1 Tuesday, 18 October 2016
2 (10.00 am)
3 Submissions by MR WOLFSON (continued)
4 LORD NEUBERGER: Since we are doing rather well on time, and
5 to help everybody, I think, because this is quite
6 concentrated stuff, we will take ten minutes off at
7 11.30, just so everybody knows.
8 MR WOLFSON: My Lords, may I pick up two short points from
9 yesterday and then conclude my submissions on the
10 Court of Appeal's approach and then make a few
11 submissions on the two cross-appeals.
12 The first point to pick up from yesterday, as
13 my Lord Lord Neuberger said, the key question, really,
14 is whether rule 2.88(7) only applies in the
15 administration. One of the points I made yesterday --
16 which, looking at the transcript, I may have made
17 a little too quickly -- is that none of the enabling
18 provisions which enabled the creation of rule 2.88(7) in
19 the first place permitted the creation of later rules
20 which would override the then existing statutory
21 waterfall provisions. I think I mentioned that the
22 rules were made pursuant to section 4(11).
23 LORD NEUBERGER: You did, but you didn't take us to it.
24 MR WOLFSON: I didn't take you to it. We needn't go through
25 it; it is really, so to speak, to prove a negative. But

1 they are set out in schedule 8 --
2 LORD CLARKE: Is there going to be a transcript available of
3 the whole of the argument?
4 MR WOLFSON: I understood your Lordships would be getting
5 one. We can certainly make sure of that because one
6 is available.
7 LORD NEUBERGER: That would be kind.
8 MR WOLFSON: My Lords, we will make that available. Sorry,
9 I thought your Lordships have that.
10 LORD NEUBERGER: That is fine.
11 MR WOLFSON: None of the provisions specified in schedule 8,
12 which is at F9.27, or any of the other provisions
13 referred to in sections 4.11 or 4.11(1) or 4.11(2),
14 provides rules to be made to vary the statutory
15 waterfall, so essentially we submit that when one looks
16 at the enabling provisions which give rise to rule
17 2.88(7) in the first place, there is no indication
18 there, and indeed it would not fall in any of the
19 available powers, to create a rule which would
20 override -- and your Lordships have my submissions as to
21 why it overrides -- which would override the mandatory
22 provisions which apply in a winding up.
23 That is the first point arising out of yesterday.
24 LORD NEUBERGER: Thank you.
25 MR WOLFSON: The second point is to respond to my Lord

1 Lord Neuberger's point as to passive language.
2 We have looked at this point and we respectfully
3 submit that there is nothing in the -- fact that it is
4 passive, that would not be a safe basis on which to
5 conclude that 2.88(7) --
6 LORD NEUBERGER: First of all, the point of fact, as it
7 were, was whether the use of the passive was unique, as
8 it were, in relation to the rules relating to
9 administration, because obviously the passive seems to
10 have been taken from section 189, and the rules seem to
11 use the active, in relation to administration. That was
12 really my point. That was the first point of fact. And
13 do I take it that the answer is that the rules are
14 generally phrased in the active rather than the passive?
15 MR WOLFSON: Well, they are in a mix, my Lord. We could
16 look at it. If we just look at the start of this
17 section of the rules --
18 LORD NEUBERGER: Yes.
19 MR WOLFSON: -- which your Lordship finds at F3, tab 74,
20 which is rule 2.68, which is the beginning of
21 chapter 10, confusingly called, as we have seen,
22 part 10.
23 LORD NEUBERGER: We have that.
24 MR WOLFSON: Your Lordship sees 2.68. This is F3, 74. This
25 chapter, chapter 10, applies where:

1 "The administrator makes or proposes to make
2 a distribution to any class of creditors".
3 So the starting point is that the whole chapter, we
4 submit, is focused on the administrator and the
5 administrator alone, and that is what the introductory
6 sentence says. Before we get to the language and when
7 we get to the language, it may be constructive to
8 compare, just on the same page, 2.68(2) and 2.68(3):
9 2.68(2):
10 "The administrator shall give notice to the
11 creditors of his intention to declare and distribute
12 a dividend."
13 And then (3):
14 "Where it is intended that the distribution ..."
15 So it there goes into the passive but it is
16 obviously still referring necessarily to
17 the administrator.
18 LORD NEUBERGER: But that is linked to the administrator
19 giving notice of his intention.
20 MR WOLFSON: It is.
21 LORD NEUBERGER: But you are right, it is the passive, yes.
22 MR WOLFSON: There is then a lot of passive language; there
23 is some active language as well, but our submission is
24 that it is just not a safe basis on which to conclude
25 that one particular sub-rule inures after the

1 administration into the liquidation, because that
2 sub-rule is in the passive tense when quite a lot of the
3 rest of it is as well. That is where we get to in our
4 submission on your Lordship's point.
5 Having made those two points, my Lord, I indicated
6 yesterday that I had three overall submissions: I had
7 one set of submissions that the Court of Appeal's
8 approach was inconsistent with the legislative scheme;
9 I have made those submissions. The second is, it was
10 a matter for the legislature and not for this court
11 to resolve.
12 LORD NEUBERGER: The court would be legislating; that would
13 be your point. That is not what we should do,
14 particularly when it is inconsistent with the
15 legislation passed by parliament. That is your
16 point, yes.
17 MR WOLFSON: My Lord, yes. And the third point I make now
18 is that the Court of Appeal's approach gives rise to
19 unjustifiable discrepancies in practice. And my Lord,
20 I can make three points here, all short points.
21 First of all, as we have seen, the Court of Appeal
22 solution only applies to distributing administrations.
23 LORD NEUBERGER: And Lord Justice Briggs and Lord
24 Justice Lewison accept that, and you took us to the
25 passages yesterday.

1 MR WOLFSON: Exactly, but in this context, my Lord, it may
2 be thought, as Mr Justice David Richards pointed out in
3 his judgment, that it would be more likely, in a
4 non-distributing administration, that it would be
5 followed by liquidation. And Mr Justice David Richards
6 used the phrase "very telling"; he thought it was very
7 telling in that case where you have a non-distributing
8 administration that goes into liquidation, that there
9 is, even on the Court of Appeal's approach, no basis for
10 statutory interest.
11 LORD NEUBERGER: Which paragraph of his judgment is that?
12 MR WOLFSON: It is paragraph 125 of Mr Justice David
13 Richards' judgment, at D5, page 639.
14 LORD NEUBERGER: Thank you. We don't need to look it up,
15 I have the point. I just wanted the reference.
16 MR WOLFSON: That is that point. The second point, my Lord,
17 is that the Court of Appeal's solution and approach
18 cannot apply to a surplus which arises for the first
19 time in the hands of the liquidator.
20 LORD NEUBERGER: I see.
21 MR WOLFSON: So assuming there is no surplus at the end of
22 the administration, but because there are more assets --
23 and I have explained how it could be that there are more
24 assets available in the liquidation, and there is
25 a surplus -- in those circumstances there is no

1 provision for that surplus to be applied to statutory
2 interest for the period arising in the preceding
3 administration. Again we submit, with respect, that is
4 very telling.
5 The third point is that the Court of Appeal's
6 approach can only assist creditors who lodge a proof for
7 the first time in the administration. Creditors who
8 didn't prove in the administration but lodge a proof for
9 the first time in the liquidation would not be assisted.
10 And yet the deeming provisions in rule 4.73(8), which
11 your Lordships have at F3, 45 to 46, and rule 2.72(6),
12 which is at F3, 38, those proofs show that the
13 legislature intended that when there are two consecutive
14 insolvency processes creditors are supposed to be
15 treated equally regardless of which process they
16 actually proved it with.
17 So again, it would give rise to a discrepancy which,
18 in my respectful submission, is unjustifiable. It also
19 does not square with the fact that debts are supposed to
20 rank equally for the payment of statutory interest,
21 which would not apply if this were the case.
22 Therefore the Court of Appeal's approach gives rise
23 to differential treatment as regards a payment of
24 interest, depending on whether a creditor has proved in
25 the administration.

1 So for those three reasons, we submit that the
2 Court of Appeal's approach itself gives rise to
3 discrepancies which are unjustifiable, and therefore for
4 those three reasons, the one I have made today and the
5 two submissions I made yesterday, we submit that your
6 Lordship should allow our appeal on the statutory
7 interest issue.
8 My Lords, can I now turn to say a few words, at
9 Lord Neuberger's invitation, on the cross-appeals.
10 I appreciate I am doing this before Mr Trower has said
11 anything but --
12 LORD NEUBERGER: Just sketch out what -- that would be very
13 helpful, thank you.
14 MR WOLFSON: I will deal with the first cross-appeal first.
15 This is whether interest is a liability provable under
16 rule 13.12(1)(a). LBIE cross-appeals here, to use their
17 phrase, by way of fallback argument, to contend that:
18 "Any statutory interest arising in LBIE's
19 administration under rule 2.88(7) will be provable in
20 a subsequent liquidation to the extent that such a right
21 has not been satisfied in the preceding administration".
22 So if some interest is paid out but there is
23 an interest claim left over, the argument is that that
24 remaining claim for interest is provable in the
25 subsequent liquidation.

1 I make a forensic point and a substantive point.
2 The forensic one I will make shortly: this is contrary
3 to the stance taken by LBIE through this litigation,
4 until Day 3 in the Court of Appeal. Indeed, early on in
5 the Court of Appeal hearing the Court of Appeal was told
6 in terms that LBIE was not contending that unpaid
7 statutory interest is provable. Sinners can repent, and
8 the point is either good or bad, so I will move on to
9 the substantive point.
10 They now argue that it is provable. And what is the
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
13 in which it goes into liquidation, and that is based on
14 rule 13.12(1)(a).
15 LORD NEUBERGER: Yes.
16 MR WOLFSON: And that, in its current form, is at F1, tab 6.
17 It is important for your Lordships to see how this rule
18 is set out, because this rule does a number of things.
19 This is the rule which applies because of the
20 transitional provisions to LBIE's liquidation, and
21 defines at 13.12 what we mean by debt.
22 13.12(1) provides that debt in relation to the
23 winding up of a company means, subject to the next
24 paragraph, any of the following:
25 "(a), any debt or liability to which the company is

1 subject at the date in which it goes into liquidation."
2 LBIE's argument, as we understand it, is essentially
3 to say that the statutory interest falls within (a): it
4 is a debt or liability to which the company is subject
5 at the date in which it goes into liquidation.
6 We respectfully submit that that is plainly wrong
7 because it ignores (c). (c) sets out:
8 "Any interest provable as mentioned in
9 rule 4.93(1)."
10 We submit that 13.12(1)(c) expressly and exclusively
11 deals with what interest is provable in a liquidation,
12 and it does so very simply by applying the test in
13 rule 4.93(1). The version of rule 4.93(1) which will
14 apply in the liquidation of LBIE is not in F1; it is in
15 F3. It is in F3 at tab 53. Perhaps your Lordships
16 might glance at that. F3, tab 53.
17 LORD NEUBERGER: Yes, we have seen this.
18 MR WOLFSON: You have seen this in another context: where
19 a debt proving liquidation bears interest, it is
20 provable as part of the debt except insofar as it is
21 payable in respect of any period after the company went
22 into liquidation. Then clause 4 -- and this is the bit
23 I rely on:
24 "If the liquidation was immediately preceded by an
25 administration, any period after the date the company

1 entered into administration."
2 As we saw yesterday, that rule expressly and clearly
3 prohibits interest accrued in the period of the
4 administration from being provable in
5 a subsequent liquidation.
6 LORD SUMPTION: Where do you say the reference to 4.93(1)
7 in (c) eliminates the possibility of reliance on (a)?
8 They are presumably different. Have I missed something?
9 MR WOLFSON: Of course they are different, in the sense that
10 if you are not talking about interest you would fall
11 within (a), but as far as interest is concerned,
12 interest has been dealt with in --
13 LORD SUMPTION: A debt in respect of interest has to fall
14 within (c) or it is not covered by this at all.
15 MR WOLFSON: Exactly.
16 LORD SUMPTION: Implicitly taken out of (a) and (b).
17 MR WOLFSON: That is my submission.
18 LORD SUMPTION: Even if it is a debt.
19 MR WOLFSON: Exactly, because interest has been dealt with
20 specifically by the draughtsman in (c).
21 The deeming provision in rule 4.73(8), which is in
22 F3 at tab 45, which is in mandatory and unqualified
23 terms, has the effect -- this is at the bottom of the
24 page 1944 -- has the effect that the reference in
25 rule 4.93(1), which we were just looking at, to a debt

1 proved in the liquidation, includes also debts proved in
2 the administration, because a deeming provision
3 provides:
4 "Where a winding up is immediately preceded by
5 an administration, a creditor proving in the
6 administration shall be deemed to have proved in the
7 winding up."
8 1944.
9 MR WOLFSON: 1944, tab 45, F3, my Lord.
10 LORD NEUBERGER: At the very bottom of the page.
11 MR WOLFSON: Yes.
12 Where we get to, in my submission, is that for debts
13 proved in the administration, interest is only provable
14 as part of the debt under rule 4.93(1) for the period
15 before the company went into administration. And in my
16 respectful submission that makes LBIE's new
17 case impossible.
18 As my Lord Lord Neuberger pointed out in
19 Re Nortel -- and the reference is paragraph 68 to 71 --
20 the subprovisions of rule 13.12.(1) must be read
21 together sensibly in a coherence manner. My Lord, that
22 is why we submit that when the draughtsman, in 13.12(1),
23 has dealt specifically with interest in (c), it cannot
24 also be the case that interest falls somehow within (a)
25 as well.

1 My Lord, if one stands back and just asks oneself
2 what is the consequence of this case that is now being
3 put, the consequence of LBIE's case would be to create
4 a new provable debt in respect of statutory interest for
5 the administration period which would compete with
6 unsecured claims to principal proved for the first time
7 in the liquidation.
8 My Lords, we submit that that is impossible to
9 square with the plain intent behind the statutory
10 scheme, which is that once a company enters insolvency,
11 that stops the clock as far as interest is concerned.
12 In an insolvency, interest can only ever be provable for
13 the period prior to the insolvency, and post-insolvency
14 interest is payable if there is a surplus after the
15 payment of provable debts.
16 So LBIE's cross-appeal, which creates a provable
17 claim for post-insolvency interest, we submit is
18 inconsistent with the plain intent behind that scheme.
19 Those are our essential submissions, subject to how
20 Mr Trower puts it, on LBIE's first cross-appeal.
21 The second cross-appeal, as your Lordships know, is
22 that the claim for a contractual, ie non-statutory,
23 interest, gives rise to a non-provable claim.
24 So this is the argument that the creditors who are
25 entitled to interest for the administration period

1 otherwise than under rule 2.88(7) -- for example under
2 their contracts -- will be entitled in a liquidation to
3 claim such interest as a non-provable claim.
4 LORD NEUBERGER: Yes.
5 MR WOLFSON: This is based, of course, on paragraph 127 of
6 the judgment of Mr Justice David Richards, at the end of
7 that section, where, with respect to the judge, with
8 almost no reasoning, he says: I think there should be
9 a non-provable claim. And the Court of Appeal obviously
10 didn't deal with this point, because of
11 their conclusion --
12 LORD NEUBERGER: Unnecessary, yes.
13 MR WOLFSON: -- on the other point. But
14 Lord Justice Lewison indicated the references to 110,
15 paragraph 110, of Lord Justice Lewison's judgment, that
16 he thought the creation of a new non-provable claim was
17 the wrong solution, in particular because it is contrary
18 to the legislative and judicial policy to eliminate
19 non-provable claims. And Lord Justices Briggs and
20 Moore-Bick agreed on that point.
21 We submit, in short, that the statutory scheme for
22 the payment of interest in a liquidation, introduced by
23 section 189 and rule 4.93, which we have looked at,
24 replaces any pre-existing or contractual or other rights
25 to interest that would otherwise accrue.

1 At this point I really echo my learned friend
2 Mr Miles' submissions yesterday on the non-applicability
3 of the Humber Ironworks line of reasoning to the
4 post-1986 insolvency world.
5 There is, in our respectful submission, no longer
6 any room for the application of the Humber Ironworks
7 submission, which is the remission or reversion to
8 contract theory, to support the creation of non-provable
9 claims, in particular for interest. But we also
10 support, of course, the submissions on currency
11 conversion claims for which LBIE contends.
12 Humber Ironworks was decided 150 years ago when
13 there was no statutory requirement to post-insolvency
14 interest at all, and in enacting section 189 and
15 rule 2.88 the legislature did not adopt the
16 Humber Ironworks 'reversion to contract' approach but
17 instead put in place a completely different statutory
18 regime for the payment of interest on all debts
19 regardless of whether those debts actually had interest
20 contractually to be paid after all proved debts had been
21 paid in full. So under the statutory scheme, even if
22 you don't have a contractual right to interest, you can
23 still get statutory interest. Even if your contractual
24 interest rate runs at 1.5 per cent, you get statutory
25 interest at 8 per cent. It is a completely different

1 scheme. And there is, in our submission, no basis for
2 the Humber Ironworks 'reversion to contract' theory
3 any more.
4 We have set out at paragraph 69 of our written case
5 various passages from Mr Justice David Richards'
6 judgment in Waterfall IIA, and those passages
7 emphasise -- I think five or six -- the fact that the
8 new statutory scheme is intended to be a complete --
9 LORD NEUBERGER: These are quotations from
10 Mr Justice Nicholls, Lord Justice Millett, and so on.
11 MR WOLFSON: There is an illustrious line of authority on
12 this point, and we submit that nothing in the
13 legislation supports any contractual entitlement.
14 That is particularly the case -- and we do say it is
15 rather odd that the LBIE administrators are arguing for
16 the creation of a non-provable debt in the following
17 liquidation when, of course, if they themselves were to
18 decide to pay out interest there would in fact be no
19 need for any non-provable claim at all. So it is rather
20 odd, we submit, that the administrators of LBIE are
21 making this argument at all, because there need not be
22 any lacuna in the case in the first place if they decide
23 to pay out interest, and secondly there is a clear
24 statutory mechanism for the payment of
25 post-administration interest.

1 My Lords, to finish on this point, what ultimately
2 underlies this issue, and indeed a number of other
3 issues before your Lordships, in particular currency
4 conversion, is that what we submit the creditors of LBIE
5 are seeking to do is really to have their cake and
6 eat it. Where the statutory scheme helps them, where
7 they are getting, for example, 8 per cent interest, they
8 will take it. And where it doesn't, they are seeking to
9 argue that they have non-provable claims. We submit
10 simply that the statutory scheme is there: there are
11 swings and roundabouts, winners and losers, and
12 essentially it should be applied. And it is important
13 that it be applied in accordance with its terms, because
14 insolvency practitioners need to be able to read the
15 rules and know what to do.
16 Unless I can assist your Lordships further, those
17 are our submissions.
18 LORD NEUBERGER: Thank you very much indeed. Very helpful.
19 Thank you.
20 Submissions by MR MILES
21 MR MILES: It is back to me. I am going to deal now with
22 a short point about section 74 and in particular
23 its scope.
24 The relevant part of the order that we are dealing
25 with at this part of the appeals can be found in

1 bundle D, tab 4, page 600.
2 LORD NEUBERGER: Thank you.
3 MR MILES: Just to remind you, this is part of the order of
4 Mr Justice David Richards, and this part of the order
5 was upheld by the Court of Appeal. It is (vi): the
6 obligation of members to contribute under section 74 of
7 the Act extends to provide for proved debts such
8 statutory interest on those debts as payable under
9 section 189 of the Act and non-provable liabilities.
10 Here, of course, we are dealing with a hypothesis,
11 because the company is not actually in liquidation, so
12 we are dealing with something which may or may not
13 happen, and what we are dealing with at this stage of
14 the argument is interest under section 189 of the Act,
15 which is, of course, statutory interest in relation to
16 liquidations, as you have just seen.
17 It is also important to remember, for the purpose of
18 these submissions, that we are dealing with an unlimited
19 company, so we are not dealing with a case where there
20 are calls for unpaid portions of share capital. It is
21 rather an unusual case, perhaps, and that, as we will
22 see, has some implications for the scope of section 74.
23 The section itself is found in the judgment of
24 Mr Justice (inaudible due to rustling) at page 574 --
25 LORD NEUBERGER: Yes.

1 MR MILES: -- at paragraph 172 of the judgment.
2 LORD NEUBERGER: Yes.
3 MR MILES: If you just remind yourselves of the terms of it.
4 It is when a company is wound up, so it is only in the
5 winding up: every present and past member is liable to
6 contribute to its assets, to any amount sufficient for
7 payment of its debts and liabilities and the expense of
8 winding up and the adjustment of the rights ...
9 amongst themselves.
10 So the questions are not identical but similar to
11 some of the questions on the first issue, whether
12 non-provable liabilities are captured by this section,
13 and secondly whether statutory interest is captured by
14 this section.
15 It has to be read with certain other provisions.
16 I will just give you the references for now and not go
17 to. Section 150, which you can find in F2, tab 25,
18 which says that the power to make calls under this
19 section is vested in the court.
20 Then 160, which is page 177.2, provides for the
21 delegation of the court's power to make calls to the
22 liquidator. And that was then done under insolvency
23 rule 4.195, which is in F3, tab 57.
24 So the structure of the act is that the power to
25 make calls is a power vested initially in the court and

1 then under the rules -- well, first of all there is
2 a power to make rules, and then under the rules it is
3 delegated to the liquidator. So it follows from this
4 that calls on members in unlimited may only be made by
5 the liquidator after the company has gone into
6 liquidation. It may be different where there are partly
7 paid up shares, because in those circumstances the
8 unpaid portion of the shares is an asset which the
9 company, before the liquidation, was able to call up.
10 It can properly be regarded as an asset of the company.
11 It is different, we suggest, in relation to
12 an unlimited company. And the way the scheme works is
13 that if there is a liquidation of an unlimited company,
14 the liquidator then has the power to call for
15 contributions, going back to section 74, of an amount
16 sufficient for payment of its debts and liabilities.
17 Of course, that power also would apply in the case
18 of a company with un-called-up share capital. After the
19 liquidation the liquidator would call on it rather than
20 the directors calling on it. But in the case of
21 an unlimited company we are dealing with a situation
22 where the power is vested only in the liquidator
23 on liquidation.
24 Now, our submission is that the reference to debts
25 and liabilities in this section doesn't extend to

1 non-provable liabilities of the company or
2 post-liquidation statutory interest.
3 Pre-liquidation interest is of course provable, as
4 you have seen. So that is in a different category.
5 The first of our points is that the liability under
6 section 74 to make payments in respect of an unlimited
7 company is triggered only by the winding up of the
8 company. It is part of the statutory scheme for the
9 payment of debts and liabilities of the company. And as
10 we have already submitted on the first point, the
11 payment of non-provable liabilities is no part of the
12 statutory winding-up scheme. If it occurs at all, it
13 happens outside or notwithstanding the statutory scheme;
14 it is not part of the statutory scheme.
15 We also rely on section 107 of the act, which is set
16 out in Lord Justice Briggs' judgment at page 576. That
17 is paragraph 185. This is dealing with voluntary
18 winding up. It says:
19 "Subject to provisions of the Act as to preferential
20 payments, the company's property in a voluntary winding
21 up shall, on the winding up, be applied in satisfaction
22 of a company's liabilities pari passu and, subject to
23 that, shall be distributed to the members."
24 Now, that is, as I say, only expressly concerned
25 with voluntary winding up, not with compulsory

1 winding up. But in paragraph 189 of the same judgment,
2 you will see that Lord Justice Briggs also refers to
3 section 143, which does cover and which does apply to
4 compulsory winding up. And he goes on to say in that
5 paragraph that the same principle of pari passu
6 distribution as you find in section 107 applies also in
7 winding up by the court, which must be right.
8 So essentially he is saying in that paragraph that
9 the same underlying principle in section 107 applies in
10 all forms of winding up.
11 Now, what we suggest that shows is that when one is
12 looking at the liabilities of the company in a section
13 like 107, which is the same word or one of the same
14 words which is used in 74(?). When the act is talking
15 generally in this way, it is talking about the
16 liabilities which are payable in the winding-up process.
17 In other words, the provable debts of the company.
18 There is no provision in the act for the pari passu
19 payment of non-provable liabilities. So if you go back
20 to 107, although it doesn't say so in terms, it is
21 clear, we say, that it is talking about the provable
22 liabilities, provable debts --
23 LORD NEUBERGER: Because those are the only ones that the
24 liquidator should be --
25 MR MILES: Should be paying out, and those are the only ones

1 which are payable pari passu. There is not any process
2 for the treatment of non-provable liabilities, pari
3 passu with other liabilities. There is nothing in the
4 statute which brings them into that scheme.
5 Now, you will remember when we looked at the T&N
6 case yesterday that actually Mr Justice David Richards
7 in that case looked at this section, and he said: well,
8 you cannot say, oh, well, you have to bypass
9 non-provable claimants altogether. And that was the
10 passage where he said that what would happen in those
11 circumstances is that the statutory stay would be lifted
12 and they would be able to then claim by writ action,
13 effectively, and execution against the company.
14 LORD NEUBERGER: Therefore that is outside section 107.
15 MR MILES: Exactly, so it is outside section 107. And we
16 say the language of section 107, which is the most
17 general statement you will find in the insolvency
18 legislation of what the liquidator has to do, is clearly
19 to do with provable liabilities.
20 LORD NEUBERGER: If that is right, it still only applies to
21 voluntary winding up.
22 MR MILES: Unless you take the same view as
23 Lord Justice Briggs did in the Court of Appeal, that the
24 same principle applies in relation to compulsory winding
25 up as well. That is what he says.

1 LORD SUMPTION: In section 143?
2 MR MILES: In section 143, and if you read the text after
3 that quote, he says:
4 "There is neither a reference to liabilities nor to
5 the pari passu principle, but these differences are in
6 my view no more than historical accidents in drafting.
7 No one doubts that the pari passu principle applies as
8 much to compulsory as to voluntary liquidation."
9 Which must be right. It is just not spelt out. And
10 we say that you have to read the same principle as you
11 find embodied in section 107 as applying to all forms of
12 winding up. So we say that, in that regard at least,
13 Lord Justice Briggs was correct.
14 The other point is that it would be very odd if the
15 answer to this question was different for a voluntary
16 winding up as opposed to a compulsory winding up. So we
17 say it is a strong indicator.
18 LORD NEUBERGER: Lord Justice Briggs, as it were, goes
19 this far with you --
20 MR MILES: I go this far with him.
21 LORD NEUBERGER: Fair enough. Yes, we are concerned with
22 your argument in the end rather than --
23 MR MILES: We say that is an important pointer.
24 LORD NEUBERGER: Okay, I have that.
25 MR MILES: The next point we make -- and this goes back to

1 the point I made yesterday -- is that section 74 is
2 concerned with liability, debts and liabilities of the
3 company. You can see that from the terms of
4 the section.
5 LORD NEUBERGER: It is debts and liabilities, yes.
6 MR MILES: You have heard my submission yesterday that in
7 relation to statutory interest --
8 LORD NEUBERGER: The duty on the administrator.
9 MR MILES: Or in this case on the liquidator --
10 LORD NEUBERGER: Quite right.
11 MR MILES: -- to pay -- to apply the money for the statutory
12 purpose set out in the section, but it is not
13 a liability of the company. And the same thing --
14 sorry -- and when you come to look at the various
15 references to debts and liabilities, throughout the act,
16 it doesn't make sense, we say, to treat the obligation
17 on the liquidator under section 189 to apply the assets
18 in that way as a liability of the company. It is dealt
19 with separately, so we say that it is not a liability of
20 the company.
21 The next point is that we rely on a point in this
22 respect in the judgment of Lord Justice Lewison, which
23 starts at page 561 of the judgment. He refers in
24 paragraph 113 to a decision of the Court of Appeal in
25 a case called Re Pyle Works. That is in F1 at tab 19

1 but I think I can deal with it by reference to the
2 passages set out here by Lord Justice Lewison.
3 LORD NEUBERGER: Thank you very much.
4 MR MILES: That was a case in which the there was a limited
5 company, so it was a company with share capital, where
6 the shares were partly paid up but only partly paid up.
7 And the company, before it went into liquidation, gave
8 a mortgage in favour of a lender, including over its
9 uncalled capital. The company was then wound up. At
10 that stage the uncalled portion of the capital was still
11 uncalled, and the question was whether the secured
12 creditors could claim under their mortgage over the
13 uncalled capital which was then called up by
14 the liquidator.
15 It was held that the calls in that case were covered
16 by the mortgage, but the case also went on to discuss
17 the position of an unlimited company.
18 LORD NEUBERGER: Again, we have the benefit of
19 obiter observations.
20 MR MILES: They are obiter observations, but the way that it
21 was dealt with by the Court of Appeal -- perhaps it is
22 most clearly in the bit set out by Lord Justice Lewison,
23 in 118, I think --
24 LORD NEUBERGER: 118, right, thank you.
25 MR MILES: -- where he is saying that those monies which are

1 payable only on a winding up, and which would include
2 the monies we are looking at because we are dealing with
3 a situation in an unlimited company:
4 "... and which by the act are excluded from the
5 capital of the company and never under the control of
6 the directors and cannot, I apprehend, be dealt with in
7 any way by them. Those monies form a statutory fund
8 which only comes into existence when the company is in
9 liquidation, that is to say when the powers that direct
10 have ceased. But uncalled capital [so he then draws
11 a distinction between that situation and uncalled share
12 capital] is in a totally different position."
13 The reason for that is that the directors can call
14 on that before the company goes into liquidation.
15 Now, he, Lord Justice --
16 LORD NEUBERGER: That is a wider reason than yours, is it?
17 MR MILES: This is a further reason.
18 LORD NEUBERGER: Because it comes into existence after the
19 liquidation and was never therefore something that the
20 directors could have asked for?
21 MR MILES: Yes. And for that reason it is a particular
22 statutory power which is vested in the liquidator; it
23 cannot therefore be regarded as being an asset of the
24 company in the way that the uncalled share capital can
25 be regarded as an asset of the company.

1 LORD NEUBERGER: This is a slightly broader reason. You are
2 saying this is something that is imposed on the
3 liquidator by the administrator. This is saying: even
4 apart from that, it is something that only comes into
5 existence of as a result of the liquidation.
6 MR MILES: Yes.
7 LORD NEUBERGER: It is a slightly wider point.
8 MR MILES: Yes, I am making that point.
9 LORD NEUBERGER: Sorry, my misunderstanding.
10 MR MILES: Sorry, in the case of an unlimited company, that
11 is part of the argument we are advancing.
12 LORD NEUBERGER: Thank you.
13 MR MILES: In the case of a company with share capital,
14 where it has not been fully called, then obviously the
15 directors can call for that at any time.
16 LORD NEUBERGER: Okay. Thank you.
17 LORD REED: He is not saying, is he, that it is not the
18 company's money, that it is not the property of the
19 company? He is simply saying that it is never under the
20 control of the directors because they have been
21 superseded.
22 MR MILES: Yes. We say that the right conclusion to draw
23 from that is that it is not an asset of the company.
24 Sorry, the next point I should make is --
25 LORD REED: Whose asset is it?

1 MR MILES: It is a fund available to the liquidator under
2 section 74. This is a conclusion that
3 Lord Justice Lewison --
4 LORD SUMPTION: What happens if there is a surplus and the
5 liquidator is discharged? What happens if the
6 liquidation comes to an end on the basis --
7 MR MILES: It would go back to the members.
8 LORD SUMPTION: It would go back to the members?
9 MR MILES: Yes.
10 LORD SUMPTION: Right. Is --
11 MR MILES: He will apply it according to the statutory
12 scheme at that point. So if there were creditors to pay
13 under section 74 he will have to use it for that
14 purpose. If they are paid off in full, he will then
15 return it to the members. So it is a fund which is
16 created for the purpose of the section but it is not to
17 be regarded as part of the assets of the company.
18 This is a conclusion that Lord Justice Lewison
19 himself drew in paragraph 120, where he says: it is
20 difficult to see how that is an asset of the company
21 rather than being a right of contribution.
22 That is where it is for the purpose of contribution
23 between the members.
24 Now, Lord Justice Lewison then said -- it is fair to
25 say -- that this does not matter. He got this far in

1 the analysis, and said that in any case that doesn't
2 really affect the proper interpretation of section 74.
3 He agreed with Lord Justice Briggs on this point. But
4 we say, again, I go this far with Lord Justice Lewison
5 and then part company. This is where the argument goes.
6 It is not actually necessary, for the purposes of this
7 argument, for me to say conclusively whether it is
8 an asset of the company or not. The point I am really
9 emphasising at this point is that it is a sui generis
10 statutory power vested in the liquidator, which can only
11 be exercised by the liquidator for the purpose of
12 section 74. That is really the point I am making
13 so far.
14 Now, where does this go? Because one really needs
15 to go further than this. Where this goes is this, that
16 there is something, we suggest, odd about the argument
17 that the power under section 74 in the case of
18 an unlimited company can be used to create a surplus for
19 the purpose of determining whether statutory interest is
20 payable under the act at all.
21 LORD NEUBERGER: You are pulling yourself up by your own
22 bootstraps. You say there is no surplus until you call
23 for the money. You call for the money, and then there
24 is a surplus, and then the interest is payable.
25 MR MILES: Exactly.

1 LORD NEUBERGER: Unless the interest is payable, you
2 wouldn't have the right to call. That is your point.
3 You are creating its call-ability by -- you are creating
4 its payability by calling the money rather than what you
5 say should be the other way round: there is a liability
6 to pay and therefore you should --
7 MR MILES: Exactly, that is the argument. If one goes back
8 then to section 74, what that is concerned about is
9 calling for an amount sufficient for the payment of the
10 debts and liabilities.
11 LORD NEUBERGER: So it doesn't become a debt or liability --
12 even if it is debt or liability, it doesn't become it
13 until it has the money, so how can it call for
14 the money?
15 MR MILES: Yes. And conversely, if you look at section 189,
16 that says that the liability, if it is a liability, to
17 pay the creditors' statutory interest only arises where
18 there is a surplus of assets over liabilities.
19 LORD NEUBERGER: I see.
20 MR MILES: Now, we are accused of circularity in this
21 argument, but with respect we suggest that there isn't
22 any circularity about the position we are advancing,
23 because we are not making any particular assumptions one
24 way or the other when reading these two sections, but we
25 are just asking you to read them together.

1 The section which gives rise to the liability to pay
2 interest only arises if there is a surplus. It says it,
3 in terms, and one can see the purpose of the statute: if
4 there is a surplus, this is what you do with it.
5 The hypothesis which is advanced against us is that
6 under section 74 statutory interest is a liability but
7 there is no liability to pay statutory interest unless
8 there is a surplus.
9 LORD NEUBERGER: Yes, I have the point.
10 MR MILES: It cannot be said properly that you can then call
11 on the members of an unlimited company for some amount
12 which would then create that surplus. And that is
13 the argument.
14 LORD NEUBERGER: I think we have that argument.
15 MR MILES: My Lord, what we say is, what this really amounts
16 to doing is reading the two sections together on the
17 basis of an unfair hypothesis. Their reading requires
18 one to say, under section 74, that there is an amount
19 which is payable as if there were a surplus. But that
20 is not right. The section does not allow you to assume
21 something which is not the case for the purpose of
22 generating the liability.
23 LORD NEUBERGER: That is making the same point in different
24 clothes, yes? In a slightly different form.
25 My Lord, we say that, looking at things generally

1 here, section 74 is intended to deal with provable
2 debts; it is not intended to deal with non-provable
3 debts or statutory interest.
4 There is one final point, which is the bit at the
5 end of section 74 about adjusting the rights
6 contributory --
7 LORD NEUBERGER: By themselves, yes.
8 MR MILES: By themselves. Now, the Court of Appeal was
9 struck by this point and said, well, since that is
10 something that happens after the payment of creditors
11 and the payment of all of their claims, including
12 statutory interest, doesn't that give you the clue that
13 it must be intended to cover everything down to
14 that point? That was the way the Court of Appeal looked
15 at it.
16 We say you can't read into this -- if we are
17 otherwise right, we say that you cannot read into this
18 things which are not there. It is quite possible for
19 the act to make specific reference to the things which
20 it has without intending to include other things.
21 LORD NEUBERGER: Yes.
22 MR MILES: It is striking that, although in the liquidation,
23 general liquidation waterfall is described in a case
24 like Nortel, expenses would come out before the payment
25 of debts and liabilities, and here it comes out

1 afterwards. In other words, this cannot be seen as
2 simply reflecting the overall liquidation waterfall.
3 So we say there is really nothing in that point.
4 LORD NEUBERGER: Thank you.
5 MR MILES: My Lord, those are my submissions on section 74,
6 unless I can assist further.
7 LORD NEUBERGER: Mr Isaacs, I think you are on next, are
8 you not?
9 Submissions by MR ISAACS
10 MR ISAACS: I will address LBIE's appeal against the order
11 of the Court of Appeal upholding declaration 8 of the
12 judge. This declared that the LBIE administrators would
13 be entitled to lodge a proof in a distributing
14 administration or a liquidation of its members in
15 respect of those companies' contingent liabilities under
16 section 74 of the act. That is the proof point.
17 I will also address LBIE's cross-appeal against the
18 order of the Court of Appeal upholding declaration(?)
19 number 9. That declared that in LBIE's administration
20 the contingent liabilities of LBIE's members under
21 section 74 are the subject of mandatory insolvency
22 set-off against the members' provable claims as
23 creditors of LBIE.
24 So proof and set-off. Now, for convenience I will
25 refer to the liability of a member under section 74 of

1 the Insolvency Act as "the section 74 liability".
2 I start, then, with declaration 8 of the judge. My
3 submissions may be summarised as follows. Firstly, the
4 section 74 liability is not provable in the distributing
5 administration or liquidation of LBIE's members so long
6 as LBIE is not in liquidation, for two reasons. The
7 first is that the statutory scheme which creates the
8 section 74 liability is inconsistent with proof by the
9 company in the distributing administration or
10 liquidation of the member before the company is itself
11 in liquidation.
12 The second point is, the statutory scheme which
13 creates the section 74 liability has amplification only
14 if the company itself is in winding up.
15 The second submission is that the court below erred
16 in that it failed to pay regard to the differences
17 between, on the one hand, the members' contractual
18 liability to pay unpaid capital, with which this appeal
19 is not concerned, and on the other hand the section 74
20 liability to contribute to the assets of the company,
21 which is the subject matter of this part of the appeal.
22 Thirdly, the principal difference between the two is
23 that the contractual liability is created at the time of
24 the contract of membership of the company and it can be
25 dealt with by the directors of the company.

1 In contrast, the section 74 liability is not created
2 until the company is winding up. It can only be dealt
3 with by the liquidator, and in the case of an unlimited
4 company it is no part of the company's capital.
5 It is convenient to start with the judgment of
6 Lord Justice Briggs in the court below. That is at
7 bundle D3. If I can pick it up at paragraph 213.
8 Page 582.
9 He starts by setting out rule 12.3(1) and in
10 particular 13.12(1)(b) and the definition of debt, and
11 then he refers to the decision of this court in
12 Re Nortel and in particular what he describes as
13 Lord Neuberger's new threefold test for the provability
14 of statutory liabilities under the rule. I would invite
15 your Lordships, please, to read that paragraph at
16 paragraph 214. (Pause).
17 LORD NEUBERGER: Yes.
18 MR ISAACS: Then over the page at paragraph 218 he says that
19 he will turn to the three-stage test:
20 "The obligation to contribute under section 74 in
21 the case of the unlimited company arises because the
22 member enters into a legal relationship with the
23 company, namely the relationship constituted by the
24 membership of an unlimited company."
25 And he goes on to say at the bottom of the

1 paragraph:
2 "The real battleground arises in relation to stage
3 (c), that is the third limb of the test in Re Nortel."
4 I accept, my Lord, that that is the battleground.
5 And the question for the battle is this: is it
6 consistent with the regime under which the section 74
7 liability is imposed to conclude that the contract of
8 membership gives rise to an obligation under
9 rule 13.12.(1)(b) before LBIE is in winding up?
10 In order to answer this question, first I will refer
11 to the provisions of the statutory regime which create
12 the section 74 liability.
13 LORD NEUBERGER: It is probably my fault. Just to get it
14 clear in my own mind, how do your submissions
15 interrelate with the submissions we have just heard from
16 Mr Miles?
17 MR ISAACS: The answer to that, my Lord, is that I will be
18 shining a microscope on Mr Miles's submission. What he
19 actually submitted to you, in very abbreviated form, is
20 a large part of my submission and I will go into it in
21 considerably more detail, because one of the submissions
22 I will be making is that the section 74 liability is not
23 an asset of the company at all until the winding up.
24 And I will answer my Lord's question --
25 LORD SUMPTION: That was his submission also.

1 MR ISAACS: That was his submission, but there are a lot of
2 material cases and statutory material which make good
3 that submission.
4 That is, if I might put it --
5 LORD NEUBERGER: So Mr Miles, as it were, was acting as your
6 John the Baptist, if I may make an inappropriate
7 suggestion, but he was an introduction to your
8 submissions really? A herald.
9 MR ISAACS: I am content with that, my Lord. Mr Miles made
10 a submission which I endorse and which I will develop.
11 LORD NEUBERGER: It is not a question of endorsing; you are
12 developing those submissions.
13 MR ISAACS: I will develop it, my Lord, but it is important
14 to emphasise that it is just one part of my submissions
15 so if I am wrong on that then the alternative submission
16 is that even if it is an asset of the company from the
17 date of the contract of membership, it is still
18 inconsistent with the statutory regime to prove, because
19 if there is a proof then there are consequences which
20 are inconsistent with the statutory regime, and that
21 cannot be right. So the only way of resolving the
22 conundrum is to say there cannot be a proof. So there
23 are two limbs to my submission.
24 LORD NEUBERGER: Right.
25 MR ISAACS: The structure of my submissions is, first I will

1 address briefly the provisions of the statutory scheme
2 in the Insolvency Act. Secondly I will describe six
3 features of the scheme which demonstrate that the member
4 does not have an obligation under rule 13.12(1)(b)
5 before the winding up. And finally I will address the
6 policy arguments which were relied on by the
7 court below.
8 I start with the statutory scheme. The important
9 point about this is that all of the provisions in the
10 Insolvency Act which relate to contributories and their
11 liability are contained in part 4 of the act. That is
12 at bundle 9, tab 9, page 4038.
13 Your Lordships see that the heading for part 4 is
14 "Winding up of companies registered under the Companies
15 Acts". Section 73, scheme of this part. This part
16 applies to the winding up of a company registered under
17 the Companies Acts.
18 LORD NEUBERGER: Yes.
19 MR ISAACS: It follows that part 4 does not apply to a going
20 concern company or companies in administration at all.
21 In short, none of the provisions to which I will refer
22 apply to LBIE, because it is in administration. It is
23 convenient to take the other provisions of part 4 of the
24 act from the judgment of Mr Justice David Richards,
25 because he collected them all together in one place.

1 That is at bundle 5, D5.
2 LORD NEUBERGER: Page?
3 MR ISAACS: Page 641.
4 LORD NEUBERGER: Thank you, yes.
5 This starts at the very bottom of the page, does it?
6 MR ISAACS: Yes, my Lord. I am going to go through them
7 briefly, if I may.
8 LORD SUMPTION: Which paragraph?
9 MR ISAACS: It starts at paragraph 138.
10 LORD NEUBERGER: Yes.
11 MR ISAACS: Your Lordships will have seen section 74 already
12 so I don't need to go through it at all; I just need to
13 emphasise a couple of points. The first is -- the
14 introductory words are, "When a company is bound up".
15 LORD NEUBERGER: I have that.
16 MR ISAACS: The second point is that the amount of the
17 liability is sufficient for the three purposes set out
18 in section 74(1), and what is significant about those
19 three purposes is that they all can exist only in
20 a winding up.
21 The next point I wish to emphasise --
22 LORD REED: It may not matter, and I think Mr Miles was
23 pretty clear that it was not critical to his argument
24 anyway, but under 74(1) it is a liability to contribute
25 to its assets, ie the assets of the company.

1 MR ISAACS: Yes, my Lord.
2 LORD REED: So the amount contributed must form part of the
3 assets of the company.
4 MR ISAACS: I agree, my Lord.
5 LORD NEUBERGER: Yes.
6 MR ISAACS: The liability is subject to the qualification
7 set out in section 74(2) of which two are of particular
8 importance. The first is under section 74(2)(a):
9 "A past member is not liable to contribute if he has
10 ceased to be a member for one year or more before the
11 winding up."
12 And under (c):
13 "A past member is not liable to contribute unless it
14 appears to the court that the existing members are
15 unable to satisfy the contributions required to be made
16 of them."
17 LORD NEUBERGER: Right.
18 MR ISAACS: Then at paragraph 142, over the page,
19 section 80, I invite your Lordships to look at that. It
20 is important to see where this has come from, and it is
21 derived from section 75 of the Companies Act 1862, which
22 is at bundle 9, tab 3.
23 LORD NEUBERGER: What relevance does that have?
24 MR ISAACS: Well, there are two points of relevance,
25 my Lord. The first is that the words in section 75 of

1 the 1862 act, the opening words, are:
2 "The liability of any person to contribute to the
3 assets of the company under this act, in the event of
4 the same being wound up, shall be deemed to create
5 a debt."
6 So it makes it clear again that there needs to be
7 a winding up for the contribution to take place.
8 LORD NEUBERGER: You say that is clear from the opening
9 words of section 73. Yes. That is why they were not
10 included in section 80, you say. I see.
11 MR ISAACS: The next point, the last words of section 75 of
12 the Companies Act 1862 are:
13 "It should be lawful in the case of the bankruptcy
14 of any contributory to prove against his estates the
15 estimated value of his liability for future calls as
16 well as calls already made."
17 The reason that is significant is because it is the
18 predecessor of section 82 of the act. I will come on to
19 some cases which explain the significance of that point.
20 Section 82 is at paragraph 144, Mr Justice David
21 Richards judgment. You will see 82(4) --
22 LORD NEUBERGER: Basically you say it has the effect of the
23 closing words of old section 75, is that right?
24 MR ISAACS: Yes, it is the same words.
25 LORD NEUBERGER: Thank you.

1 MR ISAACS: I will explain why it is significant when I get
2 to the cases.
3 LORD NEUBERGER: Yes.
4 MR ISAACS: Then paragraph 146, section 148 refers to
5 settling a list as soon as may be after making
6 a winding-up order. Section 151 is the power -- these
7 words are not in that paragraph, but it is:
8 "At any time after the making of a winding-up order
9 to make calls on any of the contributory settles(?) on
10 the list."
11 Section 154 is the power (inaudible due to sneeze)
12 has to adjust the rights of the contributor. Section --
13 LORD NEUBERGER: We will read this section, this paragraph.
14 If you want to have the whole paragraph, it is probably
15 more efficient for us to read it.
16 MR ISAACS: Thank you, my Lord.
17 (Pause).
18 So that sets out certain sections, yes.
19 In addition to the powers given to the liquidator by
20 the provisions referred to already, the liquidator has
21 all the powers set out in schedule 4 of the act. And
22 there are two important powers that are not referred to
23 by Mr Justice David Richards. You don't need to go to
24 it but it is at bundle 3, tabs 25 and 26. The first
25 power is the power to compromise all calls and

1 liabilities to calls and to take any security for the
2 discharge of any such call and give a complete
3 discharge --
4 LORD NEUBERGER: That is page 1873, yes.
5 MR ISAACS: It is, my Lord. And page 1874 is another
6 important power: to prove in the insolvency of any
7 contributory for any balance against his estate and to
8 receive dividends.
9 LORD NEUBERGER: Yes.
10 MR ISAACS: The administrator's powers are set out in
11 schedule 1 of the act. Neither of the powers given to
12 the liquidators in paragraphs 3 and 8 of schedule 4 are
13 included in schedule 1.
14 The only reference to calls in the administrator's
15 powers is in paragraph 19, which gives the administrator
16 the power to call up any unpaid capital of the company.
17 The fact that the liquidator is given the specific
18 power to prove in an insolvency of contributory, whereas
19 the administrator is not, indicates that the
20 administrator does not have that power.
21 LORD NEUBERGER: Yes, I see.
22 MR ISAACS: Then at paragraph 147 of Mr Justice David
23 Richards he refers to the rules which delegate the
24 duties and powers with respect to the settlement of the
25 list and making calls to the liquidator as an officer of

1 the court. I will not go through them, my Lord. My
2 submission on them, briefly, is that they are very
3 detailed and they give protections to the contributories
4 in the winding up. I will come back to that later.
5 LORD NEUBERGER: Yes.
6 MR ISAACS: I now turn to three cases which address the
7 statutory regime governing the section 74 liability.
8 The first of them is in bundle 6 at tab 22, page 3426.
9 LORD NEUBERGER: Yes.
10 MR ISAACS: It is a decision called Ex Parte Brandwise(?).
11 It is a decision of Mr Justice Fry and it was concerned
12 with set-off in the winding up of a company with limited
13 liability. The facts don't matter but there is
14 an important paragraph that appears on the left-hand
15 column of page 653.
16 LORD NEUBERGER: Thank you.
17 MR ISAACS: It appears after Mr Justice Fry sets out
18 section 75 of the 1862 act, which, as I have said, is
19 the predecessor of section 80. If I could invite your
20 Lordships to read the words from "It appears to me to be
21 clear that the liability to contribute ..."
22 LORD NEUBERGER: Where do we find that?
23 MR ISAACS: It is about two thirds of the way down.
24 LORD NEUBERGER: The line beginning with the words
25 "Speciality ..." Read on from there, to where?

Page 45

1 MR ISAACS: To the words "to meet the special demand of the
2 fund created by the statute", which is seven or eight
3 lines up from the bottom of the page.
4 LORD NEUBERGER: Thank you. Yes, I see.
5 (Pause).
6 Yes, I see.
7 MR ISAACS: At the top of the next column he refers to
8 a decision that I will come to, the Financial
9 Corporation Limited v Lawrence. He says, half a dozen
10 lines down:
11 "As soon as the company begins to be wound up, the
12 liability of the shareholders, which was not then
13 an existing obligation, is altered by the statute into
14 a different specious of liability. It is then to be
15 a debt."
16 LORD NEUBERGER: Yes.
17 MR ISAACS: The second case is Re Pyle Works, which has
18 already been referred to by my learned friend.
19 LORD NEUBERGER: It has. Where do we find that?
20 MR ISAACS: That is at tab 19, bundle 1. My learned friend
21 has already told you what that was about. It was about
22 whether you can mortgage --
23 LORD NEUBERGER: It was considered quite carefully by Lord
24 Justice Lewison. Yes.
25 MR ISAACS: It is. And I refer to it for more expansive

Page 46

1 reasons than it was referred to by Lord Justice Lewison.
2 The first paragraph I would invite your Lordships to
3 look at is at 1492.
4 LORD NEUBERGER: Right.
5 MR ISAACS: It is important to have in mind what capital is,
6 and this is a very useful explanation from Lord
7 Justice Lindley. If your Lordships can read down from
8 the words "What is meant by the capital of the company",
9 which is the first main paragraph on 1492. The sections
10 which refer to capital are: "It is plain what is meant
11 by capital ..."
12 (Pause).
13 LORD NEUBERGER: Where do we read to?
14 MR ISAACS: To "such a power does not extend to
15 other monies".
16 LORD NEUBERGER: The whole paragraph. Yes, I have read
17 that, thank you.
18 MR ISAACS: The next paragraph, if your Lordships can just
19 read to the words "a further sum in the event of winding
20 up but only in that event."
21 LORD NEUBERGER: I see, first six lines, yes.
22 MR ISAACS: Then at 1494, your Lordships have already read
23 part of the paragraph.
24 LORD NEUBERGER: Because that is in Lord Justice Lewison's
25 judgment.

Page 47

1 MR ISAACS: Yes. But I would like your Lordships to read
2 further, because I rely on the next bits.
3 Now, your Lordships have read to --
4 LORD NEUBERGER: Where have we started reading?
5 MR ISAACS: Your Lordships started with the words, "There
6 being no prohibition in terms."
7 LORD NEUBERGER: And you want us to read the whole of that
8 paragraph up to "further liability", or further?
9 MR ISAACS: Up to "further liability".
10 LORD NEUBERGER: Okay, the whole paragraph.
11 (Pause).
12 LORD NEUBERGER: Yes.
13 MR ISAACS: Then at 1498 Lord Justice Lopez quotes
14 Lord Selborne in a case called Black & Co's case. He
15 says, three paragraphs up:
16 "I can't help thinking that Lord Selborne, when he
17 used those words, intended to express an opinion that
18 there could be no anticipation of future calls in any
19 case so as to alter the administration of assets under
20 a winding up."
21 I submit that a proof would be in anticipation. And
22 finally, Lord Justice Cotton at 1484.
23 LORD NEUBERGER: Going back, I see, yes.
24 MR ISAACS: At the bottom of the page, where he says:
25 "In the case of an unlimited company, what can be

Page 48

1 called for in the winding up may not be, and I think is
2 not, considered as part of the capital of the company.
3 LORD NEUBERGER: Yes. Thank you.
4 MR ISAACS: The third case is another decision of the
5 Court of Appeal, Mayfair Property, which is at bundle 5.
6 It is at tab 14. Can I invite your Lordships to read
7 the headnote, please. (Pause).
8 LORD NEUBERGER: Yes.
9 MR ISAACS: Then Lord Linley, Master of the Rolls, at
10 paragraph 2822 --
11 LORD NEUBERGER: He stuck to his view, did he?
12 MR ISAACS: He did stick to his view, but what he actually
13 said, my Lord, in the bottom paragraph is that he
14 foresaw that the decision in Pyle Works might be pressed
15 further than he was prepared to go.
16 He then says:
17 "Let's look at the position of unlimited companies
18 at the time."
19 And at the bottom of the page, if your Lordships
20 can read first:
21 "They were liable to calls. This was the only
22 liability which could be enforced by the company or its
23 directors."
24 "This liability, but no liability beyond, was
25 an asset of the company ..."

1 And so on.
2 He says it was not an asset of the company which the
3 company or its directors could charge, and so on.
4 LORD NEUBERGER: I see. Yes.
5 MR ISAACS: Over the page, paragraph 2824. Again, Lord
6 Linley, picking it up in the sentence that starts "The
7 prohibition against calling up the reserve capital in
8 the case of limited companies". If your Lordships could
9 read ...
10 LORD NEUBERGER: About a quarter of the way down. Yes.
11 (Pause).
12 That is not directly relevant to what we have to
13 decide, is it?
14 MR ISAACS: It is, my Lord, because the next paragraph says:
15 "Neither the act of 1879 nor the other
16 Companies Acts give a company the power to dispose of
17 assets which could not come into existence until it is
18 wound up."
19 That is my case, my Lord. He says that to hand over
20 reserve power is not to apply the reserve capital for
21 the purpose of the company being wound up."
22 I say that that would be the same if a proof were
23 allowed. You would be applying an asset which was for
24 a particular purpose, for a completely
25 different purpose.

1 LORD NEUBERGER: Yes.
2 MR ISAACS: Lord Justice Vaughan Williams.
3 LORD NEUBERGER: Lord Justice Rigby agrees, and so does Lord
4 Justice Vaughan Williams, but he puts it --
5 MR ISAACS: He puts it slightly differently, at the top of
6 paragraph 2827, where he talks about an unlimited
7 company, and he refers to the fund that was not
8 available for the company in the conduct of its business
9 or in any way at the disposal of the company.
10 LORD NEUBERGER: The same concept but different words.
11 MR ISAACS: Indeed it is, my Lord.
12 My Lord, those are the three cases on that part of
13 the regime.
14 Now I propose to turn to six features of the regime
15 which follow and demonstrate that there cannot be
16 an obligation before the winding up of the company
17 within 13.12(1)(b).
18 If I can start with disposal. Now, if the proceeds
19 of a proof were payable to the company before it was
20 wound up, the company would be free to dispose of the
21 proceeds without regard to the fact that the monies form
22 a fund to be applied for the purposes set out in
23 section 74.1, in particular a company in financial
24 difficulty which was a going concern or in trading
25 administration could use the proceeds to further its

1 trading activities. In which case, it would not use
2 them for the payment of debts and liabilities pari passu
3 or for paying the expense of the winding up, nor for the
4 adjustment of the rights of --
5 Lord Justice Briggs said at paragraph 231 that the
6 directors of a company which proves in respect of future
7 calls may reasonably be expected to use the fruits of
8 that proof to keep the wolf from the door.
9 Now, I submit that this shows that the proof is
10 inconsistent with the regime which creates the
11 section 74 --
12 LORD CLARKE: Sorry, which paragraph of Lord Justice Briggs?
13 MR ISAACS: It is 231, my Lord, page 588. The last
14 sentence, my Lord, do you see, "Wolf from the door"?
15 LORD NEUBERGER: Yes.
16 MR ISAACS: My submission is that the monies paid pursuant
17 to section 74 most definitely cannot be applied to keep
18 the wolf from the door, because that is another way of
19 saying it would prevent a winding up, and the whole
20 question of section 74 is to provide funds that would be
21 used in the winding up. And the same point may be made
22 in relation to a company in distributing administration
23 which would not use the proceeds of a call consistently
24 with section 74, because it might use them to pay the
25 expenses of the administration, which was not one of

1 the purposes. And the proceeds could not be used to pay
2 for an adjustment of the rights of contributories
3 because there is no adjustment in the context of the
4 company in administration.
5 The same point may be looked at from the other end
6 of the telescope if one considers the position of
7 a member where a proof is made against the member before
8 it is wound up and then a subsequent call is made
9 against the member in a winding up.
10 Now, because the monies paid before the winding up
11 can be used for purposes other than those specified in
12 section 74(1), what this means is that the total amount
13 that the member may be liable to pay under the proof and
14 the call is in fact greater than that provided for in
15 section 74(1).
16 There is an example of that in my case at
17 paragraph 26, but essentially the point is that there
18 will be leakage if there is a proof beforehand.
19 Now, the response of LBIE in paragraph 254 of their
20 case is to say that the members liability is unlimited.
21 LORD NEUBERGER: Sorry, which paragraph of your submission
22 you did say? Your submissions, you said --
23 MR ISAACS: That is LBIE --
24 LORD NEUBERGER: I am asking of your case, you referred to
25 a paragraph of your case.

1 MR ISAACS: Did I refer to my case? Oh, I apologise,
2 my Lord. Paragraph 26, I am sorry.
3 Then I referred to LBIE's response to this point.
4 LORD NEUBERGER: Yes.
5 MR ISAACS: What they say is that the member's liability is
6 unlimited so there is no difficulty with this.
7 The problem is, the member's liability is only
8 unlimited in one sense. It is unlimited in that it is
9 not limited to the amount unpaid on the shares but it is
10 limited by section 74(1) itself, in that the members are
11 liable to contribute for the purposes set out in
12 section 74.
13 The second feature relates to a compromise of the
14 proof in relation to the section 74 liability. If, as
15 the court below held, the company can prove in respect
16 of a call before the company's winding up, it must
17 follow that the company can compromise the proof with
18 the member. If this were possible, the full and final
19 settlement between the company and the member would
20 render a subsequently appointed liquidator unable to
21 make a call on that contributory, and that would be
22 inconsistent with the statutory scheme since the
23 liquidator cannot be prevented from making such a call
24 on the authority of Blacks case and Pyle Works. And as
25 Mr Justice David Richards said at paragraph 137, it is

1 not possible to contract out of the statutory liability.
2 Now, this is not an issue for a liquidator, who can
3 compromise, because he is given the power to compromise
4 and to give a complete discharge in respect of calls
5 under paragraph 3 of section 4, whereas the
6 administrator has no such power.
7 The third feature relates to an assignment or charge
8 of the proceeds of a proof. If the directors or
9 administrators can prove in respect of a call relating
10 to the section 74 liability, they must also be able to
11 assign or charge the proceeds. And that is because the
12 basis of proof is that the section 74 liability is
13 an asset of the company or that it can be dealt with
14 before the winding up.
15 However, the company is unable, before it is wound
16 up, to assign or charge the proceeds of a proof. And
17 that is clear from Pyle Works. And the reason is that
18 the proceeds would be payable to the assignee or the
19 chargee rather than to constitute the statutory fund
20 administered by the liquidator for unsecured creditors
21 as a whole.
22 This analysis is consistent with recent cases, which
23 hold that a liquidator cannot sell assets recoverable by
24 the liquidator by virtue of his statutory powers.
25 I refer your Lordships to Oasis Merchandising in the

1 Court of Appeal.
2 LORD REED: This is spelt out by Lord Linley in the passage
3 you have given us, and he explains the background to all
4 of this as being the collapse of the City of Glasgow
5 Bank, followed by the 1879 act, and the whole point
6 being to keep certain funds in reserve for use in
7 a winding up and put them beyond the control of the
8 directors prior to a winding up.
9 MR ISAACS: Indeed, my Lord. What is fascinating, if I may
10 say so, is there is a hiatus of 130 years and then we
11 get to Oasis Merchandising and the same distinction
12 is drawn.
13 In the Court of Appeal it was said that it would be
14 very surprising if an administrator was empowered to
15 sell the fruits of a future action under sections 213 or
16 214 by a liquidator.
17 "If such fruits fall within the property of
18 a company, it is hard to see how they are not caught by
19 a debenture holder's charge over the future and present
20 assets of a company."
21 That is at page 3046. The court also drew
22 a distinction between assets which were the property of
23 the company at the time of the commencement of the
24 liquidation and assets which only arise after the
25 liquidation and are recoverable only by the liquidator

1 pursuant to statutory powers conferred on him.
2 And I say that the same distinction applies here.
3 Lord Justice Briggs responded to these submissions
4 at paragraph 229, and what he said is that these
5 submissions may show, as I had submitted --
6 LORD KERR: Just remind me of the electronic page number,
7 please.
8 MR ISAACS: 587, paragraph 229, halfway down:
9 "They may show, as Mr Isaacs submitted, that the
10 early turning into money of an asset ordinarily
11 realisable only by a liquidator should not be permitted.
12 Alternatively, they may show that if the asset is turned
13 into money before liquidation, then the proceeds of its
14 realisation must be held on trust, as in Re Jaeger
15 Phone(?), for the persons entitled to the benefit of
16 it."
17 Now, he implicitly rejected the first alternative,
18 because that was my submission. But the trust
19 alternative must, in my submission, be rejected, for
20 three reasons, which are as follows. Firstly, the
21 administrator does not have the power to create such
22 a trust because it would not be incidental to the
23 performance of his functions set out in paragraph 3 of
24 schedule B1.
25 The second point is that it would by bizarre if

1 a going concern company held the proceeds of a proof on
2 trust to be applied by a future liquidator whilst at the
3 same time it was in fact wound up because it was unable
4 to pay its debts.
5 Furthermore, if this were the correct analysis, the
6 proceeds would have to be returned to the members if the
7 company did not actually go into liquidation.
8 The third point is that the argument is itself
9 internally consistent both with the wolf at the door
10 referred to by Lord Justice Briggs and also with his
11 holding at paragraph 202, which is 580 of the electronic
12 bundle, that the proceeds of a proof in respect of
13 a call become part of the assets of the company, because
14 they cannot then be held on trust.
15 The fourth feature relates to the provisions of the
16 statutory regime which provide protections for the
17 benefit of contributories.
18 If a contributory is obliged to contribute to
19 a company which is not in winding up, these protections
20 will be sidestepped. And the protection of particular
21 importance is the adjustment of the rights of
22 contributories amongst themselves.
23 As I have said, the company and the administrators
24 cannot affect this adjustment, because the power to
25 adjust is delegated to the liquidator alone. So if the

1 court below was correct, the right to an adjustment
2 would be lost.
3 Again, Lord Justice Briggs addressed this point, at
4 page 587, paragraph 227, last sentence, where he said:
5 "This could be reflected in the reduced value
6 attributed to the contingent section 74 liability."
7 The difficulty with this submission is that it would
8 require an estimate of the amount which the company
9 would be able to recover from other contributories, if
10 the company entered winding up at some indeterminate
11 future date and/or if other contributories entered
12 winding up at some indeterminate further dates, because
13 it is only then that they would be obliged
14 to contribute.
15 The estimate would also depend on whether the
16 company would acquire new members or lose existing ones
17 in the future. There is no indication that the regime
18 contemplates this sort of exercise.
19 Furthermore, the suggestion of Lord Justice Briggs
20 does not provide for a situation in which a contributory
21 in fact contributes more than his share of the losses of
22 the company. That is because if the company is not in
23 winding up it will not be possible for that contributory
24 to recover from others by virtue of the adjustment.
25 My Lord, I am about to go on to the fifth point,

1 I wonder if that is convenient moment for the
2 ten-minute break.
3 LORD NEUBERGER: Yes, we will resume again at 11.40. Thank
4 you very much. The court will now adjourn.
5 (11.30 am)
6 (A short adjournment)
7
8 (11.40 am)
9 LORD NEUBERGER: Mr Isaacs, we took the advantage of the
10 very short adjournment to discuss where we were going
11 on this.
12 I think one of the problems with the points you were
13 making is that they are quite detailed, and we had taken
14 them on board in what was, if I may say so, a very clear
15 and helpful written case. And I wonder whether it is
16 possible for you to put your points on this in
17 a slightly more condensed way. It is a slightly unfair
18 thing to invite you to do, when you have no doubt
19 prepared it, but if you could condense somewhat, that
20 would be good.
21 It would have been helpful if I had told you that
22 before we rose but I needed to discuss it with my
23 colleagues. But as I say, we have the point. I am not
24 trying to stop you making them, but it is quite dense
25 and we have read your written case.

1 MR ISAACS: Yes, my Lord. One point that occurs to me is
2 where I refer to cases rather than taking your Lordship
3 necessarily to all of the cases, and if I can give your
4 Lordship the references --
5 LORD NEUBERGER: That would be just the ticket, actually.
6 Thank you very much.
7 There are a lot of cases coming up, so rather than
8 try your Lordship's patience --
9 LORD NEUBERGER: I think that would enable us to concentrate
10 on the essence of the points, and we can then read the
11 supporting material later on.
12 LORD SUMPTION: Where the case is referred to in your
13 printed case, it would help if you gave us
14 the paragraph.
15 MR ISAACS: Yes.
16 Now, the fifth point is that proof is inconsistent
17 with the qualifications relating to the liability of
18 past members. Firstly, section 74(1)(a) provides that
19 a past member is not liable to contribute if he has
20 ceased to be a member for a year or more before the
21 winding up. Where a past member who has ceased to be
22 a member for more than a year before the winding up has
23 met a proof, the member would have been subject to
24 a liability which is inconsistent with the statute.
25 Lord Justice Briggs said at paragraph 227 that this

1 could be reflected in the reduced value attributed to
2 the contingent debt. But that does not meet the point
3 that it is inconsistent with the statute for a past
4 member to be liable to contribute at all in such a case.
5 The second qualification is section 74(2)(c): a past
6 member is not liable to contribute unless it appears to
7 the court that the existing members are unable to
8 satisfy the contributions required to be made by them.
9 Now, if the court below was correct, it is not
10 possible for the court to form such a view. That is
11 because where the company is not in winding up no
12 contribution is required to be made of existing members
13 who are going concerns.
14 In contrast, where the company is in winding up, it
15 can require contributions from existing members whether
16 or not they are going concerns. So the court can form
17 a view as to whether existing members are unable to
18 satisfy contributions required to be made of them.
19 The final and sixth point is that there can be no
20 proof before the company is in winding up, because the
21 provisions which create the liability have no
22 application until the company is in winding up,
23 whereupon they have retrospective effects.
24 This submission was rejected by the court below, and
25 it relied principally on two cases I will come to in

1 relation to the predecessor of section 80. One is
2 called Ex Parte Canwell and the other is Williams v
3 Harding. It was held in Williams v Harding, a decision
4 of the House of Lords, that in relation to a company in
5 winding up, the section 74 liability commences at the
6 time of the contract of membership. Lord Justice Briggs
7 deduced from this that the section 74 liability is
8 an asset of the company before the winding up.
9 I say that the conclusion does not follow from the
10 premise, for four reasons. The first is section 73,
11 a point I have already made. Secondly, the courts below
12 failed to pay regard to the difference between the
13 statutory liability and the contractual liability.
14 Both liabilities are debts. However, neither
15 section 80 nor its predecessor, section 75, provide that
16 the liability to contribute to the assets of the company
17 is a debt due to the company. And I would invite your
18 Lordships to contrast section 33 of the Companies Act
19 2006 -- which is bundle 213 for your Lordships'
20 reference; we don't need to go to it -- but that is the
21 provision that provides that the member's contractual
22 liability is a debt "due to the company."
23 That was derived from section 16 of the
24 Companies Act 1862 which is referred to in the cases.
25 In contrast, the section 74 liability is, by

1 section 80, provided to be a debt but not a debt due to
2 the company. There is no reference to the company.
3 I submit there is a reason for that difference and it is
4 not a mere accident.
5 This was the conclusion of Sir George Jessel, Master
6 of the Rolls, in a case called Colonial Trusts. If
7 I can give you the reference, it is the supplemental
8 volume G, bundle 1, page 9. The point I emphasise is
9 the paragraph where he says that the Companies Act most
10 carefully distinguishes between the property of the
11 company and the liability to contribute to the assets:
12 "At the date of commencement of the winding up, it
13 was not part of the assets of the company."
14 The third point is that there are a number of
15 authorities that section 75 of the 1862 Companies Act
16 does not apply until the company is in winding up and
17 that it is then retrospective.
18 My Lord, I have a number. I wonder if I might be
19 allowed to cut it down but not to completely excise it.
20 LORD CLARKE: Are these referred to in your case?
21 MR ISAACS: They are referred to in my case, my Lord.
22 LORD CLARKE: Could you just give us the reference.
23 MR ISAACS: My Lord, I am grateful. Actually, it might be
24 that that is helpful. If your Lordship sees
25 paragraph 72, it is the first one. That is Martin's

1 Patent Anchor. I have not set out in detail the extract
2 that I rely on, but if I can give your Lordship the
3 reference, it is at 4065. What is important about that
4 case is that that bankrupts, former bankrupts, had
5 submitted that they were discharged because calls were
6 provable in the bankruptcy. They submitted that their
7 liabilities to calls under section 75 commenced when
8 they became shareholders, relying, you will see at pages
9 4068 to 4069, on Williams v Harding.
10 LORD NEUBERGER: The House of Lords case you referred
11 to, yes.
12 MR ISAACS: Yes. Mr Justice Blackburn rejected that
13 submission, and what he said was:
14 "The question is, when does the liability of
15 a contributory commence?"
16 The case cited from the House of Lords does not
17 touch that point. Section 75 refers to the bankruptcy
18 still pending when the winding up takes place.
19 Then he went on to say:
20 "Section 75 does not apply to the present cases
21 where the shoulders have been adjudged bankrupt and
22 discharged before the winding up commenced.
23 There needs to be a winding up. And Mr Justice Lush
24 agreed at 4072 to 73.
25 LORD NEUBERGER: Yes.

1 MR ISAACS: The next place I wanted to refer to is
2 Financial Corporation v Lawrence, which is again
3 referred to at paragraph 74 of my case.
4 LORD NEUBERGER: Is the passage you rely on then set out in
5 paragraph 74?
6 MR ISAACS: Yes.
7 LORD NEUBERGER: Thank you.
8 MR ISAACS: It is. And if I can just emphasise.
9 LORD NEUBERGER: The words you emphasise in bold?
10 MR ISAACS: Yes. Section 75 had not come into operation on
11 the date of the deed. This is the key part. Part 4 of
12 the Companies Act speaks only of the commencement of
13 a winding up of a company. When they begin to speak, no
14 doubt for some purposes, they have
15 a retrospective effect.
16 LORD NEUBERGER: Yes.
17 MR ISAACS: Then there is a case, Whittaker v Kershaw, which
18 is a decision of the Court of Appeal which I refer to at
19 paragraph 79 of my case.
20 LORD NEUBERGER: Thank you. You are not referring to
21 a number of cases orally which you have referred to here
22 between 74 and 79. You rely on those but you are
23 assuming we are going to look at them; is that right?
24 MR ISAACS: I am grateful, my Lord.
25 LORD NEUBERGER: That is very helpful.

1 MR ISAACS: If I can put it this way: the best cases are the
2 ones I am referring to orally. If you are not persuaded
3 by those, you will not be persuaded by the others. But
4 as I think your Lordship said yesterday, if your
5 Lordship is persuaded you will find even more comfort in
6 the other ones.
7 The significant point about Whittaker v Kershaw is
8 again that the submissions of the wife in that case
9 relied on Williams v Harding. And again, she said the
10 liability to make calls commenced when the shareholder
11 joined the company.
12 Lord Justice Cotton, who of course was in
13 Pyle Works, said: that does not apply, we have no
14 winding up here. And Lord Justice Fry and Lord
15 Justice Bowen said much the same thing.
16 LORD NEUBERGER: Thank you.
17 MR ISAACS: So that is the cases on which I positively rely.
18 Then the fourth point is that the cases relied on by
19 the court below and by LBIE in its case do not support
20 the proposition that section 80 has any application
21 before the winding up.
22 I think it would be helpful to take your Lordships
23 to Williams v Harding, because that is a case relied on
24 very heavily by the courts below and by my
25 learned friend. That is at bundle 1, tab 24.

1 LORD NEUBERGER: Thank you.
2 MR ISAACS: If I can invite your Lordship to read, please,
3 the headnote, 1624. (Pause).
4 LORD NEUBERGER: Yes, thank you.
5 MR ISAACS: That is a case which was actually a decision on
6 the Bankruptcy Act 1861 in relation to a company which
7 had been wound up under earlier Companies Acts, so it is
8 not actually on the Companies Act 1962 at all. The only
9 point of relevance is at the end of the case, at 1644,
10 the last main paragraph, Lord Kingsdown's speech, where
11 he refers to the Companies Act of 1862 and says:
12 "This has removed all doubt about subsequent cases
13 by expressly declaring that the call shall constitute
14 a debt as from the time when the liability was
15 contracted. I do not consider the declaration as an
16 alteration of existing law."
17 LORD NEUBERGER: Yes.
18 MR ISAACS: That is fine, my Lord, but that is the case if
19 the company is wound up. That is absolutely right.
20 When a company is wound up, that is exactly the effect
21 of this. And the point that I am making is made by the
22 Court of Appeal for me in a case called Hastey's
23 Case(?). I will not go to it but it is bundle 9, tab 8,
24 4036. Again it is a case in which a shareholder in
25 a company which became bankrupt obtains his discharge

1 and then the company was later wound up, and then again
2 counsel relied on Williams v Harding.
3 LORD NEUBERGER: Hastey's Case. Where is it in your case?
4 MR ISAACS: In my case?
5 LORD NEUBERGER: Paragraph 82.
6 MR ISAACS: I am grateful.
7 LORD CLARKE: Thank you very much.
8 MR ISAACS: Thank you very much. It is only this: at
9 paragraph 436 of the electronic bundle, Lord
10 Justice Gifford said this:
11 "Williams v Harding and Ex Parte Canwell result in
12 this and nothing more: that the debt has its inception
13 at the date of, and originates with, the membership."
14 That is the context of a company being wound up.
15 LORD NEUBERGER: But Hastey's Case is referred to in the
16 Court of Appeal -- in argument --
17 MR ISAACS: It is referred to in the judgment of
18 Mr Justice David Richards below and -- no, my Lord.
19 LORD NEUBERGER: I don't recall it.
20 MR ISAACS: It is not. It is not there.
21 LORD NEUBERGER: Thank you.
22 MR ISAACS: Now, there are a number of cases --
23 LORD NEUBERGER: I thought you said it was referred to by
24 Mr Justice David Richards.
25 MR ISAACS: Yes, in the judgment, my Lord.

1 LORD REED: Lord Kingsdown, in the Williams case, must be
2 looking retrospectively, from the perspective of
3 a winding up, because the call could only be made
4 against somebody who was on the settled list of
5 contributories, and people are liable to, at one point
6 in time, be somebody who might be a contributory in the
7 event of a winding up and at another point in time not
8 be such a person, so it is not fixed on you at the
9 moment you become a member of a company.
10 MR ISAACS: No, my Lord, and that is obviously an essential
11 part of my case, which is that if you can prove years
12 before the winding up, you subvert the entire system in
13 relation to settling the list and making
14 the adjustments.
15 Now, my Lord, there are a number of cases which my
16 learned friends rely on in their written case and there
17 is an important authority that was put in subsequently
18 that they may well refer to. So I am in your Lordships'
19 hands: I can wait and see what my learned friends say
20 and then respond in reply.
21 LORD NEUBERGER: Yes, that is a kind offer. I think that
22 would be a good way to proceed.
23 MR ISAACS: If I can just anticipate and say this much,
24 which is that it is very important to keep in mind the
25 distinction between the contractual liability and the

1 statutory liability, and some of those cases say things
2 about the contractual liability --
3 LORD NEUBERGER: A point made in the passage of the very
4 first case, Mr Justice Fry.
5 MR ISAACS: Yes, in Re Brandwise(?). And the second
6 distinction is to bear in mind that we are dealing with
7 an unlimited company, so that what can be called up by
8 a liquidator is not capital.
9 LORD NEUBERGER: Is not ...?
10 MR ISAACS: Is not capital. This has nothing to do with --
11 cases which talk about calling up uncalled capital
12 simply have nothing to do with the appeal.
13 LORD NEUBERGER: I understand. Thank you.
14 MR ISAACS: Finally, then, policy considerations. The
15 Court of Appeal relied on two policies in supporting
16 their arguments, the first of which is enlarging the
17 scope of provable claims and seeking as far as possible
18 to eliminate non-provable claims.
19 Now, that policy cannot be disputed. It has been
20 going on for 200 or 300 or 400 years, depending on who
21 you read. But my submission is, if on the proper
22 construction of the statutory provisions which create
23 the section 74 liability they do not apply before
24 winding up or are inconsistent with proof before winding
25 up, then that is the proper construction of the statute

1 and your Lordships are bound to follow it.
2 The second policy is that the members of
3 an unlimited company are required to make their
4 resources available to the fullest possible extent
5 available to ensure that the company discharges all its
6 liabilities. That is referred to by Lord Justice Briggs
7 at 232. I don't accept that is a policy. I submit that
8 that is circular because it assumes that the members of
9 an unlimited company are required to make their
10 resources available to the company. And they are not,
11 unless the company is in winding up. Once the company
12 is in winding up, then the policy applies.
13 A further response to both policy considerations is
14 that a company and its creditors may benefit from the
15 section 74 liability in calls by causing the company to
16 be wound up. Lord Justice Briggs said at paragraphs 243
17 to 244, in relation to the contributory rule, that all
18 that needs to be done is to put the company into
19 liquidation and thereby enable the liquidator to make
20 a call on the insolvent contributory. The administrator
21 has it within his power to choose the liquidation root
22 if at any stage it appears to be in the interests
23 of creditors.
24 This is particularly apt in this case because the
25 proposals of the LBIE administrators, which were

1 approved by creditors, include liquidation as an exit
2 route, and LBIE states in its submissions at
3 paragraph 283 that the future applicability of the
4 statutory regime in respect of calls is in (inaudible
5 due to sneeze).
6 So all they need to do is put the company into
7 winding up and make a call.
8 That concludes what I propose to say about
9 declaration 8, my Lord.
10 I now turn to declaration 9, which is set-off, which
11 is a much shorter point. LBHI's submission is that the
12 section 74 liability was set off against LBIE's
13 liability to its members in LBIE's administration,
14 whether or not the section 74 liability is provable by
15 the LBIE administrators in the members' administrations
16 or liquidations.
17 Now, I accept that if the section 74 liability is
18 provable by the LBIE administers in the members'
19 administrations or liquidations, it was taken into the
20 set-off account. If, however, as I have submitted, the
21 section 74 liability is not provable in the members'
22 administrations, it was not taken into the set-off
23 account in LBIE's administration.
24 And I say that for three reasons. The first is that
25 the section 74 liability does not exist until the

1 company is wound up, a point I have made, so there is no
2 corresponding sum due from the member to the company
3 which falls within the set-off account prescribed by
4 285(3).
5 Similarly, if, as I have also submitted, the
6 section 74 liability cannot be dealt with in any way
7 until the company is wound up, it cannot be the subject
8 of a set-off, as this would lead to the consequences
9 that I have discussed.
10 This is because of the incidence of the section 74
11 liability. I refer your Lordship to Grissell's Case,
12 Overend, Gurney. We don't need to look at it.
13 Bundle 1, tab 18. But that is another case where
14 a set-off was disallowed because of the inherent
15 incidence of a section 74 liability.
16 The second point is that LBIE submits at paragraphs
17 205 to 207 of its case that the section 74 liability is
18 a contingent obligation within rule 284(4)(b), which, by
19 virtue of rule 2.85(5), can be included in the set-off
20 account at the value estimated by the administrator
21 under rule 2.81.
22 Rule 2.81 requires the administrator to estimate the
23 value of any debt which does not bear a certain value.
24 It is not disputed that the debt is limited by rule 13
25 to provable debts. See, for example, Lord

1 Justice Briggs at paragraph 175.
2 It follows that a contingent claim can only be
3 attributed a value for the purposes of set-off if it is
4 a provable debt, since the section 74 liability is not
5 provable, on the assumption that the cross-appeal arises
6 for decision, it cannot be set-off.
7 My third point is that set-off between a provable
8 claim by an insolvent creditor against a non-provable
9 claim by the insolvent company would be unjust, because
10 it would put the insolvent company in a better position
11 than other creditors, or creditor, and the purpose of
12 insolvency set-off is to do substantial justice, and
13 justice would not be done if set-off were allowed.
14 I make this point good by an example at paragraph 93
15 to 96 of my case. I don't propose to go through it but
16 it speaks for itself.
17 My Lord, that concludes my submissions on proof and
18 set-off. I propose to address LBIE's cross-appeal in
19 relation to the contributory rule, which is a different
20 point, once LBIE has opened that cross-appeal, but
21 I will be very short on that.
22 Unless I can be of further assistance, my Lord --
23 LORD NEUBERGER: That was very helpful, Mr Isaacs, and thank
24 you for adjusting your submissions at our request, and
25 I assure you and those behind you that we will reread

1 your submissions that were not included in your oral
2 submissions. Thank you very much indeed.
3 MR ISAACS: I am grateful.
4 Submissions by MR TROWER
5 MR TROWER: Your Lordships are now moving to the other side
6 of the court. The way we have agreed to do this, as
7 your Lordships know, is, I am going to address
8 declarations 1, which is the construction of the
9 sub-debt agreement, the statutory interest lacuna point,
10 4 and 5 --
11 LORD NEUBERGER: Yes.
12 MR TROWER: -- the scope of the liability point, number 6,
13 and the points on which my Lords have just been hearing
14 submissions from Mr Isaacs.
15 Mr Dicker is dealing with currency conversion claims
16 and is going to come after me. I hope it is all right
17 for my Lords that that is dealt with at the end rather
18 than my sitting down and --
19 LORD NEUBERGER: Yes, rather than Box and Cox. Yes.
20 MR TROWER: Starting, then, with the construction point so
21 far as the sublet agreement is concerned, we have not
22 actually together looked at the agreement itself,
23 because we have looked at it in the context of the
24 judgment -- and of course that is a very important
25 starting point -- but one of the reasons I just wanted

1 to go quickly to the agreement itself is that there are
2 some important points on the structure of the agreement
3 which one has to be careful not to miss.
4 The reason we start there is that we say that LBHI2
5 submissions don't give sufficient weight to the fact
6 that the first few lines of clause 5 -- and can we just
7 go there straight away. It is in bundle D, behind
8 tab 7. The agreement itself is at 680 and the bit that
9 we are concerned with is 689.
10 First, we say that LBHI2 submissions do not give
11 sufficient weight to the fact that the first few lines
12 of clause 5 contain the overarching subordination
13 provision, in the light of which the conditional payment
14 mechanism, the trust device at the end of clause 5, and
15 the restrictions in clauses 4 and 7 have to be read,
16 because the way it works is that the repayment
17 obligation arises under clause 9 of the variable terms
18 and clause 4.2 of the standard terms, but both those two
19 provisions are subject always to clause 5, and it is the
20 starting point to look at those first two lines of
21 clause 5.
22 Now, the restriction contained in those first two
23 lines is that the rights of the lender in respect of the
24 subordinated liabilities are subordinated to the senior
25 liabilities. And the concept of subordination means

1 that the sub-debt ranks behind the senior liabilities
2 for payment purposes. That is what the concept of
3 subordination is all about. And it is the rights of the
4 lender that are subordinated. That is why I put it that
5 way, and the principal right they have, of course, is
6 the right to repayment.
7 So it follows that if something qualifies as a
8 senior liability as defined, it ranks, for payment
9 purposes, ahead of the subordinated liabilities.
10 And senior liabilities, which we get in the
11 definition on page 687 are all liabilities except
12 subordinated liabilities and excluded liabilities.
13 Now, nobody suggests that statutory interest or
14 non-provable liabilities fall within the exception of
15 the subordinated liabilities, obviously. There is
16 an argument on the case, although it was not developed
17 by my learned friend at all, that statutory interest
18 falls within the definition of excluded liabilities.
19 I will briefly refer to that later. I think I have to,
20 because it is referred to on the case, although it was
21 not developed in oral argument.
22 The real question here is whether or not they are
23 liabilities at all. When I say "they", I mean statutory
24 interest and non-provable liabilities. And to be
25 a liability at all, they must be, or their

1 characteristics are, first of all, a sum liability or
2 obligation. Whether present or future is a second
3 aspect of the characteristics. Payable or owing by LBIE
4 as borrower. Whether actual or contingent, whether
5 joint or several.
6 And as Lord Justice Lewison held at paragraph 42 in
7 his judgment, it was difficult to think of a wider
8 definition. There is nothing in the definition of
9 liabilities which relates in any way to questions of
10 provability or in any form of limitation of that sort.
11 The phrase that is used in the definition of liabilities
12 is simply "payable or owing by the borrower."
13 Not "provable against LBIE", nothing like that;
14 "payable or owing by the borrower".
15 There is no attempt to track language of claims
16 which are rendered provable by 12.3, where the wording
17 is very different, for example. My Lords have seen
18 12.3 -- and for the note it is page 1984 of the
19 bundle -- provable claims are all claims by creditors as
20 provable as debts against the company, whether they are
21 present or future et cetera. There is no attempt to use
22 that word of concept of provability, and nor is there
23 any attempt to restrict the relevant sum, liability or
24 obligation, to debts to which the company was subject at
25 a particular date, which is one of the characteristics

1 of provability which, as my Lords know, is one of the
2 issues that arises when construing rule 13.12.
3 LORD REED: Presumably the priority has to be given to any
4 mandatory statutory provisions that there are rather
5 than any contractual obligations if there is a conflict
6 between them.
7 LORD NEUBERGER: They cannot jump the queue but they could
8 push themselves back in the queue.
9 MR TROWER: Yes, that is right. That is certainly right.
10 I mean, what one has to ask oneself, and what this point
11 is all about, is: to what extent have these creditors
12 subordinated themselves? How far back down the queue
13 have they gone?
14 LORD REED: Essentially the approach on the other side, as
15 I understand it, has been to say that the statute and
16 the rules are the starting point and they provide for
17 pari passu ranking, and this particular debt is
18 a contingent debt. But it is given effect. It ranks
19 pari passu but it is given effect as a contingent debt
20 in relation to valuation and your approach seems to be,
21 no, you take the contracts as your starting point. It
22 provides for a ranking which is not pari passu but under
23 which this a postponed debt.
24 MR TROWER: Yes. We say one of the points about this
25 agreement -- and there a number of points as to the way

1 it actually works -- but one of points is that they have
2 contracted out of their entitlement to prove. I will
3 come on to that in a moment, and is that is the correct
4 way of looking at it, and that has the effect of
5 meaning, apart from anything else, that they are not
6 a proved debt when one looks at the statutory
7 interest point.
8 LORD NEUBERGER: They have contracted out of certain rights
9 they might otherwise have had, and does that mean they
10 have contracted out of their right to prove?
11 MR TROWER: Indeed, and that is one of the core points
12 I will come on to, obviously, at a later stage in the
13 argument.
14 The overarching point here is that one has to read
15 all of this in the light of the first few lines of
16 clause-paragraph 5, which provides for them to rank
17 behind anything that qualifies as a senior liability,
18 and then you look at how that is achieved pursuant to
19 the contracting-out provisions and the like, because
20 there are lots of different contexts in which one has to
21 think about why and how it is necessary to achieve the
22 subordination itself. And there is the concept of
23 conditional payment, the concept of not proving, the
24 concept of 'if you acquire anything that you shouldn't
25 have, that you shouldn't have acquired, it is held on

1 trust for others'. These are all ways of subordinating
2 the liability under the test(?) to whatever constitutes
3 a senior liability as a matter of construction.
4 The reason I start with this is because my learned
5 friend, for perfectly understandable reasons, leapt
6 fairly rapidly in his argument to the definition of
7 "solvent".
8 Now, that is important, it is very important, of
9 course, but one has to read the definition of "solvent"
10 in the light of the overarching subordination provision,
11 not the other way round.
12 As a sort of textual fortification for that point,
13 if I can put it that way, if you read the first three
14 lines of paragraph 5.1, one sees at the end of line 2
15 and the beginning of line 3 the words "and accordingly".
16 So what you have is a structure which sets out the
17 generality and then you have the "and accordingly"
18 process: this is how we are going to achieve it.
19 Now, what clauses 5.1(a) and 5.1(b) do is they
20 provide for one of the ways in which the subordination
21 is achieved, but one must not lose sight of the fact
22 that there is then a further bolstering of the
23 subordination in other parts of the agreement. One gets
24 it, for example, in clause 5.6, which I alluded to just
25 now, where there is a statutory trust -- sorry,

1 a contractual trust agreed in relation to the receipt of
2 any proceeds in breach of the subordination.
3 You also get it under paragraphs 4 and 7, and I will
4 come on to those slightly later on in my submissions,
5 about how they fit in the context of the subordination
6 agreement itself.
7 Now, 5.1(a) is, of course, inapplicable because an
8 order has been made for the insolvency of LBIE. So what
9 we are looking at is 5.1(b), which sets out the relevant
10 condition for payment, which is the first stage of the
11 subordination support. And the focus is on that part of
12 the clause which defines when a borrower is solvent for
13 the purpose of identifying the circumstances in which
14 the sub-debt is repayable.
15 Now, what 5.1(b) does is it provides that repayment
16 of the sub-debt is conditional on the borrower being
17 solvent at the time of or immediately following the
18 repayment of the sub-debt, but the solvency required to
19 be established as a condition for payment means that all
20 liabilities, as defined, must be capable of being paid
21 in full, disregarding the two categories, excluded
22 liabilities and the obligations which are not payable or
23 capable of being established or determined in the
24 insolvency of the borrower.
25 So those are liabilities which do not fulfil any of

1 the characteristics of being payable or capable of being
2 established or determined in the insolvency of the
3 borrower. So that is the way it works.
4 Now, the essence of LBHI2's case, as we understand
5 it, is, in using those words the draughtsman has
6 modelled himself on the English statutory scheme, so
7 what they say is that he has modelled himself on those
8 parts of the act and rules which deal with proving
9 debts, using the word "payable" to mean debts falling
10 within 13.12(1)(a) and "capable of being established or
11 determined" to mean debts falling within 12.1(b), not
12 being payable at the relevant insolvency date.
13 That is the sort of essence of the way it seems to
14 be put.
15 Now, we submit there is no warrant for giving the
16 word such a limited meaning, particularly set against
17 the background of the overarching subordination which is
18 designed to be achieved here.
19 Now, doubtless the words "Capable of being
20 established or determined in the insolvency" will cover
21 future and contingent provable liabilities. But we
22 don't understand why they will not also cover actual
23 future and contingent non-provable liabilities as well.
24 We don't understand why those words should be given such
25 a restrictive meaning, not least because the extent to

1 which it is possible to say that aspects of the language
2 chime with actual provable debts contingent and
3 actual --
4 LORD NEUBERGER: Non-provable debt established or determined
5 in the insolvency.
6 MR TROWER: Yes, and I will come on and explain to my Lord
7 why that is. That involves looking at the cases lightly
8 and briefly and the sort of processes by which, in the
9 insolvency, a non-provable debt can be established or
10 determined.
11 Now, just one point: we agree that "in the
12 insolvency" is probably intended to cover the word
13 "payable" as well as the words "capable of being
14 established or determined", which is a question my Lord
15 Lord Neuberger asked. It is a natural way of reading
16 the flow of the sentence but it doesn't mean in any way
17 that the draughtsman had concepts of provability in
18 mind, let alone English concepts of provability. And
19 there are a number of reasons for this, but one of the
20 questions one might ask is: why is it he used the two
21 concepts of payability, on the one hand, and capable of
22 being established and determined? One might think that
23 in almost every circumstance one can think about the two
24 would run hand in hand, but that requires one just to
25 remind oneself as to the defence of insolvency. If one

Page 85

1 goes back to the definition of insolvency --
2 LORD NEUBERGER: Lord Justice Lewison sets all these out in
3 paragraphs 33 and 34, 539.
4 MR TROWER: I forgot my Lord was --
5 LORD NEUBERGER: Liquidation, winding-up, bankruptcy,
6 sequestration, administration rehabilitation and
7 dissolution, or the equivalent in any
8 other jurisdiction.
9 MR TROWER: Yes. So we are looking at this for the moment
10 through the spectacles of liquidation, but the
11 draughtsman was looking at insolvency proceedings
12 through the spectacles of many other different sorts of
13 insolvency process, and not all processes amounting to
14 an insolvency of the borrower will necessarily lead to
15 payments being made in that insolvency. I mean, take
16 for example administrations which are not distributing
17 ones, or rehabilitation is another one, under English
18 and foreign laws, because one has to bear in mind one is
19 looking at insolvencies in England, and subject to any
20 other foreign jurisdiction which is a point the judge
21 stressed in paragraph 66 where the whole purpose of the
22 insolvency may be to reschedule or re-organise the
23 liabilities, for which purpose the liability would
24 require to be determined and established but as
25 a consequence of which it may not be payable as such at

Page 86

1 all, indeed quite the contrary, it may be deferred as
2 part of it.
3 But in such a case, the liabilities would obviously
4 be something that would be needed to be taken into
5 account and not disregarded when assessing whether the
6 company is solvent within the meaning of the definition.
7 So we posit that as a possible reason why the
8 draughtsman used the language of both payable and
9 capable of being established or determined.
10 I have explained why it is that we say that the
11 concept of provability does not fit very well with the
12 language. I have also mentioned -- and my Lords need to
13 bear this in mind throughout when construing this
14 agreement -- that it was intended to be capable of use
15 by a borrower, which might enter into a foreign
16 insolvency process.
17 Concepts of provability, concepts as to the payment
18 of statutory interest and the existence of non-provable
19 liabilities may not be relevant in the context of
20 foreign insolvency proceedings in the same way that they
21 are relevant in the context of English insolvency
22 proceedings. They may be different in their parameters
23 and impact, which strongly suggests, we submit, that it
24 would be wrong to take an approach which is English
25 insolvency proceedings centric when construing this

Page 87

1 agreement. It was a point the judge made and it was
2 a point Lord Justice Lewison made at paragraph 45 of his
3 judgment, and we respectfully agree with it.
4 Now, what LBHI2 says is that there is an obvious
5 English genesis of the subordinated debt agreement. It
6 says that the English proceedings would be the principal
7 regulated proceedings and we need to think of it, this
8 whole agreement, in English terms.
9 Now, that is true to an extent, but the point
10 doesn't really go anywhere because an English genesis
11 which contemplates a foreign insolvency, subject to
12 potentially different distribution rules, will be as
13 likely to wish to avoid localised concepts of
14 provability as an agreement which has its genesis under
15 some other legal system.
16 So put another way, introducing provability as
17 a matter of English law introduces an unnecessary level
18 of uncertainty into an agreement which is intended to
19 have universal effect whatever the jurisdiction in which
20 the borrower ended up in insolvency proceedings in.
21 So what we say is that what is much more likely is
22 that the draughtsman had in mind the quality for
23 characteristics of a debt when he is thinking about what
24 is being excluded under clause 5, paragraph 5.2(a), and
25 the two qualitative characteristics of the debt which we

Page 88

1 suggested in our case were: is it statute barred debts
2 and debts which are capable of enforcement for some
3 other reason, such as a foreign revenue claim, rather
4 than the characteristics of whether or not the debt
5 is provable?
6 And of course one has to bear in mind again the
7 foreign application. One has to keep that in mind all
8 the time, because there may, under other jurisdictions,
9 be debts that remain in law liabilities of the company
10 but which ought, for the policy purposes under this
11 sub-debt agreement or for intention purposes under this
12 sub-debt agreement, be left out of account when
13 determining whether or not the company is solvent.
14 LORD NEUBERGER: You say a statute barred debt is
15 an obligation?
16 MR TROWER: I do, because it is trite law, my Lord, that the
17 limitation act bars the remedy. It does not extinguish
18 the right. The law of limitation is procedural, not
19 substantive.
20 LORD NEUBERGER: If it didn't have that exception, it would
21 include -- it would be subordinated to -- your
22 contention is it would be subordinated to statute
23 barred claims?
24 MR TROWER: Yes. And indeed there are plenty of -- wherever
25 you have something that continues to exist in law as

Page 89

1 a liability, one has to find a way of ensuring that
2 notwithstanding its existence as a liability it is taken
3 out of account in relation to the solvency test.
4 LORD NEUBERGER: If 'disregard (a)' was not there, the
5 subordinated debt would not be payable if the company
6 had a statute-barred debt.
7 MR TROWER: A statute-barred debt, yes.
8 So what one is looking at here is what it is that it
9 is appropriate to disregard for the purposes --
10 LORD NEUBERGER: Why isn't a foreign revenue claim payable?
11 The fact it cannot be enforced -- why is it not payable?
12 MR TROWER: I do need to take my Lords to Government of
13 India v Taylor on this point, for this reason: two of
14 their lordships disagreed as to the correct analysis as
15 to whether or not a foreign revenue claim constituted
16 a liability for the purposes of the insolvency
17 legislation or not.
18 LORD NEUBERGER: We are not concerned with the insolvency
19 legislation; we are concerned with the
20 contractual agreement.
21 MR TROWER: Well, we are concerned with a draughtsman who is
22 concerned to ensure that when assessing the company's
23 liabilities that have to be taken out of account for the
24 purposes of looking at solvency a proper distinction is
25 drawn between liabilities which are capable of

Page 90

1 participating in an insolvency -- which is what we say
2 he is ultimately driving at here -- and liabilities
3 which simply do not participate in the insolvency. They
4 may be liabilities in law but why should they be taken
5 into account when assessing questions of solvency if
6 they simply are left out of the participation process?
7 I quite understand my Lord's point that we are
8 looking at it here for the purposes of construing the
9 agreement, but we are looking at it in the context of
10 whether or not this company is solvent once the
11 liabilities have been paid, disregarding that which is
12 excluded, because it is only then that you get to the
13 moment in time at which the conditional payment
14 obligation is satisfied and the sub-debt
15 becomes payable.
16 LORD NEUBERGER: I see, okay.
17 MR TROWER: My Lord, can I just give my Lord the page
18 numbers in Government of India v Taylor, just for this
19 reason -- we don't, I think, need to go to it -- but one
20 of the reasons it is important is simply that what one
21 is trying to discern, we suggest, is the thrust of what
22 the draughtsman had in mind by way of exclusion. What
23 is he trying to encapsulate with these words? What is
24 he driving at? And what he is not driving at, we say,
25 are things like statutory interest and non-provable

Page 91

1 claims. What he is driving at is something that is very
2 different. And the two passages from
3 Government of India v Taylor -- the first one is in the
4 speech of Viscount --
5 LORD NEUBERGER: Sorry, where is it?
6 MR TROWER: I am so sorry, it is at page 2568 of the bundle.
7 LORD NEUBERGER: That is very helpful. Thank you.
8 MR TROWER: Let's have a quick look. 2568 is the case and
9 it is 2585 and it's the passage at the bottom of the
10 page. But it is said about ten lines up, over to the
11 fourth line on page 2586 of my Lord's note.
12 LORD NEUBERGER: Yes, I see.
13 MR TROWER: But Lord Keith takes a slightly different
14 approach, on page 2590. The last full paragraph of
15 his speech.
16 (Pause).
17 LORD NEUBERGER: Viscount Simonds seems to have the rest
18 really -- Lord Morton certainly. Lord Reed.
19 Quite clear.
20 MR TROWER: I don't pray in aid this for the purposes of
21 saying to my Lords: well, you can work out from their
22 Lordships' speeches whether or not a foreign revenue
23 claim is intended to be a liability for the purposes of
24 this agreement. What I draw attention to this for is
25 that one has two different analyses as to why it is that

Page 92

1 something that constitutes a liability does not
2 participate in the winding up at all for the purposes --
3 if it is a foreign revenue claim.
4 We say that is the kind of thing which the
5 draughtsman probably had in mind when he was using the
6 form of words "Payable or capable of being established
7 or determined in the insolvency of the borrower". It is
8 that kind of concept.
9 Statute-barred debts fall into the same category.
10 We have included in our case -- I explained to my Lord
11 that obviously the statute of limitation bars the remedy
12 but not the right, and there is a case which we refer to
13 in our case, and it is in the bundles at F4, tab 3,
14 page 2125 -- we don't need to turn it up; it is called
15 Art Reproductions -- where it was held that the
16 liquidator had in fact no power to pay a statute-barred
17 debt, is the way it was put in that case.
18 Now, that might or might not be the right way of
19 analysing exactly what it is about that liability that
20 means that it doesn't participate in the winding up at
21 all, but that is the thrust of what it is that the
22 draughtsman is driving at when he is looking at the type
23 of liability that is to be disregarded for the purposes
24 of the solvency test.
25 Of course, there may be other liabilities under

1 foreign laws which have similar qualitative
2 characteristics which don't entitle them to participate
3 in any insolvency.
4 So that is the first sort of head of submissions.
5 The second is just, very briefly, before I turn to look
6 at questions of non-provability and statutory interests
7 separately, the regulatory context. I don't want to say
8 very much about it but the judge dealt with the
9 regulatory context of the subordinated debt agreement at
10 some length in paragraphs 35 to 47 of his judgment, and
11 paragraph 60 and following of his judgment.
12 He said this at paragraph 63, page 621:
13 "All of this is consistent with the concept that
14 subordinated loan capital qualifying as part of the
15 institution's regulatory capital is as against creditors
16 to be treated as part of the capital of the institution.
17 It is not, of course, part of the share capital of the
18 company. It ranks ahead of any share capital in terms
19 of repayment."
20 Now, this may have been one of the parts of the
21 judgment which Lord Justice Lewison had in mind at
22 paragraph 29 when he said that many of the arguments on
23 the appeal, and indeed parts of the judgment, proceeded
24 on the basis that LBHI2 was no more than a member of
25 LBIE.

1 Now, this, with respect, is not quite fair of
2 Lord Justice Lewison. There may have been other things
3 in the argument that he relied on; I can't now recall.
4 But the judge was plainly well aware of the difference
5 between membership and a creditor. The point he was
6 making -- and it is a good one, we respectfully
7 submit -- is that the regulatory context is consistent
8 with the subordinated debt ranking immediately above the
9 share capital but below everything else, and to that
10 extent being treated as against creditors as part of
11 its capital.
12 That is the point the judge was making, and we
13 respectfully submit it is a good one.
14 Now, moving on, then, my Lords, to look at
15 non-provable liabilities and statutory interests
16 separately and how they work in the context of the
17 agreement. Of course, in general terms the best
18 established non-provable liability is unliquidated
19 claims for damages in tort. They were the liabilities
20 that were under consideration in T&N. They were
21 considered by Lord Justice Lewison in the present case
22 at paragraph 24, and Lord Justice Briggs at
23 paragraph 145.
24 Before 1986, as we know, all such claims would have
25 been non-provable, and that was an end to it. Even now,

1 they are still only provable to the extent that the
2 cause of action was complete at the insolvency date, or
3 the only missing element to complete the cause of action
4 is actionable damage. That you get from the latest
5 version of rule 13.12.2(b), that I think Mr Miles took
6 you to.
7 In the present case, the more relevant non-provable
8 claims are, of course, currency conversion claims. One
9 has to approach them from the same perspective, in light
10 of the arguments that have been made by Mr Miles, that
11 what you get excluded from the subordination and
12 definition of solvency is non anything that is not
13 provable.
14 I am not going to make any submissions about the
15 qualitative characteristics of a non-provable claim,
16 save and insofar as it is necessary to say this, in
17 order to put it in the context of the subordinated debt
18 agreement. The reason I am not is because my learned
19 friend Mr Dicker is essentially dealing with that and
20 I don't want to trespass on what he is going to
21 be saying.
22 But as a specious of claim, they exist -- and this
23 is currency conversion claims -- as what Lord
24 Justice Briggs called a contractual shortfall or the
25 balance of the creditors' original contractual claim

1 which has not been discharged by the process of early
2 conversion, proof and dividend under the
3 statutory scheme.
4 So that is the type of claim we are thinking about
5 when we are trying to work out how it fits into the
6 structure of this agreement.
7 We say that non-provable liabilities, whether of the
8 currency conversion variety or the non-provable claims
9 in tort type of claim, or indeed anything else that
10 might be excluded by rule 12.3 -- because one must not
11 forget that rule 12.3 of the insolvency rules includes
12 an admittedly very small body of claims which fall
13 outside the concept of provability; they are
14 specifically excluded by the statute.
15 So when one is thinking about those claims, one has
16 to think about what is contemplated by the concept of
17 'in the insolvency', because what we are looking to see
18 is how those claims fit in the insolvency.
19 We submit that the concept of 'in the insolvency'
20 must be anything which constitutes part of the
21 administration or distribution of the borrower's assets
22 occurring in the course of the insolvency process.
23 Secondly, it covers anything that the insolvency
24 officer is appointed to do. That is another way of
25 thinking about a very similar concept. And one gets

1 a little bit of that from the structure of the agreement
2 itself because the definition of 'insolvency officer' in
3 the subordinated debt agreement -- which I don't think
4 my Lords have seen before -- at 686: he is the person
5 who is duly appointed to administer and distribute the
6 borrower's assets in the course of the
7 borrower's insolvency.
8 So you have a relationship there between what is
9 going on in the insolvency and the normal case and the
10 insolvency officer who is appointed to do it. And we
11 will come back and look at that because it chimes with
12 what we say works within the English statutory scheme
13 anyway under section 107 and the duty which a liquidator
14 has in order to deal with the non-provable debts.
15 Now, so far as the process itself is concerned, it
16 is necessary to deal, we submit, with non-provable
17 claims before any distribution can be made to members.
18 It is a point that was recognised by my Lord
19 Lord Neuberger in Nortel in the Waterfall, but it has
20 statutory support. And it has clear statutory support,
21 we say.
22 In a CVL, a creditor voluntary, it is provided for
23 by section 107, and we do submit that section 107
24 itself -- and we can turn it up again; it is F2,
25 page 1760, behind tab 18 -- company's property is to be

1 applied in satisfaction of its liabilities. And we say
2 that means all of its liabilities, because it then
3 goes on:
4 "... and, subject to that application, is to be
5 distributed amongst its members."
6 Now, Lord Justices Lewis and Briggs, at paragraphs
7 60 and 185 of their judgments in the Court of Appeal
8 recognise that the liabilities here referred to must
9 extend to statutory interest and non-provable
10 liabilities. They can't not, because you then have to
11 go on and give some meaning to the words "and subject to
12 that application". "That application" must be
13 a reference back to "in satisfaction of the company's
14 liabilities, be distributed amongst the members".
15 So anything that is required to be distributed
16 amongst the members can only be after the satisfaction
17 of the liabilities.
18 The simple way, we say, in which 107 must be read so
19 as to be consistent with that is that you construe the
20 word "liabilities" as meaning all liabilities, whether
21 or not provable; you include statutory interest, because
22 on any view it has to be paid before members, and you
23 read the obligation to pay pari passu not in a manner
24 which applies across the entirety of the liabilities but
25 in a manner which applies across each category of

1 liability otherwise defined. And that makes sense of
2 what, on any view, is a piece of relatively telescoped
3 drafting. We accept that. But it makes sense, and it
4 is a point that was accepted by Lord Justice Briggs in
5 particular in paragraph 186 of his judgment.
6 LORD NEUBERGER: Thank you.
7 MR TROWER: My Lord, we will come back to that point again
8 in the context of other arguments, because it actually
9 transcends or crosses over into a number of the
10 arguments that are relevant on this appeal.
11 Now, in a compulsory liquidation the position is
12 provided for by reading not just section 143, which
13 my Lords have been referred to, but 143 and 148
14 together. 143 is behind 1765, tab 22. And 148 is the
15 next tab at page 1767.
16 Would my Lords just read the first of those two
17 subsections, subsections (1) in each of the sections.
18 (Pause).
19 LORD NEUBERGER: Yes.
20 MR TROWER: If one reads those together, the overall
21 obligation of a liquidator is plainly to collect the
22 assets, apply them in discharge of the liabilities, and
23 thereafter make payment to the persons entitled.
24 Now, you don't find the pari passu aspect in here.
25 You find the pari passu aspect in the rules. And that

1 is at rule 4.18(1). I think we have already looked at
2 it. I am afraid I have failed to make a note of where
3 it is to be found in the bundles. At 4.18(1).
4 LORD NEUBERGER: 4.31 you say?
5 MR TROWER: Yes. One moment. Yes, it was tab 56 in bundle
6 F3, 1962.
7 LORD NEUBERGER: 4.18(1)?
8 MR TROWER: Yes.
9 LORD NEUBERGER: Right.
10 MR TROWER: That is what applies in a compulsory ...
11 So that is the part of the code that deals with the
12 process itself. What assistance does one get from the
13 duties of the liquidator, the office holder aspect
14 of this?
15 Now, the process is obviously administered by the
16 liquidator in complying with his duties to do what
17 section 107 contemplates is required to be done. In the
18 context of "non-provable liabilities", there is a little
19 statement in Lines Brothers by Lord Justice Brightman.
20 We have looked at Lord Justice Brightman's judgment in
21 Lines Brothers already but it is F1, tab 15, page 1371.
22 It is the paragraph that refers to Humber Ironworks,
23 between D and E, and my Lords will see the language of
24 duty.
25 LORD NEUBERGER: Yes.

1 MR TROWER: Now, as I think has been mentioned, the code is
2 slightly different in relation to this now. But when
3 one stops and thinks about it, it has to be part of the
4 liquidator's duties, if he has to make a return to
5 members or the persons entitled, for him to comply with
6 the obligation to deal with any liabilities that had to
7 be dealt with before there could be a return to members
8 so that the company could then be dissolved, because one
9 must not forget, in a liquidation context, what one is
10 talking about is an interminable process. I will
11 mention this again in the context of the bankruptcy
12 issue, which I will need very briefly to trouble
13 my Lords with.
14 But in liquidation, once you have got to the end of
15 the winding-up process, that is the end of the company,
16 so you have to deal with the liabilities. So you cannot
17 have a concept that does not deal with the liabilities,
18 insofar as there are assets available for those
19 liabilities to be dealt with.
20 So that is the second aspect. The first aspect was
21 the process, and the third aspect of this is the
22 procedural questions of how it is done within
23 an insolvency.
24 Now, it seems to have been suggested that the
25 solution that was advanced by Mr Justice David Richards

1 in T&N as to how non-provable liabilities should be
2 dealt with demonstrates that that determination and
3 establishment that is to take place outside of the
4 insolvency and not in it, because he contemplated that
5 as a matter of procedure there may be cases in which
6 litigation may be necessary to determine the extent of
7 the non-provable liability. And I think that was prayed
8 in aid, apart from anything else, against the background
9 of pointing out that there is not a proof process in
10 relation to non-provable liabilities which enables you
11 to do it other than through some form of litigation,
12 were there to be a dispute.
13 Now, the way, of course, that would happen, were it
14 to be necessary, is described by Mr Justice David
15 Richards. For my Lord's note -- we don't need to turn
16 it up -- it is page 1556 of the bundle, paragraph 107
17 of T&N.
18 The way it may be done is by lifting the statutory
19 moratorium that otherwise exists in relation to
20 litigation and permitting, if necessary, the
21 commencement of ordinary legal process.
22 Now, we say that even if it was correct to
23 characterise legal proceedings that were commenced in
24 that process as not a legal process in the insolvency --
25 although we respectfully query whether that is really

1 right -- there are a number of aspects in fact to what
2 might happen which ensure that establishment and
3 determination is capable of taking place in
4 the insolvency.
5 The first point is that there is, on any view,
6 a necessity to apply to lift the statutory moratorium,
7 in order to commence ordinary legal process, which is
8 something that has to happen on the insolvency, on
9 any view.
10 Secondly, it is always possible to use the process
11 of an application for directions under section 168,
12 which happens in liquidations all the time, or indeed
13 under paragraph 63 of schedule B1, which is what
14 administrators do when they want to resolve issues in
15 an administration, and indeed it is what has been done
16 on the application which is before my Lords.
17 All that is required is that the matter on which
18 directions are sought either arises in the winding up or
19 is in connection with the functions of the
20 administrator, depending on which of the systems one is
21 dealing with.
22 The third point is -- and this was a point, I think,
23 that arose in a debate that I think my Lord Lord
24 Sumption mentioned -- the liquidator can simply exercise
25 his powers in a slightly different context. The

1 liquidator can always exercise his powers under
2 section 4 of paragraph 2 to compromise or arrange with
3 creditors or persons claiming to be creditors. It is
4 a very wide compromise power, and the administrators
5 have a similar power. And it is what you would expect.
6 If there is a liability that has to be decided, it can
7 be compromised as well as litigated.
8 But whatever the procedure that is used, in all
9 these cases the non-provable liability is being
10 established or determined in the insolvency for the
11 purpose of enabling the liquidator to comply with his
12 duty to effect its payment or for the administrator to
13 comply with his duty to manage the affairs of the
14 business and property of the company.
15 So in summary, because non-provable liabilities are
16 required to be paid before a distribution is made to
17 a company's members under either 107 or 143 and 148, it
18 necessarily follows that they must constitute
19 an obligation which is payable or capable of being
20 established or determined in the insolvency of the
21 borrower within the meaning of the clause.
22 My Lord, can I, just really by way of postscript,
23 say something about the bankruptcy case, Levi(?).
24 I realise there was a little bit of a debate which
25 indicated that it was not going to get anyone terribly

1 far unless my Lords were moving in one direction or the
2 other, but can I just explain why it is correct but it
3 does not assist the analysis, in a few short sentences.
4 The reason is quite straightforward: in bankruptcy
5 there are some debts with which a trustee does not have
6 to deal, because they continue to be payable by the
7 bankrupt after his discharge.
8 Those were the debts with which Levi was concerned.
9 The same situation does not arise in a corporate
10 insolvency, because although the company remains liable
11 for payment of the non-provable liabilities action,
12 something has to be done with them before the company
13 can be dissolved, and anything left is distributed on to
14 the members. So it is a different situation.
15 My Lord, then moving to statutory interest. Now,
16 our simple submission is that statutory interest is
17 plainly payable and capable of being established and
18 determined in the insolvency of the borrower, so long as
19 there is a surplus. As far as it goes, on the sort of
20 arguments that will also relate to non-provable
21 liabilities, there is not a great deal between us on
22 that bit of the point.
23 Their primary argument is that statutory interest is
24 not a sum liability or obligation payable or owing by
25 the borrower so as to fall within the definition of

1 liabilities in the first place. So it is a different
2 thrust of argument that is made against us on this.
3 We respectfully suggest that the argument is wrong,
4 for the reasons given by the judge, Lord
5 Justice Lewison. And the judge gives them as
6 paragraph 71 of his judgment and Lord Justice Lewison
7 gives them at paragraph 45 of his judgment, and we
8 endorse and accept their reasons.
9 Now, my Lord, can I say this about them. This part
10 of my submissions will obviously chime with some of the
11 argument in relation to the scope and extent of the
12 section 74 liability. What I will endeavour not to do
13 is to repeat them when I have to come to deal with the
14 scope and extent of the --
15 LORD NEUBERGER: You are going to deal with them at
16 this stage?
17 MR TROWER: I will deal with them at this stage. I will,
18 though, just mention how they fit into the section 74
19 context, obviously, but I will develop them in a little
20 bit more detail at this stage --
21 LORD NEUBERGER: It is sensible to do it at some stage so it
22 is fine to do it now.
23 MR TROWER: This is the first time I have mentioned them, so
24 I might as well deal with them now.
25 LORD NEUBERGER: You have started, so you will finish.

1 MR TROWER: There is that too.
2 The way it works, of course, is that 2.88(7) which
3 is the statutory provision with which we are concerned,
4 imposes a statutory obligation to apply the surplus
5 remaining after payment of the debts proved in payment
6 of interest before applying that surplus for any
7 other purpose.
8 Can we just turn it up. I have the references for
9 both of the bundles, depending which one my Lords have
10 marked. I am afraid there are two copies F1, 1189 or
11 F3, 2013.
12 LORD NEUBERGER: The advantage of F3 is it has almost all
13 the relevant parts to it.
14 MR TROWER: Mr Miles had the luxury of starting, so he could
15 catch me out because I had marked up that one.
16 LORD NEUBERGER: It is 2013. The advantage of opening,
17 Mr Trower.
18 Yes.
19 MR TROWER: 2013 it is. I agree with Lord Kerr.
20 Now, we respectfully agree with the most accurate
21 characterisation of rule 2.88(7), which is that it is
22 a statutory statement of how the fund is to be dealt
23 with. That is the starting point, which is Lord
24 Justice Lewison's form of words. But what it does not
25 do is expressly identify the person on whom the

1 obligation is imposed, and in particular it doesn't
2 expressly identify the administrator. So one has this
3 neutral, this passage language, neutral language in the
4 sense of who it is on whom the obligation is being
5 imposed, so this means that although there is obviously
6 an obligation to effect an application in accordance
7 with the wording of the rule, the person or persons who
8 may be subject to that obligation have to be identified
9 from the statutory context. That is the way we would
10 approach the question.
11 Now, we say that the passive language, which we are
12 perfectly content with as a concept --
13 LORD NEUBERGER: That is just as well, because it is there.
14 MR TROWER: It is there, indeed. I was trying to think if
15 there was any other way of describing it, and
16 I certainly cannot think of anything better than the
17 words my Lord has chosen. But it is consistent with
18 a natural reading, which gives rise to a freestanding
19 obligation on the person who holds, acquires or into
20 whose hands the surplus is received, to comply with
21 the obligation.
22 Now, the form of compliance and the nature of the
23 obligations that arise in order to comply may depend on
24 the relationship which the relevant person has to the
25 surplus. One can see that. So if one tests it this

1 way: the two people most likely to have obligations in
2 relation to the surplus are the liquidator and
3 the company.
4 So far as the company is concerned, there are two
5 reasons why it is burdened with obligations in relation
6 to the application of the surplus.
7 LORD NEUBERGER: You say "the liquidator"; at the moment we
8 are looking at --
9 MR TROWER: Sorry, my Lord, that was a slip; I meant to say
10 "administrator".
11 LORD NEUBERGER: I was not being pedantic; I just wanted to
12 make sure I didn't miss something.
13 MR TROWER: Very important, and I am grateful.
14 LORD NEUBERGER: That is fine.
15 MR TROWER: There are two reasons why, as far as the company
16 is concerned, the surplus is burdened with an obligation
17 by it in relation to the applications of the surplus
18 towards payment of statutory interest. The first is
19 that the statutory interest is payable out of the
20 surplus in its estate, which is the most sort of basic
21 point, we respectfully suggest. The assets are its
22 assets. It is core to the whole structure of
23 liquidation that they remain its assets. Of course, it
24 holds its assets to be applied in accordance with the
25 statutory scheme, that is Ayerst v C&K Construction, and

1 we accept that. But they remain its assets, and there
2 is no vesting of the assets in anybody else. So it
3 would be very peculiar, we respectfully suggest, for
4 there to be no obligation on the legal owner of the
5 assets to effect the payment.
6 LORD NEUBERGER: Is it a meaningful description of
7 the administrator to describe him or her as the "agent"
8 of the company or not?
9 MR TROWER: I was going to come on to that as
10 a second point.
11 LORD NEUBERGER: Sorry.
12 MR TROWER: No, I will deal with it straight away.
13 Everything an administrator does he does as agent of
14 the company. So of course we accept that one of the
15 functions which he carries out is to ensure that the
16 application of the surplus is given effect in accordance
17 with rule 2.88(7). But paragraph 65 of schedule B1 --
18 and I don't think we have looked at this yet; it is
19 bundle F3, tab 3, page 1838.
20 LORD NEUBERGER: Yes.
21 MR TROWER: Tab 5, I am sorry.
22 LORD NEUBERGER: The administrator --
23 MR TROWER: Sorry, it is tab 4. I gave you the wrong
24 tab number.
25 Is that it now? 65?

1 MR TROWER: No, it is not, no. 69, I am sorry.
2 LORD NEUBERGER: Page 1841 --
3 MR TROWER: Sorry, it is tab 7, page 1841.
4 LORD NEUBERGER: There is the answer. Thank you.
5 MR TROWER: Sorry about that. It was a wrong reference.
6 So everything that he does is done by the agent, and
7 it is as simple as that. But it is important to bear in
8 mind that none of this is in inconsistent with the fact
9 that the administrator may also himself be susceptible
10 to process to enforce the application of the surplus.
11 The mere fact that we suggest that this rule imposes
12 an obligation on the company doesn't mean to say that
13 the court would not enforce compliance of the
14 administrator with his obligations to ensure that the
15 surplus was applied in accordance with the contemplation
16 of the rule.
17 There is a case -- and perhaps, seeing the time,
18 I can just finish with this before the short
19 adjournment. There is a case referred to in the cases,
20 called HIH, which eventually made it to the House of
21 Lords, but it is the judgment of Mr Justice David
22 Richards at first instance on page 2653, F5, tab 2,
23 where he -- and I will just give my Lords the reference.
24 We don't, I think, need to turn it up.
25 What it demonstrates is that a distribution of the

1 assets without regard to properly provable claims gives
2 rise to two consequences. The first is the liability of
3 the liquidator or the administrator for breach of duty
4 and the second is a continuing obligation on the company
5 for payment of a proved claim.
6 LORD NEUBERGER: Paragraph? Page?
7 MR TROWER: 2653.
8 LORD NEUBERGER: Paragraph 116, I think. There is a duty
9 there on the --
10 MR TROWER: 116, 2652.
11 LORD SUMPTION: He is referring to provable claims.
12 LORD NEUBERGER: What you say there is, if he doesn't comply
13 with his duty, there is a claim against him. And where
14 do we see the claim against the company?
15 MR TROWER: Well, he will not have paid the proved claim, so
16 the claim against the company will inevitably continue
17 to subsist.
18 The mere fact that if you have a proved claim which
19 has not been discharged by payment, the company remains
20 liable in respect of it. It is as simple as that.
21 The point I am making simply is that the mere fact
22 that there is an obligation of the office holder to
23 apply the assets does not of itself have any effect on
24 the discharge of the underlying obligation. You have
25 two separate obligations going hand in hand there.

1 LORD NEUBERGER: You have effectively the contractual
2 obligations of the company and the statutory obligation
3 of the office holder.
4 MR TROWER: Yes. And what one has here is a structure under
5 2.887 which contemplates the imposition, we suggest, of
6 two obligations which have different qualities to them
7 but they are both equally enforceable, although in
8 different contexts.
9 LORD NEUBERGER: Very well. That is a convenient moment, is
10 it, Mr Trower?
11 MR TROWER: My Lord, I think it is a convenient moment, yes.
12 LORD NEUBERGER: We will resume again at 2.00. Thank you
13 very much. The court is now adjourned.
14 (1.05 pm)
15 (The Luncheon Adjournment)
16 (2.00 pm)
17 LORD NEUBERGER: Mr Trower.
18 MR TROWER: My Lords, just before the short adjournment
19 I had mentioned the case of HIH and I had made
20 a submission or two about coextensive -- or not
21 coextensive, but obligations which two persons had in
22 respect of the rule 2.88(7) obligation and how the fact
23 that it may be possible to enforce an office holder to
24 comply with the obligations to ensure that the surplus
25 was applied in accordance with rule 2.88(7) was not of

1 itself inconsistent in any way with the existence of a
2 liability on the company. That being a liability for
3 present purposes within the meaning of the sub-debt
4 agreement. The same or very similar point will apply in
5 due course when I come on to explain our submissions in
6 relation to the liability of a company for the purposes
7 of section 74.
8 So that is, I think, where we finished just before
9 the short adjournment. My Lord, can I just say, just
10 for my Lord's note, really, more than anything else:
11 I mentioned Ayerst v C&K Construction before the short
12 adjournment when I was making a submission to my Lords
13 about how the assets remained in the ownership of the
14 company notwithstanding the introduction of the
15 liquidation statutory scheme.
16 Lord Collins, in the Belmont case, referred to
17 a similar concept in the context of the administration
18 statutory scheme. We don't need to look at it, I don't
19 think. It is in the bundle, F4, tab 9, 2227. He
20 mentions the point in paragraphs 1 and 4 of his
21 judgment. And Mr Justice David Richards does the same
22 in a case called the Football League case, at paragraphs
23 101 and 102, F6, tab 7, 3149. It is just so my Lords
24 can see how in both insolvency contexts one has the
25 concept of a scheme being imposed on top of the assets,

1 which are otherwise assets that remain in the
2 company's ownership.
3 My Lord, I am still on the theme of the interest
4 obligation being more than simply a direction to the
5 administrators, and therefore being a liability that we
6 say constitutes a liability of the company's.
7 My Lord, just a few words about a case which is
8 referred to in the cases and also the judgment of
9 Mr Justice David Richards and Lord Justice Lewison, and
10 indeed Lord Justice Briggs, which is one of the
11 Lynes Brothers cases. It is a decision of
12 Mr Justice Mervyn Davies, which one finds at F1, tab 16,
13 page 1386.
14 Just so my Lords can see it -- I don't think we need
15 to spend a large amount of time on it, because the
16 explanation we respectfully adopt for this case is the
17 explanation that is given by Lord Justice Lewison at
18 paragraphs 46 to 47 of his judgment and Lord
19 Justice Briggs at paragraphs 194 and 195 of
20 his judgment. But just so my Lords can see it, because
21 quite a lot is made of it in some of the cases, the
22 passage that is relied on is --
23 LORD SUMPTION: Which tab?
24 MR TROWER: Tab 16 of bundle 1, page 1386.
25 What was going on here was that Mr Justice Mervyn

1 Davies was considering the meaning of the phrase "debts
2 and liabilities" in legislation going back to section 10
3 of the Supreme Court of Judicature Act 1875. The
4 question in that case was whether the company was
5 insolvent in circumstances where there was a surplus of
6 assets over all proved debts.
7 It was not an issue about whether -- it had nothing
8 to do with the contributories' liability to contribute
9 to the assets of the company or anything like that. The
10 passage that is relied on by the other side is between D
11 and the end of the paragraph, on page 223 of 1386 of
12 the bundle.
13 LORD NEUBERGER: Thank you. Yes.
14 MR TROWER: Then if my Lords would turn up in bundle D,
15 tab 3, page 578, paragraphs 194 and 195 of Lord
16 Justice Briggs's judgment.
17 LORD NEUBERGER: Yes. Paragraph?
18 MR TROWER: Sorry, 193.
19 LORD NEUBERGER: Thank you. Don't apologise.
20 I should apologise.
21 MR TROWER: 193 through to 195.
22 LORD NEUBERGER: Thank you.
23 MR TROWER: He gives an explanation as to why the judgment
24 of Mr Justice Mervyn Davis really does not help
25 very much.

1 LORD NEUBERGER: Right.
2 MR TROWER: As I say, for my Lord's notes, Lord
3 Justice Lewison's take on this judgment is at paragraphs
4 46 and 47. Mr Justice David Richards judgment is at
5 paragraphs 72 and 73. And I don't think it is unfair to
6 submit that all of their Lordships seem to have felt
7 that maybe the judgment was not quite right, but they
8 didn't need to say it in terms because it was on
9 a rather different point.
10 LORD NEUBERGER: Not very likely to have much weight,
11 a first instance judgment, some time ago, which
12 is doubted.
13 MR TROWER: I just thought I would mention it to my Lords.
14 LORD NEUBERGER: I don't mean that rudely to
15 Mr Justice Mervyn Davis.
16 MR TROWER: My Lord, the next topic is just a few brief
17 submissions on interest as a liability in a capital
18 adequacy context, because that is of course what we are
19 looking at here in the context of whether or not
20 interest is to be treated as a liability for the purpose
21 of a subordinated debt agreement.
22 We do say that it would be a particularly strange
23 result to find that for capital adequacy purposes there
24 was a major difference between a creditor's entitlement
25 to interest accruing pre-liquidation -- which is plainly

1 a liability of the borrower's -- and a creditor's
2 entitlement to interest accruing post-liquidation on
3 exactly the same debt.
4 We submit this is not what the draughtsman could
5 have intended. It is one thing to look at it in the
6 context of a statutory code -- and we obviously make
7 similar points -- but it is one thing to look at it in
8 the context of a statutory code, but when thinking about
9 it in a contractual context, which this is, for capital
10 adequacy purposes, we submit it would be a very odd
11 result, because of course pre-insolvency interest is
12 provable, we know that, so clearly doesn't fall, even on
13 my learned friend's case, to be disregarded for the
14 purposes of clause 5.2 (a).
15 It is plainly payable, plainly capable of being
16 established or determined in the insolvency of
17 the borrower. Both categories of interest are payable
18 to compensate the creditor for being kept out of his
19 money. They are both an important entitlement, we
20 suggest, for creditors, whose potential losses are meant
21 to be protected by the capital adequacy rules. But more
22 importantly on this point, there is no good reason why
23 the intervention of the insolvency should make all the
24 difference as to whether the subordinated debt should
25 rank ahead of or behind the undischarged obligation to

1 pay interest in respect of a particular period.
2 Put another way: why, we ask, should the interest
3 loss be absorbed only if and to the extent that it is
4 sustained in the pre-insolvency period? There is no
5 obvious reason why, from a regulatory perspective, the
6 costs of the creditors who are being kept out of their
7 money post-insolvency should be just as much a cause of
8 concern as the costs of keeping those creditors out of
9 their money pre-insolvency.
10 My Lord, can I now say something briefly about
11 pre-excluded liabilities? No oral submission was made
12 by Mr Miles on this point but LBHI2 did submit in their
13 case that if statutory interest is a liability of
14 LBIE's, it is within the definition of excluded
15 liabilities, and they make that point in paragraph 49 of
16 their case.
17 If one goes to the definition of excluded
18 liabilities, which is at page 686, that definition is:
19 "Liabilities expressed to be and in the opinion of
20 the insolvency officer of the borrower do rank junior to
21 the subordinated liabilities in any insolvency of the
22 borrower."
23 Page 686.
24 Now the argument would appear to be as we understand
25 it that rule 2.88(7) expressly provides that statutory

1 interest is to be paid after payment of proved debts,
2 and that this is the same thing as expressly providing
3 for statutory interest to rank junior to the
4 subordinated liabilities. We say that argument is wrong
5 for two reasons.
6 The first of is the reason given by the judge in
7 paragraph 74 and 75 of his judgment, page 624 of the
8 bundle.
9 "Rule 2.88(7) provides for payment of interest tab
10 made after payment of the debt is proved. It doesn't
11 use language which comes near an expression that the
12 interest is to rank junior to something else, nor to
13 express that the ranking is to be junior to the
14 subordinated liabilities. It is simply payment after
15 the debts proved."
16 That is the first point. Secondly, the obvious
17 focus of the excluded liabilities definition is on
18 junior subordinated liabilities. That is why the
19 language of ranking is used and why it refers to ranking
20 after the subordinated liabilities.
21 It is what makes sense in the context of
22 an internationally applicable cross-jurisdictional
23 standard form, where it will often not be the case that
24 post-insolvency interest is even arguably subordinated.
25 In any event, the argument does not work at all unless

1 the debts, the subordinated liabilities, are debts
2 proved within the meaning of rule 2.88(7), which is the
3 subject matter of our cross-appeal.
4 We say they cannot be. We say that the subordinated
5 liabilities cannot be debts proved because if LBHI2
6 seeks to prove them, it will be acting in breach of the
7 term of the sub-debt agreement. I will explain our
8 submission in relation to that in just a moment, but
9 what LBHI2 also say is that, because statutory interest
10 is not payable until there is a surplus after debts
11 proved within the meaning of rule 2.88(7), and because
12 the sub-debt is a provable debt, there can be no
13 liability to pay statutory interests, save to the extent
14 that there is a surplus left after paying the sub-debt
15 because it is provable.
16 Now, we say that is wrong for two reasons. The
17 first reason is that the subordinated debt is not a debt
18 which is capable of being proved anyway, if its proof
19 has the effect contended for by LBHI2, our cross-appeal.
20 It is perfectly possible for a creditor to contract out
21 of the right to prove or to receive dividends pari
22 passu.
23 The judge held that to be the case and there is
24 a description of the analysis and the law in
25 paragraph 85 of his judgment, I think. As I understood,

1 it Mr Miles correctly accepted that it is possible. It
2 was the subject matter of the decision of
3 Mr Justice Vinelott in one of the Maxwell cases and
4 Professor Goode has agreed that it can be done. So the
5 bottom line is that, and this is the first bit, as
6 a matter of construction, we say, in accordance with
7 what is legally possible rule 2.88(7) does not use the
8 word "debt proved" to include debts which the creditor
9 has contracted not to prove. That is the first point.
10 The second point is that the rule, that is 2.88(7),
11 surplus is what is left after payment of the debts
12 proved. Now, payment of the debts proved is payment of
13 them at the amount for which they were admitted to
14 proof, which is a point made by the judge at
15 paragraph 69. For so long as the interest and the
16 non-provable liabilities have not been paid, the
17 sub-debt can only on any view be valued at zero, and
18 everyone seems to accept that. So the surplus will be
19 quantified on the basis that, until such time as the
20 interest and non-provable liabilities are paid, that is
21 the position. The surplus will be quantified on that
22 basis, until such time as the interest and non-provable
23 liabilities are paid.
24 So to that extent --
25 LORD NEUBERGER: Valued at zero, if it is obvious that they

1 are going to be paid, then on the face of it it would
2 have some value.
3 MR TROWER: That is one of the problems that we suggest
4 arises from the judge's analysis of this being
5 a contingent liability. There is a possibility that
6 it -- he says in his judgment that you value it at zero.
7 LORD NEUBERGER: Yes, he does.
8 MR TROWER: Until such time as the liability falls in and
9 the contingency is satisfied -- we have concerns about
10 that.
11 LORD NEUBERGER: On that basis, all contingent debts will be
12 valid at zero, but you would say, "Well, I am not going
13 to be paid until everybody else has been paid off", or
14 whatever the contingency is, but the market would take
15 a view that there was a very good prospect or a zero
16 prospect of that contingency being satisfied, would
17 value the debt accordingly.
18 MR TROWER: On one level, of course, we are content to
19 accept the judge's analysis on how you go about valuing
20 the figure but we have real concerns about it as an
21 analysis, and we think the better view is that there is
22 a prohibition on proving at all under the terms of the
23 agreement because, to the extent that you prove and
24 thereby give rise to the difficulty under rule 2.88(7),
25 you are in breach of the restriction provisions which

1 interfere with the subordination.
2 LORD NEUBERGER: And which therefore would support the
3 principle that either you cannot prove or it is valued
4 at nil.
5 LORD REED: It is not so much a question of interpretation
6 of the rule, is it, it is more that the contract
7 prevents you from asserting?
8 MR TROWER: Indeed, my Lord.
9 LORD NEUBERGER: Either it entitles you to -- in order for
10 that provision to be effective, either you cannot prove
11 or you can prove but it is put in at nil, otherwise you
12 are in breach of --
13 MR TROWER: Otherwise you are in breach of the paragraph.
14 LORD NEUBERGER: I see the force of that.
15 MR TROWER: My Lord, absolutely has it.
16 Of course the critical point about all this is that
17 it is well established now, and that is the reason
18 I mentioned the number of ways in which it is well
19 established, that you can contract out of the ability to
20 prove and contract out of the ability to share pari
21 passu.
22 LORD NEUBERGER: You cannot contract into jumping up, but
23 you can contract into jumping down or jumping out.
24 MR TROWER: Indeed. Yes.
25 LORD SUMPTION: If you can contract out of the right to

1 share pari passu, why can you not put a valuation of
2 more than zero but that the result is simply that the
3 liquidator will not pay you until the preconditions have
4 been satisfied?
5 MR TROWER: Well, if you contract -- the problem about that
6 is that you are then proving, or then you are then
7 acting in a manner which renders the interest not
8 payable.
9 LORD SUMPTION: Not if it is lawful for the liquidator,
10 having regard to the terms of the contract, not to pay
11 you until he has paid everyone else. I mean if you can
12 contract out of the right to prove, why can you not
13 contract out of the right to be paid on a proof?
14 MR TROWER: Well, the only difficulty would arise if in
15 those circumstances your proof was given a value which
16 meant that it had to be paid in order for the right to
17 statutory interest to arise under 2.88(7). That is
18 where the problem arises.
19 LORD SUMPTION: On that footing you simply wouldn't, unless
20 the preconditions had been satisfied, have a right to
21 statutory interest.
22 MR TROWER: Yes, but I mean the way we -- yes.
23 The way we put it is that the first point is whether
24 or not there is a liability there, which we say there is
25 a liability there, a liability that constitutes a senior

1 liability. My Lord's approach to it means that there
2 would be an interference with that subordination, on the
3 assumption that the statutory interest constitutes
4 a senior liability.
5 I accept that one has to say that statutory interest
6 constitutes a senior liability, but the definition of
7 senior liability is very wide. It includes
8 contingent -- it includes every sort of liability.
9 Which does perhaps bring me on to the restrictions
10 on proving element, because I think one has to develop
11 this submission in the light, obviously, of the
12 restrictions that are contained in clauses 4 and 7
13 because, as my Lords know, the judge concluded that the
14 subordination provisions do restrict and prevent the
15 sub-debt lender from proving and the Court of Appeal
16 disagreed. We suggest that the judge was correct on
17 this point and the contracting out of whatever rights it
18 may have to prove can be seen from paragraphs 4 and 7,
19 we suggest.
20 The way it works is this, in our submission. The
21 first point is that paragraph 4 is subject in all
22 respects to paragraph 5. So it is subject in all
23 respects to the subordination, and you get that from
24 paragraph 4.1, which makes it necessary to read it as
25 a clause which is subsidiary in its terms to the

1 overriding nature of the subordination clause.
2 Paragraphs 4.4 and 4.7, which are on 688 and 689,
3 provide for a single remedy to be available to the
4 lender, but in all respects subject to the subordination
5 in clause 5. That single remedy is to institute
6 proceedings for the insolvency of the borrower, of LBIE.
7 Because this is the only remedy, the lender is precluded
8 from obtaining judgment, executing or otherwise
9 enforcing the judgment, thereby avoiding the
10 subordination provisions.
11 Clause 4.7 provides that no remedy against the
12 borrower other than are specifically provided for by 4
13 shall be available. We submit that this prohibits the
14 ability of the lender to prove its debt anyway in a
15 manner which might interfere with the subordination.
16 That is because proof is a separate part of the remedy
17 of collective execution which is instituted by the
18 commencement of a distributing insolvency process, and
19 only the institution of proceedings for the insolvency
20 is permitted. The fact that the draughtsman has focused
21 on the separate nature of the remedy of proof is
22 stressed by the phrase "other than as specifically
23 provided for by this paragraph 4" -- the word is
24 "specifically.
25 Where the Court of Appeal went wrong, we would

1 suggest, was when in paragraph 39 Lord Justice Lewison
2 elided the institution of the insolvency process and the
3 proof of the debt. It is one thing to start the
4 process, which may be of benefit to the creditor as it
5 puts an insolvency officer in charge, but it is quite
6 another to take any step within it to prove for the
7 debt, which is particularly the case if the proof has
8 any effect at all on the subordination of the creditor's
9 right, because the proof would then cut across
10 paragraph 5, which is something that is plainly barred.
11 Sorry, my Lord?
12 LORD NEUBERGER: You are saying that he could apply to wind
13 up but it doesn't mean to say he could prove?
14 MR TROWER: Yes.
15 What Mr Miles relied on were the words "enforcing
16 payment". He said proof was obviously contemplated
17 because 4.4 refers to enforcing payment by instituting
18 proceedings for the insolvency of the borrower. The
19 answer to that -- and effectively he said that this
20 carried with it the ability to submit a proof in the
21 proceedings.
22 Now, our answer is that it is not the case that
23 Mr Miles gets any mileage from that submission, anyway
24 to the extent that a proof might be submitted in
25 competition with the unsubordinated creditors, because

1 that would cut across the subordination. The process of
2 enforcing payment in the insolvency proceedings, as
3 constituted by clause 4.4, commences with the
4 institution of the proceedings but it is only once the
5 senior liabilities have been paid in full that the
6 sub-debt holder is entitled to prove or, alternatively,
7 as the judge said in paragraph 69 of his judgment, to
8 require the admission of his proof, which is another way
9 of putting it.
10 So, put another way, the enforcement of payment by
11 instituting proceedings for the insolvency of the
12 borrower may carry with it the ability to prove a debt
13 but not until such time as the statutory interest and
14 non-provable liabilities have been paid in full. So
15 there is a timing restriction -- until such time as the
16 subordination will no longer be impaired by the proof --
17 but it is not necessarily an absolute bar. So there is
18 no inconsistency between the concept of enforcing
19 payment and the concept of being limited simply to the
20 institution of the insolvency process.
21 That makes, in our submission, coherent sense and
22 consistent sense to the structure of the agreement as
23 a whole. Your right as a subordinated creditor is to
24 introduce the process of collective enforcement and, as
25 a result of the introduction of the process of

1 collective enforcement, a point in time may come at
2 which you are entitled to prove, but it doesn't come
3 merely by the process, merely by instituting the
4 process.
5 Now, it is clear from the way that LBHI2 present
6 their case on statutory interest that they contend the
7 fact of proving --
8 LORD SUMPTION: Can I stop you there. When you say a time
9 may come, what time do you envisage? After others have
10 proved and received payments?
11 MR TROWER: Yes.
12 LORD SUMPTION: So you then have a second round of proofs,
13 do you, if there is a surplus after that stage is
14 reached?
15 MR TROWER: Yes, because --
16 LORD SUMPTION: That is an entirely neutral question.
17 MR TROWER: No, my Lord, sorry, I didn't intend to react in
18 the way my Lord might have thought I did.
19 LORD SUMPTION: It was a bit more defensive than my question
20 was intended to --
21 MR TROWER: It may require a process of proof at that stage,
22 but there is nothing particularly surprising about that
23 because what you have, what this is a contemplating, is
24 a situation where a particular category of subordinated
25 creditor is agreeing that he is not going to participate

1 in the collective distribution process, save for the
2 purpose of instituting it if he wants to. He is not
3 going to participate in it until such time as those who
4 rank ahead of him have been paid.
5 LORD KERR: There is no distinction here between proving and
6 enforcing payment. The clause in its text at the moment
7 suggests that you can institute proceedings, and it
8 depends what one means by proving. I mean is that
9 proving, once you institute proceedings?
10 MR TROWER: No, I would say not, my Lord. What we are
11 concerned about here is proving in accordance with the
12 statutory code under our insolvency legislation.
13 LORD NEUBERGER: Has such a person got a statutory power to
14 wind up, to apply to wind up?
15 MR TROWER: He would potentially wind up as a contingent
16 creditor.
17 LORD NEUBERGER: Right. Doesn't that mean that the judge
18 must be right that he is a contingent creditor, if he
19 has the right to wind up, otherwise they are purporting
20 to give him a right that the statute doesn't give him?
21 MR TROWER: My Lord, perhaps I have not made this clear.
22 I would suggest that the characteristics of the sub-debt
23 agreement render the sub-debt lender a contingent
24 creditor.
25 LORD NEUBERGER: Within the meaning of the act?

1 MR TROWER: Within the meaning of act.
2 What has happened under the sub-debt agreement is
3 that, qua contingent creditor, he has contracted out of
4 his right to prove. He has said "I am not going to
5 prove", and therefore his debt will never be a debt
6 proved within the meaning of 2.88(7), until such time as
7 everyone else has been paid.
8 LORD NEUBERGER: But the as it were covenant not to prove is
9 not expressed, as Mr Miles pointed out, but you say then
10 you work out how this works, it is part of what of he
11 has agreed to give up?
12 MR TROWER: Yes, because it is a remedy that is available to
13 him and the only remedies that are -- sorry, I say it is
14 a remedy available. That is the wrong impression. It
15 is a remedy that would be but is not available to him
16 because he has contracted out of it under clause 4.
17 LORD SUMPTION: Does this depend upon the correctness of
18 your submission, that the pari passu rule is to be
19 applied separately to each category, including each
20 subordinate category, so that when eventually the time
21 comes there is an apparent surplus and you have a second
22 round of proofs, it is only proving and claiming a right
23 to have distributed to you the residue and not the whole
24 estate?
25 MR TROWER: I wouldnt put it -- the way I would put it would

1 be slightly different, my Lord. The way I would put it
2 is that it is not unusual for late provers to come in
3 after a distribution has been made in an insolvency. It
4 does happen from time to time.
5 LORD NEUBERGER: Are they always people who could have
6 proved at the beginning?
7 MR TROWER: No. So I am dealing with my Lord, Lord
8 Sumption's point in a slightly different way to try
9 an identify what -- I think the point that was put to me
10 was how it was that this process fitted in with
11 section 107, and what I was saying --
12 LORD SUMPTION: (Inaudible) equivalent by implication under
13 143 and 148.
14 MR TROWER: Yes. What would happen, once everyone else has
15 been paid in full out of the assets that were available,
16 a late prover can always come in and share in what is
17 left but he not disturb dividends already paid. That is
18 basic rule.
19 That is effectively what is happening under this
20 contract because what is happening is that everybody
21 else is getting payed in full under the initial proving
22 process and he has agreed to be a late prover and take
23 whatever is left. He will not be proving in competition
24 with anybody else who has already been paid because that
25 is not how it works.

1 So he comes in as a late prover and he is able to
2 prove in respect of the surplus and that, with respect,
3 is what -- in a sense, there are similarities between
4 the rights which he has in respect of what is ultimately
5 left over after everybody else has been paid in full and
6 the rights that arise in relation to statutory interest
7 for the interest creditors. There is a liability to
8 them and they come in and take out of the surplus once
9 everybody else has been paid.
10 LORD KERR: He is not so much a late prover, he is proving
11 at the first opportunity available to him, according to
12 you.
13 MR WOLFSON: Yes, I accept that. I certainly accept that.
14 LORD KERR: I see. A second class prover.
15 MR TROWER: He is a second class prover. He has agreed to
16 be a second class prover. I am very happy to put it
17 that way.
18 LORD KERR: I think if your argument is right, he has no
19 option to accept that he is second class.
20 MR TROWER: Indeed.
21 So, my Lords, that is why I put it as a timing
22 restriction. That is what we say it is. There is not
23 an absolute bar, it is a timing restriction.
24 LORD NEUBERGER: Under which provision is he then applying
25 as a late prover?

1 MR TROWER: He has a right to prove --
2 LORD NEUBERGER: Under which part of insolvency rules is he
3 applying?
4 MR TROWER: Because he is --
5 LORD NEUBERGER: No, which rule enables you to apply late?
6 MR TROWER: Well, hang on, let me just think how I can do
7 this. I am not sure we have got the late proving rules,
8 actually. Can I borrow somebody's red book?
9 I think probably rather than waste time, can I come
10 back to that point. I will take my Lords through how it
11 actually works.
12 LORD NEUBERGER: Possibly tomorrow we can have the rules, or
13 copies of the rules. It may be it is agreed and this is
14 an unhelpful investigation but if it isn't, then we
15 ought to look at it.
16 MR TROWER: So, as I say, that is the argument in relation
17 to the contracting out of the ability to prove.
18 What we submit also in relation to this is that, as
19 an alternative really, picking up the approach that Lord
20 Justice Lewison adopted, if the debt is worth zero, that
21 is the amount at which it should be admitted and, in
22 that sense, the interest obligation will arise under
23 rule 2.88(7) because the amount of zero for which it has
24 been admitted to proof means that there is no debt
25 proved in respect of it which has to be discharged in

1 accordance with rule 2.88(7) in order for the interest
2 obligation to arise.
3 LORD SUMPTION: So on that footing you submit an amended
4 proof when everyone has been paid, do you? With
5 a different --
6 MR TROWER: If this was the correct analysis, that one had
7 a contingent claim which was only ever based at zero,
8 yes, you would submit an amended proof in due course
9 once the indebtedness had been discharged in full and
10 you would then claim for whatever amount was owing in
11 toto under the sub-debt agreement.
12 So that is why we submit that the proof would
13 constitute a remedy that is barred under clause 4.7
14 because of the interference with and the cutting across
15 of the subordination in clause 5.
16 Before I leave the question of proof, in their case,
17 LBHI2 relied on a bit of GENPRU to show that proof is
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
22 an insolvency and prove for a debt. The bit of GENPRU
23 they relied on is in the bundles at F8, tab 4,
24 page 3799. What that demonstrates is that the
25 regulators anyway regard proof as a remedy separate from

1 instituting the proceedings, but the important point is
2 that, if my Lords look at 2.2.159(3), which is at
3 page 3799, its availability as a remedy is only
4 permitted where it doesn't prejudice the subordination,
5 and one gets that from 2.2.159(4).
6 LORD NEUBERGER: GENPRU is what?
7 MR TROWER: It is one of the regulatory rules, and there
8 were two points I was going to make about this.
9 LORD NEUBERGER: What status does it have?
10 MR TROWER: The status it has is that it is a successor to
11 the rules under which the standard form which is in
12 issue in these proceedings was produced.
13 LORD SUMPTION: It is simply the reason why there is
14 a standard form.
15 MR TROWER: Indeed. I am happy to adopt that. Although the
16 other point about this is that, actually, this
17 particular standard form agreement was plainly not based
18 on GENPRU, it was based on the predecessor to GENPRU,
19 which is called IPRU, which did not distinguish between
20 instituting proceedings for the insolvency of a borrower
21 and proving.
22 LORD NEUBERGER: So this a document we are using to construe
23 the contract even though it came into existence
24 afterwards?
25 MR TROWER: Indeed. The reason I am just telling my Lords

1 what the position is in relation to GENPRU is because it
2 doesn't help for a number of reasons, including the fact
3 it is not the regulatory rule pursuant to which the
4 document was drafted in the first place.
5 LORD NEUBERGER: Thank you.
6 MR TROWER: So our approach or our submissions in relation
7 to the way in which paragraph 4.7 works are also
8 consistent with clause 7(e).
9 LORD NEUBERGER: 7(e)? Right.
10 MR TROWER: Yes, of the agreement, which my Lords find on
11 page 691.
12 LORD NEUBERGER: "... not to take any action whereby the
13 subordination ...", et cetera?
14 MR TROWER: Yes. So the argument is, the submission is,
15 that if by the very act of proving the interests that
16 would otherwise be payable can no longer be paid because
17 of the way that 2.88 interrelates, the very act of
18 proving adversely affects the liability that would
19 otherwise arise or accrue, and so --
20 LORD NEUBERGER: If it is recorded as having a value of nil,
21 that doesn't matter.
22 MR TROWER: It matters less.
23 LORD NEUBERGER: Why does it matter?
24 MR TROWER: It depends on what you mean by "debt proved" for
25 the purposes of 2.88(7). I agree with my Lord, it

1 shouldn't matter at all, but there seems to be
2 an argument that "debt proved" in 2.88(7) means that the
3 debt that is being proved has to be paid in full, not
4 just the amount for which it is entitled to be admitted
5 in proof.
6 LORD SUMPTION: Is a proof for a debt valued at zero, is it
7 a claim at all?
8 MR TROWER: It may not be.
9 LORD SUMPTION: In that case it is not a proof, is it?
10 MR TROWER: That is just because we have to put it at zero.
11 If they only put it in for zero, it is probably not a
12 claim at all, they probably haven't proved, so there is
13 no debt proved.
14 LORD SUMPTION: Yes.
15 MR TROWER: I see what my Lord says, it probably is not
16 a claim at all.
17 LORD KERR: As a matter of practical reality, it is unlikely
18 that a claim will be made for --
19 MR TROWER: For zero, yes.
20 But the reality is that, if the right thing to do is
21 to value it at zero, that is what it is submitted to
22 proof at, the debts proved will have been paid when zero
23 has been paid on it, if you see what I mean.
24 In a sense there is an element of circuity about
25 this debate, I accept that, but what the bottom line in

1 relation to it is that, if there is any argument to the
2 effect, or if there is actually any consequence that
3 interferes with the subordination in any way by reason
4 of the proving of the debt, that constitutes something
5 that cannot be done under clause 4(7) and 7(e).
6 LORD NEUBERGER: It may not be a comment for you to answer,
7 it may be more for Mr Miles but there could be said to
8 be a slight inconsistency with this and the currency
9 claim argument, to the extent that he gets two bites of
10 the cherry that he says the currency claim should not
11 get, because he gets a nil -- admittedly it is a pretty
12 technical bite -- but he nonetheless puts it in at nil
13 and then it springs back in full at a later stage, so it
14 counts twice, which is slightly inconsistent with one of
15 his arguments on the currency claim.
16 He can deal with that.
17 MR TROWER: Yes.
18 The essential point here at the end of the day is
19 that the proof is a separate remedy and there is a bar
20 in respect of it, in any event, under clause 4.
21 LORD NEUBERGER: Just picking up Lord Sumption's point a bit
22 further, if effectively you have agreed that your proof
23 will be valued at nil because that is what you say you
24 have agreed, it is a pretty odd proof.
25 MR TROWER: Yes.

1 LORD NEUBERGER: That is in a sense what you are --
2 MR TROWER: I don't submit that is the right way of
3 analysing what is going on here.
4 LORD NEUBERGER: No, no, what I am saying is you can say it
5 is pretty odd.
6 MR TROWER: I can certainly say that, my Lord, yes,
7 I certainly can.
8 So I have taken my Lords to 7(e) -- sorry, I have
9 just got to find where I had got to on my submissions.
10 LORD CLARKE: I was wondering where you have got to in your
11 case?
12 MR TROWER: My Lord, can I try and answer that. We were
13 sort of around about 61, is where we start with the
14 point about the sub-debt is not currently capable of
15 being -- sorry, I should have given some references as
16 I went along.
17 While we are there, the bit of our case up until
18 there is essentially dealing with the points more
19 generally on the construction and the cross-appeal in
20 relation to the debt proved starts at paragraph 61; and
21 the bit that deals with the cross-appeal goes through to
22 page 373, paragraph 70.
23 LORD NEUBERGER: Thank you.
24 MR TROWER: So, my Lords, I think the only other point
25 I needed to make in relation to debts proved is that we

1 rely on, as I have indicated, 4.77(e) and also 7(d),
2 which is an attempt to obtain payment provision, which
3 the subordinated creditor is also barred from doing,
4 save otherwise and in accordance with the terms of the
5 agreement.
6 That is page 691, volume D, tab 7, which is the
7 agreement itself.
8 LORD NEUBERGER: Page what, sorry?
9 MR TROWER: 691.
10 LORD NEUBERGER: Thank you so much. Yes, I see.
11 MR TROWER: The only other point that I wanted to make on
12 this part of the case, subject to any other balls
13 my Lords have got to bowl at me, is in relation and to
14 a point that I don't think was developed in oral
15 submissions but that was made by Mr Miles in his case,
16 which was a submission that it somehow makes
17 a difference that rule 2.88 provides for statutory
18 interest to rank equally whether or not the debts on
19 which it is payable rank equally.
20 Now, I don't think my Lords have heard any
21 submissions in relation to that bit of the rule at all.
22 The purpose of the provision is to ensure that
23 preferential creditors and non-preferential creditors
24 share equally in any surplus in respect of interest
25 entitlements. LBHI2 subordination, we say, necessarily

1 involves the contracting out of the right to share and
2 the surplus (Inaudibly) with the non-subordinated
3 creditors, just as it necessarily involves the
4 contracting out of the right to a pari passu
5 distribution alongside the creditors in relation to
6 dividends on principal. It is as simple as that. So
7 nothing further is gained in relation to that particular
8 part of rule 2.88.
9 My Lord, I was then going to move on to declarations
10 4 and 5, which is the Latin lacuna --
11 LORD NEUBERGER: The point Mr Wolfson argued?
12 MR TROWER: Indeed.
13 Can I just start with the shape of the case in
14 relation to this in our perspective. We seek to uphold
15 the conclusion of the Court of Appeal. If we fail in
16 upholding the Court of Appeal's conclusion on the
17 judge's declaration four, then we say that an accrued
18 right to statutory interest in the administration will
19 be provable in a subsequent liquidation and,
20 alternatively, we cross-appeal against the Court of
21 Appeal's reversal on the judge's declaration five, which
22 was the one which dealt with it being a non-provable
23 claim.
24 The background to why it matters, just a few short
25 submissions on that. As my Lords know, LBIE is not

1 being wound up, it is in administration, but liquidation
2 is an exit route available. Whether that course is
3 adopted will depend upon what is in the creditor's best
4 interests as a whole, having regard amongst other things
5 to the outcome of this appeal. The amount of statutory
6 interest payable on the debts proved is very
7 substantial. It has been in administration
8 since September 2008 and statutory interest has been
9 accruing at 8 per cent since then, or the contractual
10 rate, if it is higher. So uncertainty or a risk of
11 a loss to some creditors as an entitlement to statutory
12 interest is quite significant and highly relevant to
13 deciding how to take matters forward from here.
14 Now, the effect of the judge's declaration four --
15 so if one were to go back to where the judge was --
16 would be that a creditor of LBIE who has accrued
17 an entitlement to statutory interest during the period
18 of administration but has not been paid will lose that
19 entitlement upon LBIE moving into liquidation and the
20 creditor is not entitled to it. We have got what was
21 described somewhere as a black hole, I think. Creditors
22 simply lose an entitlement. We submit that it is
23 exposes a lacuna in the law. No policy justification is
24 suggested and the judge accurately summarised the
25 consequences in paragraphs 119 and 121 of his judgment.

1 He says:
2 "There would seem to be no purpose served in
3 a denial of any interest during the period of
4 an immediately preceding administration or liquidation.
5 That there was a policy justifying such a denial would
6 appear to be demonstrated by the amendments made to rule
7 2.88 with effect from April 2010, which ensure that in
8 an administration which has been immediately preceded by
9 a liquidation, statutory interest is payable in respect
10 of the period ..."
11 LORD NEUBERGER: Mr Wolfson has realistically conceded the
12 merits. That is not the issue.
13 MR TROWER: No, I understand that, but it is important
14 that -- yes, and I will say no more about them. It is
15 obviously relevant to the approach that my Lords take in
16 relation to what it is that one can construe from the
17 wording of the rule.
18 LORD NEUBERGER: I understand.
19 MR TROWER: The particular concern, and I alluded to this
20 when I was opening this bit of our response to the
21 appeal, is that it will have a distorting effect if the
22 judge's declaration is restored on insolvency decision
23 making, in the sense that it will serve to cause
24 a company, or may serve to cause a company to stay in
25 administration when it ought to be going into

1 liquidation. That is the summary of the concern.
2 As I understand it, as my Lord said, Mr Wolfson did
3 not rely on any of the policy justifications that were
4 relied on below but, by contrast, if I can put the
5 positive point, the construction adopted by the Court of
6 Appeal does have ample policy justification and it has
7 ample policy justification in the sense that statutory
8 interest is intended to compensate creditors and what
9 one does with the solution that they adopt is anyway in
10 part -- and I will come to the significance of the fact
11 that it is only a partial solution in a moment -- but it
12 does anyway in part resolve the issue.
13 LORD NEUBERGER: Plainly, otherwise it would not be worth
14 (Inaudible).
15 MR TROWER: Of course.
16 Going straight then to the rule to construe it and
17 to give my Lords our submissions as to how it works ...
18 LORD NEUBERGER: Yes.
19 MR TROWER: We were looking at it in F3, weren't we?
20 LORD NEUBERGER: That's right. The joy of having it in more
21 than one place.
22 MR TROWER: Sorry, I have already complained to Mr Miles
23 about his use of this volume. Too late.
24 It is page 2013 in 3.
25 So it applies to a surplus in the administration and

1 the surplus is what is left after payment of the debts
2 proved. The rule then provides for how the surplus is
3 to be applied, and what we say is -- I have already
4 submitted in another context that it imposes obligations
5 on the company, but it doesn't impose any restrictions
6 on who specifically is to give effect to the
7 application, which is consistent with the submissions
8 I made on the rule amounting to a statutory instruction.
9 As a matter of straightforward language, it is not
10 expressed as a direction of the administrator, although
11 I would certainly accept that the legislative intent is
12 that he should effect the application if the time for
13 doing so arises while he still has the administration of
14 the surplus in his hands, but if he goes out of office
15 and is replaced by a liquidator, our submission is that
16 the statutory instruction to apply the surplus in
17 accordance with 2.88 (7) continues to subsist binding
18 the surplus in the hands of the persons into whose
19 control it passes.
20 It is said by Mr Wolfson that the solution adopted
21 by the Court of Appeal constitutes only a direction to
22 the administrators and is not part of the waterfall in
23 the winding up. The first thing he does is he relies on
24 those rules which govern the introduction of rule 2.88.
25 That is the rule at the very beginning of chapter 10,

1 2.11(d). He also relies on 2.68(1), and so you get 2.68
2 is at the beginning of tab 74 on 1988.
3 The way we would suggest my Lords ought to approach
4 this sort of argument is that these rules operate so as
5 to cause the provisions of chapter 10, which obviously
6 include 2.88(7), to be engaged in the first place, but
7 they say nothing about causing the effect of any one of
8 the rules to cease or to be extinguished, once the
9 status of a company as being one in administration comes
10 to an end. We suggest that it would actually be
11 a surprising result if the company were relieved of
12 a statutory liability to which it had become subject in
13 the course of administration, merely because it moved
14 into liquidation and we suggest that it is more
15 appropriate to look it the other way round from the way
16 round that Mr Wolfson looks at it. We would suggest
17 that that would require explicit words, "once something
18 has become", "an obligation has been imposed".
19 So we submit that if a right to payment has been
20 granted by one part of the statutory scheme, which it
21 has under rule 2.88(7), particularly where it is
22 expressed in passive terms, clear words would be needed
23 to remove the accrued right merely by reason of the fact
24 that the company moves from one process to another.
25 LORD NEUBERGER: Are there any other parts of part 2 that

1 impose obligations on the company rather than the
2 administrator?
3 MR TROWER: We could not find anything that dealt with it in
4 any sort of explicit way.
5 LORD NEUBERGER: Because there are plenty of provisions that
6 plainly impose provisions on the administrator.
7 MR TROWER: Indeed, my Lord. The closest we actually got
8 was the paragraph 99 provision in schedule B1 which
9 deals with charging costs and expenses when
10 an administrator goes outs of office -- I was going to
11 come to my submissions on that a bit later -- but that
12 is expressed in slightly more passive terms but simply
13 finding situations in which there is imposed without
14 identifying the obligor an obligation for something to
15 be done expressed in the terms of 2.88(7), we couldn't
16 find anything that correlated.
17 LORD NEUBERGER: Is there anything that expresses and
18 imposes -- I repeat the question -- on obligation on the
19 company as opposed to the administrator?
20 MR TROWER: No, I don't think there is. I am not sure
21 I actually carried out that exercise in that form, but
22 we will check it overnight if we can find anything.
23 LORD NEUBERGER: It can be said against you that there is
24 nothing that imposes an obligation on a company, and it
25 is a bit odd if this does, as it were, particularly as

1 it doesn't do so expressly. On the other hand, you can
2 say this is unusually expressed, in the passive sense,
3 not specifically addressed to the administrator.
4 MR TROWER: My Lord, indeed.
5 LORD NEUBERGER: For what it is worth.
6 MR TROWER: My Lord, indeed, and I think I can at the very
7 least say that there is a clear argument that is open to
8 us which has real legs, which would not be open to us
9 if, as a matter of construction, there was a very
10 limited provision in relation to the role of an office
11 holder, although even then -- actually, it is in
12 a slightly different context from the one we are looking
13 at now, because we are looking here at the statutory
14 instruction -- but even then the office holder in the
15 form of the administrator acts as agent for the company,
16 so one sort of gets there by a different way.
17 LORD NEUBERGER: It is introduced by 2.68 that talks about
18 the administrator doing something, "the administrator
19 makes or proposes to make ..." so it might be said that
20 rather flavours it in suggesting this is all to do with
21 what the administrator must or must not do.
22 MR TROWER: No, I see that the focus of the rule is plainly,
23 this part of rules, is plainly how it is that there is
24 going to be a distribution of assets within
25 a distributing administration and of course there are

1 going to be elements of the way this is characterised
2 where one can see that the focus is on what it is that
3 an administrator has to do.
4 I would perfectly accept that, but that doesn't
5 really, in our submission, meet the point --
6 LORD NEUBERGER: I see.
7 MR TROWER: -- which the question is, at the end of the day,
8 whether rule 2.88(7) gives rise to something which does
9 more than constitute a statutory direction. It plainly
10 does constitute a statutory direction as a matter of
11 implication. I don't resile from that. But the
12 question is whether it does more than that. I mean one
13 of the reasons it does a little bit more than that is
14 the point that my Lord has made about the passivity of
15 the way in which it is expressed.
16 So there obviously are some categories of financial
17 obligation where this argument would not be open to us,
18 and this way of looking at the rule would not be open to
19 us, but we do respectfully submit that this is a rule
20 which does appear to be expressed in very broad terms
21 indeed, and which is expressed in terms which impose
22 both in personam obligations on people, namely the
23 office holder and the entity, and they attach the asset
24 concerned.
25 It was really at the core of Mr Wolfson's

Page 153

1 submissions that the Court of Appeal's construction
2 causes a breach of the liquidation waterfall when it
3 came to it. That was one of the core points that he
4 made. He said that, well, there is a problem with this
5 approach because what you are doing is construing rule
6 2.88(7) in a manner which interferes with the way in
7 which the statutory liquidation scheme works, once the
8 assets have passed into the hands of a liquidator.
9 We respectfully disagree with that. The reason we
10 disagree with that is that the assets which come into
11 the hands of the liquidator, to the extent that they
12 represent the surplus after payment of proved claims in
13 the administration, only come into his hands subject to
14 the statutory instruction that they be applied in
15 payment of administration statutory interest.
16 It follows that the unpaid interest creditors'
17 rights are not just in personam rights against the
18 company, they are also rights that attach to the
19 surplus.
20 A statutory instruction which restricts the use to
21 which an asset can be put until an obligation is
22 discharged by application of that asset leaves, in our
23 submission, that asset encumbered and means that it
24 never falls within the free disposition of the recipient
25 until the obligation has been discharged. That is the

Page 154

1 way we suggest one can characterise the nature of the
2 statutory instruction.
3 LORD NEUBERGER: You say it is a statutory bar on the money
4 being dealt with, effectively?
5 MR TROWER: Effectively.
6 LORD NEUBERGER: However one characterises it -- a trust or
7 whatever may not be very helpful.
8 MR TROWER: One of the points we made in our case was we
9 prefer, and respectfully commend, Lord Justice Lewison's
10 approach that, really, you don't need to try and
11 shoehorn it into some sort of private law Quistclose
12 type analysis, it is a simple question of statutory
13 construction as to what this rule does.
14 So what happens is that the rights under the rule
15 arise immediately that the surplus comes into existence
16 and they then attach to the surplus, and the attachment
17 protects the obligation to pay interest on the debts
18 proved, a liability which is discharged pro tanto by
19 payment and may be discharged pro tanto by payment
20 within the administration or pro tanto by payment once
21 the assets subject to the encumbrance come into the
22 hands of anybody else.
23 So the consequence is that the surplus only forms
24 part of the liquidation estate out of which the
25 liquidation waterfall is to be paid subject to the

Page 155

1 undischarged rights of the administration creditors to
2 receive interest.
3 LORD NEUBERGER: We have that.
4 MR TROWER: One needs to bear in mind in this context that
5 right may arise in relation to all or any part of the
6 administration creditors' entitlement statutory
7 interests, so you could have a situation where some but
8 not all of the interest had been paid prior to
9 the company moving from administration into liquidation.
10 We are positing an example at a relatively extreme end
11 of the factual scenario but it could arise, this issue,
12 where there has been a distribution in respect of
13 interest but for whatever reason there is an urgent need
14 to go into liquidation maybe because assets have not yet
15 been realised, but you still need to go into
16 liquidation, and the question then is how does this
17 statutory instruction work possibly in relation to only
18 a relatively small element of the interest obligation.
19 So the consequence of this structure is that anyone
20 who finds themselves in possession or control of assets
21 which constitute the administration surplus, which for
22 present purposes means either the administrator or the
23 liquidator, is required to give effect to the
24 application and it includes the company, it includes the
25 liquidator once he goes into office, and it is

Page 156

1 a perfectly rational policy approach which preserves and
2 protects rights once assets have been transferred to
3 another process with a different statutory scheme.
4 LORD NEUBERGER: Your point really is it is a general
5 direction. It isn't addressed to anybody and it is just
6 a bar on anyone distributing before it is applied, and
7 that is the end of it.
8 MR TROWER: Yes.
9 Just one point, before I go to paragraph 99, which
10 is the next sort of theme, I think an ultra vires issue
11 which arises in relation to the liquidation waterfall,
12 I think some form of ultra vires issue was suggested by
13 Mr Wolfson. We say there is absolutely nothing in this.
14 The rule is simply providing for how the administration
15 interest is to be paid, and that is obviously something
16 the rule making bodies or authorities have got the power
17 to do.
18 It is a rule making power that arises in the
19 administration, and it is in the administration that the
20 statutory right is granted and acquired and the
21 obligation is imposed. Merely because it has effect in
22 the liquidation waterfall is neither here nor there. So
23 it is really the ultra vires issue, we respectfully
24 suggest, has nothing in it.
25 LORD NEUBERGER: I understand.

1 MR TROWER: Next, paragraph 99, schedule B1, at page 1867,
2 that is bundle F3, tab 21, page 1867. It is said by
3 Mr Wolfson that this supports LBL's position because it
4 shows that where the legislature intends to create
5 a charge to preserve in a liquidation accrued rights --
6 and in this case it is a former administrator's costs
7 and expenses and certain other debts and liabilities --
8 it does so by express words. The words that matter are
9 paragraph 99.1, 99.2 and 99.3, and, my Lords, if you
10 would just read those, you will get the theme of the way
11 it works.
12 We say there isn't substance in this submission,
13 because obvious implication is just as good as express
14 words. Actually, rather a better way of putting is may
15 be that there are a number of different statutory
16 devices that are capable of being used which achieve
17 ultimately the same result.
18 LORD NEUBERGER: Your point is that this specifically
19 applies to a certain point, whereas the other provision
20 is a general provision which is a general application.
21 MR TROWER: It is a general application, that's right.
22 LORD NEUBERGER: I understand. Thank you.
23 MR TROWER: I think it was also said at one stage during
24 Mr Wolfson's submissions that the approach that we had
25 adopted gave rise to difficulties for liquidators

1 because they were going to have to administer assets
2 that were subject to encumbrances and work out how much
3 was claimed in administration, and so on and so forth,
4 but we respectfully suggest there is nothing in that
5 submission at all. It is often that the case that
6 liquidators receive assets that are encumbered in
7 some way by people's rights, and they then have to work
8 out as part of the process of liquidation what it is
9 that you do with the right and how extensive the right
10 is and the extent to which the relevant asset is
11 encumbered.
12 LORD NEUBERGER: It is also said that it only deals with
13 some problems, not with others.
14 MR WOLFSON: Sorry, what?
15 LORD NEUBERGER: Your solution still leaves some people out
16 in the cold.
17 MR TROWER: Yes, and, actually, conveniently, my Lord, I was
18 just about to come on to that submission, so a well
19 timed intervention because --
20 LORD NEUBERGER: Thank you.
21 MR TROWER: Yes. That didn't come out quite right.
22 We of course accept that the solution does not solve
23 the problem in its entirety because it does not have the
24 same effect as the amended rule 2.88(7), which makes
25 statutory interest payable on debts proved from the

1 commencement of the earlier of two successive insolvency
2 processes in particular context, and in particular it
3 doesn't deal with two issues: it doesn't deal with the
4 position of creditors who only prove in the later
5 liquidation -- so you have got those categories of
6 people who are not protected -- and it only applies
7 where chapter 10 of the rules applies in the first
8 place, in other words where you have a distributing
9 administration.
10 In an appropriate case, these considerations will be
11 of relevance to administrators when determining whether
12 or not it is in creditors' interests for the company to
13 move into liquidation. On one view, a partial answer is
14 better than none, but on one level one the first of
15 those differences is not something that ought to give
16 rise to too much concern as a matter of policy. What
17 one is talking about here is non-protection of the
18 rights of creditors who only prove later in the
19 liquidation. So they haven't exercised their proving
20 right at the same time as everybody else anyway.
21 Of course I accept that a coherent, properly
22 structured scheme would probably deal with that, and
23 I am not intending to submit that we have a perfect
24 solution here -- of course I am not -- but I am saying
25 that the fact that there is still an issue in relation

1 to this particular category of creditor is not a matter
2 of significant concern.
3 LORD SUMPTION: That approach assumes that the object of the
4 exercise is to navigate one's way around these
5 provisions in order to achieve a result that is not
6 provided for by any of them. If what we are actually
7 trying to do is to work out what they mean, it must be
8 perhaps a rather stronger argument than you give it
9 credit for that your submissions result in a certain
10 incoherence, a different incoherence maybe to the
11 alternative but incoherent anyway.
12 MR TROWER: Yes, well, of course, if one ends up with
13 a solution which is not a perfect solution, that gives
14 rise to the question in one's mind that maybe one has
15 not come up with the right solution. I accept that.
16 But what we are carrying out here is a comparative
17 exercise between a number of different alternative
18 constructions of the rule and asking ourselves which is
19 the construction that most accurately reflects the
20 policy that one --
21 LORD SUMPTION: There is a third possibility, isn't there,
22 which is that the rule simply does not provide for what
23 you are seeking anyway, which is the submission against
24 you? It is, in other words, a lacuna.
25 LORD NEUBERGER: Exactly. It is all very well talking about

1 policy, but you say the act -- if, on any view, there is
2 a gap, there is an oversight, then it might be said that
3 that confirms that there is an oversight, because nobody
4 can come up with the solution, along the lines we are
5 discussing at the moment, at any rate, that doesn't
6 involve an oversight. And why is it not better to give
7 the words their natural meaning? I know you say that
8 gets you home, but if it doesn't, should one bend the
9 words to achieve a small lacuna rather than
10 a large lacuna?
11 Well, policy may suggest yes, but are we really
12 dealing with policy? Are we dealing with
13 interpretation? Policy may help, but it is a bit
14 difficult to say it is consistent with policy if it
15 still leaves holes.
16 MR TROWER: Well, two points, what we are trying to do is
17 identify the legislative intent, obviously. That is the
18 underlying exercise that I am inviting my Lords to carry
19 out, and there is obviously only so far that you can go
20 in making words fit with what you think the -- obviously
21 in order to find the intent you have to understand what
22 the words mean; I accept that is the correct approach.
23 But it is perfectly open to my Lords to say: well, if
24 I look at these words in one way, they have meaning (a).
25 If I look at these words in another way they have

1 meaning (b). And meaning (b) is a meaning which,
2 although not completely satisfying what I would have
3 thought would be the consistent answer in accordance
4 with the underlying policy, it does go some way towards
5 it, so it is better than meaning (a).
6 LORD SUMPTION: The problem, or at least part of the
7 problem, is that the underlying policy is one that only
8 comes into being after this particular provision
9 was enacted.
10 MR TROWER: Yes. And the approach one takes, with respect,
11 in that context is: of course I cannot say that there
12 was any specific appreciation of what the position would
13 be where one moved from administration into liquidation,
14 because there was no such thing as a distributing
15 administration -- well, no, that is not quite
16 right, actually.
17 LORD NEUBERGER: You say we are interpreting sub-rule 7.
18 Lord Sumption's point does not quite apply. It is only
19 where we are construing the Insolvency Act.
20 MR TROWER: I realised that halfway through my point.
21 LORD NEUBERGER: Another well-timed intervention.
22 MR TROWER: It is the wrong way round. I did have
23 a submission to make on the other way round, because my
24 learned friend made submissions against us about the
25 impact of our construction of the rule on how you

1 approach section 189. And the point that my Lord Lord
2 Sumption made applies in relation to that, but it
3 doesn't apply in relation to 2.88(7).
4 So far as that 189 point is concerned, we do accept
5 that one has to look at section 189 in the same way and
6 through the same spectacles as rule 2.88(7).
7 Now, what is the effect of the fact that at the time
8 section 189 was enacted there was no possibility of
9 moving from liquidation into administration; it simply
10 did not matter. We respectfully say it doesn't actually
11 make any difference. It is perfectly coherent for
12 section 189 to have a passive, applicable-to-all policy
13 that underpins it even though the draughtsman may not
14 have had to have had in mind the fact that there was
15 going to be a move, or might be a move, from liquidation
16 to administration. There is no particular reason. And
17 if one looks at section 189 and the way in which it is
18 expressed -- it can be found in F1, behind tab 2.
19 LORD NEUBERGER: Yes.
20 MR TROWER: It talks about application for any other
21 purpose, and it imposes a neutral obligation, neutral in
22 the sense of passive. It is not on anyone in
23 particular, anyone into whose hands the surplus comes.
24 Now, I would certainly accept that if the
25 draughtsman of 189 applied his mind to who else or what

1 other person's hands it may come into, there is probable
2 not anyone else apart from the liquidator whose hands it
3 would come into as the statutory scheme then stood. But
4 that does not answer the point. The point is, is there,
5 as a matter of language, a scheme which imposes
6 something more than an in personam obligation? And we
7 would say it does. And that is what the words mean.
8 And it doesn't matter that the draughtsman can't have
9 been specifically thinking about the move from
10 liquidation back to administration, because there was no
11 such move available.
12 LORD NEUBERGER: Okay.
13 MR TROWER: There was a further submission I think I have to
14 deal with in relation to 189, which was that somehow
15 there would be a double process in the light of the way
16 section 189 works, given that rule 2.88(7) has now been
17 amended. So the submission was based on a hypothesis
18 that a company moves from liquidation into
19 administration and the new rule 2.88(7) then applies,
20 which enables the relation back of the interest
21 entitlement to the commencement of the preceding
22 liquidation, as a matter of language, of rule 2.88(7).
23 We simply say that this doesn't give rise to the
24 difficulties that my learned friend identified. As it
25 happens, to the extent that there is a surplus, after

1 payment of the debts proved in the prior liquidation,
2 liquidation interest will still be payable out of that
3 surplus under section 189.
4 The administration surplus referred to in rule
5 2.88(7) will simply be what is left after taking account
6 of the accrued rights under section 189. And the
7 amendments to rule 2.88(7) do not change the position.
8 What they do is something slightly different. What they
9 do is they simply allow late-proving creditors who are
10 only proving in a later administration, not having
11 proved in the earlier liquidation, to recover statutory
12 interest out of whatever is the surplus once the
13 interest rights which accrued to creditors who did prove
14 in the earlier liquidation have been discharged. So it
15 is not inconsistent in any way, we respectfully suggest,
16 with -- or this analysis we adopt in relation to the
17 meaning of 189 and 2.88(7), in its original form, is not
18 inconsistent in any way with the application of the new
19 rule in relation to administrations --
20 LORD NEUBERGER: Yes.
21 MR TROWER: -- that succeed a liquidation.
22 The consequence of that is that the position is now
23 better -- the position for late-proving creditors in
24 an administration following a liquidation is better than
25 the position of late-proving creditors in a liquidation

1 following an administration.
2 That is the consequence of this. But merely because
3 there is no symmetry between the situations does not
4 count against the Court of Appeal's construction.
5 I would accept that one could only get submit
6 symmetry -- which obviously parliament has not got round
7 to doing -- but that does not affect the approach to
8 construing rule 2.88(7) in its original form, and
9 section 189, which we have suggested.
10 LORD NEUBERGER: Right.
11 MR TROWER: I think, my Lord, that is all I had to say about
12 the Court of Appeal's approach to construction.
13 LORD NEUBERGER: Right. Thank you.
14 MR TROWER: Can I then deal with the first alternative case,
15 if I can put it that way, in relation to provable debt.
16 What we contend is, if we are wrong on the lacuna point
17 and we are wrong because -- on the court of Appeal's
18 construction, and we are wrong because the
19 administration surplus is not encumbered with the
20 statutory construction that interest on the proved debts
21 be paid out of the surplus, then there is still
22 a liability of the company to effect the application of
23 the surplus in the manner provided for by rule 2.88(7),
24 which is not discharged simply because it goes into
25 liquidation. That is the first stage in the analysis.

1 Stage 2 is that that liability is one to which the
2 company is subject on the date it goes into liquidation.
3 Stage 2. And the consequence of that is that the
4 liability is a provable debt within rule 13.12.1(a).
5 Now, just to get one point of the way to start with.
6 It is common ground between the parties -- and one can
7 see that from Mr Wolfson's case at paragraph 53 -- that
8 for a debt to be provable in a liquidation of LBIE
9 following its administration, the cut-off date is the
10 commencement of the liquidation. So that is the date
11 you are looking at to see how 13.12.1 works.
12 The change in law, to make the cut-off date the
13 earlier commencement of the administration, does not
14 apply in the present case. And that was decided by
15 Mr Justice Briggs, actually, at first instance in
16 Nortel, at 2329 of the bundle.
17 We say the starting point is, if one simply were to
18 stop there, it would be clear that on the face of it the
19 accrued right to interest during administration
20 is provable.
21 Now, what LBL does is they rely on the effect of
22 rule 4.93(1) and 13.12.(1)(c) to contend that it is not.
23 4.93(1) is at bundle F3, page 1957.
24 LORD NEUBERGER: Thank you, yes.
25 MR TROWER: 13.12(1)(c) is F1, tab 6, page 1184.

1 LORD NEUBERGER: Yes.
2 MR TROWER: In essence, it says the liability is not
3 provable because the only interest that is provable in
4 a liquidation is that described in 13.12.(1)(c), ie the
5 interest that is referred to in rule 4.93(1) where
6 a debt proved in the liquidation bears interest. They
7 then say, of course, that the unpaid administration
8 interest doesn't fall within 4.93(1) because it is
9 payable in respect of the period after the company went
10 into administration and is therefore excluded by the
11 words of the rule.
12 Now, we say that the true character of what is being
13 proved in LBIE's liquidation is simply a debt within the
14 meaning of 13.12(1)(a), which is not to be treated as
15 interest capable of being excluded by operation of
16 rule 4.93(1). And the reason we say that is that the
17 characteristics of the interest liability which is
18 contemplated by 13.12(1)(c) require it to be interest
19 which is borne on a debt proved in the liquidation,
20 because that is what 4.93(1) says.
21 LORD NEUBERGER: But this argument tracks, initially, the
22 argument you have been running, which is that the
23 company owes this money to the contingent creditor.
24 MR TROWER: Yes. I have to establish there is a liability.
25 LORD NEUBERGER: You have to establish there is a liability

1 on the company.
2 MR TROWER: On the company, yes, because if there is no
3 liability on the company -- and we say there is, for all
4 the reasons I have already given -- I don't fall -- it
5 is not a debt of the company's at all.
6 LORD NEUBERGER: If you are right that far but you are wrong
7 on the rest of your first argument, then you fall back
8 on this and say you fall within 13.12(1)(a). Because
9 this was a liability of the company and it was
10 ex hypothesi subject to it the date it went into
11 liquidation.
12 MR TROWER: Indeed. And we say the construction of
13 13.12(1)(c) and 4.93(1) that has been adopted by
14 Mr Wolfson simply does not run. And the reason it does
15 not run is because this is not to be treated as interest
16 borne on the debt proved in the liquidation.
17 LORD NEUBERGER: You say -- it really picks up a point
18 I think Lord Sumption put to Mr Wolfson. I am putting
19 it a different way, but you cannot use paragraph (c) to
20 cut down paragraph (a). It does not say: you cannot
21 claim any other interest that is due as a debt.
22 MR TROWER: No.
23 LORD SUMPTION: But are you also submitting that the
24 reference to 4.93(1) means only debts which, immediately
25 before the liquidation, carried interests,

1 ie effectively contractual interest only? Is that
2 what --
3 MR TROWER: I wouldn't limit it to contractual interest, but
4 I would say that you had to identify a debt, something
5 called a debt proved in the liquidation, on which the
6 interest could properly be said to be borne.
7 LORD SUMPTION: Are you submitting that the debt has to
8 carry the right to interest immediately before the
9 liquidation? On some basis or other, whether
10 contractual or not? I mean, as I understood it, what
11 you just said was, you were trying to cut down the
12 effect of 4.93 so as to reduce the measure of
13 duplication with your submission of the meaning of (a).
14 Perhaps I am attributing to you more than you have
15 actually said.
16 MR TROWER: I think my Lord has, but I am just cogitating,
17 if I may, whether that way of putting it is not a good
18 one. I mean, the submission I had made was --
19 LORD NEUBERGER: Is that Lord Sumption's submission or not?
20 MR TROWER: The submission I had made was that one has to
21 characterise that which we are seeking to prove. And
22 that which we are seeking to prove, characterised,
23 cannot be described as interest --
24 LORD NEUBERGER: In the liquidation. The point is, 4.93
25 only applies in a case where a debt proved in the

1 liquidation bears interest.
2 MR TROWER: Yes. And we are not in that --
3 LORD SUMPTION: Bears interest at the time it becomes
4 a debt, ie before the liquidation.
5 MR TROWER: Yes. Yes.
6 LORD NEUBERGER: And here, the interest being claimed, you
7 say, if you are right on your construction of 2.88(7),
8 that there is a sum due; it happens to be interest but
9 it cannot be described as interest falling within the
10 ambit of 4.93.
11 MR TROWER: My Lord, indeed.
12 LORD NEUBERGER: It happens to be interest but it is a debt,
13 if your construction is right.
14 MR TROWER: If we are right on that.
15 LORD NEUBERGER: 13.12(1)(c) just has nothing to do with it.
16 MR TROWER: Nothing to do with it.
17 There was a reason why it was that Mr Wolfson
18 submitted that 4.93 did have something to do with it,
19 and therefore 13.12(1)(c), because he relied on rule
20 4.73(8), which is to be found behind tab 45 of tab 3.
21 LORD NEUBERGER: Yes, that's right.
22 MR TROWER: What we submit about that is, those words simply
23 do not bear the weight which Mr Wolfson seeks to put on
24 them. What 4.73(8) is plainly trying to do is ensure
25 that a creditor does not have to prove again when he has

1 already proved in an antecedent administration. It is
2 as simple as that. That is what rule 4.73(8) is
3 concerned with. So you are deemed to have proved in
4 a previous administration.
5 It doesn't convert, for a completely different
6 purpose, the qualitative nature of a debt into something
7 that is different from that which it would otherwise be.
8 The upshot of all of this is that we say it is
9 a misuse of language to say that the original and, by
10 necessity, fully discharged debt bears interest in any
11 meaningful sense as far as rule 4.93 is concerned. It
12 just simply does not. That is causing or putting
13 together a combination of the rules in a manner that is
14 wholly artificial. And the bottom line is that we
15 submit that the reason it is wholly artificial and
16 doesn't work is because 4.73(8) is being sought to be
17 given more meaning than it can properly bear.
18 LORD REED: Can I ask -- I may be missing something. At the
19 moment I am wondering why in 13.12, if one reads 1(a)
20 the way you are asking us to read it, why 1(c) is there
21 at all? Would interest falling within 1(c) not be
22 covered by 1(a)?
23 MR TROWER: Interest falling within ... Yes, it might be.
24 Well, accrued interest rights certainly fall within the
25 concept of a debt or liability to which the company is

1 subject, yes. Yes, I accept that.
2 LORD SUMPTION: As are all the rights that you say come
3 within 4.93.
4 MR TROWER: Yes. Which is why at the end of the day we say
5 that the most that can be got out of the combination of
6 13.12(1)(c) and 4.93(1) is that, to the extent that
7 4.93(1) is covering the ground in relation to a category
8 of interest, it is dealt with in 13.12(1)(c), but only
9 to that extent. 4.93 does not cover the ground in
10 relation to the interests that we are concerned with, or
11 the debt that we are concerned with here.
12 LORD REED: I appreciate that. It just strikes me that
13 effectively accrued interest at the date of liquidation,
14 which is what is covered by 1(c), would necessarily fall
15 under 1(a) in any event, if one reads it --
16 MR TROWER: Yes. I see my Lord's point on that.
17 I mean, just to mention, just so we don't lose sight
18 of it, Mr Wolfson also said that the debt flowing from
19 the non-payment of the interest out of surplus in
20 accordance with rule 2.88(7) is not provable because it
21 is not a liability of LBIE's at all, and all those
22 points that we make in relation to why it is a liability
23 of LBIE's -- which I am not going to repeat --
24 LORD NEUBERGER: That is why I say, part of the argument --
25 you have a common argument up to a certain point, and

1 for the two points, and then the two points bifurcate.
2 Okay.
3 MR TROWER: My Lord, can I move next, then, on to our second
4 alternative case, which is declaration 5, explaining why
5 if the judge was right in making declaration 4 he was
6 also right to make declaration 5 to say it is
7 a non-provable claim. Our submission is relatively
8 short on this.
9 What the judge ordered in paragraph 5 -- and I think
10 it probably is just worth turning it up to make sure we
11 have it right. It is in bundle D and it is behind
12 tab 4.
13 LORD SUMPTION: Bundle D is that?
14 MR TROWER: Bundle D, tab 4, page 600, declaration at (v).
15 The effect of that declaration is that creditors
16 whose debts would, but for the administration, have
17 borne interest during the relevant period will be
18 remitted to their rights such as to find a non-provable
19 claim in LBIE's winding up.
20 LORD NEUBERGER: So a non-provable claim, payable after --
21 MR TROWER: Payable after everything else, derived from the
22 original contractual or judgment right.
23 LORD NEUBERGER: Yes.
24 MR TROWER: Now, the starting principle which underpins the
25 declaration is that the process of winding up doesn't

1 affect the underlying debts, and it operates simply as
2 a process of enforcement, which leaves the underlying
3 debts untouched. And the crispest articulation of the
4 principle is in Wight v Eckhardt, which I know my Lords
5 have seen and there have been submissions made on those
6 principles. It is paragraph 27 of
7 Lord Hoffmann's decision.
8 LORD NEUBERGER: This third way of putting it, the second
9 alternative way of putting it, we also have to accept
10 the argument that there is then an obligation on the
11 company. All three arguments.
12 MR TROWER: All three arguments depend on that.
13 LORD NEUBERGER: Right.
14 MR TROWER: Now, of course we accept that there are
15 circumstances in which the statutory scheme can affect
16 the underlying liability. So one way of putting it is
17 that once the scheme is imposed, the nature of the right
18 will not necessarily be the same as the original
19 contractual right. And that is one way of thinking
20 about it, but in each case one has to look at what it is
21 that has been affected by the scheme and how it is that
22 the scheme has affected the thing that is affected.
23 The statute, in other words, may compel some form of
24 adjustment of the underlying contractual right. The
25 reason I put it like that is because what we are looking

1 at here is the survival, we say, of a non-provable claim
2 in the context of an interest entitlement.
3 Now, there is no reason to consider, we will submit,
4 that the legislation is designed to interfere with
5 existing rights to any greater extent than is necessary
6 to enable the purposes of the scheme to be fully
7 carried out.
8 I am not going to develop elaborate submissions in
9 relation to this because I know it is an area Mr Dicker
10 is going to be dealing with in the context of currency
11 conversion claims, but I am going to just assert it in
12 those fairly broad terms.
13 Now, we accept that the provisions of the insolvency
14 code which deal with interest are intended to provide
15 a complete answer to the interest entitlements with
16 which it engages. But that qualification is important.
17 The reason Mr Justice David Richards addressed this
18 point in relation to what it was that the interest
19 aspect elements of the code were intended, or the impact
20 of the application of the interest elements of the code
21 in the Waterfall IIA judgment, in a passage that we cite
22 in paragraph 104 of our case -- and can I just take
23 my Lords to paragraph 104 of our case. It is volume C.
24 LORD NEUBERGER: Yes.
25 MR TROWER: The passage which I will just invite my Lords to

1 read is in 104(2).
2 LORD NEUBERGER: Page.
3 MR TROWER: Page 387. (Pause).
4 LORD NEUBERGER: Yes.
5 MR TROWER: Now, the way we put it is, in the case of this
6 particular issue, if the judge was right on
7 declaration 5 and if the liability is not provable, the
8 scheme, taken as a whole, simply does not deal at all
9 with interest accruing between the commencement of the
10 administration and the commencement of any subsequent
11 liquidation where that is what has happened. And if
12 that is the case, there is no reason to conclude that
13 the legislature intended to provide for the underlying
14 right to be replaced.
15 In effect, and in the circumstances applicable, it
16 would have amounted to something akin to
17 an expropriation of the interest entitlement without any
18 recompense. It would run flatly contrary to the
19 underlying principle that where there is a surplus the
20 fact that a creditor has been kept out of his money
21 based on solvency should be compensated for in some way.
22 And what we are of course talking about here is
23 a situation where there would inevitably arise, as
24 a matter of legislative intent, the idea that you don't
25 get this interest entitlement to which you would

1 otherwise be entitled under your contract -- this is the
2 context in which we are arguing it: you don't get your
3 interest entitlement at all in this context.
4 LORD NEUBERGER: I understand.
5 MR TROWER: Now --
6 LORD NEUBERGER: Your point is, you say basically you have
7 this contractual claim given to you in the statute --
8 "contractual" is the wrong word. You have this right,
9 and your first two arguments fail, then it would fall
10 into being a non-provable. And why not?
11 MR TROWER: Yes. If one goes right back to the sort of
12 Humber Ironworks basic principle of going back to
13 contractual rights, it is exactly the sort of thing that
14 you would expect to survive in circumstances where the
15 scheme does not engage with the point at all.
16 In a sense, I am not sure -- my Lord has articulated
17 the point much more clearly than I have, and I can't
18 really put it any other way: that is the point, and it
19 is hopefully relatively shortly but clearly made in our
20 case in the same section where the citation from the
21 Waterfall judgment is dealt with.
22 My Lords, that is the argument in relation to
23 lacuna. The next argument -- and I am sorry my Lords
24 are having to hear me in succession, issue after issue,
25 without any break -- is the section 74 'extent and

1 scope' point.
2 Now, this is paragraph 6 of the judge's order, where
3 he directed that the obligation of members to contribute
4 under section 74 extends to provide for proved debts,
5 statutory interest on those debts such as is payable
6 under section 189, and non-provable liabilities.
7 So what happened was that the Court of Appeal
8 dismissed the appeal against declaration 6 insofar as 2
9 and 3 are concerned. There is an appeal by the
10 appellants, who consider that the members' liability to
11 contribute does not extend to provide for statutory
12 interest or non-provable debts.
13 The way I thought I would start my submissions on
14 this aspect of the case is just to give my Lords a very
15 short background to the statutory scheme as it is
16 reflected in section 74.
17 LORD NEUBERGER: We are just checking. In terms of time,
18 you have given yourself to 1.00. But I should remind
19 you, I think, if my calculations are correct, if you
20 don't perform as Mr Miles did and even more as Mr Isaacs
21 did, and take up your whole time, then you should finish
22 at 11.45. But I would hope that you will follow their
23 example. Mr Wolfson only slightly exceeded his time
24 because we invited him to deal with the point he was
25 going to deal with in reply.

1 MR TROWER: My Lord, we are on time. I suspect I will be
2 slightly under the amount of time that was given to me,
3 if that helps.
4 LORD NEUBERGER: That is what I was encouraging you to say
5 and, even more importantly, to do.
6 MR TROWER: I certainly took that.
7 LORD NEUBERGER: I thought to spring it on you nearer the
8 end point would be slightly unfair, so I did it now.
9 MR TROWER: My Lord, the starting point is to look at the
10 context in which we have to construe section 74, because
11 although declaration 6 turns on the proper construction
12 of section 74 in conjunction, amongst other things, with
13 section 189, the issue in dispute does really require
14 an outline understanding of how the relationship between
15 the company and its members has developed over time.
16 I am not going to give my Lords a dissertation in
17 relation to the corporate law in that sense, but there
18 are two cases we need to look at very quickly. One is
19 Oakes v Turquand and the other is Webb v Whiffin. And
20 the reason that my Lords need to just consider that is
21 because they help to explain how it is that one needs to
22 approach section 74, which is the direct statutory
23 successor to a very similar provision in the 1962 act,
24 on the issue of the extent of the liabilities with which
25 section 74 is concerned when one is asking oneself the

1 question: well, what are the debts and liabilities which
2 are intended to be passed on to the members pursuant to
3 section 74?
4 Now, Lord Justice Briggs in his judgment referred to
5 Oakes v Turquand at paragraph 182 --
6 LORD NEUBERGER: Thank you. Yes.
7 MR TROWER: If my Lords would just simply quickly turn that
8 up. It is behind tab 3 of the bundle.
9 LORD NEUBERGER: 575, yes.
10 MR TROWER: Yes. Then he referred to Webb v Whiffin at
11 paragraph 183.
12 LORD NEUBERGER: Yes.
13 MR TROWER: Now, what one gets from those two cases is that
14 what the 1862 act affected was the mode in which
15 creditors were to seek their remedy. In other words,
16 you now had to seek your remedy against the company and
17 could not proceed against the members directly. What it
18 did not affect was the extent or nature of the
19 liabilities to which the members were required
20 to contribute.
21 So the underlying submission that we make in
22 relation to this particular line of authority, and the
23 reason I am taking my Lords to them -- albeit, I hope,
24 very quickly -- is that it is important to understand
25 that the extent and nature to which members were

1 previously liable before unlimited liability came in in
2 1962 continued to be --
3 LORD NEUBERGER: Limited liability.
4 MR TROWER: Sorry, limited liability came in in 1962,
5 continued to be debts and liabilities the nature and
6 extent of which are caught by the concepts which
7 underpin the section 74 statutory predecessor and
8 section 74 itself.
9 Now, so far as Oakes v Turquand was concerned, can
10 I just take my Lords to one passage in the judgment of
11 Lord Carnwath. It is to be found at F5, tab 20,
12 page 2980. The passage is at page 364 of the report,
13 starting at the beginning of the paragraph, saying:
14 "But if this change in the mode ..."
15 Now, the short submission that we make on the back
16 of that is that whilst the 1862 act introduced the
17 principle of limited liability and altered the mode in
18 which a company's creditor could seek his remedy,
19 substituting a winding up of the company for execution
20 against individual shareholders, shareholders were
21 otherwise liable to the full extent of
22 previous liabilities.
23 LORD SUMPTION: Is this an analysis that would survive
24 Salomon's case(?) 15 years later.
25 MR TROWER: My Lord, I am sorry, I didn't catch

1 the question.
2 LORD SUMPTION: Is this analysis in the paragraph you are
3 taking us to consistent with the famous decision in
4 Salomon's case?
5 MR TROWER: I hadn't thought it was inconsistent, my Lord,
6 but I am ready to stand corrected, obviously.
7 LORD SUMPTION: It is a question.
8 MR TROWER: The answer is --
9 LORD SUMPTION: It appears to envisage a continuing
10 liability by shareholders of exactly the same nature as
11 existed -- would have applied, for example, to
12 a partnership. With just a limit over it. They are
13 totally different.
14 MR TROWER: But what it does is it affects the mechanism by
15 which -- I think the point that is being made, which is
16 not inconsistent with Salomon at all, is that you have
17 to identify that which constitutes a liability in the
18 form of something for which -- sorry, I am just turning
19 back to the relevant paragraph because I turned it over.
20 (Pause).
21 Yes, plainly the creditors can only exercise their
22 rights of execution through the collective process which
23 is administered when the company goes into a process,
24 and the liability arises in that context. That is what
25 he means by the change in the mode in which the creditor

1 is to seek his remedy.
2 It may be worth going back to the passage at
3 page 3017, two pages back, so that one can see the
4 context in which Lord Carnwath is saying what he says at
5 page 364. It is the paragraph beginning "There are
6 important differences ..."
7 One gets at something similar from the top of the
8 paragraph, "It is obvious that ..." on the next page,
9 363. So I submit that the context in which
10 Lord Carnwath is saying what he is saying on 364 is
11 clearly a context in which he fully appreciates that the
12 mode has changed. But what this paragraph represents is
13 a focus on the idea of a simple shift in mode, without
14 any effect on the nature or extent of the
15 underlying liability.
16 LORD SUMPTION: Or the persons under that liability.
17 MR TROWER: Well, it affects the person directly under that
18 liability because of the introduction of the separate
19 corporate entity with limited liability, but it doesn't
20 affect the nature or extent of that which is sought to
21 be laid off against the members.
22 LORD SUMPTION: Because the concept of limited liability is
23 actually a concept of no liability. Amongst the
24 shareholders, yes. Their liability is not limited; it
25 doesn't exist.

1 MR TROWER: Although, of course, section 74 does not express
2 it in quite those terms, because section 74 says, "You
3 are liable unless ..."
4 LORD SUMPTION: Yes, but it cannot possibly mean that.
5 MR TROWER: Well, it may give some guidance, we would
6 suggest, to the approach one needs take to construction
7 of section 74 anyway. The starting point is that
8 everybody is liable. You are liable to the full amount.
9 But you are then limited to the extent to which that
10 liability to the full amount is something that attaches
11 to you. But that statutory construct does give some
12 guidance, we respectfully suggest, to the way in which
13 one ought to approach how far the liabilities that are
14 covered by section 74 ought to go.
15 It remains, of course, the case, as I am sure
16 my Lords are only too aware, that LBIE is an unlimited
17 liability company, so LBIE is liable to the full
18 extant -- not LBIE, sorry, the members are liable to the
19 full extent of LBIE's liabilities in any event.
20 So we submit that liabilities would always have
21 included the non-provable liability of the company to
22 pay contractual interest on proved debts in respect of
23 the period since the company went into liquidation, or
24 indeed any other non-provable liability that might have
25 been extant under the code. And as my Lords have heard

1 on a number of different occasions in a different
2 contexts, the extent to which liabilities of an entity
3 have continued or have become provable over time
4 has expanded. But there have always been a significant
5 number of liabilities, certainly back in the early days,
6 which were not actually provable.
7 Just for my Lords' note, we do have the bundles
8 section 38 of the 1962 act, which the House of Lords was
9 considering in Oakes v Turquand. It is at F2, tab 6,
10 page 1739. It is drafted differently, but one can see
11 how it is the statutory predecessor of section 74 in all
12 material respects.
13 Also of direct relevance on this particular point is
14 Webb v Whiffin. Perhaps I can just take my Lords
15 quickly to that. I am conscious of the time.
16 LORD CLARKE: You have two quotations of that in your case.
17 MR TROWER: We have. I am grateful to my Lord for that. It
18 is to be found in the bundles at F1/22/1583. Can I just
19 say this about it: the case was about the obligations of
20 past members, and that was the way in which the
21 liabilities of the members concerned were limited. And
22 the substantive issue was whether the past members on
23 the B-list could be required to contribute to the assets
24 for payment of the debts after the time they had ceased
25 to be members.

1 Now, in that context, two of their Lordships, Lord
2 Haverly and Lord Chelmsford, made clear that the
3 contributions of the members to the assets of the
4 company are to be applied in accordance with the
5 statutory scheme. That is a slightly separate point.
6 But for present purposes what matters is the passages at
7 pages 718 and 723. I think they are the ones in our
8 case, but to turn up the bundle it is F1, 22, pages 1590
9 and 1595.
10 The words that I simply commend to my Lords are:
11 "These directions are in the largest and most
12 general terms."
13 As far as Lord Haverly is concerned.
14 And Lord Chelmsford, the last sentence of the quote:
15 "Nothing can be more general than these words,
16 embracing as they do ...(reading to the words)... all
17 liable to contribute to the assets of the company, not
18 to be applied differently with reference ...(reading to
19 the words)... to the payment generally of the debts and
20 liabilities of the company."
21 That is a consistent theme that one gets from these
22 two cases in the early years, and we say -- it carries
23 on through -- there is nothing to indicate that in any
24 way section 74 ought to be construed or treated
25 differently from the original concept which underpinned

1 the imposition or the continuation of the liability of
2 members when the concept of limited liability was first
3 introduced in the 1862 act.
4 LORD NEUBERGER: Yes.
5 We are sitting until 4.15.
6 MR TROWER: Sorry, my Lord, I will carry on then. I am
7 sorry, I thought it was 4.00. I mistimed it.
8 Can I then move on to a pure construction submission
9 in relation to section 74 itself.
10 Now, the structure of the section -- and section 74
11 is a section that we have in bundle F1 behind tab 1. It
12 is the very first, page 1174.
13 LORD NEUBERGER: Yes.
14 MR TROWER: This is a point that I mentioned briefly just
15 now. The structure of the section is all allowable for
16 the full amount, but then there is the carve-out of
17 exceptions to the general liability, which are obviously
18 much more significant from a practical point of view
19 than the generality of the liability in the first place.
20 So what do the words "debts and liabilities" mean?
21 And for that one goes to rule 13.12, is our
22 first submission.
23 LORD NEUBERGER: Back to 13.12.
24 MR TROWER: Actually it is in the same bundle.
25 LORD NEUBERGER: Tab 6, yes.

1 MR TROWER: It is behind tab 6, so one can see it there.
2 The way that this works is it defines debt in
3 relation to the winding up of a company, which you get
4 at the beginning of sub-rule (1).
5 LORD NEUBERGER: We have seen this.
6 MR TROWER: Then the opening words of 4:
7 "In any provision of the act or rules about
8 winding up."
9 It defines liability.
10 LORD NEUBERGER: Yes.
11 LORD REED: You cannot really look to the subordinate
12 legislation, can you, for the definition of the language
13 in the primary legislation?
14 MR TROWER: Well, there is a rule-making power in
15 section 411.
16 LORD NEUBERGER: Does the rule-making power say you can
17 construe the rules together 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?
20 MR TROWER: Well, perhaps I can take the submission in
21 stages. We do say that it is clear that the draughtsman
22 of the rules certainly intended that this definition
23 should have application in the act.
24 Now, that is not a complete answer, I realise, to
25 my Lord's point. I understand that, but it is pretty

1 obvious, that, because it says "in any provision of
2 the act".
3 LORD NEUBERGER: Yes.
4 MR TROWER: The next question is whether the rule-making
5 power itself extends sufficiently broadly to enable you
6 to construe the rules in this way. But --
7 LORD NEUBERGER: Are we construing the act or are we
8 construing the rule?
9 MR TROWER: You are construing the act.
10 LORD NEUBERGER: Because Lord Reed's point then stands.
11 LORD SUMPTION: Subject to the terms of the rule-making
12 powers, which is in 411. Do we have that?
13 MR TROWER: I am not sure whether we have it in the bundles.
14 LORD NEUBERGER: I remember that rather unusually there was
15 a specific provision saying that you could construe the
16 act together with the rules made under it. I don't
17 recall anything like that in the Insolvency Act but --
18 MR TROWER: I don't think there is anything.
19 LORD NEUBERGER: It is a very unusual provision but ...
20 MR TROWER: I am told they are in --
21 LORD NEUBERGER: F2.
22 MR TROWER: -- F2. Yes, that takes one forward to
23 the schedule.
24 LORD NEUBERGER: 411 is tab 48 at page 1810, yes.
25 MR TROWER: Yes. It takes you to schedule 8 to the act.

1 I don't think we have schedule 8 to the act in the
2 bundles. I am not sure --
3 LORD NEUBERGER: There is nothing saying that you can use
4 the rules to construe the act, or the rules and the act
5 must be construed together or anything.
6 LORD SUMPTION: It may not matter because, speaking for
7 myself, I would have thought that 13.12(4) states the
8 obvious anyway.
9 LORD NEUBERGER: That is why I asked whether we are
10 construing the act or the rule. But you say we are
11 construing section 74.
12 MR TROWER: I am just turning up 27.
13 LORD NEUBERGER: Can we come back to this aspect?
14 MR TROWER: My Lord, I think I had better.
15 LORD NEUBERGER: You develop your argument and park the
16 point about interpretation for the moment. I don't know
17 whether you can use the rule, because we are
18 interrupting your flow.
19 MR TROWER: Yes, perhaps I can take it this far. I am not,
20 I am afraid, going to finish this evening, even on this
21 particular part of the case. So I think I will come
22 back to that particular point tomorrow morning if I may.
23 LORD NEUBERGER: Your point is -- looking at section 74 and
24 13.12, what was your point?
25 MR MILES: On the assumption that this is a legitimate

1 exercise to carry out, and one applies the wording of
2 13.12(1), the first point is that the word "debt" is
3 obviously, as my Lords have heard submissions on
4 already, primarily concerned with the meaning of
5 provable debts. To be provable, a claim must be a debt.
6 But there is still something that can be a debt within
7 the meaning of the rule but then excluded from proof by
8 some other provision.
9 So it does go slightly wider than that, but from
10 a timing point of view it is the critical definition
11 that is used for provability when you are distinguishing
12 between 13.12(1)(a) and 13.12(1)(b). So that is the
13 position in relation to debt. Just for my Lords' notes,
14 in Nortel, my Lord Lord Neuberger gave guidance as to
15 the scope of rule 13.12(1)(a) at paragraphs 68 to 71 and
16 the scope of 13.12(1(b) at paragraphs 72 to 86 of
17 your judgment.
18 Now, 13.12(1)(a), as we know, is concerned with
19 liabilities to which the company is subject at the date,
20 and 13.12(1)(b) is concerned with the liabilities to
21 which it may become subject thereafter. That is debt.
22 As far as "liabilities" is concerned, 13.12(4) deals
23 with this. The definition of "liabilities" is broader
24 than that of "debts", in the sense that it has no
25 temporal limitation, such as it is contained in

1 13.12(1). The consequence of that, we respectfully
2 suggest, is that the word "liability" is unconnected to
3 what is provable. On its face, it plainly encompasses
4 statutory interest and non-provable liabilities, as
5 a matter of the language and construction of this
6 particular part of the rules.
7 Furthermore, 13.12(3) introduces a very expansive
8 definition to debts or liabilities, making clear that it
9 is immaterial whether they are "present or future,
10 certain or contingent, fixed or liquidated, capable of
11 being ascertained by fixed rules or as a matter of
12 opinion". And it is hard to think of any valid claim
13 against the company which would not give rise to
14 a liability, we would respectfully suggest, within the
15 meaning of 13.12(4) as expanded by 13.12(3).
16 The point that we make -- which is made irrespective
17 of the point that my Lord Lord Reed made about whether
18 or not the rules can provide for a definition in
19 relation to the act -- irrespective of that point, it is
20 entirely consistent, this very wide definition, with the
21 approach that one sees adopted in Oakes v Turquand and
22 Webb v Whiffin. So one has a situation where the case
23 law background focuses on a very expansive concept of
24 what constitutes a liability which is capable of being
25 passed on to the members, pursuant to what was then

1 section 38 and is now section 74, and that is then
2 followed through to a place in the rules where one sees
3 it again appear in a particular statutory context.
4 I will come back to the point about what you are
5 actually construing. But we respectfully suggest that
6 in any event this shows a consistent theme which the
7 legislature have adopted when using the phrase "Debts
8 and liabilities" within the insolvency code generally
9 which is specifically designed to have a very
10 expansive meaning.
11 Can I also make the submission that the words "debts
12 and liabilities" appear to contemplate two different
13 things. Now, there are a number of possible
14 distinctions that one could think of which might, in
15 different private law contexts, be an accurate
16 reflection of the distinction between a debt and
17 a liability.
18 LORD SUMPTION: A liability includes a debt.
19 MR TROWER: Yes, nearly always. I agree with that, my Lord.
20 I would certainly accept that.
21 And normally a liability is something which has
22 quite an expansive meaning. So --
23 LORD CLARKE: Section 38 of the 1862 act included the
24 expression "debts and liabilities".
25 MR TROWER: Yes, my Lord, it did.

1 LORD CLARKE: So that is the expression which is being
2 construed in paragraphs 124 and 125, but I don't think
3 you include the debts and liabilities point deriving
4 from the 1862 act.
5 MR TROWER: No. I have just said yes, but I have a nasty
6 feeling I should not have said yes without checking.
7 LORD SUMPTION: The earlier(?) legislation refers to debts.
8 MR TROWER: Yes, it is debts and liabilities. One gets it
9 at 1739.
10 It might be just worth turning up 1739, which is in
11 bundle F2 and is to be found behind tab 6, because, just
12 reading through it, 1739 to 1740, one can see straight
13 away the close correlation between both its structure
14 and the terminology used with the form of section 74,
15 which we have in bundle F1 behind tab 1.
16 LORD NEUBERGER: Debts and liabilities are not defined in
17 the Insolvency Act?
18 MR TROWER: No, they are not. Clearly -- and I quite take
19 my Lord Lord Reed's point, and we will have a look at
20 it -- but it looks as if people thought that you went to
21 the rules to find what it meant. But I will develop
22 a submission on that tomorrow morning if I may.
23 LORD NEUBERGER: Very well.
24 MR TROWER: My Lord, I think --
25 LORD NEUBERGER: We have gone to 4.15.

1 MR TROWER: We have gone to 4.15, and I think I can say I am
2 well up on time.
3 LORD NEUBERGER: Good.
4 We will resume again, then, I think it is
5 10.00 tomorrow. Thank you very much.
6 Thank you, Mr Trower.
7 Court is now adjourned.
8 (4.16 pm)
9 (The hearing adjourned until 10.00 am the following day)
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20
21
22
23
24
25

1 INDEX
2

3 Submissions by MR WOLFSON 1
(continued)
4
Submissions by MR MILES 17
5
Submissions by MR ISAACS 34
6
Submissions by MR TROWER 76
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 197

A

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

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

asking 31:25 53:24 160:18 172:20 180:25
asks 13:1
aspect 79:3 100:24 100:25 101:13 102:20,20,21 176:19 179:14 191:13
aspects 85:1 104:1
assert 176:11
asserting 125:7
assessing 87:5 90:22 91:5
asset 20:8,10 27:23 27:25 28:23,25 29:20 30:8 37:23 38:16 49:25 50:2 50:23 55:13 57:10 57:12 63:8 152:23 153:21,22,23 158:10
assets 6:22,24 19:6 25:17 29:17 31:18 35:20 40:25,25 41:3 42:3 48:19 50:17 55:23 56:20 56:22,24 58:13 63:16 64:11,13 97:21 98:6 100:22 102:18 110:21,22 110:23,24 111:1,2 111:5 113:1,23 115:13,25 116:1 117:6,9 134:15 151:24 153:8,10 154:21 155:14,20 156:2 158:1,6 186:23 187:3,17
assign 55:11,16
assignee 55:18
assignment 55:7
assist 7:6 17:16 34:6 106:3
assistance 75:22 101:12
assisted 7:9
assume 32:20
assumes 72:8 160:3
assuming 6:21 66:23
assumption 75:5 127:3 191:25
assumptions 31:23
assure 75:25
attach 152:23 153:18 154:16
attaches 185:10
attachment 154:16
attempt 79:15,21 79:23 143:2
attention 92:24
attributed 59:6 62:1 75:3
attributing 170:14
authorities 64:15 156:16
authority 16:11 54:24 70:17 181:22
availability 138:3
available 2:2,6,8,19 6:24 29:1 51:8 72:4,5,10 102:18 128:3,13 133:12 133:14,15 134:15 135:11 145:2 164:11
avoid 88:13
avoiding 128:9
aware 95:4 185:16
Ayerst 110:25 115:11

B

b 11:16 37:9 162:1 162:1
B-list 186:23
B1 57:24 104:13 111:17 150:8 157:1
back 13:1 17:21 20:15 22:19 24:25 29:7,8 31:7 45:4 48:23 80:8,12 86:1 98:11 99:13 100:7 117:2 136:10 141:13 145:15 164:10,20 169:7 178:11,12 182:15 183:19 184:2,3 186:5 188:23 191:13,22 194:4
background 56:3 84:17 103:8 144:24 179:15 193:23
bad 9:8
balance 44:7 96:25
balls 143:12
Bank 56:5
bankrupt 65:21 68:25 106:7
bankruptcy 42:13 65:6,17 68:6 86:5 102:11 105:23 106:4
bankrupts 65:4,4
Baptist 38:6
bar 130:17 135:23 141:19 154:3 156:6
barred 89:1,14,23 129:10 137:13 143:3
bars 89:17 93:11
based 9:13 14:5 137:7 138:17,18 164:17 177:21
basic 110:20 134:18 178:12
basically 42:22 178:6
basis 3:4 4:24 6:9 9:11 16:1 29:6 32:17 55:12 94:24 123:19,22 124:11 170:9
battle 37:5
battleground 37:2 37:4
bear 71:6 74:23 86:18 87:13 89:6 112:7 155:4 171:23 172:17
bears 10:19 168:6 171:1,3 172:10
beginning 3:20 45:24 82:15 134:6 148:25 149:2 182:13 184:5 189:4
begins 46:11
Belmont 115:16
bend 161:8
benefit 26:18 57:15 58:17 72:14 129:4
best 67:1 95:17 145:3
better 75:10 109:16 124:21 157:14 159:14 161:6 162:5 165:23,24 191:14
beyond 49:24 56:7
bifurcate 174:1
binding 148:17
bit 10:22 26:22 33:4 77:8 98:1 105:24 106:22 107:20 123:5 131:19 137:17,22 141:21 142:17,21 143:21 146:20 150:11,25 152:13 161:13
bite 141:12
bites 141:9
bits 48:2
bizarre 57:25
black 48:14 145:21
Blackburn 65:12
Blacks 54:24
board 60:14
bodies 156:16
body 97:12
bold 66:9
bolstering 82:22
book 136:8
bootstraps 30:22
borne 168:19 169:16 170:6 174:17
borrow 136:8
borrower 79:4,12 79:14 83:12,16,24 84:3 86:14 87:15 88:20 93:7 105:21 106:18,25 119:17 120:20,22 128:6 128:12 129:18 130:12 138:20
borrower's 97:21 98:6,7 119:1
bottom 11:23 12:10 36:25 40:5 46:3 48:24 49:13,19 92:9 123:5 140:25 172:14
bound 40:14 72:1
Bowen 67:15
bowl 143:13
Box 76:19
Brandwise 45:10 71:5
breach 83:2 113:3 122:6 124:25 125:12,13 153:2
break 60:2 178:25
brief 118:16
briefly 39:1 40:7 45:2 78:19 85:8 94:5 102:12 120:10 188:14

Briggs 5:23 14:19 22:2 23:23 24:13 24:18 30:3 36:6 52:5,12 57:3 58:10 59:3,19 61:25 63:6 72:6 72:16 75:1 95:22 96:24 99:6 100:4 116:10,19 167:15 181:4
Briggs' 21:16
Briggs's 117:16
Brightman 101:19
Brightman's 101:20
bring 127:9
brings 23:4
broad 152:20 176:12
broader 28:1 192:23
broadly 190:5
Brothers 101:19,21 116:11
bundle 18:1 36:7 39:12 40:1 41:22 43:24 45:8 46:20 49:5 58:12 63:19 64:8 67:25 68:23 69:9 74:13 77:7 79:19 92:6 101:5 103:16 111:19 115:19 116:24 117:12,14 121:8 157:2 167:16,23 174:11,13,14 181:8 187:8 188:11,24 195:11 195:15
bundles 93:13 101:3 108:9 137:23 186:7,18 190:13 191:2
burdened 110:5,16
business 51:8 105:14
bypass 23:8

C

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

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

172:25 175:11 180:15 181:16 182:19 183:23 185:17,21,23 187:4,17,20 189:3 192:19 193:13
company's 21:20 21:22 28:18 36:4 54:16 90:22 98:25 99:13 105:17 116:2,6 169:5 182:18
comparative 160:16
compare 4:8
compel 175:23
compensate 119:18 147:8
compensated 177:21
compete 13:5
competition 129:25 134:23
complained 147:22
complete 16:8 44:2 55:4 96:2,3 176:15 189:24
completely 15:17 15:25 50:24 64:19 162:2 172:5
compliance 109:22 112:13
comply 102:5 105:11,13 109:20 109:23 113:12 114:24
complying 101:16
compromise 43:25 54:13,17 55:3,3 105:2,4
compromised 105:7
compulsory 21:25 22:4 23:24 24:8 24:16 100:11
101:10
conceded 146:11
concentrate 61:9
concentrated 1:6
concept 51:10 77:25 78:2 79:22 81:22,23,24 87:11 93:8 94:13 97:13 97:16,19,25 102:17 109:12 115:17,25 130:18 130:19 172:25 184:22,23 187:25 188:2 193:23
concepts 85:17,18 85:21 87:17,17 88:13 182:6
concern 39:20 51:24 58:1 120:8 146:19 147:1 159:16 160:2
concerned 11:11 13:11 21:24 24:21 25:2 31:8 35:19 45:11 76:21 77:9 90:18,19,21,22 98:15 106:8 108:3 110:4,16 132:11 152:24 163:4 172:3,11 173:10 173:11 179:9 180:25 182:9 186:21 187:13 192:4,18,20,22
concerns 62:13,16 124:9,20
conclude 1:9 3:5 4:24 37:7 177:12
concluded 127:13
concludes 73:8 75:17
conclusion 14:11 28:22 29:2,18 63:9 64:5 144:15 144:16
conclusively 30:7
condense 60:19
condensed 60:17
condition 83:10,19
conditional 77:13 81:23 83:16 91:13
conduct 51:8
conferred 57:1
confirms 161:3
conflict 80:5
confusingly 3:21
conjunction 180:12
connection 104:19
conscious 186:15
consecutive 7:13
consequence 13:2,3 86:25 141:2 154:23 155:19 165:22 166:2 167:3 193:1
consequences 38:19 74:8 113:2 145:25
consider 68:15 176:3 179:10 180:20
considerably 37:21
consideration 95:20
considerations 71:14 72:13 159:10
considered 46:23 49:2 95:21
considering 117:1 186:9
considers 53:6
consistent 37:6 55:22 58:9 94:13 95:7 99:19 109:17 130:22 139:8 148:7 161:14 162:3 183:3 187:21 193:20 194:6
consistently 52:23
constitute 55:19 68:13 105:18 137:13 152:9,10 155:21
constituted 36:23 90:15 130:3
constitutes 82:2 93:1 97:20 116:6 126:25 127:3,6 141:4 148:21 183:17 193:24
construct 185:11
construction 71:22 71:25 76:8,20 82:3 110:25 115:11 123:6 142:19 147:5 151:9 153:1 154:13 160:19 162:25 166:4,12 166:18,20 169:12 171:7,13 180:11 185:6 188:8 193:5
constructions 160:18
constructive 4:7
construe 99:19 138:22 146:16 147:16 180:10 189:17 190:6,15 191:4
construed 187:24 191:5 195:2
construing 80:2 87:13,25 91:8 153:5 162:19 166:8 190:7,8,9 191:10,11 194:5
contain 77:12
contained 39:11 77:22 127:12 192:25
contemplate 194:12
contemplated 97:16 103:4 129:16 168:18
contemplates 59:18 88:11 101:17 114:5
contemplating 131:23
contemplation 112:15
contend 8:17 131:6 166:16 167:22
contended 122:19
contending 9:6
contends 15:11
content 38:9 109:12 124:18
contention 89:22
context 6:1 10:18 53:3 69:14 76:23 83:5 87:19,21 91:9 94:7,9 95:7 95:16 96:17 100:8 101:18 102:9,11 104:25 107:19 109:9 115:17 118:18,19 119:6,8 119:9 121:21 137:20 148:4 151:12 155:4 159:2 162:11 176:2,10 178:2,3 180:10 183:24 184:4,9,11 187:1 194:3
contexts 81:20 114:8 115:24 186:2 194:15
contingency 124:9 124:14,16
contingent 34:15 34:20 59:6 62:2 74:18 75:2 79:4 80:18,19 84:21,23 85:2 124:5,11

127:8 132:15,18 132:23 133:3 137:7 168:23 193:10
continuation 188:1
continue 106:6 113:16
continued 1:3 182:2,5 186:3 197:3
continues 89:25 148:17
continuing 113:4 183:9
contract 15:8 35:24 37:7 38:17 55:1 63:6 122:20 125:6 125:19,20,22,23 125:25 126:5,10 126:12,13 134:20 138:23 178:1
contract' 15:16 16:2
contracted 68:15 81:2,8,10 123:9 133:3,16
contracting 127:17 136:17 144:1,4
contracting-out 81:19
contracts 14:2 80:21
contractual 13:22 14:24 15:22,23 16:13 35:17,23 63:13,21 70:25 71:2 80:5 83:1 90:20 96:24,25 114:1 119:9 145:9 170:1,3,10 174:22 175:19,24 178:7,8 178:13 185:22
contractually 15:20
contrary 9:2 14:17 87:1 177:18
contrast 36:1 62:14 63:18,25 147:4
contribute 18:6 19:6 35:20 36:20 40:24 41:9,13 42:2 45:21 54:11 58:18 59:14 61:19 62:4,6 63:16 64:11 117:8 179:3 179:11 181:20 186:23 187:17
contributed 41:2
contributes 59:21
contribution 29:21 29:22 42:7 62:12
contributions 20:15 41:15 62:8 62:15,18 187:3
contributor 43:12
contributories 39:10 45:3 53:2 58:17,22 59:9,11 70:5
contributories' 117:8
contributory 33:6 42:14 43:9 44:7 44:18 54:21 58:18 59:20,23 65:15 70:6 72:17,20 75:19
control 27:5 28:20 56:7 148:19 155:20
conundrum 38:22
convenience 34:24
convenient 36:5 39:23 60:1 114:9 114:11
conveniently 158:17
conversely 31:15
conversion 15:11 17:4 76:15 96:8 96:23 97:2,8 176:11
convert 172:5
copies 108:10 136:13
core 81:11 110:22 152:25 153:3
corporate 106:9 180:17 184:19
Corporation 46:9 66:2
correct 24:13 58:5 59:1 62:9 81:3 90:14 103:22 106:2 127:16 137:6 161:22 179:19
corrected 183:6
correctly 123:1
correctness 133:17
correlated 150:16
correlation 195:13
corresponding 74:2
costs 120:6,8 150:9 157:6
Cotton 48:22 67:12
counsel 69:2
count 166:4
counts 141:14
couple 40:13
course 11:9 14:5 15:10 16:17 18:10 18:15 20:17 21:3 67:12 76:24 78:5 82:9 83:7 89:6 93:25 94:17 95:17 96:8 97:22 98:6 103:13 108:2 110:23 111:14 115:5 118:18 119:11 124:18 125:16 137:8 145:2 147:15 149:13 151:25 158:22 159:21,24 160:12 162:11 168:7 175:14 177:22 185:1,15
court 1:10 5:7,10 5:12,18,21 6:9,17 7:5,22 8:2 9:4,5,5 14:9 18:5 19:19 19:25 22:7 23:23 25:24 26:21 33:8 33:14 34:11,18 35:15 36:6,11 39:7 41:14 45:1 49:5 54:15 56:1 56:13,21 59:1 60:4 62:7,9,10,16 62:24 66:18 67:19 68:22 69:16 71:15 76:6 99:7 112:13 114:13 117:3 127:15 128:25 144:15,16,20 147:5 148:21 153:1 166:4,12,17 179:7 196:7
court's 19:21
courts 63:11 67:24
covenant 133:8
cover 22:3 33:13 84:20,22 85:12 173:9
covered 11:14 26:15 172:22 173:14 185:14
covering 173:7
covers 97:23
Cox 76:19
create 2:19 13:3 30:18 32:12 37:11 42:4 57:21 62:21 71:22 157:4
created 29:16 35:23 36:1 46:2
creates 13:16 35:7 35:13 52:10
creating 31:3,3
creation 1:18,19 14:16 15:8 16:16
credit 160:9
creditor 7:24 12:5 75:8,11 95:5 98:22 119:18 122:20 123:8 129:4 130:23 131:25 132:16,18 132:24 133:3 143:3 145:16,20 160:1 168:23 171:25 177:20 182:18 183:25
creditor's 118:24 119:1 129:8 145:3
creditors 4:2,11 7:6 7:7,14 13:24 17:4 26:12 29:12 33:10 34:23 55:20 72:14 72:23 73:1 75:11 79:19 80:11 94:15 95:10 105:3,3 119:20 120:6,8 129:25 135:7 143:23,23 144:3,5 145:11,21 147:8 155:1 159:4,18 165:9,13,23,25 174:15 181:15 183:21
creditors' 31:17 96:25 153:16 155:6 159:12
crispest 175:3
critical 40:23 125:16 192:10
cross-appeal 8:14 13:16,20,21 34:17 75:5,18,20 122:3 122:19 142:19,21 144:20
cross-appeals 1:11 8:9,16

cross-jurisdictio... 121:22
crosses 100:9
currency 15:10 17:3 76:15 96:8 96:23 97:8 141:8 141:10,15 176:10
current 9:16
currently 142:14
cut 64:19 129:9 130:1 169:20 170:11
cut-off 167:9,12
cutting 137:14
CVL 98:22

D

D 18:1 77:7 101:23 117:10,14 143:6 174:11,13,14
D3 36:7
D5 6:13 40:1
damage 96:4
damages 95:19
date 9:12 10:1,5,25 38:17 59:11 64:12 66:11 69:13 79:25 84:12 96:2 167:2 167:9,10,12 169:10 173:13 192:19
dates 59:12
David 6:2,5,12 14:6 16:5 18:4 23:6 39:24 42:20 43:23 44:22 54:25 69:18 69:24 102:25 103:14 112:21 115:21 116:9 118:4 176:17
Davies 116:12 117:1
Davis 117:24 118:15
day 9:4 141:18 152:7 173:4 196:9
days 186:5
deal 8:14 14:10 17:21 26:1 33:1,2 84:8 98:14,16 102:6,16,17 106:6 106:21 107:13,15 107:17,24 111:12 141:16 159:3,3,22 164:14 166:14 176:14 177:8 179:24,25
dealing 17:24 18:10 18:12,13,18,19 20:21 21:17 27:2 71:6 76:15 96:19 104:21 134:7 142:18 161:12,12 176:10
deals 10:11 101:11 142:21 150:9 158:12 192:22
dealt 11:12,19 12:23 25:18 26:21 27:6 35:25 36:2 55:13 74:6 76:17 94:8 102:7,19 103:2 108:22 144:22 150:3 154:4 173:8 178:21
debate 104:23 105:24 140:25
debenture 56:19
debt 9:11,21,22,25 10:4,19,20 11:13 11:18,25 12:14 13:4 16:16 31:11 31:12 36:10 42:5 46:15 62:2 63:17 63:22 64:1,1 68:14 69:12 74:23 74:24 75:4 80:17 80:18,19,23 81:6 85:4,9 88:5,23,25 89:4,14 90:5,6,7 93:17 94:9 95:8 96:17 98:3 118:21 119:3,24 121:10 122:12,17,17 123:8 124:17 128:14 129:3,7 130:12 133:5,5 136:20,24 137:20 137:22 139:24 140:2,3,6,13 141:4 142:20 166:15 167:4,8 168:6,13,19 169:5 169:16,21 170:4,5 170:7,25 171:4,12 172:6,10,25 173:11,18 189:2 192:2,5,6,13,21 194:16,18
debts 7:19 12:1,12 13:15 15:18,19,20 18:7,8 19:7 20:16 20:24 21:9 22:17 22:22 25:2,5,15 31:10 33:2,3,25 52:2 58:4 63:14 74:25 79:20,24 84:9,9,11 85:2 89:1,2,9 93:9 98:14 106:5,8 108:5 117:1,6 121:1,15 122:1,1 122:5,10 123:8,11 123:12 124:11 140:22 142:25 143:18 145:6 148:1 154:17 157:7 158:25 165:1 166:20 169:24 174:16 175:1,3 179:4,5 179:12 181:1 182:5 185:22 186:24 187:19 188:20 192:5,24 193:8 194:7,11,24 195:3,7,8,16
decide 16:18,22 50:13
decided 15:12 105:6 167:14
deciding 145:13
decision 25:24 36:11 45:10,11 46:8 49:4,14 63:3 66:18 68:5 75:6 116:11 123:2 146:22 175:7 183:3
declaration 34:11 34:18 35:2 68:15 73:9,10 144:17,21 145:14 146:22 174:4,5,6,14,15 174:25 177:7 179:8 180:11
declarations 76:8 144:9
declare 4:11
declared 34:12,19
declaring 68:13
deduced 63:7
deed 66:11
deemed 12:6 42:4 172:3
deeming 7:10 11:21 12:2
defence 85:25
defensive 131:19
deferred 87:1
defined 78:8 83:20 100:1 195:16
defines 9:21 83:12 189:2,9
definitely 52:17
definition 36:10 78:11,18 79:8,8 79:11 82:6,9 86:1 87:6 96:12 98:2 106:25 120:14,17 120:18 121:17 127:6 189:12,22 192:10,23 193:8 193:18,20
delegate 44:23
delegated 20:3 58:25
delegation 19:21
demand 46:1
demonstrate 39:3 51:15
demonstrated 137:20 146:6
demonstrates 103:2 112:25 137:24
denial 146:3,5
dense 60:24
depend 59:15 109:23 133:17 145:3 175:12
depending 7:24 71:20 104:20 108:9
depends 132:8 139:24
derived 41:21 63:23 174:21
deriving 195:3
describe 39:2 111:7
described 33:23 103:14 145:21 168:4 170:23 171:9
describes 36:12
describing 109:15
description 111:6 122:24
designed 84:18 176:4 194:9
detail 37:21 65:1 107:20
detailed 45:3 60:13
determination

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

E

E 101:23
earlier 68:7 159:1 165:11,14 167:13 195:7
early 9:4 57:10 97:1 186:5 187:22
eat 17:6
echo 15:1
Eckhardt 175:4
effect 11:23,24 42:22 66:15 68:20 80:18,19 81:4 88:19 105:12 109:6 111:5,16 113:23 122:19 129:8 141:2 145:14 146:7,21 148:6,12 149:7 155:23 156:21 158:24 163:7 166:22 167:21 170:12 174:15 177:15 184:14
effective 125:10
effectively 23:13 114:1 129:19 134:19 141:22 154:4,5 170:1 173:13
effects 62:23
efficient 43:15
eight 46:2
either 9:8 104:18 105:17 125:3,9,10 155:22
elaborate 176:8
electronic 57:6 58:11 69:9
element 96:3

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

120:25 121:2 151:1
expropriation 177:17
extant 185:18,25
extend 20:25 47:14 99:9 179:11
extends 18:7 179:4 190:5
extensive 158:9
extent 8:20 72:4 80:11 84:25 88:9 95:10 96:1 103:6 107:11,14 120:3 122:13 123:24 124:23 129:24 141:9 153:11 158:10 164:25 173:6,9 176:5 178:25 180:24 181:18,25 182:6 182:21 184:14,20 185:9,19 186:2
extinguish 89:17
extinguished 149:8
extract 65:1
extreme 155:10

F

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

109:18
friend 15:1 46:18 46:20 67:25 78:17 82:5 96:19 162:24 164:24
friend's 119:13
friends 70:16,19
fruits 52:7 56:15,17
Fry 45:11,17 67:14 71:4
fulfil 83:25
full 15:21 29:14 54:18 83:21 92:14 130:5,14 134:15 134:21 135:5 137:9 140:3 141:13 182:21 185:8,10,17,19 188:16
fullest 72:4
fully 28:14 172:10 176:6 184:11
functions 57:23 104:19 111:15
fund 27:7 29:1,15 46:2 51:7,22 55:19 108:22
funds 52:20 56:6
further 17:16 27:17 30:15 34:6 47:19 48:2,8,8,9 49:15 51:25 59:12 72:13 75:22 82:22 141:22 144:7 164:13
Furthermore 58:5 59:19 193:7
future 42:15 48:18 52:6 56:15,19 58:2 59:11,17 73:3 79:2,21 84:21,23 193:9

G

G 64:8
gained 144:7
gap 161:2
general 23:17 33:23 95:17 156:4 157:20,20,21 187:12,15 188:17
generality 82:17 188:19
generally 3:14 22:15 32:25 142:19 187:19 194:8
generating 32:22
generis 30:9
genesis 88:5,10,14
GENPRU 137:17 137:19,22 138:6 138:18,18 139:1
George 64:5
getting 2:4 17:7 134:21
Gifford 69:10
give 2:16 4:10 7:17 19:16 33:12 44:2 45:3 50:16 55:4 61:3 64:7,22 65:2 77:5,10 91:17 99:11 112:23 124:24 132:20,20 133:11 147:17 148:6 155:23 159:15 160:8 161:6 164:23 179:14 180:16 185:5,11 193:13
given 43:19 44:11 44:17 55:3 56:3 80:3,18,19 84:24 107:4 111:16 116:17 121:6 126:15 142:15 164:16 169:4 172:17 178:7 179:18 180:2
gives 5:18 7:22 8:2 13:23 32:1 37:8 44:15 107:5,7 109:18 113:1 117:23 152:8 160:13
giving 4:19 84:15
glance 10:16
Glasgow 56:4
go 1:24 19:16 22:19 24:20 29:7,8 30:4 30:14,15 37:20 40:6,12 43:23 45:1 49:15 58:7 59:25 63:20 68:23 75:15 77:1,7 88:10 91:19 99:11 124:19 145:15 155:14,15 156:9 161:19 162:4 185:14 192:9
goes 4:15 6:8 9:13 10:1,5 22:4 24:18 24:25 27:14 30:5 30:15 31:7 36:25 86:1 99:3 106:19 120:17 142:21 148:14 150:10 155:25 166:24 167:2 178:11 183:23 188:21
going 2:2 17:21 20:15 39:19 40:6 48:23 51:24 58:1 60:10 62:13,16 66:23 71:20 76:7 76:16 82:18 96:14 96:20 98:9 105:25 107:15 111:9 113:25 116:25 117:2 124:1,12 131:25 132:3 133:4 138:8 142:3 144:9 146:25 147:16 150:10 151:24 152:1 158:1 163:15 173:23 176:8,10 176:11 178:12 179:25 180:16 184:2 191:20
good 9:8 38:2 60:20 70:22 75:14 95:6 95:13 119:22 124:15 157:13 170:17 196:3
Goode 123:4
govern 148:24
governing 45:7
Government 90:12 91:18 92:3
granted 149:20 156:20
grateful 64:23 66:24 69:6 76:3 110:13 186:17
great 106:21
greater 53:14 176:5
Grissell's 74:11
ground 167:6 173:7 173:9
guidance 185:5,12 192:14
Gurney 74:12

H

half 46:9
halfway 57:8 162:20
hand 35:17,19 50:19 85:21,24,24 113:25,25 151:1
hands 6:19 70:19 109:20 148:14,18 153:8,11,13 154:22 163:23 164:1,2
hang 136:6
happen 18:13 23:10 103:13 104:2,8 134:4,14
happened 133:2 177:11 179:7
happening 134:19 134:20
happens 21:13 29:4 29:5 33:10 104:12 154:14 164:25 171:8,12
happy 135:16 138:15
hard 56:18 193:12
Harding 63:3,3 65:9 67:9,23 69:2 69:11
Hastey's 68:22 69:3 69:15
Haverly 187:2,13
head 94:4
heading 39:13
headnote 49:7 68:3
hear 178:24
heard 25:6 37:15 143:20 185:25 192:3
hearing 9:5 76:13 196:9
heavily 67:24
held 26:15 54:15 57:14 58:1,14 63:3 79:6 81:25 93:15 122:23
help 1:5 48:16 61:13 117:24 139:2 161:13 180:21 189:18
helpful 8:13 17:18 60:15,21 64:24 66:25 67:22 75:23 92:7 154:7
helps 17:6 180:3
herald 38:8
hiatus 56:10
higher 145:10
highly 145:12
HIH 112:20 114:19

historical 24:6
Hoffmann's 175:7
hold 55:23
holder 101:13 113:22 114:3,23 130:6 151:11,14 152:23
holder's 56:19
holding 58:11
holds 109:19 110:24
hole 145:21
holes 161:15
home 161:8
hope 76:16 179:22 181:23
hopefully 178:19
House 63:4 65:10 65:16 112:20 186:8
Humber 15:3,6,12 15:16 16:2 101:22 178:12
hypothesi 169:10
hypothesis 18:10 32:5,17 164:17

I

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

119:2,11,17 120:1 120:2,13 121:1,3 121:9,12,24 122:9 123:15,20,22 126:7,17,21 127:3 127:5 130:13 131:6 135:6,7 136:22 137:1 143:18,24 144:18 145:6,8,12,17 146:3,9 147:8 153:15,16 154:17 155:2,8,13,18 156:15 158:25 164:20 165:2,12 165:13 166:20 167:19 168:3,5,6 168:8,15,17,18 169:15,21 170:1,3 170:6,8,23 171:1 171:3,6,8,9,12 172:10,21,23,24 173:8,13,19 174:17 176:2,14 176:15,18,20 177:9,17,25 178:3 179:5,12 185:22 193:4
interests 72:22 94:6 95:15 122:13 139:15 145:4 155:7 159:12 169:25 173:10
interfere 125:1 128:15 176:4
interference 127:2 137:14
interferes 141:3 153:6
interminable 102:10
internally 58:9
internationally 121:22
interpretation 30:2 125:5 161:13 191:16
interpreting 162:17
interrelate 37:15
interrelates 139:17
interrupting 191:18
intervention 119:23 158:19 162:21
introduce 130:24
introduced 14:22 151:17 182:16 188:3
introduces 88:17 193:7
introducing 88:16
introduction 38:7 115:14 130:25 148:24 184:18
introductory 4:5 40:14
inures 4:25
investigation 136:14
invitation 8:9
invite 36:14 41:19 45:19 47:2 49:6 60:18 63:17 68:2 176:25
invited 179:24
inviting 161:18
involve 161:6
involves 85:7 144:1 144:3
IPRU 138:19
Ironworks 15:3,6 15:12,16 16:2 101:22 178:12
irrespective 193:16 193:19
Isaacs 34:7,9,10 36:18 37:17 38:1 38:9,13,25 39:19 40:3,6,9,11,16 41:1,4,6,18,24 42:11,24 43:1,4 43:16 44:5,10,22 45:6,10,17,23 46:1,7,17,20,25 47:5,14,18,22 48:1,5,9,13,24 49:4,9,12 50:5,14 51:2,5,11 52:13 52:16 53:23 54:1 54:5 56:9 57:8,9 60:9 61:1,15 64:21,23 65:12 66:1,6,8,10,17,24 67:1,17 68:2,5,18 69:4,6,8,17,20,22 69:25 70:10,23 71:5,10,14 75:23 76:3,14 179:20 197:5
issue 8:7 17:2 19:11 55:2 102:12 117:7 138:12 146:12 147:12 155:11 156:10,12,23 159:25 177:6 178:24,24 180:13 180:24 186:22
issues 17:3 80:2 104:14 159:3

J

Jaeger 57:14
Jessel 64:5
John 38:6
joined 67:11
joint 79:5
joy 147:20
judge 14:7 34:12 35:2 86:20 88:1 94:8 95:4,12 107:4,5 121:6 122:23 123:14 127:13,16 130:7 132:17 145:15,24 174:5,9 177:6
judge's 124:4,19 144:17,21 145:14 146:22 179:2
judgment 6:3,11,13 14:6,15 16:6 18:23 19:1 21:16 22:1 25:22,23 36:5 39:24 42:21 47:25 69:17,25 76:24 79:7 88:3 94:10,11,21,23 100:5 101:20 107:6,7 112:21 115:21 116:8,18 116:20 117:16,23 118:3,4,7,11 121:7 122:25 124:6 128:8,9 130:7 145:25 174:22 176:21 178:21 181:4 182:10 192:17
judgments 99:7
Judicature 117:3
judicial 14:18
jump 80:7
jumping 125:22,23 125:23
junior 120:20 121:3,12,13,18
jurisdiction 86:8 86:20 88:19
jurisdictions 89:8
justice 5:23,24 6:2 6:5,12 14:6,14,15 16:5,10,10 18:4 18:24 21:16 22:2 23:6,23 24:13,18 25:22 26:2,22 27:15 29:3,18,24 30:3,4 36:6 39:24 42:20 43:23 44:22 45:11,17 46:24 47:1,7,24 48:13 48:22 51:2,3,4 52:5,12 54:25 57:3 58:10 59:3 59:19 61:25 63:6 65:12,23 67:12,14 67:15 69:10,18,24 71:4 72:6,16 75:1 75:12,13 79:6 86:2 88:2 94:21 95:2,21,22 96:24 100:4 101:19,20 102:25 103:14 107:5,6 108:24 112:21 115:21 116:9,9,10,12,17 116:19,25 117:16 117:24 118:3,4,15 123:3 129:1 136:20 154:9 167:15 176:17 181:4
Justices 14:19 99:6
justification 145:23 147:6,7
justifications 147:3
justifying 146:5

K

keep 52:8,17 56:6 70:24 89:7
keeping 120:8
Keith 92:13
kept 119:18 120:6 177:20
Kerr 57:6 108:19 132:5 135:10,14 135:18 140:17
Kershaw 66:17 67:7
key 1:13 66:11
kind 2:7 70:21 93:4 93:8
Kingsdown 70:1
Kingsdown's 68:10

know 13:21 17:15 76:7 80:1 95:24 119:12 127:13 137:18 144:25 161:7 175:4 176:9 191:16 192:18
knows 1:7

L

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

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

132:5,10,13,17,21
132:25 133:8,17
134:1,5,7,7,12
135:10,14,18,24
136:2,5,12,19
137:3 138:6,9,13
138:22 139:5,9,12
139:20,23,25
140:6,9,14,15,17
141:6,21,21 142:1
142:4,6,10,12,23
143:8,10 144:9,11
146:11,18 147:2
147:13,18,20
149:25 150:5,7,17
150:23 151:4,5,6
151:17 152:6,14
154:3,6,9 155:3
156:4,25 157:18
157:22 158:12,15
158:17,20 160:3
160:21,25 162:6
162:17,18,21
163:1,1,19 164:12
165:20 166:10,11
166:13 167:24
168:1,21,25 169:6
169:17,18,23
170:7,16,19,19,24
171:3,6,11,12,15
171:21 172:18
173:2,12,24 174:3
174:13,20,23
175:7,8,13 176:24
177:2,4 178:4,6
178:16 179:17
180:1,4,7,9 181:4
181:6,9,12 182:3
182:11,23,25
183:2,5,7,9 184:4
184:10,16,22
185:4 186:16,17
187:1,2,13,14
188:4,6,13,23,25
189:5,10,11,16
190:3,7,10,10,11
190:14,19,21,24
191:3,6,9,13,14
191:15,23 192:14
192:14 193:17,17
194:18,19,23,25
195:1,7,16,19,19
195:23,24,25
196:3
Lord's 37:24 91:7
92:11 103:15
115:10 118:2
127:1 173:16
189:25
Lords 1:8 2:8 8:8
13:8 17:1 63:4
65:10,16 76:13,17
79:17 80:1 87:12
90:12 92:21 95:14
98:4 100:13,16
101:23 102:13
104:16 106:1
108:9 112:21,23
114:18 115:12,23
116:14,20 117:14
118:13 127:13
135:21 136:10
137:19 138:2,25
139:10 142:8,24
143:13,20 144:25
146:15 147:17
149:3 157:9
161:18,23 175:4
176:23,25 178:22
178:23 179:14
180:16,20 181:7
181:23 182:10
185:16,25 186:8
186:14 187:10
192:3
Lords' 186:7
192:13
Lordship 3:19,24
8:6 61:2,4 64:24
65:2 67:4,5 68:2
74:11
Lordship's 5:4
61:8
lordships 2:4,9,20
7:11 9:17 10:15
13:21 17:3,16
36:15 39:13 40:11
41:19 45:20 47:2
47:7,18,22 48:1,3
48:5 49:6,19 50:8
55:25 63:18 67:22
72:1 76:5,7 90:14
118:6 187:1
Lordships' 63:19
70:18 92:22
lose 59:16 82:21
145:18,22 173:17
losers 17:11
loss 120:3 145:11
losses 59:21 119:20
lost 59:2
lot 4:22 5:2 38:1
61:7 116:21
lots 81:20
Luncheon 114:15
Lush 65:23
luxury 108:14
Lynes 116:11

M

main 47:9 68:10
major 118:24
making 16:21 28:8
30:12 31:23 32:23
37:22 43:5,8
44:25 54:23 60:13
60:24 68:21 70:13
95:6,12 113:21
115:12 146:23
156:16,18 161:20
174:5 193:8
manage 105:13
mandatory 2:21
11:22 34:21 80:4
manner 12:21
99:23,25 126:7
128:15 153:6
166:23 172:13
marked 108:10,15
market 124:14
Martin's 64:25
Master 49:9 64:5
material 38:2,2
61:11 186:12
matter 5:10 29:25
35:21 40:22 45:13
82:3 88:17 103:5
104:17 122:3
123:2,6 139:21,23
140:1,17 148:9
151:9 152:10
157:8 159:16
160:1 163:10
164:5,8,22 177:24
191:6 193:5,11
matters 139:22
144:24 145:13
187:6
Maxwell 123:3
Mayfair 49:5
mean 9:21 78:23
80:10 81:9 84:9
84:11 85:16 86:15
112:12 118:14
126:11,22 129:13
132:8,17 139:24
140:23 152:12
160:7 161:22
164:7 170:10,18
173:17 185:4
188:20
meaning 81:5
84:16,25 87:6
99:11,20 105:21
115:3 117:1 122:2
122:11 132:25
133:1,6 161:7,24
162:1,1,1,5
165:17 168:14
170:13 172:17
192:4,7 193:15
194:10,22
meaningful 111:6
172:11
means 9:23 53:12
77:25 83:19 93:20
99:2 109:5 127:1
132:8 136:24
140:2 153:23
155:22 169:24
183:25
meant 47:8,10
110:9 119:20
126:16 195:21
measure 170:12
mechanism 16:24
77:14 183:14
meet 46:1 62:2
152:5
member 19:5 34:25
35:10 36:22 39:3
41:9,10,13 53:7,7
53:9,13 54:18,19
61:19,20,21,22,23
62:4,6 70:9 74:2
94:24
member's 54:5,7
63:21
members 18:6 20:4
21:23 29:7,8,15
29:23 32:11 34:14
34:20 35:5 41:14
53:20 54:10 58:6
59:16 61:18 62:7
62:12,15,17 72:2
72:8 73:13 98:17
99:5,14,16,22
102:5,7 105:17
106:14 179:3
180:15 181:2,17
181:19,25 184:21
185:18 186:20,21
186:22,25 187:3
188:2 193:25
members' 34:22

35:17 73:15,18,21 179:10
membership 35:24 36:24 37:8 38:17 63:6 69:13 95:5
mention 102:11 107:18 118:13 173:17
mentioned 1:21 10:8 87:12 102:1 104:24 107:23 114:19 115:11 125:18 188:14
mentions 115:20
Merchandising 55:25 56:11
mere 64:4 112:11 113:18,21 189:18
merely 131:3,3 149:13,23 156:21 166:2
merits 146:12
Mervyn 116:12,25 117:24 118:15
met 61:23
microscope 37:18
mileage 129:23
Miles 17:20,21 18:3 19:1,3 22:25 23:15,22 24:2,20 24:23,25 25:6,9 25:11 26:4,20,25 27:17,21 28:6,8 28:10,13,22 29:1 29:7,9,11 30:25 31:7,15,20 32:10 32:15 33:8,22 34:5 37:16 38:5,9 40:22 96:5,10 108:14 120:12 123:1 129:15,23 133:9 141:7 143:15 147:22 179:20 191:25 197:4
Miles' 15:2
Miles's 37:18
Millett 16:10
mind 37:14 47:5 70:24 71:6 85:18 86:18 87:13 88:22 89:6,7 91:22 93:5 94:21 112:8 155:4 160:14 163:14,25
minutes 1:6
missed 11:8
missing 96:3 172:18
mistimed 188:7
misunderstanding 28:9
misuse 172:9
mix 3:15
mode 181:14 182:14,17 183:25 184:12,13
modelled 84:6,7
moment 60:1 70:9 81:3 86:9 91:13 101:5 110:7 114:9 114:11 122:8 132:6 147:11 161:5 172:19 191:16
money 25:11 28:18 30:23,23 31:4,13 31:14 57:10,13 119:19 120:7,9 154:3 168:23 177:20
monies 26:25 27:2 27:7 47:15 51:21 52:16 53:10
Moore-Bick 14:20
moratorium 103:19 104:6
morning 191:22 195:22
mortgage 26:8,12 26:16 46:22
Morton 92:18
move 9:8 144:9 159:13 163:15,15 164:9,11 174:3 188:8
moved 149:13 162:13
moves 149:24 164:18
moving 76:5 95:14 106:1,15 145:19 155:9 163:9

N

nasty 195:5
natural 85:15 109:18 161:7
nature 109:22 128:1,21 154:1 172:6 175:17 181:18,25 182:5 183:10 184:14,20
navigate 160:4
near 121:11
nearer 180:7
nearly 194:19
necessarily 4:16 61:3 86:14 105:18 130:17 143:25 144:3 173:14 175:18
necessary 30:6 81:21 96:16 98:16 103:6,14,20 127:24 176:5
necessity 104:6 172:10
need 6:14 16:19,21 17:14 40:12,12 43:23 63:20 73:6 74:12 87:12 88:7 90:12 91:19 93:14 102:12 103:15 112:24 115:18 116:14 118:8 154:10 155:13,15 180:18,20
needed 60:22 87:4 142:25 149:22
needn't 1:24
needs 30:14 42:6 65:23 72:18 155:4 180:21 185:6
negative 1:25
neither 24:4 44:11 50:15 63:14 156:22
Neuberger 1:4,13 1:23 2:7,10,24 3:6 3:18,23 4:18,21 5:12,23 6:11,14 6:20 8:12 9:15 10:17 12:10,18 14:4,12 16:9 17:18 18:2,25 19:2 22:23 23:14 23:20 24:18,21,24 25:5,8,10 26:3,18 26:24 27:16,18 28:1,7,9,12,16 30:21 31:1,11,19 32:9,14,23 33:7 33:21 34:4,7 36:17 37:13 38:5 38:11,24 39:18 40:2,4,10,15 41:5 41:17,23 42:8,22 42:25 43:3,13 44:4,9,21 45:5,9 45:16,22,24 46:4 46:16,19,23 47:4 47:13,16,21,24 48:4,7,10,12,23 49:3,8,11 50:4,10 51:1,3,10 52:15 53:21,24 54:4 60:3,9 61:5,9 65:10,25 66:4,7,9 66:16,20,25 67:16 68:1,4,17 69:3,5 69:15,19,21,23 70:21 71:3,9,13 75:23 76:11,19 80:7 81:8 85:4,15 86:2,5 89:14,20 90:4,10,18 91:16 92:5,7,12,17 98:19 100:6,19 101:4,7,9,25 107:15,21,25 108:12,16 109:13 110:7,11,14 111:6 111:11,20,22 112:2,4 113:6,8 113:12 114:1,9,12 114:17 117:13,17 117:19,22 118:1 118:10,14 123:25 124:7,11 125:2,9 125:14,22 129:12 132:13,17,25 133:8 134:5 135:24 136:2,5,12 138:6,9,22 139:5 139:9,12,20,23 141:6,21 142:1,4 142:23 143:8,10 144:11 146:11,18 147:13,18,20 149:25 150:5,17 150:23 151:5,17 152:6 154:3,6 155:3 156:4,25 157:18,22 158:12 158:15,20 160:25 162:17,21 163:19 164:12 165:20 166:10,13 167:24 168:1,21,25 169:6 169:17 170:19,24 171:6,12,15,21 173:24 174:20,23 175:8,13 176:24 177:2,4 178:4,6 179:17 180:4,7

181:6,9,12 182:3
188:4,13,23,25
189:5,10,16 190:3
190:7,10,14,19,21
190:24 191:3,9,13
191:15,23 192:14
195:16,23,25
196:3
Neuberger's 3:1
8:9 36:13
neutral 109:3,3
131:16 163:21,21
never 27:5,19
28:19 133:5
153:24
new 12:16 13:4
14:16 16:8 36:13
59:16 164:19
165:18
Nicholls 16:10
nil 125:4,11 139:20
141:11,12,23
non 96:12
non-applicability
15:2
non-distributing
6:4,7
non-payment
173:19
non-preferential
143:23
non-protection
159:17
non-provability
94:6
non-provable
13:23 14:3,9,16
14:19 15:8 16:16
16:19 17:9 18:9
19:12 21:1,11
22:19 23:2,9 33:2
71:18 75:8 78:14
78:24 84:23 85:4
85:9 87:18 91:25
95:15,18,25 96:7
96:15 97:7,8
98:14,16 99:9
101:18 103:1,7,10
105:9,15 106:11
106:20 123:16,20
123:22 130:14
144:22 174:7,18
174:20 176:1
178:10 179:6,12
185:21,24 193:4
non-statutory
13:22
non-subordinated
144:2
normal 98:9
normally 194:21
Nortel 12:19 33:24
36:12 37:3 98:19
167:16 192:14
note 79:18 92:11
101:2 103:15
115:10 186:7
notes 118:2 192:13
notice 4:10,19
notwithstanding
21:13 90:2 115:14
number 9:18 17:2
34:19 57:6 64:14
64:18 66:21 69:22
70:15 76:12 80:25
85:19 100:9 104:1
111:24 125:18
139:2 157:15
160:17 186:1,5
194:13
numbers 91:18

O

Oakes 180:19
181:5 182:9 186:9
193:21
Oasis 55:25 56:11
obiter 26:19,20
object 160:3
objectionable
137:18
obligation 18:6
25:16 36:20 37:8
39:4 46:13 51:16
74:18 77:17 79:2
79:24 89:15 91:14
99:23 100:21
102:6 105:19
106:24 108:4
109:1,4,6,8,19,21
110:16 111:4
112:12 113:4,22
113:24 114:2,22
116:4 119:25
136:22 137:2
149:18 150:14,18
150:24 152:17
153:21,25 154:17
155:18 156:21
163:21 164:6
175:10 179:3
obligations 80:5
83:22 109:23
110:1,5 112:14
113:25 114:2,6,21
114:24 148:4
150:1 152:22
186:19
obliged 58:18 59:13
obligor 150:14
observations 26:19
26:20
obtain 143:2
obtaining 128:8
obtains 68:25
obvious 88:4 120:5
121:16 123:25
157:13 184:8
190:1 191:8
obviously 3:9 4:16
14:9 28:14 70:10
78:15 81:12 87:3
93:11 101:15
107:10,19 109:5
119:6 127:11
129:16 146:15
149:5 152:16
156:15 161:17,19
161:20 166:6
183:6 188:17
192:3
occasions 186:1
occurring 97:22
occurs 21:12 61:1
October 1:1
odd 16:15,20 24:14
30:16 119:10
141:24 142:5
150:25
offer 70:21
office 101:13
113:22 114:3,23
148:14 150:10
151:10,14 152:23
155:25
officer 44:25 97:24
98:10 120:20
129:5
officer' 98:2
oh 23:8 54:1
okay 24:24 28:16
48:10 91:16
164:12 174:2
old 42:23
once 13:10 72:11
75:20 91:10
102:14 130:4
132:9 134:14
135:8 137:9 149:8
149:17 153:7
154:20 155:25
156:2 165:12
175:17
one's 160:4,14
ones 22:23,25
59:16 67:2,6
86:17 187:7
oneself 13:1 80:10
85:25 180:25
open 151:7,8
152:17,18 161:23
opened 75:20
opening 42:1,8
108:16 146:20
189:6
operate 149:4
operates 175:1
operation 66:10
168:15
opinion 48:17
120:19 193:12
opportunity 135:11
opposed 24:16
150:19
option 135:19
oral 76:1 78:21
120:11 143:14
orally 66:21 67:2
order 17:24 18:3,4
34:10,18 37:10
43:6,8 83:8 96:17
98:14 104:7
109:23 125:9
126:16 137:1
160:5 161:21
179:2
ordered 174:9
ordinarily 57:10
ordinary 103:21
104:7
original 96:25
165:17 166:8
172:9 174:22
175:18 187:25
originates 69:13
others' 82:1
ought 89:10 136:15
146:25 149:3
159:15 185:13,14
187:24
outcome 145:5
outline 180:14
outs 150:10
outside 21:13 23:14
23:15 97:13 103:3

overall 5:6 34:2 100:20
overarching 77:12 81:14 82:10 84:17
Overend 74:12
overnight 150:22
override 1:20 2:20 2:21
overrides 2:21
overriding 128:1
oversight 161:2,3,6
owes 168:23
owing 79:3,12,14 106:24 137:10
owner 111:4
ownership 115:13 116:2

P

page 4:8 6:13 11:24 12:10 18:1,24 19:20 21:16 25:23 36:8,18 39:12 40:2,3,5 41:18 44:4,5 45:8,15 46:3 48:24 49:19 50:5 52:13 56:21 57:6 59:4 64:8 78:11 79:18 91:17 92:6,10,11,14 93:14 94:12 98:25 100:15 101:21 103:16 111:19 112:2,3,22 113:6 116:13,24 117:11 117:15 120:18,23 121:7 137:24 138:3 139:11 142:22 143:6,8 147:24 157:1,2 167:23,25 174:14 177:2,3 182:12,12 184:3,5,8 186:10 188:12 190:24
pages 65:8 184:3 187:7,8
paid 8:22 15:20,21 20:7 26:6,6 29:14 52:16 53:10 83:20 91:11 99:22 105:16 113:15 121:1 123:16,20 123:23 124:1,13 124:13 126:11,13 126:16 130:5,14 132:4 133:7 134:15,17,24 135:5,9 137:4 139:16 140:3,22 140:23 145:18 154:25 155:8 156:15 166:21
paragraph 6:11,12 9:24 12:19 14:5 14:15 16:4 19:1 21:17 22:1,5,8 25:24 29:19 36:7 36:15,16,18 37:1 40:8,9 41:18 42:20 43:4,7,13 43:14 44:15,22 45:14 47:2,9,16 47:18,23 48:8,10 49:10,13 50:5,14 51:6 52:5,12 53:17,19,21,25 54:2,25 55:5 57:4 57:8,23 58:11 59:4 61:14,25 64:9,25 66:3,5,19 68:10 69:5,9 73:3 75:1,14 79:6 82:14 86:21 88:2 88:24 92:14 94:11 94:12,22 95:22,23 100:5 101:22 103:16 104:13 105:2 107:6,7 111:17 113:6,8 117:11,17 120:15 121:7 122:25 123:15 125:13 127:21,22,24 128:23 129:1,10 130:7 139:7 142:20,22 150:8 156:9 157:1,9 167:7 169:19,20 174:9 175:6 176:22,23 179:2 181:5,11 182:13 183:2,19 184:5,8 184:12
paragraphs 44:12 48:15 72:16 74:16 83:3 86:3 94:10 99:6 115:20,22 116:18,19 117:15 118:3,5 127:18 128:2 145:25 192:15,16 195:2
parameters 87:22
pari 21:22 22:5,18 23:1,2 24:5,7 52:2 80:17,19,22 99:23 100:24,25 122:21 125:20 126:1 133:18 144:4
park 191:15
parliament 5:15 166:6
part 3:22 10:20 12:14 17:24,25 18:3,4 21:8,11,14 28:11 29:17 30:5 35:21 36:4 37:20 38:14 39:11,13,15 39:15,19,23 41:2 47:23 49:2 51:12 58:13 64:13 66:11 66:11 70:11 83:11 87:2 94:14,16,17 95:10 97:20 101:11 102:3 107:9 128:16 133:10 136:2 143:12 144:8 147:10,12 148:22 149:20,25 151:23 154:24 155:5 158:8 162:6 173:24 191:21 193:6
Parte 45:10 63:2 69:11
partial 147:11 159:13
participate 91:3 93:2,20 94:2 131:25 132:3
participating 91:1
participation 91:6
particular 4:25 14:17 15:9 17:3 17:22 27:21 31:23 36:10,12 41:7 50:24 51:23 58:20 79:25 80:17 100:5 109:1 120:1 131:24 138:17 144:7 146:19 159:2,2 160:1 162:8 163:16,23 177:6 181:22 186:13 191:21,22 193:6 194:3
particularly 5:14 16:14 72:24 84:16 118:22 129:7 131:22 149:21 150:25
parties 167:6
partly 20:6 26:6,6
partnership 183:12
parts 82:23 84:8 94:20,23 108:13 149:25
passage 23:10 56:2 66:4 71:3 92:9 109:3 116:22 117:10 176:21,25 182:10,12 184:2
passages 5:25 16:5 16:6 26:2 92:2 187:6
passed 5:15 153:8 181:2 193:25
passes 148:19
passive 3:1,4,7,9,14 4:15,21,22 5:2 109:11 149:22 150:12 151:2 163:12,22
passivity 152:14
passu 21:22 22:5 22:18 23:1,3 24:5 24:7 52:2 80:17 80:19,22 99:23 100:24,25 122:22 125:21 126:1 133:18 144:4
Patent 65:1
patience 61:8
Pause 36:16 43:17 46:5 47:12 48:11 49:7 50:11 68:3 92:16 100:18 177:3 183:20
pay 16:18,23 25:11 29:12 31:6,17 32:1,7 35:16,18 52:24 53:1,13 58:4 63:12 93:16 99:23 120:1 122:13 126:3,10 154:17 185:22
payability 31:4 85:21
payable 10:21 13:14 18:8 22:16 23:1 27:1 30:20 30:24 31:1 32:19 51:19 55:18 79:3 79:12,14 83:22 84:1,9,12 85:13

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

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

127:18 128:14 129:6,13 130:6,12 131:2 133:4,5,8 135:2 136:1,17 137:22 159:4,18 165:13 170:21,22 171:25
proved 7:16,24 12:1,1,6,13 13:6 15:20 18:7 81:6 108:5 113:5,15,18 117:6 121:1,10,15 122:2,5,11,18 123:8,12,12 131:10 133:6 134:6 136:25 139:24 140:2,3,12 140:13,22 142:20 142:25 145:6 148:2 153:12 154:18 158:25 165:1,11 166:20 168:6,13,19 169:16 170:5,25 172:1,3 179:4 185:22
prover 134:16,22 135:1,10,14,15,16 135:25
provers 134:2
proves 52:6
provide 18:7 52:20 58:16 59:20 63:15 80:16 82:20 128:3 160:22 176:14 177:13 179:4,11 193:18
provided 53:14 64:1 98:22 100:12 128:12,23 160:6 166:23
provides 2:14 9:22 12:3 19:20 61:18 63:21 80:22 81:16 83:15 120:25
121:9 128:11 143:17 148:2
providing 121:2 156:14
proving 10:19 12:5 81:23 84:8 124:22 126:6 127:10,15 131:7 132:5,8,9 132:11 133:22 134:21,23 135:10 136:7 138:21 139:15,18 141:4 159:19 165:10
provision 7:1 11:21 12:2 22:18 63:21 77:13 82:10 108:3 125:10 135:24 143:2,22 150:8 151:10 157:19,20 162:8 180:23 189:7 190:1,15,19 192:8
provisions 1:18,21 2:11,12,16,22 7:10 9:20 19:15 21:19 37:11 39:1 39:9,21,23 43:20 58:15 62:21 71:22 77:19 80:4 81:19 124:25 127:14 128:10 149:5 150:5,6 160:5 176:13
pulling 30:21
pure 188:8
purporting 132:19
purpose 18:17 25:12 29:14,16,22 30:11,19 32:3,21 50:21,24,25 75:11 83:13 86:21,23 105:11 108:7 118:20 132:2 143:22 146:2 163:21 172:6
purposes 30:6 40:17,19 51:22 53:1,11 54:11 66:14 75:3 78:2,9 89:10,11 90:9,16 90:24 91:8 92:20 92:23 93:2,23 115:3,6 118:23 119:10,14 139:25 155:22 176:6 187:6
pursuant 1:22 52:16 57:1 81:18 139:3 181:2 193:25
push 80:8
put 13:3 15:17 38:4 56:7 60:16 67:1 70:17 72:18 73:6 75:10 78:4 82:13 84:14 88:16 93:17 96:17 120:2 125:11 126:1,23 130:10 133:25,25 134:1,9 135:16,21 140:10,11 147:4 153:21 166:15 169:18 171:23 175:25 177:5 178:18
puts 13:20 51:4,5 129:5 141:12
putting 130:9 157:14 169:18 170:17 172:12 175:8,9,16
Pyle 25:25 46:17 49:14 54:24 55:17 67:13

Q

qua 133:3
qualification 41:6 62:5 176:16
qualifications 61:17
qualifies 78:7 81:17
qualifying 94:14
qualitative 88:25 94:1 96:15 172:6
qualities 114:6
quality 88:22
quantified 123:19 123:21
quarter 50:10
query 103:25
question 1:13 24:15 26:11 37:5,10,24 38:11 52:20 65:14 78:22 85:14 109:10 117:4 125:5 131:16,19 137:16 150:18 152:7,12 154:12 155:16 160:14 181:1 183:1,7 190:4
questions 19:10,11 79:9 85:20 91:5 94:6 102:22
queue 80:7,8,12
quick 92:8
quickly 1:17 77:1 180:18 181:7,24 186:15
Quistclose 154:11
quite 1:5 5:2 25:10 33:18 46:23 60:13 60:24 87:1 91:7 92:19 95:1 106:4 116:21 118:7 129:5 145:12 158:21 162:15,18 185:2 194:22 195:18
quotations 16:9 186:16
quote 24:3 187:14
quotes 48:13

R

rank 7:20 81:16 119:25 120:20 121:3,12 132:4 143:18,19
ranking 80:17,22 95:8 121:13,19,19
ranks 78:1,8 80:18 94:18
rapidly 82:6
rate 15:24 145:10 161:5
rational 156:1
re-organise 86:22
reached 131:14
react 131:17
read 12:20 17:14 19:15 24:2,10 31:25 33:16,17 36:15 43:13,15 45:20,25 47:7,13 47:16,19,22 48:1 48:3,7 49:6,20 50:9 60:25 61:10 68:2 71:21 77:15 81:14 82:9,13 99:18,23 100:16 127:24 157:10 172:20 177:1
reading 31:24 32:16,17 48:4 85:15 100:12 109:18 187:16,18 195:12
reads 100:20 172:19 173:15
ready 183:6
real 37:2 78:22 124:20 151:8
realisable 57:11
realisation 57:14
realise 105:24 189:24
realised 155:15 162:20

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

177:14
replaces 14:24
reply 70:20 179:25
report 182:12
represent 153:12
represents 184:12
Reproductions 93:15
request 75:24
require 59:8 62:15 86:24 130:8 131:21 149:17 168:18 180:13
required 41:15 62:8,12,18 72:3,9 83:18 99:15 101:17 104:17 105:16 155:23 181:19 186:23
requirement 15:13
requires 32:17 74:22 85:24
reread 75:25
reschedule 86:22
reserve 50:7,20,20 56:6
residue 133:23
resile 152:11
resolve 5:11 104:14 147:12
resolving 38:21
resources 72:4,10
respect 7:3 10:21 11:13 13:4 14:7 21:6 25:22 31:21 34:15 44:24 52:6 54:15 55:4,9 58:12 73:4 77:23 95:1 113:20 114:22 120:1 135:2,2,4 136:25 141:20 143:24 146:9 155:12 162:10 168:9 185:22
respectful 7:18 12:16 15:5
respectfully 3:2 10:6 88:3 95:6,13 103:25 107:3 108:20 110:21 111:3 116:16 152:19 153:9 154:9 156:23 158:4 163:10 165:15 185:12 193:1,14 194:5
respects 127:22,23 128:4 186:12
respond 2:25 70:20
responded 57:3
response 53:19 54:3 72:13 146:20
rest 5:3 92:17 169:7
restored 146:22
restrict 79:23 127:14
restriction 77:22 124:25 130:15 135:22,23
restrictions 77:15 127:9,12 148:5
restrictive 84:25
restricts 153:20
result 28:5 69:11 118:23 119:11 126:2 130:25 149:11 157:17 160:5,9
resume 60:3 114:12 196:4
retrospective 62:23 64:17 66:15
retrospectively 70:2
return 29:15 102:4 102:7
returned 58:6
revenue 89:3 90:10 90:15 92:22 93:3
reversal 144:21
reversion 15:7,16 16:2
Richards 6:2,5 14:6 18:4 23:6 39:24 42:21 43:23 44:23 54:25 69:18 69:24 102:25 103:15 112:22 115:21 116:9 118:4 176:17
Richards' 6:13 16:5
Rigby 51:3
right 4:21 8:20 15:22 22:7 23:20 24:9 25:10 26:24 28:22 29:10,21 31:2 32:20 33:17 38:21,24 41:17 42:23 47:4 59:1 66:23 68:19 76:16 78:5,6 80:9,9 81:10 89:18 93:12 93:18 101:9 104:1 118:1,7 122:21 125:25 126:12,13 126:16,20 129:9 130:23 132:17,18 132:19,20 133:4 133:22 135:18 136:1 139:9 140:20 142:2 144:1,4,18 147:20 149:19,23 155:5 156:20 157:21 158:9,9,21 159:20 160:15 162:16 166:10,13 167:19 169:6 170:8 171:7 171:13,14,21 174:5,6,11,22 175:13,17,19,24 177:6,14 178:8,11
rights 14:24 19:8 33:5 43:12 52:4 53:2 58:21 77:23 78:3 81:8 127:17 135:4,6 153:17,17 153:18 154:14 155:1 156:2 157:5 158:7 159:18 165:6,13 172:24 173:2 174:18 176:5 178:13 183:22
rise 2:16 5:18 7:17 7:22 8:2 13:23 32:1 37:8 109:18 113:2 124:24 152:8 157:25 159:16 160:14 164:23 193:13
risk 145:10
role 151:10
Rolls 49:9 64:6
room 15:6
root 72:21
rose 60:22
round 31:5 82:11 131:12 133:22 149:15,16 162:22 162:23 166:6
roundabouts 17:11
route 73:2 145:2
rudely 118:14
rule 1:14,18 2:16 2:19 3:20 7:10,11 8:16,19 9:14,17 9:18,19 10:9,13 10:13 11:2,21,25 12:14,20 14:1,23 15:15 19:23 36:9 36:14 37:9 39:4 72:17 74:18,19,21 74:22,24 75:19 80:2 96:5 97:10 97:11 101:1 108:21 109:7 111:17 112:11,16 114:22,25 120:25 121:9 122:2,11 123:7,10 124:24 125:6 133:18 134:18 136:5,23 137:1 139:3 143:17,21 144:8 146:6,17 147:16 148:2,8,24,25 149:21 151:22 152:8,18,19 153:5 154:13,14 156:14 156:16,18 158:24 160:18,22 162:25 163:6 164:16,19 164:22 165:4,7,19 166:8,23 167:4,22 168:5,11,16 171:19 172:2,11 173:20 188:21 190:8 191:10,17 192:7,15
rule-making 189:14,16,19 190:4,11
rules 1:19,22 2:14 3:8,10,13,17 17:15 20:1,2,2 44:23 80:16 84:8 88:12 97:11 100:25 119:21 136:2,7,12,13 138:7,11 148:24 149:4,8 151:23 159:7 172:13 189:7,17,22 190:6 190:16 191:4,4 193:6,11,18 194:2 195:21
run 85:24 169:14 169:15 177:18
running 168:22
runs 15:24
rustling 18:24

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

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

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

summarised 35:3 145:24
summary 105:15 147:1
Sumption 11:6,13 11:16,18 24:1 29:4,8,10 37:25 40:8 61:12 104:24 113:11 116:23 125:25 126:9,19 131:8,12,16,19 133:17 134:12 137:3 138:13 140:6,9,14 160:3 160:21 162:6 163:2 169:18,23 170:7 171:3 173:2 174:13 182:23 183:2,7,9 184:16 184:22 185:4 190:11 191:6 194:18 195:7
Sumption's 134:8 141:21 162:18 170:19
superseded 28:21
supplemental 64:7
support 15:8,10 67:19 83:11 98:20 98:20 125:2
supporting 61:11 71:15
supports 16:13 157:3
supposed 7:14,19
Supreme 117:3
sure 2:5 110:12 136:7 150:20 174:10 178:16 185:15 190:13 191:2
surplus 6:18,21,25 7:1 13:14 29:4 30:18,22,24 31:18 32:2,4,8,12,19 106:19 108:4,6 109:20,25 110:2,6 110:16,17,20 111:16 112:10,15 114:24 117:5 122:10,14 123:11 123:18,21 131:13 133:21 135:2,8 143:24 144:2 147:25 148:1,2,14 148:16,18 153:12 153:19 154:15,16 154:23 155:21 163:23 164:25 165:3,4,12 166:19 166:21,23 173:19 177:19
surprising 56:14 131:22 149:11
survival 176:1
survive 178:14 182:23
susceptible 112:9
suspect 180:1
sustained 120:4
swings 17:11
symmetry 166:3,6
system 70:12 88:15
systems 104:20

T

T&N 23:5 95:20 103:1,17
tab 3:19 9:16 10:15 10:16 11:22 12:9 18:1 19:17,23 25:25 39:12 41:22 45:8 46:20 49:6 67:25 68:23 74:13 77:8 93:13 98:25 100:14,15 101:5 101:21 111:19,21 111:23,24 112:3 112:22 115:19,23 116:12,23,24 117:15 121:9 137:23 143:6 149:2 157:2 163:18 167:25 171:20,20 174:12 174:14 181:8 182:11 186:9 188:11,25 189:1 190:24 195:11,15
tabs 43:24
take 1:6,23,24 3:13 17:8 23:22 39:23 42:7 44:1 67:22 80:21 86:15 87:24 90:12 103:3 118:3 124:14 129:6 134:22 135:8 136:10 139:12 145:13 146:15 176:22 179:21 182:10 185:6 186:14 189:20 191:19 195:18
taken 3:10 9:3 11:16 60:13 73:19 73:22 87:4 90:2 90:23 91:4 142:8 177:8
takes 65:18 92:13 162:10 190:22,25
talk 71:11
talking 11:10 22:14 22:15,21 102:10 159:17 160:25 177:22
talks 51:6 151:17 163:20
tanto 154:18,19,20
Taylor 90:13 91:18 92:3
technical 141:12
telescope 53:6
telescoped 100:2
telling 6:6,7 7:4 138:25
temporal 192:25
ten 1:6 92:10
ten-minute 60:2
tense 5:2
term 122:7
terminology 195:14
terms 9:6 11:23 17:13 19:3 22:20 25:3 32:3 48:6 77:17,18 88:8 94:18 95:17 118:8 124:22 126:10 127:25 143:4 149:22 150:12,15 152:20,21 176:12 179:17 185:2 187:12 190:11
terribly 105:25
test 10:12 36:13,19 37:3 82:2 90:3 93:24
tests 109:25
text 24:2 132:6
textual 82:12
thank 2:24 6:14 8:13 17:18,19 18:2 26:3,24 28:12,16 34:4 40:4 42:25 43:16 45:16 46:4 47:17 49:3 60:3 61:6 66:7,20 67:16 68:1,4 69:7,8,21 71:13 75:23 76:2 92:7 100:6 112:4 114:12 117:13,19 117:22 139:5 142:23 143:10 157:22 158:20 166:13 167:24 181:6 196:5,6
theme 116:3 156:10 157:10 187:21 194:6
theory 15:8 16:2
thing 25:13 60:18 67:15 93:4 119:5 119:7 121:2 129:3 140:20 148:23 162:14 175:22 178:13
things 9:18 32:25 33:18,19,20 71:1 91:25 95:2 145:4 180:12 194:13
think 1:5,21 14:8 16:7 26:1,23 32:14 34:7 40:22 49:1 60:12 61:9 67:4,22 70:21 78:19 79:7 81:21 85:22,23 88:7 91:19 96:5 97:16 98:3 101:1 102:1 103:7 104:22,23 109:14,16 111:18 112:24 113:8 114:11 115:8,19 116:14 118:5 122:25 124:21 127:10 134:9 135:18 136:6,9 142:24 143:14,20 145:21 150:20 151:6 156:10,12 157:23 161:20 164:13 166:11 169:18 170:16 174:9 179:19 183:15 187:7 190:18 191:1,14 191:21 193:12 194:14 195:2,24 196:1,4
thinking 48:16 88:23 97:4,15,25 119:8 164:9 175:19
thinks 102:3
third 5:17 7:5 37:3

49:4 55:7 58:8 64:14 75:7 102:21 104:22 160:21 175:8
Thirdly 35:22
thirds 45:23
thought 2:9 6:2,6 14:16 69:23 118:13 131:18 162:3 179:13 180:7 183:5 188:7 191:7 195:20
three 5:6,20 8:1,4 40:17,19 45:6 48:15 51:12 57:20 73:24 82:13 175:11,12
three-stage 36:19
threefold 36:13
thrust 91:21 93:21 107:2
ticket 61:5
time 1:4 6:19 7:7,9 13:6 28:15 35:23 43:8 49:18 56:23 58:3 63:6 68:14 70:6,7 83:17 89:8 91:13 104:12 107:23 112:17 116:15 118:11 123:19,22 124:8 130:13,15 131:1,8 131:9 132:3 133:6 133:20 134:4,4 136:9 148:12 159:20 163:7 171:3 179:17,21 179:23 180:1,2,15 186:3,15,24 196:2
timed 158:19
timing 130:15 135:21,23 192:10
today 8:4
told 9:5 46:21 60:21 190:20
tomorrow 136:12 191:22 195:22 196:5
top 46:7 51:5 115:25 184:7
topic 118:16
tort 95:19 97:9
total 53:12
totally 27:12 183:13
toto 137:11
touch 65:17
track 79:15
tracks 168:21
trading 51:24 52:1
transcends 100:9
transcript 1:16 2:2
transferred 156:2
transitional 9:20
treat 25:16
treated 7:15 94:16 95:10 118:20 168:14 169:15 187:24
treatment 7:23 23:2
trespass 96:20
triggered 21:7
trite 89:16
trouble 102:12
Trower 8:10 13:20 76:4,5,12,20 80:9 80:24 81:11 85:6 86:4,9 89:16,24 90:7,12,21 91:17 92:6,8,13,20 100:7,20 101:5,8 101:10 102:1 107:17,23 108:1 108:14,17,19 109:14 110:9,13 110:15 111:9,12 111:21,23 112:1,3 112:5 113:7,10,15 114:4,10,11,17,18 116:24 117:14,18 117:21,23 118:2 118:13,16 124:3,8 124:18 125:8,13 125:15,24 126:5 126:14,22 129:14 131:11,15,17,21 132:10,15,21 133:1,12,25 134:7 134:14 135:15,20 136:1,4,6,16 137:6 138:7,10,15 138:25 139:6,10 139:14,22,24 140:8,10,15,19 141:17,25 142:2,6 142:12,24 143:9 143:11 144:12 146:13,19 147:15 147:19,22 150:3,7 150:20 151:4,6,22 152:7 154:5,8 155:4 156:8 157:1 157:21,23 158:17 158:21 160:12 161:16 162:10,20 162:22 163:20 164:13 165:21 166:11,14 167:25 168:2,24 169:2,12 169:22 170:3,16 170:20 171:2,5,11 171:14,16,22 172:23 173:4,16 174:3,14,21,24 175:12,14 176:25 177:3,5 178:5,11 180:1,6,9 181:7 181:10,13 182:4 182:25 183:5,8,14 184:17 185:1,5 186:17 188:6,14 188:24 189:1,6,14 189:20 190:4,9,13 190:18,20,22,25 191:12,14,19 194:19,25 195:5,8 195:18,24 196:1,6 197:6
true 88:9 168:12
trust 57:14,18,22 58:2,14 77:14 82:1,25 83:1 154:6
trustee 106:5
Trusts 64:6
try 61:8 134:8 142:12 154:10
trying 60:24 91:21 91:23 97:5 109:14 160:7 161:16 170:11 171:24
Tuesday 1:1
turn 8:8 36:19 45:6 51:14 73:10 93:14 94:5 98:24 103:15 108:8 112:24 117:14 181:7 187:8
turned 57:12 183:19
turning 57:10 174:10 183:18 191:12 195:10
turns 180:11
Turquand 180:19 181:5 182:9 186:9 193:21
twice 141:14
two 1:8,11 5:5 7:13 8:5 31:24 32:16 35:6,22 38:23 41:7,24 43:22 45:23 62:25 71:15 77:18,20,22 83:21 85:20,23 88:25 90:13 92:2,25 100:16 108:10 110:1,4,15 113:2 113:25 114:6,20 114:21 121:5 122:16 138:8 141:9 159:1,3 161:16 174:1,1 178:9 180:18 181:13 184:3 186:16 187:1,22 194:12
type 93:22 97:4,9 154:12

U

ultimately 17:1 91:2 135:4 157:17
ultra 156:10,12,23
un-called-up 20:18
unable 41:15 54:20 55:15 58:3 62:7 62:17
uncalled 26:9,10,11 26:13 27:10,11,24 71:11
uncertainty 88:18 145:10
unconnected 193:2
underlies 17:2
underlying 22:9 113:24 161:18 162:4,7 175:1,2 175:16,24 177:13 177:19 181:21 184:15
underpin 182:7
underpinned 187:25
underpins 163:13 174:24
understand 10:2 71:13 80:15 84:4 84:22,24 91:7 120:24 146:13,18 147:2 156:25 157:22 161:21 178:4 181:24 189:25

understandable 82:5
understanding 180:14
understood 2:4 122:25 170:10
undischarged 119:25 155:1
unfair 32:17 60:17 118:5 180:8
unhelpful 136:14
unique 3:7
universal 88:19
unjust 75:9
unjustifiable 5:19 7:18 8:3
unlimited 18:18 20:4,12,13,21 21:6 26:17 27:3 28:10 30:18 32:11 36:3,21,24 48:25 49:17 51:6 53:20 54:6,8,8 71:7 72:3 72:9 182:1 185:16
unliquidated 95:18
unnecessary 14:12 88:17
unpaid 9:6 18:20 20:8 35:18 44:16 54:9 153:16 168:7
unqualified 11:22
unsecured 13:6 55:20
unsubordinated 129:25
untouched 175:3
unusual 18:21 134:2 190:19
unusually 151:2 190:14
upheld 18:5
uphold 144:14
upholding 34:11,18 144:16
upshot 172:8
urgent 155:13
use 3:7,11 8:16 29:13 51:25 52:1 52:7,23,24 56:6 79:21 87:14 104:10 121:11 123:7 147:23 153:20 169:19 191:3,17
useful 47:6

V

v 46:9 63:2,3 65:9 66:2,17 67:7,9,23 69:2,11 90:13 91:18 92:3 110:25 115:11 174:14 175:4 180:19,19 181:5,10 182:9 186:9,14 193:21 193:22
valid 124:12 193:12
valuation 80:20 126:1
value 42:15 59:5 62:1 74:20,23,23 75:3 124:2,6,17 126:15 139:20 140:21
valued 123:17,25 125:3 140:6 141:23
valuing 124:19
variable 77:17
variety 97:8
various 16:5 25:14
vary 2:14
Vaughan 51:2,4
version 10:13 96:5
vested 19:19,25 20:22 27:22 30:10
vesting 111:2
vi 18:5
view 23:22 24:6 49:11,12 62:10,17 99:22 100:2 104:5 104:9 123:17 124:15,21 159:13 161:1 188:18 192:10
Vinelott 123:3
vires 156:10,12,23
virtue 55:24 59:24 74:19
Viscount 92:4,17
volume 64:8 143:6 147:23 176:23
voluntary 21:17,20 21:25 23:21 24:8 24:15 98:22

W

wait 70:19
want 43:14 48:7 94:7 96:20 104:14
wanted 6:15 66:1 76:25 110:11 143:11
wants 132:2
warrant 84:15
waste 136:9
waterfall 1:21 2:15 16:6 33:23 34:2 98:19 148:22 153:2 154:25 156:11,22 176:21 178:21
way 8:17 20:12 22:15 25:18 26:20 27:7,24 31:5,24 33:14 38:21 45:23 50:10 51:9 52:18 60:17 67:1 70:22 74:6 76:6 77:16 78:5 79:9 80:25 81:4 82:11,13 84:3,13 85:15,16 87:20 88:16 90:1 91:22 93:17,18 97:24 99:18 103:13,18 105:22 108:2 109:9,15 110:1 115:1 120:2 126:22,23 127:20 130:8,10 131:5,18 133:25 134:1,8 135:17 139:7,17 141:3 142:2 149:3 149:15,15 150:4 151:16 152:1,15 152:18 153:6 154:1 157:10,14 158:7 160:4 161:24,25 162:4 162:22,23 163:5 163:17 164:15 165:15,18 166:15 167:5 169:19 170:17 172:20 175:8,9,16,19 177:5,21 178:18 179:13 185:12 186:20 187:24 189:2 190:6
ways 82:1,20 125:18
Webb 180:19 181:10 186:14 193:22
weight 77:5,11 118:10 171:23
well-timed 162:21
went 10:21 12:15 26:7,16 65:19 128:25 142:16 168:9 169:10 185:23 195:20
weren't 147:19
Whiffin 180:19 181:10 186:14 193:22
whilst 58:2 182:16
Whittaker 66:17 67:7
wholly 172:14,15
wide 105:4 127:7 193:20
wider 27:16 28:7 79:7 192:9
wife 67:8
Wight 175:4
Williams 51:2,4 63:2,3 65:9 67:9 67:23 69:2,11 70:1
wind 129:12 132:14,14,15,19
winding 2:22 9:23 12:4,7 19:5,8 21:7 21:18,20,21,25 22:1,4,7,10 23:21 23:24 24:12,16,16 27:1 35:14 36:2 37:9,23 39:5,14 39:16 40:20 41:11 42:7 45:4,12 47:19 48:20 49:1 51:16 52:3,19,21 53:9,10 54:16 55:14 56:7,8 58:19 59:10,12,23 61:21,22 62:11,14 62:20,22 63:5,8 64:12,16 65:18,22 65:23 66:13 67:14 67:21 70:3,7,12 71:24,24 72:11,12 73:7 93:2,20 104:18 148:23 174:19,25 182:19 189:3,8
winding-up 21:12 22:16 43:6,8 86:5 102:15
winners 17:11
wish 40:21 88:13
wolf 52:8,14,18 58:9
Wolfson 1:3,8,24 2:4,8,11,25 3:15

3:19,24 4:20,22 5:17 6:1,12,16,21 8:14 9:16 10:18 11:9,15,17,19 12:9,11 14:5,13 16:11 135:13 144:11 146:11 147:2 148:20 149:16 156:13 157:3 158:14 169:14,18 171:17 171:23 173:18 179:23 197:3
Wolfson's 152:25 157:24 167:7
wonder 60:1,15 64:18
wondering 142:10 172:19
word 22:13 79:22 84:9,16 85:12 99:20 123:8 128:23 178:8 192:2 193:2
wording 79:16 109:7 146:17 192:1
words 8:8 22:14,17 34:1 40:14 41:25 42:1,9,11,23,24 43:7 45:20,24 46:1 47:8,19 48:5 48:17 51:10 66:9 82:15 84:5,19,24 85:13 91:23 93:6 99:11 108:24 109:17 116:7 129:15 149:17,22 157:8,8,14 159:8 160:24 161:7,9,20 161:22,24,25 164:7 168:11 171:22 175:23 181:15 187:10,15 187:16,19 188:20 189:6 194:11
work 92:21 95:16 97:5 121:25 133:10 155:17 158:2,7 160:7 172:16
works 20:12 25:25 46:17 49:14 54:24 55:17 67:13 77:16 81:1 84:3 98:12 108:2 127:20 133:10 134:25 136:11 139:7 147:17 153:7 157:11 164:16 167:11 189:2
world 15:4
worth 136:20 147:13 151:5 174:10 184:2 195:10
wouldn't 31:2 126:19 170:3
wouldnt 133:25
wound 19:4 26:9 42:4 46:11 50:18 50:21 51:20 53:8 55:15 58:3 68:7 68:19,20 69:1,14 72:16 74:1,7 145:1
writ 23:12
written 16:4 60:15 60:25 70:16
wrong 10:6 14:17 38:15 87:24 107:3 111:23 112:5 121:4 122:16 128:25 133:14 162:22 166:16,17 166:18 169:6 178:8

X

Y

year 41:10 61:20 61:22
years 15:12 56:10 70:11 71:20 182:24 187:22
yesterday 1:9,12,15 2:23 5:6,25 8:5 11:2 15:2 23:6 25:1,6 67:4

Z

zero 123:17,25 124:6,12,15 126:2 136:20,23 137:7 140:6,10,11,19,21 140:22

0

1

1 12:20 37:9 44:11 44:13 46:20 64:8 67:25 74:13 76:8 100:17 115:20 116:24 167:22 168:4 188:11 189:4 195:15 197:3
1(a) 172:19,22 173:15
1(c) 172:20,21 173:14
1.00 179:18
1.05 114:14
1.5 15:24
10 3:21,22,25 117:2 148:25 149:5 159:7
10.00 1:2 196:5,9
101 115:23
102 115:23
104 176:22,23
104(2) 177:1
107 21:15 22:6,9,13 22:20 23:14,15,16 24:11 98:13,23,23 99:18 101:17 103:16 105:17 134:11
11.30 1:7 60:5
11.40 60:3,8
11.45 179:22
110 14:14,15
113 25:24
116 113:8,10
1174 188:12
118 26:23,24
1184 167:25
1189 108:10
119 145:25
12.1(b) 84:11
12.3 79:16,18 97:10 97:11
12.3(1) 36:9
120 29:19
121 145:25
124 195:2
125 6:12 195:2
127 14:5
13 74:24
13.12 9:21 12:20 37:9 80:2 167:22 168:4 172:19 188:21,23 191:24
13.12(1(b) 192:16
13.12(1) 9:22 12:22 192:2 193:1
13.12(1)(a) 8:16 9:14 84:10 168:14 169:8 192:12,15 192:18
13.12(1)(b) 36:10 39:4 51:17 192:12 192:20
13.12(1)(c) 10:10 167:25 168:18 169:13 171:15,19 173:6,8
13.12(3) 193:7,15
13.12(4) 191:7 192:22 193:15
13.12.1 167:11
13.12.1(a) 167:4
13.12.2(b) 96:5
130 56:10
137 54:25
1371 101:21
138 40:9
1386 116:13,24 117:11
14 49:6
142 41:18
143 22:3 24:1,2 100:12,13,14 105:17 134:13
144 42:20
145 95:23
146 43:4
147 44:22
148 43:4 100:13,14 105:17 134:13
1484 48:22
1492 47:3,9
1494 47:22
1498 48:13
15 101:21 182:24
150 15:12 19:17
151 43:6
154 43:11
1556 103:16
1590 187:8
1595 187:9
16 63:23 116:12,24
160 19:20
1624 68:3
1644 68:9
168 104:11
17 197:4
172 19:1
1739 186:10 195:9 195:10,12
1740 195:12
175 75:1
1760 98:25
1765 100:14
1767 100:15

177.2 19:20
18 1:1 74:13 98:25
1810 190:24
182 181:5
183 181:11
1838 111:19
1841 112:2,3
185 21:17 99:7
186 100:5
1861 68:6
1862 41:21 42:1,12 45:18 63:24 64:15 68:11 181:14 182:16 188:3 194:23 195:4
1867 157:1,2
1873 44:4
1874 44:5
1875 117:3
1879 50:15 56:5
189 3:10 14:23 15:14 18:9,14 22:1 25:17 31:15 163:1,4,5,8,12,17 163:25 164:14,16 165:3,6,17 166:9 179:6 180:13
19 25:25 44:15 46:20
193 117:18,21
194 116:19 117:15
1944 11:24 12:8,9
195 116:19 117:15 117:21
1957 167:23
1962 68:8 101:6 180:23 182:2,4 186:8
1984 79:18
1986 95:24
1988 149:2

2

2 82:14 105:2 112:22 149:25 163:18 167:1,3 179:8
2.00 114:12,16
2.11(d) 149:1
2.2.159(3) 138:2
2.2.159(4) 138:5
2.68 3:20,24 149:1 151:17
2.68(1) 149:1
2.68(2) 4:8,9
2.68(3) 4:8
2.72(6) 7:11
2.81 74:21,22
2.85(5) 74:19
2.88 15:15 139:17 143:17 144:8 146:7 148:17,24
2.88(7) 1:14,18 2:17 3:5 8:19 14:1 108:2,21 111:17 114:22,25 120:25 121:9 122:2,11 123:7,10 124:24 126:17 133:6 136:23 137:1 139:25 140:2 149:6,21 150:15 152:8 153:6 158:24 163:3,6 164:16,19 164:22 165:5,7,17 166:8,23 171:7 173:20
2.887 114:5
20 182:11
200 71:20
2006 63:19
2008 145:8
2010 146:7
2013 108:11,16,19 147:24
2016 1:1
202 58:11
205 74:17
207 74:17
21 157:2
2125 93:14
213 36:7 56:15 63:19
214 36:16 56:16
218 36:18
22 45:8 100:14 187:8
2227 115:19
223 117:11
227 59:4 61:25
229 57:4,8
231 52:5,13
232 72:7
2329 167:16
24 67:25 95:22
243 72:16
244 72:17
25 19:17 43:24
254 53:19
2568 92:6,8
2585 92:9
2586 92:11
2590 92:14
26 43:24 53:17 54:2
2652 113:10
2653 112:22 113:7
27 175:6 191:12
2822 49:10
2824 50:5
2827 51:6
283 73:3
284(4)(b) 74:18
285(3) 74:4
29 94:22
2980 182:12

3

3 4:13 9:4 41:22 43:24 44:12 55:5 57:23 82:15 93:13 111:19 117:15 147:24 171:20 179:9 181:8
300 71:20
3017 184:3
3046 56:21
3149 115:23
33 63:18 86:3
34 86:3 197:5
3426 45:8
35 94:10
363 184:9
364 182:12 184:5 184:10
373 142:22
3799 137:24 138:3
38 7:12 186:8 194:1 194:23
387 177:3
39 129:1

4

4 10:22 18:1 39:11 39:13,19,23 43:21 44:12 55:5 66:11 76:10 77:15 83:3 105:2 111:23 115:20 127:12,18 127:21 128:12,23 133:16 137:23 141:20 144:10 174:5,12,14 189:6
4(11) 1:22
4(7) 141:5
4.00 188:7
4.1 127:24
4.11 2:13
4.11(1) 2:13
4.11(2) 2:13
4.15 188:5 195:25 196:1
4.16 196:8
4.18(1) 101:1,3,7
4.195 19:23
4.2 77:18
4.31 101:4
4.4 128:2 129:17 130:3
4.7 128:2,11 137:13 139:7
4.73(8) 7:10 11:21 171:20,24 172:2 172:16
4.77(e) 143:1
4.93 14:23 170:12 170:24 171:10,18 172:11 173:3,9
4.93(1) 10:9,13,13 11:6,25 12:14 167:22,23 168:5,8 168:16,20 169:13 169:24 173:6,7
400 71:20
4036 68:24
4038 39:12
4065 65:3
4068 65:9
4069 65:9
4072 65:24
411 189:15 190:12 190:24
42 79:6
436 69:9
45 7:11 11:22 12:9 88:2 107:7 171:20
46 7:11 116:18 118:4
47 94:10 116:18 118:4
48 190:24
49 120:15

5

5 40:1 49:5 76:10 77:6,12,14,19,21 81:16 88:24 111:21 127:22 128:5 129:10 137:15 144:10 174:4,6,9 177:7
5.1 82:14
5.1(a) 82:19 83:7
5.1(b) 82:19 83:9 83:15

5.2 119:14
5.2(a) 88:24
5.6 82:24
53 10:15,16 167:7
539 86:3
56 101:5
561 25:23
57 19:23
574 18:24
575 181:9
576 21:16
578 117:15
580 58:11
582 36:8
587 57:8 59:4
588 52:13

6

6 9:16 45:8 76:12 167:25 179:2,8 180:11 186:9 188:25 189:1 195:11
60 94:11 99:7
600 18:1 174:14
61 142:13,20
621 94:12
624 121:7
63 94:12 104:13
639 6:13
641 40:3
65 111:17,25
653 45:15
66 86:21
68 12:19 192:15
680 77:8
686 98:4 120:18,23
687 78:11
688 128:2
689 77:9 128:2
69 16:4 112:1 123:15 130:7
691 139:11 143:6,9

7

7 77:8,15 83:3 112:3 115:23 127:12,18 143:6 148:17 162:17
7(d) 143:1
7(e) 139:8,9 141:5 142:8
70 142:22
71 12:19 107:6 192:15
718 187:7
72 64:25 118:5 192:16
723 187:7
73 39:15 42:9 63:10 65:24 118:5
74 3:19,24 17:22 18:6,22 20:15 21:6 22:14 25:1 29:2,13 30:2,12 30:17 31:8 32:6 32:18 33:1,5 34:5 34:16,21,25 35:1 35:4,8,13,19 36:1 36:20 37:6,12,22 40:11 45:7 52:11 52:17,20,24 54:12 54:14 55:10,12 59:6 63:5,7,25 66:3,5,22 71:23 72:15 73:12,14,17 73:21,25 74:6,10 74:15,17 75:4 107:12,18 115:7 121:7 149:2 178:25 179:4,16 180:10,12,22,25 181:3 182:7,8 185:1,2,7,14 186:11 187:24 188:9,10 191:11 191:23 194:1 195:14
74(1) 40:18,24 53:12,15 54:10
74(1)(a) 61:18
74(2) 41:7
74(2)(a) 41:8
74(2)(c) 62:5
74.1 51:23
75 41:21,25 42:11 42:23 45:18 63:15 64:15 65:7,17,20 66:10 121:7
76 197:6
79 66:19,22

8

8 2:1,11 15:25 17:7 34:11 35:2 44:12 68:23 73:9 145:9 190:25 191:1
80 41:19 42:10 45:19 63:1,15 64:1 67:20
82 42:18,20 69:5
82(4) 42:21
85 122:25
86 192:16

9

9 34:19 39:12,12 41:22 64:8 68:23 73:10 77:17 115:19
93 75:14
96 75:15
99 150:8 156:9 157:1
99.1 157:9
99.2 157:9
99.3 157:9