

<p>1 Thursday, 14 November 2013</p> <p>2 (10.30 am)</p> <p>3 Housekeeping</p> <p>4 MR JUSTICE DAVID RICHARDS: Mr Wolfson.</p> <p>5 MR WOLFSON: Good morning, my Lord. Before I continue my</p> <p>6 substantive submission, a few points of housekeeping.</p> <p>7 The first is that we have had added to your Lordship's</p> <p>8 bundle in 1D another little bit from Derham's book on</p> <p>9 set-off, which we will come to in due course. I have</p> <p>10 been asked by counsel for LBIE also to mention that</p> <p>11 another extract from Derham has gone in in the same</p> <p>12 place from them. That is an extract referred to in</p> <p>13 footnote 20 of their supplemental submissions which</p> <p>14 deals with the sub-debt point, but they have asked me to</p> <p>15 explain to your Lordship that that has gone in.</p> <p>16 MR JUSTICE DAVID RICHARDS: I have something loose here.</p> <p>17 I will just make sure I have it. So this is tab?</p> <p>18 MR WOLFSON: It's tab 106. There are two --</p> <p>19 MR JUSTICE DAVID RICHARDS: Sorry, I have pages 320 to 321,</p> <p>20 then pages 414 to 417 and then 473 to 477.</p> <p>21 MR WOLFSON: Yes, that's all --</p> <p>22 MR JUSTICE DAVID RICHARDS: Then 614.</p> <p>23 MR WOLFSON: Yes, that's all the materials that was in</p> <p>24 originally.</p> <p>25 MR JUSTICE DAVID RICHARDS: Okay. Right.</p> <p style="text-align: center;">Page 1</p>	<p>1 Lordship's note, what I am going to seek to do today is</p> <p>2 to keep very strictly to the particular sections as I am</p> <p>3 addressing them. So I am going to continue with my</p> <p>4 submissions on insolvency set-off. Your Lordship will</p> <p>5 recall that I was in the middle of referring to</p> <p>6 Grissell's case within the context of insolvency</p> <p>7 set-off.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR WOLFSON: I was doing that because, as your Lordship</p> <p>10 recalls, my submission is that you address insolvency</p> <p>11 set-off before addressing the contributory rule because</p> <p>12 you only get to the contributory rule if there is no</p> <p>13 set-off. As I submitted last evening, insolvency</p> <p>14 set-off is therefore logically the prior question</p> <p>15 because of its mandatory self-executing nature. That is</p> <p>16 why I am taking it in this order. Before going to the</p> <p>17 contributory rule, I am looking first at insolvency</p> <p>18 set-off and I am looking at it in the context of the two</p> <p>19 separate estates, LBIE's estate and LBL's estate. I am</p> <p>20 going to deal with LBIE's administration first and then</p> <p>21 I will deal with LBL's administration.</p> <p>22 MR JUSTICE DAVID RICHARDS: Very well.</p> <p>23 MR WOLFSON: My first set of submissions are to do with</p> <p>24 insolvency set-off in LBIE's administration. Now,</p> <p>25 yesterday I addressed your Lordship shortly on the</p> <p style="text-align: center;">Page 3</p>
<p>1 MR WOLFSON: What has been added by me, and perhaps it might</p> <p>2 be on your Lordship's desk. I don't know if it's</p> <p>3 actually gone into the bundle.</p> <p>4 MR JUSTICE DAVID RICHARDS: I have it here actually.</p> <p>5 MR WOLFSON: What has been added by me -- and if your</p> <p>6 Lordship would prefer we could rearrange the whole</p> <p>7 section now so that it actually runs, so to speak,</p> <p>8 chronologically from the book, it might be easier -- we</p> <p>9 have added 408, 615 and 616 and my learned friends</p> <p>10 representing LBIE have added 318, 319 and 320.</p> <p>11 MR JUSTICE DAVID RICHARDS: I hate to put people to trouble,</p> <p>12 but I think it might be helpful actually.</p> <p>13 MR WOLFSON: We will do that over the short break.</p> <p>14 MR JUSTICE DAVID RICHARDS: Thank you very much.</p> <p>15 MR WOLFSON: My Lord, that's the first piece of</p> <p>16 housekeeping.</p> <p>17 The second point -- I hope your Lordship didn't</p> <p>18 have it -- I found on my desk this morning a court user</p> <p>19 survey inviting me to explain and answer a few questions</p> <p>20 about my experience in court today.</p> <p>21 MR JUSTICE DAVID RICHARDS: Very well.</p> <p>22 MR WOLFSON: Which I will fill in at 4.14.</p> <p>23 Submissions by MR WOLFSON (continued)</p> <p>24 MR WOLFSON: My Lord, I was addressing your Lordship</p> <p>25 yesterday on insolvency set-off. Mindful of your</p> <p style="text-align: center;">Page 2</p>	<p>1 policy reasons as to why there can be no set-off of the</p> <p>2 liability for calls in the company's administration.</p> <p>3 Your Lordship will recall there were essentially two</p> <p>4 reasons. First of all, the <i>pari passu</i> point; in other</p> <p>5 words, the contributory would be getting pound for pound</p> <p>6 when other creditors merely get a dividend. Secondly,</p> <p>7 although relatedly, the point that the calls which the</p> <p>8 member should pay should be used to satisfy all the</p> <p>9 creditors' claims. It's for those reasons that I invite</p> <p>10 your Lordship to look at some of the Grissell's case</p> <p>11 line of authority now. Although, because I am taking</p> <p>12 these issues thematically, it will be necessary to come</p> <p>13 back to some of these cases when we look at them in the</p> <p>14 context of the contributory rule and its inapplicability</p> <p>15 when LBIE is in administration. But the focus now on</p> <p>16 the cases is set-off and, in particular, set-off in the</p> <p>17 company's administration.</p> <p>18 Now, so far as set-off is concerned, LBIE accepts</p> <p>19 that the contributory rule precludes any set-off between</p> <p>20 the members' obligation to contribute and the company's</p> <p>21 liability to the member. The reference for your</p> <p>22 Lordship's note is paragraphs 15 and 142 to 143 of</p> <p>23 LBIE's opening. But that's a central plank of LBIE's</p> <p>24 case. Otherwise, says LBIE, the member wouldn't be</p> <p>25 treated <i>pari passu</i> with the other creditors but rather</p> <p style="text-align: center;">Page 4</p>

<p>1 better than them and, as I have said, the funds</p> <p>2 contributed by the member wouldn't be available for</p> <p>3 distribution among the creditors generally.</p> <p>4 Further, at paragraphs 148 to 150 of LBIE's opening</p> <p>5 LBIE accepts that the rule precluding a set-off in</p> <p>6 respect of the liability of a contributory extends to</p> <p>7 the members of unlimited companies as well; that is</p> <p>8 because of the introduction of section 101 of the 1862</p> <p>9 Act, which is now largely replicated in section 149 of</p> <p>10 the Insolvency Act 1986; and we agree. But -- and this</p> <p>11 is the important point -- the circumstances in which</p> <p>12 a set-off is prohibited is where a call has been made</p> <p>13 post winding-up. It might be helpful just to look at</p> <p>14 the way LBIE puts this in its written opening at</p> <p>15 paragraph 150(2).</p> <p>16 MR JUSTICE DAVID RICHARDS: Can you give me that reference</p> <p>17 again.</p> <p>18 MR WOLFSON: Paragraph 150(2).</p> <p>19 MR JUSTICE DAVID RICHARDS: Sorry, what are we looking at?</p> <p>20 MR WOLFSON: This is LBIE's opening.</p> <p>21 MR JUSTICE DAVID RICHARDS: Paragraph?</p> <p>22 MR WOLFSON: 150(2).</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, sorry.</p> <p>24 MR WOLFSON: Having started at 150, dealing with</p> <p>25 section 101, in 150(2) they say:</p> <p style="text-align: center;">Page 5</p>	<p>1 read that.</p> <p>2 MR JUSTICE DAVID RICHARDS: I have not but I will. Yes.</p> <p>3 MR WOLFSON: So the short point there is that it doesn't</p> <p>4 exclude calls made before the winding-up as to which</p> <p>5 there was set-off available for a member in an unlimited</p> <p>6 company.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR WOLFSON: I think we can probably put Derham away for the</p> <p>9 moment.</p> <p>10 So the absence of a set-off in the context of calls</p> <p>11 made in unlimited companies is also confirmed by the</p> <p>12 decision in Ex Parte Branwhite. We need not go to it</p> <p>13 now, but just to give your Lordship the reference it's</p> <p>14 at --</p> <p>15 MR JUSTICE DAVID RICHARDS: Ex parte what?</p> <p>16 MR WOLFSON: Branwhite. It's at authorities 1A, tab 25.</p> <p>17 The reference in our written submissions is footnote 16,</p> <p>18 page 39. In that case, what happened there was that</p> <p>19 Mr Justice Fry declined to follow the decision to the</p> <p>20 contrary in the Gibbs v West case -- this was a decision</p> <p>21 we looked at yesterday -- where it appears to have been</p> <p>22 wrongly assumed by Vice Chancellor Malins that the then</p> <p>23 equivalent of section 149, i.e. section 101, extended to</p> <p>24 calls made in the winding-up also, when of course the</p> <p>25 whole point is that calls made in the winding-up are</p> <p style="text-align: center;">Page 7</p>
<p>1 "The terms of section 101 gave rise to an</p> <p>2 implication that, in the case of a limited company or an</p> <p>3 unlimited company in relation to which a call is made on</p> <p>4 a contributory by the court after the commencement of</p> <p>5 the winding-up, Parliament intended that the call should</p> <p>6 be paid without set-off and this principle has since</p> <p>7 become entrenched."</p> <p>8 Now, this may be a helpful point to pick up</p> <p>9 a question which your Lordship asked my learned friend</p> <p>10 yesterday about section 101 and what was excluded by the</p> <p>11 proviso. The shortest way to answer your Lordship's</p> <p>12 question may be to invite your Lordship to have a look</p> <p>13 at the Derham sections, because Dr Derham deals with</p> <p>14 this at paragraph 8.64. This is 1D, tab 106.</p> <p>15 MR JUSTICE DAVID RICHARDS: Just remind me what is the</p> <p>16 section now?</p> <p>17 MR WOLFSON: 149. It's effectively replicated in 149.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes. Which tab is it again?</p> <p>19 MR WOLFSON: It's tab 106, my Lord. It's paragraph 8.64,</p> <p>20 which is on page 408. It's one of the new bits that</p> <p>21 went in.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR WOLFSON: Perhaps I could just invite your Lordship to</p> <p>24 read that paragraph. If your Lordship looks at the</p> <p>25 footnote as well. I don't know if your Lordship has</p> <p style="text-align: center;">Page 6</p>	<p>1 excluded from the set-off.</p> <p>2 Now, if we go back to the Gibbs v West case, which</p> <p>3 I know your Lordship did look at, the reference for that</p> <p>4 is 1A at tab 19. The critical point about this case,</p> <p>5 and the reason why, with respect, the learned judge was</p> <p>6 wrong, appears from page 328. It's thanks to the</p> <p>7 industry of the law reporter that we can make this</p> <p>8 submission. If one looks at page 328, just before the</p> <p>9 second hole punch, the learned judge refers to the 101st</p> <p>10 section. In the square brackets, one is told that the</p> <p>11 learned judge read the section except the proviso at the</p> <p>12 end.</p> <p>13 MR JUSTICE DAVID RICHARDS: I see.</p> <p>14 MR WOLFSON: Of course that's a problem because the proviso</p> <p>15 at the end is actually rather important because it's the</p> <p>16 proviso at the end that makes clear that it doesn't</p> <p>17 apply to calls made under the Acts. It's for those</p> <p>18 reasons we say that the decision on this point is, with</p> <p>19 respect, plainly wrong. Mr Justice Fry in Branwhite is</p> <p>20 right. I am sorry, we probably should have kept Derham</p> <p>21 open because I am going to invite your Lordship to go</p> <p>22 back to Derham because there is a useful summary on this</p> <p>23 point in Derham's book. We are now back in 1D at</p> <p>24 tab 106. We invite your Lordship --</p> <p>25 MR JUSTICE DAVID RICHARDS: Sorry, in the Gibbs v West case,</p> <p style="text-align: center;">Page 8</p>

<p>1 was this a limited or an unlimited company?</p> <p>2 MR WOLFSON: Unlimited. The conclusion the learned judge --</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>4 MR WOLFSON: He basically says there being therefore, in the</p> <p>5 case of an unlimited company, a clear right of set-off.</p> <p>6 With great respect --</p> <p>7 MR JUSTICE DAVID RICHARDS: He was wrong.</p> <p>8 MR WOLFSON: -- he's wrong.</p> <p>9 MR JUSTICE DAVID RICHARDS: You see, I mean Mr Higgins, who</p> <p>10 was the bold junior counsel for one side, had submitted</p> <p>11 that Lord Chelmsford was wrong. Lord Chelmsford</p> <p>12 probably was wrong, wasn't he, in the earlier case?</p> <p>13 MR WOLFSON: Well --</p> <p>14 MR JUSTICE DAVID RICHARDS: Perhaps it doesn't matter.</p> <p>15 MR WOLFSON: It may not matter now, but certainly it's fair</p> <p>16 to say that that passage in Lord Chelmsford's judgment</p> <p>17 is difficult.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes, quite. Anyway, your point</p> <p>19 is that actually this was in Branwhite, is it?</p> <p>20 MR WOLFSON: Yes. Mr Justice Fry -- we need not go to</p> <p>21 Branwhite. It's a fairly short report. But the point I</p> <p>22 am making, just to try and make it clear, appears much</p> <p>23 more easily from Derham.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes, all right.</p> <p>25 MR WOLFSON: Shall I show your Lordship Derham. If your</p> <p style="text-align: center;">Page 9</p>	<p>1 administration so --</p> <p>2 MR WOLFSON: If LBIE went into liquidation and made a call.</p> <p>3 MR JUSTICE DAVID RICHARDS: Right, sorry.</p> <p>4 MR WOLFSON: If LBIE went into liquidation and made a call,</p> <p>5 there wouldn't be a set-off, which is LBIE's original</p> <p>6 position and we agree.</p> <p>7 LBIE's alternative position in its supplemental</p> <p>8 submissions is that, if it's wrong about the</p> <p>9 contributory rule, insolvency set-off operates.</p> <p>10 MR JUSTICE DAVID RICHARDS: In an administration.</p> <p>11 MR WOLFSON: In an administration.</p> <p>12 MR JUSTICE DAVID RICHARDS: That's the point. I mean, there</p> <p>13 is no doubting the position if LBIE goes into</p> <p>14 liquidation though, is there?</p> <p>15 MR WOLFSON: No, exactly.</p> <p>16 MR JUSTICE DAVID RICHARDS: They argue that the same</p> <p>17 position, the contributory rule applies in an</p> <p>18 administration.</p> <p>19 MR WOLFSON: Exactly.</p> <p>20 MR JUSTICE DAVID RICHARDS: But if they are wrong about</p> <p>21 that, then they say there is set-off.</p> <p>22 MR WOLFSON: Yes, exactly. There were two points therefore</p> <p>23 we have in response to their alternative case, ie if we</p> <p>24 are wrong about the contributory rule, there's set-off</p> <p>25 in our administration. We make two points in response</p> <p style="text-align: center;">Page 11</p>
<p>1 Lordship then wants to go to Branwhite we will, but I am</p> <p>2 not sure we will need to.</p> <p>3 MR JUSTICE DAVID RICHARDS: No, okay.</p> <p>4 MR WOLFSON: In Derham, because he brings it all together,</p> <p>5 it's paragraph 8.77. This is 1D, tab 106.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes. This is page?</p> <p>7 MR WOLFSON: It's page 417, my Lord, paragraph 8.77.</p> <p>8 Perhaps I can just invite your Lordship to read that</p> <p>9 paragraph.</p> <p>10 MR JUSTICE DAVID RICHARDS: When I get to it. So which</p> <p>11 paragraph?</p> <p>12 MR WOLFSON: 8.77, my Lord.</p> <p>13 MR JUSTICE DAVID RICHARDS: Thanks. Yes.</p> <p>14 MR WOLFSON: My Lord, we respectfully adopt the reasoning</p> <p>15 and approach adopted there. We invite your Lordship to</p> <p>16 prefer the approach of Mr Justice Fry. The result of</p> <p>17 that is that the position LBIE adopted in its original</p> <p>18 submissions was of course that there was no insolvency</p> <p>19 set-off in its own administration, and we agree, in</p> <p>20 respect of a call made after. LBIE's original --</p> <p>21 MR JUSTICE DAVID RICHARDS: Sorry, I am getting quite lost</p> <p>22 here. I mean, how can there be -- we were talking about</p> <p>23 an administration.</p> <p>24 MR WOLFSON: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: There cannot be a call in an</p> <p style="text-align: center;">Page 10</p>	<p>1 to that.</p> <p>2 MR JUSTICE DAVID RICHARDS: All right. Just hold on. Yes.</p> <p>3 MR WOLFSON: We make two submissions in response to LBIE's</p> <p>4 alternative case. The first is this. If we are right</p> <p>5 that the first question has to be is there a set-off and</p> <p>6 the second question is whether the contributory rule</p> <p>7 applies, for the reasons which I submitted yesterday and</p> <p>8 earlier today, if we are right that is the order in</p> <p>9 which the questions have to arise, then it is wrong in</p> <p>10 principle for LBIE to advance a submission in the form</p> <p>11 if there is no contributory rule then there must be</p> <p>12 a set-off, because there either is a set-off or there is</p> <p>13 not. The set-off is the first --</p> <p>14 MR JUSTICE DAVID RICHARDS: They say there is.</p> <p>15 MR WOLFSON: Yes but --</p> <p>16 MR JUSTICE DAVID RICHARDS: Alternatively.</p> <p>17 MR WOLFSON: That's right, but the reason they say there is</p> <p>18 is, in their alternative case, their formulation is if</p> <p>19 the contributory rule does not apply, then there must be</p> <p>20 set-off. But we do take the point that that's actually</p> <p>21 the wrong order. Whether there is a set-off or not is</p> <p>22 a distinct question and should be the first question.</p> <p>23 The second point of course is just the forensic</p> <p>24 point --</p> <p>25 MR JUSTICE DAVID RICHARDS: But that first point, assume for</p> <p style="text-align: center;">Page 12</p>

<p>1 a moment you are right, doesn't mean one does not have</p> <p>2 to grapple with the issue.</p> <p>3 MR WOLFSON: No, absolutely, and I am going to come to that.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes, the second point.</p> <p>5 MR WOLFSON: The second point is just to make the obvious</p> <p>6 point that there is obviously an irreconcilable tension.</p> <p>7 I mean, these are alternative cases in the fuller sense.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, okay.</p> <p>9 MR WOLFSON: Now, how is this set-off said to have been</p> <p>10 effected? The way LBIE puts it in its supplemental</p> <p>11 submission dealing with this alternative case, so this</p> <p>12 is where we find it for the first time, is at</p> <p>13 paragraph 52. Perhaps your Lordship should look at the</p> <p>14 way it is put at paragraph 52.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR WOLFSON: "If, however, the court concludes the</p> <p>17 contributory rule does not apply, whether because no</p> <p>18 call has yet been made or otherwise, LBIE will contend</p> <p>19 that on 4 December 2009, when the administrators gave</p> <p>20 notice they were proposing to distribute, an account was</p> <p>21 taken under 285.3 of what was actually or contingently</p> <p>22 due from each party to the other, irrespective of their</p> <p>23 mutual dealings and the sums due from one party set-off</p> <p>24 against the sums due from the other."</p> <p>25 Now, for the purpose of insolvency set-off under</p> <p style="text-align: center;">Page 13</p>	<p>1 MR JUSTICE DAVID RICHARDS: I am sorry, Mr Wolfson, this has</p> <p>2 not been done because they argue that the</p> <p>3 contributory rule applies. The position we are in is</p> <p>4 that if I say the contributory rule doesn't apply they</p> <p>5 say at that point we must go on to consider the question</p> <p>6 of set-off.</p> <p>7 MR WOLFSON: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: I mean, that's what we are</p> <p>9 really having to discuss here.</p> <p>10 MR WOLFSON: In which case, fine, we can certainly proceed</p> <p>11 on that basis, and we can proceed on the basis that this</p> <p>12 is what, so to speak, they will do if your Lordship</p> <p>13 finds that on the contributory rule.</p> <p>14 MR JUSTICE DAVID RICHARDS: This is an application for</p> <p>15 directions.</p> <p>16 MR WOLFSON: Absolutely.</p> <p>17 MR TROWER: I hesitate to interrupt, but can I also say that</p> <p>18 there isn't an admission of this proof in any event.</p> <p>19 There are issues between the two officeholders in</p> <p>20 relation to its amount.</p> <p>21 MR JUSTICE DAVID RICHARDS: I see. Thank you.</p> <p>22 MR WOLFSON: Yes, as I said earlier, it's in limbo. It has</p> <p>23 not been admitted or rejected.</p> <p>24 MR JUSTICE DAVID RICHARDS: Correct.</p> <p>25 MR WOLFSON: Now, if we do get to this stage, that then</p> <p style="text-align: center;">Page 15</p>
<p>1 rule 285, the account "shall be taken as at the date of</p> <p>2 the notice" of the administrator that he proposes to</p> <p>3 make a distribution. That's 285 that's referred to</p> <p>4 there. Now, the submission appears to be not that an</p> <p>5 account was deemed to have been taken or should be</p> <p>6 treated as having been taken but that an account was</p> <p>7 taken. We don't quite follow this. There is no</p> <p>8 evidence that any account was taken.</p> <p>9 MR JUSTICE DAVID RICHARDS: I can't believe it is being</p> <p>10 suggested that actually someone sat down and did this</p> <p>11 account.</p> <p>12 MR WOLFSON: No, exactly.</p> <p>13 MR JUSTICE DAVID RICHARDS: But what they are saying is that</p> <p>14 that is the effect of the rule.</p> <p>15 MR WOLFSON: I am perfectly prepared to work on that basis.</p> <p>16 In which case, rule 285 is an account shall be taken as</p> <p>17 at the date. This does not seem to have happened.</p> <p>18 MR JUSTICE DAVID RICHARDS: No.</p> <p>19 MR WOLFSON: If an account had been taken and the balance</p> <p>20 had been determined to be payable by LBIE to LBL on the</p> <p>21 taking of that account, then plainly a dividend on the</p> <p>22 balance should have been paid to LBL. But, importantly,</p> <p>23 also if an account had been taken there should have</p> <p>24 been, in our submission, an admission or rejection of</p> <p>25 proofs which would have --</p> <p style="text-align: center;">Page 14</p>	<p>1 brings us to the argument originally run by Lydian but</p> <p>2 adopted by LBIE, which LBIE adopts as part of its</p> <p>3 argument for insolvency set-off in the alternative.</p> <p>4 That argument is this. LBIE adopts Lydian's point, but</p> <p>5 it doesn't make a difference if there is insolvency</p> <p>6 set-off when the company is unlimited, as it says at</p> <p>7 paragraph 30 of its supplemental submissions because,</p> <p>8 they say this, any claim which the member has against</p> <p>9 the company will always be "paid" by way of set-off</p> <p>10 against the part of its own liability to contribute,</p> <p>11 meaning that there will never be any extant claim by the</p> <p>12 member against the company against which a distribution</p> <p>13 could be paid out of the assets of the company.</p> <p>14 This was the point Mr Zacaroli addressed your</p> <p>15 Lordship on yesterday. With respect, this is</p> <p>16 a superficially attractive point but it is false. The</p> <p>17 reason it is false is because it ignores the point made</p> <p>18 at paragraph 67 of our written opening and that point is</p> <p>19 this. The contribution from LBL which falls to be</p> <p>20 brought into the account is only the dividend --</p> <p>21 MR JUSTICE DAVID RICHARDS: But before we get there, I would</p> <p>22 rather just try and address this point as to whether</p> <p>23 there is or is not available an insolvency set-off in</p> <p>24 the alternative case.</p> <p>25 MR WOLFSON: Yes.</p> <p style="text-align: center;">Page 16</p>

<p>1 MR JUSTICE DAVID RICHARDS: So we have the position 2 hypothetically that the contributory rule doesn't apply. 3 MR WOLFSON: Yes. 4 MR JUSTICE DAVID RICHARDS: Now, as I understand it, and 5 I may be wrong, it's the contention of the 6 administrators of LBIE that in that event there is an 7 insolvency set-off. 8 MR WOLFSON: Yes. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR WOLFSON: Yes. 11 MR JUSTICE DAVID RICHARDS: As I understand it, it is your 12 contention, the administrators of LBL, that there isn't 13 an insolvency set-off. 14 MR WOLFSON: Yes. 15 MR JUSTICE DAVID RICHARDS: Can we just address that as 16 a matter of principle. 17 MR WOLFSON: Yes. 18 MR JUSTICE DAVID RICHARDS: Why do you say there isn't an 19 insolvency set-off? That's really what I would like to 20 go to first, and then we can go to Mr Zacaroli's example 21 and so on. 22 MR WOLFSON: The short answer is this -- 23 MR JUSTICE DAVID RICHARDS: Because Mr Zacaroli's 24 example really presupposes there is a set-off, doesn't 25 it?</p> <p style="text-align: center;">Page 17</p>	<p>1 MR JUSTICE DAVID RICHARDS: So you say, well, because there 2 cannot be a set-off of the actual liability if a call 3 has been made, it follows that there cannot be a set-off 4 of the contingent liability. 5 MR WOLFSON: My Lord, yes. With respect, that must be 6 right. Because what do we mean when we have a set-off 7 of a contingent liability? If there is a set-off, it 8 discharges the underlying debt. 9 MR JUSTICE DAVID RICHARDS: That would matter in the case of 10 a limited company with uncalled capital on its shares 11 held by an insolvent member. 12 MR WOLFSON: For example. 13 MR JUSTICE DAVID RICHARDS: It may not matter -- this is 14 Mr Zacaroli's example -- in the case of an unlimited 15 company. 16 MR WOLFSON: I hope I have answered your Lordship's 17 question, which is why I do need to deal with 18 Mr Zacaroli's example. 19 MR JUSTICE DAVID RICHARDS: Yes, okay. But your point is 20 simply that. 21 MR WOLFSON: Yes. 22 MR JUSTICE DAVID RICHARDS: I see. 23 MR WOLFSON: Your Lordship, if I may say, with respect, 24 asked me a very short and important question. I hope I 25 have given an equally short answer. It's the same</p> <p style="text-align: center;">Page 19</p>
<p>1 MR WOLFSON: Yes. 2 MR JUSTICE DAVID RICHARDS: And you say there isn't. 3 MR WOLFSON: Yes, or it is another way of him putting it 4 though is to say, so to speak, it doesn't matter whether 5 there is a formal set-off because I get there anyway. 6 MR JUSTICE DAVID RICHARDS: I am not sure about that but -- 7 MR WOLFSON: To answer your Lordship's question, there 8 cannot be a set-off in LBIE's administration of the 9 contingent liability for calls, which I understand is 10 the point your Lordship is putting to me. 11 MR JUSTICE DAVID RICHARDS: You say there cannot be 12 a set-off? 13 MR WOLFSON: In LBIE's administration of the contingent 14 liability for calls because of the same line of 15 authority, the Grissell's case line of authority. The 16 short point we make is this. If there cannot be 17 a set-off of the actual liability, there cannot be 18 a set-off of the contingent liability either. The 19 reason for that, as your Lordship will appreciate, is 20 this: set-off operates to discharge the debts that are 21 set-off. So the same policy justifications which 22 prevent a set-off of the actual liability necessarily 23 prevent a set-off of the contingent liability too. 24 I hope that's a short answer to your Lordship's 25 question.</p> <p style="text-align: center;">Page 18</p>	<p>1 policy. One just has to ask oneself: what do we mean by 2 set-off? What does a set-off do? A set-off discharges 3 the underlying debt. One asks rhetorically: does that 4 make a difference if the set-off is of the actual 5 liability or the contingent liability? No. If you 6 set-off a contingent liability, in my submission, you 7 have discharged the underlying debt, otherwise what do 8 we mean when we are talking about a set-off of 9 a contingent liability? 10 So my answer to your Lordship is it's exactly the 11 same policy. If I am right on the policy on actual 12 liability, the same applies to set-off of contingent 13 liability. But that does mean I need to deal with 14 Mr Zacaroli's example. 15 MR JUSTICE DAVID RICHARDS: It does. What's said against 16 you is that it produces an odd result. Perhaps in the 17 case of a member with, let us say, uncalled capital on 18 the shares it owns, which goes into, let us say, 19 liquidation, holding shares in a company which is not in 20 liquidation, not in administration, but where there is 21 some serious prospect that it might become insolvent, 22 what is said against you is, well, it's an odd result 23 that in those circumstances the member is entitled to 24 recover the full amount of its claim against the 25 company, without any claim being admitted against it for</p> <p style="text-align: center;">Page 20</p>

<p>1 its contingent liability arising in respect of the</p> <p>2 unpaid capital. Indeed, the liquidation of the member</p> <p>3 may be completed before the company itself goes into</p> <p>4 insolvency, which let us assume it subsequently does.</p> <p>5 So the policy behind the contributory rule in the</p> <p>6 liquidation of the company is to protect the creditors</p> <p>7 of the company, but in the circumstances we are now</p> <p>8 discussing the creditors of the company are deprived of</p> <p>9 that protection. That is the oddity.</p> <p>10 MR WOLFSON: Yes. The phrase your Lordship used in that</p> <p>11 question was the policy of the contributory rule in the</p> <p>12 liquidation of the company.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR WOLFSON: Of course that brings me back to my starting</p> <p>15 point, which is that the way to cut through -- sorry.</p> <p>16 MR JUSTICE DAVID RICHARDS: Go on.</p> <p>17 MR WOLFSON: Your Lordship sees the point I am making. The</p> <p>18 way to cut through it is of course is the company can</p> <p>19 always go into liquidation and make a call.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes, but that's a very odd</p> <p>21 proposition. I mean, it may be that there are real</p> <p>22 prospects of the company's survival and it may or may</p> <p>23 not survive.</p> <p>24 MR WOLFSON: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: But there is a prospect of it</p> <p style="text-align: center;">Page 21</p>	<p>1 is that for so long as we are in administration we</p> <p>2 cannot make calls and we don't have the benefit of as if</p> <p>3 we had made a call. This really brings me back to where</p> <p>4 we started.</p> <p>5 MR JUSTICE DAVID RICHARDS: I am postulating a company that</p> <p>6 isn't in administration either.</p> <p>7 MR WOLFSON: Yes. Well, this is a submission I made</p> <p>8 yesterday, which is that on LBIE's case we are in the</p> <p>9 same position whether LBIE is in administration or</p> <p>10 liquidation or perhaps neither, solvent or insolvent.</p> <p>11 MR JUSTICE DAVID RICHARDS: No, I think their argument is</p> <p>12 that this applies as from the time that the</p> <p>13 administration becomes a distributing administration.</p> <p>14 MR WOLFSON: But the point your Lordship is putting to me is</p> <p>15 that my argument frustrates the contributory rule in any</p> <p>16 circumstance, or I have misunderstood the point your</p> <p>17 Lordship is putting to me?</p> <p>18 MR JUSTICE DAVID RICHARDS: No, you say that there is no</p> <p>19 set-off of a contingent liability because there would</p> <p>20 not be any set-off of an actual liability.</p> <p>21 MR WOLFSON: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: I was saying that that seems to</p> <p>23 be capable of producing, as it were, the very reverse of</p> <p>24 the policy behind the contributory rule and the absence</p> <p>25 of set-off.</p> <p style="text-align: center;">Page 23</p>
<p>1 going subsequently into liquidation. I mean, the point</p> <p>2 remain that in this circumstance the member is using, as</p> <p>3 it were, the contributory rule to be effectively</p> <p>4 relieved of any liability, isn't it?</p> <p>5 MR WOLFSON: My Lord, the policy -- and maybe I am repeating</p> <p>6 the answer I gave a moment ago -- is that members have</p> <p>7 to contribute in a liquidation.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, okay.</p> <p>9 MR WOLFSON: First of all, that's the policy. Secondly,</p> <p>10 that is where we get to. You can always create</p> <p>11 circumstances where you have what you might think is odd</p> <p>12 results. One of the oddities here is that the dividend</p> <p>13 in LBIE's estate is likely to be very substantially</p> <p>14 greater than the dividend in LBL's estate. If it was</p> <p>15 the other way round, one wonders quite how the arguments</p> <p>16 would play out before your Lordship. One can play with</p> <p>17 the examples, but in my respectful submission what one</p> <p>18 has to do is really approach it from a matter of</p> <p>19 principle. If one starts from the principle that what</p> <p>20 the members are there for is to contribute to the assets</p> <p>21 in a winding-up, in my respectful submission there is no</p> <p>22 reason why that should not be given effect to. If</p> <p>23 a company is in a position of, well, we may go into</p> <p>24 liquidation, we may not, one of the factors they have to</p> <p>25 take into account in deciding to stay in administration</p> <p style="text-align: center;">Page 22</p>	<p>1 MR WOLFSON: My Lord, of course I see the force of the point</p> <p>2 your Lordship puts to me in terms of the consequences.</p> <p>3 Of course I see that. But, with respect, my Lord, there</p> <p>4 are only two ways of, so to speak, cutting the Gordian</p> <p>5 Knot here. One either says that my submission is wrong</p> <p>6 as regards actual liability so therefore there is</p> <p>7 a set-off --</p> <p>8 MR JUSTICE DAVID RICHARDS: That does not seem very likely.</p> <p>9 MR WOLFSON: That does not seem very likely. I am not</p> <p>10 suggesting it as a correct answer.</p> <p>11 MR JUSTICE DAVID RICHARDS: No, all right.</p> <p>12 MR WOLFSON: So that's out. Or one has to say is that,</p> <p>13 although that's a case with actual liability, the</p> <p>14 position is contingent liability is different.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR WOLFSON: With respect, the insuperable problem that that</p> <p>17 argument faces is that -- I hesitate to use the words,</p> <p>18 the jurisprudential problem -- what do we mean by</p> <p>19 a set-off of a contingent liability? And that</p> <p>20 discharges the debt as much as a set-off of an actual</p> <p>21 liability does. If that is right, and if my point on</p> <p>22 actual liability is right, then, with respect, the</p> <p>23 argument is right. The fact that it may, in certain</p> <p>24 circumstances, produce what your Lordship thinks is an</p> <p>25 odd result is the function of the system. One can only</p> <p style="text-align: center;">Page 24</p>

<p>1 cut this argument, to put it another way, in two places.</p> <p>2 I am either wrong on actual liability, and with respect</p> <p>3 I am not, or there is a distinction between a set-off of</p> <p>4 a contingent liability and a set-off of an actual</p> <p>5 liability. But, with respect, that distinction eludes</p> <p>6 me. There cannot be a distinction in principle.</p> <p>7 MR JUSTICE DAVID RICHARDS: The way it works is of course</p> <p>8 you estimate or value a contingent liability and it is</p> <p>9 estimated at X. If events subsequently occur which show</p> <p>10 that it is more than X, then it is revalued.</p> <p>11 MR WOLFSON: But if the set-off has already taken place --</p> <p>12 with great respect, my Lord --</p> <p>13 MR JUSTICE DAVID RICHARDS: Let us suppose you estimate it</p> <p>14 at 50 and so the company has a contingent claim which is</p> <p>15 estimated at 50.</p> <p>16 MR WOLFSON: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: And the member has a contractual</p> <p>18 claim which is 50.</p> <p>19 MR WOLFSON: Yes.</p> <p>20 MR JUSTICE DAVID RICHARDS: So you have a set-off. But if</p> <p>21 subsequently the contingency occurs and the actual</p> <p>22 liability of the member to the company is 120, i.e. 70</p> <p>23 more than the 50, the fact that there has been a prior</p> <p>24 set-off between the contingent and the actual claim</p> <p>25 I don't think would destroy the company's claim for 70.</p> <p style="text-align: center;">Page 25</p>	<p>1 MR WOLFSON: In my respectful submission, that is enough of</p> <p>2 an answer, so to speak.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, okay.</p> <p>4 MR WOLFSON: It's a complete answer to your Lordship's</p> <p>5 point.</p> <p>6 MR JUSTICE DAVID RICHARDS: Okay, I understand. Thank you.</p> <p>7 You say there is no set-off.</p> <p>8 MR WOLFSON: There is no set-off of a contingent liability</p> <p>9 for the same policy reasons as the actual liability.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR WOLFSON: I hope I have not over-laboured that.</p> <p>12 MR JUSTICE DAVID RICHARDS: No, I follow.</p> <p>13 MR WOLFSON: Perhaps now is a more convenient time than what</p> <p>14 I was going to do before to address Mr Zacaroli's</p> <p>15 example.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR WOLFSON: I don't think I have to go through his example</p> <p>18 again. Your Lordship knows the point he makes.</p> <p>19 MR JUSTICE DAVID RICHARDS: Let me just turn it up.</p> <p>20 MR WOLFSON: It's in paragraph 31 I think of his written</p> <p>21 submissions. It's 31, my Lord.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR WOLFSON: I am not going to reread the example. Does</p> <p>24 your Lordship have it in mind or shall I --</p> <p>25 MR JUSTICE DAVID RICHARDS: I have it here. It's helpful</p> <p style="text-align: center;">Page 27</p>
<p>1 MR WOLFSON: My Lord, yes. It seems to me, with respect,</p> <p>2 that must be right. The legislation certainly provides</p> <p>3 for the hindsight principle.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>5 MR WOLFSON: In your Lordship's example, it seems to me that</p> <p>6 would be right. However, the point I am submitting --</p> <p>7 and, in my respectful submission, this is an answer to</p> <p>8 the point your Lordship put to me.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR WOLFSON: Because, with respect, your Lordship has</p> <p>11 changed the focus of the objection. The original</p> <p>12 objection your Lordship had was the policy objection.</p> <p>13 The point I was submitting there, going back to our 50</p> <p>14 and 50, if one has a contingent 50 and a contractual</p> <p>15 debt 50.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR WOLFSON: And one sets-off the contingent 50 against the</p> <p>18 contractual debt 50 and it turns out that the</p> <p>19 contingency was correctly estimated.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR WOLFSON: That has been set-off. Importantly, it's not</p> <p>22 set-off when it turns out that the contingency was</p> <p>23 right. It was set-off when you set-off against the</p> <p>24 contingency.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 26</p>	<p>1 perhaps, I mean by reference to this, for you to</p> <p>2 identify the point at which it goes wrong and why.</p> <p>3 MR WOLFSON: Exactly. The point at which it goes wrong is</p> <p>4 that what it fails to do is to recognise this point,</p> <p>5 which I will illustrate first by reference to authority</p> <p>6 and then by reference to a worked example. It fails to</p> <p>7 recognise the point that what falls to be brought into</p> <p>8 account is not the full value of the proof against the</p> <p>9 contributory, the insolvent contributory, but rather</p> <p>10 only the dividend in the contributory's administration</p> <p>11 or subsequent liquidation on the section 74 liability.</p> <p>12 Your Lordship will appreciate -- and, as I say, we will</p> <p>13 come to a worked example after we have looked at the</p> <p>14 authorities -- immediately that if one reruns this</p> <p>15 example, assuming first an insolvent contributory and</p> <p>16 assuming second that the company only brings into</p> <p>17 account in a set-off the dividend it can get from that</p> <p>18 insolvent contributory, then of course the numbers will</p> <p>19 be radically different. I will show your Lordship</p> <p>20 a worked example. I have changed the numbers slightly</p> <p>21 from Mr Zacaroli's only because we had a lot of twos and</p> <p>22 fours and I have used numbers which produce sort of</p> <p>23 fractions which are easier to work with or make it more</p> <p>24 obvious.</p> <p>25 Now, the key point on the facts -- let me make</p> <p style="text-align: center;">Page 28</p>

<p>1 a factual point and then I will go to the authorities</p> <p>2 and then I will go to the worked example. The factual</p> <p>3 point is this. This is the key factual point. Because</p> <p>4 LBL went into administration before LBIE will be wound</p> <p>5 up, and also before LBIE started making distributions,</p> <p>6 LBIE will never be able to claim against LBL for more</p> <p>7 than the dividend payable in LBL's estate on a proof by</p> <p>8 LBIE's officeholders in respect of that section 74</p> <p>9 liability.</p> <p>10 MR JUSTICE DAVID RICHARDS: Sorry, can you just repeat that.</p> <p>11 MR WOLFSON: Because LBL went into administration before</p> <p>12 LBIE will be wound up and before LBIE started making</p> <p>13 distributions, LBIE will never be able to claim against</p> <p>14 LBL for more than the dividend payable in LBL's estate</p> <p>15 on a proof by LBIE's officeholders in respect of</p> <p>16 a section 74 liability.</p> <p>17 MR JUSTICE DAVID RICHARDS: Just hold on. LBIE will never</p> <p>18 be able to claim for more than what?</p> <p>19 MR WOLFSON: The dividend payable in LBL's estate on a proof</p> <p>20 by LBIE's officeholders in respect of a section 74</p> <p>21 liability. Just looking at my note here, I think I have</p> <p>22 used the word "claim", but I should probably more</p> <p>23 accurately say "received".</p> <p>24 MR JUSTICE DAVID RICHARDS: Received?</p> <p>25 MR WOLFSON: They are never going to get more than what they</p> <p style="text-align: center;">Page 29</p>	<p>1 MR JUSTICE DAVID RICHARDS: -- to obtain credit for more</p> <p>2 than; is that one way of putting it?</p> <p>3 MR WOLFSON: Yes, for more than the dividend payable.</p> <p>4 MR JUSTICE DAVID RICHARDS: More than the dividend.</p> <p>5 MR WOLFSON: Which would be payable in LBL's administration</p> <p>6 on that claim. That's the same for section 74, whether</p> <p>7 you look at it in terms of set-off or for the</p> <p>8 contributory rule. We will see that in the authorities.</p> <p>9 Now, once one accepts that, of course the worked</p> <p>10 example of Mr Zacaroli falls apart. Because you don't</p> <p>11 keep sort of going round. There isn't always an amount</p> <p>12 to bring in. I will show your Lordship a worked example</p> <p>13 which shows that.</p> <p>14 MR JUSTICE DAVID RICHARDS: Right.</p> <p>15 MR WOLFSON: Now, we made this point in writing. Neither of</p> <p>16 LBL's (sic) written documents deal with the point.</p> <p>17 Lydian doesn't --</p> <p>18 MR JUSTICE DAVID RICHARDS: You said LBL.</p> <p>19 MR WOLFSON: I meant LBIE, sorry. Lydian doesn't deal with</p> <p>20 it. It was not dealt with orally by Mr Trower and it</p> <p>21 wasn't dealt with orally by Mr Zacaroli. We submit</p> <p>22 there is simply no answer to this point.</p> <p>23 MR JUSTICE DAVID RICHARDS: You explain the point to me,</p> <p>24 okay. But Mr Trower does have a right of reply.</p> <p>25 MR WOLFSON: Oh, yes, absolutely. I hope your Lordship has</p> <p style="text-align: center;">Page 31</p>
<p>1 can get by way of dividend.</p> <p>2 MR JUSTICE DAVID RICHARDS: Are we talking here about</p> <p>3 set-off? Are we talking about the amount you can</p> <p>4 set-off?</p> <p>5 MR WOLFSON: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: Plainly, they can claim the full</p> <p>7 amount.</p> <p>8 MR WOLFSON: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: Because it's only then that you</p> <p>10 can work out the dividend. Plainly, they can only be</p> <p>11 paid by monetary transfer.</p> <p>12 MR WOLFSON: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: The amount of the dividend.</p> <p>14 MR WOLFSON: The point your Lordship is about to put to</p> <p>15 me --</p> <p>16 MR JUSTICE DAVID RICHARDS: I just want to get the</p> <p>17 submission.</p> <p>18 MR WOLFSON: The point is that, for the purposes of a</p> <p>19 set-off, it's not the full amount of the proof, the</p> <p>20 section 74 liability which is brought into account; it's</p> <p>21 only the dividend which would be paid on that liability</p> <p>22 on LBL's administration.</p> <p>23 MR JUSTICE DAVID RICHARDS: So, in a sense, LBL will never</p> <p>24 be able, for the purposes of set-off --</p> <p>25 MR WOLFSON: Yes.</p> <p style="text-align: center;">Page 30</p>	<p>1 the point which I am putting.</p> <p>2 MR JUSTICE DAVID RICHARDS: I have written it down but I am</p> <p>3 interested to see the development of it.</p> <p>4 MR WOLFSON: The authorities, to give your Lordship the</p> <p>5 reference, are in footnote 18 of our written submissions</p> <p>6 on page 41. We will go to them. Perhaps I can invite</p> <p>7 your Lordship --</p> <p>8 MR JUSTICE DAVID RICHARDS: Give me the footnote again.</p> <p>9 MR WOLFSON: It's footnote 18. Perhaps your Lordship should</p> <p>10 reread paragraph 67. We are going to go to Kaupthing.</p> <p>11 So, for the purposes of the footnote, I would just</p> <p>12 invite your Lordship first to read the first two and a</p> <p>13 bit lines which deal with Cherry v Boulton itself. The</p> <p>14 critical point in Cherry v Boulton is that the</p> <p>15 beneficiary had become bankrupt before the will took</p> <p>16 effect. So the executor of the will could deduct from</p> <p>17 the legacies only so much of the debt as would have been</p> <p>18 paid as a dividend in the bankruptcy and not the full</p> <p>19 value, the full face value. It's developed in the later</p> <p>20 cases and it is easier to see it --</p> <p>21 MR JUSTICE DAVID RICHARDS: The cases that develop it, are</p> <p>22 they corporate insolvency cases or are they sort of</p> <p>23 trust fund type cases?</p> <p>24 MR WOLFSON: Some of them are trust cases. Some of them are</p> <p>25 company cases. But we will end up at Lord Walker in</p> <p style="text-align: center;">Page 32</p>

<p>1 Kaupthing. My submission is that this point that it's</p> <p>2 only the dividend which is brought into account is found</p> <p>3 both in the original case, i.e. Cherry v Boulton.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR WOLFSON: And the most recent and authoritative</p> <p>6 discussion of this area, Lord Walker in Kaupthing.</p> <p>7 MR JUSTICE DAVID RICHARDS: Right.</p> <p>8 MR WOLFSON: I am not going to go through all of those</p> <p>9 cases, but I am going to invite your Lordship to look at</p> <p>10 one case and then we are going to go to Kaupthing.</p> <p>11 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>12 MR WOLFSON: But I just point out as a footnote that of</p> <p>13 course you do find this in Cherry v Boulton itself.</p> <p>14 MR JUSTICE DAVID RICHARDS: Right.</p> <p>15 MR WOLFSON: Without going through all of the cases, the</p> <p>16 easiest way to look at this point is in a case called</p> <p>17 Peruvian Railway Construction Company, which is in</p> <p>18 bundle 1D at tab 49.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR WOLFSON: Perhaps I can first invite your Lordship just</p> <p>21 to read the headnote.</p> <p>22 MR JUSTICE DAVID RICHARDS: Sure. Yes.</p> <p>23 MR WOLFSON: Your Lordship sees the authorities referred to</p> <p>24 are some of our old friends.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 33</p>	<p>1 at) and, turning over the page, reference to Auriferous</p> <p>2 properties number 2.</p> <p>3 But then he makes the point again, in the middle of</p> <p>4 that first paragraph, we are now at the top of 153,</p> <p>5 where in the middle of the line your Lordship sees the</p> <p>6 point he makes is:</p> <p>7 "In Re Akerman, in Re Rhodesia Goldfields</p> <p>8 ...(Reading to the words)... and in the case before me,</p> <p>9 namely the insolvency of the original debtor before the</p> <p>10 right of retainer or [what he calls] quasi set-off had</p> <p>11 arisen."</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR WOLFSON: He says Cherry v Boulton is binding. Then,</p> <p>14 just before the second hole punch:</p> <p>15 "Accordingly, I propose to declare the liquidator is</p> <p>16 not entitled to retain his distribution against more</p> <p>17 than the proper dividend on the ascertained debt", et</p> <p>18 cetera.</p> <p>19 In my submission, the learned judge is correct and</p> <p>20 your Lordship should approach it on the same basis.</p> <p>21 MR JUSTICE DAVID RICHARDS: Can I just make this comment.</p> <p>22 This is about Cherry v Boulton. It's not about</p> <p>23 insolvency set-off.</p> <p>24 MR WOLFSON: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: I thought we were addressing</p> <p style="text-align: center;">Page 35</p>
<p>1 MR WOLFSON: Then, at the bottom, the principle in Cherry v</p> <p>2 Boulton, et cetera.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR WOLFSON: Now if your Lordship turns to the judgment of</p> <p>5 Mr Justice Sergeant and picks it up at page 150, towards</p> <p>6 the bottom, can I invite your Lordship to read from 150.</p> <p>7 MR JUSTICE DAVID RICHARDS: Where shall I start?</p> <p>8 MR WOLFSON: Eight lines up from the bottom of the page,</p> <p>9 "The liquidator argues that the testator ..."</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR WOLFSON: To the end of the paragraph at the top of</p> <p>12 page 151, please.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes, I will read that.</p> <p>14 MR WOLFSON: The learned judge picks up the point further</p> <p>15 down the page at 151, just by the second hole punch,</p> <p>16 towards the end of the line, "And I am of the opinion</p> <p>17 ..." If your Lordship could read from there to the end</p> <p>18 of the middle of 152, "As the executors of the testator</p> <p>19 ..."</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR WOLFSON: The learned judge then, your Lordship sees in</p> <p>22 the rest of 152, he goes through some of the Cherry v</p> <p>23 Boulton line of cases and talks about Leeds and Hanley</p> <p>24 Theatre of Varieties (we will see that later), in Re</p> <p>25 West Coast Gold fields (which your Lordship has looked</p> <p style="text-align: center;">Page 34</p>	<p>1 insolvency set-off.</p> <p>2 MR WOLFSON: Yes. The same principle here applies to both.</p> <p>3 I am going to look at Re Kaupthing now to see how Lord</p> <p>4 Walker puts it in Re Kaupthing. Sorry, just for your</p> <p>5 Lordship's note, that decision went on appeal.</p> <p>6 MR JUSTICE DAVID RICHARDS: Right.</p> <p>7 MR WOLFSON: The appeal is in the bundle. It's at tab 50.</p> <p>8 The judgments are very short and don't add anything.</p> <p>9 MR JUSTICE DAVID RICHARDS: Right.</p> <p>10 MR WOLFSON: Now, to be clear, we are now going to look at</p> <p>11 Lord Walker in Kaupthing. This is 1D, tab 94. So your</p> <p>12 Lordship has our submission clearly, I am dealing here</p> <p>13 with insolvency set-off. My submission is that the same</p> <p>14 principles and the same policy, which says that when you</p> <p>15 are effectively looking at the Cherry v Boulton rule</p> <p>16 and effectively what is called quasi set-off there, the</p> <p>17 same principles should apply for insolvency set-off.</p> <p>18 MR JUSTICE DAVID RICHARDS: The same principles.</p> <p>19 MR WOLFSON: Should apply to insolvency set-off.</p> <p>20 MR JUSTICE DAVID RICHARDS: Should apply to insolvency</p> <p>21 set-off.</p> <p>22 MR WOLFSON: Is it only the dividend that you bring into</p> <p>23 account for these purposes.</p> <p>24 MR JUSTICE DAVID RICHARDS: As apply.</p> <p>25 MR WOLFSON: In the Cherry v Boulton line of cases.</p> <p style="text-align: center;">Page 36</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR WOLFSON: To look at Lord Walker in Kaupthing,</p> <p>3 Lord Walker makes this point at the first paragraph in</p> <p>4 17, which I think your Lordship may have looked at</p> <p>5 already. Perhaps it might be easier to start at 15</p> <p>6 actually because what Lord Walker does is he looks at</p> <p>7 some of the cases. Your Lordship sees if I can make</p> <p>8 submissions as your Lordship glances through the</p> <p>9 paragraphs -- they are quite short paragraphs -- in 15,</p> <p>10 Lord Walker looks at Jeffs v Wood. Your Lordship</p> <p>11 sees -- it's a very old case, 1723 -- that in the last</p> <p>12 sentence Lord Walker notes:</p> <p>13 "Sir Joseph Jekyll MR directed the executors to pay</p> <p>14 Wood the balance of the legacy after retention by the</p> <p>15 executor of the full amount of Wood's debt to the</p> <p>16 testator."</p> <p>17 MR JUSTICE DAVID RICHARDS: Let me just read it. Yes.</p> <p>18 MR WOLFSON: Lord Walker then, in 16, refers to Cherry v</p> <p>19 Boulton. As your Lordship sees, at the end of 16 he</p> <p>20 notes the decision in Cherry v Boulton. Of course</p> <p>21 there, as we have seen, the executor could deduct from</p> <p>22 the legacies only so much of the debt as would have been</p> <p>23 paid as a dividend.</p> <p>24 MR JUSTICE DAVID RICHARDS: Just let me the -- this is in</p> <p>25 16, is it?</p> <p style="text-align: center;">Page 37</p>	<p>1 crystallisation.</p> <p>2 MR JUSTICE DAVID RICHARDS: "The inception of the</p> <p>3 administration or bankruptcy or liquidation crystallises</p> <p>4 the position and persons who were previously unsecured</p> <p>5 creditors" -- right, okay.</p> <p>6 MR WOLFSON: Lord Walker comes back to this point at 48.</p> <p>7 Perhaps I can invite your Lordship to read that.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR WOLFSON: My Lord, we submit that the same analysis and</p> <p>10 the same underlying principle applies for insolvency</p> <p>11 set-off too. That's why we submit that when one works</p> <p>12 through the example you bring in the dividend in</p> <p>13 effectively LBL's administration and not the full</p> <p>14 amount.</p> <p>15 MR JUSTICE DAVID RICHARDS: Do you have any authority to</p> <p>16 support that?</p> <p>17 MR WOLFSON: No. My Lord, if I had authority to support it</p> <p>18 I would have shown it to your Lordship; there isn't.</p> <p>19 The submission it is a question of matter of principle.</p> <p>20 In my respectful submission, there should be no</p> <p>21 principle distinction between what one brings into</p> <p>22 account when one is applying the equitable rule in</p> <p>23 Cherry v Boulton and what one brings into account in</p> <p>24 this circumstance where one is applying insolvency</p> <p>25 set-off in the context of a contribution under</p> <p style="text-align: center;">Page 39</p>
<p>1 MR WOLFSON: This is in 16.</p> <p>2 MR JUSTICE DAVID RICHARDS: Let me just read this.</p> <p>3 MR WOLFSON: Yes. Lord Walker doesn't, so to speak, ask the</p> <p>4 question in terms, well, why is there a different</p> <p>5 result? It's obviously in his mind because in 17 he</p> <p>6 explains, he says the --</p> <p>7 MR JUSTICE DAVID RICHARDS: Just sorry ... Yes, then you</p> <p>8 get the reasoning.</p> <p>9 MR WOLFSON: The reason of course is the answer to the</p> <p>10 question, well, why in Jeffs v Wood was it the whole</p> <p>11 amount and why in Cherry v Boulton was it only the</p> <p>12 dividend, and the reason is in 17.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR WOLFSON: Lord Walker comes back to this as well at</p> <p>15 paragraph 48 of the judgment.</p> <p>16 MR JUSTICE DAVID RICHARDS: Should I read the whole of 17?</p> <p>17 Let me just read it to myself, if I may.</p> <p>18 MR WOLFSON: Yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, Willes v Greenhill, I am</p> <p>20 not sure how far I go along with Lord Walker in thinking</p> <p>21 that Willes v Greenhill sets out the principle more</p> <p>22 clearly but, anyway, there it is. Yes, thank you.</p> <p>23 MR WOLFSON: Perhaps I can say, with respect, Lord Walker</p> <p>24 puts the point, with respect, nicely in the last</p> <p>25 sentence of that paragraph where he talks about</p> <p style="text-align: center;">Page 38</p>	<p>1 section 74.</p> <p>2 MR JUSTICE DAVID RICHARDS: Insolvency set-off operates on</p> <p>3 the basis that as at the relevant date, the commencement</p> <p>4 of the liquidation, giving of notice of distribution</p> <p>5 I think it is in administration, an account is taken.</p> <p>6 MR WOLFSON: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: Of what is due between the two</p> <p>8 parties, and it is only the balance, one way or the</p> <p>9 other, which is a debt at all. This is a self-executing</p> <p>10 set-off leaving a balance which is the debt.</p> <p>11 MR WOLFSON: Yes.</p> <p>12 MR JUSTICE DAVID RICHARDS: Now, as between LBL and LBIE,</p> <p>13 the debts are -- let us take your claim for 300-odd</p> <p>14 million against LBIE and LBIE's contingent claim in</p> <p>15 respect of future calls. Now, the reason, as</p> <p>16 I understand it, in the Cherry v Boulton cases as to</p> <p>17 why you only brought into account a dividend is because</p> <p>18 there had been either a death or a bankruptcy. So the</p> <p>19 amount which one side could get from the other, the</p> <p>20 other being a trustee in bankruptcy or an executor of an</p> <p>21 insolvent estate, was the dividend. But that doesn't</p> <p>22 apply as between two companies, solvent or insolvent.</p> <p>23 MR WOLFSON: With respect, no. If one is using the language</p> <p>24 "could get from the other" --</p> <p>25 MR JUSTICE DAVID RICHARDS: No, but it is not a matter of --</p> <p style="text-align: center;">Page 40</p>

<p>1 I mean, the maximum to which you would be entitled from</p> <p>2 the trustee in bankruptcy is the dividend. You are not</p> <p>3 entitled to be paid by the trustee in bankruptcy more</p> <p>4 than, as I say, the dividend.</p> <p>5 MR WOLFSON: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: He doesn't owe the debt.</p> <p>7 MR WOLFSON: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: He just owes the dividend, as it</p> <p>9 were.</p> <p>10 MR WOLFSON: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: Isn't that what they are saying?</p> <p>12 MR WOLFSON: Just so I understand your Lordship's point.</p> <p>13 MR JUSTICE DAVID RICHARDS: I can illustrate it I think best</p> <p>14 by -- we may have to go back to the earlier cases. If</p> <p>15 you go to Peruvian Railway Construction at tab 49.</p> <p>16 MR WOLFSON: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: Page 151. It's really what</p> <p>18 Mr Justice Sergeant says at the foot of the page,</p> <p>19 beginning with, "But if the date when the right arises</p> <p>20 ..."</p> <p>21 MR WOLFSON: Yes. So I understand your Lordship's point</p> <p>22 though, let us assume this case. Let us assume a Cherry</p> <p>23 v Boulton situation where the person who has to</p> <p>24 contribute to the fund is a company and is an insolvent</p> <p>25 company. So it's not a section 74 case.</p> <p style="text-align: center;">Page 41</p>	<p>1 Cherry v Boulton, would that make a difference? In my</p> <p>2 respectful submission, the answer would have to be: no,</p> <p>3 it wouldn't make a difference.</p> <p>4 MR JUSTICE DAVID RICHARDS: Why -- okay.</p> <p>5 MR WOLFSON: Because the same logic applies.</p> <p>6 MR JUSTICE DAVID RICHARDS: Does it?</p> <p>7 MR WOLFSON: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: I see.</p> <p>9 MR WOLFSON: It has to apply, my Lord, because as at the</p> <p>10 date of the death all that the testators could ever get</p> <p>11 was a dividend.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes, but that's because the debt</p> <p>13 was due from the trustee in bankruptcy.</p> <p>14 MR WOLFSON: Sorry, I am assuming now it is a company, the</p> <p>15 debt is due from a company.</p> <p>16 MR JUSTICE DAVID RICHARDS: But that's not right. The</p> <p>17 testator would be entitled to the full amount of the</p> <p>18 debt from the company. Of course it may only be able to</p> <p>19 get the dividend.</p> <p>20 MR WOLFSON: But the question is -- and it is a point</p> <p>21 ultimately of principle -- when one is operating the</p> <p>22 account, the set-off, the worked example, whatever we</p> <p>23 call it, what is brought in? I mean, it is a submission</p> <p>24 of a point of principle. My submission is that the</p> <p>25 analysis in the Cherry v Boulton line of cases, from</p> <p style="text-align: center;">Page 43</p>
<p>1 MR JUSTICE DAVID RICHARDS: But it does not seem to me we</p> <p>2 should be considering a Cherry v Boulton case. We</p> <p>3 should be considering an insolvency set-off case.</p> <p>4 MR WOLFSON: Absolutely. But my submission is that when one</p> <p>5 looks at the Cherry v Boulton cases what's brought into</p> <p>6 account is the dividend. Your Lordship said --</p> <p>7 MR JUSTICE DAVID RICHARDS: You say that and you are</p> <p>8 right --</p> <p>9 MR WOLFSON: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: -- if the debt is due from the</p> <p>11 person who has become bankrupt before, let us say, the</p> <p>12 death of the testator.</p> <p>13 MR WOLFSON: Yes.</p> <p>14 MR JUSTICE DAVID RICHARDS: But not afterwards.</p> <p>15 MR WOLFSON: No, absolutely.</p> <p>16 MR JUSTICE DAVID RICHARDS: That is the point, because that</p> <p>17 is what illustrates it, isn't it?</p> <p>18 MR WOLFSON: Of course. The reason why perhaps I am just</p> <p>19 suggesting your Lordship thinks about this example is</p> <p>20 because it may tease out the point. Assume that before</p> <p>21 the relevant debt it's not an individual who has become</p> <p>22 bankrupt.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR WOLFSON: It's a company which has become insolvent.</p> <p>25 Question one would be: in those circumstances, and in</p> <p style="text-align: center;">Page 42</p>	<p>1 Cherry v Boulton through Peruvian Railway, right up to</p> <p>2 Lord Walker, is that what is brought into account is the</p> <p>3 dividend. In my respectful submission, when one is</p> <p>4 working out the situation with regard to insolvency</p> <p>5 set-off in the context of section 74, the answer</p> <p>6 shouldn't be any different. Lord Walker did not</p> <p>7 distinguish between bankrupts and corporate insolvent</p> <p>8 contributories or defendants. There is no hint of that.</p> <p>9 The point Lord Walker is making is a point of principle,</p> <p>10 which is a point of timing, which is that as at the</p> <p>11 relevant date there was already an insolvency and</p> <p>12 therefore all you were ever going to get was a dividend.</p> <p>13 In my respectful submission, that is the point Lord</p> <p>14 Walker is making in Kaupthing.</p> <p>15 (11.45 am)</p> <p>16 MR JUSTICE DAVID RICHARDS: The trouble is that the</p> <p>17 administrator or the liquidator of a company does not</p> <p>18 owe anything, the debt is due from the company, the</p> <p>19 administrator applies the assets in payment of the debt.</p> <p>20 That is not true where there has been a bankruptcy</p> <p>21 because there is an assignment of the estate of the</p> <p>22 bankrupt to the trustee and the trustee must then pay</p> <p>23 the dividend and that is the maximum liability. That</p> <p>24 paragraph I referred to you in page 151 of Peruvian</p> <p>25 Railway seemed to me to be what that was saying.</p> <p style="text-align: center;">Page 44</p>

<p>1 Now, there are cases, I'm sure there are cases, 2 where you have insolvency set-off as between a company 3 in liquidation and another party also in liquidation. 4 MR WOLFSON: Yes. 5 MR JUSTICE DAVID RICHARDS: But you would be saying there 6 that the liquidation of each the set-off would operate 7 only on the dividend, that is all you would bring into 8 account? I'm not quite sure how this quite works out. 9 So suppose you have company A and company B both in 10 liquidation owing cross debts, how does the set-off work 11 then? 12 MR WOLFSON: In a double insolvency? 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR WOLFSON: I'm going to come to this point in a slightly 15 different context later when we look at how you add 16 a notional dividend to the fund. 17 MR JUSTICE DAVID RICHARDS: No, I'm not talking about that, 18 I'm talking about set-off. 19 MR WOLFSON: You are talking about insolvency set-off, yes. 20 MR JUSTICE DAVID RICHARDS: Yes. How does it work then? 21 Let's say company A owes company B 100. 22 MR WOLFSON: Yes. 23 MR JUSTICE DAVID RICHARDS: Company B owes company A 150. 24 MR WOLFSON: Yes. 25 MR JUSTICE DAVID RICHARDS: So how does the set-off work?</p> <p style="text-align: center;">Page 45</p>	<p>1 these facts using the time lap between administration 2 and notice of distribution. Let's assume these facts; B 3 goes into administration first, A goes into 4 administration and gives a notice to distribute, of 5 course, we take the account as at the date of notice to 6 distribute, but at this time, of course, B is already in 7 administration. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR WOLFSON: In my respectful submission, what would happen 10 is that, and we are here looking in A's estate because 11 it is A who is giving the notice to distribute, A would 12 set-off the dividend which A would obtain from B's 13 estate, on the one hand -- 14 MR JUSTICE DAVID RICHARDS: Sorry, I think your example was 15 that B has gone into administration? 16 MR WOLFSON: Yes, but has not given a notice -- 17 MR JUSTICE DAVID RICHARDS: No notice? 18 MR WOLFSON: No notice. 19 MR JUSTICE DAVID RICHARDS: A then goes into administration 20 but before B has done so gives a notice of 21 administration? 22 MR WOLFSON: Yes. 23 MR JUSTICE DAVID RICHARDS: So there is no question of 24 a dividend from B's estate at this stage because B has 25 not given any notice of distribution and may never do</p> <p style="text-align: center;">Page 47</p>
<p>1 Would that be a good moment to break? 2 MR WOLFSON: Yes. 3 MR JUSTICE DAVID RICHARDS: I will rise for five minutes. 4 (11.47 am) 5 (A short break) 6 (11.53 am) 7 MR JUSTICE DAVID RICHARDS: Mr Wolfson? 8 MR WOLFSON: My Lord, to answer the question that 9 your Lordship put to me before your Lordship rose, one 10 has to first consider the circumstances in which the 11 question arises and, in my respectful submission, it is 12 important to consider that. 13 Your Lordship is assuming a case where A owes B 100 14 and B owes A 150. Now, let's deal with the easy cases 15 first. If A goes insolvent first there would be 16 a set-off in A's estate between those debts, the full 17 amount of those debts. That set-off would discharge the 18 debts effectively leaving the balance due and when later 19 B goes insolvent there is nothing else to do in B's 20 estate because you have done it in A's. 21 MR JUSTICE DAVID RICHARDS: Yes. All right. 22 MR WOLFSON: So that is an easy case. 23 MR JUSTICE DAVID RICHARDS: All right. 24 MR WOLFSON: The issue arises, however, and this may be the 25 point your Lordship was putting to me, if one assumed</p> <p style="text-align: center;">Page 46</p>	<p>1 so. 2 MR WOLFSON: And may never do so. 3 MR JUSTICE DAVID RICHARDS: May come out of administration. 4 MR WOLFSON: Yes. What one would have to do though -- 5 MR JUSTICE DAVID RICHARDS: I thought you were going to say 6 the answer in the second example was the same as the 7 first. 8 MR WOLFSON: My Lord, no. My Lord, can I come back on this 9 point because your Lordship has put the question to me 10 and I don't want to give an answer to you if it's going 11 to be wrong. 12 MR JUSTICE DAVID RICHARDS: Perhaps we out to translate 13 this, therefore, into what we are talking about with 14 LBIE and LBL because LBL is in the position, isn't it, 15 of company B, it is in administration but the 16 administrators have not given, is this right, notice of 17 any distribution? 18 MR WOLFSON: Yes, exactly. But LBIE has. 19 MR JUSTICE DAVID RICHARDS: But LBIE has. 20 MR WOLFSON: Yes. My submission is that certainly when one 21 is operating in the contributory rule one brings into 22 account the dividend but we are here talking about 23 insolvency settlement. In my submission, what you bring 24 into account is under 285.3, what is due from each party 25 to the other. The submission is, and it is a point of</p> <p style="text-align: center;">Page 48</p>

<p>1 principle, the submission is that it should make no</p> <p>2 difference whether we are talking of insolvency set-off</p> <p>3 or the contributory rule, what is brought into account</p> <p>4 is the dividend which is payable and not the set-off for</p> <p>5 the full amount of the debt.</p> <p>6 MR JUSTICE DAVID RICHARDS: The issue which we are</p> <p>7 addressing here is a question of what the rules of</p> <p>8 set-off produce in LBIE's administration, is that right?</p> <p>9 MR WOLFSON: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: So LBL lodges or has lodged</p> <p>11 a proof for 300 odd million.</p> <p>12 MR WOLFSON: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: LBIE, on its alternative case,</p> <p>14 says that it can set off a just estimate of LBL's</p> <p>15 contingent liability as a member of an unlimited</p> <p>16 company.</p> <p>17 MR WOLFSON: Yes. Obviously when it says a just estimate</p> <p>18 they mean their just estimate of the full amount of such</p> <p>19 liability.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes. I think those are the</p> <p>21 words in the rules but I may be wrong. Now, your first</p> <p>22 response to that is to say, no, there is no set-off</p> <p>23 because --</p> <p>24 MR WOLFSON: For the reasons I have submitted.</p> <p>25 MR JUSTICE DAVID RICHARDS: For the reasons you have</p> <p style="text-align: center;">Page 49</p>	<p>1 a principle distinction there. I don't want to burden</p> <p>2 your Lordship with bits of paper but your Lordship may</p> <p>3 or may not have had the chance to work through the</p> <p>4 worked example.</p> <p>5 MR JUSTICE DAVID RICHARDS: I'm very happy to do so.</p> <p>6 MR WOLFSON: Perhaps I can hand one up to your Lordship and</p> <p>7 we will hand copies round.</p> <p>8 (Handed).</p> <p>9 We have provided to get it on one sheet of paper.</p> <p>10 MR JUSTICE DAVID RICHARDS: Well done.</p> <p>11 MR WOLFSON: Perhaps your Lordship might find it help if</p> <p>12 I effective read it through and explained what we have</p> <p>13 tried to do in each step.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR WOLFSON: I'm sorry, I should have put a heading on it.</p> <p>16 So we have an unlimited company, X. It has its own</p> <p>17 assets of 3 million. It has independent creditors with</p> <p>18 claims of 5 million and a contributory who I have called</p> <p>19 Y in liquidation and the contributory has got its own</p> <p>20 claim against X for 1 million. I have assumed that the</p> <p>21 contributory Y has assets of 2 million and creditors of</p> <p>22 its own of 4 million. So Y is insolvent as well. X is</p> <p>23 in liquidation and the call is being made on Y's</p> <p>24 contributories to avoid any -- I have just made a simple</p> <p>25 example.</p> <p style="text-align: center;">Page 51</p>
<p>1 submitted but alternatively if you are wrong on that</p> <p>2 there is a set-off you say the amount to be set off is</p> <p>3 not the just estimate --</p> <p>4 MR WOLFSON: Of the full amount.</p> <p>5 MR JUSTICE DAVID RICHARDS: -- of the contingent liability.</p> <p>6 MR WOLFSON: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: But is the dividend.</p> <p>8 MR WOLFSON: Or, if I may interject, a just estimate of the</p> <p>9 dividend if necessary.</p> <p>10 MR JUSTICE DAVID RICHARDS: But is the dividend or just</p> <p>11 estimate of the dividend payable by --</p> <p>12 MR WOLFSON: LBL.</p> <p>13 MR JUSTICE DAVID RICHARDS: -- LBL, assuming it either</p> <p>14 becomes a distributing administration or goes into</p> <p>15 liquidation.</p> <p>16 MR WOLFSON: That is assuming, in other words, you would</p> <p>17 only have a dividend in those circumstances, yes.</p> <p>18 Absolutely, yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: Now, there is nothing special</p> <p>20 about this being either, is there, a contingent</p> <p>21 liability or a contingent liability as a member of</p> <p>22 an unlimited company? I mean, the principle you are</p> <p>23 advancing would apply equally, I assume, if LBL owed</p> <p>24 LBIE repayment of a loan?</p> <p>25 MR WOLFSON: Yes. I can't immediately see that I can make</p> <p style="text-align: center;">Page 50</p>	<p>1 The total shortfall in X, including the liability to</p> <p>2 Y, is 3 million because it has assets of 3, claims of 5</p> <p>3 and also a claim by Y of 1. So the shortfall in X is</p> <p>4 3 million. But because Y is also in liquidation and, in</p> <p>5 any event, only has assets of 2 million it is not able</p> <p>6 to pay all that 3 million to X, it is only ever going to</p> <p>7 be able to pay a dividend to X.</p> <p>8 The dividend Y will pay to X, taking into account</p> <p>9 Y's total assets and liabilities, will be 2 million over</p> <p>10 7 million, ie, about 29 per cent. So based on a proof</p> <p>11 of 3 million the dividend it can pay X is about</p> <p>12 £857,000.</p> <p>13 If you have then set-off in X's estate of the</p> <p>14 857,000 as against Y's claim against X of 1 million, if</p> <p>15 you set that off, then a dividend will be payable to Y</p> <p>16 on the balance, 143,000, ie, 1 million minus 857,</p> <p>17 roughly 58p in the pound. So Y would then receive</p> <p>18 82,940. It could add to its pot of 2 million and pay</p> <p>19 the full amount to its creditors at a dividend rate of</p> <p>20 just over 50p in the pound.</p> <p>21 Then we say that paragraph 7 has to be wrong, the</p> <p>22 contributory rule obviously prevents that, because what</p> <p>23 we have done in paragraph 7 is enable Y to receive pound</p> <p>24 for pound in respect of its claim against X to the</p> <p>25 extent of 857,000 with the other creditors only getting</p> <p style="text-align: center;">Page 52</p>

<p>1 58p in the pound.</p> <p>2 If, on the other hand, there is no set-off in X's</p> <p>3 estate of the 857 as against Y's claim against X of</p> <p>4 1 million and the contributory rules applies and for the</p> <p>5 purposes of the rule it is a dividend of 857 payable by</p> <p>6 Y that falls to be brought into account -- pausing</p> <p>7 there. That is a point which I have been submitting to</p> <p>8 your Lordship and your Lordship may say is right or may</p> <p>9 say is wrong but I'm showing how it works out in</p> <p>10 practice. Then it's necessary to work out how much will</p> <p>11 be payable to Y by X out of X's notionally increased</p> <p>12 funds of assets of 3,857. What Y would be entitled to</p> <p>13 would be 3,857 over 6, which is 64p in the pound --</p> <p>14 MR JUSTICE DAVID RICHARDS: Let just let me read paragraph 9</p> <p>15 to myself.</p> <p>16 MR WOLFSON: Yes, sorry.</p> <p>17 (Pause).</p> <p>18 MR JUSTICE DAVID RICHARDS: Right.</p> <p>19 MR WOLFSON: Of course, if in paragraph 9 the words, "For</p> <p>20 the purposes of the rule it is a dividend payable by</p> <p>21 (inaudible) brought into account", if that is wrong as</p> <p>22 a matter of law and your Lordship says I'm wrong about</p> <p>23 that then, of course, the example falls away.</p> <p>24 The point of the example is this though, to give</p> <p>25 your Lordship an example to illustrate the point that</p> <p style="text-align: center;">Page 53</p>	<p>1 whether the contributor was a bankrupt individual or an</p> <p>2 insolvent corporate.</p> <p>3 MR JUSTICE DAVID RICHARDS: Well, I think it might matter.</p> <p>4 MR WOLFSON: In which case, my Lord, without having a rerun</p> <p>5 of the submissions, clearly my submission would be, as</p> <p>6 your Lordship will appreciate, that within the scope of</p> <p>7 the contributory rule on the basis of those authorities</p> <p>8 it can't make any principled difference between the</p> <p>9 contributor is an individual or a company. Essentially</p> <p>10 that is another way of putting my wider submission,</p> <p>11 which is that the same should apply in insolvency</p> <p>12 set-off too.</p> <p>13 It did seem to me that it was a necessary part of</p> <p>14 the way your Lordship had put the point to me, that</p> <p>15 your Lordship would be saying even in the contributory</p> <p>16 rule it would make a difference whether the contributor</p> <p>17 is a bankrupt individual or an insolvent corporate and</p> <p>18 I just wanted to highlight that point.</p> <p>19 MR JUSTICE DAVID RICHARDS: Well, I mean, looking at those</p> <p>20 cases what seemed to be critical was that the</p> <p>21 contributor, shall we call him, became a bankrupt before</p> <p>22 the testator's death.</p> <p>23 MR WOLFSON: Yes. The timing point is certainly critical.</p> <p>24 The question is whether it is critical that he was</p> <p>25 an individual rather than a company.</p> <p style="text-align: center;">Page 55</p>
<p>1 the reason why it matters as to whether it is a dividend</p> <p>2 payable or the full amount is because that is the issue</p> <p>3 between myself and my learned friend Mr Zacaroli on the</p> <p>4 worked example because otherwise the example is</p> <p>5 obviously right.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: The second point is that what we have done in</p> <p>8 paragraph 9, just so your Lordship knows where I'm</p> <p>9 going, the way this works, ie, that you add the</p> <p>10 contribution by way of dividend to the fund and then</p> <p>11 work out the aliquot share of the contributory, that is</p> <p>12 based on the approach in a case called Leeds and Hanley</p> <p>13 and explained by Lord Justice Chadwick in SSSL and we</p> <p>14 will come to that later but that's what is being done in</p> <p>15 9.</p> <p>16 So, my Lord, if we're right, and I appreciate this</p> <p>17 is a point which your Lordship has to decide, if we're</p> <p>18 right that the same principle applies with regard to</p> <p>19 insolvency set-off, the same approach applies as it does</p> <p>20 within the contributory rule, that is how the example</p> <p>21 would play out.</p> <p>22 I would also make this submission though, my Lord.</p> <p>23 If wasn't clear to me whether your Lordship was</p> <p>24 supposing that, just within the context of the</p> <p>25 contributory rule for the moment, it would matter</p> <p style="text-align: center;">Page 54</p>	<p>1 MR JUSTICE DAVID RICHARDS: The question is: why is the</p> <p>2 timing critical.</p> <p>3 MR WOLFSON: Yes. With respect, yes, that must be the</p> <p>4 question: why is the timing critical.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR WOLFSON: If I may put it with respect the two rival</p> <p>7 contentions would be it is critical because he is</p> <p>8 an individual and it is transferred to the trustee and</p> <p>9 the trustee personally doesn't have a debt, argument A,</p> <p>10 and, argument B, it is critical because of a timing</p> <p>11 point, ie, that by the time the testator dies all the</p> <p>12 estate can obtain from the other side, if I can just put</p> <p>13 it that way, is a dividend.</p> <p>14 MR JUSTICE DAVID RICHARDS: What you are just saying is in</p> <p>15 argument A it's legal rights we're looking at.</p> <p>16 MR WOLFSON: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: In argument B it's economic</p> <p>18 return.</p> <p>19 MR WOLFSON: That is certainly the effect of the argument,</p> <p>20 yes, my Lord.</p> <p>21 MR JUSTICE DAVID RICHARDS: You see, the reason it appears</p> <p>22 from Peruvian Railway that the timing is critical is</p> <p>23 because of argument A.</p> <p>24 MR WOLFSON: Well, my Lord, with --</p> <p>25 MR JUSTICE DAVID RICHARDS: Because economic return is going</p> <p style="text-align: center;">Page 56</p>

<p>1 to be the same in both cases.</p> <p>2 MR WOLFSON: Yes, but my Lord, if I can just invite</p> <p>3 your Lordship -- I really don't mean to go round in</p> <p>4 circles with your Lordship.</p> <p>5 MR JUSTICE DAVID RICHARDS: I have your submissions, I'm</p> <p>6 just --</p> <p>7 MR WOLFSON: Teasing it out.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR WOLFSON: Can I just make one final submission on this</p> <p>10 point to try and make good my submission that it is not</p> <p>11 the fact that it is an individual or a company.</p> <p>12 Can I invite your Lordship, I hesitate to do so</p> <p>13 because your Lordship has seen it now a number of times,</p> <p>14 can we just go back to Lord Walker in Kaupthing?</p> <p>15 MR JUSTICE DAVID RICHARDS: Of course.</p> <p>16 MR WOLFSON: Of course, I accept, with respect, the point</p> <p>17 your Lordship puts to me about Peruvian but, of course,</p> <p>18 it may beg the question a little bit because in Peruvian</p> <p>19 it was an individual and so necessarily the court is</p> <p>20 dealing with it in terms of an individual bankrupt, that</p> <p>21 is a fact. I invite your Lordship to look at it in the</p> <p>22 way that Lord Walker looked at it in Kaupthing. At the</p> <p>23 end of 17, between C and D.</p> <p>24 MR JUSTICE DAVID RICHARDS: 17?</p> <p>25 MR WOLFSON: 17, my Lord. This is tab 94:</p> <p style="text-align: center;">Page 57</p>	<p>1 submission, Lord Walker supports that because what he is</p> <p>2 saying:</p> <p>3 "The inception of the administration or bankruptcy</p> <p>4 or liquidation crystallises the position."</p> <p>5 In 48 he makes it perhaps even more clearly. Second</p> <p>6 sentence of 48:</p> <p>7 "It is true that in a situation of double</p> <p>8 insolvency, that is where both PD ...(Reading to the</p> <p>9 words)... if PD's insolvency occurred before that of S."</p> <p>10 MR JUSTICE DAVID RICHARDS: Well, that's right.</p> <p>11 MR WOLFSON: In my respectful submission, Lord Walker there</p> <p>12 is not drawing any distinction between the two and,</p> <p>13 therefore, my Lord, with respect --</p> <p>14 MR JUSTICE DAVID RICHARDS: Rhodesia Goldfields we looked</p> <p>15 at, I think, but I have forgotten, I'm afraid, what the</p> <p>16 detail was there.</p> <p>17 MR WOLFSON: We're going to come to Rhodesia Goldfields in</p> <p>18 another context. We will go back to that case.</p> <p>19 MR JUSTICE DAVID RICHARDS: I see.</p> <p>20 MR WOLFSON: In my respectful submission, what Lord Walker</p> <p>21 is certainly doing, let's just put insolvency settlement</p> <p>22 to one side, what Lord Walker is certainly doing in 48</p> <p>23 is to say that in the contributory rule it makes no</p> <p>24 difference whether it is a personal contributory or</p> <p>25 a corporate contributory.</p> <p style="text-align: center;">Page 59</p>
<p>1 "The inception of the administration or bankruptcy</p> <p>2 or liquidation crystallises the position."</p> <p>3 Lord Walker is not drawing any distinction, and</p> <p>4 I accept he is dealing here with the contributory rule,</p> <p>5 I accept that, I hope I have made that point clear, but</p> <p>6 Lord Walker is certainly not distinguishing between, in</p> <p>7 the contributory rule, an individual or a company.</p> <p>8 MR JUSTICE DAVID RICHARDS: I'm not quite sure of the point</p> <p>9 he is making there. I'm not meaning to be clever about</p> <p>10 this but ...</p> <p>11 MR WOLFSON: He is making the point that in the -- the case</p> <p>12 of Kaupthing itself was an administration case.</p> <p>13 MR JUSTICE DAVID RICHARDS: Quite.</p> <p>14 MR WOLFSON: What Lord Walker has done in 15, 16 and the</p> <p>15 first bit of 17 is refer to the old cases and he is</p> <p>16 explaining why you get a different result in Cherry v</p> <p>17 Boulton, dividend brought into account, as opposed to</p> <p>18 Jeffs v Wood, whole amount brought into account.</p> <p>19 MR JUSTICE DAVID RICHARDS: That is the timing point.</p> <p>20 MR WOLFSON: That is the timing point, exactly. It wouldn't</p> <p>21 make any difference whether in Cherry v Boulton it had</p> <p>22 been a company who was contributing as opposed to</p> <p>23 an individual.</p> <p>24 MR JUSTICE DAVID RICHARDS: That is your submission.</p> <p>25 MR WOLFSON: That is my submission. In my respectful</p> <p style="text-align: center;">Page 58</p>	<p>1 I think I have said, with respect, so many times,</p> <p>2 I'm going to stop saying it because you Lordship can</p> <p>3 take it as read.</p> <p>4 MR JUSTICE DAVID RICHARDS: I only get worried when you say,</p> <p>5 "With the greatest of respect".</p> <p>6 MR WOLFSON: And, therefore, in so far as it is a necessary</p> <p>7 part of your Lordship's proposition which your Lordship</p> <p>8 was putting to me that the contrary argument to the</p> <p>9 argument I'm advancing would mean that in the</p> <p>10 contributory rule you would have a different result for</p> <p>11 personal contributors who are bankrupt and corporate</p> <p>12 contributors who are insolvent and you do have to get</p> <p>13 there because the same principle would apply. If that</p> <p>14 is wrong and in the contributory rule they're treated</p> <p>15 the same then that supports my argument that the same</p> <p>16 principle applies in insolvency set-off. Otherwise it</p> <p>17 is very difficult to explain why in the contributory</p> <p>18 rule you are treating corporates the same way as</p> <p>19 individuals and you plainly are, according to</p> <p>20 Lord Walker.</p> <p>21 MR JUSTICE DAVID RICHARDS: Do I gather you are coming back</p> <p>22 to this in the context of your submissions on the</p> <p>23 contributory rule in due course or not?</p> <p>24 MR WOLFSON: I'm going to look at it, I hope shortly, in the</p> <p>25 context of the contributory rule because really in the</p> <p style="text-align: center;">Page 60</p>

<p>1 context of the contributory rule we submit it is very 2 clear what you do. The issue in insolvency set-off is 3 that I have to argue, so to speak, from the contributory 4 rule and say the same applies. So I'm going to go to 5 Rhodesia Goldfields albeit in a different context. As 6 I said yesterday, these things do overlap and I'm trying 7 to deal with them separately but there is a point where 8 they did overlap.</p> <p>9 MR JUSTICE DAVID RICHARDS: That's fine.</p> <p>10 MR WOLFSON: If I'm wrong the effect would, of course, be 11 this, that if a company made calls and a company has two 12 members, one is an individual and one is a corporate 13 shareholder, and the first is bankrupt and the second is 14 insolvent, if I'm wrong the effect is that those calls 15 are going to be treated differently and the effect of 16 those calls would be different or the contingent 17 liability would be different for each of them. It's 18 difficult to see why as a matter of principle that 19 should be the case but it would have to follow if I'm 20 wrong, it seems to me.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR WOLFSON: Not only is it difficult to see how it would 23 work, therefore, and the justice of that vis-a-vis the 24 relevant estates on their contingent liability to the 25 company but also how it would then work as between the</p> <p style="text-align: center;">Page 61</p>	<p>1 administration, no insolvency set-off, but your Lordship 2 appreciates that my submission is that there would be 3 an insolvency set-off in LBL's administration, that is 4 my primary case, either when LBL's administrators give 5 notice of their intention to declare a dividend or when 6 we go into liquidation.</p> <p>7 There would be a set-off if and to the extent that 8 LBIE, through its office holders, can prove in respect 9 of a section 74 liability, which is a distinct question. 10 I'm just assuming that for present purposes.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR WOLFSON: The reason for that is this: any proof which 13 could be filed in LBL's administration in respect of 14 LBL's section 74 liability to LBIE would rank <i>pari passu</i> 15 with the claims of LBL's other unsecured creditors. 16 I don't think that is controversial.</p> <p>17 That is the first point.</p> <p>18 The second point is that it would be unfair to LBL's 19 other creditors if LBL had to pay LBIE a proof on the 20 full value of any claim LBIE has against LBL without 21 deduction for LBL's claim against LBIE. That is 22 presently due and payable and obviously to an extent it 23 remains unsatisfied.</p> <p>24 So, therefore, although, for the reasons I submitted 25 earlier, there is every reason why there is no</p> <p style="text-align: center;">Page 63</p>
<p>1 contributories is very difficult because you start off 2 from the proposition that, so to speak, and we will come 3 to this right at the end, whatever one pays we say there 4 is a contribution claim and you have to sort it out 5 between them. It would make it very difficult. In my 6 submission, it's very difficult to see a principled 7 basis for that distinction but it must follow.</p> <p>8 So the two problems with the contrary argument are, 9 first, that it means that in the contributory rule you 10 are distinguishing between insolvent contributors 11 depending on whether they are individuals or companies 12 and a second problem is the example I have just given, 13 that you are treating the contingent calls differently 14 whether the contributor is an insolvent individual or 15 an insolvent company.</p> <p>16 I think I have said all I should and probably even 17 can say about insolvency set-off in LBIE's 18 administration so unless I can help your Lordship 19 further on that I was going to move to insolvency 20 set-off in LBL's administration.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR WOLFSON: Of course, my last set of submissions have all 23 been, so to speak, on my alternative case and really on 24 my learned friend's alternative case. My primary case, 25 of course, is that there is no set-off in LBIE's</p> <p style="text-align: center;">Page 62</p>	<p>1 insolvency set-off in LBIE's estate it does not follow 2 that insolvency set-off doesn't operate in LBL's estate.</p> <p>3 Now, it's clear in the context of a bankrupt 4 contributory that there is a set-off in the bankruptcy 5 in respect of the contributory liability. That is 6 clear. The authority is the decision of Lord Cairns in 7 a case called <i>Re Duckworth</i>. For your Lordship's note it 8 is at authorities A1 at tab 11. I wasn't proposing to 9 go to it because, again, it's helpfully summarised in 10 Dr Derham's book and he shows in a footnote that it has 11 been applied in a number of Court of Appeal cases 12 subsequently so I was going to invite your Lordship to 13 turn to that as a short cut, so to speak. This is in 14 authorities 1d at tab 106, page 414. Can I invite 15 your Lordship to read paragraph 8.71.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 (Pause).</p> <p>18 Can I just ask you about this. I mean, I think 19 I fully follow all that is said down to the second to 20 last line on page 414 where you get footnote 326.</p> <p>21 MR WOLFSON: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: I mean, it is entirely 23 consistent with what you have just said.</p> <p>24 MR WOLFSON: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: I am slightly puzzled by the</p> <p style="text-align: center;">Page 64</p>

16 (Pages 61 to 64)

<p>1 next sentence. I don't know how important that is to</p> <p>2 your submissions. Is it really the passage I have just</p> <p>3 referred to which you rely on?</p> <p>4 MR WOLFSON: Exactly. This explains --</p> <p>5 MR JUSTICE DAVID RICHARDS: I'm not sure I follow that</p> <p>6 sentence.</p> <p>7 MR WOLFSON: I'm slightly struggling with it and it's not</p> <p>8 the point I'm submitting.</p> <p>9 MR JUSTICE DAVID RICHARDS: Nor am I surprised by the</p> <p>10 decision of Lord Justice Gifford in Re Universal Banking</p> <p>11 as it happens because it seems to me that was just</p> <p>12 a question of assignment of a debt subject to equities.</p> <p>13 MR WOLFSON: Exactly. The critical point I'm focussing on</p> <p>14 is precisely that point up to footnote 326.</p> <p>15 MR JUSTICE DAVID RICHARDS: Well, I follow that entirely.</p> <p>16 MR WOLFSON: And your Lordship will see footnote 320 as part</p> <p>17 of that.</p> <p>18 MR JUSTICE DAVID RICHARDS: I will just have a look at that.</p> <p>19 (Pause).</p> <p>20 MR WOLFSON: Just so your Lordship knows where I'm going,</p> <p>21 your Lordship sees in that footnote a case Re GEB,</p> <p>22 a debtor and that is a case we're going to look at it in</p> <p>23 a moment.</p> <p>24 MR JUSTICE DAVID RICHARDS: All right.</p> <p>25 MR WOLFSON: While we're in this tab can I invite</p> <p style="text-align: center;">Page 65</p>	<p>1 MR JUSTICE DAVID RICHARDS: Right.</p> <p>2 MR WOLFSON: So the starting point, therefore, is, I hope,</p> <p>3 consistent with what I have just said, which is that</p> <p>4 Re Duckworth provides that you do have a set-off in the</p> <p>5 estate of a bankrupt contributory.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: The question is then asked: what is the balance</p> <p>8 if it is an insolvent corporate contributory. For that</p> <p>9 we turn over the page and we look at paragraph 8.74.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR WOLFSON: And footnote 335, just to make it clear, where</p> <p>12 Dr Down says in Re Auriferous Properties Limited that is</p> <p>13 Auriferous Properties number 1. As your Lordship</p> <p>14 recalls, number 1 is dealing with the contributor's</p> <p>15 estate, number 2 is dealing with the company's estate.</p> <p>16 It's number 1 he is saying is wrongly decided.</p> <p>17 Before we leave Dr Derham on this point can I ask</p> <p>18 your Lordship to turn through to page 476 where he comes</p> <p>19 back to this point in a footnote and just takes it</p> <p>20 a little bit further.</p> <p>21 The relevant sentence is the sentence at the top of</p> <p>22 that page, "If in addition". He is not telling us</p> <p>23 anything new there, we know that by now. First</p> <p>24 sentence:</p> <p>25 "If in addition the shareholder is bankrupt you can</p> <p style="text-align: center;">Page 67</p>
<p>1 your Lordship then to turn over the page.</p> <p>2 MR JUSTICE DAVID RICHARDS: So the last sentence -- yes,</p> <p>3 I see.</p> <p>4 MR WOLFSON: The last sentence, which relies on this New</p> <p>5 Zealand case, of course, in my submission, that is</p> <p>6 wrong.</p> <p>7 MR JUSTICE DAVID RICHARDS: You say that is wrong.</p> <p>8 MR WOLFSON: That is my 82.4 point from yesterday. There is</p> <p>9 only statutory basis for that against an individual's</p> <p>10 estate and there is no statutory basis for that against</p> <p>11 a corporate estate, a corporate contributor's estate.</p> <p>12 That flows from my submissions on the effect of the</p> <p>13 statute in 82.4 providing you could prove for future</p> <p>14 calls against a bankrupt and there is no equivalent for</p> <p>15 future calls against a corporate contributory.</p> <p>16 MR JUSTICE DAVID RICHARDS: That sentence you don't have</p> <p>17 a problem with because, is this right, that is 82.4?</p> <p>18 MR WOLFSON: That is 82.4, yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: That is all right?</p> <p>20 MR WOLFSON: I have just misread it, sorry.</p> <p>21 MR JUSTICE DAVID RICHARDS: I think I did too actually.</p> <p>22 Well, I had forgotten 82.4. You say that is consistent</p> <p>23 with 82.4.</p> <p>24 MR WOLFSON: That's right. However, you would be able to if</p> <p>25 it was payable from an insolvent corporate.</p> <p style="text-align: center;">Page 66</p>	<p>1 have set-off. Footnote 36, see paragraph 8.71 above,</p> <p>2 [which I have shown your Lordship], explaining Re</p> <p>3 Duckworth."</p> <p>4 Which is the bankrupt case. There are a whole load</p> <p>5 of cases which follow.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: And then compare Re Auriferous Properties</p> <p>8 [1898] 1 Ch 691, that is Auriferous number 1 obviously,</p> <p>9 where Mr Justice Wright, while acknowledging the</p> <p>10 authority in Re Duckworth held that set-off is not</p> <p>11 available when the contributory is a company in</p> <p>12 liquidation:</p> <p>13 "Inquiry whether Re Auriferous Properties number 1</p> <p>14 was correctly decided. See 8.74 above."</p> <p>15 Which your Lordship has just seen. Then:</p> <p>16 "Re Duckworth was decided before the bankruptcy</p> <p>17 set-off ...(Reading to the words)... the principle is</p> <p>18 not affected."</p> <p>19 So he is just again saying that he considers that</p> <p>20 Auriferous number 1 was wrongly decided.</p> <p>21 Now, before we look at Auriferous number 1 I do make</p> <p>22 this submission, that it is very difficult to see why</p> <p>23 the same logic which underpins Re Duckworth doesn't</p> <p>24 apply in the estate of a corporate contributory. If Re</p> <p>25 Duckworth is right and you are considering the rules</p> <p style="text-align: center;">Page 68</p>

<p>1 governing the administration of the bankrupt's estate</p> <p>2 and you are looking at that estate similarly the court</p> <p>3 has to consider separately in the insolvent</p> <p>4 contributory's estate whether insolvency set-off applies</p> <p>5 there.</p> <p>6 So, as we set out in writing and we flagged up, we</p> <p>7 do, therefore, say that Auriferous number 1 is wrongly</p> <p>8 decide and, therefore, I should take your Lordship to</p> <p>9 that case because I am submitting that's it's wrong.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR WOLFSON: It's in 1B at tab 38. I am conscious that</p> <p>12 your Lordship has already seen this case.</p> <p>13 MR JUSTICE DAVID RICHARDS: No, don't worry, I shall be</p> <p>14 looking at it with a perhaps a greater focus now.</p> <p>15 MR WOLFSON: Well, certainly if I'm going to submit it's</p> <p>16 wrong I need to give Mr Justice Wright a fair crack of</p> <p>17 the whip.</p> <p>18 MR JUSTICE DAVID RICHARDS: Certainly.</p> <p>19 MR WOLFSON: The facts essentially are these. If I can call</p> <p>20 them G and A. G held shares in A. Before either</p> <p>21 company went into liquidation calls from made on the</p> <p>22 shares and A became indebted to G for money lent.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR WOLFSON: A is ordered to be wound up by the court and</p> <p>25 what happened then is that G, which was insolvent,</p> <p style="text-align: center;">Page 69</p>	<p>1 The first point he makes is in the next sentence:</p> <p>2 "If the gold company had not been in liquidation it</p> <p>3 could not have set-off its claim for money lent against</p> <p>4 its liability for the amount of the calls."</p> <p>5 That is Grissell's case and we are well familiar</p> <p>6 with that.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR WOLFSON: A couple of line later he sets out his take, if</p> <p>9 I can put it in those terms, of what the rule in</p> <p>10 Grissell's case is and your Lordship can see that when</p> <p>11 he starts in the middle of the page, "The ground of the</p> <p>12 rule", and if your Lordship just reads down about seven</p> <p>13 lines down to, "Ought to be distributed rateably."</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR WOLFSON: So, if I may say, what he is doing there is</p> <p>16 effectively setting out the rule.</p> <p>17 Towards the bottom of the page he raises the point</p> <p>18 which is at issue in this case. The penultimate line:</p> <p>19 "But in the present case it happens that the gold</p> <p>20 company is also in liquidation and the question is what</p> <p>21 is the effect of this. If the gold company had been</p> <p>22 a bankrupt individual instead of being a company in</p> <p>23 liquidation the liquidator of A must have enforced his</p> <p>24 claim in the bankruptcy and according to bankruptcy</p> <p>25 rule, which even before and apart from the two</p> <p style="text-align: center;">Page 71</p>
<p>1 passed an extraordinary resolution for voluntarily</p> <p>2 winding up and G proved its claim for debt in the</p> <p>3 winding up of A.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR WOLFSON: The question was whether the liquidator of G</p> <p>6 being the contributory could set-off the debt against</p> <p>7 the calls.</p> <p>8 Now, your Lordship sees that the important point --</p> <p>9 that is the important point, that we are dealing here</p> <p>10 with the estate of the contributory and your Lordship</p> <p>11 sees, taking it first at the top of 692, that the</p> <p>12 summons which had been taken out was further intituled</p> <p>13 in the matter of the gold company, the contributory.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>15 MR WOLFSON: So that obviously is critical because what we</p> <p>16 are dealing with here is the estate of the contributory.</p> <p>17 It is adjourned into court and heard by Mr Justice</p> <p>18 Wright and if we turn through to page 696 we find there</p> <p>19 the start of Mr Justice Wright's judgment. He starts</p> <p>20 off by saying:</p> <p>21 "Both companies are now in liquidation. Before the</p> <p>22 liquidation of either G owed the former for calls made,</p> <p>23 was in arrears, and A owed G for money lent. The</p> <p>24 question is whether against the claim for the amount of</p> <p>25 the calls the claim for the money lent can be set-off."</p> <p style="text-align: center;">Page 70</p>	<p>1 (inaudible) acts would have allowed the set-off in Re</p> <p>2 Duckworth."</p> <p>3 So he explains, therefore, that if the gold company</p> <p>4 had been a bankrupt individual there would have been</p> <p>5 a set-off according to Duckworth.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: But then, of course, it says:</p> <p>8 "Here the creditor contributory is not a bankrupt</p> <p>9 individual but is a company in liquidation and,</p> <p>10 therefore, the particular ground on which Re Duckworth</p> <p>11 was decided is not applicable."</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR WOLFSON: "The liquidator is not in the Bankruptcy Court,</p> <p>14 he is in the Chancery Division and we are looking at the</p> <p>15 Companies Acts."</p> <p>16 The simple question, if your Lordship has me in the</p> <p>17 middle of the page:</p> <p>18 "... is whether section 10 of the Judicator Act 1875</p> <p>19 ...(Reading to the words)... in the case of a company</p> <p>20 constituted with limited liability."</p> <p>21 So he treats the question as to whether section 10</p> <p>22 has introduced into the winding up of companies that</p> <p>23 provision of the bankruptcy rules and, as your Lordship</p> <p>24 sees, the learned judge, relying on Gill's case, says</p> <p>25 that it hadn't, it hadn't so introduced the bankruptcy</p> <p style="text-align: center;">Page 72</p>

<p>1 rules.</p> <p>2 Towards the bottom of the page your Lordship sees:</p> <p>3 "True it is in Gill's case it was not a company in</p> <p>4 liquidation but that does not matter."</p> <p>5 Therefore, over the page, I don't wish to go too</p> <p>6 fast, over the page he, therefore, says:</p> <p>7 "Re Duckworth therefore has no application."</p> <p>8 That is his conclusion.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR WOLFSON: In my respectful submission, the short answer</p> <p>11 to this point is that there is, in fact, no proper</p> <p>12 distinction between these two points. The liquidation</p> <p>13 and the administration set-off regimes have been brought</p> <p>14 into line with bankruptcy set-off.</p> <p>15 MR JUSTICE DAVID RICHARDS: Well, I mean, perhaps we should</p> <p>16 look at the last paragraph.</p> <p>17 MR WOLFSON: Yes, I'm going to come to that.</p> <p>18 MR JUSTICE DAVID RICHARDS: You are? Yes.</p> <p>19 MR WOLFSON: In the last paragraph he questions how</p> <p>20 Re Duckworth, ie, where there was a set-off, can be</p> <p>21 reconciled with a law of companies and what he there</p> <p>22 refers to is Black & Co's Case and, of course, a point</p> <p>23 about Black & Co's Case is that that is an application</p> <p>24 of Grissell's Case. Black & Co's Case is, in fact, one</p> <p>25 of the earliest applications of Grissell's Case and one</p> <p style="text-align: center;">Page 73</p>	<p>1 relation to LBIE and LBL separately and look at the</p> <p>2 various points. It is simply non constat, it doesn't</p> <p>3 follow, that because there is no set-off in LBIE there</p> <p>4 is no set-off in LBL.</p> <p>5 Grissell's Case, therefore, and Black & Co was</p> <p>6 asking the question whether there was set-off in the</p> <p>7 estate of the company. Re Duckworth is asking the</p> <p>8 question whether there is set-off in the estate of the</p> <p>9 contributory.</p> <p>10 To make this point good by reference to Court of</p> <p>11 Appeal authority if your Lordship would turn on in the</p> <p>12 same bundle to the case I mentioned earlier of Re GEB,</p> <p>13 a debtor.</p> <p>14 Therefore, just to make it absolutely clear, it is</p> <p>15 for those reasons we say that Auriferous Properties</p> <p>16 number 1 is wrongly decided. I appreciate it has stood</p> <p>17 for a long time but when one actually looks at the</p> <p>18 decision, in my submission, it is plainly wrong and the</p> <p>19 criticism of Dr Derham is unanswerable.</p> <p>20 However, we can also approach it as a matter of</p> <p>21 authority in looking at Re GEB, a debtor. This is</p> <p>22 a decision of Court of Appeal in 1983. Perhaps I should</p> <p>23 invite your Lordship just to read the fairly short</p> <p>24 headnote.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 75</p>
<p>1 can see that perhaps most --</p> <p>2 MR JUSTICE DAVID RICHARDS: So in Black & Co you are looking</p> <p>3 at what the position is in the liquidation of the</p> <p>4 company which has the benefit of the calls.</p> <p>5 MR WOLFSON: With respect your Lordship has the point.</p> <p>6 Just to make good the point I just made, if</p> <p>7 your Lordship turns back to 696 after the learned judge</p> <p>8 has set out the rule in Grissell's Case, your Lordship</p> <p>9 read down to, "Ought to be distributed rateably", the</p> <p>10 first case he refers to is, "See Black & Co's Case". It</p> <p>11 is an application of Grissell's Case.</p> <p>12 So, going back to 698, the point in the final</p> <p>13 paragraph of the judgment is a false point, with respect</p> <p>14 to Mr Justice Wright. It's not at all difficult to see</p> <p>15 how Re Duckworth is to be reconciled because you are</p> <p>16 dealing with completely different things. In</p> <p>17 Re Duckworth you are asking the question: in the estate</p> <p>18 of a contributory is there a set-off. In Black & Co's</p> <p>19 case you are asking: in the case of the estate of the</p> <p>20 company is there a set-off. I don't wish to be flippant</p> <p>21 but really if you ask different questions you will get</p> <p>22 different answers. It goes back to my earlier</p> <p>23 submission in this regard and the overarching</p> <p>24 submission, which is when you are asking the question,</p> <p>25 "Is there an insolvency set-off", you have to ask it in</p> <p style="text-align: center;">Page 74</p>	<p>1 (Pause).</p> <p>2 MR WOLFSON: My Lord, this is a catch 22 case and one feels</p> <p>3 for the --</p> <p>4 MR JUSTICE DAVID RICHARDS: But this is Duckworth, isn't it?</p> <p>5 MR WOLFSON: Yes. I will come to --</p> <p>6 MR JUSTICE DAVID RICHARDS: Well, it's not but, I mean, in</p> <p>7 so far as they look at the position there --</p> <p>8 MR WOLFSON: It would have been, so to speak.</p> <p>9 MR JUSTICE DAVID RICHARDS: It would have been, yes.</p> <p>10 MR WOLFSON: You can see the Court of Appeal is very sorry</p> <p>11 for this chap because he is really caught in a catch 22</p> <p>12 because until he is bankrupt there is no set-off and, of</p> <p>13 course, what he really wants to do is avoid bankruptcy</p> <p>14 by selling the set-off. Even Victorian judges had</p> <p>15 sympathy and one can see that just looking at the end of</p> <p>16 the report at 353. If one can just glance down at the</p> <p>17 last paragraph of Lord Justice Romer, the short</p> <p>18 paragraph of Lord Justice Sterling, they clearly find</p> <p>19 this on the fact a troubling case and as a mark of their</p> <p>20 generosity they give him seven days to pay.</p> <p>21 MR JUSTICE DAVID RICHARDS: Right.</p> <p>22 MR WOLFSON: The bit we rely on is the passage on 352 from</p> <p>23 the judgment of Lord Justice Romer. If I can invite</p> <p>24 your Lordship to read from the first hole punch, "It is</p> <p>25 true that", to the end of that paragraph, "Must be</p> <p style="text-align: center;">Page 76</p>

<p>1 enforced".</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 (Pause).</p> <p>4 MR WOLFSON: Obviously, to be clear, Lord Justice Romer is</p> <p>5 not saying in terms that Auriferous Properties number 1</p> <p>6 is wrong, the point is it was right. The reason why</p> <p>7 I show your Lordship this case is because it is one of</p> <p>8 the cases cited by Dr Derham to support the general</p> <p>9 principle that one is looking within the contributory's</p> <p>10 estate and to make good my submission that when on which</p> <p>11 applies that principle it can't make a difference</p> <p>12 whether the contributory is a bankrupt individual or</p> <p>13 a corporate insolvent.</p> <p>14 MR JUSTICE DAVID RICHARDS: Mr Justice Wright in Auriferous</p> <p>15 Properties relied on Gill's Case.</p> <p>16 MR WOLFSON: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: So are you going to show me</p> <p>18 Gill's Case?</p> <p>19 MR WOLFSON: My Lord, I wasn't going to at this point.</p> <p>20 MR JUSTICE DAVID RICHARDS: Because I will have to look at</p> <p>21 that.</p> <p>22 MR WOLFSON: You will have to look at that.</p> <p>23 MR JUSTICE DAVID RICHARDS: I mean, I take it that this</p> <p>24 Auriferous Properties has not been commented on in any</p> <p>25 subsequent authority adversely or with approbation.</p> <p style="text-align: center;">Page 77</p>	<p>1 MR TROWER: My Lord, if it is helpful, in the light of the</p> <p>2 fact that I was referred to, we also cite in our</p> <p>3 submissions a passage from Lord Walker's judgment in</p> <p>4 Kaupthing where he refers to Auriferous number 1</p> <p>5 apparently just accepting it.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes. On the other hand,</p> <p>7 I suppose it was not the focus of any submission.</p> <p>8 MR TROWER: Absolutely.</p> <p>9 MR WOLFSON: Yes, that is very fair. Lord Walker does refer</p> <p>10 to it but this point, it wasn't on the horizon, with</p> <p>11 respect, in Kaupthing.</p> <p>12 I think I should probably deal first with my learned</p> <p>13 friend's point that it was approved in White Star Line</p> <p>14 because if he is right about that then I am really in</p> <p>15 trouble before your Lordship because that is a case in</p> <p>16 the Court of Appeal.</p> <p>17 MR JUSTICE DAVID RICHARDS: Indeed.</p> <p>18 MR WOLFSON: So let me deal with that point first. My</p> <p>19 learned friend makes the point and to refer to his</p> <p>20 written argument he makes the point at paragraph 153 of</p> <p>21 his original submissions. Perhaps I should invite</p> <p>22 your Lordship just to read that paragraph.</p> <p>23 In the second sentence my learned friend makes two</p> <p>24 points. The first point he makes is, with respect,</p> <p>25 correct, it is different, it is right. The second point</p> <p style="text-align: center;">Page 79</p>
<p>1 MR WOLFSON: No, I haven't found that it has been, sort of,</p> <p>2 approved.</p> <p>3 MR JUSTICE DAVID RICHARDS: It has not been approved, it has</p> <p>4 not been disapproved.</p> <p>5 MR WOLFSON: On this point it hasn't been disapproved, it is</p> <p>6 out there. Well, actually -- can I --</p> <p>7 MR JUSTICE DAVID RICHARDS: Mr Trower might have something</p> <p>8 to add.</p> <p>9 MR WOLFSON: There are three things I need to do.</p> <p>10 Mr Trower has a point which he made in writing,</p> <p>11 I think I mentioned this yesterday, that he says</p> <p>12 Auriferous Properties was approved in White Star Line.</p> <p>13 He said that in writing but didn't say that orally.</p> <p>14 I need to deal with that.</p> <p>15 MR JUSTICE DAVID RICHARDS: I think you say, no, that is</p> <p>16 Auriferous number 2, don't you?</p> <p>17 MR WOLFSON: Yes. I need to show you Gill's Case and</p> <p>18 I would also like to show you some of Dr Derham on why</p> <p>19 it can be the case, if your Lordship is troubled by the</p> <p>20 point, why it can be the case that in a double</p> <p>21 insolvency situation you can have a different result in</p> <p>22 each insolvency and Dr Derham explains why. In my</p> <p>23 submission, really, the simple reason is because you are</p> <p>24 asking different questions to different estates.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes, I follow that.</p> <p style="text-align: center;">Page 78</p>	<p>1 he makes, that it is confirmed by the court in Re White</p> <p>2 Star Line, he is wrong about that but, of course, if he</p> <p>3 is right then I'm in trouble on this point before</p> <p>4 your Lordship and actually frankly in the Court of</p> <p>5 Appeal as well.</p> <p>6 So let's have a look at White Star Line. It's at</p> <p>7 tab 54 of bundle 1B. My learned friend took you to this</p> <p>8 case but didn't make any submission when he took you to</p> <p>9 this case that it supported the Auriferous Properties</p> <p>10 number 1. Fortunately we have, because it is</p> <p>11 an official report, the argument. The argument starts</p> <p>12 at 465 and runs through to 472.</p> <p>13 MR JUSTICE DAVID RICHARDS: Just give me a moment.</p> <p>14 (Pause).</p> <p>15 Mr Trower refers to page 480 in White Star and that</p> <p>16 is clearly a reference to Auriferous Properties</p> <p>17 number 2.</p> <p>18 MR WOLFSON: Yes. Maybe I don't have to say much more than</p> <p>19 that.</p> <p>20 MR JUSTICE DAVID RICHARDS: Mr Trower, page 480 refers to</p> <p>21 Auriferous Properties number 2, quite correctly,</p> <p>22 I think. I don't think that is a mistake for number 1.</p> <p>23 MR TROWER: No. We're just saying the principle is approved</p> <p>24 in White Star Line.</p> <p>25 MR JUSTICE DAVID RICHARDS: Well, that's the principle, the</p> <p style="text-align: center;">Page 80</p>

<p>1 Grissell's Case principle, which is the point at issue</p> <p>2 in Auriferous Properties number 2.</p> <p>3 MR TROWER: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: But that doesn't touch the point</p> <p>5 covered, does it, in Auriferous number 1?</p> <p>6 MR TROWER: Well, it covers the set-off point as opposed to</p> <p>7 --</p> <p>8 MR JUSTICE DAVID RICHARDS: It's set-off in the</p> <p>9 contributory's liquidation or bankruptcy. That's what</p> <p>10 we are looking at, whether there is set-off. In the</p> <p>11 contributory's bankruptcy there is set-off, that's</p> <p>12 Duckworth.</p> <p>13 MR TROWER: Yes.</p> <p>14 MR JUSTICE DAVID RICHARDS: Mr Justice Wright held in</p> <p>15 Auriferous number 1 that that didn't apply in the case</p> <p>16 of a corporate contributory.</p> <p>17 MR TROWER: Yes.</p> <p>18 MR JUSTICE DAVID RICHARDS: That is the point that</p> <p>19 Mr Wolfson is challenging.</p> <p>20 MR TROWER: Yes. I think we had taken the view that that</p> <p>21 principle was established by this passage here but can</p> <p>22 I --</p> <p>23 MR JUSTICE DAVID RICHARDS: It is a reference to number 2.</p> <p>24 MR TROWER: I certainly accept it is a reference per se to</p> <p>25 number 2. It wasn't intended. What we said in 153 is</p> <p style="text-align: center;">Page 81</p>	<p>1 We do say, as your Lordship correctly says, by the</p> <p>2 first hole punch is a reference to Auriferous Properties</p> <p>3 number 1 and footnote 4. Of course, [1898] 1 Ch report</p> <p>4 691 is the correct reference to Auriferous number 1.</p> <p>5 There is also, of course, a reference further down the</p> <p>6 page.</p> <p>7 MR JUSTICE DAVID RICHARDS: To number 2, Mr Harman.</p> <p>8 MR WOLFSON: Mr Harman Queens Counsel goes back to</p> <p>9 Auriferous number 2.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes. I mean, it's not very</p> <p>11 clear. All that is said of Auriferous number 1 is that</p> <p>12 it is another case bearing on the matter. Well, there</p> <p>13 we go.</p> <p>14 MR WOLFSON: I do have some precedent, therefore.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes, all right. So Gill you</p> <p>16 will take me to.</p> <p>17 MR WOLFSON: Yes, I will take you to Gill. It may be easier</p> <p>18 to do that after your Lordship rises.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, it will be.</p> <p>20 MR WOLFSON: Can I just make one short point, however, on</p> <p>21 the statute which we say also supports the proposition</p> <p>22 that there ought to be a set-off or that one might</p> <p>23 expect there to be a set-off in the contributory's</p> <p>24 estate.</p> <p>25 Frankly the submissions I have made up to now really</p> <p style="text-align: center;">Page 83</p>
<p>1 a reference to the underlying principle. 153 of our</p> <p>2 submission is meant to be a reference to the position</p> <p>3 which is plainly correct as confirmed. Now, whether</p> <p>4 that is right or not I quite accept that there isn't</p> <p>5 anything specifically in White Star that specifically</p> <p>6 confirms that the Court of Appeal has approved</p> <p>7 Auriferous number 1.</p> <p>8 MR JUSTICE DAVID RICHARDS: All right. Thank you.</p> <p>9 MR TROWER: That much I accept.</p> <p>10 MR JUSTICE DAVID RICHARDS: Right. Thank you.</p> <p>11 Mr Wolfson, yes? There is a reference to Auriferous</p> <p>12 number 1 in argument, isn't there?</p> <p>13 MR WOLFSON: My Lord, that was precisely the point I was</p> <p>14 going to take your Lordship to and that's why</p> <p>15 I mentioned the argument. It was argued, if one looks</p> <p>16 at the names, by some familiar names.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, indeed.</p> <p>18 MR WOLFSON: And there is a reference.</p> <p>19 MR JUSTICE DAVID RICHARDS: I see Mr Eversheds junior was</p> <p>20 Mr Gordon Brown but that's not such a well-known name in</p> <p>21 this context.</p> <p>22 MR WOLFSON: No.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, page 470?</p> <p>24 MR WOLFSON: The fact that it is an insolvency case is, of</p> <p>25 course, not a political point at all.</p> <p style="text-align: center;">Page 82</p>	<p>1 ought to have dealt with the point. It's a point I made</p> <p>2 earlier. If we just take it out. It's paragraph 8 of</p> <p>3 schedule 4. Your Lordship recalls this is the point</p> <p>4 where in paragraph 8 of schedule 4, we're now in the</p> <p>5 volume 2, tab 12 --</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, this is the proof.</p> <p>7 MR WOLFSON: This is the proof point. Exactly.</p> <p>8 Your Lordship remembers we had the phrase twice, "The</p> <p>9 balance against the estate rateably". Here we are</p> <p>10 looking at the proof in the estate of the contributory.</p> <p>11 It applies in bankruptcy and in insolvency of</p> <p>12 a contributory and it talks about a proof for any</p> <p>13 balance against his estate, it uses that phrase twice,</p> <p>14 and rateably with the other separate creditors.</p> <p>15 The point is simply this: we say that is some</p> <p>16 further textual support, if needed, for the proposition</p> <p>17 that you can certainly have a set-off in the estate of</p> <p>18 the contributory.</p> <p>19 It's not entirely clear otherwise, and I don't think</p> <p>20 any other party has suggested, what "balance" should</p> <p>21 otherwise be mean in this context.</p> <p>22 MR JUSTICE DAVID RICHARDS: It's the balance under that</p> <p>23 section that we have been looking at, isn't it, the</p> <p>24 balance order which would not permit a set-off.</p> <p>25 MR WOLFSON: In which case I'm not going to get my argument</p> <p style="text-align: center;">Page 84</p>

<p>1 any further.</p> <p>2 MR JUSTICE DAVID RICHARDS: It doesn't answer the point</p> <p>3 whether there would be a set-off in the contributory's</p> <p>4 liquidation or bankruptcy.</p> <p>5 MR WOLFSON: My Lord, if that is right then I'm not going to</p> <p>6 advance the argument on the basis of this paragraph.</p> <p>7 MR JUSTICE DAVID RICHARDS: No. I mean, if you're going to</p> <p>8 say that Mr Justice Wright in wrong in Auriferous</p> <p>9 number 1 as well as Dr Derham I would you like you to</p> <p>10 bring to my attention any comments made by any other</p> <p>11 textbook writers.</p> <p>12 I mean, the difficulty is the very one that</p> <p>13 Mr Justice Wright refers to as regards Re Duckworth,</p> <p>14 which was admittedly Court of Appeal so binding on him.</p> <p>15 This has remained undisturbed for over 100 years. For</p> <p>16 reasons we discussed yesterday it has had no great</p> <p>17 practical importance until today over the last 50 years</p> <p>18 or so but in the first half of the 20th century,</p> <p>19 certainly the first two or three decades, the assumption</p> <p>20 must that be that it was acted on when the circumstance</p> <p>21 arose. I mean, you do get these anomalies sometimes,</p> <p>22 don't you, in the law but because they have stood for so</p> <p>23 long they continue to stand.</p> <p>24 MR WOLFSON: I certainly agree with the first half of what</p> <p>25 your Lordship has said, one certainly gets anomalies in</p> <p style="text-align: center;">Page 85</p>	<p>1 principle there might be quite a lot to say for</p> <p>2 Mr Justice Wright's approach but it wasn't open to him</p> <p>3 in a sense to approach it that way because of</p> <p>4 Re Duckworth.</p> <p>5 MR WOLFSON: I'm conscious of time but, my Lord, once one</p> <p>6 accepts that the liquidation and administration set-off</p> <p>7 regimes have been brought into line with the bankruptcy</p> <p>8 set-off regime, which is the point in the Court</p> <p>9 Committee reports, and perhaps I will come to this after</p> <p>10 lunch, it is very difficult then to say --</p> <p>11 MR JUSTICE DAVID RICHARDS: I was wondering whether there</p> <p>12 was any point but there is no, sort of, significant -- I</p> <p>13 mean, by the time that Auriferous number 1 was decided</p> <p>14 were the relevant set-off rules equally applicable in</p> <p>15 bankruptcy and in company winding up? Is there some</p> <p>16 background that is different there to the background</p> <p>17 now?</p> <p>18 MR WOLFSON: Certainly the position now is, as I have said,</p> <p>19 that the set-off regimes have been brought into line</p> <p>20 across bankruptcy, administration and liquidation and</p> <p>21 one that is the case it is very difficult to see how</p> <p>22 Mr Justice Wright's approach survives even if he was</p> <p>23 right at the time.</p> <p>24 MR JUSTICE DAVID RICHARDS: Assuming that Re Duckworth is</p> <p>25 right as a matter of principle.</p> <p style="text-align: center;">Page 87</p>
<p>1 the law. One gets anomalies in the law generally</p> <p>2 because Parliament has said X in one situation and</p> <p>3 another has said Y in another or certainly hasn't said X</p> <p>4 in another situation.</p> <p>5 One ought not to have, and I'm probably speaking now</p> <p>6 well above my pay grade, one ought not to have anomalies</p> <p>7 in the law when it is a decision of a judge which has</p> <p>8 applied a principle wrongly or has misapplied</p> <p>9 a principle. In other words, if the approach of</p> <p>10 Mr Justice Wright in Re Auriferous number 1 is wrong as</p> <p>11 a matter of principle it ought not to matter, if I can</p> <p>12 say this, that it is a decision from 100 years ago or</p> <p>13 a decision of last Tuesday. That is probably easier to</p> <p>14 submit than it may be for your Lordship to find.</p> <p>15 MR JUSTICE DAVID RICHARDS: It may be that you are right.</p> <p>16 MR WOLFSON: He is either right or he is wrong and, in my</p> <p>17 submission, the criticism made by Dr Derham is actually</p> <p>18 unanswerable. We will, of course, see whether there is</p> <p>19 anything to say --</p> <p>20 MR JUSTICE DAVID RICHARDS: I think Mr Justice Wright</p> <p>21 probably thought that Re Duckworth was wrongly decided</p> <p>22 but obviously that wasn't open to him.</p> <p>23 MR WOLFSON: He was stuck with Re Duckworth and he was able</p> <p>24 to say, "Ah, but Re Duckworth is different".</p> <p>25 MR JUSTICE DAVID RICHARDS: You see, as a matter of</p> <p style="text-align: center;">Page 86</p>	<p>1 MR WOLFSON: Assuming that Re Duckworth is right as a matter</p> <p>2 of principle, yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: Assuming that the principle in</p> <p>4 Re Duckworth should apply in an insolvent corporate</p> <p>5 contributory.</p> <p>6 MR WOLFSON: Yes. Re Duckworth has been approved at a Court</p> <p>7 of Appeal level so Re Duckworth is certainly right. The</p> <p>8 question now is not whether Re Duckworth is right, it is</p> <p>9 whether you apply it across.</p> <p>10 MR JUSTICE DAVID RICHARDS: All right. We will continue at</p> <p>11 2.05 pm.</p> <p>12 (1.04 pm)</p> <p>13 (The short adjournment)</p> <p>14 (2.05 pm)</p> <p>15 MR JUSTICE DAVID RICHARDS: Mr Wolfson.</p> <p>16 MR WOLFSON: My Lord, before your Lordship rose your</p> <p>17 Lordship asked me the extent to which Re Auriferous</p> <p>18 Properties number 1 had been applied in subsequent</p> <p>19 cases.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR WOLFSON: We have only had time to do a Westlaw search,</p> <p>22 but the results of that are as follows. There is the</p> <p>23 mention in Re Kaupthing, which your Lordship has seen</p> <p>24 and is familiar with. It's referred to in argument, as</p> <p>25 we saw, in Re White Star Line. It's referred to in</p> <p style="text-align: center;">Page 88</p>

<p>1 argument in the Court of Appeal but not in the judgments 2 in the Court of Appeal in Soden and it was not 3 apparently even cited in the House of Lords in argument. 4 MR JUSTICE DAVID RICHARDS: Right. 5 MR WOLFSON: It is also referred to in argument in a case 6 which I don't think is in the bundles. It is called 7 Hiram Maxim Lamp Company [1903] 1 Chancery 70. But 8 that's only in argument. The argument is really just 9 one of those square brackets lines where it says -- 10 I forget who the counsel was now -- X KC, presumably, 11 1903, yes -- QC? 12 MR JUSTICE DAVID RICHARDS: Good point. 13 MR WOLFSON: I am not sure. X in reply referred to, but it 14 doesn't say what the submission was. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR WOLFSON: So that doesn't take us, it seems, very much 17 further. 18 So far as textbooks is concerned, we have shown your 19 Lordship the passages in Derham. There are two places 20 where it is mentioned in Wood. Somewhat confusingly, if 21 you look at Re Auriferous Properties number 1 in the 22 table of cases, you only get the first citation because 23 the second citation of Re Auriferous Properties number 24 1, in the table of cases, is put as a citation of Re 25 Auriferous Properties number 2. So we do have a certain</p> <p style="text-align: center;">Page 89</p>	<p>1 MR WOLFSON: So putting it in our Auriferous number 1 and 2 Auriferous number 2 language, this is an Auriferous 3 number 2 case, not an Auriferous number 1 case at all. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR WOLFSON: Vice Chancellor Baker, your Lordship sees the 6 judgment at 757, there is a reference to Re Duckworth. 7 He says there is no case. Then he says this: 8 "In the case of a bankrupt shareholder, when 9 a company or its liquidator went to prove for their call 10 ...(Reading to the words)... allow it to be set-off." 11 Just pausing there, that would appear to apply 12 equally to a corporate contributory as well. 13 Then, towards the bottom of the page, there is 14 a reference to Re Whitehouse and the mutuality point, 15 which now of course has been overtaken by Pyle. We had 16 that discussion yesterday. 17 Then, over the page, my Lord, one can perhaps 18 extract, so to speak, the ratio here. Three lines down: 19 "The relationship (?) between debtor and creditor do 20 not here exist. Mr Gill is nothing better than a 21 partner in a concern which has become insolvent, and if 22 I were to adopt his contention the result would be to 23 allow one creditor only to recover 20 shillings in the 24 pound while all the other creditors had to be satisfied 25 with little or nothing."</p> <p style="text-align: center;">Page 91</p>
<p>1 amount of confusion. It does not seem to us that those 2 citations really take the debate very much further, but 3 we will photocopy them overnight and we will circulate 4 them so your Lordship has them. 5 The third thing though was to show your Lordship 6 Gill's Case. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR WOLFSON: Which is in the bundles and is at tab 27. 9 MR JUSTICE DAVID RICHARDS: Right. Thank you. 10 MR WOLFSON: As your Lordship's sees from the headnote: 11 "The rules that a company cannot set-off a judgment 12 debt due to him from the company against calls made upon 13 him by the official liquidator in the winding-up of 14 a company has not been affected by section 10." 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR WOLFSON: Importantly, when one looks through the facts, 17 which are not too complex, your Lordship sees in the 18 last paragraph: 19 "A call of £25 per share having been made by the 20 official liquidator, Gill claimed the right to set-off 21 his debt of 501 and to prove under the winding-up for 22 the balance." 23 So it would seem therefore that this was actually 24 a case of a claim set-off in the estate of the company. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 90</p>	<p>1 That's familiar, Grissell's Case, <i>pari passu</i> 2 territory, which of course is entirely consistent, so to 3 speak, if you are looking in Auriferous number 2 4 territory in the insolvency of the company. 5 Going back to Mr Justice Wright in Re Auriferous 6 Properties number 1, obviously going back to him but 7 forward in time, that's back in tab 38. At tab 38, 8 page 697 of the report, where your Lordship recalls, 9 just after halfway down: 10 "It seems to me this case is to be cited in effect 11 in a negative by Gill's Case." 12 Then he says: 13 "It is true in Gill's Case a creditor contributory 14 was not a company in liquidation." 15 With respect, it's the same problem, the same 16 fallacy, if I may say, with respect, that he makes on 17 the following page, because in the same way as he's 18 asking on the following page how do you tie up Re 19 Duckworth with Black & Co's case, relying on Gill's Case 20 is essentially the same problem because he's looking at 21 cases of set-off in the company's estate to answer 22 questions arising in set-off in the contributory's 23 estate. The problem with the decision, in my 24 submission, remains and is really re-enforced when one 25 actually looks at Gill's Case because one sees it's the</p> <p style="text-align: center;">Page 92</p>

<p>1 same problem he has on 697 as he has on 698, which is</p> <p>2 the point that Dr Derham makes.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR WOLFSON: My Lord, if obviously our researches turn up</p> <p>5 anything else, we will of course bring it to your</p> <p>6 Lordship's attention, but I am not sure at the moment I</p> <p>7 can take that any further.</p> <p>8 MR JUSTICE DAVID RICHARDS: No, that's fine. Thank you.</p> <p>9 MR WOLFSON: My Lord, I now move to a different point, which</p> <p>10 is my last point in the overall context of insolvency</p> <p>11 set-off.</p> <p>12 MR JUSTICE DAVID RICHARDS: Right.</p> <p>13 MR WOLFSON: That's a very short point on valuing contingent</p> <p>14 claims. I am not entirely sure how far your Lordship</p> <p>15 either needs or wants us to address your Lordship on</p> <p>16 this point, because your Lordship is not going to get</p> <p>17 into the underlying detail of valuation. Perhaps if</p> <p>18 I could just take two minutes really to sketch out where</p> <p>19 we are and we will see whether any of this is too</p> <p>20 controversial. A lot of this seems to be common ground.</p> <p>21 If there is an insolvency set-off in either estate, you</p> <p>22 are going to have to value the claims. The general</p> <p>23 approach to valuing contingent claims appears to be</p> <p>24 fairly common ground, Re Danka, the judgment of Lord</p> <p>25 Justice Patten in particular. There has to be a fair</p> <p style="text-align: center;">Page 93</p>	<p>1 as to whether formally 2.105 applies and you apply the</p> <p>2 formula where -- this is rule 2.105. This is the</p> <p>3 formula with N, where N is the number of years in</p> <p>4 decimal formation to the time the event occurs. It's on</p> <p>5 page 150 in the top right-hand corner.</p> <p>6 MR JUSTICE DAVID RICHARDS: It seems to be clearly it does</p> <p>7 not apply.</p> <p>8 MR WOLFSON: If it doesn't apply because you haven't got</p> <p>9 a fixed value for N --</p> <p>10 MR JUSTICE DAVID RICHARDS: It's not a future debt, as that</p> <p>11 term is normally understood. It is a contingent.</p> <p>12 MR WOLFSON: Exactly. It may be therefore that what you</p> <p>13 have do is, when you are going to your general power in</p> <p>14 2.81 of valuing contingent debts, one of the factors in</p> <p>15 the midst, to use that phrase, is the likely time at</p> <p>16 which the event would arise. My submission really is no</p> <p>17 more than this. In any contingency, there are normally</p> <p>18 at least two factors, two relevant factors; the first is</p> <p>19 whether the event will occur and the second is when the</p> <p>20 event will occur. To make the obvious point, if you</p> <p>21 don't factor the when into the -- if you don't put that</p> <p>22 into the mix as well as the whether, then there is going</p> <p>23 to be no difference for estimating purposes between</p> <p>24 somebody with a 60 per cent chance of a £10 million</p> <p>25 right next Tuesday and a 60 per cent chance of</p> <p style="text-align: center;">Page 95</p>
<p>1 and genuine assessment of the relevant contingencies</p> <p>2 arising. Certainly my learned friend Mr Trower does not</p> <p>3 seem to be suggesting that there should not be</p> <p>4 a discount for accelerated receipt.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes, I don't quite know how that</p> <p>6 works with a contingency.</p> <p>7 MR WOLFSON: Sorry, I think I may have got that wrong. I</p> <p>8 think maybe perhaps he is suggesting there shouldn't be</p> <p>9 a discount for accelerated receipts.</p> <p>10 MR TROWER: I think what I am suggesting is that it's one of</p> <p>11 the factors that is capable of being taken into account</p> <p>12 for estimation purposes. It's just the point about</p> <p>13 acceleration receipt was that 2.105 doesn't apply.</p> <p>14 That's where it went.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes. It's an interesting point.</p> <p>16 It must arise, in a sense, with all estimations of</p> <p>17 contingencies. If you are the holder of a policy of</p> <p>18 insurance, you are proving for the possibility of</p> <p>19 a claim which might be made in a year's time. I am not</p> <p>20 quite sure -- somehow one feels that in some way they</p> <p>21 are in the mix, but I am not sure anyone has ever got</p> <p>22 the recipe out to say --</p> <p>23 MR WOLFSON: There may be --</p> <p>24 MR JUSTICE DAVID RICHARDS: -- how much it contributes.</p> <p>25 MR WOLFSON: Exactly. There may be a nice point between us</p> <p style="text-align: center;">Page 94</p>	<p>1 a £10 million right in 5 years' time. Of course</p> <p>2 commercially they are radically different.</p> <p>3 It may be that the debate between us as to whether</p> <p>4 it is 2.105 or it's in 2.81 and whether, when you are in</p> <p>5 2.81, you should nonetheless apply a discount of 5 per</p> <p>6 cent is a debate we don't need to have now because it</p> <p>7 seems to be common ground across the court that it is</p> <p>8 part of the mix. If there are any further issues, no</p> <p>9 doubt we can deal with those in due course.</p> <p>10 My Lord, that's all I was going to say about</p> <p>11 insolvency set-off generally. I have dealt with it in</p> <p>12 LBIE's estate and I have dealt with it in LBL's estate.</p> <p>13 I hope I have submitted clearly the reasons why we</p> <p>14 advance different contentions in the two different</p> <p>15 estates.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR WOLFSON: Can I now move to a completely separate area,</p> <p>18 which is the contributory rule.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR WOLFSON: The issue here is the contributory rule and</p> <p>21 what we say is its inapplicability in LBIE's</p> <p>22 administration. My first submission is simple. The</p> <p>23 contributory rule cannot apply where there is only</p> <p>24 a contingent liability to contribute. Now, LBIE accepts</p> <p>25 in paragraph 22 of its supplemental submissions that it</p> <p style="text-align: center;">Page 96</p>

<p>1 is unable to cite any authority in support of the</p> <p>2 proposition that the contributory rule applies in</p> <p>3 circumstances where there is no present liability to</p> <p>4 contribute but only a contingent liability. LBIE's</p> <p>5 supplemental submissions further accept at paragraph 20</p> <p>6 that all the previous cases applying the contributory</p> <p>7 rule involved a company in liquidation, the company</p> <p>8 cases, where a call had actually been made. I think</p> <p>9 that was a question your Lordship asked yesterday as</p> <p>10 well.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR WOLFSON: In the normal case, the right of retainer, as</p> <p>13 LBIE calls it -- and that's a phrase used in some of the</p> <p>14 cases -- arising from the rule in <i>Cherry v Boulton</i> does</p> <p>15 not entitle a fund which owes a present debt to another</p> <p>16 person to retain an amount equal to a future liability</p> <p>17 of that person to a fund. So in the <i>Cherry v Boulton</i></p> <p>18 line of cases retention does not occur if all the</p> <p>19 contributor owes is, so to speak, a future liability.</p> <p>20 Now, what I propose to do is to go through the</p> <p>21 previous cases applying the contributory rule, but what</p> <p>22 I propose to do is not to go through them</p> <p>23 chronologically but to go through them thematically in</p> <p>24 order to see various points arising as to when the rule</p> <p>25 applies and where it does not. The starting point of</p> <p style="text-align: center;">Page 97</p>	<p>1 a liability to contribute ...(Reading to the words)...</p> <p>2 debts and liabilities of the company", et cetera.</p> <p>3 Then at 536 perhaps your Lordship could remind</p> <p>4 yourself of the paragraph beginning, "But if the amount</p> <p>5 of an unpaid call ..." Perhaps your Lordship could just</p> <p>6 read from there to just over the page.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR WOLFSON: The circumstances in which you are paid that by</p> <p>9 the company is either, at the bottom of 536, when no</p> <p>10 call has been made or when you have paid. His Lordship</p> <p>11 does not say, "Or where there is no possibility that</p> <p>12 a call may be made in the future", to make the obvious</p> <p>13 point.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR WOLFSON: So this is a founding case. It only applies</p> <p>16 when a call is to be made and, in my respectful</p> <p>17 submission, it expressly says it does not apply when no</p> <p>18 call has been made.</p> <p>19 The later cases we submit --</p> <p>20 MR JUSTICE DAVID RICHARDS: I mean, Mr Trower showed me</p> <p>21 these facts, but it's worth noting that on page 528 the</p> <p>22 shares had a nominal value of £50, on each of which £15</p> <p>23 had been paid.</p> <p>24 MR WOLFSON: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: The liquidators made a call of</p> <p style="text-align: center;">Page 99</p>
<p>1 course is <i>Grissell's Case</i>. I am conscious your Lordship</p> <p>2 has now looked at this a number of times, but perhaps we</p> <p>3 should just go back to it quickly. This is at 1A,</p> <p>4 tab 10. This is really the founding case. Your</p> <p>5 Lordship will see at page 534 of the report that the way</p> <p>6 Lord Chelmsford phrased the question was whether there</p> <p>7 should be a set-off or have credit for "so much of his</p> <p>8 debt as is equal to the amount of calls which have been</p> <p>9 made upon him but not paid".</p> <p>10 So he is clearly here talking about calls which have</p> <p>11 been made. Your Lordship has seen the way the judgment</p> <p>12 developed on 535. But of course the passage we cited in</p> <p>13 our written submissions, which I don't think your</p> <p>14 Lordship has been so far referred, is at the end of the</p> <p>15 first paragraph of 535 where, in a memorable phrase, his</p> <p>16 Lordship says:</p> <p>17 "The Act would be a complete snare upon members of</p> <p>18 companies who are creditors if they were to be postponed</p> <p>19 to other creditors who are not members. Members of the</p> <p>20 company being then entitled to such ...(Reading to the</p> <p>21 words)... to be dealt with."</p> <p>22 I think your Lordship has seen that in the middle of</p> <p>23 that page, continuing on 535, just above the second</p> <p>24 punch:</p> <p>25 "Until the call is made, there is nothing more than</p> <p style="text-align: center;">Page 98</p>	<p>1 £10 per share.</p> <p>2 MR WOLFSON: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: So it was, as it were, a live</p> <p>4 issue in that case.</p> <p>5 MR WOLFSON: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: Of course it may be the</p> <p>7 circumstances were such that there was no prospect of</p> <p>8 any further call being made, but we don't know.</p> <p>9 MR WOLFSON: We don't know that, one way or the other. In</p> <p>10 my submission, the later cases followed this approach.</p> <p>11 The first case to look at is <i>Ex Parte Mackenzie</i>,</p> <p>12 a decision behind tab 17. This is a decision in the</p> <p>13 Court of Appeal in 1869. Your Lordship sees -- perhaps</p> <p>14 I should ask your Lordship just to read the very short</p> <p>15 headnote.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR WOLFSON: The relevant passage is at 244.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR WOLFSON: If we pick it up about five lines up, "But it</p> <p>20 was contended the observations of the Lord Chancellor in</p> <p>21 <i>Grissell's Case</i> affected the present case." If your</p> <p>22 Lordship could just read to the end of that paragraph on</p> <p>23 the following page, 245.</p> <p>24 MR JUSTICE DAVID RICHARDS: Sorry, let me just follow this.</p> <p>25 MR WOLFSON: Your Lordship may be thinking about this point,</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 which is a slight oddity about this case. It was being 2 suggested that if the company wanted to assert a set-off 3 it could. If a company wanted to assert a set-off, but 4 the set-off of course is mandatory and it doesn't matter 5 who wants or does not want to assert it. There either 6 is a set-off or there isn't a set-off. 7 The only point we -- 8 MR JUSTICE DAVID RICHARDS: Sorry, obviously what's puzzling 9 me about it is why it should be thought there would be 10 a set-off. 11 MR WOLFSON: Yes. That is slightly odd, yes. 12 MR JUSTICE DAVID RICHARDS: Right. So what do we get out of 13 this? 14 MR WOLFSON: We get out of this, at the bottom of 244: 15 "That case merely says this [that case being 16 Grissell's Case]: when dividends are payable and no 17 calls have been made, the creditor is entitled to 18 receive his dividend nonconstant any call will be made." 19 It is just reinforcing the point. It is a point 20 that you have to have a call. 21 MR JUSTICE DAVID RICHARDS: All right. 22 MR WOLFSON: The last case on this point is in the next 23 volume of authorities, a decision of Mr Justice Buckley. 24 We have looked at this one already. Re West Coast Gold 25 Fields is at tab 45. It's really just the way Mr</p> <p style="text-align: center;">Page 101</p>	<p>1 a right of retainer. 2 MR JUSTICE DAVID RICHARDS: Right. 3 MR WOLFSON: We submit that the most accurate way to think 4 about it, as a matter of principle, is to look at it as 5 the right to appropriate an asset as payment. In this 6 regard, one of the cases which does consider this in 7 some detail is the decision of Mr Justice Kekowich in Re 8 Akerman. That's at tab 36, which is in bundle 2, bundle 9 B. This is a decision in 1891. Halfway down that page, 10 he refers to this question. Your Lordship sees -- 11 MR JUSTICE DAVID RICHARDS: Sorry, this is page? 12 MR WOLFSON: 219, my Lord, sorry. He refers to Cherry v 13 Boulton. Your Lordship sees at the end of the line: 14 "The Lord Chancellor, Lord Cotton, in the case of 15 Cherry v Boulton took occasion to remark the expression 16 set-off was very inaccurately used in a case of this 17 kind ...(Reading to the words)... the term retainer also 18 is inaccurately used in a case of this kind. I have 19 heard more of retainer in this case than I have heard of 20 set-off, but neither the one term nor the other can 21 really be used with propriety and either I think equally 22 introduces confusion." 23 He summarises the principle towards the bottom. 24 MR JUSTICE DAVID RICHARDS: Yes, that's the passage that 25 Lord Walker cites.</p> <p style="text-align: center;">Page 103</p>
<p>1 Justice Buckley explains Grissell's Case in the very 2 first paragraph of the judgment on 600, where he uses 3 the language "paying into the common fund all sums due 4 from him in respect of calls". It's the same point. 5 Again, it focuses on amounts actually due in respect of 6 calls actually made. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR WOLFSON: Now, in addition to the authorities on the 9 contributory rule, the authorities clearly establish 10 that the right of retainer arising from the rule in 11 Cherry v Boulton only comes into play when the 12 obligation to contribute to the fund is presently due 13 and payable. So you only have a right of retention as 14 the fund manager, so to speak, if the obligation to 15 contribute is presently due and payable. The 16 phraseology used in this context that we have seen in a 17 few cases -- for example, "He who seeks equity must do 18 equity", and "to complete the estate" -- support that 19 proposition. 20 Now, your Lordship asked my learned friend yesterday 21 and also asked me about the nature of the right in 22 Cherry v Boulton and how it is best characterised. It 23 is a question of some nicety. Some of the authorities 24 refer it to similar to set-off. We saw the phrase 25 "quasi set-off" in one case. Some refer to it as</p> <p style="text-align: center;">Page 102</p>	<p>1 MR WOLFSON: Exactly. 2 "Where the contributory is paid by holding in his 3 own hand part of the ...(Reading to the words)... he 4 would receive back." 5 That essentially is the basis of my suggested 6 characterisation of the principle as the right to 7 appropriate an asset as payment. Your Lordship sees 8 another way it's put slightly differently is at the top 9 of 220 where, referring to the Courtenay v Williams 10 case, he refers to Lord Chancellor Lord Lyndhurst in 11 that case. He uses the phrase "satisfied pro tanto". 12 Just to give your Lordship the reference, that is 13 how Dr Derham characterises it as well. I don't think 14 we need go to it. The reference is paragraph 1404. 15 That's behind tab 106. Insofar as your Lordship wishes 16 to drill down to the best way of actually understanding 17 what this is. 18 MR JUSTICE DAVID RICHARDS: What it is. 19 MR WOLFSON: We submit therefore, following on from that, 20 that the fact that, properly characterised, the 21 principle is in effect a method of obtaining payment 22 illustrates why it cannot be engaged when there is no 23 present obligation to pay into the fund. To put it the 24 other way round, there must be a present obligation to 25 pay into the fund because the principle operates</p> <p style="text-align: center;">Page 104</p>

<p>1 a method of the payee fund obtaining payment from the 2 payer. That's another conceptual reason, in addition to 3 the authorities, why there must be a present obligation. 4 The key authorities which make clear that the 5 principle only applies when there is a present 6 obligation to contribute to the fund have been set out 7 at paragraph 48 of our written opening. My Lord, 8 I don't propose to go through all the material cited in 9 paragraph 48. There are effectively five citations and 10 then paragraph 6 is a conclusion. But I do wish, if 11 I may, just to go through two -- perhaps I should go 12 through three. If I could take your Lordship to Re 13 Kaupthing first and then Re Abrahams. Kaupthing is at 14 1D, 94. 15 MR JUSTICE DAVID RICHARDS: Funnily enough, the way that 16 Philip Wood puts it in paragraph 48.1 was answering -- 17 I mean, if that's a correct statement, answering 18 a question that was going through my mind. We are not 19 here concerned with debts due now but payable in the 20 future. We are not actually concerned with that. 21 MR WOLFSON: That is right. 22 MR JUSTICE DAVID RICHARDS: He says that even there the rule 23 would not apply, as I read that. The administrator of 24 a fund may not retain a share of the fund against 25 a contribution.</p> <p style="text-align: center;">Page 105</p>	<p>1 Kaupthing, which is at 1D, tab 94. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR WOLFSON: At paragraph 45, Lord Walker is here dealing 4 with the judgment of Lord Justice Chadwick in the Re 5 SSSL decision. Perhaps I can invite your Lordship just 6 to read paragraph 45. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR WOLFSON: So he approves there the approach/the statement 9 of Mr Justice Warrington in Re Abrahams: it depends 10 whether there is an immediate right. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR WOLFSON: It's worth, my Lord, looking at Re Abrahams, 13 because it's a case where there was a debt payable by 14 instalments. Re Abrahams is at tab 47 in bundle B. 15 MR JUSTICE DAVID RICHARDS: Which tab? 16 MR WOLFSON: 47 in bundle B. 17 MR JUSTICE DAVID RICHARDS: Are we coming back to Kaupthing 18 or not? 19 MR WOLFSON: I was not going to, my Lord. 20 Essentially the facts in Re Abrahams were these. We 21 summarised this, for your Lordship's note, at 48.3 in 22 our written submissions. Essentially it's this. When 23 the testator died, a person to whom a share of the 24 residue had been given by the will (i.e. he had a 25 present right to a share of the residue) owed a debt to</p> <p style="text-align: center;">Page 107</p>
<p>1 MR WOLFSON: I am not sure that is right, my Lord, with 2 respect. 3 MR JUSTICE DAVID RICHARDS: Oh, right. If a share is 4 presently payable -- 5 MR WOLFSON: If the share of the fund is payable now, but 6 the contribution in is payable in the future. 7 MR JUSTICE DAVID RICHARDS: Yes, but the administrator may 8 not retain that share. Sorry, am I reading this the 9 wrong way round? 10 MR WOLFSON: Certainly the way -- I may be misreading it, 11 my Lord. I thought -- 12 MR JUSTICE DAVID RICHARDS: The share is something payable 13 by the administrator. 14 MR WOLFSON: Yes, to the contributor, that's payable now. 15 What you cannot do is say, "I am not going to pay that 16 now because you will owe the fund something in the 17 future." 18 MR JUSTICE DAVID RICHARDS: Yes, will definitely owe 19 something in the future. 20 MR WOLFSON: Your Lordship is making the point that 21 contingent will be a fortiori. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR WOLFSON: Exactly. 24 MR JUSTICE DAVID RICHARDS: Yes, thank you. 25 MR WOLFSON: If we can take it first from Lord Walker in</p> <p style="text-align: center;">Page 106</p>	<p>1 the testator. The debt was payable by instalments. The 2 question was, when the executors were considering 3 whether to pay out, whether future instalments of that 4 debt were to be taken into account. So it's a nice case 5 because it raises the point very neatly. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR WOLFSON: Your Lordship sees, first of all, in the 8 argument at page 71, reference to Re Rees, which we will 9 see in the judgment as well. You see counsel says by 10 the second bullet point: 11 "That was a different case. There, the debt was not 12 an ascertained debt" -- 13 MR JUSTICE DAVID RICHARDS: Sorry, where are you? 14 MR WOLFSON: By the second hole punch on 71. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR WOLFSON: Then again counsel submitted towards the end 17 there about we have seen that in Re Akerman. Then we 18 get into the judgment. If you look at page 172, the 19 learned judge sets out the two questions which he has to 20 determine. First, whether at the date of the testator 21 and at the time when the question became material the 22 debt was still payable by instalments, question one, 23 and, secondly, if it is, whether the trustees are 24 entitled to retain his share in the residual estate 25 against it."</p> <p style="text-align: center;">Page 108</p>

<p>1 In square brackets, he held that the debt had not 2 become immediately payable but was still payable by 3 instalments. So that means that question number two 4 arises.</p> <p>5 MR JUSTICE DAVID RICHARDS: Sorry, can I just -- yes, that's 6 fine.</p> <p>7 MR WOLFSON: Obviously if the debt on the death had become 8 immediately payable (inaudible). So the debt is still 9 payable by instalments.</p> <p>10 The second question is one as to which there doesn't 11 seem to be much authority. Perhaps your Lordship could 12 just read from there down to the reference to Re Rees.</p> <p>13 If your Lordship is now on 73, you will see before 14 the first hole punch the important point that 15 Mr Justice Kekewich held:</p> <p>16 "Because the remedy for the debt ...(Reading to the 17 words)... the debtor could compel the executor to pay 18 the legacy. Persons who were entitled to the legacy by 19 virtue of an assignment to the debtor were also entitled 20 to have it paid, notwithstanding the debt. It is 21 exactly in point. It is immaterial how the remedy for 22 the debt is postponed, whether under the bankruptcy laws 23 or otherwise."</p> <p>24 So that's Re Rees.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 109</p>	<p>1 is a case called Re Rhodesia Goldfields, which your 2 Lordship mentioned earlier this morning. We looked at 3 this in a different context. I said I would come back 4 to it because this is the case on which my learned 5 friend relies to argue the contrary; that it doesn't 6 matter if it's not immediately payable, provided its 7 contingent is enough. So let us have a look at Re 8 Rhodesia Goldfields. It is also 1D, tab 48. This is 9 the case about Mr Partridge.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR WOLFSON: This is the decision of Mr Justice Swinfen 12 Eady. The central point that is important to understand 13 when looking at this case is that the amount of the debt 14 to the fund had not been established or ascertained, but 15 there was no dispute that if there was an amount it was 16 presently payable. That is the critical point. What 17 Mr Justice Swinfen Eady holds is that, pending 18 ascertainment and establishment of the amount, if any, 19 due to the fund, the share of the fund for which payment 20 was sought should be retained and put in a separate 21 account, so to speak, to hold the ring, if I can put it 22 in those terms.</p> <p>23 But the critical point is that there was a question 24 of ascertainment but there was no dispute that if there 25 was a debt it was presently payable. So it doesn't</p> <p style="text-align: center;">Page 111</p>
<p>1 MR WOLFSON: He then refers to Re Akerman and says that is 2 entirely different because the remedy was barred but the 3 debts remained. We need not get into that. He's 4 unwilling to refer to his own decision in Re Wheeler, 5 perhaps modestly because it seems to support the view 6 he's now taking.</p> <p>7 We can pick it up again in the last paragraph:</p> <p>8 "In my opinion, the ground on which the present case 9 is to be decided ...(Reading to the words)... is an 10 immediate right. I think therefore the debtor is 11 entitled to receive that share and that the executors 12 are not entitled to retain it as against any future 13 payments."</p> <p>14 Against any future payments. Let us take an example 15 of an obligation -- let us consider this case -- 16 undertaken to the testator to pay his estate 17 £150 million in the event of his death, £50 million 18 payable immediately and then 50 million a year later and 19 then another 50 million a year later. In my submission, 20 that wouldn't be any different from the facts in Re 21 Abrahams as a matter of principle. You would be able to 22 bring the first 50 into account if it had not been paid 23 but the second and third 50s you wouldn't.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR WOLFSON: The last case I shall deal with in this regard</p> <p style="text-align: center;">Page 110</p>	<p>1 offend, in my respectful submission, the point I am 2 making and indeed it supports it. As my learned friend 3 Mr Trower said, it's important here to read the argument 4 at 242.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR WOLFSON: If we just take it from the top in 242, this is 7 the argument by Mr Russell, King's Counsel, taking it 8 from the top in the second line:</p> <p>9 "In the present case, there are merely claims which 10 may or may not result in a debt against Partridge."</p> <p>11 The judge: "The claim is for a liquidated demand. 12 The plaintiff can sue for money it had not received 13 without specifying the amount."</p> <p>14 Counsel: "That is so, but the amount couldn't be 15 set-off against the cross claim until it was definitely 16 ascertained."</p> <p>17 Can I just invite your Lordship to note that word 18 "ascertained" and "established". Referring to 19 authority.</p> <p>20 The judge: "The company could not set-off a future 21 debt, eg a future call. The present claim is for an 22 existing debt."</p> <p>23 Counsel: "It is only an inchoate liability. It is 24 not a debt until the amount, if any, due is ascertained 25 [again] and established."</p> <p style="text-align: center;">Page 112</p>

<p>1 Another authority.</p> <p>2 The judge comes back: "That was a claim for damages</p> <p>3 for misfeasance. There was no debt until ...(Reading to</p> <p>4 the words)... Re Akerman."</p> <p>5 Counsel comes back: "That principle assumes an</p> <p>6 established debt. It has never been applied to a mere</p> <p>7 inchoate liability."</p> <p>8 Sorry, reference to Re Abrahams.</p> <p>9 The judge comes back again: "Because the instalments</p> <p>10 are not presently payable ...(Reading to the words)...</p> <p>11 amount of any being ascertained [the third time the word</p> <p>12 has been used]."</p> <p>13 Counsel: "It is not payable until the amount is</p> <p>14 ascertained [the fourth time] and established. Until</p> <p>15 then it is a mere possible inchoate liability."</p> <p>16 One does feel for Mr Russell who is somewhat under</p> <p>17 fire at this point. It's in those circumstances that</p> <p>18 one has to read the passage that my learned friend</p> <p>19 showed your Lordship, which begins at the bottom of 246</p> <p>20 and continues over into 247. I think this is a passage</p> <p>21 your Lordship has already read.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR WOLFSON: 246.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR WOLFSON: I think this is a passage your Lordship was</p> <p style="text-align: center;">Page 113</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR WOLFSON: Indeed, if one just turns back to the beginning</p> <p>3 of the judgment at 244, when the learned judge is</p> <p>4 setting out what the issue is, your Lordship sees at the</p> <p>5 bottom of 244 the paragraph beginning:</p> <p>6 "Partridge was the director. It is alleged he is</p> <p>7 largely indebted to the company. The amount, if any, of</p> <p>8 that alleged indebtedness has not yet been ascertained."</p> <p>9 The second sentence, "It is alleged that he is</p> <p>10 largely indebted ... the amount." In my respectful</p> <p>11 submission, this case does not take my learned friend</p> <p>12 anywhere and indeed --</p> <p>13 MR JUSTICE DAVID RICHARDS: Sorry, apart from that, do we</p> <p>14 know what the nature of the claim against Partridge was?</p> <p>15 MR WOLFSON: It was a claim for misfeasance.</p> <p>16 MR JUSTICE DAVID RICHARDS: Was it?</p> <p>17 MR WOLFSON: I think.</p> <p>18 MR JUSTICE DAVID RICHARDS: No, I would have thought not.</p> <p>19 MR TRACE: It's in the middle of 245, my Lord.</p> <p>20 MR WOLFSON: Sorry, the misfeasance case is the one put in</p> <p>21 argument.</p> <p>22 MR JUSTICE DAVID RICHARDS: So it's at 245.</p> <p>23 MR WOLFSON: It's at 245.</p> <p>24 MR TRACE: It's a claim, about 15 lines down, my Lord.</p> <p>25 MR WOLFSON: That's right, yes, thank you.</p> <p style="text-align: center;">Page 115</p>
<p>1 taken to. The word "ascertained" there, your Lordship</p> <p>2 sees that first paragraph on 247 or the continuation of</p> <p>3 this paragraph, is used three times. If one turns over</p> <p>4 the page, when the learned judge gets to the decision</p> <p>5 and actually, so to speak, the ratio -- on page 248 I am</p> <p>6 now -- when one gets over the page to 248, in the third</p> <p>7 line:</p> <p>8 "In any case, I am of the opinion until the rights</p> <p>9 in the company as between the company and Partridge are</p> <p>10 ascertained they are in the process of being ascertained</p> <p>11 ...(Reading to the words)... owed to the company."</p> <p>12 That's clearly used by the learned judge in the same</p> <p>13 sense as he was putting it to counsel; that the issue</p> <p>14 here is, so to speak, what is the debt? Is there a debt</p> <p>15 out there? But there is no question that if there was</p> <p>16 a debt it was presently payable. That's particularly</p> <p>17 the case when one notes that it was not a reserved</p> <p>18 judgment.</p> <p>19 MR JUSTICE DAVID RICHARDS: Right.</p> <p>20 MR WOLFSON: So the learned judge has had this discussion</p> <p>21 with counsel at 242, has made the point to him on</p> <p>22 a number of occasions that this is the essential</p> <p>23 difference between Re Abrahams and the present case,</p> <p>24 i.e. Rhodesia Goldfields, and then uses that word three</p> <p>25 times on 247 and again three times on 248.</p> <p style="text-align: center;">Page 114</p>	<p>1 "A claim [against the first hole punch] in respect</p> <p>2 of moneys ...(Reading to the words)... pockets."</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, thank you. So it's a debt,</p> <p>4 not damages for compensation.</p> <p>5 MR WOLFSON: Precisely. If we look at the second hole punch</p> <p>6 on that same page:</p> <p>7 "Now a claim of that sort [does your Lordship have</p> <p>8 this] which is a claim for a debt may be a disputed debt</p> <p>9 and will have to be established. At present, I do not</p> <p>10 assume the debt is established ...(Reading to the</p> <p>11 words)... disputed tailor's bill."</p> <p>12 That is not authority for any sort of proposition</p> <p>13 that the principle can encompass a case where there is</p> <p>14 a future liability. That was a case where there was</p> <p>15 a present liability. The only question was it had to be</p> <p>16 ascertained.</p> <p>17 Indeed, LBIE has not been able to point to any</p> <p>18 reason why, in circumstances where LBIE appears to</p> <p>19 accept that the rule in Cherry v Boulton only applies</p> <p>20 where the obligation to contribute to the fund is</p> <p>21 presently payable, the contributory rule which has its</p> <p>22 origins in Cherry v Boulton should be broader.</p> <p>23 When I said just then that LBIE has not advanced any</p> <p>24 reason, I should probably, in fairness, have said any</p> <p>25 good reason. That perhaps was a slight forensic slight</p> <p style="text-align: center;">Page 116</p>

<p>1 of hand there. They do advance a reason. My Lord, it 2 qualifies as an attempted reason but it does not get 3 much further than that. It's in their supplemental 4 submissions, paragraph 25. To be fair to my learned 5 friend Mr Trower, he made this point also orally. But 6 let us just pick it up first from his supplemental 7 submissions at 25. He asks me to start at 24 which of 8 course I will. Perhaps your Lordship could just read 24 9 and 25.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR WOLFSON: Although we are told in the first line of 25 12 that the special position of members of a company is, in 13 summary, that they have undertaken to contribute for the 14 very purpose of enabling a distribution, there is no 15 further detail given on that point. The way my learned 16 friend put it on Tuesday, at about 12.15, was this. He 17 said the case of a contributory to an insolvent company 18 is a special case of Cherry v Boulton because: 19 "The fund is the very fund which the contributory 20 has undertaken to complete, the very fund which is to be 21 distributed among creditors on the statutory scheme." 22 Yesterday -- the reference is transcript page 40, 23 lines 7 to 15 -- my learned friend said: 24 "The contributory rule is stricter than the right of 25 retainer on this point, described by Lord Walker in Page 117</p>	<p>1 MR JUSTICE DAVID RICHARDS: That is Mr Trower point. You 2 say that's insufficient.</p> <p>3 MR WOLFSON: It's an insufficient distinction because we 4 say, looking at it fairly, it is always a case in 5 a Cherry v Boulton situation, first of all, that a 6 person who owes something to the fund has undertaken to 7 pay something to the fund. That's obviously the case. 8 It's always the case the fund is going to be 9 distributed. If one thinks back to my example I gave of 10 the very generous offer to pay £150 million into the 11 estate of the testator on death, that would be an 12 example where the obligation arises in order to, so to 13 speak, constitute the fund which is going to be 14 distributed. But in my respectful submission, the 15 example I gave of the 50 on death, 50 on year one, 50 on 16 year two, would be decided, so to speak, on the classic 17 Re Abrahams basis. It's difficult to distinguish, other 18 than one is, so to speak, the free act of an individual 19 and one is a statutory scheme position, conceptually 20 between that example and the obligation of the 21 contributory.</p> <p>22 MR JUSTICE DAVID RICHARDS: You see, this is where the 23 nature of the Cherry v Boulton right, whatever it is, 24 may be important, because if it is a right of 25 retainer or -- I forget exactly how it was put by Page 119</p>
<p>1 Kaupthing as a special case. It's stricter for very 2 good reason. The fund from which the contributory seeks 3 to recover the assets of the company is the very fund 4 which the contributory has undertaken to complete, 5 albeit at some stage in the future."</p> <p>6 My submission, with respect to my learned friend, is 7 that simply is not a reason.</p> <p>8 MR JUSTICE DAVID RICHARDS: You accept the proposition, 9 I take it, that the contributories or the members do 10 undertake to contribute to the assets for the very 11 purpose of enabling a distribution of those assets among 12 creditors?</p> <p>13 MR WOLFSON: Yes.</p> <p>14 MR JUSTICE DAVID RICHARDS: You accept that?</p> <p>15 MR WOLFSON: Yes, I have to.</p> <p>16 MR JUSTICE DAVID RICHARDS: Certainly it is a distinction at 17 any rate from the Cherry v Boulton type of case, 18 because Cherry v Boulton applies simply where the 19 beneficiary owes a debt. It's not a debt owed in order 20 to pay creditors; it's just a debt.</p> <p>21 MR WOLFSON: Absolutely. But of course the point about 22 Cherry v Boulton is that there was always going to be a 23 distribution of the funds. I accept the point your 24 Lordship is making that it's not because, so to speak, 25 as you might say in a contributory context. Page 118</p>	<p>1 Mr Justice Kekowich.</p> <p>2 MR WOLFSON: Part payment.</p> <p>3 MR JUSTICE DAVID RICHARDS: Payment out of the fund, it is 4 an appropriation. So you have the fund and it is owed 5 £100 by the beneficiary on a debt. What is said is, 6 well, you cannot claim your share of the fund without 7 giving credit for that 100, in effect. Isn't that it?</p> <p>8 MR WOLFSON: Yes, although one could of course put it the 9 other way round. One could put it that the fund makes 10 the claim against the contributory and the contributory 11 says, "I am not going to pay until I am able to, I am 12 taking out", but, yes, essentially that's --</p> <p>13 MR JUSTICE DAVID RICHARDS: But that's how it works.</p> <p>14 MR WOLFSON: It would work that way, yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: Is that right?</p> <p>16 MR WOLFSON: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: That is not how the 18 contributory's liability works in a liquidation. He has 19 to pay.</p> <p>20 MR WOLFSON: Yes.</p> <p>21 MR JUSTICE DAVID RICHARDS: Until he has paid, he cannot 22 claim out of the fund.</p> <p>23 MR WOLFSON: Yes.</p> <p>24 MR JUSTICE DAVID RICHARDS: There is quite a distinction 25 there. Page 120</p>

<p>1 MR WOLFSON: The only --</p> <p>2 MR JUSTICE DAVID RICHARDS: He cannot set-off, because we</p> <p>3 have those cases, he's not allowed to set-off because</p> <p>4 that would undermine the whole point of the</p> <p>5 contributory's liability.</p> <p>6 MR WOLFSON: Exactly, because he would get pound for pound.</p> <p>7 MR JUSTICE DAVID RICHARDS: And he wouldn't provide the fund</p> <p>8 he's required to provide.</p> <p>9 MR WOLFSON: Which is the second reason, exactly.</p> <p>10 But, my Lord, the essential point though is this.</p> <p>11 In both cases -- the origin is in Cherry v Boulton that</p> <p>12 the fund cannot retain, cannot deny the claim made</p> <p>13 against the fund in circumstances where the obligation</p> <p>14 to pay in is a future obligation.</p> <p>15 MR JUSTICE DAVID RICHARDS: I see that. I think all I am</p> <p>16 saying is that you are saying there is no material</p> <p>17 distinction between the rule in Cherry v Boulton and</p> <p>18 the contributory's rule. I am just really testing that.</p> <p>19 Of course you have your points anyway by reference to,</p> <p>20 well, Grissell's Case, for example.</p> <p>21 MR WOLFSON: Exactly.</p> <p>22 MR JUSTICE DAVID RICHARDS: But, anyway, that's the point of</p> <p>23 my questions to you now.</p> <p>24 MR WOLFSON: In trying to answer it another way, the</p> <p>25 contributory also has a claim against the company.</p> <p style="text-align: center;">Page 121</p>	<p>1 been made.</p> <p>2 MR JUSTICE DAVID RICHARDS: You say the contributory rule</p> <p>3 doesn't apply because of what is said in Grissell's</p> <p>4 Case; is that not right?</p> <p>5 MR WOLFSON: Exactly. It may be that if I am right about</p> <p>6 that, then we don't get to the point we are now on.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes. I am simply saying to you</p> <p>8 that I sort of do see some force in the distinction that</p> <p>9 Mr Trower draws between the rule in Cherry v Boulton</p> <p>10 and the contributory's rule.</p> <p>11 MR WOLFSON: Yes. It's not entirely clear to us -- perhaps</p> <p>12 one way of approaching it is this. Where the argument</p> <p>13 goes as a matter of practicality, because I am not sure</p> <p>14 it's suggested that the maths, the way you work out the</p> <p>15 maths, is different on my learned friend Mr Trower's</p> <p>16 argument because of this point; in other words, if the</p> <p>17 contributory rule nonetheless applies. If that's the</p> <p>18 case, you still wouldn't be able to pay out. Perhaps</p> <p>19 the best thing is -- if I am right on Grissell's Case,</p> <p>20 we don't get here at all.</p> <p>21 MR JUSTICE DAVID RICHARDS: You don't.</p> <p>22 MR WOLFSON: Now --</p> <p>23 MR JUSTICE DAVID RICHARDS: I take your point that,</p> <p>24 Grissell's Case, the result is consistent with the</p> <p>25 result in Abrahams, for example.</p> <p style="text-align: center;">Page 123</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR WOLFSON: What the administrator is doing is, to use the</p> <p>3 language of Cherry v Boulton, the administrator is</p> <p>4 appropriating his contribution as payment of his claim.</p> <p>5 MR JUSTICE DAVID RICHARDS: Sorry, no.</p> <p>6 MR WOLFSON: Because the administrator is saying, "I am not</p> <p>7 going to pay you anything out until you pay in."</p> <p>8 Another way of doing that is to see that as a form of</p> <p>9 appropriation of the contributor's notional part of the</p> <p>10 fund.</p> <p>11 MR JUSTICE DAVID RICHARDS: It's perhaps easier to start</p> <p>12 with the position of a liquidator rather than an</p> <p>13 administrator because let us take the case a call has</p> <p>14 been made but not paid.</p> <p>15 MR WOLFSON: But there is a present right.</p> <p>16 MR JUSTICE DAVID RICHARDS: At that point, it's not Cherry v</p> <p>17 Boulton because the liquidator can enforce a call and</p> <p>18 the contributory's claim in debt against the estate is</p> <p>19 ignored at that point. They cannot set it off.</p> <p>20 MR WOLFSON: There is no set-off.</p> <p>21 MR JUSTICE DAVID RICHARDS: So that's different from Cherry</p> <p>22 v Boulton, as I understand it.</p> <p>23 MR WOLFSON: When a call has been made.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR WOLFSON: But now let us take a case where a call has not</p> <p style="text-align: center;">Page 122</p>	<p>1 MR WOLFSON: Totally consistent. It's more than consistent.</p> <p>2 It goes really to the heart of what is a contributory</p> <p>3 rule: it is a rule of equity.</p> <p>4 MR JUSTICE DAVID RICHARDS: The rule in Cherry v Boulton</p> <p>5 might be, but I am not sure about the contributory rule</p> <p>6 really. If it is a rule of equity, it's one which is</p> <p>7 very firmly anchored in the legislation.</p> <p>8 MR WOLFSON: Yes. At the time, at the moment, when there is</p> <p>9 a contingent call on a contributory, what is that person</p> <p>10 meant to do? There is no equity to be done. How is he</p> <p>11 meant to complete the estate? It's very difficult to</p> <p>12 shoehorn in the way my learned friend Mr Trower seeks to</p> <p>13 extend the ambit of the contributory rule without really</p> <p>14 undermining what it is really all about. I mean, LBIE's</p> <p>15 administrators, to make the obvious forensic point, have</p> <p>16 not asked us to write a cheque. They couldn't ask us to</p> <p>17 write a cheque.</p> <p>18 MR JUSTICE DAVID RICHARDS: Quite.</p> <p>19 MR WOLFSON: They haven't even suggested that they have</p> <p>20 attempted to value the prospect of LBIE going into</p> <p>21 liquidation and the amount of any shortfall. It's for</p> <p>22 those reasons we say the contributory rule doesn't</p> <p>23 apply.</p> <p>24 My Lord, I am just now going to go on to my last</p> <p>25 submission in this context, which is an alternative</p> <p style="text-align: center;">Page 124</p>

<p>1 submission, if the contributory rule does apply, what 2 the LBIE administrators would have to do. If your 3 Lordship wished to give the shorthand writer five 4 minutes, this may be an appropriate time. 5 MR JUSTICE DAVID RICHARDS: Because this will last a bit 6 longer than five minutes, will it? It looks as if it 7 might. 8 MR WOLFSON: It depends how interested your Lordship is in 9 the point. 10 MR JUSTICE DAVID RICHARDS: I am interested in everything. 11 I will give the break now. 12 (3.09 pm) 13 (Short break) 14 (3.16 pm) 15 MR WOLFSON: My Lord, the point I was coming to, which is 16 if, contrary to the submissions I'm making, the LBIE 17 joint administrators can withhold distributions on the 18 basis of the potential liability's contributory what 19 happens in that circumstance. 20 That is set out, for your Lordship's note, in 21 paragraph 52 of our written opening. Your Lordship 22 needn't turn it up. 23 The point is this: if it's right that the LBIE joint 24 administrators can withhold distributions on the basis 25 of a potential liability of a contributory there has to</p> <p style="text-align: center;">Page 125</p>	<p>1 and let us assume, as may well be the case, that there 2 are sufficient assets in the estate to pay all the 3 provable claims, including yours, in full. Make that 4 assumption. You say, well, it would be wrong, even if 5 the contributory rule applies, to require LBL to 6 contribute when it will actually be holding its hand out 7 and saying: 8 "Yes, please, I want that money because I'm the 9 person entitled to it as the holder of a provable debt." 10 MR WOLFSON: That is certainly right. 11 MR JUSTICE DAVID RICHARDS: "I am the next person in the 12 queue." 13 MR WOLFSON: That is certainly right but I think we go 14 further as well and if there was going to be very small 15 shortfall that we would still be a net recipient. 16 MR JUSTICE DAVID RICHARDS: Yes. So on that basis they 17 could recover something but not, well, you would net it 18 off, you work out what -- 19 MR WOLFSON: That is precisely the point, you would net it 20 off. But what the administrator, this is the point I'm 21 making, what the administrators can't do is to say even 22 though it may well be that you are the net recipient 23 we're not going to entertain writing you a cheque of any 24 amount until you pay in the full amount. That is the 25 second point I was making. The authorities establish</p> <p style="text-align: center;">Page 127</p>
<p>1 be an exercise of comparing an estimate of that 2 potential liability as contributory against LBL's claim 3 in LBIE's estate in order to determine whether any 4 balance is payable. 5 That is what has to be done and it's wrong to say 6 that the answer is that LBL has to pay an amount to LBIE 7 as a condition precedent to receiving any distribution. 8 Or, to put it another way, a person shouldn't be ordered 9 to pay that part of a liability which would then come 10 back to you on a distribution. That is another way of 11 putting the same point. 12 We cite a few authorities at footnote 15. I don't 13 propose to go to them now. 14 My Lord, the way this is approached in the most 15 recent authorities which deal with it in terms is as 16 follows. In Re SSSL -- 17 MR JUSTICE DAVID RICHARDS: Can I just understand the point. 18 LBL has a claim, assuming it was agreed by the 19 administrators of LBIE, but it's an unsubordinated 20 claim, on the face of it it ranks pari passu -- 21 MR WOLFSON: With the other creditors. 22 MR JUSTICE DAVID RICHARDS: -- with the other creditors. 23 MR WOLFSON: It is not a qua member claim. 24 MR JUSTICE DAVID RICHARDS: It is not a qua member claim, 25 it's not a subordinated claim, it is a provable claim</p> <p style="text-align: center;">Page 126</p>	<p>1 that what you do is you work out whether the share of 2 the estate or the fund which is going to come to you is 3 greater or lesser than the amount of your contribution. 4 If it's going to be less then a net balance in you have 5 to pay. If it's going to be more then they have to pay 6 the net balance out. But what the administrator or the 7 manager of the fund can't do is to say, "I'm not going 8 to pay you out anything until you pay in the whole 9 amount", because you should never have to pay in, so to 10 speak, the full amount on the basis that you are then 11 going to get some of it back again, you have the netting 12 off. 13 I don't think I'm saying anything different to 14 your Lordship but I'm saying it applies even in 15 a situation where there may be a liability to contribute 16 whereas your Lordship's point to me was an example where 17 there is no liability to contribute all. 18 MR JUSTICE DAVID RICHARDS: In this case, you see, of 19 course, there could certainly still be a liability to 20 contribute if the liability to contribute extends to 21 non-provable debts but you have a provable debt. 22 MR WOLFSON: Yes. 23 MR JUSTICE DAVID RICHARDS: So if you do contribute then the 24 first 300 odd million of it comes back to you as the 25 holder of a provable debt.</p> <p style="text-align: center;">Page 128</p>

<p>1 MR WOLFSON: Yes. Clearly the netting off exercise will, of</p> <p>2 course, depend on your Lordship's decision as to what</p> <p>3 our section 74 liability extends to.</p> <p>4 MR JUSTICE DAVID RICHARDS: Sure. Yes. I mean, your only</p> <p>5 claims are provable, aren't they?</p> <p>6 MR WOLFSON: Yes. We don't have the (inaudible) issue, no.</p> <p>7 MR JUSTICE DAVID RICHARDS: No.</p> <p>8 MR WOLFSON: No. That is where my learned friend Mr Trace</p> <p>9 and I divide.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes, I know your category.</p> <p>11 MR WOLFSON: The way Lord Justice Chadwick approached this</p> <p>12 in Re SSSL is, I'm afraid, in mathematical notation,</p> <p>13 which may not appeal to your Lordship.</p> <p>14 MR JUSTICE DAVID RICHARDS: It didn't appeal to Lord Walker.</p> <p>15 MR WOLFSON: He made the point that it is not a branch of</p> <p>16 rocket science. It may be, therefore, that all I really</p> <p>17 need to do is to explain the way it works and it really</p> <p>18 isn't very complicated.</p> <p>19 MR JUSTICE DAVID RICHARDS: Can't we leave it in the way</p> <p>20 that Lord Walker explains it?</p> <p>21 MR WOLFSON: Exactly. You pay it in, you work out what your</p> <p>22 share would be. It is the discussion that your Lordship</p> <p>23 and I have just had.</p> <p>24 MR JUSTICE DAVID RICHARDS: Exactly.</p> <p>25 MR WOLFSON: In which case we can leave rockets behind us.</p> <p style="text-align: center;">Page 129</p>	<p>1 contributory liability crystallising the amounts which</p> <p>2 the administrators could retain, applying this netting</p> <p>3 off, would be zero. Indeed, that example is a good way</p> <p>4 of showing why the valuation exercise is so important,</p> <p>5 assuming the contributory rule applies, because you have</p> <p>6 to take into account all contingencies, including</p> <p>7 whether there will be a liquidation, what the deficiency</p> <p>8 will be, whether a call would be made, et cetera, and</p> <p>9 what you can't do is just sit back and say, "I'm not</p> <p>10 paying out until (inaudible)".</p> <p>11 Those are submissions on contributory rule.</p> <p>12 I'm now going to turn to a separate topic, which is</p> <p>13 the scope of the section 74 liability, which, I hope, is</p> <p>14 my fourth heading.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR WOLFSON: In particular that it doesn't extend to</p> <p>17 statutory interest. That is the first point I'm going</p> <p>18 to deal with.</p> <p>19 Some of the points which I'm going to make in this</p> <p>20 context will also be applicable to whether the</p> <p>21 section 74 liability extends to the currency conversion</p> <p>22 claim, although, of course, there are separate points in</p> <p>23 relation to that and I will deal with those points</p> <p>24 separately in that context.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 131</p>
<p>1 A further reason why the submission I have just made</p> <p>2 is correct can be seen, this really arises also out of</p> <p>3 a discussion I have just had with your Lordship, from</p> <p>4 74.2(f) because otherwise the effect is that you will</p> <p>5 always be subordinating all claims of members no matter</p> <p>6 in what capacity. You have to do it this way because</p> <p>7 otherwise you end up with the rule that members are</p> <p>8 always last and if you always have to pay in the full</p> <p>9 amount in order to receive everything then you will</p> <p>10 offend against that. It is another way of approaching</p> <p>11 the same point. Whereas, of course, it is only member</p> <p>12 claims qua member that are subordinated. That is why we</p> <p>13 say the contributory rule does not apply when there is</p> <p>14 only a contingent or a theoretical possibility of</p> <p>15 a claim on the member.</p> <p>16 Finally in this context your Lordship asked my</p> <p>17 learned friend, Mr Trower, a question, I can't recall</p> <p>18 whether there was an answer, it was a difficult</p> <p>19 question, to be fair, about what would happen if the</p> <p>20 contributory rules applies in an administration but</p> <p>21 there is no prospect of the company going into</p> <p>22 liquidation and it will simply be dissolved after the</p> <p>23 administration.</p> <p>24 Our answer to your Lordship's question would be that</p> <p>25 because in that circumstance there is no prospect of the</p> <p style="text-align: center;">Page 130</p>	<p>1 MR WOLFSON: The starting point is section 189.2, which</p> <p>2 tells the liquidator what to do with:</p> <p>3 "Any surplus remaining after the payment of the</p> <p>4 debts proved in a winding up."</p> <p>5 That is section 189.2.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: In our submission, the starting point is that</p> <p>8 this is not a provision that creates a liability, it is</p> <p>9 an instruction to the liquidator as to how to apply</p> <p>10 a surplus or a left over amount after payment of debts</p> <p>11 proved in the winding up. In this regard my learned</p> <p>12 friend, Mr Trower, of course, relies on the definition</p> <p>13 of liabilities in rule 13.12(4).</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR WOLFSON: Your Lordship has seen our answer to this in</p> <p>16 writing and I'm conscious this is a point which is going</p> <p>17 to be developed at, I'm sure, greater length by my</p> <p>18 learned friend Mr Isaacs and I don't want to trample on</p> <p>19 his territory too much but your Lordship sees that</p> <p>20 essentially our argument is that debts and liabilities</p> <p>21 in section 74 means provable debts. The reason for that</p> <p>22 is it's for debts as defined that creditors can prove in</p> <p>23 a liquidation or a distributing administration. If we</p> <p>24 look at rule 13.12, the definition of "debt", debt means</p> <p>25 in (1)(a), "Any debt or liability". Also, in (b), "Any</p> <p style="text-align: center;">Page 132</p>

<p>1 debt or liability".</p> <p>2 So we submit that when section 74 uses the phrase</p> <p>3 "debt or liability" it's similarly limited to provable</p> <p>4 debts.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR WOLFSON: That is essentially is our submission, that</p> <p>7 debt or liability in section 74 is limited to provable</p> <p>8 debts.</p> <p>9 It's not just a textual point, I'm not just playing</p> <p>10 with the words on the page, in my submission, there are</p> <p>11 good commercial reasons that this is the case,</p> <p>12 essentially this: the company will only have to make</p> <p>13 payment of distributions in respect of debts provable in</p> <p>14 its liquidation and the contributory shouldn't have to</p> <p>15 pay for something which if the company doesn't have</p> <p>16 sufficient assets the company itself doesn't have to pay</p> <p>17 for.</p> <p>18 MR JUSTICE DAVID RICHARDS: I think that Mr Trower's</p> <p>19 approaches this by saying what is referred to in</p> <p>20 13.12(1) are provable debts but you have also to look at</p> <p>21 (3) and (4).</p> <p>22 MR WOLFSON: Yes, that is his point but, my Lord, the short</p> <p>23 point, and, in my respectful submission, it's plainly</p> <p>24 right, is that once we see that debt or liability in</p> <p>25 13.12(1)(a) and 13.12(1)(b) is provable debt then when</p> <p style="text-align: center;">Page 133</p>	<p>1 post-insolvency interest or foreign exchange losses.</p> <p>2 That is one thing. It's quite another thing to say if</p> <p>3 there is no surplus the members have to, so to speak,</p> <p>4 put their hands in their pockets and cough up for those</p> <p>5 amounts.</p> <p>6 In this regard your Lordship will recall, just going</p> <p>7 back to rule 13 for a moment, rule 13.12(1)(c) refers</p> <p>8 expressly, as part of the definition of "debt", to any</p> <p>9 interest provable as mentioned in rule 4.931, which is,</p> <p>10 of course, pre-administration or pre-liquidation</p> <p>11 interest, which is provable and, therefore, is within</p> <p>12 the scope of the potential liability's contributory, it</p> <p>13 would be within section 74.</p> <p>14 So that interest does fall within section 74.1 and</p> <p>15 I have to accept that but there is no mention in</p> <p>16 section 74.1 of post-insolvency interest which is not</p> <p>17 a provable debt.</p> <p>18 One of the points that my learned friend makes in</p> <p>19 support of his approach to section 74, that it should</p> <p>20 apply also to non-provable debts, is a completely</p> <p>21 separate point which is that it is established that</p> <p>22 a creditor has standing to petition for winding up even</p> <p>23 if the liability is non-provable. This is another way</p> <p>24 my learned friend approaches a point and I shall deal</p> <p>25 with it.</p> <p style="text-align: center;">Page 135</p>
<p>1 one sees those words in section 74 one reads them in the</p> <p>2 same way as referring to provable. As I say, that is</p> <p>3 supported by the commercial point I have just made,</p> <p>4 which is there is good reason to limit it that way.</p> <p>5 MR JUSTICE DAVID RICHARDS: Sorry, I was just perhaps still</p> <p>6 focussing on the language.</p> <p>7 MR WOLFSON: It is really this: the company only has to make</p> <p>8 payment of distributions in respect of debts provable in</p> <p>9 its liquidation and the contributories shouldn't have to</p> <p>10 pay for something which if the company doesn't have</p> <p>11 sufficient assets the company itself wouldn't pay for.</p> <p>12 In other words, they agree to make up a shortfall but</p> <p>13 that shortfall can only be created by provable debts.</p> <p>14 Of course, I accept that there is a category of</p> <p>15 non-provable claims, that is expressly referred to in</p> <p>16 12.3. It's an important point and this point applies as</p> <p>17 much to statutory interest and also to the currency</p> <p>18 conversion claim. Your Lordship recalls that in 12.3(2)</p> <p>19 one has what is not provable, categories of non-provable</p> <p>20 debt.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR WOLFSON: So, of course, we accept there is a category of</p> <p>23 non-provable claims but it is one thing to say that if</p> <p>24 the company has a surplus then before payments are made</p> <p>25 to the members amounts should be paid in respect of</p> <p style="text-align: center;">Page 134</p>	<p>1 Your Lordship is, of course, aware of this point</p> <p>2 from your Lordship's decision in T&N.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR WOLFSON: It's worth in this regard looking at the</p> <p>5 decision of <i>Levi v LSC</i> which is in the supplemental</p> <p>6 authorities at tab 8. This is the decision which</p> <p>7 your Lordship referred to in T&N.</p> <p>8 Your Lordship recalls that the background to this</p> <p>9 case was a statute demand made by the beneficiary for an</p> <p>10 order for costs in ancillary relief proceedings and rule</p> <p>11 12.3 provides that:</p> <p>12 "In a bankruptcy any obligation arising under an</p> <p>13 order made in family proceedings is not provable."</p> <p>14 It's in the middle of 12.3.(2)(a).</p> <p>15 MR JUSTICE DAVID RICHARDS: Right.</p> <p>16 MR WOLFSON: The Court of Appeal claimed that the cost order</p> <p>17 fell within that provision so it was not provable.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR WOLFSON: Perhaps I can invite your Lordship to read the</p> <p>20 judgment of Mr Justice Jonathan Parker.</p> <p>21 MR JUSTICE DAVID RICHARDS: Let me just remind myself of</p> <p>22 this case.</p> <p>23 MR WOLFSON: So he got an order for costs.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes. I'm just reading.</p> <p>25 (Pause).</p> <p style="text-align: center;">Page 136</p>

<p>1 I see. So actually the effect of the decision has 2 been reversed by amendment of the rule. Yes, I see. 3 MR WOLFSON: But it's the same sort of principle which 4 I want to get out of it. 5 MR JUSTICE DAVID RICHARDS: I follow. 6 MR WOLFSON: As to the non-provable debt. Picking it up in 7 the judgment of Mr Justice Jonathan Parker at 34. If 8 your Lordship would first read that paragraph, please. 9 MR JUSTICE DAVID RICHARDS: Sorry? 10 MR WOLFSON: Paragraph 34, page 903. 11 (Pause). 12 MR JUSTICE DAVID RICHARDS: Right. I have read to the end 13 of paragraph 38. 14 MR WOLFSON: I was going to ask your Lordship to look at 15 three more paragraphs. 43 and 44 in the same judgment 16 Nd then 58 in the judgment of Mr Justice Peter Gibson. 17 (Pause). 18 MR JUSTICE DAVID RICHARDS: Yes? 19 MR WOLFSON: Your Lordship has read 43 and 44? 20 MR JUSTICE DAVID RICHARDS: I have. 21 MR WOLFSON: Now 58. We are now in the judgment of 22 Mr Justice Peter Gibson. 23 I think I have been saying Mr Justice, it is Lord 24 Justice. It is consistently wrong all the way through 25 actually.</p> <p style="text-align: center;">Page 137</p>	<p>1 true with companies. 2 MR WOLFSON: My Lord, the way we put it is this, and it may 3 be I can make the submission without the case, the 4 purpose of the insolvency process is to enable the 5 realisation of the estate and to pay provable and proved 6 debts to creditors. That is the purpose of the 7 insolvency process. 8 MR JUSTICE DAVID RICHARDS: Not according to Lord Neuberger. 9 MR WOLFSON: The non-proved debts are paid if there is 10 a surplus. 11 MR JUSTICE DAVID RICHARDS: A surplus after paying the 12 proved debts. 13 MR WOLFSON: The proved debts, yes. The section 74 14 liability arises in a winding up to meet a shortfall in 15 the company's assets. 16 MR JUSTICE DAVID RICHARDS: Let me take the case of 17 a contingent creditor with a debt which at the date of 18 a winding up order, if made, would not be provable. 19 Assume that the company clearly has sufficient assets to 20 pay all its provable debts but also assume that it will 21 be heavily insolvent once account is taken of its 22 contingent liabilities which are not provable. Now, in 23 those circumstances, at the moment, as it seems to me, 24 the contingent creditor would have a perfectly good 25 interest in seeking a winding up order notwithstanding</p> <p style="text-align: center;">Page 139</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR WOLFSON: Then the short point is that in so far as my 3 learned friend seeks to bolster his argument on 4 section 74 by saying even if I have a non-provable debt 5 because I could still apply to the winding up it, 6 therefore, makes sense that all those liabilities are 7 also within the scope of section 74. 8 In my respectful submission, it is a very weak point 9 because the ability to apply and actually to obtain 10 a winding up order when all you have is a non-provable 11 debt is extremely limited. 12 MR JUSTICE DAVID RICHARDS: That is a bankruptcy petition. 13 They are very different. 14 MR WOLFSON: They are different but, my Lord, the high level 15 principle point I seek to make is this: the purpose of 16 the insolvency process in this case is to realise the 17 estate -- 18 MR JUSTICE DAVID RICHARDS: I'm not at all convinced that 19 this reasoning would apply to a winding up petition. 20 I don't see why it should because the point about 21 bankruptcy is, remember, that the debtor emerges from 22 bankruptcy -- 23 MR WOLFSON: At the end of the day. 24 MR JUSTICE DAVID RICHARDS: But if the debts are not 25 provable he is still liable for them but that is not</p> <p style="text-align: center;">Page 138</p>	<p>1 that it won't have a provable debt. I mean, for 2 example, it may be that the company's trading is on 3 a downward trajectory and the longer it goes on the 4 smaller the fund will become. That is very different 5 from a bankruptcy case. 6 MR WOLFSON: Just to be clear, your Lordship's example is 7 not where the debt of this creditor is not provable 8 because it is contingent, it is a both contingent and 9 not provable. 10 MR JUSTICE DAVID RICHARDS: Well, I think if it is not -- 11 yes. 12 MR WOLFSON: Because obviously in the normal course 13 a contingent debt can be provable. 14 MR JUSTICE DAVID RICHARDS: Yes, but I'm thinking of the 15 situation that existed in relation to T&N because, of 16 course, the rules were only changed following one of my 17 decisions in T&N but T&N was faced with vast 18 liabilities, contingent liabilities, none of which were 19 provable. 20 MR WOLFSON: Yes. It may be, therefore, that really one 21 comes back to the proposition really where I started 22 from, which is that the section 74 liability arises to 23 meet a shortfall in proved claims. 24 MR JUSTICE DAVID RICHARDS: That is your assertion. Do you 25 put it in terms of construction of section 74 or as</p> <p style="text-align: center;">Page 140</p>

35 (Pages 137 to 140)

<p>1 a proposition of principle which should inform the 2 construction of section 74? 3 MR WOLFSON: Yes. 4 MR JUSTICE DAVID RICHARDS: Which? 5 MR WOLFSON: Both. 6 MR JUSTICE DAVID RICHARDS: What is the principle? 7 Supposing T&N were an unlimited company, had been 8 an unlimited company, what would be the principle which 9 would say that the members of T&N should bear no 10 liability for judgments in favour of asbestos claimants 11 entered after the winding up order? 12 MR WOLFSON: The essential point is this, and this really 13 perhaps is a way to start a submission which I'm going 14 to make and will cut across both interest and currency 15 conversion, the simplest way to put it is that the 16 insolvency process sets out a defined process and there 17 are pluses and there are minuses if you are a creditor. 18 The liability to contribute is, in my respectful 19 submission, not open ended and it is limited to provable 20 debts and that is because that will, therefore, 21 necessarily work against a creditor -- 22 MR JUSTICE DAVID RICHARDS: Forgive me. I understand that 23 is the submission you are making and I understand you 24 may wish to base it on simply a construction of 25 section 74 by reference to the rules but the question</p> <p style="text-align: center;">Page 141</p>	<p>1 come back to: what is the function of the section 74 2 liability. 3 MR JUSTICE DAVID RICHARDS: That is what we're getting at. 4 MR WOLFSON: Exactly. 5 MR JUSTICE DAVID RICHARDS: I'm trying to understand, 6 leaving aside points of detailed construction, whether 7 there is some clear principle which should inform the 8 process of construction so as to limit the liability of 9 members to provable debts. I'm trying to understand 10 what that is. 11 MR WOLFSON: It is essentially that the company's 12 contributories -- the company only has to pay the 13 provable debts. 14 MR JUSTICE DAVID RICHARDS: That's not true because if it 15 has assets available to it to pay unprovable debts it 16 has to pay those. 17 MR WOLFSON: Only if it has assets available to it. 18 MR JUSTICE DAVID RICHARDS: It can only pay anything if it 19 has assets available to it. 20 MR WOLFSON: Yes, but these are only payable if there are 21 assets available to it. 22 MR JUSTICE DAVID RICHARDS: I'm sure that is true. They may 23 be payable but they won't be paid because the waterfall, 24 there isn't enough water to cascade down that far. It 25 depends what one means. If a tort claimant obtained</p> <p style="text-align: center;">Page 143</p>
<p>1 was: is there some principle which should lead the court 2 to say, "Well, that, quite apart from any, sort of, nice 3 points of drafting, would seem to be the right answer"? 4 MR WOLFSON: Yes. It is a point which I'm seeking to make, 5 perhaps I should develop it, that there are pluses and 6 minuses. Some creditors in an insolvency situation are 7 going to be better off than they would have been against 8 the company, for example, if there is sufficient to pay 9 statutory interest you get your statutory interest at 10 8 per cent in circumstances where you may have your 11 contract at 2 per cent. 12 In the currency conversion claim, I will develop 13 these submissions obviously, that can operate to your 14 benefit in circumstances where the exchange rate 15 movement between the date of winding up and the date of 16 payment out goes one way and there is a surplus but if 17 it had gone the other way you wouldn't have to pay back 18 in. 19 The point I'm essentially submitting is that this 20 whole regime is a system of, so to speak, swings and 21 roundabouts and pluses and minuses. 22 MR JUSTICE DAVID RICHARDS: I think the asbestos claimants 23 in T&N, I mean, the swings and roundabouts are all going 24 the same way, aren't they? 25 MR WOLFSON: Sometimes it will work that way. Maybe we do</p> <p style="text-align: center;">Page 142</p>	<p>1 judgment against the company the judgment debt is 2 payable but it can't be enforced. 3 MR WOLFSON: No, but statutory interest -- 4 MR JUSTICE DAVID RICHARDS: Yes, I know but I think you're 5 on a different point, if I may say so. Although you 6 started this on statutory interest you broadened it to 7 the whole concept. You're saying that section 74 8 extends only to provable debts and liabilities. Now, 9 statutory interest is a special subset of that and maybe 10 currency conversion claims but while we are on the 11 general argument, if we focus on that. I don't think 12 it's right to say that the non-provable claims are not 13 payable. 14 Habitually the court, when giving leave to a tort 15 claimant to continue proceedings, gives it but on terms 16 that any judgment will not be enforced. That's the 17 point. It's payable but it's not going to be paid out 18 of the company's assets, normally they are to be paid by 19 an insurer, it won't be paid out of the company's assets 20 unless and until there are assets available, at which 21 point it will be paid. 22 MR WOLFSON: On this point we have the textual point, 23 point 1. 24 MR JUSTICE DAVID RICHARDS: I would like to come back to 25 that in a moment.</p> <p style="text-align: center;">Page 144</p>

<p>1 MR WOLFSON: The only way in which certainly I put this</p> <p>2 point, and it may be my learned friend Mr Isaacs puts</p> <p>3 this much more eloquently than I'm going to, is that the</p> <p>4 way the scheme operates is that the section 74 liability</p> <p>5 is co-extensive with provable debts.</p> <p>6 MR JUSTICE DAVID RICHARDS: I follow.</p> <p>7 MR WOLFSON: And the reason for that is, well, the reason</p> <p>8 I have already mentioned and it either appeals to</p> <p>9 your Lordship or it doesn't.</p> <p>10 MR JUSTICE DAVID RICHARDS: You say the point of the winding</p> <p>11 up is to pay the provable debt.</p> <p>12 MR WOLFSON: For these purposes, yes, and that is what the</p> <p>13 contributories effectively have signed up to, to make</p> <p>14 sure that provable debts are paid.</p> <p>15 MR JUSTICE DAVID RICHARDS: So that is, as it were, the</p> <p>16 general point, that's fine. I'm just, sort of,</p> <p>17 struggling a tiny bit with the construction of the</p> <p>18 rules. 13.12 doesn't itself, in terms, talk about</p> <p>19 provability but the link, as Mr Trower said in his</p> <p>20 submissions, was through 12.3.</p> <p>21 MR WOLFSON: 12.3(1). Exactly.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR WOLFSON: Your Lordship plainly has the point. The point</p> <p>24 is that we read debts and liabilities in section 74 in</p> <p>25 the same way as it is used in 13.12 and that runs</p> <p style="text-align: center;">Page 145</p>	<p>1 sequitur. The last bit of the waterfall has got nothing</p> <p>2 to do with paying claims to shareholders, it is really</p> <p>3 about adjusting the rights generally, adjusting the</p> <p>4 rights of fully and partly paid shares.</p> <p>5 That is supported by the approach of</p> <p>6 Mr Justice Roxborough(?) in the Phoenix Oil case. I'm</p> <p>7 not sure we need to turn it up, perhaps I can just give</p> <p>8 your Lordship the reference. It's only one sentence.</p> <p>9 It's in 1B, tab 61, page 563 to 564. The learned judge</p> <p>10 says this:</p> <p>11 "The apportionment of the surplus could not</p> <p>12 reasonably ...(Reading to the words)... whereas the</p> <p>13 words precisely fit an adjustment between holders of</p> <p>14 fully and partly paid shares."</p> <p>15 Another point taken against me in this context is</p> <p>16 that one has to take account of the definition of</p> <p>17 "liabilities" in rule 13.12(4). This was another point</p> <p>18 taken by my learned friend Mr Trower.</p> <p>19 Your Lordship will appreciate that our response to</p> <p>20 this is simply that interest under section 189(2), which</p> <p>21 is what I'm dealing with at the moment, is not</p> <p>22 a liability. That provision, as I started with, does</p> <p>23 not create a liability but simply a direction to the</p> <p>24 liquidator as to what to do with any surplus remaining</p> <p>25 and we rely for that on the judgment of</p> <p style="text-align: center;">Page 147</p>
<p>1 through provable debts from 12.3.(1).</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR WOLFSON: Also, as your Lordship is aware, in 4.73 when</p> <p>4 we are dealing with the meaning of "prove" we also have</p> <p>5 the language of "proving a debt", which is obviously</p> <p>6 where ...</p> <p>7 MR JUSTICE DAVID RICHARDS: Sorry, where?</p> <p>8 MR WOLFSON: 4.73, on the proof part of it.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>10 MR WOLFSON: That is the link as well.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR WOLFSON: So that is that point. We submit it's correct.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>14 MR WOLFSON: There is a separate point in this regard which</p> <p>15 is a point made against me and others by Lydian which is</p> <p>16 a different point under section 74, which is because,</p> <p>17 says Lydian, section 74 extends to adjusting the rights</p> <p>18 of the contributories amongst themselves it must follow</p> <p>19 that that obligation extends to any and all liabilities</p> <p>20 which rank for payment ahead of such payments to</p> <p>21 shareholders, including, therefore, any non-provable</p> <p>22 liabilities.</p> <p>23 This point is made, for your Lordship's note, in</p> <p>24 paragraph 37 of Lydian's written opening.</p> <p>25 Our short answer to that is that it is a non</p> <p style="text-align: center;">Page 146</p>	<p>1 Mr Justice Mervyn Davies in Re Lines Brothers, which</p> <p>2 your Lordship recalls.</p> <p>3 MR JUSTICE DAVID RICHARDS: I do.</p> <p>4 MR WOLFSON: If the potential liability as contributory were</p> <p>5 to extend to post-insolvency interest we submit that</p> <p>6 anomalous results would follow and let me explain two of</p> <p>7 them. First, if a proof could be made by the company's</p> <p>8 liquidator in the contributory's insolvency for</p> <p>9 post-liquidation interest in circumstances where the</p> <p>10 contributory itself doesn't have a surplus to pay its</p> <p>11 own creditors post-insolvency interest the consequence</p> <p>12 is that you are placing the company's creditors in</p> <p>13 a better position than the contributory's own creditors.</p> <p>14 We submit that would be odd.</p> <p>15 Your Lordship sees the point?</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR WOLFSON: The second anomalous result is this: if the</p> <p>18 company's liquidators could make a call upon and prove</p> <p>19 the insolvency of contributories for an amount necessary</p> <p>20 to meet provable debts and also post-liquidation</p> <p>21 interest and assume that the contributory could only pay</p> <p>22 a dividend on that proof of less than 100p in the pound</p> <p>23 because the contributory is insolvent, the dividend</p> <p>24 would have been paid on the entire sum proved including</p> <p>25 post-liquidation interest but it may well be that the</p> <p style="text-align: center;">Page 148</p>

<p>1 company, even having received that money in, still 2 doesn't have a surplus within the scope of 3 section 189(2). So the claim has been made for the full 4 amount, only a dividend can be paid and because it is 5 only a dividend the company making the claim still 6 hasn't got a surplus.</p> <p>7 In those circumstances what has happened is that the 8 company presumably would be using the dividend to pay 9 only provable debts, in that it doesn't have a surplus, 10 and not post-liquidation interest, creating 11 a discrepancy between the dividend paid to the company 12 to the contributory which is calculated on the basis 13 including post-liquidation interest and the use by that 14 company of that dividend as regards distribution.</p> <p>15 We submit those are two anomalous results which 16 follow if you include post-liquidation interest in the 17 amount for which a call can be made against 18 contributories under section 74.</p> <p>19 A separate point taken in this regard by LBIE is 20 their reliance on the case of Re Overnight Limited, 21 which is at authorities 1D, tab 91.</p> <p>22 My Lord, Mr Trower didn't deal with this case orally 23 and I wasn't really going to say very much about it.</p> <p>24 MR JUSTICE DAVID RICHARDS: I will just remind myself of 25 what it is.</p> <p style="text-align: center;">Page 149</p>	<p>1 doesn't link it to --</p> <p>2 MR TROWER: Which is why we didn't put it any higher than 3 consistent.</p> <p>4 MR JUSTICE DAVID RICHARDS: I doubt whether you need to deal 5 with it.</p> <p>6 MR WOLFSON: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>8 MR WOLFSON: Finally in this context we rely on the point 9 made by Mr Isaacs for LBHI at paragraph 68. It is 10 a point which I'm only going to mention because I'm sure 11 he will develop it, it's his point, which is that the 12 result of imposing liability on the member to contribute 13 in relation to statutory interest has this oddity, that 14 the contribution then creates the very liability to 15 which the contribution itself is intended to relate in 16 the sense that you have a contribution which then 17 creates a surplus and it's only if you have a surplus 18 that you have to pay out post-liquidation interest.</p> <p>19 It's slightly circular but that's a point which 20 Mr Isaacs has taken and if it proves to be correct we 21 adopt it wholeheartedly.</p> <p>22 My Lord, I was now going to go on to the 288.7, 23 post-administration interest point and the lacuna point.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR WOLFSON: My Lord, I hope I can make some headway into in</p> <p style="text-align: center;">Page 151</p>
<p>1 MR WOLFSON: It is the decision of Mr Justice Roth. It is 2 a fraudulent trading case under 2.13.</p> <p>3 MR JUSTICE DAVID RICHARDS: He didn't take me to it, 4 I think, did he?</p> <p>5 MR WOLFSON: No, he didn't, my Lord. Mr Justice Roth 6 appears to have assumed that the liability to contribute 7 to the assets of a company under 2.13 extended to 8 post-liquidation interest. I think the point made 9 against me, although, as I say, it wasn't taken orally, 10 is that if it's good enough for 2.13 it's good enough 11 for 74.</p> <p>12 MR JUSTICE DAVID RICHARDS: Mr Trower, are you relying on 13 this case? You didn't take me to it orally.</p> <p>14 MR TROWER: I'm not going to say it's my strongest point. 15 It was a helpful analogy, we thought. I'm just trying 16 to remind myself of where it was in my written 17 submissions.</p> <p>18 MR WOLFSON: Until my learned friend said it was a helpful 19 analogy we were in full agreement.</p> <p>20 MR TROWER: It is at 95 of our written submissions. We said 21 it was consistent. I don't put it any higher than that.</p> <p>22 MR JUSTICE DAVID RICHARDS: There is an obvious distinction, 23 isn't there, because under section 2.13 the court may 24 order the respondent to make such contributions, if any, 25 to the company's assets as the court thinks proper. It</p> <p style="text-align: center;">Page 150</p>	<p>1 this evening.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes, thank you.</p> <p>3 MR WOLFSON: This is, as your Lordships knows, LBIE's 4 argument that post-administration interest under rule 5 288(7) survives a winding up following the 6 administration.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR WOLFSON: Despite what my learned friend called the 9 apparent lacuna in the rules of the act.</p> <p>10 So the question here is whether if a company goes 11 into liquidation after administration interest accrued 12 during the period of the administration survives.</p> <p>13 The rules we are looking at here are these. First 14 of all, in an administration a surplus in the 15 administrator's hands after payment of debts proved is 16 payable in respect of interest on those debts in the 17 period that they have been outstanding and, this is the 18 important bit, since the company entered into 19 administration. That is rule 288.7. Turning to 20 a liquidation. A surplus in the liquidator's hands 21 after payment of the debts proved is payable in respect 22 of interest on those debts in the period since they have 23 been outstanding since the company entered liquidation. 24 That is section 189.2. The creditor who proved in 25 an administration preceding the winding up is, under</p> <p style="text-align: center;">Page 152</p>

<p>1 rule 4.73, deemed to have proved in the winding up. 2 Unlike many of the rules which were amended to 3 provide an administration cut-off date when 4 an administration preceded the liquidation there was no 5 amendment to section 189. As your Lordship knows, there 6 are and there were a whole number of amendments which 7 were made in that context and they are found in the 8 Insolvency Amendment Rules 2005. They're in authorities 9 2, tab 18, pages 3 to 4 but we don't need to go through 10 them.</p> <p>11 The short point is this: whilst it may seem unfair, 12 and Mr Trower's cri de coeur on behalf of the creditors 13 is still ringing in my ears, that post-administration 14 interest is lost when a company moves from an 15 administration to a liquidation, that is what the 16 legislation provides. Of course, he accepts that 17 because he talks about a lacuna.</p> <p>18 LBIE says, this is paragraph 104 of its supplemental 19 submissions, that Parliament clearly intended that 20 creditors should be entitled to interest accruing during 21 an administration before any return was made to members. 22 With respect that really begs a question because, of 23 course, the answer to the question then is if that was 24 the intention why wasn't an amendment made to 25 section 189.</p> <p style="text-align: center;">Page 153</p>	<p>1 It's important though in this context, as I said 2 earlier, to remember that rule 473 provides that where 3 a winding up is immediately preceded by 4 an administration a creditor proving in the 5 administration shall be deemed to have proved in the 6 winding up. For that reason we submit that section 189 7 exhaustively circumscribes how a surplus in a winding up 8 is to be applied providing for it to be applied to pay 9 interest commencing from the winding up only to 10 a creditor proving in the winding up and which includes 11 a creditor proving in the administration preceding it.</p> <p>12 Where we differ with my learned friend obviously is 13 what he seeks to do with rule 288.7 which he seeks to 14 have application into the period of the winding up. The 15 reason why that is impermissible is because it only 16 applies to a "surplus remaining" in the administration.</p> <p>17 MR JUSTICE DAVID RICHARDS: I should have it open, I think.</p> <p>18 MR WOLFSON: To make the obvious point, we're here in 19 chapter 2 and we are dealing here with what is to happen 20 in an administration. In our respectful submission, 21 288.7 is dealing with what administrators should do with 22 a surplus in an administration. It, in our submission, 23 simply cannot be construed so as to apply also to 24 a surplus in a subsequent liquidation, which is the 25 effect of LBIE's argument. That is dealt with</p> <p style="text-align: center;">Page 155</p>
<p>1 In the reverse context, where an administration 2 follows a winding up statutory interest there runs from 3 the date of the commencement of the earlier winding up. 4 This follows from the definition of relevant date in 5 rule 288(A1). I think this is common ground because 6 LBIE also makes this point at footnote 35 of its written 7 opening on page 30.</p> <p>8 MR JUSTICE DAVID RICHARDS: Which rule is it? 9 MR WOLFSON: It's rule 2.88(A1).</p> <p>10 I make the obvious point that the fact that there 11 was no similar provision put in for section 189 or to 12 deal with this point means that LBIE's argument that 13 this is what Parliament plainly intended is, with 14 respect, wrong. Parliament corrected it and dealt with 15 it when an administration follows a winding up and left 16 it open, left it as is, when an administration precedes 17 a winding up.</p> <p>18 The way my learned friend seeks to get round the 19 point, as he submitted orally, is to do this. He says: 20 ah, in which case the way I'm going to read the rules is 21 this, section 189 only addresses what occurs in 22 a winding up and does not contemplate a prior 23 administration and so section 189 is limited to interest 24 accruing on debts since the company went into 25 liquidation. That's right.</p> <p style="text-align: center;">Page 154</p>	<p>1 exhaustively by section 189.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR WOLFSON: Rule 288, of course, is in chapter 10 of the 4 rules and rule 2.68(1) provides that this chapter 5 applies where the administrator makes or proposes to 6 make a distribution to any class of creditors other than 7 secured creditors. It doesn't apply in a liquidation.</p> <p>8 Finally in this regard, as your Lordship was shown 9 by Mr Trower, rule 4.93(1), in the form that it was in 10 when LBIE went into administration, provided this: 11 "Where a debt proved in a liquidation bears interest 12 that interest is provable as part of the debt except in 13 so far as it is payable in respect of any period after 14 the company went into liquidation or if the liquidation 15 was immediately preceded by an administration any period 16 after the debt the company entered administration."</p> <p>17 So, in my respectful submission, the scheme ties 18 together.</p> <p>19 MR JUSTICE DAVID RICHARDS: Which provision is that again? 20 MR WOLFSON: That is 4.93(1).</p> <p>21 Of course, I see the commercial point my learned 22 friend seeks to make.</p> <p>23 MR JUSTICE DAVID RICHARDS: I just want to have a look at 24 that.</p> <p>25 MR WOLFSON: This is one of the ones where it has since been</p> <p style="text-align: center;">Page 156</p>

<p>1 changed to bring in the relevant date point.</p> <p>2 MR JUSTICE DAVID RICHARDS: I see, yes. So seeing as it was</p> <p>3 ...?</p> <p>4 MR WOLFSON: Seeing it as it was it's in tab 15. It's just</p> <p>5 after halfway through that tab.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, I have it. We looked at it</p> <p>7 yesterday.</p> <p>8 MR WOLFSON: We looked at it yesterday, yes.</p> <p>9 Your Lordship shouldn't think that this is, so to</p> <p>10 speak, an anti-LBIE point because, of course, it's going</p> <p>11 to apply to the creditors in my own administration as</p> <p>12 well.</p> <p>13 MR JUSTICE DAVID RICHARDS: If you go into liquidation.</p> <p>14 MR WOLFSON: If we go into liquidation. It applies</p> <p>15 generally. The question is: is this or is this not</p> <p>16 where we get to on the legislation. In my respectful</p> <p>17 submission, when one reads the legislation this is</p> <p>18 plainly where we get to and the question then becomes,</p> <p>19 well, what is the ability of the court when faced with</p> <p>20 that to fill the gap or to try and get round a lacuna.</p> <p>21 I have already submitted that my learned friend's</p> <p>22 suggested approach, the reading he gives to rule</p> <p>23 2.88(7), is impermissible for the reasons I have given.</p> <p>24 There is a further point in this regard which is --</p> <p>25 it's a fairly short point so I will be able to finish</p> <p style="text-align: center;">Page 157</p>	<p>1 it had always provided for an administration cut-off</p> <p>2 date in the context of proof of debts in an immediately</p> <p>3 following liquidation. That was the submission. One</p> <p>4 can pick this up from paragraph 111 of the learned</p> <p>5 judge's judgment. You will see there the submission</p> <p>6 made to the learned judge.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR WOLFSON: Your Lordship sees from looking through 112</p> <p>9 that the learned judge refers to the explanatory note of</p> <p>10 the Insolvency Service and discusses what part 2 of the</p> <p>11 rules are doing and then at the end of 114 he says, in</p> <p>12 terms:</p> <p>13 "I can think of no obvious reason for having two</p> <p>14 different cut-off dates in relation to the same process</p> <p>15 of proof."</p> <p>16 He plainly doesn't like it, if I can put it in those</p> <p>17 terms.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR WOLFSON: At 115 Mr Dicker suggested that he should take</p> <p>20 the bull by the horns and have a radical construction</p> <p>21 approach on the ground that the failure to introduce it</p> <p>22 earlier was an obvious drafting mistake. That is</p> <p>23 a citation from Lord Nicholls in Inco Europe.</p> <p>24 MR JUSTICE DAVID RICHARDS: Right.</p> <p>25 MR WOLFSON: Your Lordship sees the first paragraph and it</p> <p style="text-align: center;">Page 159</p>
<p>1 this in a couple of minutes.</p> <p>2 MR JUSTICE DAVID RICHARDS: Certainly. Go on.</p> <p>3 MR WOLFSON: It is that the court has to be careful in this</p> <p>4 area and should only re-interpret these provisions if</p> <p>5 the court is both "abundantly sure" of the mistake which</p> <p>6 Parliament has made and, second, abundantly sure of what</p> <p>7 Parliament would have done about it. It's in that</p> <p>8 respect that I rely on the decision of Mr Justice Briggs</p> <p>9 in Bloom v Pensions Regulator.</p> <p>10 MR JUSTICE DAVID RICHARDS: Right. "Abundantly sure", is</p> <p>11 that the expression he used in that case?</p> <p>12 MR WOLFSON: He uses it but it doesn't arise from him. He</p> <p>13 cites an earlier decision in Inco Europe of</p> <p>14 Lord Nicholls. So the reason why I was only really</p> <p>15 going to go to Bloom is that in Bloom we see both the</p> <p>16 rule and the application.</p> <p>17 MR JUSTICE DAVID RICHARDS: That's fine.</p> <p>18 MR WOLFSON: That's in authorities 1D at tab 93. We have</p> <p>19 dealt with this in writing, for your Lordship's note, in</p> <p>20 paragraph 32 of our written submissions.</p> <p>21 MR JUSTICE DAVID RICHARDS: Paragraph ...?</p> <p>22 MR WOLFSON: Sorry, paragraph 32 of our supplemental</p> <p>23 submissions.</p> <p>24 The point in Bloom, the submission was that the</p> <p>25 pre-2010 version of rule 13.12 should be construed as if</p> <p style="text-align: center;">Page 158</p>	<p>1 is really the second paragraph:</p> <p>2 "(inaudible) confined to plain cases of drafting</p> <p>3 mistakes ...(Reading to the words)... before</p> <p>4 interpreting a statute in this way the court must be</p> <p>5 abundantly sure of three matters."</p> <p>6 This is where I got the phrase "abundantly sure"</p> <p>7 from:</p> <p>8 "First, the intended purpose of the statute</p> <p>9 ...(Reading to the words)... had the error in the bill</p> <p>10 be noted. The third is of crucial importance."</p> <p>11 As matters presently stand before your Lordship my</p> <p>12 learned friend has not made any submission to the effect</p> <p>13 that there has been a drafting mistake in the sense</p> <p>14 described by Lord Nicholls in Inco Europe. He says</p> <p>15 there is a lacuna but that is a very different point</p> <p>16 because my learned friend certainly hasn't argued,</p> <p>17 either in writing or orally, that the court could be</p> <p>18 abundantly sure of the mistake or abundantly sure of</p> <p>19 what Parliament would have done about it.</p> <p>20 MR JUSTICE DAVID RICHARDS: Do you think we can be</p> <p>21 abundantly sure that intention was to introduce a common</p> <p>22 regime for interest post-administration or insolvency?</p> <p>23 It is certainly difficult, isn't it, to see why there</p> <p>24 should be this black hole into which interest</p> <p>25 post-administration but pre-liquidation would fall.</p> <p style="text-align: center;">Page 160</p>

<p>1 MR WOLFSON: I am tempted to accede to the point 2 your Lordship makes but I won't, for this reason. It 3 comes back to the point I made before which may or may 4 not find favour with your Lordship. It comes back to my 5 swings and roundabouts point before and it's this. Let 6 me explain. The point here is why should you lose 7 post-administration interest if you then have a later 8 liquidation. What post-administration interest are we 9 looking at here? What are we dealing with? We're 10 dealing with statutory interest, which runs at the 11 greater of the Judgments Act rate and the contractual 12 rate.</p> <p>13 Your Lordship asked me yesterday what the rate was. 14 The rate under section 17 of the Judgments Act 1838 15 remains £8. In fact, in the wonderful language of the 16 old statute it is £8 per centum per annum. Magnificent 17 it has been 8, and this is an important commercial 18 point, since 1 April 1983.</p> <p>19 In my respectful submission, in those circumstances 20 it is far from clear that Parliament did intend that 21 interest to run through because what Parliament is doing 22 is --</p> <p>23 MR JUSTICE DAVID RICHARDS: Is this right, the creditor who 24 is entitled as a matter of contract or otherwise to 25 interest can't prove for it post-administration? So the</p> <p style="text-align: center;">Page 161</p>	<p>1 be a year, it might be a few weeks, months --</p> <p>2 MR WOLFSON: In this case it's a long time.</p> <p>3 MR JUSTICE DAVID RICHARDS: -- or years in respect of which 4 he gets no interest except possibly as a non-provable 5 claim after statutory interest.</p> <p>6 MR WOLFSON: In the liquidation, exactly. It would 7 revive --</p> <p>8 MR JUSTICE DAVID RICHARDS: It is a very odd result, isn't 9 it, really?</p> <p>10 MR WOLFSON: My Lord, as I said, I was tempted to agree 11 because on initial impression it is a odd result but 12 when one bears in mind that if there a surplus in the 13 administration what Parliament is giving this creditor 14 is a rate of interest way in excess.</p> <p>15 MR JUSTICE DAVID RICHARDS: That is true though for 16 liquidation. I mean, that's true where you have 17 an administration preceded by a liquidation and there, 18 as I understand it, the right to interest at the 19 statutory rate is reserved.</p> <p>20 You see, the way I would approach this might be 21 this: clearly it is easier to amend delegated 22 legislation then it is to amend primary legislation.</p> <p>23 The rule as to section 189 is the one relevant provision 24 which is in primary legislation and in circumstances 25 where all these amendments were made in 2005 perhaps the</p> <p style="text-align: center;">Page 163</p>
<p>1 company goes into administration, it goes into 2 liquidation, he has lost his right to prove for 3 interest, that is right, isn't it, but he doesn't get 4 statutory interest either? Isn't that the point?</p> <p>5 MR WOLFSON: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: That's right?</p> <p>7 MR WOLFSON: Yes, but in the administration is the point I'm 8 making. In the administration he is getting interest at 9 8 per cent.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes. So a company goes into 11 administration, a creditor who has a right to 12 contractual interest cannot prove for interest post the 13 start of the administration.</p> <p>14 MR WOLFSON: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: But he becomes entitled, if 16 there is a surplus, to statutory interest. So that is 17 the quid pro quo so far as he is concerned. The company 18 then goes into liquidation. He still can't prove for 19 his interest at a contractual rate between the date of 20 administration and the date of liquidation.</p> <p>21 MR WOLFSON: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: But he has also, you submit, 23 lost his statutory interest.</p> <p>24 MR WOLFSON: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: So there is a period, it might</p> <p style="text-align: center;">Page 162</p>	<p>1 right approach is, because this may not have been 2 successful, but the legislative intention, one may 3 assume, was to affect the necessary change through the 4 changes to the delegated legislation and one should 5 approach the construction of the rules with that in 6 mind. No one can actually think of any good reason why 7 they should have left the lacuna but they didn't amend 8 section 189 so the obvious inference from that is that 9 they thought they had achieved it through the changes to 10 the rules.</p> <p>11 Now, that informs the approach to construction of 12 the rules without determining the result because they 13 may just have failed.</p> <p>14 Is that a fair approach?</p> <p>15 MR WOLFSON: It's certainly a fair approach. I certainly 16 accept there is a two stage process here. The first 17 stage is what your Lordship is doing in saying, "What do 18 the rules mean and how should I construe them", as 19 I understand the point your Lordship just made.</p> <p>20 MR JUSTICE DAVID RICHARDS: I am but one is approaching it 21 on the basis that there is this provision in primary 22 legislation which has been left alone.</p> <p>23 MR WOLFSON: I accept that but --</p> <p>24 MR JUSTICE DAVID RICHARDS: There are two reasons for 25 leaving it alone. One is the intention was that it</p> <p style="text-align: center;">Page 164</p>

<p>1 should apply in the way that you submit, the alternative</p> <p>2 is that it was thought that the necessary changes were</p> <p>3 made by the changes to the rules.</p> <p>4 MR WOLFSON: But, my Lord, the question may be what is the</p> <p>5 extent of the principle set out by Mr Justice Briggs in</p> <p>6 Bloom or applied by Mr Justice Briggs in Bloom because</p> <p>7 the submission there, of course, was that the judge</p> <p>8 should take the bull by the horns and construe. So this</p> <p>9 is in the context of construction. Your Lordship sees</p> <p>10 at paragraph 119:</p> <p>11 "Although I think the omission was probably</p> <p>12 a mistake ..."</p> <p>13 MR JUSTICE DAVID RICHARDS: I think the way I'm looking at</p> <p>14 is not to say there is a mistake but to look at this</p> <p>15 purposively. I'm not saying anything about what the</p> <p>16 result of this approach is but not that there is</p> <p>17 a mistake unless, of course, it transpires that however</p> <p>18 you look at the rules they can't have the effect for</p> <p>19 which Mr Trower contends, in which case they can't have</p> <p>20 that effect.</p> <p>21 MR WOLFSON: In which case, my Lord, the way that</p> <p>22 your Lordship has just put it is not something from</p> <p>23 which I can dissent. Clearly the court can construe the</p> <p>24 rules in their proper context. The reason why I wanted</p> <p>25 to show your Lordship Bloom is that I didn't want</p> <p style="text-align: center;">Page 165</p>	<p>1 right. Is that really what you wanted to say on the</p> <p>2 lacuna point?</p> <p>3 MR WOLFSON: That is on the lacuna point.</p> <p>4 Just to come back to the commercial point just to</p> <p>5 reiterate, the commercial point as to why we say that it</p> <p>6 may not be the case that Parliament has made a mistake</p> <p>7 here is because, as I say, I do come back to the point</p> <p>8 that interest runs at 8 per cent. That is why LBIE's</p> <p>9 debt is trading in the market above par, which is</p> <p>10 a pretty strange thing for debt. I mean, not much debt</p> <p>11 trades in the market above par.</p> <p>12 I do, therefore, come back to my, so to speak,</p> <p>13 swings and roundabouts point that Parliament gives you</p> <p>14 the benefit of a very good rate and in those</p> <p>15 circumstances you cannot be abundantly sure, it is</p> <p>16 certainly far from certain, that a mistake was made.</p> <p>17 My Lord, that leaves me to deal with contractual</p> <p>18 interest, currency conversion claims and then how the</p> <p>19 liability under section 74 should be shared between</p> <p>20 myself and LBHI2.</p> <p>21 On the timetable I was due to finish by lunchtime</p> <p>22 tomorrow. I am certainly confident I shall do that. So</p> <p>23 I still expect us to be landing ahead of schedule.</p> <p>24 MR JUSTICE DAVID RICHARDS: All right. Thank you very much.</p> <p>25 We will resume at 10.30 am tomorrow morning.</p> <p style="text-align: center;">Page 167</p>
<p>1 Mr Trower to be able to take a further point, which is</p> <p>2 really the submission made by Mr Dicker in Bloom, which</p> <p>3 is that if at the end of that construction process he is</p> <p>4 still on the wrong side of the argument then what</p> <p>5 your Lordship should do is, so to speak, a radical</p> <p>6 construction or radical rewriting, taking the bull by</p> <p>7 the horns. For that the court has to be abundantly</p> <p>8 sure.</p> <p>9 MR JUSTICE DAVID RICHARDS: I'm not quite sure how this</p> <p>10 works. Anyway, I'll look carefully at this passage.</p> <p>11 MR WOLFSON: The reason why I asked your Lordship, with</p> <p>12 respect, the question I did was because what Mr Justice</p> <p>13 Briggs thought he was doing in Bloom is a process of</p> <p>14 construction. I just put it in a two-stage process but</p> <p>15 it would appear that Mr Justice Briggs regarded it, so</p> <p>16 to speak, as an one-stage process. You look at the</p> <p>17 rules and see if there is an error and if there is and</p> <p>18 if you are abundantly sure what has gone wrong and what</p> <p>19 should have been done you can correct it but otherwise</p> <p>20 you can't.</p> <p>21 MR JUSTICE DAVID RICHARDS: That is the bit I'm -- right.</p> <p>22 All right.</p> <p>23 MR WOLFSON: That is certainly not the way your Lordship</p> <p>24 just put it to me.</p> <p>25 MR JUSTICE DAVID RICHARDS: No, it's not, no. That's quite</p> <p style="text-align: center;">Page 166</p>	<p>1 (4.31 pm)</p> <p>2 (The court adjourned until 10.30 am the following morning)</p> <p>3</p> <p>4 INDEX</p> <p>5 Housekeeping1</p> <p>6</p> <p>7 Submissions by MR WOLFSON2</p> <p>8 (continued)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 168</p>

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