1	Tuesday, 18 October 2016	1	Lord Neuberger's point as to passive language.
2	(10.00 am)	2	We have looked at this point and we respectfully
3	Submissions by MR WOLFSON (continued)	3	submit that there is nothing in the fact that it is
4	LORD NEUBERGER: Since we are doing rather well on time, and	4	passive, that would not be a safe basis on which to
5	to help everybody, I think, because this is quite	5	conclude that 2.88(7)
6	concentrated stuff, we will take ten minutes off at	6	LORD NEUBERGER: First of all, the point of fact, as it
7	11.30, just so everybody knows.	7	were, was whether the use of the passive was unique, as
8	MR WOLFSON: My Lords, may I pick up two short points from	8	it were, in relation to the rules relating to
9	yesterday and then conclude my submissions on the	9	administration, because obviously the passive seems to
10	Court of Appeal's approach and then make a few	10	have been taken from section 189, and the rules seem to
11	submissions on the two cross-appeals.	11	use the active, in relation to administration. That was
12	The first point to pick up from yesterday, as	12	really my point. That was the first point of fact. And
13	my Lord Lord Neuberger said, the key question, really,	13	do I take it that the answer is that the rules are
14	is whether rule 2.88(7) only applies in the	14	generally phrased in the active rather than the passive?
15	administration. One of the points I made yesterday	15	MR WOLFSON: Well, they are in a mix, my Lord. We could
16	which, looking at the transcript, I may have made	16	look at it. If we just look at the start of this
17	a little too quickly is that none of the enabling provisions which enabled the creation of rule 2.88(7) in	17 18	section of the rules
18 19	the first place permitted the creation of later rules	18	LORD NEUBERGER: Yes.
	which would override the then existing statutory	20	MR WOLFSON: which your Lordship finds at F3, tab 74,
20 21	waterfall provisions. I think I mentioned that the	20	which is rule 2.68, which is the beginning of
21	rules were made pursuant to section 4(11).	21	chapter 10, confusingly called, as we have seen,
22	LORD NEUBERGER: You did, but you didn't take us to it.	22	part 10. LORD NEUBERGER: We have that.
23 24	MR WOLFSON: I didn't take you to it. We needn't go through	23	MR WOLFSON: Your Lordship sees 2.68. This is F3, 74. This
24	it; it is really, so to speak, to prove a negative. But	24	chapter, chapter 10, applies where:
23	it, it is really, so to speak, to prove a negative. But	23	chapter, chapter 10, appres where.
	Page 1		Page 3
1	they are set out in schedule 8	1	"The administrator makes or proposes to make
2	LORD CLARKE: Is there going to be a transcript available of	2	a distribution to any class of creditors".
3	the whole of the argument?	3	So the starting point is that the whole chapter, we
4	MR WOLFSON: I understood your Lordships would be getting	4	submit, is focused on the administrator and the
5	one. We can certainly make sure of that because one	5	administrator alone, and that is what the introductory
6	is available.	6	sentence says. Before we get to the language and when
7	LORD NEUBERGER: That would be kind.	7	we get to the language, it may be constructive to
8	MR WOLFSON: My Lords, we will make that available. Sorry,	8	compare, just on the same page, 2.68(2) and 2.68(3):
9	I thought your Lordships have that.	9	2.68(2):
10	LORD NEUBERGER: That is fine.	10	"The administrator shall give notice to the
11	MR WOLFSON: None of the provisions specified in schedule 8,	11	creditors of his intention to declare and distribute
12	which is at F9.27, or any of the other provisions	12	a dividend."
13	referred to in sections 4.11 or $4.11(1)$ or $4.11(2)$,	13	And then (3):
14	provides rules to be made to vary the statutory	14	"Where it is intended that the distribution"
15	waterfall, so essentially we submit that when one looks	15	So it there goes into the passive but it is
16	at the enabling provisions which give rise to rule	16	obviously still referring necessarily to
17	2.88(7) in the first place, there is no indication	17	the administrator.
18	there, and indeed it would not fall in any of the	18	LORD NEUBERGER: But that is linked to the administrator
19	available powers, to create a rule which would	19	giving notice of his intention.
20	override and your Lordships have my submissions as to	20	MR WOLFSON: It is.
21	why it overrides which would override the mandatory	21	LORD NEUBERGER: But you are right, it is the passive, yes.
22	provisions which apply in a winding up.	22	MR WOLFSON: There is then a lot of passive language; there
23	That is the first point arising out of yesterday.	23	is some active language as well, but our submission is
24	LORD NEUBERGER: Thank you.	24	that it is just not a safe basis on which to conclude
25	MR WOLFSON: The second point is to respond to my Lord	25	that one particular sub-rule inures after the
	Page 2		Page 4
		1	

1	administration into the liquidation, because that	1	provision for that surplus to be applied to statutory
2	sub-rule is in the passive tense when quite a lot of the	2	interest for the period arising in the preceding
3	rest of it is as well. That is where we get to in our	3	administration. Again we submit, with respect, that is
4	submission on your Lordship's point.	4	very telling.
5	Having made those two points, my Lord, I indicated	5	The third point is that the Court of Appeal's
6	yesterday that I had three overall submissions: I had	6	approach can only assist creditors who lodge a proof for
7	one set of submissions that the Court of Appeal's	7	the first time in the administration. Creditors who
8	approach was inconsistent with the legislative scheme;	8	didn't prove in the administration but lodge a proof for
9	I have made those submissions. The second is, it was	9	the first time in the liquidation would not be assisted.
10	a matter for the legislature and not for this court	10	And yet the deeming provisions in rule 4.73(8), which
11	to resolve.	11	your Lordships have at F3, 45 to 46, and rule 2.72(6),
12	LORD NEUBERGER: The court would be legislating; that would	12	which is at F3, 38, those proofs show that the
13	be your point. That is not what we should do,	13	legislature intended that when there are two consecutive
14	particularly when it is inconsistent with the	14	insolvency processes creditors are supposed to be
15	legislation passed by parliament. That is your	15	treated equally regardless of which process they
16	point, yes.	16	actually proved it with.
17	MR WOLFSON: My Lord, yes. And the third point I make now	17	So again, it would give rise to a discrepancy which,
18	is that the Court of Appeal's approach gives rise to	18	in my respectful submission, is unjustifiable. It also
19	unjustifiable discrepancies in practice. And my Lord,	19	does not square with the fact that debts are supposed to
20	I can make three points here, all short points.	20	rank equally for the payment of statutory interest,
21	First of all, as we have seen, the Court of Appeal	21	which would not apply if this were the case.
22	solution only applies to distributing administrations.	22	Therefore the Court of Appeal's approach gives rise
23	LORD NEUBERGER: And Lord Justice Briggs and Lord	23	to differential treatment as regards a payment of
24	Justice Lewison accept that, and you took us to the	24	interest, depending on whether a creditor has proved in
25	passages yesterday.	25	the administration.
	P	25	the administration.
	Page 5		Page 7
1	MR WOLESON: Exactly but in this context my Lord it may		
	MR WOLFSON: Exactly, but in this context, my Lord, it may	1	So for those three reasons, we submit that the
2	be thought, as Mr Justice David Richards pointed out in	2	Court of Appeal's approach itself gives rise to
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2 (Pages 5 to 8)

Lehman Brothers - Waterfall I

1 I make a forensic point and a substantive point. 1 entered into administration." 2 2 The forensic one I will make shortly: this is contrary As we saw yesterday, that rule expressly and clearly 3 to the stance taken by LBIE through this litigation, 3 prohibits interest accrued in the period of the 4 until Day 3 in the Court of Appeal. Indeed, early on in 4 administration from being provable in 5 the Court of Appeal hearing the Court of Appeal was told 5 a subsequent liquidation. 6 LORD SUMPTION: Where do you say the reference to 4.93(1) 6 in terms that LBIE was not contending that unpaid 7 7 in (c) eliminates the possibility of reliance on (a)? statutory interest is provable. Sinners can repent, and 8 They are presumably different. Have I missed something? 8 the point is either good or bad, so I will move on to 9 9 MR WOLFSON: Of course they are different, in the sense that the substantive point. 10 They now argue that it is provable. And what is the 10 if you are not talking about interest you would fall 11 within (a), but as far as interest is concerned, 11 basis they argue it is provable? They say it is a debt 12 or liability which the company is subject to at the date 12 interest has been dealt with in --13 LORD SUMPTION: A debt in respect of interest has to fall 13 in which it goes into liquidation, and that is based on 14 rule 13.12(1)(a). 14 within (c) or it is not covered by this at all. 15 LORD NEUBERGER: Yes. 15 MR WOLFSON: Exactly. 16 MR WOLFSON: And that, in its current form, is at F1, tab 6. 16 LORD SUMPTION: Implicitly taken out of (a) and (b). 17 It is important for your Lordships to see how this rule 17 MR WOLFSON: That is my submission. 18 LORD SUMPTION: Even if it is a debt. 18 is set out, because this rule does a number of things. 19 This is the rule which applies because of the 19 MR WOLFSON: Exactly, because interest has been dealt with 20 20 transitional provisions to LBIE's liquidation, and specifically by the draughtsman in (c). 21 defines at 13.12 what we mean by debt. 21 The deeming provision in rule 4.73(8), which is in 22 F3 at tab 45, which is in mandatory and unqualified 22 13.12(1) provides that debt in relation to the 23 23 winding up of a company means, subject to the next terms, has the effect -- this is at the bottom of the 24 paragraph, any of the following: 24 page 1944 -- has the effect that the reference in 25 "(a), any debt or liability to which the company is 25 rule 4.93(1), which we were just looking at, to a debt Page 9 Page 11 1 subject at the date in which it goes into liquidation." proved in the liquidation, includes also debts proved in 1 2 LBIE's argument, as we understand it, is essentially 2 the administration, because a deeming provision 3 to say that the statutory interest falls within (a): it 3 provides: 4 is a debt or liability to which the company is subject 4 "Where a winding up is immediately preceded by 5 at the date in which it goes into liquidation. 5 an administration, a creditor proving in the We respectfully submit that that is plainly wrong 6 6 administration shall be deemed to have proved in the 7 because it ignores (c). (c) sets out: 7 winding up." 8 "Any interest provable as mentioned in 8 1944. 9 rule 4.93(1)." 9 MR WOLFSON: 1944, tab 45, F3, my Lord. 10 We submit that 13.12(1)(c) expressly and exclusively 10 LORD NEUBERGER: At the very bottom of the page. 11 deals with what interest is provable in a liquidation, 11 MR WOLFSON: Yes. 12 and it does so very simply by applying the test in 12 Where we get to, in my submission, is that for debts 13 rule 4.93(1). The version of rule 4.93(1) which will 13 proved in the administration, interest is only provable 14 apply in the liquidation of LBIE is not in F1; it is in 14 as part of the debt under rule 4.93(1) for the period 15 F3. It is in F3 at tab 53. Perhaps your Lordships 15 before the company went into administration. And in my 16 might glance at that. F3, tab 53. 16 respectful submission that makes LBIE's new 17 LORD NEUBERGER: Yes, we have seen this. 17 case impossible. 18 MR WOLFSON: You have seen this in another context: where 18 As my Lord Lord Neuberger pointed out in 19 a debt proving liquidation bears interest, it is 19 Re Nortel -- and the reference is paragraph 68 to 71 --20 provable as part of the debt except insofar as it is 20 the subprovisions of rule 13.12.(1) must be read 21 payable in respect of any period after the company went 21 together sensibly in a coherence manner. My Lord, that 22 into liquidation. Then clause 4 -- and this is the bit 22 is why we submit that when the draughtsman, in 13.12(1), 23 I relv on: 23 has dealt specifically with interest in (c), it cannot 24 "If the liquidation was immediately preceded by an 24 also be the case that interest falls somehow within (a) 25 administration, any period after the date the company 25 as well. Page 10 Page 12

8th Floor, 165 Fleet Street London EC4A 2DY

Lehman Brothers - Waterfall I

18 October 2016

1	My Lord, if one stands back and just asks oneself	1	At this point I really echo my learned friend
2	what is the consequence of this case that is now being	2	Mr Miles' submissions yesterday on the non-applicability
3	put, the consequence of LBIE's case would be to create	3	of the Humber Ironworks line of reasoning to the
4	a new provable debt in respect of statutory interest for	4	post-1986 insolvency world.
5	the administration period which would compete with	5	There is, in our respectful submission, no longer
6	unsecured claims to principal proved for the first time	6	any room for the application of the Humber Ironworks
7	in the liquidation.	7	submission, which is the remission or reversion to
8	My Lords, we submit that that is impossible to	8	contract theory, to support the creation of non-provable
9	square with the plain intent behind the statutory	9	claims, in particular for interest. But we also
10	scheme, which is that once a company enters insolvency,	10	support, of course, the submissions on currency
11	that stops the clock as far as interest is concerned.	11	conversion claims for which LBIE contends.
12	In an insolvency, interest can only ever be provable for	12	Humber Ironworks was decided 150 years ago when
13	the period prior to the insolvency, and post-insolvency	13	there was no statutory requirement to post-insolvency
14	interest is payable if there is a surplus after the	14	interest at all, and in enacting section 189 and
15	payment of provable debts.	15	rule 2.88 the legislature did not adopt the
16	So LBIE's cross-appeal, which creates a provable	16	Humber Ironworks 'reversion to contract' approach but
17	claim for post-insolvency interest, we submit is	17	instead put in place a completely different statutory
18	inconsistent with the plain intent behind that scheme.	18	regime for the payment of interest on all debts
19	Those are our essential submissions, subject to how	19	regardless of whether those debts actually had interest
20	Mr Trower puts it, on LBIE's first cross-appeal.	20	contractually to be paid after all proved debts had been
21	The second cross-appeal, as your Lordships know, is	21	paid in full. So under the statutory scheme, even if
22	that the claim for a contractual, ie non-statutory,	22	you don't have a contractual right to interest, you can
23	interest, gives rise to a non-provable claim.	23	still get statutory interest. Even if your contractual
24	So this is the argument that the creditors who are	24	interest rate runs at 1.5 per cent, you get statutory
25	entitled to interest for the administration period	25	interest at 8 per cent. It is a completely different
	Page 13		Page 15
1	otherwise than under rule 2.88(7) for example under	1	scheme. And there is, in our submission, no basis for
2	their contracts will be entitled in a liquidation to	2	the Humber Ironworks 'reversion to contract' theory
3	claim such interest as a non-provable claim.	3	any more.
4	LORD NEUBERGER: Yes.	4	We have set out at paragraph 69 of our written case
5	MR WOLFSON: This is based, of course, on paragraph 127 of	5	various passages from Mr Justice David Richards'
6	the judgment of Mr Justice David Richards, at the end of	6	judgment in Waterfall IIA, and those passages
7	that section, where, with respect to the judge, with	7	emphasise I think five or six the fact that the
8	almost no reasoning, he says: I think there should be	8	new statutory scheme is intended to be a complete
9	a non-provable claim. And the Court of Appeal obviously	9	LORD NEUBERGER: These are quotations from
10	didn't deal with this point, because of	10	Mr Justice Nicholls, Lord Justice Millett, and so on.
11	their conclusion	11	MR WOLFSON: There is an illustrious line of authority on
12	LORD NEUBERGER: Unnecessary, yes.	12	this point, and we submit that nothing in the
13	MR WOLFSON: on the other point. But	13	legislation supports any contractual entitlement.
14	Lord Justice Lewison indicated the references to 110,	14	That is particularly the case and we do say it is
15	paragraph 110, of Lord Justice Lewison's judgment, that	15	rather odd that the LBIE administrators are arguing for
16	he thought the creation of a new non-provable claim was	16	the creation of a non-provable debt in the following
17	the wrong solution, in particular because it is contrary	17	liquidation when, of course, if they themselves were to
18	to the legislative and judicial policy to eliminate	18	decide to pay out interest there would in fact be no
19	non-provable claims. And Lord Justices Briggs and	19	need for any non-provable claim at all. So it is rather
20	Moore-Bick agreed on that point.	20	odd, we submit, that the administrators of LBIE are
20	We submit, in short, that the statutory scheme for	20	making this argument at all, because there need not be
21	the payment of interest in a liquidation, introduced by	21	any lacuna in the case in the first place if they decide
22	section 189 and rule 4.93, which we have looked at,	23	to pay out interest, and secondly there is a clear
23	replaces any pre-existing or contractual or other rights	23	statutory mechanism for the payment of
25	to interest that would otherwise accrue.	25	post-administration interest.
			r - 54 wallingstation interest.
	Page 14		Page 16

4 (Pages 13 to 16)

1	My Lords, to finish on this point, what ultimately	1	MR MILES: at paragraph 172 of the judgment.
2	underlies this issue, and indeed a number of other	2	LORD NEUBERGER: Yes.
3	issues before your Lordships, in particular currency	3	MR MILES: If you just remind yourselves of the terms of it.
4	conversion, is that what we submit the creditors of LBIE	4	It is when a company is wound up, so it is only in the
5	are seeking to do is really to have their cake and	5	winding up: every present and past member is liable to
6	eat it. Where the statutory scheme helps them, where	6	contribute to its assets, to any amount sufficient for
7	they are getting, for example, 8 per cent interest, they	7	payment of its debts and liabilities and the expense of
8	will take it. And where it doesn't, they are seeking to	8	winding up and the adjustment of the rights
9	argue that they have non-provable claims. We submit	9	amongst themselves.
10	simply that the statutory scheme is there: there are	10	So the questions are not identical but similar to
11	swings and roundabouts, winners and losers, and	11	some of the questions on the first issue, whether
12	essentially it should be applied. And it is important	12	non-provable liabilities are captured by this section,
13	that it be applied in accordance with its terms, because	13	and secondly whether statutory interest is captured by
14	insolvency practitioners need to be able to read the	14	this section.
15	rules and know what to do.	15	It has to be read with certain other provisions.
16	Unless I can assist your Lordships further, those	16	I will just give you the references for now and not go
17	are our submissions.	17	to. Section 150, which you can find in F2, tab 25,
18	LORD NEUBERGER: Thank you very much indeed. Very helpful.	18	which says that the power to make calls under this
19	Thank you.	19	section is vested in the court.
20	Submissions by MR MILES	20	Then 160, which is page 177.2, provides for the
21	MR MILES: It is back to me. I am going to deal now with	21	delegation of the court's power to make calls to the
22	a short point about section 74 and in particular	22	liquidator. And that was then done under insolvency
23	its scope.	23	rule 4.195, which is in F3, tab 57.
24	The relevant part of the order that we are dealing	24	So the structure of the act is that the power to
25	with at this part of the appeals can be found in	25	make calls is a power vested initially in the court and
	Dage 17		Dage 10
	Page 17		Page 19
1	bundle D, tab 4, page 600.	1	then under the rules well, first of all there is
		-	then under the rules wen, first of an there is
2	LORD NEUBERGER: Thank you.	2	a power to make rules, and then under the rules it is
2 3	LORD NEUBERGER: Thank you. MR MILES: Just to remind you, this is part of the order of		
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3	MR MILES: Just to remind you, this is part of the order of	2 3	a power to make rules, and then under the rules it is delegated to the liquidator. So it follows from this
3 4	MR MILES: Just to remind you, this is part of the order of Mr Justice David Richards, and this part of the order	2 3 4	a power to make rules, and then under the rules it is delegated to the liquidator. So it follows from this that calls on members in unlimited may only be made by
3 4 5	MR MILES: Just to remind you, this is part of the order of Mr Justice David Richards, and this part of the order was upheld by the Court of Appeal. It is (vi): the	2 3 4 5	a power to make rules, and then under the rules it is delegated to the liquidator. So it follows from this that calls on members in unlimited may only be made by the liquidator after the company has gone into
3 4 5 6	MR MILES: Just to remind you, this is part of the order of Mr Justice David Richards, and this part of the order was upheld by the Court of Appeal. It is (vi): the obligation of members to contribute under section 74 of	2 3 4 5 6	a power to make rules, and then under the rules it is delegated to the liquidator. So it follows from this that calls on members in unlimited may only be made by the liquidator after the company has gone into liquidation. It may be different where there are partly
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Page 22 Page 24				
		Page 22		Page 24

6 (Pages 21 to 24)

1	the point I made yesterday is that section 74 is	1	payable only on a winding up, and which would include
2	concerned with liability, debts and liabilities of the	2	the monies we are looking at because we are dealing with
3	company. You can see that from the terms of	3	a situation in an unlimited company:
4	the section.	4	" and which by the act are excluded from the
5	LORD NEUBERGER: It is debts and liabilities, yes.	5	capital of the company and never under the control of
6	MR MILES: You have heard my submission yesterday that in	6	the directors and cannot, I apprehend, be dealt with in
7	relation to statutory interest	7	any way by them. Those monies form a statutory fund
8	LORD NEUBERGER: The duty on the administrator.	8	which only comes into existence when the company is in
9	MR MILES: Or in this case on the liquidator	9	liquidation, that is to say when the powers that direct
10	LORD NEUBERGER: Quite right.	10	have ceased. But uncalled capital [so he then draws
11	MR MILES: to pay to apply the money for the statutory	11	a distinction between that situation and uncalled share
12	purpose set out in the section, but it is not	12	capital] is in a totally different position."
13	a liability of the company. And the same thing	13	The reason for that is that the directors can call
14	sorry and when you come to look at the various	14	on that before the company goes into liquidation.
15	references to debts and liabilities, throughout the act,	15	Now, he, Lord Justice
16	it doesn't make sense, we say, to treat the obligation	16	LORD NEUBERGER: That is a wider reason than yours, is it?
17	on the liquidator under section 189 to apply the assets	17	MR MILES: This is a further reason.
18	in that way as a liability of the company. It is dealt	18	LORD NEUBERGER: Because it comes into existence after the
19	with separately, so we say that it is not a liability of	19	liquidation and was never therefore something that the
20	the company.	20	directors could have asked for?
21	The next point is that we rely on a point in this	21	MR MILES: Yes. And for that reason it is a particular
22	respect in the judgment of Lord Justice Lewison, which	22	statutory power which is vested in the liquidator; it
23	starts at page 561 of the judgment. He refers in	23	cannot therefore be regarded as being an asset of the
24	paragraph 113 to a decision of the Court of Appeal in	24	company in the way that the uncalled share capital can
25	a case called Re Pyle Works. That is in F1 at tab 19	25	be regarded as an asset of the company.
	Page 25		Page 27
1	but I think I can deal with it by reference to the	1	LORD NEUBERGER: This is a slightly broader reason. You are
2	passages set out here by Lord Justice Lewison.	2	saying this is something that is imposed on the
3	LORD NEUBERGER: Thank you very much.	3	liquidator by the administrator. This is saying: even
4	MR MILES: That was a case in which the there was a limited	4	apart from that, it is something that only comes into
5	company, so it was a company with share capital, where	5	existence of as a result of the liquidation.
6	the shares were partly paid up but only partly paid up.	6	MR MILES: Yes.
7	And the company, before it went into liquidation, gave	7	LORD NEUBERGER: It is a slightly wider point.
8	a mortgage in favour of a lender, including over its	8	MR MILES: Yes, I am making that point.
9	uncalled capital. The company was then wound up. At	9	LORD NEUBERGER: Sorry, my misunderstanding.
10	that stage the uncalled portion of the capital was still	10	MR MILES: Sorry, in the case of an unlimited company, that
11	uncalled, and the question was whether the secured	11	is part of the argument we are advancing.
12	creditors could claim under their mortgage over the	12	LORD NEUBERGER: Thank you.
12	uncalled capital which was then called up by	13	MR MILES: In the case of a company with share capital,
13	the liquidator.	14	where it has not been fully called, then obviously the
14	It was held that the calls in that case were covered	14	directors can call for that at any time.
15	by the mortgage, but the case also went on to discuss	15	LORD NEUBERGER: Okay. Thank you.
		17	LORD REED: He is not saying, is he, that it is not the
17 18	the position of an unlimited company.	17	company's money, that it is not the property of the
18 19	LORD NEUBERGER: Again, we have the benefit of	18	company? He is simply saying that it is never under the
	obiter observations.	20	control of the directors because they have been
20	MR MILES: They are obiter observations, but the way that it	20	-
21	was dealt with by the Court of Appeal perhaps it is most clearly in the bit set out by Lord Justice Lewison	21	superseded. MR MILES: Yes. We say that the right conclusion to draw
22 23	most clearly in the bit set out by Lord Justice Lewison,	22	from that is that it is not an asset of the company.
	in 118, I think LOPD NEUREPGER: 118 right thank you	23	
24 25	LORD NEUBERGER: 118, right, thank you. MR MILES: where he is saying that those monies which are	24	Sorry, the next point I should make is LORD REED: Whose asset is it?
23	with with 25 where he is saying that those momes which are	23	LOND REED. WHOSE asset is it:
	Page 26		Page 28

8th Floor, 165 Fleet Street London EC4A 2DY

1	MR MILES: It is a fund available to the liquidator under	1	LORD NEUBERGER: Unless the interest is payable, you
2	section 74. This is a conclusion that	2	wouldn't have the right to call. That is your point.
3	Lord Justice Lewison	3	You are creating its call-ability by you are creating
4	LORD SUMPTION: What happens if there is a surplus and the	4	its payability by calling the money rather than what you
5	liquidator is discharged? What happens if the	5	say should be the other way round: there is a liability
6	liquidation comes to an end on the basis	6	to pay and therefore you should
7	MR MILES: It would go back to the members.	7	MR MILES: Exactly, that is the argument. If one goes back
8	LORD SUMPTION: It would go back to the members?	8	then to section 74, what that is concerned about is
9	MR MILES: Yes.	9	calling for an amount sufficient for the payment of the
10	LORD SUMPTION: Right. Is	10	debts and liabilities.
11	MR MILES: He will apply it according to the statutory	11	LORD NEUBERGER: So it doesn't become a debt or liability
12	scheme at that point. So if there were creditors to pay	12	even if it is debt or liability, it doesn't become it
13	under section 74 he will have to use it for that	13	until it has the money, so how can it call for
14	purpose. If they are paid off in full, he will then	14	the money?
15	return it to the members. So it is a fund which is	15	MR MILES: Yes. And conversely, if you look at section 189,
16	created for the purpose of the section but it is not to	16	that says that the liability, if it is a liability, to
17	be regarded as part of the assets of the company.	17	pay the creditors' statutory interest only arises where
18	This is a conclusion that Lord Justice Lewison	18	there is a surplus of assets over liabilities.
19	himself drew in paragraph 120, where he says: it is	19	LORD NEUBERGER: I see.
20	difficult to see how that is an asset of the company	20	MR MILES: Now, we are accused of circularity in this
20	rather than being a right of contribution.	20	argument, but with respect we suggest that there isn't
21	That is where it is for the purpose of contribution	21	any circularity about the position we are advancing,
22	between the members.	22	because we are not making any particular assumptions one
23 24	Now, Lord Justice Lewison then said it is fair to	23	way or the other when reading these two sections, but we
24 25	say that this does not matter. He got this far in	24	are just asking you to read them together.
23	say that this does not matter. The got this far m	23	are just asking you to read ment together.
	Page 29		Page 31
1	the analysis, and said that in any case that doesn't	1	The section which gives rise to the liability to pay
2	really affect the proper interpretation of section 74.	2	interest only arises if there is a surplus. It says it,
3	He agreed with Lord Justice Briggs on this point. But	3	in terms, and one can see the purpose of the statute: if
4	we say, again, I go this far with Lord Justice Lewison	4	there is a surplus, this is what you do with it.
5	and then part company. This is where the argument goes.	5	The hypothesis which is advanced against us is that
6	It is not actually necessary, for the purposes of this	6	under section 74 statutory interest is a liability but
7	argument, for me to say conclusively whether it is	7	there is no liability to pay statutory interest unless
8	an asset of the company or not. The point I am really	8	there is a surplus.
9	emphasising at this point is that it is a sui generis	9	LORD NEUBERGER: Yes, I have the point.
10	statutory power vested in the liquidator, which can only	10	MR MILES: It cannot be said properly that you can then call
11	be exercised by the liquidator for the purpose of	11	on the members of an unlimited company for some amount
12	section 74. That is really the point I am making	12	which would then create that surplus. And that is
12	so far.	13	the argument.
14	Now, where does this go? Because one really needs	14	LORD NEUBERGER: I think we have that argument.
15	to go further than this. Where this goes is this, that	15	MR MILES: My Lord, what we say is, what this really amounts
16	there is something, we suggest, odd about the argument	16	to doing is reading the two sections together on the
17	that the power under section 74 in the case of	17	basis of an unfair hypothesis. Their reading requires
18	an unlimited company can be used to create a surplus for	18	one to say, under section 74, that there is an amount
19	the purpose of determining whether statutory interest is	19	which is payable as if there were a surplus. But that
20	payable under the act at all.	20	is not right. The section does not allow you to assume
20	LORD NEUBERGER: You are pulling yourself up by your own	21	something which is not the case for the purpose of
21	bootstraps. You say there is no surplus until you call	22	generating the liability.
22	for the money. You call for the money, and then there	23	LORD NEUBERGER: That is making the same point in different
23	is a surplus, and then the interest is payable.	24	clothes, yes? In a slightly different form.
25	MR MILES: Exactly.	25	My Lord, we say that, looking at things generally
	,		,,
	Page 30		Page 32

8 (Pages 29 to 32)

1	here, section 74 is intended to deal with provable	1	the Insolvency Act as "the section 74 liability".
2	debts; it is not intended to deal with non-provable	2	I start, then, with declaration 8 of the judge. My
3	debts or statutory interest.	3	submissions may be summarised as follows. Firstly, the
4	There is one final point, which is the bit at the	4	section 74 liability is not provable in the distributing
5	end of section 74 about adjusting the rights	5	administration or liquidation of LBIE's members so long
6	contributory	6	as LBIE is not in liquidation, for two reasons. The
7	LORD NEUBERGER: By themselves, yes.	7	first is that the statutory scheme which creates the
8	MR MILES: By themselves. Now, the Court of Appeal was	8	section 74 liability is inconsistent with proof by the
9	struck by this point and said, well, since that is	9	company in the distributing administration or
10	something that happens after the payment of creditors	10	liquidation of the member before the company is itself
11	and the payment of all of their claims, including	11	in liquidation.
12	statutory interest, doesn't that give you the clue that	12	The second point is, the statutory scheme which
13	it must be intended to cover everything down to	13	creates the section 74 liability has amplification only
14	that point? That was the way the Court of Appeal looked	14	if the company itself is in winding up.
15	at it.	15	The second submission is that the court below erred
16	We say you can't read into this if we are	16	in that it failed to pay regard to the differences
17	otherwise right, we say that you cannot read into this	17	between, on the one hand, the members' contractual
18	things which are not there. It is quite possible for	18	liability to pay unpaid capital, with which this appeal
19	the act to make specific reference to the things which	19	is not concerned, and on the other hand the section 74
20	it has without intending to include other things.	20	liability to contribute to the assets of the company,
21	LORD NEUBERGER: Yes.	21	which is the subject matter of this part of the appeal.
22	MR MILES: It is striking that, although in the liquidation,	22	Thirdly, the principal difference between the two is
23	general liquidation waterfall is described in a case	23	that the contractual liability is created at the time of
24	like Nortel, expenses would come out before the payment	24	the contract of membership of the company and it can be
25	of debts and liabilities, and here it comes out	25	dealt with by the directors of the company.
	Page 33		Page 35
1	afterwards. In other words, this cannot be seen as	1	In contrast, the section 74 liability is not created
2	simply reflecting the overall liquidation waterfall.	2	until the company is winding up. It can only be dealt
3	So we say there is really nothing in that point.	3	with by the liquidator, and in the case of an unlimited
4	LORD NEUBERGER: Thank you.	4	company it is no part of the company's capital.
5	MR MILES: My Lord, those are my submissions on section 74,	5	It is convenient to start with the judgment of
6	unless I can assist further.	6	Lord Justice Briggs in the court below. That is at
7	LORD NEUBERGER: Mr Isaacs, I think you are on next, are	7	bundle D3. If I can pick it up at paragraph 213.
8	you not?	8	Page 582.
9	Submissions by MR ISAACS	9	He starts by setting out rule 12.3(1) and in
10	MR ISAACS: I will address LBIE's appeal against the order	10	particular $13.12(1)(b)$ and the definition of debt, and
11	of the Court of Appeal upholding declaration 8 of the	11	then he refers to the decision of this court in
12	judge. This declared that the LBIE administrators would	12	Re Nortel and in particular what he describes as
13	be entitled to lodge a proof in a distributing	13	Lord Neuberger's new threefold test for the provability
14	administration or a liquidation of its members in	14	of statutory liabilities under the rule. I would invite
15	respect of those companies' contingent liabilities under	15	your Lordships, please, to read that paragraph at
16	section 74 of the act. That is the proof point.	16	paragraph 214. (Pause).
17	I will also address LBIE's cross-appeal against the	17	LORD NEUBERGER: Yes.
18	order of the Court of Appeal upholding declaration(?)	18	MR ISAACS: Then over the page at paragraph 218 he says that
19	number 9. That declared that in LBIE's administration	19	he will turn to the three-stage test:
20	the contingent liabilities of LBIE's members under	20	"The obligation to contribute under section 74 in
21	section 74 are the subject of mandatory insolvency	21	the case of the unlimited company arises because the
22	set-off against the members' provable claims as	22	member enters into a legal relationship with the
23	creditors of LBIE.	23	company, namely the relationship constituted by the
24	So proof and set-off. Now, for convenience I will	24	membership of an unlimited company."
25	refer to the liability of a member under section 74 of	25	And he goes on to say at the bottom of the
	Page 34		Page 36

9 (Pages 33 to 36)

1	paragraph:	1	address briefly the provisions of the statutory scheme
2	"The real battleground arises in relation to stage	2	in the Insolvency Act. Secondly I will describe six
3	(c), that is the third limb of the test in Re Nortel."	3	features of the scheme which demonstrate that the member
4	I accept, my Lord, that that is the battleground.	4	does not have an obligation under rule 13.12(1)(b)
5	And the question for the battle is this: is it	5	before the winding up. And finally I will address the
6	consistent with the regime under which the section 74	6	policy arguments which were relied on by the
7	liability is imposed to conclude that the contract of	7	court below.
8	membership gives rise to an obligation under	8	I start with the statutory scheme. The important
9	rule 13.12.(1)(b) before LBIE is in winding up?	9	point about this is that all of the provisions in the
10	In order to answer this question, first I will refer	10	Insolvency Act which relate to contributories and their
11	to the provisions of the statutory regime which create	11	liability are contained in part 4 of the act. That is
12	the section 74 liability.	12	at bundle 9, tab 9, page 4038.
13	LORD NEUBERGER: It is probably my fault. Just to get it	13	Your Lordships see that the heading for part 4 is
14	clear in my own mind, how do your submissions	14	"Winding up of companies registered under the Companies
15	interrelate with the submissions we have just heard from	15	Acts". Section 73, scheme of this part. This part
16	Mr Miles?	16	applies to the winding up of a company registered under
17	MR ISAACS: The answer to that, my Lord, is that I will be	17	the Companies Acts.
18	shining a microscope on Mr Miles's submission. What he	18	LORD NEUBERGER: Yes.
19	actually submitted to you, in very abbreviated form, is	19	MR ISAACS: It follows that part 4 does not apply to a going
20	a large part of my submission and I will go into it in	20	concern company or companies in administration at all.
21	considerably more detail, because one of the submissions	21	In short, none of the provisions to which I will refer
22	I will be making is that the section 74 liability is not	22	apply to LBIE, because it is in administration. It is
23	an asset of the company at all until the winding up.	23	convenient to take the other provisions of part 4 of the
24	And I will answer my Lord's question	24	act from the judgment of Mr Justice David Richards,
25	LORD SUMPTION: That was his submission also.	25	because he collected them all together in one place.
	Page 37		Page 39
1	MR ISAACS: That was his submission, but there are a lot of	1	That is at bundle 5, D5.
2	material cases and statutory material which make good	2	LORD NEUBERGER: Page?
3	that submission.	3	MR ISAACS: Page 641.
4	That is, if I might put it	4	LORD NEUBERGER: Thank you, yes.
5	LORD NEUBERGER: So Mr Miles, as it were, was acting as your	5	This starts at the very bottom of the page, does it?
6	John the Baptist, if I may make an inappropriate	6	MR ISAACS: Yes, my Lord. I am going to go through them
7	suggestion, but he was an introduction to your	7	briefly, if I may.
8	submissions really? A herald.	8	LORD SUMPTION: Which paragraph?
9	MR ISAACS: I am content with that, my Lord. Mr Miles made	9	MR ISAACS: It starts at paragraph 138.
10	a submission which I endorse and which I will develop.	10	LORD NEUBERGER: Yes.
11	LORD NEUBERGER: It is not a question of endorsing; you are	11	MR ISAACS: Your Lordships will have seen section 74 already
12	developing those submissions.	12	so I don't need to go through it at all; I just need to
13	MR ISAACS: I will develop it, my Lord, but it is important	13	emphasise a couple of points. The first is the
14	to emphasise that it is just one part of my submissions	14	introductory words are, "When a company is bound up".
15	so if I am wrong on that then the alternative submission	15	LORD NEUBERGER: I have that.
16	is that even if it is an asset of the company from the	16	MR ISAACS: The second point is that the amount of the
17	date of the contract of membership, it is still	17	liability is sufficient for the three purposes set out
18	inconsistent with the statutory regime to prove, because	18	in section 74(1), and what is significant about those
19	if there is a proof then there are consequences which	19	three purposes is that they all can exist only in
20	are inconsistent with the statutory regime, and that	20	a winding up.
21	cannot be right. So the only way of resolving the	21	The next point I wish to emphasise
22	conundrum is to say there cannot be a proof. So there	22	LORD REED: It may not matter, and I think Mr Miles was
23	are two limbs to my submission.	23	pretty clear that it was not critical to his argument
24	LORD NEUBERGER: Right.	24	anyway, but under 74(1) it is a liability to contribute
25	MR ISAACS: The structure of my submissions is, first I will	25	to its assets, ie the assets of the company.
	Page 38		Page 40

1	MR ISAACS: Yes, my Lord.		MR ISAACS: I will explain why it is significant when I get
2	LORD REED: So the amount contributed must form part of the	2	to the cases.
3	assets of the company.	3	LORD NEUBERGER: Yes.
4	MR ISAACS: I agree, my Lord. LORD NEUBERGER: Yes.	4	MR ISAACS: Then paragraph 146, section 148 refers to
5		6	settling a list as soon as may be after making
6	MR ISAACS: The liability is subject to the qualification $74(2)$ of which two are of portionlar	7	a winding-up order. Section 151 is the power these
7	set out in section 74(2) of which two are of particular importance. The first is under section $74(2)(s)$:		words are not in that paragraph, but it is: "At any time after the making of a winding-up order
8 9	importance. The first is under section 74(2)(a): "A past member is not liable to contribute if he has		to make calls on any of the contributory settles(?) on
10	ceased to be a member for one year or more before the	10	the list."
10	winding up."	11	Section 154 is the power (inaudible due to sneeze)
12	And under (c):	12	has to adjust the rights of the contributor. Section
12	"A past member is not liable to contribute unless it	12	LORD NEUBERGER: We will read this section, this paragraph.
14	appears to the court that the existing members are	14	If you want to have the whole paragraph, it is probably
15	unable to satisfy the contributions required to be made	15	more efficient for us to read it.
16	of them."	16	MR ISAACS: Thank you, my Lord.
17	LORD NEUBERGER: Right.	17	(Pause).
18	MR ISAACS: Then at paragraph 142, over the page,	18	So that sets out certain sections, yes.
19	section 80, I invite your Lordships to look at that. It	19	In addition to the powers given to the liquidator by
20	is important to see where this has come from, and it is	20	the provisions referred to already, the liquidator has
21	derived from section 75 of the Companies Act 1862, which	21	all the powers set out in schedule 4 of the act. And
22	is at bundle 9, tab 3.	22	there are two important powers that are not referred to
23	LORD NEUBERGER: What relevance does that have?	23	by Mr Justice David Richards. You don't need to go to
24	MR ISAACS: Well, there are two points of relevance,	24	it but it is at bundle 3, tabs 25 and 26. The first
25	my Lord. The first is that the words in section 75 of	25	power is the power to compromise all calls and
	Page 41		Page 43
1	the 1862 act, the opening words, are:	1	liabilities to calls and to take any security for the
2	"The liability of any person to contribute to the	2	discharge of any such call and give a complete
3	assets of the company under this act, in the event of	3	discharge
4	the same being wound up, shall be deemed to create	4	LORD NEUBERGER: That is page 1873, yes.
5	a debt."	5	MR ISAACS: It is, my Lord. And page 1874 is another
6	So it makes it clear again that there needs to be	6	important power: to prove in the insolvency of any
7	a winding up for the contribution to take place.	7	contributory for any balance against his estate and to
8	LORD NEUBERGER: You say that is clear from the opening	8	receive dividends.
9	words of section 73. Yes. That is why they were not	9	LORD NEUBERGER: Yes.
10	included in section 80, you say. I see.	10	MR ISAACS: The administrator's powers are set out in
11	MR ISAACS: The next point, the last words of section 75 of	11	schedule 1 of the act. Neither of the powers given to
12	the Companies Act 1862 are:	12	the liquidators in paragraphs 3 and 8 of schedule 4 are
13	"It should be lawful in the case of the bankruptcy	13	included in schedule 1.
14	of any contributory to prove against his estates the	14	The only reference to calls in the administrator's
15	estimated value of his liability for future calls as	15	powers is in paragraph 19, which gives the administrator
16	well as calls already made."	16	the power to call up any unpaid capital of the company.
17	The reason that is significant is because it is the	17	The fact that the liquidator is given the specific
18	predecessor of section 82 of the act. I will come on to	18	power to prove in an insolvency of contributory, whereas
19 20	some cases which explain the significance of that point.	19	the administrator is not, indicates that the
20	Section 82 is at paragraph 144, Mr Justice David	20	administrator does not have that power.
21 22	Richards judgment. You will see 82(4)	21 22	LORD NEUBERGER: Yes, I see.
22	LORD NEUBERGER: Basically you say it has the effect of the closing words of old section 75 is that right?	22	MR ISAACS: Then at paragraph 147 of Mr Justice David Richards ha refers to the rules which delegate the
23 24	closing words of old section 75, is that right? MR ISAACS: Yes, it is the same words.	23	Richards he refers to the rules which delegate the duties and powers with respect to the settlement of the
24 25	LORD NEUBERGER: Thank you.	24	list and making calls to the liquidator as an officer of
23	Loto Aboberoek, Thunk you.	25	ist and making cans to the inquidator as an officer of
	Page 42		Page 44

11 (Pages 41 to 44)

1	the court. I will not go through them, my Lord. My	1	reasons than it was referred to by Lord Justice Lewison.
2	submission on them, briefly, is that they are very	2	The first paragraph I would invite your Lordships to
3	detailed and they give protections to the contributories	3	look at is at 1492.
4	in the winding up. I will come back to that later.	4	LORD NEUBERGER: Right.
5	LORD NEUBERGER: Yes.	5	MR ISAACS: It is important to have in mind what capital is,
6	MR ISAACS: I now turn to three cases which address the	6	and this is a very useful explanation from Lord
7	statutory regime governing the section 74 liability.	7	Justice Lindley. If your Lordships can read down from
8	The first of them is in bundle 6 at tab 22, page 3426.	8	the words "What is meant by the capital of the company",
9	LORD NEUBERGER: Yes.	9	which is the first main paragraph on 1492. The sections
10	MR ISAACS: It is a decision called Ex Parte Brandwise(?).	10	which refer to capital are: "It is plain what is meant
11	It is a decision of Mr Justice Fry and it was concerned	11	by capital"
12	with set-off in the winding up of a company with limited	12	(Pause).
13	liability. The facts don't matter but there is	13	LORD NEUBERGER: Where do we read to?
14	an important paragraph that appears on the left-hand	14	MR ISAACS: To "such a power does not extend to
15	column of page 653.	15	other monies".
16	LORD NEUBERGER: Thank you.	16	LORD NEUBERGER: The whole paragraph. Yes, I have read
17	MR ISAACS: It appears after Mr Justice Fry sets out	17	that, thank you.
18	section 75 of the 1862 act, which, as I have said, is	18	MR ISAACS: The next paragraph, if your Lordships can just
19	the predecessor of section 80. If I could invite your	19	read to the words "a further sum in the event of winding
20	Lordships to read the words from "It appears to me to be	20	up but only in that event."
20	clear that the liability to contribute"	20	LORD NEUBERGER: I see, first six lines, yes.
21	LORD NEUBERGER: Where do we find that?	22	MR ISAACS: Then at 1494, your Lordships have already read
22	MR ISAACS: It is about two thirds of the way down.	22	part of the paragraph.
23	LORD NEUBERGER: The line beginning with the words	23	LORD NEUBERGER: Because that is in Lord Justice Lewison's
24	"Speciality" Read on from there, to where?	24	judgment.
23	Speciality Read on non unce, to where?	23	Judgment.
	Page 45		Page 47
1	MR ISAACS: To the words "to meet the special demand of the	1	MR ISAACS: Yes. But I would like your Lordships to read
2	fund created by the statute", which is seven or eight	2	further, because I rely on the next bits.
3	lines up from the bottom of the page.	3	Now, your Lordships have read to
4	LORD NEUBERGER: Thank you. Yes, I see.	4	LORD NEUBERGER: Where have we started reading?
5	(Pause).	5	MR ISAACS: Your Lordships started with the words, "There
6	Yes, I see.	6	being no prohibition in terms."
7	MR ISAACS: At the top of the next column he refers to	7	LORD NEUBERGER: And you want us to read the whole of that
8	a decision that I will come to, the Financial	8	paragraph up to "further liability", or further?
9	Corporation Limited v Lawrence. He says, half a dozen	9	MR ISAACS: Up to "further liability".
10	lines down:	10	LORD NEUBERGER: Okay, the whole paragraph.
11	"As soon as the company begins to be wound up, the	11	(Pause).
12	liability of the shareholders, which was not then	12	LORD NEUBERGER: Yes.
13	an existing obligation, is altered by the statute into	13	MR ISAACS: Then at 1498 Lord Justice Lopez quotes
14	a different specious of liability. It is then to be	14	Lord Selborne in a case called Black & Co's case. He
15	a debt."	15	says, three paragraphs up:
16	LORD NEUBERGER: Yes.	16	"I can't help thinking that Lord Selborne, when he
17	MR ISAACS: The second case is Re Pyle Works, which has	17	used those words, intended to express an opinion that
18	already been referred to by my learned friend.	18	there could be no anticipation of future calls in any
19	LORD NEUBERGER: It has. Where do we find that?	19	case so as to alter the administration of assets under
20	MR ISAACS: That is at tab 19, bundle 1. My learned friend	20	a winding up."
20	has already told you what that was about. It was about	21	I submit that a proof would be in anticipation. And
22	whether you can mortgage	22	finally, Lord Justice Cotton at 1484.
23	LORD NEUBERGER: It was considered quite carefully by Lord	23	LORD NEUBERGER: Going back, I see, yes.
24	Justice Lewison. Yes.	24	MR ISAACS: At the bottom of the page, where he says:
25	MR ISAACS: It is. And I refer to it for more expansive	25	"In the case of an unlimited company, what can be
	Page 46		Page 48

12 (Pages 45 to 48)

1	called for in the winding up may not be, and I think is	1	LORD NEUBERGER: Yes.
2	not, considered as part of the capital of the company.	2	MR ISAACS: Lord Justice Vaughan Williams.
3	LORD NEUBERGER: Yes. Thank you.	3	LORD NEUBERGER: Lord Justice Rigby agrees, and so does Lord
4	MR ISAACS: The third case is another decision of the	4	Justice Vaughan Williams, but he puts it
5	Court of Appeal, Mayfair Property, which is at bundle 5.	5	MR ISAACS: He puts it slightly differently, at the top of
6	It is at tab 14. Can I invite your Lordships to read	6	paragraph 2827, where he talks about an unlimited
7	the headnote, please. (Pause).	7	company, and he refers to the fund that was not
8	LORD NEUBERGER: Yes.	8	available for the company in the conduct of its business
9	MR ISAACS: Then Lord Linley, Master of the Rolls, at	9	or in any way at the disposal of the company.
10	paragraph 2822	10	LORD NEUBERGER: The same concept but different words.
11	LORD NEUBERGER: He stuck to his view, did he?	11 12	MR ISAACS: Indeed it is, my Lord.
12	MR ISAACS: He did stick to his view, but what he actually	12	My Lord, those are the three cases on that part of the regime.
13 14	said, my Lord, in the bottom paragraph is that he	13	-
14	foresaw that the decision in Pyle Works might be pressed	14	Now I propose to turn to six features of the regime which follow and demonstrate that there cannot be
15	further than he was prepared to go. He then says:	16	an obligation before the winding up of the company
10	"Let's look at the position of unlimited companies	17	within 13.12(1)(b).
18	at the time."	18	If I can start with disposal. Now, if the proceeds
19	And at the bottom of the page, if your Lordships	19	of a proof were payable to the company before it was
20	can read first:	20	wound up, the company would be free to dispose of the
20	"They were liable to calls. This was the only	21	proceeds without regard to the fact that the monies form
22	liability which could be enforced by the company or its	22	a fund to be applied for the purposes set out in
23	directors."	23	section 74.1, in particular a company in financial
23	"This liability, but no liability beyond, was	24	difficulty which was a going concern or in trading
25	an asset of the company"	25	administration could use the proceeds to further its
			ľ
	Page 49		Page 51
1	And so on.	1	trading activities. In which case, it would not use
2	He says it was not an asset of the company which the	2	them for the payment of debts and liabilities pari passu
3	company or its directors could charge, and so on.	3	or for paying the expense of the winding up, nor for the
4	LORD NEUBERGER: I see. Yes.	4	adjustment of the rights of
5	MR ISAACS: Over the page, paragraph 2824. Again, Lord	5	Lord Justice Briggs said at paragraph 231 that the
6	Linley, picking it up in the sentence that starts "The	6	directors of a company which proves in respect of future
7	prohibition against calling up the reserve capital in	7	calls may reasonably be expected to use the fruits of
8	the case of limited companies". If your Lordships could	8	that proof to keep the wolf from the door.
9	read	9	Now, I submit that this shows that the proof is
10	LORD NEUBERGER: About a quarter of the way down. Yes.	10	inconsistent with the regime which creates the
11	(Pause).	11	section 74
12	That is not directly relevant to what we have to	12	LORD CLARKE: Sorry, which paragraph of Lord Justice Briggs?
13	decide, is it?	13	MR ISAACS: It is 231, my Lord, page 588. The last
14	MR ISAACS: It is, my Lord, because the next paragraph says:	14	sentence, my Lord, do you see, "Wolf from the door"?
15	"Neither the act of 1879 nor the other	15	LORD NEUBERGER: Yes.
16	Companies Acts give a company the power to dispose of	16	MR ISAACS: My submission is that the monies paid pursuant
17	assets which could not come into existence until it is	17	to section 74 most definitely cannot be applied to keep
18	wound up."	18	the wolf from the door, because that is another way of
19	That is my case, my Lord. He says that to hand over	19	saying it would prevent a winding up, and the whole
20	reserve power is not to apply the reserve capital for	20	question of section 74 is to provide funds that would be
21	the purpose of the company being wound up."	21	used in the winding up. And the same point may be made
22	I say that that would be the same if a proof were	22 23	in relation to a company in distributing administration
23 24	allowed. You would be applying an asset which was for a particular purpose, for a completely	23	which would not use the proceeds of a call consistently with section 74, because it might use them to pay the
24 25	different purpose.	24	expenses of the administration, which was not one of
25	anterent purpose.		espenses of the duministration, which was not one of
	Page 50		Page 52

13 (Pages 49 to 52)

1	the purposes. And the proceeds could not be used to pay	1	not possible to contract out of the statutory liability.
2	for an adjustment of the rights of contributories	2	Now, this is not an issue for a liquidator, who can
3	because there is no adjustment in the context of the	3	compromise, because he is given the power to compromise
4	company in administration.	4	and to give a complete discharge in respect of calls
5	The same point may be looked at from the other end	5	under paragraph 3 of section 4, whereas the
6	of the telescope if one considers the position of	6	administrator has no such power.
7	a member where a proof is made against the member before	7	The third feature relates to an assignment or charge
8	it is wound up and then a subsequent call is made	8	of the proceeds of a proof. If the directors or
9	against the member in a winding up.	9	administrators can prove in respect of a call relating
10	Now, because the monies paid before the winding up	10	to the section 74 liability, they must also be able to
11	can be used for purposes other than those specified in	11	assign or charge the proceeds. And that is because the
12	section $74(1)$, what this means is that the total amount	12	basis of proof is that the section 74 liability is
13	that the member may be liable to pay under the proof and	13	an asset of the company or that it can be dealt with
14	the call is in fact greater than that provided for in	14	before the winding up.
15	section 74(1).	15	However, the company is unable, before it is wound
16	There is an example of that in my case at	16	up, to assign or charge the proceeds of a proof. And
17	paragraph 26, but essentially the point is that there	17	that is clear from Pyle Works. And the reason is that
18	will be leakage if there is a proof beforehand.	18	the proceeds would be payable to the assignee or the
19	Now, the response of LBIE in paragraph 254 of their	19	chargee rather than to constitute the statutory fund
20	case is to say that the members liability is unlimited.	20	administered by the liquidator for unsecured creditors
21	LORD NEUBERGER: Sorry, which paragraph of your submission	21	as a whole.
22	you did say? Your submissions, you said	22	This analysis is consistent with recent cases, which
23	MR ISAACS: That is LBIE	23	hold that a liquidator cannot sell assets recoverable by
24	LORD NEUBERGER: I am asking of your case, you referred to	24	the liquidator by virtue of his statutory powers.
25	a paragraph of your case.	25	I refer your Lordships to Oasis Merchandising in the
	Page 53		Page 55
1	MR ISAACS: Did I refer to my case? Oh, I apologise,	1	Court of Appeal.
2	my Lord. Paragraph 26, I am sorry.	2	LORD REED: This is spelt out by Lord Linley in the passage
3	Then I referred to LBIE's response to this point.	3	you have given us, and he explains the background to all
4	LORD NEUBERGER: Yes.	4	of this as being the collapse of the City of Glasgow
5	MR ISAACS: What they say is that the member's liability is	5	Bank, followed by the 1879 act, and the whole point
6	unlimited so there is no difficulty with this.	6	being to keep certain funds in reserve for use in
7	The problem is, the member's liability is only	7	a winding up and put them beyond the control of the
8	unlimited in one sense. It is unlimited in that it is	8	directors prior to a winding up.
9	not limited to the amount unpaid on the shares but it is	9	MR ISAACS: Indeed, my Lord. What is fascinating, if I may
10	limited by section 74(1) itself, in that the members are	10	say so, is there is a hiatus of 130 years and then we
11	liable to contribute for the purposes set out in	11	get to Oasis Merchandising and the same distinction
12	section 74.	12	is drawn.
13	The second feature relates to a compromise of the	13	In the Court of Appeal it was said that it would be
14	proof in relation to the section 74 liability. If, as	14	very surprising if an administrator was empowered to
15	the court below held, the company can prove in respect	15	sell the fruits of a future action under sections 213 or
16	of a call before the company's winding up, it must	16	214 by a liquidator.
17	follow that the company can compromise the proof with	17	"If such fruits fall within the property of
18	the member. If this were possible, the full and final	18	a company, it is hard to see how they are not caught by
19	settlement between the company and the member would	19	a debenture holder's charge over the future and present
20	render a subsequently appointed liquidator unable to	20	assets of a company."
21	make a call on that contributory, and that would be	21	That is at page 3046. The court also drew
22	inconsistent with the statutory scheme since the	22	a distinction between assets which were the property of
23	liquidator cannot be prevented from making such a call	23	the company at the time of the commencement of the
24	on the authority of Blacks case and Pyle Works. And as	24	liquidation and assets which only arise after the
25	Mr Justice David Richards said at paragraph 137, it is	25	liquidation and are recoverable only by the liquidator
	Page 54		Page 56

14 (Pages 53 to 56)

court below was correct, the right to an adjustment 1 1 pursuant to statutory powers conferred on him. 2 2 And I say that the same distinction applies here. would be lost. 3 3 Lord Justice Briggs responded to these submissions Again, Lord Justice Briggs addressed this point, at 4 at paragraph 229, and what he said is that these 4 page 587, paragraph 227, last sentence, where he said: 5 5 submissions may show, as I had submitted --"This could be reflected in the reduced value attributed to the contingent section 74 liability." 6 LORD KERR: Just remind me of the electronic page number, 6 7 7 The difficulty with this submission is that it would please. 8 8 MR ISAACS: 587, paragraph 229, halfway down: require an estimate of the amount which the company 9 9 "They may show, as Mr Isaacs submitted, that the would be able to recover from other contributories, if 10 early turning into money of an asset ordinarily 10 the company entered winding up at some indeterminate 11 realisable only by a liquidator should not be permitted. 11 future date and/or if other contributories entered 12 12 winding up at some indeterminate further dates, because Alternatively, they may show that if the asset is turned 13 into money before liquidation, then the proceeds of its 13 it is only then that they would be obliged 14 realisation must be held on trust, as in Re Jaeger 14 to contribute. 15 Phone(?), for the persons entitled to the benefit of 15 The estimate would also depend on whether the 16 it " 16 company would acquire new members or lose existing ones Now, he implicitly rejected the first alternative, 17 17 in the future. There is no indication that the regime 18 because that was my submission. But the trust 18 contemplates this sort of exercise. 19 alternative must, in my submission, be rejected, for 19 Furthermore, the suggestion of Lord Justice Briggs 20 20 three reasons, which are as follows. Firstly, the does not provide for a situation in which a contributory 21 administrator does not have the power to create such 21 in fact contributes more than his share of the losses of 22 a trust because it would not be incidental to the 22 the company. That is because if the company is not in 23 performance of his functions set out in paragraph 3 of 23 winding up it will not be possible for that contributory 24 schedule B1. 24 to recover from others by virtue of the adjustment. 25 The second point is that it would by bizarre if 25 My Lord, I am about to go on to the fifth point, Page 57 Page 59 a going concern company held the proceeds of a proof on 1 I wonder if that is convenient moment for the 1 2 trust to be applied by a future liquidator whilst at the 2 ten-minute break 3 LORD NEUBERGER: Yes, we will resume again at 11.40. Thank 3 same time it was in fact wound up because it was unable 4 4 you very much. The court will now adjourn. to pay its debts. 5 5 Furthermore, if this were the correct analysis, the (11.30 am) 6 (A short adjournment) 6 proceeds would have to be returned to the members if the 7 7 company did not actually go into liquidation. 8 8 The third point is that the argument is itself (11.40 am) 9 9 LORD NEUBERGER: Mr Isaacs, we took the advantage of the internally consistent both with the wolf at the door 10 referred to by Lord Justice Briggs and also with his 10 very short adjournment to discuss where we were going 11 holding at paragraph 202, which is 580 of the electronic 11 on this. 12 12 I think one of the problems with the points you were bundle, that the proceeds of a proof in respect of 13 a call become part of the assets of the company, because 13 making is that they are quite detailed, and we had taken them on board in what was, if I may say so, a very clear 14 14 they cannot then be held on trust. 15 The fourth feature relates to the provisions of the 15 and helpful written case. And I wonder whether it is 16 possible for you to put your points on this in 16 statutory regime which provide protections for the 17 17 benefit of contributories. a slightly more condensed way. It is a slightly unfair 18 18 thing to invite you to do, when you have no doubt If a contributory is obliged to contribute to 19 19 a company which is not in winding up, these protections prepared it, but if you could condense somewhat, that 20 will be sidestepped. And the protection of particular 20 would be good. 21 21 It would have been helpful if I had told you that importance is the adjustment of the rights of 22 contributories amongst themselves. 22 before we rose but I needed to discuss it with my 23 23 colleagues. But as I say, we have the point. I am not As I have said, the company and the administrators 24 cannot affect this adjustment, because the power to 24 trying to stop you making them, but it is quite dense 25 25 and we have read your written case. adjust is delegated to the liquidator alone. So if the Page 58 Page 60

15 (Pages 57 to 60)

1 MR ISACS: Yes, my Lord. One point that occurs to me is sheer left to uses indue that taking your Lordship and the concers and if I on give your Lordship to all office access and if I on give your Lordship to all office access and if I on give your Lordship to all office access and if I on give your Lordship to all office access and if I on give your Lordship to all office access and if I on give your Lordship to all office access and the last is to all office access and the last is to all the last is the last is to all the last is to all the last is to all the last is the last is the last is the last is to all the last is to all the last is t			-	
2 where 1 refer to cases and/or than taking your Torobhip 2 3 mecosenity to all of the cases, and if I can give your 3 4 Inding. It was held in Williams v Harding, a decision 5 Londbut the references— 6 Londbut the references— 7 There are a tot of cases coming up, so ruther than 7 There are a tot of cases coming up, so ruther than 8 an asset of the company before the winding up 9 LORD NULBERGER: think that would enable us to concrutue 9 Law A that the conclusion does not follow from the 10 orbit sees are does on its and enable us 11 a point I have already made. Secondly, the courts below 12 LORD NULBERGER: thank that would enable us to concrutue? 13 appoint I have already made. Secondly, the courts below 14 the paragraph. 15 MK IBAACS: Yes. 16 Now, the fifth point is that poor is inconsistent 17 winding up. Wear a set on mather is on that bus coarable be 18 an ember is no that bus coarable be 19 past members. Firstly, section 74 (1/k) provides that 10 an athat bis coarable wi	1	MR ISAACS: Yes, my Lord. One point that occurs to me is	1	relation to the predecessor of section 80. One is
3 Harding It was held in Williams V Harding, a decision 4 Lordbip the references 4 5 Lordbip the references 4 6 There are lat of cases coming up, so ruler than 5 7 There are lat of cases coming up, so ruler than 5 8 up your Lordbip patence 6 9 LORD NUTRERGET: this would explose the outpany before the winding up. 11 appoint patence 7 12 LORD SUTREGET: this than would explose to outpany the concernence on the essence of the points, and we can then read the samporting material later on. 7 12 LORD SUTREGET: this than would explose to outpany the concernence on the sessence of the points, and we can then read the samporting material later on. 7 13 appoint parent concernence on the sessence of the points, and we can then read the samporting material later on. 7 14 the paragraph. 16 8 15 MR ISAACS: Yes. 15 3 8 16 Now, the fifth portis in more sistent. 16 16 16 16 16 16 16 16 16 16 16 16 16 16 16 <td< td=""><td></td><td></td><td></td><td>-</td></td<>				-
4 Lordbing the efferences - 4 of the House of Lords, that in relation to a company in winding up, the section 74 inbihity commences at the winding up, the section 74 inbihity commences at the time to the contract of the contract of the contract of the inbihity commences at the time end the section 74 inbihity is a dust the section 73. 7 There are a lot of cases coming up, so rather than is the provise memory. There is a contract with the section 74 inbihity is a dust the section 74. Inbihity is a dust the section 73. 9 LORD SEUBERGER: I think that would enable us to concurrate on the ease is referred to in your prime material later on. 11 control bit prime is and or can there and the contract of the contract o				
5 LORD NEURERGE: That would be just the ticket, actually. 5 winding up, the section 74 liability is 6 Thank you vary much. 6 time of the contract of membership. Lord Justice Briggs deduced from this that the section 74 liability is at asset of the compared from the instant the section 74 liability is at the conclusion does not follow from the premise, for four reasons. The first is section 73 liability is at the contract of membership. Lord Justice Briggs at an asset of the compared from this that the section 74 liability is at the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the statuctory liability and the contract below failed to pay regard to the difference between the pay regard to the advect to the company. A statuct between the pay regard to the difference and it is not advect due to the dithe to contribute to the save to be difference				
6 Thank yes very much. 6 time of the contract of membershy. Lord Justice Briggs 7 There are lat of cases coming up, so rather than 7 an set of the company before the winding up. 9 LORD NEURERGER. I think that would enable us to concentrate 7 an set of the company before the winding up. 10 orth essence of the points, and we can them read the assets of the company. The contract of membershy. Use contrast of membershy whice courts below failed to pay regard to the difference between the 11 the paragraph. 12 failed to pay regard to the difference between the 14 the paragraph. 14 between the 15 15 MRISAACS: Yes. 16 16 section 80 nor its predecessor, section 73, provide that 16 MRISAACS: Yes. 16 16 section 80 nor its predecessor, section 32 nor the between the 19 a past members. Firstly, section 74(1)(a) provide that 16 16 16 21 a member is not liable to commbust if the has 19 206 - which is bundle 213 for your Lordships 22 a member for more than 2 way hore the existing members. 17 18 18 23 member so that at the status. 21 11 12 <td></td> <td>*</td> <td></td> <td></td>		*		
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8 ty you Lodship's patience - 8 an asset of the company before the winding up. 9 LORD NEUBERGER: Linkin the would eashe us to concentrate 9 I say that the conclusion does not follow from the 9 LORD NEUBERGER: Linkin the would eashe us to concentrate 9 I say that the conclusion does not follow from the 10 concentrate 9 I say that the conclusion does not follow from the 11 concentrate 9 I say that the conclusion does not follow from the 12 LORD NUPTION: Where the case is referred to in your 13 a point I have a incady much. Secondly, the courts below 13 the paragraph. 14 Both liabilities are dobts. However, neither 14 the quilification existenting to the liability of 15 a section 80 nor inbut to the company. And I would nivie your 16 Now, the fifth point is that proof is inconsistent 16 16 16 16 17 with due and much section 74 (1)(2) provides that 18 Lordships to contribut to the assets of the company. 17 20 eased to be a member is not lable to contribute in the statuce 20 10 11 10 21 a patoffere for a year 10 12<				
9 LORD NEUBERCE: I think that would enable us to concurrate 9 I say that the conclusion does not follow from the 10 on the essence of the points, and we can the read the 10 9 I say that the conclusion does not follow from the 12 LORD SUMPTION: Where the case is referred to in your 11 a point I have already made. Secondly, the courts below the 13 printed ease, it would help if you gave us 11 a point I have already made. Secondly, the courts below 14 the fill point is that proof is inconsistent 11 a point flave already made. Secondly, the courts below 16 Now, the fill point is that proof is inconsistent 13 14 Both liabilities contribute to the assets of the company: a already made. Secondly, the companies Act 19 a past member is not liable to contribute if he has 10 10 10 11 10 10 10 11 10 10 10 10 10 10 10 10 10 10 10 10 10 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11 11	-			-
10 on the essence of the points, and we can then read the supporting material later on. 10 premise, for four reasons. The first is section 73, a point I have already made. Secondly, the courts below failed to pay regard to the difference between the statutory inhability and the contrantal liability. 11 LORD SUMPTON: Where the case is referred to in your protections for nor is predecessor, section 73, provide that the qualification retaining to the liability of the company. 10 Boh liabilities are debts. However, neither statutory inhability to contribute to the assess of the company is a past member is not liable to contribute if the has 10 11 Boh liabilities are debts. However, neither statutory inhabity to contribute to the company is a debt debt to contribute if the has 10 11 11 12 13 14 </td <td></td> <td></td> <td></td> <td></td>				
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Page 62 Page 64	_			
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16 (Pages 61 to 64)

1	Patent Anchor. I have not set out in detail the extract	1	MR ISAACS: If I can put it this way: the best cases are the
2	that I rely on, but if I can give your Lordship the	2	ones I am referring to orally. If you are not persuaded
3	reference, it is at 4065. What is important about that	3	by those, you will not be persuaded by the others. But
4	case is that that bankrupts, former bankrupts, had	4	as I think your Lordship said yesterday, if your
5	submitted that they were discharged because calls were	5	Lordship is persuaded you will find even more comfort in
6	provable in the bankruptcy. They submitted that their	6	the other ones.
7	liabilities to calls under section 75 commenced when	7	The significant point about Whittaker v Kershaw is
8	they became shareholders, relying, you will see at pages	8	again that the submissions of the wife in that case
9	4068 to 4069, on Williams v Harding.	9	relied on Williams v Harding. And again, she said the
10	LORD NEUBERGER: The House of Lords case you referred	10	liability to make calls commenced when the shareholder
11	to, yes.	11	joined the company.
12	MR ISAACS: Yes. Mr Justice Blackburn rejected that	12	Lord Justice Cotton, who of course was in
13	submission, and what he said was:	13	Pyle Works, said: that does not apply, we have no
14	"The question is, when does the liability of	14	winding up here. And Lord Justice Fry and Lord
15	a contributory commence?"	15	Justice Bowen said much the same thing.
16	The case cited from the House of Lords does not	16	LORD NEUBERGER: Thank you.
17	touch that point. Section 75 refers to the bankruptcy	17	MR ISAACS: So that is the cases on which I positively rely.
18	still pending when the winding up takes place.	18	Then the fourth point is that the cases relied on by
19	Then he went on to say:	19	the court below and by LBIE in its case do not support
20	"Section 75 does not apply to the present cases	20	the proposition that section 80 has any application
20	where the shoulders have been adjudged bankrupt and	20	before the winding up.
21	discharged before the winding up commenced.	22	I think it would be helpful to take your Lordships
22	There needs to be a winding up. And Mr Justice Lush	23	to Williams v Harding, because that is a case relied on
23 24	agreed at 4072 to 73.	23	very heavily by the courts below and by my
24	LORD NEUBERGER: Yes.	25	learned friend. That is at bundle 1, tab 24.
23	LOKD NEUDEROEK. TCS.	23	learned mend. That is at buildle 1, tab 24.
	Page 65		Page 67
1	MD ICAACS. The next place I wanted to refer to is	₁	LODD NEUDEDCED: These you
1	MR ISAACS: The next place I wanted to refer to is Financial Corporation v Lawrence, which is again	1 2	LORD NEUBERGER: Thank you. MR ISAACS: If I can invite your Lordship to read, please,
2		$\begin{vmatrix} 2\\ 3 \end{vmatrix}$	
3 4	referred to at paragraph 74 of my case.		the headnote, 1624. (Pause). LORD NEUBERGER: Yes, thank you.
	LORD NEUBERGER: Is the passage you rely on then set out in	45	
5	paragraph 74?	6	MR ISAACS: That is a case which was actually a decision on the Bankruptcy Act 1861 in relation to a company which
6 7	MR ISAACS: Yes.	7	
	LORD NEUBERGER: Thank you.	8	had been wound up under earlier Companies Acts, so it is
8	MR ISAACS: It is. And if I can just emphasise.		not actually on the Companies Act 1962 at all. The only
9	LORD NEUBERGER: The words you emphasise in bold?	9	point of relevance is at the end of the case, at 1644,
10	MR ISAACS: Yes. Section 75 had not come into operation on	10	the last main paragraph, Lord Kingsdown's speech, where
11	the date of the deed. This is the key part. Part 4 of	11	he refers to the Companies Act of 1862 and says:
12	the Companies Act speaks only of the commencement of	12	"This has removed all doubt about subsequent cases
13	a winding up of a company. When they begin to speak, no	13	by expressly declaring that the call shall constitute
14	doubt for some purposes, they have	14	a debt as from the time when the liability was
15	a retrospective effect.	15	contracted. I do not consider the declaration as an
16	LORD NEUBERGER: Yes.	16	alteration of existing law."
17	MR ISAACS: Then there is a case, Whittaker v Kershaw, which	17	LORD NEUBERGER: Yes.
18	is a decision of the Court of Appeal which I refer to at	18	MR ISAACS: That is fine, my Lord, but that is the case if
19	paragraph 79 of my case.	19	the company is wound up. That is absolutely right.
20	LORD NEUBERGER: Thank you. You are not referring to	20	When a company is wound up, that is exactly the effect
21	a number of cases orally which you have referred to here	21	of this. And the point that I am making is made by the
22	between 74 and 79. You rely on those but you are	22	Court of Appeal for me in a case called Hastey's
23	between 74 and 79. You rely on those but you are assuming we are going to look at them; is that right?	23	Case(?). I will not go to it but it is bundle 9, tab 8,
23 24	between 74 and 79. You rely on those but you are assuming we are going to look at them; is that right? MR ISAACS: I am grateful, my Lord.	23 24	Case(?). I will not go to it but it is bundle 9, tab 8, 4036. Again it is a case in which a shareholder in
23	between 74 and 79. You rely on those but you are assuming we are going to look at them; is that right?	23	Case(?). I will not go to it but it is bundle 9, tab 8,
23 24	between 74 and 79. You rely on those but you are assuming we are going to look at them; is that right? MR ISAACS: I am grateful, my Lord.	23 24	Case(?). I will not go to it but it is bundle 9, tab 8, 4036. Again it is a case in which a shareholder in

17 (Pages 65 to 68)

1	and then the company was later wound up, and then again	1	statutory liability, and some of those cases say things
2	counsel relied on Williams v Harding.	2	about the contractual liability
3	LORD NEUBERGER: Hastey's Case. Where is it in your case?	3	LORD NEUBERGER: A point made in the passage of the very
4	MR ISAACS: In my case?	4	first case, Mr Justice Fry.
5	LORD NEUBERGER: Paragraph 82.	5	MR ISAACS: Yes, in Re Brandwise(?). And the second
6	MR ISAACS: I am grateful.	6	distinction is to bear in mind that we are dealing with
7	LORD CLARKE: Thank you very much.	7	an unlimited company, so that what can be called up by
8	MR ISAACS: Thank you very much. It is only this: at	8	a liquidator is not capital.
9	paragraph 436 of the electronic bundle, Lord	9	LORD NEUBERGER: Is not?
10	Justice Gifford said this:	10	MR ISAACS: Is not capital. This has nothing to do with
11	"Williams v Harding and Ex Parte Canwell result in	11	cases which talk about calling up uncalled capital
12	this and nothing more: that the debt has its inception	12	simply have nothing to do with the appeal.
12	at the date of, and originates with, the membership."	12	LORD NEUBERGER: I understand. Thank you.
13		13	•
	That is the context of a company being wound up.		MR ISAACS: Finally, then, policy considerations. The
15	LORD NEUBERGER: But Hastey's Case is referred to in the	15	Court of Appeal relied on two policies in supporting
16	Court of Appeal in argument	16	their arguments, the first of which is enlarging the
17	MR ISAACS: It is referred to in the judgment of	17	scope of provable claims and seeking as far as possible
18	Mr Justice David Richards below and no, my Lord.	18	to eliminate non-provable claims.
19	LORD NEUBERGER: I don't recall it.	19	Now, that policy cannot be disputed. It has been
20	MR ISAACS: It is not. It is not there.	20	going on for 200 or 300 or 400 years, depending on who
21	LORD NEUBERGER: Thank you.	21	you read. But my submission is, if on the proper
22	MR ISAACS: Now, there are a number of cases	22	construction of the statutory provisions which create
23	LORD NEUBERGER: I thought you said it was referred to by	23	the section 74 liability they do not apply before
24	Mr Justice David Richards.	24	winding up or are inconsistent with proof before winding
25	MR ISAACS: Yes, in the judgment, my Lord.	25	up, then that is the proper construction of the statute
	Page 69		Page 71
	1 460 07		
1	LORD REED: Lord Kingsdown, in the Williams case, must be	1	and an an Translation and the colliner is
		1	and your Lordships are bound to follow it.
2		$\begin{vmatrix} 1\\2 \end{vmatrix}$	
2 3	looking retrospectively, from the perspective of		The second policy is that the members of
	looking retrospectively, from the perspective of a winding up, because the call could only be made	2	The second policy is that the members of an unlimited company are required to make their
3	looking retrospectively, from the perspective of a winding up, because the call could only be made against somebody who was on the settled list of	2 3	The second policy is that the members of an unlimited company are required to make their resources available to the fullest possible extent
3 4	looking retrospectively, from the perspective of a winding up, because the call could only be made against somebody who was on the settled list of contributories, and people are liable to, at one point	2 3 4 5	The second policy is that the members of an unlimited company are required to make their resources available to the fullest possible extent available to ensure that the company discharges all its
3 4 5 6	looking retrospectively, from the perspective of a winding up, because the call could only be made against somebody who was on the settled list of contributories, and people are liable to, at one point in time, be somebody who might be a contributory in the	2 3 4 5 6	The second policy is that the members of an unlimited company are required to make their resources available to the fullest possible extent available to ensure that the company discharges all its liabilities. That is referred to by Lord Justice Briggs
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1	approved by creditors, include liquidation as an exit	1	Justice Briggs at paragraph 175.
2	route, and LBIE states in its submissions at	2	It follows that a contingent claim can only be
3	paragraph 283 that the future applicability of the	3	attributed a value for the purposes of set-off if it is
4	statutory regime in respect of calls is in (inaudible	4	a provable debt, since the section 74 liability is not
5	due to sneeze).	5	provable, on the assumption that the cross-appeal arises
6	So all they need to do is put the company into	6	for decision, it cannot be set-off.
7	winding up and make a call.	7	My third point is that set-off between a provable
8	That concludes what I propose to say about	8	claim by an insolvent creditor against a non-provable
9	declaration 8, my Lord.	9	claim by the insolvent company would be unjust, because
10	I now turn to declaration 9, which is set-off, which	10	it would put the insolvent company in a better position
11	is a much shorter point. LBHI's submission is that the	11	than other creditors, or creditor, and the purpose of
12	section 74 liability was set off against LBIE's	12	insolvency set-off is to do substantial justice, and
13	liability to its members in LBIE's administration,	13	justice would not be done if set-off were allowed.
14	whether or not the section 74 liability is provable by	14	I make this point good by an example at paragraph 93
15	the LBIE administrators in the members' administrations	15	to 96 of my case. I don't propose to go through it but
16	or liquidations.	16	it speaks for itself.
17	Now, I accept that if the section 74 liability is	17	My Lord, that concludes my submissions on proof and
18	provable by the LBIE administers in the members'	18	set-off. I propose to address LBIE's cross-appeal in
19	administrations or liquidations, it was taken into the	19	relation to the contributory rule, which is a different
20	set-off account. If, however, as I have submitted, the	20	point, once LBIE has opened that cross-appeal, but
21	section 74 liability is not provable in the members'	21	I will be very short on that.
22	administrations, it was not taken into the set-off	22	Unless I can be of further assistance, my Lord
23	account in LBIE's administration.	23	LORD NEUBERGER: That was very helpful, Mr Isaacs, and thank
24	And I say that for three reasons. The first is that	24	you for adjusting your submissions at our request, and
25	the section 74 liability does not exist until the	25	I assure you and those behind you that we will reread
	Page 73	<u> </u>	Page 75
1	company is wound up, a point I have made, so there is no	1	your submissions that were not included in your oral
2	corresponding sum due from the member to the company	2	submissions. Thank you very much indeed.
3	which falls within the set-off account prescribed by	3	MR ISAACS: I am grateful.
4	285(3).	4	Submissions by MR TROWER
5	Similarly, if, as I have also submitted, the	5	MR TROWER: Your Lordships are now moving to the other side
6	section 74 liability cannot be dealt with in any way	6	of the court. The way we have agreed to do this, as
7	until the company is wound up, it cannot be the subject	7	your Lordships know, is, I am going to address
8	of a set-off, as this would lead to the consequences	8	declarations 1, which is the construction of the
9	that I have discussed.	9	sub-debt agreement, the statutory interest lacuna point,
10	This is because of the incidence of the section 74	10	4 and 5
11	liability. I refer your Lordship to Grissell's Case,	11	LORD NEUBERGER: Yes.
12	Overend, Gurney. We don't need to look at it.	12	MR TROWER: the scope of the liability point, number 6,
12	Bundle 1, tab 18. But that is another case where	13	and the points on which my Lords have just been hearing
13	a set-off was disallowed because of the inherent	14	submissions from Mr Isaacs.
15	incidence of a section 74 liability.	15	Mr Dicker is dealing with currency conversion claims
16	The second point is that LBIE submits at paragraphs	16	and is going to come after me. I hope it is all right
10	205 to 207 of its case that the section 74 liability is	17	for my Lords that that is dealt with at the end rather
18	a contingent obligation within rule 284(4)(b), which, by	18	than my sitting down and
18	virtue of rule $2.85(5)$, can be included in the set-off	19	LORD NEUBERGER: Yes, rather than Box and Cox. Yes.
20	account at the value estimated by the administrator	20	MR TROWER: Starting, then, with the construction point so
20	under rule 2.81.	20	far as the sublet agreement is concerned, we have not
21	Rule 2.81 requires the administrator to estimate the	22	actually together looked at the agreement itself,
22	value of any debt which does not bear a certain value.	23	because we have looked at it in the context of the
23 24	It is not disputed that the debt is limited by rule 13	24	judgment and of course that is a very important
24 25	to provable debts. See, for example, Lord	25	starting point but one of the reasons I just wanted
			and point out one of the reasons i just manued
23	to provable debts. See, for example, Lord		
23	Page 74		Page 76

1 to go quickly to the agreement leaft's that there are sumportant ports on the structure of the agreement which one has to be careful not to miss. 1 characteristics are, first of all, a sum holitily of obligation. Whether prevents of future is a second a spect of the characteristics. Payable or outingent, whether joint or several. 3 mate reason we start there is that we say that LHHI2 submissions dont give sufficient weight to the fact in the first few lines of clause 5 - and can we just we are concerned with is 689. a ab or future 1 was with the third is the first few lines of clause 5 - and can we just of clause 5 contain the overarching subodination provision, in the light of which the conditional payment is simply "payable or owing by the borrower." 10 First, we say that LH12 submissions do not give sufficient weight to the fact that the first few lines of clause 5 contain the overarching subodination provision, in the light of which the conditional payment is simply "payable or owing by the borrower." The primes that is used in the definition of liabilities that the first few lines of clause 5 contain the overarching subodination is simply "payable or owing by the borrower." 10 Decause 5 how with works is that the repronent obligation arises under clause 5 in the two tables of starting point to look at the first two lines of clause 4.2 of the starting terms, thu blicks in adduce 4.2 of the starting terms, thu blicks or provisions are subject at lose first two lines is that the rights of the lender in respect of the starting point look at the first first the serier of subordinated linkbilities, which we get in the subordinated linkbilities, which we get in the subordinated linkbilities, which we get in the subordinated linkbilities, which we ge				
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	10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	And senior liabilities, which we get in the definition on page 687 are all liabilities except subordinated liabilities and excluded liabilities. Now, nobody suggests that statutory interest or non-provable liabilities fall within the exception of the subordinated liabilities, obviously. There is an argument on the case, although it was not developed by my learned friend at all, that statutory interest falls within the definition of excluded liabilities. I will briefly refer to that later. I think I have to, because it is referred to on the case, although it was not developed in oral argument. The real question here is whether or not they are liabilities at all. When I say "they", I mean statutory interest and non-provable liabilities. And to be a liability at all, they must be, or their	10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	 MR TROWER: Yes, that is right. That is certainly right. I mean, what one has to ask oneself, and what this point is all about, is: to what extent have these creditors subordinated themselves? How far back down the queue have they gone? LORD REED: Essentially the approach on the other side, as I understand it, has been to say that the statute and the rules are the starting point and they provide for pari passu ranking, and this particular debt is a contingent debt. But it is given effect. It ranks pari passu but it is given effect as a contingent debt in relation to valuation and your approach seems to be, no, you take the contracts as your starting point. It provides for a ranking which is not pari passu but under which this a postponed debt. MR TROWER: Yes. We say one of the points about this agreement and there a number of points as to the way

20 (Pages 77 to 80)

1 it actually works - but one of points is that they have contracts out of their anotherment to yours. I will contract on the in a normality als, that the ocreted way of looking at it, and that has the electrof meaning, apart form anything site, that they are not a proved debt when no looks at the statutery Yeak as got it under paragraph 4.3 and Y will come on to those significant to the statutery 1 it meaning, apart form anything site, that they are not a proved debt when no looks at the statutery So about how they fit in the context of the stabordination agreement itself. 1 NUR TROWER. Indeed, and that is one of the core points Now, sh(a) is, of conser, inarplicable because an ecdra has been made for the insolvencey of the statuse of the real water. 1 With TROWER. Indeed, and that is one of the core points Now, what S.1(b), obten is a target of the statuse of the argument. 1 With TROWER. Indeed, and that is one of a gramment. Now, what S.1(b) does is it provides for them to make a subordination support. And the focus is on that part of argument. 1 the class which defines which defines which defines which defines which defines which defines which and then yeu look at how that is actived parsatual to the contrading of proving the concept of a proving. 1 their another and the second parsatual to the contrading of proving the concept of a proving. 2 the high of the first few its necessary to advective the and then yeu look at how that is active of parsatuse a second fail which and here are all ways of subdinting a subordination itself, and there is the work are accepted or accepticic, excluded in find, discegrading the two cocclasplate, e				
2 contracted out of their entitlement to prove. I will 2 any proceeds in breach of the ashooting. 3 conce on to their a normes, and is thit is the errect 3 You also get it under prangephs 4 and 7, and 1 will 4 way of looking at it, and that has the effect of 5 and the scale of the subodifunition 5 meaning, apart from anything else, that they are not 5 about how they fit in the contexts of the subodifunition 7 interest point. Now, 51(a) is of course, implicible because an order has been made for the insolvency of LDIE. So what 9 they might obevices have had, and does that reage in the interest point. Now, 51(a) is of course, implicible because an 12 I will come on to obvicedy, at a later stage in the interest point fore is that one has to read interest point here is that one has to read 14 The overarching point here is that one has to read into the solution is the light of the fits fore lines to it and the solution is the light of the fits fits point is a secord failing with any about hy whot S1(b) does is it provides that repayment of the sub-deft, but the solvency required to it is about how the it is chieves to a solution is a secord failing with any about hy whot his is chieves to a solution whot way to solution whot way it works. 14 the contracting out provides at how that is chieve a point of proving the about how whot his a neclease of adout how the sot a	1	it actually works but one of points is that they have	1	a contractual trust agreed in relation to the receipt of
3 come on to that in a memeriu, and is this the correct 3 You also get it under paragraphs 4 and 7, and 1 will 4 way of booking it it, and thus the effect of 4 come on to those slightly later on it may submissions, 5 meaning, apart from anything else, that they are not a proved dobt when on looks at the statutory 6 6 a proved dobt when one looks at the statutory 6 agreement itsoff. 7 Now, 5 (a) is, of course, impliciable because an 9 LORDN NULHERGER: They have contracted out of certain rights 8 9 meaning, apart from anything else, that they are not agreement itsoff. 10 MR TROWER: Indeed, and that is one of the core points 11 11 magnets. 11 subordination support. And the focus is on that part of 12 agreement. 13 agreement itsoff. 13 argument. 14 the paragraph 5. which which we has to read 14 The overarchang point here is that one has to read 15 Now, what 5.1(0) does is it provides the repayment 14 The overarchang point here is that one has to read 15 Now, what 5.1(0) does is it provides the repayment 15 adit this is hele origo thishing that qualifies as a schice i paragraph 5. which doe has to read 16 repayment of the shick where aread 16<	2			
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5 meaning, apart from anything else, that they are not 5 about how they fit in the context of the subordination 6 a proved ddt when one looks at the statutory 6 7 investa point. 6 8 LORD NELIPERGER: They have contracted out of certain rights 7 9 more that is one of the core points 7 10 MR TROVAER: Indeed, and had the is one of the core points 7 11 audot out of their right or prove? 10 12 I will come on to, obviously, at a later stage in the 12 13 and this is the light of the first twins of 13 14 The overarching point here is that one has to read 15 15 all of this in the light of the first twins of 15 16 of the sub-debt is conductional on the borrower is solvent for 17 betind anything had qualifies as samic inbility. 18 and threy volook had bwe this concept of 19 be calabilities and efficient, first neess of the sub-debt is conduction on payment, the sub-debt is conduction on payment in the sub-debt is co	4	way of looking at it, and that has the effect of	4	
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8 LORD MUBBR/CHE: They have contracted out of certain rights 9 9 they might otherwise have had, and does that mean they 9 11 MAR (ROWER: Indeed, and that is one of the core points 11 12 Ivel concernst-of out of their right to powe? 10 13 argument. 12 the classe which defines when a borrower is solvent for the sub-offsition support. And the focus is on that part of the purpose of identifying the circumstances in which the absolution support. And the solvency required to the purpose of identifying the circumstances in which the the solvence prequired to be prepared the solvence prequired to be prepared the solvence prequired to the solvence prequired to be established as a condition for payment means that all liabilities, as a defined, must be capable of being restablished or determined in the issolvence of ot proving, the cases which data must be capable of being restablished or determined in the issolvence of ot proving, the cases which data must be capable of being restablished or determined in the issolvence of the solvence of the purpose. 11 trust for others'. These are all ways of subordinating it haves, thay you should have acaquitred, it is held on the as	7	interest point.	7	-
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Page 82 Page 84				
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21 (Pages 81 to 84)

1	which it is possible to say that aspects of the language	1	all, indeed quite the contrary, it may be deferred as
2	chime with actual provable debts contingent and	2	part of it.
3	actual	3	But in such a case, the liabilities would obviously
4	LORD NEUBERGER: Non-provable debt established or determined	4	be something that would be needed to be taken into
5	in the insolvency.	5	account and not disregarded when assessing whether the
6	MR TROWER: Yes, and I will come on and explain to my Lord	6	company is solvent within the meaning of the definition.
7	why that is. That involves looking at the cases lightly	7	So we posit that as a possible reason why the
8	and briefly and the sort of processes by which, in the	8	draughtsman used the language of both payable and
9	insolvency, a non-provable debt can be established or	9	capable of being established or determined.
10	determined.	10	I have explained why it is that we say that the
11	Now, just one point: we agree that "in the	11	concept of provability does not fit very well with the
12	insolvency" is probably intended to cover the word	12	language. I have also mentioned and my Lords need to
13	"payable" as well as the words "capable of being	13	bear this in mind throughout when construing this
14	established or determined", which is a question my Lord	14	agreement that it was intended to be capable of use
15	Lord Neuberger asked. It is a natural way of reading	15	by a borrower, which might enter into a foreign
16	the flow of the sentence but it doesn't mean in any way	16	insolvency process.
17	that the draughtsman had concepts of provability in	17	Concepts of provability, concepts as to the payment
18	mind, let alone English concepts of provability. And	18	of statutory interest and the existence of non-provable
19	there are a number of reasons for this, but one of the	19	liabilities may not be relevant in the context of
20	questions one might ask is: why is it he used the two	20	foreign insolvency proceedings in the same way that they
21	concepts of payability, on the one hand, and capable of	21	are relevant in the context of English insolvency
22	being established and determined? One might think that	22	proceedings. They may be different in their parameters
23	in almost every circumstance one can think about the two	23	and impact, which strongly suggests, we submit, that it
24	would run hand in hand, but that requires one just to	24	would be wrong to take an approach which is English
25	remind oneself as to the defence of insolvency. If one	25	insolvency proceedings centric when construing this
	Dage 95		Dage 97
	Page 85		Page 87
1	goes back to the definition of insolvency	1	agreement. It was a point the judge made and it was
1 2	goes back to the definition of insolvency LORD NEUBERGER: Lord Justice Lewison sets all these out in	1 2	agreement. It was a point the judge made and it was a point Lord Justice Lewison made at paragraph 45 of his
2	LORD NEUBERGER: Lord Justice Lewison sets all these out in	2	a point Lord Justice Lewison made at paragraph 45 of his
2 3	LORD NEUBERGER: Lord Justice Lewison sets all these out in paragraphs 33 and 34, 539.	2 3	a point Lord Justice Lewison made at paragraph 45 of his judgment, and we respectfully agree with it.
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22 (Pages 85 to 88)

1	suggested in our case were: is it statute barred debts	1	participating in an insolvency which is what we say
2	and debts which are capable of enforcement for some	2	he is ultimately driving at here and liabilities
3	other reason, such as a foreign revenue claim, rather	3	which simply do not participate in the insolvency. They
4	than the characteristics of whether or not the debt	4	may be liabilities in law but why should they be taken
5	is provable?	5	into account when assessing questions of solvency if
6	And of course one has to bear in mind again the	6	they simply are left out of the participation process?
7	foreign application. One has to keep that in mind all	7	I quite understand my Lord's point that we are
8	the time, because there may, under other jurisdictions,	8	looking at it here for the purposes of construing the
9	be debts that remain in law liabilities of the company	9	agreement, but we are looking at it in the context of
10	but which ought, for the policy purposes under this	10	whether or not this company is solvent once the
11	sub-debt agreement or for intention purposes under this	11	liabilities have been paid, disregarding that which is
12	sub-debt agreement, be left out of account when	12	excluded, because it is only then that you get to the
13	determining whether or not the company is solvent.	13	moment in time at which the conditional payment
14	LORD NEUBERGER: You say a statute barred debt is	14	obligation is satisfied and the sub-debt
15	an obligation?	15	becomes payable.
16	MR TROWER: I do, because it is trite law, my Lord, that the	16	LORD NEUBERGER: I see, okay.
17	limitation act bars the remedy. It does not extinguish	17	MR TROWER: My Lord, can I just give my Lord the page
18	the right. The law of limitation is procedural, not	18	numbers in Government of India v Taylor, just for this
19	substantive.	19	reason we don't, I think, need to go to it but one
20	LORD NEUBERGER: If it didn't have that exception, it would	20	of the reasons it is important is simply that what one
20	include it would be subordinated to your	20	is trying to discern, we suggest, is the thrust of what
22	contention is it would be subordinated to statute	22	the draughtsman had in mind by way of exclusion. What
23	barred claims?	23	is he trying to encapsulate with these words? What is
23	MR TROWER: Yes. And indeed there are plenty of wherever	24	he driving at? And what he is not driving at, we say,
25	you have something that continues to exist in law as	25	are things like statutory interest and non-provable
25	you have something that continues to exist in law as	25	are things like statutory interest and hon-provable
	Page 89		Page 91
1	a liability, one has to find a way of ensuring that	1	claims. What he is driving at is something that is very
2	notwithstanding its existence as a liability it is taken	2	different. And the two passages from
3	out of account in relation to the solvency test.	3	Government of India v Taylor the first one is in the
4	LORD NEUBERGER: If 'disregard (a)' was not there, the	4	speech of Viscount
5	subordinated debt would not be payable if the company	5	LORD NEUBERGER: Sorry, where is it?
6	had a statute-barred debt.	6	MR TROWER: I am so sorry, it is at page 2568 of the bundle.
7	MR TROWER: A statute-barred debt, yes.	7	LORD NEUBERGER: That is very helpful. Thank you.
8	So what one is looking at here is what it is that it	8	MR TROWER: Let's have a quick look. 2568 is the case and
9	is appropriate to disregard for the purposes	9	it is 2585 and it's the passage at the bottom of the
10	LORD NEUBERGER: Why isn't a foreign revenue claim payable?	10	page. But it is said about ten lines up, over to the
11	The fact it cannot be enforced why is it not payable?	11	fourth line on page 2586 of my Lord's note.
12	MR TROWER: I do need to take my Lords to Government of	12	LORD NEUBERGER: Yes, I see.
13	India v Taylor on this point, for this reason: two of	13	MR TROWER: But Lord Keith takes a slightly different
14	their lordships disagreed as to the correct analysis as	14	approach, on page 2590. The last full paragraph of
15	to whether or not a foreign revenue claim constituted	15	his speech.
16	a liability for the purposes of the insolvency	16	(Pause).
17	legislation or not.	17	LORD NEUBERGER: Viscount Simonds seems to have the rest
18	LORD NEUBERGER: We are not concerned with the insolvency	18	really Lord Morton certainly. Lord Reed.
19	legislation; we are concerned with the	19	Quite clear.
20	contractual agreement.	20	MR TROWER: I don't pray in aid this for the purposes of
21	MR TROWER: Well, we are concerned with a draughtsman who is	20	saying to my Lords: well, you can work out from their
22	concerned to ensure that when assessing the company's	22	Lordships' speeches whether or not a foreign revenue
22	liabilities that have to be taken out of account for the	23	claim is intended to be a liability for the purposes of
24	purposes of looking at solvency a proper distinction is	24	this agreement. What I draw attention to this for is
25	drawn between liabilities which are capable of	25	that one has two different analyses as to why it is that
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	Page 90		Page 92

23 (Pages 89 to 92)

1	something that constitutes a liability does not	1	Now, this, with respect, is not quite fair of
2	participate in the winding up at all for the purposes	2	Lord Justice Lewison. There may have been other things
3	if it is a foreign revenue claim.	3	in the argument that he relied on; I can't now recall.
4	We say that is the kind of thing which the	4	But the judge was plainly well aware of the difference
5	draughtsman probably had in mind when he was using the	5	between membership and a creditor. The point he was
6	form of words "Payable or capable of being established	6	making and it is a good one, we respectfully
7	or determined in the insolvency of the borrower". It is	7	submit is that the regulatory context is consistent
8	that kind of concept.	8	with the subordinated debt ranking immediately above the
9	Statute-barred debts fall into the same category.	9	share capital but below everything else, and to that
10	We have included in our case I explained to my Lord	10	extent being treated as against creditors as part of
11	that obviously the statute of limitation bars the remedy	11	its capital.
12	but not the right, and there is a case which we refer to	12	That is the point the judge was making, and we
13	in our case, and it is in the bundles at F4, tab 3,	13	respectfully submit it is a good one.
14	page 2125 we don't need to turn it up; it is called	14	Now, moving on, then, my Lords, to look at
15	Art Reproductions where it was held that the	15	non-provable liabilities and statutory interests
16	liquidator had in fact no power to pay a statute-barred	16	separately and how they work in the context of the
17	debt, is the way it was put in that case.	17	agreement. Of course, in general terms the best
18	Now, that might or might not be the right way of	18	established non-provable liability is unliquidated
19	analysing exactly what it is about that liability that	19	claims for damages in tort. They were the liabilities
20	means that it doesn't participate in the winding up at	20	that were under consideration in T&N. They were
21	all, but that is the thrust of what it is that the	21	considered by Lord Justice Lewison in the present case
22	draughtsman is driving at when he is looking at the type	22	at paragraph 24, and Lord Justice Briggs at
23	of liability that is to be disregarded for the purposes	23	paragraph 145.
24	of the solvency test.	24	Before 1986, as we know, all such claims would have
25	Of course, there may be other liabilities under	25	been non-provable, and that was an end to it. Even now,
	Page 93		Page 95
1	foreign laws which have similar qualitative	1	they are still only provable to the extent that the
2	characteristics which don't entitle them to participate	2	cause of action was complete at the insolvency date, or
3	in any insolvency.	$\begin{vmatrix} 2\\ 3 \end{vmatrix}$	the only missing element to complete the cause of action
4	So that is the first sort of head of submissions.	4	is actionable damage. That you get from the latest
5	The second is just, very briefly, before I turn to look	5	version of rule 13.12.2(b), that I think Mr Miles took
6	at questions of non-provability and statutory interests	6	you to.
7	separately, the regulatory context. I don't want to say	7	In the present case, the more relevant non-provable
8	very much about it but the judge dealt with the	8	claims are, of course, currency conversion claims. One
9	regulatory context of the subordinated debt agreement at	9	has to approach them from the same perspective, in light
10	some length in paragraphs 35 to 47 of his judgment, and	10	of the arguments that have been made by Mr Miles, that
11	paragraph 60 and following of his judgment.	11	what you get excluded from the subordination and
12	He said this at paragraph 63, page 621:	12	definition of solvency is non anything that is not
13	"All of this is consistent with the concept that	13	provable.
14	subordinated loan capital qualifying as part of the	14	I am not going to make any submissions about the
15	institution's regulatory capital is as against creditors	15	qualitative characteristics of a non-provable claim,
16	to be treated as part of the capital of the institution.	16	save and insofar as it is necessary to say this, in
17	It is not, of course, part of the share capital of the	17	order to put it in the context of the subordinated debt
18	company. It ranks ahead of any share capital in terms	18	agreement. The reason I am not is because my learned
19	of repayment."	19	friend Mr Dicker is essentially dealing with that and
20	Now, this may have been one of the parts of the	20	I don't want to trespass on what he is going to
21	judgment which Lord Justice Lewison had in mind at	21	be saying.
22	paragraph 29 when he said that many of the arguments on	22	But as a specious of claim, they exist and this
23	the appeal, and indeed parts of the judgment, proceeded	23	is currency conversion claims as what Lord
24	on the basis that LBHI2 was no more than a member of	24	Justice Briggs called a contractual shortfall or the
25	LBIE.	25	balance of the creditors' original contractual claim
	Page 94		Page 96

24 (Pages 93 to 96)

1	which has not been discharged by the process of early	1	applied in satisfaction of its liabilities. And we say
2	conversion, proof and dividend under the	2	that means all of its liabilities, because it then
3	statutory scheme.	3	goes on:
4	So that is the type of claim we are thinking about	4	" and, subject to that application, is to be
5	when we are trying to work out how it fits into the	5	distributed amongst its members."
6	structure of this agreement.	6	Now, Lord Justices Lewis and Briggs, at paragraphs
7	We say that non-provable liabilities, whether of the	7	60 and 185 of their judgments in the Court of Appeal
8	currency conversion variety or the non-provable claims	8	recognise that the liabilities here referred to must
9	in tort type of claim, or indeed anything else that	9	extend to statutory interest and non-provable
10	might be excluded by rule 12.3 because one must not	10	liabilities. They can't not, because you then have to
11	forget that rule 12.3 of the insolvency rules includes	11	go on and give some meaning to the words "and subject to
12	an admittedly very small body of claims which fall	12	that application". "That application" must be
13	outside the concept of provability; they are	13	a reference back to "in satisfaction of the company's
14	specifically excluded by the statute.	14	liabilities, be distributed amongst the members".
15	So when one is thinking about those claims, one has	15	So anything that is required to be distributed
16	to think about what is contemplated by the concept of	16	amongst the members can only be after the satisfaction
17	'in the insolvency', because what we are looking to see	17	of the liabilities.
18	is how those claims fit in the insolvency.	18	The simple way, we say, in which 107 must be read so
19	We submit that the concept of 'in the insolvency'	19	as to be consistent with that is that you construe the
20	must be anything which constitutes part of the	20	word "liabilities" as meaning all liabilities, whether
21	administration or distribution of the borrower's assets	21	or not provable; you include statutory interest, because
22	occurring in the course of the insolvency process.	22	on any view it has to be paid before members, and you
23	Secondly, it covers anything that the insolvency	23	read the obligation to pay pari passu not in a manner
24	officer is appointed to do. That is another way of	24	which applies across the entirety of the liabilities but
25	thinking about a very similar concept. And one gets	25	in a manner which applies across each category of
	Page 97		Page 99
1	a little bit of that from the structure of the agreement	1	liability otherwise defined. And that makes sense of
2	itself because the definition of 'insolvency officer' in	2	what, on any view, is a piece of relatively telescoped
3	the subordinated debt agreement which I don't think	3	drafting. We accept that. But it makes sense, and it
4	my Lords have seen before at 686: he is the person	4	is a point that was accepted by Lord Justice Briggs in
5	who is duly appointed to administer and distribute the	5	particular in paragraph 186 of his judgment.
6	borrower's assets in the course of the	6	LORD NEUBERGER: Thank you.
7	borrower's insolvency.	7	MR TROWER: My Lord, we will come back to that point again
8	So you have a relationship there between what is	8	in the context of other arguments, because it actually
9	going on in the insolvency and the normal case and the	9	transcends or crosses over into a number of the
10	insolvency officer who is appointed to do it. And we	10	arguments that are relevant on this appeal.
11	will come back and look at that because it chimes with	11	Now, in a compulsory liquidation the position is
12	what we say works within the English statutory scheme	12	provided for by reading not just section 143, which
13	anyway under section 107 and the duty which a liquidator	13	my Lords have been referred to, but 143 and 148
14	has in order to deal with the non-provable debts.	14	together. 143 is behind 1765, tab 22. And 148 is the
15	Now, so far as the process itself is concerned, it	15	next tab at page 1767.
16	is necessary to deal, we submit, with non-provable	16	Would my Lords just read the first of those two
17	claims before any distribution can be made to members.	17	subsections, subsections (1) in each of the sections.
18	It is a point that was recognised by my Lord	18	(Pause).
19	Lord Neuberger in Nortel in the Waterfall, but it has	19	LORD NEUBERGER: Yes.
20	statutory support. And it has clear statutory support,	20	MR TROWER: If one reads those together, the overall
21	we say.	21	obligation of a liquidator is plainly to collect the
22	In a CVL, a creditor voluntary, it is provided for	22	assets, apply them in discharge of the liabilities, and
23	by section 107, and we do submit that section 107	23	thereafter make payment to the persons entitled.
24	itself and we can turn it up again; it is F2,	24	Now, you don't find the pari passu aspect in here.
25	page 1760, behind tab 18 company's property is to be	25	You find the pari passu aspect in the rules. And that
	Page 98		Page 100
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25 (Pages 97 to 100)

1	is at rule 4.18(1). I think we have already looked at	1	in T&N as to how non-provable liabilities should be
2	it. I am afraid I have failed to make a note of where	2	dealt with demonstrates that that determination and
3	it is to be found in the bundles. At $4.18(1)$.	3	establishment that is to take place outside of the
4	LORD NEUBERGER: 4.31 you say?	4	insolvency and not in it, because he contemplated that
5	MR TROWER: Yes. One moment. Yes, it was tab 56 in bundle	5	as a matter of procedure there may be cases in which
6	F3, 1962.	6	litigation may be necessary to determine the extent of
7	LORD NEUBERGER: 4.18(1)?	7	the non-provable liability. And I think that was prayed
8	MR TROWER: Yes.	8	in aid, apart from anything else, against the background
9	LORD NEUBERGER: Right.	9	of pointing out that there is not a proof process in
10	MR TROWER: That is what applies in a compulsory	10	relation to non-provable liabilities which enables you
11	So that is the part of the code that deals with the	11	to do it other than through some form of litigation,
12	process itself. What assistance does one get from the	12	were there to be a dispute.
13	duties of the liquidator, the office holder aspect	13	Now, the way, of course, that would happen, were it
14	of this?	14	to be necessary, is described by Mr Justice David
15	Now, the process is obviously administered by the	15	Richards. For my Lord's note we don't need to turn
16	liquidator in complying with his duties to do what	16	it up it is page 1556 of the bundle, paragraph 107
17	section 107 contemplates is required to be done. In the	17	of T&N.
18	context of "non-provable liabilities", there is a little	18	The way it may be done is by lifting the statutory
19	statement in Lines Brothers by Lord Justice Brightman.	19	moratorium that otherwise exists in relation to
20	We have looked at Lord Justice Brightman's judgment in	20	litigation and permitting, if necessary, the
21	Lines Brothers already but it is F1, tab 15, page 1371.	21	commencement of ordinary legal process.
22	It is the paragraph that refers to Humber Ironworks,	22	Now, we say that even if it was correct to
23	between D and E, and my Lords will see the language of	23	characterise legal proceedings that were commenced in
24	duty.	24	that process as not a legal process in the insolvency
25	LORD NEUBERGER: Yes.	25	although we respectfully query whether that is really
	Page 101		Page 103
1			
1	MR TROWER: Now, as I think has been mentioned, the code is	1	right there are a number of aspects in fact to what
2	slightly different in relation to this now. But when	2	might happen which ensure that establishment and
2 3	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the	2 3	might happen which ensure that establishment and determination is capable of taking place in
2 3 4	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to	2 3 4	might happen which ensure that establishment and determination is capable of taking place in the insolvency.
2 3 4 5	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to members or the persons entitled, for him to comply with	2 3 4 5	might happen which ensure that establishment and determination is capable of taking place in the insolvency. The first point is that there is, on any view,
2 3 4 5 6	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to members or the persons entitled, for him to comply with the obligation to deal with any liabilities that had to	2 3 4 5 6	might happen which ensure that establishment and determination is capable of taking place in the insolvency. The first point is that there is, on any view, a necessity to apply to lift the statutory moratorium,
2 3 4 5 6 7	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to members or the persons entitled, for him to comply with the obligation to deal with any liabilities that had to be dealt with before there could be a return to members	2 3 4 5 6 7	might happen which ensure that establishment and determination is capable of taking place in the insolvency. The first point is that there is, on any view, a necessity to apply to lift the statutory moratorium, in order to commence ordinary legal process, which is
2 3 4 5 6 7 8	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to members or the persons entitled, for him to comply with the obligation to deal with any liabilities that had to be dealt with before there could be a return to members so that the company could then be dissolved, because one	2 3 4 5 6 7 8	might happen which ensure that establishment and determination is capable of taking place in the insolvency. The first point is that there is, on any view, a necessity to apply to lift the statutory moratorium, in order to commence ordinary legal process, which is something that has to happen on the insolvency, on
2 3 4 5 6 7 8 9	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to members or the persons entitled, for him to comply with the obligation to deal with any liabilities that had to be dealt with before there could be a return to members so that the company could then be dissolved, because one must not forget, in a liquidation context, what one is	2 3 4 5 6 7 8 9	might happen which ensure that establishment and determination is capable of taking place in the insolvency. The first point is that there is, on any view, a necessity to apply to lift the statutory moratorium, in order to commence ordinary legal process, which is something that has to happen on the insolvency, on any view.
2 3 4 5 6 7 8 9 10	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to members or the persons entitled, for him to comply with the obligation to deal with any liabilities that had to be dealt with before there could be a return to members so that the company could then be dissolved, because one must not forget, in a liquidation context, what one is talking about is an interminable process. I will	2 3 4 5 6 7 8 9 10	might happen which ensure that establishment and determination is capable of taking place in the insolvency. The first point is that there is, on any view, a necessity to apply to lift the statutory moratorium, in order to commence ordinary legal process, which is something that has to happen on the insolvency, on any view. Secondly, it is always possible to use the process
2 3 4 5 6 7 8 9 10 11	slightly different in relation to this now. But when one stops and thinks about it, it has to be part of the liquidator's duties, if he has to make a return to members or the persons entitled, for him to comply with the obligation to deal with any liabilities that had to be dealt with before there could be a return to members so that the company could then be dissolved, because one must not forget, in a liquidation context, what one is talking about is an interminable process. I will mention this again in the context of the bankruptcy	2 3 4 5 6 7 8 9 10 11	might happen which ensure that establishment and determination is capable of taking place in the insolvency. The first point is that there is, on any view, a necessity to apply to lift the statutory moratorium, in order to commence ordinary legal process, which is something that has to happen on the insolvency, on any view. Secondly, it is always possible to use the process of an application for directions under section 168,
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1	liquidator can always exercise his powers under	1	liabilities in the first place. So it is a different
2	section 4 of paragraph 2 to compromise or arrange with	2	thrust of argument that is made against us on this.
3	creditors or persons claiming to be creditors. It is	3	We respectfully suggest that the argument is wrong,
4	a very wide compromise power, and the administrators	4	for the reasons given by the judge, Lord
5	have a similar power. And it is what you would expect.	5	Justice Lewison. And the judge gives them as
6	If there is a liability that has to be decided, it can	6	paragraph 71 of his judgment and Lord Justice Lewison
7	be compromised as well as litigated.	7	gives them at paragraph 45 of his judgment, and we
8	But whatever the procedure that is used, in all	8	endorse and accept their reasons.
9	these cases the non-provable liability is being	9	Now, my Lord, can I say this about them. This part
10	established or determined in the insolvency for the	10	of my submissions will obviously chime with some of the
11	purpose of enabling the liquidator to comply with his	11	argument in relation to the scope and extent of the
12	duty to effect its payment or for the administrator to	12	section 74 liability. What I will endeavour not to do
13	comply with his duty to manage the affairs of the	13	is to repeat them when I have to come to deal with the
14	business and property of the company.	14	scope and extent of the
15	So in summary, because non-provable liabilities are	15	LORD NEUBERGER: You are going to deal with them at
16	required to be paid before a distribution is made to	16	this stage?
17	a company's members under either 107 or 143 and 148, it	17	MR TROWER: I will deal with them at this stage. I will,
18	necessarily follows that they must constitute	18	though, just mention how they fit into the section 74
19	an obligation which is payable or capable of being	19	context, obviously, but I will develop them in a little
20	established or determined in the insolvency of the	20	bit more detail at this stage
21	borrower within the meaning of the clause.	21	LORD NEUBERGER: It is sensible to do it at some stage so it
22	My Lord, can I, just really by way of postscript,	22	is fine to do it now.
23	say something about the bankruptcy case, Levi(?).	23	MR TROWER: This is the first time I have mentioned them, so
24	I realise there was a little bit of a debate which	24	I might as well deal with them now.
25	indicated that it was not going to get anyone terribly	25	LORD NEUBERGER: You have started, so you will finish.
	D 105		D 107
	Page 105		Page 107
1	far unless my Lords were moving in one direction or the	1	MR TROWER: There is that too.
2	other, but can I just explain why it is correct but it	2	The way it works, of course, is that 2.88(7) which
3	does not assist the analysis, in a few short sentences.	3	is the statutory provision with which we are concerned,
4	The reason is quite straightforward: in bankruptcy	4	imposes a statutory obligation to apply the surplus
5	there are some debts with which a trustee does not have	5	remaining after payment of the debts proved in payment
6	to deal, because they continue to be payable by the	6	of interest before applying that surplus for any
7	bankrupt after his discharge.	7	other purpose.
8	Those were the debts with which Levi was concerned.	8	Can we just turn it up. I have the references for
9	The same situation does not arise in a corporate	9	both of the bundles, depending which one my Lords have
10	insolvency, because although the company remains liable	10	marked. I am afraid there are two copies F1, 1189 or
11	for payment of the non-provable liabilities action,	11	F3, 2013.
12	something has to be done with them before the company	12	LORD NEUBERGER: The advantage of F3 is it has almost all
13	can be dissolved, and anything left is distributed on to	13	the relevant parts to it.
14	the members. So it is a different situation.	14	MR TROWER: Mr Miles had the luxury of starting, so he could
15	My Lord, then moving to statutory interest. Now,	15	catch me out because I had marked up that one.
16	our simple submission is that statutory interest is	16	LORD NEUBERGER: It is 2013. The advantage of opening,
17	plainly payable and capable of being established and	17	Mr Trower.
18	determined in the insolvency of the borrower, so long as	18	Yes.
19	there is a surplus. As far as it goes, on the sort of	19	MR TROWER: 2013 it is. I agree with Lord Kerr.
20	arguments that will also relate to non-provable	20	Now, we respectfully agree with the most accurate
21	liabilities, there is not a great deal between us on	21	characterisation of rule 2.88(7), which is that it is
22	that bit of the point.	22	a statutory statement of how the fund is to be dealt
23	Their primary argument is that statutory interest is	23	with. That is the starting point, which is Lord
24	not a sum liability or obligation payable or owing by	24	Justice Lewison's form of words. But what it does not
25	the borrower so as to fall within the definition of	25	do is expressly identify the person on whom the
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	Page 106		Page 108

27 (Pages 105 to 108)

1	obligation is imposed, and in particular it doesn't	1	we accept that. But they remain its assets, and there
2	expressly identify the administrator. So one has this	2	is no vesting of the assets in anybody else. So it
3	neutral, this passage language, neutral language in the	3	would be very peculiar, we respectfully suggest, for
4	sense of who it is on whom the obligation is being	4	there to be no obligation on the legal owner of the
5	imposed, so this means that although there is obviously	5	assets to effect the payment.
6	an obligation to effect an application in accordance	6	LORD NEUBERGER: Is it a meaningful description of
7	with the wording of the rule, the person or persons who	7	the administrator to describe him or her as the "agent"
8	may be subject to that obligation have to be identified	8	of the company or not?
9	from the statutory context. That is the way we would	9	MR TROWER: I was going to come on to that as
10	approach the question.	10	a second point.
11	Now, we say that the passive language, which we are	11	LORD NEUBERGER: Sorry.
12	perfectly content with as a concept	12	MR TROWER: No, I will deal with it straight away.
13	LORD NEUBERGER: That is just as well, because it is there.	13	Everything an administrator does he does as agent of
14	MR TROWER: It is there, indeed. I was trying to think if	14	the company. So of course we accept that one of the
15	there was any other way of describing it, and	15	functions which he carries out is to ensure that the
16	I certainly cannot think of anything better than the	16	application of the surplus is given effect in accordance
17	words my Lord has chosen. But it is consistent with	17	with rule 2.88(7). But paragraph 65 of schedule B1
18	a natural reading, which gives rise to a freestanding	18	and I don't think we have looked at this yet; it is
19	obligation on the person who holds, acquires or into	19	bundle F3, tab 3, page 1838.
20	whose hands the surplus is received, to comply with	20	LORD NEUBERGER: Yes.
21	the obligation.	21	MR TROWER: Tab 5, I am sorry.
22	Now, the form of compliance and the nature of the	22	LORD NEUBERGER: The administrator
23	obligations that arise in order to comply may depend on	23	MR TROWER: Sorry, it is tab 4. I gave you the wrong
24	the relationship which the relevant person has to the	24	tab number.
25	surplus. One can see that. So if one tests it this	25	Is that it now? 65?
	Page 109		Page 111
1	way: the two people most likely to have obligations in	1	MR TROWER: No, it is not, no. 69, I am sorry.
2	relation to the surplus are the liquidator and	2	LORD NEUBERGER: Page 1841
3	the company.	3	MR TROWER: Sorry, it is tab 7, page 1841.
4	So far as the company is concerned, there are two	4	LORD NEUBERGER: There is the answer. Thank you.
5	reasons why it is burdened with obligations in relation	5	MR TROWER: Sorry about that. It was a wrong reference.
6	to the application of the surplus.	6	So everything that he does is done by the agent, and
7	LORD NEUBERGER: You say "the liquidator"; at the moment we	7	it is as simple as that. But it is important to bear in
8	are looking at	8	mind that none of this is in inconsistent with the fact
9	MR TROWER: Sorry, my Lord, that was a slip; I meant to say	9	that the administrator may also himself be susceptible
10	"administrator".	10	to process to enforce the application of the surplus.
11	LORD NEUBERGER: I was not being pedantic; I just wanted to	11	The mere fact that we suggest that this rule imposes
12	make sure I didn't miss something.	12	an obligation on the company doesn't mean to say that
13	MR TROWER: Very important, and I am grateful.	13	the court would not enforce compliance of the
14	LORD NEUBERGER: That is fine.	14	administrator with his obligations to ensure that the
15	MR TROWER: There are two reasons why, as far as the company	15	surplus was applied in accordance with the contemplation
16	is concerned, the surplus is burdened with an obligation	16	of the rule.
17	by it in relation to the applications of the surplus	17	There is a case and perhaps, seeing the time,
18	towards payment of statutory interest. The first is	18	I can just finish with this before the short
19	that the statutory interest is payable out of the	19	adjournment. There is a case referred to in the cases,
20	surplus in its estate, which is the most sort of basic	20	called HIH, which eventually made it to the House of
21	point, we respectfully suggest. The assets are its	21	Lords, but it is the judgment of Mr Justice David
22	assets. It is core to the whole structure of	22	Richards at first instance on page 2653, F5, tab 2,
23	liquidation that they remain its assets. Of course, it	23	where he and I will just give my Lords the reference.
24	holds its assets to be applied in accordance with the	24	We don't, I think, need to turn it up.
25	statutory scheme, that is Ayerst v C&K Construction, and	25	What it demonstrates is that a distribution of the
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	Page 110		Page 112

28 (Pages 109 to 112)

1	assets without regard to properly provable claims gives	1	itself inconsistent in any way with the existence of a
2	rise to two consequences. The first is the liability of	2	liability on the company. That being a liability for
3	the liquidator or the administrator for breach of duty	3	present purposes within the meaning of the sub-debt
4	and the second is a continuing obligation on the company	4	agreement. The same or very similar point will apply in
5	for payment of a proved claim.	5	due course when I come on to explain our submissions in
6	LORD NEUBERGER: Paragraph? Page?	6	relation to the liability of a company for the purposes
7	MR TROWER: 2653.	7	of section 74.
8	LORD NEUBERGER: Paragraph 116, I think. There is a duty	8	So that is, I think, where we finished just before
9	there on the	9	the short adjournment. My Lord, can I just say, just
10	MR TROWER: 116, 2652.	10	for my Lord's note, really, more than anything else:
11	LORD SUMPTION: He is referring to provable claims.	11	I mentioned Ayerst v C&K Construction before the short
12	LORD NEUBERGER: What you say there is, if he doesn't comply	12	adjournment when I was making a submission to my Lords
13	with his duty, there is a claim against him. And where	13	about how the assets remained in the ownership of the
14	do we see the claim against the company?	14	company notwithstanding the introduction of the
15	MR TROWER: Well, he will not have paid the proved claim, so	15	liquidation statutory scheme.
16	the claim against the company will inevitably continue	16	Lord Collins, in the Belmont case, referred to
17	to subsist.	17	a similar concept in the context of the administration
18	The mere fact that if you have a proved claim which	18	statutory scheme. We don't need to look at it, I don't
19	has not been discharged by payment, the company remains	19	think. It is in the bundle, F4, tab 9, 2227. He
20	liable in respect of it. It is as simple as that.	20	mentions the point in paragraphs 1 and 4 of his
21	The point I am making simply is that the mere fact	21	judgment. And Mr Justice David Richards does the same
22	that there is an obligation of the office holder to	22	in a case called the Football League case, at paragraphs
23	apply the assets does not of itself have any effect on	23	101 and 102, F6, tab 7, 3149. It is just so my Lords
24	the discharge of the underlying obligation. You have	24	can see how in both insolvency contexts one has the
25	two separate obligations going hand in hand there.	25	concept of a scheme being imposed on top of the assets,
	Page 113		Page 115
1	LORD NEUBERGER: You have effectively the contractual		
1			which are otherwise assets that remain in the
2	-		which are otherwise assets that remain in the
2	obligations of the company and the statutory obligation	2	company's ownership.
3	obligations of the company and the statutory obligation of the office holder.	2 3	company's ownership. My Lord, I am still on the theme of the interest
3 4	obligations of the company and the statutory obligation of the office holder. MR TROWER: Yes. And what one has here is a structure under	2 3 4	company's ownership. My Lord, I am still on the theme of the interest obligation being more than simply a direction to the
3 4 5	obligations of the company and the statutory obligation of the office holder. MR TROWER: Yes. And what one has here is a structure under 2.887 which contemplates the imposition, we suggest, of	2 3 4 5	company's ownership. My Lord, I am still on the theme of the interest obligation being more than simply a direction to the administrators, and therefore being a liability that we
3 4 5 6	obligations of the company and the statutory obligation of the office holder.MR TROWER: Yes. And what one has here is a structure under 2.887 which contemplates the imposition, we suggest, of two obligations which have different qualities to them	2 3 4 5 6	company's ownership. My Lord, I am still on the theme of the interest obligation being more than simply a direction to the administrators, and therefore being a liability that we say constitutes a liability of the company's.
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29 (Pages 113 to 116)

1	Davies was considering the meaning of the phrase "debts	1	a liability of the borrower's and a creditor's
2	and liabilities" in legislation going back to section 10	2	entitlement to interest accruing post-liquidation on
3	of the Supreme Court of Judicature Act 1875. The	3	exactly the same debt.
4	question in that case was whether the company was	4	We submit this is not what the draughtsman could
5	insolvent in circumstances where there was a surplus of	5	have intended. It is one thing to look at it in the
6	assets over all proved debts.	6	context of a statutory code and we obviously make
7	It was not an issue about whether it had nothing	7	similar points but it is one thing to look at it in
8	to do with the contributories' liability to contribute	8	the context of a statutory code, but when thinking about
9	to the assets of the company or anything like that. The	9	it in a contractual context, which this is, for capital
10	passage that is relied on by the other side is between D	10	adequacy purposes, we submit it would be a very odd
11	and the end of the paragraph, on page 223 of 1386 of	11	result, because of course pre-insolvency interest is
12	the bundle.	12	provable, we know that, so clearly doesn't fall, even on
13	LORD NEUBERGER: Thank you. Yes.	13	my learned friend's case, to be disregarded for the
14	MR TROWER: Then if my Lords would turn up in bundle D,	14	purposes of clause 5.2 (a).
15	tab 3, page 578, paragraphs 194 and 195 of Lord	15	It is plainly payable, plainly capable of being
16	Justice Briggs's judgment.	16	established or determined in the insolvency of
17	LORD NEUBERGER: Yes. Paragraph?	17	the borrower. Both categories of interest are payable
18	MR TROWER: Sorry, 193.	18	to compensate the creditor for being kept out of his
19	LORD NEUBERGER: Thank you. Don't apologise.	19	money. They are both an important entitlement, we
20	I should apologise.	20	suggest, for creditors, whose potential losses are meant
21	MR TROWER: 193 through to 195.	21	to be protected by the capital adequacy rules. But more
22	LORD NEUBERGER: Thank you.	22	importantly on this point, there is no good reason why
23	MR TROWER: He gives an explanation as to why the judgment	23	the intervention of the insolvency should make all the
24	of Mr Justice Mervyn Davis really does not help	24	difference as to whether the subordinated debt should
25	very much.	25	rank ahead of or behind the undischarged obligation to
	-		
	Page 117		Page 119
1	LORD MEUDERCER D'14		
1	LORD NEUBERGER: Right.	1	pay interest in respect of a particular period.
2	MR TROWER: As I say, for my Lord's notes, Lord	2	Put another way: why, we ask, should the interest
2 3	MR TROWER: As I say, for my Lord's notes, Lord Justice Lewison's take on this judgment is at paragraphs	2 3	Put another way: why, we ask, should the interest loss be absorbed only if and to the extent that it is
2 3 4	MR TROWER: As I say, for my Lord's notes, Lord Justice Lewison's take on this judgment is at paragraphs 46 and 47. Mr Justice David Richards judgment is at	2 3 4	Put another way: why, we ask, should the interest loss be absorbed only if and to the extent that it is sustained in the pre-insolvency period? There is no
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1	interest is to be paid after payment of proved debts,	1	it Mr Miles correctly accepted that it is possible. It
2	and that this is the same thing as expressly providing	2	was the subject matter of the decision of
3	for statutory interest to rank junior to the	3	Mr Justice Vinelott in one of the Maxwell cases and
4	subordinated liabilities. We say that argument is wrong	4	Professor Goode has agreed that it can be done. So the
5	for two reasons.	5	bottom line is that, and this is the first bit, as
6	The first of is the reason given by the judge in	6	a matter of construction, we say, in accordance with
7	paragraph 74 and 75 of his judgment, page 624 of the	7	what is legally possible rule 2.88(7) does not use the
8	bundle.	8	word "debt proved" to include debts which the creditor
9	"Rule 2.88(7) provides for payment of interest tab	9	has contracted not to prove. That is the first point.
10	made after payment of the debt is proved. It doesn't	10	The second point is that the rule, that is 2.88(7),
11	use language which comes near an expression that the	11	surplus is what is left after payment of the debts
12	interest is to rank junior to something else, nor to	12	proved. Now, payment of the debts proved is payment of
13	express that the ranking is to be junior to the	13	them at the amount for which they were admitted to
14	subordinated liabilities. It is simply payment after	14	proof, which is a point made by the judge at
15	the debts proved."	15	paragraph 69. For so long as the interest and the
16	That is the first point. Secondly, the obvious	16	non-provable liabilities have not been paid, the
17	focus of the excluded liabilities definition is on	17	sub-debt can only on any view be valued at zero, and
18	junior subordinated liabilities. That is why the	18	everyone seems to accept that. So the surplus will be
19	language of ranking is used and why it refers to ranking	19	quantified on the basis that, until such time as the
20	after the subordinated liabilities.	20	interest and non-provable liabilities are paid, that is
21	It is what makes sense in the context of	21	the position. The surplus will be quantified on that
22	an internationally applicable cross-jurisdictional	22	basis, until such time as the interest and non-provable
23	standard form, where it will often not be the case that	23	liabilities are paid.
24	post-insolvency interest is even arguably subordinated.	24	So to that extent
25	In any event, the argument does not work at all unless	25	LORD NEUBERGER: Valued at zero, if it is obvious that they
20	in any event, the argument does not work at an amoss		
	Page 121		Page 123
1	the debts, the subordinated liabilities, are debts	1	are going to be paid, then on the face of it it would
2	proved within the meaning of rule 2.88(7), which is the	2	have some value.
3	subject matter of our cross-appeal.	3	MR TROWER: That is one of the problems that we suggest
4	We say they cannot be. We say that the subordinated	4	arises from the judge's analysis of this being
5	liabilities cannot be debts proved because if LBHI2	5	
		1 5	a contingent liability. There is a possibility that
6	seeks to prove them, it will be acting in breach of the	1	a contingent liability. There is a possibility that it he says in his judgment that you value it at zero.
6 7	seeks to prove them, it will be acting in breach of the term of the sub-debt agreement. I will explain our	6	it he says in his judgment that you value it at zero.
7	term of the sub-debt agreement. I will explain our	6 7	it he says in his judgment that you value it at zero. LORD NEUBERGER: Yes, he does.
7 8	term of the sub-debt agreement. I will explain our submission in relation to that in just a moment, but	6 7 8	it he says in his judgment that you value it at zero. LORD NEUBERGER: Yes, he does. MR TROWER: Until such time as the liability falls in and
7 8 9	term of the sub-debt agreement. I will explain our submission in relation to that in just a moment, but what LBHI2 also say is that, because statutory interest	6 7 8 9	it he says in his judgment that you value it at zero.LORD NEUBERGER: Yes, he does.MR TROWER: Until such time as the liability falls in and the contingency is satisfied we have concerns about
7 8 9 10	term of the sub-debt agreement. I will explain our submission in relation to that in just a moment, but what LBHI2 also say is that, because statutory interest is not payable until there is a surplus after debts	6 7 8 9 10	it he says in his judgment that you value it at zero.LORD NEUBERGER: Yes, he does.MR TROWER: Until such time as the liability falls in and the contingency is satisfied we have concerns about that.
7 8 9 10 11	term of the sub-debt agreement. I will explain our submission in relation to that in just a moment, but what LBHI2 also say is that, because statutory interest is not payable until there is a surplus after debts proved within the meaning of rule 2.88(7), and because	6 7 8 9 10 11	it he says in his judgment that you value it at zero.LORD NEUBERGER: Yes, he does.MR TROWER: Until such time as the liability falls in and the contingency is satisfied we have concerns about that.LORD NEUBERGER: On that basis, all contingent debts will be
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31 (Pages 121 to 124)

1	interfere with the subordination.	1	liability. My Lord's approach to it means that there
2	LORD NEUBERGER: And which therefore would support the	2	would be an interference with that subordination, on the
3	principle that either you cannot prove or it is valued	3	assumption that the statutory interest constitutes
4	at nil.	4	a senior liability.
5	LORD REED: It is not so much a question of interpretation	5	I accept that one has to say that statutory interest
6	of the rule, is it, it is more that the contract	6	constitutes a senior liability, but the definition of
7	prevents you from asserting?	7	senior liability is very wide. It includes
8	MR TROWER: Indeed, my Lord.	8	contingent it includes every sort of liability.
9	LORD NEUBERGER: Either it entitles you to in order for	9	Which does perhaps bring me on to the restrictions
10	that provision to be effective, either you cannot prove	10	on proving element, because I think one has to develop
11	or you can prove but it is put in at nil, otherwise you	11	this submission in the light, obviously, of the
12	are in breach of	12	restrictions that are contained in clauses 4 and 7
13	MR TROWER: Otherwise you are in breach of the paragraph.	13	because, as my Lords know, the judge concluded that the
14	LORD NEUBERGER: I see the force of that.	14	subordination provisions do restrict and prevent the
15	MR TROWER: My Lord, absolutely has it.	15	sub-debt lender from proving and the Court of Appeal
16	Of course the critical point about all this is that	16	disagreed. We suggest that the judge was correct on
17	it is well established now, and that is the reason	17	this point and the contracting out of whatever rights it
18	I mentioned the number of ways in which it is well	18	may have to prove can be seen from paragraphs 4 and 7,
19	established, that you can contract out of the ability to	19	we suggest.
20	prove and contract out of the ability to share pari	20	The way it works is this, in our submission. The
21	passu.	21	first point is that paragraph 4 is subject in all
22	LORD NEUBERGER: You cannot contract into jumping up, but	22	respects to paragraph 5. So it is subject in all
23	you can contract into jumping down or jumping out.	23	respects to the subordination, and you get that from
24	MR TROWER: Indeed. Yes.	24	paragraph 4.1, which makes it necessary to read it as
25	LORD SUMPTION: If you can contract out of the right to	25	a clause which is subsidiary in its terms to the
	Page 125		Page 127
	1 age 125		1 age 127
1	share pari passu, why can you not put a valuation of	1	overriding nature of the subordination clause.
1 2	share pari passu, why can you not put a valuation of more than zero but that the result is simply that the	1 2	-
			overriding nature of the subordination clause. Paragraphs 4.4 and 4.7, which are on 688 and 689, provide for a single remedy to be available to the
2	more than zero but that the result is simply that the	2	Paragraphs 4.4 and 4.7, which are on 688 and 689,
2 3	more than zero but that the result is simply that the liquidator will not pay you until the preconditions have	2 3	Paragraphs 4.4 and 4.7, which are on 688 and 689, provide for a single remedy to be available to the
2 3 4	more than zero but that the result is simply that the liquidator will not pay you until the preconditions have been satisfied?	2 3 4	Paragraphs 4.4 and 4.7, which are on 688 and 689, provide for a single remedy to be available to the lender, but in all respects subject to the subordination
2 3 4 5	more than zero but that the result is simply that the liquidator will not pay you until the preconditions have been satisfied? MR TROWER: Well, if you contract the problem about that	2 3 4 5	Paragraphs 4.4 and 4.7, which are on 688 and 689, provide for a single remedy to be available to the lender, but in all respects subject to the subordination in clause 5. That single remedy is to institute
2 3 4 5 6	more than zero but that the result is simply that the liquidator will not pay you until the preconditions have been satisfied?MR TROWER: Well, if you contract the problem about that is that you are then proving, or then you are then	2 3 4 5 6	Paragraphs 4.4 and 4.7, which are on 688 and 689, provide for a single remedy to be available to the lender, but in all respects subject to the subordination in clause 5. That single remedy is to institute proceedings for the insolvency of the borrower, of LBIE.
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32 (Pages 125 to 128)

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1	suggest, was when in paragraph 39 Lord Justice Lewison	1	collective enforcement, a point in time may come at
2	elided the institution of the insolvency process and the	2	which you are entitled to prove, but it doesn't come
3	proof of the debt. It is one thing to start the	3	merely by the process, merely by instituting the
4	process, which may be of benefit to the creditor as it	4	process.
5	puts an insolvency officer in charge, but it is quite	5	Now, it is clear from the way that LBHI2 present
6	another to take any step within it to prove for the	6	their case on statutory interest that they contend the
7	debt, which is particularly the case if the proof has	7	fact of proving
8	any effect at all on the subordination of the creditor's	8	LORD SUMPTION: Can I stop you there. When you say a time
9	right, because the proof would then cut across	9	may come, what time do you envisage? After others have
10	paragraph 5, which is something that is plainly barred.	10	proved and received payments?
11	Sorry, my Lord?	11	MR TROWER: Yes.
12	LORD NEUBERGER: You are saying that he could apply to wind	12	LORD SUMPTION: So you then have a second round of proofs,
13	up but it doesn't mean to say he could prove?	13	do you, if there is a surplus after that stage is
14	MR TROWER: Yes.	14	reached?
15	What Mr Miles relied on were the words "enforcing	15	MR TROWER: Yes, because
16	payment". He said proof was obviously contemplated	16	LORD SUMPTION: That is an entirely neutral question.
17	because 4.4 refers to enforcing payment by instituting	17	MR TROWER: No, my Lord, sorry, I didn't intend to react in
18	proceedings for the insolvency of the borrower. The	18	the way my Lord might have thought I did.
19	answer to that and effectively he said that this	19	LORD SUMPTION: It was a bit more defensive than my question
20	carried with it the ability to submit a proof in the	20	was intended to
21	proceedings.	21	MR TROWER: It may require a process of proof at that stage,
22	Now, our answer is that it is not the case that	22	but there is nothing particularly surprising about that
23	Mr Miles gets any mileage from that submission, anyway	23	because what you have, what this is a contemplating, is
24	to the extent that a proof might be submitted in	24	a situation where a particular category of subordinated
25	competition with the unsubordinated creditors, because	25	creditor is agreeing that he is not going to participate
	D 120		Dec. 121
	Page 129		Page 131
1	that would cut across the subordination. The process of	1	in the collective distribution process, save for the
2	enforcing payment in the insolvency proceedings, as	2	purpose of instituting it if he wants to. He is not
3	constituted by clause 4.4, commences with the	3	going to participate in it until such time as those who
4	institution of the proceedings but it is only once the	4	rank ahead of him have been paid.
5	senior liabilities have been paid in full that the	5	LORD KERR: There is no distinction here between proving and
6	sub-debt holder is entitled to prove or, alternatively,	6	enforcing payment. The clause in its text at the moment
7	as the judge said in paragraph 69 of his judgment, to	7	suggests that you can institute proceedings, and it
8	require the admission of his proof, which is another way	8	depends what one means by proving. I mean is that
9	of putting it.	9	proving, once you institute proceedings?
10	So, put another way, the enforcement of payment by	10	MR TROWER: No, I would say not, my Lord. What we are
11	instituting proceedings for the insolvency of the	11	concerned about here is proving in accordance with the
12	borrower may carry with it the ability to prove a debt	12	statutory code under our insolvency legislation.
13	but not until such time as the statutory interest and	13	LORD NEUBERGER: Has such a person got a statutory power to
14	non-provable liabilities have been paid in full. So	14	wind up, to apply to wind up?
15	there is a timing restriction until such time as the	15	MR TROWER: He would potentially wind up as a contingent
16	subordination will no longer be impaired by the proof	16	creditor.
17	but it is not necessarily an absolute bar. So there is	17	LORD NEUBERGER: Right. Doesn't that mean that the judge
18	no inconsistency between the concept of enforcing	18	must be right that he is a contingent creditor, if he
19	payment and the concept of being limited simply to the	19	has the right to wind up, otherwise they are purporting
20	institution of the insolvency process.	20	to give him a right that the statute doesn't give him?
21	That makes, in our submission, coherent sense and	21	MR TROWER: My Lord, perhaps I have not made this clear.
22	consistent sense to the structure of the agreement as	22	I would suggest that the characteristics of the sub-debt
23	a whole. Your right as a subordinated creditor is to	23	agreement render the sub-debt lender a contingent
24	introduce the process of collective enforcement and, as	24	creditor.
25	a result of the introduction of the process of	25	LORD NEUBERGER: Within the meaning of the act?
	Page 130		Page 132

33 (Pages 129 to 132)

1	MR TROWER: Within the meaning of act.	1	So he comes in as a late prover and he is able to
2	What has happened under the sub-debt agreement is	2	prove in respect of the surplus and that, with respect,
3	that, qua contingent creditor, he has contracted out of	3	is what in a sense, there are similarities between
4	his right to prove. He has said "I am not going to	4	the rights which he has in respect of what is ultimately
5	prove", and therefore his debt will never be a debt	5	left over after everybody else has been paid in full and
6	proved within the meaning of 2.88(7), until such time as	6	the rights that arise in relation to statutory interest
7	everyone else has been paid.	7	for the interest creditors. There is a liability to
8	LORD NEUBERGER: But the as it were covenant not to prove is	8	them and they come in and take out of the surplus once
9	not expressed, as Mr Miles pointed out, but you say then	9	everybody else has been paid.
10	you work out how this works, it is part of what of he	10	LORD KERR: He is not so much a late prover, he is proving
11	has agreed to give up?	11	at the first opportunity available to him, according to
12	MR TROWER: Yes, because it is a remedy that is available to	12	you.
13	him and the only remedies that are sorry, I say it is	13	MR WOLFSON: Yes, I accept that. I certainly accept that.
14	a remedy available. That is the wrong impression. It	14	LORD KERR: I see. A second class prover.
15	is a remedy that would be but is not available to him	15	MR TROWER: He is a second class prover. He has agreed to
16	because he has contracted out of it under clause 4.	16	be a second class prover. I am very happy to put it
17	LORD SUMPTION: Does this depend upon the correctness of	17	that way.
18	your submission, that the pari passu rule is to be	18	LORD KERR: I think if your argument is right, he has no
19	applied separately to each category, including each	19	option to accept that he is second class.
20	subordinate category, so that when eventually the time	20	MR TROWER: Indeed.
21	comes there is an apparent surplus and you have a second	21	So, my Lords, that is why I put it as a timing
22	round of proofs, it is only proving and claiming a right	22	restriction. That is what we say it is. There is not
23	to have distributed to you the residue and not the whole	23	an absolute bar, it is a timing restriction.
24	estate?	24	LORD NEUBERGER: Under which provision is he then applying
25	MR TROWER: I wouldnt put it the way I would put it would	25	as a late prover?
	Page 133		Page 135
1	be slightly different, my Lord. The way I would put it	1	MR TROWER: He has a right to prove
1 2	is that it is not unusual for late provers to come in	1 2	
3	after a distribution has been made in an insolvency. It	3	LORD NEUBERGER: Under which part of insolvency rules is he applying?
4	does happen from time to time.	4	MR TROWER: Because he is
5	LORD NEUBERGER: Are they always people who could have	5	LORD NEUBERGER: No, which rule enables you to apply late?
6	proved at the beginning?	6	MR TROWER: Well, hang on, let me just think how I can do
7	MR TROWER: No. So I am dealing with my Lord, Lord	7	this. I am not sure we have got the late proving rules,
8	Sumption's point in a slightly different way to try	8	actually. Can I borrow somebody's red book?
9	an identify what I think the point that was put to me	9	I think probably rather than waste time, can I come
10	was how it was that this process fitted in with	10	back to that point. I will take my Lords through how it
11	section 107, and what I was saying	11	actually works.
12	LORD SUMPTION: (Inaudible) equivalent by implication under	12	LORD NEUBERGER: Possibly tomorrow we can have the rules, or
13	143 and 148.	13	copies of the rules. It may be it is agreed and this is
14	MR TROWER: Yes. What would happen, once everyone else has	14	an unhelpful investigation but if it isn't, then we
15	been paid in full out of the assets that were available,	15	ought to look at it.
16	a late prover can always come in and share in what is	16	MR TROWER: So, as I say, that is the argument in relation
17	left but he not disturb dividends already paid. That is	17	to the contracting out of the ability to prove.
18	basic rule.	18	What we submit also in relation to this is that, as
19	That is effectively what is happening under this	19	an alternative really, picking up the approach that Lord
20	contract because what is happening is that everybody	20	Justice Lewison adopted, if the debt is worth zero, that
21	else is getting payed in full under the initial proving	21	is the amount at which it should be admitted and, in
22	process and he has agreed to be a late prover and take	22	that sense, the interest obligation will arise under
23	whatever is left. He will not be proving in competition	23	rule 2.88(7) because the amount of zero for which it has
24	with anybody else who has already been paid because that	24	been admitted to proof means that there is no debt
25	is not how it works.	25	proved in respect of it which has to be discharged in
	Page 134		Page 136

34 (Pages 133 to 136)

1 accordance with rule 2.88(7) in order for the interest	 what the position is in relation to GENPRU is because it doesn't help for a number of reasons, including the fact
	2 doesn't help for a number of reasons including the fact
2 obligation to arise.	
3 LORD SUMPTION: So on that footing you submit an amended	3 it is not the regulatory rule pursuant to which the
4 proof when everyone has been paid, do you? With	4 document was drafted in the first place.
5 a different	5 LORD NEUBERGER: Thank you.
6 MR TROWER: If this was the correct analysis, that one had	6 MR TROWER: So our approach or our submissions in relation
7 a contingent claim which was only ever based at zero,	7 to the way in which paragraph 4.7 works are also
8 yes, you would submit an amended proof in due course	8 consistent with clause 7(e).
9 once the indebtedness had been discharged in full and	9 LORD NEUBERGER: 7(e)? Right.
10 you would then claim for whatever amount was owing in	10 MR TROWER: Yes, of the agreement, which my Lords find on
11 toto under the sub-debt agreement.	11 page 691.
12 So that is why we submit that the proof would	12 LORD NEUBERGER: " not to take any action whereby the
13 constitute a remedy that is barred under clause 4.7	13 subordination", et cetera?
14 because of the interference with and the cutting across	14 MR TROWER: Yes. So the argument is, the submission is,
15 of the subordination in clause 5.	15 that if by the very act of proving the interests that
16 Before I leave the question of proof, in their case,	16 would otherwise be payable can no longer be paid because
17 LBHI2 relied on a bit of GENPRU to show that proof is	of the way that 2.88 interrelates, the very act ofproving adversely affects the liability that would
18 not objectionable because I don't know whether	
19 my Lords remember this what they said was that GENPRU	
20 demonstrated that in a subordinated debt context it was 21 perfectly acceptable both to institute proceedings for	 LORD NEUBERGER: If it is recorded as having a value of nil, that doesn't matter.
	21 mar doesn't matter. 22 MR TROWER: It matters less.
 an insolvency and prove for a debt. The bit of GENPRU they relied on is in the bundles at F8, tab 4, 	LORD NEUBERGER: Why does it matter?
23 hey relea on is in the buildles at F8, tab 4,24 page 3799. What that demonstrates is that the	24 MR TROWER: It depends on what you mean by "debt proved" for
24 page 5799. What that demonstrates is that the25 regulators anyway regard proof as a remedy separate from	 the purposes of 2.88(7). I agree with my Lord, it
25 regulators anyway regard proof as a remedy separate from	25 the purposes of 2.86(7). Tagree with my Loru, it
Page 137	Page 139
1 instituting the proceedings, but the important point is	1 shouldn't matter at all, but there seems to be
2 that, if my Lords look at 2.2.159(3), which is at	2 an argument that "debt proved" in 2.88(7) means that the
3 page 3799, its availability as a remedy is only	3 debt that is being proved has to be paid in full, not
4 permitted where it doesn't prejudice the subordination,	4 just the amount for which it is entitled to be admitted
5 and one gets that from 2.2.159(4).	5 in proof.
6 LORD NEUBERGER: GENPRU is what?	6 LORD SUMPTION: Is a proof for a debt valued at zero, is it
7 MR TROWER: It is one of the regulatory rules, and there	7 a claim at all?
8 were two points I was going to make about this.	8 MR TROWER: It may not be.
9 LORD NEUBERGER: What status does it have?	9 LORD SUMPTION: In that case it is not a proof, is it?
10 MR TROWER: The status it has is that it is a successor to	10 MR TROWER: That is just because we have to put it at zero.
11 the rules under which the standard form which is in	11 If they only put it in for zero, it is probably not a
12 issue in these proceedings was produced.	12 claim at all, they probably haven't proved, so there is
13 LORD SUMPTION: It is simply the reason why there is	13 no debt proved.
14 a standard form.	14 LORD SUMPTION: Yes.
15 MR TROWER: Indeed. I am happy to adopt that. Although the	15 MR TROWER: I see what my Lord says, it probably is not
16 other point about this is that, actually, this	16 a claim at all.
17 particular standard form agreement was plainly not based	17 LORD KERR: As a matter of practical reality, it is unlikely
18 on GENPRU, it was based on the predecessor to GENPRU,	18 that a claim will be made for
19 which is called IPRU, which did not distinguish between	19 MR TROWER: For zero, yes.
20 instituting proceedings for the insolvency of a borrower	20 But the reality is that, if the right thing to do is
21 and proving.	21 to value it at zero, that is what it is submitted to
22 LORD NEUBERGER: So this a document we are using to construe	22 proof at, the debts proved will have been paid when zero
23 the contract even though it came into existence	has been paid on it, if you see what I mean.
24 afterwards?	24 In a sense there is an element of circuity about
25 MR TROWER: Indeed. The reason I am just telling my Lords	25 this debate, I accept that, but what the bottom line in
Page 138	Page 140

^{35 (}Pages 137 to 140)

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	ion to it is that, if there is any argument to the	1	rely on, as I have indicated, 4.77(e) and also 7(d),
2 effec	et, or if there is actually any consequence that	2	which is an attempt to obtain payment provision, which
3 inter	feres with the subordination in any way by reason	3	the subordinated creditor is also barred from doing,
4 of th	e proving of the debt, that constitutes something	4	save otherwise and in accordance with the terms of the
5 that	cannot be done under clause 4(7) and 7(e).	5	agreement.
6 LORD	NEUBERGER: It may not be a comment for you to answer,	6	That is page 691, volume D, tab 7, which is the
7 it ma	ay be more for Mr Miles but there could be said to	7	agreement itself.
8 be a	slight inconsistency with this and the currency	8	LORD NEUBERGER: Page what, sorry?
9 clain	n argument, to the extent that he gets two bites of	9	MR TROWER: 691.
10 the c	herry that he says the currency claim should not	10	LORD NEUBERGER: Thank you so much. Yes, I see.
11 get,	because he gets a nil admittedly it is a pretty	11	MR TROWER: The only other point that I wanted to make on
	nical bite but he nonetheless puts it in at nil	12	this part of the case, subject to any other balls
	then it springs back in full at a later stage, so it	13	my Lords have got to bowl at me, is in relation and to
14 coun	its twice, which is slightly inconsistent with one of	14	a point that I don't think was developed in oral
15 his a	rguments on the currency claim.	15	submissions but that was made by Mr Miles in his case,
	e can deal with that.	16	which was a submission that it somehow makes
	ROWER: Yes.	17	a difference that rule 2.88 provides for statutory
	he essential point here at the end of the day is	18	interest to rank equally whether or not the debts on
	the proof is a separate remedy and there is a bar	19	which it is payable rank equally.
	spect of it, in any event, under clause 4.	20	Now, I don't think my Lords have heard any
	NEUBERGER: Just picking up Lord Sumption's point a bit	21	submissions in relation to that bit of the rule at all.
	er, if effectively you have agreed that your proof	22	The purpose of the provision is to ensure that
	be valued at nil because that is what you say you	23	preferential creditors and non-preferential creditors
	agreed, it is a pretty odd proof.	24	share equally in any surplus in respect of interest
25 MR TR	ROWER: Yes.	25	entitlements. LBHI2 subordination, we say, necessarily
	Page 141		Page 143
1 1 0000			
	NEUBERGER: That is in a sense what you are	1	involves the contracting out of the right to share and
	ROWER: I don't submit that is the right way of	2	the surplus (Inaudibly) with the non-subordinated
	ysing what is going on here.	3	creditors, just as it necessarily involves the
	NEUBERGER: No, no, what I am saying is you can say it	4	contracting out of the right to a pari passu
1	etty odd.	5	distribution alongside the creditors in relation to
	ROWER: I can certainly say that, my Lord, yes, tainly can.	6	dividends on principal. It is as simple as that. So
	o I have taken my Lords to 7(e) sorry, I have	7	nothing further is gained in relation to that particular
		8	part of rule 2.88.
5	got to find where I had got to on my submissions. CLARKE: I was wondering where you have got to in your	9	My Lord, I was then going to move on to declarations
10 LORD 11 case		10	4 and 5, which is the Latin lacuna
	ROWER: My Lord, can I try and answer that. We were	11 12	LORD NEUBERGER: The point Mr Wolfson argued? MR TROWER: Indeed.
	of around about 61, is where we start with the	12	
	it about the sub-debt is not currently capable of	1	Can I just start with the shape of the case in
	g sorry, I should have given some references as	14 15	relation to this in our perspective. We seek to uphold the conclusion of the Court of Appeal. If we fail in
	nt along.	15	upholding the Court of Appeal's conclusion on the
	Thile we are there, the bit of our case up until	17	judge's declaration four, then we say that an accrued
	e is essentially dealing with the points more	17	right to statutory interest in the administration will
	erally on the construction and the cross-appeal in	19	be provable in a subsequent liquidation and,
	tion to the debt proved starts at paragraph 61; and	20	alternatively, we cross-appeal against the Court of
	bit that deals with the cross-appeal goes through to	20	Appeal's reversal on the judge's declaration five, which
	e 373, paragraph 70.	21	was the one which dealt with it being a non-provable
	NEUBERGER: Thank you.	23	claim.
	ROWER: So, my Lords, I think the only other point	23	The background to why it matters, just a few short
	eded to make in relation to debts proved is that we	25	submissions on that. As my Lords know, LBIE is not
	Page 142		Page 144

36 (Pages 141 to 144)

1	being wound up, it is in administration, but liquidation	1	liquidation. That is the summary of the concern.
2	is an exit route available. Whether that course is	2	As I understand it, as my Lord said, Mr Wolfson did
3	adopted will depend upon what is in the creditor's best	3	not rely on any of the policy justifications that were
4	interests as a whole, having regard amongst other things	4	relied on below but, by contrast, if I can put the
5	to the outcome of this appeal. The amount of statutory	5	positive point, the construction adopted by the Court of
6	interest payable on the debts proved is very	6	Appeal does have ample policy justification and it has
7	substantial. It has been in administration	7	ample policy justification in the sense that statutory
8	since September 2008 and statutory interest has been	8	interest is intended to compensate creditors and what
9	accruing at 8 per cent since then, or the contractual	9	one does with the solution that they adopt is anyway in
10	rate, if it is higher. So uncertainty or a risk of	10	part and I will come to the significance of the fact
11	a loss to some creditors as an entitlement to statutory	11	that it is only a partial solution in a moment but it
12	interest is quite significant and highly relevant to	12	does anyway in part resolve the issue.
13	deciding how to take matters forward from here.	13	LORD NEUBERGER: Plainly, otherwise it would not be worth
14	Now, the effect of the judge's declaration four	14	(Inaudible).
15	so if one were to go back to where the judge was	15	MR TROWER: Of course.
16	would be that a creditor of LBIE who has accrued	16	Going straight then to the rule to construe it and
17	an entitlement to statutory interest during the period	17	to give my Lords our submissions as to how it works
18	of administration but has not been paid will lose that	18	LORD NEUBERGER: Yes.
19	entitlement upon LBIE moving into liquidation and the	19	MR TROWER: We were looking at it in F3, weren't we?
20	creditor is not entitled to it. We have got what was	20	LORD NEUBERGER: That's right. The joy of having it in more
21	described somewhere as a black hole, I think. Creditors	21	than one place.
22	simply lose an entitlement. We submit that it is	22	MR TROWER: Sorry, I have already complained to Mr Miles
23	exposes a lacuna in the law. No policy justification is	23	about his use of this volume. Too late.
24	suggested and the judge accurately summarised the	24	It is page 2013 in 3.
25	consequences in paragraphs 119 and 121 of his judgment.	25	So it applies to a surplus in the administration and
	Page 145		Page 147
1			
1	He says:		the surplus is what is left after payment of the debts
2	"There would seem to be no purpose served in	2	proved. The rule then provides for how the surplus is
3	a denial of any interest during the period of	3	to be applied, and what we say is I have already
4	an immediately preceding administration or liquidation. That there was a policy justifying such a denial would	4	submitted in another context that it imposes obligations
	appear to be demonstrated by the amendments made to rule	5	on the company, but it doesn't impose any restrictions
6 7	2.88 with effect from April 2010, which ensure that in	6	on who specifically is to give effect to the
8	an administration which has been immediately preceded by	7	application, which is consistent with the submissions
0 9		8	I made on the rule amounting to a statutory instruction.
	a liquidation, statutory interest is payable in respect of the period"	9	As a matter of straightforward language, it is not
10		10	expressed as a direction of the administrator, although
11 12	LORD NEUBERGER: Mr Wolfson has realistically conceded the marita. That is not the issue	11	I would certainly accept that the legislative intent is
12	merits. That is not the issue. MR TROWER: No, I understand that, but it is important	12	that he should effect the application if the time for
13		13	doing so arises while he still has the administration of the surplus in his hands, but if he goes out of office
14	that yes, and I will say no more about them. It is obviously relevant to the approach that my Lords take in	14 15	the surplus in his hands, but if he goes out of office
15	relation to what it is that one can construe from the	1	and is replaced by a liquidator, our submission is that the statutory instruction to apply the surplus in
10	wording of the rule.	16	the statutory instruction to apply the surplus in $2,82,(7)$ continues to subject binding
17	LORD NEUBERGER: I understand.	17 18	accordance with 2.88 (7) continues to subsist binding the surplus in the bands of the persons into whose
18	MR TROWER: The particular concern, and I alluded to this	18	the surplus in the hands of the persons into whose
20	when I was opening this bit of our response to the	20	control it passes. It is said by Mr Wolfson that the solution adopted
20	appeal, is that it will have a distorting effect if the	20	It is said by Mr Wolfson that the solution adopted by the Court of Appeal constitutes only a direction to
21	judge's declaration is restored on insolvency decision	21	the administrators and is not part of the waterfall in
22	making, in the sense that it will serve to cause	22	
23	a company, or may serve to cause a company to stay in	23	the winding up. The first thing he does is he relies on those rules which govern the introduction of rule 2.88.
25	administration when it ought to be going into	24	That is the rule at the very beginning of chapter 10,
			That is no rule at the very beginning of enapter 10,
	Page 146		Page 148

37 (Pages 145 to 148)

1	2.11(d). He also relies on 2.68(1), and so you get 2.68	1	it doesn't do so expressly. On the other hand, you can
2	is at the beginning of tab 74 on 1988.	2	say this is unusually expressed, in the passive sense,
3	The way we would suggest my Lords ought to approach	3	not specifically addressed to the administrator.
4	this sort of argument is that these rules operate so as	4	MR TROWER: My Lord, indeed.
5	to cause the provisions of chapter 10, which obviously	5	LORD NEUBERGER: For what it is worth.
6	include 2.88(7), to be engaged in the first place, but	6	MR TROWER: My Lord, indeed, and I think I can at the very
7	they say nothing about causing the effect of any one of	7	least say that there is a clear argument that is open to
8	the rules to cease or to be extinguished, once the	8	us which has real legs, which would not be open to us
9	status of a company as being one in administration comes	9	if, as a matter of construction, there was a very
10	to an end. We suggest that it would actually be	10	limited provision in relation to the role of an office
11	a surprising result if the company were relieved of	11	holder, although even then actually, it is in
12	a statutory liability to which it had become subject in	12	a slightly different context from the one we are looking
13	the course of administration, merely because it moved	13	at now, because we are looking here at the statutory
14	into liquidation and we suggest that it is more	14	instruction but even then the office holder in the
15	appropriate to look it the other way round from the way	15	form of the administrator acts as agent for the company,
16	round that Mr Wolfson looks at it. We would suggest	16	so one sort of gets there by a different way.
17	that that would require explicit words, "once something	17	LORD NEUBERGER: It is introduced by 2.68 that talks about
18	has become", "an obligation has been imposed".	18	the administrator doing something, "the administrator
19	So we submit that if a right to payment has been	19	makes or proposes to make" so it might be said that
20	granted by one part of the statutory scheme, which it	20	rather flavours it in suggesting this is all to do with
21	has under rule 2.88(7), particularly where it is	21	what the administrator must or must not do.
22	expressed in passive terms, clear words would be needed	22	MR TROWER: No, I see that the focus of the rule is plainly,
23	to remove the accrued right merely by reason of the fact	23	this part of rules, is plainly how it is that there is
24	that the company moves from one process to another.	24	going to be a distribution of assets within
25	LORD NEUBERGER: Are there any other parts of part 2 that	25	a distributing administration and of course there are
	Page 149		Page 151
1	impose obligations on the company rather than the	1	going to be elements of the way this is characterised
2	administrator?	2	where one can see that the focus is on what it is that
3	MR TROWER: We could not find anything that dealt with it in	3	an administrator has to do.
4	any sort of explicit way.	4	I would perfectly accept that, but that doesn't
5	LORD NEUBERGER: Because there are plenty of provisions that	5	really, in our submission, meet the point
6	plainly impose provisions on the administrator.	6	LORD NEUBERGER: I see.
7	MR TROWER: Indeed, my Lord. The closest we actually got	7	MR TROWER: which the question is, at the end of the day,
8	was the paragraph 99 provision in schedule B1 which	8	whether rule 2.88(7) gives rise to something which does
9	deals with charging costs and expenses when	9	more than constitute a statutory direction. It plainly
10	an administrator goes outs of office I was going to	10	does constitute a statutory direction as a matter of
11	come to my submissions on that a bit later but that	11	implication. I don't resile from that. But the
12	is expressed in slightly more passive terms but simply	12	question is whether it does more than that. I mean one
13	finding situations in which there is imposed without	13	of the reasons it does a little bit more than that is
14	identifying the obligor an obligation for something to	14	the point that my Lord has made about the passivity of
15	be done expressed in the terms of 2.88(7), we couldn't	15	the way in which it is expressed.
16	find anything that correlated.	16	So there obviously are some categories of financial
17	LORD NEUBERGER: Is there anything that expresses and	17	obligation where this argument would not be open to us,
18	imposes I repeat the question on obligation on the	18	and this way of looking at the rule would not be open to
19	company as opposed to the administrator?	19	us, but we do respectfully submit that this is a rule
20	MR TROWER: No, I don't think there is. I am not sure	20	which does appear to be expressed in very broad terms
21	I actually carried out that exercise in that form, but	21	indeed, and which is expressed in terms which impose
22	we will check it overnight if we can find anything.	22	both in personam obligations on people, namely the
23	LORD NEUBERGER: It can be said against you that there is	23	office holder and the entity, and they attach the asset
24	nothing that imposes an obligation on a company, and it	24	concerned.
25	is a bit odd if this does, as it were, particularly as	25	It was really at the core of Mr Wolfson's
			· · · ·
	Page 150		Page 152

38 (Pages 149 to 152)

1	submissions that the Court of Appeal's construction	1	undischarged rights of the administration creditors to
2	causes a breach of the liquidation waterfall when it	2	receive interest.
3	came to it. That was one of the core points that he	3	LORD NEUBERGER: We have that.
4	made. He said that, well, there is a problem with this	4	MR TROWER: One needs to bear in mind in this context that
5	approach because what you are doing is construing rule	5	right may arise in relation to all or any part of the
6	2.88(7) in a manner which interferes with the way in	6	administration creditors' entitlement statutory
7	which the statutory liquidation scheme works, once the	7	interests, so you could have a situation where some but
8	assets have passed into the hands of a liquidator.	8	not all of the interest had been paid prior to
9	We respectfully disagree with that. The reason we	9	the company moving from administration into liquidation.
10	disagree with that is that the assets which come into	10	We are positing an example at a relatively extreme end
11	the hands of the liquidator, to the extent that they	11	of the factual scenario but it could arise, this issue,
12	represent the surplus after payment of proved claims in	12	where there has been a distribution in respect of
13	the administration, only come into his hands subject to	13	interest but for whatever reason there is an urgent need
14	the statutory instruction that they be applied in	14	to go into liquidation maybe because assets have not yet
15	payment of administration statutory interest.	15	been realised, but you still need to go into
16	It follows that the unpaid interest creditors'	16	liquidation, and the question then is how does this
17	rights are not just in personam rights against the	17	statutory instruction work possibly in relation to only
18	company, they are also rights that attach to the	18	a relatively small element of the interest obligation.
19	surplus.	19	So the consequence of this structure is that anyone
20	A statutory instruction which restricts the use to	20	who finds themselves in possession or control of assets
20	which an asset can be put until an obligation is	21	which constitute the administration surplus, which for
22	discharged by application of that asset leaves, in our	22	present purposes means either the administrator or the
23	submission, that asset encumbered and means that it	23	liquidator, is required to give effect to the
24	never falls within the free disposition of the recipient	24	application and it includes the company, it includes the
25	until the obligation has been discharged. That is the	25	liquidator once he goes into office, and it is
25	until the obligation has been discharged. That is the		inquitation onloo no good into onnoo, and it is
	Page 153	ļ	Page 155
1	way we suggest one can characterise the nature of the	1	a perfectly rational policy approach which preserves and
2	statutory instruction.	2	protects rights once assets have been transferred to
3	LORD NEUBERGER: You say it is a statutory bar on the money	3	another process with a different statutory scheme.
4	being dealt with, effectively?	4	LORD NEUBERGER: Your point really is it is a general
5	MR TROWER: Effectively.	5	direction. It isn't addressed to anybody and it is just
6	LORD NEUBERGER: However one characterises it a trust or	6	a bar on anyone distributing before it is applied, and
7	whatever may not be very helpful.	7	that is the end of it.
8	MR TROWER: One of the points we made in our case was we	8	MR TROWER: Yes.
9	prefer, and respectfully commend, Lord Justice Lewison's	9	Just one point, before I go to paragraph 99, which
10	approach that, really, you don't need to try and	10	is the next sort of theme, I think an ultra vires issue
11	shoehorn it into some sort of private law Quistclose	11	which arises in relation to the liquidation waterfall,
12	type analysis, it is a simple question of statutory	12	I think some form of ultra vires issue was suggested by
12	construction as to what this rule does.	12	Mr Wolfson. We say there is absolutely nothing in this.
13	So what happens is that the rights under the rule	13	The rule is simply providing for how the administration
14	arise immediately that the surplus comes into existence	14	interest is to be paid, and that is obviously something
15	and they then attach to the surplus, and the attachment	15	
10	protects the obligation to pay interest on the debts	10	the rule making bodies or authorities have got the power to do.
18	proved, a liability which is discharged pro tanto by	17	It is a rule making power that arises in the
19	payment and may be discharged pro tanto by payment	10	administration, and it is in the administration that the
20	within the administration or pro tanto by payment once	20	
	main the administration of pro-tanto by payment once		statutory right is granted and acquired and the
	the assets subject to the encumbrance come into the	1 21	
21 22	the assets subject to the encumbrance come into the hands of anybody else	21	obligation is imposed. Merely because it has effect in the liquidation waterfall is paither here nor there. So
22	hands of anybody else.	22	the liquidation waterfall is neither here nor there. So
22 23	hands of anybody else. So the consequence is that the surplus only forms	22 23	the liquidation waterfall is neither here nor there. So it is really the ultra vires issue, we respectfully
22 23 24	hands of anybody else. So the consequence is that the surplus only forms part of the liquidation estate out of which the	22 23 24	the liquidation waterfall is neither here nor there. So it is really the ultra vires issue, we respectfully suggest, has nothing in it.
22 23	hands of anybody else. So the consequence is that the surplus only forms	22 23	the liquidation waterfall is neither here nor there. So it is really the ultra vires issue, we respectfully
22 23 24	hands of anybody else. So the consequence is that the surplus only forms part of the liquidation estate out of which the	22 23 24	the liquidation waterfall is neither here nor there. So it is really the ultra vires issue, we respectfully suggest, has nothing in it.

39 (Pages 153 to 156)

1	MR TROWER: Next, paragraph 99, schedule B1, at page 1867,	1	commencement of the earlier of two successive insolvency
2	that is bundle F3, tab 21, page 1867. It is said by	2	processes in particular context, and in particular it
3	Mr Wolfson that this supports LBL's position because it	3	doesn't deal with two issues: it doesn't deal with the
4	shows that where the legislature intends to create	4	position of creditors who only prove in the later
5	a charge to preserve in a liquidation accrued rights	5	liquidation so you have got those categories of
6	and in this case it is a former administrator's costs	6	people who are not protected and it only applies
7	and expenses and certain other debts and liabilities	7	where chapter 10 of the rules applies in the first
8	it does so by express words. The words that matter are	8	place, in other words where you have a distributing
9	paragraph 99.1, 99.2 and 99.3, and, my Lords, if you	9	administration.
10	would just read those, you will get the theme of the way	10	In an appropriate case, these considerations will be
11 12	it works.	11 12	of relevance to administrators when determining whether
12	We say there isn't substance in this submission, because obvious implication is just as good as express	12	or not it is in creditors' interests for the company to
13	words. Actually, rather a better way of putting is may	13	move into liquidation. On one view, a partial answer is better than none, but on one level one the first of
14	be that there are a number of different statutory	14	those differences is not something that ought to give
15	devices that are capable of being used which achieve	15	rise to too much concern as a matter of policy. What
17	ultimately the same result.	17	one is talking about here is non-protection of the
18	LORD NEUBERGER: Your point is that this specifically	18	rights of creditors who only prove later in the
19	applies to a certain point, whereas the other provision	19	liquidation. So they haven't exercised their proving
20	is a general provision which is a general application.	20	right at the same time as everybody else anyway.
21	MR TROWER: It is a general application, that's right.	21	Of course I accept that a coherent, properly
22	LORD NEUBERGER: I understand. Thank you.	22	structured scheme would probably deal with that, and
23	MR TROWER: I think it was also said at one stage during	23	I am not intending to submit that we have a perfect
24	Mr Wolfson's submissions that the approach that we had	24	solution here of course I am not but I am saying
25	adopted gave rise to difficulties for liquidators	25	that the fact that there is still an issue in relation
	Page 157		Page 159
1	because they were going to have to administer assets	1	to this particular category of creditor is not a matter
2	that were subject to encumbrances and work out how much	2	of significant concern.
3	was claimed in administration, and so on and so forth,	3	LORD SUMPTION: That approach assumes that the object of the
4	but we respectfully suggest there is nothing in that	4	exercise is to navigate one's way around these
5	submission at all. It is often that the case that	5	provisions in order to achieve a result that is not
6	liquidators receive assets that are encumbered in	6	provided for by any of them. If what we are actually
7	some way by people's rights, and they then have to work	7	trying to do is to work out what they mean, it must be
8	out as part of the process of liquidation what it is	8	perhaps a rather stronger argument than you give it
9	that you do with the right and how extensive the right	9	credit for that your submissions result in a certain
10	is and the extent to which the relevant asset is	10	incoherence, a different incoherence maybe to the
11	encumbered.	11	alternative but incoherent anyway.
12	LORD NEUBERGER: It is also said that it only deals with	12	MR TROWER: Yes, well, of course, if one ends up with
13	some problems, not with others.	13	a solution which is not a perfect solution, that gives
14	MR WOLFSON: Sorry, what?	14	rise to the question in one's mind that maybe one has
15	LORD NEUBERGER: Your solution still leaves some people out	15	not come up with the right solution. I accept that.
16	in the cold.	16	But what we are carrying out here is a comparative
17	MR TROWER: Yes, and, actually, conveniently, my Lord, I was	17	exercise between a number of different alternative
18	just about to come on to that submission, so a well	18	constructions of the rule and asking ourselves which is
19	timed intervention because	19	the construction that most accurately reflects the
20	LORD NEUBERGER: Thank you.	20	policy that one
21	MR TROWER: Yes. That didn't come out quite right.	21	LORD SUMPTION: There is a third possibility, isn't there,
22	We of course accept that the solution does not solve the method in its entirety because it does not have the	22	which is that the rule simply does not provide for what
23 24	the problem in its entirety because it does not have the	23	you are seeking anyway, which is the submission against
24 25	same effect as the amended rule 2.88(7), which makes statutory interest payable on debts proved from the	24 25	you? It is, in other words, a lacuna. LORD NEUBERGER: Exactly. It is all very well talking about
23	statutory interest payable on debts proved nom the	2.5	LORD REUDERGER. Exactly. It is all very well taiking about
	Page 158		Page 160

40 (Pages 157 to 160)

1 policy, but you say the act if on any view, there is 1 approach section 199. And the point that polication to that, but if 3 a confirms that there is an oversight, because nobody 3 doesn't apply in relation to that, but if 4 a confirms that there is an oversight, because nobody 4 So find that that the is concerned, we do accept 5 discussing at the moment, at any rate, that decart 5 that enc has to foldw at section 189 in the anew way and 6 involve an oversight. And why to say that 6 moving from build that on that at the time 8 gestro 189 van decaded there was no possibility of moving from build that on the doministration, it simply 10 a large lacana? 10 did not matter. We respectfully say it doesn't at taully 11 mole up of the document and there was no possibility of moving from build that on the document and the say in why the say it is a bit 12 dealing with policy? Are we dealing with 12 section 189 to have a passive, applicable that mere was no possibility of a moving from the fact that there was no possibility of a moving from the fact that there was no possibility of a moving from the fact that which its a sign of be a move, criticable and which its a bit of that we are trying to do is fact the work on how any the fact that the work of how any which its a bit of that we are trying to do is fact that we are trying to do is fact that we are trying to do is fact the work of how any which was that sect on 189 to have a passive. This no any one fina m				
3 the confirms that there is an oversigh, because nobody 3 doesn't apply in reliation to 2.88(7) 4 ean come up with the solution, along the lines we are 4 So far as that 189 point is concerned, we do accept 6 this work their start are maining? I know yues of that 5 that no has to look at section 189 in the same way and 7 the work their start are maining? I know yues of that 7 Now, whit is the effect of the fact that at the time 8 gets yue home, but if it doesn't, should one bend the 8 section 189 was canceld there was no boostilly of 9 work to achieve a small learn rather than 90 moving from liquidation in administration; it simply 10 a large lacuna? 11 make any difference. It is perfectly cohered for 11 make any difference. It is perfectly cohered for section 189 in the same way and 12 deling with bely? Are we daing with 12 section 180 in the same way and 13 interpretation? Policy may help, but it is a bit 13 that underpriss it contains an any and 14 definition to 2.84(7) moving from the solutions of the solutions of the solution to administration, it is a perfectly open to my Look to carry 16 15 still leave holes. 16 for looks at section 189 and the way in which it is 16 more for the the intra to way of	1	policy, but you say the act if, on any view, there is	1	approach section 189. And the point that my Lord Lord
4 can come up with the solution, along the lines we are set of accusing at the moment, at any rate, that desent is the cite of the fact that any enter that the time is through the same spectacles as rule 2.88(7). 7 the words their natural meaning? I know you say that age is you home, but if it desent's, should one bend the set of the set of the fact there was no possibility of moving from liquidation into administration, it simply default to say it desent should have a passive, applicable-to-all policy it is perfectly may suggest yes, but are we really in the registry is consistent with policy if it is bit identified by the policy if it is bit identified by any suggest yes, but are ver range to a sit il areas boks. 16 MR TROWER: Well, woo points, what we are trying to do is in diministration. There is no participation. There is no participation. There is no participation areas of the sit which at you think the - obviously in order to fard the intert, obviously, that is the same section as a neural obligation, neural in the section section is a meaning which, at they work in any one you have bar advise any difference. It is no on anyone in the solution account is a participation anyone in a participation. There is no participation, neural in the section section what the same section section any other participation, neural in the section section any other participation, neural in the section section what the same section section. The section section is a meaning which, at the underlying policy, it does go some way towards the same inter of any other is probable in the index to advise that we advise what it was the same in a not advise and the same is not advised and the advise way in which we has a not advised and the same inter of a same advised and the same inter of a same advised and the advise way is a solution in the index is wart the sama the advised and there is a	2	a gap, there is an oversight, then it might be said that	2	Sumption made applies in relation to that, but it
5discussing at the moment, at any rule, that doesn't5that one has to look in section 189 with seame spectacles as rule 2.88(7).6involve an oversight. And why is it not better to give6through the same spectacles as rule 2.88(7).7Now, what is the effect of the fact that at the time8gets you home, but if it doesn't, should one bend the89words to achieve a samal lacuum rather than910a large lacun?1011Well, policy may uegest yes, but are we really1012dealing with policy? Are we dealing with1213interpretation? Policy may help, but it is a bit1314factuality is apply is consist, what we are trying to do is1415going to be a move, or might be a mughtsman may not16identify the legislative intert, obviously. That is the1517out, and there is obviously only so far that you can apply1020in order to find the intert, oviously, that is the intert of far the intert, oviously, that is the correct approach.2021look at these words in one way, hey have meaning (a).2423Ho kat these words in one way, they have meaning (a).2524look at these words in one way, they have meaning (a).125rel 10 dat meaning (b).1other person's hands it may come infi, there is probable24look at these words in an ensampting (b).26other person's hands it may come infi, there is probable25if look at these words in one way, they have meaning (a). <td>3</td> <td>that confirms that there is an oversight, because nobody</td> <td>3</td> <td>doesn't apply in relation to 2.88(7).</td>	3	that confirms that there is an oversight, because nobody	3	doesn't apply in relation to 2.88(7).
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Page 162 Page 164	-	· · · · · · · · · · · · · · · · · · ·		······································
		Page 162		Page 164

41 (Pages 161 to 164)

1	payment of the debts proved in the prior liquidation,	1	Stage 2 is that that liability is one to which the
2	liquidation interest will still be payable out of that	2	company is subject on the date it goes into liquidation.
3	surplus under section 189.	3	Stage 2. And the consequence of that is that the
4	The administration surplus referred to in rule	4	liability is a provable debt within rule 13.12.1(a).
5	2.88(7) will simply be what is left after taking account	5	Now, just to get one point of the way to start with.
6	of the accrued rights under section 189. And the	6	It is common ground between the parties and one can
7	amendments to rule 2.88(7) do not change the position.	7	see that from Mr Wolfson's case at paragraph 53 that
8	What they do is something slightly different. What they	8	for a debt to be provable in a liquidation of LBIE
9	do is they simply allow late-proving creditors who are	9	following its administration, the cut-off date is the
10	only proving in a later administration, not having	10	commencement of the liquidation. So that is the date
11	proved in the earlier liquidation, to recover statutory	11	you are looking at to see how 13.12.1 works.
12	interest out of whatever is the surplus once the	12	The change in law, to make the cut-off date the
13	interest out of whatever is the surplus once the interest rights which accrued to creditors who did prove	13	earlier commencement of the administration, does not
14	in the earlier liquidation have been discharged. So it	14	apply in the present case. And that was decided by
14	is not inconsistent in any way, we respectfully suggest,	15	Mr Justice Briggs, actually, at first instance in
16	with or this analysis we adopt in relation to the	16	Nortel, at 2329 of the bundle.
17	meaning of 189 and 2.88(7), in its original form, is not	17	
	inconsistent in any way with the application of the new	18	We say the starting point is, if one simply were to stop there, it would be clear that on the face of it the
18			-
19	rule in relation to administrations	19	accrued right to interest during administration
20	LORD NEUBERGER: Yes.	20	is provable.
21	MR TROWER: that succeed a liquidation.	21	Now, what LBL does is they rely on the effect of
22	The consequence of that is that the position is now	22	rule $4.93(1)$ and $13.12.(1)(c)$ to contend that it is not.
23	better the position for late-proving creditors in	23	4.93(1) is at bundle F3, page 1957.
24	an administration following a liquidation is better than	24	LORD NEUBERGER: Thank you, yes.
25	the position of late-proving creditors in a liquidation	25	MR TROWER: 13.12(1)(c) is F1, tab 6, page 1184.
	Page 165		Page 167
1	fallouing on a dministration	1	LODD NEUDEDCED, Var
1	following an administration.	1	LORD NEUBERGER: Yes.
2	That is the consequence of this. But merely because	2	MR TROWER: In essence, it says the liability is not
2 3	That is the consequence of this. But merely because there is no symmetry between the situations does not	2 3	MR TROWER: In essence, it says the liability is not provable because the only interest that is provable in
2 3 4	That is the consequence of this. But merely because there is no symmetry between the situations does not count against the Court of Appeal's construction.	2 3 4	MR TROWER: In essence, it says the liability is not provable because the only interest that is provable in a liquidation is that described in 13.12.(1)(c), ie the
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42 (Pages 165 to 168)

1	on the company.	1	liquidation bears interest.
2	MR TROWER: On the company, yes, because if there is no	2	MR TROWER: Yes. And we are not in that
3	liability on the company and we say there is, for all the reasons I have already given I don't fall it	3	LORD SUMPTION: Bears interest at the time it becomes a debt, ie before the liquidation.
4 5		5	MR TROWER: Yes. Yes.
6	is not a debt of the company's at all. LORD NEUBERGER: If you are right that far but you are wrong	6	LORD NEUBERGER: And here, the interest being claimed, you
7	on the rest of your first argument, then you fall back	7	say, if you are right on your construction of 2.88(7),
8	on this and say you fall within 13.12(1)(a). Because	8	that there is a sum due; it happens to be interest but
9	this was a liability of the company and it was	9	it cannot be described as interest falling within the
10	ex hypothesi subject to it the date it went into	10	ambit of 4.93.
11	liquidation.	11	MR TROWER: My Lord, indeed.
12	MR TROWER: Indeed. And we say the construction of	12	LORD NEUBERGER: It happens to be interest but it is a debt,
13	13.12(1)(c) and $4.93(1)$ that has been adopted by	13	if your construction is right.
14	Mr Wolfson simply does not run. And the reason it does	14	MR TROWER: If we are right on that.
15	not run is because this is not to be treated as interest	15	LORD NEUBERGER: 13.12(1)(c) just has nothing to do with it.
16	borne on the debt proved in the liquidation.	16	MR TROWER: Nothing to do with it.
17	LORD NEUBERGER: You say it really picks up a point	17	There was a reason why it was that Mr Wolfson
18	I think Lord Sumption put to Mr Wolfson. I am putting	18	submitted that 4.93 did have something to do with it,
19	it a different way, but you cannot use paragraph (c) to	19	and therefore 13.12(1)(c), because he relied on rule
20	cut down paragraph (a). It does not say: you cannot	20	4.73(8), which is to be found behind tab 45 of tab 3.
21	claim any other interest that is due as a debt.	21	LORD NEUBERGER: Yes, that's right.
22	MR TROWER: No.	22	MR TROWER: What we submit about that is, those words simply
23	LORD SUMPTION: But are you also submitting that the	23	do not bear the weight which Mr Wolfson seeks to put on
24	reference to 4.93(1) means only debts which, immediately	24	them. What 4.73(8) is plainly trying to do is ensure
25	before the liquidation, carried interests,	25	that a creditor does not have to prove again when he has
	Page 169		Page 171
1	ie effectively contractual interest only? Is that	1	already proved in an antecedent administration. It is
2	what	2	as simple as that. That is what rule 4.73(8) is
3	MR TROWER: I wouldn't limit it to contractual interest, but	3	concerned with. So you are deemed to have proved in
4	I would say that you had to identify a debt, something	4	a previous administration.
5	called a debt proved in the liquidation, on which the	5	It doesn't convert, for a completely different
6	interest could properly be said to be borne.	6	purpose, the qualitative nature of a debt into something
7	LORD SUMPTION: Are you submitting that the debt has to	7	that is different from that which it would otherwise be.
8	carry the right to interest immediately before the	8	The upshot of all of this is that we say it is
9	liquidation? On some basis or other, whether	9	a misuse of language to say that the original and, by
10	contractual or not? I mean, as I understood it, what	10	necessity, fully discharged debt bears interest in any
11	you just said was, you were trying to cut down the	11	meaningful sense as far as rule 4.93 is concerned. It
12 13	effect of 4.93 so as to reduce the measure of duplication with your submission of the meaning of (a).	12 13	just simply does not. That is causing or putting together a combination of the rules in a manner that is
13	Perhaps I am attributing to you more than you have	13	wholly artificial. And the bottom line is that we
	· shups i ani attroating to you more than you have	1 14	mony artificial. This are obtoin fine is that we
15	actually said.	15	submit that the reason it is wholly artificial and
15 16	actually said. MR TROWER: I think my Lord has, but I am just cogitating.	15 16	submit that the reason it is wholly artificial and doesn't work is because 4.73(8) is being sought to be
16	MR TROWER: I think my Lord has, but I am just cogitating,	16	doesn't work is because 4.73(8) is being sought to be
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16 17	MR TROWER: I think my Lord has, but I am just cogitating, if I may, whether that way of putting it is not a good	16 17	doesn't work is because 4.73(8) is being sought to be
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43 (Pages 169 to 172)

8th Floor, 165 Fleet Street London EC4A 2DY Day 2

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1	subject, yes. Yes, I accept that.	1	affect the underlying debts, and it operates simply as
2	LORD SUMPTION: As are all the rights that you say come	2	a process of enforcement, which leaves the underlying
3	within 4.93.	3	debts untouched. And the crispest articulation of the
4	MR TROWER: Yes. Which is why at the end of the day we say	4	principle is in Wight v Eckhardt, which I know my Lords
5	that the most that can be got out of the combination of $12, 12(1)(c)$ and $4, 02(1)$ is that to the autent that	5	have seen and there have been submissions made on those
6	13.12(1)(c) and $4.93(1)$ is that, to the extent that	6 7	principles. It is paragraph 27 of Lord Hoffmann's decision.
7 8	4.93(1) is covering the ground in relation to a category	8	LORD NEUBERGER: This third way of putting it, the second
8 9	of interest, it is dealt with in 13.12(1)(c), but only to that extent. 4.93 does not cover the ground in		alternative way of putting it, we also have to accept
10	relation to the interests that we are concerned with, or	10	the argument that there is then an obligation on the
10	the debt that we are concerned with here.	11	company. All three arguments.
12	LORD REED: I appreciate that. It just strikes me that	12	MR TROWER: All three arguments depend on that.
12	effectively accrued interest at the date of liquidation,	13	LORD NEUBERGER: Right.
13	which is what is covered by 1(c), would necessarily fall	14	MR TROWER: Now, of course we accept that there are
15	under 1(a) in any event, if one reads it	15	circumstances in which the statutory scheme can affect
16	MR TROWER: Yes. I see my Lord's point on that.	16	the underlying liability. So one way of putting it is
17	I mean, just to mention, just so we don't lose sight	17	that once the scheme is imposed, the nature of the right
18	of it, Mr Wolfson also said that the debt flowing from	18	will not necessarily be the same as the original
19	the non-payment of the interest out of surplus in	19	contractual right. And that is one way of thinking
20	accordance with rule $2.88(7)$ is not provable because it	20	about it, but in each case one has to look at what it is
21	is not a liability of LBIE's at all, and all those	21	that has been affected by the scheme and how it is that
22	points that we make in relation to why it is a liability	22	the scheme has affected the thing that is affected.
23	of LBIE's which I am not going to repeat	23	The statute, in other words, may compel some form of
24	LORD NEUBERGER: That is why I say, part of the argument	24	adjustment of the underlying contractual right. The
25	you have a common argument up to a certain point, and	25	reason I put it like that is because what we are looking
	Page 173		Page 175
1	for the two points, and then the two points bifurcate.	1	at here is the survival, we say, of a non-provable claim
2	Okay.	2	in the context of an interest entitlement.
3	MR TROWER: My Lord, can I move next, then, on to our second	3	Now, there is no reason to consider, we will submit,
4	alternative case, which is declaration 5, explaining why	4	that the legislation is designed to interfere with
5	if the judge was right in making declaration 4 he was	5	existing rights to any greater extent than is necessary
6	also right to make declaration 5 to say it is	6	to enable the purposes of the scheme to be fully
7	a non-provable claim. Our submission is relatively	7	carried out.
8	short on this.	8	I am not going to develop elaborate submissions in
9	What the judge ordered in paragraph 5 and I think	9	relation to this because I know it is an area Mr Dicker
10	it probably is just worth turning it up to make sure we	10	is going to be dealing with in the context of currency
11	have it right. It is in bundle D and it is behind	11	conversion claims, but I am going to just assert it in
12	tab 4.	12	those fairly broad terms.
13	LORD SUMPTION: Bundle D is that?	13	Now, we accept that the provisions of the insolvency
14	MR TROWER: Bundle D, tab 4, page 600, declaration at (v).	14	code which deal with interest are intended to provide
15	The effect of that declaration is that creditors	15	a complete answer to the interest entitlements with
16	whose debts would, but for the administration, have	16	which it engages. But that qualification is important.
17	borne interest during the relevant period will be	17	The reason Mr Justice David Richards addressed this
18	remitted to their rights such as to find a non-provable	18	point in relation to what it was that the interest
19 20	claim in LBIE's winding up.	19	aspect elements of the code were intended, or the impact
20	LORD NEUBERGER: So a non-provable claim, payable after	20	of the application of the interest elements of the code
21	MR TROWER: Payable after everything else, derived from the	21	in the Waterfall IIA judgment, in a passage that we cite
22 23	original contractual or judgment right. LORD NEUBERGER: Yes.	22 23	in paragraph 104 of our case and can I just take
23 24	MR TROWER: Now, the starting principle which underpins the	23	my Lords to paragraph 104 of our case. It is volume C. LORD NEUBERGER: Yes.
24 25	declaration is that the process of winding up doesn't	24	MR TROWER: The passage which I will just invite my Lords to
			The passage when I will just hivite my Loius to
	Page 174		Page 176

44 (Pages 173 to 176)

Day 2

1 read is in 104(2). 1 scope' point.	
-	agraph 6 of the judge's order, where
3 MR TROWER: Page 387. (Pause). 3 he directed that the	e obligation of members to contribute
	xtends to provide for proved debts,
	n those debts such as is payable
	and non-provable liabilities.
7 declaration 5 and if the liability is not provable, the 7 So what happened	ed was that the Court of Appeal
8 scheme, taken as a whole, simply does not deal at all 8 dismissed the appe	eal against declaration 6 insofar as 2
	ed. There is an appeal by the
10 administration and the commencement of any subsequent 10 appellants, who com	nsider that the members' liability to
11 liquidation where that is what has happened. And if 11 contribute does not	t extend to provide for statutory
12 that is the case, there is no reason to conclude that 12 interest or non-prov	vable debts.
13 the legislature intended to provide for the underlying 13 The way I thoug	ght I would start my submissions on
14 right to be replaced. 14 this aspect of the ca	ase is just to give my Lords a very
15 In effect, and in the circumstances applicable, it 15 short background to	to the statutory scheme as it is
16 would have amounted to something akin to 16 reflected in section	n 74.
17 an expropriation of the interest entitlement without any 17 LORD NEUBERGER	R: We are just checking. In terms of time,
18 recompense. It would run flatly contrary to the 18 you have given you	urself to 1.00. But I should remind
	calculations are correct, if you
20 fact that a creditor has been kept out of his money 20 don't perform as M	Ir Miles did and even more as Mr Isaacs
21 based on solvency should be compensated for in some way. 21 did, and take up yo	our whole time, then you should finish
	uld hope that you will follow their
-	fson only slightly exceeded his time
	him to deal with the point he was
25 get this interest entitlement to which you would 25 going to deal with	-
Page 177	Page 179
1 otherwise be entitled under your contract this is the 1 MR TROWER: My L	Lord, we are on time. I suspect I will be
	mount of time that was given to me,
3 interest entitlement at all in this context. 3 if that helps.	
	: That is what I was encouraging you to say
5 MR TROWER: Now 5 and, even more imp	
6 LORD NEUBERGER: Your point is, you say basically you have 6 MR TROWER: I certa	
1 /5 5 55	: I thought to spring it on you nearer the
	slightly unfair, so I did it now.
	Lord, the starting point is to look at the
	e have to construe section 74, because
	n 6 turns on the proper construction
	ijunction, amongst other things, with
	ue in dispute does really require
	nding of how the relationship between
	s members has developed over time.
	o give my Lords a dissertation in
	orate law in that sense, but there
	eed to look at very quickly. One is
	5 1 5
	and the other is Webb v Whiffin. And
	Lords need to just consider that is
	o explain how it is that one needs to
	4, which is the direct statutory
	similar provision in the 1962 act,
	extent of the liabilities with which
25 without any break is the section 74 'extent and 25 section 74 is concer	rned when one is asking oneself the
Page 178	Page 180

45 (Pages 177 to 180)

1	question: well, what are the debts and liabilities which	1	the question.
2	are intended to be passed on to the members pursuant to	2	LORD SUMPTION: Is this analysis in the paragraph you are
3	section 74?	3	taking us to consistent with the famous decision in
4	Now, Lord Justice Briggs in his judgment referred to	4	Salomon's case?
5	Oakes v Turquand at paragraph 182	5	MR TROWER: I hadn't thought it was inconsistent, my Lord,
6	LORD NEUBERGER: Thank you. Yes.	6	but I am ready to stand corrected, obviously.
7	MR TROWER: If my Lords would just simply quickly turn that	7	LORD SUMPTION: It is a question.
8	up. It is behind tab 3 of the bundle.	8	MR TROWER: The answer is
9	LORD NEUBERGER: 575, yes.	9	LORD SUMPTION: It appears to envisage a continuing
10	MR TROWER: Yes. Then he referred to Webb v Whiffin at	10	liability by shareholders of exactly the same nature as
11	paragraph 183.	11	existed would have applied, for example, to
12	LORD NEUBERGER: Yes.	12	a partnership. With just a limit over it. They are
13	MR TROWER: Now, what one gets from those two cases is that	13	totally different.
14	what the 1862 act affected was the mode in which	14	MR TROWER: But what it does is it affects the mechanism by
15	creditors were to seek their remedy. In other words,	15	which I think the point that is being made, which is
16	you now had to seek your remedy against the company and	16	not inconsistent with Salomon at all, is that you have
17	could not proceed against the members directly. What it	17	to identify that which constitutes a liability in the
18	did not affect was the extent or nature of the	18	form of something for which sorry, I am just turning
19	liabilities to which the members were required	19	back to the relevant paragraph because I turned it over.
20	to contribute.	20	(Pause).
21	So the underlying submission that we make in	21	Yes, plainly the creditors can only exercise their
22	relation to this particular line of authority, and the	22	rights of execution through the collective process which
23	reason I am taking my Lords to them albeit, I hope,	23	is administered when the company goes into a process,
24	very quickly is that it is important to understand	24	and the liability arises in that context. That is what
25	that the extent and nature to which members were	25	he means by the change in the mode in which the creditor
	Page 181		Page 183
1	previously liable before unlimited liability came in in	1	is to seek his remedy.
1	previously liable before unlimited liability came in in 1962 continued to be	1	is to seek his remedy. It may be worth going back to the passage at
2	1962 continued to be	2	It may be worth going back to the passage at
2 3	1962 continued to be LORD NEUBERGER: Limited liability.	2 3	It may be worth going back to the passage at page 3017, two pages back, so that one can see the
2 3 4	1962 continued to be LORD NEUBERGER: Limited liability. MR TROWER: Sorry, limited liability came in in 1962,	2 3 4	It may be worth going back to the passage at page 3017, two pages back, so that one can see the context in which Lord Carnwath is saying what he says at
2 3 4 5	1962 continued to beLORD NEUBERGER: Limited liability.MR TROWER: Sorry, limited liability came in in 1962, continued to be debts and liabilities the nature and	2 3 4 5	It may be worth going back to the passage at page 3017, two pages back, so that one can see the context in which Lord Carnwath is saying what he says at page 364. It is the paragraph beginning "There are
2 3 4 5 6	1962 continued to beLORD NEUBERGER: Limited liability.MR TROWER: Sorry, limited liability came in in 1962, continued to be debts and liabilities the nature and extent of which are caught by the concepts which	2 3 4 5 6	It may be worth going back to the passage at page 3017, two pages back, so that one can see the context in which Lord Carnwath is saying what he says at page 364. It is the paragraph beginning "There are important differences"
2 3 4 5 6 7	 1962 continued to be LORD NEUBERGER: Limited liability. MR TROWER: Sorry, limited liability came in in 1962, continued to be debts and liabilities the nature and extent of which are caught by the concepts which underpin the section 74 statutory predecessor and 	2 3 4 5 6 7	It may be worth going back to the passage at page 3017, two pages back, so that one can see the context in which Lord Carnwath is saying what he says at page 364. It is the paragraph beginning "There are important differences" One gets at something similar from the top of the
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46 (Pages 181 to 184)

8th Floor, 165 Fleet Street London EC4A 2DY

1	MR TROWER: Although, of course, section 74 does not express	1	Now, in that context, two of their Lordships, Lord
2	it in quite those terms, because section 74 says, "You	2	Haverly and Lord Chelmsford, made clear that the
3	are liable unless"	3	contributions of the members to the assets of the
4	LORD SUMPTION: Yes, but it cannot possibly mean that.	4	company are to be applied in accordance with the
5	MR TROWER: Well, it may give some guidance, we would	5	statutory scheme. That is a slightly separate point.
6	suggest, to the approach one needs take to construction	6	But for present purposes what matters is the passages at
7	of section 74 anyway. The starting point is that	7	pages 718 and 723. I think they are the ones in our
8	everybody is liable. You are liable to the full amount.	8	case, but to turn up the bundle it is F1, 22, pages 1590
9	But you are then limited to the extent to which that	9	and 1595.
10	liability to the full amount is something that attaches	10	The words that I simply commend to my Lords are:
11	to you. But that statutory construct does give some	11	"These directions are in the largest and most
12	guidance, we respectfully suggest, to the way in which	12	general terms."
13	one ought to approach how far the liabilities that are	13	As far as Lord Haverly is concerned.
14	covered by section 74 ought to go.	14	And Lord Chelmsford, the last sentence of the quote:
15	It remains, of course, the case, as I am sure	15	"Nothing can be more general than these words,
16	my Lords are only too aware, that LBIE is an unlimited	16	embracing as they do(reading to the words) all
17	liability company, so LBIE is liable to the full	17	liable to contribute to the assets of the company, not
18	extant not LBIE, sorry, the members are liable to the	18	to be applied differently with reference (reading to
19	full extent of LBIE's liabilities in any event.	19	the words) to the payment generally of the debts and
20	So we submit that liabilities would always have	20	liabilities of the company."
21	included the non-provable liability of the company to	21	That is a consistent theme that one gets from these
22	pay contractual interest on proved debts in respect of	22	two cases in the early years, and we say it carries
23	the period since the company went into liquidation, or	23	on through there is nothing to indicate that in any
24	indeed any other non-provable liability that might have	24	way section 74 ought to be construed or treated
25	been extant under the code. And as my Lords have heard	25	differently from the original concept which underpinned
	Page 185		Page 187
1			
		1 1	the imposition or the continuation of the liability of
	on a number of different occasions in a different contexts, the extent to which liabilities of an entity.	$\begin{vmatrix} 1 \\ 2 \end{vmatrix}$	the imposition or the continuation of the liability of members when the concept of limited liability was first
2	contexts, the extent to which liabilities of an entity	2	members when the concept of limited liability was first
2 3	contexts, the extent to which liabilities of an entity have continued or have become provable over time	2 3	members when the concept of limited liability was first introduced in the 1862 act.
2 3 4	contexts, the extent to which liabilities of an entity have continued or have become provable over time has expanded. But there have always been a significant	2 3 4	members when the concept of limited liability was first introduced in the 1862 act. LORD NEUBERGER: Yes.
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47 (Pages 185 to 188)

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5 LORD NUTURENCE: We have seen this. 5 must be construid together or anything. 6 MR TROWER: Then the opening words of 4: 6 7 'nany provision of the act or rules about. 7 8 winding up." 8 9 'LotRD NEUBERGER: Yes. 10 10 LORD NEUBERGER: Yes. 10 11 LORD NEUBERGER: Yes. 10 12 log DR DEFERGER: Yes. 10 13 in the primary legislation? 13 14 LORD NEUBERGER: Conse the rule mushordinate is a rule-making power in the second the is a rule-making power? 13 15 section 411 12 16 LORD NEUBERGER: To see the rule- making power? 13 17 constraing power? 14 18 Because if it doesn't, then does that help you, the mere 15 19 fit doesn't, then does that help you, the mere 16 20 MR TROWER: Ves, the relias rule making power? 16 21 mst rule, we do syl dati it is definition 20 22 affer the significantian 20 23 should have application in the add. 20 24 Now, that is not a complete answer, I realize, to 20 25 my Lord's point. 20 </td <td>3</td> <td>relation to the winding up of a company, which you get</td> <td>3</td> <td>LORD NEUBERGER: There is nothing saying that you can use</td>	3	relation to the winding up of a company, which you get	3	LORD NEUBERGER: There is nothing saying that you can use	
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14 MR TROWER: Well, there is a rule-making power in section 41. 14 MR TROWER: My Lord, I think I had better. 15 section 41. 16 DORD NEUBERGER: Does the rule-making power say you can out the statuter or not? 17 18 Because if it doesn't, then does that help you, the mere in fact there is a rule-making power? 19 MR TROWER: Well, pethaps I can take it submission in stages. We do say that it is clear that the draghtsman of the rules certainly inended that this definition a should have application in the act. 20 MR TROWER: Well, pethaps I can take it submission in stages. We do say that it is clear that the draghtsman of the rules extrainly inended that this definition a should have application in the act. 20 I am afraid, going to finish this evening, even on this a particular point four tomorrow morning if I may. 25 my Lord's point. 1 understand that, but it is pretty 20 MR TROWER: Well pethese is any "n any provision of the act". 21 12.0 knH ways sour point? 26 Page 191 1 evercise to carry out, and one applies the word "deb" is o obvious, that, hecuse it says "n any provision of the act". 21 13.12.(1), the first point is that the word "deb" is o obvious, yas my Lord's have heard submissions on a laready, primarily concerned with the meaning of provable debts. To be provable, a claim must be a debt. 31 LORD NEUBERGER: Rev we constraing the act. 30 So it does go slightly wider than that, but from a timing point of view it	12	legislation, can you, for the definition of the language	12	MR TROWER: I am just turning up 27.	
15 section 411. 16 LORD NEUBERGER: Does the rule-making power say you can 17 construct the rule solewher with the statute or not? 18 Because if it doesn't, then does that help you, the mere 19 fact there is a rule-making power? 10 MR TROWER: Well pertups I can take the submission in 21 stages. We do say that it is clear that the draughtsman 22 of the rule-scentainly intended that this definition 23 should have application in the act. 24 Now, that is not a complete answer, 1 realise, to 25 my Lord's point. 1 understand that, but it is pretty Page 189 Page 189 Page 191 1 obvious, that, because it says "in any provision of the ace". 1. LORD NEUBERGER: Yes. 4 MR TROWER: Yes. 1 obvious, have applicating the act. 10 LORD NEUBERGER: Are we construing the act. 11 LORD NEUBERGER: Are we construing the act. 12 DARD Stud Exerces. 13 LORD NEUBERGER: The next question is whether the rule-making power itself extends sufficiently broadly to enable you construte true als in this way.	13	in the primary legislation?	13	LORD NEUBERGER: Can we come back to this aspect?	
16 LORD NEUBERGER: Does the rule-making power say you can 16 point about interpretation for the moment. I don't know 17 construe the nules together with the statute or not? 17 whether you can use the rule, because we are 18 because if it descrift, then does that help you, the more 18 interrupting your flow. 19 fact there is a rule-making power? 19 MR TROWER: Well, perhaps I can take the submission in 20 MR TROWER: Well, perhaps I can take the draughtsman 20 I am afraid, going to finish is evening, even on this 21 stages: We do say that the is calcent the the draughtsman 21 particular part of the case. So I think is vall come 22 of the rules certainly intended that this definition 22 back to that particular point is - looking at section 74 and 23 LORD NEUBERGER: Yes. 13.12, what was your point? 25 24 MR TROWER: The next question is whether the rule-making 26 13.12, what was your point is - looking at section 74 and 24 LORD NEUBERGER: Yes. 14 exercise to carry out, and one applies the word "debt" is 25 most rule ends in this wy. But - 21 13.12, what at the word "debt" is 26 to construe the rules making the act.	14	MR TROWER: Well, there is a rule-making power in	14		
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7LORD NEUBERGER: Are we construing the act or are we some other provision.7the meaning of the rule but then excluded from proof by some other provision.9MR TROWER: You are construing the act.9So it does go slightly wider than that, but from a timing point of view it is the critical definition10LORD NEUBERGER: Because Lord Reed's point then stands.10a timing point of view it is the critical definition11LORD SUMPTION: Subject to the terms of the rule-making11that is used for provability when you are distinguishing12powers, which is in 411. Do we have that?12between 13.12(1)(a) and 13.12(1)(b). So that is the position in relation to debt. Just for my Lords' notes, in Nortel, my Lord Lord Neuberger gave guidance as to the scope of rule 13.12(1)(a) at paragraphs 68 to 71 and the scope of rule 13.12(1)(b) at paragraphs 72 to 86 of your judgment.18MR TROWER: I don't think there is anything.1819LORD NEUBERGER: It is a very unusual provision but1910LORD NEUBERGER: F2.2121Which it may become subject thereafter. That is debt.23the schedule.2224that that of "debts", in the sense that it has no temporal limitation, such as it is contained in25MR TROWER: Yes. It takes you to schedule 8 to the act.25					
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Page 190 Page 192	25	ININ INCOMER. I es. IL LAKES YOU TO SCHEdule & to the act.	25	temporal limitation, such as it is contained in	
0 0		Page 190		Page 192	

48 (Pages 189 to 192)

Day 2

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1	13.12(1). The consequence of that, we respectfully	1	LORD CLARKE: So that is the expression which is being
2	suggest, is that the word "liability" is unconnected to	2	construed in paragraphs 124 and 125, but I don't think
3	what is provable. On its face, it plainly encompasses	3	you include the debts and liabilities point deriving
4	statutory interest and non-provable liabilities, as	4	from the 1862 act.
5	a matter of the language and construction of this	5	MR TROWER: No. I have just said yes, but I have a nasty
6	particular part of the rules.	6	feeling I should not have said yes without checking.
7	Furthermore, 13.12(3) introduces a very expansive	7	LORD SUMPTION: The earlier(?) legislation refers to debts.
8	definition to debts or liabilities, making clear that it	8	MR TROWER: Yes, it is debts and liabilities. One gets it
9	is immaterial whether they are "present or future,	9	at 1739.
10	certain or contingent, fixed or liquidated, capable of	10	It might be just worth turning up 1739, which is in
11	being ascertained by fixed rules or as a matter of	11	bundle F2 and is to be found behind tab 6, because, just
12	opinion". And it is hard to think of any valid claim	12	reading through it, 1739 to 1740, one can see straight
13	against the company which would not give rise to	13	away the close correlation between both its structure
14	a liability, we would respectfully suggest, within the	14	and the terminology used with the form of section 74,
15	meaning of $13.12(4)$ as expanded by $13.12(3)$.	15	which we have in bundle F1 behind tab 1.
16	The point that we make which is made irrespective	16	LORD NEUBERGER: Debts and liabilities are not defined in
17	of the point that my Lord Lord Reed made about whether	17	the Insolvency Act?
18	or not the rules can provide for a definition in	18	MR TROWER: No, they are not. Clearly and I quite take
19	relation to the act irrespective of that point, it is	19	my Lord Lord Reed's point, and we will have a look at
20	entirely consistent, this very wide definition, with the	20	it but it looks as if people thought that you went to
21	approach that one sees adopted in Oakes v Turquand and	21	the rules to find what it meant. But I will develop
22	Webb v Whiffin. So one has a situation where the case	22	a submission on that tomorrow morning if I may.
23	law background focuses on a very expansive concept of	23	LORD NEUBERGER: Very well.
24	what constitutes a liability which is capable of being	24	MR TROWER: My Lord, I think
25	passed on to the members, pursuant to what was then	25	LORD NEUBERGER: We have gone to 4.15.
	Page 193		Page 195
1	section 38 and is now section 74, and that is then	1	MR TROWER: We have gone to 4.15, and I think I can say I am
2	followed through to a place in the rules where one sees	2	well up on time.
3	it again appear in a particular statutory context.	3	LORD NEUBERGER: Good.
4	I will come back to the point about what you are	4	We will resume again, then, I think it is
5	actually construing. But we respectfully suggest that	5	10.00 tomorrow. Thank you very much.
6	in any event this shows a consistent theme which the	6	Thank you, Mr Trower.
7	legislature have adopted when using the phrase "Debts	7	Court is now adjourned.
8	and liabilities" within the insolvency code generally	8	(4.16 pm)
9	which is specifically designed to have a very	9	(The hearing adjourned until 10.00 am the following day)
10	expansive meaning.	10	
11	Can I also make the submission that the words "debts	11	
12	and liabilities" appear to contemplate two different	12	
13	things. Now, there are a number of possible	13	
14	distinctions that one could think of which might, in	14	
15	different private law contexts, be an accurate	15	
16	reflection of the distinction between a debt and	16	
17	a liability.	17	
18	LORD SUMPTION: A liability includes a debt.	18	
19	MR TROWER: Yes, nearly always. I agree with that, my Lord.	19	
20	I would certainly accept that.	20	
21	And normally a liability is something which has	21	
22	quite an expansive meaning. So	22	
23	LORD CLARKE: Section 38 of the 1862 act included the	23	
24	expression "debts and liabilities".	24	
25		1	
25	MR TROWER: Yes, my Lord, it did.	25	
25	MR TROWER: Yes, my Lord, it did. Page 194	25	Page 196

49 (Pages 193 to 196)

Day 2

1	INDEX	
2 3	Submissions by MR WOLFSON1 (continued)	
4	Submissions by MR MILES17	
5	Submissions by MR ISAACS	
$\begin{array}{c} 6 \\ 7 \\ 8 \\ 9 \\ 10 \\ 11 \\ 12 \\ 13 \\ 14 \\ 15 \\ 16 \\ 17 \\ 18 \\ 19 \\ 20 \\ 21 \\ 22 \\ 23 \\ 24 \\ 25 \end{array}$	Submissions by MR TROWER76	
25		
	Page 197	

Page	198
raye	T 20

				Tage 190
A	194:15	actual 79:4 84:22	146:4,8,25 147:25	adopted 136:20
a)' 90:4	accurately 145:24	85:2,3	148:13 149:9,13	145:3 147:5
abbreviated 37:19	160:19	addition 43:19	151:25 153:13,15	148:20 157:25
ability 125:19,20	accused 31:20	address 34:10,17	154:20 155:1,6,9	169:13 193:21
128:14 129:20	achieve 81:21	39:1,5 45:6 75:18	155:21 156:14,19	194:7
130:12 136:17	82:18 157:16	76:7	156:19 158:3	advanced 32:5
able 17:14 20:9	160:5 161:9	addressed 59:3	159:9 162:13,15	102:25
23:12 55:10 59:9	achieved 81:18	151:3 156:5	163:9,16 164:10	advancing 28:11
135:1	82:21 84:18	176:17	164:19 165:4,10	31:22
absolute 130:17	acquire 59:16	adequacy 118:18	165:24 166:1,19	advantage 60:9
135:23	81:24	118:23 119:10,21	167:9,13,19 168:7	108:12,16
	acquired 81:25	adjourn 60:4	168:10 172:1,4	adversely 139:18
absolutely 68:19	156:20	adjourned 114:13	174:16 177:10	affairs 105:13
125:15 156:13	acquires 109:19	196:7,9	administrations	affect 30:2 58:24
absorbed 120:3	act 18:7,9,14 19:24	adjournment 60:6	5:22 73:15,19,22	166:7 175:1,15
accept 5:24 37:4	21:15,19 22:14,18	60:10 112:19	86:16 165:19	181:18 184:20
72:7 73:17 100:3	25:15 27:4 30:20	114:15,18 115:9	administrator 4:1	afraid 101:2 108:10
107:8 111:1,14	33:19 34:16 35:1	114.13,18 113.9	4:4,5,10,17,18	191:20
123:18 124:19		adjudged 65:21	25:8 28:3 44:15	agent 111:7,13
127:5 135:13,13	39:2,10,11,24	adjust 43:12 58:25		112:6 151:15
135:19 140:25	41:21 42:1,3,12		44:19,20 55:6	
148:11 152:4	42:18 43:21 44:11	adjusting 33:5	56:14 57:21 72:20	ago 15:12 118:11
158:22 159:21	45:18 50:15 56:5	75:24	74:20,22 104:20	agree 41:4 85:11
160:15 161:22	63:18,24 64:9,15	adjustment 19:8	105:12 109:2	88:3 108:19,20
163:4,24 166:5	66:12 68:6,8,11	52:4 53:2,3 58:21	110:10 111:7,13	139:25 194:19
173:1 175:9,14	84:8 89:17 117:3	58:24 59:1,24	111:22 112:9,14	agreed 14:20 30:3
176:13 194:20	132:25 133:1	175:24	113:3 148:10	65:24 76:6 83:1
acceptable 137:21	139:15,17 161:1	adjustments 70:14	150:2,6,10,19	123:4 133:11
accepted 100:4	162:19 180:23	administer 98:5	151:3,15,18,18,21	134:22 135:15
123:1	181:14 182:16	158:1	152:3 155:22	136:13 141:22,24
accident 64:4	186:8 188:3 189:7	administered 55:20	administrator's	agreeing 131:25
accidents 24:6	189:23 190:2,7,9	101:15 183:23	44:10,14 157:6	agreement 76:9,21
account 73:20,23	190:16,17,25	administers 73:18	administrators	76:22 77:1,2,8
74:3,20 87:5	191:1,4,4,10	administration	16:15,20 34:12	80:25 82:23 83:6
89:12 90:3,23	193:19 194:23	1:15 3:9,11 5:1	55:9 58:23 72:25	87:14 88:1,5,8,14
91:5 165:5	195:4,17	6:4,8,22 7:3,7,8	73:15 104:14	88:18 89:11,12
accrue 14:25	acting 38:5 122:6	7:25 8:19,21	105:4 116:5	90:20 91:9 92:24
139:19	126:7	10:25 11:1,4 12:2	148:22 159:11	94:9 95:17 96:18
accrued 11:3	action 23:12 56:15	12:5,6,13,15 13:5	admission 130:8	97:6 98:1,3 115:4
144:17 145:16	96:2,3 106:11	13:25 34:14,19	admitted 123:13	118:21 122:7
149:23 157:5	139:12	35:5,9 39:20,22	136:21,24 140:4	124:23 130:22
165:6,13 167:19	actionable 96:4	48:19 51:25 52:22	admittedly 97:12	132:23 133:2
172:24 173:13	active 3:11,14 4:23	52:25 53:4 73:13	141:11	137:11 138:17
accruing 118:25	activities 52:1	73:23 86:6 97:21	adopt 15:15 116:16	139:10 143:5,7
119:2 145:9 177:9	acts 39:15,17 50:16	104:15 115:17	138:15 147:9	agrees 51:3
accurate 108:20	68:7 151:15	144:18 145:1,7,18	165:16	ahead 78:9 94:18
accurate 100.20		,_,_		
	I	I	I	I

www.DTIGlobal.com 8th Floor, 165 Fleet Street

				raye 199
119:25 132:4	142:3	144:15 145:5	147:25 157:19	area 176:9
aid 92:20 103:8	analysis 30:1 55:22	146:21 147:6	159:6,7 163:2	arguably 121:24
akin 177:16	58:5 90:14 106:3	148:21 179:7,8,9	164:19 170:25	argue 9:10,11 17:9
albeit 181:23	122:24 124:4,19	Appeal's 1:10 5:7	192:1	argued 144:11
allow 8:6 32:20	124:21 137:6	5:18 6:9,17 7:5,22	apply 2:22 6:18	arguing 16:15
165:9	154:12 165:16	8:2 144:16,21	7:21 10:14 20:17	178:2
allowable 188:15	166:25 182:23	153:1 166:4,12,17	22:3 25:11,17	argument 2:3 8:17
allowed 50:23	183:2	appeals 17:25	29:11 39:19,22	8:23 10:2 13:24
64:19 75:13	Anchor 65:1	appear 120:24	50:20 64:16 65:20	16:21 18:14 24:22
alluded 82:24	and/or 59:11	146:6 152:20	67:13 71:23	28:11 30:5,7,16
146:19	answer 3:13 24:15	194:3,12	100:22 104:6	31:7,21 32:13,14
alongside 144:5	37:10,17,24 112:4	appears 41:14	108:4 113:23	40:23 58:8 69:16
alter 48:19	129:19,22 141:6	45:14,17,20 62:6	115:4 129:12	78:16,21 81:13
alteration 68:16	142:12 159:13	72:22 183:9	132:14 136:5	82:6 95:3 106:23
altered 46:13	162:3 164:4	appellants 179:10	148:16 162:18	107:2,3,11 120:24
182:17	176:15 183:8	applicability 73:3	163:3 167:14	121:4,25 135:18
alternative 38:15	189:24	applicable 121:22	applying 10:12	136:16 139:14
57:17,19 136:19	antecedent 172:1	177:15	24:11 50:23 108:6	140:2 141:1,9
160:11,17 166:14	anticipate 70:23	applicable-to-all	135:24 136:3	149:4 151:7
174:4 175:9	anticipation 48:18	163:12	appointed 54:20	152:17 160:8
alternatively 57:12	48:21	application 15:6	97:24 98:5,10	168:21,22 169:7
130:6 144:20	anybody 111:2	62:22 67:20 89:7	appreciate 8:10	173:24,25 175:10
altogether 23:9	134:24 154:22	99:4,12,12 104:11	173:12	178:22,23 191:15
ambit 171:10	154.24 154.22	104:16 109:6	appreciates 184:11	arguments 39:6
amended 137:3,8	anyway 40:24	110:6 111:16	appreciation	71:16 94:22 96:10
158:24 164:17	98:13 122:18	112:10 148:7,12	162:12	100:8,10 106:20
amendments 146:6	128:14 129:23	153:22 155:24	apprehend 27:6	141:15 175:11,12
165:7	137:25 147:9,12	157:20,21 163:20	approach 1:10 5:8	178:9
amount 19:6 20:15	159:20 160:11,23	165:18 166:22	5:18 6:9,17 7:6,22	arises 6:18 31:17
31:9 32:11,18	185:7 191:8	176:20 189:23	8:2 15:16 80:14	32:2 36:21 37:2
40:16 41:2 53:12	apart 28:4 81:5	applications	80:20 87:24 92:14	75:5 77:17 80:2
54:9 59:8 116:15	103:8 164:2	110:17	96:9 109:10 127:1	104:18 124:4
123:13 136:21,23	apologise 54:1	applied 7:1 17:12	136:19 139:6	126:18 148:13
125:15 150:21,25	117:19,20	17:13 21:21 51:22	146:15 149:3	156:11,18 183:24
145:5 180:2 185:8	apparent 133:21	52:17 58:2 99:1	153:5 154:10	arising 2:23 7:2
185:10 188:16	appeal 5:21 8:6 9:4	110:24 112:15	156:1 157:24	8:18
amounted 177:16	9:5,5 14:9 18:5	114:25 133:19	160:3 161:22	arose 104:23
amounting 86:13	23:23 25:24 26:21	148:3 153:14	162:10 163:1	arrange 105:2
148:8	33:8,14 34:10,11	156:6 163:25	166:7,12 180:22	Art 93:15
amounts 32:15	34:18 35:18,21	183:11 187:4,18	185:6,13 193:21	articulated 178:16
ample 147:6,7	49:5 56:1,13	applies 1:14 3:25	appropriate 90:9	articulation 175:3
amplification	66:18 68:22 69:16	5:22 9:19 22:6,9	149:15 159:10	artificial 172:14,15
35:13	71:12,15 94:23	23:20,24 24:7	approved 73:1	ascertained 193:11
analyses 92:25	99:7 100:10	39:16 57:2 72:12	April 146:7	asked 27:20 85:15
analysing 93:19	127:15 128:25	99:24,25 101:10	apt 72:24	191:9
anaryonig 73.17	127.13 120.23	JJ.27,2J 101.10	apt / 2.27	171.7
				l

DTI (+44)207 4041400 www.DTIGlobal.com 8th Floor, 165 Fleet Street

				Page 200
asking 31:25 53:24	101:12	157:1	9:11 16:1 29:6	bizarre 57:25
160:18 172:20	assisted 7:9	back 13:1 17:21	32:17 55:12 94:24	black 48:14 145:21
180:25	assume 32:20	20:15 22:19 24:25	123:19,22 124:11	Blackburn 65:12
asks 13:1	assume 52:20 assumes 72:8 160:3	29:7,8 31:7 45:4	170:9	Blacks 54:24
aspect 79:3 100:24	assumes 72.8 100.5 assuming 6:21	48:23 80:8,12	battle 37:5	board 60:14
100:25 101:13	66:23	48.23 80.8,12 86:1 98:11 99:13		
			battleground 37:2 37:4	bodies 156:16
102:20,20,21	assumption 75:5	100:7 117:2		body 97:12
176:19 179:14	127:3 191:25	136:10 141:13	bear 71:6 74:23	bold 66:9
191:13	assumptions 31:23	145:15 164:10,20	86:18 87:13 89:6	bolstering 82:22
aspects 85:1 104:1	assure 75:25	169:7 178:11,12	112:7 155:4	book 136:8
assert 176:11	attach 152:23	182:15 183:19	171:23 172:17	bootstraps 30:22
asserting 125:7	153:18 154:16	184:2,3 186:5	bears 10:19 168:6	borne 168:19
assessing 87:5	attaches 185:10	188:23 191:13,22	171:1,3 172:10	169:16 170:6
90:22 91:5	attachment 154:16	194:4	beginning 3:20	174:17
asset 20:8,10 27:23	attempt 79:15,21	background 56:3	45:24 82:15 134:6	borrow 136:8
27:25 28:23,25	79:23 143:2	84:17 103:8	148:25 149:2	borrower 79:4,12
29:20 30:8 37:23	attention 92:24	144:24 179:15	182:13 184:5	79:14 83:12,16,24
38:16 49:25 50:2	attributed 59:6	193:23	189:4	84:3 86:14 87:15
50:23 55:13 57:10	62:1 75:3	bad 9:8	begins 46:11	88:20 93:7 105:21
57:12 63:8 152:23	attributing 170:14	balance 44:7 96:25	Belmont 115:16	106:18,25 119:17
153:21,22,23	authorities 64:15	balls 143:12	bend 161:8	120:20,22 128:6
158:10	156:16	Bank 56:5	benefit 26:18 57:15	128:12 129:18
assets 6:22,24 19:6	authority 16:11	bankrupt 65:21	58:17 72:14 129:4	130:12 138:20
25:17 29:17 31:18	54:24 70:17	68:25 106:7	best 67:1 95:17	borrower's 97:21
35:20 40:25,25	181:22	bankruptcy 42:13	145:3	98:6,7 119:1
41:3 42:3 48:19	availability 138:3	65:6,17 68:6 86:5	better 75:10 109:16	bottom 11:23 12:10
50:17 55:23 56:20	available 2:2,6,8,19	102:11 105:23	124:21 157:14	36:25 40:5 46:3
56:22,24 58:13	6:24 29:1 51:8	106:4	159:14 161:6	48:24 49:13,19
63:16 64:11,13	72:4,5,10 102:18	bankrupts 65:4,4	162:5 165:23,24	92:9 123:5 140:25
97:21 98:6 100:22	128:3,13 133:12	Baptist 38:6	191:14	172:14
102:18 110:21,22	133:14,15 134:15	bar 130:17 135:23	beyond 49:24 56:7	bound 40:14 72:1
110:23,24 111:1,2	135:11 145:2	141:19 154:3	bifurcate 174:1	Bowen 67:15
111:5 113:1,23	164:11	156:6	binding 148:17	bowl 143:13
115:13,25 116:1	avoid 88:13	barred 89:1,14,23	bit 10:22 26:22	Box 76:19
117:6,9 134:15	avoiding 128:9	129:10 137:13	33:4 77:8 98:1	Brandwise 45:10
151:24 153:8,10	aware 95:4 185:16	143:3	105:24 106:22	71:5
154:21 155:14,20	Ayerst 110:25	bars 89:17 93:11	107:20 123:5	breach 83:2 113:3
156:2 158:1,6	115:11	based 9:13 14:5	131:19 137:17,22	122:6 124:25
186:23 187:3,17		137:7 138:17,18	141:21 142:17,21	125:12,13 153:2
assign 55:11,16	B	164:17 177:21	143:21 146:20	break 60:2 178:25
assignee 55:18	b 11:16 37:9 162:1	basic 110:20	150:11,25 152:13	brief 118:16
assignment 55:7	162:1	134:18 178:12	161:13	briefly 39:1 40:7
assist 7:6 17:16	B-list 186:23		bite 141:12	45:2 78:19 85:8
	B1 57:24 104:13	basically 42:22		
34:6 106:3	111:17 150:8	178:6 hasis 2:4 4:24 6:0	bites 141:9	94:5 102:12
assistance 75:22	111.17 1.50.0	basis 3:4 4:24 6:9	bits 48:2	120:10 188:14

www.DTIGlobal.com 8th Floor, 165 Fleet Street

				ruge 201
Briggs 5:23 14:19	105:14	157:16 168:15	68:5,9,18,22,23	category 21:4 93:9
22:2 23:23 24:13	bypass 23:8	193:10,24	68:24 69:3,3,4,15	99:25 131:24
24:18 30:3 36:6		capital 18:20 20:18	70:1,11,16 71:4	133:19,20 160:1
52:5,12 57:3	C	26:5,9,10,13 27:5	72:24 74:11,13,17	173:7
58:10 59:3,19	c 10:7,7 11:7,14,20	27:10,12,24 28:13	75:15 78:16,20	caught 56:18 182:6
61:25 63:6 72:6	12:23 37:3 41:12	35:18 36:4 44:16	84:4 87:3 89:1	cause 96:2,3 120:7
72:16 75:1 95:22	167:22 168:4	47:5,8,10,11 49:2	92:8 93:10,12,13	146:23,24 149:5
96:24 99:6 100:4	169:19 176:23	50:7,20 71:8,10	93:17 95:21 96:7	causes 153:2
116:10,19 167:15	C&K 110:25	71:11 94:14,15,16	98:9 105:23	causing 72:15
181:4	115:11	94:17,18 95:9,11	112:17,19 114:19	149:7 172:12
Briggs' 21:16	cake 17:5	118:17,23 119:9	115:16,22,22	cease 149:8
Briggs's 117:16	calculations 179:19	119:21	116:7,16 117:4	ceased 27:10 41:10
Brightman 101:19	call 20:9,14,19	captured 19:12,13	119:13 120:13,16	61:20,21 186:24
Brightman's	27:13 28:15 30:22	careful 77:3	121:23 122:23	cent 15:24,25 17:7
101:20	30:23 31:2,13	carefully 46:23	129:7,22 131:6	145:9
bring 127:9	32:10 44:2,16	64:10	137:16 140:9	centric 87:25
brings 23:4	52:23 53:8,14	Carnwath 182:11	142:11,17 143:12	certain 19:15 43:18
broad 152:20	54:16,21,23 55:9	184:4,10	143:15 144:13	56:6 74:23 81:8
176:12	58:13 68:13 70:3	carried 129:20	154:8 157:6 158:5	157:7,19 160:9
broader 28:1	72:20 73:7	150:21 169:25	159:10 166:14	173:25 193:10
192:23	call-ability 31:3	176:7	167:7,14 170:25	certainly 2:5 80:9
broadly 190:5	called 3:21 25:25	carries 111:15	174:4 175:20	92:18 109:16
Brothers 101:19,21	26:13 28:14 45:10	187:22	176:22,23 177:5	135:13 142:6,7
116:11	48:14 49:1 63:2	carry 130:12	177:12 178:20	148:11 163:24
bundle 18:1 36:7	64:6 68:22 71:7	161:18 170:8	179:14 182:24	172:24 180:6
39:12 40:1 41:22	93:14 96:24	188:6 192:1	183:4 185:15	186:5 189:22
43:24 45:8 46:20	112:20 115:22	carrying 160:16	186:16,19 187:8	194:20
49:5 58:12 63:19	138:19 170:5	carve-out 188:16	191:21 193:22	cetera 79:21 139:13
64:8 67:25 68:23	calling 20:20 31:4,9	case 6:7 7:21 12:17	cases 38:2 42:19	change 165:7
69:9 74:13 77:7	50:7 71:11	12:24 13:2,3 16:4	43:2 45:6 51:12	167:12 182:14
79:19 92:6 101:5	calls 18:20 19:18	16:14,22 18:19,21	55:22 61:2,3,7	183:25
103:16 111:19	19:21,25 20:4	20:17,20 23:6,7	62:25 63:24 65:20	
115:19 116:24	26:15 42:15,16	25:9,25 26:4,15	66:21 67:1,17,18	chapter 3:21,25,25
117:12,14 121:8	43:9,25 44:1,14	26:16 28:10,13	68:12 69:22 70:15	4:3 148:25 149:5
157:2 167:16,23	44:25 48:18 49:21	30:1,17 32:21	71:1,11 85:7	159:7
174:11,13,14	52:7 55:4 65:5,7	33:23 36:3,21	103:5 105:9	character 168:12
181:8 187:8	67:10 72:15 73:4	42:13 46:17 48:14	112:19 116:8,11	characterisation
188:11,24 195:11	Canwell 63:2 69:11	48:14,19,25 49:4	116:21 123:3	108:21
195:15	capable 83:20,23	50:8,19 52:1	180:18 181:13	characterise
bundles 93:13	84:1,10,19 85:13	53:16,20,24,25	187:22	103:23 154:1
101:3 108:9	85:21 87:9,14	54:1,24 60:15,25	catch 108:15	170:21
137:23 186:7,18	89:2 90:25 93:6	61:12,13 62:4	182:25	characterised
190:13 191:2	104:3 105:19	64:6,20,21 65:4	categories 83:21	152:1 170:22
burdened 110:5,16	106:17 119:15	65:10,16 66:3,17	119:17 152:16	characterises 154:6
business 51:8	122:18 142:14	66:19 67:8,19,23	159:5	characteristics
545111035 J 1.0		00.17 07.0,17,25	107.0	vitat aviet isties
				Ι

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				Page 202
70.1 2 25 94.1	174.7 10 20 176.1	100.21 102.0	150.11 152.10 12	26.5 7 0 17 27.2 5
79:1,3,25 84:1	174:7,19,20 176:1	189:21 193:8	150:11 153:10,13	26:5,7,9,17 27:3,5
88:23,25 89:4 94:2 96:15 132:22	178:7 192:5	clearly 11:2 23:18	154:21 158:18,21	27:8,14,24,25
	193:12	26:22 119:12	160:15 161:4	28:10,13,19,23
168:17	claimants 23:9	178:17,19 184:11	164:1,3 173:2	29:17,20 30:5,8
charge 50:3 55:7	claimed 158:3	195:18	191:13,21 194:4	30:18 32:11 35:9
55:11,16 56:19	171:6	clock 13:11	comes 27:8,18 28:4	35:10,14,20,24,25
129:5 157:5	claiming 105:3	close 195:13	29:6 33:25 121:11	36:2,4,21,23,24
chargee 55:19	133:22	closest 150:7	133:21 135:1	37:23 38:16 39:16
charging 150:9	claims 13:6 14:19	closing 42:23	149:9 154:15	39:20 40:14,25
check 150:22	15:9,11 17:9	clothes 32:24	162:8 163:23	41:3 42:3 44:16
checking 179:17	33:11 34:22 71:17	clue 33:12	comfort 67:5	45:12 46:11 47:8
195:6	71:18 76:15 79:15	Co's 48:14	coming 61:7	48:25 49:2,22,25
Chelmsford 187:2	79:19,19 89:23	code 101:11 102:1	commence 65:15	50:2,3,16,21 51:7
187:14	92:1 95:19,24	119:6,8 132:12	104:7	51:8,9,16,19,20
cherry 141:10	96:8,8,23 97:8,12	176:14,19,20	commenced 65:7	51:23 52:6,22
chime 85:2 107:10	97:15,18 98:17	185:25 194:8	65:22 67:10	53:4 54:15,17,19
chimes 98:11	113:1,11 153:12	coextensive 114:20	103:23	55:13,15 56:18,20
choose 72:21	176:11	114:21	commencement	56:23 58:1,7,13
chosen 109:17	CLARKE 2:2	cogitating 170:16	56:23 64:12 66:12	58:19,23 59:8,10
circuity 140:24	52:12 64:20,22	coherence 12:21	103:21 128:18	59:16,22,22 62:11
circular 72:8	69:7 142:10	coherent 130:21	159:1 164:21	62:14,20,22 63:4
circularity 31:20	186:16 194:23	159:21 163:11	167:10,13 177:9	63:8,16,17,22
31:22	195:1	cold 158:16	177:10	64:2,2,11,13,16
circumstance 85:23	class 4:2 135:14,15	collapse 56:4	commences 63:5	66:13 67:11 68:6
circumstances 6:25	135:16,19	colleagues 60:23	130:3	68:19,20,25 69:1
20:7 23:11 83:13	clause 10:22 77:6	collect 100:21	commend 154:9	69:14 70:9 71:7
117:5 126:15	77:12,14,17,18,19	collected 39:25	187:10	72:3,5,9,10,11,11
175:15 177:15	77:21 82:24 83:12	collective 128:17	comment 141:6	72:14,15,18 73:6
178:14	88:24 105:21	130:24 131:1	common 167:6	74:1,2,7 75:9,10
citation 178:20	119:14 127:25	132:1 183:22	173:25	79:20,24 87:6
cite 176:21	128:1,5,11 130:3	Collins 115:16	companies 39:14	89:9,13 90:5
cited 65:16	132:6 133:16	Colonial 64:6	39:14,17,20 41:21	91:10 94:18 102:8
City 56:4	137:13,15 139:8	column 45:15 46:7	42:12 49:17 50:8	102:15 105:14
claim 8:23,24 13:17	141:5,20	combination	50:16 63:18,24	106:10,12 110:3,4
13:22,23 14:3,3,9	clause-paragraph	172:13 173:5	64:9,15 66:12	110:15 111:8,14
14:16 16:19 23:12	81:16	come 25:14 33:24	68:7,8,11	112:12 113:4,14
26:12 75:2,8,9	clauses 77:15 82:19	41:20 42:18 45:4	companies' 34:15	113:16,19 114:2
89:3 90:10,15	127:12	46:8 50:17 62:25	company 9:12,23	115:2,6,14 117:4
92:23 93:3 96:15	clear 16:23 22:21	66:10 76:16 81:3	9:25 10:4,21,25	117:9 146:24,24
96:22,25 97:4,9	37:14 40:23 42:6	81:12 83:4 85:6	9.25 10.4,21,25 12:15 13:10 18:11	148:5 149:9,11,24
113:5,13,14,15,16	42:8 45:21 55:17	98:11 100:7	12.13 13.10 18.11	148.5 149.9,11,24
			,	1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
113:18 137:7,10	60:14 92:19 98:20	107:13 111:9	20:10,12,13,18,21	151:15 153:18
140:7,12,16,18	131:5 132:21	115:5 131:1,2,9	21:1,7,8,9 22:12	155:9,24 159:12
141:9,10,15	149:22 151:7	134:2,16 135:8	22:17 23:13 25:3	164:18 166:22
144:23 169:21	167:18 187:2	136:9 147:10	25:13,18,20 26:5	167:2 168:9,23

www.DTIGlobal.com 8th Floor, 165 Fleet Street

172:25 175:11

180:15 181:16

182:19 183:23

185:17,21,23

192:19 193:13

company's 21:20

99:13 105:17

116:2,6 169:5

182:18

187:4,17,20 189:3

21:22 28:18 36:4 54:16 90:22 98:25

Eerman	Disensis have	JIIGII I	10 0000001 2010
			Page 203
101:10	conclusively 30:7	consistently 52:23	contemplated
conceded 146:11	condense 60:19	constitute 55:19	97:16 103:4
concentrate 61:9	condensed 60:17	68:13 105:18	129:16 168:18
concentrated 1:6	condition 83:10,19	137:13 152:9,10	contemplates 59:18
concept 51:10	conditional 77:13	155:21	88:11 101:17
77:25 78:2 79:22	81:23 83:16 91:13	constituted 36:23	114:5
81:22,23,24 87:11	conduct 51:8	90:15 130:3	contemplating
93:8 94:13 97:13	conferred 57:1	constitutes 82:2	131:23
97:16,19,25	confirms 161:3	93:1 97:20 116:6	contemplation
102:17 109:12	conflict 80:5	126:25 127:3,6	112:15
115:17,25 130:18	confusingly 3:21	141:4 148:21	contend 8:17 131:6
130:19 172:25	conjunction 180:12	183:17 193:24	166:16 167:22
184:22,23 187:25	connection 104:19	construct 185:11	contended 122:19
188:2 193:23	conscious 186:15	construction 71:22	contending 9:6
concepts 85:17,18	consecutive 7:13	71:25 76:8,20	contends 15:11
85:21 87:17,17	consequence 13:2,3	82:3 110:25	content 38:9
88:13 182:6	86:25 141:2	115:11 123:6	109:12 124:18
concern 39:20	154:23 155:19	142:19 147:5	contention 89:22
51:24 58:1 120:8	165:22 166:2	151:9 153:1	context 6:1 10:18
146:19 147:1	167:3 193:1	154:13 160:19	53:3 69:14 76:23
159:16 160:2	consequences	162:25 166:4,12	83:5 87:19,21
concerned 11:11	38:19 74:8 113:2	166:18,20 169:12	91:9 94:7,9 95:7
13:11 21:24 24:21	145:25	171:7,13 180:11	95:16 96:17 100:8
25:2 31:8 35:19	consider 68:15	185:6 188:8 193:5	101:18 102:9,11
45:11 76:21 77:9	176:3 179:10	constructions	104:25 107:19
90:18.19.21.22	180:20	160:18	109:9 115:17

102.10	150.17 172.25	conjunction 100.12	105.17 175.24	100.10 107.22
comparative	184:22,23 187:25	connection 104:19	construct 185:11	contended 122:19
160:16	188:2 193:23	conscious 186:15	construction 71:22	contending 9:6
compare 4:8	concepts 85:17,18	consecutive 7:13	71:25 76:8,20	contends 15:11
compel 175:23	85:21 87:17,17	consequence 13:2,3	82:3 110:25	content 38:9
compensate 119:18	88:13 182:6	86:25 141:2	115:11 123:6	109:12 124:18
147:8	concern 39:20	154:23 155:19	142:19 147:5	contention 89:22
compensated	51:24 58:1 120:8	165:22 166:2	151:9 153:1	context 6:1 10:18
177:21	146:19 147:1	167:3 193:1	154:13 160:19	53:3 69:14 76:23
compete 13:5	159:16 160:2	consequences	162:25 166:4,12	83:5 87:19,21
competition 129:25	concerned 11:11	38:19 74:8 113:2	166:18,20 169:12	91:9 94:7,9 95:7
134:23	13:11 21:24 24:21	145:25	171:7,13 180:11	95:16 96:17 100:8
complained 147:22	25:2 31:8 35:19	consider 68:15	185:6 188:8 193:5	101:18 102:9,11
complete 16:8 44:2	45:11 76:21 77:9	176:3 179:10	constructions	104:25 107:19
55:4 96:2,3	90:18,19,21,22	180:20	160:18	109:9 115:17
176:15 189:24	98:15 106:8 108:3	considerably 37:21	constructive 4:7	118:18,19 119:6,8
completely 15:17	110:4,16 132:11	consideration	construe 99:19	119:9 121:21
15:25 50:24 64:19	152:24 163:4	95:20	138:22 146:16	137:20 148:4
162:2 172:5	172:3,11 173:10	considerations	147:16 180:10	151:12 155:4
compliance 109:22	173:11 179:9	71:14 72:13	189:17 190:6,15	159:2 162:11
112:13	180:25 182:9	159:10	191:4	176:2,10 178:2,3
comply 102:5	186:21 187:13	considered 46:23	construed 187:24	180:10 183:24
105:11,13 109:20	192:4,18,20,22	49:2 95:21	191:5 195:2	184:4,9,11 187:1
109:23 113:12	concerns 62:13,16	considering 117:1	construing 80:2	194:3
114:24	124:9,20	186:9	87:13,25 91:8	contexts 81:20
complying 101:16	conclude 1:9 3:5	considers 53:6	153:5 162:19	114:8 115:24
compromise 43:25	4:24 37:7 177:12	consistent 37:6	166:8 190:7,8,9	186:2 194:15
54:13,17 55:3,3	concluded 127:13	55:22 58:9 94:13	191:10,11 194:5	contingency 124:9
105:2,4	concludes 73:8	95:7 99:19 109:17	contain 77:12	124:14,16
compromised	75:17	130:22 139:8	contained 39:11	contingent 34:15
105:7	conclusion 14:11	148:7 161:14	77:22 127:12	34:20 59:6 62:2
compulsory 21:25	28:22 29:2,18	162:3 183:3	192:25	74:18 75:2 79:4
22:4 23:24 24:8	63:9 64:5 144:15	187:21 193:20	contemplate	80:18,19 84:21,23
24:16 100:11	144:16	194:6	194:12	85:2 124:5,11
			1	•

www.DTIGlobal.com 8th Floor, 165 Fleet Street London EC4A 2DY

				Page 204
127:8 132:15,18	87:1 177:18	06.23 07.2 8	158.22 150.21 24	areating 21.2.2
132:23 133:3	contrast 36:1 62:14	96:23 97:2,8 176:11	158:22 159:21,24 160:12 162:11	creating 31:3,3 creation 1:18,19
132.23 135.3	63:18,25 147:4	convert 172:5	168:7 175:14	14:16 15:8 16:16
193:10	contribute 18:6		177:22 185:1,15	credit 160:9
continuation 188:1	19:6 35:20 36:20	copies 108:10 136:13	court 1:10 5:7,10	creditor 7:24 12:5
continue 106:6	40:24 41:9,13	core 81:11 110:22	5:12,18,21 6:9,17	75:8,11 95:5
113:16	40.24 41.9,15 42:2 45:21 54:11	152:25 153:3	7:5,22 8:2 9:4,5,5	98:22 119:18
continued 1:3	58:18 59:14 61:19	corporate 106:9	14:9 18:5 19:19	122:20 123:8
182:2,5 186:3	62:4,6 63:16	180:17 184:19	19:25 22:7 23:23	122:20 123:8
197:3	64:11 117:8 179:3	Corporation 46:9	25:24 26:21 33:8	131:25 132:16,18
continues 89:25	179:11 181:20	66:2	33:14 34:11,18	131:23 132:10,18
148:17	186:23 187:17	correct 24:13 58:5	35:15 36:6,11	143:3 145:16,20
continuing 113:4	contributed 41:2	59:1 62:9 81:3	39:7 41:14 45:1	160:1 168:23
183:9	contributes 59:21	90:14 103:22	49:5 54:15 56:1	171:25 177:20
contract 15:8 35:24	contribution 29:21	106:2 127:16	56:13,21 59:1	182:18 183:25
37:7 38:17 55:1	29:22 42:7 62:12	137:6 161:22	60:4 62:7,9,10,16	creditor's 118:24
63:6 122:20 125:6	contributions	179:19	62:24 66:18 67:19	119:1 129:8 145:3
125:19,20,22,23	20:15 41:15 62:8	corrected 183:6	68:22 69:16 71:15	creditors 4:2,11 7:6
125:25 126:5,10	62:15,18 187:3	correctly 123:1	76:6 99:7 112:13	7:7,14 13:24 17:4
126:12,13 134:20	contributor 43:12	correctness 133:17	114:13 117:3	26:12 29:12 33:10
138:23 178:1	contributories	correlated 150:16	127:15 128:25	34:23 55:20 72:14
contract' 15:16	39:10 45:3 53:2	correlation 195:13	144:15,16,20	72:23 73:1 75:11
16:2	58:17,22 59:9,11	corresponding	147:5 148:21	79:19 80:11 94:15
contracted 68:15	70:5	74:2	153:1 166:4,12,17	95:10 105:3,3
81:2,8,10 123:9	contributories'	costs 120:6,8 150:9	179:7 196:7	119:20 120:6,8
133:3,16	117:8	157:6	court's 19:21	129:25 135:7
contracting 127:17	contributory 33:6	Cotton 48:22 67:12	courts 63:11 67:24	143:23,23 144:3,5
136:17 144:1,4	42:14 43:9 44:7	counsel 69:2	covenant 133:8	145:11,21 147:8
contracting-out	44:18 54:21 58:18	count 166:4	cover 22:3 33:13	155:1 159:4,18
81:19	59:20,23 65:15	counts 141:14	84:20,22 85:12	165:9,13,23,25
contracts 14:2	70:6 72:17,20	couple 40:13	173:9	174:15 181:15
80:21	75:19	course 11:9 14:5	covered 11:14	183:21
contractual 13:22	control 27:5 28:20	15:10 16:17 18:10	26:15 172:22	creditors' 31:17
14:24 15:22,23	56:7 148:19	18:15 20:17 21:3	173:14 185:14	96:25 153:16
16:13 35:17,23	155:20	67:12 76:24 78:5	covering 173:7	155:6 159:12
63:13,21 70:25	conundrum 38:22	82:9 83:7 89:6	covers 97:23	crispest 175:3
71:2 80:5 83:1	convenience 34:24	93:25 94:17 95:17	Cox 76:19	critical 40:23
90:20 96:24,25	convenient 36:5	96:8 97:22 98:6	create 2:19 13:3	125:16 192:10
114:1 119:9 145:9	39:23 60:1 114:9	103:13 108:2	30:18 32:12 37:11	cross-appeal 8:14
170:1,3,10 174:22	114:11	110:23 111:14	42:4 57:21 62:21	13:16,20,21 34:17
175:19,24 178:7,8	conveniently	115:5 118:18	71:22 157:4	75:5,18,20 122:3
178:13 185:22	158:17	119:11 124:18	created 29:16	122:19 142:19,21
contractually	conversely 31:15	125:16 137:8	35:23 36:1 46:2	144:20
15:20	conversion 15:11	145:2 147:15	creates 13:16 35:7	cross-appeals 1:11
contrary 9:2 14:17	17:4 76:15 96:8	149:13 151:25	35:13 52:10	8:9,16
L	•	-		•

www.DTIGlobal.com 8th Floor, 165 Fleet Street London EC4A 2DY

Page 2	05
--------	----

				Page 205
cross-jurisdictio	152:7 173:4 196:9	89:4,14 90:5,6,7	188:20 192:5,24	106:25 120:14,17
121:22	days 186:5	93:17 94:9 95:8	193:8 194:7,11,24	120:18 121:17
crosses 100:9	deal 8:14 14:10	96:17 98:3 118:21	195:3,7,8,16	127:6 189:12,22
currency 15:10	17:21 26:1 33:1,2	119:3,24 121:10	decide 16:18,22	192:10,23 193:8
17:3 76:15 96:8	84:8 98:14,16	122:12,17,17	50:13	193:18,20
96:23 97:8 141:8	102:6,16,17 106:6	123:8 124:17	decided 15:12	delegate 44:23
141:10,15 176:10	106:21 107:13,15	128:14 129:3,7	105:6 167:14	delegated 20:3
current 9:16	107:17,24 111:12	130:12 133:5,5	deciding 145:13	58:25
currently 142:14	141:16 159:3,3,22	136:20,24 137:20	decision 25:24	delegation 19:21
cut 64:19 129:9	164:14 166:14	137:22 139:24	36:11 45:10,11	demand 46:1
130:1 169:20	176:14 177:8	140:2,3,6,13	46:8 49:4,14 63:3	demonstrate 39:3
170:11	179:24,25	141:4 142:20	66:18 68:5 75:6	51:15
cut-off 167:9,12	dealing 17:24 18:10	166:15 167:4,8	116:11 123:2	demonstrated
cutting 137:14	18:12,13,18,19	168:6,13,19 169:5	146:22 175:7	137:20 146:6
CVL 98:22	20:21 21:17 27:2	169:16,21 170:4,5	183:3	demonstrates
	71:6 76:15 96:19	170:7,25 171:4,12	declaration 34:11	103:2 112:25
D	104:21 134:7	172:6,10,25	34:18 35:2 68:15	137:24
D 18:1 77:7 101:23	142:18 161:12,12	173:11,18 189:2	73:9,10 144:17,21	denial 146:3,5
117:10,14 143:6	176:10	192:2,5,6,13,21	145:14 146:22	dense 60:24
174:11,13,14	deals 10:11 101:11	194:16,18	174:4,5,6,14,15	depend 59:15
D3 36:7	142:21 150:9	debts 7:19 12:1,12	174:25 177:7	109:23 133:17
D5 6:13 40:1	158:12 192:22	13:15 15:18,19,20	179:8 180:11	145:3 175:12
damage 96:4	dealt 11:12,19	18:7,8 19:7 20:16	declarations 76:8	depending 7:24
damages 95:19	12:23 25:18 26:21	20:24 21:9 22:17	144:9	71:20 104:20
date 9:12 10:1,5,25	27:6 35:25 36:2	22:22 25:2,5,15	declare 4:11	108:9
38:17 59:11 64:12	55:13 74:6 76:17	31:10 33:2,3,25	declared 34:12,19	depends 132:8
66:11 69:13 79:25	94:8 102:7,19	52:2 58:4 63:14	declaring 68:13	139:24
84:12 96:2 167:2	103:2 108:22	74:25 79:20,24	deduced 63:7	derived 41:21
167:9,10,12	144:22 150:3	84:9,9,11 85:2	deed 66:11	63:23 174:21
169:10 173:13	154:4 173:8	89:1,2,9 93:9	deemed 12:6 42:4	deriving 195:3
192:19	178:21	98:14 106:5,8	172:3	describe 39:2 111:7
dates 59:12	debate 104:23	108:5 117:1,6	deeming 7:10 11:21	described 33:23
David 6:2,5,12 14:6	105:24 140:25	121:1,15 122:1,1	12:2	103:14 145:21
16:5 18:4 23:6	debenture 56:19	122:5,10 123:8,11	defence 85:25	168:4 170:23
39:24 42:20 43:23	debt 9:11,21,22,25	122:3,10 123:0,11	defensive 131:19	171:9
44:22 54:25 69:18	10:4,19,20 11:13	140:22 142:25	deferred 87:1	describes 36:12
69:24 102:25	11:18,25 12:14	140:22 142:23	defined 78:8 83:20	describing 109:15
103:14 112:21	13:4 16:16 31:11	148:1 154:17	100:1 195:16	description 111:6
115:21 116:9	31:12 36:10 42:5	157:7 158:25	defines 9:21 83:12	122:24
118:4 176:17	46:15 62:2 63:17	165:1 166:20	189:2,9	designed 84:18
Davies 116:12	63:22 64:1,1	169:24 174:16	definitely 52:17	176:4 194:9
117:1	68:14 69:12 74:23	175:1,3 179:4,5	definition 36:10	detail 37:21 65:1
Davis 117:24	74:24 75:4 80:17	179:12 181:1	78:11,18 79:8,8	107:20
118:15	80:18,19,23 81:6	182:5 185:22	79:11 82:6,9 86:1	detailed 45:3 60:13
day 9:4 141:18	85:4,9 88:5,23,25	182.3 183.22	87:6 96:12 98:2	determination
	05.7,200.5,45,45	100.27 10/.17	07.0 70.12 70.2	
	l		l	l

www.DTIGlobal.com 8th Floor, 165 Fleet Street

				Page 206
103:2 104:3	differential 7:23	discussed 74:9	151:24 155:12	101:16 102:4
determine 103:6	differently 51:5	discussing 161:5	disturb 134:17	duty 25:8 98:13
determined 83:23	186:10 187:18,25	dismissed 179:8	dividend 4:12 97:2	101:24 105:12,13
84:2,11,20 85:4	difficult 29:20 79:7	disposal 51:9,18	dividends 44:8	113:3,8,13
85:10,14,22 86:24	161:14	dispose 50:16 51:20	122:21 134:17	
87:9 93:7 105:10	difficulties 157:25	disposition 153:24	144:6	E
105:20 106:18	164:24	dispute 103:12	document 138:22	E 101:23
119:16	difficulty 51:24	180:13	139:4	earlier 68:7 159:1
determining 30:19	54:6 59:7 124:24	disputed 71:19	doing 1:4 8:10	165:11,14 167:13
89:13 159:11	126:14	74:24	32:16 143:3	195:7
develop 38:10,13	direct 27:9 180:22	disregard 90:4,9	148:13 151:18	early 9:4 57:10
107:19 127:10	186:13	disregarded 87:5	153:5 166:7	97:1 186:5 187:22
176:8 191:15	directed 179:3	93:23 119:13	door 52:8,14,18	eat 17:6
195:21	direction 106:1	disregarding 83:21	58:9	echo 15:1
developed 78:16,21	116:4 148:10,21	91:11	double 164:15	Eckhardt 175:4
143:14 180:15	152:9,10 156:5	dissertation 180:16	doubt 60:18 66:14	effect 11:23,24
developing 38:12	directions 104:11	dissolution 86:7	68:12	42:22 66:15 68:20
device 77:14	104:18 187:11	dissolved 102:8	doubted 118:12	80:18,19 81:4
devices 157:16	directly 50:12	106:13	doubtless 84:19	88:19 105:12
Dicker 76:15 96:19	181:17 184:17	distinction 27:11	doubts 24:7	109:6 111:5,16
176:9	directors 20:20	56:11,22 57:2	dozen 46:9	113:23 122:19
difference 35:22	27:6,13,20 28:15	70:25 71:6 90:24	drafted 139:4	129:8 141:2
63:12 64:3 95:4	28:20 35:25 49:23	132:5 194:16	186:10	145:14 146:7,21
118:24 119:24	50:3 52:6 55:8	distinctions 194:14	drafting 24:6 100:3	148:6,12 149:7
143:17 163:11	56:8	distinguish 138:19	draughtsman	155:23 156:21
differences 24:5	disagree 153:9,10	distinguishes 64:10	11:20 12:22 84:5	158:24 163:7
35:16 159:15	disagreed 90:14	distinguishing	85:17 86:11 87:8	166:22 167:21
184:6	127:16	192:11	88:22 90:21 91:22	170:12 174:15
different 11:8,9	disallowed 74:14	distorting 146:21	93:5,22 119:4	177:15 184:14
15:17,25 20:6,11	discern 91:21	distribute 4:11	128:20 163:13,25	effective 125:10
21:4 24:15 27:12	discharge 44:2,3	98:5	164:8 189:21	effectively 23:13
32:23,24 46:14	55:4 68:25 100:22	distributed 21:23	draw 28:22 92:24	114:1 129:19
50:25 51:10 75:19	106:7 113:24	99:5,14,15 106:13	drawn 56:12 90:25	134:19 141:22
79:17 81:20 86:12	discharged 29:5	133:23	draws 27:10	154:4,5 170:1
87:22 88:12 92:2	65:5,22 97:1	distributing 5:22	drew 29:19 56:21	173:13
92:13,25 102:2	113:19 136:25	34:13 35:4,9	driving 91:2,24,24	effects 62:23
104:25 106:14	137:9 153:22,25	52:22 86:16	92:1 93:22	efficient 43:15
107:1 114:6,8	154:18,19 165:14	128:18 151:25	due 18:24 43:11	eight 46:2
118:9 134:1,8	166:24 172:10	156:6 159:8	63:17,22 64:1	either 9:8 104:18
137:5 151:12,16	discharges 72:5	162:14	73:5 74:2 115:5	105:17 125:3,9,10
156:3 157:15	discrepancies 5:19	distribution 4:2,14	137:8 169:21	155:22
160:10,17 165:8	8:3	22:6 88:12 97:21	171:8	elaborate 176:8
169:19 172:5,7	discrepancy 7:17	98:17 105:16	duly 98:5	electronic 57:6
183:13 186:1,1	discuss 26:16 60:10	112:25 132:1	duplication 170:13	58:11 69:9
194:12,15	60:22	134:3 144:5	duties 44:24 101:13	element 96:3
	1	1	•	·

www.DTIGlobal.com 8th Floor, 165 Fleet Street London EC4A 2DY

				Page 207
127:10 140:24	90:11	entitles 125:9	124:13 134:20	90:2 115:1 138:23
155:18	enforcement 89:2	entity 152:23	135:5,9 159:20	154:15
elements 152:1	130:10,24 131:1	184:19 186:2	185:8	existing 1:20 41:14
176:19,20	175:2	envisage 131:9	ex 45:10 63:2 69:11	46:13 59:16 62:7
elided 129:2	enforcing 128:9	183:9	169:10	62:12,15,17 68:16
eliminate 14:18	129:15,17 130:2	equally 7:15,20	exactly 6:1 11:15	176:5
71:18	130:18 132:6	114:7 143:18,19	11:19 23:15 30:25	exists 103:19
eliminates 11:7	engage 178:15	143:24	31:7 68:20 93:19	exit 73:1 145:2
embodied 24:11	engaged 149:6	equivalent 86:7	119:3 160:25	expanded 186:4
embracing 187:16	engages 176:16	134:12	178:13 183:10	193:15
emphasise 16:7	England 86:19	erred 35:15	example 14:1 17:7	expansive 46:25
38:14 40:13,21	English 84:6 85:18	essence 61:10 84:4	53:16 74:25 75:14	193:7,23 194:10
64:8 66:8,9	86:17 87:21,24	84:13 168:2	79:17 82:24 86:16	194:22
emphasising 30:9	88:5,6,8,10,17	essential 13:19	155:10 179:23	expect 105:5
empowered 56:14	98:12	70:10 141:18	183:11	178:14
enable 61:9 72:19	enlarging 71:16	essentially 2:15	exceeded 179:23	expected 52:7
176:6 190:5	ensure 72:5 90:22	10:2 17:12 22:8	exception 78:14	expense 19:7 52:3
enabled 1:18	104:2 111:15	53:17 80:14 96:19	89:20	expenses 33:24
enables 103:10	112:14 114:24	142:18	exceptions 188:17	52:25 150:9 157:7
136:5 164:20	143:22 146:7	establish 168:24,25	excise 64:19	explain 42:19 43:1
enabling 1:17 2:16	171:24	established 83:19	excluded 27:4	85:6 106:2 115:5
105:11	ensuring 90:1	83:23 84:2,10,20	78:12,18 83:21	122:7 180:21
enacted 162:9	enter 87:15	85:4,9,14,22	88:24 91:12 96:11	explained 6:23
163:8	entered 11:1 59:10	86:24 87:9 93:6	97:10,14 120:14	87:10 93:10
enacting 15:14	59:11	95:18 105:10,20	120:17 121:17	explaining 174:4
encapsulate 91:23	enters 13:10 36:22	106:17 119:16	168:10,15 192:7	explains 56:3
encompasses 193:3	entire 70:12	125:17,19	exclusion 91:22	explanation 47:6
encouraging 180:4	entirely 131:16	establishment	exclusively 10:10	116:16,17 117:23
encumbered	193:20	103:3 104:2	executing 128:8	explicit 149:17
153:23 158:6,11	entirety 99:24	estate 44:7 110:20	execution 23:13	150:4
166:19	158:23	133:24 154:24	128:17 182:19	exposes 145:23
encumbrance	entitle 94:2	estates 42:14	183:22	express 48:17
154:21	entitled 13:25 14:2	estimate 59:8,15	exercise 59:18	121:13 157:8,13
encumbrances	34:13 57:15	74:22	104:24 105:1	185:1
158:2	100:23 102:5	estimated 42:15	150:21 160:4,17	expressed 120:19
endeavour 107:12	130:6 131:2 140:4	74:20	161:18 183:21	133:9 148:10
ended 88:20	145:20 178:1	et 79:21 139:13	192:1	149:22 150:12,15
endorse 38:10	entitlement 16:13	evening 191:20	exercised 30:11	151:2 152:15,20
107:8	81:2 118:24 119:2	event 42:3 47:19,20	159:19	152:21 163:18
endorsing 38:11	119:19 145:11,17	70:7 121:25	exist 40:19 73:25	expresses 150:17
ends 160:12	145:19,22 155:6	141:20 173:15	89:25 96:22	expression 121:11
enforce 112:10,13	164:21 176:2	185:19 194:6	184:25	194:24 195:1
114:23	177:17,25 178:3	eventually 112:20	existed 183:11	expressly 10:10
enforceable 114:7	entitlements	133:20	existence 27:8,18	11:2 21:24 68:13
enforced 49:22	143:25 176:15	everybody 1:5,7	28:5 50:17 87:18	108:25 109:2
		, .		
	I	I	I	I

www.DTIGlobal.com 8th Floor, 165 Fleet Street London EC4A 2DY

Page	208
Lugo	200

				rage 200
120:25 121:2	F4 93:13 115:19	161:19 163:4	41:25 43:24 45:8	167:9 196:9
151:1	F5 112:22 182:11	169:6 172:11	47:2,9,21 49:20	follows 20:3 35:3
expropriation	F6 115:23	182:9 185:13	57:17 63:10 64:25	39:19 57:20 75:2
177:17	F8 137:23	187:13 191:19	71:4,16 73:24	78:7 105:18
extant 185:18,25	F9.27 2:12	192:22	77:6,10,11,20,22	153:16
extend 20:25 47:14	face 124:1 167:18	fascinating 56:9	79:1 81:15 82:13	Football 115:22
99:9 179:11	193:3	fault 37:13	83:10 92:3 94:4	footing 126:19
extends 18:7 179:4	fact 3:3,6,12 7:19	favour 26:8	100:16 102:20	137:3
190:5	16:7,18 44:17	feature 54:13 55:7	100.10 102.20	force 125:14
extensive 158:9	51:21 53:14 58:3	58:15	110:18 112:22	foreign 86:18,20
extensive 138.9 extent 8:20 72:4	59:21 77:5,11	features 39:3 51:14	110.18 112.22	87:15,20 88:11
80:11 84:25 88:9	82:21 90:11 93:16			89:3,7 90:10,15
		feeling 195:6	121:6,16 122:17	92:22 93:3 94:1
95:10 96:1 103:6	104:1 112:8,11	felt 118:6	123:5,9 126:23	
107:11,14 120:3	113:18,21 114:22	fifth 59:25 61:16	127:21 135:11	forensic 9:1,2
122:13 123:24	128:20 131:7	figure 124:20	139:4 148:23	foresaw 49:14
124:23 129:24	139:2 147:10	final 33:4 54:18	149:6 159:7,14	forget 97:11 102:9
141:9 153:11	149:23 159:25	62:19	166:14,25 167:15	forgot 86:4
158:10 164:25	163:7,14 177:20	finally 39:5 48:22	169:7 178:9 188:2	form 9:16 27:7
173:6,9 176:5	189:19	71:14	188:12,19,22	32:24 37:19 41:2
178:25 180:24	facts 45:13	financial 46:8	192:2	51:21 62:10,16
181:18,25 182:6	factual 155:11	51:23 66:2 152:16	Firstly 35:3 57:20	79:10 93:6 103:11
182:21 184:14,20	fail 144:15 178:9	find 19:17 22:6	61:18	108:24 109:22
185:9,19 186:2	failed 35:16 63:12	23:17 24:11 45:22	fit 83:5 87:11 97:18	121:23 138:11,14
extinguish 89:17	101:2	46:19 67:5 90:1	107:18 161:20	138:17 150:21
extinguished 149:8	fair 24:21 29:24	100:24,25 118:23	fits 97:5	151:15 156:12
extract 65:1	95:1	139:10 142:9	fitted 134:10	165:17 166:8
extreme 155:10	fairly 82:6 176:12	150:3,16,22	five 16:7 144:21	175:23 183:18
—	fall 2:18 11:10,13	161:21 174:18	fixed 70:8 193:10	195:14
	56:17 78:14 93:9	195:21	193:11	former 65:4 157:6
F1 9:16 10:14	97:12 106:25	finding 150:13	flatly 177:18	forms 22:10 24:11
25:25 101:21	119:12 168:8	finds 3:19 116:12	flavours 151:20	154:23
108:10 116:12	169:4,7,8 172:24	155:20	flow 85:16 191:18	forth 158:3
163:18 167:25	173:14 178:9	fine 2:10 68:18	flowing 173:18	fortification 82:12
187:8 188:11	fallback 8:17	107:22 110:14	focus 83:11 121:17	forward 145:13
195:15	falling 84:9,11	finish 17:1 107:25	151:22 152:2	190:22
F1/22/1583 186:18	171:9 172:21,23	112:18 179:21	184:13	found 17:25 18:23
F2 19:17 98:24	falls 10:3 12:24	191:20	focused 4:4 128:20	101:3 163:18
186:9 190:21,22	74:3 78:18 124:8	finished 115:8	focuses 193:23	171:20 182:11
195:11	153:24	first 1:12,19 2:17	follow 51:15 54:17	186:18 195:11
F3 3:19,24 7:11,12	famous 183:3	2:23 3:6,12 5:21	63:9 72:1 179:22	four 63:10 144:17
10:15,15,16 11:22	far 11:11 13:11	6:18 7:7,9 8:14,14	followed 6:5 56:5	145:14
12:9 19:23 101:6	24:19,20 29:25	13:6,20 16:22	194:2	fourth 58:15 67:18
108:11,12 111:19	30:4,13 71:17	19:11 20:1 21:5	following 9:24	92:11
147:19 157:2	76:21 80:12 98:15	21:10 35:7 37:10	16:16 83:17 94:11	free 51:20 153:24
167:23	106:1,19 110:4,15	38:25 40:13 41:8	165:24 166:1	freestanding

www.DTIGlobal.com 8th Floor, 165 Fleet Street

				Page 209
109:18	gained 144:7	13:23 32:1 37:8	158:1 163:15	happened 133:2
friend 15:1 46:18	gap 161:2	44:15 107:5,7	173:23 176:8,10	177:11 179:7
46:20 67:25 78:17	general 23:17	109:18 113:1	176:11 178:12	happening 134:19
82:5 96:19 162:24	33:23 95:17 156:4	117:23 152:8	179:25 180:16	134:20
164:24	157:20,20,21	160:13	184:2 191:20	happens 21:13 29:4
friend's 119:13	187:12,15 188:17	giving 4:19 84:15	good 9:8 38:2 60:20	29:5 33:10 104:12
friends 70:16,19	generality 82:17	glance 10:16	70:22 75:14 95:6	154:14 164:25
fruits 52:7 56:15,17	188:19	Glasgow 56:4	95:13 119:22	171:8,12
Fry 45:11,17 67:14	generally 3:14	go 1:24 19:16 22:19	124:15 157:13	happy 135:16
71:4	22:15 32:25	24:20 29:7,8 30:4	170:17 196:3	138:15
fulfil 83:25	142:19 187:19	30:14,15 37:20	Goode 123:4	hard 56:18 193:12
full 15:21 29:14	194:8	40:6,12 43:23	govern 148:24	Harding 63:3,3
54:18 83:21 92:14	generating 32:22	45:1 49:15 58:7	governing 45:7	65:9 67:9,23 69:2
130:5,14 134:15	generis 30:9	59:25 63:20 68:23	Government 90:12	69:11
134:21 135:5	genesis 88:5,10,14	75:15 77:1,7	91:18 92:3	Hastey's 68:22 69:3
137:9 140:3	GENPRU 137:17	88:10 91:19 99:11	granted 149:20	69:15
141:13 182:21	137:19,22 138:6	124:19 145:15	156:20	Haverly 187:2,13
185:8,10,17,19	138:18,18 139:1	155:14,15 156:9	grateful 64:23	head 94:4
188:16	George 64:5	161:19 162:4	66:24 69:6 76:3	heading 39:13
fullest 72:4	getting 2:4 17:7	185:14 192:9	110:13 186:17	headnote 49:7 68:3
fully 28:14 172:10	134:21	goes 4:15 6:8 9:13	great 106:21	hear 178:24
176:6 184:11	Gifford 69:10	10:1,5 22:4 24:18	greater 53:14 176:5	heard 25:6 37:15
functions 57:23	give 2:16 4:10 7:17	24:25 27:14 30:5	Grissell's 74:11	143:20 185:25
104:19 111:15	19:16 33:12 44:2	30:15 31:7 36:25	ground 167:6 173:7	192:3
fund 27:7 29:1,15	45:3 50:16 55:4	86:1 99:3 106:19	173:9	hearing 9:5 76:13
46:2 51:7,22	61:3 64:7,22 65:2	120:17 142:21	guidance 185:5,12	196:9
55:19 108:22	77:5,10 91:17	148:14 150:10	192:14	heavily 67:24
funds 52:20 56:6	99:11 112:23	155:25 166:24	Gurney 74:12	held 26:15 54:15
further 17:16 27:17	124:24 132:20,20	167:2 178:11		57:14 58:1,14
30:15 34:6 47:19	133:11 147:17	183:23 188:21	<u> </u>	63:3 79:6 81:25
48:2,8,8,9 49:15	148:6 155:23	going 2:2 17:21	half 46:9	93:15 122:23
51:25 59:12 72:13	159:15 160:8	20:15 39:19 40:6	halfway 57:8	help 1:5 48:16
75:22 82:22	161:6 164:23	48:23 51:24 58:1	162:20	61:13 117:24
141:22 144:7	179:14 180:16	60:10 62:13,16	hand 35:17,19	139:2 161:13
164:13	185:5,11 193:13	66:23 71:20 76:7	50:19 85:21,24,24	180:21 189:18
Furthermore 58:5	given 43:19 44:11	76:16 82:18 96:14	113:25,25 151:1	helpful 8:13 17:18
59:19 193:7	44:17 55:3 56:3	96:20 98:9 105:25	hands 6:19 70:19	60:15,21 64:24
future 42:15 48:18	80:3,18,19 84:24	107:15 111:9	109:20 148:14,18	66:25 67:22 75:23
52:6 56:15,19	107:4 111:16	113:25 116:25	153:8,11,13	92:7 154:7
58:2 59:11,17	116:17 121:6	117:2 124:1,12	154:22 163:23	helps 17:6 180:3
73:3 79:2,21	126:15 142:15	131:25 132:3	164:1,2	herald 38:8
84:21,23 193:9	164:16 169:4	133:4 138:8 142:3	hang 136:6	hiatus 56:10
~	172:17 178:7	144:9 146:25	happen 18:13	higher 145:10
G	179:18 180:2	147:16 150:10	23:10 103:13	highly 145:12
G 64:8	gives 5:18 7:22 8:2	151:24 152:1	104:2,8 134:4,14	HIH 112:20 114:19
	1			·

DTI (+44)207 4041400 www.DTIGlobal.com 8th Floor, 165 Fleet Street

				Page 210
historical 24:6	169:24 170:8	inception 69:12	initial 134:21	institution 94:16
Hoffmann's 175:7	impact 87:23	incidence 74:10,15	initially 19:25	128:19 129:2
hold 55:23	162:25 176:19	incidental 57:22	168:21	130:4,20
holder 101:13	impaired 130:16	include 27:1 33:20	insofar 10:20 96:16	institution's 94:15
113:22 114:3,23	implication 134:12	73:1 89:21 99:21	102:18 179:8	instruction 148:8
130:6 151:11,14	152:11 157:13	123:8 149:6 195:3	insolvencies 86:19	148:16 151:14
152:23	implications 18:22	included 42:10	insolvency 7:14	153:14,20 154:2
holder's 56:19	implicitly 11:16	44:13 74:19 76:1	13:10,12,13 15:4	155:17
holding 58:11	57:17	93:10 185:21	17:14 19:22 23:17	intend 131:17
holds 109:19	importance 41:8	194:23	34:21 35:1 39:2	intended 4:14 7:13
110:24	58:21	includes 12:1 97:11	39:10 44:6,18	16:8 33:1,2,13
hole 145:21	important 9:17	127:7,8 155:24,24	75:12 83:8,24	48:17 85:12 87:14
holes 161:15	17:12 18:17 24:23	194:18	84:2,12,20 85:5,9	88:18 92:23 119:5
home 161:8	38:13 39:8 41:20	including 26:8	85:12,25 86:1,11	131:20 147:8
hope 76:16 179:22	43:22 44:6 45:14	33:11 133:19	86:13,14,15,22	176:14,19 177:13
181:23	47:5 65:3 70:17	139:2	87:16,20,21,25	181:2 189:22
hopefully 178:19	70:24 76:24 77:2	incoherence 160:10	88:11,20 90:16,18	intending 33:20
House 63:4 65:10	82:8,8 91:20	160:10	91:1,3 93:7 94:3	159:23
65:16 112:20	110:13 112:7	incoherent 160:11	96:2 97:11,18,22	intends 157:4
186:8	119:19 138:1	inconsistency	97:23 98:2,7,9,10	intent 13:9,18
Humber 15:3,6,12	146:13 176:16	130:18 141:8	102:23 103:4,24	148:11 161:17,21
15:16 16:2 101:22	181:24 184:6	inconsistent 5:8,14	104:4,8 105:10,20	177:24
178:12	importantly 119:22	13:18 35:8 38:18	106:10,18 115:24	intention 4:11,19
hypothesi 169:10	180:5	38:20 52:10 54:22	119:16,23 120:20	89:11
hypothesis 18:10	impose 148:5 150:1	61:16,24 62:3	120:21 128:6,18	interest 6:10 7:2,20
32:5,17 164:17	150:6 152:21	71:24 112:8 115:1	128:19 129:2,5,18	7:24 8:7,15,18,22
	imposed 28:2 37:7	141:14 165:15,18	130:2,11,20	8:23,24 9:7 10:3,8
<u> </u>	109:1,5 115:25	183:5,16	132:12 134:3	10:11,19 11:3,10
idea 177:24 184:13	149:18 150:13	indebtedness 137:9	136:2 137:22	11:11,12,13,19
identical 19:10	156:21 175:17	indeterminate	138:20 146:22	12:13,23,24 13:4
identified 109:8	imposes 108:4	59:10,12	159:1 162:19	13:11,12,14,17,23
164:24	112:11 148:4	INDEX 197:1	176:13 190:17	13:25 14:3,22,25
identify 108:25	150:18,24 163:21	India 90:13 91:18	194:8 195:17	15:9,14,18,19,22
109:2 134:9	164:5	92:3	insolvency' 97:17	15:23,24,25 16:18
161:17 170:4	imposition 114:5	indicate 187:23	97:19	16:23,25 17:7
183:17	188:1	indicated 5:5 14:14	insolvent 72:20	18:8,14,15 19:13
identifying 83:13	impossible 12:17	105:25 143:1	75:8,9,10 117:5	21:2,3 25:7 30:19
150:14	13:8	indicates 44:19	instance 112:22	30:24 31:1,17
ignores 10:7	impression 133:14	indication 2:17	118:11 167:15	32:2,6,7 33:3,12
IIA 16:6 176:21	inapplicable 83:7	59:17	institute 128:5	76:9 78:13,17,24
illustrious 16:11	inappropriate 38:6	indicator 24:17	132:7,9 137:21	81:7 87:18 91:25
immaterial 193:9	inaudible 18:24	individual 182:20	instituted 128:17	99:9,21 106:15,16
immediately 10:24	43:11 73:4 134:12	inevitably 113:16	instituting 129:17	106:23 108:6
12:4 83:17 95:8	147:14	177:23	130:11 131:3	110:18,19 116:3
146:4,8 154:15	Inaudibly 144:2	inherent 74:14	132:2 138:1,20	118:17,20,25
		•	•	·

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$\begin{array}{c c c c c c c c c c c c c c c c c c c $					Page 211
$\begin{array}{c c c c c c c c c c c c c c c c c c c $	110 0 11 17 100 1	105 5 1 (1 10	40.0 (0.11.1 (100 17 145 15 04	47 1 7 94 40 19
$\begin{array}{c c c c c c c c c c c c c c c c c c c $	· · ·			-	
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$\begin{array}{ c c c c c c c c c c c c c c c c c c c$				-	
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$\begin{array}{c c c c c c c c c c c c c c c c c c c $					-
$\begin{array}{c c c c c c c c c c c c c c c c c c c $	143:18,24 144:18	intervention	49:4,9,12 50:5,14	2	-
$\begin{array}{c c c c c c c c c c c c c c c c c c c $	145:6,8,12,17	119:23 158:19	51:2,5,11 52:13	36:5 39:24 42:21	86:2 88:2 94:21
$\begin{array}{c c c c c c c c c c c c c c c c c c c $	146:3,9 147:8	162:21	52:16 53:23 54:1	47:25 69:17,25	95:2,21,22 96:24
$\begin{array}{ c c c c c c c c c c c c c c c c c c c$	153:15,16 154:17	introduce 130:24	54:5 56:9 57:8,9	76:24 79:7 88:3	100:4 101:19,20
$\begin{array}{ c c c c c c c c c c c c c c c c c c c$	155:2,8,13,18	introduced 14:22	60:9 61:1,15	94:10,11,21,23	102:25 103:14
$\begin{array}{c c c c c c c c c c c c c c c c c c c $	156:15 158:25	151:17 182:16	64:21,23 65:12	100:5 101:20	107:5,6 108:24
$\begin{array}{ c c c c c c c c c c c c c c c c c c c$	164:20 165:2,12	188:3	66:1,6,8,10,17,24	107:6,7 112:21	112:21 115:21
168:8,15,17,18 introducing 88:16 69:25 70:10,23 118:3,4,7,11 117:24 118:3,4,15 169:15,21 170:1,3 introduction 38:7 71:5,10,14 75:23 121:7 122:25 123:3 129:1 170:6,8,23 171:1 115:14 130:25 76:3,14 179:20 124:6 128:8,9 136:20 154:9 172:10,21,23,24 introductory 4:5 issue 8:7 17:2 19:11 174:22 176:21 181:4 173:8,13,19 40:14 55:2 102:12 117:7 178:21 181:4 Justices 14:19 99:6 174:17 176:2,14 investigation 147:12 155:11 judgments 99:7 justification 145:23 177:9,17,25 178:3 136:14 156:10,12,23 judicature 117:3 justifications 147:3 193:4 invite 36:14 41:19 178:24,24 180:13 jump 80:7 justifications 147:3 193:5 145:4 176:25 104:14 159:3 junior 120:20 70:24 89:7 155:7 159:12 invited 179:24 Jaeger 57:14 jurisdictions 80:8 86:20 88:19 137:14 IPRU 138:19 Joint 38:6 joint 67:5 16:5,12 14:6,14,15 135:10,14 153:6 151:2,16 16:2 judg 14	165:13 166:20	introduces 88:17	67:1,17 68:2,5,18	115:21 116:8,18	116:9,9,10,12,17
168:8,15,17,18 introducing 88:16 69:25 70:10,23 118:3,4,7,11 117:24 118:3,4,15 169:15,21 170:1,3 introduction 38:7 71:5,10,14 75:23 121:7 122:25 123:3 129:1 170:6,8,23 171:1 115:14 130:25 76:3,14 179:20 124:6 128:8,9 136:20 154:9 172:10,21,23,24 introductory 4:5 issue 8:7 17:2 19:11 174:22 176:21 181:4 173:8,13,19 40:14 55:2 102:12 117:7 178:21 181:4 Justices 14:19 99:6 174:17 176:2,14 investigation 147:12 155:11 judgments 99:7 justification 145:23 177:9,17,25 178:3 136:14 156:10,12,23 judicature 117:3 justifications 147:3 193:4 invite 36:14 41:19 178:24,24 180:13 jump 80:7 justifications 147:3 193:5 145:4 176:25 104:14 159:3 junior 120:20 70:24 89:7 155:7 159:12 invited 179:24 Jaeger 57:14 jurisdictions 80:8 86:20 88:19 137:14 IPRU 138:19 Joint 38:6 joint 67:5 16:5,12 14:6,14,15 135:10,14 153:6 151:2,16 16:2 judg 14	167:19 168:3,5,6	193:7		· · · · · · · · · · · · · · · · · · ·	
$\begin{array}{c c c c c c c c c c c c c c c c c c c $	168:8,15,17,18	introducing 88:16	69:25 70:10,23	118:3,4,7,11	117:24 118:3,4,15
$\begin{array}{c c c c c c c c c c c c c c c c c c c $		e	-		
171:3,6,8,9,12148:24 184:18197:5130:7 145:25167:15 176:17172:10,21,23,24introductory 4:5issue 8:7 17:2 19:11174:22 176:21181:4173:8,13,1940:1455:2 102:12 117:7178:21 181:4Justices 14:19 99:6174:17 176:2,14investigation147:12 155:11182:10 192:17justification 145:23176:15,18,20investigation147:12 155:11judgments 99:7147:6,7177:9,17,25 178:3136:14156:10,12,23judicature 117:3justifications 147:3193:4invita 36:14 41:19178:24,24 180:13jumping 125:22,23issues 17:3 80:2193:4invite 36:17 68:2issues 17:3 80:2125:23125:23195:15 122:1360:18 63:17 68:2issues 17:3 80:2125:23125:23195:57 159:12invited 179:24inviteg 161:18justifications 86:8keep 52:8,17 56:6192:15 176:4involve 161:6Jaeger 57:14Jessel 64:5jurisdiction 86:8keep 119:18 120:6137:14IPRU 138:19joined 67:1165;12 14:6,14,15132:5 135:10,14132:5 135:10,14153:615:12,16 16:2jouge 14:7 34:1235:2 86:20 88:125:22 26:2,22Kershaw 66:17102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11	, , ,			124:6 128:8.9	
172:10,21,23,24introductory 4:5issue 8:7 17:2 19:11174:22 176:21181:4173:8,13,1940:1455:2 102:12 117:7178:21 181:4Justices 14:19 99:6174:17 176:2,14inures 4:25investigation147:12 155:11182:10 192:17justification 145:23176:15,18,20investigation147:12 155:11judgments 99:7147:6,7177:9,17,25 178:3136:14156:10,12,23judicature 117:3justifications 147:3179:5,12 185:22invita 36:14 41:19178:24,24 180:13jump 80:7justifications 147:3193:4invite 36:14 41:19178:24,24 180:13jump 80:7justifications 147:3199:15 145:4176:25issues 17:3 80:2125:23125:23125:23155:7 159:12invited 179:24invite 161:6justifications 86:8keep 52:8,17 56:6128:15 176:4involve 85:7 144:1Jaeger 57:14Jaeger 57:14keep 119:18 120:6137:14IPRU 138:19joined 67:1165:12 14:6,14,15132:5 135:10,14153:615:12,16 16:2joug 147:2018:24 21:16 22:223:6,23 24:13,18102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11			<i>,</i>	· · · · · · · · · · · · · · · · · · ·	
173:8,13,1940:1455:2 102:12 117:7178:21 181:4Justices 14:19 99:6174:17 176:2,14inures 4:25138:12 146:12182:10 192:17justification 145:23176:15,18,20investigation147:12 155:11judgments 99:7147:6,7177:9,17,25 178:3136:14156:10,12,23judicature 117:3justifications 147:3179:5,12 185:22invitation 8:9159:25 177:6judicature 117:3justifications 147:3193:4invite 36:14 41:19178:24,24 180:13jump 80:7justifications 147:3195:15 122:1360:18 63:17 68:2issues 17:3 80:2125:23125:23195:57 159:12invited 179:24invite 161:6jurisdiction 86:8keep 52:8,17 56:6192:15 176:4involves 85:7 144:1Jessel 64:5jurisdictions 89:8keep 119:18 120:6137:14involves 85:7 144:1joined 67:116:5,12 14:6,14,15132:5 135:10,14153:615:12,16 16:2joy 147:206:5,12 14:6,14,15132:5 135:10,14152:10interferes 141:315:12,16 16:2joy 147:2018:24 21:16 22:2101:22 178:12judge 14:7 34:1223:6,23 24:13,1867:7102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11					
174:17 176:2,14 176:15,18,20inures 4:25 investigation138:12 146:12 147:12 155:11 judgments 99:7182:10 192:17 judgments 99:7justification 145:23 147:6,7177:9,17,25 178:3 179:5,12 185:22136:14 invita 36:14 41:19156:10,12,23 159:25 177:6Judicature 117:3 judicat 14:18 jump 80:7justification 145:23 147:6,7193:4 193:4invita 36:14 41:19 invite 36:14 41:19178:24,24 180:13 180:24 186:22jump 80:7 jumping 125:22,23 125:23justifying 146:5139:15 145:4 155:7 159:1260:18 63:17 68:2 invited 179:24 inviteg 161:18 involve 161:6issues 17:3 80:2 104:14 159:3125:23 junior 120:20K r0:24 89:7128:15 176:4 128:15 176:4involve 161:6 involve 85:7 144:1Jaeger 57:14 Jessel 64:5 John 38:6 joined 67:11 joined 67:11 joined 67:11 joint 79:5132:5 135:10,14 132:5 135:10,14Kert 57:6 108:19 132:5 135:10,14 132:5 135:10,14135:16 15:12,16 16:2 101:22 178:12 102:10101:22 178:12 irrespective 193:16judge 14:7 34:12 35:2 86:20 88:1 25:22 26:2,2223:6,23 24:13,18 25:22 26:2,22Ker \$1:13 66:11 key 1:13 66:11		•			
176:15,18,20investigation147:12 155:11judgments 99:7147:6,7177:9,17,25 178:3136:14156:10,12,23judicature 117:3justifications 147:3179:5,12 185:22invitation 8:9159:25 177:6judicature 117:3justifications 147:3193:4invite 36:14 41:19178:24,24 180:13jump 80:7justifications 147:3interests 72:22 94:645:19 47:2 49:6180:24 186:22jumping 125:22,23keep 52:8,17 56:695:15 122:1360:18 63:17 68:2issues 17:3 80:2125:2370:24 89:7199:15 145:4176:25104:14 159:3121:3,12,13,18keep ing 120:8169:25 173:10invited 179:24Jaeger 57:14Jaeger 57:14seep ing 120:8128:15 176:4involve 161:6John 38:686:20 88:19177:20137:14IPRU 138:19joined 67:116:5,12 14:6,14,15132:5 135:10,14153:615:12,16 16:2joy 147:206:5,12 14:6,14,15135:18 140:17153:6101:22 178:12judge 14:7 34:1223:6,23 24:13,1825:22 26:2,22interminable101:22 178:1235:2 86:20 88:125:22 26:2,22key 1:13 66:11102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11					
177:9,17,25 178:3136:14156:10,12,23Judicature 117:3justifications 147:3179:5,12 185:22invitation 8:9159:25 177:6judicature 117:3justifications 147:3193:4invite 36:14 41:19159:25 177:6judicature 117:3justifications 147:3193:4invite 36:14 41:19178:24,24 180:13judicature 117:3justifications 147:3193:460:18 63:17 68:2180:24 186:22jump 80:7jumping 125:22,23K139:15 145:4176:25invited 179:24104:14 159:3125:23125:2370:24 89:7169:25 173:10inviting 161:18justef 179:24justifications 86:8Keith 92:13Keep ing 120:8128:15 176:4involves 85:7 144:1Jessel 64:5John 38:6177:20177:20137:14IPRU 138:19joined 67:116:5,12 14:6,14,15132:5 135:10,14132:5 135:10,14153:615:12,16 16:2jouge 14:7 34:1223:6,23 24:13,18135:18 140:17102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22Kershaw 66:17	· · · · ·				
179:5,12 185:22 193:4invitation 8:9 invite 36:14 41:19159:25 177:6 178:24,24 180:13 180:24 186:22 issues 17:3 80:2 104:14 159:3judicial 14:18 jump 80:7 jumping 125:22,23 125:23 125:23 125:23justifying 146:595:15 122:13 139:15 145:4 155:7 159:12 155:7 159:12 155:7 159:12 128:15 176:4 interference 127:2 137:14176:25 invited 179:24 inviteg 161:18 involve 161:6 involve 85:7 144:1159:25 177:6 104:14 159:3judicial 14:18 jumping 125:22,23 125:23 125:23 125:23justifying 146:5169:25 173:10 interfere 125:1 128:15 176:4 interference 127:2 137:14inviteg 161:18 involve 85:7 144:1J Jessel 64:5 John 38:6 joined 67:11 joint 79:5justice 5:23,24 6:2 6:5,12 14:6,14,15Kerp 57:6 108:19 132:5 135:10,14 135:18 140:17153:6 interminable 102:1015:12,16 16:2 interspective 193:16joy 147:20 judge 14:7 34:12 35:2 86:20 88:1 35:2 86:20 88:115:22 26:2,22Kershaw 66:17 67:7 key 1:13 66:11		0		• •	2
193:4 invite 36:14 41:19 178:24,24 180:13 jump 80:7 interests 72:22 94:6 45:19 47:2 49:6 180:24 186:22 jumping 125:22,23 139:15 145:4 176:25 issues 17:3 80:2 125:23 139:15 145:4 176:25 invited 179:24 invited 179:24 169:25 173:10 invited 179:24 inviting 161:18 jumior 120:20 121:3,12,13,18 interfere 125:1 involve 161:6 jaeger 57:14 jessel 64:5 jurisdiction 86:8 128:15 176:4 involves 85:7 144:1 jessel 64:5 jurisdictions 89:8 177:20 137:14 IPRU 138:19 joined 67:11 ioint 79:5 6:5,12 14:6,14,15 135:18 140:17 153:6 15:12,16 16:2 joy 147:20 judge 14:7 34:12 23:6,23 24:13,18 135:18 140:17 102:10 irrespective 193:16 35:2 86:20 88:1 25:22 26:2,22 key 1:13 66:11			· · ·		0
interests 72:22 94:645:19 47:2 49:6180:24 186:2295:15 122:1360:18 63:17 68:2issues 17:3 80:2125:23125:23139:15 145:4176:25104:14 159:3125:23125:23155:7 159:12invited 179:24104:14 159:3121:3,12,13,18120:20interfere 125:1involve 161:6Jaeger 57:14Jaeger 57:14128:15 176:4keep 120:8128:15 176:4involves 85:7 144:1Jessel 64:5John 38:686:20 88:19177:20137:14IPRU 138:19joined 67:11ioint 79:56:5,12 14:6,14,15132:5 135:10,14153:615:12,16 16:2joy 147:2018:24 21:16 22:223:6,23 24:13,18135:18 140:17102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11	-				
95:15 122:13 139:15 145:4 155:7 159:12 invited 179:24 invited 179:24 involve 161:6 128:15 176:460:18 63:17 68:2 176:25 invited 179:24 inviting 161:18 involve 161:6 Jaeger 57:14 Jessel 64:5 John 38:6 joined 67:11 joined 67:11 joint 79:5 interminable 102:10issues 17:3 80:2 125:23 invited 179:24 invited 179:24 invited 179:24 involve 161:6 Jaeger 57:14 Jessel 64:5 John 38:6 joined 67:11 joint 79:5 joined 67:11 joint 79:5 joined 67:11 interferes 141:3keep 52:8,17 56:6 70:24 89:7 keeping 120:8 Keith 92:13 kept 119:18 120:6 177:20101:22 178:12 102:10101:22 178:12 irrespective 193:16joint 79:5 joint 79:5 joint 734:12 35:2 86:20 88:1issues 17:3 80:2 125:23keep 52:8,17 56:6 70:24 89:7 keeping 120:8 Keith 92:13 kept 119:18 120:6 177:20101:22 178:12 102:10irrespective 193:1635:2 86:20 88:1 35:2 86:20 88:125:22 26:2,22key 1:13 66:11			-	J I	K
139:15 145:4 176:25 104:14 19:00 102:10 70:24 89:7 139:15 145:4 176:25 104:14 159:3 121:3,12,13,18 keeping 120:8 169:25 173:10 invited 169:25 169:25 169:25 169:25 173:10 invited 169:24 104:14 159:3 121:3,12,13,18 keeping 120:8 128:15 176:4 involves 169:25 121:3,12,13,18 keeping 120:8 128:15 176:4 involves 85:7 144:1 Jessel 64:5 John 38:6 177:20 Kerr 57:6 108:19 132:5 132:5 135:10,14 132:5 135:10,14 135:18 140:17 132:5 135:10,14 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17 135:18 140:17					keep 52:8,17 56:6
155:17 170:12 invited 179:24 120:11 + 105:15 120:12					-
169:25 173:10 interfere 125:1 128:15 176:4 interference 127:2 137:14inviting 161:18 involves 85:7 144:1J Jaeger 57:14 Jessel 64:5 John 38:6 joined 67:11 joint 79:5 joy 147:20 judge 14:7 34:12jurisdiction 86:8 86:20 88:19 jurisdictions 89:8 (65,12 14:6,14,15)Keith 92:13 kept 119:18 120:6 177:20Keith 92:13 kept 119:18 120:6IPRU 138:19 interferes 141:3 153:6ISSIG interminable 102:10101:22 178:12 interminable102:10IPRU 138:19 interminable 101:22 178:12IPRU 138:19 interminable 101:22 178:12IPRU 138:19 interminable 101:22 178:12IPRU 138:19 interminable 101:22 178:12IPRU 138:19 interminable 101:22 178:12IPRU 138:19 interminable interminableIPRU 138:19 ID1:22 178:12IPRU 138:1			104.14 137.3	•	
interfere 125:1 128:15 176:4 interference 127:2involve 161:6 involves 85:7 144:1Jaeger 57:14 Jessel 64:5 John 38:6 joined 67:11kept 119:18 120:6 177:20137:14 interferes 141:3 153:6 102:10IPRU 138:19 15:12,16 16:2 interspective 193:16Jaeger 57:14 Jessel 64:5 John 38:6 joined 67:11 joint 79:5 judge 14:7 34:12kept 119:18 120:6 177:20137:14 interferes 141:3 101:22 178:12Ionworks 15:3,6 15:12,16 16:2joined 67:11 joint 79:5 judge 14:7 34:12kept 119:18 120:6 177:20101:22 178:12 102:10irrespective 193:1635:2 86:20 88:1 35:2 86:20 88:125:22 26:2,22102:10irrespective 193:1635:2 86:20 110			J		
Interference 127:2involves 85:7 144:1Jessel 64:5jurisdictions 89:8177:20137:14144:3John 38:6justice 5:23,24 6:2Kerr 57:6 108:19137:14IPRU 138:19joined 67:116:5,12 14:6,14,15132:5 135:10,14interferes 141:3Ironworks 15:3,615:12,16 16:2joy 147:2018:24 21:16 22:2Kershaw 66:17interminable101:22 178:12judge 14:7 34:1223:6,23 24:13,1867:7102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11		0	Jaeger 57:14	0	
interference 127:2 137:14144:3John 38:6justice 5:23,24 6:2Kerr 57:6 108:19interferes 141:3 153:6IPRU 138:19 Ironworks 15:3,6Joined 67:11 joint 79:5i.5:12,16 16:2joined 67:11 132:5 135:10,14interminable 102:10101:22 178:12judge 14:7 34:1235:2 86:20 88:123:6,23 24:13,18Kerr 57:6 108:19 132:5 135:10,14interminable 102:10101:22 178:12judge 14:7 34:1223:6,23 24:13,18Kery 1:13 66:11			0		-
Interfere127.2111.5joined 67:11joined 67:11132:5 135:10,14interferes 141:3Ironworks 15:3,6joint 79:56:5,12 14:6,14,15132:5 135:10,14153:615:12,16 16:2joy 147:2018:24 21:16 22:2Kershaw 66:17interminable101:22 178:12judge 14:7 34:1223:6,23 24:13,1867:7102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11				0	
interferes 141:3 153:6Ironworks 15:3,6 15:12,16 16:2joint 79:5 joy 147:2016:5,10,10 18:4 18:24 21:16 22:2135:18 140:17 Kershaw 66:17 67:7interminable 102:10101:22 178:12 irrespective 193:16joint 79:5 joy 147:20 35:2 86:20 88:116:5,10,10 18:4 18:24 21:16 22:2135:18 140:17 Kershaw 66:17 67:7					
153:615:12,16 16:2joy 147:2018:24 21:16 22:2Kershaw 66:17interminable101:22 178:12judge 14:7 34:1223:6,23 24:13,18Kershaw 66:17102:10irrespective 193:1635:2 86:20 88:125:22 26:2,22key 1:13 66:11			0		,
interminable 101:22 178:12 judge 14:7 34:12 23:6,23 24:13,18 67:7 102:10 irrespective 193:16 35:2 86:20 88:1 25:22 26:2,22 key 1:13 66:11		,	0		
102:10 irrespective 193:16 35:2 86:20 88:1 25:22 26:2,22 key 1:13 66:11		,			
				· · · ·	
(1) = (1) + (1)		-		· · · · · · · · · · · · · · · · · · ·	e e
195.19 195.19 27.15 29.5,10,21			· · · · · · · · · · · · · · · · · · ·		
internationally isaacs 34.7,9,10			-	· ·	
					8
interpretation 30:2 38:9,13,25 39:19 127:13,16 130:7 45:11,17 46:24 Kingsdown's 68:10	interpretation 30:2	38.9,13,23 39.19	127.13,10 130.7	43.11,1/40.24	
			l	I	

www.DTIGlobal.com 8th Floor, 165 Fleet Street

				Page ZIZ
know 13:21 17:15	122:5,9,19 131:5	104:7 111:4	72:6 77:24,25	63:7,13,13,16,22
76:7 80:1 95:24	137:17 143:25	legally 123:7	78:1,9,10,11,12	63:25 64:11 65:14
119:12 127:13	LBHI2's 84:4	legislating 5:12	78:12,14,15,18,23	67:10 68:14 70:25
137:18 144:25	LBIE 8:16 9:3,6	legislation 5:15	78:24 79:9,11	71:1,2,23 72:15
161:7 175:4 176:9	10:14 15:11 16:15	16:13 23:18 90:17	83:20,22,25 84:21	73:12,13,14,17,21
191:16 192:18	16:20 17:4 34:12	90:19 117:2	84:23 86:23 87:3	73:25 74:6,11,15
knows 1:7	34:23 35:6 37:9	132:12 176:4	87:19 89:9 90:23	74:17 75:4 76:12
	39:22 53:19,23	189:12,13 195:7	90:25 91:2,4,11	78:8,25 79:1,23
L	67:19 72:25 73:2	legislative 5:8	93:25 95:15,19	81:17 82:2,3
lacuna 16:22 76:9	73:15,18 74:16	14:18 148:11	97:7 99:1,2,8,10	86:23 90:1,2,16
144:10 145:23	75:20 79:3,13	161:17 177:24	99:14,17,20,20,24	92:23 93:1,19,23
160:24 161:9,10	83:8 94:25 128:6	legislature 5:10	100:22 101:18	95:18 100:1 103:7
166:16 178:23	144:25 145:16,19	7:13 15:15 157:4	102:6,16,17,19	105:6,9 106:24
laid 184:21	167:8 185:16,17	177:13 194:7	103:1,10 105:15	107:12 113:2
language 3:1 4:6,7	185:18	legitimate 191:25	106:11,21 107:1	115:2,2,6 116:5,6
4:22,23 23:16	LBIE's 8:18 9:20	legs 151:8	117:2 120:11,15	117:8 118:17,20
79:15 85:1 87:8	10:2 12:16 13:3	lender 26:8 77:23	120:18,19,21	119:1 120:13
87:12 101:23	13:16,20 34:10,17	78:4 127:15 128:4	121:4,14,17,18,20	122:13 124:5,8
109:3,3,11 121:11	34:19,20 35:5	128:7,14 132:23	122:1,5 123:16,20	126:24,25,25
121:19 148:9	54:3 73:12,13,23	length 94:10	123:23 130:5,14	127:1,4,6,7,8
164:5,22 172:9	75:18 120:14	Let's 49:17 92:8	157:7 179:6	135:7 139:18
189:12 193:5	168:13 173:21,23	level 88:17 124:18	180:24 181:1,19	149:12 154:18
large 37:20 116:15	174:19 185:19	159:14	182:5,22 185:13	166:22 167:1,4
161:10	LBL 167:21	Levi 105:23 106:8	185:19,20 186:2,5	168:2,17,24,25
largest 187:11	LBL's 157:3	Lewis 99:6	186:21 187:20	169:3,9 172:25
late 134:2,16,22	lead 74:8 86:14	Lewison 5:24 14:14	188:20 192:19,20	173:21,22 175:16
135:1,10,25 136:5	League 115:22	25:22 26:2,22	192:22,23 193:4,8	177:7 179:10
136:7 147:23	leakage 53:18	29:3,18,24 30:4	194:8,12,24 195:3	182:1,3,4,17
late-proving 165:9	leapt 82:5	46:24 47:1 79:6	195:8,16	183:10,17,24
165:23,25	learned 15:1 46:18	86:2 88:2 94:21	liability 8:15 9:12	184:15,16,18,19
latest 96:4	46:20 67:25 70:16	95:2,21 107:5,6	9:25 10:4 21:5	184:22,23,24
Latin 144:10	70:19 78:17 82:4	116:9,17 129:1	25:2,13,18,19	185:10,17,21,24
law 68:16 88:17	96:18 119:13	136:20	31:5,11,12,16,16	188:1,2,17,19
89:9,16,18,25	162:24 164:24	Lewison's 14:15	32:1,6,7,22 34:25	189:9 193:2,14,24
91:4 122:24	leave 137:16	47:24 108:24	35:1,4,8,13,18,20	194:17,18,21
145:23 154:11	leaves 153:22	118:3 154:9	35:23 36:1 37:7	liable 19:5 41:9,13
167:12 180:17	158:15 161:15	liabilities 18:9 19:7	37:12,22 39:11	49:21 53:13 54:11
193:23 194:15	175:2	19:12 20:16,25	40:17,24 41:6	61:19 62:4,6 70:5
lawful 42:13 126:9	left 8:23 89:12 91:6	21:1,9,11,22	42:2,15 45:7,13	106:10 113:20
Lawrence 46:9 66:2	106:13 122:14	22:12,16,19,22	45:21 46:12,14	182:1,21 185:3,8
	123:11 134:17,23	23:2,3,19 24:4	48:8,9 49:22,24	185:8,17,18
laws 86:18 94:1	135:5 148:1 165:5	25:2,5,15 31:10	49:24 53:20 54:5	187:17
LBHI's 73:11	left-hand 45:14	31:18 33:25 34:15	54:7,14 55:1,10	lift 104:6
LBHI2 77:4,10 88:4 94:24 120:12	legal 36:22 88:15	34:20 36:14 44:1	55:12 59:6 61:17	lifted 23:11
00.4 94.24 120.12	103:21,23,24	52:2 63:14 65:7	61:24 62:21 63:5	lifting 103:18

DTI (+44)207 4041400 www.DTIGlobal.com 8th Floor, 165 Fleet Street

Page	213

				Page 215
light 77:13 81:15	73:1 86:5,10	litigated 105:7	4:21 5:5,12,17,19	61:25 63:6 64:18
82:10 96:9 127:11	100:11 102:9,14	litigation 9:3 103:6	5:23,23,23 6:1,11	64:20,21,22,23
164:15	110:23 115:15	103:11,20	6:14,16,20 8:9,12	65:10,25 66:4,7,9
lightly 85:7	144:19 145:1,19	little 1:17 98:1	9:15 10:17 11:6	66:16,20,24,25
0.	· · · · · ·			· · · ·
limb 37:3	146:4,9 147:1	101:18 105:24	11:13,16,18 12:9	67:12,14,14,16
limbs 38:23	149:14 153:2,7	107:19 152:13	12:10,18,18,21	68:1,4,10,17,18
limit 170:3 183:12	154:24,25 155:9	loan 94:14	13:1 14:4,12,14	69:3,5,7,9,15,18
limitation 79:10	155:14,16 156:11	localised 88:13	14:15,19 16:9,10	69:19,21,23,25
89:17,18 93:11	156:22 157:5	lodge 7:6,8 34:13	17:18 18:2,25	70:1,1,10,15,21
192:25	158:8 159:5,13,19	long 35:5 106:18	19:2 21:16 22:2	71:3,9,13 72:6,16
limited 26:4 45:12	162:13 163:9,15	123:15	22:23 23:14,20,23	73:9 74:25 75:17
46:9 50:8 54:9,10	164:10,18,22	longer 15:5 130:16	24:1,13,18,18,21	75:22,23 76:11,19
74:24 84:16	165:1,2,11,14,21	139:16	24:24 25:5,8,10	79:6 80:3,7,14
130:19 151:10	165:24,25 166:25	look 3:16,16 6:14	25:22 26:2,3,18	81:8 85:4,6,14,15
182:3,4,17 184:19	167:2,8,10 168:4	25:14 31:15 41:19	26:22,24 27:15,16	86:2,2,4,5 88:2
184:22,24 185:9	168:6,13,19	47:3 49:17 66:23	27:18 28:1,7,9,12	89:14,16,20 90:4
186:21 188:2	169:11,16,25	74:12 77:20 81:18	28:16,17,25 29:3	90:10,18 91:16,17
Lindley 47:7	170:5,9,24 171:1	92:8 94:5 95:14	29:4,8,10,18,24	91:17 92:5,7,12
line 15:3 16:11	171:4 173:13	98:11 115:18	30:3,4,21 31:1,11	92:13,17,18,18
45:24 82:14,15	177:11 185:23	119:5,7 136:15	31:19 32:9,14,15	93:10 94:21 95:2
92:11 123:5	liquidations 18:16	138:2 149:15	32:23,25 33:7,21	95:21,22 96:23
140:25 172:14	73:16,19 104:12	161:24,25 163:5	34:4,5,7 36:6,13	98:18,19 99:6
181:22	liquidator 6:19	175:20 180:9,18	36:17 37:4,13,17	100:4,6,7,19
lines 46:3,10 47:21	19:22 20:3,5,14	189:11 195:19	37:25 38:5,9,11	101:4,7,9,19,20
77:6,11,20,23	20:19,22 22:24	looked 3:2 14:23	38:13,24 39:18	101:25 104:23,23
81:15 82:14 92:10	23:18 25:9,17	23:5,7 33:14 53:5	40:2,4,6,8,10,15	105:22 106:15
101:19,21 161:4	26:14 27:22 28:3	76:22,23 101:1,20	40:22 41:1,2,4,5	107:4,6,9,15,21
linked 4:18	29:1,5 30:10,11	111:18	41:17,23,25 42:8	107:25 108:12,16
Linley 49:9 50:6	36:3 43:19,20	looking 1:16 11:25	42:22,25 43:3,13	108:19,23 109:13
56:2	44:17,25 54:20,23	22:12 27:2 32:25	43:16 44:4,5,9,21	109:17 110:7,9,11
liquidated 193:10	55:2,20,23,24	70:2 81:4 83:9	45:1,5,9,16,22,24	110:14 111:6,11
liquidation 5:1 6:5	56:16,25 57:11	85:7 86:9,11,19	46:4,16,19,23,23	111:20,22 112:2,4
6:8,24 7:9 8:20,25	58:2,25 71:8	90:8,24 91:8,9	47:1,4,6,13,16,21	113:6,8,11,12
9:13,20 10:1,5,11	72:19 93:16 98:13	93:22 97:17 110:8	47:24,24 48:4,7	114:1,9,11,12,17
10:14,19,22,24	100:21 101:13,16	118:19 147:19	48:10,12,13,14,16	115:9,16 116:3,7
11:5 12:1 13:7	100.21 101.13,10		48:10,12,13,14,10	
	· · · · · ·	151:12,13 152:18		116:9,10,17,18,23
14:2,22 16:17	110:2,7 113:3	167:11 175:25	49:11,13 50:4,5	117:13,15,17,19
18:11 20:6,9,13	126:3,9 148:15	191:23	50:10,14,19 51:1	117:22 118:1,2,10
20:19,23 24:8	153:8,11 155:23	looks 2:15 81:6	51:2,3,3,3,10,11	118:14,16 120:10
26:7 27:9,14,19	155:25 164:2	149:16 163:17	51:12 52:5,12,12	123:25 124:7,11
28:5 29:6 33:22	liquidator's 102:4	195:20	52:13,14,15 53:21	125:2,5,8,9,14,15
33:23 34:2,14	liquidators 44:12	Lopez 48:13	53:24 54:2,4 56:2	125:22,25 126:9
35:5,6,10,11	157:25 158:6	Lord 1:4,13,13,23	56:2,9 57:3,6	126:19 129:1,11
56:24,25 57:13	list 43:5,10 44:25	2:2,7,10,24,25 3:1	58:10 59:3,19,25	129:12 131:8,12
58:7 72:19,21	70:4,13	3:6,15,18,23 4:18	60:3,9 61:1,5,9,12	131:16,17,18,19

www.DTIGlobal.com 8th Floor, 165 Fleet Street London EC4A 2DY

rage Eri

				Page 214
132:5,10,13,17,21	190:3,7,10,10,11	74:11	99:23,25 126:7	192:4,7 193:15
132:25 133:8,17	190:14,19,21,24	Lordship's 5:4	128:15 153:6	194:10,22
134:1,5,7,7,12	191:3,6,9,13,14	61:8	166:23 172:13	meaningful 111:6
135:10,14,18,24	191:15,23 192:14	lordships 2:4,9,20	marked 108:10,15	172:11
136:2,5,12,19	192:14 193:17,17	7:11 9:17 10:15	market 124:14	means 9:23 53:12
137:3 138:6,9,13	194:18,19,23,25	13:21 17:3,16	Martin's 64:25	77:25 83:19 93:20
138:22 139:5,9,12	195:1,7,16,19,19	36:15 39:13 40:11	Master 49:9 64:5	99:2 109:5 127:1
139:20,23,25	195:23,24,25	41:19 45:20 47:2	material 38:2,2	132:8 136:24
140:6,9,14,15,17	196:3	47:7,18,22 48:1,3	61:11 186:12	140:2 153:23
141:6,21,21 142:1	Lord's 37:24 91:7	48:5 49:6,19 50:8	matter 5:10 29:25	155:22 169:24
142:4,6,10,12,23	92:11 103:15	55:25 63:18 67:22	35:21 40:22 45:13	183:25
143:8,10 144:9,11	115:10 118:2	72:1 76:5,7 90:14	82:3 88:17 103:5	meant 47:8,10
146:11,18 147:2	127:1 173:16	118:6 187:1	104:17 122:3	110:9 119:20
147:13,18,20	189:25	Lordships' 63:19	123:2,6 139:21,23	126:16 195:21
149:25 150:5,7,17	Lords 1:8 2:8 8:8	70:18 92:22	140:1,17 148:9	measure 170:12
150:23 151:4,5,6	13:8 17:1 63:4	lose 59:16 82:21	151:9 152:10	mechanism 16:24
151:17 152:6,14	65:10,16 76:13,17	145:18,22 173:17	157:8 159:16	77:14 183:14
154:3,6,9 155:3	79:17 80:1 87:12	losers 17:11	160:1 163:10	meet 46:1 62:2
156:4,25 157:18	90:12 92:21 95:14	loss 120:3 145:11	164:5,8,22 177:24	152:5
157:22 158:12,15	98:4 100:13,16	losses 59:21 119:20	191:6 193:5,11	member 19:5 34:25
158:17,20 160:3	101:23 102:13	lost 59:2	matters 139:22	35:10 36:22 39:3
160:21,25 162:6	104:16 106:1	lot 4:22 5:2 38:1	144:24 145:13	41:9,10,13 53:7,7
162:17,18,21	108:9 112:21,23	61:7 116:21	187:6	53:9,13 54:18,19
163:1,1,19 164:12	114:18 115:12,23	lots 81:20	Maxwell 123:3	61:19,20,21,22,23
165:20 166:10,11	116:14,20 117:14	Luncheon 114:15	Mayfair 49:5	62:4,6 70:9 74:2
166:13 167:24	118:13 127:13	Lush 65:23	mean 9:21 78:23	94:24
168:1,21,25 169:6	135:21 136:10	luxury 108:14	80:10 81:9 84:9	member's 54:5,7
169:17,18,23	137:19 138:2,25	Lynes 116:11	84:11 85:16 86:15	63:21
170:7,16,19,19,24	139:10 142:8,24		112:12 118:14	members 18:6 20:4
171:3,6,11,12,15	143:13,20 144:25	M	126:11,22 129:13	21:23 29:7,8,15
171:21 172:18	146:15 147:17	main 47:9 68:10	132:8,17 139:24	29:23 32:11 34:14
173:2,12,24 174:3	149:3 157:9	major 118:24	140:23 152:12	34:20 35:5 41:14
174:13,20,23	161:18,23 175:4	making 16:21 28:8	160:7 161:22	53:20 54:10 58:6
175:7,8,13 176:24	176:23,25 178:22	30:12 31:23 32:23	164:7 170:10,18	59:16 61:18 62:7
177:2,4 178:4,6	178:23 179:14	37:22 43:5,8	173:17 185:4	62:12,15,17 72:2
178:16 179:17	180:16,20 181:7	44:25 54:23 60:13	188:20	72:8 73:13 98:17
180:1,4,7,9 181:4	181:23 182:10	60:24 68:21 70:13	meaning 81:5	99:5,14,16,22
181:6,9,12 182:3	185:16,25 186:8	95:6,12 113:21	84:16,25 87:6	102:5,7 105:17
182:11,23,25	186:14 187:10	115:12 146:23	99:11,20 105:21	106:14 179:3
183:2,5,7,9 184:4	192:3	156:16,18 161:20	115:3 117:1 122:2	180:15 181:2,17
184:10,16,22	Lords' 186:7	174:5 193:8	122:11 132:25	181:19,25 184:21
185:4 186:16,17	192:13	manage 105:13	133:1,6 161:7,24	185:18 186:20,21
187:1,2,13,14	Lordship 3:19,24	mandatory 2:21	162:1,1,1,5	186:22,25 187:3
188:4,6,13,23,25	8:6 61:2,4 64:24	11:22 34:21 80:4	165:17 168:14	188:2 193:25
189:5,10,11,16	65:2 67:4,5 68:2	manner 12:21	170:13 172:17	members' 34:22
	•	-	-	-

www.DTIGlobal.com 8th Floor, 165 Fleet Street London EC4A 2DY

Page	21	5
- a g o		

				raye 215
35:17 73:15,18,21	Miles' 15:2	Morton 92:18	154:10 155:13,15	69:15,19,21,23
179:10	Miles's 37:18	move 9:8 144:9	180:18,20	70:21 71:3,9,13
	Millett 16:10		needed 60:22 87:4	75:23 76:11,19
membership 35:24		159:13 163:15,15		,
36:24 37:8 38:17	mind 37:14 47:5	164:9,11 174:3	142:25 149:22	80:7 81:8 85:4,15
63:6 69:13 95:5	70:24 71:6 85:18	188:8	needn't 1:24	86:2,5 89:14,20
mention 102:11	86:18 87:13 88:22	moved 149:13	needs 30:14 42:6	90:4,10,18 91:16
107:18 118:13	89:6,7 91:22 93:5	162:13	65:23 72:18 155:4	92:5,7,12,17
173:17	94:21 112:8 155:4	moves 149:24	180:21 185:6	98:19 100:6,19
mentioned 1:21	160:14 163:14,25	164:18	negative 1:25	101:4,7,9,25
10:8 87:12 102:1	minutes 1:6	moving 76:5 95:14	neither 24:4 44:11	107:15,21,25
104:24 107:23	missed 11:8	106:1,15 145:19	50:15 63:14	108:12,16 109:13
114:19 115:11	missing 96:3	155:9 163:9	156:22	110:7,11,14 111:6
125:18 188:14	172:18		Neuberger 1:4,13	111:11,20,22
mentions 115:20	mistimed 188:7	<u> </u>	1:23 2:7,10,24 3:6	112:2,4 113:6,8
Merchandising	misunderstanding	nasty 195:5	3:18,23 4:18,21	113:12 114:1,9,12
55:25 56:11	28:9	natural 85:15	5:12,23 6:11,14	114:17 117:13,17
mere 64:4 112:11	misuse 172:9	109:18 161:7	6:20 8:12 9:15	117:19,22 118:1
113:18,21 189:18	mix 3:15	nature 109:22	10:17 12:10,18	118:10,14 123:25
merely 131:3,3	mode 181:14	128:1,21 154:1	14:4,12 16:9	124:7,11 125:2,9
149:13,23 156:21	182:14,17 183:25	172:6 175:17	17:18 18:2,25	125:14,22 129:12
166:2	184:12,13	181:18,25 182:5	19:2 22:23 23:14	132:13,17,25
merits 146:12	modelled 84:6,7	183:10 184:14,20	23:20 24:18,21,24	132:13,17,23
Mervyn 116:12,25	moment 60:1 70:9	navigate 160:4	25:5,8,10 26:3,18	135:24 136:2,5,12
117:24 118:15	81:3 86:9 91:13	near 121:11	26:24 27:16,18	138:6,9,22 139:5
met 61:23	101:5 110:7 114:9	nearer 180:7	· · ·	139:9,12,20,23
		nearly 194:19	28:1,7,9,12,16	
microscope 37:18	114:11 122:8	necessarily 4:16	30:21 31:1,11,19	141:6,21 142:1,4
mileage 129:23	132:6 147:11	61:3 86:14 105:18	32:9,14,23 33:7	142:23 143:8,10
Miles 17:20,21 18:3	161:5 172:19	130:17 143:25	33:21 34:4,7	144:11 146:11,18
19:1,3 22:25	191:16	144:3 173:14	36:17 37:13 38:5	147:13,18,20
23:15,22 24:2,20	money 25:11 28:18	175:18	38:11,24 39:18	149:25 150:5,17
24:23,25 25:6,9	30:23,23 31:4,13		40:2,4,10,15 41:5	150:23 151:5,17
25:11 26:4,20,25	31:14 57:10,13	necessary 30:6	41:17,23 42:8,22	152:6 154:3,6
27:17,21 28:6,8	119:19 120:7,9	81:21 96:16 98:16	42:25 43:3,13	155:3 156:4,25
28:10,13,22 29:1	154:3 168:23	103:6,14,20	44:4,9,21 45:5,9	157:18,22 158:12
29:7,9,11 30:25	177:20	127:24 176:5	45:16,22,24 46:4	158:15,20 160:25
31:7,15,20 32:10	monies 26:25 27:2	necessity 104:6	46:16,19,23 47:4	162:17,21 163:19
32:15 33:8,22	27:7 47:15 51:21	172:10	47:13,16,21,24	164:12 165:20
34:5 37:16 38:5,9	52:16 53:10	need 6:14 16:19,21	48:4,7,10,12,23	166:10,13 167:24
40:22 96:5,10	Moore-Bick 14:20	17:14 40:12,12	49:3,8,11 50:4,10	168:1,21,25 169:6
108:14 120:12	moratorium	43:23 63:20 73:6	51:1,3,10 52:15	169:17 170:19,24
123:1 129:15,23	103:19 104:6	74:12 87:12 88:7	53:21,24 54:4	171:6,12,15,21
133:9 141:7	morning 191:22	90:12 91:19 93:14	60:3,9 61:5,9	173:24 174:20,23
143:15 147:22	195:22	102:12 103:15	65:10,25 66:4,7,9	175:8,13 176:24
179:20 191:25	mortgage 26:8,12	112:24 115:18	66:16,20,25 67:16	177:2,4 178:4,6
197:4	26:16 46:22	116:14 118:8	68:1,4,17 69:3,5	179:17 180:4,7
	_0.10 10.22			
	I	I	I I	

www.DTIGlobal.com 8th Floor, 165 Fleet Street

r				Page 216
181:6,9,12 182:3	96:15 97:7,8	137:18	129:16 146:15	152:17,18 161:23
188:4,13,23,25	98:14,16 99:9	obligation 18:6	149:5 152:16	opened 75:20
189:5,10,16 190:3	101:18 103:1,7,10	25:16 36:20 37:8	156:15 161:17,19	opening 42:1,8
190:7,10,14,19,21	105:9,15 106:11	39:4 46:13 51:16	161:20 166:6	108:16 146:20
190:24 191:3,9,13	106:20 123:16,20	74:18 77:17 79:2	183:6 188:17	189:6
191:15,23 192:14	123:22 130:14	79:24 89:15 91:14	192:3	operate 149:4
195:16,23,25	144:22 174:7,18	99:23 100:21	occasions 186:1	operates 175:1
196:3	174:20 176:1	102:6 105:19	occurring 97:22	operation 66:10
Neuberger's 3:1	178:10 179:6,12	106:24 108:4	occurs 21:12 61:1	168:15
8:9 36:13	185:21,24 193:4	109:1,4,6,8,19,21	October 1:1	opinion 48:17
neutral 109:3,3	non-statutory	110:16 111:4	odd 16:15,20 24:14	120:19 193:12
131:16 163:21,21	13:22	112:12 113:4,22	30:16 119:10	opportunity 135:11
never 27:5,19	non-subordinated	113:24 114:2,22	141:24 142:5	opposed 24:16
28:19 133:5	144:2	116:4 119:25	150:25	150:19
153:24	normal 98:9	136:22 137:2	offer 70:21	option 135:19
new 12:16 13:4	normally 194:21	149:18 150:14,18	office 101:13	oral 76:1 78:21
14:16 16:8 36:13	Nortel 12:19 33:24	150:24 152:17	113:22 114:3,23	120:11 143:14
59:16 164:19	36:12 37:3 98:19	153:21,25 154:17	148:14 150:10	orally 66:21 67:2
165:18	167:16 192:14	155:18 156:21	151:10,14 152:23	order 17:24 18:3,4
Nicholls 16:10	note 79:18 92:11	163:21 164:6	155:25	34:10,18 37:10
nil 125:4,11 139:20	101:2 103:15	175:10 179:3	officer 44:25 97:24	43:6,8 83:8 96:17
141:11,12,23	115:10 186:7	obligations 80:5	98:10 120:20	98:14 104:7
non 96:12	notes 118:2 192:13	83:22 109:23	129:5	109:23 125:9
non-applicability	notice 4:10,19	110:1,5 112:14	officer' 98:2	126:16 137:1
15:2	notwithstanding	113:25 114:2,6,21	oh 23:8 54:1	160:5 161:21
non-distributing	21:13 90:2 115:14	114:24 148:4	okay 24:24 28:16	179:2
6:4,7	number 9:18 17:2	150:1 152:22	48:10 91:16	ordered 174:9
non-payment	34:19 57:6 64:14	186:19	164:12 174:2	ordinarily 57:10
173:19	64:18 66:21 69:22	obliged 58:18 59:13	old 42:23	ordinary 103:21
non-preferential	70:15 76:12 80:25	obligor 150:14	once 13:10 72:11	104:7
143:23	85:19 100:9 104:1	observations 26:19	75:20 91:10	original 96:25
non-protection	111:24 125:18	26:20	102:14 130:4	165:17 166:8
159:17	139:2 157:15	obtain 143:2	132:9 134:14	172:9 174:22
non-provability	160:17 186:1,5	obtaining 128:8	135:8 137:9 149:8	175:18 187:25
94:6	194:13	obtains 68:25	149:17 153:7	originates 69:13
non-provable	numbers 91:18	obvious 88:4 120:5	154:20 155:25	others' 82:1
13:23 14:3,9,16		121:16 123:25	156:2 165:12	ought 89:10 136:15
14:19 15:8 16:16		157:13 184:8	175:17	146:25 149:3
16:19 17:9 18:9	Oakes 180:19	190:1 191:8	one's 160:4,14	159:15 185:13,14
19:12 21:1,11	181:5 182:9 186:9	obviously 3:9 4:16	ones 22:23,25	187:24
22:19 23:2,9 33:2	193:21	14:9 28:14 70:10	59:16 67:2,6	outcome 145:5
71:18 75:8 78:14	Oasis 55:25 56:11	78:15 81:12 87:3	86:17 187:7	outline 180:14
78:24 84:23 85:4	obiter 26:19,20	93:11 101:15	oneself 13:1 80:10	outs 150:10
85:9 87:18 91:25	object 160:3	107:10,19 109:5	85:25 180:25	outside 21:13 23:14
95:15,18,25 96:7	objectionable	119:6 127:11	open 151:7,8	23:15 97:13 103:3
L	1		•	·

www.DTIGlobal.com 8th Floor, 165 Fleet Street

Page	217
rage	

				raye 217
overall 5:6 34:2	187:7,8	121:7 122:25	133:10 136:2	117:10 176:21,25
100:20	paid 8:22 15:20,21	123:15 125:13	143:12 144:8	182:10,12 184:2
overarching 77:12	20:7 26:6,6 29:14	127:21,22,24	147:10,12 148:22	passages 5:25 16:5
81:14 82:10 84:17	52:16 53:10 83:20	128:23 129:1,10	149:20,25 151:23	16:6 26:2 92:2
Overend 74:12	91:11 99:22	130:7 139:7	154:24 155:5	187:6
overnight 150:22	105:16 113:15	142:20,22 150:8	158:8 162:6	passed 5:15 153:8
override 1:20 2:20	121:1 123:16,20	156:9 157:1,9	173:24 191:21	181:2 193:25
2:21	123:23 124:1,13	167:7 169:19,20	193:6	passes 148:19
overrides 2:21	-	174:9 175:6	Parte 45:10 63:2	passive 3:1,4,7,9,14
	124:13 126:11,13		69:11	1
overriding 128:1	126:16 130:5,14	176:22,23 179:2		4:15,21,22 5:2
oversight 161:2,3,6	132:4 133:7	181:5,11 182:13	partial 147:11	109:11 149:22
owes 168:23	134:15,17,24	183:2,19 184:5,8	159:13	150:12 151:2
owing 79:3,12,14	135:5,9 137:4	184:12	participate 91:3	163:12,22
106:24 137:10	139:16 140:3,22	paragraphs 44:12	93:2,20 94:2	passivity 152:14
owner 111:4	140:23 145:18	48:15 72:16 74:16	131:25 132:3	passu 21:22 22:5
ownership 115:13	154:25 155:8	83:3 86:3 94:10	participating 91:1	22:18 23:1,3 24:5
116:2	156:15 166:21	99:6 115:20,22	participation 91:6	24:7 52:2 80:17
	paragraph 6:11,12	116:18,19 117:15	particular 4:25	80:19,22 99:23
P	9:24 12:19 14:5	118:3,5 127:18	14:17 15:9 17:3	100:24,25 122:22
page 4:8 6:13 11:24	14:15 16:4 19:1	128:2 145:25	17:22 27:21 31:23	125:21 126:1
12:10 18:1,24	21:17 22:1,5,8	192:15,16 195:2	36:10,12 41:7	133:18 144:4
19:20 21:16 25:23	25:24 29:19 36:7	parameters 87:22	50:24 51:23 58:20	Patent 65:1
36:8,18 39:12	36:15,16,18 37:1	pari 21:22 22:5,18	79:25 80:17 100:5	patience 61:8
40:2,3,5 41:18	40:8,9 41:18	23:1,2 24:5,7 52:2	109:1 120:1	Pause 36:16 43:17
44:4,5 45:8,15	42:20 43:4,7,13	80:17,19,22 99:23	131:24 138:17	46:5 47:12 48:11
46:3 48:24 49:19	43:14 44:15,22	100:24,25 122:21	144:7 146:19	49:7 50:11 68:3
50:5 52:13 56:21	45:14 47:2,9,16	125:20 126:1	159:2,2 160:1	92:16 100:18
57:6 59:4 64:8	47:18,23 48:8,10	133:18 144:4	162:8 163:16,23	177:3 183:20
78:11 79:18 91:17	49:10,13 50:5,14	park 191:15	177:6 181:22	pay 16:18,23 25:11
92:6,10,11,14	51:6 52:5,12	parliament 5:15	186:13 191:21,22	29:12 31:6,17
93:14 94:12 98:25	53:17,19,21,25	166:6	193:6 194:3	32:1,7 35:16,18
100:15 101:21	54:2,25 55:5 57:4	part 3:22 10:20	particularly 5:14	52:24 53:1,13
103:16 111:19	57:8,23 58:11	12:14 17:24,25	16:14 72:24 84:16	58:4 63:12 93:16
112:2,3,22 113:6	59:4 61:14,25	18:3,4 21:8,11,14	118:22 129:7	99:23 120:1
116:13,24 117:11	64:9,25 66:3,5,19	28:11 29:17 30:5	131:22 149:21	122:13 126:3,10
117:15 120:18,23	68:10 69:5,9 73:3	35:21 36:4 37:20	150:25	154:17 185:22
121:7 137:24	75:1,14 79:6	38:14 39:11,13,15	parties 167:6	payability 31:4
138:3 139:11	82:14 86:21 88:2	39:15,19,23 41:2	partly 20:6 26:6,6	85:21
142:22 143:6,8	88:24 92:14 94:11	47:23 49:2 51:12	partnership 183:12	payable 10:21
147:24 157:1,2	94:12,22 95:22,23	58:13 64:13 66:11	parts 82:23 84:8	13:14 18:8 22:16
167:23,25 174:14	100:5 101:22	66:11 70:11 83:11	94:20,23 108:13	23:1 27:1 30:20
177:2,3 182:12,12	100:3 101:22	87:2 94:14,16,17	149:25	30:24 31:1 32:19
184:3,5,8 186:10	105:10 104.15	95:10 97:20	passage 23:10 56:2	51:19 55:18 79:3
188:12 190:24	111:17 113:6,8	101:11 102:3	66:4 71:3 92:9	79:12,14 83:22
pages 65:8 184:3	117:11,17 120:15	107:9 128:16	109:3 116:22	84:1,9,12 85:13
P-5000000000000000000000000000000000000	11/.11,1/ 120.13	107.7 120.10	107.5 110.22	04.1,7,12 03.13
	I		l	l

DTI (+44)207 4041400 www.DTIGlobal.com 8th Floor, 165 Fleet Street

Page	218
Page	Z 1 8

				Page 210
96.25 97.9 00.5	160.12	42.7 (5.10 ((.1	95.11 96.20 99.1	154.9 161.16
86:25 87:8 90:5	160:13	42:7 65:18 66:1	85:11 86:20 88:1	154:8 161:16
90:10,11 91:15	perfectly 82:5	103:3 104:3 107:1	88:2,9 90:13 91:7	173:22 174:1,1
93:6 105:19 106:6	109:12 122:20	139:4 147:21	95:5,12 98:18	policies 71:15
106:17,24 110:19	137:21 152:4	149:6 159:8	100:4,7 104:5,22	policy 14:18 39:6
119:15,17 122:10	156:1 161:23	188:19 194:2	104:22 106:22	71:14,19 72:2,7
126:8 139:16	163:11	plain 13:9,18 47:10	108:23 110:21	72:12,13 89:10
143:19 145:6	perform 179:20	plainly 10:6 95:4	111:10 113:21	145:23 146:5
146:9 158:25	performance 57:23	100:21 106:17	115:4,20 118:9	147:3,6,7 156:1
165:2 168:9	period 7:2 10:21,25	118:25 119:15,15	119:22 120:12,15	159:16 160:20
174:20,21 179:5	11:3 12:14 13:5	129:10 138:17	121:16 123:9,10	161:1,11,12,13,14
payed 134:21	13:13,25 120:1,4	147:13 150:6	123:14 125:16	162:4,7 163:12
paying 22:25 52:3	145:17 146:3,10	151:22,23 152:9	126:23 127:17,21	portion 20:8 26:10
122:14	168:9 174:17	171:24 183:21	131:1 134:8,9	portions 18:20
payment 7:20,23	185:23	193:3	136:10 138:1,16	posit 87:7
13:15 14:22 15:18	permitted 1:19	please 36:15 49:7	141:18,21 142:14	positing 155:10
16:24 19:7 20:16	57:11 128:20	57:7 68:2	142:24 143:11,14	position 26:17
21:9,11 22:19	138:4	plenty 89:24 150:5	144:11 147:5	27:12 31:22 49:17
31:9 33:10,11,24	permitting 103:20	pm 114:14,16	152:5,14 156:4,9	53:6 75:10 100:11
52:2 77:13 78:2,8	person 42:2 70:8	196:8	157:18,19 162:18	123:21 139:1
81:23 83:10,19	98:4 108:25 109:7	point 1:12 2:23,25	162:20 163:1,4	157:3 159:4
87:17 91:13	109:19,24 132:13	3:1,2,6,12,12 4:3	164:4,4 166:16	162:12 165:7,22
100:23 105:12	184:17	5:4,13,16,17 6:15	167:5,17 169:17	165:23,25 192:13
106:11 108:5,5	person's 164:1	6:16,16 7:5 9:1,1	170:24 173:16,25	positive 147:5
110:18 111:5	personam 152:22	9:8,9 14:10,13,20	176:18 178:6,15	positively 67:17
113:5,19 121:1,9	153:17 164:6	15:1 16:12 17:1	178:17,18 179:1	possession 155:20
121:10,14 123:11	persons 57:15	17:22 21:10 24:14	179:24 180:8,9	possibility 11:7
123:12,12 129:16	100:23 102:5	24:25 25:1,21,21	183:15 185:7	124:5 160:21
129:17 130:2,10	105:3 109:7	28:7,8,24 29:12	186:13 187:5	163:8
130:19 132:6	114:21 148:18	30:3,8,9,12 31:2	188:14,18 189:25	possible 33:18
143:2 148:1	184:16	32:9,23 33:4,9,14	190:10 191:16,22	54:18 55:1 59:23
149:19 153:12,15	perspective 70:2	34:3,16 35:12	191:23,24 192:2	60:16 62:10 71:17
154:19,19,20	96:9 120:5 144:14	39:9 40:16,21	192:10 193:16,17	72:4 85:1 87:7
165:1 186:24	persuaded 67:2,3,5	42:11,19 52:21	193:19 194:4	104:10 114:23
187:19	Phone 57:15	53:5,17 54:3 56:5	195:3,19	122:20 123:1,7
payments 21:6,20	phrase 6:6 8:17	57:25 58:8 59:3	pointed 6:2 12:18	194:13
86:15 131:10	79:11 117:1	59:25 60:23 61:1	133:9	possibly 136:12
peculiar 111:3	128:22 194:7	61:16 62:2,19	pointer 24:23	155:17 185:4
pedantic 110:11	phrased 3:14	63:11 64:8,14	pointing 103:9	post-1986 15:4
pending 65:18	pick 1:8,12 36:7	65:17 67:7,18	points 1:8,15 5:5,20	post-administrat
people 70:5 110:1	picking 50:6	68:9,21 70:5,7	5:20 21:5 40:13	16:25
134:5 152:22	136:19 141:21	71:3 73:11 74:1	41:24 60:12,16	post-insolvency
158:15 159:6	picks 169:17	74:16 75:7,14,20	61:10 76:13 77:2	13:13,17 15:13
195:20	piece 100:2	76:9,12,20,25	80:24,25 81:1,11	120:7 121:24
people's 158:7	place 1:19 2:17	77:20 80:10,16,21	119:7 138:8	post-liquidation
perfect 159:23	15:17 16:22 39:25	81:7,14 82:12	142:18 153:3	21:2 119:2
P	10.11, 10.22 59.20	51.7,1102.12	112.10 100.0	21.2 11/.2
			I	I

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Page	219
-) -	

postponed 80:23	186:11	155:8 165:1	131:3,4,21 132:1	proposals 72:25
postscript 105:22	prefer 154:9	priority 80:3	134:10,22 149:24	propose 51:14 73:8
potential 119:20	preferential 21:19	private 154:11	156:3 158:8	75:15,18
potentially 88:12	143:23	194:15	164:15 174:25	proposes 4:1
132:15	prejudice 138:4	pro 154:18,19,20	175:2 183:22,23	151:19
power 19:18,21,24	premise 63:10	probable 164:1	processes 7:14 85:8	proposition 67:20
19:25 20:2,14,17	prepared 49:15	probably 37:13	86:13 159:2	prospect 124:15,16
20:22 27:22 30:10	60:19	43:14 85:12 93:5	produced 138:12	protected 119:21
30:17 43:6,11,25	prescribed 74:3	136:9 140:11,12	Professor 123:4	159:6
43:25 44:6,16,18	present 19:5 56:19	140:15 159:22	prohibition 48:6	protection 58:20
44:20 47:14 50:16	65:20 79:2,21	174:10	50:7 124:22	protections 45:3
50:20 55:3,6	95:21 96:7 115:3	problem 54:7 126:5	prohibits 11:3	58:16,19
57:21 58:24 72:21	131:5 155:22	126:18 153:4	128:13	protects 154:17
93:16 105:4,5	167:14 187:6	158:23 162:6,7	proof 7:6,8 34:13	156:2
,	193:9	problems 60:12	-	
132:13 156:16,18		1	34:16,24 35:8	provability 36:13
189:14,16,19	preserve 157:5	124:3 158:13	38:19,22 48:21	79:10,22 80:1
190:5	preserves 156:1	procedural 89:18	50:22 51:19 52:8	85:17,18 87:11,17
powers 2:19 27:9	pressed 49:14	102:22	52:9 53:7,13,18	88:14,16 97:13
43:19,21,22 44:10	presumably 11:8	procedure 103:5	54:14,17 55:8,12	192:11
44:11,15,24 55:24	80:3	105:8	55:16 58:1,12	provable 8:15,19
57:1 104:25 105:1	pretty 40:23 141:11	proceed 70:22	61:16,23 62:20	8:24 9:7,10,11
190:12	141:24 142:5	181:17	71:24 75:17 97:2	10:8,11,20 11:4
practical 140:17	189:25	proceeded 94:23	103:9 122:18	12:13 13:4,12,15
188:18	prevent 52:19	proceedings 86:11	123:14 126:13,15	13:16 21:3 22:17
practice 5:19	127:14	87:20,22,25 88:6	128:16,21 129:3,7	22:21,22 23:19
practitioners 17:14	prevented 54:23	88:7,20 103:23	129:9,16,20,24	33:1 34:22 35:4
pray 92:20	prevents 125:7	128:6,19 129:18	130:8,16 131:21	65:6 71:17 73:14
prayed 103:7	previous 172:4	129:21 130:2,4,11	136:24 137:4,8,12	73:18,21 74:25
pre-excluded	182:22	132:7,9 137:21	137:16,17,25	75:4,5,7 79:13,16
120:11	previously 182:1	138:1,12,20	140:5,6,9,22	79:19,20 84:21
pre-existing 14:24	primarily 192:4	proceeds 51:18,21	141:19,22,24	85:2 89:5 96:1,13
pre-insolvency	primary 106:23	51:25 52:23 53:1	192:7	99:21 113:1,11
119:11 120:4,9	189:13	55:8,11,16,18	proofs 7:12 131:12	119:12 122:12,15
pre-liquidation	principal 13:6	57:13 58:1,6,12	133:22	144:19 166:15
21:3 118:25	35:22 78:5 88:6	83:2	proper 30:2 71:21	167:4,8,20 168:3
preceded 10:24	144:6	process 7:15 22:16	71:25 90:24	168:3 173:20
12:4 146:8	principally 62:25	23:1 82:18 86:13	180:11	177:7 186:3,6
preceding 7:2 8:21	principle 22:5,9	87:16 91:6 97:1	properly 20:10	192:5,5 193:3
146:4 164:21	23:24 24:5,7,10	97:22 98:15	32:10 113:1	prove 1:25 7:8
precluded 128:7	125:3 174:24	101:12,15 102:10	159:21 170:6	38:18 42:14 44:6
preconditions	175:4 177:19	102:15,21 103:9	172:17	44:18 54:15 55:9
126:3,20	178:12 182:17	103:21,24,24	property 21:20	70:11 81:2,10
predecessor 42:18	principles 175:6	104:7,10 112:10	28:18 49:5 56:17	122:6,21 123:9
45:19 63:1,15	printed 61:13	128:18 129:2,4	56:22 64:10 98:25	124:23 125:3,10
138:18 182:7	prior 13:13 56:8	130:1,20,24,25	105:14	125:11,20 126:12
	-			ŕ
	I	1	1	1

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Page 220

				Idge 220
127:18 128:14	121:9 128:11	purposes 30:6	61:17	R
129:6,13 130:6,12	143:17 148:2	40:17,19 51:22	qualifies 78:7	rank 7:20 81:16
131:2 133:4,5,8	providing 121:2	53:1,11 54:11	81:17	
135:2 136:1,17	156:14	66:14 75:3 78:2,9	qualifying 94:14	119:25 120:20
137:22 159:4,18	proving 10:19 12:5	89:10,11 90:9,16	qualitative 88:25	121:3,12 132:4
165:13 170:21,22	81:23 84:8 124:22	90:24 91:8 92:20	94:1 96:15 172:6	143:18,19
171:25	126:6 127:10,15	92:23 93:2,23	qualities 114:6	ranking 80:17,22
proved 7:16,24	131:7 132:5,8,9	115:3,6 118:23	quality 88:22	95:8 121:13,19,19
12:1,1,6,13 13:6	131:7 132:3,8,9	119:10,14 139:25	quantified 123:19	ranks 78:1,8 80:18
15:20 18:7 81:6	132.11 133.22	155:22 176:6	123:21	94:18
	· · · · · · · · · · · · · · · · · · ·			rapidly 82:6
108:5 113:5,15,18	136:7 138:21	187:6	quarter 50:10	rate 15:24 145:10
117:6 121:1,10,15	139:15,18 141:4	pursuant 1:22	query 103:25	161:5
122:2,5,11,18	159:19 165:10	52:16 57:1 81:18	question 1:13 24:15	rational 156:1
123:8,12,12	provision 7:1 11:21	139:3 181:2	26:11 37:5,10,24	re-organise 86:22
131:10 133:6	12:2 22:18 63:21	193:25	38:11 52:20 65:14	reached 131:14
134:6 136:25	77:13 82:10 108:3	push 80:8	78:22 85:14	react 131:17
139:24 140:2,3,12	125:10 135:24	put 13:3 15:17 38:4	109:10 117:4	read 12:20 17:14
140:13,22 142:20	143:2,22 150:8	56:7 60:16 67:1	125:5 131:16,19	19:15 24:2,10
142:25 145:6	151:10 157:19,20	70:17 72:18 73:6	137:16 150:18	31:25 33:16,17
148:2 153:12	162:8 180:23	75:10 78:4 82:13	152:7,12 154:12	36:15 43:13,15
154:18 158:25	189:7 190:1,15,19	84:14 88:16 93:17	155:16 160:14	45:20,25 47:7,13
165:1,11 166:20	192:8	96:17 120:2	181:1 183:1,7	47:16,19,22 48:1
168:6,13,19	provisions 1:18,21	125:11 126:1,23	190:4	48:3,7 49:6,20
169:16 170:5,25	2:11,12,16,22	130:10 133:25,25	questions 19:10,11	50:9 60:25 61:10
172:1,3 179:4	7:10 9:20 19:15	134:1,9 135:16,21	79:9 85:20 91:5	68:2 71:21 77:15
185:22	21:19 37:11 39:1	140:10,11 147:4	94:6 102:22	81:14 82:9,13
prover 134:16,22	39:9,21,23 43:20	153:21 166:15	queue 80:7,8,12	99:18,23 100:16
135:1,10,14,15,16	58:15 62:21 71:22	169:18 171:23	quick 92:8	127:24 157:10
135:25	77:19 80:4 81:19	175:25 177:5	quickly 1:17 77:1	172:20 177:1
provers 134:2	124:25 127:14	178:18	180:18 181:7,24	reading 31:24
proves 52:6	128:10 149:5	puts 13:20 51:4,5	186:15	32:16,17 48:4
provide 18:7 52:20	150:5,6 160:5	129:5 141:12	Quistclose 154:11	85:15 100:12
58:16 59:20 63:15	176:13	putting 130:9	quite 1:5 5:2 25:10	
80:16 82:20 128:3	pulling 30:21	157:14 169:18	33:18 46:23 60:13	109:18 187:16,18
160:22 176:14	pure 188:8	170:17 172:12	60:24 87:1 91:7	195:12
177:13 179:4,11	purporting 132:19	175:8,9,16	92:19 95:1 106:4	reads 100:20
193:18	purpose 18:17	Pyle 25:25 46:17	116:21 118:7	172:19 173:15
provided 53:14	25:12 29:14,16,22	49:14 54:24 55:17	129:5 145:12	ready 183:6
64:1 98:22 100:12	30:11,19 32:3,21	67:13	129.5 145.12 158:21 162:15,18	real 37:2 78:22
128:12,23 160:6	50:21,24,25 75:11	07.15	185:2 194:22	124:20 151:8
128:12,23 100:0		0	185:2 194:22	realisable 57:11
	83:13 86:21,23	qua 133:3		realisation 57:14
provides 2:14 9:22	105:11 108:7	qualification 41:6	quotations 16:9	realise 105:24
12:3 19:20 61:18	118:20 132:2	62:5 176:16	186:16	189:24
63:21 80:22 81:16	143:22 146:2	qualifications	quote 24:3 187:14	realised 155:15
83:15 120:25	163:21 172:6	quanneacions	quotes 48:13	162:20

Page	221
Page	22

				ruge 221
realistically 146:11	received 109:20	115:16 116:8	relation 3:8,11 9:22	171:19
reality 140:17,20	131:10	165:4 168:5 181:4	18:15 20:11 23:24	relies 148:23 149:1
really 1:13,25 3:12	recipient 153:24	181:10	25:7 37:2 52:22	relieved 149:11
15:1 17:5 30:2,8	recognise 99:8	referring 4:16	54:14 63:1,4 68:6	rely 10:23 21:15
30:12,14 32:15	recognised 98:18	66:20 67:2 113:11	70:13 72:17 75:19	25:21 48:2 65:2
34:3 38:8 88:10	recompense 177:18	refers 22:2 25:23	80:20 83:1 90:3	66:4,22 67:17
92:18 103:25	recorded 139:20	36:11 43:4 44:23	102:2 103:10,19	70:16 143:1 147:3
			· · · · · ·	
105:22 115:10	recover 59:9,24	46:7 51:7 65:17	107:11 110:2,5,17	167:21
117:24 136:19	165:11	68:11 101:22	115:6 122:8 135:6	relying 65:8
152:5,25 154:10	recoverable 55:23	121:19 129:17	136:16,18 139:1,6	remain 89:9 110:23
156:4,23 161:11	56:25	195:7	141:1 142:20,25	111:1 116:1
169:17 178:18	red 136:8	reflected 59:5 62:1	143:13,21 144:5,7	remained 115:13
180:13 189:11	reduce 170:12	179:16	144:14 146:16	remaining 8:24
reason 27:13,16,17	reduced 59:5 62:1	reflecting 34:2	151:10 155:5,17	108:5
27:21 28:1 42:17	Reed 28:17,25	reflection 194:16	156:11 159:25	remains 106:10
55:17 64:3 77:4	40:22 41:2 56:2	reflects 160:19	163:2,3 164:14,20	113:19 185:15
82:4 87:7 89:3	70:1 80:3,14	regard 24:12 35:16	165:16,19 166:15	remedies 133:13
90:13 91:19 96:18	92:18 125:5	51:21 63:12 113:1	173:7,10,22 176:9	remedy 89:17
106:4 119:22	172:18 173:12	126:10 137:25	176:18 178:22	93:11 128:3,5,7
120:5 121:6	189:11 193:17	145:4	180:17 181:22	128:11,16,21
122:17 125:17	Reed's 190:10	regarded 20:10	188:9 189:3	133:12,14,15
138:13,25 141:3	195:19	27:23,25 29:17	192:13 193:19	137:13,25 138:3
149:23 153:9	refer 34:25 37:10	regardless 7:15	relationship 36:22	141:19 181:15,16
155:13 163:16	39:21 46:25 47:10	15:19	36:23 98:8 109:24	182:18 184:1
168:16 169:14	54:1 55:25 61:2	regards 7:23	180:14	remember 18:17
171:17 172:15	66:1,18 70:18	regime 15:18 37:6	relatively 100:2	23:5 137:19
175:25 176:3,17	74:11 78:19 93:12	37:11 38:18,20	155:10,18 174:7	190:14
177:12 180:20	reference 6:15 11:6	45:7 51:13,14	178:19	remind 18:3 19:3
181:23	11:24 12:19 20:24	52:10 58:16 59:17	relevance 41:23,24	57:6 85:25 179:18
reasonably 52:7	24:4 26:1 33:19	73:4	68:9 159:11	remission 15:7
reasoning 14:8	44:14 63:20 64:2	registered 39:14,16	186:13	remitted 174:18
15:3	64:7,22 65:3	regulated 88:7	relevant 17:24	remove 149:23
reasons 8:1,4 35:6	99:13 112:5,23	regulators 137:25	50:12 79:23 83:9	removed 68:12
47:1 57:20 63:10	169:24 187:18	regulatory 94:7,9	84:12 87:19,21	render 54:20
73:24 76:25 82:5	references 14:14	94:15 95:7 120:5	96:7 100:10	132:23
85:19 91:20 107:4	19:16 25:15 61:4	138:7 139:3	108:13 109:24	rendered 79:16
107:8 110:5,15	108:8 142:15	rehabilitation 86:6	145:12 146:15	renders 126:7
121:5 122:16	referred 2:13 43:20	86:17	158:10 174:17	repayable 83:14
139:2 152:13	43:22 46:18 47:1	rejected 57:17,19	183:19	repayment 77:16
169:4	43.22 40.18 47.1 53:24 54:3 58:10	62:24 65:12	reliance 11:7	1 0
recall 69:19 95:3	61:12 63:24 64:20	relate 39:10 106:20	relied 39:6 62:25	78:6 83:15,18 94:19
190:17	64:21 65:10 66:3	relates 54:13 55:7	67:9,18,23 69:2	repeat 107:13
receipt 83:1	66:21 69:15,17,23	58:15 79:9	71:15 95:3 116:22	150:18 173:23
receive 44:8 122:21	72:6 78:20 99:8	relating 3:8 55:9	117:10 129:15	repent 9:7
155:2 158:6	100:13 112:19	61:17	137:17,23 147:4	replaced 148:15
			l	

				ruge zzz
177:14	respectful 7:18	90:15 92:22 93:3	rights 14:24 19:8	111:17 112:11,16
replaces 14:24	12:16 15:5	reversal 144:21	33:5 43:12 52:4	114:22,25 120:25
reply 70:20 179:25	respectfully 3:2	reversion 15:7,16	53:2 58:21 77:23	121:9 122:2,11
report 182:12	10:6 88:3 95:6,13	16:2	78:3 81:8 127:17	123:7,10 124:24
represent 153:12	103:25 107:3	Richards 6:2,5	135:4,6 153:17,17	125:6 133:18
represents 184:12	108:20 110:21	14:6 18:4 23:6	153:18 154:14	134:18 136:5,23
Reproductions	111:3 116:16	39:24 42:21 43:23	155:1 156:2 157:5	137:1 139:3
93:15	152:19 153:9	44:23 54:25 69:18	158:7 159:18	143:17,21 144:8
request 75:24	154:9 156:23	69:24 102:25	165:6,13 172:24	146:6,17 147:16
require 59:8 62:15	158:4 163:10	103:15 112:22	173:2 174:18	148:2,8,24,25
86:24 130:8	165:15 185:12	115:21 116:9	176:5 178:13	149:21 151:22
131:21 149:17	193:1,14 194:5	118:4 176:17	183:22	152:8,18,19 153:5
168:18 180:13	respects 127:22,23	Richards' 6:13	rise 2:16 5:18 7:17	154:13,14 156:14
required 41:15	128:4 186:12	16:5	7:22 8:2 13:23	156:16,18 158:24
62:8,12,18 72:3,9	respond 2:25 70:20	Rigby 51:3	32:1 37:8 109:18	160:18,22 162:25
83:18 99:15	responded 57:3	right 4:21 8:20	113:2 124:24	163:6 164:16,19
101:17 104:17	responded 57.5 response 53:19	15:22 22:7 23:20	152:8 157:25	164:22 165:4,7,19
105:16 155:23	54:3 72:13 146:20	24:9 25:10 26:24	159:16 160:14	166:8,23 167:4,22
181:19 186:23	rest 5:3 92:17	28:22 29:10,21	164:23 193:13	168:5,11,16
requirement 15:13	169:7	31:2 32:20 33:17	risk 145:10	171:19 172:2,11
requires 32:17	restored 146:22	38:21,24 41:17	role 151:10	173:20 188:21
74:22 85:24	restrict 79:23	42:23 47:4 59:1	Rolls 49:9 64:6	190:8 191:10,17
reread 75:25	127:14	66:23 68:19 76:16	room 15:6	190.8 191.10,17
	restriction 77:22		root 72:21	-
reschedule 86:22		78:5,6 80:9,9		rule-making
reserve 50:7,20,20	124:25 130:15	81:10 89:18 93:12	rose 60:22	189:14,16,19
56:6	135:22,23	93:18 101:9 104:1	round 31:5 82:11	190:4,11
residue 133:23	restrictions 77:15	118:1,7 122:21	131:12 133:22	rules 1:19,22 2:14
resile 152:11	127:9,12 148:5	125:25 126:12,13	149:15,16 162:22	3:8,10,13,17
resolve 5:11 104:14	restrictive 84:25	126:16,20 129:9	162:23 166:6	17:15 20:1,2,2
147:12	restricts 153:20	130:23 132:17,18	roundabouts 17:11	44:23 80:16 84:8
resolving 38:21	result 28:5 69:11	132:19,20 133:4	route 73:2 145:2	88:12 97:11
resources 72:4,10	118:23 119:11	133:22 135:18	rudely 118:14	100:25 119:21
respect 7:3 10:21	126:2 130:25	136:1 139:9	rule 1:14,18 2:16	136:2,7,12,13
11:13 13:4 14:7	149:11 157:17	140:20 142:2	2:19 3:20 7:10,11	138:7,11 148:24
21:6 25:22 31:21	160:5,9	144:1,4,18 147:20	8:16,19 9:14,17	149:4,8 151:23
34:15 44:24 52:6	resume 60:3 114:12	149:19,23 155:5	9:18,19 10:9,13	159:7 172:13
54:15 55:4,9	196:4	156:20 157:21	10:13 11:2,21,25	189:7,17,22 190:6
58:12 73:4 77:23	retrospective 62:23	158:9,9,21 159:20	12:14,20 14:1,23	190:16 191:4,4
95:1 113:20	64:17 66:15	160:15 162:16	15:15 19:23 36:9	193:6,11,18 194:2
114:22 120:1	retrospectively	166:10,13 167:19	36:14 37:9 39:4	195:21
135:2,2,4 136:25	70:2	169:6 170:8 171:7	72:17 74:18,19,21	run 85:24 169:14
141:20 143:24	return 29:15 102:4	171:13,14,21	74:22,24 75:19	169:15 177:18
146:9 155:12	102:7	174:5,6,11,22	80:2 96:5 97:10	running 168:22
162:10 168:9	returned 58:6	175:13,17,19,24	97:11 101:1	runs 15:24
185:22	revenue 89:3 90:10	177:6,14 178:8,11	108:21 109:7	rustling 18:24

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Page	223
r a g o	

				raye 225
<u> </u>	21:14 23:4 29:12	35:4,8,13,19 36:1	52:14 56:18 65:8	sensibly 12:21
safe 3:4 4:24	35:7,12 39:1,3,8	36:20 37:6,12,22	70:19 74:25 91:16	sentence 4:6 50:6
Salomon 183:16	39:15 54:22 84:6	39:15 40:11,18	92:12 97:17	52:14 59:4 85:16
Salomon's 182:24	97:3 98:12 110:25	41:7,8,19,21,25	101:23 109:25	187:14
183:4	115:15,18,25	42:9,10,11,18,20	113:14 115:24	sentences 106:3
satisfaction 21:21	149:20 153:7	42:23 43:4,6,11	116:14,20 125:14	separate 113:25
99:1,13,16	156:3 159:22	43:12,13 45:7,18	135:14 140:15,23	128:16,21 137:25
satisfied 8:21 91:14	164:3,5 175:15,17	45:19 51:23 52:11	143:10 151:22	141:19 184:18
124:9,16 126:4,20	175:21,22 176:6	52:17,20,24 53:12	152:2,6 167:7,11	187:5
satisfy 41:15 62:8	177:8 178:15	53:15 54:10,12,14	173:16 184:3	separately 25:19
62:18	179:15 187:5	55:5,10,12 59:6	186:10 189:1	94:7 95:16 133:19
satisfying 162:2	scope 17:23 18:22	61:18 62:5 63:1,5	195:12	September 145:8
save 96:16 122:13	71:17 76:12	63:7,10,15,15,18	seeing 112:17	sequestration 86:6
132:1 143:4	107:11,14 192:15	63:23,25 64:1,15	seek 144:14 181:15	serve 146:23,24
saw 11:2	192:16	65:7,17,20 66:10	181:16 182:18	served 146:2
saving 22:8 26:25	scope' 179:1	67:20 71:23 72:15	184:1	set 2:1 5:7 9:18
28:2,3,17,19	second 2:25 5:9	73:12,14,17,21,25	seeking 17:5,8	16:4 21:15 25:12
52:19 92:21 96:21	6:16 13:21 35:12	74:6,10,15,17	71:17 160:23	26:2,22 40:17
129:12 134:11	35:15 40:16 46:17	75:4 98:13,23,23	170:21,22	41:7 43:21 44:10
142:4 159:24	54:13 57:25 62:5	100:12 101:17	seeks 122:6 171:23	51:22 54:11 57:23
182:13 184:4,10	71:5 72:2 74:16	104:11 105:2	seen 3:21 5:21	65:1 66:4 73:12
184:10 190:15	79:2 94:5 102:20	107:12,18 115:7	10:17,18 18:16	84:16
191:3	111:10 113:4	117:2 134:11	21:4 34:1 40:11	set-off 34:22,24
says 4:6 14:8 19:18	123:10 131:12	163:1,5,8,12,17	79:17 98:4 127:18	45:12 73:10,20,22
21:18 23:25 24:3	133:21 135:14,15	164:16 165:3,6	175:5 189:5	74:3,8,14,19 75:3
29:19 31:16 32:2	135:16,19 174:3	166:9 178:20,25	sees 3:24 64:24	75:6,7,12,13,18
36:18 46:9 48:15	175:8	179:4,6,16 180:10	82:14 193:21	sets 10:7 43:18
48:24 49:16 50:2	secondly 16:23	180:12,13,22,25	194:2	45:17 82:16 83:9
50:14,19 64:9	19:13 39:2 63:11	181:3 182:7,8	Selborne 48:14,16	86:2
68:11 88:4,6	97:23 104:10	185:1,2,7,14	sell 55:23 56:15	setting 36:9
124:6 140:15	121:16	186:8,11 187:24	senior 77:24 78:1,8	settled 70:4
141:10 146:1	section 1:22 3:10	188:9,10,10,11,15	78:10 81:17 82:3	settlement 44:24
168:2,20 184:4	3:17 14:7,23	189:15 191:11,23	126:25 127:4,6,7	54:19
185:2 190:1	15:14 17:22 18:6	194:1,1,23 195:14	130:5	settles 43:9
scenario 155:11	18:9,14,22,23	sections 2:13 31:24	sense 11:9 25:16	settling 43:5 70:13
schedule 2:1,11	19:12,14,17,19	32:16 43:18 47:9	54:8 100:1,3	seven 46:2
43:21 44:11,12,13	20:15,25 21:6,15	56:15 100:17	109:4 121:21	shape 144:13
57:24 104:13	22:3,6,9,12 23:7	secured 26:11	130:21,22 135:3	share 18:20 20:18
111:17 150:8	23:14,15,16 24:1	security 44:1	136:22 140:24	26:5 27:11,24
157:1 190:23,25	24:2,11 25:1,4,12	see 6:20 9:17 18:22	142:1 146:23	28:13 59:21 94:17
191:1	25:17 29:2,13,16	22:2 25:3 29:20	147:7 151:2	94:18 95:9 125:20
scheme 5:8 13:10	30:2,12,17 31:8	31:19 32:3 39:13	163:22 172:11	126:1 134:16
13:18 14:21 15:21	31:15 32:1,6,18	41:20 42:10,21	178:16 180:17	143:24 144:1
16:1,8 17:6,10	32:20 33:1,5 34:5	44:21 46:4,6	192:24	shareholder 67:10
20:12 21:8,12,13	34:16,21,25 35:1	47:21 48:23 50:4	sensible 107:21	68:24
				•

raye ZZ4

				raye 224
shareholders 46:12	simply 10:12 17:10	14:17 102:25	44:17 162:12	80:21 108:14,23
65:8 182:20,20	28:19 34:2 71:12	147:9,11 148:20	190:15	167:17 174:24
183:10 184:24	79:12 91:3,6,20	158:15,22 159:24	specifically 11:20	180:9 182:13
shares 20:7,8 26:6	104:24 113:21	160:13,13,15	12:23 97:14	185:7
54:9	116:4 121:14	161:4	128:12,22,24	starts 25:23 36:9
shift 184:13	126:2,19 130:19	solve 158:22	148:6 151:3	40:5,9 50:6
shining 37:18	138:13 145:22	solvency 83:18 90:3	157:18 164:9	142:20
shoehorn 154:11	150:12 156:14	90:24 91:5 93:24	194:9	statement 23:17
short 1:8 5:20	160:22 163:9	96:12 177:21	specified 2:11	101:19 108:22
14:21 17:22 39:21	164:23 165:5,9	solvent 82:7,9	53:11	states 73:2 191:7
60:6,10 75:21	166:24 167:17	83:12,17 87:6	specious 46:14	status 138:9,10
106:3 112:18	168:13 169:14	89:13 91:10	96:22	149:9
114:18 115:9,11				statute 23:4 32:3
· · ·	171:22 172:12	somebody 70:4,6	spectacles 86:10,12	
144:24 174:8	175:1 177:8 181:7	somebody's 136:8	163:6	46:2,13 61:24
179:15 182:15	187:10	somewhat 60:19	speech 68:10 92:4	62:3 71:25 80:15
shorter 73:11	single 128:3,5	soon 43:5 46:11	92:15	89:1,14,22 93:11
shortfall 96:24	Sinners 9:7	sorry 2:8 25:14	speeches 92:22	97:14 132:20
shortly 9:2 178:19	Sir 64:5	28:9,10,24 52:12	spelt 24:9 56:2	175:23 178:7
shoulders 65:21	sitting 76:18 188:5	53:21 54:2 82:25	spend 116:15	189:17
show 7:12 57:5,9	situation 20:21	92:5,6 110:9	spring 180:7	statute-barred 90:6
57:12 137:17	27:3,11 59:20	111:11,21,23	springs 141:13	90:7 93:9,16
shows 22:11 52:9	106:9,14 131:24	112:1,3,5 117:18	square 7:19 13:9	statutory 1:20 2:14
157:4 194:6	155:7 177:23	129:11 131:17	stage 18:13 26:10	6:10 7:1,20 8:6,18
side 76:5 80:14	193:22	133:13 142:8,15	37:2 72:22 81:12	9:7 10:3 13:4,9
117:10	situations 150:13	143:8 147:22	83:10 107:16,17	14:21 15:13,17,21
sidestepped 58:20	166:3	158:14 178:23	107:20,21 131:13	15:23,24 16:8,24
sight 82:21 173:17	six 16:7 39:2 47:21	182:4,25 183:18	131:21 141:13	17:6,10 18:8,15
significance 42:19	51:14	185:18 188:6,7	157:23 166:25	19:13 21:2,8,12
147:10	sixth 62:19	sort 59:18 79:10	167:1,3	21:13,14 23:11
significant 40:18	sketch 8:12	82:12 84:13 85:8	stages 189:21	25:7,11 27:7,22
42:17 43:1 67:7	slight 141:8	94:4 106:19	stance 9:3	29:11 30:10,19
145:12 160:2	slightly 28:1,7	110:20 127:8	stand 183:6	31:17 32:6,7 33:3
186:4 188:18	32:24 51:5 60:17	142:13 149:4	standard 77:18	33:12 35:7,12
similar 19:10 94:1	60:17 83:4 92:13	150:4 151:16	121:23 138:11,14	36:14 37:11 38:2
97:25 105:5 115:4	102:2 104:25	154:11 156:10	138:17	38:18,20 39:1,8
115:17 119:7	134:1,8 141:14	178:11,13	stands 13:1 190:10	45:7 54:22 55:1
180:23 184:7	150:12 151:12	sorts 86:12	start 3:16 35:2 36:5	55:19,24 57:1
similarities 135:3	165:8 179:23	sought 104:18	39:8 51:18 77:4	58:16 63:13 71:1
Similarly 74:5	180:2,8 187:5	172:16 184:20	82:4 129:3 142:13	71:22 73:4 76:9
Simonds 92:17	192:9	speak 1:25 66:13	144:13 167:5	78:13,17,23 80:4
simple 99:18	slip 110:9	speaking 191:6	179:13	81:6 82:25 84:6
106:16 112:7	small 97:12 155:18	speaks 66:12 75:16	started 48:4,5	87:18 91:25 94:6
113:20 144:6	161:9	special 46:1	107:25	95:15 97:3 98:12
154:12 172:2	sneeze 43:11 73:5	Speciality 45:25	starting 4:3 76:20	98:20,20 99:9,21
184:13	solution 5:22 6:17	specific 33:19	76:25 77:20 80:16	103:18 104:6
L			·	

Page	225
------	-----

				Page 225
106:15,16,23	structure 19:24	120:11 122:8	137:3,8,12 142:2	subsequently 54:20
108:3,4,22 109:9	38:25 77:2 82:16	127:11,20 129:23	145:22 149:19	70:17
110:18,19,25	97:6 98:1 110:22	130:21 133:18	152:19 159:23	subsidiary 127:25
114:2 115:15,18	114:4 130:22	139:14 143:16	166:5 171:22	subsist 113:17
119:6,8 120:13,25	155:19 188:10,15	148:15 152:5	172:15 176:3	148:17
121:3 122:9,13	195:13	153:23 157:12	184:9 185:20	substance 157:12
126:17,21 127:3,5	structured 159:22	158:5,18 160:23	submits 74:16	substantial 75:12
130:13 131:6	stuck 49:11	162:23 164:13,17	submitted 21:10	145:7
132:12,13 135:6	stuff 1:6	170:13,18,19,20	37:19 57:5,9 65:5	substantive 9:1,9
143:17 144:18	sub-debt 76:9 78:1	174:7 181:21	65:6 73:20 74:5	89:19 186:22
145:5,8,11,17	83:14,16,18 89:11	182:15 188:8,22	129:24 140:21	substituting 182:19
146:9 147:7 148:8	89:12 91:14 115:3	189:20 194:11	148:4 171:18	subvert 70:12
148:16 149:12,20	122:7,12,14	195:22	submitting 169:23	succeed 165:21
151:13 152:9,10	123:17 127:15	submissions 1:3,9	170:7	succession 178:24
153:7,14,15,20	130:6 132:22,23	1:11 2:20 5:6,7,9	subordinate 133:20	successive 159:1
154:2,3,12 155:6	133:2 137:11	8:5 13:19 15:2,10	189:11	successor 138:10
155:17 156:3,20	142:14	17:17,20 18:18	subordinated	180:23
157:15 158:25	sub-rule 4:25 5:2	34:5,9 35:3 37:14	77:24,24 78:4,9	sufficient 19:6
164:3 165:11	162:17 189:4	37:15,21 38:8,12	78:12,15 80:12	20:16 31:9 40:17
166:20 175:15	subject 9:12,23	38:14,25 53:22	88:5 89:21,22	77:5,11
179:5,11,15	10:1,4 13:19	57:3,5 67:8 73:2	90:5 94:9,14 95:8	sufficiently 190:5
180:22 182:7	21:19,22 34:21	75:17,24 76:1,2,4	96:17 98:3 118:21	suggest 20:11 22:11
185:11 186:11	35:21 41:6 61:23	76:14 77:5,10	119:24 120:21	30:16 31:21 91:21
187:5 193:4 194:3	74:7 77:19 79:24	83:4 94:4 96:14	121:4,14,18,20,24	107:3 110:21
stay 23:11 146:24	86:19 88:11 99:4	107:10 115:5	122:1,4,17 130:23	111:3 112:11
step 129:6	99:11 109:8 122:3	118:17 139:6	131:24 137:20	114:5 119:20
stick 49:12	123:2 127:21,22	142:9 143:15,21	143:3	124:3 127:16,19
stood 164:3	128:4 143:12	144:25 147:17	subordinating 82:1	129:1 132:22
stop 60:24 131:8	149:12 153:13	148:7 150:11	subordination	149:3,10,14,16
167:18	154:21,25 158:2	153:1 157:24	77:12,25 78:3	154:1 156:24
stops 13:11 102:3	167:2 169:10	160:9 162:24	81:22 82:10,20,23	158:4 161:11
straight 77:7	173:1 190:11	175:5 176:8	83:2,5,11 84:17	165:15 185:6,12
111:12 147:16	192:19,21	179:13 192:3	96:11 125:1 127:2	193:2,14 194:5
195:12	sublet 76:21	197:3,4,5,6	127:14,23 128:1,4	suggested 89:1
straightforward	submission 4:23	submit 2:15 3:3 4:4	128:10,15 129:8	102:24 145:24
106:4 148:9	5:4 7:18 11:17	7:3 8:1,5 10:6,10	130:1,16 137:15	156:12 166:9
strange 118:22	12:12,16 15:5,7	12:22 13:8,17	138:4 139:13	suggesting 151:20
stressed 86:21	16:1 20:24 25:6	14:21 16:12,20	141:3 143:25	suggestion 38:7
128:22	35:15 37:18,20,25	17:4,9 48:21 52:9	subprovisions	59:19
strikes 173:12	38:1,3,10,15,23	64:3 72:7 84:15	12:20	suggests 78:13
striking 33:22	45:2 52:16 53:21	87:23 95:7,13	subsections 100:17	87:23 132:7
strong 24:17	57:18,19 59:7	97:19 98:16,23	100:17	sui 30:9
stronger 160:8	62:24 65:13 71:21	118:6 119:4,10	subsequent 8:20,25	sum 47:19 74:2
strongly 87:23	73:11 106:16	120:12 128:13	11:5 53:8 68:12	79:1,23 106:24
struck 33:9	114:20 115:12	129:20 136:18	144:19 177:10	171:8
L				

Page	226

r				raye 220
summarised 35:3	106:19 108:4,6	117:15 121:9	temporal 192:25	thing 25:13 60:18
145:24	109:20,25 110:2,6	137:23 143:6	ten 1:6 92:10	67:15 93:4 119:5
summary 105:15	110:16,17,20	149:2 157:2	ten-minute 60:2	119:7 121:2 129:3
147:1	111:16 112:10,15	163:18 167:25	tense 5:2	140:20 148:23
Sumption 11:6,13	114:24 117:5	171:20,20 174:12	term 122:7	162:14 175:22
11:16,18 24:1	122:10,14 123:11	174:14 181:8	terminology 195:14	178:13
29:4,8,10 37:25	123:18,21 131:13	182:11 186:9	terms 9:6 11:23	things 9:18 32:25
40:8 61:12 104:24	133:21 135:2,8	188:11,25 189:1	17:13 19:3 22:20	33:18,19,20 71:1
113:11 116:23	143:24 144:2	190:24 195:11,15	25:3 32:3 48:6	91:25 95:2 145:4
125:25 126:9,19	147:25 148:1,2,14	tabs 43:24	77:17,18 88:8	180:12 194:13
131:8,12,16,19	148:16,18 153:12	take 1:6,23,24 3:13	94:18 95:17 118:8	think 1:5,21 14:8
133:17 134:12	153:19 154:15,16	17:8 23:22 39:23	124:22 126:10	16:7 26:1,23
137:3 138:13	154:23 155:21	42:7 44:1 67:22	127:25 143:4	32:14 34:7 40:22
140:6,9,14 160:3	163:23 164:25	80:21 86:15 87:24	149:22 150:12,15	49:1 60:12 61:9
160:21 162:6	165:3,4,12 166:19	90:12 103:3 118:3	152:20,21 176:12	67:4,22 70:21
163:2 169:18,23	166:21,23 173:19	124:14 129:6	179:17 185:2	78:19 79:7 81:21
170:7 171:3 173:2	177:19	134:22 135:8	187:12 190:11	85:22,23 88:7
174:13 182:23	surprising 56:14	136:10 139:12	terribly 105:25	91:19 96:5 97:16
183:2,7,9 184:16	131:22 149:11	145:13 146:15	test 10:12 36:13,19	98:3 101:1 102:1
184:22 185:4	survival 176:1	176:22 179:21	37:3 82:2 90:3	103:7 104:22,23
190:11 191:6	survive 178:14	182:10 185:6	93:24	109:14,16 111:18
194:18 195:7	182:23	186:14 189:20	tests 109:25	112:24 113:8
Sumption's 134:8	susceptible 112:9	191:19 195:18	text 24:2 132:6	114:11 115:8,19
141:21 162:18	suspect 180:1	taken 3:10 9:3	textual 82:12	116:14 118:5
170:19	sustained 120:4	11:16 60:13 73:19	thank 2:24 6:14	122:25 124:21
superseded 28:21	swings 17:11	73:22 87:4 90:2	8:13 17:18,19	127:10 134:9
supplemental 64:7	symmetry 166:3,6	90:23 91:4 142:8	18:2 26:3,24	135:18 136:6,9
support 15:8,10	system 70:12 88:15	177:8	28:12,16 34:4	142:24 143:14,20
67:19 83:11 98:20	systems 104:20	takes 65:18 92:13	40:4 42:25 43:16	145:21 150:20
98:20 125:2		162:10 190:22,25	45:16 46:4 47:17	151:6 156:10,12
supporting 61:11		talk 71:11	49:3 60:3 61:6	157:23 161:20
71:15	T&N 23:5 95:20	talking 11:10 22:14	66:7,20 67:16	164:13 166:11
supports 16:13	103:1,17	22:15,21 102:10	68:1,4 69:7,8,21	169:18 170:16
157:3	tab 3:19 9:16 10:15 10:16 11:22 12:9	159:17 160:25	71:13 75:23 76:2	174:9 179:19
supposed 7:14,19	10:16 11:22 12:9 18:1 19:17,23	177:22	92:7 100:6 112:4	183:15 187:7
Supreme 117:3	25:25 39:12 41:22	talks 51:6 151:17	114:12 117:13,19	190:18 191:1,14
sure 2:5 110:12	45:8 46:20 49:6	163:20	117:22 139:5	191:21 193:12
136:7 150:20	43.8 46.20 49.8 67:25 68:23 74:13	tanto 154:18,19,20	142:23 143:10	194:14 195:2,24
174:10 178:16	77:8 93:13 98:25	Taylor 90:13 91:18	157:22 158:20	196:1,4
185:15 190:13	100:14,15 101:5	92:3	166:13 167:24	thinking 48:16
191:2	101:21 111:19,21	technical 141:12	181:6 196:5,6	88:23 97:4,15,25
surplus 6:18,21,25	111:23,24 112:3	telescope 53:6	theme 116:3 156:10	119:8 164:9 175:10
7:1 13:14 29:4	112:22 115:19,23	telescoped 100:2	157:10 187:21	175:19
30:18,22,24 31:18	116:12,23,24	telling 6:6,7 7:4	194:6	thinks 102:3
32:2,4,8,12,19	110.12,23,27	138:25	theory 15:8 16:2	third 5:17 7:5 37:3
			l	

Page	227
rage	

r				raye 227
49:4 55:7 58:8	tomorrow 136:12	116:24 117:14,18	191:12,14,19	114:21 121:5
64:14 75:7 102:21	191:22 195:22	117:21,23 118:2	194:19,25 195:5,8	122:16 138:8
104:22 160:21	196:5	118:13,16 124:3,8	195:18,24 196:1,6	141:9 159:1,3
175:8	top 46:7 51:5	124:18 125:8,13	195.18,24 190.1,0	161:16 174:1,1
	1	· · · · · · · · · · · · · · · · · · ·		-
Thirdly 35:22	115:25 184:7	125:15,24 126:5	true 88:9 168:12	178:9 180:18
thirds 45:23	topic 118:16	126:14,22 129:14	trust 57:14,18,22	181:13 184:3
thought 2:9 6:2,6	tort 95:19 97:9	131:11,15,17,21	58:2,14 77:14	186:16 187:1,22
14:16 69:23	total 53:12	132:10,15,21	82:1,25 83:1	194:12
118:13 131:18	totally 27:12	133:1,12,25 134:7	154:6	type 93:22 97:4,9
162:3 179:13	183:13	134:14 135:15,20	trustee 106:5	154:12
180:7 183:5 188:7	toto 137:11	136:1,4,6,16	Trusts 64:6	
191:7 195:20	touch 65:17	137:6 138:7,10,15	try 61:8 134:8	
three 5:6,20 8:1,4	track 79:15	138:25 139:6,10	142:12 154:10	ultimately 17:1
40:17,19 45:6	tracks 168:21	139:14,22,24	trying 60:24 91:21	91:2 135:4 157:17
48:15 51:12 57:20	trading 51:24 52:1	140:8,10,15,19	91:23 97:5 109:14	ultra 156:10,12,23
73:24 82:13	transcends 100:9	141:17,25 142:2,6	160:7 161:16	un-called-up 20:18
175:11,12	transcript 1:16 2:2	142:12,24 143:9	170:11 171:24	unable 41:15 54:20
three-stage 36:19	transferred 156:2	143:11 144:12	Tuesday 1:1	55:15 58:3 62:7
threefold 36:13	transitional 9:20	146:13,19 147:15	turn 8:8 36:19 45:6	62:17
thrust 91:21 93:21	treat 25:16	147:19,22 150:3,7	51:14 73:10 93:14	uncalled 26:9,10,11
107:2	treated 7:15 94:16	150:20 151:4,6,22	94:5 98:24 103:15	26:13 27:10,11,24
ticket 61:5	95:10 118:20	152:7 154:5,8	108:8 112:24	71:11
time 1:4 6:19 7:7,9	168:14 169:15	155:4 156:8 157:1	117:14 181:7	uncertainty 88:18
13:6 28:15 35:23	187:24	157:21,23 158:17	187:8	145:10
43:8 49:18 56:23	treatment 7:23	158:21 160:12	turned 57:12	unconnected 193:2
58:3 63:6 68:14	23:2	161:16 162:10,20	183:19	underlies 17:2
70:6,7 83:17 89:8	trespass 96:20	162:22 163:20	turning 57:10	underlying 22:9
91:13 104:12	triggered 21:7	164:13 165:21	174:10 183:18	113:24 161:18
107:23 112:17	trite 89:16	166:11,14 167:25	191:12 195:10	162:4,7 175:1,2
116:15 118:11	trouble 102:12	· · · · · · · · · · · · · · · · · · ·	turns 180:11	175:16,24 177:13
		168:2,24 169:2,12		177:19 181:21
123:19,22 124:8	Trower 8:10 13:20	169:22 170:3,16	Turquand 180:19	184:15
130:13,15 131:1,8	76:4,5,12,20 80:9	170:20 171:2,5,11	181:5 182:9 186:9	underpin 182:7
131:9 132:3 133:6	80:24 81:11 85:6	171:14,16,22	193:21	underpinned
133:20 134:4,4	86:4,9 89:16,24	172:23 173:4,16	twice 141:14	187:25
136:9 148:12	90:7,12,21 91:17	174:3,14,21,24	two 1:8,11 5:5 7:13	
159:20 163:7	92:6,8,13,20	175:12,14 176:25	8:5 31:24 32:16	underpins 163:13
171:3 179:17,21	100:7,20 101:5,8	177:3,5 178:5,11	35:6,22 38:23	174:24
179:23 180:1,2,15	101:10 102:1	180:1,6,9 181:7	41:7,24 43:22	understand 10:2
186:3,15,24 196:2	107:17,23 108:1	181:10,13 182:4	45:23 62:25 71:15	71:13 80:15 84:4
timed 158:19	108:14,17,19	182:25 183:5,8,14	77:18,20,22 83:21	84:22,24 91:7
timing 130:15	109:14 110:9,13	184:17 185:1,5	85:20,23 88:25	120:24 146:13,18
135:21,23 192:10	110:15 111:9,12	186:17 188:6,14	90:13 92:2,25	147:2 156:25
today 8:4	111:21,23 112:1,3	188:24 189:1,6,14	100:16 108:10	157:22 161:21
told 9:5 46:21	112:5 113:7,10,15	189:20 190:4,9,13	110:1,4,15 113:2	178:4 181:24
60:21 190:20	114:4,10,11,17,18	190:18,20,22,25	113:25 114:6,20	189:25
			, í	
	1		1	1

				raye 220
understandable	urgent 155:13	99:22 100:2 104:5	103:13,18 105:22	wide 105:4 127:7
82:5	use 3:7,11 8:16	104:9 123:17	105:15,18 105:22	193:20
understanding	29:13 51:25 52:1	124:15,21 159:13	110:1 115:1 120:2	wider 27:16 28:7
180:14	52:7,23,24 56:6	161:1 188:18	126:22,23 127:20	79:7 192:9
understood 2:4	79:21 87:14	192:10	130:8,10 131:5,18	wife 67:8
122:25 170:10	104:10 121:11	Vinelott 123:3	133:25 134:1,8	Wight 175:4
undischarged	123:7 147:23	vires 156:10,12,23	135:17 139:7,17	Williams 51:2,4
119:25 155:1	153:20 169:19	virtue 55:24 59:24	141:3 142:2 149:3	63:2,3 65:9 67:9
		74:19		-
unfair 32:17 60:17 118:5 180:8	191:3,17		149:15,15 150:4	67:23 69:2,11 70:1
	useful 47:6	Viscount 92:4,17	151:16 152:1,15	
unhelpful 136:14	V	volume 64:8 143:6	152:18 153:6	wind 129:12
unique 3:7	v 46:9 63:2,3 65:9	147:23 176:23	154:1 157:10,14	132:14,14,15,19
universal 88:19	66:2,17 67:7,9,23	voluntary 21:17,20	158:7 160:4	winding 2:22 9:23
unjust 75:9	69:2,11 90:13	21:25 23:21 24:8	161:24,25 162:4	12:4,7 19:5,8 21:7
unjustifiable 5:19	91:18 92:3 110:25	24:15 98:22	162:22,23 163:5	21:18,20,21,25
7:18 8:3	115:11 174:14	W	163:17 164:15	22:1,4,7,10 23:21
unlimited 18:18	175:4 180:19,19	wait 70:19	165:15,18 166:15	23:24 24:12,16,16
20:4,12,13,21	181:5,10 182:9		167:5 169:19	27:1 35:14 36:2
21:6 26:17 27:3	· · · · · · · · · · · · · · · · · · ·	want 43:14 48:7	170:17 172:20	37:9,23 39:5,14
28:10 30:18 32:11	186:9,14 193:21	94:7 96:20 104:14	175:8,9,16,19	39:16 40:20 41:11
36:3,21,24 48:25	193:22	wanted 6:15 66:1	177:5,21 178:18	42:7 45:4,12
49:17 51:6 53:20	valid 124:12 193:12	76:25 110:11	179:13 185:12	47:19 48:20 49:1
54:6,8,8 71:7 72:3	valuation 80:20	143:11	186:20 187:24	51:16 52:3,19,21
72:9 182:1 185:16	126:1	wants 132:2	189:2 190:6	53:9,10 54:16
unliquidated 95:18	value 42:15 59:5	warrant 84:15	ways 82:1,20	55:14 56:7,8
unnecessary 14:12	62:1 74:20,23,23	waste 136:9	125:18	58:19 59:10,12,23
88:17	75:3 124:2,6,17	waterfall 1:21 2:15	Webb 180:19	61:21,22 62:11,14
unpaid 9:6 18:20	126:15 139:20	16:6 33:23 34:2	181:10 186:14	62:20,22 63:5,8
20:8 35:18 44:16	140:21	98:19 148:22	193:22	64:12,16 65:18,22
54:9 153:16 168:7	valued 123:17,25	153:2 154:25	weight 77:5,11	65:23 66:13 67:14
unqualified 11:22	125:3 140:6	156:11,22 176:21	118:10 171:23	67:21 70:3,7,12
unsecured 13:6	141:23	178:21	well-timed 162:21	71:24,24 72:11,12
55:20	valuing 124:19	way 8:17 20:12	went 10:21 12:15	73:7 93:2,20
unsubordinated	variable 77:17	22:15 25:18 26:20	26:7,16 65:19	104:18 148:23
129:25	variety 97:8	27:7,24 31:5,24	128:25 142:16	174:19,25 182:19
untouched 175:3	various 16:5 25:14	33:14 38:21 45:23	168:9 169:10	189:3,8
unusual 18:21	vary 2:14	50:10 51:9 52:18	185:23 195:20	winding-up 21:12
134:2 190:19	Vaughan 51:2,4	60:17 67:1 70:22	weren't 147:19	22:16 43:6,8 86:5
unusually 151:2	version 10:13 96:5	74:6 76:6 77:16	Whiffin 180:19	102:15
190:14	vested 19:19,25	78:5 79:9 80:25	181:10 186:14	winners 17:11
upheld 18:5	20:22 27:22 30:10	81:4 82:11,13	193:22	wish 40:21 88:13
uphold 144:14	vesting 111:2	84:3,13 85:15,16	whilst 58:2 182:16	wolf 52:8,14,18
upholding 34:11,18	vi 18:5	87:20 88:16 90:1	Whittaker 66:17	58:9
144:16	view 23:22 24:6	91:22 93:17,18	67:7	Wolfson 1:3,8,24
upshot 172:8	49:11,12 62:10,17	97:24 99:18	wholly 172:14,15	2:4,8,11,25 3:15
-				
	1		1	1

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				Page 229
3:19,24 4:20,22	189:6 194:11	year 41:10 61:20	99:18 101:17	13.12.1 167:11
5:17 6:1,12,16,21	work 92:21 95:16	61:22	103:16 105:17	13.12.1(a) 167:4
8:14 9:16 10:18	97:5 121:25	years 15:12 56:10	134:11	13.12.2(b) 96:5
11:9,15,17,19	133:10 155:17	70:11 71:20	11.30 1:7 60:5	130 56:10
12:9,11 14:5,13	158:2,7 160:7	182:24 187:22	11.40 60:3,8	137 54:25
16:11 135:13	172:16	yesterday 1:9,12,15	11.45 179:22	1371 101:21
144:11 146:11	works 20:12 25:25	2:23 5:6,25 8:5	11.4 5 179.22 110 14:14,15	1371 101.21 138 40:9
147:2 148:20	46:17 49:14 54:24	11:2 15:2 23:6	110 14.14,15 113 25:24	
149:16 156:13	40.17 49.14 54.24 55:17 67:13 77:16	25:1,6 67:4	115 23.24 116 113:8,10	1386 116:13,24 117:11
157:3 158:14	81:1 84:3 98:12	23.1,0 07.4	1174 188:12	11 7.11 14 49:6
	108:2 127:20	Z		14 49.0 142 41:18
169:14,18 171:17		zero 123:17,25	118 26:23,24 1184 167:25	142 41:18 143 22:3 24:1,2
171:23 173:18	133:10 134:25	124:6,12,15 126:2		2
179:23 197:3	136:11 139:7	136:20,23 137:7	1189 108:10	100:12,13,14
Wolfson's 152:25	147:17 153:7	140:6,10,11,19,21	119 145:25	105:17 134:13
157:24 167:7	157:11 164:16 167:11 189:2	140:0,10,11,19,21	12.1(b) 84:11	144 42:20 145 95:23
wonder 60:1,15 64:18		140.22	12.3 79:16,18 97:10	145 95.25 146 43:4
	world 15:4 worth 136:20	0	97:11 12.3(1) 36:9	140 43.4 147 44:22
wondering 142:10 172:19	147:13 151:5		12.3(1) 30.9 120 29:19	14 7 44.22 148 43:4 100:13,14
word 22:13 79:22	147:13 131:5	1	120 29:19 121 145:25	148 43:4 100:13,14 105:17 134:13
		1 12:20 37:9 44:11		
84:9,16 85:12	195:10	44:13 46:20 64:8	124 195:2	1484 48:22
99:20 123:8	wouldn't 31:2	67:25 74:13 76:8	125 6:12 195:2	1492 47:3,9
128:23 178:8	126:19 170:3	100:17 115:20	127 14:5	1494 47:22
192:2 193:2	wouldnt 133:25	116:24 167:22	13 74:24	1498 48:13
wording 79:16	wound 19:4 26:9	168:4 188:11	13.12 9:21 12:20	15 101:21 182:24
109:7 146:17	42:4 46:11 50:18	189:4 195:15	37:9 80:2 167:22	150 15:12 19:17
192:1	50:21 51:20 53:8	197:3	168:4 172:19	151 43:6
words 8:8 22:14,17	55:15 58:3 68:7	1(a) 172:19,22	188:21,23 191:24	154 43:11
34:1 40:14 41:25	68:19,20 69:1,14	173:15	13.12(1(b) 192:16	1556 103:16
42:1,9,11,23,24	72:16 74:1,7	1(c) 172:20,21	13.12(1) 9:22 12:22	1590 187:8
43:7 45:20,24	145:1	173:14	192:2 193:1	1595 187:9
46:1 47:8,19 48:5	writ 23:12	1.00 179:18	13.12(1)(a) 8:16	16 63:23 116:12,24
48:17 51:10 66:9	written 16:4 60:15	1.05 114:14	9:14 84:10 168:14	160 19:20
82:15 84:5,19,24	60:25 70:16	1.5 15:24	169:8 192:12,15	1624 68:3
85:13 91:23 93:6	wrong 10:6 14:17	10 3:21,22,25 117:2	192:18	1644 68:9
99:11 108:24	38:15 87:24 107:3	148:25 149:5	13.12(1)(b) 36:10	168 104:11
109:17 116:7	111:23 112:5	159:7	39:4 51:17 192:12	17 197:4
129:15 149:17,22	121:4 122:16	10.00 1:2 196:5,9	192:20	172 19:1
157:8,8,14 159:8	128:25 133:14	101 115:23	13.12(1)(c) 10:10	1739 186:10 195:9
160:24 161:7,9,20	162:22 166:16,17	102 115:23	167:25 168:18	195:10,12
161:22,24,25	166:18 169:6	104 176:22,23	169:13 171:15,19	1740 195:12
164:7 168:11	178:8	104(2) 177:1	173:6,8	175 75:1
171:22 175:23	X	107 21:15 22:6,9,13	13.12(3) 193:7,15	1760 98:25
181:15 187:10,15	<u>Λ</u>	22:20 23:14,15,16	13.12(4) 191:7	1765 100:14
187:16,19 188:20	Y	24:11 98:13,23,23	192:22 193:15	1767 100:15
		, , , -		

Page 230

				Page 230
177.2 19:20	163:18 167:1,3	21 157:2	3017 184:3	139:7
177.2 19.20 18 1:1 74:13 98:25	103.18 107.1,5	21 137.2 2125 93:14	3046 56:21	4.73(8) 7:10 11:21
18 1.1 74.13 98.23 1810 190:24	2.00 114:12,16	212 3 95.14 213 36:7 56:15	3149 115:23	171:20,24 172:2
1810 190.24 182 181:5	2.11(d) 149:1	63:19	33 63:18 86:3	171:20,24 172:2
182 181.5 183 181:11	2.2.159(3) 138:2	214 36:16 56:16	34 86:3 197:5	4.77(e) 143:1
1838 111:19	2.2.159(3) 138.2 2.2.159(4) 138:5	218 36:18	3426 45:8	4.93 14:23 170:12
1841 112:2,3	2.68 3:20,24 149:1	210 50.18 22 45:8 100:14	35 94:10	170:24 171:10,18
185 21:17 99:7	151:17	187:8	363 184:9	170:24 171:10,18
185 21:17 <i>33</i> .77 186 100:5	2.68(1) 149:1	2227 115:19	364 182:12 184:5	4.93(1) 10:9,13,13
1861 68:6	2.68(2) 4:8,9	223 117:11	184:10	11:6,25 12:14
1862 41:21 42:1,12	2.68(3) 4:8	227 59:4 61:25	373 142:22	167:22,23 168:5,8
45:18 63:24 64:15	2.72(6) 7:11	229 57:4,8	3799 137:24 138:3	168:16,20 169:13
68:11 181:14	2.81 74:21,22	231 52:5,13	38 7:12 186:8 194:1	169:24 173:6,7
182:16 188:3	2.85(5) 74:19	231 <i>32 3</i> ,1 <i>3</i> 232 <i>7</i> 2 <i>:</i> 7	194:23	400 71:20
194:23 195:4	2.88 15:15 139:17	2329 167:16	387 177:3	4036 68:24
1867 157:1,2	143:17 144:8	24 67:25 95:22	39 129:1	4038 39:12
1873 44:4	146:7 148:17,24	243 72:16		4065 65:3
1874 44:5	2.88(7) 1:14,18	244 72:17	4	4068 65:9
1875 117:3	2:17 3:5 8:19	25 19:17 43:24	4 10:22 18:1 39:11	4069 65:9
1879 50:15 56:5	14:1 108:2,21	254 53:19	39:13,19,23 43:21	4072 65:24
189 3:10 14:23	111:17 114:22,25	2568 92:6,8	44:12 55:5 66:11	411 189:15 190:12
15:14 18:9,14	120:25 121:9	2585 92:9	76:10 77:15 83:3	190:24
22:1 25:17 31:15	122:2,11 123:7,10	2586 92:11	105:2 111:23	42 79:6
163:1,4,5,8,12,17	124:24 126:17	2590 92:14	115:20 127:12,18	436 69:9
163:25 164:14,16	133:6 136:23	26 43:24 53:17 54:2	127:21 128:12,23	45 7:11 11:22 12:9
165:3,6,17 166:9	137:1 139:25	2652 113:10	133:16 137:23	88:2 107:7 171:20
179:6 180:13	140:2 149:6,21	2653 112:22 113:7	141:20 144:10	46 7:11 116:18
19 25:25 44:15	150:15 152:8	27 175:6 191:12	174:5,12,14 189:6	118:4
46:20	153:6 158:24	2822 49:10	4(11) 1:22	47 94:10 116:18
193 117:18,21	163:3,6 164:16,19		4(7) 141:5	118:4
194 116:19 117:15	164:22 165:5,7,17	2827 51:6	4.00 188:7	48 190:24
1944 11:24 12:8,9	166:8,23 171:7	283 73:3	4.1 127:24	49 120:15
195 116:19 117:15	173:20	284(4)(b) 74:18	4.11 2:13	
117:21	2.887 114:5	285(3) 74:4	4.11(1) 2:13	5
1957 167:23	20 182:11	29 94:22	4.11(2) 2:13	5 40:1 49:5 76:10
1962 68:8 101:6	200 71:20	2980 182:12	4.15 188:5 195:25	77:6,12,14,19,21
180:23 182:2,4	2006 63:19		196:1	81:16 88:24
186:8	2008 145:8	3	4.16 196:8	111:21 127:22
1984 79:18	2010 146:7	3 4:13 9:4 41:22	4.18(1) 101:1,3,7	128:5 129:10
1986 95:24	2013 108:11,16,19	43:24 44:12 55:5	4.195 19:23	137:15 144:10
1988 149:2	147:24	57:23 82:15 93:13	4.2 77:18	174:4,6,9 177:7
	2016 1:1	111:19 117:15	4.31 101:4	5.1 82:14
2	202 58:11	147:24 171:20	4.4 128:2 129:17	5.1(a) 82:19 83:7
2 82:14 105:2	205 74:17	179:9 181:8	130:3	5.1(b) 82:19 83:9
112:22 149:25	207 74:17	300 71:20	4.7 128:2,11 137:13	83:15
		1	1	•

Page 231

			Ŧ	aye z.
5.2 119:14	112:3 115:23	74(2) 41:7		
5.2(a) 88:24	127:12,18 143:6	74(2)(a) 41:8		
5.6 82:24	148:17 162:17	74(2)(c) 62:5		
53 10:15,16 167:7	7(d) 143:1	74.1 51:23		
539 86:3	7(e) 139:8,9 141:5	75 41:21,25 42:11		
56 101:5	142:8	42:23 45:18 63:15		
561 25:23	70 142:22	64:15 65:7,17,20		
57 19:23	71 12:19 107:6	66:10 121:7		
574 18:24	192:15	76 197:6		
575 181:9	718 187:7	79 66:19,22		
576 21:16	72 64:25 118:5			
578 117:15	192:16	8		
580 58:11	723 187:7	8 2:1,11 15:25 17:7		
582 36:8	73 39:15 42:9 63:10	34:11 35:2 44:12		
587 57:8 59:4	65:24 118:5	68:23 73:9 145:9		
588 52:13	74 3:19,24 17:22	190:25 191:1		
	18:6,22 20:15	80 41:19 42:10		
6	21:6 22:14 25:1	45:19 63:1,15		
6 9:16 45:8 76:12	29:2,13 30:2,12	64:1 67:20		
167:25 179:2,8	30:17 31:8 32:6	82 42:18,20 69:5		
180:11 186:9		82(4) 42:21		
188:25 189:1	32:18 33:1,5 34:5	85 122:25		
195:11	34:16,21,25 35:1	86 192:16		
60 94:11 99:7	35:4,8,13,19 36:1	00172.10		
600 18:1 174:14	36:20 37:6,12,22	9		
	40:11 45:7 52:11	9 34:19 39:12,12		
61 142:13,20	52:17,20,24 54:12	41:22 64:8 68:23		
621 94:12	54:14 55:10,12	73:10 77:17		
624 121:7	59:6 63:5,7,25	115:19		
63 94:12 104:13	66:3,5,22 71:23			
639 6:13	72:15 73:12,14,17	93 75:14		
641 40:3	73:21,25 74:6,10	96 75:15		
65 111:17,25	74:15,17 75:4	99 150:8 156:9		
653 45:15	107:12,18 115:7	157:1		
66 86:21	121:7 149:2	99.1 157:9		
68 12:19 192:15	178:25 179:4,16	99.2 157:9		
680 77:8	180:10,12,22,25	99.3 157:9		
686 98:4 120:18,23	181:3 182:7,8			
687 78:11	185:1,2,7,14			
688 128:2	186:11 187:24			
689 77:9 128:2	188:9,10 191:11			
69 16:4 112:1	191:23 194:1			
123:15 130:7	191.23 194.1			
691 139:11 143:6,9				
v/1 1 <i>J</i> /.11 1 H <i>J</i> .0,7	74(1) 40:18,24			
7	53:12,15 54:10			
777:8,15 83:3	74(1)(a) 61:18			

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