

<p>1 Friday, 15 November 2013</p> <p>2 (10.30 am)</p> <p>3 Submissions by MR WOLFSON (continued)</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes, Mr Wolfson.</p> <p>5 MR WOLFSON: Good morning, my Lord. We have placed on your</p> <p>6 Lordship's desk the extract from Wood which I mentioned</p> <p>7 yesterday. These are the places where the case of Re</p> <p>8 Auriferous number 1 is discussed in Wood. I was not</p> <p>9 proposing to go back to it, but those are the relevant</p> <p>10 extracts.</p> <p>11 MR JUSTICE DAVID RICHARDS: Thank you very much. Where</p> <p>12 shall we put that?</p> <p>13 MR WOLFSON: I think that will become tab 103 in bundle D,</p> <p>14 because we already have some extracts from Wood in</p> <p>15 there, so perhaps that might be the best place to add</p> <p>16 it.</p> <p>17 My Lord, the extracts your Lordship has from Derham</p> <p>18 have been reorganised as your Lordship asked yesterday.</p> <p>19 MR JUSTICE DAVID RICHARDS: Thank you very much.</p> <p>20 MR WOLFSON: My Lord, I have three issues to deal with, all</p> <p>21 of which are fairly short, just so your Lordship knows</p> <p>22 which they are: the first is the contractual interest</p> <p>23 point and whether it survives; the second is the</p> <p>24 currency conversion point; and the third is the</p> <p>25 liability inter se to the contributories.</p> <p style="text-align: center;">Page 1</p>	<p>1 interest happens to be higher than the Judgments Act</p> <p>2 rate of interest, you get your contractual rate. So if</p> <p>3 a contract said 10 per cent at the moment, you would get</p> <p>4 ten rather than 8.</p> <p>5 But other than that, we submit the contractual</p> <p>6 provisions fall away. Of course the critical point is</p> <p>7 the comments which your Lordship has seen from Lord</p> <p>8 Justices Selwyn and Giffard in Re Humber Ironworks were</p> <p>9 of course made before the introduction of the</p> <p>10 post-insolvency interest provisions, so my learned</p> <p>11 friend does not get any support from them.</p> <p>12 A further point in this regard is that the</p> <p>13 paramountcy of the statutory regime is also reinforced</p> <p>14 by the fact that both for rule 288.7, and also for</p> <p>15 section 189, the relevant provisions -- for rule 288</p> <p>16 it's 288.8 and for section 189 it's 189.3 -- in both</p> <p>17 cases they provide that all interest payable, whether</p> <p>18 under the rule or the section, ranks equally, whether or</p> <p>19 not the debts on which it is payable rank equally.</p> <p>20 So one can see, we submit, that the statutory regime</p> <p>21 in that regard is qualitatively different from the</p> <p>22 contractual regime and may give a creditor</p> <p>23 a significantly better position than he would have had</p> <p>24 under the contract. It's 288.8 and 189.3. In</p> <p>25 substance, it is the same point in each case.</p> <p style="text-align: center;">Page 3</p>
<p>1 MR JUSTICE DAVID RICHARDS: Right.</p> <p>2 MR WOLFSON: My Lord, dealing with the contractual interest</p> <p>3 first. This is the argument raised by LBIE to the</p> <p>4 effect that despite the fact that post insolvency</p> <p>5 interest is not provable, and despite also rules 288.7</p> <p>6 and section 189 which we looked at yesterday, the</p> <p>7 argument is that winding-up leaves the underlying</p> <p>8 liability in respect of interest untouched and so</p> <p>9 contractual interest is not extinguished.</p> <p>10 As we pointed out, the reference is paragraph 34 of</p> <p>11 our supplemental submissions. We adopt the point made</p> <p>12 by LBHI at greater length in its submissions. The</p> <p>13 reference to LBHI's submissions is paragraph 81 to 88.</p> <p>14 Therefore, I really propose to say not too much about</p> <p>15 this, because this is a point developed by LBHI and we</p> <p>16 adopt their submissions.</p> <p>17 The short point is this. We submit that there is</p> <p>18 a statutory scheme governing the payment of</p> <p>19 post-insolvency interest. Your Lordship referred to the</p> <p>20 scheme as a complete code. We respectfully say that's</p> <p>21 right. That replaces any contractual right to interest.</p> <p>22 There is no co-existing contractual regime that sits</p> <p>23 along the statutory regime.</p> <p>24 The only relevance of contractual interest following</p> <p>25 the insolvency is that if the contractual rate of</p> <p style="text-align: center;">Page 2</p>	<p>1 My Lord, as your Lordship will recall, the judgment</p> <p>2 of Mr Justice Mervyn Davies in Re Lines Bros, if we</p> <p>3 could just turn back to that. That's at 1C, tab 67.</p> <p>4 Your Lordship has looked at this case a number of times.</p> <p>5 Your Lordship recalls the point made at 223, we have</p> <p>6 looked at that.</p> <p>7 Then turning over to 224 at F:</p> <p>8 "My conclusion from these observations is that</p> <p>9 a company is insolvent if the assets do not ...(Reading</p> <p>10 to the words)... as they existed at the date of the</p> <p>11 winding up an insolvent if, when such dates are paid,</p> <p>12 there is a surplus. If there is a surplus, a post</p> <p>13 liquidation interest credit is remitted to his rights</p> <p>14 under the contract ... but as I see it, such rights are</p> <p>15 then rights against a solvent company."</p> <p>16 So even if a creditor is remitted to his rights</p> <p>17 under the contract, those rights are rights against a</p> <p>18 solvent company, so we say the members' liability under</p> <p>19 section 74 does not and cannot extend to it.</p> <p>20 A similar point, we say, arises from the reference</p> <p>21 to the judgment of Mr Justice Buckley, which one sees at</p> <p>22 225G, the sentence:</p> <p>23 "That is not the position with respect to the</p> <p>24 winding-up, since the words of Mr Justice Buckley that</p> <p>25 I have quoted indicate that interest in a winding up can</p> <p style="text-align: center;">Page 4</p>

<p>1 be claimed only after an insolvency has been 2 established." 3 So, my Lord, we submit that -- 4 MR JUSTICE DAVID RICHARDS: Sorry, where is that? 5 MR WOLFSON: That's at 225G. So we submit that, following 6 that approach, on any analysis the members' liability 7 under section 74 -- 8 MR JUSTICE DAVID RICHARDS: Where does he get solvency from 9 here? I appreciate that section 10 doesn't use the word 10 "solvency" or "insolvency". The insufficiency there 11 referred to I think is to the same effect. 12 MR WOLFSON: Yes. 13 MR JUSTICE DAVID RICHARDS: Section 10 of the judicature I 14 think. 15 MR WOLFSON: Yes, my Lord, I think it may be 253 of the 16 Companies Act. I think that's what my learned friend 17 was referring to. 18 MR JUSTICE DAVID RICHARDS: Is it? 19 MR WOLFSON: When he looked at this case. The 1948 Act. 20 MR JUSTICE DAVID RICHARDS: So the whole of this paragraph 21 talks about -- 22 MR ISAACS: Can I assist. It is at the bottom of 220, 23 section 10, the 1875 Act. Your Lordship sees the word 24 "insufficient" is the last word on that page. 25 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p style="text-align: center;">Page 5</p>	<p>1 MR JUSTICE DAVID RICHARDS: Pro tanto, or maybe in -- yes, 2 in full. 3 MR WOLFSON: I don't wish to argue against myself, but of 4 course one can see the other argument to say, well, I am 5 given a statutory right to take interest out, my 6 contractual right during that period abates, but my 7 contractual right thereafter doesn't. 8 MR JUSTICE DAVID RICHARDS: So you get statutory rate plus 9 the contractual rate. 10 MR WOLFSON: I am raising this as an issue because -- 11 MR JUSTICE DAVID RICHARDS: The rule itself says you get it 12 at the greater of judgment rate and contract rate, which 13 I think would suggest that if you receive interest at 14 the contractual rate pursuant to the statutory scheme, 15 it would be odd if the contractual right to interest 16 survived. It would seem as if it had been satisfied, 17 wouldn't it? It would be very odd if you got your 18 contractual rate under the statute, but then you still, 19 on there being a further surplus, had a right to further 20 interest. But that's not the point we are addressing. 21 The point we are addressing is where you don't get 22 interest under the statutory scheme, isn't it? 23 MR WOLFSON: No, the point I am making, my Lord, is this: 24 that if under the statutory scheme you receive interest 25 at 8 per cent.</p> <p style="text-align: center;">Page 7</p>
<p>1 MR WOLFSON: Thank you very much. 2 Then further down on page 221, between D and G, 3 there are the statutory successions. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR WOLFSON: My Lord, the short point is that because the 6 approach here is that the rights are rights against 7 a solvent company, we submit that the liability under 8 section 74 cannot extend to it. 9 Finally in this context, there are again, as we saw 10 yesterday with other forms of interest, a number of 11 problems and anomalies which arise if my learned friend 12 Mr Trower is right. Just to take two -- there are more, 13 but just to take two -- if the contractual interest 14 right does coexist alongside the statutory interest 15 right, then when one is calculating the contractual 16 interest, how do you calculate the amount for which the 17 contributories should pay? Because, for example, you 18 could have a contractual interest rate at say 3 per 19 cent, but if there was a surplus you would have received 20 interest out of the surplus at 10 per cent. Is that 21 meant to be set-off? Sorry, did I say 10 per cent? 8 22 per cent. Is that meant to be set-off? 23 MR JUSTICE DAVID RICHARDS: I think his right to interest 24 would have been satisfied then. 25 MR WOLFSON: Pro tanto.</p> <p style="text-align: center;">Page 6</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR WOLFSON: But you are still not paid out in full. 3 MR JUSTICE DAVID RICHARDS: Your interest? 4 MR WOLFSON: Your interest. 5 MR JUSTICE DAVID RICHARDS: I see. 6 MR WOLFSON: You have a contractual interest right, on my 7 learned friend's case, thereafter, which the members 8 have to pay under section 74. 9 MR JUSTICE DAVID RICHARDS: Let us get this right, because 10 under the statutory scheme, if you are receiving 11 interest under the statutory scheme, you get it at the 12 greater of judgment rate and the contract rate. 13 MR WOLFSON: Yes. 14 MR JUSTICE DAVID RICHARDS: So if you receive your full 15 entitlement to interest under the statutory scheme -- 16 MR WOLFSON: There wouldn't be anything left over, if you 17 received your full entitlement under the statutory 18 scheme. But of course you can have a situation where 19 there is a surplus which pays interest on the statutory 20 rate, but may not necessarily discharge all the 21 contractual interest you are entitled to. 22 MR JUSTICE DAVID RICHARDS: Well, you may be right there, 23 but can I ask you this as a preliminary: is the right to 24 interest under the statutory scheme a right to simple 25 interest?</p> <p style="text-align: center;">Page 8</p>

<p>1 MR WOLFSON: My Lord, I think it is, yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: Because your contractual right</p> <p>3 may well be a right to compound interest.</p> <p>4 MR WOLFSON: Yes.</p> <p>5 MR JUSTICE DAVID RICHARDS: So I can see that, even though</p> <p>6 you receive interest at the contractual rate, your</p> <p>7 contractual rights may not be exhausted.</p> <p>8 MR WOLFSON: Yes, that's certainly one way it could apply.</p> <p>9 Or you could have a situation where there is a surplus,</p> <p>10 and therefore interest is paid out, but there are a</p> <p>11 number of creditors claiming interest out of that</p> <p>12 surplus, so it does not necessarily discharge the</p> <p>13 interest entitlement of any of them in full.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, that I follow.</p> <p>15 MR WOLFSON: So it can happen in a number of ways. There is</p> <p>16 no indication in the statutory scheme of how these</p> <p>17 points are to be dealt with. At the very lowest, no</p> <p>18 thought has been given to it, and, my Lord, we say</p> <p>19 that's a good indication that the statutory scheme is a</p> <p>20 complete code and it doesn't survive. That is the first</p> <p>21 point.</p> <p>22 The second point, my Lord, is really a similar point</p> <p>23 to the point I made yesterday, which is my, so to speak,</p> <p>24 swings and roundabouts point. As I said yesterday, when</p> <p>25 a company goes into liquidation, there can be</p> <p style="text-align: center;">Page 9</p>	<p>1 give credit, it would seem, for benefits he's received</p> <p>2 from having a 5 per cent discount rate than a commercial</p> <p>3 discount rate. But of course, from the point of view of</p> <p>4 the company, the company has certainly suffered an</p> <p>5 economic loss from having to pay on a discount rate --</p> <p>6 or may have suffered an economic loss -- of having to</p> <p>7 pay the discount rate on the 5 per cent rather than the</p> <p>8 contractual discount rate.</p> <p>9 So we submit, for reasons which will be no doubt set</p> <p>10 out at greater length by Mr Isaacs, there is no</p> <p>11 contractual right to interest, and certainly no</p> <p>12 contractual right to interest for which the members are</p> <p>13 liable under section 74.</p> <p>14 My Lord, moving on to the currency conversion</p> <p>15 claims. Our short point is that there is no such thing,</p> <p>16 there is no currency conversion claim. To make the</p> <p>17 obvious point, the legislation expressly requires</p> <p>18 conversion to take place at the date of entry into</p> <p>19 administration or liquidation. This applies whether the</p> <p>20 company is solvent or insolvent. Neither the Act nor</p> <p>21 the rules make any provision for any subsequent residual</p> <p>22 currency conversion claim.</p> <p>23 My Lord, first looking at rule 12.3, which I know we</p> <p>24 looked at yesterday, which your Lordship finds either in</p> <p>25 volume 2 of your Lordship's ... Lydian of course accepts</p> <p style="text-align: center;">Page 11</p>
<p>1 significant benefits to creditors as well as detriment</p> <p>2 to creditors. What I mean by that is this: if you have,</p> <p>3 for example, a future claim which bears interest at</p> <p>4 quite a low rate of interest, the way the statutory</p> <p>5 scheme works is that you can prove an insolvency for</p> <p>6 that future debt, and it's discounted at the statutory</p> <p>7 rate of 5 per cent. That discount may be significantly</p> <p>8 better for you than the commercial discount rates</p> <p>9 applicable to that debt, depending on currency interest</p> <p>10 rates and all the rest of it.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR WOLFSON: Equally, as I said earlier, you get interest</p> <p>13 from any surplus at 8 per cent, which can be</p> <p>14 significantly better than your contractual right. What</p> <p>15 this argument really seeks to do, in my respectful</p> <p>16 submission, is to say, well, I will take, so to speak,</p> <p>17 all the benefits that the statutory scheme gives me, but</p> <p>18 I am not going to take any of the detriments.</p> <p>19 The discount actually, my Lord, in my submission, is</p> <p>20 another useful way of looking at it, because of course</p> <p>21 discount is, one might say, a corollary of interest.</p> <p>22 Discount is a discount for accelerated receipts and</p> <p>23 interest is compensation for delayed receipts.</p> <p>24 The creditor, on Mr Trower's case, is entitled to</p> <p>25 contractual interest. He's not under any compulsion to</p> <p style="text-align: center;">Page 10</p>	<p>1 that this would be a non-provable claim. My Lord,</p> <p>2 non-provable claims are dealt with in rule 12.3(2)(a)</p> <p>3 and (b). Rule 12.3(2)(a) recognises the category of</p> <p>4 non-provable claims when all of the claims of the</p> <p>5 creditors have been paid in full with interest. It does</p> <p>6 not fall within 12.3(2)(a)(a), and also of course</p> <p>7 doesn't fall within 12.3(2)(a)(c). So rather --</p> <p>8 MR JUSTICE DAVID RICHARDS: 12 point?</p> <p>9 MR WOLFSON: 12.3(2)(a) deals with postponed debts when all</p> <p>10 of the claims have been paid with interest.</p> <p>11 MR JUSTICE DAVID RICHARDS: Sorry, yes.</p> <p>12 MR WOLFSON: Which is where one might expect to find this.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes. Well 12.3(2)(a), they are</p> <p>14 provable but only when other claims --</p> <p>15 MR WOLFSON: Have been paid with interest.</p> <p>16 MR JUSTICE DAVID RICHARDS: -- have been paid with interest,</p> <p>17 yes. So they are subordinated class.</p> <p>18 MR WOLFSON: Yes, it's not in there, and it's also not in</p> <p>19 12.3(2), what's not provable. There is no mention of</p> <p>20 them anywhere.</p> <p>21 MR JUSTICE DAVID RICHARDS: Right.</p> <p>22 MR WOLFSON: My Lord, it's not therefore the case where</p> <p>23 these debts have been mentioned in the statute or have</p> <p>24 been postponed. There is simply no mention of them at</p> <p>25 all. These sections, my Lord, have been revised after</p> <p style="text-align: center;">Page 12</p>

<p>1 Re Lines Bros, when this point, so to speak, was out 2 there and was recognised. Yet there has been no mention 3 of them, no indication that they exist at all.</p> <p>4 Now, the same point about benefit and detriment, 5 my Lord, applies here as well. The way my learned 6 friend puts it is this. He says there is no problem 7 essentially with detriment, because he says, "I am 8 coming after all creditors who have been paid with 9 interest, all I am doing is, so to speak, coming last 10 before members, and there is no reason why I should lose 11 out in favour of the members." My Lord, of course that 12 ignores a situation where at the end of the 13 administration there is a rescue of the company and the 14 company itself continues. So, my Lord, it's not the 15 case -- this is the first part of the argument -- that 16 the only pot out of which these claims will be paid will 17 be, so to speak, the members; it could come out of 18 assets which would otherwise remain in the company.</p> <p>19 Now, my Lord, the second point, and perhaps I can 20 put both points together.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR WOLFSON: Assume a circumstance where the debt should 23 have been paid on 1 January. The company goes into 24 liquidation. The winding-up starts on 1 March. The 25 payment out is made on 1 July. The relevant conversion</p> <p style="text-align: center;">Page 13</p>	<p>1 happened. I may be wrong about that.</p> <p>2 MR WOLFSON: I don't know.</p> <p>3 MR JUSTICE DAVID RICHARDS: I am sure there are those in 4 court who can correct me if I am wrong. So I think we 5 are talking about something -- but still, there is the 6 argument.</p> <p>7 MR WOLFSON: It's a development of the upside only argument 8 which we put in writing.</p> <p>9 MR JUSTICE DAVID RICHARDS: So the company defaults in 10 payment on 1 January. It goes into a distributing 11 administration. It comes out of administration 12 completely as a rescued company. What Mr Trower says 13 is, well, the creditor has a claim, so we are assuming 14 that payment is made on 1 July --</p> <p>15 MR WOLFSON: July.</p> <p>16 MR JUSTICE DAVID RICHARDS: -- in the distributing 17 administration.</p> <p>18 MR WOLFSON: Of course that payment will be in sterling.</p> <p>19 MR JUSTICE DAVID RICHARDS: The creditor gets --</p> <p>20 MR WOLFSON: Sterling.</p> <p>21 MR JUSTICE DAVID RICHARDS: But it's worth less than his 22 dollar debt because of changes in currency rates.</p> <p>23 MR WOLFSON: Yes, that's right, and it's that that gives 24 rise now. My example is where the creditor does better. 25 The creditor on 1 July --</p> <p style="text-align: center;">Page 15</p>
<p>1 date is 1 March. The currency conversion claim is 2 saying, well, if when I get paid out on 1 July I am in 3 a worse position than I should have been on 1 March, or 4 perhaps even on 1 January, I have a claim for the 5 difference.</p> <p>6 Of course the contrary can be the case as well, that 7 the foreign currency creditor on 1 July is in a better 8 position not only than he would have been on 1 March, 9 but also than he would have been on 1 January. In 10 a situation where the company is rescued from 11 administration and continues, my learned friend will 12 still say he has a currency conversion claim, but what 13 he has therefore, on his analysis, it would appear, is 14 that the foreign currency creditor is in a better 15 position than he would have been vis-a-vis the company 16 even as at 1 January.</p> <p>17 Does your Lordship see the point?</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes. I mean, I am having some 19 difficulty with conceiving the rescue of a company which 20 has gone into a distributing administration. I mean, of 21 course it's conceptually possible.</p> <p>22 MR WOLFSON: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: But it's unlikely.</p> <p>24 MR WOLFSON: I accept it happens less often than it doesn't.</p> <p>25 MR JUSTICE DAVID RICHARDS: I don't think it's ever</p> <p style="text-align: center;">Page 14</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, gets more.</p> <p>2 MR WOLFSON: -- gets a sterling amount which is a higher 3 sterling amount than the sterling amount he would have 4 received on 1 March or 1 January.</p> <p>5 MR JUSTICE DAVID RICHARDS: Right. Okay.</p> <p>6 MR WOLFSON: Now, it's not suggested that there would be any 7 repayment in those circumstances.</p> <p>8 MR JUSTICE DAVID RICHARDS: No. I mean, he's got no loss 9 obviously.</p> <p>10 MR WOLFSON: Sorry, who --</p> <p>11 MR JUSTICE DAVID RICHARDS: He has no loss, has he, then?</p> <p>12 MR WOLFSON: Sorry, who is "he" in this circumstance?</p> <p>13 MR JUSTICE DAVID RICHARDS: The creditor.</p> <p>14 MR WOLFSON: No, but he's got a gain.</p> <p>15 MR JUSTICE DAVID RICHARDS: Oh, you're saying there's no 16 suggestion he has to pay back?</p> <p>17 MR WOLFSON: Absolutely.</p> <p>18 MR JUSTICE DAVID RICHARDS: I see.</p> <p>19 MR WOLFSON: The one-way bet argument -- what I am seeking 20 to do is to respond to Mr Zacaroli's response to me. He 21 makes a claim. I have said this is a one-way bet. 22 Mr Zacaroli says "It doesn't matter that it's a one-way 23 bet because I am coming after all the other creditors," 24 the only people who can possibly be disadvantaged are 25 the members. In any event, he says "I either have</p> <p style="text-align: center;">Page 16</p>

<p>1 a claim or I haven't, there is no loser here," but there 2 can be a loser and he can actually gain.</p> <p>3 It's not the case that the currency conversion claim 4 is to fill a loss. If this currency conversion claim is 5 correct, it's a way for creditors to play the foreign 6 currency markets within an administration to their 7 benefit, because rates are moving up and down all the 8 time. Of course if you have very significant foreign 9 currency claims, one of the issues in the administration 10 will be when to distribute, and you could actually 11 arrange matters so you would gain significantly on the 12 foreign currency claim, because you could be, as I say, 13 in a significantly better position than you would have 14 been either at the date of winding-up or indeed at the 15 date when the liability crystallised vis-a-vis the 16 company.</p> <p>17 Of course, to take my example just a stage further, 18 if you assume a creditor with a foreign currency claim, 19 which is future and which has a low interest rate, then 20 of course on my learned friend's approach the foreign 21 currency creditor has a one-way bet on exchange rates. 22 He benefits from a 5 per cent discount rate, which may 23 be significantly more advantageous to him than the real 24 market discount rate if it's a future claim. He 25 benefits from statutory interest at a rate of 8 per</p> <p style="text-align: center;">Page 17</p>	<p>1 is it?</p> <p>2 MR WOLFSON: My headline submission of course is that there 3 is no such currency conversion claim at all for these 4 reasons. If there were such a currency conversion 5 claim, then what principle would apply to make credit be 6 given? I mean, the argument would be: well, you have 7 received more under the statutory scheme than you would 8 have got under the contract. The contrary position 9 would be: well, these are the rights statute has given 10 me, and there is no indication anywhere that I have to 11 give credit anywhere else.</p> <p>12 MR JUSTICE DAVID RICHARDS: I would have thought that it 13 might follow from the law relating to damages for breach 14 of contract.</p> <p>15 MR WOLFSON: Well, my Lord, let me take this point. Let us 16 just take a simple case. Let us just take a sterling 17 debt. A future sterling debt: a claim for contractual 18 interest remains after statutory interest has been paid. 19 Your Lordship and I had a discussion a few moments ago 20 as to whether you would have to give credit for 21 statutory interest.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR WOLFSON: There, we are dealing with, so to speak, 24 interest and interest.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 19</p>
<p>1 cent, when his contractual interest rate may be lower, 2 and one of the reasons of course why the debt may have 3 been created in a foreign currency is because it would 4 carry a low rate of interest in that currency. To state 5 the obvious, low rates of interests, on the one hand, 6 exchange rate risk, on the other, and yet, despite all 7 those advantages which he gets from the statutory 8 scheme, on my learned friend's case he still has his 9 rights to contractual interest, he still has his rights 10 to a currency conversion claim. It's really, "Heads 11 I win, tails you lose."</p> <p>12 MR JUSTICE DAVID RICHARDS: I am not quite sure that's 13 right. Would he be entitled to maintain a claim for his 14 currency loss without giving credit for benefits on 15 other aspects?</p> <p>16 MR WOLFSON: Well, my Lord, it may be that's a question for 17 Mr Zacaroli.</p> <p>18 MR JUSTICE DAVID RICHARDS: No, I think it is for you as 19 well, because you are asserting that he has this 20 remarkably advantageous position. I am just asking you: 21 is that right?</p> <p>22 MR WOLFSON: My Lord, my submission is of course --</p> <p>23 MR JUSTICE DAVID RICHARDS: I am not sure that Mr Trower 24 made the submission you are making. You are carrying 25 his submission further and saying that's the result but</p> <p style="text-align: center;">Page 18</p>	<p>1 MR WOLFSON: Without wishing to ask the court a rhetorical 2 question, would the creditor have to give credit in that 3 example for the fact that the statutory 5 per cent 4 discount rate may be significantly better for him than 5 the market discount rate?</p> <p>6 MR JUSTICE DAVID RICHARDS: What's the answer to your 7 question?</p> <p>8 MR WOLFSON: My Lord, it would seem --</p> <p>9 MR JUSTICE DAVID RICHARDS: I don't mind you posing 10 rhetorical questions, provided you try and answer them.</p> <p>11 MR WOLFSON: I was hoping I would only have to do the easy 12 part. My Lord, it would seem very difficult to see how 13 that set-off would arise and would be applied. What it 14 would mean, for example, is that in every case where 15 there was a claim for contractual interest there would 16 necessarily be an argument as to whether the statutory 5 17 per cent discount rate was or was not for that debt, 18 against that company, in that market, ahead or behind of 19 the market discount rate.</p> <p>20 MR JUSTICE DAVID RICHARDS: Whatever they so get. I think 21 the issue here may be is it a claim in debt or in 22 damages.</p> <p>23 MR WOLFSON: Yes.</p> <p>24 MR JUSTICE DAVID RICHARDS: Because if it's a claim in 25 damages, I don't quite see why you shouldn't take into</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 account the benefit from accelerated payment.</p> <p>2 MR WOLFSON: But, my Lord, it's a claim in debt because the</p> <p>3 way it has been put --</p> <p>4 MR JUSTICE DAVID RICHARDS: That was -- yes.</p> <p>5 MR WOLFSON: The way it has been put is it's a claim in</p> <p>6 debt, that I have these contractual rights against the</p> <p>7 company and the company --</p> <p>8 MR JUSTICE DAVID RICHARDS: Which have been partly</p> <p>9 satisfied.</p> <p>10 MR WOLFSON: Which have been partly satisfied. Certainly</p> <p>11 I have been approaching it as a claim in debt.</p> <p>12 MR JUSTICE DAVID RICHARDS: So that's the interest, yes.</p> <p>13 MR WOLFSON: Of course I see -- interest and currency</p> <p>14 conversion.</p> <p>15 MR JUSTICE DAVID RICHARDS: Currency conversion is I think</p> <p>16 a claim in damages, isn't it?</p> <p>17 MR WOLFSON: My Lord, with respect, it's a claim in debt,</p> <p>18 isn't it, because you have a contractual right to be</p> <p>19 paid in the foreign currency?</p> <p>20 MR JUSTICE DAVID RICHARDS: You have to give credit for what</p> <p>21 you received, haven't you?</p> <p>22 MR WOLFSON: Yes, but that's always the case in debt. You</p> <p>23 have a claim in debt for whatever has not yet been paid.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes. If you have had an</p> <p>25 accelerated payment because it was a future debt, maybe</p> <p style="text-align: center;">Page 21</p>	<p>1 MR WOLFSON: My Lord, I would like to think first, if I may,</p> <p>2 about the future foreign currency claim.</p> <p>3 MR JUSTICE DAVID RICHARDS: It's you who has mentioned the</p> <p>4 discount rate, you see, so I think one has to, having</p> <p>5 raised it -- I can see there is a point there -- work</p> <p>6 through how it works.</p> <p>7 MR WOLFSON: There are three issues here. There is the</p> <p>8 discount rate, there is the interest and there is the</p> <p>9 foreign currency. If we take a foreign currency debt,</p> <p>10 which is, as in my example, due on 1 January, so it's</p> <p>11 not a future foreign currency debt, it's a present</p> <p>12 foreign currency debt.</p> <p>13 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>14 MR WOLFSON: Part-payment there, my Lord, must be debt,</p> <p>15 that's not damages.</p> <p>16 MR JUSTICE DAVID RICHARDS: So you give credit for what you</p> <p>17 have received, which was an amount in sterling converted</p> <p>18 into US dollars, so I have received X.</p> <p>19 MR WOLFSON: Exactly. As I say, we come back to the point</p> <p>20 I was mentioning earlier, that you can be significantly</p> <p>21 better off in those circumstances because you may</p> <p>22 receive an amount in sterling as at 1 July which is</p> <p>23 a greater amount than you would have received on</p> <p>24 1 January.</p> <p>25 MR JUSTICE DAVID RICHARDS: So you clearly have no currency</p> <p style="text-align: center;">Page 23</p>
<p>1 you have to take that into account.</p> <p>2 MR WOLFSON: Maybe. But, my Lord, if the interest is viewed</p> <p>3 and correctly viewed in debt terms, then the currency</p> <p>4 conversion claim ought to be viewed in debt terms as</p> <p>5 well.</p> <p>6 MR JUSTICE DAVID RICHARDS: I don't see why that follows.</p> <p>7 MR WOLFSON: Because the currency conversion claim is to</p> <p>8 say, "I have a contractual right to be paid in dollars,</p> <p>9 and I haven't had my full fill of dollars and so I still</p> <p>10 have part of my debt unsatisfied."</p> <p>11 MR JUSTICE DAVID RICHARDS: But you were not entitled to</p> <p>12 your debt for another five years.</p> <p>13 MR WOLFSON: If it's a future claim --</p> <p>14 MR JUSTICE DAVID RICHARDS: You are raising some very</p> <p>15 interesting questions. I mean, I am a creditor for a</p> <p>16 US\$1 million payable in five years' time. The company</p> <p>17 goes into administration. My debt is converted into</p> <p>18 sterling at the rate prevailing at the date of</p> <p>19 administration and the discount rate is applied. I get</p> <p>20 paid pounds X. There is then a surplus. My contractual</p> <p>21 right is not to the payment of \$1 million less what I</p> <p>22 have received. My contractual right is for the payment</p> <p>23 of \$1 million in five years' time, less what I have</p> <p>24 received. So I am not quite sure how one would cope</p> <p>25 with this.</p> <p style="text-align: center;">Page 22</p>	<p>1 loss claim.</p> <p>2 MR WOLFSON: You have no currency loss claim, and you have</p> <p>3 actually received more than you would have been entitled</p> <p>4 to so you have benefited.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes, I follow that. Then you</p> <p>6 are saying -- so what do you deduce from that?</p> <p>7 MR WOLFSON: That it would be very odd, my Lord, if there</p> <p>8 was out there a claim which was not only a one-way bet</p> <p>9 for a creditor -- because Mr Zacaroli's argument is,</p> <p>10 when I say it's a one-way bet, he says, "Well, of course</p> <p>11 it's a one-way bet because I either have a claim or I</p> <p>12 haven't, and if I have got a claim it's only the</p> <p>13 members, so to speak, who suffer." But, my Lord, the</p> <p>14 point about this claim is that it's a way for a foreign</p> <p>15 currency creditor to obtain more than he's contractually</p> <p>16 entitled to.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR WOLFSON: That cannot be right, my Lord.</p> <p>19 MR JUSTICE DAVID RICHARDS: Just looking at the foreign</p> <p>20 currency claim, the creditor whose claim is in</p> <p>21 a currency which has depreciated against sterling will</p> <p>22 benefit.</p> <p>23 MR WOLFSON: Yes.</p> <p>24 MR JUSTICE DAVID RICHARDS: That's clear. But we are</p> <p>25 concerned with the creditor in the opposite position.</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 MR WOLFSON: But, my Lord, Mr Zacaroli is not suggesting 2 that it's only a creditor in the opposite position who 3 would have such a claim. 4 MR JUSTICE DAVID RICHARDS: A currency claim. 5 MR WOLFSON: My Lord, the point is this. You have 6 a currency claim if the relevant difference is the 7 difference between the exchange rate at winding-up and 8 the exchange rate when you are paid out, as I understand 9 Mr Zacaroli's position. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR WOLFSON: One also has to factor in the exchange rate at 12 the time when the debt crystallised. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR WOLFSON: You can have a claim, you can have a currency 15 conversion claim, which puts you in a better position 16 than you would have been in if the debt had been paid on 17 time. 18 MR JUSTICE DAVID RICHARDS: Yes. With what result, sorry? 19 MR WOLFSON: With the result that the member -- 20 MR JUSTICE DAVID RICHARDS: I see, you are saying that 21 although the creditor is in a worse position when he is 22 paid in the administration than at the date of 23 administration -- 24 MR WOLFSON: Which is Mr Zacaroli's point. He could -- 25 MR JUSTICE DAVID RICHARDS: He's in a better position --</p> <p style="text-align: center;">Page 25</p>	<p>1 thought of debts which were payable at an earlier date, 2 through the company's breach of contract it had not been 3 paid at the earlier date, it is subsequently paid in 4 a currency which gives the creditor more than he would 5 have got at the earlier date. I am not at all sure it 6 follows that he has any foreign currency loss claim, in 7 those circumstances. 8 MR WOLFSON: Certainly the way understood Mr Zacaroli to be 9 making his submissions is that he was assuming an 10 earlier default by the company. 11 MR JUSTICE DAVID RICHARDS: Sorry? 12 MR WOLFSON: Certainly I understood Mr Zacaroli's case to be 13 assuming a case where there was an earlier default by 14 the company, because that was part of his submissions to 15 say, "The company is in default: I have a claim." 16 MR JUSTICE DAVID RICHARDS: So you are saying, well, what 17 about that case? But it does not answer the more 18 general point as to whether there can be a foreign 19 currency claim. 20 MR WOLFSON: It does, in my submission, to this extent. The 21 contortion one has to go to to decide whether there is 22 or whether there is not a foreign currency claim -- and, 23 equally, we say with contractual interest -- shows that 24 really the way this ought to work is that there is 25 a single date of conversion, which is the date of</p> <p style="text-align: center;">Page 27</p>
<p>1 MR WOLFSON: Vis-a-vis the company than he would have been 2 in on 1 January. 3 MR JUSTICE DAVID RICHARDS: I am not sure Mr Zacaroli 4 addressed that. 5 MR WOLFSON: No, there were a number of points here which 6 have not been addressed on the currency conversion 7 claim. 8 MR JUSTICE DAVID RICHARDS: You are saying there that, in 9 those circumstances, actually, as it happens, he's done 10 better. 11 MR WOLFSON: Yes. 12 MR JUSTICE DAVID RICHARDS: Because the rate at the date of 13 administration -- so let me get this right. The rate at 14 the date of administration was lower than 1 January but 15 1 July it's better. 16 MR WOLFSON: Yes, and one can ... 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR WOLFSON: The short point is this. There are a number of 19 areas here where creditors are better off and where 20 creditors might be worse off in the statutory scheme. 21 You can look at statutory interest. You can look at 22 discount rates. 23 MR JUSTICE DAVID RICHARDS: You see, I may be wrong, but 24 I certainly had been looking at this issue in terms of 25 a presently payable debt. I have not particularly</p> <p style="text-align: center;">Page 26</p>	<p>1 administration or the date of winding-up, and that is 2 it. Those are the rights you have, full stop. So far 3 as interest is concerned thereafter, if you have a debt 4 in foreign currency you have the benefit of the 8 per 5 cent rate from the surplus like everybody else. But you 6 don't have continual rights. The insolvency intervenes. 7 The conversion is made. There is no reference anywhere 8 to later dates for conversion or reanalysis or the 9 reevaluation or anything else. 10 MR JUSTICE DAVID RICHARDS: On one view, it might be said to 11 be quite straightforward, I suppose. The creditor who 12 is owed US\$1 million says, "My contractual right is to 13 US\$1 million. That's what I demand payment of, but 14 I must give credit for sums that I have received. Well, 15 I received £500,000 sterling on 1 July, the dollar 16 equivalent of which at that date was \$900,000. Ergo, my 17 claim is for \$100,000." 18 MR WOLFSON: Yes. 19 MR JUSTICE DAVID RICHARDS: There is nothing very difficult 20 about that. 21 MR WOLFSON: No. My Lord, there is nothing very difficult 22 about a situation where, on 1 July, he receives 23 £500,000. On 1 March that equated to \$1 million. Was 24 it 1 million or 900,000? 25 MR JUSTICE DAVID RICHARDS: His claim is \$1 million.</p> <p style="text-align: center;">Page 28</p>

<p>1 MR WOLFSON: His claim is \$1 million. On 1 March, \$1  2 million dollars is 500,000 sterling. On 1 July, he  3 receives 500,000 sterling, and that's \$1.1 million as at  4 1 July.  5 MR JUSTICE DAVID RICHARDS: Ergo, no currency claim.  6 MR WOLFSON: My Lord, ergo, he's received \$100,000 more.  7 MR JUSTICE DAVID RICHARDS: He has.  8 MR WOLFSON: At the expense of either the members or the  9 company it has resurrected.  10 MR JUSTICE DAVID RICHARDS: Immediately he has received it  11 at the expense of the other foreign currency creditors  12 who have gone the wrong way.  13 MR WOLFSON: Yes, absolutely, or foreign currency creditors  14 who have gone the wrong way.  15 MR JUSTICE DAVID RICHARDS: It is later that it may be at  16 the expense of company.  17 MR WOLFSON: My Lord, yes. There is no indication on  18 Mr Zacaroli's case that this 100,000 would have to be  19 paid back or accounted for.  20 MR JUSTICE DAVID RICHARDS: No, there isn't. I mean, it's  21 clear it doesn't. I don't think anyone suggests that.  22 MR WOLFSON: But, my Lord, it does lead to these very odd  23 results because, as your Lordship says, you could have  24 three foreign currency creditors. You are simply  25 robbing Peter to pay Paul, to some extent. Some are</p> <p style="text-align: center;">Page 29</p>	<p>1 the rules that this is one of the categories of  2 non-provable debts.  3 MR JUSTICE DAVID RICHARDS: Yes. Perhaps I will make the  4 comment now which I nearly made before on that. It's  5 clear that this is not a comprehensive list of  6 non-provable claims.  7 MR WOLFSON: I accept that, yes.  8 MR JUSTICE DAVID RICHARDS: Yes, so Lord Justice Brightman.  9 MR WOLFSON: Lord Justice Brightman. My Lord, I think we  10 are probably on page 21.  11 MR JUSTICE DAVID RICHARDS: Yes.  12 MR WOLFSON: My Lord, in addition to the obvious point that  13 this is plainly obiter but obviously of some authority,  14 the way Lord Justice Brightman approaches it at F is to  15 say:  16 "On that principle, a creditor may claim  17 post-liquidation interest. He does this on the basis  18 that obligations under the contract are not necessarily  19 discharges ...(Reading to the words)... context of a  20 wholly solvent liquidation."  21 I am at 21F.  22 MR JUSTICE DAVID RICHARDS: Yes.  23 MR WOLFSON: Again, we have the case of a wholly solvent  24 liquidation that you would have to make good. My Lord,  25 we submit that again the reference to wholly solvent</p> <p style="text-align: center;">Page 31</p>
<p>1 benefiting. Some are losing inter se.  2 MR JUSTICE DAVID RICHARDS: Yes, but they are all innocent.  3 MR WOLFSON: They are all innocent, yes, absolutely.  4 MR JUSTICE DAVID RICHARDS: So it's an attempt to achieve  5 justice between the innocent.  6 MR WOLFSON: My Lord, yes. Of course we say that the  7 attempt to achieve justice is simply that you are  8 converted to sterling on the relevant administration or  9 winding-up date and that's it.  10 My Lord, unless your Lordship has any further  11 questions on that, I was going to move on to how the  12 liability--  13 MR JUSTICE DAVID RICHARDS: Is Mr Isaacs going to be  14 addressing this? I don't know. I just wanted to know  15 I mean, you haven't actually addressed  16 Lord Justice Brightman and Lord Justice Oliver in Re  17 Lines.  18 MR WOLFSON: My Lord, yes. The issue on  19 Lord Justice Brightman and Lord Justice Oliver in Re  20 Lines is this. First of all, let us go to that. It's  21 at 1C, tab 66. My Lord, I did make one point earlier of  22 course which was that after this case the rules have  23 been amended to deal with non-provable debts and this  24 claim has not been included in there. So that's a point  25 on the silence in the rules. They could have put into</p> <p style="text-align: center;">Page 30</p>	<p>1 liquidation would indicate that even if there is,  2 contrary to my submissions, a currency conversion claim,  3 it is only payable where, without reference to  4 contributions from the members, there is a surplus in  5 the company's assets. It's a similar point to the point  6 we have in relation to contractual interest where there  7 are two questions. First of all, is it payable?  8 Secondly, does the obligation under section 74 extend to  9 it? Of course I make submissions at both levels, so to  10 speak.  11 MR JUSTICE DAVID RICHARDS: Yes.  12 MR WOLFSON: My Lord, the point your Lordship just made on  13 the non-exhaustive nature, was your Lordship referring  14 to 12.3(2) or 12.3(2)(a)? I was not sure which your  15 Lordship was putting to me.  16 MR JUSTICE DAVID RICHARDS: I was referring to 2.  17 MR WOLFSON: 12.3(2). My Lord, yes. On 12.3(2)(a), where  18 one is dealing with postponed debts, of course I invite  19 your Lordship there to (c), so to speak, "In an  20 administration, any claim by which virtue of the Act" --  21 so in 12.3(2)(a) it is so limited. But if your Lordship  22 was putting 12.3(2) to me, then yes.  23 MR JUSTICE DAVID RICHARDS: Yes. Because  24 Lord Justice Brightman says at 21F:  25 "I do not say this is necessarily the solution to</p> <p style="text-align: center;">Page 32</p>



<p>1 the problem posed, but I have not heard any convincing 2 objection to that solution."</p> <p>3 I was just checking back at the summary of counsel's 4 submissions to see whether this was the subject of 5 submissions. But I can't see any referred to, I must 6 say. I think it would have been for the liquidators to 7 raise the submissions probably.</p> <p>8 MR WOLFSON: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: Anyway, there it is. It sort of 10 sounds as if there was some discussion.</p> <p>11 MR WOLFSON: It sounds as if there was discussion during the 12 case and it has found it's way -- it was obviously 13 a point which Lord Justice Brightman found interesting 14 and important.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes, and Lord Justice Oliver 16 agreed with him.</p> <p>17 MR WOLFSON: Yes, he did.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes, thank you.</p> <p>19 MR WOLFSON: My Lord, unless I can help further on that 20 point, I am going to move to my last point, which is how 21 the liability under section 74 should be shared between 22 LBL and LBHI2. My Lord, I hope I can take this fairly 23 shortly because certainly my learned friend Mr Trace did 24 not address this in any detail in writing and really has 25 only raised one point, which is a point on double proof</p> <p style="text-align: center;">Page 33</p>	<p>1 as between LBIE, on the one hand, and the two members, 2 on the other. So what is your submission on that?</p> <p>3 MR WOLFSON: My Lord, I was coming to that. Our submission 4 is that LBIE's legal entitlement is that it can look to 5 any contributory in any amount it wishes. When I say in 6 any amount, within the envelope of the available amount, 7 so your Lordship appreciates the point I make.</p> <p>8 MR JUSTICE DAVID RICHARDS: I do.</p> <p>9 MR WOLFSON: But the court -- and I will develop this, if 10 I may -- on whose behalf LBIE's administrators, or 11 liquidators as the case may be, are making calls ought 12 to direct that calls be made in an appropriate manner, 13 bearing in mind the nature of the contributories and, in 14 particular, the fact that those contributories are 15 themselves in insolvency procedures over which this 16 court has control and has oversight.</p> <p>17 Now, that's a submission which I will develop, 18 unless your Lordship wants me to deal with that point 19 first.</p> <p>20 MR JUSTICE DAVID RICHARDS: I think it is logically the 21 first area and then we move on to the position as 22 between the two members inter se. So why not develop 23 this aspect of it first.</p> <p>24 MR WOLFSON: My Lord, yes. On our primary case, as I said 25 earlier, right at the outset, the power to make calls is</p> <p style="text-align: center;">Page 35</p>
<p>1 which I will come to in a moment.</p> <p>2 My Lord, to give your Lordship the references, we 3 have set out at paragraphs 124 to 133 the relevant 4 factual background, which is that originally we held 5 a single £1 share as nominee and since then \$1 share. 6 Since 1 May 1997 we have held just \$1 share. LBHI2 7 holds 2 million, 5 per cent redeemable preference shares 8 for \$1,000 each. 5.1 million redeemable, et cetera. We 9 own 1 out of 6.28 billion shares. In terms of the 10 aggregate nominal value of LBIE's shares, we hold nought 11 point and then ten noughts follow and then 747769. So 12 it's a pretty small amount. Putting it in terms of 13 dividends, we have worked out that if LBHI2 has been 14 paid something like \$525 million in dividends, sorry, 15 LBH, we have received less than a dollar.</p> <p>16 MR JUSTICE DAVID RICHARDS: Perhaps you could help me on 17 this. First of all, which of the paragraphs in the 18 application for directions does this arise under?</p> <p>19 MR WOLFSON: Yes. Let me go back to that. I think it's 10. 20 Whether the obligations are joint, several or otherwise, 21 whether we can seek a contribution or indemnity, to what 22 extent it is affected by any claims which we have 23 against each other.</p> <p>24 MR JUSTICE DAVID RICHARDS: Right. Okay. Now, just looking 25 at that, so paragraph (a) really is basically an issue</p> <p style="text-align: center;">Page 34</p>	<p>1 a power of the court, as we saw, section 150.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR WOLFSON: Which is delegated to liquidators. My Lord, 4 I won't go through those provisions again.</p> <p>5 MR JUSTICE DAVID RICHARDS: No.</p> <p>6 MR WOLFSON: Your Lordship recalls that rule 4.202 says that 7 the powers conferred by the Act with respect to making 8 of calls on contributories are exercisable by the 9 liquidator as an officer of the court, subject to the 10 court's control. The liquidator also has a duty to 11 adjust the rights of the contributories amongst 12 themselves. The word "shall" is used in the relevant 13 provisions, as we have seen.</p> <p>14 Your Lordship gave the example in argument of 15 a company with two solvent members holding an equal 16 number of shares and a deficit of 100 and suggested that 17 in the first instance you might expect the liquidator to 18 call on each for 50, all other things being equal.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR WOLFSON: I didn't understand your Lordship to be saying 21 that the liquidator, so to speak, wouldn't have the 22 legal right to call on one of them for 100.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR WOLFSON: But that's what I understood your Lordship -- 25 MR JUSTICE DAVID RICHARDS: Or on both of them for 100.</p> <p style="text-align: center;">Page 36</p>

<p>1 MR WOLFSON: As I understood your Lordship, your Lordship</p> <p>2 was saying that's what the liquidator, so to speak,</p> <p>3 ought to do in the first instance.</p> <p>4 MR JUSTICE DAVID RICHARDS: Well, yes, possibly.</p> <p>5 MR WOLFSON: Possibly, yes. It's a point put in argument.</p> <p>6 Here, we have a situation where both members are</p> <p>7 insolvent. This court is supervising all officeholders.</p> <p>8 We submit that this ought to be taken into account in</p> <p>9 determining how calls should be made. Of course, as</p> <p>10 your Lordship recalls, section 150(2), we have looked at</p> <p>11 this, states that in making the call the court can take</p> <p>12 into consideration the fact that some contributories may</p> <p>13 partly or wholly fail to pay the call.</p> <p>14 MR JUSTICE DAVID RICHARDS: Sorry, that's section?</p> <p>15 MR WOLFSON: 150(2), my Lord.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes, I remember it.</p> <p>17 MR WOLFSON: The submission is this: it is not that LBIE's</p> <p>18 liquidators are legally unable to make a call on</p> <p>19 a single member for the full amount. They are legally</p> <p>20 able to do so. But the court, in exercising its control</p> <p>21 as to how calls are made, should see to it that the</p> <p>22 calls are made in a fair way, bearing in mind all the</p> <p>23 relevant factors of the case, which would include the</p> <p>24 amounts of the shareholdings, whether you have solvent</p> <p>25 or insolvent contributories, the likely dividends</p> <p style="text-align: center;">Page 37</p>	<p>1 MR JUSTICE DAVID RICHARDS: Looking at it from the point of</p> <p>2 view of the administrators of LBIE, is it not their duty</p> <p>3 to maximise recoveries for their estate?</p> <p>4 MR WOLFSON: My Lord, yes, it would have to be.</p> <p>5 MR JUSTICE DAVID RICHARDS: So if the maximisation of</p> <p>6 recoveries requires the maximum call on each of the</p> <p>7 members, is that not the answer?</p> <p>8 MR WOLFSON: My Lord, equally --</p> <p>9 MR JUSTICE DAVID RICHARDS: As between LBIE, on the one</p> <p>10 hand, and the two members, on the other.</p> <p>11 MR WOLFSON: My Lord, of course LBIE's administrators or</p> <p>12 officeholders have to get in the maximum they can. But</p> <p>13 insofar as there are different ways of achieving that</p> <p>14 objective, then, for example, you don't have to make</p> <p>15 calls --</p> <p>16 MR JUSTICE DAVID RICHARDS: But that's why I put it to you</p> <p>17 that, both members being insolvent, they are not going</p> <p>18 to make a full recovery from either.</p> <p>19 MR WOLFSON: No.</p> <p>20 MR JUSTICE DAVID RICHARDS: I mean, are they going to make</p> <p>21 a full recovery from both?</p> <p>22 MR WOLFSON: At the moment, the figures -- we don't know</p> <p>23 what the figures are. But of course the point I am</p> <p>24 really making is that the court, when deciding what call</p> <p>25 should be made by LBIE, should also give thought to the</p> <p style="text-align: center;">Page 39</p>
<p>1 payable, all those are factors which ought to be taken</p> <p>2 into account when LBIE's officeholders, subject to the</p> <p>3 court's overall supervision, make calls.</p> <p>4 MR JUSTICE DAVID RICHARDS: Now, if both members are</p> <p>5 insolvent it follows that the administrators of LBIE are</p> <p>6 not going to make a full recovery from either; is that</p> <p>7 right?</p> <p>8 MR WOLFSON: Yes. I mean, there may be an issue here</p> <p>9 depending on whether you include what we do with the</p> <p>10 LBHI2 debt, which complicates the picture a bit. But as</p> <p>11 a general proposition, your Lordship must be right. The</p> <p>12 LBHI2 debt, without wishing to over-complicate it, is</p> <p>13 relevant in a number of respects. First of all, where</p> <p>14 does it rank vis-a-vis LBIE? But, secondly, is that</p> <p>15 something -- and this is a point I will have to come on</p> <p>16 to -- which falls within the section 74 liability?</p> <p>17 Because of course what LBHI2 seeks to do is effectively</p> <p>18 to have us pay that debt by including it within the --</p> <p>19 MR JUSTICE DAVID RICHARDS: Have you addressed that?</p> <p>20 MR WOLFSON: No, I have not yet. This is one of the points</p> <p>21 I need to address under this topic.</p> <p>22 MR JUSTICE DAVID RICHARDS: I see.</p> <p>23 MR WOLFSON: Yes, it might also depend on currency claims</p> <p>24 and interest and all the other results that we have as</p> <p>25 well of course.</p> <p style="text-align: center;">Page 38</p>	<p>1 effect of that on the separate estates of LBL and LBHI2.</p> <p>2 MR JUSTICE DAVID RICHARDS: The administrators of LBIE</p> <p>3 should hold back for the benefit of the creditors of</p> <p>4 those estates.</p> <p>5 MR WOLFSON: No, my Lord, I can't put it in those terms and</p> <p>6 I am not putting it in those terms.</p> <p>7 MR JUSTICE DAVID RICHARDS: No, that's the trouble, isn't</p> <p>8 it?</p> <p>9 MR WOLFSON: Let me put it in these terms. The difference</p> <p>10 between the court's position -- and it's the court's</p> <p>11 ultimate power here, this is the point. It's all</p> <p>12 delegated out to the officeholders. The officeholders</p> <p>13 see things through LBIE spectacles. The court in this</p> <p>14 regard is omniscient. I use the words "in this regard"</p> <p>15 by way of emphasis rather than limitation. The court in</p> <p>16 this regard is omniscient and is looking at the estates</p> <p>17 of LBL and LBHI2 as well.</p> <p>18 MR JUSTICE DAVID RICHARDS: I mean, if you postulate</p> <p>19 a situation in which the administrators of LBIE will be</p> <p>20 able to make a full recovery from one or both of the</p> <p>21 members so there isn't any concern about what LBIE will</p> <p>22 recover, then I can see that there comes into play the</p> <p>23 factors that you are referring to as to how the</p> <p>24 obligation should be split between the two members so</p> <p>25 far as calls by LBIE are concerned. I can see there</p> <p style="text-align: center;">Page 40</p>

<p>1 would be quite a lot of scope for achieving an overall 2 just result. But I have more difficulty in seeing this 3 if LBIE will not make full recovery from either or both 4 of the members, because the power of the court (as you 5 say, it's delegated to the liquidator but who acts 6 subject to the directions of the court) is a power given 7 for the benefit of the LBIE estate. 8 MR WOLFSON: Yes, of course it is. 9 MR JUSTICE DAVID RICHARDS: So at the moment I find it 10 difficult to see how the court or the administrators or 11 liquidators could, as I put it, hold back. 12 MR WOLFSON: My Lord, it may be easier to do this by 13 reference to an example with figures rather than in the 14 abstract, but of course if one posits a situation where 15 both contributories are insolvent but the dividend rates 16 are going to be radically different. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR WOLFSON: When one factors in the claims for contribution 19 inter se, one can conceive of circumstances where it 20 makes really very little difference to LBIE, although 21 there might be a small difference to LBIE, as to whether 22 it goes, so to speak, route A or route B, but the effect 23 on the creditors of the contributories is very, very 24 significant. 25 The submission I really make is simply this. It is</p> <p style="text-align: center;">Page 41</p>	<p>1 doesn't matter. That's not a concern of theirs. 2 MR JUSTICE DAVID RICHARDS: No. 3 MR WOLFSON: But from the court's point of view, my Lord, to 4 have claims made in circumstances where, for example -- 5 let us take a case, for example, where we have 6 a relatively large amount of money, LBHI2 has 7 a relatively small amount of money. If we both pay up 8 whatever the dividend rate is we cannot pay in full. 9 But a call is made on us for a much larger amount than 10 a call is made on LBHI2, despite the fact that we hold 11 the fraction I mentioned of the overall shareholding. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR WOLFSON: I know your Lordship is sitting without a jury. 14 It would be wrong in those circumstances to think, oh, 15 well, look, it doesn't really matter because it will all 16 sort itself out in the wash because LBL will have 17 a claim over in contribution, because that contribution 18 may be worthless. That last point I have made, from 19 LBIE's point of view, is irrelevant. They get the money 20 in, that's fine. The submission I am really making is 21 that from the court's point of view it ought to be 22 relevant. If there is another way of achieving or 23 substantially achieving that result, then in the first 24 instance that's the way in which it ought to be 25 approached.</p> <p style="text-align: center;">Page 43</p>
<p>1 not just a question of LBIE's liquidators making calls, 2 so to speak, free of any other considerations. The 3 submission I make is that the factors of the effect on 4 the contributories themselves and inter se ought to be 5 brought into the picture. I can't go so far as to say 6 they, so to speak, rank above or even perhaps equally 7 with LBIE's obligations to try and maximise the estate. 8 MR JUSTICE DAVID RICHARDS: No. Okay. Right. Thank you. 9 MR WOLFSON: Now, the point I was really making is that the 10 way LBHI2 have put it at paragraph 13 of their 11 supplemental submissions is to say that what I am 12 arguing for is to say that LBIE's officeholders are not 13 entitled to make calls as they wish. My Lord, I hope I 14 have explained that I am not making that submission at 15 all. My submission is that of course they have that 16 entitlement, but the court should be astute to see that 17 it's exercised in a just and fair way in all the 18 circumstances of the case. One of the relevant factors, 19 as I said earlier, given the relevant dividends, is that 20 we submit LBIE's liquidators ought to have regard to the 21 contribution issue, given that later on, for example in 22 this case, we may not be able to make any contribution 23 recovery at all from LBHI2 if there is nothing left. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR WOLFSON: So from LBIE's point of view, so to speak, it</p> <p style="text-align: center;">Page 42</p>	<p>1 My Lord, that is the submission on the point which 2 your Lordship first raised, which is how, so to speak, 3 the calls should be made. The interrelationship between 4 the obligation vis-a-vis LBIE's and the obligations 5 between ourselves. 6 The second point therefore, moving from, so to 7 speak, LBIE being in the picture just to the situation 8 inter se, is whether we have a contribution claim 9 between ourselves. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR WOLFSON: Now, my Lord, I hope I can take this fairly 12 shortly because we cited a lot of authority on this 13 point. The reference is paragraph 144 of our written 14 opening. In response, the only point which appears to 15 have been taken in relation to the contribution point by 16 LBHI2 is that a contribution claim would contravene the 17 rule against double proof. That appears to be the only 18 point taken. So, my Lord, that was the only point I was 19 proposing to deal with orally now. 20 MR JUSTICE DAVID RICHARDS: Let me just have a look at your 21 paragraph 144. 22 MR WOLFSON: 144, my Lord, yes. In addition, my Lord, the 23 points made at 136 and 137 are also relevant here. 24 MR JUSTICE DAVID RICHARDS: Well, yes. The citation from 25 McPherson at 137 is, in broad terms, saying that the</p> <p style="text-align: center;">Page 44</p>

<p>1 losses should be shared in the same proportion as gains.</p> <p>2 MR WOLFSON: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: So if you were to get 1 per cent</p> <p>4 of a return of capital, you should be required to</p> <p>5 contribute 1 per cent of the losses.</p> <p>6 MR WOLFSON: Precisely.</p> <p>7 MR JUSTICE DAVID RICHARDS: They then go on to say "in</p> <p>8 direct proportion to the nominal amount of the shares</p> <p>9 held", and that probably presupposes a single class of</p> <p>10 shares. It is a little bit more complicated where, as</p> <p>11 here, you have classes of preference shares.</p> <p>12 MR WOLFSON: I accept that.</p> <p>13 MR JUSTICE DAVID RICHARDS: But subject to that -- that's</p> <p>14 basically what you say.</p> <p>15 MR WOLFSON: It a very simple point, my Lord.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes. I can see the force of</p> <p>17 that certainly. No issue is taken, you say, by Mr Trace</p> <p>18 in his submissions on that.</p> <p>19 MR WOLFSON: Unless I have missed it, no issue was taken</p> <p>20 with any of this.</p> <p>21 MR JUSTICE DAVID RICHARDS: There is a sort of factual point</p> <p>22 here. You mentioned earlier that the original was it a</p> <p>23 sterling share you held?</p> <p>24 MR WOLFSON: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: You now have a dollar share and</p> <p style="text-align: center;">Page 45</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>2 MR WOLFSON: So it's not just the fact that we were, so to</p> <p>3 speak, in the corner holding one share. For a lot of</p> <p>4 the period of the time, people seem to have ignored our</p> <p>5 existence at all.</p> <p>6 MR JUSTICE DAVID RICHARDS: There it is. You are certainly</p> <p>7 not at the moment making that argument. All right. So</p> <p>8 you say, well, contributions should be on this issue you</p> <p>9 have just discussed.</p> <p>10 MR WOLFSON: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: And that's supported -- I mean,</p> <p>12 I just looked at those citations from Gore-Browne on</p> <p>13 McPherson, but you say that the authorities in</p> <p>14 paragraph 144 support that approach.</p> <p>15 MR WOLFSON: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: It sounds right, doesn't it?</p> <p>17 MR WOLFSON: My Lord, not only does it sound right but of</p> <p>18 course it is right.</p> <p>19 MR JUSTICE DAVID RICHARDS: That's good too.</p> <p>20 MR WOLFSON: But my Lord Ex Parte Maude is a call on shares</p> <p>21 point, but of course we make the point that it shouldn't</p> <p>22 make a difference. I mean, it's difficult to see what</p> <p>23 the difference of principle is.</p> <p>24 MR JUSTICE DAVID RICHARDS: Birch v Cropper said, yes,</p> <p>25 distribution of assets, yes. It does not sound -- I</p> <p style="text-align: center;">Page 47</p>
<p>1 you did have a sterling share, or have I got it the</p> <p>2 wrong way round?</p> <p>3 MR WOLFSON: No, your Lordship has it the right way round.</p> <p>4 Originally we had a £1 sterling share as nominee.</p> <p>5 MR JUSTICE DAVID RICHARDS: As nominee.</p> <p>6 MR WOLFSON: For LBH plc.</p> <p>7 MR JUSTICE DAVID RICHARDS: Then you would have been</p> <p>8 entitled to an indemnity.</p> <p>9 MR WOLFSON: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: Now, it's not really an issue</p> <p>11 for this hearing, but what is your position as to</p> <p>12 whether LBL held the dollar share? Do you say that LBL</p> <p>13 held the dollar share as nominee for LBHI2 or not?</p> <p>14 MR WOLFSON: I wish I could, but we have no evidence to</p> <p>15 support that.</p> <p>16 MR JUSTICE DAVID RICHARDS: Okay. Thank you.</p> <p>17 MR WOLFSON: Currently, I might add. I can't make that</p> <p>18 submission at the moment, no. I don't want to take</p> <p>19 a whole load of jury points before your Lordship, but</p> <p>20 there are a number of documents. Just to give your</p> <p>21 Lordship the reference, it's bundle 11, tab 7 and</p> <p>22 bundle 11, tab 8, where actually there are</p> <p>23 contemporaneous documents going back to 2008 which</p> <p>24 actually refer to LBHI2 being the sole shareholder of</p> <p>25 the company.</p> <p style="text-align: center;">Page 46</p>	<p>1 mean, we will hear from Mr Trace, but judging by his</p> <p>2 written submissions he's not taking issue with it.</p> <p>3 MR WOLFSON: My Lord, he does not seem to be. He does take</p> <p>4 a point on double proof so I should say a word about</p> <p>5 that.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: My Lord, with respect, this is a bad point. We</p> <p>8 are only saying, to make it clear, that LBL would have</p> <p>9 a contribution or indemnity claim -- it is better seen</p> <p>10 in terms of contribution -- if LBL has paid more than</p> <p>11 its rateable share of any shortfall or LBIE has validly</p> <p>12 made a deduction from LBL's claim against LBIE for more</p> <p>13 than that amount, because it may be the case that the</p> <p>14 way we paid, so to speak, is not formal payment in but</p> <p>15 they have not paid us out on our claim. It comes to the</p> <p>16 same thing.</p> <p>17 MR JUSTICE DAVID RICHARDS: Sorry?</p> <p>18 MR WOLFSON: We would have a contribution claim against</p> <p>19 LBHI2 if we paid more than our rateable share. There</p> <p>20 are two ways of putting it.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes, I understand.</p> <p>22 MR WOLFSON: In those circumstances, LBIE would already have</p> <p>23 made some recovery from LBL and what LBIE would then be</p> <p>24 able to recover ultimately from LBHI2 would be limited.</p> <p>25 It would have to give credit obviously.</p> <p style="text-align: center;">Page 48</p>

<p>1 MR JUSTICE DAVID RICHARDS: It would.</p> <p>2 MR WOLFSON: Ultimately. It may be that in the first</p> <p>3 instance it could, so to speak, claim more, but it would</p> <p>4 have to give back any surplus. That's plainly right.</p> <p>5 For example, to go back to the example your Lordship</p> <p>6 gave, in the circumstances where you have 100 and two</p> <p>7 members, if, for example, you both claim on 60 for both,</p> <p>8 ultimately the 20 would have to come back at some point.</p> <p>9 My Lord, therefore our answer is simply this. If</p> <p>10 LBIE were claiming against LBHI2 for any remaining</p> <p>11 shortfall and if LBL was making its contribution claim</p> <p>12 against LBHI2, LBL and LBIE would not be proven for the</p> <p>13 same debt. So there is no problem of double proof.</p> <p>14 Provided people give credit for what has been paid in</p> <p>15 and any moneys coming back, there is no problem of</p> <p>16 double proof here at all.</p> <p>17 MR JUSTICE DAVID RICHARDS: Well, normally -- the question</p> <p>18 I think is whether LBIE can prove in the administration</p> <p>19 of each of the members for the full amount of the call</p> <p>20 until it has made full recovery. I mean, if it can</p> <p>21 prove for the full amount until it gets full recovery,</p> <p>22 then the rule against double proof I would have thought</p> <p>23 does apply.</p> <p>24 MR WOLFSON: It would apply for so long as, so to speak,</p> <p>25 more money has been paid out and none has come back in.</p> <p style="text-align: center;">Page 49</p>	<p>1 circumstances for claiming 100 from both.</p> <p>2 MR JUSTICE DAVID RICHARDS: Mr Wolfson, I think we have been</p> <p>3 through that. Let us assume against you on that that</p> <p>4 it's a claim of 100 against each.</p> <p>5 MR WOLFSON: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: The issue is I think whether</p> <p>7 LBIE has to reduce its proof to 90, given that it has</p> <p>8 received 10 from LBL.</p> <p>9 MR WOLFSON: Yes. My Lord, can I see whether that is the</p> <p>10 way Mr Trace is putting it and consider the point your</p> <p>11 Lordship has put to me.</p> <p>12 MR JUSTICE DAVID RICHARDS: How do you address this?</p> <p>13 MR WOLFSON: My Lord, we have dealt with it in our</p> <p>14 supplemental submissions.</p> <p>15 MR JUSTICE DAVID RICHARDS: I see. The point on double</p> <p>16 proof is something, as you say, Mr Trace raised. Then</p> <p>17 you deal with it --</p> <p>18 MR WOLFSON: We have dealt with it in -- I will find the</p> <p>19 reference -- in our supplemental submissions in -- no,</p> <p>20 what has happened is this. This is a point taken by</p> <p>21 LBHI2 in its supplemental submissions.</p> <p>22 MR JUSTICE DAVID RICHARDS: Very well. I will hear what</p> <p>23 Mr Trace has to say. You can deal with it in reply.</p> <p>24 Mr Trower will make common calls with Mr Trace on this.</p> <p>25 So there will then be a response to your reply to</p> <p style="text-align: center;">Page 51</p>
<p>1 There would be a right of contribution, but it may</p> <p>2 not -- it depends when that right of contribution</p> <p>3 exists. Your Lordship has given the example where, to</p> <p>4 take your Lordship's figures, 100 has been claimed from</p> <p>5 both.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: If one puts it in those terms, that might be</p> <p>8 the result that you end up with.</p> <p>9 MR JUSTICE DAVID RICHARDS: Let us take 100. So LBIE makes</p> <p>10 calls on each of you for 100 and lodges a proof for 100</p> <p>11 against each of you. Let us assume your aliquot share</p> <p>12 as between you and LBHI2 is one and LBHI2 is 99. You</p> <p>13 pay 10. LBHI2 has not paid anything. Now, I would have</p> <p>14 thought that LBIE could continue to prove for 100</p> <p>15 against LBHI2 and wouldn't have to give credit for the</p> <p>16 10 it had received from you. That's probably the point.</p> <p>17 So you say: no, the administrators of LBIE would have to</p> <p>18 give credit.</p> <p>19 MR WOLFSON: For that 10.</p> <p>20 MR JUSTICE DAVID RICHARDS: Okay. Well, that's quite an</p> <p>21 issue.</p> <p>22 MR WOLFSON: Yes. My Lord, of course another way of</p> <p>23 approaching this is to say that, in those circumstances,</p> <p>24 without wishing to repeat what I have said before, the</p> <p>25 court to, unless there is a very good reason in those</p> <p style="text-align: center;">Page 50</p>	<p>1 Mr Trace.</p> <p>2 MR WOLFSON: Yes. It's put very shortly in paragraph 15 of</p> <p>3 Mr Trace's supplemental submissions.</p> <p>4 (11.45 am)</p> <p>5 MR WOLFSON: It seems to be put on certainly a wider basis</p> <p>6 than just the example your Lordship put to me.</p> <p>7 MR JUSTICE DAVID RICHARDS: So we are at paragraph --</p> <p>8 MR WOLFSON: Paragraph 15, the last paragraph.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes, just let me get -- I'm</p> <p>10 getting a little lost. Yes, all right, we will deal</p> <p>11 with it that way.</p> <p>12 MR WOLFSON: So the way that it is put there is</p> <p>13 significantly than the example your Lordship --</p> <p>14 MR JUSTICE DAVID RICHARDS: Is it? Yes, well, I will look</p> <p>15 at that. Yes, I see.</p> <p>16 MR WOLFSON: My Lord the last point, if we can just sit</p> <p>17 a little bit longer than we normally would for the</p> <p>18 break.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR WOLFSON: But this is the last point -- is whether the</p> <p>21 liability under Section 74 extends to the LBHI 2</p> <p>22 sub-debt.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR WOLFSON: We dealt with this in writing, the reference is</p> <p>25 118 to 122. Of course, the contractual points are</p> <p style="text-align: center;">Page 52</p>

<p>1 relevant here. In other words, in determining whether</p> <p>2 the borrower, is solvent and the standard term, 5(2),</p> <p>3 solvency ought to be determined by what the borrower</p> <p>4 itself can pay, without reference to contributions from</p> <p>5 the members.</p> <p>6 MR JUSTICE DAVID RICHARDS: Right.</p> <p>7 MR WOLFSON: So if LBIE can't pay senior liabilities in full</p> <p>8 from its own assets, which would include post-insolvency</p> <p>9 interests, then it would be solvent for these purposes.</p> <p>10 In those circumstances, even if the LBHI 2 sub-debt is</p> <p>11 a debt or liability within Section 74, the value would</p> <p>12 be zero, for these purposes.</p> <p>13 MR JUSTICE DAVID RICHARDS: You will have to take me through</p> <p>14 this. Sorry, I am not sure I am seeing this.</p> <p>15 MR WOLFSON: Understand the term 5(2) --</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR WOLFSON: -- in assessing whether the borrower is</p> <p>18 solvent.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR WOLFSON: We submit that solvency is to be determined by</p> <p>21 reference to what LBIE itself can pay, without reference</p> <p>22 to any contributions that could be made by the members.</p> <p>23 MR JUSTICE DAVID RICHARDS: What I am just confused about,</p> <p>24 I thought we were on Section 74?</p> <p>25 MR WOLFSON: Yes, and whether it includes a sub-debt.</p> <p style="text-align: center;">Page 53</p>	<p>1 MR WOLFSON: Because in 5(2):</p> <p>2 "For the purposes of sub-paragraph 1B above, the</p> <p>3 borrower shall be solvent if it is able to pay its</p> <p>4 liabilities, the senior liabilities, in full from its</p> <p>5 own assets."</p> <p>6 We submit that means without reference to</p> <p>7 contributions from members.</p> <p>8 MR JUSTICE DAVID RICHARDS: Sorry, this is 5(2), did you</p> <p>9 say?</p> <p>10 MR WOLFSON: 5(2).</p> <p>11 MR JUSTICE DAVID RICHARDS: "The borrower shall be solvent</p> <p>12 if it is able to pay its liabilities, other than</p> <p>13 subordinated liabilities, in full."</p> <p>14 MR WOLFSON: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: You inserted the words "from its</p> <p>16 assets".</p> <p>17 MR WOLFSON: My Lord, I am submitting that in the context</p> <p>18 that must mean from its own assets, because otherwise,</p> <p>19 my Lord, one has a situation that the company has to be</p> <p>20 insolvent.</p> <p>21 MR JUSTICE DAVID RICHARDS: I am sorry, I mean plainly while</p> <p>22 the company is a going concern, in applying 5(1)B, one</p> <p>23 does not take account of the liability of unlimited</p> <p>24 members, because they can only be called in</p> <p>25 a liquidation.</p> <p style="text-align: center;">Page 55</p>
<p>1 MR JUSTICE DAVID RICHARDS: A sub-debt, yes. Okay, right,</p> <p>2 okay, go on.</p> <p>3 MR WOLFSON: The submission I am seeking to make is that</p> <p>4 because of the terms of the sub-debt, the liability</p> <p>5 under Section 74 cannot extend to it.</p> <p>6 MR JUSTICE DAVID RICHARDS: Right.</p> <p>7 MR WOLFSON: Because if LBIE can't pay senior liabilities in</p> <p>8 full, it wouldn't be solvent and would have no</p> <p>9 obligations therefore to pay under the contract, and</p> <p>10 therefore even if the words in Section 74, debts and</p> <p>11 liabilities, are wide enough to encompass LBIE's</p> <p>12 obligation in this regard, the value of that obligation</p> <p>13 would be zero.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, I see. Yes.</p> <p>15 MR WOLFSON: One can make the point by imagining this</p> <p>16 example, let's say you have a debt, and the debt says,</p> <p>17 "This debt is only payable if the company can pay it</p> <p>18 from its own resources, without regard to any</p> <p>19 contributions it may get from its members". I am</p> <p>20 talking about an unlimited company. In those</p> <p>21 circumstances --</p> <p>22 MR JUSTICE DAVID RICHARDS: I follow that. No, I follow</p> <p>23 that, but you say that is this case, do you?</p> <p>24 MR WOLFSON: Exactly.</p> <p>25 MR JUSTICE DAVID RICHARDS: How do you get there?</p> <p style="text-align: center;">Page 54</p>	<p>1 MR WOLFSON: Exactly.</p> <p>2 MR JUSTICE DAVID RICHARDS: But once the company goes into</p> <p>3 liquidation, you say the borrower shall be solvent if it</p> <p>4 is able to pay its liabilities. Well, it will be able</p> <p>5 to pay its liabilities, let us assume, from the</p> <p>6 realisation on its assets and from calls on its members.</p> <p>7 MR WOLFSON: But my Lord what one then has is this very</p> <p>8 peculiar situation that the borrower has to go into --</p> <p>9 in my submission, of course, I say it can only be done</p> <p>10 in liquidation -- an insolvency regime, it may cause on</p> <p>11 its members, in order to be treated as solvent, for the</p> <p>12 purposes of paying sub-debt.</p> <p>13 MR JUSTICE DAVID RICHARDS: Well, it seems though me that in</p> <p>14 applying 5(2) in a liquidation, you might have</p> <p>15 a situation -- I find it difficult to see you disregard,</p> <p>16 at any rate in determining the borrower can pay its</p> <p>17 liabilities, the proceeds of cause. The borrower will</p> <p>18 be able, if it makes calls, it may be able to pay its</p> <p>19 liabilities.</p> <p>20 MR WOLFSON: My Lord, let's assume that the only member was</p> <p>21 LBHI 2 for the moment.</p> <p>22 MR JUSTICE DAVID RICHARDS: Right.</p> <p>23 MR WOLFSON: In those circumstances, the position would be</p> <p>24 that LBHI 2 would have to put money in, which would</p> <p>25 then, on this analysis, make the company solvent again,</p> <p style="text-align: center;">Page 56</p>

<p>1 so it could pay the money back to LBHI 2.</p> <p>2 MR JUSTICE DAVID RICHARDS: Well, it could put the money in</p> <p>3 in the first instance to pay the senior liabilities</p> <p>4 couldn't it?</p> <p>5 MR WOLFSON: Of course, absolutely. But your Lordship is</p> <p>6 putting to me a situation where the only way to pay the</p> <p>7 LBHI2 sub-debt was by way of calls on the members.</p> <p>8 MR JUSTICE DAVID RICHARDS: No, I wasn't actually.</p> <p>9 MR WOLFSON: Oh sorry, with the assumption --</p> <p>10 MR JUSTICE DAVID RICHARDS: I was putting you in a situation</p> <p>11 where the only way of paying the senior liabilities was</p> <p>12 by calls.</p> <p>13 MR WOLFSON: In which case the call can be made. But the</p> <p>14 question is whether --</p> <p>15 MR JUSTICE DAVID RICHARDS: Well, then surely that performs</p> <p>16 part of the ability of the company to pay its</p> <p>17 liabilities for the purposes of 5(2)?</p> <p>18 MR WOLFSON: Yes, if a call is made in order to pay its</p> <p>19 senior liabilities.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR WOLFSON: Then that obviously follows. But my Lord what</p> <p>22 is sought to be done here is effectively for LBHI 2 to</p> <p>23 say the sub-debt set forms part of the Section 74</p> <p>24 liability, so that effectively put in by LBHI 2 then</p> <p>25 comes back to them by way of the sub-debt. But my Lord</p> <p style="text-align: center;">Page 57</p>	<p>1 subordination. So you have a discrepancy.</p> <p>2 MR JUSTICE DAVID RICHARDS: Sorry, I mean the call -- I mean</p> <p>3 obviously the first application of any money called from</p> <p>4 the members will be to pay the unsubordinated proveable</p> <p>5 debts.</p> <p>6 MR WOLFSON: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: In fact, it is not needed for</p> <p>8 that purpose, if that is the hypothesis way of</p> <p>9 proceeding on it. The company is able to pay its</p> <p>10 proveable debts, excluding interest, but that is not</p> <p>11 a proveable debt, from its own resources. But if it had</p> <p>12 needed to make a call, it would have gone to pay the</p> <p>13 proveable debts.</p> <p>14 MR WOLFSON: Yes, but if the LBHI 2 sub-debt forms part of</p> <p>15 the Section 74 liability --</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR WOLFSON: -- then presumably when the call was made, the</p> <p>18 call would be made including that liability on --</p> <p>19 MR JUSTICE DAVID RICHARDS: You could have a series of</p> <p>20 calls, you need not call at all at once, I don't think.</p> <p>21 But you could call.</p> <p>22 MR WOLFSON: You could call.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR WOLFSON: In which case you have got 100 of unsecured,</p> <p>25 300 of sub-debt. You make a call for -- so let's say</p> <p style="text-align: center;">Page 59</p>
<p>1 if the dividend, let me put this way, paid by LBHI 2,</p> <p>2 taking your Lordship's example, on a proof by LBIE's</p> <p>3 office holders in respect of a shortfall in LBIE, was</p> <p>4 insufficient to allow LBIE to make payment in full to</p> <p>5 all its creditors in respect of its unsecured debts, one</p> <p>6 then has this situation; if the dividend paid by LBHI 2</p> <p>7 on the proof was distributed by LBIE's office holders</p> <p>8 for unsecured claims, one then has a discrepancy between</p> <p>9 the basis of the dividend paid to the company by LBHI 2,</p> <p>10 which is calculated on a basis including the sub-debt,</p> <p>11 and the use of the company of that dividend as regards</p> <p>12 distributions, which would not be used to pay down the</p> <p>13 sub-debt, which ranks behind. If the dividend paid was</p> <p>14 distributed in respect of all the claims used to</p> <p>15 quantify the proof, including the LBHI 2 sub-debt, then,</p> <p>16 of course, that would contradict the subordination</p> <p>17 provisions in the LBHI 2 sub-debt. So on your</p> <p>18 Lordship's example, if a call can be made, if a call is</p> <p>19 made on LBHI 2 --</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR WOLFSON: -- and monies come in, and that call is made on</p> <p>22 the basis that the LBHI 2 sub-debt is callable, and</p> <p>23 forms part of the call, the monies would not be used for</p> <p>24 that basis, they would be used for paying unsecured</p> <p>25 creditors first, because that is the nature of the</p> <p style="text-align: center;">Page 58</p>	<p>1 you have got 500 of unsecured, 300 of sub-debt.</p> <p>2 MR JUSTICE DAVID RICHARDS: I can see there was a point,</p> <p>3 Mr Wolfson, that you might say that until the state is</p> <p>4 in a position to pay the senior liabilities in full,</p> <p>5 a call should not be made in respect of the subordinated</p> <p>6 debt, because the subordinated debt is not yet payable.</p> <p>7 MR WOLFSON: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: So there should be a wait and</p> <p>9 see.</p> <p>10 MR WOLFSON: I can certainly get that far, my Lord.</p> <p>11 MR JUSTICE DAVID RICHARDS: You get that far. I follow</p> <p>12 that.</p> <p>13 MR WOLFSON: But that may, just for me, put the problem out.</p> <p>14 MR JUSTICE DAVID RICHARDS: But then you get to the point of</p> <p>15 the prior liabilities have been paid, and we had better</p> <p>16 park for the moment the problem of statutory interest</p> <p>17 and proveable claims.</p> <p>18 MR WOLFSON: Yes, exactly.</p> <p>19 MR JUSTICE DAVID RICHARDS: You have then got the LBHI 2</p> <p>20 subordinated claim, which at that point, it is entitled</p> <p>21 to assert on any footing.</p> <p>22 MR WOLFSON: Yes, yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: You say well that is not a debt</p> <p>24 that can fall within Section 74.</p> <p>25 MR WOLFSON: Yes, or that if it does fall within Section 74,</p> <p style="text-align: center;">Page 60</p>

<p>1 the value of it is zero because it is payable only when  2 the company is solvent, and that must mean, as a matter  3 of construction, that must mean when the company is  4 solvent without recourse to its members.  5 MR JUSTICE DAVID RICHARDS: That is the case, because its  6 liabilities have been paid, let us assume.  7 MR WOLFSON: If they had all been paid in full, but if there  8 is \$1 that has not been paid, then nothing can be paid  9 (overspeaking).  10 MR JUSTICE DAVID RICHARDS: No, we are talking about  11 senior -- if we read senior liabilities as meaning  12 proveable debts --  13 MR WOLFSON: Yes.  14 MR JUSTICE DAVID RICHARDS: -- let us assume that they have  15 all been paid.  16 MR WOLFSON: Yes.  17 MR JUSTICE DAVID RICHARDS: We have parked the issue of  18 statutory interest and non-proveable claims. The  19 question then is you are saying well the subordinated  20 debt is not payable, because the borrower is not able to  21 pay it. Actually that is not -- sorry, the ability to  22 pay is the ability to pay the senior liabilities.  23 MR WOLFSON: It is liabilities --  24 MR JUSTICE DAVID RICHARDS: Sorry, I have got myself  25 confused now.</p> <p style="text-align: center;">Page 61</p>	<p>1 concerned with solvency. The company is solvent,  2 because it has paid all its senior liabilities.  3 MR WOLFSON: Yes.  4 MR JUSTICE DAVID RICHARDS: So I don't think that is going  5 to help. I would have thought at this point you grab  6 hold of Mr Trower's contributory rule, don't you? You  7 say that LBHI 2 shouldn't be allowed to claim anything  8 on the subordinated debt, until it has made good its  9 contribution to the fund.  10 MR WOLFSON: Well, my Lord, can I --  11 MR TROWER: (inaudible) rule in Cherry v Boulton.  12 MR JUSTICE DAVID RICHARDS: What you are saying -- I am  13 sorry, Section 74, your basic proposition is that  14 Section 74 applies to -- well, your first point is  15 proveable debt, but of course the subordinated debt is  16 a proveable debt --  17 MR WOLFSON: Yes.  18 MR JUSTICE DAVID RICHARDS: -- but it is subordinate.  19 MR WOLFSON: It is subordinated and proveable, so that's not  20 going --  21 MR JUSTICE DAVID RICHARDS: So you have to -- provable debts  22 doesn't get you home.  23 MR WOLFSON: That's the problem.  24 MR JUSTICE DAVID RICHARDS: You have to say that there is  25 something in the subordination. You rely --</p> <p style="text-align: center;">Page 63</p>
<p>1 MR WOLFSON: My Lord, it is ability to pay liabilities,  2 other than subordinated.  3 MR JUSTICE DAVID RICHARDS: Yes.  4 MR WOLFSON: Liabilities is defined as all present and  5 future sums payable, this is on page 2 of the contract,  6 shortly and separately(?) or otherwise.  7 MR JUSTICE DAVID RICHARDS: Yes. Well, let's assume they  8 have all been paid.  9 MR WOLFSON: So the question would be in 1B, whether the  10 borrower would be solvent immediately after the payment  11 by the borrower.  12 MR JUSTICE DAVID RICHARDS: Well, all the liabilities have  13 been paid.  14 MR WOLFSON: Yes.  15 MR JUSTICE DAVID RICHARDS: So it is, in terms of this  16 clause, solvent forever and a day now.  17 MR WOLFSON: Yes.  18 MR JUSTICE DAVID RICHARDS: Right.  19 MR WOLFSON: Now you have to make a call on the members.  20 MR JUSTICE DAVID RICHARDS: You say no, you don't,  21 because --  22 MR WOLFSON: Because the notion that you are solvent in  23 circumstances where the only way you can pay the debt is  24 to make --  25 MR JUSTICE DAVID RICHARDS: No, no, I am sorry, we are not</p> <p style="text-align: center;">Page 62</p>	<p>1 MR WOLFSON: That's the problem.  2 MR JUSTICE DAVID RICHARDS: -- on the definition of  3 solvency.  4 MR WOLFSON: Yes.  5 MR JUSTICE DAVID RICHARDS: But there is a slight difficulty  6 there, I think.  7 MR WOLFSON: My Lord, exactly. I can't get home on my  8 proveable point, in this regard.  9 MR JUSTICE DAVID RICHARDS: No. No, I follow, I follow.  10 MR WOLFSON: My Lord, it may be that the contributory rule  11 does come to save me, and Mr Trower's tailcoat is always  12 a wonderful place to hang on to. But my Lord, bearing  13 that I mind that I said I would finish by 12 for my  14 learned friends. Can I see how Mr Trace develops this  15 point? I think what I am doing at the moment is  16 responding to a point which hasn't actually yet perhaps  17 fully been made, and my Lord it may be that I can come  18 back.  19 MR JUSTICE DAVID RICHARDS: Right, we will see how it goes.  20 Very well.  21 MR WOLFSON: My Lord, unless I can help you further.  22 Thank you.  23 MR JUSTICE DAVID RICHARDS: No, Mr Wolfson, thank you very  24 much. We will take a break now. Can I just say I think  25 it would help me, it might also help the shorthand</p> <p style="text-align: center;">Page 64</p>



<p>1 writer, I don't know, if Mr Trace was able speak from</p> <p>2 Mr Wolfson's position. It would help you. Yes, it</p> <p>3 would help me too. So it would be a good idea, if the</p> <p>4 two teams swap over, over the break, and that might just</p> <p>5 take a little longer than five minutes, I think. Good,</p> <p>6 thank you.</p> <p>7 (12.04 pm)</p> <p>8 (A short break)</p> <p>9 (12.12 pm)</p> <p>10 MR JUSTICE DAVID RICHARDS: Mr Trace.</p> <p>11 Submissions by MR TRACE QC</p> <p>12 MR TRACE: May it please your Lordship, I have been given</p> <p>13 what some might say is the graveyard slot, the Friday</p> <p>14 afternoon slot, so my Lord I will do my best to keep</p> <p>15 your Lordship awake and my learned friends. I will</p> <p>16 begin, if I may, with the very simple submission we ask</p> <p>17 your Lordship to accept, is that basically all our</p> <p>18 points are right, save where anyone disagrees with us,</p> <p>19 in which case they are wrong. Now my Lord can I begin</p> <p>20 because Mr Wolfson obviously has to leave this</p> <p>21 afternoon. He has raised two points. We obviously</p> <p>22 accept and support everything Mr Wolfson basically says,</p> <p>23 but there are two areas where we disagree. With the</p> <p>24 greatest respect the points that he has made are both</p> <p>25 thoroughly bad points. The first point was the point</p> <p style="text-align: center;">Page 65</p>	<p>1 because it is a proveable debt, it is as simple as that.</p> <p>2 Therefore it is within Section 74. My learned friend</p> <p>3 accepts that doesn't get him home, so what he has to</p> <p>4 show with his argument, he has to say it is reduced to</p> <p>5 zero. My Lord I don't want to ask rhetorical questions,</p> <p>6 but we say there is absolutely no reason to reduce it to</p> <p>7 zero. What happens then is once the senior debt has</p> <p>8 been paid, that is a given, our debt is then payable in</p> <p>9 full. There is absolutely no reason to reduce it at</p> <p>10 all. My Lord, my learned friend, when your Lordship was</p> <p>11 pressing him, was saying, "Oh well, what I'm going to do</p> <p>12 is I'm going to see how it has developed". My Lord, it</p> <p>13 is obvious how it is developed, and it is obvious how it</p> <p>14 is answered. So with respect, that is also a thoroughly</p> <p>15 bad point. My Lord, I made those points and my learned</p> <p>16 friend is here.</p> <p>17 Now my Lord it is worth to stand back and seeing is</p> <p>18 what are we basically saying in relation to LBHI 2. Now</p> <p>19 my Lord just as Mr Wolfson submitted, and we accept is</p> <p>20 right on this part of the case, your Lordship must look</p> <p>21 at each administration separately. Now my Lord in</p> <p>22 LBIE's administration we have two areas of debt. We</p> <p>23 have, first of all, our unsubordinated debt. Now there,</p> <p>24 we respectfully submit, we are in exactly the same</p> <p>25 position as LBL. We are entitled to prove, we say, and</p> <p style="text-align: center;">Page 67</p>
<p>1 your Lordship knows, which is in relation to how the</p> <p>2 liability was to be split inter se. The very short</p> <p>3 answer in relation to that, my Lord, and we set it out</p> <p>4 in our supplemental submissions, it is paragraphs 13 to</p> <p>5 15, but the basic point, and your Lordship is absolutely</p> <p>6 right, and here I do accept for once what Mr Trower says</p> <p>7 in this case, that the obligation on the LBIE</p> <p>8 administrators is to maximise the estate. That must be</p> <p>9 mean, and there can be no other meaning other than that</p> <p>10 this, that they have to make a call in the full amount,</p> <p>11 on both the members. If that happens, there is no</p> <p>12 question of contribution inter se at all. A call has</p> <p>13 been made, it has to be satisfied, and until it is</p> <p>14 satisfied in full, it is a liability in respect of each</p> <p>15 of them, in full, to make that obligation. If it were</p> <p>16 otherwise, my Lord, the rule against double proof would</p> <p>17 clearly be exercised, as your Lordship rightly put to my</p> <p>18 learned friend in submission. So we say with the</p> <p>19 greatest respect that is a thoroughly bad point and we</p> <p>20 can really deal very quickly.</p> <p>21 My Lord, the other point, the only other point that</p> <p>22 was made was the point in relation to Section 74, that</p> <p>23 inter se between LBL and my clients. My Lord, again</p> <p>24 with respect, it is a thoroughly bad point. The very</p> <p>25 simple point is our sub-debt is included in Section 74,</p> <p style="text-align: center;">Page 66</p>	<p>1 we are entitle to get a dividend and there is no set</p> <p>2 off. The reason why there is no set off is because the</p> <p>3 LBIE administrators are, ipso facto, in</p> <p>4 an administration and they can't make calls. These</p> <p>5 calls can only be made in a liquidation. The other part</p> <p>6 of the debt is the sub-debt. Now there, my Lord, our</p> <p>7 main submission is that, yes, there is some</p> <p>8 subordination, but they are only subordinated to come to</p> <p>9 the bottom of the unsecured claims, but no further in</p> <p>10 the waterfall. So once the unsecured claims have been</p> <p>11 paid, then my clients are entitled to be paid in full,</p> <p>12 again without any set off for the same reason. They</p> <p>13 can't make calls and therefore they can't make any claim</p> <p>14 only(?) against us. So that is our basic position.</p> <p>15 My Lord, in our administration, looking at it from</p> <p>16 the other way, our primary position is that there is</p> <p>17 nothing for them to prove in our administration, because</p> <p>18 they can't make calls, and they are not in liquidation.</p> <p>19 If that is wrong, and of course we don't accept for one</p> <p>20 minute that it is wrong, but if it is wrong, then our</p> <p>21 secondary position is that if they can prove set off,</p> <p>22 the ordinary insolvency set off applies -- and we rather</p> <p>23 deviate, my Lord, from the way Mr Wolfson puts it. We</p> <p>24 say set off -- traditional and insolvency set off takes</p> <p>25 hold. The way that works is you then have to have</p> <p style="text-align: center;">Page 68</p>

<p>1 valuations in the ordinary way of what the claims and</p> <p>2 cross claims are, that are being set off. What we</p> <p>3 effectively say, my Lord, there, is that there would be</p> <p>4 effectively a tiny liability as contributory, and we say</p> <p>5 that is tiny, because the chances of LBIE going into</p> <p>6 liquidation are virtually nil. Whereas conversely we</p> <p>7 have a very large both sub-debt claim and</p> <p>8 an unsubordinated claim as the 38 million(?). Of</p> <p>9 course, my Lord, that secondary position would also</p> <p>10 apply, if we are wrong, in the LBIE administration.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR TRACE: So my Lord that is the basic position as to where</p> <p>13 we are.</p> <p>14 MR JUSTICE DAVID RICHARDS: Right.</p> <p>15 MR TRACE: Now my Lord in terms of the material that</p> <p>16 your Lordship has, we have put in, as your Lordship</p> <p>17 knows, initial written submissions and supplemental</p> <p>18 submissions. If I can just remind your Lordship as to</p> <p>19 the structure of those.</p> <p>20 MR JUSTICE DAVID RICHARDS: Please do.</p> <p>21 MR TRACE: If your Lordship would be so kind as to take them</p> <p>22 out.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR TRACE: Your Lordship might just like to note, and what</p> <p>25 I propose to do to assist your Lordship's note is follow</p> <p style="text-align: center;">Page 69</p>	<p>1 Mr Jonathan Brock. What they have done is they have</p> <p>2 found -- and if I can just hand up to your Lordship,</p> <p>3 have you got the top sheet? Your Lordship was</p> <p>4 interested in the point about the old editions of</p> <p>5 Buckley. Other people haven't (inaudible) but we have</p> <p>6 (inaudible) the other side. What we have done, or what</p> <p>7 those assisting me have done, is gone back to Buckley.</p> <p>8 What I have handed up to your Lordship is a piece from</p> <p>9 the 1902 Buckley. (Handed).</p> <p>10 MR JUSTICE DAVID RICHARDS: Right.</p> <p>11 MR TRACE: That was the eighth edition, my Lord. The</p> <p>12 headline point, I will take your Lordship to the</p> <p>13 passages, for your Lordship's note is that by this</p> <p>14 edition, the learned editor, Mr Buckley, appeared to</p> <p>15 accept that Mr Justice Fry in Branwright had noted the</p> <p>16 misunderstanding in the Gibbs and White's Case --</p> <p>17 MR JUSTICE DAVID RICHARDS: Right.</p> <p>18 MR TRACE: -- and Mr Justice Fry's approach to Section 101</p> <p>19 should be followed. Your Lordship can see that -- if</p> <p>20 your Lordship looks, Section 108 is quoted at the top of</p> <p>21 328.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TRACE: We need not look at that. Then if your Lordship</p> <p>24 looks down at the bottom of the page, it is three lines</p> <p>25 up from the bottom "Going then to Section ... " Does</p> <p style="text-align: center;">Page 71</p>
<p>1 the order that we have done. I have got slightly out of</p> <p>2 order with Mr Wolfson's two bad points. Your Lordship</p> <p>3 will note that in the opening submissions, we begin</p> <p>4 after a little introduction. We have section B, which</p> <p>5 is at the bottom of page 4, that is the sub-debt.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TRACE: That is basically, my Lord, what I should</p> <p>8 probably be dealing with, and that is only thing</p> <p>9 probably on the menu this afternoon --</p> <p>10 MR JUSTICE DAVID RICHARDS: Right.</p> <p>11 MR TRACE: -- because that takes some time. My Lord, then</p> <p>12 at section C, that is page 16 and following, we deal</p> <p>13 with the equitable rule and contributory rule.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TRACE: Your Lordship might care to note just at this</p> <p>16 stage, your Lordship may recall -- well, you will recall</p> <p>17 because your Lordship read it, paragraphs 52 and 53, we</p> <p>18 set out how we read the position in relation to</p> <p>19 Grissell's Case and Gibbs and West's Case, your Lordship</p> <p>20 may recall that.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TRACE: My Lord, I wish to praise here the industry, as</p> <p>23 I do generally, of Ms Hutton and Ms Foskett, and indeed</p> <p>24 Ms Hutton's pupil, Mr Brock, a chip of the old block,</p> <p>25 his father was Mr Jonathan Brock, the late</p> <p style="text-align: center;">Page 70</p>	<p>1 your Lordship see that?</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TRACE: "Going then from Section 101, you find that only</p> <p>4 two provisions ... (reading to the words) ... before the</p> <p>5 winding up."</p> <p>6 So your Lordship sees that point.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p>8 MR TRACE: Then if your Lordship then turns over the page,</p> <p>9 330, they turn to an unlimited company, the learned</p> <p>10 editors:</p> <p>11 "Then in the case of an unlimited company, the set</p> <p>12 off which may be allowed by the court is a set off of</p> <p>13 debts due from a company to the contributors ... "</p> <p>14 MR JUSTICE DAVID RICHARDS: I am sorry, this is --</p> <p>15 MR TRACE: I am so sorry, my Lord, top of page 330, the next</p> <p>16 page.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, I see, thank you.</p> <p>18 MR TRACE: The learned editors there turn to the unlimited</p> <p>19 company situation.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR TRACE: "In the case of an unlimited company, the set off</p> <p>22 which ... (reading to the words) ... and calls made</p> <p>23 before ... "</p> <p>24 Emphasis. Then they talk about Branwright:</p> <p>25 "The decision of Mr Justice Fry, there cannot be set</p> <p style="text-align: center;">Page 72</p>

<p>1 off ... (reading to the words) ... Mr Justice Fry</p> <p>2 refused to follow it."</p> <p>3 That is when it was picked up, my Lord.</p> <p>4 MR JUSTICE DAVID RICHARDS: Thank you very much indeed.</p> <p>5 MR TRACE: We need not look at it now, but the learned</p> <p>6 editors do go on in there to look into how you make</p> <p>7 adjustments. We say it is perfectly ordinary</p> <p>8 adjustments, but not the way Mr Wolfson is trying to put</p> <p>9 it.</p> <p>10 MR JUSTICE DAVID RICHARDS: Very well.</p> <p>11 MR TRACE: So my Lord going back then to our submissions</p> <p>12 there, we respectfully submit that the analysis that we</p> <p>13 set out in our opening submissions is indeed correct.</p> <p>14 We made the point, my Lord, particularly footnote 16,</p> <p>15 which your Lordship sees in page 24.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TRACE: And we made the joke, I am sure your Lordship</p> <p>18 spotted it, in the last line of footnote 16:</p> <p>19 " ... as Counsel submitted fruitlessly in the Gibbs</p> <p>20 and West's Case.</p> <p>21 MR JUSTICE DAVID RICHARDS: Fruitlessly, yes.</p> <p>22 MR TRACE: Your Lordship made a comment about court counsel.</p> <p>23 So my Lord that is that section. We then have a section</p> <p>24 that begins at page 29 "set off". Then we have</p> <p>25 a section at 30, quantifying the contingent claims, how</p> <p style="text-align: center;">Page 73</p>	<p>1 is what -- we have done that research and it doesn't</p> <p>2 seem to take us any further. Eckhart, Lord Hoffman</p> <p>3 says, is the last(?) word, as far as we can see.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR WOLFSON: My Lord, then the currency conversion claim,</p> <p>6 that is really that section F, 39 and following, and</p> <p>7 I dealt, albeit fairly briefly, with the position</p> <p>8 between LBHI 2 and LBL, and your Lordship sees that. My</p> <p>9 Lord, your Lordship might care to note, just because we</p> <p>10 are passing here and I raise this so that Mr Wolfson</p> <p>11 hears me say it, because he is not going to be here for</p> <p>12 a lot of the afternoon, but on page 43, the end of 96,</p> <p>13 we talk about that it is not actually joint and several,</p> <p>14 that it gives a right -- it is the last five lines,</p> <p>15 your Lordship will have seen that before.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TRACE: My Lord, then the supplemental submissions, the</p> <p>18 other submissions that we have put in. My Lord, I will</p> <p>19 come back to those, but the supplemental submissions are</p> <p>20 relatively short. What we have done is we have dealt</p> <p>21 with the sub-debt, which I shall come back to later on</p> <p>22 this afternoon. Then the second section of the</p> <p>23 formulation of contributory rule, and we answer those</p> <p>24 various points. We say they don't go anyway, the points</p> <p>25 that are taken against us. Then we deal with the</p> <p style="text-align: center;">Page 75</p>
<p>1 that is to be done. Your Lordship will note, although</p> <p>2 in a slightly different point, page 38, that we make</p> <p>3 a reference to Eckhart, that is in the middle of 38.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR TRACE: Now your Lordship may recall that your Lordship</p> <p>6 asked Mr Trower whether anyone had done the exercise in</p> <p>7 relation to looking at the Australian position.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR TRACE: Your Lordship may recall Eckhart is --</p> <p>10 particularly Mr Zacaroli, I think, is particularly keen</p> <p>11 on this. The way that was answered, not terribly</p> <p>12 helpfully, was I think somebody has done it, but maybe</p> <p>13 Allen Overy have done it. I was expecting to hear from</p> <p>14 Mrs Zacaroli because of the results of those searches.</p> <p>15 My Lord, we have heard nothing. My Lord, what I can say</p> <p>16 is we have had a look at the Australian cases, obviously</p> <p>17 in an endeavour to be helpful. My Lord, the position is</p> <p>18 that it doesn't seem to go any further than Eckhart.</p> <p>19 MR JUSTICE DAVID RICHARDS: Right.</p> <p>20 MR TRACE: So we respectfully submit there is not really</p> <p>21 anything between us. The real question is whether or</p> <p>22 not the relevant claim does exist or not. Whatever it</p> <p>23 is, I will come back to this in due course, if it's</p> <p>24 a currency claim. We say whatever it is, it ranks down</p> <p>25 below us. So we say it doesn't really matter, but that</p> <p style="text-align: center;">Page 74</p>	<p>1 application of the equitable rule, and very lastly the</p> <p>2 position for calls which are already shown. So that is</p> <p>3 the structure of the submissions.</p> <p>4 My Lord, I then turn then to the guts of this, which</p> <p>5 is the sub-debt point. If I can make these opening</p> <p>6 comments. What LBIE and Lydian are seeking to suggest,</p> <p>7 is that LBIE's administrators or its liquidators, if it</p> <p>8 ever gets that far, should be able to pay statutory</p> <p>9 interest, non-proveable debts and currency conversion</p> <p>10 claims, to independent creditors, ie non-member</p> <p>11 creditors, before paying the debts over to the members.</p> <p>12 We say, my Lord, that is a very striking proposition.</p> <p>13 What this would do is it would force to the bottom of</p> <p>14 the waterfall, the debts which LBIE owes to its</p> <p>15 members. ie my client's unsubordinated claim for the</p> <p>16 £38 million, as well as its claim for a sub-debt of</p> <p>17 around £1.25 billion -- those are both pound figures --</p> <p>18 and also LBL's claim, which they have put at around</p> <p>19 363 million, which is unsubordinated. Against us, what</p> <p>20 LBIE and Lydian rely on is they say are two reasons why</p> <p>21 that happens. They say, first of all, there is</p> <p>22 contractual subordination in the sub-debt agreements.</p> <p>23 My Lord, for these purposes, they are, I think everyone</p> <p>24 accepts in the court, all identical, so the same</p> <p>25 arguments for both, for all three. My Lord, that is the</p> <p style="text-align: center;">Page 76</p>

<p>1 first answer. The second answer is the equitable rule.</p> <p>2 My Lord it is worth bearing in mind for the contractual</p> <p>3 subordination, that as far as my clients are concerned,</p> <p>4 that only applies to our sub-debt, so not our</p> <p>5 unsubordinated debt claim. So far as that sub-debt is</p> <p>6 concerned, it is enough for LBIE and Lydian if they win</p> <p>7 on that point alone, ie they don't have to go into the</p> <p>8 equitable rule, your Lordship appreciates that.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR TRACE: The equitable rule, that applies to both, both</p> <p>11 our unsubordinated claim and our sub-debt.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p>13 MR TRACE: Now my Lord we make six headline points, I will</p> <p>14 develop these. We say, one, there is no authority to</p> <p>15 establish that it is legally possible to subordinate</p> <p>16 debt below statutory interest, non-proveable</p> <p>17 liabilities, currency conversion claims, if they exist,</p> <p>18 and liabilities owed by the company to its members. So</p> <p>19 it is a legally possible point, we say it is impossible.</p> <p>20 Secondly, even if it is possible, that is not what any</p> <p>21 of those three agreements provide, as we say is clear</p> <p>22 when one construes those three agreements in their</p> <p>23 context, ie against the background of the legislative</p> <p>24 insolvency scheme. Thirdly, we say that statutory</p> <p>25 interest and non-proveable debts, et cetera, are either</p> <p style="text-align: center;">Page 77</p>	<p>1 sub-debt should, for regulatory capital purposes, be</p> <p>2 subordinated to statutory interest and non-proveable</p> <p>3 debts. It is no part of their case. Your Lordship will</p> <p>4 see where we are with that. We say that is the position</p> <p>5 and there has been a mass of work generated to look at</p> <p>6 evidence, and there is the evidence which is largely</p> <p>7 undisputed, the only disputes your Lordship will recall</p> <p>8 from the outing we had in front of your Lordship before,</p> <p>9 was in relation to LBL's decision, and your Lordship</p> <p>10 will recall I took particular issue with not knowing</p> <p>11 what they were, and there was an interchange of various</p> <p>12 things, that is all it is. But on this point Mr Trower</p> <p>13 is not running as part of his case that these regulatory</p> <p>14 requirements, the regulatory scheme, require this at</p> <p>15 all, which (inaudible) if they don't. Why on earth --</p> <p>16 I don't want to ask a rhetorical question. There is</p> <p>17 absolutely no reason why there would be any such</p> <p>18 agreement. Sixthly, my Lord, we respectfully submit,</p> <p>19 that one would expect abundantly clear words, very clear</p> <p>20 words, extremely clear words, I don't mind any adverb</p> <p>21 you like, if the sub-debt agreements provided for this</p> <p>22 extreme form of subordination. My Lord, when one looks</p> <p>23 at the sub-debt agreements, and finds there(?) such</p> <p>24 words, there are none.</p> <p>25 Now my Lord it may also be helpful, I will develop</p> <p style="text-align: center;">Page 79</p>
<p>1 not within liabilities -- as to that phrase, I put that</p> <p>2 in inverted commas -- at all, or not effectively within</p> <p>3 others, as defined, or if they are within liabilities,</p> <p>4 then they are within excluded liabilities, capital E,</p> <p>5 capital L. My Lord, fourthly, we submit that nothing in</p> <p>6 the sub-debt agreements restricts us from proving, and,</p> <p>7 my Lord, we were very surprised in Mr Trower's opening</p> <p>8 submissions that they seem very unkeen to develop their</p> <p>9 submissions to the contrary. No doubt we may hear more.</p> <p>10 It is perhaps unfortunate, because I would have liked to</p> <p>11 have heard more, but there it is. The fact they haven't</p> <p>12 said much, in our respectful submission, speaks volumes.</p> <p>13 Fifthly, it would be surprising if my clients, the</p> <p>14 company in whose shoes my clients now stand, had agreed</p> <p>15 this extreme form of subordination, because it is no</p> <p>16 part of the relevant regulatory requirements that our</p> <p>17 sub-debt should be subordinated to more than the other</p> <p>18 unsecured creditors. It is important to remember here,</p> <p>19 my Lord, the interchange between your Lordship and</p> <p>20 my learned friend Mr Trower about this. Mr Trower said</p> <p>21 that his clients didn't rely on any of the regulatory</p> <p>22 background, your Lordship will recall that -- this is</p> <p>23 important my Lord, and we noted it carefully and your</p> <p>24 Lordship has from the transcript -- ie it is not LBIE's</p> <p>25 case that the regulatory requirements were that the</p> <p style="text-align: center;">Page 78</p>	<p>1 this obviously, to see how we and our position ties in</p> <p>2 with my learned friend Mr Isaacs' clients on this,</p> <p>3 Mr Isaacs' clients agree with our overall position,</p> <p>4 your Lordship will have seen that, that we are not</p> <p>5 subordinated to more than the other unsecured creditors.</p> <p>6 Their arguments are slightly different, ie they don't</p> <p>7 say that statutory interest is an excluded liability.</p> <p>8 They say instead it is not payable, your Lordship has</p> <p>9 seen the way they put it, ie falls within clause 5(2)A</p> <p>10 that my learned friend Mr Wolfson was taking</p> <p>11 your Lordship to. My Lord, we will leave it to</p> <p>12 Mr Isaacs to make those submissions. We put ours in</p> <p>13 a slightly different way. I am not saying he is</p> <p>14 necessarily right or we are wrong or whatever, but these</p> <p>15 are all submissions for your Lordship.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes, of course.</p> <p>17 MR TRACE: If your Lordship accepts one of them, we don't</p> <p>18 mind because it gets to the right result, we say.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR TRACE: I say the right result, the correct result. The</p> <p>21 net effect of all this, my Lord, and one must not lose</p> <p>22 site of this, is that what LBIE are saying is that we</p> <p>23 are subordinated to statutory interests, non-provable</p> <p>24 liabilities, as well as all other unsecured creditors.</p> <p>25 Now let's deal, first of all, with the question of is it</p> <p style="text-align: center;">Page 80</p>

<p>1 legally possible?</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TRACE: Now my Lord we raise this issue, fair and square</p> <p>4 in our submissions, but neither LBIE nor Lydian have</p> <p>5 identified any authority for the contention that it is</p> <p>6 possible contractually to subordinate debts to statutory</p> <p>7 interest. Now my Lord we raise this, for your</p> <p>8 Lordship's note it was paragraph 24 in our submissions,</p> <p>9 and it is perhaps worth just looking at that. It is</p> <p>10 page 11, my Lord.</p> <p>11 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>12 MR TRACE: We said there:</p> <p>13 "It is far from clear that the contracting parties</p> <p>14 could validly agree to move a debt, which is by statute</p> <p>15 put in a particular class of liability, eg here the</p> <p>16 unsecured creditors class, into a different class. That</p> <p>17 would be a different exercise to an agreement for</p> <p>18 a particular creditor agreeing to (inaudible) other</p> <p>19 creditors within that same class for the purpose of</p> <p>20 proof and/or dividend payment."</p> <p>21 My Lord, that sentence absolutely encapsulates -- it</p> <p>22 is short, but it is pithy, and with respect it is</p> <p>23 correct. Now the only answer we have had, my Lord, is</p> <p>24 in LBIE's supplemental submissions, paragraph 66 to 67,</p> <p>25 and the only liability, only authority that is referred</p> <p style="text-align: center;">Page 81</p>	<p>1 this case, but it is perhaps best to --</p> <p>2 MR JUSTICE DAVID RICHARDS: In the last few days, I reminded</p> <p>3 myself, obviously.</p> <p>4 MR TRACE: I am obliged my Lord. In that case, I will just</p> <p>5 read the little bit of the holding at the top of</p> <p>6 page 1403.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR TRACE: The learned judge said -- I will quote from the</p> <p>9 headnote:</p> <p>10 "No principles of insolvency legislation or a public</p> <p>11 policy, which precluded the making of a contract between</p> <p>12 a company and a creditor, whereby in the event of the</p> <p>13 company's insolvency, the debt was to be subordinated in</p> <p>14 the winding up for the payment of debts owed to other</p> <p>15 unsecured creditors, and then accordingly ... "</p> <p>16 Et cetera. We need not look at the case.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TRACE: Frankly, it is not at all surprising that someone</p> <p>19 can do that. But the real question is in relation to</p> <p>20 this position, is can this be done to achieve what my</p> <p>21 learned friend wants to achieve in this case. Now we</p> <p>22 respectfully submit that what both LBIE and Lydian are</p> <p>23 trying to achieve are very different from what was</p> <p>24 sanctioned, if that is the right word, by</p> <p>25 Mr Justice Vinelock(?) in MCC. Nowhere in Maxwell, my</p> <p style="text-align: center;">Page 83</p>
<p>1 to is Maxwell 2, and we have answered that my Lord, for</p> <p>2 your Lordship's note, in paragraph 2 of our responsive</p> <p>3 supplemental submissions. It is worth just looking at</p> <p>4 that, my Lord. It is worth looking at the authority.</p> <p>5 My Lord, our supplemental submissions, paragraph 2, does</p> <p>6 your Lordship see that? Your Lordship might just like</p> <p>7 to remind your Lordship about what was said here:</p> <p>8 "We relied on the general principle ... "</p> <p>9 What your Lordship seen. Then we say that:</p> <p>10 "In their opening submissions, LBIE seeks to rely on</p> <p>11 the general principle from Maxwell, the contractual</p> <p>12 subordination is effected in a formal insolvency,</p> <p>13 without there needing to be a trust deed. We don't have</p> <p>14 any objection to that. That proposition is not</p> <p>15 controversial, so far as it goes. But it doesn't assist</p> <p>16 LBIE, with the greatest respect, when they seek to say</p> <p>17 that the contractual subordination provisions ... varies</p> <p>18 the effect of the insolvency rule."</p> <p>19 MR JUSTICE DAVID RICHARDS: Did they say that? I had better</p> <p>20 remind myself. 2887 actually, just the precise --</p> <p>21 I have it open here. Oh yes. Yes.</p> <p>22 MR TRACE: My Lord, it is worth just looking at Maxwell.</p> <p>23 That is in the authorities bundle 1C, my Lord, tab 69.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR TRACE: I don't know how long ago your Lordship looked at</p> <p style="text-align: center;">Page 82</p>	<p>1 learned friend (inaudible) nowhere in this case does it</p> <p>2 say, in MCC, does it say that there is power to do what</p> <p>3 they now want to do.</p> <p>4 MR JUSTICE DAVID RICHARDS: No.</p> <p>5 MR TRACE: Now what they say is effectively that</p> <p>6 Mr Justice Vinelock referred, we can see it -- the quote</p> <p>7 they give is to page 1412A, this is the passage they</p> <p>8 rely on, the top of the page, 1412, my Lord. They</p> <p>9 say -- perhaps pick it up at the bottom of the preceding</p> <p>10 page. The learned judge says, two lines from the end:</p> <p>11 "I can see no reason said why he should not waive</p> <p>12 his right to prove, save to the extent of any assets</p> <p>13 remaining, after the debts of other ... (reading to the</p> <p>14 words) ... unsecured non-preferential debts."</p> <p>15 Now what they are trying to say is that</p> <p>16 Mr Justice Vinelock envisaged there preferential debts</p> <p>17 being subordinated to rank equally with non-preferential</p> <p>18 debts. But that is more consistent with the existing</p> <p>19 statutory regime. Preferential and non-preferential</p> <p>20 debts are debts as defined in the rules, and the</p> <p>21 statutory interest provision itself provides that</p> <p>22 statutory interest is re-paid, if the trigger for</p> <p>23 payment exists, ie a surplus after the payment of all</p> <p>24 proved debts, rateably in respect of both pref and</p> <p>25 non-pref debts, that is 288(8). But there is nothing in</p> <p style="text-align: center;">Page 84</p>

<p>1 this passage which undermines our contention that</p> <p>2 subordination to statutory interest goes beyond what is</p> <p>3 possible. What the learned judge actually said, if one</p> <p>4 looks at 1411H over the page --</p> <p>5 MR JUSTICE DAVID RICHARDS: 1411H? Yes.</p> <p>6 MR TRACE: He says:</p> <p>7 "If the creditor can waive his right altogether,</p> <p>8 I can see no reason why he should not waive his right to</p> <p>9 prove."</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TRACE: So we respectfully submit MCC really doesn't take</p> <p>12 them anywhere. What we would submit is it would be</p> <p>13 a most unusual, and I am giving advance warning of</p> <p>14 submissions you will be making later on -- in our</p> <p>15 respectful submission, I don't know whether this has</p> <p>16 ever been done, but the research is that the combined</p> <p>17 power and firepower of the counsel in this courtroom not</p> <p>18 found any authority to show the court recognising or</p> <p>19 upholding subordination to this extent.</p> <p>20 MR JUSTICE DAVID RICHARDS: I think Maxwell -- isn't that</p> <p>21 the only case on --</p> <p>22 MR TRACE: It is the only one we have found.</p> <p>23 MR JUSTICE DAVID RICHARDS: I mean it was a very important</p> <p>24 decision when it was made --</p> <p>25 MR TRACE: Absolutely.</p> <p style="text-align: center;">Page 85</p>	<p>1 the subordination of this level, putting my clients</p> <p>2 right at the back of the queue. My Lord, we do pray in</p> <p>3 aid here, one of the points I made in opening, that the</p> <p>4 fact that LBIE is not praying in aid the regulatory</p> <p>5 requirements as in some way requiring this, and bearing</p> <p>6 in mind that LBIE is saying that this was a standard</p> <p>7 form agreement, bearing both those points in mind, it</p> <p>8 would be very surprising, we respectfully submit, if the</p> <p>9 standard form agreement did provide for this sort of</p> <p>10 (inaudible).</p> <p>11 MR JUSTICE DAVID RICHARDS: That is moving away from your</p> <p>12 first point.</p> <p>13 MR TRACE: It is moving away from the first point. But my</p> <p>14 Lord we say it reinforces that first point. My Lord, we</p> <p>15 then turn to --</p> <p>16 MR JUSTICE DAVID RICHARDS: I mean the way that Mr Trower</p> <p>17 puts it is that the subordination is achieved by your</p> <p>18 agreement not to prove until the statutory interest and</p> <p>19 indeed the non-proveable debts have been paid, and that</p> <p>20 therefore that fits with the wording of 2887, so far as</p> <p>21 statutory interest is concerned, which refers to any</p> <p>22 surplus remaining after payment of the debts proved.</p> <p>23 MR TRACE: Exactly.</p> <p>24 MR JUSTICE DAVID RICHARDS: So yours will not be a proved</p> <p>25 debt and therefore no reason why statutory interest</p> <p style="text-align: center;">Page 87</p>
<p>1 MR JUSTICE DAVID RICHARDS: -- because it did undoubtedly</p> <p>2 change the approach to subordinated debt.</p> <p>3 MR TRACE: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: It was before then generally</p> <p>5 considered that you had to have a subordination trust to</p> <p>6 be effective, so it was very important to --</p> <p>7 MR TRACE: My Lord, well I remember, yes. So at its very</p> <p>8 lowest, we respectfully submit your Lordship should be</p> <p>9 very cautious of a submission that subordination to this</p> <p>10 extent was what the draftsmen had in mind. But we</p> <p>11 actually go further than that, and they say head on,</p> <p>12 there is simply authority, and we say no principle why</p> <p>13 this sort of subordination should be possible. We do</p> <p>14 pray in aid, my Lord, and your Lordship is absolutely</p> <p>15 right -- one doesn't want to talk about people who have</p> <p>16 been at the Bar longer than other people at the Bar, it</p> <p>17 gets a bit invidious. But your Lordship will remember</p> <p>18 that the backdrop to MCC and the decision that was made</p> <p>19 did cause an enormous stir, and in our respectful</p> <p>20 submission that sort of stir is exactly the sort of stir</p> <p>21 that would be made if your Lordship did say that it was</p> <p>22 possible to subordinate in this way. It really is</p> <p>23 a very, very radical subordination. It is one thing to</p> <p>24 have subordination of the sort of subordination that one</p> <p>25 has MCC, but quite another to say that you should have</p> <p style="text-align: center;">Page 86</p>	<p>1 should not be paid. Now are you saying that it is</p> <p>2 legally impossible for a subordinated creditor to make</p> <p>3 an agreement not to prove until statutory interest has</p> <p>4 been paid?</p> <p>5 MR TRACE: Well, what is so very odd about it, my Lord --</p> <p>6 yes we are, is the short answer to the question.</p> <p>7 MR JUSTICE DAVID RICHARDS: You say that.</p> <p>8 MR TRACE: But the reason why we say that is because it is</p> <p>9 so very odd. You have a scheme which includes statutory</p> <p>10 interest and the like. Everyone knows how it works.</p> <p>11 The idea that legally it is possible to put yourself</p> <p>12 right at the back of the queue, we say no. The closest</p> <p>13 one gets to it -- one would have thought, my Lord, that</p> <p>14 if was right, for example, and MCC -- there had been</p> <p>15 some sort of the statements effectively saying that one</p> <p>16 could agree anything.</p> <p>17 MR JUSTICE DAVID RICHARDS: Mr Justice Vinelock was</p> <p>18 concerned to decide the case in front of him.</p> <p>19 MR TRACE: Of course he was, I accept that, my Lord. But</p> <p>20 nevertheless, the reason why I press that point,</p> <p>21 my Lord, and the reason why I don't shrink from making</p> <p>22 the point again, with respect, even though we are</p> <p>23 looking at that one point.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p>25 MR TRACE: If my learned friends were right, you would</p> <p style="text-align: center;">Page 88</p>

<p>1 expect the principle to be parties can contract</p> <p>2 anything, therefore what is the matter? That would be</p> <p>3 the substratum, the logical substratum for MCC's</p> <p>4 decision, but it is not. The substratum is effectively</p> <p>5 people within various classes can agree to do various</p> <p>6 things. That I can understand. But to suggest that one</p> <p>7 can actually legally agree, effectively -- and however</p> <p>8 my learned friend puts it, "Oh well, you have agreed not</p> <p>9 to prove", but what one is actually is doing</p> <p>10 substantively is interfering with the scheme, the</p> <p>11 statutory scheme. There is nothing in the statute, for</p> <p>12 example, that says one can do that. That may be only</p> <p>13 a small point, but it is a telling point we say. There</p> <p>14 is nothing in MCC. There is no authority they have been</p> <p>15 able to find, and this would be first occasion, as far</p> <p>16 as we know, where this would be done. The submission is</p> <p>17 there, we make it, we don't shrink from it.</p> <p>18 MR JUSTICE DAVID RICHARDS: Mr justice Vinelock did</p> <p>19 contemplate that a preferential creditor could agree to</p> <p>20 give up his preference --</p> <p>21 MR TRACE: My Lord, yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: -- and have his debt rank</p> <p>23 equally with the general body of unsecured debts.</p> <p>24 MR TRACE: My Lord, yes. That is certainly true, certainly</p> <p>25 true. But that again is a different situation from</p> <p style="text-align: center;">Page 89</p>	<p>1 Lordship, your Lordship has only been looking at this</p> <p>2 for a relatively short time.</p> <p>3 MR JUSTICE DAVID RICHARDS: I regard that as a benefit.</p> <p>4 MR TRACE: My Lord, I would not like to say anything in that</p> <p>5 regard. I could not possibly comment. Now my Lord I am</p> <p>6 looking at it at page 216.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR TRACE: Your Lordship sees there are a lot of</p> <p>9 definitions. When your Lordship is writing in your</p> <p>10 Lordship's judgment, it is worth going back and taking</p> <p>11 these down in order and spending time with them. There</p> <p>12 are definitions, and then they are picked up again</p> <p>13 particularly in clause 5. What it does, so</p> <p>14 your Lordship understands the structure of it, is it</p> <p>15 establishes a priority of senior liabilities over</p> <p>16 subordinated liabilities and its (inaudible)</p> <p>17 liabilities.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR TRACE: Your Lordship sees that. Now senior liabilities,</p> <p>20 that is defined, as your Lordship sees on page 217, all</p> <p>21 liabilities, except the subordinated liabilities and</p> <p>22 excluded liabilities, so far so good. Then subordinated</p> <p>23 liabilities, which is the next one down, means all</p> <p>24 liabilities to the lender. Again, the same phrase</p> <p>25 liabilities, in respect of each advance made under this</p> <p style="text-align: center;">Page 91</p>
<p>1 this.</p> <p>2 MR JUSTICE DAVID RICHARDS: I follow, but it is moving, as</p> <p>3 it were, between classes rather than within.</p> <p>4 MR TRACE: Of course it is, I can't make the point, "Oh</p> <p>5 well, Mr Justice Vinelock can't have thought about</p> <p>6 moving into a class", that I accept. But we say this</p> <p>7 actually is more than that, it is more than just moving</p> <p>8 between classes details. Now my Lord if we are wrong,</p> <p>9 we then must look at the construction.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TRACE: Now, as I have already said, we respectfully</p> <p>12 submit that on the true construction, it simply</p> <p>13 subordinates the sub-debt to LBIE's unsecured and</p> <p>14 unsubordinated debts, ie we are just pushed to the</p> <p>15 bottom of the payment pile, within the category of</p> <p>16 unsecured debts, but we are not pushed further down the</p> <p>17 waterfall. Now, my Lord, it is probably worth, at this</p> <p>18 point, looking at the back of the agreements, they are</p> <p>19 all in volume 4.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR TRACE: Now I hate to say this, my Lord, but when your</p> <p>22 Lordship is writing in your Lordship's judgment, this is</p> <p>23 very much a wet towel around the head job, I am afraid,</p> <p>24 on this document. We, of course, have been looking at</p> <p>25 this for a very, very long time. I am sorry for your</p> <p style="text-align: center;">Page 90</p>	<p>1 agreement and all interests payable thereon. Excluded</p> <p>2 liabilities, we have to go back one page, that means</p> <p>3 liabilities, again capital L for liabilities:</p> <p>4 " ... which are expressed to be and in the opinion</p> <p>5 of the ... (reading to the words) ... subordinated</p> <p>6 liabilities ... "</p> <p>7 And we have already looked at that definition:</p> <p>8 " ... in any insolvency."</p> <p>9 And then liabilities itself we see defined at the</p> <p>10 top of 217:</p> <p>11 "All present and future sums, liabilities and</p> <p>12 obligations ... (reading to the words) ... or otherwise</p> <p>13 how so ever."</p> <p>14 Now my Lord we respectfully submit, before we go any</p> <p>15 further with looking at the guts of this, if I can take</p> <p>16 your Lordship back to our Section A in our opening</p> <p>17 submissions. We respectfully submit that this is</p> <p>18 a contract like any other, and therefore it needs to be</p> <p>19 construed like any other contract. I can pick it up,</p> <p>20 my Lord, at paragraph 14 of our opening submissions,</p> <p>21 page 5. We quote -- your Lordship have seen it many,</p> <p>22 many times no doubt -- the ICS passage of Lord Hoffman,</p> <p>23 this is paragraph 14, line 17. We give the reference</p> <p>24 and I won't turn it up. One has got to look at the</p> <p>25 background reasonably available to both parties, and we</p> <p style="text-align: center;">Page 92</p>

<p>1 say that must include in this situation, the legal</p> <p>2 regulatory and commercial contacts, must do.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, and Mr Trower agrees.</p> <p>4 MR TRACE: And Mr Trower seems to accept that.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TRACE: So we are (inaudible) for that, my Lord.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR TRACE: My Lord, we have quoted from McMeal(?). If your</p> <p>9 Lordship wants, it is in the authorities 1D and tab 104,</p> <p>10 just for your Lordship's note.</p> <p>11 MR JUSTICE DAVID RICHARDS: You have quoted from -- oh</p> <p>12 McMeal, yes I see.</p> <p>13 MR TRACE: McMeal and his construction of contracts.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, thank you. Yes, yes.</p> <p>15 MR TRACE: "The extension of the context to include</p> <p>16 explicitly legal background was a major advance.</p> <p>17 Contracts are drafted against a legal and regulatory</p> <p>18 backdrop. In many cases it would be unrealistic to</p> <p>19 disregard that reality."</p> <p>20 I hesitate to take issue with McMeal, of course your</p> <p>21 Lordship and those of us schooled in the sort of</p> <p>22 Prenn~v Simms days -- in fact Prenn v Simms are not</p> <p>23 saying anything different from ICS.</p> <p>24 MR JUSTICE DAVID RICHARDS: Absolutely not, no.</p> <p>25 MR TRACE: One had to look at the factual matrix.</p> <p style="text-align: center;">Page 93</p>	<p>1 is absolutely obvious what it means. So I hope if your</p> <p>2 Lordship's decision goes any further, it is going to be</p> <p>3 correct and not held all the way through. So my Lord as</p> <p>4 we say in paragraph 16 of our written submissions, your</p> <p>5 Lordship should consider the natural meaning of the</p> <p>6 words, and should not divorce those in any way from the</p> <p>7 commercial context, and we refer to the Charter case.</p> <p>8 For your Lordship's note that is volume 1C at tab 72.</p> <p>9 Your Lordship might care to note footnote 2, because it</p> <p>10 is quite striking, and where one can end at lunchtime.</p> <p>11 MR JUSTICE DAVID RICHARDS: Oh yes, yes.</p> <p>12 MR TRACE: Lord Hoffman uses a very graphic example about</p> <p>13 the word "pay", it is in the footnote, my Lord:</p> <p>14 "In many contexts it will mean that monies changed</p> <p>15 hands, usually in discharge of some liability. In other</p> <p>16 contexts ... (reading to the words) ... had been</p> <p>17 discharged."</p> <p>18 Well, obviously humorous and Lord Hoffman is very</p> <p>19 pithy as always.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR TRACE: But, my Lord, just so we can complete the</p> <p>22 citation before the short adjournment, Charter Re was</p> <p>23 cited with approval by the Supreme Court in Sigma, your</p> <p>24 Lordship knows that. Lord Mance explained the natural</p> <p>25 meaning. He said:</p> <p style="text-align: center;">Page 95</p>
<p>1 MR JUSTICE DAVID RICHARDS: Indeed.</p> <p>2 MR TRACE: But anyway, Lord Hoffman's speech in ICS is</p> <p>3 a modern example. The assignment document was clearly</p> <p>4 drafted by legal representatives of the statutory</p> <p>5 compensation body. His Lordship immediately</p> <p>6 contextualised the document in the wider context of the</p> <p>7 primary and secondary legislation, governing investment</p> <p>8 advice and constituting the scheme. It is important to</p> <p>9 bear in mind, of course, what that case was actually</p> <p>10 about. It was something against that sort of scheme, in</p> <p>11 that sense, similar.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TRACE: The other, of course, point to make about ICS is</p> <p>14 it was loss all the way up, and it was changed in the</p> <p>15 House of Lords. So construction of documents can be</p> <p>16 seen by different people in different ways, and that is</p> <p>17 why I am urging your Lordship, when your Lordship comes</p> <p>18 to your Lordship's initial decision, which we hope will</p> <p>19 be the final decision in your Lordship's judgment, we</p> <p>20 urge your Lordship to look at this in the right way</p> <p>21 before coming to any provisional views about it, against</p> <p>22 that legal background, against the textual background,</p> <p>23 against the regulatory background. We say when you have</p> <p>24 that background, you then turn at the documents(?), we</p> <p>25 say it can only be construed in one way. That, we say,</p> <p style="text-align: center;">Page 94</p>	<p>1 "In my opinion, the conclusion reached below</p> <p>2 attaches too much ... (reading to the words) ... as</p> <p>3 a whole."</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR TRACE: Your Lordship also knows we have referred to the</p> <p>6 Roney Sky(?) authority.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR TRACE: That if there are two possible constructions --</p> <p>9 of course we say here there is only one construction.</p> <p>10 But if your Lordship is troubled in any way, then we</p> <p>11 rely on Roney Sky and we rely on the regulatory</p> <p>12 background. That is perhaps a convenient moment.</p> <p>13 MR JUSTICE DAVID RICHARDS: Certainly, thank you.</p> <p>14 2 o'clock.</p> <p>15 (1.00 pm)</p> <p>16 (The short adjournment)</p> <p>17</p> <p>18 (2.02 pm)</p> <p>19 MR JUSTICE DAVID RICHARDS: Mr Trace.</p> <p>20 MR TRACE: My Lord, just before the short adjournment we</p> <p>21 looked at the classic authorities on construing a</p> <p>22 contract, and I made the submission that the regulatory</p> <p>23 scheme is an important matter for your Lordship to look</p> <p>24 at.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 96</p>



<p>1 MR TRACE: The other matter that we say your Lordship should  2 look at is the statutory insolvency scheme that was in  3 force at the time. We say this because, first of all,  4 insolvency is exactly the situation in which  5 subordination matters and so insolvency is the context  6 for understanding the agreement. Secondly, we say it's  7 important to look at the insolvency regime because the  8 agreements themselves expressly refer to insolvency and  9 the legislative ranking of debts in insolvency. Your  10 Lordship can see that if your Lordship looks back at the  11 document -- I hope your Lordship still has it open.  12 MR JUSTICE DAVID RICHARDS: I do.  13 MR TRACE: At page 216.  14 MR JUSTICE DAVID RICHARDS: Yes.  15 MR TRACE: If your Lordship looks at the definition of  16 excluded liabilities, we have read it once already, but  17 your Lordship sees that liabilities which are expressed  18 to be in and in the opinion of officer, et cetera, do  19 rank junior to the subordinated liabilities in any  20 insolvency of the borrower. So ranking and insolvency  21 are absolutely key, we respectfully submit, background  22 matters to consider.  23 Insolvency is given a very, very wide meaning. You  24 see that, my Lord, six lines up from the bottom of the  25 same page. Insolvency means and includes "liquidation,</p> <p style="text-align: center;">Page 97</p>	<p>1 Lordship is with us so far, then we respectfully submit  2 your Lordship should be taking into account then what  3 the statutory scheme is under the Act, and that of  4 course provides the payment of all proved debts and then  5 use of any surplus -- and we emphasise the word  6 "surplus" -- remaining, et cetera, in paying interest on  7 those debts in respect of the period to which they have  8 been outstanding. That's rule 2.88(a)(1) that your  9 Lordship was looking at before. It's all set out at  10 2.88(7). Your Lordship might like to look back it just  11 to remind yourself. 2.88(7), "any surplus", I was just  12 quoting from 2.88(7).  13 MR JUSTICE DAVID RICHARDS: Yes.  14 MR TRACE: My Lord, payment of statutory interest, your  15 Lordship was reminded, in administration only occurs  16 under that rule, and that rule makes it clear that such  17 payment only occurs once the administrators have in  18 their hands a surplus remaining after payment of the  19 debts proved.  20 MR JUSTICE DAVID RICHARDS: Yes.  21 MR TRACE: Now, my Lord, there is a sub-point which your  22 Lordship may have gathered. The sub-point in this  23 application is whether the terms of the agreement, the  24 sub-debt agreements, prevent my clients from proving in  25 the sub-debt. Now, of course, as your Lordship knows,</p> <p style="text-align: center;">Page 99</p>
<p>1 winding-up, bankruptcy, sequestration, administration,  2 rehabilitation and dissolution, whichever term may apply  3 to the borrower, or the equivalent in any other  4 jurisdiction to which the borrower may be subject". It  5 really is the widest possible definition, we  6 respectfully submit.  7 My Lord, the reason why we urge this submission on  8 your Lordship is because -- and can I remind your  9 Lordship, for the reference it's LBIE's supplemental  10 submissions at 67. I can just quote from it, my Lord.  11 They recognise that the extent of my client's  12 contractual subordination is to be determined as  13 a matter of construction of the agreement. So they  14 accept that.  15 Then they say this:  16 "The framework of the Insolvency Act 1986, referred  17 to extensively by my clients at 25 to 31 of the opening  18 submissions, is at this stage of the analysis of little  19 significance or assistance."  20 That's what they say or that's what they submit. We  21 respectfully submit that's fundamentally wrong. It must  22 be, we respectfully submit, part of the background, not  23 only because it was in existence but also the whole  24 thrust of this agreement is looking at the position or  25 potentially the position on insolvency. If your</p> <p style="text-align: center;">Page 98</p>	<p>1 there is a difference between, on the one hand, whether  2 and when a debt is provable and whether and when it  3 ranks the payment of the dividend (inaudible). Now, we  4 say and submit that the way in which the sub-debt  5 agreements are drafted doesn't affect my client's  6 ability to prove, ie to fall within the definition of  7 provable debts for the purpose of the rules. So it  8 doesn't affect that. But it does affect the order in  9 which payment out of the estate should be made. So, to  10 be absolutely clear, my Lord, we accept that payment of  11 dividends on a sub-debt should come after payment in  12 full, ie a dividend of 100p in the pound, of the  13 unsubordinated unsecured creditors.  14 MR JUSTICE DAVID RICHARDS: Yes.  15 MR TRACE: Now, my learned friend Mr Trower on Tuesday made  16 a number of submissions where he emphasised the  17 distinction between whether something was provable and  18 whether something was payable. Your Lordship will  19 remember those.  20 MR JUSTICE DAVID RICHARDS: Yes.  21 MR TRACE: My Lord, we urge your Lordship to note that,  22 here, the draftsman, the draftsman, or whatever, of  23 this agreement was concerned not to restrict or prohibit  24 whether my clients can prove for its debt but simply  25 when it is payable. If your Lordship looks at</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 clause 5.1, that's page 219, that contains the 2 subordination mechanism. It refers, your Lordship sees, 3 the third line, to payment of any amount is conditional 4 upon various things. So it doesn't make my client's 5 ability to prove conditional upon the satisfaction of 6 those conditions. There is in fact no reference in the 7 agreement at all to proving and we say nothing to 8 suggest that my clients or our client's claim is not 9 provable. So it's payment only, nothing about 10 provability.</p> <p>11 Now, in the written submissions of LBIE -- for your 12 Lordship's note, it's paragraph 32, sub-paragraph 1 -- 13 they say or submit there that clause 7(d) of the 14 agreement prohibits my clients from proving in respect 15 of the sub-debt if LBIE is solvent. Your Lordship will 16 recall that. For the purposes of 5.2, that's what they 17 submit. We respectfully submit that's incorrect. 18 My Lord, it's worth looking carefully at clause 7(d), 19 page 221, my Lord.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR TRACE: "From and after the date of this agreement, or 22 the effective date if earlier, the lender shall not, 23 without prior written consent of the FSA, (d) attempt to 24 retain repayment of any of the subordinated liabilities 25 otherwise than in accordance with the terms of this</p> <p style="text-align: center;">Page 101</p>	<p>1 we say it's a point that doesn't really get us anywhere 2 particularly, but there is a point there and we 3 respectfully submit we have an answer to it but, even if 4 we don't have an answer, we say it doesn't matter.</p> <p>5 MR JUSTICE DAVID RICHARDS: Just so we are clear, Mr Trower 6 relies on it quite heavily for the purposes of 2.88(7).</p> <p>7 MR TRACE: My Lord, yes. My Lord, we may not be proving at 8 the start of the process, but one way or another we will 9 be proving as Ms Hutton puts it.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes, the question is when.</p> <p>11 MR TRACE: Exactly. So we say there is a dispute between us 12 there. Those are our submissions of the answer. Your 13 Lordship sees the point.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, thank you.</p> <p>15 MR TRACE: But, my Lord, we do respectfully agree with LBHI 16 and say the debt in fact is and always has been provable 17 in LBIE's administration. That is that little side 18 alley. We say it doesn't really get us anywhere in 19 terms of the guts of the case.</p> <p>20 Now, my Lord, as to what we say our construction is, 21 we say, respectfully, that there is nothing in the 22 agreements to postpone payment or proof of the sub-debt 23 beyond, at the latest, the time when all unsecured and 24 unsubordinated debts have been paid. We say that's -- 25 let us start at the beginning, clause 5. Under</p> <p style="text-align: center;">Page 103</p>
<p>1 agreement."</p> <p>2 Now, that's not a prohibition on proving at all. 3 Proving, as your Lordship knows, is simply a process of 4 registering a claim. This argument, my Lord, was not 5 developed orally by my learned friend. For your 6 Lordship's note, for the transcript of that day it is 7 pages 38 to 39. Your Lordship reminded my learned 8 friend what the point was, and my learned friend 9 responded effectively that this was part of his case but 10 he didn't really develop it. In our respectful 11 submission, that's telling. But whether it's telling or 12 not, we respectfully submit the submission is wrong.</p> <p>13 In any event --</p> <p>14 MR JUSTICE DAVID RICHARDS: I think he relies also on 7(e).</p> <p>15 MR TRACE: I think he does, "Take or admit any action", but 16 in relation to whether or not it prevents proving, we 17 have put forward our submission as to how it is to be 18 construed.</p> <p>19 But we say, in any event, my Lord, when one 20 construes the agreement properly it does not matter 21 whether we can prove for the debt at the start of the 22 administration or subsequently, once all the unsecured 23 unsubordinated claims have been paid in full, so long -- 24 and this is the critical thing -- we are entitled to 25 payment once all the other creditors have been paid. So</p> <p style="text-align: center;">Page 102</p>	<p>1 clause 5, payment of the sub-debts, the subordinated 2 liabilities, is conditional on LBIE (that's the 3 borrower) being solvent, as defined in clause 5.2. 4 That's the starting point.</p> <p>5 Then you look at clause 5.2 to decide when it is 6 "solvent". You look at clause 5.2. It is solvent, on 7 the wording, if it compares liabilities, as defined, 8 other than the subordinated liabilities, as defined, and 9 the excluded liabilities, that's (b), and "obligations 10 which are not payable or capable of being established or 11 determined in the insolvency of the borrower".</p> <p>12 Now, we respectfully submit what that means and must 13 mean is that the sub-debt is not payable unless LBIE can 14 pay all the unsecured unsubordinated claims as well. 15 However, if it can pay all such claims, which we say it 16 must necessarily be able to do before the administrators 17 have a surplus to be applied and paid in statutory 18 interest, then the agreements permit my clients to be 19 paid in respect of its sub-debt. At that point, we 20 respectfully submit the borrower is solvent, that's 5.2, 21 for the purposes of clause 5.2, and therefore there is 22 no borrower and payment of the subordinated liabilities, 23 ie the sub-debt.</p> <p>24 MR JUSTICE DAVID RICHARDS: So the reference in 2(a) is to 25 provable obligations.</p> <p style="text-align: center;">Page 104</p>

26 (Pages 101 to 104)

<p>1 MR TRACE: Yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TRACE: We say that this fits in with the scheme. It's</p> <p>4 worth looking back at 2.88(7), if your Lordship still</p> <p>5 has it open, "Debts proved", is the phrase. We say</p> <p>6 that, after payment of the sub-debt, all debts proved,</p> <p>7 that word or those two words, have been paid as required</p> <p>8 by sub-rule 7 and then the administrators of LBIE may</p> <p>9 then and only then pay statutory interest.</p> <p>10 Now, orally my learned friend Mr Trower didn't</p> <p>11 address the question of how it is said that an agreement</p> <p>12 which doesn't prevent our clients from proving for the</p> <p>13 sub-debt before the payment of statutory interest has</p> <p>14 the effect of subordinating our sub-debt to statutory</p> <p>15 interest, given that the rules provide that statutory</p> <p>16 interest is payable only if there is a surplus after</p> <p>17 payment of the debts proved. That's worth saying again</p> <p>18 because it's a little dense. They just didn't deal with</p> <p>19 the point here. The point is simply this. If, as we</p> <p>20 say it is, the agreement doesn't prohibit my clients</p> <p>21 from proof of the sub-debt before the payment of</p> <p>22 statutory interest, if that's right, how is it that it</p> <p>23 has the effect -- I won't ask a rhetorical question -- I</p> <p>24 just can't see how it has the effect of subordinating my</p> <p>25 client's sub-debt to statutory interest, given that the</p> <p style="text-align: center;">Page 105</p>	<p>1 situation. On their case, if it was the intention of</p> <p>2 the draftsman of this standard form document to</p> <p>3 subordinate the sub-debt to statutory interest, it would</p> <p>4 have been the easiest thing in the world to have made</p> <p>5 that explicit by express reference to statutory</p> <p>6 interest. If that wasn't to have been done, that's the</p> <p>7 second point we make, one would have expected, if their</p> <p>8 construction was correct, that the draftsman would</p> <p>9 have focused carefully on the concept of proving for the</p> <p>10 sub-debt so that it could clearly be seen that by</p> <p>11 prohibiting my clients from proving it was intending to</p> <p>12 subordinate the sub-debt to statutory interest,</p> <p>13 providing it shouldn't fall within debts proved for the</p> <p>14 purpose of 2.88(7), which doesn't happen either.</p> <p>15 We respectfully submit that the insuperable</p> <p>16 difficulty in LBIE's path, in Mr Trower's path, is that</p> <p>17 what he has to argue is he has to say the effect of the</p> <p>18 agreement is not to rank the sub-debt at the bottom of</p> <p>19 the pile of unsecured unsubordinated liabilities, but</p> <p>20 instead he has to relegate it to the bottom of the</p> <p>21 Lord Neuberger waterfall, even though there's nothing in</p> <p>22 the agreement which expressly says that. We</p> <p>23 respectfully submit there is nothing to show the</p> <p>24 intention of the draftsman that was the case or indeed</p> <p>25 any of the parties was to prevent proof in the normal</p> <p style="text-align: center;">Page 107</p>
<p>1 rules provide that statutory interest is payable only if</p> <p>2 there is a surplus after payment of the debts proved.</p> <p>3 As I say, they didn't deal with that point, but what</p> <p>4 they do say is that they construe the agreements as</p> <p>5 effectively containing an agreement by my clients that</p> <p>6 it won't be paid in respect of the sub-debt until after</p> <p>7 the statutory interest has been paid, and it does so by</p> <p>8 saying that statutory interest payable under sub-rule 7</p> <p>9 and then under section 189(2) in any liquidation is</p> <p>10 within the definition of liabilities. That's what they</p> <p>11 say. Secondly, they say it's not within the definition</p> <p>12 of excluded liabilities. Thirdly, they say it's not</p> <p>13 within the category of obligations which are not payable</p> <p>14 or capable of being established or determined in the</p> <p>15 insolvency of the borrower, which is 2(a). So they say</p> <p>16 it is within liabilities and not within excluded</p> <p>17 liabilities and not within (a). That's how they do it.</p> <p>18 Now, what they cannot say is that the agreements</p> <p>19 address this issue head-on and make clear provisions</p> <p>20 that the sub-debt is to rank behind statutory interest</p> <p>21 because it doesn't mention it. In fact, it doesn't</p> <p>22 mention statutory interest at all anywhere in the</p> <p>23 agreement. We very strenuously urge upon your Lordship</p> <p>24 that it would be very surprising indeed if their</p> <p>25 construction was correct because one posits this</p> <p style="text-align: center;">Page 106</p>	<p>1 way.</p> <p>2 Put the other way, my Lord, we respectfully submit</p> <p>3 that this agreement works perfectly well and is readily</p> <p>4 intelligible and, critically, entirely consistent with</p> <p>5 the statutory scheme. There are no contortions, to</p> <p>6 borrow my learned friend Mr Wolfson's phrase, necessary</p> <p>7 in relation to 2.88(7). Whereas their analysis does</p> <p>8 require those sort of contortions to be put into effect.</p> <p>9 It requires the court to try and work out what is this</p> <p>10 complete subordination, we say a very extreme form</p> <p>11 subordination.</p> <p>12 My Lord, we respectfully submit that either</p> <p>13 statutory interest is not within liabilities at all or,</p> <p>14 alternatively, it's not within excluded liabilities.</p> <p>15 So, my Lord --</p> <p>16 MR JUSTICE DAVID RICHARDS: Sorry, it's either not within?</p> <p>17 MR TRACE: Liabilities at all or it's within --</p> <p>18 MR JUSTICE DAVID RICHARDS: Or it is within.</p> <p>19 MR TRACE: -- excluded liabilities.</p> <p>20 Now, my Lord, let us look at liabilities and what</p> <p>21 the definition there is. We say it's not within this.</p> <p>22 Now, we have the words. We can all see what they say.</p> <p>23 "All present and future sums, liabilities and</p> <p>24 obligations payable or owed by the borrower, whether</p> <p>25 actual or contingent, jointly or severally or otherwise</p> <p style="text-align: center;">Page 108</p>

<p>1 held howsoever."</p> <p>2 What they say -- and for your Lordship's reference,</p> <p>3 it's LBIE's opening submissions, paragraph 38 -- is that</p> <p>4 sub-rule 7 of 2.88 creates a liability or obligation of</p> <p>5 the company which is payable contingently, the</p> <p>6 contingencies being the payment in full of the debts</p> <p>7 proved and the existence of a surplus, or they say it's</p> <p>8 otherwise howsoever. So that's how they do it.</p> <p>9 We say, my Lord, with respect, that 2.88(7) and</p> <p>10 section 189.2, what they do or the effect of the two</p> <p>11 together is they provide a mechanism which directs the</p> <p>12 officeholder as to how he is to apply the surplus in his</p> <p>13 hands. My Lord, it's worth looking at the words:</p> <p>14 "Any surplus remaining after payment shall be</p> <p>15 applied."</p> <p>16 Now, if that's right, my Lord -- and we respectfully</p> <p>17 submit on the wording that there can be no argument</p> <p>18 about it -- all that is is a direction as to how the</p> <p>19 surplus is to be applied. It therefore doesn't impose</p> <p>20 any liability or obligation on the company. It's simply</p> <p>21 a mechanism, a direction, guidance, however one phrases</p> <p>22 it, but what it is not saying is that there is an</p> <p>23 obligation being created or there is some sort of</p> <p>24 liability. My Lord, for our cross-referencing, that's</p> <p>25 our submissions, paragraph 32.</p> <p style="text-align: center;">Page 109</p>	<p>1 contained in an Act rather than a rule.</p> <p>2 My Lord, it's also worth bearing in mind that we are</p> <p>3 talking here about a surplus by definition. It's very</p> <p>4 difficult to see, and we say actually impossible to see,</p> <p>5 how, if one has a surplus, anything that remains in that</p> <p>6 surplus can be a debt or a liability which would have to</p> <p>7 be recognised in any balance sheet or the sort of</p> <p>8 exercise, whatever it may be called, in 5.1(b).</p> <p>9 Can I remind your Lordship what 5.1(b) is about, if</p> <p>10 one goes back at the top of page 220. Clearly, what the</p> <p>11 draftsperson of this document was trying to set out here</p> <p>12 and the parties were agreeing was obviously</p> <p>13 a subordination provision. Various things are being</p> <p>14 subordinated upon and conditional upon. Your Lordship</p> <p>15 sees (a). 1(b) helps in relation to solvency:</p> <p>16 "The borrower being solvent at the time of and</p> <p>17 immediately after the payment by the borrower and,</p> <p>18 accordingly, no such amount will otherwise fall due or</p> <p>19 shall be payable, except to the extent the borrower</p> <p>20 could much such payment and still be solvent."</p> <p>21 So there obviously was to be considered there some</p> <p>22 sort of what we have described as a balance sheet</p> <p>23 exercise. My Lord, in our respectful submission, it</p> <p>24 really is very, very difficult to see, and we would say</p> <p>25 actually impossible to see, how a payment from a surplus</p> <p style="text-align: center;">Page 111</p>
<p>1 Put another way, my Lord, the words "all present and</p> <p>2 future sums", if one goes back to the definition of</p> <p>3 liabilities, "All present and future sums, liabilities</p> <p>4 and obligations payable or owing", we say are simply not</p> <p>5 apt in any way to describe the power given to the</p> <p>6 administrators to pay statutory interest.</p> <p>7 MR JUSTICE DAVID RICHARDS: It is more than a power.</p> <p>8 I mean, as you said, it's a direction.</p> <p>9 MR TRACE: It's a direction.</p> <p>10 Now, my Lord, we are not making a point here that</p> <p>11 relies on a distinction between the identity of the</p> <p>12 administrators and the company, we are not making that,</p> <p>13 which is what my learned friend is focusing on in his</p> <p>14 oral submissions. Our submission -- and my learned</p> <p>15 friend said he wanted to see how we put it, this is how</p> <p>16 we put it -- is simply that the definition of</p> <p>17 liabilities is not apt to catch the application of any</p> <p>18 "surplus" by the administrators, pursuant to the</p> <p>19 direction given by 2.88(7) as to how to apply a surplus.</p> <p>20 My Lord, we don't shrink at all from accepting</p> <p>21 that's a direction. A direction that something shall be</p> <p>22 done if there is a fund and somebody says, statutorily,</p> <p>23 "Well, this fund shall be applied in the following way",</p> <p>24 that doesn't create a liability, nor does it create an</p> <p>25 obligation, even if it's a direction, even if it's</p> <p style="text-align: center;">Page 110</p>	<p>1 can in some way be a debt or a liability recognised</p> <p>2 under that sort of arrangement. Instead, we</p> <p>3 respectfully submit, the direction in 2.88(7) and</p> <p>4 section 189.2, we say what it's intended to do is</p> <p>5 reflect the insolvency waterfall in a true sense, ie it</p> <p>6 identifies how any money which reaches this stage of the</p> <p>7 process is to be used.</p> <p>8 Standing back from it, accepting the waterfall, once</p> <p>9 you get to this stage, you can only get to this stage</p> <p>10 once you have a surplus. Once you have the surplus, you</p> <p>11 then have directions, whatever it is. Even if it is an</p> <p>12 order, we say it doesn't create a debt or liability.</p> <p>13 It's directed how that surplus is to be used. It's to</p> <p>14 be used in a certain way. Whatever it is, it's not the</p> <p>15 sort of process that was going to be done under 5.1(b).</p> <p>16 My Lord, it's also worth pondering for a few minutes</p> <p>17 just what the word "surplus" is or what does it mean.</p> <p>18 We respectfully submit that it means something that's</p> <p>19 left over, in its natural meaning, not something to</p> <p>20 which another creditor would agree to subordinate</p> <p>21 himself to. My Lord, that point is another point --</p> <p>22 I will come back to it in reply when I see how my</p> <p>23 learned friend deals with my point about legal</p> <p>24 impossibility, but this point about as practical</p> <p>25 point --</p> <p style="text-align: center;">Page 112</p>

28 (Pages 109 to 112)

<p>1 MR JUSTICE DAVID RICHARDS: I am not quite sure what you are 2 referring to there, Mr Trace, when you say a reply. 3 I think that Mr Trower will have a right of reply. I 4 don't think you will have a right of rebuttal or 5 whatever it would be at that point. 6 MR TRACE: Under the timetable, my Lord -- 7 MR JUSTICE DAVID RICHARDS: Is there something in there? 8 I have not looked at that carefully. 9 MR TRACE: I have some sort of reply on Wednesday, 10 20 November. 11 MR JUSTICE DAVID RICHARDS: Never mind. I am not going to 12 be very difficult about it. The best thing would be to 13 say as much as you can now. 14 MR TRACE: My Lord, that's an invitation I will take. 15 MR JUSTICE DAVID RICHARDS: But not more than you can. 16 MR TRACE: As long as it's entertaining. 17 MR JUSTICE DAVID RICHARDS: Yes, quite. 18 MR TRACE: Being serious for a moment, the point about the 19 surplus, the fact that we are only here when there is 20 a surplus, is one of the problems just inherent if there 21 is this subordination at all. How does it work? We 22 respectfully submit that the fact that one has to go 23 through these contortions to try and understand how on 24 earth it can work, irrespective of legal impossibility, 25 we say what it's looking at is when you get to this</p> <p style="text-align: center;">Page 113</p>	<p>1 helps us, and I have already made that submission and 2 I won't repeat it. My Lord, put very shortly, this 3 point about liabilities we say is really very, very 4 clear indeed. 5 My Lord, we put an alternative way on construction 6 here. Your Lordship may recall our written submissions. 7 I don't propose to go through all those. This is 8 a slightly different way of putting it and it's this. 9 What we are considering here is the waterfall provisions 10 and how the administrators are to deal with the assets 11 in their hands. Now, LBIE recognises, as we understand 12 it, that what they say is the company's liability to pay 13 statutory interest is a contingent liability. We can 14 see that in paragraph 38 where they say that statutory 15 interest "is a liability or obligation of the company 16 which is payable contingently, the contingencies being 17 the payment in full of the debts proved and the 18 existence of surplus". That's what they say. 19 Now, it must be right, my Lord, and it must follow 20 that unless and until that contingency is satisfied, ie 21 unless and until there has been payment in full of the 22 debts proved, which includes our sub-debt, the company 23 has no liability to pay statutory interest. So if the 24 steps in the argument so far, my Lord, just to repeat 25 them because it's a complicated argument but a simple</p> <p style="text-align: center;">Page 115</p>
<p>1 stage of the waterfall there is a surplus. A surplus 2 from what? One would have expected that any 3 subordination provisions would already have taken effect 4 and would have run their course by that stage. 5 Now, my Lord, what LBIE does in its supplemental 6 submissions -- for your Lordship's note and the 7 transcripts, it's paragraph 69 -- us having made our 8 submissions, they repeat that the definition of 9 liability is very wide. My Lord, that it may be, but 10 that doesn't answer this point. They also state that 11 LBIE is only to be regarded as solvent where it is able 12 to pay all its liability in full. My Lord, we have to 13 confess we don't actually understand that submission. 14 We don't know where it goes. That appears to be what 15 they say the construction of this agreement is. But we 16 don't see, with respect, even if they are right, where 17 that gets anybody. What they have to try and do is they 18 have to establish, somehow or other, that statutory 19 interest is a liability as defined in the sub-debt 20 agreement. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR TRACE: The fact that liabilities may be wide and the 23 fact that solvency may have a wide meaning -- we say 24 quite the reverse actually. Solvency has a specific 25 meaning and the fact that it has that specific meaning</p> <p style="text-align: center;">Page 114</p>	<p>1 one once you understand it, they say it's a contingent 2 liability. It has to be accepted that until that 3 contingency is satisfied, ie unless and until there has 4 been payment in full of our debts, the company has no 5 liability. If those two premises are correct, which we 6 say they are, we say as a result we cannot be 7 subordinated to that liability until our debts are 8 proved because until then it doesn't exist. 9 MR JUSTICE DAVID RICHARDS: I am not sure I do follow your 10 point. I mean, the definition of liability includes 11 contingent liabilities. 12 MR TRACE: Yes. 13 MR JUSTICE DAVID RICHARDS: So I don't quite follow your 14 argument that at the stage at which you say that until 15 satisfaction of the contingency there is no liability. 16 MR TRACE: My Lord, put another way, until our proved debts 17 have been paid there won't be a surplus. 18 MR JUSTICE DAVID RICHARDS: Right. 19 MR TRACE: So we say that there will never be a liability to 20 pay statutory interest, which ranks ahead of our 21 sub-debt. 22 MR JUSTICE DAVID RICHARDS: There won't be an actual 23 liability. There won't be a present liability. But the 24 premise from which Mr Trower proceeds is that there is 25 a contingent liability from the start.</p> <p style="text-align: center;">Page 116</p>

<p>1 MR TRACE: My Lord, that's a contingent liability that we</p> <p>2 say, looking at it from the beginning and taking the</p> <p>3 steps that they are, until those contingencies are</p> <p>4 satisfied the liability cannot exist. What we are</p> <p>5 looking at is it a liability, a contingent liability.</p> <p>6 We say --</p> <p>7 MR JUSTICE DAVID RICHARDS: Let us suppose that all the</p> <p>8 provable unsubordinated debts are paid in full and there</p> <p>9 is £10 million there.</p> <p>10 MR TRACE: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: Now, at that point interest is</p> <p>12 payable out of that surplus.</p> <p>13 MR TRACE: Yes.</p> <p>14 MR JUSTICE DAVID RICHARDS: So how do you satisfy 5.1(b) at</p> <p>15 that point?</p> <p>16 MR TRACE: My Lord, we simply say that until our sub-debt is</p> <p>17 paid no liability to -- there is no surplus from which</p> <p>18 statutory interest can be paid.</p> <p>19 MR JUSTICE DAVID RICHARDS: Ah, because you say you are</p> <p>20 entitled to prove before the statutory interest.</p> <p>21 MR TRACE: Correct.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes. Well, that's why Mr Trower</p> <p>23 relies on 7(d) and (e). So that's why that argument,</p> <p>24 far from being a byway, is actually quite important.</p> <p>25 MR TRACE: My Lord, I have made the submission.</p> <p style="text-align: center;">Page 117</p>	<p>1 takes place, because you have the words, "To the extent</p> <p>2 the borrower could make such payment and still be</p> <p>3 solvent." That is obviously looked at.</p> <p>4 MR JUSTICE DAVID RICHARDS: Exactly. It would be very</p> <p>5 surprising, wouldn't it, if a bank could return tier two</p> <p>6 or tier three capital to subordinated lenders without</p> <p>7 there being sufficient assets to pay accrued interest.</p> <p>8 MR TRACE: Correct.</p> <p>9 MR JUSTICE DAVID RICHARDS: To its lenders. Now, when you</p> <p>10 apply 5.1(b) in an insolvency, of course interest which</p> <p>11 has accrued between the commencement of the insolvency</p> <p>12 and the date when it's proposed to repay the</p> <p>13 subordinated debt is not provable.</p> <p>14 MR TRACE: Correct.</p> <p>15 MR JUSTICE DAVID RICHARDS: So the effect of your argument</p> <p>16 would be that in an insolvency the subordinated debt</p> <p>17 ranks ahead of interest to which it would be</p> <p>18 subordinated if the company were a going concern.</p> <p>19 MR TRACE: Well, of course it depends what your Lordship</p> <p>20 means by an insolvency.</p> <p>21 MR JUSTICE DAVID RICHARDS: I mean an administration or</p> <p>22 liquidation, let us say.</p> <p>23 MR TRACE: Your Lordship means administration.</p> <p>24 MR JUSTICE DAVID RICHARDS: Or liquidation.</p> <p>25 MR TRACE: The short answer I was going to say was but not</p> <p style="text-align: center;">Page 119</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes, I see. Can I ask you this.</p> <p>2 I want to ask you at some point. I will ask you now.</p> <p>3 I don't want to take you out of your course.</p> <p>4 MR TRACE: Not at all.</p> <p>5 MR JUSTICE DAVID RICHARDS: One does have to bear in mind</p> <p>6 that 5.1(b) operates both while the company is a going</p> <p>7 concern and after it goes into insolvency.</p> <p>8 MR TRACE: My Lord, yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: Now, if you had a situation --</p> <p>10 supposing the company, the borrower, had in mind to</p> <p>11 repay some subordinated debt on 1 December. 5.1(b)</p> <p>12 would have to be satisfied immediately after that. At</p> <p>13 1 December, there will have accrued interest on debts of</p> <p>14 the borrower.</p> <p>15 MR TRACE: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: Particularly if it's a financial</p> <p>17 institution and even more so if it's a bank, which will</p> <p>18 not have been paid but it will have been perhaps</p> <p>19 credited to accounts or be awaiting crediting. Now,</p> <p>20 I take it that on 1 December 5.1(b) would require the</p> <p>21 company to have assets after repayment of any</p> <p>22 subordinated debts sufficient to pay all that interest.</p> <p>23 MR TRACE: I think that must be right.</p> <p>24 MR JUSTICE DAVID RICHARDS: It must be.</p> <p>25 MR TRACE: Certainly there is some sort of exercise that</p> <p style="text-align: center;">Page 118</p>	<p>1 in that situation. On the basis we are in an</p> <p>2 administration and on the basis that this applies --</p> <p>3 I am not, with respect, going to give your Lordship an</p> <p>4 immediate answer because I want to think about that.</p> <p>5 MR JUSTICE DAVID RICHARDS: Sure.</p> <p>6 MR TRACE: But what I will say is that -- my Lord, I am</p> <p>7 going to hold my fire, if I may, but I am very grateful</p> <p>8 to your Lordship for raising that point.</p> <p>9 MR JUSTICE DAVID RICHARDS: Sorry.</p> <p>10 MR TRACE: No, a thought went through my head and I just had</p> <p>11 a brief word with Ms Hutton. Regulatory capital where</p> <p>12 it is different in insolvency, by the time when someone</p> <p>13 is insolvent than otherwise, we will have to check that,</p> <p>14 my Lord, over the weekend. That may be the answer.</p> <p>15 That was a point that --</p> <p>16 MR JUSTICE DAVID RICHARDS: Can I just, in the same vein,</p> <p>17 since I raise it, give you another example, which would</p> <p>18 apply to the sort of other categories of non-provable</p> <p>19 liabilities. Let us suppose that in Nortel the Supreme</p> <p>20 Court had held that liabilities created by contribution</p> <p>21 notices under the Pensions Act created a non-provable</p> <p>22 debt, which they might have done.</p> <p>23 MR TRACE: They could have done.</p> <p>24 MR JUSTICE DAVID RICHARDS: They could have done. In those</p> <p>25 circumstances -- and now of course a contribution notice</p> <p style="text-align: center;">Page 120</p>

<p>1 can be issued to a company outside insolvency  2 circumstances so it's possible that that could happen.  3 Again, on the two scenarios I am giving you, in the  4 first the contribution notice would create a liability,  5 which as it seems to me would clearly have to be taken  6 account of when applying 5.1(b). However, if the  7 contribution notice had been issued between the date of  8 the commencement of the insolvency and the date when the  9 possibility of repayment of subordinated debts arose, as  10 I understand it, you say, well, you wouldn't be  11 subordinated to the contribution notice. I think that's  12 just a different example of the same point, but it's an  13 example taken from non-provable debts as opposed to  14 statutory interest. But by all means come back to me on  15 that.</p> <p>16 MR TRACE: My Lord, I will come back obviously. Because  17 your Lordship has asked a question I will answer it.  18 But, my Lord, what it doesn't answer -- let us assume  19 your Lordship is right. What it doesn't answer is our  20 very simple construction point that it would be very  21 surprising if there had been us being pushed right the  22 way down. That point remains. So my initial answer,  23 but I will think about it, is that there may be points  24 on a spectrum. The fact there may be points on  25 a spectrum, the more I think about it the more I think</p> <p style="text-align: center;">Page 121</p>	<p>1 opinion of the insolvency officer or the borrower do,  2 rank junior to the subordinated liabilities in any  3 insolvency of the borrower."</p> <p>4 Now, it talks about liabilities which are "expressed  5 to be". In our respectful submission, that can only  6 mean a reference to -- and it supports our earlier  7 arguments about why one must look and take into account  8 the Insolvency Act and the rules because expressed to be  9 must be expressed somewhere. We say that must be  10 a reference to something expressed in the Act or the  11 rules to rank junior to the subordinated debt. Now, we  12 make that submission just as a submission in itself  13 because it talks about expressed. We then look in the  14 agreement to see, well, does the agreement itself say  15 anything about any specific liability being junior to  16 the subordinated liabilities and it doesn't. None of  17 the agreements do.</p> <p>18 We point to the fact in support, thirdly, that it  19 says "expressed to be", et cetera, et cetera, "to be  20 ranked junior in any insolvency of the borrower". It's  21 difficult to see how the expression can be something  22 other than that when it actually expressly talks about,  23 pardon the pun, insolvency. Insolvency in its own  24 definition, as we have seen, means some sort of formal  25 insolvency process. It's difficult to see how the</p> <p style="text-align: center;">Page 123</p>
<p>1 it's actually a point in my favour because what one  2 would have expected the draftsman of this document to  3 do is to say, well, we have to make absolutely clear  4 what the subordination is. If there are potential  5 shades of grey or whatever and doubts about it, what you  6 would have expected was this agreement to sort it out.  7 The fact there is nothing there at all, my present  8 submission would be to say it actually helps us rather  9 than hinders us.</p> <p>10 MR JUSTICE DAVID RICHARDS: I see. Right.  11 MR TRACE: But I will think about it, my Lord.  12 MR JUSTICE DAVID RICHARDS: Yes.  13 MR TRACE: My Lord, that's all we wanted to say about that  14 we are not within the definition of liabilities. The  15 next matter is we say we are within excluded  16 liabilities.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.  18 MR TRACE: Now, we will obviously have to meet this  19 argument. If your Lordship finds that rule 2.88(7) or  20 section 189.2 does impose a liability and obligation on  21 the company, then we respectfully submit it's within the  22 category of excluded liabilities.</p> <p>23 My Lord, let us look again at the definition of  24 excluded liabilities. Excluded liabilities means:  25 "Liabilities which are expressed to be, and in the</p> <p style="text-align: center;">Page 122</p>	<p>1 reference to the opinion of the insolvency officer,  2 officer for the borrower, can mean other than someone  3 who has been appointed to administer assets in the  4 course of some insolvency.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes, it's defined, isn't it?  6 MR TRACE: Indeed, insolvency officer is so defined.</p> <p>7 So, my Lord, not only does one have what one would  8 have thought was the case by looking at the words, it  9 talks about "expressed to be", it talks about  10 insolvency, it talks about ranking junior to the  11 subordinated liabilities. There is nothing in the  12 agreement that talks about that. It then talks about  13 insolvency and, as your Lordship has correctly pointed  14 out, insolvency officer itself is defined at the bottom  15 of that definition page.</p> <p>16 Therefore, if statutory interest is a liability,  17 contrary to our earlier arguments, it's therefore  18 clearly, in our respectful submission, an excluded  19 liability on the basis that it's expressed by the rules  20 to be junior to the subordinated liabilities. The  21 liabilities expressed to be junior to the subordinated  22 liabilities in any insolvency of the borrower are the  23 liabilities which rank below payment of unsecured  24 provable debts in the statutory priority of payments  25 (ie, using the Nortel list, statutory interest,</p> <p style="text-align: center;">Page 124</p>

<p>1 non-provable liabilities and sums due to shareholders in 2 their capacity as such). For your Lordship's note, it's 3 paragraph 39 of course of Nortel. In our submissions, 4 it's paragraph 33.</p> <p>5 If your Lordship wants to go back to it, it's 6 pages 14 and 15.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, thank you.</p> <p>8 MR TRACE: Of our initial submissions.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR TRACE: Now, my Lord, LBIE's response, for your 11 Lordship's note, is paragraph 72 and footnote 25 in 12 their supplemental submissions. They, first of all, 13 say:</p> <p>14 "Statutory interest is nowhere expressed to rank 15 junior to the subordinated liabilities in any insolvency 16 of the borrower."</p> <p>17 That's what they say.</p> <p>18 MR JUSTICE DAVID RICHARDS: This is paragraph 52, is it?</p> <p>19 MR TRACE: It's paragraph 72 and footnote 25. It's in their 20 supplemental.</p> <p>21 MR JUSTICE DAVID RICHARDS: Sorry, paragraph 72. Yes.</p> <p>22 MR TRACE: The passage I am quoting is just at the top of 23 page 26.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR TRACE: Our answer to that, my Lord, our submission is</p> <p style="text-align: center;">Page 125</p>	<p>1 judgment of the court rather than boldly asserting that, 2 "In their opinion, X, Y and Z ..."</p> <p>3 In fact, my Lord, and we do make this point, there 4 is no evidence -- I have already made the point about 5 such evidence there is, nothing about the regulatory 6 scheme -- from the administrators and all there is is 7 this assertion in the supplemental submissions.</p> <p>8 My Lord, standing back from it, that must be right, with 9 the greatest of respect to my learned friends. Excluded 10 liabilities in the agreement, when it's looking at what 11 is going to happen in an insolvency, and there is an 12 issue of this importance that has to be decided by the 13 court and everyone accepts it should be decided by the 14 court, the idea that an insolvency officer can just 15 simply say, "Oh, we think A, B and C. That is what we, 16 on one side of the court consider is the position", 17 however honestly held, in our submission, cannot be 18 enough. I am not for one minute suggesting there is 19 anything wrong with the opinion, but in a situation like 20 this, in our submission, effectively that opinion cannot 21 be given until after your Lordship has ruled.</p> <p>22 My Lord, they also say -- and it's worth looking 23 again; this is in their footnote on page 26, it's 24 footnote 25 -- they talk about the standard form 25 agreement. Your Lordship sees that?</p> <p style="text-align: center;">Page 127</p>
<p>1 this: we say it is expressed to rank junior because the 2 statutory scheme provides that statutory interest is 3 payable after provable debts. We respectfully submit 4 that the closing words of the definition, if one goes 5 back to it at page 216, the closing words of excluded 6 liabilities, "in any insolvency of the borrower", 7 support our position that the expression or the word 8 "expressed", if one is looking for an expression, where 9 is the expression, we respectfully submit that can only 10 be the statutory scheme rather than any other context, 11 particularly as there is nothing in the agreement 12 itself.</p> <p>13 What they also say, my Lord, is that statutory 14 interest does not rank junior to the subordinated 15 liabilities in the opinion of LBIE's administrators, as 16 required by the definition. In our respectful 17 submission, when one looks to see how does one construe 18 excluded liabilities, and it's talking about "expressed 19 to be and in the opinion of the insolvency officer do", 20 that must require an informed decision by an 21 administrator in accordance with the scheme, if 22 appropriate on legal advice. Where, here, we say the 23 very issue in this application by those administrators, 24 we respectfully submit that the correct way is for the 25 administrator effectively to leave that judgment to the</p> <p style="text-align: center;">Page 126</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TRACE: It's in footnote 25.</p> <p>3 MR JUSTICE DAVID RICHARDS: Sorry, yes.</p> <p>4 MR TRACE: I have dealt with express means expressed in the 5 Act, this is wrong, natural meaning, et cetera, the 6 reference in the opinion would make no sense, et cetera.</p> <p>7 Then it says:</p> <p>8 "Given that the standard form agreement could be 9 used in circumstances where there were also junior 10 liabilities which the parties wish to subordinate, the 11 subordinated liabilities are relevant. There are in 12 fact no such junior liabilities in the agreement as 13 between LBHI2 and LBIE or in any other agreement."</p> <p>14 In our respectful submission, it makes far more 15 sense, and indeed would be correct, for an appeal to the 16 opinion of the insolvency officer if the question that 17 the insolvency officer is asked to answer is how 18 something is ranked in the insolvency scheme rather than 19 the question of how it's ranked in the contract.</p> <p>20 My Lord, that's important because it builds on our 21 submission as to what excluded liabilities means and 22 what express means, express being something in the 23 insolvency regime. It would be very odd indeed, in our 24 respectful submission, if the mere fact that it was a 25 standard form contract means in some way -- well,</p> <p style="text-align: center;">Page 128</p>



<p>1 anything really.</p> <p>2 MR JUSTICE DAVID RICHARDS: Do you go so far as to say that</p> <p>3 if there were a subordinated loan agreement which</p> <p>4 expressly provided that the loan under that agreement</p> <p>5 was subordinated to these loans that they would not be</p> <p>6 excluded liabilities?</p> <p>7 MR TRACE: No, because there it would be absolutely clear.</p> <p>8 MR JUSTICE DAVID RICHARDS: It is not expressed in the</p> <p>9 rules, but it's expressed in the subordination</p> <p>10 agreement. That would fit within this.</p> <p>11 MR TRACE: That would fit because that would be an express</p> <p>12 contract.</p> <p>13 MR JUSTICE DAVID RICHARDS: Indeed. Yes, quite. So what</p> <p>14 you say is when it talks about something being express</p> <p>15 that may be in an agreement, typically perhaps the</p> <p>16 agreement creating the liability, or it may be in</p> <p>17 legislation such as the Insolvency Rules and the Act.</p> <p>18 MR TRACE: Yes. I won't repeat the point as I have already</p> <p>19 made it, but the fact that there isn't anything express</p> <p>20 in this agreement is very supportive of our</p> <p>21 construction. We say it can only be expressed, it can</p> <p>22 only mean actually expressed effectively in the scheme.</p> <p>23 MR JUSTICE DAVID RICHARDS: I mean, there could be, couldn't</p> <p>24 there, further subordinated loan agreements made after</p> <p>25 the date of this agreement?</p> <p style="text-align: center;">Page 129</p>	<p>1 MR TRACE: I suppose, potentially.</p> <p>2 MR JUSTICE DAVID RICHARDS: But it would rank ahead of</p> <p>3 shareholders.</p> <p>4 MR TRACE: Yes. Lastly on this point, LBIE's submission</p> <p>5 that this -- I am trying to find the right wording --</p> <p>6 empty category is in the agreements because it's</p> <p>7 a redundant part of the standard form, I have just made</p> <p>8 that point, effectively amounts to a submission that the</p> <p>9 parties left in a definition which should have been</p> <p>10 deleted, ie it's effectively a submission that the</p> <p>11 draftswoman made a mistake. In our respectful</p> <p>12 submission, the court should be very loathe to say that</p> <p>13 something has been put in in a document that's as</p> <p>14 carefully drafted as this that doesn't have some full</p> <p>15 meaning.</p> <p>16 MR JUSTICE DAVID RICHARDS: What are you referring to there?</p> <p>17 MR TRACE: What they say, it's the bit they talk about in</p> <p>18 their footnote 25.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR TRACE: Given that the standard form agreement could be</p> <p>21 used in certain circumstances but also junior</p> <p>22 liabilities.</p> <p>23 MR JUSTICE DAVID RICHARDS: I think that's a reference to</p> <p>24 a subsequent use of basically this template, but</p> <p>25 including specifically a subordination to these</p> <p style="text-align: center;">Page 131</p>
<p>1 MR TRACE: Of course. We are at cross purposes, my Lord.</p> <p>2 Of course if this was part of a trio of documents, as it</p> <p>3 is here, a collection of documents and in a later one</p> <p>4 they said, "For the purposes of this agreement,</p> <p>5 express" --</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, either in one of the</p> <p>7 contemporaneous ones, which as you say they are not, or</p> <p>8 in subsequent ones.</p> <p>9 MR TRACE: Or subsequent ones. We have no problem with</p> <p>10 that.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>12 MR TRACE: My Lord, I have already said that the effect of</p> <p>13 the LBIE and Lydian analysis is that the sub-debt claim</p> <p>14 is pushed right the way down to the very bottom of the</p> <p>15 list. I have made that point already. But building on</p> <p>16 that, we respectfully submit that it's, in our</p> <p>17 respectful submission, particularly unlikely on that</p> <p>18 analysis that there be any question of pushing a junior</p> <p>19 debt further down the list of priorities. On their</p> <p>20 analysis, the junior debt would effectively never fall</p> <p>21 to be repaid.</p> <p>22 MR JUSTICE DAVID RICHARDS: Junior to your debt, you mean?</p> <p>23 MR TRACE: Correct.</p> <p>24 MR JUSTICE DAVID RICHARDS: But it might if there was enough</p> <p>25 available.</p> <p style="text-align: center;">Page 130</p>	<p>1 agreements.</p> <p>2 MR TRACE: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: I don't think it's an empty</p> <p>4 definition. On the facts of this case they say it's</p> <p>5 empty, but that doesn't mean it was always going to be</p> <p>6 empty.</p> <p>7 MR TRACE: With respect, my Lord, no. What they are saying</p> <p>8 is it's irrelevant that there in fact no such junior</p> <p>9 liabilities. What they are saying is, "Here is a clause</p> <p>10 that refers to things that are in fact irrelevant."</p> <p>11 MR JUSTICE DAVID RICHARDS: It's simply a clause in</p> <p>12 agreement which doesn't bite, they say, but that's</p> <p>13 because there wasn't a subsequent subordination</p> <p>14 agreement. That's their case. It doesn't render the</p> <p>15 definition otiose when the agreement was made.</p> <p>16 MR TRACE: No, I am not suggesting it does.</p> <p>17 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>18 MR TRACE: But what we are seeking to do, my Lord, is to say</p> <p>19 that when you put those points together we say actually</p> <p>20 the standard clause is helpful to us rather than hinders</p> <p>21 us. But that is a standard clause that's been put in</p> <p>22 and the parties have thought, well, what's going to be</p> <p>23 covered and what's not covered, and they haven't covered</p> <p>24 various things. I am developing a point I think I will</p> <p>25 be answering your Lordship on Monday in relation to your</p> <p style="text-align: center;">Page 132</p>

<p>1 Lordship's question. It does not deal with all those</p> <p>2 sort of little sub-points that might have been made.</p> <p>3 But, fundamentally, it deals with something, we</p> <p>4 respectfully submit, that is far more logical from our</p> <p>5 point of view, ie expressed in Insolvency Rules or</p> <p>6 legislation, primary legislation, and therefore we</p> <p>7 respectfully submit, where this is all going, it's</p> <p>8 within the phrase "excluded liabilities".</p> <p>9 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>10 MR TRACE: Now, my Lord, I have mentioned -- and I am going</p> <p>11 to leave that to Mr Isaacs -- Mr Isaacs puts these</p> <p>12 points slightly differently. I am not saying he's wrong</p> <p>13 or right or whatever. I don't propose to go through all</p> <p>14 those but they are slightly different.</p> <p>15 My Lord, the next argument that LBIE uses -- and for</p> <p>16 your Lordship's note, it's paragraphs 39 to 43 and it's</p> <p>17 perhaps worth just looking back at those.</p> <p>18 My Lord, I know the shorthand writer would like a</p> <p>19 break at 3, if that's all right. Perhaps now would be</p> <p>20 a convenient time.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes, certainly. Okay, I will</p> <p>22 rise for five minutes.</p> <p>23 (2.59 pm)</p> <p>24 (Short break)</p> <p>25 (3.06 pm)</p> <p style="text-align: center;">Page 133</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TRACE: Your Lordship will remember I was making the</p> <p>3 point about the difference between proof and seeking</p> <p>4 payment. My Lord, our short point is, to answer the</p> <p>5 7(e) point your Lordship raised, simply submitting a</p> <p>6 proof is not seeking payment in priority or in any way</p> <p>7 inconsistent with our rights of subordination.</p> <p>8 My Lord, there is a similar point while we are on</p> <p>9 this point, 4(v) of the sub-debt agreements, which is</p> <p>10 page 219.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR TRACE: "Subject to (vi) below, the lender may, at its</p> <p>13 discretion, subject as provided in the agreement,</p> <p>14 institute proceedings in the insolvency of the borrower</p> <p>15 to enforce any obligation, condition or provision</p> <p>16 binding on the borrower under this agreement, other than</p> <p>17 any obligation for payment of principal moneys or</p> <p>18 interest in respect of the loan or any above, provided</p> <p>19 that the borrower shall not, by virtue of the</p> <p>20 institution of any such proceedings for the insolvency</p> <p>21 borrower, be obliged to pay any sum or sums sooner than</p> <p>22 the same would otherwise be payable by it."</p> <p>23 So clearly the draftsman of this agreement was</p> <p>24 looking at the way of what was allowed. We respectfully</p> <p>25 submit that it's another instance of showing that simply</p> <p style="text-align: center;">Page 135</p>
<p>1 MR JUSTICE DAVID RICHARDS: Mr Trace.</p> <p>2 MR TRACE: My Lord, two points that I know your Lordship was</p> <p>3 very not troubled but interested in, in 7(d) and (e) of</p> <p>4 the agreement, your Lordship will remember on page 221.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TRACE: Your Lordship said that point may have more</p> <p>7 significance. One point that's worth bearing in mind</p> <p>8 under 7(e), which I know your Lordship was interested</p> <p>9 in, I will just remind your Lordship of the wording.</p> <p>10 That's on 221. It talks about "take or admit to take</p> <p>11 any action whereby the subordination of the</p> <p>12 sub-liabilities or any part of them to senior</p> <p>13 liabilities might be terminated, impaired or adversely</p> <p>14 affected".</p> <p>15 Now, my Lord, the proof that was put in is in the</p> <p>16 same bundles, a few pages back, 197. It's worth looking</p> <p>17 at that. Does your Lordship have 197?</p> <p>18 MR JUSTICE DAVID RICHARDS: I have it, yes.</p> <p>19 MR TRACE: If your Lordship drops down to (3), the third box</p> <p>20 down, "Claim relating". Does your Lordship see that?</p> <p>21 Your Lordship will see the general and the company</p> <p>22 unsecured balance; that's the 38 million.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR TRACE: Then you have the inter-company notes</p> <p>25 subordinated that is referred to 1.254-odd billion.</p> <p style="text-align: center;">Page 134</p>	<p>1 submitting a proof -- we can take steps so long</p> <p>2 effectively as we don't prejudice the position.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR TRACE: My Lord, I think I did stress the point, and</p> <p>5 Ms Hutton rightly points out that if you go back to 197</p> <p>6 we do expressly state in the proof that it's</p> <p>7 subordinated. Page 197.</p> <p>8 MR JUSTICE DAVID RICHARDS: You have lodged it. Obviously</p> <p>9 whether you are entitled to lodge a proof of the</p> <p>10 subordinated debt in a sense is an issue on this</p> <p>11 application.</p> <p>12 MR TRACE: Absolutely.</p> <p>13 MR JUSTICE DAVID RICHARDS: If the answer is you cannot,</p> <p>14 then you will have to retract it, or whatever the proper</p> <p>15 approach would be, yes.</p> <p>16 MR TRACE: Now, my Lord, what I was asking your Lordship to</p> <p>17 do just before we rose was to have a look at LBIE's</p> <p>18 submissions at paragraphs 39 to 43.</p> <p>19 MR JUSTICE DAVID RICHARDS: Is this in their supplemental?</p> <p>20 MR TRACE: Their original.</p> <p>21 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>22 MR TRACE: Your Lordship has read this, but if your Lordship</p> <p>23 can remind yourself of what they say. They say as to</p> <p>24 what we appear to say and then they make various</p> <p>25 construction points. They say that the result we are</p> <p style="text-align: center;">Page 136</p>

<p>1 doing would be absurd; that is 43 and that's how they</p> <p>2 conclude. We respectfully submit that what has happened</p> <p>3 here is a mischaracterisation of our arguments. Our</p> <p>4 arguments and our submission to your Lordship is that</p> <p>5 subordination out of the statutory priority order is not</p> <p>6 permissible. I have made that point. Secondly, and in</p> <p>7 any event, the agreements don't provide for</p> <p>8 subordination to that extent but only subordination to</p> <p>9 LBIE's other unsecured debts. There is nothing absurd</p> <p>10 about that. What's surprising, which is the submission</p> <p>11 I have made -- and I am not going to characterise it as</p> <p>12 absurd, but we do say it's very striking and odd -- is</p> <p>13 there would be any further subordination than that.</p> <p>14 I have already made my submission.</p> <p>15 They go on, and again just to remind your Lordship</p> <p>16 of what they say, at 45 to 50. They discuss</p> <p>17 non-provable liabilities generally. What they say --</p> <p>18 and they make submissions about how they are liabilities</p> <p>19 and so they say they rank ahead of the liabilities of my</p> <p>20 client's sub-debt. Our short answer to this point is</p> <p>21 that the position of non-provable liabilities and</p> <p>22 currency conversion claims follows on from that of</p> <p>23 statutory interest. Just as statutory interest is not</p> <p>24 payable until after payment of all proved debts, there</p> <p>25 can be no question of non-provable liabilities being</p> <p style="text-align: center;">Page 137</p>	<p>1 We say they don't exist at all. To that extent we</p> <p>2 entirely support what Mr Wolfson has said, and I will</p> <p>3 come back to this later. But in any event it doesn't</p> <p>4 matter, and I have already made this point earlier in</p> <p>5 relation to the Eckhart point, because they rank behind</p> <p>6 our claims. So when your Lordship is wondering how do</p> <p>7 currency conversion claims fit into this construction</p> <p>8 part of the case, we say they are utterly irrelevant.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR TRACE: My Lord, so far as the non-subordinated claims,</p> <p>11 and that is both in respect of my client's claims, and</p> <p>12 LBL's claims, for your Lordship's note, the submissions</p> <p>13 made my learned friend are in my learned friend,</p> <p>14 Mr Trower's opening submissions. It is paragraphs 59</p> <p>15 and 60 and 61 to 69. There what he does is base himself</p> <p>16 on the equitable rule, we are going to deal with the</p> <p>17 equitable rule separately. Rather like Mr Wolfson we</p> <p>18 are trying to do this treating it in compartments. It</p> <p>19 is not easy, I have to say.</p> <p>20 MR JUSTICE DAVID RICHARDS: Not easy.</p> <p>21 MR TRACE: But anyway we are doing our best. But my Lord</p> <p>22 the summary headline points are this; we say that unless</p> <p>23 and until a call is made by a liquidator of LBIE, the</p> <p>24 equitable rule has no application. Therefore the</p> <p>25 unsubordinated claims of the members, ie our 38 million</p> <p style="text-align: center;">Page 139</p>
<p>1 paid until after all proved liabilities have been paid</p> <p>2 in full.</p> <p>3 MR JUSTICE DAVID RICHARDS: Including yours.</p> <p>4 MR TRACE: Yes. Accordingly, if that's right, and we</p> <p>5 respectfully say it is, ie all proved debts are paid</p> <p>6 including ours, consistent with the arguments and</p> <p>7 submissions we make to your Lordship, there can be no</p> <p>8 Liability in respect of any of those non-provable claims</p> <p>9 until all proved debts, including the sub-debt, have</p> <p>10 been paid in full.</p> <p>11 (3.14 pm)</p> <p>12 MR TRACE: And that is how it works. My Lord, we have</p> <p>13 a further argument, and in any event argument. It is</p> <p>14 a submission that I was going to make, but perhaps</p> <p>15 better made -- Ms (inaudible) is probably right -- in</p> <p>16 relation to the currency conversion claims, so I won't</p> <p>17 make it now, if I may.</p> <p>18 MR JUSTICE DAVID RICHARDS: Okay, fine.</p> <p>19 MR TRACE: My Lord, it is worth just staying a little bit</p> <p>20 though about currency conversion claims at this point,</p> <p>21 so your Lordship sees how they fit in. Whether any such</p> <p>22 claim exists -- for your Lordship's note it is LBIE's</p> <p>23 submissions 51 to 58, and they say why they are these</p> <p>24 currency conversion claims, we say two things, so</p> <p>25 your Lordship understands where we are going on this.</p> <p style="text-align: center;">Page 138</p>	<p>1 odd and LBL's 363 million odd, rank for payment with all</p> <p>2 the other unsecured debts, in other words on our version</p> <p>3 of the waterfall, before the payment of the subordinated</p> <p>4 liabilities, and before on LBIE's version of the</p> <p>5 waterfall the payment of statutory interest.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TRACE: Now here again, LBHI, Mr Isaacs' clients, they</p> <p>8 put this slightly differently. My Lord, I am going to</p> <p>9 leave that to Mr Isaacs. Now my Lord what I have sought</p> <p>10 to do or what we have sought to do there -- we have</p> <p>11 obviously said a lot more than that in the text, both in</p> <p>12 the opening submissions and in supplemental</p> <p>13 submissions -- is explain the kernel of the points.</p> <p>14 Going back to the six points that I put at the</p> <p>15 beginning, I have dealt with already the legally</p> <p>16 possible, and I have no further submissions to make in</p> <p>17 relation to that. The second one was about the context.</p> <p>18 I have made various points, ie against the background of</p> <p>19 the legislative insolvency scheme. I have made various</p> <p>20 points in relation to that at various points, but one</p> <p>21 must not forget, in our respectful submission, the</p> <p>22 overarching point that before you ever get to the</p> <p>23 sub-sub-textual points in the agreement, there is the</p> <p>24 overarching point (several inaudible words) ask the</p> <p>25 question. When one is considering what it means, we</p> <p style="text-align: center;">Page 140</p>

<p>1 respectfully submit that your Lordship just never gets</p> <p>2 there, because given the background and given the fact</p> <p>3 that there is nothing in it that requires any such</p> <p>4 construction, we say the construction that we favour</p> <p>5 should be accepted by your Lordship. On the third point</p> <p>6 about whether it is liabilities, et cetera, I have</p> <p>7 developed that. The fourth point, nothing in the</p> <p>8 agreement restricts us from proving, I have made that</p> <p>9 point at various stages, we say there is not anything</p> <p>10 there, and actually it is very telling that it isn't.</p> <p>11 The fifth point is the surprising point given</p> <p>12 particularly the regulatory background. There is really</p> <p>13 nothing more to say. That is either a good point or it</p> <p>14 is not. We respectfully submit it is a good point. The</p> <p>15 sixth and last point, again, my Lord, we do urge</p> <p>16 your Lordship to bear in mind, and that is why I took</p> <p>17 your Lordship to the authorities, that to suggest that</p> <p>18 our claims go right the way down to the bottom of the</p> <p>19 waterfall in this way, we respectfully submit would need</p> <p>20 very, very clear words, and they are not there. What my</p> <p>21 learned friend, with respect, has tried to do, and he</p> <p>22 has tucked things away in footnotes and made all these</p> <p>23 little points, but they are very, very, very</p> <p>24 sub-sub-points. When one stands back from it and says</p> <p>25 "What on earth is this agreement? What does this mean?"</p> <p style="text-align: center;">Page 141</p>	<p>1 written submissions. For your Lordship's note, the</p> <p>2 reference is paragraphs 82 to 85. This is the</p> <p>3 Section 74 point, my Lord.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR TRACE: My Lord, it is perhaps worth looking at</p> <p>6 Section 74. I am sure your Lordship is well aware of</p> <p>7 it. Under Section 74, my Lord -- does your Lordship</p> <p>8 have it now?</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes, I do.</p> <p>10 MR TRACE: The liability of the contributories is for any</p> <p>11 amount sufficient for payment of its debts and</p> <p>12 liabilities, and the expenses of the winding up and for</p> <p>13 the adjustment, as it were, of the rights of the</p> <p>14 contributors amongst themselves.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR TRACE: Now our position -- my Lord, for your Lordship's</p> <p>17 note, it is our submissions, paragraph 81 -- is that the</p> <p>18 only sums falling within the debts and liabilities,</p> <p>19 quote, unquote, of LBIE for these purposes are proveable</p> <p>20 debts within the meaning of 12.3 of the rules and 13.12.</p> <p>21 We say that is the position, because we respectfully</p> <p>22 submit that is clearly the correct construction of the</p> <p>23 legislation. Now Mr Isaacs has dealt with this in</p> <p>24 detail at paragraphs 56 and following of his</p> <p>25 submissions. My Lord, we are going to leave it to</p> <p style="text-align: center;">Page 143</p>
<p>1 What is it about"? Does it actually mean that my</p> <p>2 clients are subordinated right the way down the</p> <p>3 waterfall. We say absolutely not, plain as day. So</p> <p>4 my Lord that is all we want to say on the sub-debt.</p> <p>5 MR JUSTICE DAVID RICHARDS: I think looking at the opening</p> <p>6 submissions, it does look as if Mr Isaacs is perhaps</p> <p>7 going to take me to the regulatory and legislative</p> <p>8 background. Subordinate --</p> <p>9 MR TRACE: He is going to go to the regulatory in detail.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TRACE: My Lord, I don't want to trespass on Mr Isaacs.</p> <p>12 I am looking forward to it.</p> <p>13 MR JUSTICE DAVID RICHARDS: No, that's fine. Of course.</p> <p>14 MR ISAACS: My Lord, I believe Mr Trower is going to deal</p> <p>15 with the financial resources requirement.</p> <p>16 MR TRACE: My Lord, just a taster of that, but only</p> <p>17 a taster, the invitation to speak not too long is</p> <p>18 accepted. Your Lordship might like to look or make</p> <p>19 a note at the very least. It is my learned friend,</p> <p>20 Mr Isaacs' submissions, paragraphs 114 and 115</p> <p>21 particularly.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes. Okay.</p> <p>23 MR TRACE: My Lord, the next area we would like to go to</p> <p>24 again is what are the components of the call liability.</p> <p>25 Now my Lord we dealt with this relatively briefly in our</p> <p style="text-align: center;">Page 142</p>	<p>1 Mr Isaacs to develop those submissions, but we do have</p> <p>2 one or two points that we consider would be helpful for</p> <p>3 your Lordship. We obviously adopt everything Mr Isaacs</p> <p>4 says and we agree with it. But in our respectful</p> <p>5 submission there are a couple of points that are</p> <p>6 additional points that add weight to the fact, in our</p> <p>7 submission we say, that statutory interest is not</p> <p>8 a component of the Section 747 liability. My Lord, what</p> <p>9 we will do, if me say, is we will deal quite separately</p> <p>10 with the question of whether there are non-proveable</p> <p>11 claims of the type contended for LBIE and Lydian,</p> <p>12 ie currency conversion, we will come to that at the end,</p> <p>13 but they come into this. Now in our respectful</p> <p>14 submission, our construction is consistent with the</p> <p>15 policy in the scheme and the insolvency scheme as</p> <p>16 a whole. The reason we say that is that the scheme as</p> <p>17 a whole requires the assets of the company in the hands</p> <p>18 of the liquidator to be applied after payment of the top</p> <p>19 tiers of the Lord Neuberger waterfall, pari passu in</p> <p>20 payment of proveable debts. So that is the aim of the</p> <p>21 scheme. Firstly, my Lord, as part of that aim, the</p> <p>22 scheme includes a broad definition of proveable debts,</p> <p>23 and the scheme provides that some debts and obligations</p> <p>24 are not payable. For example, contractual interest,</p> <p>25 after the relevant date is not proveable. Your Lordship</p> <p style="text-align: center;">Page 144</p>

<p>1 also knows that there has been a lot of debate about it  2 that foreign currency debts are converted at the  3 relevant date to ensure a pari passu distribution --  4 that is the aim -- with the consequence that if there is  5 actually an increase, as Mr Wolfson rightly pointed out,  6 between the foreign currency value of the claim and the  7 sterling value that is not proveable. But that is the  8 purpose of the scheme. But what is underpinning the  9 whole of it is this pari passu guidance. We do, on this  10 aspect of the case, agree with Mr Wolfson, we are not  11 certain we categorise in -- the way he puts it is swings  12 and roundabouts, because that sounds a bit -- well  13 (a) it is fairground expression, but (b) it is a bit  14 loose and woolly. But when one understands the point,  15 and if your Lordship prepares to accept our submission  16 that the scheme is -- and it is always useful to find  17 principles underlying it. If the scheme is to have  18 a pari passu distribution and so the (inaudible)  19 legislation are trying to find a principle that runs  20 through the whole thing. We say it helps and makes  21 readily intelligible how Section 74 is supposed to work.  22 But that is the principle. We say the aim is pari passu  23 distribution, although it may be that some things at  24 first blush might be slightly odd or otherwise. We say  25 it doesn't matter, because the principle is pari passu</p> <p style="text-align: center;">Page 145</p>	<p>1 proved debts, before -- and this is critical -- there  2 can be any question of him satisfying other liabilities  3 of the company. So there is this major distinction  4 between proveable debts and non-proveable debts, and we  5 respectfully submit that it is totally consistent with  6 that policy approach, for the liabilities of the  7 contributories in this case, to extend to the expenses  8 of the liquidation and the proveable debts and  9 liabilities of the company, but no further. Now whether  10 or not the non-proveable claims do or do not exist, and  11 we will come back to that, there is no suggestion that  12 the non-proveable claims here can or should be promoted  13 to provability. We are not in the T &amp; N situation.</p> <p>14 MR JUSTICE DAVID RICHARDS: No.</p> <p>15 MR TRACE: So if your Lordship is with us so far, we then  16 have to construe 2887 and Section 1892. I say we have  17 to, regrettably we don't have to, but your Lordship has  18 to do this.</p> <p>19 MR JUSTICE DAVID RICHARDS: I am afraid so.</p> <p>20 MR TRACE: But my Lord, looking at 2887, the first thing to  21 try and work out is what is it that one has been  22 directed to do. We respectfully submit that what has  23 got to be considered is whether the treatment of  24 a surplus, that is the word, is existing in the hands of  25 a liquidator, after the payment of proved debts, debts</p> <p style="text-align: center;">Page 147</p>
<p>1 distribution. My Lord, what is important is, it is not  2 just pari passu distribution, it is pari passu  3 distribution in payment of proveable debts. So what the  4 aim of the scheme is is to look at proveable debts. The  5 policy that runs all the way through it is to have some  6 sort of pari passu distribution. As I say, there may be  7 wriggles, wrinkles at the edges, we say it matters not.  8 Now why, one asks, have they got these exclusions? What  9 is the thread that runs through those? We respectfully  10 submit that the policy is effectively to permit  11 worthwhile claims to be proved. The classic example of  12 that is after the T &amp; N decision, the amendment of the  13 rules in respect of tort claims. If that is right, and  14 we respectfully submit it is right, and those steps in  15 the process are -- there is a fundamental principle of  16 pari passu distribution, there is a fundamental  17 principle of looking at proved claims, there is  18 a fundamental principle of letting worthwhile claims  19 through, the net result of that trio of propositions, is  20 that there is a very marked distinction drawn, as  21 a matter of policy, between proveable and non-proveable  22 debts. We respectfully submit that the most obvious  23 marker is the fact that statutory interest falls to be  24 paid on all proveable debts, once the liquidator has  25 a surplus remaining in his hands after payment of all</p> <p style="text-align: center;">Page 146</p>	<p>1 proved, is a debt or liability of the company. Of  2 course, my Lord, it is important to emphasise that this  3 is in addition to the question of whether the statutory  4 interest is a proveable debt, is a proveable liability.  5 So there is a prior question.</p> <p>6 MR JUSTICE DAVID RICHARDS: Well, the statutory interest is  7 not a proveable liability, that is common ground.</p> <p>8 MR TRACE: Yes, yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: It is a separate question from  10 the issue of construction under the subordination  11 agreement. That is clear, yes.</p> <p>12 MR TRACE: Yes, yes. Now so far so good, we respectfully  13 submit. There is then a prior question as to whether it  14 is a liability for the purposes of rule 13.12 at all.  15 Now in our respectful submission, it is not. We say  16 that for a number of reasons. We say, first of all,  17 my Lord, the words in Section 1892 and the rule,  18 sub-rule 7, 288, are not apt to impose any liability.  19 We respectfully submit that they must have been  20 deliberately chosen not to impose a liability. I made  21 this submission in a slightly different context before,  22 when I was accepting that it was a direction. What it  23 is, we respectfully submit, is simply a direction to the  24 liquidator as to how to deal with remaining funds in his  25 hands or her hands, after payments of proveable debts</p> <p style="text-align: center;">Page 148</p>

37 (Pages 145 to 148)

<p>1 and liabilities. That is all it is. We say that must  2 be right, because that is why the word "surplus" has  3 been used, because a payment that is not made from  4 a surplus is not a debtor liability, which would have to  5 be recognised in a balance sheet. Nor is it a liability  6 with which an office holder will have to consider in  7 drawing up his statement of affairs and accounts, to  8 calculate dividends, for example. It is a surplus.  9 Mr Wolfson made your point, for his Lordship's  10 reference, and we adopt it, was on Thursday, my Lord,  11 page 151, lines 8 to 21 and the same point --  12 MR JUSTICE DAVID RICHARDS: Just give me that again, page --  13 MR TRACE: It is pages 151.  14 MR JUSTICE DAVID RICHARDS: 151.  15 MR TRACE: Lines 8 to 21.  16 MR JUSTICE DAVID RICHARDS: Thank you. Yes.  17 MR TRACE: LBHI make the same point in their written  18 submissions, that looking at whether there is a surplus  19 means that making a call for the payment of statutory  20 interest would create the liability it is intended to  21 satisfy. It is completely circular. Instead, we  22 respectfully submit that the direction, if that is what  23 it is, and I am happy to use those words -- the  24 direction in sub-rule 7 and Section 1892 is, we say,  25 intended to reflect the insolvency waterfall in the</p> <p style="text-align: center;">Page 149</p>	<p>1 properly it includes a liability for statutory interest,  2 currency conversion claims and non-proveable  3 liabilities", because they say Section 74 uses this  4 phrase "Call for the adjustment of the rights of the  5 contributors amongst themselves". That is what they  6 base this all on. My Lord, if your Lordship wants to  7 have it, just for your Lordship's note, it is in LBIE's  8 written submissions at paragraph 91, and it is in  9 Lydian's written submissions at paragraph 37. With the  10 greatest respect, this argument just does not work at  11 all. For our part, my Lord, we are very happy to adopt  12 the way Mr Isaacs and Mr Arnold put it in their reply  13 submissions, paragraph 21. The point that is put is  14 this; the liability of members to contribute for  15 an adjustment is simply a means for adjusting between  16 the holders for fully and partly paid shares. That is  17 all it means. They cite a couple of cases. I don't  18 propose to go through them, because they will be dealing  19 with that. Your Lordship may also like to know that in  20 the same extract that I showed your Lordship from the  21 1902 edition of Buckley, if your Lordship would be so  22 kind to take that out again. If your Lordship turns on,  23 we have dealt with the four, the point about the Gibbs.  24 MR JUSTICE DAVID RICHARDS: Yes.  25 MR TRACE: Your Lordship will remember that. That was the</p> <p style="text-align: center;">Page 151</p>
<p>1 truest sense. It identifies how any money that reaches  2 the stage we now have reached, ie the stage of  3 a surplus, is to be used. There is another small but  4 important point, and it is again (inaudible) to the to  5 the submission that I made earlier in relation to  6 construction. Surplus, by its very phrase, in our  7 respectful submission, means something to which  8 presumably someone is not meant to contribute, because  9 it is by definition a surplus. It is left over after  10 various people have already contributed. A surplus is  11 the rump. It is what is left. It is the balance. We  12 say it goes more than that, a fortiori, if that is  13 right, because of the very word in surplus, it can't be  14 something that the office holder can be under any  15 obligation to call for funds to constitute. The fund  16 has already been constituted. It is a surplus. By  17 definition, people have already contributed. There is  18 nothing left to be called for, we respectfully submit.  19 Now what my learned friends, Mr Trower and  20 Mr Zacaroli have done, is that they have realised, we  21 respectfully submit, their predicament here and the  22 weakness of their grounds, and what they have done is to  23 try to focus on the point of the adjustment, and they  24 focus on that a lot. What they say is, as we understand  25 the submission, "Oh well, when you construe Section 74</p> <p style="text-align: center;">Page 150</p>	<p>1 first two pages. Then we skipped a little bit. If we  2 then pick it up again, it is the next sheet. It is 334,  3 your Lordship is at that top left-hand page.  4 MR JUSTICE DAVID RICHARDS: I have got that, yes.  5 MR TRACE: If your Lordship then looks on the right, the  6 learned editors are discussing, just so your Lordship  7 sees the context, what was Section 109 --  8 MR JUSTICE DAVID RICHARDS: Oh yes.  9 MR TRACE: Which is on the bottom left. Does your Lordship  10 see that?  11 MR JUSTICE DAVID RICHARDS: Yes.  12 MR TRACE: "The court shall adjust the rights, et cetera, to  13 amongst themselves and distribute any surplus."  14 How the learned editors of Buckley in 1902 saw that,  15 if your Lordship looks over on the right-hand page, 335,  16 third full paragraph that begins:  17 "A holder OF fully paid up shares ... "  18 Does your Lordship see that?  19 MR JUSTICE DAVID RICHARDS: Yes, I do.  20 MR TRACE: "A holder of fully paid up shares is  21 a contributory within the meaning ... (reading to the  22 words) ... fully paid up shareholders."  23 Then there is the next paragraph:  24 "And so clear is the right of shareholders who have  25 paid ... (reading to the words) ... the shares."</p> <p style="text-align: center;">Page 152</p>

38 (Pages 149 to 152)

<p>1 There is a reference. My Lord, the last passage</p> <p>2 that we would like to show you, if your Lordship turns</p> <p>3 to the last page in that clip, page 371. If</p> <p>4 your Lordship looks down, it is the third full paragraph</p> <p>5 on page 371, your Lordship will see a reference to</p> <p>6 a contributory.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, I see it.</p> <p>8 MR TRACE: Does your Lordship see it?</p> <p>9 MR JUSTICE DAVID RICHARDS: I do.</p> <p>10 MR TRACE: "Contributory includes a holder of fully paid up</p> <p>11 shares, and therefore [say the learned editors] when all</p> <p>12 debts have been provided for, a call whose only object</p> <p>13 is to adjust the rights of the partly paid up and fully</p> <p>14 paid shareholders is valid."</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR TRACE: So my Lord the adjustment, we respectfully</p> <p>17 submit, is an adjustment between fully and partly paid</p> <p>18 up shareholders.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR TRACE: So that, with respect, is, I hate to say it, but</p> <p>21 my learned friend Mr Trower (inaudible) that really is</p> <p>22 a~bad point.</p> <p>23 My Lord, one is then left with what has been</p> <p>24 described as a statutory interest lacunae, so-called.</p> <p>25 Now what is said here is that there is this lacunae as</p> <p style="text-align: center;">Page 153</p>	<p>1 one way or the other that that is what the legislature</p> <p>2 is thinking about. What your Lordship is not entitled</p> <p>3 to do is to say -- and if you will forgive me, I can see</p> <p>4 exactly why your Lordship was saying it. Your Lordship</p> <p>5 was saying "Well, if that effectively was the intention,</p> <p>6 then wouldn't it (inaudible) A, B and C"? Well, of</p> <p>7 course, if that was the intention, but there is no</p> <p>8 evidence that it is the intention. We respectfully</p> <p>9 submit, for all the reasons that we have already made,</p> <p>10 Section 74 is what it is. My Lord, we respectfully</p> <p>11 submit, it leads to -- again, with the greatest respect</p> <p>12 to your Lordship, it leads to a fundamental problem.</p> <p>13 Because what it actually does is it assumes the truth of</p> <p>14 what LBIE is seeking to establish. Now what they would</p> <p>15 say, what LBIE say would say, no doubt -- Mr Trower and</p> <p>16 Mr Bayfield -- that one should take your Lordship's</p> <p>17 approach, because one can take it, no doubt, they say --</p> <p>18 and I think they do say, that from the amendments that</p> <p>19 were made, that intention can be seen. They say</p> <p>20 Parliament's intention must have been that creditors</p> <p>21 should be entitled to interest accruing during an admin</p> <p>22 before any return was made to members. Creditors should</p> <p>23 be entitled to interest accruing during a winding up</p> <p>24 before any return was made, et cetera, and those</p> <p>25 submissions for your Lordship's note are in</p> <p style="text-align: center;">Page 155</p>
<p>1 it is called, and LBIE described it as arising when</p> <p>2 a company moves from admin into liquidation. They say</p> <p>3 it is an obvious lacunae, and the reference for</p> <p>4 your Lordship's note is paragraphs 102 to 106 of that</p> <p>5 written submission. I don't know whether your Lordship</p> <p>6 wants to go back and be reminded, but your Lordship</p> <p>7 knows what they say.</p> <p>8 MR JUSTICE DAVID RICHARDS: I know, yes, yes.</p> <p>9 MR TRACE: Now my Lord, just for your Lordship's note again,</p> <p>10 was on Thursday debating this -- this was yesterday --</p> <p>11 matter with Mr Wolfson.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TRACE: For your Lordship's reference, that is pages 163</p> <p>14 to 164. Your Lordship will remember the exchanges.</p> <p>15 MR JUSTICE DAVID RICHARDS: I do.</p> <p>16 MR TRACE: We respectfully submit that your Lordship's</p> <p>17 approach, with all due respect, is not the correct one.</p> <p>18 We respectfully submit that the approach that</p> <p>19 your Lordship took, starts from the position that the</p> <p>20 court should assume what the legislative intention was.</p> <p>21 Does your Lordship remember that?</p> <p>22 MR JUSTICE DAVID RICHARDS: I do.</p> <p>23 MR TRACE: That is page 162, lines 2 to 4. My Lord, with</p> <p>24 respect we basically say that that is looking at it from</p> <p>25 where one is trying to get, without there being evidence</p> <p style="text-align: center;">Page 154</p>	<p>1 paragraph 104 of LBIE's submissions. However, we</p> <p>2 respectfully submit there is absolutely no reason to</p> <p>3 make that assumption, rather than simply the Parliament</p> <p>4 made the amendments it intended to make, and chose not</p> <p>5 to take a provision which LBIE said should have been</p> <p>6 made. Indeed, quite the reverse. We actually say it is</p> <p>7 an argument in our favour. I am not certain Mr Wolfson,</p> <p>8 who was slightly on the ropes with your Lordship's</p> <p>9 questioning at the time -- but with us having the</p> <p>10 reflection overnight, in our respectful submission, the</p> <p>11 fact that Parliament has decided to do something,</p> <p>12 means -- and have only done one thing and not another</p> <p>13 thing, is a point in our favour.</p> <p>14 MR JUSTICE DAVID RICHARDS: The question is whether they</p> <p>15 have done one thing or done two things?</p> <p>16 MR TRACE: Quite. Absolutely. That is the issue. But with</p> <p>17 the greatest respect, what your Lordship is not entitled</p> <p>18 to do is to presume one thing or another.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, but can you help me with</p> <p>20 this?</p> <p>21 MR TRACE: Yes, I will try to.</p> <p>22 MR JUSTICE DAVID RICHARDS: Would you suggest the</p> <p>23 legislative policy which produces the result for which</p> <p>24 you contend, in relation to interest accruing during</p> <p>25 an administration which is followed by a liquidation?</p> <p style="text-align: center;">Page 156</p>

<p>1 MR TRACE: The short answer is simplicity. What the 2 legislative intent is to do is to say we are going to 3 have a provision for interest in this way. There is not 4 anything that particularly surprising, as your Lordship 5 will know, if one has got a contractual interest, 6 a contractual can be claimed. Parliament has decided in 7 certain situations that there will be a statutory 8 interest in a particular stage, contractual interest in 9 another stage and in our submission --</p> <p>10 MR JUSTICE DAVID RICHARDS: But they won't be able to prove 11 the contractual interest.</p> <p>12 MR TRACE: They may not be able to.</p> <p>13 MR JUSTICE DAVID RICHARDS: Well, they can't, can they?</p> <p>14 MR TRACE: No, your Lordship is right.</p> <p>15 MR JUSTICE DAVID RICHARDS: The simplicity is not a very 16 convincing answer, is it, if it produces a sort of out 17 of field situation in one of the possible cases? I mean 18 one would like to think there was some underlying 19 purpose to be achieved by drawing this distinction. At 20 the moment, I am not quite sure what it is.</p> <p>21 MR TRACE: Well, my Lord, we were perhaps starting from the 22 wrong position. Your Lordship, again with respect, may 23 be falling into error. Your Lordship is assuming that 24 Parliament is wanting to make some specific change.</p> <p>25 MR JUSTICE DAVID RICHARDS: I am assuming it wants to</p> <p style="text-align: center;">Page 157</p>	<p>1 I am trying to think of these sort of possibilities. If 2 that is right, and it is very rare, that a company 3 administration with a surplus for the purposes of 4 sub-rule 8 is going to go into liquidation, what does 5 the administrator do in that circumstance is most 6 likely, we respectfully submit, would pay statutory 7 interest, and bring the admin to an end.</p> <p>8 MR JUSTICE DAVID RICHARDS: I see. So if the administrator 9 has a surplus, then why proceed to liquidation?</p> <p>10 MR TRACE: Quite.</p> <p>11 MR JUSTICE DAVID RICHARDS: You may have the situation where 12 there is not a surplus, the administrators does not have 13 a surplus, but the liquidator does have a surplus. So 14 by the time it is in liquidation there is a surplus.</p> <p>15 MR TRACE: That is possible, that is certainly possible.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TRACE: So my Lord what we wanted to do is meet the point 18 that your Lordship is making that we didn't, with 19 respect, consider that Mr Wolfson really met, and I have 20 given your Lordship our submissions in relation to that.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TRACE: In relation to the secondary point, I have given 23 your Lordship two answers. I will think about it over 24 the weekend, and see if there have been any more in 25 relation to policy.</p> <p style="text-align: center;">Page 159</p>
<p>1 produce a rational system, the parts of which are 2 consistent with each other.</p> <p>3 MR TRACE: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: Now it may be perfectly rational 5 to have a system where there is an apparent 6 inconsistency between the powers, but if that is the 7 case, one would like to understand why that 8 inconsistency is created.</p> <p>9 MR TRACE: Well, my Lord, simplicity is our simple answer. 10 It is also worth bearing in mind this; that it is hard 11 to think of circumstances where a company in 12 administration, with a surplus for the purposes of 13 sub-rule 8, would go into liquidation.</p> <p>14 MR JUSTICE DAVID RICHARDS: Well, the odd thing is that the 15 rules make specific provision for a company going from 16 liquidation into administration --</p> <p>17 MR TRACE: Certainly.</p> <p>18 MR JUSTICE DAVID RICHARDS: -- which a very unusual 19 situation, I think.</p> <p>20 MR TRACE: Certainly.</p> <p>21 MR JUSTICE DAVID RICHARDS: So I think the situation of 22 a company having a surplus at some stage in its life, 23 but going from administration to liquidation, is more 24 likely than that, I must say.</p> <p>25 MR TRACE: But if your Lordship would just bear with me.</p> <p style="text-align: center;">Page 158</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, yes, yes.</p> <p>2 MR TRACE: But my Lord it is not a swings and roundabouts, 3 but these things happens. It doesn't mean your Lordship 4 should strain, and we respectfully submit that is what 5 it would be, to have a construction the other way. So 6 my Lord what we in substance say, there is no actually 7 no presumption one way or the other. Parliament has 8 done what Parliament has done. All the arguments that 9 we have been through and the submissions that we have 10 been making, if they are accepted, that is enough. The 11 fact there may or may not a lacunae -- of course it is 12 a very emotive word, lacunae, as if there is some 13 terrible thing that is going to happen. We respectfully 14 say it is not really, and even if it is, so what, is our 15 answer.</p> <p>16 MR JUSTICE DAVID RICHARDS: Well, I mean there are occasions 17 when the legislative process simply makes a mistake.</p> <p>18 MR TRACE: Yes, possible.</p> <p>19 MR JUSTICE DAVID RICHARDS: Maybe the point wasn't thought 20 of, or alternatively it was thought of, it was thought 21 the rules somehow achieved that result, but they don't. 22 There it is.</p> <p>23 MR TRACE: My Lord, there are other examples that we have 24 thought of, and one sees that from the cases, that one 25 reason why a company might move from admin into</p> <p style="text-align: center;">Page 160</p>



<p>1 liquidation is to make investigations before proposed  2 proceedings are brought, Helas is an example. But  3 my Lord in such a case, the administrator will either  4 not have gone go into a distributing administration at  5 all, so no question arises, or alternatively the  6 administrator, he or she, may not have a surplus,  7 because they will be bound to bear the costs of those  8 investigations in subsequent proceedings. My Lord, we  9 respectfully submit it follows that one can have  10 a situation where the company moves from admin into  11 liquidation, there won't be any creditors who have these  12 accrued rights to statutory interest in the  13 administration at all. Any assets in the hands of the  14 administrator, which might otherwise constitute the  15 necessary surplus, quote, unquote, will be liable to  16 an extent in the liquidation investigations that follow.  17 MR JUSTICE DAVID RICHARDS: Yes.  18 MR TRACE: My Lord, another scenario that we thought of is  19 there may be situation where moving from liquidation --  20 your Lordship's point, moving from liquidation into  21 admin, might occur where the liquidator realised he was  22 going to have to realise more assets than expected, and  23 pay all unsecured creditors in full, so leaving him with  24 a surplus. Therefore he wants to get into admin as  25 a precursor to some sort of rescue of the company.</p> <p style="text-align: center;">Page 161</p>	<p>1 watching the football, I shall --  2 MR JUSTICE DAVID RICHARDS: It will be the usual fiver for  3 the best entry.  4 MR TRACE: My Lord, the contributory rule.  5 MR JUSTICE DAVID RICHARDS: Yes.  6 MR TRACE: A light topic at 4 o'clock.  7 MR JUSTICE DAVID RICHARDS: Yes, indeed.  8 MR TRACE: We thought it might be helpful, particularly as  9 we are approaching the weekend, to summarise what our  10 submissions are on this point, at this stage.  11 MR JUSTICE DAVID RICHARDS: Yes.  12 MR TRACE: Where the rules leave us. Now, of course,  13 my Lord, our submissions assume that our arguments as to  14 the effect of the sub-debt agreements are correct, ie we  15 are subordinated to the bottom of the category of  16 unsecured approval claims, but no further. My Lord, in  17 summary, first of all, we submit that the correct  18 analysis of Lord Walker's judgment in Kaupthing is that  19 the contributory rule, where it applies, has the effect  20 of disapplying the otherwise mandatory rules and  21 insolvency set off. It is that disapplication of the  22 mandatory insolvency set off rules that leaves room for  23 operation of the equitable rule. That is how we say it  24 works. My Lord, that is rather different from how  25 Mr Wolfson puts it. Mr Wolfson says you start the set</p> <p style="text-align: center;">Page 163</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes.  2 MR TRACE: My Lord, it may be -- it is also worth bearing  3 this in mind -- it may well be that it might be thought  4 that a transition to admin for the possibility of any  5 such rescue, should not prejudice the creditors who were  6 paid, or were to be paid from the funds available to the  7 liquidation, including interest from an expected  8 surplus. My Lord, one way that has occurred to us  9 overnight in relation to this point, is that companies  10 in admin, whether it is liquidation going to be an admin  11 or admin going into liquidation, there are curves. It  12 may be that when a company is on a planned upward  13 trajectory, intending to lead to a rescue, those sort of  14 situations, then it may be said there that the  15 creditor's interests shouldn't(?) be reduced, while  16 there is no, or certainly much less wish to protect the  17 creditor's extra interest entitlement while the company  18 moves from admin into liquidation. Now, my Lord, of  19 course all of that is speculation.  20 MR JUSTICE DAVID RICHARDS: Yes, I think the challenge, one  21 can put it this way -- this is the weekend competition  22 isn't it? Draft the briefing paper for the minister to  23 enable him to explain to a sceptical House of Commons  24 the thinking behind this policy.  25 MR TRACE: My Lord, with that happy thought, when I am</p> <p style="text-align: center;">Page 162</p>	<p>1 off.  2 MR JUSTICE DAVID RICHARDS: Yes.  3 MR TRACE: That may just be my own background in relation to  4 insolvency. Insolvency set off, we all know about it.  5 It is there --  6 MR JUSTICE DAVID RICHARDS: Yes.  7 MR TRACE: -- and the real rule question is when does one  8 not have insolvency set off?  9 MR JUSTICE DAVID RICHARDS: Yes, yes.  10 MR TRACE: So we put it in a slightly different way --  11 MR JUSTICE DAVID RICHARDS: Right.  12 MR TRACE: -- rather than just looking ago at it, A then B.  13 My Lord, we respectfully submit that the contributory  14 rule only applies where a call has been made on the  15 contributory. We say not only that, but it has got to  16 be circumstances where set off was not permitted by  17 Section 101, as was, of the 1862 Act. That is how one  18 looks at all the cases. So we have a rather different  19 approach to reference number one, I will come back to  20 that later, from Mr Wolfson.  21 MR JUSTICE DAVID RICHARDS: Right.  22 MR TRACE: But we respectfully submit that it remains the  23 case that the contributory rule operates only where  24 a call has been made. Accordingly, if that is right,  25 and we say it is, unless and until a call has been made,</p> <p style="text-align: center;">Page 164</p>

<p>1 there is no question of the contributory rule applying, 2 or for the equitable rule being engaged. 3 Now, my Lord, what is the present position? Now the 4 present position, my clients have claims in LBIE's 5 administration. We don't accept that our clients are 6 currently under any contingent liability to LBIE in 7 respect of Section 74, the submissions that we have 8 made, while LBIE remains in administration. Therefore 9 we submit that there is no set off exercise to be 10 carried out, and our claims should be admitted to proof 11 and paid, subject, of course, to whether or not there is 12 an ability to pay. 13 Now the next point in the summary is that if LBIE 14 goes into liquidation and makes a call on my clients, 15 our clients, the contributory rule will apply, we have 16 said that. There will then be claims going each way, 17 between LBHI 2, and the sub-let agreement doesn't make 18 things any different than the contributory rule. What 19 should happen is, and the mechanisms used, for applying 20 the subordination and dealing with the contributory 21 rule, is one has a netting off arrangement described by 22 Lord Walker in Kaupthing, and it was discussed between 23 your Lordship and Mr Wolfson yesterday. 24 MR JUSTICE DAVID RICHARDS: Yes. So assume that all 25 proveable debts, apart from the subordinated debts, have</p> <p style="text-align: center;">Page 165</p>	<p>1 netting off. 2 MR TRACE: It is the point that I was making in my summary 3 of the summary, at the very beginning of my submissions. 4 MR JUSTICE DAVID RICHARDS: Yes, yes, I see. 5 MR TRACE: There was a lot of running around and (inaudible) 6 on my left here. That is how we say it works. We say 7 it absolutely standard, it is just insolvency is set off 8 in that sense. 9 MR JUSTICE DAVID RICHARDS: I am not sure it is insolvency 10 set off actually, because the call -- well, it probably 11 doesn't matter. But I understand the point you are 12 making. There is no point in requiring you to pay 13 money, only to pay it back to me. Yes, I do follow. 14 MR TRACE: Your Lordship is right in the sense that set off 15 is perhaps not -- certainly I don't think it is how 16 Lord Walker would put it. 17 MR JUSTICE DAVID RICHARDS: No. 18 MR TRACE: He uses this phrase sort of "netting off". 19 MR JUSTICE DAVID RICHARDS: Yes, yes. 20 MR TRACE: I really don't think it matters actually. 21 MR JUSTICE DAVID RICHARDS: No, I don't think it matters 22 either. No, I understand your position. 23 MR TRACE: So my Lord that is what we say happens if LBIE 24 goes into liquidation and makes a call. If LBIE goes 25 into liquidation and doesn't make a call, then we accept</p> <p style="text-align: center;">Page 167</p>
<p>1 been paid, assume you are right that you are next in the 2 waterfall with your -- 3 MR TRACE: That's right. 4 MR JUSTICE DAVID RICHARDS: -- subordinated debt. 5 MR TRACE: Subordinated. 6 MR JUSTICE DAVID RICHARDS: At that point -- but the surplus 7 is insufficient to pay the whole of your subordinated 8 debt. So on the face of it, if the subordinated debt 9 was held by X and Y was the member, you say plainly 10 a call could be made on Y -- 11 MR TRACE: Yes. 12 MR JUSTICE DAVID RICHARDS: -- to provide the funds to pay 13 X. 14 MR TRACE: Yes. 15 MR JUSTICE DAVID RICHARDS: But since X and Y are the same 16 person, you say in those particular circumstances, there 17 is not the objection to set off -- 18 MR TRACE: No. 19 MR JUSTICE DAVID RICHARDS: -- that would normally arise 20 with the contributory rule? 21 MR TRACE: Correct, correct. 22 MR JUSTICE DAVID RICHARDS: Yes, I follow. 23 MR TRACE: You have just had the netting off in the order of 24 (inaudible). 25 MR JUSTICE DAVID RICHARDS: You would have at that stage of</p> <p style="text-align: center;">Page 166</p>	<p>1 that will be under a potential liability to LBIE in 2 respect of the Section 74 liability. However, in this 3 case, where there is no call, there is no application of 4 the contributory or the equitable rule, and so mandatory 5 set off, true insolvency set off applies. What happens 6 there is it requires the valuation of contingent claim, 7 and set off against my client's unsubordinated claim. 8 MR JUSTICE DAVID RICHARDS: Sorry to be -- what you are now 9 looking at is the administration of LBL, aren't you? In 10 so far as we are looking at the administration of 11 LBIE -- 12 MR TRACE: No, this is still LBIE, I think. 13 MR JUSTICE DAVID RICHARDS: Well, in the administration of 14 LBIE -- if they go into the liquidation, if it goes into 15 liquidation -- 16 MR TRACE: Yes. 17 MR JUSTICE DAVID RICHARDS: -- if the unsubordinated 18 proveable debts are paid, on your basis you have 19 a subordinated debt, which you can prove, and you are 20 entitled, you say, to have the surplus paid towards 21 that. I don't think you would really be -- either the 22 liquidators are going to make a call on you or they are 23 not. 24 MR TRACE: Or they are not. All I was doing, and it was 25 probably my fault, my Lord -- all I was trying to do in</p> <p style="text-align: center;">Page 168</p>

<p>1 these two scenarios was explain the difference  2 between -- still in LBIE's administration, but by that  3 stage liquidation.  4 MR JUSTICE DAVID RICHARDS: Yes. Liquidation, yes.  5 MR TRACE: We are positive that they have gone into  6 liquidation, (a) making a call or (b) not making a call.  7 MR JUSTICE DAVID RICHARDS: Yes.  8 MR TRACE: What I was dealing with and discussing with  9 your Lordship a few minutes ago, before your  10 Lordship's --  11 MR JUSTICE DAVID RICHARDS: If they make a call, then is  12 netted off, you say?  13 MR TRACE: Yes, it is the netting off. If they don't make  14 a call, then we say we are into set off.  15 MR JUSTICE DAVID RICHARDS: That is the bit I am not sure  16 about. What are you going to set off?  17 MR TRACE: Well, my Lord, what we accept is we are going to  18 be under a potential liability for LBIE --  19 MR JUSTICE DAVID RICHARDS: Yes.  20 MR TRACE: -- in respect of the Section 74 liability.  21 MR JUSTICE DAVID RICHARDS: Yes.  22 MR TRACE: So ie that there is a call that could be made.  23 On this basis, it assumes that not all the unsecured  24 claims have been paid.  25 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p style="text-align: center;">Page 169</p>	<p>1 contributory rule applies, claims going each way between  2 LBIE and LBHI 2, sub-debt agreement doesn't affect the  3 position, and then you have a mechanism for applying the  4 subordination, and the contributory rule is by the  5 netting off exercise described by Lord Walker in  6 Kaupthing, so that is if LBIE goes into liquidation and  7 makes a call. If LBIE goes into liquidation and doesn't  8 make a call, then we accept that there is a potential  9 liability in respect of the Section 74 liability, but  10 there, where no call has been made, there is no  11 application of the contributory, we say, or the  12 equitable rule. One is in a position of mandatory set  13 off and then there is a valuation of contingent claim,  14 which is set off against -- that is the contingent claim  15 that they are making against us, is set off on what is  16 going the other way, which is our unsubordinated 38 odd  17 million, and our subordinated claim, if it is payable  18 under the terms of the sub-debt agreements.  19 MR JUSTICE DAVID RICHARDS: With your 38 million, your  20 unsubordinated claim.  21 MR TRACE: My Lord, yes.  22 MR JUSTICE DAVID RICHARDS: I mean the situation we are  23 really postulating on this application is that in fact  24 there will be sufficient funds to pay you that, without  25 a call, I think, aren't we?</p> <p style="text-align: center;">Page 171</p>
<p>1 MR TRACE: It is complicated, but that, I think, is the  2 hypothesis.  3 MR JUSTICE DAVID RICHARDS: Yes, yes.  4 MR TRACE: So one has potentially a liability on my clients  5 under Section 74. There must be an assumption on this  6 basis that not all the unsecured claims have been paid.  7 What happens then, and we say that no application of  8 either contributory or the equitable rule -- you get  9 mandatory set off and the contingent claim has to be  10 valued somehow.  11 MR JUSTICE DAVID RICHARDS: Okay. What you set off --  12 MR TRACE: Is our unsubordinated claim.  13 MR JUSTICE DAVID RICHARDS: Oh, the -- yes.  14 MR TRACE: The unsubordinated claim.  15 MR JUSTICE DAVID RICHARDS: Yes, of course, the  16 unsubordinated claim.  17 MR TRACE: You would also set off our subordinated claim, if  18 it was payable under the terms of the sub-debt  19 agreements. My Lord, it is dead stuff for five past  20 four. Is it worth me just saying it again?  21 MR JUSTICE DAVID RICHARDS: No, no. No, that's fine.  22 MR TRACE: At least it is on the transcript.  23 MR JUSTICE DAVID RICHARDS: Yes.  24 MR TRACE: My Lord so position A is LBIE goes into  25 liquidation and makes a call on LBHI 2. We say the</p> <p style="text-align: center;">Page 170</p>	<p>1 MR TRACE: Yes.  2 MR JUSTICE DAVID RICHARDS: Because if there are not, then  3 it gets more difficult. Because if there are not  4 sufficient funds to pay you on your unsubordinated call,  5 there are not sufficient funds to pay anybody everything  6 on their proveable debts.  7 MR TRACE: Correct.  8 MR JUSTICE DAVID RICHARDS: So then you would expect a call  9 would be made, which you would have to pay before you  10 could --  11 MR TRACE: My Lord, yes. I don't know, but I would suspect  12 if it goes to liquidation, you will probably won't even  13 put in the liquidation. But we say, in order to make  14 the calls, they can't make it in admin.  15 MR JUSTICE DAVID RICHARDS: Yes, yes.  16 MR TRACE: But I have already made the point we think that  17 is highly unlikely because there are all sorts of other  18 reasons, particularly the fact that have already been  19 disputed. They must have been very good reasons why  20 they decided to do that solution.  21 MR JUSTICE DAVID RICHARDS: Yes, yes, I follow.  22 MR TRACE: So, my Lord, what the net result of one or other  23 of those set off or netting exercises -- what the result  24 of all that is, is that only the resulting balance,  25 passing one way or the other, remains between the</p> <p style="text-align: center;">Page 172</p>

<p>1 parties, and we respectfully submit there should be no</p> <p>2 question of that exercise being done again in the other</p> <p>3 party's insolvency process, because what happens is</p> <p>4 Mr Wolfson puts it in the way of saying well, set off --</p> <p>5 because he uses the word "set off". We put it slightly</p> <p>6 differently. Your Lordship will recall Mr Wolfson says,</p> <p>7 "Oh well set off extinguishes the debt". Now that may</p> <p>8 or may not (inaudible) right. We say we don't have to</p> <p>9 go as far as that. We say that whatever you have by way</p> <p>10 of this netting arrangement, or whatever you have by way</p> <p>11 of this setting off arrangement, what you have is only</p> <p>12 a balance going one way or another. It doesn't matter</p> <p>13 further on down.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes. Yes, that sounds right,</p> <p>15 yes.</p> <p>16 MR TRACE: But it is 4.15.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, I mean you would expect</p> <p>18 there to be a sort of mirror image between the two</p> <p>19 insolvencies. The only fly in the ointment might be if</p> <p>20 the relevant dates for the set off exercises are</p> <p>21 different.</p> <p>22 MR TRACE: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: That could -- could -- produce</p> <p>24 a different results, but it depends. It depends.</p> <p>25 MR TRACE: Yes. My Lord, for your Lordship's note, just</p> <p style="text-align: center;">Page 173</p>	<p>1 administrations. I am very happy to start it, if</p> <p>2 your Lordship would like.</p> <p>3 MR JUSTICE DAVID RICHARDS: No, let's start that on --</p> <p>4 MR TRACE: But if this a convenient moment, that might --</p> <p>5 MR JUSTICE DAVID RICHARDS: We will start that on Monday.</p> <p>6 Thank you very much.</p> <p>7 MR TRACE: My Lord, in terms of timing, I've told my learned</p> <p>8 friend, Mr Trower, that I hope to finish well within my</p> <p>9 allotted time.</p> <p>10 MR JUSTICE DAVID RICHARDS: Thank you all very much. I hope</p> <p>11 you have a good weekend.</p> <p>12 MR TRACE: Thank you.</p> <p>13 (4.11 pm)</p> <p>14 (The court is adjourned until 10.30 am Monday,</p> <p>15 18 November 2013)</p> <p style="text-align: center;">Page 175</p>
<p>1 completing this sum if I may, then we can probably call</p> <p>2 it a day. My Lord, my clients LBHI and LBL all accept</p> <p>3 the existence of an equitable rule to varying degrees.</p> <p>4 My Lord, for your Lordship's note in our opening, it is</p> <p>5 46, in LBL's opening it is 45 to 53 and LBHI's opening</p> <p>6 is 24 to 26.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, I've got that.</p> <p>8 MR TRACE: My Lord, the last point in this summary is if the</p> <p>9 contributory rule does not apply, then we respectfully</p> <p>10 submit the equitable rule cannot apply either, because</p> <p>11 the equitable rule can only apply where the ordinary</p> <p>12 mandatory rules of insolvency set off are for some</p> <p>13 reason disapplied. For your Lordship's note that is our</p> <p>14 submissions at paragraph 47. My Lord, that is worth</p> <p>15 just pausing and thinking about as the last thought of</p> <p>16 the day, that that really must be right, because if</p> <p>17 there is no contributory rule, then as a matter of</p> <p>18 principle it is very difficult to see where does</p> <p>19 equitable rule then apply at all? We say it can't,</p> <p>20 because we say that can only apply when the ordinary</p> <p>21 mandatory rules of insolvency set off are, for whatever</p> <p>22 reason, disapplied.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p>24 MR TRACE: Now my Lord the next topic I was going to go to</p> <p>25 was how the equitable rule, we say, should apply in</p> <p style="text-align: center;">Page 174</p>	<p>1 INDEX</p> <p>2 PAGE</p> <p>3 Submissions by MR WOLFSON .....1</p> <p>4 (continued)</p> <p>5 Submissions by MR TRACE QC .....65</p> <p>6</p> <p>7</p> <p>8</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 176</p>

<b>A</b>	157:19 160:21	168:10,13	114:20 122:6	73:12 98:18	<b>appointed</b> 124:3	127:1
<b>abates</b> 7:6	<b>achieving</b> 39:13	169:2	123:14,14	108:7 130:13	<b>appreciate</b> 5:9	<b>assertion</b> 127:7
<b>ability</b> 57:16	41:1 43:22,23	<b>administrations</b>	124:12 126:11	130:18,20	<b>appreciates</b> 35:7	<b>assessing</b> 53:17
61:21,22 62:1	<b>Act</b> 3:1 5:16,19	175:1	127:10,25	163:18	77:8	<b>assets</b> 4:9 13:18
100:6 101:5	5:23 11:20	<b>administrator</b>	128:8,12,13	<b>and/or</b> 81:20	<b>approach</b> 5:6 6:6	32:5 47:25
165:12	32:20 36:7	126:21,25	129:3,4,10,15	<b>anomalies</b> 6:11	17:20 47:14	53:8 55:5,16
<b>able</b> 37:20 40:20	98:16 99:3	159:5,8 161:3	129:16,20,25	<b>answer</b> 20:6,10	71:18 86:2	55:18 56:6
42:22 48:24	111:1 120:21	161:6,14	130:4 131:20	27:17 39:7	136:15 147:6	84:12 115:10
55:3,12 56:4,4	123:8,10 128:5	<b>administrators</b>	132:12,14,15	49:9 66:3	154:17,18	118:21 119:7
56:18,18 59:9	129:17 164:17	35:10 38:5	134:4 135:13	75:23 77:1,1	155:17 164:19	124:3 144:17
61:20 65:1	<b>action</b> 102:15	39:2,11 40:2	135:16,23	81:23 88:6	<b>approached</b>	161:13,22
76:8 89:15	134:11	40:19 41:10	140:23 141:8	103:3,4,12	43:25	<b>assignment</b> 94:3
104:16 114:11	<b>acts</b> 41:5	50:17 66:8	141:25 148:11	114:10 119:25	<b>approaches</b>	<b>assist</b> 5:22 69:25
157:10,12	<b>actual</b> 108:25	68:3 76:7	165:17 171:2	120:4,14	31:14	82:15
<b>absolutely</b> 16:17	116:22	99:17 104:16	<b>agreements</b>	121:17,18,19	<b>approaching</b>	<b>assistance</b> 98:19
29:13 30:3	<b>add</b> 1:15 46:17	105:8 110:6,12	76:22 77:21,22	121:22 125:25	21:11 50:23	<b>assisting</b> 71:7
57:5 66:5 67:6	144:6	110:18 115:10	78:6 79:21,23	128:17 135:4	163:9	<b>assume</b> 13:22
67:9 79:17	<b>addition</b> 31:12	126:15,23	90:18 97:8	136:13 137:20	<b>appropriate</b>	17:18 50:11
81:21 85:25	44:22 148:3	127:6 159:12	99:24 100:5	157:1,16 158:9	35:12 126:22	51:3 56:5,20
86:14 93:24	<b>additional</b> 144:6	<b>admit</b> 102:15	103:22 104:18	160:15	<b>approval</b> 95:23	61:6,14 62:7
95:1 97:21	<b>address</b> 33:24	134:10	106:4,18	<b>answered</b> 67:14	163:16	121:18 154:20
100:10 122:3	38:21 51:12	<b>admitted</b> 165:10	123:17 129:24	74:11 82:1	<b>apt</b> 110:5,17	163:13 165:24
129:7 136:12	105:11 106:19	<b>adopt</b> 2:11,16	131:6 132:1	<b>answering</b>	148:18	166:1
142:3 156:2,16	<b>addressed</b> 26:4,6	144:3 149:10	135:9 137:7	132:25	<b>area</b> 35:21	<b>assumes</b> 155:13
167:7	30:15 38:19	151:11	163:14 170:19	<b>answers</b> 159:23	142:23	169:23
<b>abstract</b> 41:14	<b>addressing</b> 7:20	<b>advance</b> 85:13	171:18	<b>anybody</b> 114:17	<b>areas</b> 26:19	<b>assuming</b> 15:13
<b>absurd</b> 137:1,9	7:21 30:14	91:25 93:16	<b>agrees</b> 93:3	172:5	65:23 67:22	27:9,13 157:23
137:12	<b>adjourned</b>	<b>advantageous</b>	<b>Ah</b> 117:19	<b>anyway</b> 33:9	<b>argue</b> 7:3 107:17	157:25
<b>abundantly</b>	175:14	17:23 18:20	<b>ahead</b> 20:18	75:24 94:2	<b>arguing</b> 42:12	<b>assumption</b> 57:9
79:19	<b>adjournment</b>	<b>advantages</b> 18:7	116:20 119:17	139:21	<b>argument</b> 2:3,7	156:3 170:5
<b>accelerated</b>	95:22 96:16,20	<b>adverb</b> 79:20	131:2 137:19	<b>apart</b> 165:25	7:4 10:15	<b>astute</b> 42:16
10:22 21:1,25	<b>adjust</b> 36:11	<b>adversely</b> 134:13	<b>aid</b> 86:14 87:3,4	<b>apparent</b> 158:5	13:15 15:6,7	<b>attaches</b> 96:2
<b>accept</b> 14:24	152:12 153:13	<b>advice</b> 94:8	<b>aim</b> 144:20,21	<b>appeal</b> 128:15	16:19 19:6	<b>attempt</b> 30:4,7
31:7 45:12	<b>adjusting</b> 151:15	126:22	145:4,22 146:4	<b>appear</b> 14:13	20:16 24:9	101:23
65:17,22 66:6	<b>adjustment</b>	<b>affairs</b> 149:7	<b>albeit</b> 75:7	136:24	36:14 37:5	<b>Auriferous</b> 1:8
67:19 68:19	143:13 150:23	<b>affect</b> 100:5,8,8	<b>aliquot</b> 50:11	<b>appeared</b> 71:14	47:7 67:4	<b>Australian</b> 74:7
71:15 88:19	151:4,15	171:2	<b>Allen</b> 74:13	<b>appears</b> 44:14	102:4 109:17	74:16
90:6 93:4	153:16,17	<b>afraid</b> 90:23	<b>alley</b> 103:18	44:17 114:14	115:24,25	<b>authorities</b>
98:14 100:10	<b>adjustments</b>	147:19	<b>allotted</b> 175:9	<b>applicable</b> 10:9	116:14 117:23	47:13 82:23
145:15 165:5	73:7,8	<b>afternoon</b> 65:14	<b>allow</b> 58:4	<b>application</b>	119:15 122:19	93:9 96:21
167:25 169:17	<b>admin</b> 154:2	65:21 70:9	<b>allowed</b> 63:7	34:18 59:3	133:15 138:13	141:17
171:8 174:2	155:21 159:7	75:12,22	72:12 135:24	76:1 99:23	138:13 151:10	<b>authority</b> 31:13
<b>accepted</b> 116:2	160:25 161:10	<b>aggregate</b> 34:10	<b>alongside</b> 6:14	110:17 126:23	156:7	44:12 77:14
141:5 142:18	161:21,24	<b>ago</b> 19:19 82:25	<b>alternative</b>	136:11 139:24	<b>arguments</b> 76:25	81:5,25 82:4
160:10	162:4,10,10,11	164:12 169:9	115:5	168:3 170:7	80:6 123:7	85:18 86:12
<b>accepting</b> 110:20	162:18 172:14	<b>agree</b> 80:3 81:14	<b>alternatively</b>	171:11,23	124:17 137:3,4	89:14 96:6
112:8 148:22	<b>administer</b>	88:16 89:5,7	108:14 160:20	<b>applied</b> 20:13	138:6 160:8	<b>available</b> 35:6
<b>accepts</b> 11:25	124:3	89:19 103:15	161:5	22:19 104:17	163:13	92:25 130:25
67:3 76:24	<b>administration</b>	112:20 144:4	<b>altogether</b> 85:7	109:15,19	<b>arises</b> 4:20 161:5	162:6
80:17 127:13	11:19 13:13	145:10	<b>amended</b> 30:23	110:23 144:18	<b>arising</b> 154:1	<b>awaiting</b> 118:19
<b>account</b> 21:1	14:11,20 15:11	<b>agreed</b> 33:16	<b>amendment</b>	<b>applies</b> 11:19	<b>Arnold</b> 151:12	<b>awake</b> 65:15
22:1 37:8 38:2	15:11,17 17:6	78:14 89:8	146:12	13:5 63:14	<b>arose</b> 121:9	<b>aware</b> 143:6
55:23 99:2	17:9 22:17,19	<b>agreeing</b> 81:18	<b>amendments</b>	68:22 77:4,10	<b>arrange</b> 17:11	<b>a~bad</b> 153:22
121:6 123:7	25:22,23 26:13	111:12	155:18 156:4	120:2 163:19	<b>arrangement</b>	
<b>accounted</b> 29:19	26:14 28:1	<b>agreement</b> 79:18	<b>amount</b> 6:16	164:14 168:5	112:2 165:21	<b>B</b>
<b>accounts</b> 118:19	30:8 32:20	81:17 87:7,9	16:2,3,3 23:17	171:1	173:10,11	<b>b</b> 12:3 41:22
149:7	49:18 67:21,22	87:18 88:3	23:22,23 34:12	<b>apply</b> 9:8 19:5	<b>asked</b> 1:18 74:6	70:4 104:9
<b>accrued</b> 118:13	68:4,15,17	92:1 97:6	35:5,6,6 37:19	49:23,24 69:10	121:17 128:17	127:15 145:13
119:7,11	69:10 98:1	98:13,24 99:23	43:6,7,9 45:8	98:2 109:12	<b>asking</b> 18:20	155:6 164:12
161:12	99:15 102:22	100:23 101:7	48:13 49:19,21	110:19 119:10	136:16	169:6
<b>accruing</b> 155:21	103:17 119:21	101:14,21	66:10 101:3	120:18 165:15	<b>asks</b> 146:8	<b>back</b> 1:9 4:3
155:23 156:24	119:23 120:2	102:1,20	111:18 143:11	174:9,10,11,19	<b>aspect</b> 35:23	16:16 23:19
<b>achieve</b> 30:4,7	156:25 158:12	105:11,20	<b>amounts</b> 37:24	174:20,25	145:10	29:19 33:3
83:20,21,23	158:16,23	106:5,23	131:8	<b>applying</b> 55:22	<b>aspects</b> 18:15	34:19 40:3
<b>achieved</b> 87:17	159:3 161:4,13	107:18,22	<b>analysis</b> 5:6	56:14 121:6	<b>assert</b> 60:21	41:11 46:23
	165:5,8 168:9	108:3 114:15	14:13 56:25	165:1,19 171:3	<b>asserting</b> 18:19	49:4,5,8,15,25

57:1,25 64:18 67:17 71:7 73:11 74:23 75:19,21 87:2 88:12 90:18 91:10 92:2,16 97:10 99:10 105:4 110:2 111:10 112:8 112:22 121:14 121:16 125:5 126:5 127:8 133:17 134:16 136:5 139:3 140:14 141:24 147:11 154:6 164:19 167:13 <b>backdrop</b> 86:18 93:18 <b>background</b> 34:4 77:23 78:22 92:25 93:16 94:22,22 94:23,24 96:12 97:21 98:22 140:18 141:2 141:12 142:8 164:3 <b>bad</b> 48:7 65:25 66:19,24 67:15 70:2 <b>balance</b> 111:7,22 134:22 149:5 150:11 172:24 173:12 <b>bank</b> 118:17 119:5 <b>bankruptcy</b> 98:1 <b>Bar</b> 86:16,16 <b>base</b> 139:15 151:6 <b>basic</b> 63:13 66:5 68:14 69:12 <b>basically</b> 34:25 45:14 65:17,22 67:18 70:7 131:24 154:24 <b>basis</b> 31:17 52:5 58:9,10,22,24 120:1,2 124:19 168:18 169:23 170:6 <b>Bayfield</b> 155:16 <b>bear</b> 94:9 118:5 141:16 158:25 161:7 <b>bearing</b> 35:13 37:22 64:12 77:2 87:5,7 111:2 134:7 158:10 162:2 <b>bears</b> 10:3 <b>beginning</b> 103:25 117:2 140:15 167:3 <b>begins</b> 73:24	152:16 <b>behalf</b> 35:10 <b>believe</b> 142:14 <b>benefit</b> 13:4 17:7 21:1 24:22 28:4 40:3 41:7 91:3 <b>benefited</b> 24:4 <b>benefiting</b> 30:1 <b>benefits</b> 10:1,17 11:1 17:22,25 18:14 <b>best</b> 1:15 65:14 83:1 113:12 139:21 163:3 <b>bet</b> 16:19,21,23 17:21 24:8,10 24:11 <b>better</b> 3:23 10:8 10:14 14:7,14 15:24 17:13 20:4 23:21 25:15,25 26:10 26:15,19 48:9 60:15 82:19 138:15 <b>beyond</b> 85:2 103:23 <b>billion</b> 34:9 76:17 134:25 <b>binding</b> 135:16 <b>Birch</b> 47:24 <b>bit</b> 38:10 45:10 52:17 83:5 86:17 131:17 138:19 145:12 145:13 152:1 169:15 <b>bite</b> 132:12 <b>block</b> 70:24 <b>blush</b> 145:24 <b>body</b> 89:23 94:5 <b>boldly</b> 127:1 <b>borrow</b> 108:6 <b>borrower</b> 53:2,3 53:17 55:3,11 56:3,8,16,17 61:20 62:10,11 97:20 98:3,4 104:3,11,20,22 106:15 108:24 111:16,17,19 118:10,14 119:2 123:1,3 123:20 124:2 124:22 125:16 126:6 135:14 135:16,19,21 <b>bottom</b> 5:22 68:9 70:5 71:24,25 76:13 84:9 90:15 97:24 107:18,20 124:14 130:14 141:18 152:9 163:15	<b>Boulton</b> 63:11 <b>bound</b> 161:7 <b>box</b> 134:19 <b>Branwright</b> 71:15 72:24 <b>breach</b> 19:13 27:2 <b>break</b> 52:18 64:24 65:4,8 133:19,24 <b>brief</b> 120:11 <b>briefing</b> 162:22 <b>briefly</b> 75:7 142:25 <b>Brightman</b> 30:16,19 31:8 31:9,14 32:24 33:13 <b>bring</b> 159:7 <b>broad</b> 44:25 144:22 <b>Brock</b> 70:24,25 71:1 <b>Bros</b> 4:2 13:1 <b>brought</b> 42:5 161:2 <b>Buckley</b> 4:21,24 71:5,7,9,14 151:21 152:14 <b>building</b> 130:15 <b>builds</b> 128:20 <b>bundle</b> 1:13 46:21,22 82:23 <b>bundles</b> 134:16 <b>byway</b> 117:24  <b>C</b> c 32:19 70:12 127:15 155:6 <b>calculate</b> 6:16 149:8 <b>calculated</b> 58:10 <b>calculating</b> 6:15 <b>call</b> 36:18,22 37:11,13,18 39:6,24 43:9 43:10 47:20 49:19 57:13,18 58:18,18,21,23 59:2,12,17,18 59:20,21,22,25 60:5 62:19 66:10,12 139:23 142:24 149:19 150:15 151:4 153:12 164:14,24,25 165:14 166:10 167:10,24,25 168:3,22 169:6 169:6,11,14,22 170:25 171:7,8 171:10,25 172:4,8 174:1 <b>callable</b> 58:22 <b>called</b> 55:24 59:3	111:8 150:18 154:1 <b>calls</b> 35:11,12,25 36:8 37:9,21 37:22 38:3 39:15 40:25 42:1,13 44:3 50:10 51:24 56:6,18 57:7 57:12 59:20 68:4,5,13,18 72:22 76:2 172:14 <b>capable</b> 104:10 106:14 <b>capacity</b> 125:2 <b>capital</b> 45:4 78:4 78:5 79:1 92:3 119:6 120:11 <b>care</b> 70:15 75:9 95:9 <b>carefully</b> 78:23 101:18 107:9 113:8 131:14 <b>carried</b> 165:10 <b>carry</b> 18:4 <b>carrying</b> 18:24 <b>case</b> 1:7 3:25 4:4 5:19 8:7 10:24 12:22 13:15 14:6 17:3 18:8 19:16 20:14 21:22 27:12,13 27:17 29:18 30:22 31:23 33:12 35:11,24 37:23 42:18,22 43:5 48:13 54:23 57:13 59:24 61:5 65:19 66:7 67:20 70:19,19 71:16 72:11,21 73:20 78:25 79:3,13 83:1,4 83:16,21 84:1 85:21 88:18 94:9 95:7 102:9 103:19 107:1,24 124:8 132:4,14 139:8 145:10 147:7 158:7 161:3 164:23 168:3 <b>cases</b> 3:17 74:16 93:18 151:17 157:17 160:24 164:18 <b>catch</b> 110:17 <b>categories</b> 31:1 120:18 <b>categorise</b> 145:11 <b>category</b> 12:3 90:15 106:13 122:22 131:6	163:15 <b>cause</b> 56:10,17 86:19 <b>cautious</b> 86:9 <b>cent</b> 3:3 6:19,20 6:21,22 7:25 10:7,13 11:2,7 17:22 18:1 20:3,17 28:5 34:7 45:3,5 <b>certain</b> 112:14 131:21 145:11 156:7 157:7 <b>certainly</b> 9:8 11:4,11 21:10 26:24 27:8,12 33:23 45:17 47:6 52:5 60:10 89:24,24 96:13 118:25 133:21 158:17 158:20 159:15 162:16 167:15 <b>cetera</b> 34:8 77:25 83:16 97:18 99:6 123:19,19 128:5,6 141:6 152:12 155:24 <b>challenge</b> 162:20 <b>chances</b> 69:5 <b>change</b> 86:2 157:24 <b>changed</b> 94:14 95:14 <b>changes</b> 15:22 <b>characterise</b> 137:11 <b>Charter</b> 95:7,22 <b>check</b> 120:13 <b>checking</b> 33:3 <b>Cherry</b> 63:11 <b>chip</b> 70:24 <b>chose</b> 156:4 <b>chosen</b> 148:20 <b>circular</b> 149:21 <b>circumstance</b> 13:22 16:12 159:5 <b>circumstances</b> 16:7 23:21 26:9 27:7 41:19 42:18 43:4,14 48:22 49:6 50:23 51:1 53:10 54:21 56:23 62:23 120:25 121:2 128:9 131:21 158:11 164:16 166:16 <b>citation</b> 44:24 95:22 <b>citations</b> 47:12 <b>cite</b> 151:17 <b>cited</b> 44:12 95:23	<b>claim</b> 10:3 11:16 11:22 12:1 14:1,4,12 15:13 16:21 17:1,3,4,12,18 17:24 18:10,13 19:3,5,17 20:15,21,24 21:2,5,11,16 21:17,23 22:4 22:7,13 23:2 24:1,2,8,11,12 24:14,20,20 25:3,4,6,14,15 26:7 27:6,15 27:19,22 28:17 28:25 29:1,5 30:24 31:16 32:2,20 43:17 44:8,16 48:9 48:12,15,18 49:3,7,11 51:4 60:20 63:7 68:13 69:7,8 74:22,24 75:5 76:15,16,18 77:5,11 101:8 102:4 130:13 134:20 138:22 145:6 168:6,7 170:9,12,14,16 170:17 171:13 171:14,17,20 <b>claimed</b> 5:1 50:4 157:6 <b>claiming</b> 9:11 49:10 51:1 <b>claims</b> 11:15 12:2,4,4,10,14 13:16 17:9 31:6 34:22 38:23 41:18 43:4 58:8,14 60:17 61:18 68:9,10 69:1,2 73:25 76:10 77:17 102:23 104:14,15 137:22 138:8 138:16,20,24 139:6,7,10,11 139:12,25 141:18 144:11 146:11,13,17 146:18 147:10 147:12 151:2 163:16 165:4 165:10,16 169:24 170:6 171:1 <b>class</b> 12:17 45:9 81:15,16,16,19 90:6 <b>classes</b> 45:11 89:5 90:3,8 <b>classic</b> 96:21	146:11 <b>clause</b> 62:16 80:9 91:13 101:1,13,18 103:25 104:1,3 104:5,6,21 132:9,11,20,21 <b>clear</b> 24:24 29:21 31:5 48:8 77:21 79:19,19,20 81:13 99:16 100:10 103:5 106:19 115:4 122:3 129:7 141:20 148:11 152:24 <b>clearly</b> 23:25 66:17 94:3 107:10 111:10 121:5 124:18 135:23 143:22 <b>clients</b> 66:23 68:11 77:3 78:13,14,21 80:2,3 87:1 98:17 99:24 100:24 101:8 101:14 104:18 105:12,20 106:5 107:11 140:7 142:2 165:4,5,14,15 170:4 174:2 <b>client's</b> 76:15 98:11 100:5 101:4,8 105:25 137:20 139:11 168:7 <b>clip</b> 153:3 <b>closest</b> 88:12 <b>closing</b> 126:4,5 <b>code</b> 2:20 9:20 <b>coexist</b> 6:14 <b>collection</b> 130:3 <b>combined</b> 85:16 <b>come</b> 13:17 23:19 34:1 38:15 49:8,25 58:21 64:11,17 68:8 74:23 75:19,21 100:11 112:22 121:14,16 139:3 144:12 144:13 147:11 164:19 <b>comes</b> 15:11 40:22 48:15 57:25 94:17 <b>coming</b> 13:8,9 16:23 35:3 49:15 94:21 <b>commas</b> 78:2 <b>commencement</b> 119:11 121:8
---	--	---	---	---	---	--

<b>comment</b> 31:4 73:22 91:5	<b>components</b> 142:24	148:10 150:6 160:5	129:12	166:20 168:4 170:8 171:1,4	58:16 63:15 68:19 69:9	29:11,13,24 40:3 41:23
<b>comments</b> 3:7 76:6	<b>compound</b> 9:3 <b>comprehensive</b> 31:5	<b>constructions</b> 96:8	<b>contracting</b> 81:13	171:11 174:9 174:17	74:23 80:16 88:19 90:4,24	58:5,25 76:10 76:11 78:18
<b>commercial</b> 10:8 11:2 93:2 95:7	<b>compulsion</b> 10:25	<b>construe</b> 106:4 126:17 147:16	<b>contracts</b> 93:13 93:17	<b>control</b> 35:16 36:10 37:20	93:20 94:9,13 96:9 99:4,25	80:5,24 81:16 81:19 83:15
<b>common</b> 51:24 148:7	<b>conceive</b> 41:19 <b>conceiving</b> 14:19	150:25	<b>contractual</b> 1:22 2:2,9,21,22,24	<b>controversial</b> 82:15	114:4 118:3 119:10,19	100:13 102:25 155:20,22
<b>Commons</b> 162:23	<b>concept</b> 107:9 <b>conceptually</b> 14:21	<b>construed</b> 92:19 94:25 102:18	2:25 3:2,5,22 6:13,15,18 7:6	<b>convenient</b> 96:12 133:20	120:25 124:4 125:3 130:1,2	161:11,23 162:5
<b>companies</b> 5:16 162:9	<b>concern</b> 40:21 43:1 55:22	<b>construes</b> 77:22 102:20	7:7,9,14,15,18 8:6,21 9:2,6,7	175:4	142:13 148:2 155:7 160:11	<b>creditor's</b> 162:15,17
<b>company</b> 4:9,15 4:18 6:7 9:25	<b>concerned</b> 24:25 14:10,15,19	<b>construing</b> 96:21 <b>contacts</b> 93:2	10:14,25 11:8 11:11,12 18:1	<b>conversion</b> 1:24 11:14,16,18,22	162:19 163:12 165:11 170:15	<b>critical</b> 3:6 102:24 147:1
11:4,4,20 13:13,14,18,23	<b>conclude</b> 137:2 <b>conclusion</b> 4:8	<b>contained</b> 111:1 <b>containing</b> 106:5	18:9 19:17 20:15 21:6,18	13:25 14:1,12 17:3,4 18:10	<b>court</b> 15:4 20:1 35:9,16 36:1,9	<b>critically</b> 108:4 <b>Cropper</b> 47:24
14:10,15,19 15:9,12 17:16	28:3 40:25 63:1 77:3,6	<b>contains</b> 101:1 <b>contemplate</b> 89:19	22:8,20,22 27:23 28:12	19:3,4 21:14 21:15 22:4,7	37:7,11,20 39:24 40:13,15	<b>Cross</b> 69:2 130:1 <b>cross-referenci...</b> 109:24
20:18 21:7,7 22:16 26:1	87:21 88:18 100:23	<b>contemporane...</b> 46:23 130:7	32:6 52:25 76:22 77:2	25:15 26:6 27:25 28:7,8	41:4,6,10 42:16 50:25	<b>crystallised</b> 17:15 25:12
27:10,14,15 29:9,16 36:15	<b>conclude</b> 137:2 <b>conclusion</b> 4:8	<b>contend</b> 156:24 <b>contended</b> 144:11	82:11,17 98:12 144:24 157:5,6	32:2 75:5 76:9 77:17 137:22	72:12 73:22 76:24 85:18	<b>currency</b> 1:24 10:9 11:14,16
46:25 54:17,20 55:19,22 56:2	96:1 <b>condition</b> 135:15	<b>contention</b> 81:5 85:1	<b>contractually</b> 24:15 81:6	138:16,20,24 139:7 144:12	95:23 108:9 120:20 127:1	11:22 14:1,7 14:12,14 15:22
56:25 57:16 58:9,11 59:9	<b>conditional</b> 101:3,5 104:2	<b>context</b> 6:9 31:19 55:17	<b>contradict</b> 58:16 <b>contrary</b> 14:6	151:2 <b>converted</b> 22:17	127:13,14,16 131:12 152:12	17:3,4,6,9,12 17:18,21 18:3
61:2,3 63:1 72:9,11,13,19	111:14 <b>conditions</b> 101:6	77:23 93:15 94:6 95:7 97:5	19:8 32:2 78:9 124:17	23:17 30:8 145:2	154:20 175:14 <b>courtroom</b> 85:17	18:4,10,14 19:3,4 21:13
72:21 77:18 78:14 83:12	<b>conferred</b> 36:7 <b>confess</b> 114:13	126:10 140:17 148:21 152:7	<b>contravene</b> 44:16	<b>convincing</b> 33:1 157:16	<b>court's</b> 36:10 38:3 40:10,10	21:15,19 22:3 22:7 23:2,9,9
109:5,20 110:12 115:15	<b>confused</b> 53:23 61:25	<b>contexts</b> 95:14 95:16	<b>contribute</b> 45:5 150:8 151:14	<b>cope</b> 22:24 <b>corner</b> 47:3	43:3,21 <b>covered</b> 132:23	23:11,12,25 24:2,15,20,21
115:22 116:4 118:6,10,21	<b>consent</b> 101:23 <b>consequence</b> 145:4	<b>contextualised</b> 94:6	<b>contributed</b> 150:10,17	<b>corollary</b> 10:21 <b>correct</b> 15:4 17:5	132:23,23 <b>co-existing</b> 2:22	25:4,6,14 26:6 27:4,6,19,22
119:18 121:1 122:21 134:21	<b>consider</b> 51:10 95:5 97:22	<b>contingencies</b> 109:6 115:16	<b>contribution</b> 34:21 41:18	73:13 80:20 81:23 95:3	<b>create</b> 110:24,24 112:12 121:4	28:4 29:5,11 29:13,24 32:2
144:17 147:3,9 148:1 154:2	127:16 144:2 149:6 159:19	117:3 <b>contingency</b> 115:20 116:3	42:21,22 43:17 43:17 44:8,15	106:25 107:8 116:5 117:21	149:20 <b>created</b> 18:3	38:23 74:24 75:5 76:9
158:11,15,22 159:2 160:25	<b>consideration</b> 37:12	116:15 <b>contingent</b> 73:25	44:16 48:9,10 48:18 49:11	119:8,14 126:24 128:15	109:23 120:20 120:21 158:8	77:17 137:22 138:16,20,24
161:10,25 162:12,17	<b>considerations</b> 42:2	108:25 115:13 116:1,11,25	50:1,2 63:9 66:12 120:20	130:23 143:22 154:17 163:14	<b>creates</b> 109:4 <b>creating</b> 129:16	139:7 144:12 145:2,6 151:2
<b>company's</b> 27:2 32:5 83:13	<b>considered</b> 86:5 111:21 147:23	117:1,5 165:6 168:6 170:9	120:25 121:4,7 121:11	163:17 166:21 166:21 172:7	<b>credit</b> 4:13 11:1 18:14 19:5,11	<b>currently</b> 46:17 165:6
115:12 <b>compares</b> 104:7	<b>considering</b> 115:9 140:25	171:13,14 <b>contingently</b> 109:5 115:16	<b>contributions</b> 32:4 47:8 53:4	<b>correctly</b> 22:3 124:13	19:20 20:2 21:20 23:16	<b>curves</b> 162:11
<b>compartments</b> 139:18	<b>consistent</b> 84:18 108:4 138:6	<b>continual</b> 28:6 <b>continue</b> 50:14	53:22 54:19 55:7	<b>costs</b> 161:7 <b>counsel</b> 73:19,22	28:14 48:25 49:14 50:15,18	
<b>compensation</b> 10:23 94:5	144:14 147:5 158:2	<b>continued</b> 1:3 176:3	<b>contributories</b> 1:25 6:17	85:17 <b>counsel's</b> 33:3	<b>credited</b> 118:19 <b>crediting</b> 118:19	<b>D</b>
<b>competition</b> 162:21	<b>constitute</b> 150:15 161:14	<b>continues</b> 13:14 14:11	35:13,14 36:8 36:11 37:12,25	<b>couple</b> 144:5 151:17	<b>creditor</b> 3:22 4:16 10:24	<b>d</b> 1:13 6:2 101:23
<b>complete</b> 2:20 9:20 95:21	<b>constituted</b> 150:16	<b>contortions</b> 108:5,8 113:23	41:15,23 42:4 143:10 147:7	<b>course</b> 3:6,9 7:4 8:18 10:20	14:7,14 15:13 15:19,24,25	<b>damages</b> 19:13 20:22,25 21:16
108:10 <b>completely</b> 15:12 149:21	<b>constituting</b> 94:8 <b>construction</b> 61:3 90:9,12	<b>contract</b> 3:3,24 4:14,17 7:12	<b>contributors</b> 72:13 143:14	11:3,25 12:6 13:11 14:6,21	16:13 17:18,21 20:2 22:15	23:15 <b>date</b> 4:10 11:18
<b>completing</b> 174:1	93:13 94:15 96:9 98:13	8:12 19:8,14 27:2 31:18	151:5 <b>contributory</b> 35:5 63:6	15:18 17:8,17 17:20 18:2,22	24:9,15,20,25 25:2,21 27:4	14:1 17:14,15 22:18 25:22
<b>complicated</b> 45:10 115:25	103:20 106:25 107:8 114:15	54:9 62:5 83:11 89:1	64:10 69:4 70:13 75:23	19:2 21:13 24:10 30:6,22	28:11 31:16 81:18 83:12	26:12,14 27:1 27:3,5,25,25
170:1 <b>complicates</b> 38:10	115:5 121:20 129:21 136:25	92:18,19 96:22 128:19,25	152:21 153:6 153:10 163:4	32:9,18 37:9 38:17,25 39:11	85:7 88:2 89:19 112:20	28:1,16 30:9 101:21,22
<b>component</b> 144:8	139:7 141:4,4 143:22 144:14		163:19 164:13 164:15,23	39:23 41:8,14 42:15 47:18,21	<b>creditors</b> 9:11 10:1,2 12:5	119:12 121:7,8 129:25 144:25
			165:1,15,18,20	50:22 52:25 56:9 57:5	13:8 16:23 17:5 26:19,20	145:3 <b>dates</b> 4:11 28:8 173:20 <b>DAVID</b> 1:4,11

1:19 2:1 5:4,8 5:13,18,20,25 6:4,23 7:1,8,11 8:1,3,5,9,14,22 9:2,5,14 10:11 12:8,11,13,16 12:21 13:21 14:18,23,25 15:3,9,16,19 15:21 16:1,5,8 16:11,13,15,18 18:12,18,23 19:12,22,25 20:6,9,20,24 21:4,8,12,15 21:20,24 22:6 22:11,14 23:3 23:13,16,25 24:5,17,19,24 25:4,10,13,18 25:20,25 26:3 26:8,12,17,23 27:11,16 28:10 28:19,25 29:5 29:7,10,15,20 30:2,4,13 31:3 31:8,11,22 32:11,16,23 33:9,15,18 34:16,24 35:8 35:20 36:2,5 36:19,23,25 37:4,14,16 38:4,19,22 39:1,5,9,16,20 40:2,7,18 41:9 41:17 42:8,24 43:2,12 44:10 44:20,24 45:3 45:7,13,16,21 45:25 46:5,7 46:10,16 47:1 47:6,11,16,19 47:24 48:6,17 48:21 49:1,17 50:6,9,20 51:2 51:6,12,15,22 52:7,9,14,19 52:23 53:6,13 53:16,19,23 54:1,6,14,22 54:25 55:8,11 55:15,21 56:2 56:13,22 57:2 57:8,10,15,20 58:20 59:2,7 59:16,19,23 60:2,8,11,14 60:19,23 61:5 61:10,14,17,24 62:3,7,12,15 62:18,20,25 63:4,12,18,21 63:24 64:2,5,9 64:19,23 65:10 69:11,14,20,23	70:6,10,14,21 71:10,17,22 72:2,7,14,17 72:20 73:4,10 73:16,21 74:4 74:8,19 75:4 75:16 77:9,12 80:16,19 81:2 81:11 82:19,24 83:2,7,17 84:4 85:5,10,20,23 86:1,4 87:11 87:16,24 88:7 88:17,24 89:18 89:22 90:2,10 90:20 91:3,7 91:18 93:3,5,7 93:11,14,24 94:1,12 95:11 95:20 96:4,7 96:13,19,25 97:12,14 99:13 99:20 100:14 100:20 101:20 102:14 103:5 103:10,14 104:24 105:2 108:16,18 110:7 113:1,7 113:11,15,17 114:21 116:9 116:13,18,22 117:7,11,14,19 117:22 118:1,5 118:9,16,24 119:4,9,15,21 119:24 120:5,9 120:16,24 122:10,12,17 124:5 125:7,9 125:18,21,24 128:1,3 129:2 129:8,13,23 130:6,11,22,24 131:2,16,19,23 132:3,11,17 133:9,21 134:1 134:5,18,23 135:1,11 136:3 136:8,13,19,21 138:3,18 139:9 139:20 140:6 142:5,10,13,22 143:4,9,15 147:14,19 148:6,9 149:12 149:14,16 151:24 152:4,8 152:11,19 153:7,9,15,19 154:8,12,15,22 156:14,19,22 157:10,13,15 157:25 158:4 158:14,18,21 159:8,11,16,21	160:1,16,19 161:17 162:1 162:20 163:2,5 163:7,11 164:2 164:6,9,11,21 165:24 166:4,6 166:12,15,19 166:22,25 167:4,9,17,19 167:21 168:8 168:13,17 169:4,7,11,15 169:19,21,25 170:3,11,13,15 170:21,23 171:19,22 172:2,8,15,21 173:14,17,23 174:7,23 175:3 175:5,10 <b>Davies</b> 4:2 <b>day</b> 62:16 102:6 142:3 174:2,16 <b>days</b> 83:2 93:22 <b>dead</b> 170:19 <b>deal</b> 1:20 30:23 35:18 44:19 51:17,23 52:10 66:20 70:12 75:25 80:25 105:18 106:3 115:10 133:1 139:16 142:14 144:9 148:24 <b>dealing</b> 2:2 19:23 32:18 70:8 151:18 165:20 169:8 <b>deals</b> 12:9 112:23 133:3 <b>dealt</b> 9:17 12:2 51:13,18 52:24 75:7,20 128:4 140:15 142:25 143:23 151:23 <b>debate</b> 145:1 <b>debating</b> 154:10 <b>debt</b> 10:6,9 13:22 15:22 18:2 19:17,17 20:17,21 21:2 21:6,11,17,22 21:23,25 22:3 22:4,10,12,17 23:9,11,12,14 25:12,16 26:25 28:3 38:10,12 38:18 49:13 53:11 54:16,16 54:17 59:11 60:6,6,23 61:20 62:23 63:8,15,15,16 67:1,7,8,22,23 68:6 77:5,16 81:14 83:13	86:2 87:25 89:22 100:2,24 102:21 103:16 111:6 112:1,12 118:11 119:13 119:16 120:22 123:11 130:19 130:20,22 136:10 148:1,4 166:4,8,8 168:19 173:7 <b>debtor</b> 149:4 <b>debts</b> 3:19 12:9 12:23 27:1 30:23 31:2 32:18 54:10 58:5 59:5,10 59:13 61:12 63:21 72:13 76:9,11,14 77:25 79:3 81:6 83:14 84:13,14,16,18 84:20,20,24,25 87:19,22 89:23 90:14,16 97:9 99:4,7,19 100:7 103:24 105:5,6,17 106:2 107:13 109:6 115:17 115:22 116:4,7 116:16 117:8 118:13,22 121:9,13 124:24 126:3 137:9,24 138:5 138:9 140:2 143:11,18,20 144:20,22,23 145:2 146:3,4 146:22,24 147:1,4,4,8,25 147:25 148:25 153:12 165:25 165:25 168:18 172:6 <b>December</b> 118:11,13,20 <b>decide</b> 27:21 88:18 104:5 <b>decided</b> 127:12 127:13 156:11 157:6 172:20 <b>deciding</b> 39:24 <b>decision</b> 72:25 79:9 85:24 86:18 89:4 94:18,19 95:2 126:20 146:12 <b>deduce</b> 24:6 <b>deduction</b> 48:12 <b>deed</b> 82:13 <b>default</b> 27:10,13 27:15 <b>defaults</b> 15:9	<b>deficit</b> 36:16 <b>defined</b> 62:4 78:3 84:20 91:20 92:9 104:3,7,8 114:19 124:5,6 124:14 <b>definition</b> 64:2 92:7 97:15 98:5 100:6 106:10,11 108:21 110:2 110:16 111:3 114:8 116:10 122:14,23 123:24 124:15 126:4,16 131:9 132:4,15 144:22 150:9 150:17 <b>definitions</b> 91:9 91:12 <b>degrees</b> 174:3 <b>delayed</b> 10:23 <b>delegated</b> 36:3 40:12 41:5 <b>deleted</b> 131:10 <b>deliberately</b> 148:20 <b>demand</b> 28:13 <b>dense</b> 105:18 <b>depend</b> 38:23 <b>depending</b> 10:9 38:9 <b>depends</b> 50:2 119:19 173:24 173:24 <b>depreciated</b> 24:21 <b>Derham</b> 1:17 <b>describe</b> 110:5 <b>described</b> 111:22 153:24 154:1 165:21 171:5 <b>desk</b> 1:6 <b>despite</b> 2:4,5 18:6 43:10 <b>detail</b> 33:24 142:9 143:24 <b>details</b> 90:8 <b>determined</b> 53:3 53:20 98:12 104:11 106:14 <b>determining</b> 37:9 53:1 56:16 <b>detriment</b> 10:1 13:4,7 <b>detriments</b> 10:18 <b>develop</b> 35:9,17 35:22 77:14 78:8 79:25 102:10 144:1 <b>developed</b> 2:15	67:12,13 102:5 141:7 <b>developing</b> 132:24 <b>development</b> 15:7 <b>develops</b> 64:14 <b>deviate</b> 68:23 <b>difference</b> 14:5 25:6,7 40:9 41:20,21 47:22 47:23 100:1 135:3 169:1 <b>different</b> 3:21 39:13 41:16 74:2 80:6,13 81:16,17 83:23 89:25 93:23 94:16,16 115:8 120:12 121:12 133:14 148:21 163:24 164:10 164:18 165:18 173:21,24 <b>differently</b> 133:12 140:8 173:6 <b>difficult</b> 20:12 28:19,21 41:10 47:22 56:15 111:4,24 113:12 123:21 123:25 172:3 174:18 <b>difficulty</b> 14:19 41:2 64:5 107:16 <b>direct</b> 35:12 45:8 <b>directed</b> 112:13 147:22 <b>direction</b> 109:18 109:21 110:8,9 110:19,21,21 110:25 112:3 148:22,23 149:22,24 <b>directions</b> 34:18 41:6 112:11 <b>directs</b> 109:11 <b>disadvantaged</b> 16:24 <b>disagree</b> 65:23 <b>disagrees</b> 65:18 <b>disapplication</b> 163:21 <b>disapplied</b> 174:13,22 <b>disapplying</b> 163:20 <b>discharge</b> 8:20 9:12 95:15 <b>discharged</b> 95:17 <b>discharges</b> 31:19 <b>discount</b> 10:7,8 10:19,21,22,22	11:2,3,5,7,8 17:22,24 20:4 20:5,17,19 22:19 23:4,8 26:22 <b>discounted</b> 10:6 <b>discrepancy</b> 58:8 59:1 <b>discretion</b> 135:13 <b>discuss</b> 137:16 <b>discussed</b> 1:8 47:9 165:22 <b>discussing</b> 152:6 169:8 <b>discussion</b> 19:19 33:10,11 <b>dispute</b> 103:11 <b>disputed</b> 172:19 <b>disputes</b> 79:7 <b>disregard</b> 56:15 93:19 <b>dissolution</b> 98:2 <b>distinction</b> 100:17 110:11 146:20 147:3 157:19 <b>distribute</b> 17:10 152:13 <b>distributed</b> 58:7 58:14 <b>distributing</b> 14:20 15:10,16 161:4 <b>distribution</b> 47:25 145:3,18 145:23 146:1,2 146:3,6,16 <b>distributions</b> 58:12 <b>dividend</b> 41:15 43:8 58:1,6,9 58:11,13 68:1 81:20 100:3,12 <b>dividends</b> 34:13 34:14 37:25 42:19 100:11 149:8 <b>divorce</b> 95:6 <b>document</b> 90:24 94:3,6 97:11 107:2 111:11 122:2 131:13 <b>documents</b> 46:20,23 94:15 94:24 130:2,3 <b>doing</b> 13:9 64:15 89:9 137:1 139:21 168:24 <b>dollar</b> 15:22 28:15 34:15 45:25 46:12,13 <b>dollars</b> 22:8,9 23:18 29:2 <b>double</b> 33:25 44:17 48:4
---	--	---	--	--	--	--



49:13,16,22 51:15 66:16 <b>doubt</b> 11:9 78:9 92:22 155:15 155:17 <b>doubts</b> 122:5 <b>Draft</b> 162:22 <b>drafted</b> 93:17 94:4 100:5 131:14 <b>draftsmen</b> 86:10 <b>draftsperson</b> 100:22 111:11 135:23 <b>draftswoman</b> 100:22 107:2,8 107:24 122:2 131:11 <b>drawing</b> 149:7 157:19 <b>drawn</b> 146:20 <b>drops</b> 134:19 <b>due</b> 23:10 72:13 74:23 111:18 125:1 154:17 <b>duty</b> 36:10 39:2	101:22 <b>effectively</b> 38:17 57:22,24 69:3 69:4 78:2 84:5 88:15 89:4,7 102:9 106:5 126:25 127:20 129:22 130:20 131:8,10 136:2 146:10 155:5 <b>eighth</b> 71:11 <b>either</b> 11:24 16:25 17:14 24:11 29:8 38:6 39:18 41:3 77:25 107:14 108:12 108:16 130:6 141:13 161:3 167:22 168:21 170:8 174:10 <b>emotive</b> 160:12 <b>emphasis</b> 40:15 72:24 <b>emphasise</b> 99:5 148:2 <b>emphasised</b> 100:16 <b>empty</b> 131:6 132:3,5,6 <b>enable</b> 162:23 <b>encapsulates</b> 81:21 <b>encompass</b> 54:11 <b>endeavour</b> 74:17 <b>enforce</b> 135:15 <b>engaged</b> 165:2 <b>enormous</b> 86:19 <b>ensure</b> 145:3 <b>entertaining</b> 113:16 <b>entirely</b> 108:4 139:2 <b>entitle</b> 68:1 <b>entitled</b> 8:21 10:24 18:13 22:11 24:3,16 42:13 46:8 60:20 67:25 68:11 102:24 117:20 136:9 155:2,21,23 156:17 168:20 <b>entitlement</b> 8:15 8:17 9:13 35:4 42:16 162:17 <b>entry</b> 11:18 163:3 <b>envelope</b> 35:6 <b>envisaged</b> 84:16 <b>equal</b> 36:15,18 <b>equally</b> 3:18,19 10:12 27:23 39:8 42:6 84:17 89:23	<b>equated</b> 28:23 <b>equitable</b> 70:13 76:1 77:1,8,10 139:16,17,24 163:23 165:2 168:4 170:8 171:12 174:3 174:10,11,19 174:25 <b>equivalent</b> 28:16 98:3 <b>ergo</b> 28:16 29:5 29:6 <b>error</b> 157:23 <b>essentially</b> 13:7 <b>establish</b> 77:15 114:18 155:14 <b>established</b> 5:2 104:10 106:14 <b>establishes</b> 91:15 <b>estate</b> 39:3 41:7 42:7 66:8 100:9 <b>estates</b> 40:1,4,16 <b>et</b> 34:8 77:25 83:16 97:18 99:6 123:19,19 128:5,6 141:6 152:12 155:24 <b>event</b> 16:25 83:12 102:13 102:19 137:7 138:13 139:3 <b>everybody</b> 28:5 <b>evidence</b> 46:14 79:6,6 127:4,5 154:25 155:8 <b>Ex</b> 47:20 <b>exactly</b> 23:19 54:24 56:1 60:18 64:7 67:24 86:20 87:23 97:4 103:11 119:4 155:4 <b>example</b> 6:17 10:3 15:24 17:17 20:3,14 23:10 36:14 39:14 41:13 42:21 43:4,5 49:5,5,7 50:3 52:6,13 54:16 58:2,18 88:14 89:12 94:3 95:12 120:17 121:12,13 144:24 146:11 149:8 161:2 <b>examples</b> 160:23 <b>exchange</b> 17:21 18:6 25:7,8,11 <b>exchanges</b> 154:14 <b>excluded</b> 78:4 80:7 91:22	92:1 97:16 104:9 106:12 106:16 108:14 108:19 122:15 122:22,24,24 124:18 126:5 126:18 127:9 128:21 129:6 133:8 <b>excluding</b> 59:10 <b>exclusions</b> 146:8 <b>exercisable</b> 36:8 <b>exercise</b> 74:6 81:17 111:8,23 118:25 165:9 171:5 173:2 <b>exercised</b> 42:17 66:17 <b>exercises</b> 172:23 173:20 <b>exercising</b> 37:20 <b>exhausted</b> 9:7 <b>exist</b> 13:3 74:22 77:17 116:8 117:4 139:1 147:10 <b>existed</b> 4:10 <b>existence</b> 47:5 98:23 109:7 115:18 174:3 <b>existing</b> 84:18 147:24 <b>exists</b> 50:3 84:23 138:22 <b>expect</b> 12:12 36:17 79:19 89:1 172:8 173:17 <b>expected</b> 107:7 114:2 122:2,6 161:22 162:7 <b>expecting</b> 74:13 <b>expense</b> 29:8,11 29:16 <b>expenses</b> 143:12 147:7 <b>explain</b> 140:13 162:23 169:1 <b>explained</b> 42:14 95:24 <b>explicit</b> 107:5 <b>explicitly</b> 93:16 <b>express</b> 107:5 128:4,22,22 129:11,14,19 130:5 <b>expressed</b> 92:4 97:17 122:25 123:4,8,9,10 123:13,19 124:9,19,21 125:14 126:1,8 126:18 128:4 129:8,9,21,22 133:5 <b>expression</b>	123:21 126:7,8 126:9 145:13 <b>expressly</b> 11:17 97:8 107:22 123:22 129:4 136:6 <b>extend</b> 4:19 6:8 32:8 54:5 147:7 <b>extends</b> 52:21 <b>extension</b> 93:15 <b>extensively</b> 98:17 <b>extent</b> 27:20 29:25 34:22 84:12 85:19 86:10 98:11 111:19 119:1 137:8 139:1 161:16 <b>extinguished</b> 2:9 <b>extinguishes</b> 173:7 <b>extra</b> 162:17 <b>extract</b> 1:6 151:20 <b>extracts</b> 1:10,14 1:17 <b>extreme</b> 78:15 79:22 108:10 <b>extremely</b> 79:20	44:11 75:7 <b>fall</b> 3:6 12:6,7 60:24,25 100:6 107:13 111:18 130:20 <b>falling</b> 143:18 157:23 <b>falls</b> 38:16 80:9 146:23 <b>far</b> 28:2 40:25 42:5 60:10,11 75:3 76:8 77:3 77:5 81:13 82:15 87:20 89:15 91:22 99:1 115:24 117:24 128:14 129:2 133:4 139:10 147:15 148:12 168:10 173:9 <b>father</b> 70:25 <b>fault</b> 168:25 <b>favour</b> 13:11 122:1 141:4 156:7,13 <b>field</b> 157:17 <b>fifth</b> 141:11 <b>Fifthly</b> 78:13 <b>figures</b> 39:22,23 41:13 50:4 76:17 <b>fill</b> 17:4 22:9 <b>final</b> 94:19 <b>Finally</b> 6:9 <b>financial</b> 118:16 142:15 <b>find</b> 12:12 41:9 51:18 56:15 72:3 89:15 131:5 145:16 145:19 <b>finds</b> 11:24 79:23 122:19 <b>fine</b> 43:20 138:18 142:13 170:21 <b>finish</b> 64:13 175:8 <b>fire</b> 120:7 <b>firepower</b> 85:17 <b>first</b> 1:22 2:3 9:20 11:23 13:15 23:1 30:20 32:7 34:17 35:19,21 35:23 36:17 37:3 38:13 43:23 44:2 49:2 57:3 58:25 59:3 63:14 65:25 67:23 76:21 77:1 80:25 87:12,13,14 89:15 97:3	121:4 125:12 145:24 147:20 148:16 152:1 163:17 <b>Firstly</b> 144:21 <b>fit</b> 129:10,11 138:21 139:7 <b>fits</b> 87:20 105:3 <b>five</b> 22:12,16,23 65:5 75:14 133:22 170:19 <b>fiver</b> 163:2 <b>fly</b> 173:19 <b>focus</b> 150:23,24 <b>focused</b> 107:9 <b>focusing</b> 110:13 <b>follow</b> 9:14 19:13 24:5 34:11 54:22,22 60:11 64:9,9 69:25 73:2 90:2 115:19 116:9,13 161:16 166:22 167:13 172:21 <b>followed</b> 71:19 156:25 <b>following</b> 2:24 5:5 70:12 75:6 110:23 143:24 <b>follows</b> 22:6 27:6 38:5 57:21 137:22 161:9 <b>football</b> 163:1 <b>footing</b> 60:21 <b>footnote</b> 73:14 73:18 95:9,13 125:11,19 127:23,24 128:2 131:18 <b>footnotes</b> 141:22 <b>force</b> 45:16 76:13 97:3 <b>foreign</b> 14:7,14 17:5,8,12,18 17:20 18:3 21:19 23:2,9,9 23:11,12 24:14 24:19 27:6,18 27:22 28:4 29:11,13,24 145:2,6 <b>forever</b> 62:16 <b>forget</b> 140:21 <b>forgive</b> 155:3 <b>form</b> 78:15 79:22 87:7,9 107:2 108:10 127:24 128:8 128:25 131:7 131:20 <b>formal</b> 48:14 82:12 123:24 <b>forms</b> 6:10 57:23 58:23 59:14 <b>formulation</b>
--	---	--	--	---	---	---

75:23 <b>fortiori</b> 150:12 <b>forward</b> 102:17 142:12 <b>Foskett</b> 70:23 <b>found</b> 33:12,13 71:2 85:18,22 <b>four</b> 151:23 170:20 <b>fourthly</b> 78:5 <b>fraction</b> 43:11 <b>framework</b> 98:16 <b>Frankly</b> 83:18 <b>free</b> 42:2 <b>Friday</b> 1:1 65:13 <b>friend</b> 3:11 5:16 6:11 13:6 14:11 33:23 66:18 67:2,10 67:16 78:20 80:2,10 83:21 84:1 89:8 100:15 102:5,8 102:8 105:10 108:6 110:13 110:15 112:23 139:13,13 141:21 142:19 153:21 175:8 <b>friends</b> 64:14 65:15 88:25 127:9 150:19 <b>friend's</b> 8:7 17:20 18:8 <b>front</b> 79:8 88:18 <b>fruitlessly</b> 73:19 73:21 <b>Fry</b> 71:15 72:25 73:1 <b>Fry's</b> 71:18 <b>FSA</b> 101:23 <b>full</b> 7:2 8:2,14,17 9:13 12:5 22:9 28:2 37:19 38:6 39:18,21 40:20 41:3 43:8 49:19,20 49:21,21 53:7 54:8 55:4,13 58:4 60:4 61:7 66:10,14,15 67:9 68:11 100:12 102:23 109:6 114:12 115:17,21 116:4 117:8 131:14 138:2 138:10 152:16 153:4 161:23 <b>fully</b> 64:17 151:16 152:17 152:20,22 153:10,13,17 <b>fund</b> 63:9 110:22	110:23 150:15 <b>fundamental</b> 146:15,16,18 155:12 <b>fundamentally</b> 98:21 133:3 <b>funds</b> 148:24 150:15 162:6 166:12 171:24 172:4,5 <b>further</b> 3:12 6:2 7:19,19 17:17 18:25 30:10 33:19 64:21 68:9 74:18 75:2 86:11 90:16 92:15 95:2 129:24 130:19 137:13 138:13 140:16 147:9 163:16 173:13 <b>future</b> 10:3,6 17:19,24 19:17 21:25 22:13 23:2,11 62:5 92:11 108:23 110:2,3  <b>G</b> <b>G</b> 6:2 <b>gain</b> 16:14 17:2 17:11 <b>gains</b> 45:1 <b>gathered</b> 99:22 <b>general</b> 27:18 38:11 82:8,11 89:23 134:21 <b>generally</b> 70:23 86:4 137:17 <b>generated</b> 79:5 <b>getting</b> 52:10 <b>Gibbs</b> 70:19 71:16 73:19 151:23 <b>Giffard</b> 3:8 <b>give</b> 3:22 11:1 19:11,20 20:2 21:20 23:16 28:14 34:2 39:25 46:20 48:25 49:4,14 50:15,18 84:7 89:20 92:23 120:3,17 149:12 <b>given</b> 7:5 9:18 19:6,9 41:6 42:19,21 50:3 51:7 65:12 67:8 97:23 105:15,25 110:5,19 127:21 128:8 131:20 141:2,2 141:11 159:20	159:22 <b>gives</b> 10:17 15:23 27:4 75:14 <b>giving</b> 18:14 85:13 121:3 <b>go</b> 1:9 27:21 30:20 34:19 36:4 42:5 45:7 49:5 54:2 56:8 73:6 74:18 75:24 77:7 86:11 92:2,14 113:22 115:7 125:5 129:2 133:13 136:5 137:15 141:18 142:9,23 151:18 154:6 158:13 159:4 161:4 168:14 173:9 174:24 <b>goes</b> 9:25 13:23 15:10 22:17 41:22 56:2 64:19 82:15 85:2 95:2 110:2 111:10 114:14 118:7 126:4 150:12 165:14 167:24 167:24 168:14 170:24 171:6,7 172:12 <b>going</b> 10:18 30:11,13 33:20 38:6 39:17,20 41:16 46:23 55:22 63:4,20 67:11,12 69:5 71:25 72:3 73:11 75:11 91:10 95:2 112:15 113:11 118:6 119:18 119:25 120:3,7 127:11 132:5 132:22 133:7 133:10 137:11 138:14,25 139:16 140:8 140:14 142:7,9 142:14 143:25 157:2 158:15 158:23 159:4 160:13 161:22 162:10,11 165:16 168:22 169:16,17 171:1,16 173:12 174:24 <b>good</b> 1:5 9:19 31:24 47:19 50:25 63:8 65:3,5 91:22 141:13,14	148:12 172:19 175:11 <b>Gore-Browne</b> 47:12 <b>governing</b> 2:18 94:7 <b>grab</b> 63:5 <b>graphic</b> 95:12 <b>grateful</b> 120:7 <b>graveyard</b> 65:13 <b>greater</b> 2:12 7:12 8:12 11:10 23:23 <b>greatest</b> 65:24 66:19 82:16 127:9 151:10 155:11 156:17 <b>grey</b> 122:5 <b>Grissell's</b> 70:19 <b>ground</b> 148:7 <b>grounds</b> 150:22 <b>guidance</b> 109:21 145:9 <b>guts</b> 76:4 92:15 103:19  <b>H</b> <b>hand</b> 18:5 35:1 39:10 71:2 100:1 <b>handed</b> 71:8,9 <b>hands</b> 95:15 99:18 109:13 115:11 144:17 146:25 147:24 148:25,25 161:13 <b>hang</b> 64:12 <b>happen</b> 9:15 107:14 121:2 127:11 160:13 165:19 <b>happened</b> 15:1 51:20 137:2 <b>happens</b> 3:1 14:24 26:9 66:11 67:7 76:21 160:3 167:23 168:5 170:7 173:3 <b>happy</b> 149:23 151:11 162:25 175:1 <b>hard</b> 158:10 <b>hate</b> 90:21 153:20 <b>head</b> 86:11 90:23 120:10 <b>headline</b> 19:2 71:12 77:13 139:22 <b>headnote</b> 83:9 <b>Heads</b> 18:10 <b>head-on</b> 106:19 <b>hear</b> 48:1 51:22 74:13 78:9	<b>heard</b> 33:1 74:15 78:11 <b>hearing</b> 46:11 <b>hears</b> 75:11 <b>heavily</b> 103:6 <b>Helas</b> 161:2 <b>held</b> 34:4,6 45:9 45:23 46:12,13 95:3 109:1 120:20 127:17 166:9 <b>help</b> 33:19 34:16 63:5 64:21,25 64:25 65:2,3 156:19 <b>helpful</b> 74:17 79:25 132:20 144:2 163:8 <b>helpfully</b> 74:12 <b>helps</b> 111:15 115:1 122:8 145:20 <b>hesitate</b> 93:20 <b>higher</b> 3:1 16:2 <b>highly</b> 172:17 <b>hinders</b> 122:9 132:20 <b>Hoffman</b> 75:2 92:22 95:12,18 <b>Hoffman's</b> 94:2 <b>hold</b> 34:10 40:3 41:11 43:10 63:6 68:25 120:7 <b>holder</b> 149:6 150:14 152:17 152:20 153:10 <b>holders</b> 58:3,7 151:16 <b>holding</b> 36:15 47:3 83:5 <b>holds</b> 34:7 <b>home</b> 63:22 64:7 67:3 <b>honestly</b> 127:17 <b>hope</b> 33:22 42:13 44:11 94:18 95:1 97:11 175:8,10 <b>hoping</b> 20:11 <b>House</b> 94:15 162:23 <b>howsoever</b> 109:1 109:8 <b>Humber</b> 3:8 <b>humorous</b> 95:18 <b>Hutton</b> 70:23 103:9 120:11 136:5 <b>Hutton's</b> 70:24 <b>hypothesis</b> 59:8 170:2  <b>I</b> <b>ICS</b> 92:22 93:23 94:2,13	<b>idea</b> 65:3 88:11 127:14 <b>identical</b> 76:24 <b>identified</b> 81:5 <b>identifies</b> 112:6 150:1 <b>identity</b> 110:11 <b>ignored</b> 47:4 <b>ignores</b> 13:12 <b>image</b> 173:18 <b>imagining</b> 54:15 <b>immediate</b> 120:4 <b>immediately</b> 29:10 62:10 94:5 111:17 118:12 <b>impaired</b> 134:13 <b>importance</b> 127:12 <b>important</b> 33:14 78:18,23 85:23 86:6 94:8 96:23 97:7 117:24 128:20 146:1 148:2 150:4 <b>impose</b> 109:19 122:20 148:18 148:20 <b>impossibility</b> 112:24 113:24 <b>impossible</b> 77:19 88:2 111:4,25 <b>inaudible</b> 63:11 71:5,6 79:15 81:18 84:1 87:10 91:16 93:6 100:3 138:15 140:24 145:18 150:4 153:21 155:6 166:24 167:5 173:8 <b>include</b> 37:23 38:9 53:8 93:1 93:15 <b>included</b> 30:24 66:25 <b>includes</b> 53:25 88:9 97:25 115:22 116:10 144:22 151:1 153:10 <b>including</b> 38:18 58:10,15 59:18 131:25 138:3,6 138:9 162:7 <b>inconsistency</b> 158:6,8 <b>inconsistent</b> 135:7 <b>incorrect</b> 101:17 <b>increase</b> 145:5 <b>indemnity</b> 34:21 46:8 48:9 <b>independent</b>	76:10 <b>INDEX</b> 176:1 <b>indicate</b> 4:25 32:1 <b>indication</b> 9:16 9:19 13:3 19:10 29:17 <b>industry</b> 70:22 <b>informed</b> 126:20 <b>inherent</b> 113:20 <b>initial</b> 69:17 94:18 121:22 125:8 <b>innocent</b> 30:2,3 30:5 <b>inserted</b> 55:15 <b>insofar</b> 39:13 <b>insolvencies</b> 173:19 <b>insolvency</b> 2:4 2:25 5:1,10 10:5 28:6 35:15 56:10 68:22,24 77:24 82:12,18 83:10 83:13 92:8 97:2,4,5,7,8,9 97:20,20,23,25 98:16,25 104:11 106:15 112:5 118:7 119:10,11,16 119:20 120:12 121:1,8 123:1 123:3,8,20,23 123:23,25 124:1,4,6,10 124:13,14,22 125:15 126:6 126:19 127:11 127:14 128:16 128:17,18,23 129:17 133:5 135:14,20 140:19 144:15 149:25 163:21 163:22 164:4,4 164:8 167:7,9 168:5 173:3 174:12,21 <b>insolvent</b> 4:9,11 11:20 37:7,25 38:5 39:17 41:15 55:20 120:13 <b>instance</b> 36:17 37:3 43:24 49:3 57:3 135:25 <b>institute</b> 135:14 <b>institution</b> 118:17 135:20 <b>insufficiency</b> 5:10 <b>insufficient</b> 5:24 58:4 166:7
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<b>insuperable</b> 107:15	144:7,24 146:23 148:4,6	23:10,24 26:2 26:14	33:18 34:16,24 35:8,20 36:2,5	108:16,18 110:7 113:1,7	<b>keep</b> 65:14 <b>kernel</b> 140:13	50:14,17 51:7 53:7,21 54:7
<b>intelligible</b> 108:4 145:21	149:20 151:1 153:24 155:21	<b>job</b> 90:23 <b>joint</b> 34:20 75:13	36:19,23,25 37:4,14,16	113:11,15,17 114:21 116:9	<b>key</b> 97:21 <b>kind</b> 69:21	58:3,4 66:7 68:3 69:5,10
<b>intended</b> 112:4 149:20,25 156:4	155:23 156:24 157:3,5,8,8,11 159:7 161:12	<b>jointly</b> 108:25 <b>joke</b> 73:17 <b>Jonathan</b> 70:25	38:4,19,22 39:1,5,9,16,20 40:2,7,18 41:9	116:13,18,22 117:7,11,14,19 117:22 118:1,5	151:22 <b>know</b> 11:23 15:2	76:6,14,20 77:6 80:22
<b>intending</b> 107:11 162:13	162:7,17 <b>interested</b> 71:4	71:1 <b>judge</b> 83:8 84:10	41:17 42:8,24 43:2,12 44:10	118:9,16,24 119:4,9,15,21	30:14,14 39:22 43:13 65:1	81:4 82:10,16 83:22 87:4,6
<b>intent</b> 157:2	134:3,8	85:3 <b>judging</b> 48:1	44:20,24 45:3 45:7,13,16,21	119:24 120:5,9 120:16,24	82:25 85:15 89:16 114:14	101:11,15 104:2,13 105:8
<b>intention</b> 107:1 107:24 154:20	<b>interesting</b> 22:15 33:13	<b>judgment</b> 4:1,21 7:12 8:12	45:25 46:5,7 46:10,16 47:1	122:10,12,17 124:5 125:7,9	133:18 134:2,8 151:19 154:5,8	114:5,11 115:11 128:13
155:5,7,8,19 155:20	<b>interests</b> 18:5 53:9 80:23	90:22 91:10 94:19 126:25	47:6,11,16,19 47:24 48:6,17	125:18,21,24 128:1,3 129:2	157:5 164:4 172:11	130:13 133:15 139:23 143:19
<b>inter</b> 1:25 30:1 35:22 41:19	<b>interfering</b> 89:10	127:1 163:18 <b>Judgments</b> 3:1	48:21 49:1,17 50:6,9,20 51:2	129:8,13,23 130:6,11,22,24	<b>knowing</b> 79:10 <b>knows</b> 1:21 66:1	144:11 154:1 155:14,15
42:4 44:8 66:2 66:12,23	<b>interrelationsh...</b> 44:3	<b>judicature</b> 5:13 <b>July</b> 13:25 14:2	51:6,12,15,22 52:7,9,14,19	131:2,16,19,23 132:3,11,17	69:17 88:10 95:24 96:5	156:5 165:6,8 165:13 167:23
<b>interchange</b> 78:19 79:11	<b>intervenes</b> 28:6	14:7 15:14,15 15:25 23:22	52:23 53:6,13 53:16,19,23	133:9,21 134:1 134:5,18,23	99:25 102:3 145:1 154:7	167:24 168:1 168:11,12,14
<b>interest</b> 1:22 2:2 2:5,8,9,19,21	<b>inter-company</b> 134:24	26:15 28:15,22 29:2,4	54:1,6,14,22 54:25 55:8,11	135:1,11 136:3 136:8,13,19,21	<b>L</b> <b>L</b> 78:5 92:3	169:18 170:24 171:2,6,7
2:24 3:1,2,10 3:17 4:13,25	<b>introduction</b> 3:9 70:4	<b>junior</b> 97:19 123:2,11,15,20	55:15,21 56:2 56:13,22 57:2	138:3,18 139:9 139:20 140:6	<b>Lacunae</b> 153:24 153:25 154:3	<b>LBIE's</b> 34:10 35:4,10 37:17
6:10,13,14,16 6:18,20,23 7:5	<b>inverted</b> 78:2 <b>investigations</b>	124:10,20,21 125:15 126:1	57:8,10,15,20 58:20 59:2,7	142:5,10,13,22 143:4,9,15	160:11,12 <b>large</b> 43:6 69:7	38:2 39:11 42:1,7,12,20
7:13,15,20,22 7:24 8:3,4,6,11	<b>investment</b> 94:7 <b>invidious</b> 86:17	126:14 128:9 128:12 130:18	59:16,19,23 60:2,8,11,14	147:14,19 148:6,9 149:12	<b>largely</b> 79:6 <b>larger</b> 43:9	42:25 43:19 44:4 54:11
8:15,19,21,24 8:25 9:3,6,10	<b>invitation</b> 113:14 142:17	130:20,22 131:21 132:8	60:19,23 61:5 61:10,14,17,24	149:14,16 151:24 152:4,8	<b>lastly</b> 76:1 131:4 <b>late</b> 70:25	58:2,7 67:22 76:7 78:24
9:11,13 10:3,4 10:9,12,21,23	<b>invite</b> 32:18 <b>ipso</b> 68:3	<b>jurisdiction</b> 98:4 <b>jury</b> 43:13 46:19	62:3,7,12,15 62:18,20,25	152:11,19 153:7,9,15,19	<b>latest</b> 103:23 <b>law</b> 19:13	81:24 90:13 98:9 103:17
10:25 11:11,12 12:5,10,15,16	<b>Ironworks</b> 3:8 <b>irrelevant</b> 43:19	<b>justice</b> 1:4,11,19 2:1 4:2,21,24	63:4,12,18,21 63:24 64:2,5,9	154:8,12,15,22 156:14,19,22	<b>LBH</b> 34:15 46:6 <b>LBHI</b> 2:12,15	107:16 109:3 125:10 126:15
13:9 17:19,25 18:1,4,9 19:18	132:8,10 139:8 <b>irrespective</b>	5:4,8,13,18,20 5:25 6:4,23 7:1	64:19,23 65:10 69:11,14,20,23	157:10,13,15 157:25 158:4	52:21 53:10 56:21,24 57:1	131:4 136:17 137:9 138:22
19:18,21,24,24 20:15 21:12,13	113:24 <b>Isaacs</b> 5:22	7:8,11 8:1,3,5 8:9,14,22 9:2,5	70:6,10,14,21 71:10,15,17,18	158:14,18,21 159:8,11,16,21	57:22,24 58:1 58:6,9,15,17	140:4 151:7 156:1 165:4
22:2 23:8 26:21 27:23	11:10 30:13 80:2,3,12	9:14 10:11 12:8,11,13,16	71:22 72:2,7 72:14,17,20,25	160:1,16,19 161:17 162:1	58:19,22 59:14 60:19 63:7	169:2 <b>LBL</b> 33:22 40:1
28:3 31:17 32:6 38:24	133:11,11 140:7,9 142:6	12:21 13:21 14:18,23,25	73:1,4,10,16 73:21 74:4,8	162:20 163:2,5 163:7,11 164:2	67:18 75:8 103:15 140:7	40:17 43:16 46:12,12 48:8
59:10 60:16 61:18 76:9	142:11,14,20 143:23 144:1,3	15:3,9,16,19 15:21 16:1,5,8	74:19 75:4,16 77:9,12 80:16	164:6,9,11,21 165:24 166:4,6	149:17 165:17 170:25 171:2	48:10,23 49:11 49:12 51:8
77:16,25 79:2 80:7 81:7	151:12 <b>issue</b> 7:10 20:21	16:11,13,15,18 18:12,18,23	80:19 81:2,11 82:19,24 83:2	166:12,15,19 166:22,25	174:2 <b>LBHI's</b> 2:13	66:23 67:25 75:8 168:9
84:21,22 85:2 87:18,21,25	26:24 30:18 34:25 38:8	19:12,22,25 20:6,9,20,24	83:7,17,25 84:4,6,16 85:5	167:4,9,17,19 167:21 168:8	174:5 <b>LBHI2</b> 33:22	174:2 <b>LBL's</b> 48:12
88:3,10 99:6 99:14 104:18	42:21 45:17,19 46:10 47:8	21:4,8,12,15 21:20,24 22:6	85:10,20,23 86:1,4 87:11	168:13,17 169:4,7,11,15	34:6,13 38:10 38:12,17 40:1	76:18 79:9 139:12 140:1
105:9,13,15,16 105:22,25	48:2 50:21 51:6 61:17	22:11,14 23:3 23:13,16,25	87:16,24 88:7 88:17,17,24	169:19,21,25 170:3,11,13,15	40:17 42:10,23 43:6,10 44:16	174:5 <b>lead</b> 29:22
106:1,7,8,20 106:22 107:3,6	79:10 81:3 93:20 106:19	24:5,17,19,24 25:4,10,13,18	89:18,18,22 90:2,5,10,20	170:21,23 171:19,22	46:13,24 48:19 48:24 49:10,12	162:13 <b>leads</b> 155:11,12
107:12 108:13 110:6 114:19	126:23 127:12 136:10 148:10	25:20,25 26:3 26:8,12,17,23	91:3,7,18 93:3 93:5,7,11,14	172:2,8,15,21 173:14,17,23	50:12,12,13,15 51:21 57:7	<b>learned</b> 3:10 5:16 6:11 8:7
115:13,15,23 116:20 117:11	156:16 <b>issued</b> 121:1,7	27:11,16 28:10 28:19,25 29:5	93:24 94:1,12 95:11,20 96:4	174:7,23 175:3 175:5,10	128:13 <b>LBIE</b> 2:3 35:1	13:5 14:11 17:20 18:8
117:18,20 118:13,22	<b>issues</b> 1:20 17:9 23:7	29:7,10,15,20 30:2,4,5,7,13	96:7,13,19,25 97:12,14 99:13	<b>Justices</b> 3:8 <b>K</b>	38:5,14 39:2,9 39:25 40:2,13	33:23 64:14 65:15 66:18
119:7,10,17 121:14 124:16	<b>J</b> <b>January</b> 13:23	30:16,16,19,19 31:3,8,8,9,11	99:20 100:14 100:20 101:20	<b>Kaupthing</b> 163:18 165:22	40:19,21,25 41:3,7,20,21	67:2,10,15 71:14 72:9,18
124:25 125:14 126:2,14	14:4,9,16 15:10 16:4	31:14,22 32:11 32:16,23,24	102:14 103:5 103:10,14	171:6 <b>keen</b> 74:10	44:7 48:11,12 48:22,23 49:10	73:5 78:20 80:2,10 83:8
135:18 137:23 137:23 140:5		33:9,13,15,15	104:24 105:2		49:12,18 50:9	83:21 84:1,10 85:3 88:25

89:8 100:15	101:24 104:2,7	<b>line</b> 73:18 92:23	<b>look</b> 26:21,21	33:19,22 34:2	128:20 130:1	80:8,11,15,17
102:5,7,8	104:8,9,22	101:3	35:4 43:15	35:3,24 36:3	130:12 132:7	82:6,6,7,9,25
105:10 108:6	106:10,12,16	<b>lines</b> 4:2 13:1	44:20 52:14	37:15 39:4,8	132:18 133:10	86:8,14,17,21
110:13,14	106:17 107:19	30:17,20 71:24	67:20 71:23	39:11 40:5	133:15,18	90:22 91:1,1,8
112:23 127:9	108:13,14,17	75:14 84:10	73:5,6 74:16	41:12 42:13	134:2,15 135:4	91:9,14,19,20
139:13,13	108:19,20,23	97:24 149:11	79:5 83:16	43:3 44:1,11	135:8 136:4,16	92:16,21 93:9
141:21 142:19	110:3,3,17	149:15 154:23	90:9 92:24	44:18,22,22	138:12,19	93:21 94:5,17
150:19 152:6	114:22 115:3	<b>liquidation</b> 4:13	93:25 94:20	45:15 47:17,20	139:10,21	94:17,20 95:5
152:14 153:11	116:11 120:19	9:25 11:19	96:23 97:2,7	48:3,7 49:9	140:8,9 141:15	95:9,24 96:5
153:21 175:7	120:20 122:14	13:24 31:20,24	99:10 104:5,6	50:22 51:9,13	142:4,11,14,16	96:10,23 97:1
<b>leave</b> 65:20	122:16,22,24	32:1 55:25	108:20 122:23	52:16 55:17,19	142:23,25	97:10,10,11,15
80:11 126:25	122:24,25	56:3,10,14	123:7,13	56:7,20 57:21	143:3,5,7,16	97:17 98:8,9
133:11 140:9	123:2,4,16	68:5,18 69:6	136:17 142:6	57:25 60:10	143:25 144:8	99:1,2,9,10,15
143:25 163:12	124:11,20,21	97:25 106:9	142:18 146:4	62:1 63:10	144:19,21	99:22,25
<b>leaves</b> 2:7 163:22	124:22,23	119:22,24	<b>looked</b> 2:6 4:4,6	64:7,10,12,17	146:1 147:20	100:18,21,25
<b>leaving</b> 161:23	125:1,15 126:6	147:8 154:2	5:19 11:24	64:21 65:14,19	148:2,17	101:2,15 102:3
<b>left</b> 8:16 42:23	126:15,18	156:25 158:13	39:10 47:12	66:3,16,21,23	149:10 151:6	102:7 103:13
112:19 131:9	127:10 128:10	158:16,23	82:25 92:7	67:5,10,12,15	151:11 153:1	105:4 106:23
150:9,11,18	128:11,12,21	159:4,9,14	96:21 113:8	67:17,19,21	153:16,23	111:9,14 115:6
152:9 153:23	129:6 131:22	161:1,11,16,19	119:3	68:6,15,23	154:9,23	119:19,23
167:6	132:9 133:8	161:20 162:7	<b>looking</b> 10:20	69:3,9,12,15	155:10 157:21	120:3,8 121:17
<b>left-hand</b> 152:3	134:13 137:17	162:10,11,18	11:23 24:19	70:7,11,22	158:9 159:17	121:19 122:19
<b>legal</b> 35:4 36:22	137:18,19,21	165:14 167:24	26:24 34:24	71:11 72:15	160:2,6,23	124:13 125:5
93:1,16,17	137:25 138:1	167:25 168:14	39:1 40:16	73:3,11,14,23	161:3,8,18	127:21,25
94:4,22 112:23	140:4 141:6	168:15 169:3,4	68:15 74:7	74:15,15,17	162:2,8,18,25	132:25 134:2,4
113:24 126:22	143:12,18	169:6 170:25	81:9 82:3,4,22	75:2,5,9,17,18	163:4,13,16,18	134:6,8,9,17
<b>legally</b> 37:18,19	147:2,6,9	171:6,7 172:12	88:23 90:18,24	76:4,12,23,25	163:24 164:13	134:19,20,21
77:15,19 81:1	149:1 151:3	172:13	91:1,6 92:15	77:2,13 78:5,7	165:3,22	135:2,5 136:16
88:2,11 89:7	<b>liability</b> 1:25 2:8	<b>liquidator</b> 36:9	98:24 99:9	78:19,23 79:18	167:16,23	136:22,22
140:15	4:18 5:6 6:7	36:10,17,21	101:18 105:4	79:22,25 80:11	168:25 169:17	137:4,15 138:7
<b>legislation</b> 11:17	17:15 30:12	37:2 41:5	109:13 113:25	80:21 81:3,7	170:19,24	138:21,25
83:10 94:7	33:21 38:16	139:23 144:18	117:2,5 124:8	81:10,21,23	171:5,21	139:6 141:1,5
129:17 133:6,6	52:21 53:11	146:24 147:25	126:8 127:10	82:1,4,5,22,23	172:11,22	141:16,17
143:23 145:19	54:4 55:23	148:24 159:13	127:22 133:17	83:4 84:8 86:7	173:25 174:2,4	142:18 143:6,7
<b>legislative</b> 77:23	57:24 59:15,18	161:21	134:16 135:24	86:14 87:2,14	174:8,14,24	144:3,25
97:9 140:19	66:2,14 69:4	<b>liquidators</b> 33:6	142:5,12 143:5	87:14 88:5,13	175:7	145:15 147:15
142:7 154:20	80:7 81:15,25	35:11 36:3	146:17 147:20	88:19,21 89:21	<b>Lords</b> 94:15	147:17 151:6
156:23 157:2	95:15 109:4,20	37:18 41:11	149:18 154:24	89:24 90:8,17	<b>Lordship</b> 1:17	151:19,20,21
160:17	109:24 110:24	42:1,20 76:7	164:12 168:9	90:21 91:4,5	1:18,21 2:19	151:22,25
<b>legislature</b> 155:1	111:6 112:1,12	168:22	168:10	92:14,20,22	3:7 4:1,4,5	152:3,5,6,9,15
<b>lender</b> 91:24	114:9,12,19	<b>list</b> 31:5 124:25	<b>looks</b> 71:20,24	93:6,8 94:2	5:23 11:24	152:18 153:2,4
101:22 135:12	115:12,13,15	130:15,19	79:22 85:4	95:3,12,13,18	14:17 19:19	153:5,8 154:5
<b>lenders</b> 119:6,9	115:23 116:2,5	<b>little</b> 41:20 45:10	97:10,15	95:21,24 96:20	29:23 30:10	154:6,14,19,21
<b>length</b> 2:12	116:7,10,15,19	52:10,17 65:5	100:25 126:17	97:24 98:7,10	32:12,13,15,19	155:2,4,4,12
11:10	116:23,23,25	70:4 83:5	152:5,15 153:4	99:14,21	32:21 34:2	156:17 157:4
<b>letting</b> 146:18	117:1,4,5,5,17	98:18 103:17	164:18	100:10,21	35:7,18 36:6	157:14,22,23
<b>let's</b> 54:16 56:20	121:4 122:20	105:18 133:2	<b>loose</b> 145:14	101:18,19	36:14,20,24	158:25 159:18
59:25 62:7	123:15 124:16	138:19 141:23	<b>Lord</b> 1:5,17,20	102:4,19 103:7	37:1,1,10	159:20,23
80:25 175:3	124:19 129:16	152:1	2:2 3:7 4:1 5:3	103:7,15,20	38:11 43:13	160:3 165:23
<b>level</b> 87:1	138:8 142:24	<b>load</b> 46:19	5:15 6:5 7:23	107:21 108:2	44:2 46:3,19	167:14 169:9
<b>levels</b> 32:9	143:10 144:8	<b>loan</b> 129:3,4,24	9:1,18,22	108:12,15,20	46:21 49:5	173:6 175:2
<b>liabilities</b> 53:7	148:1,4,7,14	135:18	10:19 11:14,23	109:9,13,16,24	50:3 51:11	<b>Lordship's</b> 1:6
54:7,11 55:4,4	148:18,20	<b>loans</b> 129:5	12:1,22,25	110:1,10,20	52:6,13 57:5	11:25 50:4
55:12,13 56:4	149:4,5,20	<b>loathe</b> 131:12	13:5,11,14,19	111:2,23	65:12,15,17	58:2,18 69:25
56:5,17,19	151:1,14 165:6	<b>lodge</b> 136:9	18:16,22 19:15	112:16,21	66:1,5,17	71:13 81:8
57:3,11,17,19	168:1,2 169:18	<b>lodged</b> 136:8	20:8,12 21:2	113:6,14 114:5	67:10,20 69:16	82:2 90:22
60:4,15 61:6	169:20 170:4	<b>lodges</b> 50:10	21:17 22:2	114:9,12 115:2	69:16,18,21,24	91:10 93:10
61:11,22,23	171:9,9	<b>logical</b> 89:3	23:1,14 24:7	115:5,19,24	70:2,15,16,17	94:18,19 95:2
62:1,4,12 63:2	<b>liable</b> 11:13	133:4	24:13,18 25:1	116:16 117:1	70:19 71:2,3,8	95:8 101:12
77:17,18 78:1	161:15	<b>logically</b> 35:20	25:5 28:21	117:16,25	71:12,19,20,23	102:6 109:2
78:3,4 80:24	<b>life</b> 158:22	<b>long</b> 49:24 82:25	29:6,17,22	118:8 120:6,14	72:1,6,8 73:15	114:6 125:2,11
91:15,16,17,19	<b>light</b> 163:6	90:25 102:23	30:6,10,16,16	121:16,18	73:17,22 74:1	133:1,16
91:21,21,22,23	<b>liked</b> 78:10	113:16 136:1	30:18,19,19,21	122:11,13,23	74:5,5,9 75:8,9	138:22 139:12
91:24,25 92:2	<b>limitation</b> 40:15	142:17	31:8,9,9,12,14	124:7 125:10	75:15 77:8	143:1,16 149:9
92:3,3,6,9,11	<b>limited</b> 32:21	<b>longer</b> 52:17	31:24 32:12,17	125:25 126:13	78:19,22,24	151:7 154:4,9
97:16,17,19	48:24	65:5 86:16	32:24 33:13,15	127:3,8,22	79:3,7,8,9 80:4	154:13,16

155:16,25 156:8 161:20 169:10 173:25 174:4,13 <b>lose</b> 13:10 18:11 80:21 <b>loser</b> 17:1,2 <b>losing</b> 30:1 <b>loss</b> 11:5,6 16:8 16:11 17:4 18:14 24:1,2 27:6 94:14 <b>losses</b> 45:1,5 <b>lost</b> 52:10 <b>lot</b> 41:1 44:12 47:3 75:12 91:8 140:11 145:1 150:24 167:5 <b>low</b> 10:4 17:19 18:4,5 <b>lower</b> 18:1 26:14 <b>lowest</b> 9:17 86:8 <b>lunchtime</b> 95:10 <b>Lydian</b> 11:25 76:6,20 77:6 81:4 83:22 130:13 144:11 <b>Lydian's</b> 151:9	<b>matter</b> 16:22 43:1,15 61:2 74:25 89:2 96:23 97:1 98:13 102:20 103:4 122:15 139:4 145:25 146:21 154:11 167:11 173:12 174:17 <b>matters</b> 17:11 97:5,22 146:7 167:20,21 <b>Maude</b> 47:20 <b>maximisation</b> 39:5 <b>maximise</b> 39:3 42:7 66:8 <b>maximum</b> 39:6 39:12 <b>Maxwell</b> 82:1,11 82:22 83:25 85:20 <b>MCC</b> 83:25 84:2 85:11 86:18,25 88:14 89:14 <b>MCC's</b> 89:3 <b>McMeal</b> 93:8,12 93:13,20 <b>McPherson</b> 44:25 47:13 <b>mean</b> 10:2 14:18 14:20 16:8 19:6 20:14 22:15 29:20 30:15 38:8 39:20 40:18 47:11,22 48:1 49:20 55:18,21 59:2,2 61:2,3 66:9 85:23 87:16 95:14 104:13 110:8 112:17 116:10 119:21 123:6 124:2 129:22 129:23 130:22 132:5 141:25 142:1 157:17 160:3,16 171:22 173:17 <b>meaning</b> 61:11 66:9 95:5,25 97:23 112:19 114:23,25,25 128:5 131:15 143:20 152:21 <b>means</b> 55:6 91:23 92:2 95:1 97:25 104:12 112:18 119:20,23 121:14 122:24 123:24 128:4 128:21,22,25 140:25 149:19	150:7 151:15 151:17 156:12 <b>meant</b> 6:21,22 150:8 <b>mechanism</b> 101:2 109:11 109:21 171:3 <b>mechanisms</b> 165:19 <b>meet</b> 122:18 159:17 <b>member</b> 25:19 37:19 56:20 166:9 <b>members</b> 4:18 5:6 8:7 11:12 13:10,11,17 16:25 24:13 29:8 32:4 35:1 35:22 36:15 37:6 38:4 39:7 39:10,17 40:21 40:24 41:4 49:7,19 53:5 53:22 54:19 55:7,24 56:6 56:11 57:7 59:4 61:4 62:19 66:11 76:11,15 77:18 139:25 151:14 155:22 <b>mention</b> 12:19 12:24 13:2 106:21,22 <b>mentioned</b> 1:6 12:23 23:3 43:11 45:22 133:10 <b>mentioning</b> 23:20 <b>menu</b> 70:9 <b>mere</b> 128:24 <b>Mervyn</b> 4:2 <b>met</b> 159:19 <b>middle</b> 74:3 <b>million</b> 22:16,21 22:23 28:12,13 28:23,24,25 29:1,2,3 34:7,8 34:14 69:8 76:16,19 117:9 134:22 139:25 140:1 171:17 171:19 <b>mind</b> 20:9 35:13 37:22 64:13 77:2 79:20 80:18 86:10 87:6,7 94:9 111:2 113:11 118:5,10 134:7 141:16 158:10 162:3 <b>minister</b> 162:22 <b>minute</b> 68:20	127:18 <b>minutes</b> 65:5 112:16 133:22 169:9 <b>mirror</b> 173:18 <b>mischaracteris...</b> 137:3 <b>missed</b> 45:19 <b>mistake</b> 131:11 160:17 <b>misunderstan...</b> 71:16 <b>modern</b> 94:3 <b>moment</b> 3:3 34:1 39:22 41:9 46:18 47:7 56:21 60:16 64:15 96:12 113:18 157:20 175:4 <b>moments</b> 19:19 <b>Monday</b> 132:25 175:5,14 <b>money</b> 43:6,7,19 49:25 56:24 57:1,2 59:3 112:6 150:1 167:13 <b>moneys</b> 49:15 135:17 <b>monies</b> 58:21,23 95:14 <b>morning</b> 1:5 <b>move</b> 30:11 33:20 35:21 81:14 160:25 <b>moves</b> 154:2 161:10 162:18 <b>moving</b> 11:14 17:7 44:6 87:11,13 90:2 90:6,7 161:19 161:20	172:22 <b>netted</b> 169:12 <b>netting</b> 165:21 166:23 167:1 167:18 169:13 171:5 172:23 173:10 <b>Neuberger</b> 107:21 144:19 <b>never</b> 113:11 116:19 130:20 141:1 <b>nevertheless</b> 88:20 <b>nil</b> 69:6 <b>nominal</b> 34:10 45:8 <b>nominee</b> 34:5 46:4,5,13 <b>non-exhaustive</b> 32:13 <b>non-member</b> 76:10 <b>non-pref</b> 84:25 <b>non-preferential</b> 84:14,17,19 <b>non-provable</b> 12:1,2,4 30:23 31:2,6 80:23 120:18,21 121:13 125:1 137:17,21,25 138:8 <b>non-proveable</b> 61:18 76:9 77:16,25 79:2 87:19 144:10 146:21 147:4 147:10,12 151:2 <b>non-subordina...</b> 139:10 <b>normal</b> 107:25 <b>normally</b> 49:17 52:17 166:19 <b>Nortel</b> 120:19 124:25 125:3 <b>note</b> 69:24,25 70:3,15 71:13 74:1 75:9 81:8 82:2 93:10 95:8,9 100:21 101:12 102:6 114:6 125:2,11 133:16 138:22 139:12 142:19 143:1,17 151:7 154:4,9 155:25 173:25 174:4 174:13 <b>noted</b> 71:15 78:23 <b>notes</b> 134:24 <b>notice</b> 120:25 121:4,7,11 <b>notices</b> 120:21	<b>notion</b> 62:22 <b>nought</b> 34:10 <b>noughts</b> 34:11 <b>November</b> 1:1 113:10 175:15 <b>number</b> 1:8 4:4 6:10 9:11,15 26:5,18 36:16 38:13 46:20 100:16 148:16 164:19	39:12 40:12,12 42:12 <b>officer</b> 36:9 97:18 123:1 124:1,2,6,14 126:19 127:14 128:16,17 <b>oh</b> 16:15 43:14 57:9 67:11 82:21 89:8 90:4 93:11 95:11 127:15 150:25 152:8 170:13 173:7 <b>ointment</b> 173:19 <b>okay</b> 16:5 23:13 34:24 42:8 46:16 50:20 54:1,2 132:17 133:21 138:18 142:22 170:11 <b>old</b> 70:24 71:4 <b>Oliver</b> 30:16,19 33:15 <b>omniscient</b> 40:14,16 <b>once</b> 56:2 59:20 66:6 67:7 68:10 97:16 99:17 102:22 102:25 112:8 112:10,10 116:1 146:24 <b>ones</b> 130:7,8,9 <b>one-way</b> 16:19 16:21,22 17:21 24:8,10,11 <b>open</b> 82:21 97:11 105:5 <b>opening</b> 44:14 70:3 73:13 76:5 78:7 82:10 87:3 92:16,20 98:17 109:3 139:14 140:12 142:5 174:4,5,5 <b>operates</b> 118:6 164:23 <b>operation</b> 163:23 <b>opinion</b> 92:4 96:1 97:18 123:1 124:1 126:15,19 127:2,19,20 128:6,16 <b>opposed</b> 121:13 <b>opposite</b> 24:25 25:2 <b>oral</b> 110:14 <b>orally</b> 44:19 102:5 105:10 <b>order</b> 56:11 57:18 70:1,2 91:11 100:8
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112:12 137:5 166:23 172:13 <b>ordinary</b> 68:22 69:1 73:7 174:11,20 <b>original</b> 45:22 136:20 <b>originally</b> 34:4 46:4 <b>otiose</b> 132:15 <b>ought</b> 22:4 27:24 35:11 37:3,8 38:1 42:4,20 43:21,24 53:3 <b>outing</b> 79:8 <b>outset</b> 35:25 <b>outside</b> 121:1 <b>outstanding</b> 99:8 <b>overall</b> 38:3 41:1 43:11 80:3 <b>overarching</b> 140:22,24 <b>overnight</b> 156:10 162:9 <b>oversight</b> 35:16 <b>overspeaking</b> 61:9 <b>Overy</b> 74:13 <b>over-complicate</b> 38:12 <b>owed</b> 28:12 77:18 83:14 108:24 <b>owes</b> 76:14 <b>owing</b> 110:4 <b>o'clock</b> 96:14 163:6	22:8,20 25:8 25:16,22 27:3 27:3 29:19 34:14 48:10,14 48:15,19 49:14 49:25 50:13 58:1,6,9,13 60:15 61:6,7,8 61:8,15 62:8 62:13 63:2 67:8 68:11,11 87:19 88:1,4 102:23,25 103:24 104:17 104:19 105:7 106:6,7 116:17 117:8,17,18 118:18 138:1,1 138:5,10 146:24 151:16 152:17,20,22 152:25 153:10 153:13,14,17 162:6,6 165:11 166:1 168:18 168:20 169:24 170:6 <b>paper</b> 162:22 <b>paragraph</b> 2:10 2:13 5:20 34:25 42:10 44:13,21 47:14 52:2,7,8,8 81:8 81:24 82:2,5 92:20,23 95:4 101:12 109:3 109:25 114:7 115:14 125:3,4 125:11,18,19 125:21 143:17 151:8,9,13 152:16,23 153:4 156:1 174:14 <b>paragraphs</b> 34:3 34:17 66:4 70:17 133:16 136:18 139:14 142:20 143:2 143:24 154:4 <b>paramountcy</b> 3:13 <b>pardon</b> 123:23 <b>pari</b> 144:19 145:3,9,18,22 145:25 146:2,2 146:6,16 <b>park</b> 60:16 <b>parked</b> 61:17 <b>Parliament</b> 156:3,11 157:6 157:24 160:7,8 <b>Parliament's</b> 155:20 <b>part</b> 13:15 20:12 22:10 27:14	57:16,23 58:23 59:14 67:20 68:5 78:16 79:3,13 98:22 102:9 130:2 131:7 134:12 139:8 144:21 151:11 <b>Parte</b> 47:20 <b>particular</b> 35:14 79:10 81:15,18 157:8 166:16 <b>particularly</b> 26:25 73:14 74:10,10 91:13 103:2 118:16 126:11 130:17 141:12 142:21 157:4 163:8 172:18 <b>parties</b> 81:13 89:1 92:25 107:25 111:12 128:10 131:9 132:22 173:1 <b>partly</b> 21:8,10 37:13 151:16 153:13,17 <b>parts</b> 158:1 <b>party's</b> 173:3 <b>Part-payment</b> 23:14 <b>passage</b> 84:7 85:1 92:22 125:22 153:1 <b>passages</b> 71:13 <b>passing</b> 75:10 172:25 <b>passu</b> 144:19 145:3,9,18,22 145:25 146:2,2 146:6,16 <b>path</b> 107:16,16 <b>Paul</b> 29:25 <b>pausing</b> 174:15 <b>pay</b> 6:17 8:8 11:5,7 16:16 29:25 37:13 38:18 43:7,8 50:13 53:4,7 53:21 54:7,9 54:17 55:3,12 56:4,5,16,18 57:1,3,6,16,18 58:12 59:4,9 59:12 60:4 61:21,22,22 62:1,23 76:8 95:13 104:14 104:15 105:9 110:6 114:12 115:12,23 116:20 118:22 119:7 135:21 159:6 161:23 165:12 166:7	166:12 167:12 167:13 171:24 172:4,5,9 <b>payable</b> 3:17,19 22:16 26:25 27:1 32:3,7 38:1 54:17 60:6 61:1,20 62:5 67:8 80:8 92:1 100:18,25 104:10,13 105:16 106:1,8 106:13 108:24 109:5 110:4 111:19 115:16 117:12 126:3 135:22 137:24 144:24 170:18 171:17 <b>paying</b> 56:12 57:11 58:24 76:11 99:6 <b>payment</b> 2:18 13:25 15:10,14 15:18 21:1,25 22:21,22 28:13 48:14 58:4 62:10 81:20 83:14 84:23,23 87:22 90:15 99:4,14,17,18 100:3,9,10,11 101:3,9 102:25 103:22 104:1 104:22 105:6 105:13,17,21 106:2 109:6,14 111:17,20,25 115:17,21 116:4 119:2 124:23 135:4,6 135:17 137:24 140:1,3,5 143:11 144:18 144:20 146:3 146:25 147:25 149:3,19 <b>payments</b> 124:24 148:25 <b>pays</b> 8:19 <b>peculiar</b> 56:8 <b>Pensions</b> 120:21 <b>people</b> 16:24 47:4 49:14 71:5 86:15,16 89:5 94:16 150:10,17 <b>perfectly</b> 73:7 108:3 158:4 <b>performs</b> 57:15 <b>period</b> 7:6 47:4 99:7 <b>permissible</b> 137:6 <b>permit</b> 104:18 146:10	<b>permitted</b> 164:16 <b>person</b> 166:16 <b>Peter</b> 29:25 <b>phrase</b> 78:1 91:24 105:5 108:6 133:8 150:6 151:4 167:18 <b>phrases</b> 109:21 <b>pick</b> 84:9 92:19 152:2 <b>picked</b> 73:3 91:12 <b>picture</b> 38:10 42:5 44:7 <b>piece</b> 71:8 <b>pile</b> 90:15 107:19 <b>pithy</b> 81:22 95:19 <b>place</b> 1:15 11:18 64:12 119:1 <b>placed</b> 1:5 <b>places</b> 1:7 <b>plain</b> 142:3 <b>plainly</b> 31:13 49:4 55:21 166:9 <b>planned</b> 162:12 <b>play</b> 17:5 40:22 <b>plc</b> 46:6 <b>please</b> 65:12 69:20 <b>plus</b> 7:8 <b>pm</b> 65:7,9 96:15 96:18 133:23 133:25 138:11 175:13 <b>point</b> 1:23,24 2:11,15,17 3:6 3:12,25 4:5,20 6:5 7:20,21,23 9:21,22,22,23 9:24 11:3,15 11:17 12:8 13:1,4,19 14:17 19:15 23:5,19 24:14 25:5,24 26:18 27:18 30:21,24 31:12 32:5,5 32:12 33:13,20 33:20,25,25 34:11 35:7,18 37:5 38:15 39:1,23 40:11 42:9,25 43:3 43:18,19,21 44:1,6,13,14 44:15,18,18 45:15,21 47:21 47:21 48:4,7 49:8 50:16 51:10,15,20 52:16,20 54:15 60:2,14,20	63:5,14 64:8 64:15,16 65:25 65:25 66:5,19 66:21,21,22,24 66:25 67:15 71:4,12 72:6 73:14 74:2 76:5 77:7,19 79:12 87:12,13 87:14 88:20,22 88:23 89:13,13 90:4,18 94:13 102:8 103:1,2 103:13 104:4 104:19 105:19 105:19 106:3 107:7 110:10 112:21,21,23 112:24,25 113:5,18 114:10 115:3 116:10 117:11 117:15 118:2 120:8,15 121:12,20,22 122:1 123:18 127:3,4 129:18 130:15 131:4,8 132:24 133:5 134:6,7 135:3 135:4,5,8,9 136:4 137:6,20 138:20 139:4,5 140:22,24 141:5,7,9,11 141:11,13,14 141:15 143:3 145:14 149:9 149:11,17 150:4,23 151:13,23 153:22 156:13 159:17,22 160:19 161:20 162:9 163:10 165:13 166:6 167:2,11,12 172:16 174:8 <b>pointed</b> 2:10 124:13 145:5 <b>points</b> 9:17 13:20 26:5 38:20 44:23 46:19 52:25 65:18,21,24,25 67:15 70:2 75:24,24 77:13 87:3,7 121:23 121:24 132:19 133:12 134:2 136:5,25 139:22 140:13 140:14,18,20 140:20,23 141:23 144:2,5 144:6	<b>policy</b> 83:11 144:15 146:5 146:10,21 147:6 156:23 159:25 162:24 <b>pondering</b> 112:16 <b>posed</b> 33:1 <b>posing</b> 20:9 <b>position</b> 3:23 4:23 14:3,8,15 17:13 18:20 19:8 24:25 25:2,9,15,21 25:25 35:21 40:10 46:11 56:23 60:4 65:2 67:25 68:14,16,21 69:9,12 70:18 74:7,17 75:7 76:2 79:4 80:1 80:3 83:20 98:24,25 126:7 127:16 136:2 137:21 143:16 143:21 154:19 157:22 165:3,4 167:22 170:24 171:3,12 <b>positive</b> 169:5 <b>posits</b> 41:14 106:25 <b>possibilities</b> 159:1 <b>possibility</b> 121:9 162:4 <b>possible</b> 14:21 77:15,19,20 81:1,6 85:3 86:13,22 88:11 96:8 98:5 121:2 140:16 157:17 159:15 159:15 160:18 <b>possibly</b> 16:24 37:4,5 91:5 <b>post</b> 2:4 4:12 <b>postpone</b> 103:22 <b>postponed</b> 12:9 12:24 32:18 <b>postulate</b> 40:18 <b>postulating</b> 171:23 <b>post-insolvency</b> 2:19 3:10 53:8 <b>post-liquidation</b> 31:17 <b>pot</b> 13:16 <b>potential</b> 122:4 168:1 169:18 171:8 <b>potentially</b> 98:25 131:1 170:4 <b>pound</b> 76:17 100:12
--	--	---	--	---	--	--

<b>pounds</b> 22:20	<b>prior</b> 60:15	161:1	<b>proving</b> 78:6	<b>putting</b> 32:15,22	22:14 120:8	66:20 74:20,25
<b>power</b> 35:25	101:23 148:5	<b>proposing</b> 1:9	99:24 101:7,14	34:12 40:6	<b>rank</b> 3:19 38:14	75:6 85:11
36:1 40:11	148:13	44:19	102:2,3,16	48:20 51:10	42:6 84:17	86:22 98:5
41:4,6 84:2	<b>priorities</b> 130:19	<b>proposition</b>	103:7,9 105:12	57:6,10 87:1	89:22 97:19	102:10 103:1
85:17 110:5,7	<b>priority</b> 91:15	38:11 63:13	107:9,11 141:8	115:8	106:20 107:18	103:18 111:24
<b>powers</b> 36:7	124:24 135:6	76:12 82:14	<b>provision</b> 11:21		123:2,11	115:3 129:1
158:6	137:5	<b>propositions</b>	84:21 111:13	<b>Q</b>	124:23 125:14	141:12 153:21
<b>practical</b> 112:24	<b>Pro</b> 6:25 7:1	146:19	135:15 156:5	<b>QC</b> 65:11 176:4	126:1,14 131:2	159:19 160:14
<b>praise</b> 70:22	<b>probably</b> 31:10	<b>protect</b> 162:16	157:3 158:15	<b>qualitatively</b>	137:19 139:5	167:20 168:21
<b>pray</b> 86:14 87:2	33:7 45:9	<b>provability</b>	<b>provisional</b>	3:21	140:1	171:23 174:16
<b>praying</b> 87:4	50:16 70:8,9	101:10 147:13	94:21	<b>quantify</b> 58:15	<b>ranked</b> 123:20	<b>reanalysis</b> 28:8
<b>preceding</b> 84:9	90:17 138:15	<b>provable</b> 2:5	<b>provisions</b> 3:6	<b>quantifying</b>	128:18,19	<b>reason</b> 13:10
<b>precise</b> 82:20	167:10 168:25	12:14,19 63:21	3:10,15 36:4	73:25	<b>ranking</b> 97:9,20	50:25 67:6,9
<b>Precisely</b> 45:6	172:12 174:1	100:2,7,17	36:13 58:17	<b>question</b> 18:16	124:10	68:2,12 79:17
<b>precluded</b> 83:11	<b>problem</b> 13:6	101:9 103:16	72:4 82:17	20:2,7 42:1	<b>ranks</b> 3:18 58:13	84:11 85:8
<b>precursor</b>	33:1 49:13,15	104:25 117:8	106:19 114:3	49:17 57:14	74:24 100:3	87:25 88:8,20
161:25	60:13,16 63:23	119:13 124:24	115:9	61:19 62:9	116:20 119:17	88:21 98:7
<b>predicament</b>	64:1 130:9	126:3	<b>public</b> 83:10	66:12 74:21	<b>rare</b> 159:2	144:16 156:2
150:21	155:12	<b>prove</b> 10:5 49:18	<b>pun</b> 123:23	79:16 80:25	<b>rate</b> 2:25 3:2,2	160:25 174:13
<b>pref</b> 84:24	<b>problems</b> 6:11	49:21 50:14	<b>pupil</b> 70:24	83:19 88:6	6:18 7:8,9,12	174:22
<b>preference</b> 34:7	113:20	67:25 68:17,21	<b>purpose</b> 59:8	103:10 105:11	7:12,14,18	<b>reasonably</b>
45:11 89:20	<b>procedures</b>	84:12 85:9	81:19 100:7	105:23 121:17	8:12,12,20 9:6	92:25
<b>preferential</b>	35:15	87:18 88:3	107:14 145:8	128:16,19	10:4,7 11:2,3,5	<b>reasons</b> 11:9
84:16,19 89:19	<b>proceed</b> 159:9	89:9 100:6,24	157:19	130:18 133:1	11:7,8 17:19	18:2 19:4
<b>prejudice</b> 136:2	<b>proceeding</b> 59:9	101:5 102:21	<b>purposes</b> 53:9,12	137:25 140:25	17:22,24,25	76:20 148:16
162:5	<b>proceedings</b>	117:20 157:10	55:2 56:12	144:10 147:2	18:1,4,6 20:4,5	155:9 172:18
<b>preliminary</b>	135:14,20	168:19	57:17 76:23	148:3,5,9,13	20:17,19 22:18	172:19
8:23	161:2,8	<b>proveable</b> 59:4	79:1 101:16	156:14 161:5	22:19 23:4,8	<b>rebuttal</b> 113:4
<b>premise</b> 116:24	<b>proceeds</b> 56:17	59:10,11,13	103:6 104:21	164:7 165:1	25:7,8,11	<b>recall</b> 4:1 70:16
<b>premises</b> 116:5	116:24	60:17 61:12	130:1,4 143:19	173:2	26:12,13 28:5	70:16,20 74:5
<b>Prenn</b> 93:22	<b>process</b> 102:3	63:15,16,19	148:14 158:12	<b>questioning</b>	43:8 56:16	74:9 78:22
<b>Prenn~v</b> 93:22	103:8 112:7,15	64:8 67:1	159:3	156:9	<b>rateable</b> 48:11	79:7,10 101:16
<b>prepares</b> 145:15	123:25 146:15	143:19 144:20	<b>pursuant</b> 7:14	<b>questions</b> 20:10	48:19	115:6 173:6
<b>present</b> 23:11	160:17 173:3	144:22,25	110:18	22:15 30:11	<b>rateably</b> 84:24	<b>recalls</b> 4:5 36:6
62:4 92:11	<b>produce</b> 158:1	145:7 146:3,4	<b>pushed</b> 90:14,16	32:7 67:5	<b>rates</b> 10:8,10	37:10
108:23 110:1,3	173:23	146:21,24	121:21 130:14	<b>queue</b> 87:2 88:12	15:22 17:7,21	<b>receipts</b> 10:22,23
116:23 122:7	<b>produces</b> 156:23	147:4,8 148:4	<b>pushing</b> 130:18	<b>quickly</b> 66:20	18:5 26:22	<b>receive</b> 7:13,24
165:3,4	157:16	148:4,7,25	<b>put</b> 1:12 13:20	<b>quite</b> 10:4 18:12	41:15	8:14 9:6 23:22
<b>presently</b> 26:25	<b>prohibit</b> 100:23	165:25 168:18	15:8 21:3,5	20:25 22:24	<b>rational</b> 158:1,4	<b>received</b> 6:19
<b>press</b> 88:20	105:20	172:6	30:25 37:5	28:11 41:1	<b>reached</b> 96:1	8:17 11:1 16:4
<b>pressing</b> 67:11	<b>prohibiting</b>	<b>proved</b> 84:24	39:16 40:5,9	50:20 86:25	150:2	19:7 21:21
<b>presumably</b>	107:11	87:22,24 99:4	41:11 42:10	95:10 103:6	<b>reaches</b> 112:6	22:22,24 23:17
59:17 150:8	<b>prohibition</b>	99:19 105:5,6	51:11 52:2,5,6	113:1,17	150:1	23:18,23 24:3
<b>presume</b> 156:18	102:2	105:17 106:2	52:12 56:24	114:24 116:13	<b>read</b> 61:11 70:17	28:14,15 29:6
<b>presumption</b>	<b>prohibits</b> 101:14	107:13 109:7	57:2,24 58:1	117:24 129:13	70:18 83:5	29:10 34:15
160:7	<b>promoted</b>	115:17,22	60:13 66:17	144:9 156:6,16	97:16 136:22	50:16 51:8
<b>presupposes</b>	147:12	116:8,16	69:16 73:8	157:20 159:10	<b>readily</b> 108:3	<b>receives</b> 28:22
45:9	<b>proof</b> 33:25	137:24 138:1,5	75:18 76:18	<b>quote</b> 83:8 84:6	145:21	29:3
<b>pretty</b> 34:12	44:17 48:4	138:9 146:11	78:1 80:9,12	92:21 98:10	<b>reading</b> 4:9	<b>receiving</b> 8:10
<b>prevailing</b> 22:18	49:13,16,22	146:17 147:1	81:15 88:11	143:19 161:15	31:19 72:4,22	<b>recognise</b> 98:11
<b>prevent</b> 99:24	50:10 51:7,16	147:25 148:1	102:17 108:2,8	<b>quoted</b> 4:25	73:1 84:13	<b>recognised</b> 13:2
105:12 107:25	58:2,7,15	<b>proven</b> 49:12	110:1,15,16	71:20 93:8,11	92:5,12 95:16	111:7 112:1
<b>prevents</b> 102:16	66:16 81:20	<b>provide</b> 3:17	115:2,5 116:16	<b>quoting</b> 99:12	96:2 152:21,25	149:5
<b>primary</b> 35:24	103:22 105:21	77:21 87:9	131:13 132:19	125:22	<b>real</b> 17:23 74:21	<b>recognises</b> 12:3
68:16 94:7	107:25 134:15	105:15 106:1	132:21 134:15		83:19 164:7	115:11
133:6	135:3,6 136:1	109:11 137:7	140:8,14	<b>R</b>	<b>realisation</b> 56:6	<b>recognising</b>
<b>principal</b> 135:17	136:6,9 165:10	166:12	151:12,13	<b>radical</b> 86:23	<b>realise</b> 161:22	85:18
<b>principle</b> 19:5	<b>proper</b> 136:14	<b>provided</b> 20:10	162:21 164:10	<b>radically</b> 41:16	<b>realised</b> 150:20	<b>recourse</b> 61:4
31:16 47:23	<b>properly</b> 102:20	49:14 79:21	167:16 172:13	<b>raise</b> 33:7 75:10	161:21	<b>recover</b> 40:22
82:8,11 86:12	151:1	129:4 135:13	173:5	81:3,7 120:17	<b>reality</b> 93:19	48:24
89:1 145:19,22	<b>proportion</b> 45:1	135:18 153:12	<b>puts</b> 13:6 25:15	<b>raised</b> 2:3 23:5	<b>really</b> 2:14 9:22	<b>recoveries</b> 39:3,6
145:25 146:15	45:8	<b>provides</b> 84:21	50:7 68:23	33:25 44:2	10:15 18:10	<b>recovery</b> 38:6
146:17,18	<b>propose</b> 2:14	99:4 126:2	87:17 89:8	51:16 65:21	27:24 33:24	39:18,21 40:20
174:18	69:25 115:7	144:23	103:9 133:11	135:5	34:25 39:24	41:3 42:23
<b>principles</b> 83:10	133:13 151:18	<b>providing</b>	145:11 163:25	<b>raising</b> 7:10	41:20,25 42:9	48:23 49:20,21
145:17	<b>proposed</b> 119:12	107:13	173:4		43:15,20 46:10	<b>redeemable</b> 34:7

34:8	<b>relating</b> 19:13	<b>repayment</b> 16:7	140:21 144:4	<b>reverse</b> 114:24	60:2,8,11,14	151:24 152:4,8
<b>reduce</b> 51:7 67:6	134:20	101:24 118:21	144:13 148:15	156:6	60:19,23 61:5	152:11,19
67:9	<b>relation</b> 32:6	121:9	150:7 156:10	<b>revised</b> 12:25	61:10,14,17,24	153:7,9,15,19
<b>reduced</b> 67:4	44:15 66:1,3	<b>repeat</b> 50:24	<b>respectfully</b> 2:20	<b>re-paid</b> 84:22	62:3,7,12,15	154:8,12,15,22
162:15	66:22 67:18	114:8 115:2,24	67:24 73:12	<b>rhetorical</b> 20:1	62:18,20,25	156:14,19,22
<b>redundant</b> 131:7	70:18 74:7	129:18	74:20 79:18	20:10 67:5	63:4,12,18,21	157:10,13,15
<b>reevaluation</b>	79:9 83:19	<b>replaces</b> 2:21	83:22 85:11	79:16 105:23	63:24 64:2,5,9	157:25 158:4
28:9	102:16 108:7	<b>reply</b> 51:23,25	86:8 87:8	<b>RICHARDS</b> 1:4	64:19,23 65:10	158:14,18,21
<b>refer</b> 46:24 95:7	111:15 132:25	112:22 113:2,3	90:11 92:14,17	1:11,19 2:1 5:4	69:11,14,20,23	159:8,11,16,21
97:8	138:16 139:5	113:9 151:12	97:21 98:6,21	5:8,13,18,20	70:6,10,14,21	160:1,16,19
<b>reference</b> 2:10	140:17,20	<b>representatives</b>	98:22 99:1	5:25 6:4,23 7:1	71:10,17,22	161:17 162:1
2:13 4:20 28:7	150:5 156:24	94:4	101:17 102:12	7:8,11 8:1,3,5	72:2,7,14,17	162:20 163:2,5
31:25 32:3	159:20,22,25	<b>require</b> 79:14	103:3,15,21	8:9,14,22 9:2,5	72:20 73:4,10	163:7,11 164:2
41:13 44:13	162:9 164:3	108:8 118:20	104:12,20	9:14 10:11	73:16,21 74:4	164:6,9,11,21
46:21 51:19	<b>relatively</b> 43:6,7	126:20	107:15,23	12:8,11,13,16	74:8,19 75:4	165:24 166:4,6
52:24 53:4,21	75:20 91:2	<b>required</b> 45:4	108:2,12	12:21 13:21	75:16 77:9,12	166:12,15,19
53:21 55:6	142:25	105:7 126:16	109:16 112:3	14:18,23,25	80:16,19 81:2	166:22,25
74:3 92:23	<b>relegate</b> 107:20	<b>requirement</b>	112:18 113:22	15:3,9,16,19	81:11 82:19,24	167:4,9,17,19
98:9 101:6	<b>relevance</b> 2:24	142:15	122:21 126:3,9	15:21 16:1,5,8	83:2,7,17 84:4	167:21 168:8
104:24 107:5	<b>relevant</b> 1:9 3:15	<b>requirements</b>	126:24 130:16	16:11,13,15,18	85:5,10,20,23	168:13,17
109:2 123:6,10	13:25 25:6	78:16,25 79:14	133:4,7 135:24	18:12,18,23	86:1,4 87:11	169:4,7,11,15
124:1 128:6	30:8 34:3	87:5	137:2 138:5	19:12,22,25	87:16,24 88:7	169:19,21,25
131:23 143:2	36:12 37:23	<b>requires</b> 11:17	141:1,14,19	20:6,9,20,24	88:17,24 89:18	170:3,11,13,15
149:10 153:1,5	38:13 42:18,19	39:6 108:9	143:21 146:9	21:4,8,12,15	89:22 90:2,10	170:21,23
154:3,13	43:22 44:23	141:3 144:17	146:14,22	21:20,24 22:6	90:20 91:3,7	171:19,22
164:19	53:1 74:22	168:6	147:5,22	22:11,14 23:3	91:18 93:3,5,7	172:2,8,15,21
<b>references</b> 34:2	78:16 128:11	<b>requiring</b> 87:5	148:12,19,23	23:13,16,25	93:11,14,24	173:14,17,23
<b>referred</b> 2:19	144:25 145:3	167:12	149:22 150:18	24:5,17,19,24	94:1,12 95:11	174:7,23 175:3
5:11 33:5	173:20	<b>rescue</b> 13:13	150:21 153:16	25:4,10,13,18	95:20 96:4,7	175:5,10
81:25 84:6	<b>relied</b> 82:8	14:19 161:25	154:16,18	25:20,25 26:3	96:13,19,25	<b>right</b> 2:1,21,21
96:5 98:16	<b>relies</b> 102:14	162:5,13	155:8,10 156:2	26:8,12,17,23	97:12,14 99:13	6:12,14,15,23
134:25	103:6 110:11	<b>rescued</b> 14:10	159:6 160:4,13	27:11,16 28:10	99:20 100:14	7:5,6,7,15,19
<b>referring</b> 5:17	117:23	15:12	161:9 164:13	28:19,25 29:5	100:20 101:20	8:6,9,22,23,24
32:13,16 40:23	<b>rely</b> 63:25 76:20	<b>research</b> 75:1	164:22 173:1	29:7,10,15,20	102:14 103:5	9:2,3 10:14
113:2 131:16	78:21 82:10	85:16	174:9	30:2,4,13 31:3	103:10,14	11:11,12 12:21
<b>refers</b> 87:21	84:8 96:11,11	<b>residual</b> 11:21	<b>respects</b> 38:13	31:8,11,22	104:24 105:2	15:23 16:5
101:2 132:10	<b>remain</b> 13:18	<b>resources</b> 54:18	<b>respond</b> 16:20	32:11,16,23	108:16,18	18:13,21 21:18
<b>reflect</b> 112:5	<b>remaining</b> 49:10	59:11 142:15	<b>responded</b> 102:9	33:9,15,18	110:7 113:1,7	22:8,21,22
149:25	84:13 87:22	<b>respect</b> 2:8 4:23	<b>responding</b>	34:16,24 35:8	113:11,15,17	24:18 26:13
<b>reflection</b> 156:10	99:6,18 109:14	21:17 36:7	64:16	35:20 36:2,5	114:21 116:9	28:12 34:24
<b>refused</b> 73:2	146:25 148:24	48:7 58:3,5,14	<b>response</b> 16:20	36:19,23,25	116:13,18,22	35:25 36:22
<b>regard</b> 3:12,21	<b>remains</b> 19:18	60:5 65:24	44:14 51:25	37:4,14,16	117:7,11,14,19	38:7,11 42:8
40:14,14,16	111:5 121:22	66:14,19,24	125:10	38:4,19,22	117:22 118:1,5	46:3 47:7,16
42:20 54:12,18	164:22 165:8	67:14 81:22	<b>responsive</b> 82:2	39:1,5,9,16,20	118:9,16,24	47:17,18 49:4
64:8 91:3,5	172:25	82:16 84:24	<b>rest</b> 10:10	40:2,7,18 41:9	119:4,9,15,21	50:1,2 52:10
<b>regarded</b> 114:11	<b>remarkably</b>	88:22 91:25	<b>restrict</b> 100:23	41:17 42:8,24	119:24 120:5,9	53:6 54:1,6
<b>regards</b> 58:11	18:20	99:7 101:14	<b>restricts</b> 78:6	43:2,12 44:10	120:16,24	56:22 62:18
<b>regime</b> 2:22,23	<b>remember</b> 37:16	104:19 106:6	141:8	44:20,24 45:3	122:10,12,17	64:19 65:18
3:13,20,22	78:18 86:7,17	109:9 114:16	<b>result</b> 18:25	45:7,13,16,21	124:5 125:7,9	66:6 67:20
56:10 84:19	100:19 134:4	120:3 127:9	25:18,19 41:2	45:25 46:5,7	125:18,21,24	69:14 70:10
97:7 128:23	135:2 151:25	132:7 135:18	43:23 50:8	46:10,16 47:1	128:1,3 129:2	71:10,17 74:19
<b>registering</b>	154:14,21	138:8 139:11	80:18,20,20	47:6,11,16,19	129:8,13,23	75:14 80:14,18
102:4	<b>remind</b> 69:18	141:21 146:13	116:6 136:25	47:24 48:6,17	130:6,11,22,24	80:20 83:24
<b>regrettably</b>	82:7,20 98:8	151:10 153:20	146:19 156:23	48:21 49:1,17	131:2,16,19,23	84:12 85:7,8
147:17	99:11 111:9	154:17,24	160:21 172:22	50:6,9,20 51:2	132:3,11,17	86:15 87:2
<b>regulatory</b> 78:16	134:9 136:23	155:11 156:17	172:23	51:6,12,15,22	133:9,21 134:1	88:12,14,25
78:21,25 79:1	137:15	157:22 159:19	<b>resulting</b> 172:24	52:7,9,14,19	134:5,18,23	94:20 105:22
79:13,14 87:4	<b>reminded</b> 83:2	165:7 168:2	<b>results</b> 29:23	52:23 53:6,13	135:1,11 136:3	109:16 113:3,4
93:2,17 94:23	99:15 102:7	169:20 171:9	38:24 74:14	53:16,19,23	136:8,13,19,21	114:16 115:19
96:11,22	154:6	<b>respectful</b> 10:15	173:24	54:1,6,14,22	138:3,18 139:9	116:18 118:23
120:11 127:5	<b>remitted</b> 4:13,16	78:12 85:15	<b>resurrected</b> 29:9	54:25 55:8,11	139:20 140:6	121:19,21
141:12 142:7,9	<b>render</b> 132:14	86:19 102:10	<b>retain</b> 101:24	55:15,21 56:2	142:5,10,13,22	122:10 127:8
<b>rehabilitation</b>	<b>reorganised</b> 1:18	111:23 123:5	<b>retract</b> 136:14	56:13,22 57:2	143:4,9,15	130:14 131:5
98:2	<b>repaid</b> 130:21	124:18 126:16	<b>return</b> 45:4	57:8,10,15,20	147:14,19	133:13,19
<b>reinforced</b> 3:13	<b>repay</b> 118:11	128:14,24	119:5 155:22	58:20 59:2,7	148:6,9 149:12	138:4,15
<b>reinforces</b> 87:14	119:12	130:17 131:11	155:24	59:16,19,23	149:14,16	141:18 142:2



146:13,14	<b>run</b> 114:4	144:15,15,16	85:8 92:9	69:2 70:18	<b>showed</b> 151:20	140:14
149:2 150:13	<b>running</b> 79:13	144:21,22,23	93:12 97:10,24	72:11,12,21,25	<b>showing</b> 135:25	<b>sixth</b> 141:15
152:5,24	167:5	145:8,16,17	105:24 108:22	73:13,24 99:9	<b>shown</b> 76:2	<b>Sixthly</b> 79:18
157:14 159:2	<b>runs</b> 145:19	146:4	110:15 111:4,4	111:11 163:21	<b>shows</b> 27:23	<b>skipped</b> 152:1
164:11,21,24	146:5,9	<b>schooled</b> 93:21	111:24,25	163:22,25	<b>shrink</b> 88:21	<b>Sky</b> 96:6,11
166:1,3 167:14	<b>S</b>	<b>scope</b> 41:1	112:22 114:16	164:4,8,16	89:17 110:20	<b>slight</b> 64:5
173:8,14		<b>se</b> 1:25 30:1	115:14 118:1	165:9 166:17	<b>side</b> 71:6 103:17	<b>slightly</b> 70:1
174:16	<b>sanctioned</b> 83:24	35:22 41:19	122:10 123:14	167:7,10,14	127:16	74:2 80:6,13
<b>rightly</b> 66:17	<b>satisfaction</b>	42:4 44:8 66:2	123:21,25	168:5,5,7	<b>Sigma</b> 95:23	115:8 133:12
136:5 145:5	101:5 116:15	66:12,23	126:17 130:11	169:14,16	<b>significance</b>	133:14 140:8
<b>rights</b> 4:13,14,15	<b>satisfied</b> 6:24	<b>searches</b> 74:14	134:20,21	170:9,11,17	98:19 134:7	145:24 148:21
4:16,17,17 6:6	7:16 21:9,10	<b>second</b> 1:23 9:22	152:10,18	171:12,14,15	<b>significant</b> 10:1	156:8 164:10
6:6 9:7 18:9,9	66:13,14	13:19 44:6	153:5,7,8	172:23 173:4,5	17:8 41:24	173:5
19:9 21:6 28:2	115:20 116:3	75:22 77:1	155:3 159:8,24	173:7,20	<b>significantly</b>	<b>slot</b> 65:13,14
28:6 36:11	117:4 118:12	107:7 140:17	167:4 169:25	174:12,21	3:23 10:7,14	<b>small</b> 34:12
135:7 143:13	<b>satisfy</b> 117:14	<b>secondary</b> 68:21	174:18	<b>setting</b> 173:11	17:11,13,23	41:21 43:7
151:4 152:12	149:21	69:9 94:7	<b>seeing</b> 41:2	<b>set-off</b> 6:21,22	20:4 23:20	89:13 150:3
153:13 161:12	<b>satisfying</b> 147:2	159:22	53:14 67:17	20:13	52:13	<b>sole</b> 46:24
<b>right-hand</b>	<b>save</b> 64:11 65:18	<b>secondly</b> 32:8	<b>seek</b> 34:21 82:16	<b>severally</b> 108:25	<b>silence</b> 30:25	<b>solution</b> 32:25
152:15	84:12	38:14 77:20	<b>seeking</b> 16:19	<b>shades</b> 122:5	<b>similar</b> 4:20 9:22	33:2 172:20
<b>rise</b> 15:24 133:22	<b>saw</b> 6:9 36:1	97:6 106:11	54:3 76:6	<b>share</b> 34:5,5,6	32:5 94:11	<b>solvency</b> 5:8,10
<b>risk</b> 18:6	152:14	137:6	132:18 135:3,6	45:23,25 46:1	135:8	53:3,20 63:1
<b>robbing</b> 29:25	<b>saying</b> 14:2	<b>section</b> 2:6 3:15	155:14	46:4,12,13	<b>Simms</b> 93:22,22	64:3 111:15
<b>Roney</b> 96:6,11	16:15 18:25	3:16,18 4:19	<b>seeks</b> 10:15	47:3 48:11,19	<b>simple</b> 8:24	114:23,24
<b>room</b> 163:22	24:6 25:20	5:7,9,13,23 6:8	38:17 82:10	50:11	19:16 45:15	<b>solvent</b> 4:15,18
<b>ropes</b> 156:8	26:8 27:16	8:8 11:13 32:8	<b>seen</b> 3:7 36:13	<b>shared</b> 33:21	65:16 66:25	6:7 11:20
<b>rose</b> 136:17	36:20 37:2	33:21 36:1	48:9 75:15	45:1	67:1 115:25	31:20,23,25
<b>round</b> 46:2,3	44:25 48:8	37:10,14 38:16	80:4,9 82:9	<b>shareholder</b>	121:20 158:9	36:15 37:24
<b>roundabouts</b>	61:19 63:12	52:21 53:11,24	92:21 94:16	46:24	<b>simplicity</b> 157:1	53:2,9,18 54:8
9:24 145:12	67:11,18 80:13	54:5,10 57:23	107:10 123:24	<b>shareholders</b>	157:15 158:9	55:3,11 56:3
160:2	80:22 87:6	59:15 60:24,25	155:19	125:1 131:3	<b>simply</b> 12:24	56:11,25 61:2
<b>route</b> 41:22,22	88:1,15 93:23	63:13,14 66:22	<b>sees</b> 4:21 5:23	152:22,24	29:24 30:7	61:4 62:10,16
<b>rule</b> 3:14,15,18	105:17 106:8	66:25 67:2	72:6 73:15	153:14,18	41:25 49:9	62:22 63:1
7:11 11:23	109:22 132:7,9	70:4,12 71:18	75:8 91:8,19	<b>shareholding</b>	86:12 90:12	101:15 104:3,6
12:2,3 36:6	133:12 155:4,5	71:20,25 72:3	91:20 97:17	43:11	100:24 102:3	104:6,20
44:17 49:22	170:20 173:4	73:23,23,25	101:2 103:13	<b>shareholdings</b>	105:19 109:20	111:16,20
63:6,11 64:10	<b>says</b> 7:11 13:6,7	75:6,22 92:16	111:15 127:25	37:24	110:4,16	114:11 119:3
66:16 70:13,13	15:12 16:22,25	106:9 109:10	138:21 152:7	<b>shares</b> 34:7,9,10	117:16 127:15	<b>somebody</b> 74:12
75:23 76:1	24:10 28:12	112:4 122:20	160:24	36:16 45:8,10	132:11 135:5	110:22
77:1,8,10	29:23 32:24	143:3,6,7	<b>Selwyn</b> 3:8	45:11 47:20	135:25 148:23	<b>sooner</b> 135:21
82:18 99:8,16	36:6 54:16	144:8 145:21	<b>senior</b> 53:7 54:7	151:16 152:17	151:15 156:3	<b>sorry</b> 5:4 6:21
99:16 111:1	65:22 66:6	147:16 148:17	55:4 57:3,11	152:20,25	160:17	12:11 16:10,12
122:19 139:16	75:3 84:10	149:24 150:25	57:19 60:4	153:11	<b>single</b> 27:25 34:5	25:18 27:11
139:17,24	85:6 89:12	151:3 152:7	61:11,11,22	<b>sheet</b> 71:3 111:7	37:19 45:9	34:14 37:14
148:14,17	107:22 110:22	155:10 164:17	63:2 67:7	111:22 149:5	<b>sit</b> 52:16	48:17 53:14
163:4,19,23	123:19 128:7	165:7 168:2	91:15,19	152:2	<b>site</b> 80:22	55:8,21 57:9
164:7,14,23	141:24 144:4	169:20 170:5	134:12	<b>shoes</b> 78:14	<b>sits</b> 2:22	59:2 61:21,24
165:1,2,15,18	163:25 173:6	171:9	<b>sense</b> 94:11	<b>short</b> 1:21 2:17	<b>sitting</b> 43:13	62:25 63:13
165:21 166:20	<b>scenario</b> 161:18	<b>sections</b> 12:25	112:5 128:6,15	6:5 11:15	<b>situation</b> 8:18	72:14,15 90:25
168:4 170:8	<b>scenarios</b> 121:3	<b>see</b> 3:20 4:14 7:4	136:10 150:1	26:18 65:8	9:9 13:12	108:16 120:9
171:1,4,12	169:1	8:5 9:5 14:17	167:8,14	66:2 75:20	14:10 28:22	125:21 128:3
174:3,9,10,11	<b>sceptical</b> 162:23	16:18 20:12,25	<b>sentence</b> 4:22	81:22 88:6	37:6 40:19	168:8
174:17,19,25	<b>scheme</b> 2:18,20	21:13 22:6	81:21	91:2 95:22	41:14 44:7	<b>sort</b> 33:9 43:16
<b>ruled</b> 127:21	7:14,22,24	23:4,5 25:20	<b>separate</b> 40:1	96:16,20	55:19 56:8,15	45:21 86:13,20
<b>rules</b> 2:5 11:21	8:10,11,15,18	26:23 33:4,5	148:9	119:25 133:24	57:6,10 58:6	86:20,24 87:9
30:22,25 31:1	8:24 9:16,19	37:21 38:22	<b>separately</b> 62:6	135:4 137:20	72:19 89:25	88:15 93:21
84:20 100:7	10:5,17 18:8	40:13,22,25	67:21 139:17	157:1	93:1 97:4	94:10 108:8
105:15 106:1	19:7 26:20	41:10 42:16	144:9	<b>shortfall</b> 48:11	107:1 118:9	109:23 111:7
123:8,11	77:24 79:14	45:16 47:1,22	<b>sequestration</b>	49:11 58:3	120:1 127:19	111:22 112:2
124:19 129:9	88:9 89:10,11	51:9,15 52:15	98:1	<b>shorthand</b> 64:25	147:13 157:17	112:15 113:9
129:17 133:5	94:8,10 96:23	54:14 56:15	<b>series</b> 59:19	133:18	158:19,21	118:25 120:18
143:20 146:13	97:2 99:3	60:2,9 64:14	<b>serious</b> 113:18	<b>shortly</b> 33:23	159:11 161:10	122:6 123:24
158:15 160:21	105:3 108:5	64:19 67:12	<b>set</b> 11:9 34:3	44:12 52:2	161:19 171:22	133:2 146:6
163:12,20,22	126:2,10,21	71:19 72:1,17	57:23 66:3	62:6 115:2	<b>situations</b> 157:7	157:16 159:1
174:12,21	127:6 128:18	75:3 79:4 80:1	68:1,2,12,21	<b>show</b> 67:4 85:18	162:14	161:25 162:13
<b>rump</b> 150:11	129:22 140:19	82:6 84:6,11	68:22,24,24	107:23 153:2	<b>six</b> 77:13 97:24	167:18 173:18

<b>sorts</b> 172:17	<b>statute</b> 7:18	76:3 91:14	144:1 149:18	101:24 104:1,8	100:4,11	69:17 75:17,19
<b>sought</b> 57:22	12:23 19:9	<b>stuff</b> 170:19	151:8,9,13	104:22 111:14	101:15 103:22	81:24 82:3,5
140:9,10	81:14 89:11	<b>subject</b> 33:4 36:9	155:25 156:1	116:7 118:11	104:13,19,23	98:9 114:5
<b>sound</b> 47:17,25	<b>statutorily</b>	38:2 41:6	159:20 160:9	118:22 119:6	105:6,13,14,21	125:12,20
<b>sounds</b> 33:10,11	110:22	45:13 98:4	163:10,13	119:13,16,18	105:25 106:6	127:7 136:19
47:16 145:12	<b>statutory</b> 2:18	135:12,13	165:7 167:3	121:9,11 123:2	106:20 107:3	140:12
173:14	2:23 3:13,20	165:11	174:14 176:3,4	123:11,16	107:10,12,18	<b>support</b> 3:11
<b>so-called</b> 153:24	6:3,14 7:5,8,14	<b>submission</b>	<b>submit</b> 2:17 3:5	124:11,20,21	114:19 115:22	46:15 47:14
<b>speak</b> 9:23 10:16	7:22,24 8:10	10:16,19 18:22	3:20 5:3,5 6:7	125:15 126:14	116:21 117:16	65:22 123:18
13:1,9,17	8:11,15,17,19	18:24,25 19:2	11:9 31:25	128:11 129:3,5	130:13 135:9	126:7 139:2
19:23 24:13	8:24 9:16,19	27:20 35:2,3	37:8 42:20	129:24 134:25	137:20 138:9	<b>supported</b> 47:11
32:10,19 36:21	10:4,6,17	35:17 37:17	53:20 55:6	136:7,10 140:3	142:4 163:14	<b>supportive</b>
37:2 41:22	17:25 18:7	41:25 42:3,14	67:24 73:12	142:2 163:15	170:18 171:2	129:20
42:2,6,25 44:2	19:7,18,21	42:15 43:20	74:20 78:5	165:25 166:4,5	171:18	<b>supports</b> 123:6
44:7 47:3	20:3,16 26:20	44:1 46:18	79:18 83:22	166:7,8 168:19	<b>sub-debts</b> 104:1	<b>suppose</b> 28:11
48:14 49:3,24	26:21 60:16	54:3 56:9	85:11,12 86:8	170:17 171:17	<b>sub-let</b> 165:17	117:7 120:19
65:1 142:17	61:18 76:8	65:16 66:18	87:8 90:12	<b>subordinates</b>	<b>sub-liabilities</b>	131:1
<b>speaks</b> 78:12	77:16,24 79:2	68:7 78:12	92:14,17 97:21	90:13	134:12	<b>supposed</b> 145:21
<b>specific</b> 114:24	80:7,23 81:6	85:15 86:9,20	98:6,20,21,22	<b>subordinating</b>	<b>sub-paragraph</b>	<b>supposing</b>
114:25 123:15	84:19,21,22	89:16 96:22	99:1 100:4	105:14,24	55:2 101:12	118:10
157:24 158:15	85:2 87:18,21	98:7 102:11,12	101:13,17,17	<b>subordination</b>	<b>sub-point</b> 99:21	<b>Supreme</b> 95:23
<b>specifically</b>	87:25 88:3,9	102:17 110:14	102:12 103:3	58:16 59:1	99:22	120:19
131:25	89:11 94:4	111:23 114:13	104:12,20	63:25 68:8	<b>sub-points</b> 133:2	<b>sure</b> 15:3 18:12
<b>spectacles</b> 40:13	97:2 99:3,14	115:1 117:25	107:15,23	76:22 77:3	<b>sub-rule</b> 105:8	18:23 22:24
<b>spectrum</b> 121:24	104:17 105:9	122:8 123:5,12	108:2,12	78:15 79:22	106:8 109:4	26:3 27:5
121:25	105:13,14,15	123:12 124:18	109:17 112:3	82:12,17 85:2	148:18 149:24	32:14 53:14
<b>speculation</b>	105:22,25	125:25 126:17	112:18 113:22	85:19 86:5,9	158:13 159:4	73:17 113:1
162:19	106:1,7,8,20	127:17,20	122:21 126:3,9	86:13,23,24,24	<b>sub-sub-points</b>	116:9 120:5
<b>speech</b> 94:2	106:22 107:3,5	128:14,21,24	126:24 130:16	87:1,17 97:5	141:24	143:6 157:20
<b>spending</b> 91:11	107:12 108:5	130:17 131:4,8	133:4,7 135:25	98:12 101:2	<b>sub-sub-textual</b>	167:9 169:15
<b>split</b> 40:24 66:2	108:13 110:6	131:10,12	137:2 141:1,14	108:10,11	140:23	<b>surely</b> 57:15
<b>spotted</b> 73:18	114:18 115:13	137:4,10,14	141:19 143:22	111:13 113:21	<b>successions</b> 6:3	<b>surplus</b> 4:12,12
<b>square</b> 81:3	115:14,23	138:14 140:21	146:10,14,22	114:3 122:4	<b>suffer</b> 24:13	6:19,20 7:19
<b>stage</b> 17:17	116:20 117:18	144:5,7,14	147:5,22	129:9 131:25	<b>suffered</b> 11:4,6	8:19 9:9,12
70:16 98:18	117:20 121:14	145:15 148:15	148:13,19,23	132:13 134:11	<b>sufficient</b> 118:22	10:13 22:20
112:6,9,9	124:16,24,25	148:21 150:5,7	149:22 150:18	135:7 137:5,8	119:7 143:11	28:5 32:4 49:4
114:1,4 116:14	125:14 126:2,2	150:25 154:5	150:21 153:17	137:8,13	171:24 172:4,5	84:23 87:22
150:2,2 157:8	126:10,13	156:10 157:9	154:16,18	148:10 165:20	<b>suggest</b> 7:13	99:5,6,11,18
157:9 158:22	137:5,23,23	<b>submissions</b> 1:3	155:9,11 156:2	171:4	76:6 89:6	104:17 105:16
163:10 166:25	140:5 144:7	2:11,12,13,16	159:6 160:4	<b>subsequent</b>	101:8 141:17	106:2 109:7,12
169:3	146:23 148:3,6	27:9,14 32:2,9	161:9 163:17	11:21 130:8,9	156:22	109:14,19
<b>stages</b> 141:9	149:19 151:1	33:4,5,7 42:11	164:13,22	131:24 132:13	<b>suggested</b> 16:6	110:18,19
<b>stand</b> 67:17	153:24 157:7	45:18 48:2	165:9 173:1	161:8	36:16	111:3,5,6,25
78:14	159:6 161:12	51:14,19,21	174:10	<b>subsequently</b>	<b>suggesting</b> 25:1	112:10,10,13
<b>standard</b> 53:2	<b>staying</b> 138:19	52:3 65:11	<b>submitted</b> 67:19	27:3 102:22	127:18 132:16	112:17 113:19
87:6,9 107:2	<b>steps</b> 115:24	66:4 69:17,18	73:19	<b>substance</b> 3:25	<b>suggestion</b> 16:16	113:20 114:1,1
127:24 128:8	117:3 136:1	70:3 73:11,13	<b>submitting</b>	160:6	147:11	115:18 116:17
128:25 131:7	146:14	75:17,18,19	55:17 135:5	<b>substantially</b>	<b>suggests</b> 29:21	117:12,17
131:20 132:20	<b>sterling</b> 15:18,20	76:3 78:8,9	136:1	43:23	<b>sum</b> 135:21	146:25 147:24
132:21 167:7	16:2,3,3 19:16	80:12,15 81:4	<b>subordinate</b>	<b>substantively</b>	174:1	149:2,4,8,18
<b>standing</b> 112:8	19:17 22:18	81:8,24 82:3,5	63:18 77:15	89:10	<b>summarise</b>	150:3,6,9,10
127:8	23:17,22 24:21	82:10 85:14	81:6 86:22	<b>substratum</b> 89:3	163:9	150:13,16
<b>stands</b> 141:24	28:15 29:2,3	92:17,20 95:4	107:3,12	89:3,4	<b>summary</b> 33:3	152:13 158:12
<b>start</b> 102:21	30:8 45:23	98:10,18	112:20 128:10	<b>sub-debt</b> 52:22	139:22 163:17	158:22 159:3,9
103:8,25	46:1,4 145:7	100:16 101:11	142:8	53:10,25 54:1	165:13 167:2,3	159:12,13,13
116:25 163:25	<b>stir</b> 86:19,20,20	103:12 109:3	<b>subordinated</b>	54:4 56:12	174:8	159:14 161:6
175:1,3,5	<b>stop</b> 28:2	109:25 110:14	12:17 55:13	57:7,23,25	<b>sums</b> 28:14 62:5	161:15,24
<b>starting</b> 104:4	<b>straightforward</b>	114:6,8 115:6	60:5,6,20	58:10,13,15,17	92:11 108:23	162:8 166:6
157:21	28:11	125:3,8,12	61:19 62:2	58:22 59:14,25	110:2,3 125:1	168:20
<b>starts</b> 13:24	<b>strain</b> 160:4	127:7 136:18	63:8,15,19	60:1 66:25	135:21 143:18	<b>surprised</b> 78:7
154:19	<b>strenuously</b>	137:18 138:7	68:8 78:17	68:6 69:7 70:5	<b>supervising</b> 37:7	<b>surprising</b> 78:13
<b>state</b> 18:4 60:3	106:23	138:23 139:12	79:2 80:5,23	75:21 76:5,16	<b>supervision</b> 38:3	83:18 87:8
114:10 136:6	<b>stress</b> 136:4	139:14 140:12	83:13 84:17	76:22 77:4,5	<b>supplemental</b>	106:24 119:5
<b>statement</b> 149:7	<b>striking</b> 76:12	140:13,16	86:2 88:2	77:11 78:6,17	2:11 42:11	121:21 137:10
<b>statements</b> 88:15	95:10 137:12	142:6,20 143:1	91:16,21,22	79:1,21,23	51:14,19,21	141:11 157:4
<b>states</b> 37:11	<b>structure</b> 69:19	143:17,25	92:5 97:19	90:13 99:24,25	52:3 66:4	<b>survive</b> 9:20

<b>survived</b> 7:16	<b>terms</b> 22:3,4	162:20 167:15	70:7,11,15,22	157:1,12,14,21	108:9 113:23	<b>unkeen</b> 78:8
<b>survives</b> 1:23	26:24 34:9,12	167:20,21	71:11,18,23	158:3,9,17,20	114:17 147:21	<b>unlimited</b> 54:20
<b>suspect</b> 172:11	40:5,6,9 44:25	168:12,21	72:3,8,15,18	158:25 159:10	150:23 156:21	55:23 72:9,11
<b>swap</b> 65:4	48:10 50:7	170:1 171:25	72:21 73:5,11	159:15,17,22	<b>trying</b> 73:8	72:18,21
<b>swings</b> 9:24	54:4 62:15	172:16	73:17,22 74:5	160:2,18,23	83:23 84:15	<b>unquote</b> 143:19
145:11 160:2	69:15 99:23	<b>thinking</b> 155:2	74:9,20 75:17	161:18 162:2	111:11 131:5	161:15
<b>system</b> 158:1,5	101:25 103:19	162:24 174:15	77:10,13 80:17	162:25 163:4,6	139:18 145:19	<b>unrealistic</b> 93:18
<b>T</b>	170:18 171:18	<b>third</b> 1:24 101:3	80:20 81:3,12	163:8,12 164:3	154:25 159:1	<b>unsatisfied</b>
<b>T</b> 146:12 147:13	175:7	134:19 141:5	82:22,25 83:4	164:7,10,12,22	168:25	22:10
<b>tab</b> 1:13 4:3	<b>terrible</b> 160:13	152:16 153:4	83:8,18 84:5	166:3,5,11,14	<b>tucked</b> 141:22	<b>unsecured</b> 58:5
30:21 46:21,22	<b>terribly</b> 74:11	<b>thirdly</b> 77:24	85:6,11,22,25	166:18,21,23	<b>Tuesday</b> 100:15	58:8,24 59:24
82:23 93:9	<b>text</b> 140:11	106:12 123:18	86:3,7 87:13	167:2,5,14,18	<b>turn</b> 4:3 72:9,18	60:1 68:9,10
95:8	<b>textual</b> 94:22	<b>thoroughly</b>	87:23 88:5,8	167:20,23	76:4 87:15	78:18 80:5,24
<b>tailcoat</b> 64:11	<b>thank</b> 1:11,19	65:25 66:19,24	88:19,25 89:21	168:12,16,24	92:24 94:24	81:16 83:15
<b>tails</b> 18:11	5:25 6:1 33:18	67:14	89:24 90:4,11	169:5,8,13,17	<b>turning</b> 4:7	84:14 89:23
<b>take</b> 6:12,13 7:5	42:8 46:16	<b>thought</b> 9:18	90:21 91:4,8	169:20,22	<b>turns</b> 72:8	90:13,16
10:16,18 11:18	64:22,23 65:6	19:12 27:1	91:19 93:4,6,8	170:1,4,12,14	151:22 153:2	100:13 102:22
17:17 19:15,16	72:17 73:4	39:25 49:22	93:13,15,25	170:17,22,24	<b>two</b> 6:12,13 32:7	103:23 104:14
19:16 20:25	81:11 93:14	50:14 53:24	94:2,13 95:12	171:21 172:1,7	35:1,22 36:15	107:19 124:23
22:1 23:9	96:13 103:14	63:5 88:13	95:21 96:5,8	172:11,16,22	39:10 40:24	134:22 137:9
33:22 37:11	125:7 133:9	90:5 120:10	96:19,20 97:1	173:16,22,25	48:20 49:6	140:2 161:23
43:5 44:11	136:21 149:16	124:8 132:22	97:13,15 99:14	174:8,24 175:4	65:4,21,23	163:16 169:23
46:18 48:3	175:6,10,12	160:19,20,20	99:21 100:15	175:7,12 176:4	67:22 70:2	170:6
50:4,9 53:13	<b>theirs</b> 43:1	160:24 161:18	100:21 101:21	<b>Trace's</b> 52:3	72:4 76:20	<b>unsubordinated</b>
55:23 64:24	<b>thereon</b> 92:1	162:3,25 163:8	102:15 103:7	<b>traditional</b> 68:24	84:10 96:8	59:4 67:23
65:5 69:21	<b>thing</b> 11:15	174:15	103:11,15	<b>trajectory</b>	105:7 109:10	69:8 76:15,19
71:12 75:2	48:16 70:8	<b>thread</b> 146:9	105:1,3 108:17	162:13	116:5 119:5	77:5,11 90:14
85:11 92:15	86:23 102:24	<b>three</b> 1:20 23:7	108:19 110:9	<b>transcript</b> 78:24	121:3 134:2	100:13 102:23
93:20 102:15	107:4 113:12	29:24 71:24	113:2,6,9,14	102:6 170:22	138:24 144:2	103:24 104:14
113:14 118:3	145:20 147:20	76:25 77:21,22	113:16,18	<b>transcripts</b>	152:1 156:15	107:19 117:8
118:20 123:7	156:12,13,15	119:6	114:22 116:12	114:7	159:23 169:1	139:25 168:7
134:10,10	156:18 158:14	<b>thrust</b> 98:24	116:16,19	<b>transition</b> 162:4	173:18	168:17 170:12
136:1 142:7	160:13	<b>Thursday</b>	117:1,10,13,16	<b>treated</b> 56:11	<b>type</b> 144:11	170:14,16
151:22 155:16	<b>things</b> 36:18	149:10 154:10	117:21,25	<b>treating</b> 139:18	<b>typically</b> 129:15	171:16,20
155:17 156:5	40:13 79:12	<b>tier</b> 119:5,6	118:4,8,15,23	<b>treatment</b>	<b>U</b>	172:4
<b>taken</b> 37:8 38:1	89:6 101:4	<b>tiers</b> 144:19	118:25 119:8	147:23	<b>ultimate</b> 40:11	<b>untouched</b> 2:8
44:15,18 45:17	111:13 132:10	<b>ties</b> 80:1	119:14,19,23	<b>trespass</b> 142:11	<b>ultimately</b> 48:24	<b>unusual</b> 85:13
45:19 51:20	132:24 138:24	<b>time</b> 17:8 22:16	119:25 120:6	<b>tried</b> 141:21	49:2,8	158:18
75:25 114:3	141:22 145:23	22:23 25:12,17	120:10,23	<b>trigger</b> 84:22	<b>unable</b> 37:18	<b>upholding</b> 85:19
121:5,13	156:15 160:3	47:4 70:11	121:16 122:11	<b>trio</b> 130:2 146:19	<b>underlying</b> 2:7	<b>upside</b> 15:7
<b>takes</b> 68:24	165:18	90:25 91:2,11	122:13,18	<b>trouble</b> 40:7	145:17 157:18	<b>upward</b> 162:12
70:11 119:1	<b>think</b> 1:13 5:11	97:3 103:23	124:6 125:8,10	<b>troubled</b> 96:10	<b>undermines</b> 85:1	<b>urge</b> 94:20 98:7
<b>talk</b> 72:24 75:13	5:14,15,16	111:16 120:12	125:19,22,25	134:3	<b>underpinning</b>	100:21 106:23
86:15 127:24	6:23 7:13 9:1	133:20 156:9	128:2,4 129:7	<b>Trower</b> 6:12	145:8	141:15
131:17	14:25 15:4	159:14 175:9	129:11,18	15:12 18:23	<b>understand</b> 25:8	<b>urging</b> 94:17
<b>talking</b> 15:5	18:18 20:20	<b>times</b> 4:4 92:22	130:1,9,12,23	51:24 63:11	36:20 48:21	<b>use</b> 5:9 40:14
54:20 61:10	21:15 23:1,4	<b>timetable</b> 113:6	131:1,4,17,20	66:6 74:6	53:15 89:6	58:11 99:5
111:3 126:18	29:21 31:9	<b>timing</b> 175:7	132:2,7,16,18	78:20,20 79:12	113:23 114:13	131:24 149:23
<b>talks</b> 5:21 123:4	33:6 34:19	<b>tiny</b> 69:4,5	133:10 134:1,2	87:16 93:3,4	115:11 116:1	<b>useful</b> 10:20
123:13,22	35:20 43:14	<b>told</b> 175:7	134:6,19,24	100:15 103:5	121:10 150:24	145:16
124:9,9,10,12	49:18 51:2,6	<b>top</b> 71:3,20	135:2,12 136:4	105:10 113:3	158:7 167:11	<b>uses</b> 95:12
124:12 129:14	59:20 63:4	72:15 83:5	136:12,16,20	116:24 117:22	167:22	133:15 151:3
134:10	64:6,15,24	84:8 92:10	136:22 138:4	142:14 150:19	<b>understanding</b>	167:18 173:5
<b>tanto</b> 6:25 7:1	65:5 74:10,12	111:10 125:22	138:12,19	153:21 155:15	97:6	<b>usual</b> 163:2
<b>taster</b> 142:16,17	76:23 85:20	144:18 152:3	139:10,21	175:8	<b>understands</b>	<b>usually</b> 95:15
<b>teams</b> 65:4	102:14,15	<b>topic</b> 38:21	140:7 142:9,11	<b>Trower's</b> 10:24	91:14 138:25	<b>US\$1</b> 28:12,13
<b>telling</b> 89:13	113:3,4 118:23	163:6 174:24	142:16,23	63:6 64:11	145:14	<b>US1</b> 22:16
102:11,11	120:4 121:11	<b>tort</b> 146:13	143:5,10,16	78:7 107:16	<b>understood</b> 27:8	<b>utterly</b> 139:8
141:10	121:23,25,25	<b>totally</b> 147:5	147:15,20	139:14	27:12 36:24	<b>V</b>
<b>template</b> 131:24	122:11 127:15	<b>towel</b> 90:23	148:8,12	<b>true</b> 89:24,25	37:1	<b>v</b> 47:24 63:11
<b>ten</b> 3:4 34:11	131:23 132:3	<b>Trace</b> 33:23	149:13,15,17	90:12 112:5	<b>undisputed</b> 79:7	93:22
<b>term</b> 53:2,15	132:24 136:4	45:17 48:1	151:25 152:5,9	168:5	<b>undoubtedly</b>	<b>valid</b> 153:14
98:2	142:5 155:18	51:10,16,23,24	152:12,20	<b>truest</b> 150:1	86:1	<b>validly</b> 48:11
<b>terminated</b>	157:18 158:11	52:1 64:14	153:8,10,16,20	<b>trust</b> 82:13 86:5	<b>unfortunate</b>	81:14
134:13	158:19,21	65:1,10,11,12	154:9,13,16,23	<b>truth</b> 155:13	78:10	<b>valuation</b> 168:6
	159:1,23	69:12,15,21,24	156:16,21	<b>try</b> 20:10 42:7		

171:13	140:3,5 141:19	4:24 13:24	57:21 58:21	worth 15:21	Zacaroli's 16:20	118 52:25
valuations 69:1	142:3 144:19	17:14 25:7	59:6,14,17,22	67:17 77:2	24:9 25:9,24	12 12:8 64:13
value 34:10	149:25 166:2	28:1 30:9 98:1	59:24 60:3,7	81:9 82:3,4,22	27:12 29:18	12.04 65:7
53:11 54:12	way 9:8 10:4,20	wish 7:3 42:13	60:10,13,18,22	90:17 91:10	zero 53:12 54:13	12.12 65:9
61:1 145:6,7	13:5 17:5 21:3	46:14 70:22	60:25 61:7,13	101:18 105:4	61:1 67:5,7	12.3 11:23
valued 170:10	21:5 24:14	128:10 162:16	61:16,23 62:1	105:17 109:13		143:20
varies 82:17	27:8,24 29:12	wishes 35:5	62:4,9,14,17	111:2 112:16	\$	12.3(2) 12:19
various 75:24	29:14 31:14	wishing 20:1	62:19,22 63:3	127:22 133:17	\$1 22:21,23	32:14,17,22
79:11 89:5,5	33:12 37:22	38:12 50:24	63:10,17,19,23	134:7,16	28:23,25 29:1	12.3(2)(a) 12:2,3
101:4 111:13	40:15 42:10,17	Wolfson 1:3,4,5	64:1,4,7,10,21	138:19 143:5	29:1 34:5,6	12:9,13 32:14
132:24 136:24	43:22,24 46:2	1:13,20 2:2 5:5	64:23 65:20,22	158:10 162:2	61:8	32:17,21
140:18,19,20	46:3 48:14	5:12,15,19 6:1	67:19 68:23	170:20 174:14	\$1,000 34:8	12.3(2)(a)(a)
141:9 150:10	50:22 51:10	6:5,25 7:3,10	73:8 75:5,10	worthless 43:18	\$1.1 29:3	12:6
varying 174:3	52:11,12 57:6	7:23 8:2,4,6,13	80:10 139:2,17	worthwhile	\$100,000 28:17	12.3(2)(a)(c)
vein 120:16	57:7,11,25	8:16 9:1,4,8,15	145:5,10 149:9	146:11,18	29:6	12:7
version 140:2,4	58:1 59:8	10:12 12:9,12	154:11 156:7	wouldn't 7:17	\$525 34:14	122 52:25
vi 135:12	62:23 68:16,23	12:15,18,22	159:19 163:25	8:16 36:21	\$900,000 28:16	124 34:3
view 11:3 28:10	68:25 69:1	13:22 14:22,24	163:25 164:20	50:15 54:8		13 42:10 66:4
39:2 42:25	73:8 74:11	15:2,7,15,18	165:23 173:4,6	119:5 121:10	1	13.12 143:20
43:3,19,21	80:9,13 86:22	15:20,23 16:2	176:3	155:6	1 1:8 13:23,24,25	148:14
133:5	87:5,16 94:14	16:6,10,12,14	Wolfson's 65:2	wriggles 146:7	14:1,2,3,4,7,8	133 34:3
viewed 22:2,3,4	94:20,25 95:3	16:17,19 18:16	70:2 108:6	wrinkles 146:7	14:9,16 15:10	136 44:23
views 94:21	95:6 96:10	18:22 19:2,15	wonderful 64:12	writer 65:1	15:14,25 16:4	137 44:23,25
Vinelock 83:25	100:4 103:8	19:23 20:1,8	wondering 139:6	133:18	16:4 23:10,22	14 92:20,23
84:6,16 88:17	108:1,2 110:1	20:11,23 21:2	Wood 1:6,8,14	writing 15:8	23:24 26:2,14	125:6
89:18 90:5	110:5,23 112:1	21:5,10,13,17	woolly 145:14	33:24 52:24	26:15 28:15,22	1403 83:6
virtually 69:6	112:14 115:5,8	21:22 22:2,7	word 5:9,23,24	90:22 91:9	28:23,24 29:1	1411H 85:4,5
virtue 32:20	116:16 121:22	22:13 23:1,7	36:12 48:4	written 44:13	29:2,4 34:5,6,9	1412 84:8
135:19	126:24 128:25	23:14,19 24:2	75:3 83:24	48:2 69:17	45:3,5 46:4	1412A 84:7
vis-a-vis 14:15	130:14 135:6	24:7,18,23	95:13 99:5	95:4 101:11,23	101:12 118:11	144 44:13,21,22
17:15 26:1	135:24 141:18	25:1,5,11,14	105:7 112:17	115:6 143:1	118:13,20	47:14
38:14 44:4	141:19 142:2	25:19,24 26:1	120:11 126:7	149:17 151:8,9	176:3	15 1:1 52:2,8
volume 11:25	145:11 146:5	26:5,11,16,18	147:24 149:2	154:5	1B 55:2 62:9	66:5 125:6
90:19 95:8	151:12 155:1	27:8,12,20	150:13 160:12	wrong 15:1,4	1C 4:3 30:21	150 36:1
volumes 78:12	157:3 160:5,7	28:18,21 29:1	173:5	26:23 29:12,14	82:23 95:8	150(2) 37:10,15
	162:8,21	29:6,8,13,17	wording 87:20	43:14 46:2	1D 93:9	151 149:11,13,14
W	164:10 165:16	29:22 30:3,6	104:7 109:17	65:19 68:19,20	1(b) 111:15	16 70:12 73:14
wait 60:8	171:1,16	30:18 31:7,9	131:5 134:9	68:20 69:10	1.00 96:15	73:18 95:4
waive 84:11 85:7	172:25 173:4,9	31:12,23 32:12	words 4:10,24	80:14 90:8	1.25 76:17	162 154:23
85:8	173:10,12	32:17 33:8,11	31:19 40:14	98:21 102:12	1.254-odd	163 154:13
Walker 165:22	ways 9:15 39:13	33:17,19 34:19	53:1 54:10	127:19 128:5	134:25	164 154:14
167:16 171:5	48:20 94:16	35:3,9,24 36:3	55:15 72:4,22	133:12 157:22	10 3:3 5:9,13,23	17 92:23
Walker's 163:18	weakness 150:22	36:6,20,24	73:1 79:19,20		6:20,21 34:19	18 175:15
want 46:18 67:5	Wednesday	37:1,5,15,17	79:20,24 84:14	X	50:13,16,19	1862 164:17
79:16 84:3	113:9	38:8,20,23	92:5,12 95:6	X 22:20 23:18	51:8 117:9	1875 5:23
86:15 118:2,3	weekend 120:14	39:4,8,11,19	95:16 96:2	127:2 166:9,13	10.30 1:2 175:14	189 2:6 3:15,16
120:4 142:4,11	159:24 162:21	39:22 40:5,9	105:7 108:22	166:15	100 36:16,22,25	189(2) 106:9
wanted 30:14	163:9 175:11	41:8,12,18	109:13 110:1		49:6 50:4,9,10	189.2 109:10
110:15 122:13	weight 144:6	42:9,25 43:3	119:1 124:8	Y	50:10,14 51:1	112:4 122:20
159:17	went 120:10	43:13 44:11,22	126:4,5 140:2	Y 127:2 166:9,10	51:4 59:24	189.3 3:16,24
wanting 157:24	West's 70:19	45:2,6,12,15	140:24 141:20	166:15	100p 100:12	1892 147:16
wants 35:18	73:20	45:19,24 46:3	148:17 149:23	years 22:12,16	100,000 29:18	148:17 149:24
83:21 93:9	wet 90:23	46:6,9,14,17	152:22,25	22:23	101 71:18 72:3	1902 71:9 151:21
125:5 151:6	whichever 98:2	47:2,10,15,17	work 23:5 27:24	yesterday 1:7,18	164:17	152:14
154:6 157:25	White's 71:16	47:20 48:3,7	79:5 108:9	2:6 6:10 9:23	102 154:4	1948 5:19
161:24	wholly 31:20,23	48:18,22 49:2	113:21,24	9:24 11:24	103 1:13	197 134:16,17
warning 85:13	31:25 37:13	49:24 50:7,19	145:21 147:21	154:10 165:23	104 93:9 156:1	136:5,7
wash 43:16	wide 54:11 97:23	50:22 51:2,5,9	151:10		106 154:4	1986 98:16
wasn't 57:8	114:9,22,23	51:13,18 52:2	worked 34:13	Z	108 71:20	1997 34:6
107:6 132:13	wider 52:5 94:6	52:5,8,12,16	works 10:5 23:6	Z 127:2	109 152:7	
160:19	widest 98:5	52:20,24 53:7	68:25 88:10	Zacaroli 16:22	11 46:21,22	2
watching 163:1	win 18:11 77:6	53:15,17,20,25	108:3 138:12	18:17 25:1	81:10	2 11:25 32:16
waterfall 68:10	winding 4:11,25	54:3,7,15,24	163:24 167:6	26:3 27:8	11.45 52:4	34:7 52:21
76:14 90:17	72:5 83:14	55:1,10,14,17	world 107:4	74:10,14	114 142:20	53:10 56:21,24
107:21 112:5,8	143:12 155:23	56:1,7,20,23	worse 14:3 25:21	150:20	115 142:20	57:1,22,24
114:1 115:9	winding-up 2:7	57:5,9,13,18	26:20			58:1,6,9,15,17

58:19,22 59:14 60:19 62:5 63:7 67:18 75:8 82:1,2,5 95:9 96:14 154:23 165:17 170:25 171:2 <b>2(a)</b> 104:24 106:15 <b>2.02</b> 96:18 <b>2.59</b> 133:23 <b>2.88</b> 109:4 <b>2.88(a)(1)</b> 99:8 <b>2.88(7)</b> 99:10,11 99:12 103:6 105:4 107:14 108:7 109:9 110:19 112:3 122:19 <b>20</b> 49:8 113:10 <b>2008</b> 46:23 <b>2013</b> 1:1 175:15 <b>21</b> 31:10 149:11 149:15 151:13 <b>21F</b> 31:21 32:24 <b>216</b> 91:6 97:13 126:5 <b>217</b> 91:20 92:10 <b>219</b> 101:1 135:10 <b>220</b> 5:22 111:10 <b>221</b> 6:2 101:19 134:4,10 <b>223</b> 4:5 <b>224</b> 4:7 <b>225G</b> 4:22 5:5 <b>24</b> 73:15 81:8 174:6 <b>25</b> 98:17 125:11 125:19 127:24 128:2 131:18 <b>253</b> 5:15 <b>26</b> 125:23 127:23 174:6 <b>288</b> 3:15 148:18 <b>288(8)</b> 84:25 <b>288.7</b> 2:5 3:14 <b>288.8</b> 3:16,24 <b>2887</b> 82:20 87:20 147:16,20 <b>29</b> 73:24  <hr/> <b>3</b> <hr/> <b>3</b> 6:18 133:19 134:19 <b>3.06</b> 133:25 <b>3.14</b> 138:11 <b>30</b> 73:25 <b>300</b> 59:25 60:1 <b>31</b> 98:17 <b>32</b> 101:12 109:25 <b>328</b> 71:21 <b>33</b> 125:4 <b>330</b> 72:9,15 <b>334</b> 152:2 <b>335</b> 152:15 <b>34</b> 2:10	<b>363</b> 76:19 140:1 <b>37</b> 151:9 <b>371</b> 153:3,5 <b>38</b> 69:8 74:2,3 76:16 102:7 109:3 115:14 134:22 139:25 171:16,19 <b>39</b> 75:6 102:7 125:3 133:16 136:18  <hr/> <b>4</b> <hr/> <b>4</b> 70:5 90:19 154:23 163:6 <b>4(v)</b> 135:9 <b>4.11</b> 175:13 <b>4.15</b> 173:16 <b>4.202</b> 36:6 <b>43</b> 75:12 133:16 136:18 137:1 <b>45</b> 137:16 174:5 <b>46</b> 174:5 <b>47</b> 174:14  <hr/> <b>5</b> <hr/> <b>5</b> 10:7 11:2,7 17:22 20:3,16 34:7 91:13 92:21 103:25 104:1 <b>5(1)B</b> 55:22 <b>5(2)</b> 53:2,15 55:1 55:8,10 56:14 57:17 <b>5(2)A</b> 80:9 <b>5.1</b> 34:8 101:1 <b>5.1(b)</b> 111:8,9 112:15 117:14 118:6,11,20 119:10 121:6 <b>5.2</b> 101:16 104:3 104:5,6,20,21 <b>50</b> 36:18 137:16 <b>500</b> 60:1 <b>500,000</b> 28:15,23 29:2,3 <b>51</b> 138:23 <b>52</b> 70:17 125:18 <b>53</b> 70:17 174:5 <b>56</b> 143:24 <b>58</b> 138:23 <b>59</b> 139:14  <hr/> <b>6</b> <hr/> <b>6.28</b> 34:9 <b>60</b> 49:7 139:15 <b>61</b> 139:15 <b>65</b> 176:4 <b>66</b> 30:21 81:24 <b>67</b> 4:3 81:24 98:10 <b>69</b> 82:23 114:7 139:15	<hr/> <b>7</b> <hr/> <b>7</b> 46:21 105:8 106:8 109:4 148:18 149:24 <b>7(d)</b> 101:13,18 117:23 134:3 <b>7(e)</b> 102:14 134:8 135:5 <b>72</b> 95:8 125:11 125:19,21 <b>74</b> 4:19 5:7 6:8 8:8 11:13 32:8 33:21 38:16 52:21 53:11,24 54:5,10 57:23 59:15 60:24,25 63:13,14 66:22 66:25 67:2 143:3,6,7 145:21 150:25 151:3 155:10 165:7 168:2 169:20 170:5 171:9 <b>747</b> 144:8 <b>747769</b> 34:11  <hr/> <b>8</b> <hr/> <b>8</b> 3:4 6:21 7:25 10:13 17:25 28:4 46:22 149:11,15 158:13 159:4 <b>81</b> 2:13 143:17 <b>82</b> 143:2 <b>85</b> 143:2 <b>88</b> 2:13  <hr/> <b>9</b> <hr/> <b>90</b> 51:7 <b>900,000</b> 28:24 <b>91</b> 151:8 <b>96</b> 75:12 <b>99</b> 50:12				
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