

<p>1 Tuesday, 19 November 2013</p> <p>2 (10.30 am)</p> <p>3 Submissions by MR ISAACS (continued)</p> <p>4 MR JUSTICE DAVID RICHARDS: Good morning, Mr Isaacs.</p> <p>5 MR ISAACS: Good morning, my Lord. I was on the second of</p> <p>6 my five points and I was addressing whether LBHI2's</p> <p>7 potential section 74 liability is a contingent liability</p> <p>8 of LBHI2 in LBIE's administration.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR ISAACS: In that context, I was seeking to establish the</p> <p>11 important difference between a contractual liability to</p> <p>12 pay unpaid capital and a statutory liability to</p> <p>13 contribute under section 74. It was in that context</p> <p>14 that I was taking your Lordship to the Court of Appeal</p> <p>15 case <i>Re Pyle Works</i>, which is at 1A, tab 34.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TRACE: We have seen this once or twice so we can go</p> <p>18 straight to the relevant passage, which is at 574 in the</p> <p>19 judgment of Lord Justice Cotton. I pick it up</p> <p>20 two-thirds of the way down in the paragraph that begins,</p> <p>21 "But it was said ..."</p> <p>22 The second sentence reads:</p> <p>23 "It was argued that the liability to contribute to</p> <p>24 the assets of the company in the 38 section of the Act</p> <p>25 is something entirely different from a call made by the</p> <p style="text-align: center;">Page 1</p>	<p>1 MR ISAACS: Then, at 584:</p> <p>2 "There being no prohibition in term against</p> <p>3 mortgaging unpaid up capital, is such a transaction</p> <p>4 forbidden by necessary implication; that is are there</p> <p>5 provisions in the Act to which full effect cannot be</p> <p>6 given if such a transaction is un-held? I can find</p> <p>7 none. Those moneys which are payable only on a</p> <p>8 winding-up and which, by the Act, are excluded from the</p> <p>9 capital of the company are never under the control of</p> <p>10 the directors and cannot, I apprehend, be dealt with in</p> <p>11 any way by them. Those moneys form a statutory fund</p> <p>12 which only comes into existence when the company is in</p> <p>13 liquidation; that is to say when the powers of the</p> <p>14 directors have ceased. But unpaid up capital is in</p> <p>15 a totally different position. The liability to pay it</p> <p>16 up does not depend on the contingency of the</p> <p>17 liquidation", and so on.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR ISAACS: We submit, my Lord, that the administrators are</p> <p>20 in exactly the same position as directors in the</p> <p>21 material respects discussed in <i>Pyle Works</i>. In</p> <p>22 particular, a call on a contributory of an unlimited</p> <p>23 company under section 74 is payable only in</p> <p>24 a winding-up, it's never under the control of the</p> <p>25 administrators and cannot be dealt with in any way by</p> <p style="text-align: center;">Page 3</p>
<p>1 directors before the winding-up and that a call made</p> <p>2 after the winding-up has commenced is not to be</p> <p>3 considered as a call on part of the capital of the</p> <p>4 company. In my opinion, that view is wrong as regards</p> <p>5 a case like this. We are considering the case of a call</p> <p>6 made in the winding-up of a limited company, not of</p> <p>7 a company limited by guarantee nor of an unlimited</p> <p>8 company. In the case of an unlimited company or of</p> <p>9 a guarantee company, what can be called in for in the</p> <p>10 winding-up may not be, and I think is not, considered as</p> <p>11 part of the capital of the company."</p> <p>12 Then Lord Justice Lindley's judgment can be picked</p> <p>13 up at page 582. About a third of the way down the page,</p> <p>14 the sentence starts, "The power conferred by the</p> <p>15 Articles of the company ..." Does your Lordship have</p> <p>16 that?</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR ISAACS: "The power conferred by the Articles of the</p> <p>19 company to call up or to mortgage or otherwise deal with</p> <p>20 its capital extends to its nominal capital and, unless</p> <p>21 restricted in terms, to the whole of such capital, but</p> <p>22 such a power does not extend to other moneys which,</p> <p>23 although raisable in the event of a winding-up, form no</p> <p>24 part of the capital of the company."</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 2</p>	<p>1 them. Those moneys called by the liquidators form a</p> <p>2 statutory fund which only comes into existence when the</p> <p>3 company is in liquidation. Your Lordship has seen that</p> <p>4 two of their Lordships in <i>Re Pyle Works</i> said that the</p> <p>5 statutory liability was owed to the company rather than</p> <p>6 to the liquidator.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ISAACS: We respectfully submit that the views of</p> <p>9 Lord Jessel, Master of the Rolls, and Mr Justice Fry to</p> <p>10 the contrary should be preferred. I have taken you to</p> <p>11 those cases, my Lord.</p> <p>12 Your Lordship recalls that was <i>Whitehouse</i>, the</p> <p>13 Master of the Rolls, and <i>Branwhite</i>. We say that that</p> <p>14 view of the Master of the Rolls and Mr Justice Fry is</p> <p>15 supported by consideration of the relevant statutory</p> <p>16 provisions to which I have taken your Lordship, but that</p> <p>17 even if it's wrong and even if the view in <i>Re Pyle Works</i></p> <p>18 is correct, the distinction remains that the statutory</p> <p>19 liability, unlike the contractual liability, is</p> <p>20 a liability to contribute to the statutory fund, using</p> <p>21 the term used by Lord Justice Lindley. That view is, we</p> <p>22 submit, supported by more recent jurisprudence which</p> <p>23 draws a distinction between the assets which are the</p> <p>24 property of the company at the time of the commencement</p> <p>25 of the liquidation and the rights and powers of the</p> <p style="text-align: center;">Page 4</p>

<p>1 liquidator to recover assets which arose only after the 2 liquidation.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR ISAACS: We submit that that distinction is apt to apply 5 to the difference between, on the one hand, the 6 contractual right to make calls for unpaid capital, 7 which is an asset of the company at the time of the 8 commencement of the liquidation, and the statutory right 9 of the liquidator to call for a contribution under 10 section 74, which is a right or power of the liquidator 11 to recover assets which only arose after the 12 commencement of the liquidation. The distinction I 13 referred to was made by the Court of Appeal in Oasis 14 Merchandising in relation to the proceeds of an action 15 for wrongful trading. The case is at bundle 1C, tab 74.</p> <p>16 If your Lordship would please turn to page 182, the 17 judgment of Lord Justice Peter Gibson, your Lordship 18 sees at the top he refers to --</p> <p>19 MR JUSTICE DAVID RICHARDS: Just remind me, the issue here 20 was -- I will just quickly read the headnote.</p> <p>21 MR ISAACS: Thank you.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes, thank you.</p> <p>23 MR ISAACS: Your Lordship sees from the headnote that this 24 case involved an attempt by the liquidator to sell the 25 proceeds of an action for wrongful trading. In this</p> <p style="text-align: center;">Page 5</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, you would have thought 2 liquidation, wouldn't you?</p> <p>3 MR ISAACS: Liquidation, yes -- "and property representing 4 the same and property which is subsequently acquired by 5 the liquidator through the exercise of rights conferred 6 on him alone by statute and which is to be held on 7 statutory trust for distribution by the liquidator.</p> <p>8 A similar distinction is drawn in Re Ayala Holdings 9 number 2. In that case, Mr Justice Knox was concerned 10 with the effectiveness of an assignment by the 11 liquidator to a creditor of all rights to and chose in 12 action relating to or in any way arising out of or in 13 connection with an action against a secured creditor. 14 The rights purportedly assigned included the right to 15 certain dispositions of the company's property were void 16 under section 127 and charges were void under 17 section 395 of the Companies Act."</p> <p>18 Then, over the page, there is a quotation from 19 Mr Justice Knox where he says this:</p> <p>20 "In my judgment, the assignee's argument overlooks 21 an important distinction between property of the 22 company, on the one hand, and the rights and powers of 23 a liquidator, on the other. The property of a company 24 includes rights of action against third parties vested 25 in the company at the commencement of the winding-up and</p> <p style="text-align: center;">Page 7</p>
<p>1 case, it was held that even the liquidator couldn't do 2 that. So it's obviously distinguishable from the case 3 we are talking about where I am saying that the 4 liquidator can do something and the directors and the 5 administrator cannot. The reason I rely on it is for 6 the distinction that is drawn at page 182. Your 7 Lordship sees that there is a reference to MC Bacon.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ISAACS: At the top, may it please your Lordship, will 10 you read from B to E.</p> <p>11 MR JUSTICE DAVID RICHARDS: Certainly. Yes, I have read 12 that.</p> <p>13 MR ISAACS: Picking it up between E and F, it is said Mr 14 Wright accepted that Mr Justice Millett correctly 15 recognised that a claim under section 214 was not an 16 asset of the company, but submitted the decision did not 17 affect the question whether the proceeds of a claim were 18 included in the company's property.</p> <p>19 Then the learned Lord Justice said:</p> <p>20 "Mr Justice Robert Walker thought that the reasoning 21 of Mr Justice Millett was general in its application and 22 followed it. We respectfully agree, supporting, as it 23 does, the distinction which we would draw between the 24 property of the company at the commencement of the 25 litigation" -- that must be --</p> <p style="text-align: center;">Page 6</p>	<p>1 to that extent the principles in Ramsey v Hartley 2 undoubtedly apply. What is to be distinguished, in my 3 view, are the statutory privileges and liberties 4 conferred upon liquidators as such and indeed upon 5 trustees in bankruptcy, who are officers of the court 6 and under the court's direction."</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ISAACS: Now, my Lord, what one sees is in fact that the 9 analysis in Oasis Merchandising is not that different 10 from the analysis in Pyle Works and the cases I referred 11 your Lordship to in the context of section 74, although 12 those cases were not referred to here. But we say the 13 distinction is consistent, and it was made 100 years ago 14 and it's been re-enforced more recently. We say the 15 distinctions that I have referred to, and I started off 16 with five of them, inform the fact that neither of the 17 two conditions which I referred your Lordship to from Re 18 Nortel, in the context of deciding whether a liability 19 is a contingent liability, are met.</p> <p>20 I will turn to that now. The first of those two was 21 the relationship between the putative creditor and the 22 putative debtor. What's said against us is that the 23 relationship is constituted by the relationship of 24 contributory and company, and that's sufficient to 25 create that relationship and the contingent liability.</p> <p style="text-align: center;">Page 8</p>

<p>1 MR JUSTICE DAVID RICHARDS: Is it contributory company or</p> <p>2 member? I mean --</p> <p>3 MR ISAACS: The strict answer to that, my Lord, is it's</p> <p>4 contributory in this sense: that whether or not a member</p> <p>5 is a contributory is, on the law, determined by whether</p> <p>6 or not he is liable to pay in the event that there is</p> <p>7 a call. So the strict answer would be contributory.</p> <p>8 But for my submission it does not actually make any</p> <p>9 difference. It is the case your Lordship may remember</p> <p>10 which refers to Jumbo in the porch and the analysis is</p> <p>11 the porch is called Jumbo because that is where the</p> <p>12 elephant would be if he were here. So a contributory is</p> <p>13 somebody who is liable to contribute if he's asked to.</p> <p>14 MR JUSTICE DAVID RICHARDS: What I had in mind when asking</p> <p>15 the question is that until a company goes into</p> <p>16 liquidation, and leaving aside the special position of</p> <p>17 a contributory's winding-up position, I am not sure the</p> <p>18 relationship of company and contributory exists. What</p> <p>19 can be said is that somebody is a member of a company,</p> <p>20 let's say an unlimited company, and therefore if the</p> <p>21 company goes into liquidation and if he is still</p> <p>22 a member, or was within 12-months a member, he will be</p> <p>23 a contributory. That's all I had in mind when saying</p> <p>24 that.</p> <p>25 MR ISAACS: Indeed, my Lord. I understood that. Of course</p> <p style="text-align: center;">Page 9</p>	<p>1 employer to the unmarried spouse under the Fatal</p> <p>2 Accidents Act. I am obviously taking this from the T&N</p> <p>3 case. We don't need to go there. The reference is 1C,</p> <p>4 83, 595D. But as your Lordship pointed out there, the</p> <p>5 relationship between the employer and the unmarried</p> <p>6 spouse is insufficient to constitute the relationship of</p> <p>7 debtor and creditor or contingent relationship there,</p> <p>8 because she doesn't have the right status, she is</p> <p>9 unmarried to him. She will only fall within the Fatal</p> <p>10 Accidents Act when she becomes a wife and then she is</p> <p>11 within the scope of the statute. But until she becomes</p> <p>12 a wife and she is an unmarried spouse, she is not within</p> <p>13 the scope so the necessary relationship does not exist.</p> <p>14 Now, the wife exists and the employer exists.</p> <p>15 Sorry, the woman who would become the wife exists. The</p> <p>16 individual exists, that individual exists, but at the</p> <p>17 time she --</p> <p>18 MR JUSTICE DAVID RICHARDS: She does not have the status of</p> <p>19 being a wife.</p> <p>20 MR ISAACS: It's exactly analogous here, where the company</p> <p>21 exists but the company in liquidation doesn't exist and</p> <p>22 the liquidator doesn't have that role.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR ISAACS: We say they are analogous. So that is the first</p> <p>25 point on the first condition.</p> <p style="text-align: center;">Page 11</p>
<p>1 in one sense I completely agree because, as I said</p> <p>2 yesterday, our submission is that the section 74</p> <p>3 liability doesn't exist until the winding-up.</p> <p>4 MR JUSTICE DAVID RICHARDS: Sure.</p> <p>5 MR ISAACS: The strict answer to your Lordship's question is</p> <p>6 the case that I referred to. It's called Anglesea</p> <p>7 Colliery. It's in the Court of Appeal. It's not in the</p> <p>8 bundle, but it does make the point that the</p> <p>9 contributories are those who are liable if there is</p> <p>10 a call.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR ISAACS: So we say that the relationship constituted</p> <p>13 between the company and the contributory or the company</p> <p>14 and the member, it really doesn't matter for present</p> <p>15 purposes, is not sufficient because the requisite</p> <p>16 relationship is between the contributory and the</p> <p>17 liquidator. That relationship does not exist, by</p> <p>18 definition, until there is a liquidator.</p> <p>19 There is an analogy that can be drawn, my Lord, to</p> <p>20 the relationship between an unmarried spouse of an</p> <p>21 employee who has contracted mesothelioma as a result of</p> <p>22 a negligent exposure to asbestos by his employer. Now,</p> <p>23 if that happens the employer and the unmarried spouse</p> <p>24 both exist, but the relationship is insufficient to</p> <p>25 generate a contingent liability on the part of the</p> <p style="text-align: center;">Page 10</p>	<p>1 The second point we make is that the third condition</p> <p>2 in Re Nortel is not satisfied either. We say that's the</p> <p>3 case because --</p> <p>4 MR JUSTICE DAVID RICHARDS: Just remind me, the third</p> <p>5 condition being?</p> <p>6 MR ISAACS: The third condition is that it must be</p> <p>7 consistent with the regime for imposing a liability that</p> <p>8 it gives rise to a contingent liability which is</p> <p>9 provable. So one looks at the regime for imposing the</p> <p>10 particular liability in question and says is it</p> <p>11 consistent with that that it gives rise to a contingent</p> <p>12 liability? We say not, for three reasons. I will take</p> <p>13 them in turn. The first is that the statutory</p> <p>14 provisions creating the liability under section 74</p> <p>15 provide that a call for that liability can only be made</p> <p>16 and enforced by a liquidator.</p> <p>17 Now, there are several, my Lord, and it might be</p> <p>18 helpful if I just quickly canter through them, going</p> <p>19 through the provisions, starting with section 74. There</p> <p>20 are eight different provisions or groups of provisions</p> <p>21 I will go through. The first point I wish to make is</p> <p>22 the location of section 74, which finds itself in</p> <p>23 chapter 1 of part 4 of the Insolvency Act, which is</p> <p>24 entitled "Winding-up of companies registered under the</p> <p>25 Companies Act".</p> <p style="text-align: center;">Page 12</p>

<p>1 The second point is that section 73(2) provides that 2 this chapter, which includes section 73 to 83, relate to 3 winding-up generally except otherwise stated. 4 MR JUSTICE DAVID RICHARDS: Where are you reading? 5 MR ISAACS: Section 73(2). 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR ISAACS: Is your Lordship reading a different version, 8 my Lord? 9 MR JUSTICE DAVID RICHARDS: I have the Red Book here. 10 MR ISAACS: Yes. I have the blue one, my Lord. I think the 11 section may have changed actually between -- has it not? 12 You have a section -- 13 MR JUSTICE DAVID RICHARDS: 2009 -- hold on. 14 MR ISAACS: Do you have a section 73(3)? 15 MR JUSTICE DAVID RICHARDS: I do. 16 MR ISAACS: Yes. I think that's disappeared. But the 17 important point is section 73(2). 18 MR JUSTICE DAVID RICHARDS: You say that's -- hold on. 19 MR ISAACS: Yes, I think it's disappeared, section 73(3), 20 but it's not that bit that I am relying on anyway. 21 MR JUSTICE DAVID RICHARDS: All right. 22 MR ISAACS: At the relevant time, it was section 73(2) which 23 provided this chapter and chapters 7 to 10 relate to 24 winding-up generally, except where otherwise stated. 25 MR JUSTICE DAVID RICHARDS: I am trying to think -- anyway,</p> <p style="text-align: center;">Page 13</p>	<p>1 The fifth one is section 149(1): 2 "The court may, at any time after making 3 a winding-up order, make an order on any contributory." 4 The sixth one is section 150(1). 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR ISAACS: "The court may, at any time after making 7 a winding-up order, make calls ..." 8 The seventh provision or group of provisions starts 9 at section 160. This is delegation of powers to a 10 liquidator. 11 "Provision may be made for enabling or requiring all 12 or any of the powers conferred and imposed on the court 13 by the Companies Act in respect of the following 14 matters." 15 Your Lordship sees under (b), "The settling of lists 16 of contributories", and your Lordship sees under (d), 17 "The making of calls". 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR ISAACS: Subsection 2: 20 "The liquidator shall not, without the special leave 21 of the court, rectify the register and shall not make 22 any call without either the special leave or the 23 sanction of the Liquidation Committee." 24 Then, also within this seventh point, section 165, 25 involuntary winding-up, subsection 165(4):</p> <p style="text-align: center;">Page 15</p>
<p>1 there it is. At the moment it's stated to be 73(3). 2 MR ISAACS: At the moment it is, yes. 3 MR JUSTICE DAVID RICHARDS: You think it's changed. 4 MR ISAACS: It has. It's in the bundle I am using. It's in 5 volume 2, tab 12, one sees the one at the time, but it 6 doesn't matter, my Lord. 7 MR JUSTICE DAVID RICHARDS: I see, at the time of the 8 commencement of this administration. 9 MR ISAACS: Yes, I am sorry, my Lord. 10 MR JUSTICE DAVID RICHARDS: Sorry, yes, that is given in 11 small type here actually. 12 MR ISAACS: Yes, all the provisions that are relevant are 13 the old ones. 14 MR JUSTICE DAVID RICHARDS: I follow. Thank you. Yes. 15 MR ISAACS: The third provision is section 74(1) itself, 16 which commences with the words, "When a company is wound 17 up ..." 18 Then one goes to section 148, the fourth provision. 19 This is the settlement of the list, which is important, 20 my Lord, because it's a precursor to a call. It's 21 a necessary precursor to a call. One sees that from the 22 timing reference here: 23 "As soon as may be after making a winding-up order 24 the court shall settle the list." 25 So again there is a reference to the winding-up.</p> <p style="text-align: center;">Page 14</p>	<p>1 "The liquidator may exercise the court's power of 2 settling a list of contributories ... exercise the 3 court's power of making calls." 4 165.5: 5 "The liquidator shall pay the company's debts and 6 adjust the rights of the contributories amongst 7 themselves." 8 Then on to the rules as part of the seventh point, 9 starting with rule 4.195. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR ISAACS: This is part of chapter 16 which prescribes the 12 provisions governing the settlement of the list. We 13 rely on all of these, but just to draw your Lordship's 14 attention to one or two particular points. At 4.195, 15 the duties of the courts with regards to the settling of 16 the list are delegated to the liquidator. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR ISAACS: At 4.196(1): 19 "Subject as follows, the liquidator shall as soon as 20 may be after his appointment exercise the court's power 21 to settle the list." 22 At 4.196(2): 23 "The liquidator's duties are performed by him as an 24 officer of the court." 25 Then at 4.198(3) one sees that there are provisions,</p> <p style="text-align: center;">Page 16</p>

<p>1 for example, allowing objectors to inform the</p> <p>2 liquidator. 4.199, which allows a person to apply to</p> <p>3 the court to vary the list.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ISAACS: Finally, schedule 4, part 1, paragraph 3 of the</p> <p>6 Act:</p> <p>7 "Power to compromise on such terms as may be agreed</p> <p>8 all calls and liabilities to calls."</p> <p>9 Does your Lordship have that?</p> <p>10 MR JUSTICE DAVID RICHARDS: Sorry, schedule 4?</p> <p>11 MR ISAACS: Schedule 4 to the Act, part 1, "Powers</p> <p>12 exercisable with sanction", paragraph 3.</p> <p>13 MR JUSTICE DAVID RICHARDS: This is in a case of</p> <p>14 a winding-up in Scotland it says. Ah, is this another</p> <p>15 of these changes?</p> <p>16 MR ISAACS: Sadly, it is.</p> <p>17 MR JUSTICE DAVID RICHARDS: Anyway, so I should look at it</p> <p>18 in volume 2, should I?</p> <p>19 MR ISAACS: Yes. Does your Lordship have it in 2?</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes, I see. It is tab 15, isn't</p> <p>21 it? Sorry, do you know where it is in this?</p> <p>22 MR ISAACS: My Lord, I am not sure it is in there. Can</p> <p>23 I tell your Lordship what it says and we will sort it</p> <p>24 out or provide you with copies.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes, certainly. I mean, it</p> <p style="text-align: center;">Page 17</p>	<p>1 thirdly, to enforce calls; fourthly, to compromise calls</p> <p>2 and liabilities to calls; all of which powers are given</p> <p>3 to the liquidator. The administrator does, however,</p> <p>4 have an express power to call up unpaid capital. One</p> <p>5 sees that in schedule 1, paragraph 19. We see that that</p> <p>6 is a very different animal from the statutory liability</p> <p>7 under section 74.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ISAACS: We say the fact that the administrator has that</p> <p>10 power, expressly that power but not the other power, is</p> <p>11 very telling because he doesn't have it.</p> <p>12 Furthermore, your Lordship has been referred to</p> <p>13 section 80. If you remember, that's the provision that</p> <p>14 states the liability to contribute is payable when calls</p> <p>15 are made for enforcing the liability. Your Lordship</p> <p>16 asked me a question about that yesterday.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, I did.</p> <p>18 MR ISAACS: Now, we submit that what is important about that</p> <p>19 provision is that the call is payable when calls are</p> <p>20 made for enforcing the liability. The emphasis there is</p> <p>21 on enforcement. The way that a liability -- the court's</p> <p>22 powers to enforce are made is by the liquidator. It's</p> <p>23 only the liquidator who can enforce. So it can only be</p> <p>24 payable at a time when the liquidator makes a call for</p> <p>25 enforcing the liability.</p> <p style="text-align: center;">Page 19</p>
<p>1 looks as if the words, "In the case of a winding-up in</p> <p>2 Scotland, power" have been added.</p> <p>3 MR ISAACS: Yes, I was not going to make a point about</p> <p>4 Scotland, my Lord.</p> <p>5 MR JUSTICE DAVID RICHARDS: No, I appreciate that.</p> <p>6 MR ISAACS: Can I just tell your Lordship what the point is</p> <p>7 and then I will provide the document later.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>9 MR ISAACS: It's this. Under paragraph 3 of part 1, which</p> <p>10 is "Powers exercisable with sanction", there is a power</p> <p>11 to compromise on such terms as may be agreed all call</p> <p>12 and all liabilities to calls.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR ISAACS: And to take security for the discharge of any</p> <p>15 such call. That is all I was going to say on that</p> <p>16 point, my Lord. It's a small point. But they are the</p> <p>17 eight provisions or groups of provisions that make it</p> <p>18 very clear that this is a power of the court exercised</p> <p>19 by the liquidator.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR ISAACS: There is a very extensive scheme which provides</p> <p>22 for the court's power to be exercised by the liquidator.</p> <p>23 In contrast, the Acts and the rules give the</p> <p>24 administrator no powers whatsoever: firstly, to settle</p> <p>25 a list of contributories; secondly, to make calls;</p> <p style="text-align: center;">Page 18</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, but I think what I am</p> <p>2 wondering is whether, when section 80 refers to the</p> <p>3 liability accruing due from him at the time when his</p> <p>4 liability commenced, that may not be a reference to</p> <p>5 settling the list of contributories.</p> <p>6 MR ISAACS: At a time when his liability commences.</p> <p>7 MR JUSTICE DAVID RICHARDS: Your liability to contribute. I</p> <p>8 am just wondering whether that is a reference to the</p> <p>9 settlement of the list of contributories. You are on</p> <p>10 the list of contributories. I think you probably have</p> <p>11 rights of appeal to take you off. You exhaust those.</p> <p>12 You are on the list and that is when your liability as</p> <p>13 a contributory commences, but there is no debt payable</p> <p>14 unless and until a call is made. It may not be</p> <p>15 necessary to make a call.</p> <p>16 MR ISAACS: My Lord, that's a submission that would fit</p> <p>17 entirely with everything I have said.</p> <p>18 MR JUSTICE DAVID RICHARDS: It would, I appreciate that.</p> <p>19 MR ISAACS: So I gratefully accept that.</p> <p>20 MR JUSTICE DAVID RICHARDS: I am just floating it as</p> <p>21 a possibility.</p> <p>22 MR ISAACS: Whatever one does with something that is</p> <p>23 floating, I catch it. In fairness to my learned friend,</p> <p>24 I should say that there is a decision of the House of</p> <p>25 Lords called Harding, which was decided in the 1850s,</p> <p style="text-align: center;">Page 20</p>

<p>1 which is to the contrary of that. Now, what that said</p> <p>2 is that the liability accrues from the date when the</p> <p>3 relationship of member is incurred; that's to say when</p> <p>4 the shares are purchased.</p> <p>5 MR JUSTICE DAVID RICHARDS: I see. We do not have that in</p> <p>6 the bundle.</p> <p>7 MR ISAACS: Yes, it is in the bundle, my Lord.</p> <p>8 MR TROWER: It's in our argument, my Lord. Actually we</p> <p>9 didn't spend very long on it.</p> <p>10 MR JUSTICE DAVID RICHARDS: Did you take me to it?</p> <p>11 MR TROWER: I cannot remember whether I did or not.</p> <p>12 MR JUSTICE DAVID RICHARDS: So it's in 1A.</p> <p>13 MR TROWER: It's in 1A, yes, behind tab 8, my Lord.</p> <p>14 MR JUSTICE DAVID RICHARDS: Thank you. I see, 1866. Yes,</p> <p>15 I think you did take me to it.</p> <p>16 MR ISAACS: Let me say this about this, my Lord. I was not</p> <p>17 proposing to address your Lordship on it.</p> <p>18 MR JUSTICE DAVID RICHARDS: No. Yes, sorry.</p> <p>19 MR ISAACS: The reason I wasn't proposing to address your</p> <p>20 Lordship on it is because I don't need to; it's not part</p> <p>21 of my case.</p> <p>22 MR JUSTICE DAVID RICHARDS: No.</p> <p>23 MR ISAACS: It's not therefore a problem. But I would say</p> <p>24 this, as your Lordship has raised the point. This was</p> <p>25 a case that was not decided under the 1862 Act. It</p> <p style="text-align: center;">Page 21</p>	<p>1 such thing as limited liability for members of</p> <p>2 a company; that only came in in the 1850s. So quite</p> <p>3 what the regime was I simply don't know under --</p> <p>4 MR ISAACS: My Lord, I can assist on that.</p> <p>5 MR JUSTICE DAVID RICHARDS: Thank you. Yes.</p> <p>6 MR ISAACS: It was a completely different system. It</p> <p>7 appears that it was at the discretion of the judges as</p> <p>8 to the extent of the liability.</p> <p>9 MR JUSTICE DAVID RICHARDS: Right, but it was an unlimited</p> <p>10 liability. There was no limit on liability introduced</p> <p>11 until the 1856 Act.</p> <p>12 MR ISAACS: I believe that is right, yes. It was limited to</p> <p>13 I think originally, my Lord, debts and expenses. It's</p> <p>14 not exactly the same wording.</p> <p>15 MR JUSTICE DAVID RICHARDS: I don't know, was the mechanism</p> <p>16 similar though; that it was only a call in a winding-up?</p> <p>17 MR ISAACS: Yes, but the amount had to be set by the Master.</p> <p>18 MR JUSTICE DAVID RICHARDS: It had to be set by the Master.</p> <p>19 Yes, I see. Right. Okay.</p> <p>20 MR ISAACS: The other authority relied on by my learned</p> <p>21 friend is also in the same period. It's tab 6. It's a</p> <p>22 judgment called Ex Parte Canwell.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, a similar period. I see,</p> <p>24 yes. I mean, the headnote there supports Mr Trower's</p> <p>25 proposition.</p> <p style="text-align: center;">Page 23</p>
<p>1 pre-dates that case. There was a very substantial and</p> <p>2 material change in relation to the liability under</p> <p>3 what's become section 74 that was introduced by the 1862</p> <p>4 Act. At the time of this decision, that was not</p> <p>5 relevant and it's therefore distinguishable. The best</p> <p>6 that can be said for this case is the dictum that</p> <p>7 appears at the very end of the case in the speech of</p> <p>8 Lord Kingsdown. It's on page 29.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes, I think Mr Trower took me</p> <p>10 to this actually.</p> <p>11 MR ISAACS: It's the paragraph which says:</p> <p>12 "The 1862 Act has removed any doubt by declaring</p> <p>13 that the call shall constitute a debt as from the time</p> <p>14 when the liability was contracted. I do not consider</p> <p>15 that declaration has an alteration of existing law."</p> <p>16 MR JUSTICE DAVID RICHARDS: I see.</p> <p>17 MR ISAACS: Now, he alone said that.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR ISAACS: We would submit that that is not correct, but</p> <p>20 certainly there is no question of there being any</p> <p>21 considered decision on this point more recently.</p> <p>22 There is one other authority --</p> <p>23 MR JUSTICE DAVID RICHARDS: I mean, it's fair to point out</p> <p>24 that the company here was wound up under the winding-up</p> <p>25 Acts of 1848 to 1849. Now, at that time there was no</p> <p style="text-align: center;">Page 22</p>	<p>1 MR ISAACS: It does, and one sees that the judgment is</p> <p>2 exiguous.</p> <p>3 MR JUSTICE DAVID RICHARDS: It is.</p> <p>4 MR ISAACS: It starts at the bottom of the page. The</p> <p>5 learned Lord Chancellor says:</p> <p>6 "It is difficult to tell when the liability referred</p> <p>7 to is to be considered as commencing."</p> <p>8 Does your Lordship see that about a third of the way</p> <p>9 down?</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes. This is the section we are</p> <p>11 concerned with here, is it?</p> <p>12 MR ISAACS: Yes.</p> <p>13 "For my present impression is that the legislature</p> <p>14 must be held to considerations relating back."</p> <p>15 Then the Lord Chancellor went away and thought about</p> <p>16 it and came back and said he had not changed his mind:</p> <p>17 "Upon further consideration, I adhere to the opinion</p> <p>18 which I expressed at the conclusion of the arguments."</p> <p>19 MR JUSTICE DAVID RICHARDS: I see.</p> <p>20 MR ISAACS: It's difficult to find a shorter judgment than</p> <p>21 that, my Lord.</p> <p>22 MR JUSTICE DAVID RICHARDS: No, indeed. This again clearly</p> <p>23 was a case under the pre-existing old law, was it the</p> <p>24 1845 Act?</p> <p>25 MR ISAACS: 1845 or 1846. No, I think this was --</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 MR JUSTICE DAVID RICHARDS: The company was registered under 2 that. 3 MR ISAACS: Yes. I think this is the 1862 Act. 4 MR JUSTICE DAVID RICHARDS: But it's part 8. It's an 5 unregistered company being wound up. 6 MR ISAACS: Yes. Your Lordship sees that there is 7 a reference to the 1862 act in the footnote, footnote 2. 8 MR JUSTICE DAVID RICHARDS: I think we are told on the first 9 page, in the paragraph just above the hole punch: 10 "The respondent, who was a non-trader, was an 11 original shareholder in the company which was being 12 wound up as an unregistered company." 13 MR ISAACS: Yes. But, in any event, my Lord, there is no 14 argument here and there is no reasoning. 15 MR JUSTICE DAVID RICHARDS: No. Anyway, yes, thank you, 16 I can see -- 17 MR ISAACS: In fairness, that is why my learned friend says 18 what he does. I do say, if necessary, that that's wrong 19 for the reason your Lordship has floated. But even 20 if it's not, it doesn't matter. 21 The distinction between the powers of the liquidator 22 and the company acting by its directors, or 23 administrator for that matter, are similar in kind to 24 the reason Lord Neuberger gave for considering it fair 25 and appropriate that a liability under a contribution</p> <p style="text-align: center;">Page 25</p>	<p>1 would be payable if LBIE were in liquidation, that is 2 what the system provides, rather than in administration 3 where it's not payable at all, but of course that's what 4 the legislature intended. That's the first point, 5 my Lord. 6 The second is that the provisions relating to calls 7 under section 74, calls for the section 74 liability, 8 contain protections for creditors and contributories 9 which only apply in a winding-up. Now, these provisions 10 are absent in an administration which shows that the 11 legislature did not intend that section 74 liability 12 should be payable to a company in administration. 13 MR JUSTICE DAVID RICHARDS: Yes. I mean, I don't think 14 there is any dispute about that though, is there? It's 15 not suggested that it's payable to a company in 16 administration. 17 MR ISAACS: Well, your Lordship says there is no dispute. 18 In one sense, that's correct. But what we would say is, 19 in effect, what's happening by proving for a call is 20 that effectively a call is being made. They might not 21 call it a call but it is a call. It is a call by 22 another name. 23 MR JUSTICE DAVID RICHARDS: I have a feeling I jotted down 24 at the very start we are actually -- the headline issue 25 we are on at the moment, am I right, is whether the</p> <p style="text-align: center;">Page 27</p>
<p>1 notice would be provable. I went through that at the 2 beginning. I don't know if your Lordship remembers. 3 I referred to the four or five reasons. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR ISAACS: One of the reasons was at paragraph 63 of the 6 Nortel judgment where Lord Neuberger said that it wasn't 7 provable that liability would otherwise go unpaid in an 8 administration or liquidation. Does your Lordship 9 recall that? 10 MR JUSTICE DAVID RICHARDS: I do, yes, or would be 11 postponed. 12 MR ISAACS: Yes, this particular point is that it was 13 completely unpaid. 14 MR JUSTICE DAVID RICHARDS: He said effectively he couldn't 15 basically see why it should either rank ahead or below 16 the general body of creditors; is that the point you are 17 on? 18 MR ISAACS: Yes, effectively. This is the point about it 19 will be below. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR ISAACS: It would effectively go unpaid, he said. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR ISAACS: Now, we say in this case that sort of 24 consideration is material but it's the complete 25 opposite, because in this case the section 74 liability</p> <p style="text-align: center;">Page 26</p>	<p>1 administrator or LBIE acting by its administrators could 2 prove in an administration or indeed in a liquidation of 3 LBHI2 or indeed LBL? Is that the right way round? Is 4 that what we are addressing really? 5 MR ISAACS: We are addressing whether, yes, LBIE in 6 administration can make a claim against LBHI2. 7 MR JUSTICE DAVID RICHARDS: Exactly. Can LBIE in 8 administration make a claim or lodge a proof. 9 MR ISAACS: Or lodge a proof. 10 MR JUSTICE DAVID RICHARDS: Yes, make a claim or lodge 11 a proof, or I think it would have to be lodge. 12 MR ISAACS: Yes, against LBHI2. 13 MR JUSTICE DAVID RICHARDS: Against LBHI2. 14 MR ISAACS: Now, your Lordship will appreciate -- 15 MR JUSTICE DAVID RICHARDS: And LBL. There is no 16 distinction, is there? 17 MR ISAACS: There is no distinction. 18 MR JUSTICE DAVID RICHARDS: Sorry, I think I have just 19 jotted it the wrong way round. 20 MR ISAACS: No, but what's important there, my Lord, is you 21 will appreciate the submissions I am making, if correct, 22 apply against LBHI2 whether it is in administration or 23 in liquidation or neither. 24 MR JUSTICE DAVID RICHARDS: Well, I don't -- yes, well. 25 MR ISAACS: Because the point I am making is that everything</p> <p style="text-align: center;">Page 28</p>

7 (Pages 25 to 28)

<p>1 turns on the status of LBIE. My point is that if LBIE 2 is in liquidation one has this liability; if it's not 3 one doesn't, and that's the end of the story. On the 4 other hand, my learned friends say, "No, it turns on the 5 status of LBHI2 and it's the fact there is 6 a distributive administration or a liquidation of LBHI2 7 which is enough." I say that's looking at it from the 8 wrong end of the telescope.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes, I follow that.</p> <p>10 MR ISAACS: The other point --</p> <p>11 MR JUSTICE DAVID RICHARDS: Just to make a quibble, if you 12 like, really, I don't think anyone could suggest that 13 LBIE in administration could make a claim, in the sense 14 of issuing proceedings, for this contingent call. 15 I mean, there clearly isn't a cause of action. The 16 question is whether it could lodge a proof in respect of 17 a contingent liability. That I think is the point 18 there.</p> <p>19 MR ISAACS: Yes.</p> <p>20 MR JUSTICE DAVID RICHARDS: As I say, that's a bit of 21 a quibble.</p> <p>22 MR ISAACS: Just one point of clarification, which is this. 23 The main topic I am on here, although it does not feel 24 like it, is actually whether the section 74 liability 25 falls to be taken into account for the purposes of the</p> <p style="text-align: center;">Page 29</p>	<p>1 making calls. Your Lordship has seen that it's the 2 liquidator's duty to do those things, subject to the 3 court's control. I have just taken the court to those 4 4.196, 4.198(3), 4.199, 4.202 or possibly the 5 Liquidation Committee, 4.203.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR ISAACS: The second group of provisions are those which 8 govern the avoidance of the transfer of shares or the 9 alteration in the status of the company's members in 10 a liquidation. The first is section 88.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR ISAACS: "Any transfer of shares, not being a transfer 13 made to or with the sanction of the liquidator, and any 14 alteration in the status of the company's members made 15 after commencement of the voluntary winding-up is void." 16 In a compulsory, my Lord, it's 127. It's the lesser 17 known parts of section 127 with which your Lordship is 18 familiar.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR ISAACS: In the same terms.</p> <p>21 My Lord, in the same way that the first group of 22 provision is for the protection of the contributories, 23 these group of provisions are for the protection of the 24 creditors. It's to ensure that the liability isn't 25 transferred to a man of straw, as it's put in the case.</p> <p style="text-align: center;">Page 31</p>
<p>1 contributory rule. Now, I realise that --</p> <p>2 MR JUSTICE DAVID RICHARDS: I understand that but, as you 3 rightly say, this goes across the piece.</p> <p>4 MR ISAACS: It does.</p> <p>5 MR JUSTICE DAVID RICHARDS: It's very important on set-off 6 questions, isn't it?</p> <p>7 MR ISAACS: Yes, it may well be. I am not proposing to 8 address your Lordship on the set-off questions. I don't 9 know if your Lordship recalls in the position paper and 10 in our skeleton there are a number of issues where we 11 don't address your Lordship.</p> <p>12 MR JUSTICE DAVID RICHARDS: I see.</p> <p>13 MR ISAACS: The reason for that relates to the financial 14 interest of my clients, which is in certain scenarios it 15 might not be in their financial interests to argue one 16 way or the other because of the different possibilities. 17 So that's why I am arguing this point in relation to the 18 contributory rule, but I completely accept that it does 19 have an impact on the other issues.</p> <p>20 MR JUSTICE DAVID RICHARDS: Certainly.</p> <p>21 MR ISAACS: Returning then to the provisions.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes, very well.</p> <p>23 MR ISAACS: There are two groups of provisions which are 24 absent in administration but present in liquidation; the 25 first relate to the process of settling the list and</p> <p style="text-align: center;">Page 30</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR ISAACS: The reference for that -- we don't need to go to 3 it -- but for your Lordship's note, it's Rudge v Bowman, 4 which is at --</p> <p>5 MR JUSTICE DAVID RICHARDS: What's the case?</p> <p>6 MR ISAACS: It's Rudge v Bowman. It's volume 1A, 16, 696.</p> <p>7 A similar point in a slightly different context was made 8 by Mr Justice Knox in the Ayala Holdings case we have 9 seen that was referred to in Oasis. That is a more 10 recent case so I will go to that one instead. That's at 11 1C, 70.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR ISAACS: If your Lordship goes to page 483.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR ISAACS: Picking it up at letter B:</p> <p>16 "Those passages underline the fundamental 17 distinction between assets of the company and rights 18 conferred upon a liquidator in relation to the conduct 19 of the liquidation: the former are assignable; the 20 latter are not because they are an instant of the office 21 of liquidator. That conclusion is, in my view, 22 supported by the special status of the liquidator in 23 company law."</p> <p>24 Then he sets out section 143 and section 234.</p> <p>25 Then he says:</p> <p style="text-align: center;">Page 32</p>

<p>1 "There is also of course in section 167 the 2 provision to which I have already made reference that 3 introduces the power of the liquidator to exercise the 4 powers specified in schedule 4, some with consent, 5 others without it. Moreover, it appears to me that the 6 special provisions in section 167(3) would be bypassed 7 in a most undesirable way if Mr Menzies's submission was 8 correct. Section 167(3) reads as follows, "The exercise 9 by the liquidator in the winding-up of a company of the 10 powers conferred by this section is subject to the 11 control of the court and any creditor or contributory 12 may apply'."</p> <p>13 Then he carries on letter I: 14 "If Mr Menzies is right in submitting that 15 a liquidator can assign any of his powers to an assignee 16 who is not a liquidator the assignee would be free from 17 any such control and I find it very difficult to 18 envisage that Parliament could have contemplated that 19 that was a permissible state of affairs."</p> <p>20 Then he refers to section 168(5) and says the same 21 thing.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR ISAACS: We say the same considerations apply here. If 24 LBIE's submissions are correct, they apply not just when 25 LBIE is in administration but before it's in</p> <p style="text-align: center;">Page 33</p>	<p>1 objectionable because it circumvents the regime 2 governing the making of calls in a liquidation. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR ISAACS: It stems, in our submission, from this mistaken 5 assumption which underlies all of the reasoning on the 6 other side, which is that it is the status of LBIE which 7 actually governs the liability whereas my learned 8 friends assume it is the status of LBHI2. It's the 9 point I made about the wrong end of the telescope. The 10 liability only exists when LBIE is in liquidation. 11 MR JUSTICE DAVID RICHARDS: I mean, I suppose that point on 12 section 80 is not unimportant here, because if Mr Trower 13 is right in his construction of section 80, then the 14 liability does exist in some way or other from the 15 moment that a member becomes a member because, if that's 16 the correct meaning of the section, that is what the 17 section says. I will just remind myself of what it 18 says: 19 "The liability of the contributory creates a debt 20 accruing due from him at the time when his liability 21 commenced." 22 Now, I mean -- 23 MR ISAACS: We have two responses to that, my Lord. Your 24 Lordship said it exists in some way or other, and we 25 agree that it exists in some way or another. We agree</p> <p style="text-align: center;">Page 35</p>
<p>1 administration. That's the point I have just made. 2 It's the distributive administration of LBHI2 which is 3 said to trigger the right to claim; it has nothing to do 4 with the status of LBIE. If that were correct, the 5 directors of LBIE would be able to claim against LBHI2 6 in administration as much as the administrator of LBIE. 7 If that were correct, the checks on the power of the 8 liquidator in relation to drawing up the list, making 9 a call, settling a call and enforcing a call would be 10 bypassed in a most undesirable way, to use the language 11 of Mr Justice Knox.</p> <p>12 Your Lordship made a similar point, although in 13 a slightly different way. Your Lordship mentioned the 14 possibility of a proof being made by LBIE in liquidation 15 before a call. In other words, LBIE goes into 16 liquidation, a call has not yet been made by the 17 liquidator, but it proves in LBHI2's administration for 18 the alleged section 74 liability.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR ISAACS: Now, if my learned friends are correct, there is 21 nothing objectionable about that, although we of course 22 say that that would completely circumvent all the rules 23 relating to the settling of the list and so forth, as 24 I have just said. It's exactly the same point as the 25 position before the liquidation of LBIE. It's equally</p> <p style="text-align: center;">Page 34</p>	<p>1 that it exists in this sense. There is no liability at 2 all until the liquidation or possibly the call, and at 3 that point the liability is treated as accruing due from 4 the time when his liability commences. In other words, 5 it is as if it springs back. There is no liability. 6 The company goes into liquidation or has a call and 7 there is then a liability, but it isn't a liability that 8 exists until that point. So this provision is, in 9 effect, a deeming provision. That's the first way we 10 put it.</p> <p>11 MR JUSTICE DAVID RICHARDS: So you say there is no liability 12 at all until a call is made. 13 MR ISAACS: Well, either until the company goes into 14 liquidation or until a call is made. The important 15 point is there is no liability until a point which is no 16 earlier than the liquidation. It might be relevant in 17 this context to refer to the earlier provision, the 18 original section which gave rise to what is now 19 section 80 of the Insolvency Act. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR ISAACS: I have just made reference, in fact I said it's 22 possible that this is a deeming provision. The word 23 "deem" does not appear in section 80. If your Lordship 24 goes to volume 2, section 75. Does your Lordship see 25 the word "deem" in the fourth line? What's provided</p> <p style="text-align: center;">Page 36</p>

<p>1 there is that the liability is deemed to create a debt 2 accruing due at that time. Now, your Lordship has 3 written on the two different meanings of the word 4 "deem".</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes, I have.</p> <p>6 MR ISAACS: But one answer to your Lordship's question is 7 that that is deeming something to be the case which 8 would not otherwise be the case. So that's one possible 9 answer.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR ISAACS: The second possible answer, and the one that is 12 consistent with the tenor of my submissions, is that 13 even if that's correct that doesn't begin to provide an 14 answer because what one is looking at is 15 Lord Neuberger's analysis and whether it's appropriate 16 that there should be a contingent liability. For all 17 the reasons I have given, there isn't a contingent 18 liability and that's not undermined by the fact that 19 there is a liability, as your Lordship puts it, in some 20 form or another.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR ISAACS: My Lord, the next point will take a few minutes. 23 I don't know when your Lordship want to break, now or 24 quarter to?</p> <p>25 MR JUSTICE DAVID RICHARDS: I think quarter to, if that's</p> <p style="text-align: center;">Page 37</p>	<p>1 indication in the Act or the rules that contributories 2 are intended under section 74 to contribute to the debts 3 and liabilities and expenses of an administration.</p> <p>4 The next point is that LBIE could, as is suggested, 5 enter winding-up following its administration. The 6 liquidators would then make a call on LBHI2 under 7 section 74 in an amount sufficient for the payment of 8 LBIE's debts and liabilities and the expenses of the 9 winding-up. Having regard to the amount which, on this 10 hypothesis, has already been paid by LBHI2 as 11 contributory to LBIE in administration, payment of this 12 further amount could very well have the effect that LBIE 13 would be liable to pay an amount greater than was 14 sufficient for the payment of LBIE's debts and 15 liabilities and the expenses of the winding-up. We say 16 this would be bizarre. It's inconsistent with 17 section 74. It's impossible to read the Act as 18 contemplating that contributories have a liability under 19 section 74 to pay an amount greater than that specified 20 in section 74. It makes no sense.</p> <p>21 I propose to illustrate this, if I may, my Lord, by 22 an example with some numbers in it. Consider a company 23 in administration with assets of £20 million, debts and 24 liabilities of £100 million and expenses of the 25 administration of £30 million. Now, the first thing</p> <p style="text-align: center;">Page 39</p>
<p>1 all right.</p> <p>2 MR ISAACS: Thank you. This is the third point as to why 3 it's not a contingent liability.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ISAACS: It's this: if the section 74 liability did fall 6 to be taken into account in LBIE's administration, the 7 result would be surprising or we would submit bizarre in 8 several respects. I will focus on five of those. The 9 first is this: the liability imposed under section 74 10 could, if LBIE is correct, be much greater than is 11 provided for by section 74. One can see this by 12 considering what would happen if a liability under that 13 section was payable in LBIE's administration. I will 14 now work through the steps.</p> <p>15 In the first instance, this is number one, LBIE's 16 administrators would have to estimate LBHI2's potential 17 liability to LBIE under section 74. They would prove in 18 LBHI2's administration. Any amount paid to LBIE's 19 administrators could then be applied by them towards the 20 payment of the expenses of the administration and the 21 balance would be applied or could be applied towards 22 LBIE's other debts and liabilities.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR ISAACS: Now, this is the first respect in this point in 25 which the results are surprising because there is no</p> <p style="text-align: center;">Page 38</p>	<p>1 that would happen is that the administrator would apply 2 the assets of 20 million against the expenses. So, 3 having done that, we would have debts and liabilities of 4 100 million and unpaid expenses of 10 million. The 5 administrator would then make a call. To do that, he 6 would have to estimate the expenses of the winding-up. 7 Let us suppose he estimated the expenses of the 8 winding-up as being 10 million.</p> <p>9 MR JUSTICE DAVID RICHARDS: You are saying the 10 administrators would have to make a call?</p> <p>11 MR ISAACS: Sorry, the administrators would then prove in 12 LBHI2's administration in respect of the --</p> <p>13 MR JUSTICE DAVID RICHARDS: Contingent.</p> <p>14 MR ISAACS: What they call the contingent liability, yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: Indeed. Exactly.</p> <p>16 MR ISAACS: In order to value that, they would have to 17 estimate the debts and liabilities of the winding-up and 18 the expenses. Now, the debts and liability would be 19 100 million. Let us suppose they estimate the expenses 20 of the winding-up as 10 million. They therefore prove 21 for 110 million in the administration.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR ISAACS: Now, since LBHI2 is in administration, it's only 24 going to pay, one assumes, the staged (?) dividend on 25 the call. So let us suppose the dividend rate is 90 per</p> <p style="text-align: center;">Page 40</p>

10 (Pages 37 to 40)

<p>1 cent so that £99 million is made on the call of</p> <p>2 110 million. That sum is paid by the administrators of</p> <p>3 LBHI2 to LBIE. That sum is first applied towards the</p> <p>4 unpaid expenses in the administration, which are</p> <p>5 £10 million, and the balance, which is the £99 million</p> <p>6 minus the £10 million which is 89 million, would be</p> <p>7 applied towards the debts and expenses of 100 million,</p> <p>8 leaving debts and liabilities of 11 million.</p> <p>9 Now, let us suppose the company goes into</p> <p>10 liquidation. It has unpaid debts and expenses of</p> <p>11 11 million and expenses of, say, 10 million. So it</p> <p>12 makes a call of ten plus 11, which is 21 million. The</p> <p>13 result of this is that the contributories have been</p> <p>14 subjected to calls for 110 million and 21 million, which</p> <p>15 is 131 million. The contributories have paid 99 million</p> <p>16 on the first call and some further sum on the second</p> <p>17 call, which would depend on the dividend rate, with the</p> <p>18 result that they have paid 90 million-odd, which is much</p> <p>19 greater than the amount sufficient for the payment of</p> <p>20 the debts and liabilities and the expenses of the</p> <p>21 winding-up, which is the amount specified in section 74</p> <p>22 in the first place. Something has gone wrong, my Lord.</p> <p>23 What we submit has gone wrong is that there is no</p> <p>24 liability to contribute until the liquidation. That's</p> <p>25 the first bizarre consequence.</p> <p style="text-align: center;">Page 41</p>	<p>1 more than a year before the company is wound up.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ISAACS: So X has no liability to contribute under</p> <p>4 section 74(2)(a). However, if LBIE's argument were</p> <p>5 correct and an account of what is due between the</p> <p>6 company and X were taken and settled before X ceased to</p> <p>7 be a member, section 74 would impose a liability on X to</p> <p>8 contribute in the company's administration.</p> <p>9 MR JUSTICE DAVID RICHARDS: Presumably I mean because</p> <p>10 obviously because it's a contingent liability, if it's</p> <p>11 anything at all, contrary to your submissions, one of</p> <p>12 the contingencies is that X has to be or has not to have</p> <p>13 ceased to be a member more than a year before the</p> <p>14 liquidation.</p> <p>15 (11.45 am)</p> <p>16 MR JUSTICE DAVID RICHARDS: So the contingency that you</p> <p>17 might cease to be a member would be factored into the</p> <p>18 estimate.</p> <p>19 MR ISAACS: That is an interesting point. I think as</p> <p>20 a matter of analysis that is correct but when one thinks</p> <p>21 about how it would practically work. One would be</p> <p>22 deciding at a date whether or not a contributory would</p> <p>23 at some later date but more than one year before the</p> <p>24 company goes into liquidation ceased to be</p> <p>25 a contributory.</p> <p style="text-align: center;">Page 43</p>
<p>1 The second follows from the fact that a past member</p> <p>2 has no liability to contribute under section 74 if he</p> <p>3 ceases to be a member for one year or more before the</p> <p>4 commencement of the winding-up.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR ISAACS: That's section 74(2)(a).</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ISAACS: I would like to illustrate this again by an</p> <p>9 example. Consider an example of a company and a member</p> <p>10 who I will call X.</p> <p>11 MR JUSTICE DAVID RICHARDS: A company?</p> <p>12 MR ISAACS: I will call the member X. That's because he is</p> <p>13 going to be an ex member soon. On 15 September 2008,</p> <p>14 the company enters administration. On 1 January 2014, X</p> <p>15 ceases to be a member. On 15 October 2015, the company</p> <p>16 is wound up.</p> <p>17 MR JUSTICE DAVID RICHARDS: 15 October?</p> <p>18 MR ISAACS: 2015. Now, X ceases to be a member of the</p> <p>19 company one year or more before the company is wound up.</p> <p>20 MR JUSTICE DAVID RICHARDS: Sorry, I think I have my dates</p> <p>21 wrong. When did X cease to be a member?</p> <p>22 MR ISAACS: 1 January 2014, and the company was wound up on</p> <p>23 15 October 2015.</p> <p>24 MR JUSTICE DAVID RICHARDS: 15, sorry. Right. Okay.</p> <p>25 MR ISAACS: The first step is then X ceases to be a member</p> <p style="text-align: center;">Page 42</p>	<p>1 MR JUSTICE DAVID RICHARDS: I mean, of course if it is a</p> <p>2 heavily insolvent company then the chances of anyone</p> <p>3 taking on their share may be thought to be extremely</p> <p>4 small.</p> <p>5 MR ISAACS: I hear chuckles in the court but the answer to</p> <p>6 that is that is exactly a reason why the submission of</p> <p>7 my learned friend is incorrect because there would be no</p> <p>8 objection to a shell company being set up and the share</p> <p>9 being transferred to the shell company. This is the</p> <p>10 point about the protection that I made earlier which is</p> <p>11 that --</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes, I do not know, but under</p> <p>13 the articles of LBIE is there any control on the</p> <p>14 transfer of shares or is it entirely free, where the</p> <p>15 directors entitled to refuse registration of a transfer?</p> <p>16 MR ISAACS: The immediate answer to that question is this is</p> <p>17 a matter of principle.</p> <p>18 MR JUSTICE DAVID RICHARDS: Normally in terms of a limited</p> <p>19 company I rather think that normally the board has</p> <p>20 discretion to refuse to register the transfer of</p> <p>21 a partly or nil paid share, so I was thinking that the</p> <p>22 same might well apply in an unlimited. I am not sure</p> <p>23 actually; I do not know. Of course if the shares in the</p> <p>24 unlimited company, are fully paid maybe it is a</p> <p>25 different point. Anyway, I take -- yes, assume you are</p> <p style="text-align: center;">Page 44</p>

<p>1 right, that you can set up a shell company to take the</p> <p>2 share.</p> <p>3 MR ISAACS: Just in response to the point about the</p> <p>4 directors refusing to transfer, if this is a point of</p> <p>5 principle it would have to apply across the board.</p> <p>6 Your Lordship's point would only assist where there is</p> <p>7 that restriction in the articles.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, I agree. But yes, you are</p> <p>9 right. You, I do see the point of the example you are</p> <p>10 giving. I do understand the point you are making.</p> <p>11 MR ISAACS: Yes, it would be very difficult to factor in</p> <p>12 that contingency.</p> <p>13 MR JUSTICE DAVID RICHARDS: Would that be a good moment to</p> <p>14 break for the shorthand writer?</p> <p>15 MR ISAACS: Just to finish the paragraph, if I may. It is</p> <p>16 really this, the thrust of this point is not so much</p> <p>17 about transferring the shares to somebody else. It is</p> <p>18 this, that on this analysis the liability to contribute</p> <p>19 is greater than and inconsistent with the express terms</p> <p>20 of section 74(2)(a) because X has no liability under</p> <p>21 that section. The legislature has expressly</p> <p>22 contemplated that X will not have any liability where X</p> <p>23 ceases to be a member more than a year before the</p> <p>24 winding up. What my learned friend's case seeks to do</p> <p>25 is to impose the liability inconsistent with the</p> <p style="text-align: center;">Page 45</p>	<p>1 evidence which contain the restriction, just so that</p> <p>2 I can see what it says.</p> <p>3 MR ISAACS: I have not looked at it but I do believe it is</p> <p>4 in there. At the moment I am dealing with it as a point</p> <p>5 of general principle.</p> <p>6 MR JUSTICE DAVID RICHARDS: I would just like to see because</p> <p>7 I think these articles will quite often be in a pretty</p> <p>8 standard form.</p> <p>9 MR ISAACS: It is volume 4, article 10, page 7.</p> <p>10 MR JUSTICE DAVID RICHARDS: I think I have got volume 4</p> <p>11 actually. It is article 7. So it is just article 7.</p> <p>12 The rest is just rights attached to shares and so on.</p> <p>13 So that gives a complete discretion to refuse</p> <p>14 registration. If you were going to transfer to a man of</p> <p>15 straw that would be the obvious circumstance in which</p> <p>16 the board would be entitled to refuse to register the</p> <p>17 transfer.</p> <p>18 MR ISAACS: That would be the question, whether if that is</p> <p>19 the case in circumstances in which the statute provides</p> <p>20 that you can transfer; you can get rid of your shares</p> <p>21 and thereby absolve yourself of all liability completely</p> <p>22 as long as it is more than one year before the winding</p> <p>23 up.</p> <p>24 MR JUSTICE DAVID RICHARDS: I do not think that section --</p> <p>25 I mean, the first point to make is that section 74 is</p> <p style="text-align: center;">Page 47</p>
<p>1 statute. That is, we submit, again bizarre. That is</p> <p>2 the end of that paragraph, my Lord.</p> <p>3 MR JUSTICE DAVID RICHARDS: I will rise for 5 minutes.</p> <p>4 (11.49 am)</p> <p>5 (A short break)</p> <p>6 (11.59 am)</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, Mr Isaacs?</p> <p>8 MR ISAACS: I was dealing with the second of what</p> <p>9 I submitted respectfully was the bizarre consequence of</p> <p>10 the other side's argument. Your Lordship put a point to</p> <p>11 me about a possible restriction in the articles of a</p> <p>12 company preventing the transfer of shares. I posit this</p> <p>13 point, if one imagines in that situation there was an</p> <p>14 attempt to transfer the shares and the company prevented</p> <p>15 it on the basis of the articles and one imagines the</p> <p>16 case coming before the Chancery Division the argument</p> <p>17 would be something like this: we have unfettered right</p> <p>18 to restrict transfer. The other side would say you have</p> <p>19 to give some reason and the reason is, they would say,</p> <p>20 they are transferring the shares to avoid a potential</p> <p>21 liability. The response to that would surely be the</p> <p>22 response that I have given which is the right to</p> <p>23 transfer is prescribed by the statute. You can transfer</p> <p>24 more than a year before the winding up.</p> <p>25 MR JUSTICE DAVID RICHARDS: Have we got the articles in</p> <p style="text-align: center;">Page 46</p>	<p>1 not concerned with establishing the rights between</p> <p>2 members of companies which are not in liquidation or</p> <p>3 administration and the company, but I do not think</p> <p>4 section 74 does confer an unfettered right to transfer</p> <p>5 shares. The right to transfers shares is one which is</p> <p>6 conferred I think by the Companies Act but is subject to</p> <p>7 restrictions in the articles. Of course you are right,</p> <p>8 that even if it is expressed as it is here to be an</p> <p>9 absolute and unfettered discretion it must nonetheless</p> <p>10 be exercised in good faith and for proper purposes. But</p> <p>11 the point of it in the context of an unlimited company</p> <p>12 is precisely to prevent transfers to a man of straw</p> <p>13 which is why I think -- yes. Anyway, there it is.</p> <p>14 I understand the reason why you are giving this example.</p> <p>15 MR ISAACS: Yes, the man of straw point is by the by. The</p> <p>16 main point of the second consequence is not about the</p> <p>17 man of straw. The third surprising consequence is that</p> <p>18 if LBIE may claim against LIBH2 in respect of its</p> <p>19 potential liability under --</p> <p>20 MR JUSTICE DAVID RICHARDS: Sorry, is this the third or the</p> <p>21 fourth. Are we on to the fourth now?</p> <p>22 MR ISAACS: No, the third. The second was in relation to</p> <p>23 the ex-member.</p> <p>24 MR JUSTICE DAVID RICHARDS: I had got the first: these are</p> <p>25 the bizarre results.</p> <p style="text-align: center;">Page 48</p>

<p>1 MR ISAACS: Yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: The first is that the liability</p> <p>3 under section 74 could be much greater than provided by</p> <p>4 section 74. The second is that, as I understood it, the</p> <p>5 example that if a company in administration was making</p> <p>6 a claim it would go to pay for the costs of the</p> <p>7 administration.</p> <p>8 MR ISAACS: That is an example of the first one.</p> <p>9 MR JUSTICE DAVID RICHARDS: It is the example of the first.</p> <p>10 Thank you.</p> <p>11 MR ISAACS: That explains why. The second point was the</p> <p>12 past member. The third point is this, that if LBIE may</p> <p>13 claim against LBHI2 in respect of its potential</p> <p>14 section 74 liability when LBHI2 is in administration</p> <p>15 LBIE would also be able to claim against LBHI2 before it</p> <p>16 was in administration. I made this point before the</p> <p>17 break. In other words, before LBIE was in</p> <p>18 administration.</p> <p>19 MR JUSTICE DAVID RICHARDS: Sorry, yes.</p> <p>20 MR ISAACS: Because the case against me is that it is the</p> <p>21 distributive administration of LBHI2 that triggered the</p> <p>22 right. So we have the possibility of a claim by</p> <p>23 a company not in any insolvency regime. So we have the</p> <p>24 possibility of a company of doubtful insolvency perhaps,</p> <p>25 shoring up its financial position by receiving</p> <p style="text-align: center;">Page 49</p>	<p>1 sorry?</p> <p>2 MR ISAACS: What was initially said by my learned friend was</p> <p>3 that the call by a company could actually be smaller;</p> <p>4 rather than calling for the whole amount you can call</p> <p>5 for a smaller amount.</p> <p>6 MR JUSTICE DAVID RICHARDS: What, after liquidation?</p> <p>7 MR ISAACS: No, what I mean is that in order to meet the</p> <p>8 point that there is no rights -- there is no adjustment</p> <p>9 outside of administration, so this would be unfair on a</p> <p>10 contributory because he could not adjust, he could make</p> <p>11 a smaller claim on the contributory in the first place</p> <p>12 is how I understood it.</p> <p>13 MR JUSTICE DAVID RICHARDS: I see, yes, you could ...</p> <p>14 MR ISAACS: But at a later stage in the submissions when</p> <p>15 your Lordship was asking how much would the call be for</p> <p>16 in any particular case, would it not be for the maximum</p> <p>17 amount. Remember there was talk about --</p> <p>18 MR JUSTICE DAVID RICHARDS: It is getting a bit confusing</p> <p>19 here. That discussion took place in the context of the</p> <p>20 company being in liquidation and calls being made.</p> <p>21 MR ISAACS: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: But we are here talking about</p> <p>23 a situation where LBIE is not in liquidation and is</p> <p>24 lodging a proof I think.</p> <p>25 MR ISAACS: I am anticipating a possible answer.</p> <p style="text-align: center;">Page 51</p>
<p>1 a dividend in respect of the call while it is still</p> <p>2 trading thereby potentially avoiding the very situation</p> <p>3 like a winding up in which the legislature contemplates</p> <p>4 a call will be made. The fourth point is that LBIE's</p> <p>5 analysis, if correct, would impose on LBHI2 the</p> <p>6 obligations which come into existence upon LBIE's</p> <p>7 winding up but not the rights which correspond to the</p> <p>8 obligation and in particular the right to share any</p> <p>9 adjustment of the rights of the contributories amongst</p> <p>10 themselves. So according to LBIE's analysis LBHI2 would</p> <p>11 be obliged to pay a sum in respect of a call which has</p> <p>12 not been and may never been made against it. Yet it</p> <p>13 would have no right to claim an adjustment from other</p> <p>14 members because section 74 provides that the liability</p> <p>15 for adjustment exists only when a company is wound up.</p> <p>16 More fundamentally there is no mechanism for adjusting</p> <p>17 the rights of contributories at this stage because, as</p> <p>18 I have already submitted, as a pre-requisite that</p> <p>19 requires a list of contributories to have been settled.</p> <p>20 But the power to settle this is the court's power which</p> <p>21 has been settled or delegated to the liquidator and not</p> <p>22 to the administrator. LBIE's answer to this is to say</p> <p>23 that it can be reflected in the call made by the</p> <p>24 company.</p> <p>25 MR JUSTICE DAVID RICHARDS: It could be reflected in what,</p> <p style="text-align: center;">Page 50</p>	<p>1 MR JUSTICE DAVID RICHARDS: You are saying -- yes, I see.</p> <p>2 MR ISAACS: If it were said, "Well, that is okay. You just</p> <p>3 make a smaller claim in the first place so that way you</p> <p>4 are not depriving the contributory of the rights to</p> <p>5 adjust because you just claim less from him to start</p> <p>6 with". That is how the argument would go. But it does</p> <p>7 not work, it does not work because of course the amount</p> <p>8 which LBIE wants to claim from its contributories is the</p> <p>9 maximum amount. It has no interest in minimising any</p> <p>10 claim on a contributory. It would not be concerned with</p> <p>11 the fact that the contributory would be unable to</p> <p>12 recover from another contributory by way of adjustment.</p> <p>13</p> <p>14 The fifth and final of these surprising consequences</p> <p>15 follows from the effects of section 82 of the</p> <p>16 Insolvency Act which we have looked at in a different</p> <p>17 context.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR ISAACS: Your Lordship may recall:</p> <p>20 "Section 82(4) provides that there may be proof</p> <p>21 against the bankruptcy estate the estimated value of his</p> <p>22 liability to ...(Reading to the words)... call as well</p> <p>23 as calls already made."</p> <p>24 The reason I refer to this provision, my Lord, is</p> <p>25 because it only applies where the bankruptcy of</p> <p style="text-align: center;">Page 52</p>

<p>1 a contributory is contemporaneous with the winding up of</p> <p>2 the company. The authority for that proposition is</p> <p>3 Martins Patent Anchor Company which it at 1A/15.</p> <p>4 MR JUSTICE DAVID RICHARDS: Let us just have a quick look at</p> <p>5 that.</p> <p>6 MR ISAACS: Can I invite your Lordship to read the headnote?</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ISAACS: Obviously I rely on the end of that section.</p> <p>9 The point we make on that, there is no equivalent</p> <p>10 provision which provides that a call may be proved</p> <p>11 against an insolvent company.</p> <p>12 MR JUSTICE DAVID RICHARDS: No.</p> <p>13 MR ISAACS: It would be particularly surprising, I submit,</p> <p>14 if the right here was broader -- sorry, if the right to</p> <p>15 prove against an insolvent company was broader than the</p> <p>16 right given by this provision, which is limited to where</p> <p>17 the company is in winding up and that would be the</p> <p>18 consequence of my learned friend's submission.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR ISAACS: So that is the fifth surprising consequence.</p> <p>21 The final point in this section is to respond to my</p> <p>22 learned friend's contention. It appears in his</p> <p>23 submissions at paragraphs 162 and 177. That relates to</p> <p>24 the McMahon case.</p> <p>25 MR JUSTICE DAVID RICHARDS: Sorry, is this part of point 5</p> <p style="text-align: center;">Page 53</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR ISAACS: My Lord, that concludes my submission on the</p> <p>3 contributory rule, unless your Lordship has any further</p> <p>4 questions on that?</p> <p>5 MR JUSTICE DAVID RICHARDS: No.</p> <p>6 MR ISAACS: So the third submission I make relates to</p> <p>7 whether LBHI2's potential section 74 liability extends</p> <p>8 to statutory interest. This and the remaining part of</p> <p>9 my submissions relate to the scope of that section 74</p> <p>10 liability. We say that the liability does not extend to</p> <p>11 statutory interest for three reasons: first, because</p> <p>12 post-administration interest (as I will call rule 288(7)</p> <p>13 interest) is not payable in a winding up at all.</p> <p>14 Secondly, because the words "debts and liabilities" in</p> <p>15 section 4 exclude statutory or post-administration</p> <p>16 interest. Thirdly, because LBIE cannot claim against</p> <p>17 LBHI2 for interest arising in respect of the period</p> <p>18 after LBHI2's administration. The first point then is</p> <p>19 that rule 288(7) interest is not payable in a winding</p> <p>20 up. This point has been addressed by my learned friend</p> <p>21 Mr Wolfson and I do not propose to repeat what he says</p> <p>22 about the construction but I do wish to make two further</p> <p>23 points.</p> <p>24 MR JUSTICE DAVID RICHARDS: This is the lacuna.</p> <p>25 MR ISAACS: The alleged lacuna.</p> <p style="text-align: center;">Page 55</p>
<p>1 or is this --</p> <p>2 MR ISAACS: Point 5 is now finished. But before I move on</p> <p>3 to the next section I just want to pick up a point that</p> <p>4 is made in relation to McMahon. The point that is made</p> <p>5 against us is it follows from the McMahon case --</p> <p>6 MR JUSTICE DAVID RICHARDS: This is in paragraph?</p> <p>7 MR ISAACS: Paragraphs 162 and 177.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ISAACS: All I wanted to say about that is it does not</p> <p>10 respect the distinction I sought to draw to your</p> <p>11 Lordship's attention between the liability to pay unpaid</p> <p>12 capital and the statutory liability to contribute under</p> <p>13 section 74.</p> <p>14 MR JUSTICE DAVID RICHARDS: So Macmahan is concerned with</p> <p>15 the contractual liability.</p> <p>16 MR ISAACS: Yes. Macmahan is at bundle 1B at 41.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR ISAACS: Does your Lordship see at page 175, the first</p> <p>19 paragraph:</p> <p>20 "The company being a going concern, section 75 does</p> <p>21 not apply"?</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR ISAACS: So McMahon says nothing about the proof in</p> <p>24 respect of calls under section 74 and is distinguishable</p> <p>25 for that reason.</p> <p style="text-align: center;">Page 54</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, indeed.</p> <p>2 MR ISAACS: That nicely relates to my first point which is</p> <p>3 that there is no lacuna and no accrued right is lost</p> <p>4 when LBIE goes from administration to liquidation.</p> <p>5 I say that because in order for an accrued right to be</p> <p>6 lost there needs to be an accrued right in the first</p> <p>7 place. The argument that there is an accrued right in</p> <p>8 post-administration interest is based on the assertion,</p> <p>9 which I submit is mistaken, that the right to statutory</p> <p>10 interest exists independently of the surplus remaining</p> <p>11 after payment of the debts proved. However, the wording</p> <p>12 of rule 288(7) which creates the statutory interest,</p> <p>13 that is the words: "Any surplus remaining after payment</p> <p>14 of the debts proved shall be applied in paying interest"</p> <p>15 makes it clear that the right to that interest exists</p> <p>16 only if and to the extent that there is a surplus after</p> <p>17 payment of the debts proved. Rule 288(7) does not say</p> <p>18 that interest is payable if there is no surplus and it</p> <p>19 would be bizarre if it did because that would create</p> <p>20 a non-proveable debt in the administration in which</p> <p>21 proved debts could not be paid in full. So it would</p> <p>22 ex hypothesi not be paid in the administration. We</p> <p>23 submit it would be bizarre to suppose that the</p> <p>24 legislature intended to create a non-proveable debt in</p> <p>25 an administration which would virtually in all cases be</p> <p style="text-align: center;">Page 56</p>

<p>1 unpaid. For that reason I submit there is no right 2 which can be lost until there is a surplus after payment 3 of the debts proved. So far as the existence of a 4 surplus is concerned there are only two possibilities. 5 There either is a surplus or there is not. If there is 6 a surplus in the administration after payment of the 7 debts proved there is a right to a statutory interest in 8 the administration. That interest will be paid in the 9 administration and if that happens there is no right 10 which is lost when the company subsequently goes into 11 liquidation. If there is no surplus in the 12 administration after payment of the debts proved there 13 is no right to statutory interest in the administration. 14 Where there is no surplus there is therefore no right 15 which can be lost when the company goes into 16 liquidation. The submission against us is based on the 17 premise that interest accrues under rule 288(7) before 18 there is a surplus. So it is an ongoing right which 19 accrues at all times. In my submission that is 20 incorrect. If by accrue is meant there is a right to be 21 paid a fixed amount of interest before payment of all 22 the debts proved. We say that there is a right to be 23 paid the interest only if and to the extent that there 24 is a surplus. This can be illustrated by an example. 25 Suppose X pays Y valuable consideration in exchange for</p> <p style="text-align: center;">Page 57</p>	<p>1 tab 18. Page 87. 2 MR JUSTICE DAVID RICHARDS: Bundle 2, tab? 3 MR ISAACS: Tab 18. 4 MR JUSTICE DAVID RICHARDS: Yes, I have it here. 5 MR ISAACS: This is the amendment rules from 2005 which 6 amended the rules and there is an explanatory note at 7 page 87. There is a paragraph three-quarters of the way 8 down which starts: 9 "As a result of the changes made to the law". 10 MR JUSTICE DAVID RICHARDS: I was looking at the context. 11 Page? 12 MR ISAACS: Page 87. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR ISAACS: The paragraph reads: 15 "As a result of the changes made to the law in 16 administration by the ...(Reading to the words)... 2002 17 the company can move between liquidation and 18 administration or between administration and 19 liquidation. Both of these proceedings enable creditors 20 to prove their debts at the date of the administration 21 or liquidation respectively. By way of clarification of 22 the existing rules, the amendments ...(Reading to the 23 words)... provide that the relevant date is the date of 24 the first insolvency procedure concerned. The rules 25 affected are rules".</p> <p style="text-align: center;">Page 59</p>
<p>1 which Y promises that it shall apply any surplus 2 remaining after payment of the debts it owes at the year 3 end, in paying interest to X on those debts at 4 8-per cent per annum. Suppose that at the year end Y 5 has no surplus remaining after payment of the debts it 6 owes can it be said that X has an accrued right to 7 interest which it can claim from Y. I submit the answer 8 is obviously not because Y's obligation to pay interest 9 arises only if and when there is a surplus remaining 10 after payment of Y's debts at the year end. Since there 11 is no surplus X has no right to interest and the same 12 analysis, I submit, applies to statutory interest. 13 The second point on the alleged lacuna relates to 14 the court's approach to the matter of construction. 15 I submit that the words of the relevant statutory 16 provisions are clear for the reasons given by my learned 17 friend Mr Wolfson and that the only permissible reading 18 of the relevant provisions are that in a liquidation 19 statutory interest is not payable in respect of the 20 period before the liquidation. Insofar as it's 21 necessary to look beyond the relevant statutory 22 provisions the only relevant material before the court 23 other than the statutory provisions and the cases is the 24 explanatory note to the amending legislation. I would 25 like to take your Lordship to that. It is at bundle 2,</p> <p style="text-align: center;">Page 58</p>	<p>1 and they include 2.87 and 4.93. In my submission 2 this document demonstrates two matters: the first is 3 that in 2005 the legislature considered the rules 4 governing a move from administration to liquidation, and 5 in particular the rules governing statutory interest in 6 relation to those regimes. Secondly, that the 7 legislature amended those rules in the light of its 8 consideration. The submission on this part of the case 9 is that the court should be slow to seek to give the 10 rules other than their natural meaning in the light of 11 the changes that have been made to the provisions 12 governing interest in administration and in liquidation. 13 MR JUSTICE DAVID RICHARDS: The problem was they could not 14 by changing the rules amend the regime for statutory 15 interest in a liquidation, is that not right? 16 MR ISAACS: In the primary legislation. 17 MR JUSTICE DAVID RICHARDS: Precisely, yes. I mean, what do 18 I deduce from this, that consideration has been given to 19 the primary legislation and decided to leave well alone. 20 MR ISAACS: There is no indication. My point was that this 21 is the only material one outside the cases in the 22 statutory materials. There is no suggestion anywhere 23 that having looked at these provisions in the context of 24 interest in liquidation and in administration that it 25 was perceived that there was a problem and there is not</p> <p style="text-align: center;">Page 60</p>

<p>1 a problem for the reasons we have given. So what 2 I would submit is that one has to be very slow before 3 assuming that there is an issue that needs to be 4 resolved, if, as we submit, on a plain reading of the 5 sections they have an obvious meaning. I would submit 6 that if there is a problem with the provision then it is 7 a matter for the legislature, not for the court. My 8 learned friend refers to the cases about where there is 9 a mistake and how abundantly sure the court has to be. 10 That is all I was proposing to say on the first part of 11 my submissions in relation to section 74 liability. 12 The second part of the submission is that the words 13 "debts and liabilities" in section 74 excludes statutory 14 interest. This is for four reasons. The first is that 15 there is no independent right to statutory interest. 16 This is the point I have just developed. 17 MR JUSTICE DAVID RICHARDS: It depends on the existence of-- 18 MR ISAACS: Yes, LBIE assumes that the amount of the 19 statutory interest is based not on the surplus but on 20 the amount of the debts proved whereas in fact the 21 extent of statutory interest is based on the surplus. 22 The obligation to pay is created by the surplus. So 23 this can be illustrated by an example. Suppose 24 a company has assets of \$5 billion after payment of 25 expenses and debts proved of 4 billion which are paid in</p> <p style="text-align: center;">Page 61</p>	<p>1 waterfall down. But before you get to shareholders, 2 which are at the eighth tier, one must pass down through 3 all the higher tiers, including the sixth tier, which is 4 statutory interest. So the argument goes: you cannot 5 pay anything to shareholders at the eighth tier until 6 you have paid everything in the sixth tier. Furthermore 7 it said the liability of shareholders under section 74 8 must include everything at the higher levels in the 9 waterfall. I submit that is based on a misunderstanding 10 of statutory interest of the waterfall and of the 11 section 74 liability. I have already addressed 12 your Lordship on the statutory interest. I will now 13 address the waterfall and then I will come to the 14 section 74 liability. There are seven points I wish to 15 make about the waterfall. The first is that it contains 16 eight tiers but within those eight tiers there are two 17 qualitatively different types of liability. In 18 particular the liability in tiers 6 and 8 are 19 qualitative and different from the liabilities in tiers 20 1 to 5 and 7 for two reasons. 21 MR JUSTICE DAVID RICHARDS: Just give me a moment. 22 Lord Neuberger does not -- I mean, he is careful in his 23 use of language here, is he not. The order of priority 24 for payment out of the company's assets. But 25 shareholders, it is not -- I mean clearly is not</p> <p style="text-align: center;">Page 63</p>
<p>1 full by the administrator when the company has been in 2 administration for five years. Suppose also that all 3 the debts bear interest at less than 8 per~cent judgment 4 rate. The surplus remaining after payment of the debts 5 proved is a billion dollars which in accordance with 6 rule 2.88(7) is applied in paying interest on the debts 7 proved: \$4 billion. The amount of the statutory 8 interest which would be payable if the surplus were 9 large enough would be 8 per cent for 5 years of \$4 10 billion which would be \$1.6 billion. Rule 2.88(7) 11 provides that the surplus is applied in paying interest 12 on the debts proved, so that \$1 billion in surplus is 13 paid as interest. There is no provision in rule 288(7) 14 which provides that there is a subsisting liability of 15 \$600 million. There is no liability to contribute in 16 respect of any such statutory interest. This analysis 17 of statutory interest, I submit, shows why LBIE's 18 submission is based on the waterfall and Nortell are 19 mistaken. The waterfall comes up at various places in 20 the argument and I would like to address it now. It 21 does not just relate to this issue. Nortell is 22 at bundle 1D, tab 101. The waterfall is at 23 paragraph 39, at page 517. So the argument against us 24 is that there is an obligation to contribute under 25 section 74 which extends from the top-tier of the</p> <p style="text-align: center;">Page 62</p>	<p>1 a liability except in the sense that there is an 2 obligation on the liquidator to pay what is left at the 3 end to the shareholders. But it is not a liability in 4 any meaningful sense for the purposes of the present 5 discussion. 6 MR ISAACS: My Lord, I failed yesterday I think to persuade 7 your Lordship to the contrary and I shall not try again 8 today. 9 MR JUSTICE DAVID RICHARDS: Sorry yes, but I mean in a sense 10 that is your point, is it not. It is not a liability 11 because it is only an application of the surplus and you 12 say the same reasoning applies to statutory interest. 13 MR ISAACS: I do have that point as well which is why I do 14 not need to try persuade your Lordship today. So I 15 can(?) use the word liability, I accept that, but 16 whatever it is. 17 MR JUSTICE DAVID RICHARDS: Clearly, on any footing 8 is 18 different from the rest. 19 MR ISAACS: We would submit on any footing 6 and 8 are 20 different from the rest. I say that for two reasons: 21 the first is the liabilities at, whatever they are, 22 tiers 6 and 8 can exist only if the company is in an 23 insolvency process. As it happens, I have already 24 submitted that tier 8 only exists in liquidation so it 25 is even more narrow. It does not exist in</p> <p style="text-align: center;">Page 64</p>

16 (Pages 61 to 64)

<p>1 administration at all. Your Lordship has heard my 2 submissions on that. Whereas the liabilities in 1 to 5 3 and 7 all exist before the company goes into the 4 insolvency process. But more importantly, and this is 5 the second difference for present purposes, the 6 liabilities at 6 and 8 -- excuse my use of the word 7 liabilities; your Lordship knows what I mean - they are 8 referential. What I mean by that is they exist only if 9 and to the extent that the liabilities in the tier above 10 have been paid in full.</p> <p>11 MR JUSTICE DAVID RICHARDS: Is there is a surplus. 12 MR ISAACS: After payment of the tier above, yes. And a 13 number of the submissions, and this is the second point, 14 I have made flow from these characteristics. For 15 example, in relation to the insolvency of the company 16 I have said that has to be determined without regard to 17 the liabilities in tab(sic) 6 and 8. I made that 18 submission in the context of the contractual claim, 19 contractual subordination. Also in relation to my 20 submission that the liability to pay statutory interest 21 is an obligation on the office-holder which is part of 22 the statutory scheme rather than the liability of the 23 company. I have relied on the same distinction. That 24 is the second point. The third point is this: the 25 position can be illustrated by considering how one would</p> <p style="text-align: center;">Page 65</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, I see. So you say that 2 statutory interest is imponderable because (a) dependent 3 on proved, not proveable debts. Actually I dare say 4 strictly speaking perhaps Lord Neuberger should have 5 said "unsecured proved debts" rather than "proveable 6 debts" if he was, but at any rate --</p> <p>7 MR ISAACS: My Lord.</p> <p>8 MR JUSTICE DAVID RICHARDS: And B, you say you do not know 9 the time of distribution so you cannot calculate the 10 interest at the time of dividends.</p> <p>11 MR ISAACS: Or the times.</p> <p>12 MR JUSTICE DAVID RICHARDS: Time or times of payment of the 13 dividends.</p> <p>14 MR ISAACS: And how much will be paid in relation to each of 15 the dividends. In other words, if there is more than 16 one dividend one has to know how much is paid for each. 17 That is another thing --</p> <p>18 MR JUSTICE DAVID RICHARDS: The other thing, can I just say 19 this, at the commencement of the liquidation you could 20 not identify 7 either probably.</p> <p>21 MR ISAACS: No, I will make submissions on 7, my Lord.</p> <p>22 MR JUSTICE DAVID RICHARDS: All right. Well, sorry, you 23 probably could for some. I think the ones that are 24 specified in the rules. Yes, okay.</p> <p>25 MR ISAACS: That is the first point. The fourth is that I</p> <p style="text-align: center;">Page 67</p>
<p>1 draw up a balance-sheet or a list of liabilities of the 2 company at the commencement of the administration. 3 There will be no difficulty in estimating the amount of 4 liabilities at levels 1 to 5 and 7. But the amount of 5 the liabilities in 6 and 8 could not be estimated 6 because they depend on the extent to which there is a 7 surplus remaining after payment of all the liabilities 8 at the high levels.</p> <p>9 MR JUSTICE DAVID RICHARDS: I suppose you could, I mean on 10 the basis that you could identify categories 1 to 5 you 11 could equally identify the assets and therefore identify 12 if there is a surplus and the extent of it and your 13 point is you are left with a surplus of X. That is 14 balanced by statutory interest of X.</p> <p>15 MR ISAACS: That is one matter. My other point is that the 16 level 6 liability, statutory interest, is the interest 17 payable on the surplus remaining after payment of the 18 debts proved.</p> <p>19 MR JUSTICE DAVID RICHARDS: I see. Yes, so the proveable 20 debts might be more than accrued debts.</p> <p>21 MR ISAACS: Not just that. One would have to make a number 22 of estimates which are impossible as regards when the 23 proveable debts will be paid because the surplus is 24 calculated, the interest is calculated by reference to a 25 number of imponderables.</p> <p style="text-align: center;">Page 66</p>	<p>1 submit the metaphor that all the parties have been using 2 of the waterfall is appropriate. The word waterfall 3 does not actually appear in this case.</p> <p>4 MR JUSTICE DAVID RICHARDS: I wondered if it had but it does 5 not. No, I see.</p> <p>6 MR ISAACS: It did appear at the hearing. It was used by 7 everybody but it did not make it through for some 8 reason. The reason why we say the metaphor of a 9 cascading waterfall is appropriate is two-fold. The 10 first is that a waterfall flows downwards. It does not 11 flow upwards and the liability to contribute starts at 12 the top, not at the bottom, and it works down. The 13 second point flowing on from the first is that water 14 only flows from a higher tier into the next lower tier. 15 Then there is an excess at the higher tier. So the 16 reason, and this is the fifth point, that the metaphor 17 is apt is because it captures the fact that unless there 18 are sufficient distributions to satisfy the proveable 19 debts at level 5 there is no distribution at level 6. 20 Once all the unsecured proveable debts at level 5 are 21 paid in accordance with the rule there is no obligation 22 to create a surplus which does not otherwise exist any 23 more than there is in fact an obligation to create 24 a surplus at level 8 which does not otherwise exist if 25 one has paid all the liabilities at level 7.</p> <p style="text-align: center;">Page 68</p>

<p>1 MR JUSTICE DAVID RICHARDS: What about adjusting the rights 2 of contributories? 3 MR ISAACS: Adjusting is a separate point that I will come 4 on to, my Lord. So we therefore say for that reason the 5 members' liability to contribute is limited to the debts 6 down to and including level 5. The sixth point is that 7 the order of priority set out in this paragraph was said 8 by Lord Neuberger, just before the (Inaudible) as being 9 in summary terms. The case was concerned with whether 10 liabilities under financial support directions and 11 contribution notices were expenses, as the 12 Court of Appeal held, or proveables, as the 13 Supreme Court held, should be treated as a proveable 14 under the rule in <i>dare I say it ex parte James</i> -- we 15 must not forget that -- or neither. There was no 16 discussion in the case about the liabilities at level 6 17 or at level 8. There is no discussion about statutory 18 interest or about the section 74 liability. There were 19 two important respects in which it can be seen that the 20 waterfall is a summary only. The first is that the 21 waterfall does not refer to postponed debts at all. 22 MR JUSTICE DAVID RICHARDS: Sort of, for example, due to 23 members in respect of dividends declared but not paid 24 before the liquidation. 25 MR ISAACS: For example. They are identified, provided for</p> <p style="text-align: center;">Page 69</p>	<p>1 A: 2 "In administration, winding up or bankruptcy any 3 claim arising by virtue of section 382 of the Financial 4 Services and Markets Act." 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR ISAACS: And: 7 "In administration or winding up...(Reading to the 8 words)... any claim which by virtue of the act is 9 postponed." 10 MR JUSTICE DAVID RICHARDS: Yes, yes. 11 MR ISAACS: Right. So that is an example of a proveable 12 debt which is postponed. 13 MR JUSTICE DAVID RICHARDS: One would then have to look at 14 the relevant provisions to see where it comes. 15 MR ISAACS: Yes, indeed. But it is in the summary, so if it 16 is in there it is not referred to as such. The second 17 point about the summary is it does not refer to 18 unenforceable debts and liabilities. These cannot be 19 paid in a liquidation or administration at all unless 20 the contributories agree. 21 MR JUSTICE DAVID RICHARDS: That is why they are not 22 referred to there. Is Lord Neuberger right not to 23 include them in his summary because I mean, they are not 24 payable. 25 MR ISAACS: Correct, they are not payable.</p> <p style="text-align: center;">Page 71</p>
<p>1 in 12.32A. That is where -- 2 MR JUSTICE DAVID RICHARDS: I will just have a look at that. 3 In the rules? 4 MR ISAACS: In the rules. 5 MR JUSTICE DAVID RICHARDS: 12.3. 6 MR ISAACS: Big 2A. The following, do you see: "[Postponed 7 debts]"? 8 MR JUSTICE DAVID RICHARDS: 12.3. 9 MR ISAACS: 2A. It is the section after 12.32. 10 MR JUSTICE DAVID RICHARDS: Sorry, the postponed debts bit 11 I--- 12 MR ISAACS: You have not got postponed debts. 13 MR JUSTICE DAVID RICHARDS: There is a sort of headnote. 14 No. This is 12.3 headed "proveable debts". 15 MR ISAACS: Yes, and it says: "The following are not 16 proveable." 17 MR JUSTICE DAVID RICHARDS: I do not think that heading, 18 I do not think it forms parts of the rules. 19 MR ISAACS: My apologies. Yours is in red and mine is in 20 blue(?) "The following are not proveable except at the 21 time...(Reading to the words)... have been paid in full 22 with interest." 23 Does your Lordship see that? 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR ISAACS: And then over the page, sorry over my page, sub</p> <p style="text-align: center;">Page 70</p>	<p>1 MR JUSTICE DAVID RICHARDS: I do not think that is an 2 omission or a qualification. But your postponed debts 3 are, I think, your are right. For example, let us just 4 look at it, at 74(1)(f): not deemed to be a debt. So it 5 probably comes after 7. 6 MR ISAACS: But the reason I mention unenforceable debts is 7 lest it be said, that they are non-proveable. 8 Unenforceable debts are non-proveable debts or 9 liabilities. They are liabilities if they cannot be 10 proved. So it is easy to look at this, 7, and say: 11 "Ah, non-proveable liabilities." My point is to say 12 that non-proveable liabilities does not include 13 unenforceable debts which are non-proveable liabilities. 14 MR JUSTICE DAVID RICHARDS: Oh, I see. 15 MR ISAACS: My seventh point -- sorry, just to summarise 16 then. The non-proveable debts at tier 7, and these are 17 important because your Lordship has heard and asked 18 a number of questions about what happens at tier 7, the 19 non-proveable debts, as they are called at tier 7, do 20 not include certain non-proveable debts, that is 21 unenforceable debts, and they do include proveable 22 debts, namely postponed debts which are proveable. 23 MR JUSTICE DAVID RICHARDS: It is possible that Lord 24 Neuberger did not have postponed debts in mind at all 25 rather than saying they are part of 7. It may be they</p> <p style="text-align: center;">Page 72</p>

18 (Pages 69 to 72)

<p>1 should be 8 and shareholders should be 9.</p> <p>2 MR ISAACS: Yes, this is only a summary.</p> <p>3 MR JUSTICE DAVID RICHARDS: I take your point. You may know</p> <p>4 whether the concept of postponed liability such as under</p> <p>5 section 74(1)(f) were referred to at all in the course</p> <p>6 of argument. I forget whether you were in, Mr Isaacs,</p> <p>7 virtually the entirety of your chambers.</p> <p>8 MR ISAACS: I am sorry, the reason I had to refer to ex</p> <p>9 parte James is because I had the delightful task of</p> <p>10 persuading the Supreme Court that the case should be</p> <p>11 decided by reference to that case.</p> <p>12 MR JUSTICE DAVID RICHARDS: Oh, I see I had not realised</p> <p>13 I had touched on sensitive toes.</p> <p>14 MR ISAACS: Well, my Lord, you have.</p> <p>15 MR JUSTICE DAVID RICHARDS: Anyway, it seems to me that</p> <p>16 postponed debts are in a separate category, whether they</p> <p>17 are a sub class of 7 or they are actually should be</p> <p>18 class 8 and shareholders 9, I am not quite sure. It</p> <p>19 probably does not matter very much. It might depend on</p> <p>20 looking at the relevant legislation to see exactly where</p> <p>21 in the chain they are postponed.</p> <p>22 MR ISAACS: Yes, because my submission will be for reasons</p> <p>23 that I will come on to that they are what is</p> <p>24 contemplated by Lord Neuberger within section 7.</p> <p>25 MR JUSTICE DAVID RICHARDS: I see. You think that he is</p> <p style="text-align: center;">Page 73</p>	<p>1 MR JUSTICE DAVID RICHARDS: Well, that is the very point you</p> <p>2 are --</p> <p>3 MR ISAACS: It is and I will develop it in the context of my</p> <p>4 submissions on the currency conversion claim.</p> <p>5 MR JUSTICE DAVID RICHARDS: We will park that one.</p> <p>6 MR ISAACS: I just want to make one point now while we are</p> <p>7 on the case, if I may?</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ISAACS: Which relates to the judgment, because</p> <p>10 your Lordship was not taken to paragraph 54 by my</p> <p>11 learned friend Mr Trower. It is at 521 where Lord</p> <p>12 Neuberger says (between A and B) four possibilities were</p> <p>13 canvassed. Does your Lordship see that? The first --</p> <p>14 MR JUSTICE DAVID RICHARDS: I do.</p> <p>15 MR ISAACS: The first is:</p> <p>16 "The court's ...(Reading to the words)... a right",</p> <p>17 that is to say their expenses.</p> <p>18 The second is it is proveable, <i>pari passu</i>. The</p> <p>19 third is not proveable. The third is not proveable --</p> <p>20 MR JUSTICE DAVID RICHARDS: And therefore falls within</p> <p>21 category 7.</p> <p>22 MR ISAACS: That is right and therefore falls into category</p> <p>23 7. That is the reference to category 7 that we have in</p> <p>24 the case. Then the fourth possibility, if the third is</p> <p>25 correct, then the court should direct the administrators</p> <p style="text-align: center;">Page 75</p>
<p>1 referring to postponement.</p> <p>2 MR ISAACS: Well, I think they are certainly included in</p> <p>3 there. Your Lordship has focussed a great deal this</p> <p>4 week on non-proveable debts.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes, because plainly that is</p> <p>6 a live issue.</p> <p>7 MR ISAACS: It is a live issue and my submission will be, as</p> <p>8 I said yesterday, that they do not exist. I will come</p> <p>9 on to that. That is why I say that Lord Neuberger was</p> <p>10 not thinking of those. He was thinking --</p> <p>11 MR JUSTICE DAVID RICHARDS: Notwithstanding all the</p> <p>12 discussion of T & N and so on.</p> <p>13 MR ISAACS: I will develop that. The seventh point on the</p> <p>14 waterfall is really the one I have just made actually</p> <p>15 which is that Lord Neuberger did not say or suggest that</p> <p>16 there existed a further category of debts in the</p> <p>17 seventh tier, namely debts which are not proveable at</p> <p>18 all but are payable ahead of shareholders.</p> <p>19 MR JUSTICE DAVID RICHARDS: Sorry, Lord Neuberger did not</p> <p>20 suggest?</p> <p>21 MR ISAACS: That there is a further category of debts.</p> <p>22 MR JUSTICE DAVID RICHARDS: There is a further category of</p> <p>23 debts.</p> <p>24 MR ISAACS: In the seventh tier, namely debts which are not</p> <p>25 proveable at all but are payable ahead of shareholders.</p> <p style="text-align: center;">Page 74</p>	<p>1 to treat more favourably. That is <i>ex parte</i> James. That</p> <p>2 is it. My learned friend said there is a reference to</p> <p>3 category 7. If one then looks at the way the case was</p> <p>4 decided, one has the considerations that I have already</p> <p>5 taken your Lordship to which are at 58 to 63.</p> <p>6 Your Lordship remembers that. They are described at</p> <p>7 paragraph 64 as preliminary observation. Then the</p> <p>8 substantive consideration of the issue starts at</p> <p>9 paragraph 65. Your Lordship see, is the liability under</p> <p>10 an FSD a proveable debt. That extensive treatment</p> <p>11 carried on until paragraph 95.</p> <p>12 MR JUSTICE DAVID RICHARDS: Right.</p> <p>13 MR ISAACS: And concludes on the proveable debts as it then</p> <p>14 was, where he says its proveable for the reasons we have</p> <p>15 seen. At 97 he starts with the expenses issue and there</p> <p>16 is a substantial discussion of whether the liabilities</p> <p>17 are expenses. That carries on until one gets to</p> <p>18 paragraph 114 where it is held that they are not</p> <p>19 expenses.</p> <p>20 MR JUSTICE DAVID RICHARDS: Sorry. So what is the issue</p> <p>21 here.</p> <p>22 "97: Given that the potential FSD liability in each</p> <p>23 of these cases is a debt falling within 13(12)(1)(b) and</p> <p>24 therefore proveable [and therefore not an expense] it is</p> <p>25 strictly unnecessary to consider this question.</p> <p style="text-align: center;">Page 76</p>

<p>1 Is the liability under an FSD issued after an 2 insolvency event a liquidation expense. 3 MR ISAACS: Yes, and then he considers it. 4 MR JUSTICE DAVID RICHARDS: I am looking puzzled because he 5 says and: 6 "The acceptance on all sides that it would not 7 therefore be an expense." 8 MR ISAACS: Because there was an issue in the case as to 9 what the ratio was in Re Deshocku(?) and what it meant. 10 MR JUSTICE DAVID RICHARDS: I see. That was the point. 11 MR ISAACS: We will see that Deshocku is referred to at 103. 12 MR JUSTICE DAVID RICHARDS: Indeed. 13 MR ISAACS: And there is a discussion of that. It carries 14 on at 111 and it is referred to at 112 and so on. So he 15 concludes at 114 that if it was not proveable it would 16 not be an expense either. 17 MR JUSTICE DAVID RICHARDS: I see. So it is absolutely 18 unnecessary in the sense that they have already decided 19 the very opposite. 20 MR ISAACS: Then we have -- 21 MR JUSTICE DAVID RICHARDS: Then you have your ex parte 22 James. 23 MR ISAACS: Yes, sadly do(?) In fairness to my learned 24 friend I have to read something which pains me. At 25 paragraph 116 it says:</p> <p style="text-align: center;">Page 77</p>	<p>1 friend Mr Wolfson to an extent. He referred your 2 Lordship to Phoenix Oil, which is authority for the 3 proposition that the liability of the members to 4 contribute for the adjustment is a means for adjusting 5 between holders and the fully and partly paid up shares. 6 The reference is 1B/61/564. 7 There is another case. I don't need to take you to 8 it, but if I can your Lordship the reference. It's 9 called Shields Marine. It's at 1A/14, page 372, which 10 makes a similar point in slightly more detail that the 11 adjustment is about payments from under-contributing 12 contributories to over-contributing contributories. We 13 say that the liabilities of members to contribute for 14 the adjustment is not a payment which flows down the 15 waterfall. It doesn't go in and then it goes all the 16 way down through the various tiers because, by its very 17 nature, it is to be used solely for the purpose of 18 paying over-contributing contributories. If that were 19 not the case, the payment of an amount to the statutory 20 fund for a specific purpose would create a liability 21 which would ensure that the purpose was frustrated. 22 The second answer to that particular issue relates 23 to the actions which an administrator should take. If 24 it were the case that my submissions are wrong so that 25 an adjustment would actually create a liability to pay</p> <p style="text-align: center;">Page 79</p>
<p>1 "At any rate at first sight it would be 2 extraordinary if the court which had decided that 3 liability did not fall within the definition ...(Reading 4 to the words)... it was to be so treated." 5 So he is there contemplating in that sentence a 6 non-proveable debt. Again at paragraph 125, 535, 7 between A and B: 8 "However, I come back to the point that if the 9 effect of the rules ...(Reading to the words)... there 10 is no basis for the court deciding that they are." 11 But that was the entire consideration of that 12 point, my Lord. 13 MR JUSTICE DAVID RICHARDS: So that is the extent of the 14 consideration, non-proveable debt. Very well. We will 15 carry on at 5 past 2. 16 (1.05 pm) 17 (Short adjournment) 18 (2.05 pm) 19 MR JUSTICE DAVID RICHARDS: Mr Isaacs. 20 MR ISAACS: My Lord, just to pick up a couple of points made 21 against us in this context. One of the points made 22 against us is that if the members' obligation to 23 contribute extends to adjustments it must follow that 24 the obligation extends to what is higher up in the 25 waterfall. This has been dealt with by my learned</p> <p style="text-align: center;">Page 78</p>	<p>1 statutory interest, then we have a situation where an 2 act of an officeholder of the court, the administrator, 3 would be to increase the liabilities to which the 4 company is subject, which would be very curious and 5 suggest that something has gone wrong. 6 But even leaving that to one side, in those 7 circumstances I submit that the appropriate way for the 8 liquidator to conduct himself is actually not to take 9 the action in the first place that creates the 10 liability, because I would submit that the administrator 11 would be under an obligation not to take steps which 12 caused liabilities to be incurred by the company. 13 Your Lordship has dealt with this in a case in 14 a very different context but one of the T&N cases. It's 15 1C/81. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR ISAACS: Just to remind your Lordship of what was 18 happening, this was an application for directions by the 19 administrators of a number of T&N companies. You get 20 this at paragraph 1. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR ISAACS: "The administrators were of the view that the 23 company should cease to participate in a pensions scheme 24 and they wished to cause the companies to give notice of 25 withdrawal."</p> <p style="text-align: center;">Page 80</p>

<p>1 The reason they wanted to withdraw was because it 2 would be of significant and direct benefit to the 3 creditors of those companies because it would preclude 4 the liabilities arising to make very substantial 5 payments to the trustees. So therefore the 6 administrators came to you on a without notice basis and 7 made this application.</p> <p>8 Your Lordship gave them permission and the reasoning 9 is at paragraph 13. We rely on this as a general 10 principle. What your Lordship said was:</p> <p>11 "The primary duty of the administrators is to act in 12 the best interests of the creditors. Administration is 13 a procedure under which, consistently with that duty, 14 steps may be taken to preserve the companies or their 15 business as going concerns, to obtain approval for 16 compromise or to achieve a better realisation of assets 17 than is possible in a liquidation. If a company is 18 lawfully entitled to take steps which will preclude 19 a large liability from coming into existence, the duty 20 to creditors would seem to require those steps to be 21 taken. There is no benefit but there is very 22 considerable detriment to the creditors if such steps 23 are not taken."</p> <p>24 We would say that would apply in this situation we 25 are contemplating, because if I am wrong the making of</p> <p style="text-align: center;">Page 81</p>	<p>1 Finally, on the point that there is no right to 2 statutory interest --</p> <p>3 MR JUSTICE DAVID RICHARDS: I think Mr Trower's point was, 4 well, the liquidator makes a call for the purposes 5 identified in the section (expenses, debts and 6 liabilities, adjustment of rights between 7 contributories) so he receives a sum. He says, "Well, 8 those are assets available to the liquidator which he 9 must apply, if you like, in accordance with waterfall."</p> <p>10 MR ISAACS: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: Now, you say, "No, to the extent 12 that" -- assume that expenses and provable debts and 13 liabilities are covered in full, the balance required 14 for adjustments amongst contributories forms, as it 15 were, a separate fund to be applied only for that 16 purpose.</p> <p>17 MR ISAACS: Yes.</p> <p>18 MR JUSTICE DAVID RICHARDS: A sort of purpose trust really 19 of some sort.</p> <p>20 MR ISAACS: Yes, that's what the cases say.</p> <p>21 MR JUSTICE DAVID RICHARDS: That is what the cases say.</p> <p>22 MR ISAACS: I am sorry, the case that I referred to.</p> <p>23 MR JUSTICE DAVID RICHARDS: Phoenix says that.</p> <p>24 MR ISAACS: And the older case that I referred to. But it's 25 slightly different from that, my Lord, because your</p> <p style="text-align: center;">Page 83</p>
<p>1 a call for the purposes of an adjustment would actually 2 be to increase the liabilities of the company.</p> <p>3 Now, it could be said in answer to that, "That's all 4 very well, but how then do you adjust the rights of the 5 contributories?" Your Lordship will remember I made 6 the point earlier that the overpaying contributories 7 have a right which has to be respected to get some money 8 in from the under-contributing contributories. What 9 I would submit in this case, on the hypothesis that I am 10 wrong, is that in a liquidation at the very least there 11 would be a remedy. The remedy is that the court could 12 compel the underpaying contributory to pay the 13 overpaying contributory without the inter-mediation of 14 the company on the basis of the <i>Moule v Garrett</i> line of 15 authorities. My learned friend Mr Wolfson again 16 referred to those. <i>Moule v Garrett</i> is at 1A/22, 17 page 104. We don't need to go to it. It's a quote from 18 Chief Justice Lord Cockburn. But the general principle 19 your Lordship will be familiar with and that is when 20 a plaintiff is compelled by law to pay money, which the 21 defendant was also ultimately liable to pay, the 22 defendant is held indebted to the plaintiff. There are 23 a number of authorities in that line. They are in LBL's 24 written submissions at pages 72 to 73. They would 25 provide another answer to this issue if it arose.</p> <p style="text-align: center;">Page 82</p>	<p>1 Lordship posited --</p> <p>2 MR JUSTICE DAVID RICHARDS: Sorry, does it? Shields Marine 3 says that, does it?</p> <p>4 MR ISAACS: Yes. They both say that the purpose of the 5 adjustment is so that overpaying contributories are 6 compensated from the under --</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, that I follow. But I was 8 putting to you something slightly different I think 9 because I am putting to you what Mr Trower says, which 10 is that the liquidator receives these funds pursuant to 11 the calls and he says, "Well, they are funds available 12 to the liquidator which he must then apply in accordance 13 with the waterfall."</p> <p>14 MR ISAACS: Yes, and I would say to that that the way your 15 Lordship just put it to me is that there is a call for 16 a contribution for the payment of debts, liabilities, 17 expenses and for the adjustment of the rights, but it 18 doesn't actually happen that way. What happens is that 19 there is a call for an amount sufficient for the payment 20 of the debts and liabilities and the expenses, because 21 at that stage it's not known who is going to pay so 22 a call goes out to the contributories and the 23 contributories pay money in and the debts and 24 liabilities in the first instance and the expenses are 25 paid. I have made my submission that they are paid in</p> <p style="text-align: center;">Page 84</p>

<p>1 full but no more. One does not make a call for any</p> <p>2 amounts payable in respect of the surplus because there</p> <p>3 isn't one. At that stage, when the officeholder has</p> <p>4 received the contributions, he knows who has overpaid</p> <p>5 and he knows who has underpaid. It's not until --</p> <p>6 MR JUSTICE DAVID RICHARDS: He then makes a further call,</p> <p>7 does he?</p> <p>8 MR ISAACS: He does.</p> <p>9 MR JUSTICE DAVID RICHARDS: Why does he need to do that</p> <p>10 because there is an unpaid call? All he needs to do is</p> <p>11 to enforce payment of the call which has not been paid</p> <p>12 by a particular shareholder.</p> <p>13 MR ISAACS: He will make a first call on all the</p> <p>14 contributories. That's my point. He makes the</p> <p>15 first call on anyone he can call from.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes. It may be that people have</p> <p>17 paid up different amounts on their shares because the</p> <p>18 adjustment of rights between contributories is partly</p> <p>19 for that purpose. I think you said it was.</p> <p>20 MR ISAACS: Yes, it is. My Lord, that would be an answer.</p> <p>21 I was assuming that the call is in respect of the</p> <p>22 section 74 liability rather than the contractual one.</p> <p>23 If it were for the section 74 liability, my Lord,</p> <p>24 assuming that the earlier answer does not work, then</p> <p>25 there would in the first instance be a call to pay off</p> <p style="text-align: center;">Page 85</p>	<p>1 that depends on first answering the question: what does</p> <p>2 debts and liabilities mean? The rest then must follow.</p> <p>3 But I think what Mr Trower is saying is, "Well, it</p> <p>4 assists in deciding what debts and liabilities means to</p> <p>5 know that one of the purposes of a call is to adjust</p> <p>6 rights amongst contributories; that's to say something</p> <p>7 at the bottom of the chain. That may tell you something</p> <p>8 about what is meant by debt and liabilities."</p> <p>9 MR ISAACS: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: But you would say your answer</p> <p>11 is, "Debts and liabilities are provable and therefore</p> <p>12 there must be some mechanism of restricting calls in</p> <p>13 respect of adjustments ring-fencing the products of</p> <p>14 calls for adjustments.</p> <p>15 MR ISAACS: Yes. The last point in relation to whether or</p> <p>16 not there is a right to statutory interest independently</p> <p>17 of the surplus is a point that can be made by reference</p> <p>18 to the Lines Bros decision of Mr Justice Mervyn-Davies,</p> <p>19 which adopts a similar approach. I refer to this,</p> <p>20 my Lord, because I believe it's the only case that is</p> <p>21 referred to by any of the parties which actually</p> <p>22 considers the meaning of the words "debts and liability</p> <p>23 and costs of the winding-up".</p> <p>24 MR JUSTICE DAVID RICHARDS: This is, sorry, Re Lines bros?</p> <p>25 MR ISAACS: Yes, this is Lines Bros again,</p> <p style="text-align: center;">Page 87</p>
<p>1 the expenses and the debts and liabilities. You</p> <p>2 wouldn't make a call in relation to an adjustment in the</p> <p>3 first instance if it covered the section 74 liability</p> <p>4 because you wouldn't know who was going to pay and who</p> <p>5 wasn't going to pay.</p> <p>6 MR JUSTICE DAVID RICHARDS: I see.</p> <p>7 MR ISAACS: Your Lordship's suggestion, if it's in relation</p> <p>8 to the uncalled capital then that would be an answer to</p> <p>9 that point.</p> <p>10 MR JUSTICE DAVID RICHARDS: Right.</p> <p>11 MR ISAACS: But, as your Lordship says, the alternative way</p> <p>12 of putting it is it's for a specific purpose. It's for</p> <p>13 the purpose of the adjustment. If moneys paid for the</p> <p>14 purpose of the adjustment were not applied for the</p> <p>15 purpose of the adjustment, then that would be</p> <p>16 surprising, and I would submit a court would take</p> <p>17 a purposive construction and say, "These moneys which</p> <p>18 have been paid purely for the purpose of the adjustment</p> <p>19 should be applied for the purpose of the adjustment."</p> <p>20 MR JUSTICE DAVID RICHARDS: I mean, if you are right about</p> <p>21 what debts and liabilities means, so that it is</p> <p>22 restricted to the provable debts and liabilities, then</p> <p>23 some way or other it must follow that money called for</p> <p>24 the adjustment of rights amongst contributories</p> <p>25 shouldn't be applied in payment of something else. But</p> <p style="text-align: center;">Page 86</p>	<p>1 Mr Justice Mervyn-Davies. It's at 1C/67. We have</p> <p>2 looked at this so I can take it relatively quickly, my</p> <p>3 Lord. Your Lordship sees page 218B to C, if your</p> <p>4 Lordship can read that.</p> <p>5 MR JUSTICE DAVID RICHARDS: 218.</p> <p>6 MR ISAACS: 218.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes. Just that paragraph there.</p> <p>8 MR ISAACS: Yes. It's to make the point that the debts</p> <p>9 proved have been paid in full. The contest here was</p> <p>10 between post-liquidation contractual interest.</p> <p>11 MR JUSTICE DAVID RICHARDS: I see, yes.</p> <p>12 MR ISAACS: And post-liquidation statutory interest. Does</p> <p>13 my Lord see that just by D?</p> <p>14 MR JUSTICE DAVID RICHARDS: By D? Sorry, I have read the</p> <p>15 paragraph beginning, "I was shown a financial</p> <p>16 statement", so I should read on.</p> <p>17 MR ISAACS: I am sorry, just up to ...</p> <p>18 MR JUSTICE DAVID RICHARDS: Okay. I see, yes.</p> <p>19 MR ISAACS: Having explained the contest down between G and</p> <p>20 H, he said:</p> <p>21 "The question arising requires one to ascertain the</p> <p>22 true meaning of section 317 of the Companies Act 1948 in</p> <p>23 the light of the decided cases. Section 317 reads as</p> <p>24 follows."</p> <p>25 MR JUSTICE DAVID RICHARDS: This is now section ...</p> <p style="text-align: center;">Page 88</p>

<p>1 MR ISAACS: This no longer exists, my Lord.</p> <p>2 MR JUSTICE DAVID RICHARDS: That one doesn't exist. Yes,</p> <p>3 that's right. Yes, an insolvent.</p> <p>4 MR ISAACS: He sets that out. Then at 219A he sets out</p> <p>5 section 33(8) of the Bankruptcy Act, which your Lordship</p> <p>6 sees. Your Lordship sees that he refers to the words,</p> <p>7 "Any surplus after payment of the foregoing debts shall</p> <p>8 be applied." Then also that the foregoing debts means</p> <p>9 the debts proved.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR ISAACS: He says:</p> <p>12 "With these statutory provisions in mind, I can</p> <p>13 state the problems that arise. They are whether [and</p> <p>14 number two] the liquidators are engaged in the</p> <p>15 winding-up of an insolvent company within the meaning of</p> <p>16 section 317."</p> <p>17 Your Lordship will see that those are the first</p> <p>18 words in 317 that he's set out down the page.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR ISAACS: He then looks at previous authority on this</p> <p>21 provision. At 220C there is a decision of Vice</p> <p>22 Chancellor Pennycuik at C, Rolls-Royce Limited.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR ISAACS: At 220F to G, he says:</p> <p>25 "The Vice Chancellor went on to explain that, prior</p> <p style="text-align: center;">Page 89</p>	<p>1 liabilities in the costs of winding-up" are replaced by</p> <p>2 a shorter phrase, "In the winding-up of an insolvent</p> <p>3 company registered in England and Wales".</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ISAACS: The Vice Chancellor rejected the argument that</p> <p>6 that changed the law. Does your Lordship see that at G</p> <p>7 to H?</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, I see. G to H? Yes.</p> <p>9 MR ISAACS: Thank you. Over the page, at 222I:</p> <p>10 "Mr Justice Mervyn-Davies was there considering the</p> <p>11 argument; that is to say when a liquidator begins on the</p> <p>12 basis of insolvency, one applies the bankruptcy rules,</p> <p>13 including section 33(8), pursuant to section 317, until</p> <p>14 all the liabilities, including section 33(8) interest,</p> <p>15 have been satisfied."</p> <p>16 He says at B to C:</p> <p>17 "I do not accept that submission. It seems to me</p> <p>18 that what I have to do is to consider what is meant by the</p> <p>19 words 'debts and liabilities' in the company limb of</p> <p>20 section 10."</p> <p>21 Then he says:</p> <p>22 "So do the words 'debts and liabilities' in the</p> <p>23 company limb of section 10 include any post-liquidation</p> <p>24 interest, statutory or contractual? If they do, Lines</p> <p>25 Bros is not now insolvent because all debts and</p> <p style="text-align: center;">Page 91</p>
<p>1 to the Supreme Court of Judicature Act 1875, there was</p> <p>2 no general provision for the application of the</p> <p>3 bankruptcy rules in the winding-up. Such application</p> <p>4 came in by virtue of section 10 of the 1875 Act", and</p> <p>5 then he sets out the words of that Act. If your</p> <p>6 Lordship could read that, please.</p> <p>7 Your Lordship sees the crucial words which are at</p> <p>8 the bottom of the page and over the page, "... which</p> <p>9 prove to be insufficient for the payment of its debts</p> <p>10 and liabilities and the costs of winding-up".</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR ISAACS: If your Lordship reads B to D.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR ISAACS: So the Vice Chancellor had decided that one must</p> <p>15 look at the situation as it turns out and that the</p> <p>16 bankruptcy rules are only applicable where, after paying</p> <p>17 the debts and liabilities, there is a surplus.</p> <p>18 At 221D, he explains that section 10 was replacing</p> <p>19 and re-enacted leading to section 317 of the 1948 Act.</p> <p>20 Your Lordship sees that at F. He goes through</p> <p>21 everything as it happened.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR ISAACS: The words, "In the winding-up of a company under</p> <p>24 the Companies Act whose assets may prove to be</p> <p>25 insufficient for the payment of its debts and</p> <p style="text-align: center;">Page 90</p>	<p>1 liabilities at the commencement of the winding-up have</p> <p>2 been paid in full. So I turn to the question and take</p> <p>3 statutory interest first. This is not a debt or</p> <p>4 liability within section 10 for two reasons; the first</p> <p>5 one is" -- and we have seen this many times, my Lord,</p> <p>6 and on this side we all rely on it.</p> <p>7 "The second one [and this is the one I am referring</p> <p>8 to in particular here] is it is not right to consider</p> <p>9 insufficiency or insolvency by reference to any</p> <p>10 obligation to pay statutory interest under section 33(8)</p> <p>11 because that is to presuppose that section 33(8) applies</p> <p>12 in the winding-up. The true position is that one</p> <p>13 decides whether or not the winding-up is the winding-up</p> <p>14 of an insolvent company before one takes account of the</p> <p>15 rules that would be brought into account if it is</p> <p>16 insolvent."</p> <p>17 We rely on that by analogy because we say it shows</p> <p>18 that, in interpreting those words "debts and liabilities</p> <p>19 and the cost of winding-up" in section 10, one doesn't</p> <p>20 consider the obligation to statutory interest because</p> <p>21 that's to suppose there is an obligation before the</p> <p>22 company is solvent.</p> <p>23 Similar reasoning applies to the same words in</p> <p>24 section 74 of the 1986 Act, which did not include the</p> <p>25 obligation to pay statutory interest because that is to</p> <p style="text-align: center;">Page 92</p>

<p>1 suppose there is such an obligation before the company</p> <p>2 is solvent.</p> <p>3 MR JUSTICE DAVID RICHARDS: Sorry, just repeat that. I know</p> <p>4 it will be on the transcript, but section 74 does not</p> <p>5 include the obligation to pay interest, you say.</p> <p>6 MR ISAACS: Because that would be to suppose that there is</p> <p>7 such an obligation before the company is solvent. As</p> <p>8 I have submitted to you, there is no independent</p> <p>9 obligation to pay statutory interest until the debts and</p> <p>10 liabilities are proved and paid in full.</p> <p>11 MR JUSTICE DAVID RICHARDS: Can I just say, I mean</p> <p>12 I understand the point that you say that statutory</p> <p>13 interest is not a debt or a liability of the company</p> <p>14 because it simply arises if there is a surplus. But I</p> <p>15 am a little more puzzled by your solvency point. What's</p> <p>16 the point you are making?</p> <p>17 MR ISAACS: Only that the statutory interest doesn't arise</p> <p>18 until the debts and liabilities are paid, until the</p> <p>19 unproved debts are paid. So it's the point about --</p> <p>20 MR JUSTICE DAVID RICHARDS: I mean, is the short point on</p> <p>21 Lines Bros that that was a decision that, in the context</p> <p>22 of those provisions, the statutory interest -- well,</p> <p>23 it's a slightly different point really, isn't it? I am</p> <p>24 just not quite sure how much we get out of Lines Bros,</p> <p>25 except the simple point that statutory interest is not</p> <p style="text-align: center;">Page 93</p>	<p>1 section 74 excludes statutory interest.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ISAACS: The second reason we say that they don't is that</p> <p>4 the phrases "debts and liabilities" or "debts and other</p> <p>5 liabilities" or "liabilities" are used in the Act where</p> <p>6 statutory interest is not included, and the same</p> <p>7 approach should be given or taken to section 74.</p> <p>8 There are three categories of provisions I will</p> <p>9 refer to. The first are the provisions which use the</p> <p>10 term "debts and liabilities". There are number of</p> <p>11 those. For present purposes, it suffices just to</p> <p>12 mention three. Section 95(4)(a), perhaps we can just</p> <p>13 look at that.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR ISAACS: The effect of a company's insolvency. These are</p> <p>16 all statement of affairs. Section 95(4):</p> <p>17 "The statement as to the affairs of a company shall</p> <p>18 be verified by the liquidator and shall show particulars</p> <p>19 of the company's assets, debts and liabilities."</p> <p>20 This is a member's voluntary liquidation.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR ISAACS: Turning the pages to 99 --</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, I see. We have 95(1) I</p> <p>24 guess one has to read it with.</p> <p>25 MR ISAACS: Yes, correct, because the same point can be made</p> <p style="text-align: center;">Page 95</p>
<p>1 a debt or liability of the company.</p> <p>2 MR ISAACS: Yes. Well, fair enough, my Lord. That's a big</p> <p>3 point if it arises.</p> <p>4 MR JUSTICE DAVID RICHARDS: I appreciate that, yes.</p> <p>5 MR ISAACS: It's different, I accept that. But, as I say,</p> <p>6 this is the only case in the several bundles of</p> <p>7 authorities that actually look at the words "debts and</p> <p>8 liabilities and costs of the winding-up". It's</p> <p>9 a different provision. It no longer exists. I accept</p> <p>10 that.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes. Okay. Thank you. I think</p> <p>12 perhaps the short point I was making is that questions</p> <p>13 of solvency and insolvency are not directly relevant to</p> <p>14 section 74, are they?</p> <p>15 MR ISAACS: Only if solvency means payment for the debts</p> <p>16 proved.</p> <p>17 MR JUSTICE DAVID RICHARDS: The word and the concept of</p> <p>18 solvency does not enter into section 74, does it?</p> <p>19 MR ISAACS: No, it doesn't, my Lord. It only enters into it</p> <p>20 in this sense; that the statutory interest is only</p> <p>21 payable if all debts proved are paid, that's correct.</p> <p>22 That concludes the first part of this section,</p> <p>23 my Lord.</p> <p>24 MR JUSTICE DAVID RICHARDS: Right.</p> <p>25 MR ISAACS: Which is whether debts and liabilities in</p> <p style="text-align: center;">Page 94</p>	<p>1 in relation to all of these.</p> <p>2 MR JUSTICE DAVID RICHARDS: So that's section 95.</p> <p>3 MR ISAACS: The next one is 99, which is direct as to those</p> <p>4 statement of affairs before creditors. 99.(2)(a):</p> <p>5 "Particulars of the company's assets, debts and</p> <p>6 liabilities."</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ISAACS: 131(2)(a), this is winding-up:</p> <p>9 "The company's statement of affairs. The statement</p> <p>10 shall be verified and shall show particulars of the</p> <p>11 company's assets, debts and liabilities."</p> <p>12 MR JUSTICE DAVID RICHARDS: It actually just says assets and</p> <p>13 liabilities in my copy.</p> <p>14 MR ISAACS: I beg your pardon, my Lord.</p> <p>15 MR JUSTICE DAVID RICHARDS: Sorry, it says assets and</p> <p>16 liabilities, as it happens, 131(2)(a).</p> <p>17 MR ISAACS: It's happened again, I am afraid. At the</p> <p>18 relevant time it said assets, debts and liabilities.</p> <p>19 MR JUSTICE DAVID RICHARDS: Did it? Okay. Right.</p> <p>20 MR ISAACS: I will get the old one. It's similar. It's in</p> <p>21 volume 2, I am told, my Lord.</p> <p>22 MR JUSTICE DAVID RICHARDS: Right. Thank you. Yes,</p> <p>23 volume 2 at?</p> <p>24 MR ISAACS: It's tab 12.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 96</p>

<p>1 MR ISAACS: It's 131.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes, I see. It was changed in</p> <p>3 2010.</p> <p>4 MR ISAACS: Yes. I won't go there, my Lord.</p> <p>5 So, so far as the statement of affairs is concerned</p> <p>6 in relation to an insolvent company, we say that it</p> <p>7 cannot include statutory interest. I have touched on</p> <p>8 this already, but that would of course require an</p> <p>9 assumption that a company which is about to enter an</p> <p>10 insolvency regime is or will be able to pay all its</p> <p>11 debts, provable debts in full, because unless that</p> <p>12 happens there won't be any statutory interest payable.</p> <p>13 MR JUSTICE DAVID RICHARDS: No, I see. I am not quite sure</p> <p>14 what the point is.</p> <p>15 MR ISAACS: The point here is that a statement of affairs</p> <p>16 which shows the company's debts and liabilities cannot</p> <p>17 include statutory interest.</p> <p>18 MR JUSTICE DAVID RICHARDS: No.</p> <p>19 MR ISAACS: The reason for that is twofold. The first is it</p> <p>20 would require an assumption that a company which is</p> <p>21 about to enter insolvency would be able to pay its</p> <p>22 debts, its proved debts, in full, because unless that</p> <p>23 happens there is no statutory interest.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR ISAACS: Secondly, and this is the point we have touched</p> <p style="text-align: center;">Page 97</p>	<p>1 point is one can clearly form an opinion that we will be</p> <p>2 able to pay the debts plus statutory interest without</p> <p>3 being able to quantify the statutory interest as such.</p> <p>4 You wouldn't need to because you say it is clear that,</p> <p>5 whatever the statutory interest adds up to, it's still</p> <p>6 going to leave the company with a surplus.</p> <p>7 But, at any rate, I take your point that in these</p> <p>8 other cases you have references to debts and liabilities</p> <p>9 which clearly don't include statutory interest. Yes.</p> <p>10 MR ISAACS: The second category is section 123(2):</p> <p>11 "Proof that a company is also deemed unable to pay</p> <p>12 its debts if it is proved to the satisfaction of the</p> <p>13 court that the value of the company's assets is less</p> <p>14 than the amount of its liabilities, taking into account</p> <p>15 its contingent and respective liabilities."</p> <p>16 It's a similar point that one doesn't take into</p> <p>17 account statutory interest, which only comes into</p> <p>18 existence if there is a surplus.</p> <p>19 MR JUSTICE DAVID RICHARDS: But you probably could take into</p> <p>20 account future contractual interest though, couldn't</p> <p>21 you? I mean, if you had a bondholder, the bond payable</p> <p>22 in 5 years' time, interest running at a given rate, if</p> <p>23 he could prove that over, let us say, the next 12 months</p> <p>24 the company would be unable to meet its interest</p> <p>25 payments on the bonds, that would satisfy 123(2).</p> <p style="text-align: center;">Page 99</p>
<p>1 on, it would require matters to be known which cannot be</p> <p>2 known (the amount of the surplus, the length of time</p> <p>3 between the commencement of the process and the payment</p> <p>4 of dividends) and also it requires to be known whether</p> <p>5 the judgment rate is greater than the rate applicable</p> <p>6 apart from the insolvency.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ISAACS: My Lord, although that's superficially easy to</p> <p>9 know -- is your Lordship on 228(7)?</p> <p>10 MR JUSTICE DAVID RICHARDS: No, I am not. I mean, I think</p> <p>11 you must be right. You couldn't include statutory</p> <p>12 interest in a statement of affairs which you are drawing</p> <p>13 up at the start of an insolvency really.</p> <p>14 MR ISAACS: No.</p> <p>15 MR JUSTICE DAVID RICHARDS: For the reasons you give.</p> <p>16 MR ISAACS: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: Although of course before</p> <p>18 a voluntary winding-up there can be a member's voluntary</p> <p>19 winding-up, a statutory declaration that the directors</p> <p>20 must say that their opinion is that the debts will be</p> <p>21 paid in full together with statutory interest within 12</p> <p>22 months.</p> <p>23 MR ISAACS: Yes, my Lord, and that's a point I will add and</p> <p>24 I will come on to that.</p> <p>25 MR JUSTICE DAVID RICHARDS: You will come on to that. The</p> <p style="text-align: center;">Page 98</p>	<p>1 MR ISAACS: Yes, it might do. What I would submit on 74,</p> <p>2 my Lord, is that that doesn't include anything that is</p> <p>3 not provable. So for those purposes it wouldn't,</p> <p>4 I would submit, be within a section 74 liability.</p> <p>5 MR JUSTICE DAVID RICHARDS: I accept that the contractual</p> <p>6 interest would not be a provable debt. Yes, anyway,</p> <p>7 I fully take the point that 123(2), it seems to me,</p> <p>8 doesn't include statutory interest.</p> <p>9 MR ISAACS: Then the other section -- this is the third</p> <p>10 category -- is where the term used is "debts and other</p> <p>11 liabilities". If I can give you the reference and we</p> <p>12 will just go to one of them, 214(6), which is wrongful</p> <p>13 trading.</p> <p>14 "For the purposes of this section, a company goes</p> <p>15 into insolvent liquidation if it goes into liquidation</p> <p>16 at a time when its assets are insufficient for the</p> <p>17 payment of its debts and liabilities and the expenses of</p> <p>18 the winding-up."</p> <p>19 Again, that cannot include statutory interest.</p> <p>20 MR JUSTICE DAVID RICHARDS: I am not sure I need to decide</p> <p>21 what 214(6) means. But there is a curious tension here</p> <p>22 because if you are right about that, you could have</p> <p>23 a company which has gone into creditors' voluntary</p> <p>24 winding-up but which would not have gone into insolvent</p> <p>25 liquidation for the purposes of this section because it</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 will be in creditors' voluntary winding-up unless the</p> <p>2 directors couldn't give the declaration that the company</p> <p>3 will be able to pay its debts and liabilities and</p> <p>4 statutory interest within 12 months.</p> <p>5 MR ISAACS: My Lord, might I reflect on that.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes. 214(6), how much one gets</p> <p>7 out of that I am not sure.</p> <p>8 MR ISAACS: I would submit this, without having at the</p> <p>9 moment an answer to your Lordship's question. There is</p> <p>10 an impossibility, we would say, in including statutory</p> <p>11 interest for the reasons I have given, the practical</p> <p>12 reasons I have given. If one imagines, in a case like</p> <p>13 this, LBIE trying to decide the amount of</p> <p>14 post-administration statutory interest that would have</p> <p>15 been payable five years ago, it would be a meaningless</p> <p>16 question. It would be absolutely impossible to answer</p> <p>17 that question, for a whole host of reasons. So I would</p> <p>18 submit for that reason alone it cannot have been</p> <p>19 intended; and it's the same in any company, there are</p> <p>20 too many imponderables. I know one has to value</p> <p>21 contingent liabilities but this would be a step,</p> <p>22 I submit, too far.</p> <p>23 The other sections which are similar are 216(7).</p> <p>24 MR JUSTICE DAVID RICHARDS: I guess that's the same, yes,</p> <p>25 okay.</p> <p style="text-align: center;">Page 101</p>	<p>1 cases where the words "debts or other liabilities" are</p> <p>2 used. He does, however, focus on the word "other". He</p> <p>3 says "other" means that non-provable liabilities are</p> <p>4 taken into account. So he makes a distinction based on</p> <p>5 the use of that word: "Debts and other liabilities"</p> <p>6 rather than "debts and liabilities". If he's right to</p> <p>7 make any distinction at all --</p> <p>8 MR JUSTICE DAVID RICHARDS: He's really concerned with the</p> <p>9 phrase "debts and liabilities", isn't he, because that's</p> <p>10 the one in section 74?</p> <p>11 MR ISAACS: Yes. But he is responding to a submission that</p> <p>12 I make in my written submissions where I say there are</p> <p>13 all these sections which use the words "debts and</p> <p>14 liabilities" and "debts and other liabilities", and that</p> <p>15 does not include statutory interest.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR ISAACS: He says, "Where you have the word 'other', that</p> <p>18 includes non-provable liabilities", he says. If that's</p> <p>19 right, and we say it isn't right, but if it were right,</p> <p>20 then the word "other" is missing from section 74.</p> <p>21 MR JUSTICE DAVID RICHARDS: But I did not understand him to</p> <p>22 be saying that, I am sorry. I thought Mr Trower's</p> <p>23 submission was that it was the word "liabilities" which</p> <p>24 brought in non-provable liabilities. I think he accepts</p> <p>25 the word "debts" because of 13.12(1) and 12(3) is</p> <p style="text-align: center;">Page 103</p>
<p>1 MR ISAACS: 272(2)(a), which is debtors' petition.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>3 MR ISAACS: And section 421(4), "Insolvent estates of</p> <p>4 deceased persons":</p> <p>5 "For the purpose of this section, an estate is</p> <p>6 insolvent if, when realised, it would be insufficient to</p> <p>7 meet in full all the debts and other liabilities to</p> <p>8 which it is subject."</p> <p>9 MR JUSTICE DAVID RICHARDS: I am afraid I know very little</p> <p>10 about the insolvent estates of deceased persons. Is</p> <p>11 there provision for statutory interest in that?</p> <p>12 MR ISAACS: Yes. No, sorry, my yes was as in that's a fair</p> <p>13 point, my Lord. Let us leave that one out, my Lord.</p> <p>14 I am not sure and I would have to check.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR ISAACS: The point is we have the three --</p> <p>17 MR JUSTICE DAVID RICHARDS: This is actually a rule making</p> <p>18 power, is, it, they are talking about here?</p> <p>19 MR ISAACS: Yes, it appears to be.</p> <p>20 MR JUSTICE DAVID RICHARDS: Effectively, yes.</p> <p>21 MR ISAACS: The three earlier provisions I referred to, the</p> <p>22 same words "debts or other liabilities", statutory</p> <p>23 interest exists if there is a surplus in those cases,</p> <p>24 and I don't believe that my learned friend contends that</p> <p>25 statutory interest can be taken into account in those</p> <p style="text-align: center;">Page 102</p>	<p>1 provable debts, but he says that liabilities has a wider</p> <p>2 meaning. I mean, "debts and other liabilities", we</p> <p>3 probably don't need to investigate that too closely, but</p> <p>4 "debts and liabilities" is the phrase. I think that's</p> <p>5 his submission.</p> <p>6 MR ISAACS: Can I take your Lordship to the written</p> <p>7 submissions so you can see what I thought my target was.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, sure.</p> <p>9 MR ISAACS: I may be wrong, but it's page 14, paragraph 38.</p> <p>10 Does your Lordship have that?</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR ISAACS: "The third set of provisions [and they are the</p> <p>13 ones I have just taken you to] are those dealing with</p> <p>14 circumstances in which insolvency is required to be</p> <p>15 established. LBIE submits the draftsman deliberately</p> <p>16 requires the balance sheet" --</p> <p>17 MR JUSTICE DAVID RICHARDS: Sorry, where are we? This is</p> <p>18 page?</p> <p>19 MR ISAACS: Page 14.</p> <p>20 MR JUSTICE DAVID RICHARDS: Of their first submissions?</p> <p>21 MR ISAACS: Of their supplemental submissions, I apologise,</p> <p>22 paragraph 38. It's the sentence beginning, "The third</p> <p>23 set of provisions"; does your Lordship have that?</p> <p>24 MR JUSTICE DAVID RICHARDS: I am getting there, yes.</p> <p>25 MR ISAACS: I had understood that to place reference on the</p> <p style="text-align: center;">Page 104</p>

<p>1 word "other" as if to introduce non-provable</p> <p>2 liabilities, but I may be wrong. Whatever is meant,</p> <p>3 my Lord, the submission I have is twofold. The first is</p> <p>4 that statutory interest cannot be included in those</p> <p>5 references to "other liabilities" or "liabilities",</p> <p>6 whichever one. If it is said that the word "other" has</p> <p>7 a meaning and it includes non-provable liabilities which</p> <p>8 would not otherwise be included, then its absence from</p> <p>9 section 74 is a further indication that statutory</p> <p>10 interest is not included within "debts and liabilities"</p> <p>11 in section 74.</p> <p>12 MR TROWER: My Lord, just so there can be no</p> <p>13 misunderstanding, our main submissions are made in</p> <p>14 paragraph 81 and following of our main submissions,</p> <p>15 which was the point your Lordship was dealing with.</p> <p>16 Those supplemental submissions we dealt with were</p> <p>17 included by way of response to the points which Mr</p> <p>18 Isaacs has just outlined to your Lordship and which were</p> <p>19 made in his main submissions.</p> <p>20 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>21 MR ISAACS: The third section on this, my Lord, is the fact</p> <p>22 that whenever it's intended that statutory interest</p> <p>23 should be taken into account the statute says that</p> <p>24 statutory interest should be taken into account. There</p> <p>25 are four sets of provisions here. Your Lordship has</p> <p style="text-align: center;">Page 105</p>	<p>1 sections that I have referred to, the predecessor of</p> <p>2 section 89(1), which is section 283(1) of the 1948 Act.</p> <p>3 It is a couple of pages further forward. Does your</p> <p>4 Lordship see that?</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR ISAACS: "... will be able to pay its debts in full</p> <p>7 within such period not exceeding 12 months", without any</p> <p>8 reference to statutory interest.</p> <p>9 MR JUSTICE DAVID RICHARDS: That's because there wasn't any,</p> <p>10 isn't it? There was no provision for statutory</p> <p>11 interest. Because the statutory interest provisions</p> <p>12 were brought in following the Cork Committee</p> <p>13 recommendations which I have been taken to. Re Lines</p> <p>14 Bros was an attempt to bring in bankruptcy rules on</p> <p>15 interest into company liquidations. I don't think</p> <p>16 anyone had attempted to before. That's the reason there</p> <p>17 is no reference because there is nothing in the</p> <p>18 Companies Act or the winding-up rules about statutory</p> <p>19 interest.</p> <p>20 MR ISAACS: I believe that's correct, my Lord.</p> <p>21 MR JUSTICE DAVID RICHARDS: But that leads on to a question</p> <p>22 I was going to ask you sometime and I might as well ask</p> <p>23 it now. The position presumably under the 1948 Act was</p> <p>24 that Humber Ironworks was still good law.</p> <p>25 MR ISAACS: Yes.</p> <p style="text-align: center;">Page 107</p>
<p>1 already referred to one of them in section 89(1).</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ISAACS: The other one, the second one, is</p> <p>4 section 149(3), which is set-off. We have looked at</p> <p>5 that in a different context.</p> <p>6 MR JUSTICE DAVID RICHARDS: Section 149(3).</p> <p>7 MR ISAACS: Yes, 149(3). The third one is section 215(4).</p> <p>8 MR JUSTICE DAVID RICHARDS: Sorry, I misheard you I think.</p> <p>9 MR ISAACS: 215.</p> <p>10 MR JUSTICE DAVID RICHARDS: 215, sorry, I did mishear you.</p> <p>11 So that's wrongful trading.</p> <p>12 MR ISAACS: Yes. The fourth is rule 12.3(2)(a). This is</p> <p>13 the section creating postponed debts.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR ISAACS: We submit that this is in contrast to</p> <p>16 section 74(1), which makes no reference to statutory</p> <p>17 interest. That omission must have been deliberate. We</p> <p>18 say this conclusion is reinforced by consideration of</p> <p>19 the predecessor of section 74(1), which is</p> <p>20 section 212(1) of the Companies Act 1948.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes, that's in volume 2</p> <p>22 somewhere, is it?</p> <p>23 MR ISAACS: Volume 2/9. Your Lordship sees there it is in</p> <p>24 materially identical terms to what we have now. The</p> <p>25 contrast then is with the predecessors of the other</p> <p style="text-align: center;">Page 106</p>	<p>1 MR JUSTICE DAVID RICHARDS: So what was the position, would</p> <p>2 you submit, in relation to contractual interest under</p> <p>3 the pre-1986 winding-up regime?</p> <p>4 MR ISAACS: Pre or post winding-up?</p> <p>5 MR JUSTICE DAVID RICHARDS: No, no. I mean, sorry, the</p> <p>6 pre-1986 liquidation regime.</p> <p>7 MR ISAACS: Yes, what interest are we talking about, pre or</p> <p>8 post?</p> <p>9 MR JUSTICE DAVID RICHARDS: Post-liquidation contractual</p> <p>10 interest. Now it wasn't provable.</p> <p>11 MR ISAACS: No, it wasn't.</p> <p>12 MR JUSTICE DAVID RICHARDS: But in the event of a surplus --</p> <p>13 I think the way that it was put in Humber Ironworks was</p> <p>14 that in the event of a surplus the creditors were</p> <p>15 remitted to their contractual rights.</p> <p>16 MR ISAACS: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: So the question I think is,</p> <p>18 well, in those circumstances, would that have been</p> <p>19 a debt or liability for the purposes of section 212?</p> <p>20 MR ISAACS: Fortunately, my Lord, I will have a break in a</p> <p>21 couple of minutes and I will be able to think about</p> <p>22 that.</p> <p>23 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>24 MR ISAACS: The fourth point I make in relation to the words</p> <p>25 "debts and liabilities" in section 74 is that they</p> <p style="text-align: center;">Page 108</p>

<p>1 cannot be read literally as meaning all debts and 2 liabilities of the company. It's for reasons which 3 I discussed when I was submitting that the word 4 "liabilities" in the sub-debt agreements cannot be read 5 literally. There are three categories which I mention 6 there and I will mention again. The first is future 7 debts. Your Lordship recalls that the administrator or 8 liquidator is not obliged to pay the full amount of the 9 future liability. On the contrary, he is obliged to pay 10 a dividend on the amount discounted in accordance with 11 the rules, and that discounted amount is not provable or 12 payable and could not be caught by section 74. 13 MR JUSTICE DAVID RICHARDS: I mean, just to get it out in 14 the open, the point about future debts is that they are 15 payable in the future. So if one says that they are not 16 payable in full, that's right of course but if by "full" 17 you mean the nominal value. But a debt payable in 18 10 years' time is not today, in terms of payment, a debt 19 of the face value because it is not payable for 20 10 years. 21 MR ISAACS: No, my Lord, I accept that. 22 MR JUSTICE DAVID RICHARDS: So it's a slightly special case, 23 isn't it? 24 MR ISAACS: My submission that I am making to your Lordship 25 and have been is that it is a special case, contingent</p> <p style="text-align: center;">Page 109</p>	<p>1 MR ISAACS: What is the amount of the liability of the 2 company? 3 MR JUSTICE DAVID RICHARDS: It depends for what purpose you 4 are asking the question. 5 MR ISAACS: Yes. I take it what your Lordship is suggesting 6 to me is that, in relation to the £1,000 future debt 7 payable in 20 years' time, for the value of payment in 8 the liquidation, it's £376.89. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR ISAACS: Because that's the discounted amount. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR ISAACS: What that means is that, when one looks at 13 liabilities for this purpose, one says: what is the 14 value of the liability when calculated in accordance 15 with the Insolvency Rules and the value to which the 16 creditor is entitled to receive in the insolvency? 17 That's exactly my submission, my Lord. Whether one is 18 construing the contract and the meaning of liability in 19 the contract or construing section 74 and the meaning of 20 liability in that context, one looks at the value of the 21 liability as calculated in accordance with the rules. 22 Your Lordship says that contingent liabilities are in 23 a different category. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR ISAACS: The difficulty, in my respectful submission,</p> <p style="text-align: center;">Page 111</p>
<p>1 debts, future debts -- 2 MR JUSTICE DAVID RICHARDS: The reason why future debts is 3 because the liquidation regime takes account of the time 4 value of money. 5 MR ISAACS: It does, yes. 6 MR JUSTICE DAVID RICHARDS: It's fair for you to say, "Well, 7 yes, but you could have a debt which was payable in 8 five years' time from the date of liquidation." In 9 fact, the distribution is not made for five years, but 10 it's still payable at the discounted rate. But, 11 nonetheless, it's in a slightly special case because of 12 the element of the accelerated payment. 13 MR ISAACS: As is the contingent debt. 14 MR JUSTICE DAVID RICHARDS: The contingent debt I find is in 15 a quite separate category, myself, because you have 16 talked about the full amount of the contingent 17 liability, but that doesn't, with respect, make a great 18 deal of sense. I mean, I insure my house for £100,000. 19 It doesn't make any sense to say that the full amount of 20 the insurance company's liability to me is £100,000; 21 it's only that if my house burns down. 22 MR ISAACS: My Lord, if we can take them one at a time, in 23 relation to the future debt of £1 million, that's 24 a liability of the company. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 110</p>	<p>1 with that suggestion is that the level of contingency 2 can vary from zero to 100 per cent or at least slightly 3 above zero and slightly less than 100. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR ISAACS: In relation to a contingent debt, which has 6 a likelihood of occurring of 99.9 per cent but it is 7 payable in 20 years' time, the amount calculated in 8 accordance with the rules would be almost identical when 9 one takes account of futurity. The difference is that 10 the liquidator or officeholder can discount at a rate 11 other than 5 per cent, if appropriate, but that's not 12 the point. The point is the difference between the 13 £100,000 which you will get if your house burns down and 14 the amount you get will be dictated by the time value of 15 money. 16 MR JUSTICE DAVID RICHARDS: Yes, but you are taking a rather 17 special and slightly unusual contingent liability there. 18 I mean, the broad mass of contingent liabilities are 19 liabilities that may well not develop into actual 20 liabilities at all. They may or may not. So to talk 21 about the full amount of the liabilities is I find 22 a difficult concept. 23 MR ISAACS: Again, my Lord, the answer to that is, yes, 24 that's quite correct, and when one says or when one 25 assesses what is the value of the contingent liability</p> <p style="text-align: center;">Page 112</p>

<p>1 for the purpose of the contract or for the purpose of</p> <p>2 section 74, in the case of your house it would have to</p> <p>3 be valued in accordance with the rules.</p> <p>4 MR JUSTICE DAVID RICHARDS: Exactly. So you are saying the</p> <p>5 point is the value when calculated in accordance with</p> <p>6 the rules.</p> <p>7 MR ISAACS: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: Although in that case of course</p> <p>9 it can be changed, but again in accordance with the</p> <p>10 rules.</p> <p>11 MR ISAACS: Yes. The difficulty that my learned friend has</p> <p>12 is that he accepts at paragraph 49 of his supplemental</p> <p>13 submissions that payment of the discounted amount of</p> <p>14 a future liability discharges the entire liability.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR ISAACS: That's the thin end of the wedge because it must</p> <p>17 follow that payment of 99 per cent of the amount</p> <p>18 discharges 99 per cent of the liability.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR ISAACS: I can explain what I mean by that, my Lord, if</p> <p>21 it's not clear. I mean, in the example of the £1,000</p> <p>22 which is payable in 20 years' time, if the value is</p> <p>23 £376.89, if valued in accordance with the rules, and if</p> <p>24 a dividend of £376 is paid of the 376.89, 99 per cent</p> <p>25 odd, then that surely discharges pro tanto the</p> <p style="text-align: center;">Page 113</p>	<p>1 MR ISAACS: No, and that's for the reason I have just given,</p> <p>2 which is --</p> <p>3 MR JUSTICE DAVID RICHARDS: They are not payable.</p> <p>4 MR ISAACS: -- that they cannot be paid by a liquidator. He</p> <p>5 would be in breach of duty in paying them.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR ISAACS: But they are liabilities of the company. There</p> <p>8 is no doubt about that.</p> <p>9 MR JUSTICE DAVID RICHARDS: There is no doubt about that,</p> <p>10 but they are not what is meant by Lord Neuberger when he</p> <p>11 refers to non-provable debts.</p> <p>12 MR ISAACS: No. More importantly, my Lord, I submit they</p> <p>13 are not what's meant by the words "debts and</p> <p>14 liabilities" in section 74.</p> <p>15 MR JUSTICE DAVID RICHARDS: I agree, because they are not</p> <p>16 payable.</p> <p>17 MR ISAACS: That shows that debts and liabilities in</p> <p>18 section 74 does not mean liabilities of the company.</p> <p>19 It's a narrower category because it's a liability.</p> <p>20 MR JUSTICE DAVID RICHARDS: It does not get you home though</p> <p>21 because they are not provable, are they?</p> <p>22 MR ISAACS: That's my --</p> <p>23 MR JUSTICE DAVID RICHARDS: I just don't think --</p> <p>24 MR ISAACS: Your Lordship said they are not provable.</p> <p>25 MR JUSTICE DAVID RICHARDS: Well, they are clearly not</p> <p style="text-align: center;">Page 115</p>
<p>1 liability, otherwise in 20 years' time you get overpaid.</p> <p>2 If it works for 99 per cent, it has to work for 50 per</p> <p>3 cent and it has to work pro tanto. So my point is that</p> <p>4 a dividend would discharge the liability.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes. When you say a dividend,</p> <p>6 you mean a 100 per cent dividend.</p> <p>7 MR ISAACS: 100 per cent would discharge 100 per cent of the</p> <p>8 liability, but 50 per cent would discharge 50 per cent</p> <p>9 of it.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes, I think that must be right.</p> <p>11 MR ISAACS: So the first category is future liabilities.</p> <p>12 The second is contingent liabilities and I have made</p> <p>13 similar points. The third is non-provable debts.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR ISAACS: And statute barred and liability to pay foreign</p> <p>16 non-EU taxes are the examples that are often given</p> <p>17 there.</p> <p>18 MR JUSTICE DAVID RICHARDS: Not so far as Lord Neuberger's</p> <p>19 waterfall is concerned though, because his is the order</p> <p>20 in which the assets will be applied. As you rightly</p> <p>21 say, they won't be applied in payment of foreign public</p> <p>22 debts or tax at any rate.</p> <p>23 MR ISAACS: No, that's correct.</p> <p>24 MR JUSTICE DAVID RICHARDS: And statute barred debts. So</p> <p>25 he's not contemplating those.</p> <p style="text-align: center;">Page 114</p>	<p>1 because --</p> <p>2 MR ISAACS: But my point has been that the liabilities have</p> <p>3 to be provable to fall within section 74.</p> <p>4 MR JUSTICE DAVID RICHARDS: Let us talk about the sort of</p> <p>5 non-provable debts that Lord Neuberger had in mind,</p> <p>6 because he clearly didn't have in mind the ones you are</p> <p>7 just putting to me, which I, frankly, regard as a red</p> <p>8 herring.</p> <p>9 MR ISAACS: With respect, my Lord, what non-provable</p> <p>10 liabilities did he have in mind?</p> <p>11 MR JUSTICE DAVID RICHARDS: You were there.</p> <p>12 MR ISAACS: I was, my Lord.</p> <p>13 MR JUSTICE DAVID RICHARDS: Even I know there was extensive</p> <p>14 discussion of T&N.</p> <p>15 MR ISAACS: That's fantastic, my Lord. If only your</p> <p>16 Lordship would accept what I say is the answer which</p> <p>17 is --</p> <p>18 MR JUSTICE DAVID RICHARDS: It is not that easy, I am</p> <p>19 afraid.</p> <p>20 MR ISAACS: I will come on to this.</p> <p>21 MR JUSTICE DAVID RICHARDS: What you are saying -- go on.</p> <p>22 MR ISAACS: What I am saying and what I have said, my Lord,</p> <p>23 and I have addressed your Lordship on it, which is the</p> <p>24 non-provable liabilities he had in mind were deferred</p> <p>25 liabilities. I explained --</p> <p style="text-align: center;">Page 116</p>

<p>1 MR JUSTICE DAVID RICHARDS: All right, you mean the 2 postponed liabilities? 3 MR ISAACS: Yes. 4 MR JUSTICE DAVID RICHARDS: Why did he not have in mind the 5 sort of type of liability which was under consideration 6 in T&N? I know the rules have changed, but they 7 illustrate, don't they, that there are liabilities which 8 will be payable in a winding-up, albeit not provable? 9 MR ISAACS: My Lord, I will submit that there are not any 10 such liabilities. 11 MR JUSTICE DAVID RICHARDS: Following the change in the 12 rules post T&N. 13 MR ISAACS: Yes. I will come on to that, as I said I would, 14 in the context of currency conversion claims. 15 MR JUSTICE DAVID RICHARDS: Okay. So, so far as we are 16 concerned here, non-provable debts cannot be read -- 17 debts and liabilities cannot be read literally because 18 ... 19 MR ISAACS: For the three different categories. 20 MR JUSTICE DAVID RICHARDS: We have future, we have 21 contingent and we have non-provable. We will see where 22 we get to with non-provable later on perhaps. I am not 23 quite sure where we get to in this context. 24 MR ISAACS: All I get from the unenforceable liabilities at 25 this stage is a conclusion that your Lordship said,</p> <p style="text-align: center;">Page 117</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, that's fine. 2 MR ISAACS: I am pleased that the next point I deal with is 3 the currency conversion claims. 4 MR JUSTICE DAVID RICHARDS: We are moving on from -- 5 MR ISAACS: There is one last point in this section, the 6 third section. You will remember I said that there are 7 three parts to why the section 74 liability does not 8 extend to statutory interest. 9 MR JUSTICE DAVID RICHARDS: Yes. Just give me one moment, 10 please. Yes. 11 MR ISAACS: The final point I am taking is that, even if all 12 the points I have made are wrong so far, LBIE cannot 13 claim against LBHI2 for interest in respect of any 14 period after the commencement of LBHI2's administration. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR ISAACS: The reason for this point, my Lord, is that 17 LBHI2 is in administration. Pursuant to rule 2.88(1) 18 there can be no proof -- shall we go to it? 19 (3.15 pm) 20 MR ISAACS: Does your Lordship see that? 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR ISAACS: The emphasis is: 23 "Where a debt proved in the administration bears 24 interest that interest is proveable as part of the debt, 25 except insofar as it is payable in respect of any period</p> <p style="text-align: center;">Page 119</p>
<p>1 "Okay, that shows liabilities in section 74 doesn't mean 2 all liabilities of the company. It must be a narrower 3 group of liabilities than just all liabilities." I have 4 all the other arguments which show -- 5 MR JUSTICE DAVID RICHARDS: One could say a wide meaning, 6 which Mr Trower I think contends, is debts and 7 liabilities payable in a liquidation. 8 MR ISAACS: The debts and liabilities that are payable? 9 MR JUSTICE DAVID RICHARDS: Payable in a liquidation. 10 MR ISAACS: But the only debts and liabilities that are 11 payable in a liquidation are those amounts which are 12 paid in accordance with the rules. 13 MR JUSTICE DAVID RICHARDS: Meaning? 14 MR ISAACS: Meaning, in relation to a future debt, you have 15 to discount it. 16 MR JUSTICE DAVID RICHARDS: We are going round in circles 17 maybe. 18 MR ISAACS: What about non-provable? 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR ISAACS: I am sorry, my Lord. 21 MR JUSTICE DAVID RICHARDS: I think you will have to grapple 22 with non-provable debts at some point. I don't really 23 mind whether you do it under this heading or you do it 24 under foreign currency claims. 25 MR ISAACS: My Lord, I said I would and I shall.</p> <p style="text-align: center;">Page 118</p>	<p>1 after the company enters administration." 2 Insofar as LBIE seeks to claim against LBHI2 in 3 respect of statutory interest or any kind of interest, 4 payable in LBIE's own administration, it is not 5 proveable in LBHI2's administration and cannot be 6 claimed to the extent that it relates to the period 7 after LBHI2 went into administration. That would be the 8 position if such claims for interest were made directly 9 against LBHI2. It is submitted it cannot be any 10 different if LBIE seeks to claim interest under the 11 guise of section 74. 12 MR JUSTICE DAVID RICHARDS: So a contribution in respect of 13 interest running after the commencement of LBHI2 14 administration would fall foul of, if you like, 2.88. 15 MR ISAACS: Yes, my Lord, correct. So that concludes that 16 third point on this section. 17 MR JUSTICE DAVID RICHARDS: You are going to move on to 18 foreign currency. 19 MR ISAACS: In particular non-provable liabilities. 20 MR JUSTICE DAVID RICHARDS: I will give the 21 shorthand writers a break. Five minutes. 22 (3.16 pm) 23 (A short break) 24 MR ISAACS: First of all can I hand up a schedule 25 to your Lordship?</p> <p style="text-align: center;">Page 120</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes. (Handed)</p> <p>2 MR ISAACS: This I believe was missing but I referred to</p> <p>3 this earlier in the context of the powers of the</p> <p>4 liquidator in relation to calls. Your Lordship may</p> <p>5 remember there was a reference to Scotland. This is</p> <p>6 what I was reading it from. It does not refer to</p> <p>7 Scotland. The second point I wanted to clarify, I made</p> <p>8 a point earlier about the provisions in the 1948 Act</p> <p>9 which did not refer to statutory interest.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR ISAACS: Your Lordship said quite rightly that is because</p> <p>12 there was not any statutory interest which is quite</p> <p>13 right. But the point I should have made and did not</p> <p>14 make is that when one looks at the way those provisions</p> <p>15 are dealt with in the 1986 Act a number of them now</p> <p>16 expressly refer to statutory interest. But section 74</p> <p>17 does not. So the point that is being made there is the</p> <p>18 absence of the reference to statutory interest in</p> <p>19 section 74 must have been deliberate. That was the</p> <p>20 point I should have made.</p> <p>21 MR JUSTICE DAVID RICHARDS: To be fair to you, I think you</p> <p>22 did.</p> <p>23 MR ISAACS: Thank you. Point number 4, my Lord, whether</p> <p>24 LBIE's potential section 4 liability extends to currency</p> <p>25 conversion claims. I submit it does not for two</p> <p style="text-align: center;">Page 121</p>	<p>1 in 1826 points out that one of the most important and</p> <p>2 valuable alterations protected by" --</p> <p>3 That Act is in fact the Bankrupts Act 1825.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ISAACS: "was the provisions which it contained with</p> <p>6 respect to proof of contingent debts. Prior to that Act</p> <p>7 contingent demands could not be ...(Reading to the</p> <p>8 words)... nearly 80-year before that time Lord Hardwick</p> <p>9 expressed a wish ...(Reading to the words)... that some</p> <p>10 gentlemen might think of a clause which might remedy and</p> <p>11 settle the matter for the future."</p> <p>12 The two cases referred to there, my Lord, the first</p> <p>13 one is ex parte Groom which is 1744. The second one is</p> <p>14 ex parte Barker, which is 1803. My Lord:</p> <p>15 "From that time, which is 1744, until 1869 I think</p> <p>16 the legislature has been engaged in an effort to exhaust</p> <p>17 every conceivable possibility of liability under which</p> <p>18 a bankrupt might be to make it proveable in bankruptcy</p> <p>19 against his estate and relieve the bankrupt for the</p> <p>20 future of any liability in respects thereof."</p> <p>21 Then at 363 is the speech of Lord Fitzgerald. He</p> <p>22 says this, my Lord:</p> <p>23 "The bankruptcy law, as it now exists, seems to</p> <p>24 depend on the great principle of equity, the doctrine of</p> <p>25 equality. That is to say, equality ...(Reading to the</p> <p style="text-align: center;">Page 123</p>
<p>1 reasons. The first is the currency conversion claims do</p> <p>2 not exist and the second is even if they do exist they</p> <p>3 are not proveable. That is accepted. If I am correct</p> <p>4 that debts and liabilities in section 74 only extends to</p> <p>5 proveable debts it will not include currency conversion</p> <p>6 claims. So the starting point for this section of my</p> <p>7 submissions is the non-proveability of the claims. It</p> <p>8 is therefore necessary to consider the approach of the</p> <p>9 legislature and of the courts to non-proveable claims.</p> <p>10 I will do this by reference to only two cases, both of</p> <p>11 which are very well-known: one old and one new. The old</p> <p>12 case is Hardy v Fothergill which is in the bundle at 1A,</p> <p>13 tab 31. As your Lordship will know, the issue in this</p> <p>14 case was whether the assignee's liability under a lease</p> <p>15 was proveable. If your Lordship can read the headnote?</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR ISAACS: I would like to refer to three of the speeches.</p> <p>18 The first is that of Lord (Inaudible), Lord Chancellor,</p> <p>19 which is at 355. He said this, picking it up at the</p> <p>20 third line:</p> <p>21 "Before proceeding to discuss the particular words</p> <p>22 now under construction it is not unimportant to notice</p> <p>23 the gradual steps taken by the legislature to extend the</p> <p>24 application of the bankruptcy law to future and</p> <p>25 contingent debts. Mr Edin in a treaty that is published</p> <p style="text-align: center;">Page 122</p>	<p>1 words)... he gives up all his property, everything that</p> <p>2 he has, for equal distribution ...(Reading to the</p> <p>3 words)... provisions of the bankruptcy."</p> <p>4 This is the paragraph:</p> <p>5 "The present condition of this branch of our law was</p> <p>6 not accomplished all at once ...(Reading to the</p> <p>7 words)... by slow degrees from the time at which</p> <p>8 ...(Reading to the words)... whom the law considered to</p> <p>9 be criminals and delinquents until it threw off its</p> <p>10 barbarisms ...(Reading to the words)... and of justice.</p> <p>11 Lord Hardwick who expounded ...(Reading to the words)...</p> <p>12 to have stated a principle which might be aptly referred</p> <p>13 to in the present occasion. In ex parte Groom Estates</p> <p>14 privileges of creditors come in under bankruptcy</p> <p>15 ...(Reading to the words)... flimsy notes of Mr Atkins."</p> <p>16 Poor old Mr Atkins.</p> <p>17 "But in the modern edition ...(Reading to the</p> <p>18 words)...of the main object of the bankruptcy law that</p> <p>19 all creditors should be entitled to come in and prove</p> <p>20 and that the bankrupt should emerge bankruptcy free from</p> <p>21 all his liabilities."</p> <p>22 Then he goes on to describe the statutory changes</p> <p>23 pursuant to those objects of the bankruptcy law. Then</p> <p>24 Lord Norton at 366, over the page:</p> <p>25 "My Lords, the Act of 1869 was not the first attempt</p> <p style="text-align: center;">Page 124</p>

<p>1 ...(Reading to the words)... arising from the contract. 2 But for some reason or other the legislature has never 3 succeeded before in hitting the mark." 4 He quotes a Court of Appeal decision called <i>Lyn v</i> 5 <i>Cole(?)</i> in which he says: 6 "Trust in the material sections of the Act of 1869 7 ...(Reading to the words)... it is quite plain that the 8 object of these sections is that a bankrupt shall be 9 absolutely relieved from any liability under any 10 contract he has ever entered into." 11 So, my Lord, that was 1888. Now we roll forward to 12 this year which is the <i>Nortell</i> case in bundle E/101. If 13 I can pick this up at paragraph 88. It is on page 527. 14 Your Lordship sees that Lord Neuberger referred to four 15 old cases in which it was held that an order for costs 16 made against a person after an insolvency process had 17 been instituted against him were not contingent debts in 18 the insolvency, even though the costs order was made in 19 proceedings which had started before the insolvency. 20 At paragraph 90 he said he was not concerned about 21 overruling those four cases. As well as two more cases, 22 which your Lordship sees referred to in 91, the 23 decisions of the Court of Appeal in <i>Glenister v Rowan</i> 24 <i>Steele</i>. The second reason he gave for not being 25 concerned about overruling is: Page 125</p>	<p>1 somewhat ...(Reading to the words)... in paragraph 88 2 above." 3 They are the ones I have referred you to. Then he 4 quotes from <i>Bex Linvey Cole(?)</i> and we have already seen 5 that. 6 "If that was true in 1871 it is all the more true 7 following the passing of the 1986 and 2002 Acts, as is 8 illustrated by the amendment of ...(Reading to the 9 words)... following the decision in <i>T&N</i> so as to extend 10 the rights to potential court claims." 11 This was the longest judgment with which the rest of 12 their Lordships agreed. Lord Neuberger, Lord Mance, 13 Lord Clarke and Lord Toulson(?) agreed. Lord Sumption 14 gave his own speech which was short and at the end. It 15 starts above 129. Also it is a majority speech because 16 Lord Mance and Lord Clarke both agreed. I refer to the 17 passage at page 538 in which Lord Sumption said: 18 "The fact that in one case the submission is 19 contractual while in the other it is not." 20 MR JUSTICE DAVID RICHARDS: Sorry, exactly where are you? 21 MR ISAACS: It is letter F. 22 MR JUSTICE DAVID RICHARDS: Yes. Thank you. 23 MR ISAACS: He refers to: 24 "The modern scheme of insolvency law under which all 25 liabilities arising from a state of affairs which Page 127</p>
<p>1 "They were decided at a time when the legislature 2 and the courts were less anxious than currently for an 3 insolvency ...(Reading to the words)... of the bankrupt, 4 although most of the provisions ...(Reading to the 5 words)... can be found in the Bankruptcy Act 1914, over 6 the last 300 years the legislature has progressively 7 widened the definition of proveable debt and narrowed 8 the class of non-proveable liabilities." 9 That is a quote from one of the cases. At 10 paragraph 92 Lord Neuberger quotes from the Court Report 11 which described it: 12 "A basic principle of the law of insolvency is that 13 every debt or liability capable of being expressed in 14 money terms should be eligible for proof, so that the 15 insolvency administration should deal comprehensively 16 with and in one way or another discharge all such debts 17 and liabilities." 18 He continued at paragraph 93: 19 "The notion that all possible liabilities within 20 reason should be proveable helps achieve equal justice 21 to all creditors and potential creditors in any 22 insolvency and in bankruptcy proceedings, helps ensure 23 that the former bankrupt ...(Reading to the words)... 24 starts afresh. Indeed, that seems to have been the 25 approach of the courts in the 19th century before the Page 126</p>	<p>1 obtained at the time when the company went into 2 liquidation are in principle proveable." 3 So we say, my Lord, that these two cases show that 4 the consistent approach of the courts and the 5 legislature for about 300 years has been to strive to 6 ensure that all liabilities are proveable. That is the 7 legislature intervened after your Lordship's decision in 8 <i>T&N</i> to ensure that certain (Inaudible) liabilities were 9 proveable and the Supreme Court this year overruled 10 numerous decisions extending back to the 19th century 11 which held that certain costs liabilities were not 12 proveable. Where however the legislation considers that 13 debts should not be proveable it expressly provides for 14 it and one refers to rule 12.32. 15 MR JUSTICE DAVID RICHARDS: Sorry, you want... 16 MR ISAACS: 12.32. This is the section of the rules which 17 provides for non-proveable debts. The following are not 18 proveable. There are a number of obligations and 19 liabilities in a bankruptcy under 12.3A. Under 12.3B, 20 in relation to administration, winding up or bankruptcy 21 there are a number of obligations under confiscation 22 orders made under various different provisions. So, 23 my Lord, the legislature does contemplate in certain 24 specific cases that liabilities may be not proveable. 25 Where it does that it provides for it in the Page 128</p>

<p>1 Insolventy Act in the rules which apply to proveable 2 debt. So against that background my submission is it 3 would be remarkable if the legislature when introducing 4 the rules in 1986 which apply to foreign currency claims 5 contemplated that there existed a category of a 6 non-proveable debt which would potentially exist in the 7 insolventy of any company which had a debt incurred or 8 payable in a foreign currency, particularly where (1) 9 the rules make no provision whatsoever for the 10 quantification or making of such a claim and (2) the 11 liability is said to arise from a contract. The most 12 common source of debt which was clearly within the 13 contemplation of the legislature. My Lord, that is the 14 first point.</p> <p>15 There are six further reasons why these claims do 16 not exist. The first relates to the nature of the 17 alleged liability. It is accepted that the debt is 18 contractual. What is alleged is that the contract gives 19 rise to two different claims. The first is the claim 20 for the debt itself converted into Sterling on the 21 administration date and that is said(?) that is 22 proveable. In addition to that, there is the currency 23 conversion claim for the difference between the 24 contractual entitlement to payment in the contractual 25 currency and the amount received in respect of proved</p> <p style="text-align: center;">Page 129</p>	<p>1 claim existed at all it would be (Inaudible). What that 2 does demonstrate is there is no non-proveable currency 3 conversion claim. Of course, it is our submission that 4 there is no proveable currency conversion claim either 5 and the reason for that is that there is one single 6 claim and that is the claim which exists and which can 7 be proved. That point can be tested in this way. 8 Suppose D on 1 January agrees to a valuable 9 consideration to pay C the difference in Sterling 10 between a million dollars converted to Sterling on a day 11 on which D becomes insolvent and a million dollars 12 converted into Sterling on the date on which D pays a 13 dividend to its creditors. Suppose D then enters 14 liquidation and C proves for the debt. At the 15 liquidation date there is a liability to which D may 16 become subject by reason of an obligation incurred 17 before that date. This is proveable in D's liquidation. 18 Under 4.86 the value of the debt, by reason of being 19 subject to a contingency, namely the movement in 20 exchange rates, must be estimated by the liquidator. 21 That would show that if the claim did exist it would be 22 proveable.</p> <p>23 MR JUSTICE DAVID RICHARDS: I did not jot the example but I 24 think I should.</p> <p>25 MR ISAACS: Suppose D on 1 January agrees for a valuable</p> <p style="text-align: center;">Page 131</p>
<p>1 debt. That is said to be non-proveable. If one looks 2 at the second claim one sees that it does not bear 3 a certain value at the insolventy date because it is 4 subject to a contingency, namely the movement in 5 exchange rates between the insolventy date and the date 6 of payment. It is therefore a liability to which the 7 company may become subject after the insolventy date by 8 reason of an obligation incurred before that date which 9 is therefore a contingent liability within rule 10 13.12(1)(b). Where a liability arises after the 11 insolventy date, as a result of the contract entered 12 into by a company, the contract insofar as it imposes 13 any actual or contingent liability on the company can be 14 said to impose the incurred obligation. My Lord, that 15 is what Lord Neuberger said in Nortel at paragraph 75. 16 I read it to your Lordship a while ago. It follows that 17 the currency conversion claim, if it exists at all, is 18 a contingent debt of the company at the insolventy date 19 and that is entirely consistent with what Lord Sumption 20 said, described as:</p> <p>21 "The modern scheme of insolventy law under which all 22 liabilities arising from the state of affairs 23 ...(Reading to the words)... when the company went into 24 liquidation are in principle proveable."</p> <p>25 So we would submit that if a currency conversion</p> <p style="text-align: center;">Page 130</p>	<p>1 consideration to pay C the difference in Sterling 2 between million dollars converted to Sterling on the day 3 on which D becomes insolvent and a million dollars 4 converted to Sterling on the date on which D pays a 5 dividend to creditors and D enters liquidation and C 6 calls(?) for the debt.</p> <p>7 MR JUSTICE DAVID RICHARDS: The second date is the date of?</p> <p>8 MR ISAACS: Payment of the dividend. Sorry, the second, 9 then D enters liquidation --</p> <p>10 MR JUSTICE DAVID RICHARDS: I am a little lost. D agrees to 11 pay C the difference in Sterling between \$1 million on 12 the day --</p> <p>13 MR ISAACS: On the day.</p> <p>14 MR JUSTICE DAVID RICHARDS: -- before D becomes insolvent.</p> <p>15 MR ISAACS: On a day on which D becomes insolvent and one 16 million dollars converted to Sterling on the day on 17 which D pays a dividend to creditors.</p> <p>18 MR JUSTICE DAVID RICHARDS: I see.</p> <p>19 MR ISAACS: You have the insolventy date and the payment 20 date. Then we say on the liquidation date there is a 21 liability which D owes, that may become subject to that 22 by reason of an obligation that occurred before that 23 date. It is proveable, it is contingent. The 24 contingency is the exchange rate movement. There is 25 also a contingency which is the event of insolventy but</p> <p style="text-align: center;">Page 132</p>

<p>1 that is neither here nor there. That shows it is</p> <p>2 proveable, if it existed. That is the first point,</p> <p>3 my Lord.</p> <p>4 MR JUSTICE DAVID RICHARDS: That is an interesting example.</p> <p>5 So D --</p> <p>6 MR ISAACS: It is just the currency claim. It is designed</p> <p>7 to just isolate the element, the so-called non-proveable</p> <p>8 element of the claim.</p> <p>9 MR JUSTICE DAVID RICHARDS: Are you assuming, sorry, that C</p> <p>10 has an independent claim for a million dollars.</p> <p>11 MR ISAACS: The way to test that is not to do that, no.</p> <p>12 MR JUSTICE DAVID RICHARDS: So that is what I am meaning.</p> <p>13 It is a sort of currency hedge. If your hedge has been</p> <p>14 bought --</p> <p>15 MR ISAACS: Yes, it is a currency conversion claim.</p> <p>16 MR JUSTICE DAVID RICHARDS: For some reason -- so D</p> <p>17 agrees -- so I mean the contingency is D's own</p> <p>18 insolvency.</p> <p>19 MR ISAACS: And B, fluctuation and exchange rate.</p> <p>20 MR JUSTICE DAVID RICHARDS: That too. So D agrees to pay C</p> <p>21 the difference in Sterling between a million dollars on</p> <p>22 the date of going into administration or liquidation and</p> <p>23 the date of the payment of a dividend. So if that gives</p> <p>24 rise to a proveable debt, as you rightly say, it is</p> <p>25 a contingency dependent on, well, there are a couple of</p> <p style="text-align: center;">Page 133</p>	<p>1 proof -- I mean, that liability must be converted into</p> <p>2 Sterling at the liquidation date or the administration</p> <p>3 date. So where does the proveable contingent liability</p> <p>4 spring up from?</p> <p>5 MR ISAACS: In my example?</p> <p>6 MR JUSTICE DAVID RICHARDS: I mean, it is not proveable</p> <p>7 because the legislation provides for how such a claim is</p> <p>8 to be proved. I mean, if you are saying that the</p> <p>9 provisions for the conversion of foreign currency debts</p> <p>10 do not allow for a second proveable contingent liability</p> <p>11 linked to exchange rate movements in the future then</p> <p>12 I~think you must be right.</p> <p>13 MR ISAACS: My example, my Lord, is effectively the currency</p> <p>14 conversion claim on its own.</p> <p>15 MR JUSTICE DAVID RICHARDS: I appreciate that is where you</p> <p>16 have got to but that has raised its own problems in my</p> <p>17 mind because what you have postulated is a quite</p> <p>18 independent currency hedge, not necessarily related to</p> <p>19 any actual debt.</p> <p>20 MR ISAACS: It has the same --</p> <p>21 MR JUSTICE DAVID RICHARDS: You might have bought it at the</p> <p>22 same time as you made the loan but it could have become</p> <p>23 separated, I suppose.</p> <p>24 MR ISAACS: It has exactly the same elements.</p> <p>25 MR JUSTICE DAVID RICHARDS: Does your example there give</p> <p style="text-align: center;">Page 135</p>
<p>1 contingencies. There is the currency movement and</p> <p>2 indeed whether or not a dividend is paid to creditors.</p> <p>3 That would have to be expressed in Sterling.</p> <p>4 MR ISAACS: (Nodded)</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes. Where does that take me?</p> <p>6 MR ISAACS: Where that takes you is if this claim does exist</p> <p>7 at all, it is proveable.</p> <p>8 MR JUSTICE DAVID RICHARDS: This claim is proveable, is it?</p> <p>9 MR ISAACS: The example I have given you is what I have done</p> <p>10 is I have abstracted the currency conversion claim.</p> <p>11 I started off by saying that the claim alleged to exist</p> <p>12 is non-proveable and that the foreign currency claim is</p> <p>13 going to have two different claims, the proveable bit</p> <p>14 and the non-proveable bit.</p> <p>15 MR JUSTICE DAVID RICHARDS: Quite.</p> <p>16 MR ISAACS: This is just the non-proveable bit.</p> <p>17 MR JUSTICE DAVID RICHARDS: Is it?</p> <p>18 MR ISAACS: That is the point. This is contingent. In</p> <p>19 other words, there is no non-proveable liability because</p> <p>20 if the claim exists at all it is proveable. The</p> <p>21 currency conversion claim which is alleged against us,</p> <p>22 if it would exist at all would be a proveable debt.</p> <p>23 MR JUSTICE DAVID RICHARDS: I mean, I would have some</p> <p>24 difficulty with that because what you have is an actual</p> <p>25 liability in a foreign currency and for the purposes of</p> <p style="text-align: center;">Page 134</p>	<p>1 rise to a proveable debt, do you say, your currency</p> <p>2 hedge?</p> <p>3 MR ISAACS: It would do, yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: Unless --</p> <p>5 MR ISAACS: It would do and it has the same elements as the</p> <p>6 currency conversion --</p> <p>7 MR JUSTICE DAVID RICHARDS: What I do not, I am not quite</p> <p>8 sure where you are going with this.</p> <p>9 MR ISAACS: My submission is this, if this has the same</p> <p>10 elements as the currency conversion claim, the</p> <p>11 non-proveable bit of the currency claimant's claim,</p> <p>12 it would be proveable. The currency conversion claim</p> <p>13 has all the elements which one would expect of</p> <p>14 a proveable debt but(?) it is not proveable.</p> <p>15 MR JUSTICE DAVID RICHARDS: You have got an actual liability</p> <p>16 for a million dollars. Actual, that is the debt. The</p> <p>17 rules say for the purpose of proof that must be</p> <p>18 converted into Sterling at the date of the</p> <p>19 administration and that is your proveable debt full</p> <p>20 stop. But that does not leave room for any further</p> <p>21 proveable debt.</p> <p>22 MR ISAACS: No, it does not. But that is really my point.</p> <p>23 MR JUSTICE DAVID RICHARDS: I see. There is complete</p> <p>24 agreement on that but the question is surely whether the</p> <p>25 provisions for proof(?) discharge the contractual</p> <p style="text-align: center;">Page 136</p>

<p>1 obligation to pay the foreign currency amount or whether</p> <p>2 it leaves that intact I suppose, meaning that of course</p> <p>3 we have to give credit for what you have received on</p> <p>4 your proof enabling you to collect the currency loss.</p> <p>5 MR ISAACS: Yes. What I have sought to do, it may be I have</p> <p>6 not succeeded, is to say the claim alleged against us is</p> <p>7 both the debt claim which is proveable and the second</p> <p>8 part of the claim which is said to be non-proveable and</p> <p>9 then I have said let us isolate the elements of the</p> <p>10 non-proveable claim. That is what sought to do with the</p> <p>11 example. That is an attempt to show that those elements</p> <p>12 would give rise to a proveable claim if they existed.</p> <p>13 MR JUSTICE DAVID RICHARDS: If they existed independently.</p> <p>14 MR ISAACS: Yes.</p> <p>15 NEW SPEAKER: But these do not exist independently. What we</p> <p>16 are talking about does not exist independently. It is</p> <p>17 a product of the insolvency rules, the liability --</p> <p>18 I mean, it's a product first of all of contractual</p> <p>19 rights and then the insolvency law.</p> <p>20 MR ISAACS: My Lord, if it does not appeal to your Lordship</p> <p>21 I will move on. The second point is that the currency</p> <p>22 conversion rules must be the same in all liquidations</p> <p>23 and administration, that is a solvent and insolvent</p> <p>24 liquidation. They cannot be different. The same rules</p> <p>25 govern currency conversion in a solvent or an insolvent</p> <p style="text-align: center;">Page 137</p>	<p>1 MR JUSTICE DAVID RICHARDS: No, and I don't know if anyone</p> <p>2 contends that. I didn't understand Mr Trower or</p> <p>3 Mr Zacoroli to be suggesting that foreign currency</p> <p>4 claims could be asserted in a solvent administration but</p> <p>5 not in a solvent liquidation.</p> <p>6 MR ISAACS: That might be the answer to that.</p> <p>7 MR JUSTICE DAVID RICHARDS: I'm sure. Tell me if I am</p> <p>8 wrong, but --</p> <p>9 MR TROWER: Your Lordship is not wrong.</p> <p>10 MR JUSTICE DAVID RICHARDS: No.</p> <p>11 MR ISAACS: The third point is that the availability of a</p> <p>12 currency conversion claim would render unworkable the</p> <p>13 provisions for set off where there's a foreign currency</p> <p>14 creditor.</p> <p>15 The set-off rules are, so far as relevant, as</p> <p>16 follows. The account is to be taken at the date of the</p> <p>17 notice of intention to make a distribution.</p> <p>18 MR JUSTICE DAVID RICHARDS: So that's rule --</p> <p>19 MR ISAACS: That's 2.853. 2.85(6A).</p> <p>20 MR JUSTICE DAVID RICHARDS: Just give me a moment. Yes.</p> <p>21 MR ISAACS: Provides that for set-off purposes rule 2.86 is</p> <p>22 to apply in relation to any sums due to the company</p> <p>23 which are payable in the currency other than Sterling.</p> <p>24 MR JUSTICE DAVID RICHARDS: 2 point -- sorry, just give me</p> <p>25 that again.</p> <p style="text-align: center;">Page 139</p>
<p>1 liquidation. 4.91 is in materially the same terms as</p> <p>2 2.86. 4.91 is the provision in liquidation. Does</p> <p>3 your Lordship have that?</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ISAACS: If your Lordship looks at 4.12, at the beginning</p> <p>6 of the section on this part.</p> <p>7 MR JUSTICE DAVID RICHARDS: 4.12.</p> <p>8 MR ISAACS: Yes. 4.1(2). Sorry, 4.1:</p> <p>9 "In a member's voluntary liquidation, members</p> <p>10 voluntary winding up, the rules in this part do not</p> <p>11 apply except as follows."</p> <p>12 In 4.12:</p> <p>13 "Subject as follows, the rules in this part apply in</p> <p>14 both the creditors voluntary winding up and a winding up</p> <p>15 by the courts."</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR ISAACS: So the rules applying to solvent winding up</p> <p>18 apply in the same way as they do in a creditor's</p> <p>19 voluntary winding up. It follows that 4.91 applies for</p> <p>20 the purposes of proof as much in a solvent liquidation</p> <p>21 as it does in an insolvent liquidation, and we submit in</p> <p>22 those circumstances it can't possibly have been intended</p> <p>23 that a different approach should be adopted in an</p> <p>24 administration in which a distribution is to be made but</p> <p>25 it turns out that the company is solvent.</p> <p style="text-align: center;">Page 138</p>	<p>1 MR ISAACS: 85(6A).</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ISAACS: 2.86 provides --</p> <p>4 MR JUSTICE DAVID RICHARDS: As we know.</p> <p>5 MR ISAACS: -- that the conversion is to take place at the</p> <p>6 date of entry into administration.</p> <p>7 MR JUSTICE DAVID RICHARDS: Right.</p> <p>8 MR ISAACS: Now, we say that could lead to strange results.</p> <p>9 Again, an example, my Lord, suppose LBIE has a claim</p> <p>10 against C of £100 million.</p> <p>11 MR JUSTICE DAVID RICHARDS: LBIE has a claim against C --</p> <p>12 MR ISAACS: For £100 million.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR ISAACS: C has a cross claim of \$100 million, which,</p> <p>15 converted at the administration date, is £70 million.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR ISAACS: Following set off, C would owe LBIE £30 million</p> <p>18 and would have to pay that amount under rule 2.858.</p> <p>19 (Pause).</p> <p>20 C would be treated as having paid the £70 million on</p> <p>21 the date of the current 295 notice.</p> <p>22 MR JUSTICE DAVID RICHARDS: C -- sorry.</p> <p>23 MR ISAACS: C would be treated as having paid the</p> <p>24 £70 million.</p> <p>25 MR JUSTICE DAVID RICHARDS: Right. Yes.</p> <p style="text-align: center;">Page 140</p>

<p>1 MR ISAACS: On the date of the 295 notice.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ISAACS: By that date the exchange rates might have moved</p> <p>4 such that the £70 million paid by way of set-off would</p> <p>5 convert to \$90 million, with the result that on LBIE's</p> <p>6 case C would have an obligation to pay £30 million into</p> <p>7 the estate while retaining a currency conversion claim</p> <p>8 for \$10 million.</p> <p>9 MR JUSTICE DAVID RICHARDS: A currency conversion claim</p> <p>10 for --</p> <p>11 MR ISAACS: \$10 million dollars.</p> <p>12 MR JUSTICE DAVID RICHARDS: 10 million.</p> <p>13 MR ISAACS: Being the difference between the 100 million and</p> <p>14 the 90 million, and we would say that there would need</p> <p>15 to be a second conversion and a second set off, neither</p> <p>16 of which are recognised by the rules we suggest. So</p> <p>17 it's another reason why this claim doesn't exist.</p> <p>18 The second problem in this section arises from the</p> <p>19 fact that the effect of set off is that the original</p> <p>20 chose in action ceases to exist and is replaced by</p> <p>21 a claim to the net balance. The authority for that</p> <p>22 proposition is Stein v Blake. Your Lordship is familiar</p> <p>23 with it. The reference is 1C/71, page 225, 5B,</p> <p>24 Lord Hoffmann.</p> <p>25 Rule 285A provides that, the account having been</p> <p style="text-align: center;">Page 141</p>	<p>1 LBIE in pounds Sterling as a result of that, but that's</p> <p>2 only a rather uninformed reaction.</p> <p>3 MR ISAACS: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: Because the way it works seems</p> <p>5 to be that under 285, as you know, you have the account,</p> <p>6 as you say, taken as at the date of administration,</p> <p>7 isn't it -- or is it? Forgive me, I keep forgetting.</p> <p>8 MR ISAACS: No, it's the date of the 295 notice.</p> <p>9 MR JUSTICE DAVID RICHARDS: Date of the notice. Yes, thank</p> <p>10 you. And, for the purpose of operating the set off,</p> <p>11 debts have to be stated in Sterling.</p> <p>12 MR ISAACS: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: And 2.858 tells you what happens</p> <p>14 to the balance each way.</p> <p>15 MR ISAACS: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: Which must be a Sterling</p> <p>17 balance, I would think.</p> <p>18 MR ISAACS: Yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: I see.</p> <p>20 MR ISAACS: My Lord, the Stein v Blake point.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR ISAACS: 2858. If only the balance is proveable or</p> <p>23 payable, if the two debts cancel out so that nothing is</p> <p>24 payable, then the debt's extinguished. But, on my</p> <p>25 learned friend's case, that extinguished claim can give</p> <p style="text-align: center;">Page 143</p>
<p>1 taken, only the balance is proveable or payable as the</p> <p>2 case may be.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, so, supposing that LBIE's</p> <p>4 claim against C was for a dollar sum, \$100 million.</p> <p>5 MR ISAACS: In the first example, my Lord?</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes. Well, let's just rewrite</p> <p>7 it, because I just want to see how this works. So LBIE</p> <p>8 has a claim against C for \$100 million.</p> <p>9 MR ISAACS: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: C has a claim against LBIE for</p> <p>11 a Euro sum, I mean, let's say 40 million Euros. So for</p> <p>12 the purposes of set off, both have to be converted, is</p> <p>13 this right, into Sterling.</p> <p>14 MR ISAACS: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes. So whatever that may be,</p> <p>16 but let's say -- so LBIE's claim equals £70 million</p> <p>17 Sterling and C's claim equals, say, 36 million in pounds</p> <p>18 Sterling. So there's then a set-off which leaves</p> <p>19 a balance due to LBIE of £34 million.</p> <p>20 MR ISAACS: Yes.</p> <p>21 MR JUSTICE DAVID RICHARDS: On that. Now, is the effect of</p> <p>22 2.858 that LBIE's claim against C is then for</p> <p>23 £34 million or does it still have a claim denominated in</p> <p>24 dollars, obviously for a balance. I mean, it looks to</p> <p>25 me that the effect is that there is an amount due to</p> <p style="text-align: center;">Page 142</p>	<p>1 rise to a further claim because of the subsequent</p> <p>2 fluctuation in the exchange rate, and we submit that</p> <p>3 would be very surprising, because, once the claim has</p> <p>4 gone, it's gone for all purposes.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR ISAACS: My Lord, I'm conscious of the time. Can I tell</p> <p>7 your Lordship where I am.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>9 MR ISAACS: We're obviously running slightly late, for which</p> <p>10 I apologise.</p> <p>11 MR JUSTICE DAVID RICHARDS: Don't worry.</p> <p>12 MR ISAACS: I was due to have finished by lunchtime today.</p> <p>13 MR JUSTICE DAVID RICHARDS: Oh, were you? I haven't been</p> <p>14 keeping a close eye on it.</p> <p>15 MR ISAACS: My learned friends then have rights of reply.</p> <p>16 In the light of what's been said so far, and I've spoken</p> <p>17 to them, obviously nothing I've said is likely to</p> <p>18 inspire any reply, and, so far as my learned friend</p> <p>19 Mr Wolfson --</p> <p>20 MR TRACE: Say bravo, my Lord.</p> <p>21 MR ISAACS: I understand Mr Wolfson has a few sort points in</p> <p>22 submission to make, which may take 15 minutes or so.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR ISAACS: I don't believe that Mr Trace has anything that</p> <p>25 he wishes to reply to Mr Wolfson in relation to. So</p> <p style="text-align: center;">Page 144</p>

36 (Pages 141 to 144)

<p>1 that was due to take the afternoon.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>3 MR ISAACS: So in that sense we're about 15 minutes behind.</p> <p>4 So far as how much further I've got to go, if I can</p> <p>5 tell your Lordship where I'm going. The fourth point is</p> <p>6 a couple of points as to why Lines Brothers and the</p> <p>7 dictum of Lord Justice Brightman are of no further</p> <p>8 relevance.</p> <p>9 The fifth is a point about the fact that there isn't</p> <p>10 a rule that creditors are entitled to revert to their</p> <p>11 contractual rights any more and the sixth is the</p> <p>12 difficulties that would face an office holder if there</p> <p>13 were a currency conversion claim. So that's the end of</p> <p>14 that. Then the last section relates to post</p> <p>15 administration contractual interest and on that there</p> <p>16 are some short points, extracts, from the Court Report,</p> <p>17 then an explanation of why a contractual claim doesn't</p> <p>18 exist, which is quite sort, and again a look at Humber</p> <p>19 Ironworks and Nortel, in response to my learned friends,</p> <p>20 who are relying on them, in the context of this case.</p> <p>21 Now, I think all of that should take no more than 30 or</p> <p>22 40 minutes.</p> <p>23 MR JUSTICE DAVID RICHARDS: Well, we'll sit for another 10</p> <p>24 or 15 minutes now, and then you'll finish off -- I'll</p> <p>25 just ask Mr Trower and Mr Zacoroli. How long do you</p> <p style="text-align: center;">Page 145</p>	<p>1 Lines Brothers then. This is the fourth submission</p> <p>2 on currency conversion claims, and the submission on</p> <p>3 Lines Brothers is that it was based on two premises</p> <p>4 which are no longer appropriate.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR ISAACS: And the two premises appear from the case, which</p> <p>7 is at 1C, tab 66.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ISAACS: At page 20H, lord Justice Brightman says he was:</p> <p>10 "... much pressed in argument by the bank with the</p> <p>11 injustice that might arise in a liquidator's submission</p> <p>12 in a case of a wholly insolvent company."</p> <p>13 And then he gives an example, and, 21B, he says:</p> <p>14 "Suppose sterling's devalued. The profit would inure</p> <p>15 for the benefit undeserving shareholders. Per contrast,</p> <p>16 if sterling had been revalued upwards, it would be open</p> <p>17 to the liquidator, like any other foreign currency</p> <p>18 debtor, to discharge the company's contractual</p> <p>19 obligation in the currency of the contract. So in the</p> <p>20 end the foreign currency creditor would get the worst of</p> <p>21 both worlds. He would gain nothing if the exchange rate</p> <p>22 moves against the currency and he would lose if it moves</p> <p>23 in favour of the currency."</p> <p>24 We say that's no longer the case, because the</p> <p>25 creditor will now benefit if Sterling appreciates,</p> <p style="text-align: center;">Page 147</p>
<p>1 think --</p> <p>2 MR TROWER: Well, my Lord, I'm not entirely sure how long,</p> <p>3 it's quite difficult to say. I should say that we went</p> <p>4 materially shorter between us in opening than was</p> <p>5 timetabled, so my learned friends have already had</p> <p>6 substantially in excess of the amount of time allocated</p> <p>7 to them, and I don't obviously want to stop them, or</p> <p>8 suggest your Lordship should stop them, saying what they</p> <p>9 want to say, but we just need to bear that in mind. So,</p> <p>10 apart from anything else, I've got more in time terms to</p> <p>11 reply to than I anticipated.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes. Well, fair enough.</p> <p>13 MR TRACE: My Lord, I do assume, though, that Mr Trower is</p> <p>14 going to finish tomorrow. The case is going to finish. I</p> <p>15 assume that's right.</p> <p>16 MR JUSTICE DAVID RICHARDS: Well, I'm not --</p> <p>17 MR TROWER: Well, I have every intention of trying to finish</p> <p>18 tomorrow, but if I'm faced with a situation where</p> <p>19 I can't get on my feet to reply until much later on</p> <p>20 tomorrow, well then I may be in some difficulties.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes. I think that we'll just</p> <p>22 have to see how we go on this. I think, Mr Issacs, if</p> <p>23 you just carry on for another ten or 15 minutes.</p> <p>24 MR ISAACS: I'm grateful for that, my Lord. I would like to</p> <p>25 crack on if I may.</p> <p style="text-align: center;">Page 146</p>	<p>1 because he's paid in Sterling at the payment date.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ISAACS: So, insofar as Lord Justice Brightman was</p> <p>4 relying on an injustice, there's less injustice now than</p> <p>5 there was then.</p> <p>6 21E to F, he refers to Humber Ironworks, which is</p> <p>7 the reversion to contractual rights point, and he said</p> <p>8 it's on that principle that a creditor may claim post</p> <p>9 liquidation interest, and he relies on that, and we say</p> <p>10 that that right no longer exists. I'll come back to</p> <p>11 this, but what it's been replaced with is a statutory</p> <p>12 right to interest which is conferred on all creditors</p> <p>13 regardless of their contractual position.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes. Quite. Yes. That's</p> <p>15 clear.</p> <p>16 MR ISAACS: So that premise is also falsified. It's no</p> <p>17 longer the case that that's the position.</p> <p>18 We say therefore this is not a safe basis for the</p> <p>19 analogy that he draws. That's all I was proposing to</p> <p>20 say on Lines Brothers.</p> <p>21 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>22 MR ISAACS: The fifth point is the reversion to contractual</p> <p>23 rights point. Even at the time of Lines Brothers, the</p> <p>24 scheme of the insolvency legislation was such that in</p> <p>25 certain circumstances creditors might receive less than</p> <p style="text-align: center;">Page 148</p>

<p>1 their full contractual rights. I started off with this</p> <p>2 yesterday, in relation to the contract and I took</p> <p>3 your Lordship to the judgment of Mr Justice Slade at</p> <p>4 first instance in this case.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR ISAACS: Now, your Lordship pointed this out a few days</p> <p>7 ago: the appeal on this case was dismissed, the judgment</p> <p>8 of Mr Justice Slade was upheld, and I read</p> <p>9 to your Lordship the passage at page 25 where</p> <p>10 Mr Justice Slade described it as a fallacy to assume</p> <p>11 that his original contractual rights are preserved</p> <p>12 intact under the statutory scheme.</p> <p>13 It is not said in the Court of Appeal that that was</p> <p>14 wrong, far from it, because at page 26E Lord Justice</p> <p>15 Oliver says:</p> <p>16 "The scheme of the statute does undoubtedly result</p> <p>17 in certain circumstances in the possibility of creditors</p> <p>18 getting less than their full contractual entitlement,</p> <p>19 even in a fully solvent liquidation."</p> <p>20 And there's reference to house and property.</p> <p>21 I also referred your Lordship to more recent</p> <p>22 authority on this point, namely the Danka Business</p> <p>23 Systems case.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR ISAACS: And I've also referred your Lordship to the fact</p> <p style="text-align: center;">Page 149</p>	<p>1 even non-existent.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ISAACS: Delaying claims, this is the second point, will</p> <p>4 increase the claims of all creditors to statutory</p> <p>5 interest at the expense of shareholders who would</p> <p>6 otherwise receive the (Inaudible). The third point is,</p> <p>7 where claims were denominated in different currencies,</p> <p>8 the choice of date would be likely to have a beneficial</p> <p>9 effect on the claims, the currency conversion claims, of</p> <p>10 some claimants but not others and possibly at the</p> <p>11 expense of the others.</p> <p>12 That concludes the currency conversion claims.</p> <p>13 MR JUSTICE DAVID RICHARDS: Right, and then your final part</p> <p>14 is?</p> <p>15 MR ISAACS: Interest.</p> <p>16 MR JUSTICE DAVID RICHARDS: Interest, you have a few --</p> <p>17 MR ISAACS: Whether LBHI2's potential section 74 liability</p> <p>18 extends to post administration, contractual interest.</p> <p>19 MR JUSTICE DAVID RICHARDS: Is there any claim for post --</p> <p>20 because surely all contractual interest will be paid</p> <p>21 through the medium of a statutory interest?</p> <p>22 MR TROWER: Its the contractual element, I think, of the</p> <p>23 statutory interest claim, so the --</p> <p>24 MR JUSTICE DAVID RICHARDS: Statutory interest is the --</p> <p>25 MR TROWER: Yes, there are a number of aspects of what is</p> <p style="text-align: center;">Page 151</p>
<p>1 that LBIE accepts that the debts me be discharged by</p> <p>2 payment in an amount less than the full value of the</p> <p>3 debt. So I submit that that shows that there is no</p> <p>4 general principle of reversion to contractual rights.</p> <p>5 The sixth and last point on currency conversion</p> <p>6 claims relates to the predicament that any such claim</p> <p>7 would present for an office holder. The office holder,</p> <p>8 an administrator in particular, is under a number of</p> <p>9 duties and they include the following three; to perform</p> <p>10 his functions in the interests of the company's</p> <p>11 creditors as a whole (schedule B1, paragraph 3(2)); to</p> <p>12 perform his functions as quickly and efficiently as is</p> <p>13 reasonably practicable (schedule B1, paragraph 4; and he</p> <p>14 may also be under a duty identified by your Lordship in</p> <p>15 the T&N case, to which I referred earlier, not to take</p> <p>16 steps which would increase the liabilities of the</p> <p>17 company. We would submit that he is under such a duty.</p> <p>18 Because currency conversion claims depend on foreign</p> <p>19 exchange rates at the time of distributions and the</p> <p>20 administrator must decide the date of distributions, his</p> <p>21 choice may be a very difficult or impossible one to</p> <p>22 make, having regard to these duties. That's for the</p> <p>23 following three reasons. Firstly, the very act of</p> <p>24 payment could create currency conversion claims,</p> <p>25 whereas, if he delayed, such claims might be lower or</p> <p style="text-align: center;">Page 150</p>	<p>1 not provable but payable in due course by way of</p> <p>2 interest. There is the bar on paying, on proving</p> <p>3 a contractual interest in respect of the period</p> <p>4 subsequent to paid. Then there is also the element</p> <p>5 where you are given a claim for the first time under</p> <p>6 2.88, if you have made a demand. That is the middle</p> <p>7 part of the rule. Then finally, there is the statutory</p> <p>8 interest that is payable once a surplus has arisen.</p> <p>9 Whether or not you have a pre-existing contractual</p> <p>10 right.</p> <p>11 MR JUSTICE DAVID RICHARDS: Those, I mean the pre-existing</p> <p>12 contractual rights entitles you to prove for interest up</p> <p>13 to the relevant date, as do those other, you are given a</p> <p>14 right to prove for interest under those other</p> <p>15 paragraphs.</p> <p>16 MR TROWER: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: But from the date of</p> <p>18 administration to the date of payment of the</p> <p>19 distribution you get statutory interest at the higher of</p> <p>20 judgment rates, or contractual rates?</p> <p>21 MR TROWER: That is correct.</p> <p>22 MR JUSTICE DAVID RICHARDS: Your contractual right will be</p> <p>23 fully met by the statutory --</p> <p>24 MR TROWER: There is an existing contractual right. We say</p> <p>25 that the -- because it is our case that the effect of</p> <p style="text-align: center;">Page 152</p>

<p>1 the rule is to render the element, the contractual 2 entitlement, which we would otherwise have, no longer 3 provable. It then, what happens is that the 4 rule 2.88(7) takes over once a surplus has arisen. 5 I think what Mr Isaacs is going to address is the 6 difference, the two different scenarios -- I might be 7 wrong -- between that element of the interest which 8 reflects a pre-existing contractual right and that 9 element of the interest which is produced for the first 10 time. 11 MR JUSTICE DAVID RICHARDS: Are you saying this, Mr Trower, 12 that even if section 74 does not extend to statutory 13 interest, it extends to pre-existing contractual 14 interest? 15 MR TROWER: Yes, because all that has happened under the 16 ruling is there has been a postponement or a deferral of 17 the rights that we have. 18 MR JUSTICE DAVID RICHARDS: Right, so that is something that 19 Mr Isaacs has to respond to? 20 MR TROWER: Yes. There are two quite different conceptual 21 bases for what is then wrapped up within 2.88(7). 22 MR JUSTICE DAVID RICHARDS: Yes, I see. 23 Mr Isaacs, how long will it take you to deal with 24 that? 25 MR ISAACS: Less than 15 minutes, my Lord.</p> <p style="text-align: center;">Page 153</p>	<p>1 proposals are at 13.92: 2 "We consider there should be one set of rules 3 relating to the interest on debts in all form of 4 insolvency proceedings." 5 Town at 13.95(c): 6 "We recommend during the insolvency in the event of 7 there being a surplus after payment of the admitted 8 debts and liabilities, including interest prior to 9 the...(Reading to the words)... the rate being the 10 judgment rate." 11 The entitlement to post insolvency interest, as we 12 know, is now governed by 2.88(7) and 1.89(2), and its in 13 the form recommended by the court committee in this 14 paragraph, save that where the rate is the contract rate 15 where that is greater than the judgment rate. There is 16 no suggestion in the report that a creditor should have 17 any claim to contractual interest, other than that which 18 is within the scope of the statutory interest. That is 19 the first point. 20 The second is why the claim does not exist. I ask 21 your Lordship to consider a claim for statutory interest 22 in respect of a debt which bears interest at or above 23 the judgment rate. That has four features, that 24 particular claim. The first is it is payable in an 25 administration from the surplus remaining after payment</p> <p style="text-align: center;">Page 155</p>
<p>1 MR JUSTICE DAVID RICHARDS: If we are all -- 2 MR ISAACS: We say that there is no such right, essentially 3 for the reasons suggested by your Lordship, but I will 4 develop that. Even if there were such a right, it is 5 accepted not to be provable so if what I have submitted 6 in relation to the scope of the section 74 liability 7 is correct, it does not fall within that either. 8 As say I will start with the court report then 9 I will go on to why the claim does not exist. Then 10 I will consider the two cases my learned friend relies 11 on. The position prior to the act is described in the 12 court report which is at 3B, tab 11. If your Lordship 13 would turn to chapter 10, the chapter dealing with 14 interest. 13.64 deals with interest bearing debts. 15 Section 66.1 of the 1914 Bankruptcy Act, restricted 16 rights. 17 "Dividends of creditors who debts carry ...(Reading 18 to the words)... 5 per cent." 19 Then non-interest bearing is at 13.82, a few pages 20 on. We have seen that, that is statutory interest at 21 4 per cent of the winding up. Then statutory interest, 22 after the surplus, 13.83, that is section 33.8 which 23 I read your Lordship earlier. That did not apply in the 24 winding up. Interest bearing debts could recover in 25 accordance with the contract, as we have seen. The</p> <p style="text-align: center;">Page 154</p>	<p>1 of the debts proved. The second is it is payable on the 2 debts proved in respect of the period during which they 3 have been outstanding since the date on which the 4 company entered administration. The third is it is 5 payable at the contractual rate. The fourth is it is 6 not provable. 7 This is to be compared with a claim for post 8 administration contractual interest, alleged to exist by 9 LBIE. It has these four features, considering a debt 10 which bears interest at the judgment rate or higher. 11 It's exactly the same. It is payable in administration 12 from the surplus remaining after payment of the debts 13 proved. It is payable on the debts proved in respect of 14 the hearing during which they have been outstanding 15 since the date on which the company entered 16 administration. It is payable at the contractual rate, 17 and it is not provable. 18 In other worse the claim does exist, but it is the 19 interest provided for by rule 2.88(7). In relation to 20 the claim where the debt does not bear interest at the 21 judgment rate or higher, rule 2.88(7) also has the 22 effect that the interest rate is raised to the judgment 23 rate. In that situation there is an additional right 24 under 2.88(7) for a higher interest rate. That does not 25 detract from the fact that the claim alleged to exist is</p> <p style="text-align: center;">Page 156</p>

<p>1 encompassed by the rule.</p> <p>2 Finally, the two cases I referred to which are</p> <p>3 relied on by my learned friend. The first of them is</p> <p>4 <i>Wight v Eckhardt Marine</i>. In particular Lord Hoffmann's</p> <p>5 dictum at 27 that I looked at in some detail.</p> <p>6 I submitted to your Lord that this does not apply to the</p> <p>7 specific statutory regimes which govern, amongst other</p> <p>8 things, interest. It is indisputable that that is the</p> <p>9 case, because new substantive rights are created, in</p> <p>10 particular the one I have just talked about which is the</p> <p>11 right to statutory interest payable out of the surplus</p> <p>12 where there is no contractual right to interest.</p> <p>13 It is also indisputable and is accepted that some</p> <p>14 rights are destroyed. For example, in relation to</p> <p>15 future debts.</p> <p>16 Finally, the <i>Humber Iron Works</i> case in 1869, we can</p> <p>17 quickly go to that, it is at tab 18, 1A. Please read</p> <p>18 the headnote just to remind yourself.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, I have read it.</p> <p>20 MR ISAACS: Creditors whose debts weren't interest bearing</p> <p>21 wouldn't receive interest whether the estate was</p> <p>22 insolvent or solvent. I submit that that is no guide to</p> <p>23 position under the 1986 Act, for the following reasons.</p> <p>24 The first is that at the time of the decision there was</p> <p>25 no right to statutory interest at all, it was introduced</p> <p style="text-align: center;">Page 157</p>	<p>1 contract to do any more.</p> <p>2 MR ISAACS: Yes. Because your Lordship knows, at 6.44 to 45</p> <p>3 there is the discussion about the fact that it needs to</p> <p>4 be decided by the judges in the case, the quaint passage</p> <p>5 about the meeting of the judges and they could not</p> <p>6 decide.</p> <p>7 MR JUSTICE DAVID RICHARDS: Or at least there was not</p> <p>8 a common practice, so they thought it ought to be</p> <p>9 decided judicially.</p> <p>10 MR ISAACS: Lord Justice Gifford at 6.47 says the rule</p> <p>11 worked fairness when the estate is solvent, because</p> <p>12 there is a remission to rights under contract. And</p> <p>13 a creditor who has not stipulated does not get anything.</p> <p>14 As your Lordship puts to me, my case is: interest is</p> <p>15 now governed by the statute, not by the judges and there</p> <p>16 is a statutory right to interest payable from any</p> <p>17 surplus, whether or not debts are interest bearing.</p> <p>18 <i>Humber Iron Works</i> is neither here nor there, and</p> <p>19 I submit it cannot be assumed in these circumstances</p> <p>20 that any part of the court-made rule survives, because</p> <p>21 we have seen the Court Report and we have seen what was</p> <p>22 intended. The legislature that follows the court</p> <p>23 reports, save as regards the higher interest rate. That</p> <p>24 is all I propose to say on that, unless I can be of</p> <p>25 further assistance.</p> <p style="text-align: center;">Page 159</p>
<p>1 by section 45 of the Bankruptcy Act 1883. The reference</p> <p>2 to that is in <i>Lines Brothers</i>. The case we have already</p> <p>3 looked at, 1C/67/224G.</p> <p>4 MR JUSTICE DAVID RICHARDS: Which <i>Lines Brothers</i> is it?</p> <p>5 MR ISAACS: It is Mr Justice Slade, that is the first</p> <p>6 instance decision.</p> <p>7 MR JUSTICE DAVID RICHARDS: Section, what was it?</p> <p>8 MR ISAACS: Section 40(5) of the Bankruptcy Act.</p> <p>9 Mervyn Davies, I beg your pardon.</p> <p>10 MR JUSTICE DAVID RICHARDS: That did not apply in a company</p> <p>11 liquidation. Was not that the point, was that not his</p> <p>12 decision?</p> <p>13 MR ISAACS: Yes, yes. That is correct.</p> <p>14 MR JUSTICE DAVID RICHARDS: The point is that until the</p> <p>15 statutory interest regime was introduced <i>Humber Iron</i></p> <p>16 <i>Works</i>, I assume, remained good law.</p> <p>17 MR ISAACS: Yes.</p> <p>18 MR JUSTICE DAVID RICHARDS: Is that right?</p> <p>19 MR ISAACS: Yes.</p> <p>20 MR JUSTICE DAVID RICHARDS: What you basically say is: the</p> <p>21 statutory regime has replaced <i>Humber Iron Works</i>.</p> <p>22 MR ISAACS: That is what I am going to say.</p> <p>23 MR JUSTICE DAVID RICHARDS: Perhaps the best guide to that</p> <p>24 is that it in terms says you get higher of judgment rate</p> <p>25 or contractual interest. It leave nothing for the</p> <p style="text-align: center;">Page 158</p>	<p>1 MR JUSTICE DAVID RICHARDS: There is just one question I</p> <p>2 want to ask you. Can we just go back to the</p> <p>3 subordination agreement, we are going back to a point we</p> <p>4 spent a lot of time on. I am just going to ask you one</p> <p>5 question, so I have it clear. It is going back to an</p> <p>6 old point.</p> <p>7 I would just like you to say, so I am absolutely</p> <p>8 clear about it -- this is our old friend, clause 5,</p> <p>9 which is the subordination clause. It is 5.2(a). It's</p> <p>10 that phrase:</p> <p>11 "Obligations which are not payable or capable of</p> <p>12 being established or determined."</p> <p>13 Can you just tell me what you say "payable" means</p> <p>14 and what you say "capable of being established or</p> <p>15 determined" means?</p> <p>16 MR ISAACS: Yes, I can, my Lord. I start by saying that</p> <p>17 this provision applies whether or not the company is in</p> <p>18 insolvency or not in insolvency I then say that there is</p> <p>19 a disjunction here and that they both must have separate</p> <p>20 meanings.</p> <p>21 I say the sensible meaning of "not payable"</p> <p>22 encompasses the position in a solvent situation where</p> <p>23 one does not have to pay, for example, unenforceable</p> <p>24 liabilities. That is what "not payable" means.</p> <p>25 I then say "capable of being established or</p> <p style="text-align: center;">Page 160</p>

<p>1 determined" in the insolvency is a reference to the</p> <p>2 rules which govern whether a liability can be</p> <p>3 established or determined in the insolvency. What it</p> <p>4 means is capable of being proved in the insolvency.</p> <p>5 "Established or determined" is another way of saying</p> <p>6 "proved", so that expression either means capable of</p> <p>7 being proved or provable. The reason that they have</p> <p>8 used the language "being established or determined" is</p> <p>9 because this applies to all sorts of insolvency regimes</p> <p>10 in all sorts of countries, some of which do not have</p> <p>11 provability, but if you deal with an insolvency from</p> <p>12 another country one has to look at whether the debt is</p> <p>13 capable of being established or determined in that</p> <p>14 foreign insolvency.</p> <p>15 MR JUSTICE DAVID RICHARDS: Mr Isaacs, thank you very much</p> <p>16 indeed.</p> <p>17 Tomorrow morning, Mr Wolfson has just a few things</p> <p>18 he wants to say.</p> <p>19 MR WOLFSON: Very sort. I am merely replying to a few</p> <p>20 points Mr Trace makes, in particular the more egregious</p> <p>21 points he made in my absence on Friday.</p> <p>22 MR JUSTICE DAVID RICHARDS: Would it help if I sat at</p> <p>23 10 o'clock?</p> <p>24 MR TROWER: Given Mr Isaacs has in fact finished I am</p> <p>25 feeling much less uncomfortable than I was a few minutes</p> <p style="text-align: center;">Page 161</p>	<p>1 Would you prefer, is there a difficulty about</p> <p>2 10 o'clock?</p> <p>3 MR TROWER: This no difficulty. No, absolutely.</p> <p>4 MR JUSTICE DAVID RICHARDS: If it is convenient to everyone</p> <p>5 shall we sit at 10 o'clock tomorrow? Very well, thank</p> <p>6 you very much.</p> <p>7 MR TRACE: Much obliged.</p> <p>8 (4.46 pm)</p> <p>9 (The court adjourned to 10 o'clock on Wednesday,</p> <p>10 20 November 2013)</p> <p style="text-align: center;">Page 163</p>
<p>1 ago, because it looks like I have the whole of the day.</p> <p>2 MR JUSTICE DAVID RICHARDS: A few minutes from Mr Wolfson.</p> <p>3 MR TROWER: On that basis I do not think there is any need</p> <p>4 to sit early.</p> <p>5 MR TRACE: My Lord, we would -- if your Lordship is willing</p> <p>6 to grant us the indulgence of sitting at 10 -- prefer</p> <p>7 that. I say that for two reasons, (1) it is very</p> <p>8 important in our respectful condition given all the</p> <p>9 costs for this panoply of lawyers to get this case</p> <p>10 finished tomorrow. Secondly, I am a little bit worried</p> <p>11 that because what Mr Trower is trying to say is, "Oh</p> <p>12 well, we went short and therefore other people have had</p> <p>13 our time". As far as my clients are concerned, I was</p> <p>14 entirely within a day. What was said for yesterday, It</p> <p>15 is worth just looking at the timetable --</p> <p>16 MR JUSTICE DAVID RICHARDS: I am conscious of the need to</p> <p>17 get it finished within time if that is possible. I am</p> <p>18 conscious of the costs involved. I am also conscious of</p> <p>19 the range and difficulty of the issues raised, and the</p> <p>20 assistance that I require from all counsel. It sounds</p> <p>21 as if, very politely, you are really saying Mr Isaacs</p> <p>22 has overrun -- it may have been Mr Wolfson, I do not</p> <p>23 know. But one way or another, Mr Trower and Mr Zacoroli</p> <p>24 have to reply to the submissions made to them, but</p> <p>25 I have all the points.</p> <p style="text-align: center;">Page 162</p>	<p>1 INDEX</p> <p>2 PAGE</p> <p>3 Submissions by MR ISAACS (continued)1</p> <p>4</p> <p>5</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 164</p>

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