22 consider 52:20 83:8 98:15 116:1,2 147:21 consideration 3:23 50:2,4,6 considerations 38:19 considered 11:10 14:6 70:13 146:20 considering 4:8 8:24 14:10 70:10 119:9 consisted 3:11,13 3:14 consistency 155:16 consistent 150:21 consolidated 20:7 constitute 46:12 construction 40:2 40:19 41:2,12 43:15 58:11,23 61:23 66:9 67:18 68:25 69:17 93:22 94:11 96:1 100:6 169:5,10 construed 158:20 construing 102:22 157:20 contain 10:21 contained 19:13 55:18 contains 66:5 contend 29:1 contended 63:15 contending 62:14 content 171:12,18 contention 70:24 75:4 context 5:13 7:16 9:3 13:12 16:21 26:8 28:13 30:8 32:1 38:18 52:21 55:7 80:12 83:8 94:14 142:22</p>	<p>143:2 161:12 contexts 28:2 81:9 81:10 contingencies 168:15 170:7 contingency 164:3 164:6,12 166:2,22 166:24 167:5 168:17 170:14,17 170:25 171:1,2,3 171:22 173:6,16 173:21 contingent 97:19 146:8 163:9,12,20 163:24,25 165:13 166:8,9 169:24 170:18,24 172:18 173:9,10,10 continue 40:17 74:12 continued 1:3 175:3 continues 4:22 6:1 6:7,18 35:13 73:2 continuing 57:22 69:13 74:3 131:22 contract 7:24 19:5 25:20 26:9 27:24 32:6 37:14 41:6 66:2 70:1,2,6,7 79:20 83:15 85:8 87:13 92:2,13 100:19,21 107:14 107:23 108:11 111:1 118:5 120:2 121:2,5 123:10 124:10 130:16,21 135:24 136:16 140:5 154:4 158:15 contracted 70:8 97:16 contractors 40:10 contracts 10:7 33:17</p>	<p>contractual 1:21 10:18 11:14,19 12:2,4,6,7,16,18 13:2,13 21:4 31:3 32:11 33:11 36:12 37:11 38:10 39:3 40:10 45:17 50:17 51:8,21 53:6,8 62:4,15,17 63:2 64:17 69:25 79:14 79:19 80:6,8,8 81:6,20 83:13,17 83:18,23,25 84:4 88:2,5 92:4 94:3 96:20 100:11 101:21 117:19,23 118:14 119:10 121:9 125:22,25 126:1,4,6 127:21 128:5,11 129:12 130:10 135:16,18 136:13 137:1 138:5 139:14,16 139:17,18,23 140:20 141:10,14 144:2 147:10 148:7 151:4,10,14 155:10 158:12 161:20 166:10 170:13,16 contractually 127:10 143:21 contradict 69:11 74:20 contradicts 67:1 74:24 109:12 contrary 36:1 44:25 49:14 67:10 contrast 73:17 Contrastingly 169:19 conundrum 166:19 convenience 6:17 99:17 convenient 44:11</p>	<p>87:25 139:6 150:6 conversation 15:14 132:20 conversion 56:10 61:15 64:11 83:11 83:21,24 84:7,13 85:12,14 105:22 106:2,15 107:1,1 107:17 109:20,23 110:15,18 111:6 111:10,11,17 112:3,19 113:16 113:24 114:9,10 114:22 115:2 116:3,9 117:6 118:2 119:8,15 120:8,16,21 121:17,18 122:10 122:14,15,19,20 123:2 124:4,5,7 124:14 125:7,15 125:19 126:16,25 128:9,15,16 129:21 130:8,25 131:14,20,25 132:4,12,21 133:10,18 134:2 135:9 136:2 137:17,24 138:15 140:1 141:21 153:4,7 convert 107:13 120:5 122:22 125:9 134:8 converted 83:12 85:1 108:19,23 112:11 118:7 119:12 120:11 123:6,22 124:17 125:17 126:21 127:8 128:1,2 130:1,4 131:8 132:7 134:20 141:6,8,23 146:24 Cooke 14:14</p>	<p>cope 37:8 core 46:7 49:24 108:21 111:8 130:12 Cork 34:19 50:15 67:13 78:3 95:18 96:11,12 150:21 150:22 151:10 corner 65:2 128:13 139:20 corporate 16:25 17:1,3 18:17 55:6 corporation 56:19 correct 23:2 39:6 43:18 50:5 54:7 70:3 73:10 80:21 92:18 102:16 121:9 123:13 129:7 140:16,24 144:8 152:16 167:8 corrected 71:10 corresponding 127:1 corresponds 71:21 Cottenham 11:11 13:21 49:1 counter-factual 145:11 counter-factuals 145:17 County 64:23 65:9 65:9 couple 42:2,3 coupon 111:2 course 2:14 9:16 16:19 53:17 56:25 60:16 61:3,17 64:2,9 91:4 127:7 136:18 147:25 154:2 163:14 court 5:23 8:11 9:3 11:15 20:8,10,11 20:23 24:1 26:3 27:1 31:16,17,18</p>
---	--	---	--	--

39:11,22 46:8,20 46:23 47:20 48:8 49:9 55:2 56:11 57:16 64:24 65:6 65:9,9 70:9,13 85:19 86:6,8,12 86:22 88:25 89:3 90:16,21,25 91:22 92:12,17 93:9 102:21 105:15 107:3 108:3 120:15 123:8 139:13 143:11 144:3 156:8 159:4 159:6 161:13,14 166:23 167:1 court's 32:9 courts 1:10 171:7 cover 146:21 covered 68:24 70:5 95:10 98:7 146:2 covers 146:15 CPR 22:4 create 34:11,18 78:5 creates 69:16 creating 36:2 credit 112:25 133:2 138:24,25 creditor 1:18,20,24 2:19 3:2,22 4:14 6:9 7:6,18 9:19,25 13:2,5,23 21:18 23:18 25:20 35:7 35:16 36:11 39:7 40:3 41:4 46:11 46:15 49:8,15,16 49:20,23 62:12 63:7 64:4,5,20,23 66:6 80:5 81:2 98:9,10,16,21 101:1,21 102:1 103:18 104:2,2,7 105:13 109:4 111:17,18 112:6	112:17,20 120:22 125:20,21,24 126:1,3,14,18 127:8,21,24 129:14,25 130:19 131:6 132:21 138:21 141:22 142:12 145:12,15 148:11 149:1 150:3 153:13 155:14,19 159:23 160:7 162:11,17 162:18 164:4,7 166:10 167:10 170:11 171:23 creditor's 7:21 46:14 49:11 66:2 66:4 68:2 100:8 141:5,13 creditors 3:6 9:16 10:5,11,18,22 11:6,13 19:9 20:3 21:4,6,13,14,25 24:22 26:15 27:4 27:24 29:2,4,6,15 32:2,7 33:4,14 34:9,12,23 35:2 37:2 38:10 39:2 40:24 46:20 51:11 51:14,19,23,25 52:5,6,10,11,21 53:5 54:10,12,18 54:24 55:5,9,10 55:25 56:18 57:4 57:8,11,17,19,24 58:7,16,24 59:16 59:18,21 60:1,5 60:15,24 62:25,25 64:17 65:10 67:22 69:14 77:1 89:5 94:1,16,24 96:4,8 96:21 101:15 102:5 104:12,17 105:8 112:11 120:16,22 121:1	125:16 126:10 140:4 158:1,11,20 169:16 170:2 creditors' 100:13 104:20 criminal 55:21 critical 20:1 117:22 criticise 50:9 criticism 75:5 cropped 16:5 cross-purposes 122:3 cross-reference 156:2 crucial 154:10 crystallised 166:13 currencies 114:4 121:18,20 currency 56:10 61:14 62:25 63:6 63:12,14 64:4,11 64:20 83:11,14,21 83:24 84:7,13 85:12 87:12 105:21 106:2,15 106:25 107:1,11 108:5 109:5,14,20 109:22 110:15,18 111:6,10,11,12,13 111:17 112:3,19 113:16,24 114:8 114:22,25 115:2 116:3,9 117:6 118:2,21 119:4,8 119:15 120:15,21 120:25 121:7,17 122:10,15,19 123:1,12,16,23 124:4,5,14 125:7 125:9,15,19 126:16,21,24 127:11 128:9,15 128:16 129:16,21 130:6,7,25 131:7 131:14,20,24	132:4,15,19,21 133:10,18 134:2 135:8 136:2,12 137:16,24 138:15 139:25 141:1,21 143:20 current 30:24 32:18 37:13 68:17 68:21 90:16 91:22 curtailed 161:16 cut 84:8,18 100:18 132:15 161:19 cut-off 36:5 39:18 39:20 114:8 125:10 144:10,15 148:21 149:8,12 149:15,21 152:1 154:20 157:5 cuts 29:25 CVLs 31:17 <hr/> D <hr/> damages 78:20 85:15 97:15 108:5 date 6:13 21:10 22:21,23,24 23:15 24:23 25:6 26:5,9 26:15 27:3,23 28:12,14,17 29:22 35:4 36:5 37:19 39:16,21,25 40:7 40:8 41:16 42:11 43:3,10 63:25 66:22 67:12 68:24 69:1 74:4 77:17 79:1,8,9 83:13 85:5 97:20,22,25 98:3,19,21 100:16 101:16 102:1 109:24 110:21 111:4,8 112:8,15 112:21 113:6,19 113:25,25 114:1,5 114:7,8 115:1,6 115:15,19,20	119:13 121:7,19 122:16,20,23 123:4,6,10 124:18 125:9,10 130:20 131:17 132:12 133:1,6 134:19 136:13,15,19,22 138:13 139:24 140:21 142:14 143:4 144:11,12 144:15,16,21 147:7,17 148:4,21 149:5,9,12,14,15 149:17,17,19,21 150:1,2 151:3,21 152:1,14 153:11 154:5,8,20 155:4 155:9,14 157:4,5 159:18 161:4 163:2,2,6 164:10 164:20 166:22 169:1,13,17,18,20 169:24 170:23 171:20 172:17,18 173:2 dates 43:23 124:1,3 134:8 154:19 David 15:11 day 25:5 30:10 53:19 56:24 87:16 112:25 114:5 119:16 120:13 121:11,15,16 122:21 123:19 124:9 134:6 136:25 141:20 174:16 days 11:1 99:6 134:7 dead 27:19,25 28:7 deal 9:10 40:11,15 53:16 68:11,23 69:7 70:22,24 71:17,20 76:13,21 87:22 94:5 107:19
---	--	--	--	--

110:1 111:3,6 117:5 126:3 128:13 143:17 144:19 146:5 dealing 2:15 5:24 6:4 18:19 19:16 30:21 40:14 48:9 48:14 52:14 53:14 70:3,4 71:9 81:22 93:14 116:12,15 117:2 118:12 129:3 137:19 142:18 157:13 160:7 deals 16:5 39:5 71:21 118:24 126:1 130:11 139:20 159:23 dealt 18:20 21:22 50:11 51:5 76:23 79:12 83:9 90:19 93:7 96:18 105:16 120:17 139:24 143:17 145:4 146:9 debate 18:6,14 52:12 57:19 165:22 debenture 47:2,8 47:13,18 48:4,21 debt 3:13 5:24 6:2 7:7,10 8:8 9:20 19:3 21:18 22:21 23:18 25:20,25 32:24 33:7 40:25 45:10 55:11 56:6 63:14 66:12,14 67:8 70:8 72:1,2 74:8 81:2 84:23 84:24 85:1,17,18 85:21 87:14 89:7 89:8 90:10,11,14 91:6,10,20,25 92:1 93:19 100:3 100:3,7 101:18	106:12,13,14,14 106:16,17,20 107:11,12,12,14 108:23,25 109:4 109:15,25 111:1,9 112:15 113:5 120:11 124:25 125:1,1,5,7 127:2 127:4 131:1,2,5,6 131:7,11,16,17 132:2,22 137:23 137:25 141:1,8 143:1 144:22 145:2,6,8 147:3 148:24,25 150:4 151:5,15,17 152:7 152:12,12,21,24 153:24 154:9,10 155:9 158:16 160:10,16,24 162:4 163:20,24 163:25 164:11 168:15,21 169:9 169:11,13,24 170:19,24 173:4,8 173:9,13 debt's 7:13 72:4 debtor 3:22 4:5,20 49:15 55:5 56:16 56:17 57:5,5 58:8 59:2 94:1 96:22 97:20 120:24 121:1 debtor's 46:12 57:21 debtors 14:17 55:4 debtors/creditors 6:17 debts 10:22 21:25 22:19,22 26:6,9 27:24 28:10 29:9 32:2,18 34:9 38:15 39:23,25 53:7 54:19,21 67:11,12 68:4	69:4 73:13 77:24 89:6 94:13,15 95:22 97:12,13,16 97:18,23 98:7 99:9,11 101:12 106:5,8 110:2,3,6 122:11 130:15 140:23,24 146:23 146:25 149:13 151:4 152:23 154:16,23 158:2 163:9 169:11 172:24 174:2 deceased 22:19 deceased's 18:19 25:14 deceaseds' 27:16 30:4 decide 48:19 53:14 decided 11:7 30:14 63:23 86:13 155:25 decides 162:11 deciding 124:13 decision 1:13 11:21 13:22,22 19:9 25:9 26:1,1 56:11 60:7 89:2 90:16 91:22,24 92:12,17 127:15 155:24,25 declaration 67:15 68:15 76:9,15 81:14,18 82:6 87:6 88:3 105:20 110:1,10,15 112:12 116:2,6,15 116:16,17,18,21 116:23,24 117:3 129:19 142:7 163:16 declarations 81:12 81:13 82:7,10,15 82:16 87:10 decree 18:24 19:8 19:22 23:16,16	24:23,23 26:3,5 27:3,3,7,8,23 28:12,16,18 31:13 deducted 47:23 deed 47:4 48:3 deemed 28:11 97:23 123:5 157:11,13 default 149:24 166:9 defeat 70:25 deferred 59:21 98:2 deficiency 37:2 deficit 124:13 defined 65:22,22 65:23 defining 145:25 definite 93:4 definitely 12:15 definition 97:13 98:7 99:14,24 108:16 degree 14:6 delay 54:19 56:21 56:24 57:1,4,8,22 58:5,5 81:15 110:25 delays 79:15 deliberately 103:19 denominated 83:14 109:15 denying 9:2 depend 92:11 132:18 170:16,23 depending 40:3 41:4 83:16 115:16 117:15,17 126:23 depends 7:23 60:16 61:1,11 70:6 89:24 91:7 110:23 133:21 170:20 171:21 deprived 50:23 derivation 49:3	derived 49:5 described 88:4 Despite 174:8 detail 70:22 84:25 133:15 determine 150:6 determining 2:25 detriment 51:25 54:11 develop 155:10 developed 143:16 development 119:21 diagram 72:10 Dickens's 14:18 Dicker 25:12 55:15 59:12 79:17 148:19 163:18 173:24 Dicker's 34:1 155:4 dictates 35:4 died 19:20 difference 42:25 53:11 59:23,25 60:4 73:11 74:7 81:21 85:7 89:21 94:21 95:19 118:11 120:3 121:3 122:1 134:16,17 136:10 differences 30:18 different 4:24 6:21 13:16 27:8 28:1 30:4,19,19,20,21 30:22,25 31:7,9 31:10 34:13 38:23 40:2,21,22 41:3,9 44:21,23 45:24,24 49:18,21 50:8 55:7 56:20 58:9 59:5 71:4 75:16 83:15 86:16 95:19 102:4 106:17,25 114:23 117:17,21 123:25 127:18
--	--	---	---	--

134:18 138:6 145:16 154:6,18 154:19 160:13 161:21,23 169:8 170:10 173:22 differential 34:5,11 differently 25:15 27:17 28:7 48:7 89:9 differs 72:25 difficult 53:13 162:2,8,9 difficulties 145:9 difficulty 40:6 168:12 diminished 17:11 diminishes 58:24 directed 19:23 22:20 47:14 84:17 direction 22:3,8,9 65:21 directions 15:18 16:3 Directors 103:8 disaggregated 137:12,14 disagree 52:12 71:18 75:10 127:12 disagreed 130:11 discharge 2:12 3:3 4:1,13 7:10,19,21 8:1,17,18,22 9:9 47:16 66:24 67:3 96:24 97:8,11,21 98:5,8,10 99:3,9 102:25 discharged 3:15,17 7:13 8:5,7 98:14 99:9,25 132:8 discharges 7:25 discharging 66:18 discount 164:7 167:14,16,20,23 168:5,10 171:9	discounting 164:13 166:25 167:4 discussions 163:17 dismisses 65:1 dispute 16:24 94:20 disputes 57:11 dissolution 103:15 dissolved 103:24 distinction 26:23 103:3 149:18 150:11 172:23 distinctly 87:6 distracted 87:9 distribute 37:16 77:3 distributed 57:14 102:14 103:14 distributing 37:25 38:6 69:16 102:18 103:4 distribution 37:15 38:3,4,8 56:23 104:8,15 108:12 120:23 122:4 170:2 distributions 41:22 41:23 100:25 122:25 141:12 disturb 32:10 diverge 114:4,11 divergence 114:6 dividend 25:3,5,7 35:5,8 37:19 39:16,21 40:7 41:17 43:3 66:22 67:16 69:2,2 72:3 72:7 73:21,23 88:17 109:24 111:9 112:2,4,22 113:20,25 114:12 114:12,24 115:1,6 122:4,6 124:12,20 133:25 136:22 154:19 168:18 173:25	dividends 2:12 3:11,12 4:1 25:2 37:17 43:16 57:4 57:9,13 63:4 111:14,22,23 112:16 113:19 114:23 122:24 123:22 124:11 127:1 131:2,3 132:5,8 134:1 138:1 Dixon 36:14 39:17 doctrine 3:20 doing 11:13 45:21 65:13 86:1,17 102:10 139:1 dollar 113:18 114:15,17 123:3 124:17 132:25 133:6,19 134:14 135:5 dollars 84:1,1,4,8 85:21 111:24 112:6,21 118:8,9 119:11,12 124:9 124:12 127:9,9,9 130:1,4 131:10 132:23,24 134:4,8 134:20,23 136:3 136:16,23 137:1 137:25 138:4,5,20 140:4 141:20,22 141:23 143:20,21 143:23 double 124:17 153:17 doubles 34:24 doubt 1:11 135:7 144:25 163:14 draft 145:19 draftsman 96:3,3,6 146:17,19 147:21 draw 1:12 150:11 drives 169:20 driving 169:22	Dropping 36:25 due 2:13 3:4 6:2,7 6:10,14 19:4 25:5 25:24 29:21,23 35:6 66:6,13,17 72:15 73:15 104:14 123:10 130:21 136:15 144:15 173:6 Dynamics 149:11 <hr/> E <hr/> earlier 46:2 47:20 108:15 113:6 124:11,19 133:24 136:4 earliest 122:16 earned 133:19 easier 9:4 35:21 87:5 easiest 118:15 easy 35:9,10 96:16 Echoing 131:12 Eckhardt 149:11 economic 44:22 74:7 edition 15:1 16:14 editions 5:6 effect 4:4,25 6:21 7:18 14:14 24:1 39:25 43:9 44:22 48:17 55:2 69:1 99:24 145:11 159:1 effectively 13:23 24:21 42:12 117:19 161:19 effects 30:20 56:21 efficient 170:4 eight 6:11 either 14:19 17:25 53:6 56:8 117:20 139:1 156:8 166:25 168:12 elect 49:21 64:5	element 67:3 124:22 133:11 135:5 elongation 44:1 embodied 20:8 enactment 27:22 56:5 encompass 110:11 encompasses 44:10 ends 40:7 67:18 enforce 47:9 159:11,14 England 18:5 158:3 English 36:18 150:4,12 159:6,14 161:12 ensuing 66:20 ensuring 33:4 entered 172:4,8,13 enters 54:17 entertain 86:15 entire 72:18,21 entirely 45:21 49:16 109:19 143:14 160:14 entirety 73:3 entitle 27:9 77:15 entitled 4:16 6:9 10:6 36:12 48:21 50:24 51:18 55:9 56:23 64:23,24 65:11 77:1 83:17 84:24 101:23 112:7 115:16 118:5,7,9 123:14 123:16 124:10,18 127:10 128:3 130:5 135:23 136:12,17 140:5 141:10,19,21 142:12 153:10 161:3 164:4 170:13 entitlement 4:14
---	---	---	--	--

46:14 49:7 59:19 84:4 100:19 111:12 113:19 130:2,10 entitles 88:5 envisage 153:13 equal 124:8 130:1 equality 57:24 169:19 equally 54:18 57:2 69:12,24 101:15 105:9 equals 72:9 112:16 112:18,18 120:2 equated 56:15 equation 40:25 118:6 equity 18:25 19:2,8 23:13,24 24:21 27:4,7 28:16 31:13 56:13,13,13 equivalent 22:2 29:20 111:13 eroded 34:16 erred 50:1 error 17:11 74:21 Erskine 15:14,16 essence 93:13 106:2 118:25 119:22 120:20 121:4 124:4 131:4 139:12 145:6 148:21,22 essential 5:23 67:24 68:5 76:24 78:22 essentially 10:15 18:4 28:9 31:23 51:15 54:9,16 76:7 78:19 93:9 105:6 135:15 167:10 established 111:19 estate 2:10 4:10 8:5 8:22 18:19,25 25:14 26:24 27:25	28:11 30:4 37:5 38:20 46:12 56:21 56:25 57:6,20 58:4 85:8 98:11 98:17,23 107:16 119:12 141:11 170:5 estates 19:18 27:16 27:19 28:7 30:16 30:25 31:6 158:4 estimate 164:7 169:21,23 estimated 164:4 169:12 170:8 estimation 164:10 et 55:20 89:5 evening 5:5 event 8:18 30:10 31:4,7,15 129:20 events 36:19 everybody 10:8 34:16 35:10,11 38:7 60:19 61:4 evidence 69:22 159:8 Ex 37:3 exactly 4:19 35:6 42:2 74:21 95:7 120:7 122:24 124:24 152:2,24 161:25 164:22 example 4:20 13:10 18:1 44:23 46:19 49:18 50:12 56:10 57:11 58:17 61:13 62:8 66:11 68:11 71:20,21 72:4,12 73:1,1,6,18,24 74:8,10,19,20,21 74:22,24 75:6,7 88:2 90:14 99:7 101:19 112:14 113:20 114:24 115:22 165:24 166:1,9	examples 70:23 71:19 exception 131:24 138:17 excepts 60:21 excess 111:24 112:2 exclude 147:9,11 excludes 147:15 excluding 53:12 exclusion 97:15,16 exercise 4:15 134:9 171:22 exhaustive 52:19 53:15 exist 6:5 55:12,17 86:9 109:23 110:13 112:10 120:21 166:2 existed 51:4 155:13 existence 164:1 173:10 existing 24:1 51:20 172:24 exists 74:22 112:4 118:2 131:13 161:4 expected 162:6 expense 34:17 expenses 89:4 explain 38:13,17 explained 30:3 explaining 28:6 explains 27:16 36:4 expressed 107:11 108:25 109:5 119:10 131:9 expressly 23:2 74:25 extant 7:22 extend 43:1 extended 147:18 151:11 extends 100:6 extent 7:7 9:20 11:14 31:11 39:14	39:15 52:9,17 70:12 100:10 129:23 131:21 134:23 138:22 extortionately 74:6 extra-contractual 60:12 extra-territorial 159:1 extremely 76:19 <hr/> F <hr/> fact 1:17 2:3 4:17 6:1 8:20 16:15 21:5 25:13 28:17 28:20 30:10 32:1 41:21 45:17 69:19 71:6 84:16 88:10 91:24 106:9 108:2 124:23 125:17 132:16 136:3 144:25 145:1,8 148:12 149:23 157:3 162:19,20 164:14 171:19 174:8 factors 57:10 170:25 facts 61:24 62:8 115:17 failed 108:10 112:24 failing 107:23 108:5 fairness 62:2 fall 33:14 99:6 164:9 167:6 fall-back 128:21 137:9 139:5 167:7 167:19 168:9,9 fallen 114:14,16 falling 110:14 falls 54:22 61:9 170:14 false 89:17	familiar 16:5 famous 14:13 far 11:9 14:22 32:3 54:18 58:22,23 59:4 64:14 67:6 73:3 94:10 110:10 114:19 117:13 128:25 129:3 155:18 167:9 172:9,10 father 14:18 fault 57:5,21 favour 19:8 20:3 24:22 27:4 favourable 9:22 feed 170:25 felt 28:19 fewer 118:9 134:4 141:20 fifth 93:13 152:16 154:11 fifthly 94:4 fighting 147:7 figure 33:13 121:12 121:23,24 136:16 136:23 final 35:5 37:19 39:16,21 40:7 41:17 48:24 64:19 66:22 67:15 69:1 88:17 109:24 111:9 112:4,9,22 113:25 114:11 115:1 121:14 122:6,8 139:11 finally 56:13 Finance 25:1 Financial 56:3 find 54:5 70:14 105:25 113:12 156:17 159:12 162:9 finds 27:25 fine 55:19 155:22 finish 135:13
---	---	---	---	---

174:10 fire 164:3 first 1:16 3:19 6:8 10:2,5 11:9 15:18 16:2 19:18,19,22 21:2,6 23:23 25:3 25:16 27:17 34:11 43:16,25 46:15,22 47:3,6,12,24,24 48:3,8,11 49:8,10 50:2 51:2 53:23 54:24 60:1,5 63:5 64:25 65:14,24 67:2 71:9 74:7 76:1,3,21 77:8 80:15 81:23 88:14 93:22 94:10 97:1 100:5,14 105:18 105:18 106:12 109:17,22 112:17 114:24 115:6 116:2,13 117:5,14 142:12 143:3,11 144:19 148:23 149:8,20 156:7 159:2,3 163:23 171:25 172:6 fitting 168:12 five 6:20 23:14 24:25 44:13 66:13 66:14 93:21 122:24,25 139:7 149:7 156:7 164:16 174:7 fixed 37:10 89:4 fixing 167:14 flaw 73:11 flawed 160:6 flexes 151:16 floated 112:24 floating 37:13,13 89:5 154:2 flows 89:1,3,9 fluctuated 151:23 fluctuating 151:23	fluctuations 37:18 132:15 focus 141:17 163:23 focusing 32:14 124:7 141:21 follow 84:10 135:20 138:20 following 139:24 150:20 174:16 follows 89:4 118:3 120:10 footing 27:21 footnote 17:10 for-myself 87:4 force 53:25 133:21 158:2 167:9 169:22 foreign 13:17 18:9 62:24,25 63:6,12 64:4,20 83:14 87:12 107:11 109:5 111:12,13 118:21 119:4 120:24 121:7,17 123:12,15,23 125:9 126:21 129:16 130:5 131:6 136:11 141:1 142:4,13 143:4,5,22,25 144:9 145:21 146:18 147:5,9,11 147:20 148:2,5,6 148:7 150:11 153:3 158:21 159:7,16 160:24 162:18,22 163:8 forensic 163:24 Forget 87:12 form 23:15 48:23 65:24 103:22 161:11 formulation 82:24 forward 18:6,14	103:18 166:20 172:9 found 20:2 27:21 97:14 foundation 77:11 founded 3:21 24:15 four 7:5 14:8 21:2 49:25 72:17,19 fourth 21:7 71:19 71:21 73:1,1,6 74:19 76:25 93:25 100:12 157:6 158:18 Fourthly 50:19 free-for-all 39:4 friend 10:25 17:23 18:10 20:9 21:1 21:20 55:15 65:1 79:17 83:9 148:18 160:1 friends 15:3 front 90:25 full 47:16 56:1 57:14 59:19 61:21 66:15 95:23 108:13 120:24 131:3 138:20 156:10 fully 1:25 8:23 110:5 function 68:4 fundamental 63:22 77:5 78:23 fundamentally 25:15 30:19,25 44:20 45:24 50:8 52:12 75:11 84:25 160:6 further 7:1 18:6,14 66:15,19,21 78:5 88:25 93:18 96:15 98:6 127:20 146:14 163:7 future 29:20 97:19 99:12 144:23	146:8,21 151:12 163:11,13 169:24 174:2 futurity 164:8 FX 111:18 <hr/> G <hr/> gain 73:18 119:5 gains 125:4,21 133:21 gateway 162:6 gather 104:1 general 2:14,21,22 35:20 91:17 104:8 140:2 156:9 165:14 generally 51:7,25 52:1 70:13 78:6 105:25 149:21 172:2 genuine 68:22 getting 27:5 29:13 62:5 63:2 68:1 87:9 101:24 114:18 120:7 126:18 135:15 159:18,24 172:23 Gifford 27:15 28:6 156:15 give 9:25 23:17 24:1 25:21 26:14 27:6,22,23 28:17 29:16 33:12 66:11 71:4 76:1 79:2 88:1 90:1 100:19 111:23,24 145:11 given 16:6 40:21,22 50:3 68:11 77:18 121:11 126:9 145:17 148:15 gives 12:18 21:24 23:22 29:25 43:12 43:21 59:17 62:21 104:3 112:17 121:10 124:12,13	141:7 146:11 153:23 giving 11:13 23:13 24:17,22 52:5 169:4,22 170:7 global 53:24 54:12 141:10,11 globally 140:3 Gloster 1:4 2:7 4:2 5:3,11,15,20 7:9 8:9 15:14 16:9 17:6 20:19,25 22:5,12,23 23:12 24:4,8 25:18 30:12 33:17 35:17 35:20 38:11,13,22 40:11,15,18 44:13 44:17 50:21,25 68:16,19 69:21 70:2,7,11,17,21 71:4,13 73:5,8 74:18 75:1,12,14 75:17,19 76:1,5,9 76:11,16 82:4,13 82:15,20,22 83:3 85:15,17 86:5 88:1,7,9,20,24 89:12 90:9,13,18 90:23 91:19 92:3 92:7,11,15,19 93:2 94:20 95:4,6 95:8,25 97:5 100:23 101:5,12 102:7,12,17,24 103:7 104:4,13,18 104:22 107:6,9,21 107:25 108:2,4,8 112:8,13 115:7,13 115:19 116:14,20 116:25 117:2 119:14,19 120:5 120:12 121:5 123:5,9,12,14,21 123:25 127:12 128:20 129:1
--	---	---	---	--

136:9,15 137:4,14 138:7,24 139:7 140:14,18 141:3 142:2,6,10,19 143:19 145:22 146:3,13 147:2,11 147:24 148:10,13 148:15 149:3 150:16,18 151:13 151:22 153:3,7,9 153:14 154:22,25 155:3 157:7,18 158:13,17 160:5 160:23 161:1 162:17 164:21 165:1,7,14,18,21 166:3 170:15,22 171:6,10,14,21 172:21 173:3 174:5,8,12	148:11 154:23 155:15 164:9 165:15 170:4 171:14 good 1:17 9:16 25:12 59:15 105:10 114:25 136:6 Goodere 10:16 13:19 36:22 Gore-Browne 16:13 governed 92:17 great 39:15 63:16 86:2 greater 12:5 45:9 52:6 59:11 63:17 100:20 111:4 130:1 142:24 144:1 158:10	happen 103:20 165:1,3 happened 1:21 19:19 102:21 149:4 happening 103:1 139:15 happens 7:17 100:24 102:12 125:6 happy 87:11 159:9 hard 77:18 110:20 133:7 Hardwicke 10:16 head 78:21 head-on 71:20 headnote 1:16 47:3 47:12 156:7 heard 15:12 104:10 hearing 15:18 16:3 76:17 174:15 heart 84:20 104:10 heavily 18:18 heavy 28:25 held 26:18 47:20 48:2 105:23 109:2 110:12 138:14 helpful 76:19 142:16 Henry 17:14 Hereford 28:4 Herefordshire 25:10 26:21 31:14 herring 67:19 high 74:6 higher 11:19 12:17 41:6 43:12 51:21 62:22,22 64:17 66:3 143:6 151:4 153:3 158:21 159:21 161:9 highly 146:16 hinted 32:8 historically 62:10 history 15:1	holders 47:8,14,18 48:4,21 holding 50:9 hole 24:12 hope 51:5 108:15 hoped 156:16 host 79:3 house 43:19 171:16 171:18 Humber 13:11 27:14 28:5 33:3 38:14 139:13 156:15 hundred 50:16 68:7 hypothesis 101:6,7 hypothetical 144:20 148:2 166:18	58:14,19 60:24 impacted 60:7 86:8 impacts 60:10,23 61:6,10 157:9,18 implement 63:23 implemented 39:22 64:16 implementing 67:13 implication 99:10 implied 95:24 import 34:23 158:10 importance 17:11 46:4 149:20 important 1:14 2:25 6:2,9 18:3 20:10 60:19 64:14 64:22 67:2,21 83:8 87:19 97:10 149:9,15 importantly 28:18 50:19 51:19 71:24 126:12 imports 34:22 imposed 55:19 65:23 impossible 77:14 132:6 impression 15:17 imprisoned 14:18 improper 50:2 improve 77:18 146:12 improving 59:1 impute 96:2,6 146:22 imputed 146:17 inaudible 5:16 23:15 50:15 60:22 96:25 99:13 112:25 129:6 147:6 154:1 160:2 169:14 incentivise 158:22
go 17:5,7,8 30:15 42:11 53:1 59:4 70:17 73:23 82:8 82:25 83:18 87:22 88:16,24 98:22 102:15 103:7 108:20 110:10 132:15 142:17 144:16 145:1 159:10 161:6 goes 4:7 21:5,7,17 26:7 27:11 34:7 63:22 66:23,24 71:13 84:20 151:15 152:10 172:9,10 going 13:8 17:9 18:11,15 37:8 43:21 64:13 68:10 71:4 76:16,21 84:25 86:20 87:19 87:24 96:22 102:5 113:4 117:4 118:12 123:21 132:20 133:23	grey 81:13 ground 1:19 11:2,4 13:8 33:15 41:20 78:24 114:3 144:9 grounds 56:6 group 32:7 49:23 57:17 59:15 Grover 18:20 23:7 23:11 28:15 29:1 30:7 Guarantee 46:18	<hr/> I <hr/> IA 139:14 idea 52:11 identification 79:9 identified 3:25 50:6 76:25 105:4 110:14 identifies 2:24 55:13 77:6 110:1 identify 41:5,8 45:22 77:14 80:19 81:7,9 132:6 identifying 45:1 II 15:20 illogical 164:21 166:20 illogicality 167:1 image 95:13 imagine 103:13 112:14 118:15 immediate 43:22 114:7 immediately 24:14 132:13 173:15 impact 33:12 58:13		
<hr/> H <hr/> Hadfield 25:16 half 10:2 114:13,15 halfway 19:21 43:19 171:16,18 hand 71:6 hand-in-hand 82:8 83:19 hand-ups 71:8,8 handed 70:23 71:7 hands 8:5 48:6 124:17 hang 102:7				

159:22 include 55:19 98:12 125:2 145:19 147:13,14,18,22 156:24 includes 99:10 125:3 141:7 including 56:2,14 62:1 74:14 income 47:22 inconsistent 34:19 43:8 50:10 94:2 99:1 106:10 inconvenient 53:10 incorporate 158:20 incorporated 69:12 incorporates 44:19 incorporation 45:9 increase 58:18 increased 150:2 incurred 91:25 97:22 incurring 161:8 indebted 4:22 6:18 indicated 50:15 Industrial 155:22 inevitable 42:9,15 inevitably 43:20 inform 170:17 ingredients 66:5 injuncted 159:15 injunction 159:13 input 31:18 inquiries 19:23,25 insert 55:23 inserted 48:4 insists 2:10 insofar 8:23 11:5 28:23 58:3 67:19 125:3 insolvencies 39:13 65:19 insolvency 16:25 17:1,3 31:12,15 31:19 32:1 49:10	53:21 54:17 55:12 55:25 57:6 58:1 58:14 62:24 63:18 63:20 64:1 65:3 65:11 68:3 87:15 101:22 102:9 103:11 104:6,9 107:16 120:2 141:11 157:1 insolvent 38:20 51:7 52:4 98:23 156:1,4 157:12,14 157:15,24 158:7 instance 18:4 47:25 49:8 53:23 159:2 159:3 163:23 insufficient 47:15 insuperable 35:17 35:19 41:11 insurance 164:2 165:3,3,6,10,12 165:14,19 intend 96:8 intended 9:15,22 65:3 96:14 105:6 145:7,19 146:1 147:22 156:24 159:7 intending 9:25 intention 36:1 51:3 78:5 96:6 146:17 151:9,10 158:23 159:9 163:5 intentions 46:11 96:2 interest 2:13,19 3:1 3:3 4:23 6:1,4,7 6:10,13,14,18,24 7:7 9:16,20 10:8 10:12 11:19 12:2 12:22 13:14,24 15:24,25 16:17,23 17:3 19:3,3,5 20:4 20:6 21:4,7,13,14 21:14,18,21,25	23:3,15,18,19,22 24:5,6,17,23 25:4 25:5,21,24,24 26:8,14 27:2,6,10 27:23,24 28:12,13 28:17,24 29:9,19 29:21,25 31:1,3 32:4,20,23 33:5 33:10 34:14,25 35:2,4,6,9,13 36:5 36:8,12,13,20 37:9,11,14,16,18 38:15 39:2,6,7,12 39:16,19 40:4,7 41:13 42:4,11,12 43:1,6,22 44:24 44:25 45:3,4 46:11,15,23 47:7 47:18 48:3,23 49:9 52:2,8,10,24 53:7 54:20 55:10 57:1,9,14 58:2,18 58:18,19 59:7,9 59:16,18 60:10,23 61:9,15,21 62:9 62:12,18,22,23 63:2,4,8,17 64:21 64:25 65:12,22 66:2,6,13,16,18 66:21,23 67:7,8 67:14 68:13 69:3 69:15,16,19,20,23 71:2,25 72:8,11 72:13,15,22 73:3 73:12,15,24 74:5 74:12,16,17 75:21 76:7,8,22,22,23 76:23 77:4,8,16 77:22,22,23 78:1 78:5,6,8,13,20 79:2,7,21 80:8,9 81:2,16,19 82:7 83:12,14,16,22 84:4,8,18,19 85:2 85:5,7 87:14,17	88:14,16 89:6,7 90:2,10,14,15 91:3,5,11,14,17 92:8 93:7,15,16 93:19 94:13,15,18 95:2,6,9,16 96:15 96:21,21 97:25 98:3,6,12,16,18 98:20,22 99:10,16 100:3,6,9,15,16 101:22,23,24 105:7,12,12,21,24 105:25 106:21 108:24 109:6,7,12 109:13 110:3,22 111:2,2,4,6 113:5 113:22,23 115:4 115:16 116:5,9,11 117:7,11,20,24 118:20,22 119:2 120:8,10,18 121:10 122:4,9,11 122:25 124:16,16 124:24,25 125:2,4 125:5,8,23 126:2 126:4,9,13 127:2 127:19,22 128:2,5 128:10,11,14,14 128:16,18 129:21 129:23,24 130:3,5 130:7,16,18 131:13,15,16,20 131:23 132:10,13 132:17,19 133:1,3 133:6,8,9,11,18 133:19 134:3,15 134:17,19,21,24 134:25 135:3,8,11 135:15,22 136:2 136:17,24 137:18 138:3,13,15,18,22 138:23 139:3,23 139:25 140:20,21 141:15,15,16,18 142:3,23 143:20	144:1,4,10,15,16 146:23,25 149:13 149:16,16,18,22 151:5,21 152:23 153:4,22,23,23 154:12 155:20 156:3,25 158:12 159:21 160:16,19 160:20,23 161:2,3 161:4,11,20,22 162:3 164:19 166:16,21 167:11 167:15,17,18 168:8,11 169:23 170:9,22 171:20 interest-bearing 5:24 10:22 25:25 32:2 33:7 34:9 40:24 158:16 interested 17:6 70:16 interesting 5:3,7 157:8,16 interests 46:16 49:11 interfere 54:2 159:7 interim 41:22,23 72:3,7 113:20 114:17 115:5 134:4 136:22 internal 59:22 interpretation 9:13 23:6 32:15 42:14 59:17 interpreted 105:14 interpreting 9:24 159:7 interprets 23:9 interrupting 174:9 intervening 148:3 166:17 introduce 35:12 39:11 53:21 151:9 introduced 94:2
--	---	---	---	--

Introduction 39:24	items 82:13,14,18	22:21,22,24 23:13	126:20 142:13	71:11,13,15 73:5
invented 17:1	83:5 129:4	23:16,17 24:6,19	143:6 144:4	73:8,21 74:18
invest 56:20		24:21 26:6,21,22	149:24,25 152:15	75:1,5,9,12,14,17
investors 56:19,22	J	27:4,5,7,8 28:16	153:25 159:10,18	75:19,22 76:1,5,9
involve 31:18	January 19:24	29:5,7,13,15,17	161:9 167:11	76:11,16 78:12
involved 25:19	job 171:6	31:12,13,19 33:11	judicial 5:4	79:11,23 80:1,7
47:17 70:14	joint 19:17	36:14 37:10 41:1	jurisdiction 145:21	80:11,18,22,24
involvement 31:16	judge 14:17,23	41:7 45:9 46:6	147:20 156:9	81:5,11,12,18,24
involves 63:20 67:2	15:6 17:12,16	47:24,25 48:8	160:24	82:4,13,15,17,20
117:14	18:20,22 19:12	53:6 62:14 63:7	jurisdictions 17:23	82:22 83:3,5
involving 47:2	29:11 39:17 40:11	63:12 64:4,4,5,6	18:9 145:15	84:12,16,22 85:3
Ireland 18:15	43:14 46:6,17	64:21,24,25 76:24	Justice 1:4 2:7 4:2	85:9,12,15,17,23
Irish 17:17,19,19	49:25 50:9,13	78:8,8,13 82:24	5:3,11,15,20 7:9	86:4,5,10,15,18
ironed 124:13	68:14 76:23 77:5	86:6 89:18 90:21	8:2,9,10,21 11:18	86:25 87:4,9,12
Ironworks 13:11	77:17 81:25 85:4	92:22,23 93:1,8	11:22 12:1,4,10	87:21 88:1,7,9,16
27:14 28:5 33:3	92:23 93:7,10,11	106:1 107:3,7	12:20 13:1,7	88:20,24 89:12,16
139:13 156:15	105:23 108:10	109:2 110:24	14:13 15:5,8,11	89:25 90:4,7,9,13
irrelevant 78:17,25	109:2 110:9	118:18 120:15	15:11,14 16:4,9	90:18,23 91:1,7
150:3 152:15	127:12 129:8	126:19 127:4,16	16:24 17:6 18:7	91:10,13,16,19,24
irrespective 7:22	130:11,23 132:19	130:12 142:5,13	18:22 20:2,13,17	92:3,7,11,15,19
109:14 136:6	133:12,14 135:3	143:4,7,9,14,17	20:19,22,25 21:15	93:2,3 94:6,9,20
ISDA 166:8	137:16,19 138:10	143:22,25 144:3,9	21:23 22:5,6,9,12	95:4,6,8,25 96:23
issue 15:22 49:19	138:10,14 139:21	144:20,23,24	22:13,15,23,25	97:3,5 99:5,8,15
68:9,15,18,19,20	140:15,16 145:4	145:2,5,5,12,13	23:6,12 24:4,8,19	99:19,22 100:23
68:22 71:9,13,19	146:6,9,12 150:14	145:14,21,22,23	25:9,18 27:15	101:5,12 102:7,12
75:13,23 76:11,12	152:3 156:21	146:3,8,19,21,25	28:3,6,19 30:12	102:17,24 103:2,7
76:13 82:19 85:8	158:18 164:13	147:5,12,14,15,19	30:15 33:8,17,19	104:4,13,18,22,25
90:19,22,24 96:14	167:2,3 168:19,21	148:3,5,7,12,18	33:23,25 34:3	106:6 107:6,6,9
105:16,18,19	171:13	150:1,2,8,11,12	35:17,20 36:14	107:21,25 108:2,4
116:8 117:1,18	judge's 18:8 52:18	150:21,23 151:3	37:3,7,20 38:11	108:8,11,15
133:15 138:16	79:11 82:8 83:19	151:12 152:6,9,11	38:13,22 39:17	110:20,24 111:1
142:8,9 145:18	86:1 113:23	152:12,18,19,21	40:11,15,18 41:11	112:8,13,23
155:8,11 163:16	118:17 131:19	153:1,3,20 154:3	41:18,23 42:1,8	113:11 114:3
166:12,18 167:17	135:2 148:19	155:19,21 156:12	42:19,23 43:8,14	115:3,7,13,19
issues 75:24 76:17	152:5 155:15	156:20 158:21,22	43:19,25 44:3,7	116:14,17,20,23
82:17 83:6,10,15	164:19	158:25 159:11,12	44:13,17 45:8,12	116:25 117:1,2,8
84:20 89:24 116:1	judge-made 97:24	159:24 160:9,13	45:15,20 48:2,9	117:13 118:11
117:15 150:6	99:16,23	160:18,19,23	48:12,14,17 50:21	119:14,19,23
item 68:22 76:1,3,6	judgment 2:5 4:18	161:6,22 162:13	50:25 52:15 53:5	120:5,12 121:5,11
76:14 105:20	10:23 11:11,12	162:24 163:8	53:17 59:4 60:8	121:14,23 122:1,5
116:2,6,12,14,15	12:21 14:4,24	Judgment's 142:25	60:14 61:3,17	122:8,13,22 123:5
116:21,22,25	15:3,6,13 17:9	judgments 23:22	64:3,8,12 66:7	123:9,12,14,21,25
117:3 128:20	18:1,12,21,25	23:23,25 24:18	68:16,18,19,22	125:8,12 127:12
129:1,2,20 142:6	19:1,2,3,8,9 20:3	29:11 31:4 63:8	69:6,9,21 70:2,7	128:4,7,20,21
142:7 163:10,16	20:3 21:10 22:20	65:9,16 83:17	70:11,17,21 71:4	129:1,3,10,14,17

132:1,9,18 133:17 134:5,11,13 135:10 136:8,9,15 137:4,9,11,14 138:7,24 139:1,7 140:7,14,18,23,25 141:3 142:2,6,8 142:10,19 143:19 144:6,8,14,18 145:22 146:3,13 147:2,6,11,24 148:10,13,15 149:3 150:8,14,16 150:17,18 151:13 151:22,25 152:3,5 152:9 153:3,7,9 153:14 154:2,12 154:17,22,25 155:3,24 156:15 157:7,9,18 158:8 158:11,13,17 160:5,15,21,23 161:1,16,25 162:5 162:17,22 163:1 163:11 164:21,23 165:1,7,9,14,18 165:21 166:3 167:7,14,24 168:2 168:4,7,12,17,23 170:15,22 171:6 171:10,14,21,25 172:16,21 173:3 173:12,20 174:3,5 174:8,12 justified 157:3	key 49:6 148:14,17 kind 56:5 King 36:19 know 12:1 17:4 35:10 45:2,5,12 45:20 46:24 53:20 92:8 102:20 103:9 104:10 107:21 110:11 112:5 113:4,8 125:1 132:10 133:10 139:12 149:13 150:22 157:8,18 164:8,11 167:4 169:1 170:3 knows 35:6	104:4,13,18,22 107:6,9,21,25 108:2,4,8 112:8 112:13 115:7,13 115:19 116:14,20 116:25 117:2 119:14,19 120:5 120:12 121:5 123:5,9,12,14,21 123:25 127:12 128:20 129:1 136:9,15 137:4,14 138:7,24 139:7 140:14,18 141:3 142:2,6,10,19 143:19 145:22 146:3,13 147:2,11 147:24 148:10,13 148:15 149:3 150:16,18 151:13 151:22 153:3,7,9 153:14 154:22,25 155:2,3 157:7,18 158:13,17 160:3,5 160:23 161:1 162:17 164:21 165:1,7,14,18,21 166:3 170:15,22 171:6,10,14,21 172:21 173:3 174:5,8,12 Lady's 68:14 lands 10:15 language 50:10 larger 82:5 late 76:7,22 77:12 77:25 78:20 law 2:18,22 5:9 9:1 9:8 10:6 12:14 17:13,18 19:2,9 23:17,19 27:5 28:20 35:24 36:18 46:13,18 49:5 50:3,6 56:5,9 99:24 109:19	155:17 158:3 162:22,23 LBIE 145:3 learned 10:25 15:3 17:23 18:10 20:9 21:1,20 29:11 55:15 65:1 79:17 83:9 148:18 160:1 leave 71:1 101:8 155:10 161:13,14 leaves 163:9 leaving 38:11 64:19 64:21 66:19 147:25 165:12 left 58:15 72:5 74:1 74:11 104:11 142:3 156:10 left-hand 20:5 23:10 24:10 25:8 76:5,6 legislation 77:21 156:3 legislative 78:4 159:8 legislator 77:24 legislature 163:5 lending 113:2 length 1:11 18:21 111:4 lesser 59:11 let's 66:11 71:6 73:19,25 87:22 101:8,20 103:13 103:16 112:17 114:4 126:6 130:2 140:1 141:15 144:3 164:15 level 58:10,12,13 58:15,16,20 60:7 133:14 levels 55:8 56:12 58:10 liabilities 70:4,5 89:7,20 97:18 99:5	liability 92:5 99:12 liable 4:11 LIBOR-related 62:12 lie 55:1 91:3 lies 46:4 71:18 90:2 life 88:4 light 19:7 89:2,8 likewise 136:24 limitation 103:17 limited 55:17 98:10 110:17 131:21 Lindley 37:3 line 3:8 6:8 19:2 21:7 93:13 114:5 114:11 155:7 lined 82:18 lines 4:7 6:11,20 7:1,5 19:6 21:3 23:14 24:25 27:18 33:3 38:13 108:9 130:24 156:7 link 154:14 155:1 linked 31:24 32:18 53:18 100:12 liquidation 7:20 26:15 29:2,10 31:1 36:6,9 60:15 62:1 85:24 102:15 102:18 103:11,13 103:24 156:1 157:4 159:4,14 165:2,4 liquidations 65:6 liquidator 25:22 35:5 57:7 103:14 103:25 104:1 list 15:19 68:17,21 76:17 82:11 105:20 literal 41:12 169:6 169:10 literally 169:13 little 11:3 28:21 62:8 82:1 93:5
<hr/> K <hr/> keep 36:8 39:6 71:2 keeps 43:13 kept 63:24 96:4 113:21 126:10 130:19,21 131:17 135:17 141:17 167:13 170:10,12 171:19	<hr/> L <hr/> Lady 1:4,5 2:7 4:2 5:3,11,15,20 7:9 8:9 15:14 16:9 17:4,6 20:19,25 22:5,12,23 23:12 24:4,8 25:18 30:12 33:17 35:17 35:20 38:11,13,22 40:11,15,17,18 44:13,17 50:21,25 68:8,16,19 69:21 70:2,7,11,15,17 70:19,21 71:4,13 73:5,8 74:18 75:1 75:12,14,17,19 76:1,5,9,11,16 82:4,13,15,20,22 83:3 85:15,16,17 86:5 88:1,7,9,20 88:24 89:11,12 90:9,13,18,20,23 91:19 92:3,7,11 92:15,19 93:2 94:20 95:4,6,8,25 97:5 100:22,23 101:5,12 102:7,12 102:17,24 103:7			

119:21 live 90:24 living 127:22 logic 74:10 99:3 logical 119:14 Logically 166:19 long 15:19 51:4 64:16 67:8 71:2 92:15 132:11 167:12 171:10 173:14 longer 8:8 43:13 68:11 74:9 93:5 156:4,4 157:13 168:21 Longmore 78:12 look 16:19 17:7,8 20:19 22:7 73:13 86:21 87:5 90:20 97:1 100:1 113:13 119:24 122:14 123:2 134:6,13 137:22 138:2 139:17 141:10 164:14 165:22 170:17 171:18 174:3 look-in 52:22 looked 11:23 20:14 20:25 89:18 118:19 151:19 looking 1:16 14:21 28:1 36:4 57:24 59:6 72:3 81:13 90:4 134:12 143:19,23 147:3,5 149:4 155:13 163:11 169:7 171:25 looks 10:13 55:7 Lord 2:5,17 4:18 8:2,10,21 9:12,24 10:9,13,16 11:11 11:18,22 12:1,4 12:10,20 13:1,7	13:21 14:13,14 15:5,8,11 16:4,24 18:7 20:13,17,22 21:15,23,23 22:6 22:9,13,15,25 25:9 26:1,22 27:15 28:3,6 30:15 31:13 33:8 33:19,23,25 34:3 36:19 37:3,7,20 41:11,16,18,23 42:1,8,19,23 43:8 43:14,19,25 44:2 44:3,7 45:8,12,15 45:20 48:9,17 49:1 52:15 53:5 53:17 59:3,4 60:8 60:14 61:3,17 64:3,8,12 66:7,7 68:18,22 69:6,9 71:11,15 73:21 75:5,9,22 78:12 79:11,23 80:1,7 80:11,18,22,24 81:5,11,12,18,24 82:17 83:5 84:12 84:16,22 85:3,9 85:12,23 86:4,10 86:15,18,25 87:4 87:9,12,21 88:16 89:16,25 90:4,7 91:1,2,7,10,13,16 91:18,24 92:20 93:3,3 94:6,9 96:23,23 97:3 99:5,8,15,19,22 103:2 104:25,25 106:6 107:6 108:11,15 110:20 110:24 111:1 112:23 113:11 114:3 115:3 116:17,23 117:1,8 117:13 118:11 119:23 121:11,14	121:23 122:1,5,8 122:13,22 125:8 125:12 128:4,7,21 129:3,10,14,17 131:21 132:1,9,18 133:17 134:5,11 134:13 135:10 136:7,8 137:9,11 139:1 140:7,23,25 142:8 144:6,8,14 144:18 147:6 150:8,14,17 151:25 152:3,5,9 152:16,24 154:2 154:12,15,17 156:15 158:8,11 160:15,21 161:16 161:25 162:5,22 163:1,11,18 164:23 165:9 167:7,14,24 168:2 168:4,7,12,17,23 171:25 172:16 173:12,20 174:3 Lord's 42:20 61:7 133:24 Lords 1:5,9 15:9 19:15 44:9 47:1 63:11 68:8 71:8 74:24 107:5 108:2 141:25 156:15 Lordships 112:24 lose 32:3 loss 77:2,16 78:21 85:10,11,11,13 94:16 113:2,5,9,9 114:2,9,19,20,21 114:25 119:3 124:5,6 137:17 169:16 losses 125:24 lost 9:17 120:12 123:17 134:3 lot 59:1 60:18 146:15	low 62:10 63:1 65:7 65:8 lower 59:15 62:18 lunch 107:22 lurking 87:21 <hr/> M <hr/> Mackenzie 36:10 38:11 40:11 92:21 magic 96:25 main 140:7 145:5 152:5 156:6 majority 65:5 89:8 making 8:9 9:12 24:4 30:17 38:25 39:10 40:19 47:20 49:6 52:15 61:7 Markets 56:3 Marris 1:7 5:5,12 7:14 8:3 11:2,4,12 12:22 13:9,15 14:17,25 15:12,24 17:22 23:8 24:20 25:1 28:20,22 30:5,8 31:8,22 32:12,25 33:3,9 34:17,22 35:13 37:23 38:9 39:24 40:5 41:15 42:10 42:16 43:4,9,11 43:17 44:11,19,21 44:25 45:16,23 46:4,10 48:25 49:1,22 50:1,11 51:4,6 52:22 53:3 53:13 62:4,16,20 65:12,17 66:10 67:18,20 68:1,2,9 79:23 80:1 101:20 101:23 129:11 matches 135:2 material 91:14 materially 95:17 materials 50:14 93:23 94:8 96:10	155:17 156:23 matter 10:15 16:7 49:6,7 50:20 53:7 58:11 67:5 86:21 99:17,23 100:5 101:16 138:1 144:2 160:13 matters 23:5 55:18 60:9 97:9 112:1 138:9 143:24 mature 171:4 maximise 57:18 maximum 136:12 136:25 mean 7:11 16:5 33:13,17 34:15 35:23 37:7 52:15 53:1,9,17,19 59:8 59:9 60:16,19 61:5 73:21 79:5 82:18 84:13 86:10 86:19 91:19 98:21 99:19,20 102:4 153:12 161:16,22 meaning 40:3,9,20 40:21,22 41:3,9 162:20 169:7 172:1 means 1:7 31:8 35:13 42:17 72:1 84:3 94:14 100:15 106:7 meant 1:7 69:12 101:15 116:22 140:25 measure 93:14,16 meet 108:6 member 104:6,11 104:16 members 52:12 54:24 60:2,5,6,11 60:24 61:11,21 89:22 90:11 105:10,12 men's 27:19,25
--	--	--	---	---

28:7 mentioned 6:20 13:19 16:20,20 17:23 83:7 94:19 96:10 merely 17:10 24:1 51:8 59:1 106:16 merit 54:9,9,15 merits 35:22 50:22 51:17 52:16,20,25 53:12,25 54:4 55:1 57:23 60:3 64:19 69:11 met 36:21 Metals 78:17,21,25 methods 44:8 middle 18:23 114:3 Mikhaylyuk 78:11 million 123:15 mind 77:24 88:3 93:4 minimum 151:2 minion 17:8 minutes 44:13 139:7 174:7 mirror 95:13 mirrored 18:5 mirrors 67:16,16 misfortune 54:16 58:3 105:9 missed 20:10 24:9 misunderstanding 42:20 mode 2:21 3:19 modern 22:2 55:6 98:25 moment 44:4,11 71:17 75:25 81:23 87:25 90:5 117:4 125:18 139:6 140:1 145:10 157:8 160:4 Monday 132:9 money 53:11 60:17 60:18,18 63:25	65:7 66:16 79:20 80:3 94:16,25 96:5 113:21 126:10 130:19,20 141:17 167:13 169:17 170:11,12 171:20 moratorium 158:24 159:22 161:8 morning 155:23 174:13 mortgages 2:15 move 45:25 146:5 moved 28:5 movements 126:24 moves 151:22 moving 44:9 86:2 87:2,3 115:25 151:15 multifarious 145:18 multiple 122:2 124:3 145:15 <hr/> N <hr/> name 92:23 nasties 87:21 nature 7:24 104:19 170:16 necessarily 99:24 102:15 105:11 120:10 124:24 133:3 149:4 necessary 27:22 66:5 80:17 102:11 110:10 necessity 48:18,19 169:19 need 14:1 18:11 28:9 35:1 40:8 45:22 59:3 70:22 70:24,25 79:21 101:6 102:16 103:25 104:20	107:13 110:13 111:3 116:1 165:22 168:25 needn't 65:2 78:10 needs 11:3 67:20 96:5 negligence 115:20 never 37:15 52:22 53:2 61:18 64:20 64:24 98:17 103:10 134:3 155:18 156:19 157:3 161:14 171:8 new 29:24,25 51:11 51:16,17 55:23 65:23 69:12 96:13 104:1 109:19,20 144:3 160:10 non-beneficial 51:15 non-distributing 103:5 non-interest-bea... 28:10 32:24 non-provable 32:14 34:8 54:5 55:12,14 58:20 59:21 60:10 61:5 61:10,12,20 75:20 76:14 81:21 82:6 85:9,13 89:6,20 92:5 93:6,19 105:13,21,24 106:1,12,13,20 110:2,2,4,11,12 111:5 115:14 117:9,10,25 118:16 139:12 143:13,15 153:15 160:3,12,15 161:12 normally 49:10 note 5:22 14:9 27:11 28:3 38:9	47:25 68:15 87:20 116:20 noted 17:16 18:22 144:24 notes 26:15 145:8 152:18 156:21 notice 97:17 noting 14:11 notion 74:16 notional 67:5 136:23 notionally 134:7 136:17 notwithstanding 69:24 166:15 novel 113:15 November 26:12 Novoship 78:11 nuance 51:20,20 64:16 66:1 94:23 151:1 nuanced 170:18 number 1:12 10:25 17:21 33:13 54:15 55:8 57:9 68:17 68:18,21 72:9 76:1,3,4,15 86:2 113:1 116:7,12,14 116:17 129:2,20 142:7 161:17 166:14,15 167:4 numbered 150:20 numbers 73:10 82:11 NVLs 31:18 <hr/> O <hr/> obiter 1:25 objection 111:21 objective 39:11,13 obligation 77:13,14 97:22 99:13 108:23 123:9 172:23,24,25 obligations 7:24	55:21 66:4 obligor 4:10,25 5:1 6:22,23 observed 157:25 obstacle 77:8,20 obstacles 77:5 obtain 7:2 36:20 obtained 143:14,21 143:25 145:22,23 146:4,21 147:15 147:16,20,24 148:12 151:12 152:6,14,25 155:19,21 obtaining 158:25 obtains 142:14 obvious 9:5 17:11 34:24 130:22 obviously 1:25 9:15 16:2 53:24 60:20 61:1,25 75:14 77:22 79:7,14 91:8 109:9 139:4 166:2 169:23 occur 62:9 103:10 occurred 164:12,14 167:5 occurrence 166:22 166:24 occurs 6:7 168:17 173:7,21 odd 41:2 78:6 96:6 146:17,22 147:2 161:21 oddity 95:14 off-set 84:21,22 offence 55:20 offend 69:18 offenders 14:7 55:4 officeholder 65:21 offset 115:11,12,24 116:4,10 117:6,9 124:19 125:23 128:10,13,19 129:22 140:2,3
---	---	---	--	--

141:25	order 19:1,25	P	22:4,16 24:10	parte 37:3
offsetting 125:4	21:11 24:13 26:12	package 126:22	26:10 27:17 36:16	partial 93:14,15
oh 30:4 37:20 38:1	27:6,12 45:1	127:24	36:25 38:14 40:12	96:14
58:7 60:12 65:1	48:10,23 58:21	page 4:20 6:8,11	47:12 48:1,11	partially 31:24
110:23 127:11	60:8 89:15 97:11	7:5 9:11 10:14	49:1,23 77:7,19	36:6 96:7
159:9	97:20 103:1	13:25 14:3,3,8	93:12 106:3 107:9	particular 43:12
okay 11:22 22:12	107:12,15 123:16	19:21 20:2 22:14	108:20,21 109:2	46:8 47:11 49:19
34:3 35:24 70:21	138:21 147:8	22:17 23:10 26:2	130:13,23 131:22	49:20 56:5 59:14
117:2	151:3	26:22 27:16 28:6	137:21 142:23,25	59:17 68:25 70:24
old 16:9 17:13	ordered 58:4	36:15,16,17 39:18	145:4,9 146:7,9	77:13,17 78:23
22:25 55:3	orders 19:1 20:6,7	46:2 47:3,25 48:9	148:17,20,22	80:14 88:10 92:1
omitted 46:1	20:14 23:24,24	48:18 71:15,16	150:20 152:17	92:13,16 93:12
once 54:17 83:12	47:10,13,20 48:19	156:13,13,22	154:13 156:16,22	115:17 121:15
86:19 87:22 112:4	ordinary 2:18,20	157:9,22	158:19	130:13 132:3
112:8,10 119:12	5:2 25:2 56:13	pages 71:20	paragraphs 14:8	152:17 170:21,24
120:25 121:17	165:1	paid 4:25 9:1 23:3	18:2,21 19:13	particularly 11:16
124:17 127:8	origin 36:23	35:8 37:17 43:25	40:14 46:6 76:24	18:11 35:14 78:7
147:24 153:19	original 136:25	46:15 52:1,10	77:6 78:11 90:21	86:5 133:11
164:12 167:4,5	ought 34:6 47:22	56:1 57:13 58:1	93:8 105:25 107:2	155:21
one's 78:7 124:23	140:3	58:21 66:14 67:7	107:4,5 111:7	parties 2:23 3:1
163:19 172:6	outcome 42:15	69:2,2,4,19,20	118:18 127:14,15	89:13 133:16
one-size-fits-all	91:14 163:17	71:3 72:3,4,7,14	127:16 130:13	partner 19:20
54:10 64:15	outlying 102:23	72:14,17 73:4,14	parasitic 52:18	partners 19:18
163:21	outset 127:1 163:17	73:20,23 74:1,4	pari 34:13 37:25	parts 10:4 15:21
one-way 111:20	outside 10:12 58:25	74:11,15 76:22	38:2,4 51:23	21:21 71:9 86:2
ones 18:15 32:3	62:23 63:18 67:22	77:16 79:2 84:24	54:20,21 64:1	87:2,3 116:1
onwards 130:20	68:3 106:19,22,22	96:5,21 101:13	90:15 92:9 108:12	125:5 154:18
open 107:3,20	110:7 160:14	108:13,24 109:1	120:23 170:2	party 7:21,22 27:12
170:6	outstanding 19:4	111:14,15,22	park 1:22 72:15	115:21
opened 14:19 54:6	34:14 35:8 39:23	114:7,9,11,13	117:4 140:1	pass 18:12
opening 46:9	40:1,8,20 41:4,9	120:18,24 121:7	parked 72:20	passage 11:11
operate 8:17 9:8	42:6,7 43:7 45:3	127:1 131:15,16	Parliament 3:20	17:17 20:4 24:25
41:14 43:16,20	66:12,25 67:9,11	132:5,11,17 133:4	53:21 63:23	36:14 156:12
51:11 67:21	67:12 69:5 71:1	134:21 151:18	Parliament's 51:3	passing 5:25 14:4
operated 20:3	72:1,2,5,6,19,21	164:11 167:15,23	part 3:3,14 4:12 6:2	14:16 26:13 55:15
operates 18:25	73:13,16 74:1,9	167:24,25 169:18	10:4,5,10,23 11:9	155:23,25
21:24 46:10 51:10	74:12,14,15,23	173:23	21:6 64:22 67:23	passu 34:13 37:25
51:24 54:10	169:8,9 171:11	Palmer 16:10	69:3 72:2,14 78:4	38:2,4 51:23
operation 45:7	172:1,4,7,13,19	paper 45:13 71:5	89:18 106:16	54:20,21 64:1
67:23,24 68:6	172:21	78:4 150:22,23,25	115:25 119:20	90:15 92:9 108:12
operations 67:1	outward 111:16	151:11	120:23 121:24	120:23 170:2
opposite 46:19	overall 129:6 139:2	paragraph 3:8,18	125:5,6 126:13,14	Patent 25:16
159:20 171:15	overcompensating	9:10,14 10:9 14:1	132:6,10,17 133:4	Patten 15:5,8,11
orally 78:18	138:21	14:4,5,24 15:4,10	140:25 153:4	16:4 33:8,19,25
oranges 126:8	owed 63:14 107:14	17:9 18:22,23	163:4 164:10	34:3 43:14,25

44:3,7 45:8,12,15 45:20 52:15 53:5 53:17 60:8,14 61:3,17 69:6,9 71:11,15 75:22 79:11,23 80:1,7 80:11,18,22,24 81:5,11 82:17 83:5 84:12,16 85:3,9,12,23 86:4 86:10,15,18,25 89:16,25 90:4,7 91:1,7,13,16 97:3 104:25 117:1 152:5,9 154:12 161:16,25 162:5 Patten's 66:7 Pause 15:10 107:9 156:18 pay 4:11 10:5,8 25:23,23 34:16,25 38:7 42:3 43:15 52:8 60:18 61:4,8 61:13,19 65:22 66:16,23 67:8 77:13 79:7 107:23 108:5,6 123:9,12 167:17 173:7 payable 12:25 19:3 22:22 37:12 43:2 43:22 58:12,19 67:10,15 68:13 69:23 71:25 74:17 79:4 93:16 120:16 122:10 130:18 142:23 149:13,18 154:13,16,25 170:22 172:22 173:3,6 paying 43:21 73:12 74:1 77:23 94:13 94:14,18 105:7 111:22 payment 2:9 3:2,15 3:19 7:25,25 9:7	25:4 37:19 42:12 43:10 47:6,13 48:3,10,15 54:19 54:20 57:4,8 59:7 59:10 76:8 77:10 77:12,21 78:1,21 78:22 79:9,15 81:3,15 83:13 88:17 93:18 95:22 109:24 111:23 112:9 121:14 122:3,8,11,16,21 123:2,10 131:2 132:22 133:7 134:15,20 136:13 136:15 143:20 154:18 172:25 173:2,15 payments 3:10,16 3:25 4:24 6:10,21 7:20 25:3 45:1 46:12,21 48:19 49:9,17,21 64:25 68:3 88:14 112:5 122:25 125:22 135:21 137:25 PD40A 22:13 pending 56:11 penultimate 26:10 48:25 156:13 people 33:9,19,23 37:9 50:23 59:10 59:19,20 60:20 62:3 63:21,21 159:9,18 170:8 people's 170:3 perfect 164:24 perfectly 74:16 82:2 150:4 period 24:5 25:6 29:22 36:9 37:15 37:24 41:20 42:5 42:6,22 43:1,12 44:1 57:25 65:23 67:8,11,15 69:4	69:15,19 72:2,18 72:21,23 73:15 74:2,5,17 94:25 95:3 96:8 100:10 103:17 105:8 111:22 112:1 126:11 129:22,25 131:17 134:4 135:18,22,24 138:16 148:3 151:17,24 166:17 167:12 169:17 172:9,12,17 periods 34:14 41:20,21 42:14,17 67:11 71:24 72:1 73:13 154:17 171:11 172:3 permission 6:13 150:5 permit 117:22 146:18 permits 118:13 permitting 158:20 person 22:19 61:6 98:5,10,20 persons 158:4 persuade 112:25 phrase 11:3 phrased 13:1 pick 14:3 33:1 75:25 142:21 145:15 170:15 picked 19:15 69:22 88:12 picking 2:6 66:7 128:15 picks 71:23 74:15 piece 92:1 place 3:19,22 9:22 25:4 28:25 47:6 48:3 63:1 78:16 100:17 104:1 places 6:8 plain 13:6	play 167:18 plea 34:20 please 40:12 76:18 plural 71:24 plus 61:20 166:16 167:15 pm 88:21,23 139:8 139:10 174:14 pocket 112:21 124:8 141:22,24 point 1:17,22 2:2 2:20,24 5:21,22 6:7,20 7:1 8:9 9:7 13:21 14:2,3,16 14:23 16:16 18:3 21:3,19,25 24:4 24:11 25:12,13 26:23 29:5 30:1 30:17 33:1 34:3,4 35:22 37:17,20 38:9,25 39:10 40:19 42:4,24 43:1,4,4 44:9,18 44:20 45:18,22 46:9,9 47:25 48:24 49:6 50:22 51:2,10 53:25 54:16,23,23 57:23 59:17 60:3 62:2 63:22 64:13,19 67:6,18,21 69:6,7 70:6,22 71:17 76:13 77:20 78:18 79:8 80:12 81:8 89:16,20 94:10 96:12,17 98:4 100:12,22 104:23 105:10,17,17 107:22 108:22 109:25 110:9,17 111:8 113:22 115:7,9 117:16 119:19,20 127:13 128:6 132:9 133:25 135:12	136:4,6,9 138:10 138:12 139:11 140:11 142:22 143:12,24 145:10 146:6,14,22 148:10,14,17 149:9,9,20 150:14 150:19 152:17 154:11,22 155:12 155:17 156:6,21 157:4,6 158:18,24 159:17 160:1,2 168:22 pointed 13:15 16:15 24:9 30:23 50:21 104:25 131:21 pointing 62:2 points 1:12 5:25 17:12 34:21 38:3 52:15,21 54:16 69:10 91:16 94:4 109:21 150:20 152:6,8 153:16 161:17 policy 14:11 50:21 56:7 94:5 104:24 105:4 portion 42:5 43:3 131:1 138:18 posed 15:19 position 1:19 3:5 4:19 8:24 25:13 38:23 60:21 69:24 96:17 113:14 139:4,25 144:25 149:24 159:2,5 166:20 167:7,20 168:10 positions 59:23 positive 27:22 possibilities 53:16 163:19 possibility 32:23 44:4 55:10,11,13
--	--	--	--	--

80:13,15 84:6 102:23 145:20 147:21 148:2 151:9 162:11 possible 6:5 12:23 49:16 61:20 70:1 70:2 78:20 102:24 102:25 150:4 164:25 possibly 10:10 42:21 46:21 83:21 147:5,19 post-administrat... 29:10 39:19 83:22 95:3 109:7,14 117:24 118:14,22 129:22,25 130:3 137:17 138:16 143:10 post-bankruptcy 100:3,9 post-cut-off 110:21 144:16 163:2 post-insolvency 93:15,19 105:8,24 151:5 159:24 post-liquidation 16:17 postpone 43:9 93:5 postponed 31:5 55:14 56:1 pot 34:15 61:10 128:22,22 potentially 114:20 115:5 126:23 167:12 pound 3:12 71:1,3 74:23 pounds 124:8 141:23 power 156:8 Practice 22:3,7,9 pre-1986 18:5,16 39:1 50:3,6 155:17 156:19	pre-admin 148:16 pre-cut-off 147:7 163:2 pre-existing 33:10 45:6 51:13 81:6 96:17 160:10 pre-insolvency 155:20 pre-legislative 50:14 93:23 94:7 96:10 155:16 156:23 pre-liquidation 52:24 pre-occurrence 164:3,5 precise 1:13 145:11 precisely 50:6 70:15 precluded 29:3,13 118:22 precludes 100:15 preferential 70:4 preferred 56:13 139:4 144:25 prefs 89:4 prejudiced 52:5,9 prejudices 56:4 premise 8:10,13 79:12 86:16 109:9 135:19 premised 10:17 169:4 prerequisite 67:24 78:22,24 118:1 prerequisites 68:5 present 3:23,24 14:9 50:19 89:2 97:19 133:17 135:1 presented 132:20 133:12,13,22 135:4,4 142:11 preserve 60:20 presumably 79:15	presume 46:14 49:12 presumption 2:25 46:10 49:7 pretty 165:5 167:6 168:14 prevail 113:7 157:25 prevailing 114:10 prevented 65:13 82:9 preventing 104:11 prevents 27:5 37:4 previous 14:3 32:19 39:18 103:8 116:8 127:24 131:12 157:22 previously 38:18 primarily 33:19 70:4 84:17 primary 43:9 Prime 33:18 principal 2:20 3:3 3:17 4:13,22 6:18 7:10,13 8:5,6,7,8 9:9 16:1 41:24,25 43:6,7,10,15,25 45:5 46:22 47:15 47:19 66:19,19,25 67:4 69:17 73:14 79:21 88:15,17 117:10 119:2 120:9 124:15,20 124:23 125:5 127:18 137:19,23 154:18 principally 19:16 principle 1:15 4:8 5:8,12,16,17 10:15 14:10 17:22 23:8 31:21 32:24 33:2 36:18 37:1 38:15 49:22 50:7 50:20 51:6 62:21 65:14,17 67:25	75:17 94:4 104:24 105:3 109:17 110:22 126:17 161:23 principles 5:2 28:1 46:7 49:2 prior 11:2 12:15 47:10 93:25 priority 10:5 12:17 19:17 21:24 23:4 55:8 56:20 57:20 60:9 89:3 167:17 prison 14:18 pro 8:6 probably 70:3 107:2 121:19 129:10,11,15 172:6 problem 15:23 35:17,19 37:24 41:11,19 60:14 87:13 162:14 168:19,20 169:6 171:24 problems 69:16 procedure 105:7 procedures 95:16 proceed 86:16 150:5 proceeded 8:3 proceeding 157:2 proceedings 29:3 31:15 56:1 65:4 70:14 103:23 157:11 159:8 proceeds 11:12 18:23 47:5 process 9:1,8 38:6 46:13 53:9 54:17 62:5,24 63:19 85:22,24 87:15 102:9 103:11,20 106:24 108:12 110:8 118:8 120:19 124:15	126:22 127:7,19 160:14 produce 74:24 121:12 produced 74:20 professional 115:20 proof 36:24 38:16 42:1 100:15 102:11 103:20 106:23 120:9,17 131:9 136:19 149:17 152:21,22 160:14 164:17,17 167:14,15,20,23 168:5 169:20,21 170:8 173:25 proofs 77:25 96:15 168:7 proper 43:14 50:3 54:1 property 113:3 proportion 65:18 proportionate 35:2 35:15 39:8 69:14 propose 17:24 141:25 proposed 95:18 proposition 3:10 63:10 96:4 98:24 118:13 147:23 propositions 93:22 142:11 148:23 propounding 41:14 provable 6:15 55:18,24 56:6,9 56:10 61:20 84:17 84:18 89:6 91:6 91:11 97:12,13,23 98:1,7 99:9,16,20 99:22,23 101:2,18 102:1 106:4,8 108:17,18 110:6 131:5 138:19 140:23,24 149:22
---	--	--	---	--

158:2 162:16 prove 101:5,11 107:12 108:19 136:19 141:1 152:11,11,12 153:18,25 160:8 162:11 164:5 proved 3:13 39:25 53:7 60:15 66:12 66:14 67:8 69:4 77:24 95:22 106:5 106:14,16 107:11 108:18,23,25 109:25 111:9 122:11 124:25,25 125:1,3,6 127:19 130:15 131:1,2,5 132:2,7 137:23,25 145:8 149:13 152:14,23,24 153:11,18,24 154:9,10,16,23 160:7,16 161:3,7 162:4,14 169:11 169:11,12,12 proven 162:20 provide 51:18 70:19 77:25 93:16 105:6 provided 11:18 95:12 96:22 101:17 provides 21:12 31:2 47:4 providing 51:11 146:24 proving 55:9,10 102:10 104:2 152:7 153:21,21 153:22 provision 9:15 12:16,20 39:4,12 48:2 51:17 77:21 88:2,5 92:4,9 95:13,16 100:9	101:14 104:4 151:8 provisions 23:20 96:24 104:8 105:14 152:13 156:3 161:19 public 56:6 91:17 punch 24:12 purchase 138:11 purely 87:13 purser 108:11 purported 26:14 purpose 36:24 38:16 39:10 41:5 41:8 94:12,14,18 94:19,21,22,24 95:1,6,9,23 125:15 132:3 135:17 161:8,15 167:16 169:8,15 169:22 170:7,9 173:25,25 purposes 14:9 50:19 56:16 63:24 124:1 131:8 149:15 157:10 158:6 163:24 166:25 168:10 169:20,21 purposive 169:5,15 pursuant 118:7 pursue 98:18 pursued 78:18,19 put 7:16 17:14 50:22 51:2 59:25 60:2 67:14 72:25 83:15 89:16 100:22 101:5,6 103:25 123:8 136:25 137:5,6 141:24 142:21 146:16 153:17 164:4 166:14,20	qualification 36:23 qualify 52:24 question 3:23,24 6:24 15:18,22 16:3 19:17 23:9 31:19 32:15 40:1 42:9,21 44:10,18 47:17 48:10,14 51:2 53:12 58:7 58:10,12 62:3 66:8,9 67:5,20 68:12 70:9,15 75:20 76:21 79:13 87:18 89:19 92:20 92:21 93:3,6 100:23 101:4 104:24 105:2 111:4 113:16,17 115:11,24 116:13 117:5,22 118:24 133:24 135:13 141:18,19 147:18 159:23 162:23 163:8,9,14 166:14 167:22 169:2 173:8 questioned 26:16 questions 7:23 14:10 15:19,20 57:16 79:3 90:20 quickly 13:20 quite 15:12 38:19 39:14 60:17,18,19 99:2 144:14 146:15 157:8,16 159:9 170:18 quote 156:14 quoted 157:21 quotes 37:3 59:18	ran 28:12 range 56:19 65:19 rank 89:19 ranks 69:23 rare 61:18,23 rate 10:5,6 11:19 12:2,5,6,7,14,17 12:22 21:9 22:22 22:22,23,24 29:8 29:11,14,17 31:3 31:3,5 32:5 37:10 37:11,13,14 41:1 41:6,7 43:12 44:10,19,20,24,24 44:25 45:5,6,9,17 45:22 51:21 62:12 62:15,18,22 63:1 63:8,9,13 64:6,17 64:18,21 65:23 68:13 74:4 83:18 83:18 87:14 92:16 93:17 122:14,20 123:3 126:18,19 127:2 128:2,5 133:3 142:4,13,15 142:15,23,25,25 143:6,8,9 144:1,2 144:4,10,16,21 145:6,8,12,13,20 146:18,23,25 147:1,3,5,12,14 147:17 148:7,8,24 148:25 149:25,25 150:1,2,8,23 151:2,4,6,10,14 151:14,15,16,20 151:23 153:4,25 154:2,3,9,12,13 154:15,16 155:8 158:21,22 159:21 159:24,25 161:9 167:11,12 rateable 170:2 rates 12:18 37:9 41:6 62:10 63:13	72:11 78:7 83:17 111:19 132:4 134:17 142:24 145:16 146:24 156:24 163:8 rationale 33:2 39:18,20 reached 10:14 46:19 reaches 146:11 reaching 50:1 reaction 16:2 read 14:1 15:9 70:17 106:6,10 107:5 156:16 172:11 reading 1:13 2:13 3:14,21 4:11,23 7:3 13:6 22:20 23:16 26:4 27:9 36:19,24 37:1,4 47:7,14,21 48:6 48:15,22 49:4 77:9 82:9 93:18 135:2 146:10 156:10,25 172:6 readjustment 69:14 real 34:3,4 88:3 102:22 138:11,16 166:11,17 170:11 realisation 47:5 realised 79:6,8 113:3,6 reality 54:25 171:19 really 23:5 42:8 51:1 52:20 54:25 55:4 56:17,18 57:4 59:14,23 60:1,3 66:8 81:13 88:13 96:11 104:23 108:22 110:18 117:8 129:3 131:4
	Q			
		R		
		raining 173:10 rains 173:7 raised 15:22 107:22 143:12 160:1,3		

146:12 148:21 reason 7:14 27:19 36:7 44:5 49:8 54:22 57:12 59:15 83:18 85:14 97:22 101:1 106:3 111:18 117:25 120:7 124:6 126:18 127:17 149:1 159:5 reasonably 41:12 reasoned 2:1 reasoning 5:23 71:18 82:2 84:2 86:1 120:20 140:19 reasons 19:13 32:8 75:2,10 77:18 81:25 93:11 105:3 146:11 149:7 153:1 155:15 recalculate 35:24 recalculation 35:1 recall 10:3 16:18 17:4 receipt 119:13 receipts 84:7 119:11 138:2 141:11 receive 109:6 121:14 received 2:9,12 7:6 9:19 85:7 112:6 112:11 116:5,11 119:16 122:21 124:8 128:18 129:23,24 134:20 135:10,20 136:21 141:23 receiving 97:20 167:11 recite 166:5 recognised 7:11 50:17 56:8,9 recognises 32:5	recognising 51:24 154:7 recommendation 67:14 recommended 39:21 150:23 151:1 record 18:13 recorded 14:23 recovered 115:21 recovery 57:18 red 67:19 redefining 108:15 reduce 59:6 reduced 173:16 reducing 128:4 Rees 36:10 92:21 refer 15:23 21:17 42:21 48:13 78:25 145:7 referable 141:13 reference 4:16 5:25 6:19 10:2 12:11 14:25 16:13 24:13 26:4,10,11 27:14 36:3 39:22 41:19 45:15 48:24 61:24 78:10 92:25 93:24 94:4 151:16,17 156:23 references 6:1 13:20 14:22 15:2 17:10,21 76:18 82:24 referred 5:15,17 13:9,11,12 15:3 16:9,14 21:2 25:11 26:13 55:15 92:22,22,24,25 149:10 155:23 referring 2:17 4:14 10:20 16:16,17 17:12 26:23 36:22 42:21 48:18 87:2 155:25	refers 4:18 9:11 18:9 23:2 36:17 38:14 39:17 45:18 78:12 92:23 130:14 148:25 169:10 reflected 18:16 reflects 125:14 regard 157:25 regarded 55:4 78:9 78:13 158:7 regime 16:22 18:4 18:5,16,17 36:3 36:13 52:19 53:15 53:20 93:24 101:15,25 regimes 30:18,19 30:21 95:20 register 103:21,22 regulated 3:20 rehabilitation 99:1 reinforces 57:23 rejected 8:2,12,12 93:10 127:17 130:23 relate 152:13 related 49:19 relates 21:3,6 96:7 110:2 126:15 155:8 relating 20:6 66:1 96:25 relation 25:14 39:1 53:1,5,7,18 57:25 58:6 62:1 65:4,17 69:3 70:18 74:13 77:25 79:18 81:1 83:22 84:7 88:3 89:19 95:14 104:5 105:7 106:4,8 111:21 113:15 115:14 117:16 118:2 125:4,22,23 128:8 129:25 131:12,24 132:1	135:21,22 136:4 136:24 137:17 139:25 143:13 153:16,19,20 155:12 159:3,15 161:6 163:13 165:6 166:6 173:13,16 relative 69:19 162:3 relatively 55:16 65:7,8 87:17 release 97:11 100:6 released 97:8 98:8 98:20 100:2,4 relevance 6:6 10:23 relevant 11:16,18 11:20,22 18:4,16 22:16 36:13,14 63:13 151:3 157:1 reliance 28:25 78:16 relied 15:2 16:15 17:18,19 18:18 relies 25:9 32:19 rely 35:23 relying 50:13 remain 79:19 170:6 remainder 42:6 74:2 remained 3:4 98:23 remaining 43:7 66:25 74:5,5 84:3 93:20 95:22 120:19 140:20,21 remains 7:21 46:14 80:15 99:4 100:25 107:18 136:6,17 169:3 remarkable 14:24 147:23 remember 2:2 12:10,11 64:14 153:22 remembering 62:7	64:2 105:23 remind 64:3 140:14 142:17 reminded 88:18 reminding 150:24 remission 13:13 50:17 67:22 79:14 94:3 96:20 108:17 remitted 51:8 85:20 121:2,6 139:16 removal 68:1 repeal 67:25 repeat 89:10 104:21 108:10 145:10 repeated 7:1 17:17 20:7 repeatedly 88:18 repented 113:12 repetition 115:10 replicates 22:25 reply 130:24 report 12:22 17:17 36:15 48:1 50:15 78:3 96:11,13 150:21,22 151:10 156:13 represented 33:23 represents 130:25 require 25:21 37:23 41:2 69:3 69:19 147:21 169:25 170:1 required 54:3 146:19 requirement 45:6 67:10 169:21 requires 32:18 40:21 67:6,7 73:13 94:11 research 5:4,5 resemblance 65:25 reserve 35:10 residual 161:19
--	---	---	--	--

resist 86:21	167:1	144:4,12 146:7,8	Romilly 25:9 26:22 31:13	94:2 95:15,16
resolve 57:16	right 2:18 4:15 6:4	147:9,10 151:20	room 96:19 98:9	102:22 142:17
resolved 133:15	6:23 10:12,21	151:25 152:24	round 77:25 96:15	145:25 162:21
respect 27:10 49:19	11:5 13:6 14:14	153:10 154:5,15	roundabouts 63:20	164:24 165:5,18
50:18 54:21 72:1	16:25 17:2 19:12	155:17 156:19,25	route 95:2 105:7	165:23 166:3,6,6
77:2,4 109:10,25	20:4,24 21:1,4,6	158:12 161:5	Rowlatt 5:6,18	168:13 169:25
110:6 111:9	21:13,21,23 22:16	162:3,19 166:10	rule 1:6 2:21 20:19	rump 43:7
130:19 134:22	23:18 24:2,8,17	166:21 167:22	20:21 21:2,12,12	run 37:23 38:16
142:13 152:11,11	24:22 26:14 28:15	168:3 170:20	22:1,2 23:1,4,8	40:16 108:9
152:12 154:17	28:17 29:19,21,24	right-hand 19:21	26:11,13 28:9,21	109:24 113:5
158:3	29:25 30:2,14	72:10	29:5,7,14 30:23	127:7 166:21
respected 10:19	32:4,9,20,22,23	rightly 86:13	31:1,23 32:10,15	running 35:4,14
13:25 32:12	33:4,10,11,21	rights 1:18,21,24	32:17 34:6,12	37:21 39:6,16
respectfully 93:10	34:3,17 36:12	7:19,21 9:25	35:3 36:2,23 37:1	43:3,13 80:3
respective 57:12	37:22 40:4,4,6,10	10:18 11:14 13:13	37:4 39:24 40:2	132:13 133:8
158:1	42:11,16 43:2,11	13:23 29:6 32:11	40:20,23 41:5,10	runs 28:13 37:22
respond 53:25	43:14 52:23,24	38:10 39:3 50:17	50:7 54:3 55:16	111:4
responding 60:3	53:6,8 57:1 58:7,9	51:8,12,13,14,16	56:4,5 58:24	rushed 158:22
142:19,20	59:16,18 62:4,14	52:6 53:9 54:21	61:24 63:23 65:20	
response 3:18 54:1	62:17,18 63:13	57:12,20 58:17,24	65:23,24,25 66:10	S
54:4 74:19 75:3	66:2,21 68:14	60:12,20 62:4	67:2,23 68:13,25	sandwiched 89:22
responses 164:25	75:3,8,18 77:17	66:4 67:22 68:3	69:18,20 71:25	satisfied 131:1,3
166:19	79:20 80:6,8,9	79:14,19 81:20	77:9,23 84:16	138:19
rest 66:24 85:21	81:1,3,6,25 82:3	94:1,3 96:20	88:12 93:14,22	Save 97:18
restored 103:21,22	83:13,23,25 85:5	98:11,12 100:8,13	94:11,15 95:11,24	saw 99:17
restraint 159:6	85:20 88:8,14	100:18,20 104:20	96:7,13 97:24	saying 7:15 8:19,21
restricted 41:1	89:14,15,23 91:1	110:22 117:19,23	99:16 100:14	11:20 14:13 29:18
restrictive 42:13	92:15 93:11 95:10	118:14 119:10	101:21 106:3	30:1,12 38:18,22
rests 3:10	98:12 100:11	121:2,5 127:18	109:6,16 117:17	38:23 39:1 42:9
result 34:13 63:3	101:20 104:15	128:11 139:15,16	117:18 130:14	54:8 56:17 73:8
63:15 71:1 84:5	108:5 109:4,10,13	139:17,18 140:4	142:16,21,22	79:25 81:1 86:18
161:21	110:5 111:19	141:10,14 149:1	143:3,6 145:19,19	89:9 119:23
resulting 72:23	116:19 118:20	152:2 154:7,8	146:18 147:22	122:12 129:5
results 63:16 72:20	120:4 121:6,10	155:13 158:1	152:22 157:25	134:9 143:11
140:12	123:7 125:11,22	159:11 161:20	158:19 163:22	151:18 158:5,6
returning 155:11	126:2,4,6,9,12	170:13	168:14 169:5,8,15	172:10
reverse 114:23	127:18,19,22	rise 23:13 25:21	169:20 170:9	says 4:9,21 9:3 10:9
reversed 84:11	128:25 129:8	43:21 79:2 111:24	171:24	13:23 24:3 26:23
reversion 110:21	130:16 131:23	111:24 145:17	ruled 83:20 171:13	27:18 29:7 30:7
139:14	135:7,8,16,18	174:6	rules 20:8,9,11,22	32:22 46:11 48:11
revert 53:8	136:13 137:11	risk 123:6	24:1,13,15 30:25	48:20 54:20 77:7
reverted 81:20	138:4,5,8,11,14	road 132:11	31:20 38:2 51:11	85:4 86:23 93:13
reverting 39:2	139:21,22,23	roll 125:8	53:21 58:11 65:3	95:21 98:2 101:2
Richards 15:11	140:16,19,20	rolled 125:3	69:12 85:5 92:9	103:18 104:4,6
rid 68:1 87:23	141:7 143:10	Romer 48:17		110:3 118:25

132:21 135:3 142:22 152:3,23 157:9 164:23 168:15 172:2 SCG 18:19 19:11 28:25 63:16 77:1 78:16 93:10 142:12,20 143:3 167:3 SCG's 66:17 150:10 scheme 32:13 52:16 54:14 84:1 101:17 101:19 104:3 106:19 117:22 118:13 121:15 122:17 139:19 140:6 141:13 173:13 schillings 3:11 scuppered 64:10 se 147:2 second 1:6 2:2 3:8 9:14 13:25 17:13 24:11 51:10 67:6 74:8 75:6,7 76:10 76:13 77:20 93:23 94:6,7 100:7 107:9 109:25 116:6 136:1 153:19 secondly 50:9 96:10 138:1 143:6 149:23 section 2:3 9:24 10:3,3,20,24 11:5 11:9,13 12:4,17 13:1 21:16 24:15 24:17 37:8 56:2 95:12,17,21 97:2 97:5,6,14 98:2 149:24 157:20,22 157:23 158:5,6 160:22 sections 97:1	secured 113:2,15 158:1 securities 2:16 47:6 security 47:9 113:3 113:6 see 11:23 12:21 18:10 19:20 21:5 23:14 24:13 26:18 38:19 47:3,11 60:12 61:21 65:24 86:22 91:1 108:4 110:20,23 115:3 122:14 128:22 129:13 133:20 134:6 147:10 155:19,21 161:23 162:2,8,10 170:6 171:19 seek 103:15 153:7 seeks 159:11 seen 1:11 10:16 14:1 25:8 96:11 156:6,14 sees 5:7 self-contained 46:2 Sempre 78:17,21 78:25 send 17:7 senior 49:23 sense 6:3 21:23 30:2 39:3 52:1 69:8 91:2 98:15 100:4 112:20 113:20 117:20 119:24 128:4 139:17 155:10 167:18 168:14,25 169:11 170:11,12 173:9 sensible 107:20 164:6,9 sensitive 91:24 sentence 2:24 9:14 9:18 17:16 20:10 24:10,14 76:25	148:23 150:25 152:17 sentences 9:13 separate 19:18 80:20 119:2,24 137:22 138:1 separately 73:14 83:9 123:3 series 97:7 100:17 103:6 seriously 37:6 Services 56:3 set 14:4 46:6 97:9 119:4 137:1 set-off 115:12 set/offset 118:4 share 13:4 35:15 39:8 69:15 shareholders 25:22 56:23 59:13,22 61:7 89:8 sheet 71:11 short 26:1 44:15,18 44:20 45:18 50:12 53:22 67:18 70:20 78:10 88:22 98:4 108:1,22 110:9,17 115:9 121:3 135:12 139:9 140:11 shortage 59:8 shorter 8:15 45:18 108:16 144:19 shortfall 32:14 61:15 76:14 111:11,25 112:1 112:10 113:17,18 124:19 125:16 127:11 133:1,5,9 133:25 134:14,19 135:1,5,9 137:24 139:3 shorthand 158:15 shortly 68:23 69:8 78:19 94:5 109:17	110:1 118:25 show 4:7 159:6 showed 104:8 showing 49:1 shown 55:2 shows 10:20 31:14 shut 79:13 side 72:10 118:5,6 147:25 sidestep 45:25 significant 33:13 similar 63:1 75:2 simple 25:20 26:9 27:23 36:2 39:11 40:6 42:2 66:11 78:9,15 88:9 90:4 90:6 101:19 105:7 112:14 158:14 163:22 simplest 78:1 simplicity 32:10 34:20 35:3 39:14 51:18 54:2 69:11 simplification 54:25 simplified 82:23 simplistic 58:23 simply 8:8 15:9 29:17,23 32:20 39:1 68:2 84:8 85:20 114:6 133:18 140:13 150:12 159:5,22 160:9 164:8 single 73:21,23 108:22 119:1 148:20 149:8,12 168:6 169:20 sit 102:8 sitting 127:8 166:5 situation 9:23 140:2 143:19,23 148:1,6 165:15 six 5:25,25 6:7 27:17 72:22	sixth 6:8 size 59:6 skeleton 49:24 78:16 107:19 108:20 111:7 143:12,16 144:24 slightly 46:1,2 53:10 68:11 69:10 82:5 102:3 111:3 slow 84:12 slug 34:25 73:14 101:24 small 3:14 65:2 124:22 Smith 20:9 21:2,20 46:18 155:7 Smith's 33:25 Society 46:18 sold 147:6 sole 58:8 141:17 solely 77:23 124:7 141:21 solution 9:4,5 35:3 51:23 96:14 163:21 168:6 172:1 solutions 168:13 solvent 4:19,25 5:1 6:22,23 27:20 28:8,11 52:7 somebody 40:16 soon 62:11 sorry 15:5,6 28:3 30:12 68:20 82:15 84:12 94:6 107:9 115:13 116:19 151:7,13 153:14 sort 50:22 53:20 61:20 88:2 110:6 143:23 146:8 148:2 151:12 160:3 165:15 166:6 171:6,22 sorted 121:23 sorts 99:5 166:7
---	---	---	--	--

sounds 112:23	statutes 55:22	135:21 136:20	91:23 105:13	113:1,11 155:18
source 45:12	159:7	141:1,6,8 146:23	subordinating 92:4	suggesting 115:4
161:22	statutory 6:4 16:22	146:24,25 147:1	92:7	126:13
speaking 78:6 87:4	17:2 18:4 29:19	stick 54:7 128:22	subordination	suggestion 146:7
169:14 172:2	29:24 36:13 52:8	stipulate 77:9	69:25 70:12	suggests 96:13
special 28:9 165:18	54:14 55:9 56:8	stop 39:15 44:12	subsection 97:7,14	sum 3:12 62:22
172:1	58:18,19 59:7,9	stopped 37:18	97:17	65:22 72:8,16,20
specific 81:15 97:9	60:9,23 61:9 62:5	stopping 157:7	subsequent 6:14	104:13 111:13
specifically 127:3	77:8,22 81:15,19	stops 6:13 35:4	47:13 106:18	131:3 164:13,16
130:23 148:19	83:16 85:22 87:16	38:15 43:2	152:15	summarised 17:25
specified 142:24	89:6 90:14,15	storm 134:16	subsequently	107:2
specifies 154:13	91:11 92:8 101:14	straight 44:7 71:17	110:12 113:24	summary 65:21
speed 168:1	101:19 103:6	90:1 114:5,11	152:6,25 166:13	121:3
split 15:21 129:5	104:3 106:19	straying 62:7	subset 136:4	sums 65:7
stage 4:6 14:11	108:12,24 110:8	strong 65:25	subsidiary 109:21	Sunday 173:7,8,11
15:21 16:18 32:13	116:5,11 117:7,22	stuck 155:3,4	subsisting 20:8	supplemental
90:8 103:2,3,9	118:13 120:18	sub-rule 22:18,25	substance 20:7	116:6 129:19
105:1,11 112:18	121:15 122:8,11	43:15 55:19,23	96:19	130:12
114:17 121:18	122:17 126:9,9,13	69:23 100:14	substantial 30:11	supplementary
stages 105:1	126:22 127:7,19	146:2 158:21	93:25 100:13	82:18 117:3
stand 160:14	128:14,18 129:23	sub-rules 22:17	substantive 66:3	support 19:10
stands 18:12 90:17	130:18 131:14	subdebt 61:6	67:6	95:12 105:4
92:16 106:19,22	134:24 135:11,21	subject 49:14 97:20	substitute 143:5	109:18 124:22
106:22 110:7	138:2,22 140:6	97:21 106:21	145:20	146:10 158:19
161:24	141:12,16 149:12	114:18 131:24	substituted 164:17	supported 93:21
start 45:6 57:25	149:15,18 153:23	152:21,22 159:12	subsumed 162:24	96:2
102:22 118:12	161:4,11 166:21	162:21	163:3	supports 95:1
154:19 169:9	stayed 103:20	submission 5:13	succeed 57:18	suppose 7:2 33:10
172:17	step 20:1 127:20	23:5 32:19 50:5	suffer 113:1 114:8	92:3 103:2 114:4
starting 2:20	167:18	119:7 128:21	126:25	114:10 165:10,10
146:22 158:24	steps 159:15	130:24 131:4,7,12	suffered 77:16	supposed 34:12
159:17	sterling 64:5 83:12	133:21 140:8	85:10,14 105:9	69:15 96:13 146:1
state 49:25 78:2	84:5 87:13 107:13	submissions 1:3	113:9,9,17,18	158:24 159:19
96:16	107:17 108:6,24	19:10 31:21 52:17	114:2,18,20,21	161:7
stated 109:18	108:25 109:5	68:8,24 104:19	125:24 133:25	supposes 165:9
statement 65:15	111:14 112:9,11	128:8 163:8,15	135:9	Supreme 20:22
statements 55:2	113:19 114:14,18	167:3,9 175:2	suffering 58:2	56:11 70:9,13
states 2:22 51:7	118:21 119:17	submit 19:12 77:1	114:25 127:11	86:6,8,22 90:25
statute 23:20 24:16	120:8,10,11	93:21 107:16	133:5	sure 8:12 12:3 42:8
32:5,20,22 39:5	123:18 125:17	111:20 161:14	sufficient 134:23	42:24 46:8 63:11
65:13 81:4 105:6	126:20,25 127:1,4	submitted 110:9	146:20	80:11 83:3 136:9
109:15 118:7	128:1,2 131:2,8	subordinated	suggest 34:5 78:4	137:4 151:7
120:1 126:5 130:4	131:10 132:7,12	55:11 70:5,8 89:7	93:11 95:18	160:17 165:5
131:16 154:7	132:22 133:7,8	89:7 90:9,11,14	156:24	surely 114:17
156:8	134:15,20,24	91:5,5,10,20,20	suggested 49:4	surety 5:6

surplus 2:13 8:22 10:7,19 21:19 23:4 29:20,23,24 31:5 32:21 34:25 36:20 37:25 38:17 38:24 59:7,9 65:22 67:3,7 72:16 77:3,4 79:4 79:5,6,10 93:20 94:11 95:22 98:13 98:17 100:25,25 101:10,13 102:6 120:19 124:12 148:5,13 149:6 156:2,11 157:13 162:12 168:2,3,4	57:17 100:10 127:25 talking 35:20 45:8 56:18 58:17 59:14 60:5,6 65:7 110:19 124:23,24 163:19 174:2 talks 6:16 106:7 tanto 8:6 tax 47:17,22 49:19 teacup 134:16 Teatime 15:14 tell 86:20 165:2 tempting 86:20 ten 122:25 174:7 tentative 17:14 terminate 166:11 terminated 103:6 terms 5:8 17:14 19:19 35:20 38:2 53:11 55:1 58:1 59:13 65:20 66:9 67:14 69:25 70:6 70:7 75:22 90:2,4 90:6 91:7 92:12 119:4 124:25 135:15 170:16 171:1,2	think 5:15,17 7:17 8:19 12:9,13 14:14 15:20 19:15 33:15,21 34:2 40:13 42:9 43:2 43:11 44:3,8 48:12 53:13,17 54:6 59:3,5 67:17 75:7,8 78:18 79:17,24 80:14 81:1,22 83:1,8 87:4 89:16 91:23 101:3,5 103:18 105:18 106:17 108:17 111:20 113:11 115:7 119:23 123:7 128:24 132:8,24 133:14 135:13 136:6 140:25 143:10,24 144:24 148:18 154:6 157:19,21,22 158:15 159:2 160:19 162:1,16 167:19 171:17 172:6,10 173:24 174:2	three 15:21 19:6 25:13 72:4 123:25 142:11 166:16 ticking 79:16 time 2:12,12 12:24 14:17,20 23:23 32:21 34:25 35:7 35:16,25 36:19 38:5 39:8,8 43:21 55:3,25 65:24 72:18 73:16 77:3 77:10,13 78:23 80:3 87:1 94:16 94:25 97:24 103:23 111:14,23 114:14,16 120:6 122:3 134:14 143:11 151:17 152:10 154:3,3 157:12 158:2 163:25 165:7,16 169:17 170:14 171:3 173:6 174:5 174:6,11	tranches 72:5 transaction 113:2 transactions 113:15 transcripts 76:18 translate 138:3 trawl 30:16 treat 28:19 29:4,15 101:15 156:19 treated 25:14 27:17 28:7 31:12 34:13 45:2 48:7 54:18 66:17 101:25 105:8 157:14 treating 25:2 43:6 treatment 33:5 34:6,11 52:25 79:11 tried 96:3 trouble 65:6 86:18 173:12 true 31:14 33:15 38:25 77:22 158:25
<hr/> T <hr/>	90:6 91:7 92:12 119:4 124:25 135:15 170:16 171:1,2	thinking 41:16 135:2 thinks 103:14 third 6:19 7:21,22 27:14 31:24 71:11 71:19 74:21,25 75:1 77:25 96:17 115:21 150:19 155:16 156:21 thirdly 93:23 143:10 thoroughly 51:5 thought 16:1 45:19 82:22 87:6 102:5 102:17 132:19 133:12 140:8 152:5 160:21	times 10:25 60:2 today 143:11 told 12:3 22:10 33:21 102:17 tomorrow 174:13 top 4:20 topic 31:24 46:3 82:5 topics 1:6 142:3 tort 106:17 110:7 110:21 115:14,15 115:18 total 72:24 129:24 totality 119:10,11 totally 145:18 totals 72:6 totted 124:9 tough 164:23 track 123:22 153:15 traction 54:5	truly 106:13 trump 35:22 trust 46:18 48:3 trustee 35:6 47:2,4 trying 22:7 62:16 80:11 turn 1:9 12:9 13:19 20:11 59:3 68:10 78:10 115:11 148:11 turning 1:5 2:5 19:14 46:1 47:24 48:8 75:20 82:5 93:6 115:24 129:19 twice 153:18,25 two 2:23 9:13 10:4 11:1 13:17,20 15:2 17:10 21:20 22:1,17 25:11 30:18 32:18 34:21
surprising 100:2 145:2 suspect 65:5 swell 59:6 swift 83:10 swings 63:20 system 73:18	take 17:24,25 18:6 18:10 25:11 44:13 47:1 54:14,25 64:5,12 75:13 101:19 112:14 114:23 116:10 127:20 129:5 149:9 162:12 taken 8:4 19:24 77:3 111:21 116:4 takes 18:13 31:9	take 17:24,25 18:6 18:10 25:11 44:13 47:1 54:14,25 64:5,12 75:13 101:19 112:14 114:23 116:10 127:20 129:5 149:9 162:12 taken 8:4 19:24 77:3 111:21 116:4 takes 18:13 31:9	take 17:24,25 18:6 18:10 25:11 44:13 47:1 54:14,25 64:5,12 75:13 101:19 112:14 114:23 116:10 127:20 129:5 149:9 162:12 taken 8:4 19:24 77:3 111:21 116:4 takes 18:13 31:9	take 17:24,25 18:6 18:10 25:11 44:13 47:1 54:14,25 64:5,12 75:13 101:19 112:14 114:23 116:10 127:20 129:5 149:9 162:12 taken 8:4 19:24 77:3 111:21 116:4 takes 18:13 31:9

41:6 44:8 53:18 66:15,20 67:2 68:4 71:8,8 72:7,8 72:9 73:19,19,22 73:25 74:11,14 75:24 77:5,6 80:5 80:14 81:12 82:7 83:15 97:1 105:1 109:21 112:16 116:1 117:9 119:24 124:21 127:15,16,17 130:18,22,24 131:10 137:21 138:5 140:22 142:1,3 164:25 166:16,19 two-thirds 20:5 24:12 47:11 type 33:17 41:4 171:21 types 166:1	151:16 152:22,25 153:12,19 160:8 underpinning 140:7 understand 29:12 35:23 85:3 129:4 136:9,20 173:21 understanding 1:14 understood 13:14 80:12 89:13 122:13 undoubtedly 26:18 27:12 32:17 35:12 44:2 56:7 132:14 149:14 167:9 unfair 28:11 125:21 unfairness 167:10 unhelpfully 24:11 uniform 51:23 64:1 65:4 uniformly 51:19 unitary 107:18 131:11 unjust 27:21 unlimited 25:23 unliquidated 97:15 152:19 unnecessary 110:16 128:24 unpacking 11:3 unpaid 66:19 136:18 unprovable 84:13 84:19 unsecured 89:5 158:1 unseemly 158:22 unusual 102:21 unwarranted 150:13 updated 76:17 uplift 62:6,15 63:3 63:17 126:5	161:11 uplifted 126:18 usable 144:11 use 28:1 124:1 useless 165:22,24 usual 19:23 utterly 99:1 160:13	170:18 171:1,2 valued 169:1 valuing 168:15 vanilla 87:23 variable 137:5 variety 97:8 163:19 various 56:12 59:22 69:14 134:7 vary 39:7,8 92:3 115:16 varying 37:8 vast 54:24 65:5,18 Vaughan 48:9 versa 54:12 124:20 version 30:24 108:11 versions 16:10 versus 52:12 56:18 58:8 vice 54:12 124:20 Victoria 23:20 view 37:7 48:12 57:17 59:4 81:3 95:1 113:12 138:6 vires 26:17,19 27:13 volume 108:21 130:12	wasn't 11:16,16,18 11:20,22 16:16 99:2,16 110:10 143:12 172:19 waste 87:1 waterfall 12:20 15:20 31:2 52:9 55:8 56:15,20 58:9,14,15,20 59:10,15,20,22 60:7 70:17 85:19 86:12 89:1,2,3,9 90:23,24 107:3 120:15 122:17 139:14 167:19 way 9:4 13:1,14 20:5 21:24 24:12 31:13 35:22 39:17 41:23 42:1 47:11 49:18,21 53:10 54:6 56:22 57:20 58:4,19 60:2 62:13,22 65:4,4 65:12 66:10 71:23 72:25 73:10 74:15 84:8 85:18 88:17 94:17 103:12 106:10,20 112:6 117:20 118:5,15 125:19 126:24 127:23 128:9 129:13 130:5 132:8,15 135:1,23 135:25 136:2,7 138:2 140:5 146:16 149:17 153:16 155:20 160:10 166:25 170:18 174:11 ways 22:1 49:25 51:12,14,15 59:5 63:15 67:2 83:16 131:10 We'll 106:16 we're 12:3 86:15
U		V	W	
UK 87:13 ultimately 27:25 33:5 60:16 124:10 127:6 141:13 ultra 26:17,19 27:13 umbrella 125:25 unauthorised 26:17 uncertain 168:16 168:21,24,25 uncertainty 169:2 172:9 unclear 58:22 unconnected 130:15 undealt 145:18 underlying 8:10,12 107:10 111:12 125:3 126:20 131:15 135:16	161:11 v 1:7 5:5,12 7:14 8:3 10:16 11:2,4 11:12 12:22 13:9 13:15,19 14:17,25 15:12,24 17:22 18:20 23:7,8,11 24:20 25:1 28:15 28:20,22 29:1 30:5,7,8 31:8,22 32:12,25 33:3,9 34:17,22 35:13 36:10,22 37:23 38:9 39:24 40:5 41:15 42:10,16 43:4,9,11,17 44:11,19,21,25 45:16,23 46:4,10 46:18 48:25 49:1 49:22 50:1,11 51:4,6 52:22 53:3 53:13 62:4,16,20 65:12,17 66:10 67:18,20 68:1,2,9 78:11 79:23 80:1 92:21 101:20,23 129:11 149:11 vague 168:14 Vaisey 155:24 157:9 valuation 166:3,25 168:25 170:20 171:22 173:23 value 94:16,25 152:20 160:9 164:4 168:15 169:12,17 170:8	170:18 171:1,2 wait 38:6 86:22 102:8 170:6 waiting 57:14 86:5 waived 48:5 want 1:12 18:11 20:19 25:11 45:25 46:15,21 62:20 64:12 71:2 74:24 89:12 101:3 102:8 128:13 133:1 135:12 wanted 64:9 wants 17:4 101:11 Warrant 25:1	Wace 17:14 wait 38:6 86:22 102:8 170:6 waiting 57:14 86:5 waived 48:5 want 1:12 18:11 20:19 25:11 45:25 46:15,21 62:20 64:12 71:2 74:24 89:12 101:3 102:8 128:13 133:1 135:12 wanted 64:9 wants 17:4 101:11 Warrant 25:1	

89:12,20 105:19 116:25 117:2 140:14,15 143:19 145:5 169:7 172:23 we've 10:16 43:5 87:22 118:18 156:14 161:18 174:8 Wednesday 1:1 weekend 173:15,19 well-known 46:8 went 102:18 108:8 133:14 150:8 Wentworth's 92:16 whichever 142:24 146:16 whilst 3:3 19:4 40:17 77:8 78:19 120:21 170:6 whispered 104:11 White 45:13 78:3 150:22,23,25 151:11 Whittingstall 18:20 19:20 23:7,11 28:15 29:1 30:7 wholly 106:23 114:25 125:20 134:1 160:11 163:24 173:22 wicked 59:13 wickedness 59:14 Wight 149:11 Williams 15:1 48:9 winding 25:15 26:7 26:25 27:6 28:2 28:13,14 55:20 95:14,17 156:9 157:10,24 165:18 wished 49:17 withheld 126:14 wondered 16:4,6 wondering 171:16 woodwork 101:2	word 40:9,20 41:3 41:9,19 44:19 71:24 95:20,24 169:7 wording 146:20 147:9 words 2:14 3:14,22 4:4,11,24 7:3 22:20 23:17 26:5 27:9 36:20,24 37:2,5 47:7,14,21 48:6,15,22 49:5 77:9,11 93:18 145:6 156:10 157:1 work 8:14 12:23 15:12 35:9 73:15 86:10 120:12 122:18 123:1,3 124:3 126:24 132:16 134:13 136:21 137:13,14 137:23 138:3 146:1 171:7,10 worked 50:12 70:23 working 109:9 137:9 140:9 167:16 171:10 works 21:20 22:1 44:23 71:23 74:10 137:8 138:10 world 55:6 58:7 113:15 119:9 127:22 128:10 140:9,11,14,15 146:21 worry 65:2 worse 53:2 63:22 85:23 86:10 worth 14:11 36:4 62:2,7 113:4 124:16 150:24 wouldn't 60:24 62:6 79:16 80:4	88:11 113:3 114:8 121:7 141:9 150:9 150:10 159:13 wound 27:20 wrestled 8:11 writing 28:3 wrong 13:18 16:2 30:12 50:13,18,20 54:1,8 57:3 68:20 71:10,12 73:9 84:9 109:22 116:8 116:16,17,21 119:6 129:5,8 138:7,8,9 144:8 165:2 <hr/> X <hr/> X 132:24 167:25,25 <hr/> Y <hr/> year 73:2,22 114:12,13,14 132:23 years 1:8 42:3,4 50:16 57:13 66:13 66:14,15,20 68:7 72:7,8,9,17,19,22 73:19,19,22,25 74:11,14 103:16 164:16 166:16 yesterday 5:5 11:1 20:25 25:12 26:13 26:24 55:16 66:8 70:23 71:8 79:18 96:23 100:22 102:16 163:18 York 19:11 33:23 52:22 63:16 77:1 144:3 155:8 <hr/> Z <hr/> Zacaroli 1:3,4,5 2:8 4:4 5:8,14,19,22 7:17 8:15,23 11:20,25 12:3,9	12:13,21 13:6,8 14:16 15:6,9,16 16:8,13 17:2,9 18:8 20:15,18,20 20:21,24 21:1,17 22:7,10,14,16,24 23:2,13 24:5,9 25:19 28:5 30:14 30:17 33:15,18,21 33:24 34:2,4 35:19 36:1 37:15 37:22 38:12,21,25 40:13,16,19 41:16 41:19,25 42:2,18 42:20,24 43:11,18 43:24 44:2,4,9,17 44:18 45:11,14,17 45:21 51:1 53:4 53:16,22 59:25 60:12 61:1,4,18 64:3,7,9,13 68:17 68:20,23 69:7,10 70:1,3,9,12,19,22 71:6,14,16 73:7 73:10,23 74:19 75:3,7,10,13,15 75:18,20,24 76:3 76:6,10,12,21 79:17,25 80:5,10 80:14,21,23,25 81:8,17,22,25 82:5,14,16,21 83:1,7 84:15,20 84:23 85:4,11,16 85:18 86:2,7,14 86:17,24 87:2,8 87:11,19,24 88:5 88:8,10,18,24 89:11,15,24 90:1 90:6,12,16,19,24 91:2,9,12,15,18 91:22 92:1,6,10 92:14,18,20 93:3 94:7,10,23 95:5,7 95:10 96:1 97:4,6	99:7,12,17,21,23 101:8,14 102:8,16 102:20,25 103:3,9 104:9,15,19,23 106:9 107:8,10,24 108:1,3,7,9,14,17 110:23,25 111:3 112:10,14 113:8 113:13 114:20 115:4,9,18,23 116:16,19,22,24 117:4,12,14 118:12 119:18,20 120:4,7,14 121:9 121:13,22,24 122:2,7,10,18,24 123:7,11,13,20,24 124:3 125:11,13 127:14 128:6,8,24 129:2,7,13,16,18 132:3 133:14,23 134:9,12 135:7,12 136:14 137:3,7,10 137:16 138:8,25 139:4,11 140:9,15 140:19,24 141:2,4 142:3,7,9,11,20 143:24 144:7,12 144:17,19 145:23 146:5,14 147:8,13 148:9,11,14,17 149:7 150:10,15 150:19 151:13,20 151:23 152:2,4,8 152:16 153:6,8,10 153:16 154:4,15 154:21,24 155:2,6 157:17,20 158:9 158:14,18 160:6 160:17,22,25 161:2,24 162:1,9 162:19,25 163:4 163:13 164:22,25 165:5,12,17,20,24 166:5 167:8,22,25
---	--	---	---	---

168:3,6,9,14,19 168:24 170:20 171:5,9,12,17,24 172:15,20 173:1,5 173:18 174:2,4,7 174:10 175:2 zero 128:5	112 18:22,23 114 18:21 19:6 118 12:13 12 25:17 49:25 143:22 12.3 55:16 120-year 15:1 13 26:20 108:21 111:7,8 132 2:3 9:15,24 10:3,3 11:5,9 12:4 21:16 136 107:4,5 137 107:4,5 14 22:4 115:8 163:16 140 78:11 141 14:24 78:11 142 15:4,6,10 17:9 145 97:4,6 145B 97:14 15 24:13 115:8 151 20:16,17,18 151A 20:17 156 93:8 1582 14:14 16 27:15 28:6 164 93:8,12 106:7,9 165 76:24,25 166 77:7 167 76:24 77:20 168 105:25 169 106:3 17 82:16 111:7 116:18,23,24 170 106:1 177 145:4 150:16 150:18 179 148:17,22,23 17th 24:15 18 82:10 83:15 87:10 180 148:23 150:20 152:17 156:22 158:19	182 146:7,9 1825 2:3 9:11 21:16 1838 24:18 1841 19:1 20:6 23:24,24 24:15 1857 19:24 20:1 1861 20:7 1862 26:12 1883 11:3 20:22 64:16 96:19,24 97:2 99:2 100:7 189 95:12,17 189(2) 95:21 18th 56:16 19 82:11,16 83:15 87:10 1904 17:13 192A 22:3,10,11,12 30:24 192C 22:5,9 1955 155:24 1986 16:14,25 17:3 51:10 65:24 93:25 19th 56:16 1B 23:3,3	128:12 130:14 161:19,24 162:7 169:5 2.88(7) 15:25 39:23 40:2,20 41:3,10 41:12 42:14,17 58:24 65:20 67:10 68:25 71:25 77:23 94:11 169:8,15 2.88(8) 54:19 2.88(9) 37:8 40:23 40:24 44:10,19 142:4,16,21 146:18 149:24 152:23 159:25 2.88(9)) 12:16 20 66:16,22 114:15 132:22 133:5 2008 62:10 2017 1:1 21 73:24 74:3 212 151:7 214 19:21 217 20:2,5,13 23:10 22.74 72:20 228 109:2 118:18 118:19 131:22 229 118:25 127:14 137:21 230 118:18,25 127:14 137:21 24 19:15 252 26:22 261 157:22 262 157:9 263 156:13 26th 26:11 29 47:1 83:6 2A 68:19 76:11,12	3.22 139:8 3.28 139:10 30 83:6 97:2,5,6 100:1 112:19 317 157:23 34.01 72:24 354 2:6 356 6:8 357 4:20 6:20 7:5 9:11 37 15:20 57:15 97:14 37(3) 99:6,14 100:1 38 36:11 382(1)(a) 56:2	
0	1	2	3	4	
0.5 62:11 0.77 72:23	1 1:9 13:20,20 19:14 22:18 23:20 25:18,19 27:15 36:10 47:2 72:5 72:21,22 74:1,5,8 74:11,13 75:14 86:12 97:7,14 100:14 108:21 114:5 130:12 155:23 175:2 1.00 88:21 1.5 123:15 10 35:8 72:10,18,23 82:12,13,14 83:5 88:8,12 90:11 117:1 142:7 143:21 10.30 1:2 174:12,16 10.50 72:9,15 100 66:12,17 72:4,6 73:19,25 74:1 84:24 107:14 108:19,23 112:15 112:16 132:12 164:15,18 167:23 173:7 101 107:4 108 18:21 11 26:12 142:7 11.45 44:14 11.50 44:16 110 23:21	132 2:3 9:15,24 10:3,3 11:5,9 12:4 21:16 136 107:4,5 137 107:4,5 14 22:4 115:8 163:16 140 78:11 141 14:24 78:11 142 15:4,6,10 17:9 145 97:4,6 145B 97:14 15 24:13 115:8 151 20:16,17,18 151A 20:17 156 93:8 1582 14:14 16 27:15 28:6 164 93:8,12 106:7,9 165 76:24,25 166 77:7 167 76:24 77:20 168 105:25 169 106:3 17 82:16 111:7 116:18,23,24 170 106:1 177 145:4 150:16 150:18 179 148:17,22,23 17th 24:15 18 82:10 83:15 87:10 180 148:23 150:20 152:17 156:22 158:19	2 13:2,3 22:25 23:20 55:19 68:9 68:21,22 71:9 73:2 97:9 113:1 114:13,14 117:18 126:6 130:12 132:23 2(a) 55:23,23 2.00 88:20,23 2.88 29:5,7 32:10 32:15 34:6,12,22 50:8,10 52:10 54:3 59:6 63:23 84:16 86:1 87:17 88:12 93:14 95:24 100:14 101:21 106:3 109:6,16 117:17,18,24	2008 62:10 2017 1:1 21 73:24 74:3 212 151:7 214 19:21 217 20:2,5,13 23:10 22.74 72:20 228 109:2 118:18 118:19 131:22 229 118:25 127:14 137:21 230 118:18,25 127:14 137:21 24 19:15 252 26:22 261 157:22 262 157:9 263 156:13 26th 26:11 29 47:1 83:6 2A 68:19 76:11,12	4 10:8,21 11:6,19 12:5,6,8,13 13:4 20:16 21:10 23:15 27:2 31:4 76:4,6,9 81:13,14 97:4 98:12 114:12 116:6 117:3 129:19 142:9 4.15 174:5 4.18 174:14 40 22:3 46:6 66:13 66:18,19 114:16 40A 22:8 40APD 22:15 40APD.14 22:17 41 155:23 42 46:6,17 44 156:22 48 130:13 49 57:15 72:5,16,17
1	2	3	4	5	
1.00 88:21 1.5 123:15 10 35:8 72:10,18,23 82:12,13,14 83:5 88:8,12 90:11 117:1 142:7 143:21 10.30 1:2 174:12,16 10.50 72:9,15 100 66:12,17 72:4,6 73:19,25 74:1 84:24 107:14 108:19,23 112:15 112:16 132:12 164:15,18 167:23 173:7 101 107:4 108 18:21 11 26:12 142:7 11.45 44:14 11.50 44:16 110 23:21	2 13:2,3 22:25 23:20 55:19 68:9 68:21,22 71:9 73:2 97:9 113:1 114:13,14 117:18 126:6 130:12 132:23 2(a) 55:23,23 2.00 88:20,23 2.88 29:5,7 32:10 32:15 34:6,12,22 50:8,10 52:10 54:3 59:6 63:23 84:16 86:1 87:17 88:12 93:14 95:24 100:14 101:21 106:3 109:6,16 117:17,18,24	3 56:4 68:15,17,20 68:22 71:13,19 76:15 82:19 97:17 107:4	4 10:8,21 11:6,19 12:5,6,8,13 13:4 20:16 21:10 23:15 27:2 31:4 76:4,6,9 81:13,14 97:4 98:12 114:12 116:6 117:3 129:19 142:9 4.15 174:5 4.18 174:14 40 22:3 46:6 66:13 66:18,19 114:16 40A 22:8 40APD 22:15 40APD.14 22:17 41 155:23 42 46:6,17 44 156:22 48 130:13 49 57:15 72:5,16,17	5 1:1 76:15 81:14 81:18 82:6 87:6 88:3 151:7 163:10 163:16 50 14:3,8 42:3,5 72:5,6,8 73:4	

112:16,17 114:12	9			
51 13:25	9 36:15 49:23 82:11			
52 42:4 130:13	82:13,14 83:5			
53 130:23	90:11 144:5			
54 130:13	152:13 154:13,25			
571 47:25 48:1	158:21 162:7			
575 48:9	99 74:1,4,9,11,15			
578 48:18				
58 90:21				
59 90:21				
6				
6 1:9 22:14,17				
48:25 66:21 90:15				
105:20 116:2,12				
116:15,21,22,25				
142:25				
6.40 66:23				
60 66:18 112:17,18				
62 20:21 21:2,3,12				
21:21 24:13				
63 21:17,22 23:1				
24:13				
647 28:6				
67 27:16				
7				
7 43:15 105:20				
116:2,14,15,16,21				
142:23 154:13,16				
163:16 172:2				
74(2)(f) 104:9				
8				
8 36:15,16 62:6,15				
62:20 63:3,4				
64:21 66:14,20				
68:15 69:23 90:10				
108:20,21 116:7				
117:3 126:5,7,19				
129:2,20 141:7				
144:1 164:20				
166:17 167:12				
80 18:2 133:7				
83 18:2				