2 (16.0) arm) 3 Opening submissions by MR TROWER 4 MR TROWER: May it please your Lordship, these are joint applications, a joint application under paragraph 63 of schedule BI. The joint administration of Lehman 6 Schedule BI. The joint administration of Lehman 7 Brothers International Furrope, which is 1.BF, two 8 members of IBE: LBA and LBH2 for directions on 9 a number of interlinked issues arising out of 9 administrations. 11 There are two respondents to the application, it 12 being, as I said, a joint application, he two 12 respondents are LBH1, Lehman Brothers Holdings Inc., and 14 Lydian overeaes partners' master fund. The 16 representation before your Lordship will bit matter is 17 administrators; Mr Wolfson and Ms Shah appear for the 18 LBI. Joint administrators; Mr Wolfson and Ms Shah appear for the 18 LBI. Joint administrators; Mr Wolfson and Ms Shah appear for the 18 LBIL Joint administrators; Mr Shah appear for the 18 LBIL Joint administrators; Mr Shah appear for the 18 LBIL Joint administrators; Mr Shah appear for the 19 Evaluation of LBIE. LBH supports the position of 1.BIE. LBH supports the position papers, they w	1	Tuesday, 12 November 2013.	1	statement of facts and the chronology, as your Lordship
4 MR TROWER: May it please your Lordship, these are joint applications,		(10.30 am)	2	has heard. There is a bit more colour and detail on the
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debt agreements. Those subordinated debt agreement, and we will obviously look at them in more detail in a moment, were all dated on 1 November 2006, which is at the time of what has been described as the 2006 restructuring when LBHI2 became a member of LIBE. Under those agreements of course LBHI2 is the lender and LIBE is the borrower. There are three of them in the bundles. They start at bundle 4, pages 210, 225 and 241. The first two of them in the bundles are long-term subordinated loan facilities, one for 3 billion Euros 11 subordinated loan facilities, one for 3 billion. The third one is a short term subordinated loan facility for \$8 billion. 14 So that is the first category of claim. The second 15 category of claim is for £38 million in respect of 25 of ar as the respondents' relationship with the companies in administration is concerned, they do not of 19 themselves affect the legal issues with which the court 20 according to LBHI it estimates that it will receive 87% 15 interrelate and those are lintend, subject to your Lordship's, continuing to make my submissions on the seen. But in essence I intend, subject to your Lordship's, continuing to make my submissions on the seen. But in essence I intend, subject to your Lordship's, continuing to make my submissions on the basis of the list of issues. The order in which we have approached issues in our written submissions is slight different from the list of issues. But whenever I am dealing with a particular category of submission I will identify for your Lordship which issue it primarily go to. The slight problem, as your Lordship is only too well aware, I am sure, is that a lot of these issues are interrelated and structuring the way in which to present a case such as this has some difficulty because you have done it slightly differently but I hope the way we have done it slightly differently but I hope the way we have done it is of some assistance. The issues as I am goin to deal with them can be grouped into four categories The first category of issues				
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themselves affect the legal issues with which the court is concerned. Their interests are briefly as follows: 20 according to LBHI it estimates that it will receive 87% 21 The first category of issues is what I might 20 characterise as the claims against LIBE: the in-bound 21 claims, of its estate, and those are the issues on the	17	So far as the respondents' relationship with the	17	done it is of some assistance. The issues as I am going
20 is concerned. Their interests are briefly as follows: 21 according to LBHI it estimates that it will receive 87% 22 characterise as the claims against LIBE: the in-bound claims, of its estate, and those are the issues on the	18	companies in administration is concerned, they do not of	18	to deal with them can be grouped into four categories.
21 according to LBHI it estimates that it will receive 87% 21 claims, of its estate, and those are the issues on the	19	themselves affect the legal issues with which the court	19	The first category of issues is what I might
	20	is concerned. Their interests are briefly as follows:	20	characterise as the claims against LIBE: the in-bound
of all distributions made by LBHI2. That is its construction of the subordinated debt agreement; what	21	according to LBHI it estimates that it will receive 87%	21	claims, of its estate, and those are the issues on the
1	22	of all distributions made by LBHI2. That is its	22	construction of the subordinated debt agreement; what is
evidence from Mr Jones' witness statement. It therefore 23 the nature of LBHI2's rights under them, and to what		evidence from Mr Jones' witness statement. It therefore	23	
stands behind LBHI2 on the issues in this application. 24 claims against LIBE are LBHI2 rights under the		stands behind LBHI2 on the issues in this application.		claims against LIBE are LBHI2 rights under the
	25		25	subordinated debt agreements subordinated. I will also
Page 6 Page 8		Page 6		Page 8

1 address in that context the operation of what we have 1 But I think it will be clear what is being referred to. 2 2 MR JUSTICE DAVID RICHARDS: Very well. described in our submissions as the Neuberger insolvency 3 MR TROWER: Because I am going to go backward and forwards 3 waterfall. between the clauses and they are all in essentially the 4 4 MR JUSTICE DAVID RICHARDS: Oh, yes. 5 MR TROWER: The second category of claims is the claims by 5 same terms. So what your Lordship has, as I indicated 6 LIBE. Those of course primarily are the issues on the 6 at the beginning, the document at page 210 is the first 7 7 of them. If you click on to page 225 that is where the scope and enforcement of the contributory's liability 8 under section 74. So it is the outward claim from LIBE. 8 second one starts and then the third one starts at 9 Obviously, because of the nature of the claim, there is 9 page 241. The only differences that appear to exist in 10 10 relation to them relate to the currency, which quite a lot of cross-over between what has been said in 11 11 relation to the inbound claims and what is going to be I indicated at the beginning, and the repayment terms. 12 12 But too long terms ones, the repayment date which is said in relation to the outbound claims because a number 13 a date that your Lordship finds identified in 13 of the submissions in relation to the subordinated debt 14 14 agreement bear on the question of what is a debt and paragraph 9 on page 214, paragraph 9(6). MR JUSTICE DAVID RICHARDS: So the first two are 5-year; the 15 a liability for the purposes of section 74 when 15 16 assessing the amount of that claim. So that category of 16 third one is 2-year. 17 17 MR TROWER: No, the first is 10 years. submission will include what falls within the debts and 18 liabilities to be taken into account for the purposes of 18 MR JUSTICE DAVID RICHARDS: 10 years, sorry thank you. 19 19 MR TROWER: The second one is 5 years. quantifying the section 74 claim and how that claim is 20 to be quantified as well as its scope and 20 MR JUSTICE DAVID RICHARDS: I see. 21 21 enforceability. The third category of submission on MR TROWER: The point your Lordship was on about 5 years and 22 which really I will have very little to say, but I think 22 two years a 2-year is the is the restriction on the 23 23 it is a different group, is the rights between the drawdown date which you get, if I just explain, if you 24 contributors and (Inaudible). 24 go to page 214, two provisions that deal with timing in 25 25 MR JUSTICE DAVID RICHARDS: Yes. paragraph 9: 9(5) and 9(6): Page 9 Page 11 1 MR TROWER: The fourth category of submission is the 1 "No amount may be drawn down after ... (Reading to 2 contributory rule. What is it; does it only have any 2 the words)... of effective date. 4, 5 and 6 ...(Reading 3 application once LIBE is in liquidation or can it be 3 to the words)... of the effective date." 4 applied while LIBE is still in administration. If it 4 If you go on to a short term one which is where the 5 does not apply while LIBE is still in administration is 5 relevant clause is on page 245, those two dates are 6 there a set-off of the contributories' obligations to 6 significant. 7 7 MR JUSTICE DAVID RICHARDS: Thank you. contribute against any proof in LIBE's litigation. 8 Those sorts of issues. 8 MR TROWER: It is common ground between the parties, the 9 9 So can I start against that background with the statement of agreed facts, paragraph 41, that these are 10 10 claims against LIBE and a proper construction of the based on FSA standard form agreements and that they 11 formed part of LIBEs regulatory capital for capital 11 subordinated debt. 12 MR JUSTICE DAVID RICHARDS: Yes. 12 outputting(?) purposes. Before we look at the 13 13 MR TROWER: The subordinated claim agreement. For your agreements themselves can I just deal with one point 14 14 Lordship's note, we deal with this in our main written that is made here by LBHI2 because I think they appear 15 15 submissions starting at paragraph 21 and our to contend that it may not be possible to contract out 16 supplemental submissions starting at paragraph 61. 16 of the provisions of the actual (Inaudible) of payments. 17 These submissions go primarily to issues 17 and 18 of 17 They make that in their opening submissions at 18 the submissions. The subordinated debt position is 18 paragraph 24 and in the supplemental submissions at 19 dealt with under the statement of agreed facts at 19 paragraphs 2 and 3. Now we deal with that in 20 20 paragraph 35 but I think we can go straight to the paragraph 66 of our supplemental submissions as to why 21 agreements themselves which your Lordship will find 21 that is not actually right. The law, we submit, is now 22 at bundle 4. The one I was going to make submissions on 22 well established by Mr Justice Vinelot in the MCC case 23 starts at page 210. Can I apologise straightaway. 23 that so long as a subordination does not have an adverse 24 I have marked up -- I think our references in our 24 effect on strangers to the contract there is no public 25 25 written submissions are to another one. I apologise. policy which prohibits creditor A from agreeing that Page 10 Page 12

1			
1	payment of the debt to which a deferred payment of the	1	standard term agreement should always apply. The
2	debtor, creditor or class of creditor B(?) and that is,	2	subordination provision is in clause, the primary
3	the passages that matter in MCC, and we can turn it up	3	subordination provision, although I will come back to it
4	if your Lordship wants to but I suspect your Lordship is	4	at clause 4 in a moment, but the primary subordination
5	familiar, are pages 1411G to 1412C and 1416E and 1418G.	5	provision is in clause 5. The way it works is that the
6	What is said I think by LBHI2, as I understand it, the	6	subordination is of the rights of LBHI2 in respect of
7	position may be different where rule 2.88 is a mandatory	7	the subordinated liabilities are subordinated to the
8	direction as to how to apply a surplus in the hands of	8	senior liabilities. Then there is a payment being
9	the administrators. So this is the interest point. And	9	conditional upon structure that I will come back to in
10	in circumstances, and where that obligation, the	10	a moment. The subordinated liabilities are all
11	mandatory direction to the liquidator is not a liability	11	liabilities, and we have to go back to the definition
12	of the companies. Now that second aspect of their	12	page for this, are: all liabilities to LBHI2 in respect
13	submission I am going to come back to in due course and	13	of advances made under agreement and interest payable on
14	explain why we say that is wrong. But we do not really	14	them. If you go back to the previous page that is where
15	understand the submissions in the context of this	15	one sees subordinated liabilities. Senior liabilities
16	particular point because given that there is no public	16	ie those to which the subordinated liabilities are
17	policy which prevents creditors from agreeing to waive	17	subordinated are all liabilities except subordinated
18	his rights to prove until after the unsubordinated	18	liabilities and excluded liabilities. So when you are
19	claims have been paid in full, it seems a bit strange	19	working out what gets the benefit of the subordination
20	that there might be a public policy that prevents him	20	you take everything except subordinated liabilities and
21	from agreeing to waive his right to prove until after	21	excluded liabilities. Excluded liabilities is on the
22	statutory interest has been paid. The effect is simply	22	first page of the standard terms.
23	to put him in a position where the surplus after payment	23	"Liabilities which are expressed to be and in the
24	of the debt is proved is identified without regard to	24	opinion of the insolvency(Reading to the words)
25	his claim, because ex-hypothesi his claim will not be	25	do rank junior to the subordinated liabilities in any
	Page 13		Page 15
	<u> </u>		
1	treated as having been proved. So we respectfully	1	insolvency of the borrower."
2	suggest that there is no principled objection to this	2	So the first, there are two points that flow from
3	form of subordination as against interest which is I	1 ~	
4		3	that. The first is as a definition it contemplates the
	think where the guts of Mr Trace's argument comes from.	4	that. The first is as a definition it contemplates the existence of insolvency at the time the definition has
5	think where the guts of Mr Trace's argument comes from. So the only point that matters in those circumstances is	1	
		4	existence of insolvency at the time the definition has
5	So the only point that matters in those circumstances is	4 5	existence of insolvency at the time the definition has to work and the second is that the concept there is that
5 6	So the only point that matters in those circumstances is what is the nature and extent of the subordination. Its	4 5 6	existence of insolvency at the time the definition has to work and the second is that the concept there is that the excluded liability is something which has to be
5 6 7	So the only point that matters in those circumstances is what is the nature and extent of the subordination. Its a construction question. What we submit is that the	4 5 6 7	existence of insolvency at the time the definition has to work and the second is that the concept there is that the excluded liability is something which has to be expressed to be junior, subordinated. Then the
5 6 7 8	So the only point that matters in those circumstances is what is the nature and extent of the subordination. Its a construction question. What we submit is that the terms of the agreement make clear that the sub debt is	4 5 6 7 8	existence of insolvency at the time the definition has to work and the second is that the concept there is that the excluded liability is something which has to be expressed to be junior, subordinated. Then the definition of liabilities itself is:
5 6 7 8 9	So the only point that matters in those circumstances is what is the nature and extent of the subordination. Its a construction question. What we submit is that the terms of the agreement make clear that the sub debt is subordinated to the following, all non-proveable claims,	4 5 6 7 8 9	existence of insolvency at the time the definition has to work and the second is that the concept there is that the excluded liability is something which has to be expressed to be junior, subordinated. Then the definition of liabilities itself is: "All present and future sums, liabilities and
5 6 7 8 9 10	So the only point that matters in those circumstances is what is the nature and extent of the subordination. Its a construction question. What we submit is that the terms of the agreement make clear that the sub debt is subordinated to the following, all non-proveable claims, the obligation to pay statutory interest, the currency	4 5 6 7 8 9 10	existence of insolvency at the time the definition has to work and the second is that the concept there is that the excluded liability is something which has to be expressed to be junior, subordinated. Then the definition of liabilities itself is: "All present and future sums, liabilities and obligations payable(Reading to the words) jointly
5 6 7 8 9 10 11	So the only point that matters in those circumstances is what is the nature and extent of the subordination. Its a construction question. What we submit is that the terms of the agreement make clear that the sub debt is subordinated to the following, all non-proveable claims, the obligation to pay statutory interest, the currency conversion claim, although that probably falls within	4 5 6 7 8 9 10 11	existence of insolvency at the time the definition has to work and the second is that the concept there is that the excluded liability is something which has to be expressed to be junior, subordinated. Then the definition of liabilities itself is: "All present and future sums, liabilities and obligations payable(Reading to the words) jointly or severally(Reading to the words) or otherwise
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5 6 7 8 9 10 11 12 13	So the only point that matters in those circumstances is what is the nature and extent of the subordination. Its a construction question. What we submit is that the terms of the agreement make clear that the sub debt is subordinated to the following, all non-proveable claims, the obligation to pay statutory interest, the currency conversion claim, although that probably falls within non-proveable claims, and the liabilities to members which are subject to the contributory rule but not caught by this agreement, ie the unsubordinated claims	4 5 6 7 8 9 10 11 12 13 14	existence of insolvency at the time the definition has to work and the second is that the concept there is that the excluded liability is something which has to be expressed to be junior, subordinated. Then the definition of liabilities itself is: "All present and future sums, liabilities and obligations payable(Reading to the words) jointly or severally(Reading to the words) or otherwise howsoever." So a very broad form of words, we would say, to cover every possible form of liability and
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1	only arises if the financial resources condition in	1	established or determined in the insolvency of the
2	paragraph 51A is satisfied. That basically means that	2	borrower. So this means, and I am obviously going to
3	no amount is payable unless after it has been paid LIBE	3	come back to your Lordship to make some submissions
4	continues to be in compliance with not less than 120% of	4	to your Lordship in a moment as to what exactly that is
5	its financial resources requirement. I do not think its	5	all about, that in order for the principal and interest
6	necessary to go into the detail of what that actually	6	obligations to be payable under the sub debt agreements
7	means for present purposes. The financial resources	7	LIBE must be able to pay in full everything that amounts
8	requirement is itself a defined term and takes you to	8	to a liability within the meaning of paragraph 5(2) so
9	the financial rules which itself takes you to the rules	9	long as not falling within the disregarded categories.
10	in I Pru I(?) and B10 in the FSA handbook. So	10	So you look first of all to see whether its a liability
11	effectively it is ensuring liquidity. It may be that	11	and you then see whether or not it's a disregarded
12	some of the other parties will want to go into that in	12	category. That is the way the subordination provision
13	more detail but for my purposes I do not think it is	13	works structurally. It is fortified by a number of
14	necessary. That is not relevant for present purposes	14	other provisions within the agreement. The first
15	because the situation in brackets is not the present	15	fortifying provision to draw your Lordship's attention
16	situation because an order has been made for the	16	to is paragraph 4(7) which bars any remedy other than
17	insolvency of the borrower. So we are not in 5(1)A.	17	specifically provided for in the paragraph, a fairly
18	I should say that insolvency here means formal	18	standard form of, and I will come back to what is
19	insolvency process.	19	provided further in this paragraph in just a moment.
20	MR JUSTICE DAVID RICHARDS: Yes.	20	The other fortifications are contained in clause 7 of
21	MR TROWER: B applies whether or not LIBE is subject to a	21	the subordination agreement which prohibit without the
22	formal insolvency process and in that so we are in B,	22	prior written consent of the FSA certain categories of
23	and the solvency condition in paragraph 5(1)B has to be	23	thing from occurring and, in particular, I draw
24	satisfied. So no amount is payable unless after it has	24	your Lordship's attention to B, D and E. B is the
25	been paid LIBE will still be solvent. What does that	25	prohibition of any retentions and set-offs. D is:
	Page 17		Page 19
	. 1	1	WA 1'1'''
1	mean, insolvency is helpfully put in inverted commas to	1	"A prohibition to attempt to obtain repayment of any
2	express that its a defined term. If we go on to the	2	of the subordinated(Reading to the words)
3	next clause we will see what that means.	3	otherwise than in accordance with the terms of this
4	"It will only be solvent if it's able to pay its	4	agreement."
5	liabilities in full, excluding the subordinated	5	And E is:

liabilities in full, excluding the subordinated liabilities."

You can take that out of account when deciding whether or not its able to pay its liabilities in full. Disregarding two other categories of liability, the first one is obligations which are not payable or capable of being established or determined in the insolvency of the borrower. The second one is excluded liabilities, ie:

"Liabilities which are expressed to be and in the opinion of the LIBE administrators do rank junior to the sub liabilities in LIBE's administration."

What your Lordship will see from that is that there is a partial mirroring of senior liabilities in the sense that you do not take into account excluded liabilities for the purposes of insolvency in the same way that excluded liabilities are excluded from the definition of senior liabilities. But it is only partial because there is this other concept which is included for the purposes of solvency which is the obligations which are not payable or capable of being

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"A prohibition of taking or omitting to take any action whereby the ...(Reading to the words)... might be terminated ...(Reading to the words)... or adversely affected."

So quite a wide concept here of protecting the subordination. Now going back to paragraph 4 it provides, and your Lordship will recall number 7 was a (Inaudible) on remedy. It provides for only one type of remedy. So those words other than as specifically provided by this paragraph 4 refers back to one type of remedy which is the institution of proceedings for the insolvency of the borrower ie the formal process of administration or liquidation in two categories of circumstance. Those circumstances are identified in 4 and 5. In 4 it is:

"Proceedings to insolvency of the borrower to enforce a payment in respect of any advance ...(Reading to the words)... or interest due."

And 5 is to enforce any other obligation, condition or provision binding on LIBE.

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1	So where an amount of principal or interest has	1	summarises the position. It is a Government of India v
2	fallen due and not been paid a winding-up or	2	Taylor, tab 60: bundle 1B of the authorities. We only
3	administration petition may be issued by LBHI2 and	3	need deal with that because it actually refers to both
4	doubtless proceeded with to order all that is necessary.	4	statue barred debts and (Inaudible) contracts. There
5	But that is the only available remedy. So the combined	5	are two issues in The Government of India v Taylor. One
6	effect of 4(7), 7(b), (d) and (e) is, we respectfully	6	related to the commencement of the process and the other
7	submit, that LBHI2 cannot prove in LIBE's insolvency if	7	related to the identification of the liabilities to
8	to do so would adversely affect the subordination of its	8	which the liquidator is required to provide in the
9	claim against LBIE. However, contrary to a submission	9	liquidation accompanied by what was then section 302 and
10	which is made by LBHI2 in paragraph 25 of their	10	the conclusion was that the liquidator was not required
11	submissions, we submit that once every liability that	11	to provide claims that were unenforceable in the English
12	ranks ahead as a matter of the true construction of the	12	courts. That part of the speech of Viscount Simmonds
13	sub debt agreement is paid there is nothing to stop	13	starts at page 508. The first part of his speech deals
14	LBHI2 from putting a proof in in respect of that	14	with the rule because there was a challenge to the
15	liability or indeed from taking such other steps as may	15	existence of the rule. Starting about a third of the
16	be available to it for payment. The most obvious one,	16	way down the paragraph beginning:
17	and we will come on to develop this in due course, is	17	"We proceed upon an assumption there is a rule
18	for an order of the winding up that it be paid before a	18	(Reading to the words) of other countries",
19	distribution of LIBE's numbers(?) The sort of relief	19	etcetera."
20	that the court might fashion, that your Lordship talked	20	Then do you see a bit starting about 10 lines up
21	about in our submission in T&N, which I will come on to	21	"But it is said that".
22	in a moment. So the question that now therefore arises	22	MR JUSTICE DAVID RICHARDS: Yes.
23	is whether the following are liabilities which do not	23	MR TROWER: If your Lordship will just read from there to
24	fall within the excluding words in 52A or B, ie which	24	the end of Viscount Simmonds' speech which is just over
25	are not payable or capable of being established or	25	the page.
	Page 21		Page 23
1	determined in the insolvency of the borrower. Those are	1	MR JUSTICE DAVID RICHARDS: Yes, certainly I will read that.
1 2	determined in the insolvency of the borrower. Those are the four categories I identified before the	1 2	MR JUSTICE DAVID RICHARDS: Yes, certainly I will read that. Yes.
			Yes. MR TROWER: So they are the two categories of liability.
2	the four categories I identified before the	2	Yes.
2 3	the four categories I identified before the non-proveable claims, the statutory interest, the currency conversion claims and the unsupported liabilities to members. It is only if they are not such	2 3	Yes. MR TROWER: So they are the two categories of liability.
2 3 4	the four categories I identified before the non-proveable claims, the statutory interest, the currency conversion claims and the unsupported	2 3 4	Yes. MR TROWER: So they are the two categories of liability. What is interesting about this is that the analyses is
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2 3 4 5 6 7	the four categories I identified before the non-proveable claims, the statutory interest, the currency conversion claims and the unsupported liabilities to members. It is only if they are not such liabilities that they will not be payable ahead of the sub debt sorry to use not twice. If they are such	2 3 4 5 6 7	Yes. MR TROWER: So they are the two categories of liability. What is interesting about this is that the analyses is on the basis that those are liabilities which are not for the purposes of the section in the Act to be treated as liabilities. Now one can see how in an agreement it
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1	is the sort of thing the draftsman had in mind, given	1	submission, and it is in our written submissions in
2	the similarity of the language that one finds in	2	paragraphs 45-50, is that non-proveable liabilities are
3	Viscount Simmonds' speech and the way in which that	3	liabilities for the purposes of the subordinated loan
4	particular provision has been drafted.	4	agreement full stop. It is worth just saying one or two
5	MR JUSTICE DAVID RICHARDS: Foreign tax liabilities is an	5	things though about what is a non-proveable liability.
6	example of a liability which the public quality or	6	I know your Lordship is very familiar with the concept,
7	similar reasons is not enforceable in an English court	7	and what the concept flows from, the existence of
8	but there could of course be others as well.	8	non-proveable liabilities and their recognition within
9	MR TROWER: Yes, there could be many others, yes.	9	the insolvency scheme flows from certain basic
10	MR JUSTICE DAVID RICHARDS: Awards of triple damages, for	10	principles that actually are going to reemerge from time
11	example.	11	to time in the course of my submission. The first is
12	MR TROWER: Yes, that is another good example. The reason	12	that not all liabilities of the company are proveable as
13	I took your Lordship specifically to the way it was put	13	debts. A liability is only proveable if it is
14	by Viscount Simmonds is he plainly lays down the general	14	a proveable debt within the meaning of Insolvency Rule
15	principle here in relation to the meaning of the word.	15	12.31 and 13.12. The second is that that proof is not
16	He is not just simply saying, "This is one we leave	16	equivalent to payment. It is simply a record of the
17	out".	17	fact that an estate is liable for an amount and there is
18	MR JUSTICE DAVID RICHARDS: Yes.	18	an entitlement to receive rateably with the other
19	MR TROWER: So going back then to paragraph 52B, which is	19	creditors. That is the West Coast Gold Fields' case
20	the second category, what is most likely to have been in	20	where that is most pithily expressed which I do not
21	the mind there, and for that one gets the definition,	21	think we need to turn up at the moment because we will
22	go back to the definition of excluded liability on	22	come to it later. It is at tab 45. The third sort of
23	page 216. Now we respectfully suggest that the most	23	probably most critical aspect of this is that winding up
24	obvious form of excluded liability is where some other	24	leaves the underlying liability to a creditor untouched.
25	subordination agreement specifically subordinates the	25	It simply opposes a process of collective execution. If
	Page 25	<u> </u>	Page 27
1	obligations payable under it, the advances and interest	1	obviously a creditor gets paid in full it is touched in
2	payable under the sub debt agreement. We respectfully	2	the sense it has been discharged by full payment. But
3	suggest it's no more complicated than that. So dealing	3	that concept of the winding up leaving the debts of
4	with each category.	4	creditors untouched was the way in which Lord Hoffmann
5	MR JUSTICE DAVID RICHARDS: One of the oddities of these	5	put it in Wight v Eckhard Marine which we will look at
6	agreements as far as I can work out is that the	6	in a moment. I wonder whether it might be a good idea
7	liabilities under the other subordination agreement,	7	to look at Wight v Eckhard now because it underscores
8	because three of them were entered into simultaneously,	8	quite a lot of what I am going to say. Tab 79, so that
9	do not seem to have been expressly addressed. But	9	is bundle 3. Sorry, it is 1C. I am so sorry. Decision
10	fortunately we do not have to grapple with	10	of the Privy Council on appeal from the Cayman Islands.
11	MR TROWER: that problem.	11	The issue, your Lordship is probably familiar with the
12	MR JUSTICE DAVID RICHARDS: I think the answer is probably	12	case, but your Lordship gets the issue in proceedings
13	pretty obvious but it is certainly not actually provided	13	from the headnote.
14	for.	14	MR JUSTICE DAVID RICHARDS: Yes.
15	MR TROWER: No, that is right. So, my Lord, next on the	15	MR TROWER: But the bit that matters for present purposes
16	list is dealing with each category of liability which	16	starts I think at paragraph 20 is where one gets it so
17	matters for present purposes, what are their	17	one can put the whole thing in context. If
18	characteristics; why are they liabilities for the	18	your Lordship would read F it is really to the end of 29
19	purposes of the agreement and why do they not fall	19	that is relevant.
20	within the exclusions. Can I deal first with some	20	MR JUSTICE DAVID RICHARDS: So 20 to 29.
21	general submissions in relation to non-proveable	21	MR TROWER: Yes.
22	liabilities generally because on one view one can put	22	MR JUSTICE DAVID RICHARDS: Yes, all right. Feel free to
23	everything into the category of non-proveable	23	sit down if you want to, Mr Trower.
24	liabilities. I will then look more specifically at	24	MR TROWER: Thank you.
25	interest and foreign currency claims. Now the essential	25	MR TROWER: On the points, there are a number of concepts
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<u></u>	Page 26		Page 28

1	that we will come back to within this judgment, but on	1	together with the listed statutory provisions, he sets
2	the point, it is paragraph 27 is the concept that I was	2	out the ranking.
3	particularly keen on in this context that I am showing	3	MR JUSTICE DAVID RICHARDS: Yes.
4	your Lordship. So what one has is a situation where	4	MR TROWER: We will come back to it again, although I will
5	a collective execution is imposed but the winding up	5	not perhaps turn it up again, but your Lordship there
6	leaves the underlying liability untouched. So if the	6	sees eight items.
7	relevant provision of the statutory scheme is	7	MR JUSTICE DAVID RICHARDS: Yes.
8	inapplicable the underlying liabilities fall away. Now	8	MR TROWER: Five to eight of which, numbers 5 to 8 of which
9	your Lordship looked at the nature of this category of	9	have some relevance in these proceedings including at
10	liability and the fact that the court will fashion	10	item 7, what is described as non-proveable liabilities
11	appropriate relief to ensure it is paid before a return	11	which come out after statutory interest. So there is
12	to members in the context of non-proveable claims in	12	the confirmation of the Supreme Court of that category
13 14	court in the T&N case. Just so your Lordship can be	13 14	of liability being a liability that ranks within the
	reminded how that works it is in your Lordship's	15	winding up within that way. On the face of it, there is
15	judgment, at tab 84, which is in the same bundle.	16	not any reason why this category of liability should not
16	MR JUSTICE DAVID RICHARDS: Yes. No.		be a liability within the meaning of the subordinated
17	MR TROWER: It is 83.	17	debt agreement. It falls conceptually fairly and
18	MR JUSTICE DAVID RICHARDS: Yes.	18	squarely within the definition of liability which is on
19	MR TROWER: At paragraphs 82 and 83 is the critical bit. Sorry, it is wrong, 106 and 107. It is the wrong T&N.	19 20	page 217, of page 2 in the definition section so long as it is properly to be characterised as a sum, liability
20 21	I was right first. But it is the wrong T&N. It is	20	or obligation payable or owing by LIBE it will be
22	paragraphs 106 to 107 of the one behind tab 82.	22	a liability. Despite the suggestion of LBHI to an LBHI
23	MR JUSTICE DAVID RICHARDS: Right.	23	to the contrary, there really is no warrant for limiting
24	MR TROWER: Your Lordship was reaching the conclusion, as	24	the concept of liabilities that are proveable where it
25	you did, in the context of being pressed with one of the	25	appears as a term(?) The language that has been used is
23	Page 29	25	Page 31
	1 450 27		1 450 31
1	conclusions of a particular liability not being	1	language that refers to obligations being payable or
2	proveable and the concern that circumstances might then	2	owing. If one goes to look as well at paragraph 52A
3	arise where there would be a return to members	3	there is no warrant for including a non-proveable
4	your Lordship will recall.	4	liability as an obligation which is not payable or
5	MR JUSTICE DAVID RICHARDS: Yes, I do.	5	capable of being established or determined in the
6	MR TROWER: But that part of your Lordship's judgment is, if	6	insolvency of the borrower. It is said that on that
7	I may say so, a helpful summary of the type of	7	concept as well the limitation is to liabilities that
8	non-proveable claim that can exist in certain	8	are proveable and if it is not proveable it is not an
9	circumstances and how although the statutory code does	9	obligation which is not payable or capable of being
10	not make explicit provision for what should happen to it	10	established or determined in the insolvency of the
11	the court has sufficient powers and plenty of powers to	11	borrower. But the language that has been chosen is
12	ensure that justice and fairness is achieved in relation	12	language that refers to obligations being payable,
13	to the distribution of the company's assets in respect	13	obligations not liabilities being payable, not proveable
14	of it. The final authority which deals generally with	14	in the insolvency of the borrower.
15	non-proveable liabilities, which your Lordship might	15	MR JUSTICE HAMBLEN: Yes.
16	find helpful to see at this stage, is the Nortel	16	MR TROWER: So we respectfully suggest that on that point
17	companies case in the Supreme Court which is in the	17	neither the noun nor the adjective that is used is
18	next bundle behind tab 101. As your Lordship will know,	18	appropriate to their case, appropriate to LBHI's case,
19	this is all about whether or not contribution notices	19	because if that is what the draftsman had in mind the
20	under pensions legislation gave rise to applicable debts	20	language would have been very different. Now the
21	or expenses. In that context Lord Neuberger gave	21	categories of non-proveable liabilities with which we
22	consideration as to the ranking of liabilities generally	22	now are concerned are statutory addressed, foreign
23	in the context of insolvency and that part of his	23	currency claims and non-subordinated claims of members.
24 25	judgment starts at paragraph 39 where, having summarised the effect of the several authorities cited to them	24 25	We respectfully suggest in relation to each of them, and I will look at their characteristics in a moment but
23	Page 30	23	Page 32
	1 age 30	1	1 450 32

1	41-4	1	Count in and other activities and in the activities and
1	that none of them are category of liability that falls	1	first is whether statutory interest is a liability and
2	within the exclusion of 52 specifically, quite apart	2	therefore a senior liability for the purposes of the sub
3	from the generic concept of non-proveable liability are	3	debt agreements. Secondly, whether it has to be taken
4	not falling within that. In each of them they are	4	into account for the purposes of assessing whether LIBE
5	payable and capable of being established or determined	5	is solvent for the purposes of section 512. As
6	in insolvency of the borrower because each of them falls	6	I indicated at the outset of my submissions, some of the
7	within the statutory waterfall and the court will	7	points that I am going to address now, although not all
8	fashion appropriate relief to ensure it is paid before	8	of them, will also arise later when addressing the
9	distribution to members. Furthermore, and I think this	9	question of whether statutory interest is one of LIBE's
10	is the point taken against us by LBHI2, none of them are	10	liabilities for purposes of section 74 and the members'
11	an excluded liability because nowhere are any of them	11	obligations to contribute under section 74 because of
12	expressed to rank junior to the subordinated	12	the phrase "debts and liabilities" in section 74. Now
13	liabilities. There is no particular reason as a matter	13	we submit that interest payable under 2.887 is one of
14	of principle why any of these categories of liabilities	14	the sums, liabilities or obligations payable or owned by
15	were within the contemplation of the draftsman when	15	the borrower within the meaning of the liabilities
16	considering the nature of the liabilities to which the	16	definition. As I have said before, it is difficult to
17	subject should be subordinated. They are categories of	17	think of a wider form of words. We of course accept
18	liability to which the company was subject and one,	18	there is a need to characterise the nature of the
19	there is no particular reason why the draftsman might	19	liability to pay statutory interest. Can we turn up
20	have thought it was appropriate to exclude them.	20	rule 2.88. It the first time we have looked at one of
21	Just before I turn to each of them separately, we	21	the rules. I am very much in your Lordship's hands as
22	are unable to discern anything in the FCA materials	22	to what is most convenient. All the materials are in
23	which have been produced by LBHI2 and LBHI which	23	this bundle. I am happy to use that. It is bundle 2 of
24	identify why it would be inappropriate to subordinate	24	the authorities.
25	the subordinated debt to these categories of	25	MR JUSTICE DAVID RICHARDS: Yes.
	Page 33		Page 35
1	non-proyeable liability: statutory interest, foreign	1	MR TROWER: And the rules we find behind tab 3.
1 2	non-proveable liability: statutory interest, foreign currency claims and the like. There is nothing	$\begin{vmatrix} 1 \\ 2 \end{vmatrix}$	MR TROWER: And the rules we find behind tab 3. Your Lordship will not be surprised to hear that there
1 2 3	currency claims and the like. There is nothing	2	Your Lordship will not be surprised to hear that there
2	currency claims and the like. There is nothing uncommercial about the liabilities being subordinated to		Your Lordship will not be surprised to hear that there has been number of amendments in 4 and 6. What we have
2 3	currency claims and the like. There is nothing uncommercial about the liabilities being subordinated to all liabilities, whether proveable or not. It is	2 3 4	Your Lordship will not be surprised to hear that there has been number of amendments in 4 and 6. What we have done, I hope the parties have achieved this, I suspect
2 3 4	currency claims and the like. There is nothing uncommercial about the liabilities being subordinated to all liabilities, whether proveable or not. It is difficult to see why the language should not be given	2 3 4 5	Your Lordship will not be surprised to hear that there has been number of amendments in 4 and 6. What we have done, I hope the parties have achieved this, I suspect we will find the odd little lacuna. We have put in
2 3 4 5	currency claims and the like. There is nothing uncommercial about the liabilities being subordinated to all liabilities, whether proveable or not. It is difficult to see why the language should not be given its obvious straightforward meaning. But your Lordship	2 3 4 5 6	Your Lordship will not be surprised to hear that there has been number of amendments in 4 and 6. What we have done, I hope the parties have achieved this, I suspect we will find the odd little lacuna. We have put in the bundle the relevant versions that we hope we have
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	AND WARMAND DAVING DAVING AN	١.	
1	MR JUSTICE DAVID RICHARDS: Yes.	1	proved", I think I understood your argument to be from
2	MR TROWER: The reference to the creditor's claim and what	2	your written submissions that by virtue of the terms of
3	may be claimed which your Lordship finds in rules 2	3	the subordination agreement the subordinated creditor
4	at paragraphs 2 to 5 of rule 2.88 is a reference to its	4	could not prove until those debts having priority under
5	proveable debt. We do not need to turn it up first.	5	the agreement had been paid, so that at the time when
6	That is rule 12.3. The effect of rule 2.887 is then to	6	this arises, as I understood it, there would not be
7	render the pre- existing liabilities in respect of the	7	a debt proved.
8	interest referred to in sub rule 1 enforceable in so far	8	MR TROWER: Yes.
9	as it can be paid out of the surplus. That is the first	9	MR JUSTICE DAVID RICHARDS: by the subordinated creditor.
10	thing it does. Secondly, it is an equivalent right to	10	MR TROWER: That is very much our first line. It is
11	creditors in respect of all other proved debts. Sub	11	paragraph 40 I think. We have also got it in
12	rule 8 then makes provision for the ranking of what is	12	paragraph 68 of our reply submissions.
13	payable under 7. This concept of the payability of	13	MR JUSTICE DAVID RICHARDS: Right.
14	interest tracks the earlier part of the rule in sub rule	14	MR TROWER: That is very much the primary way we put it;
15	1 where it plainly means payable as a liability of the	15	there is an alternative way of putting it, simply by
16	company. Then rule 9 just deals with rate. The effect	16	looking at the definition of what the concept of debts
17	of this is that the creditors' entitlement to interest	17	proved means. But on reflection I think the first way
18	of the post administration period is not proveable but	18	of putting it is a much more attractive way of putting
19	is payable out of the company's assets as part of the	19	it. Now the second submission which is made against us
20	statutory scheme, the purpose of which is to apply the	20	is that any contractual right to interest is brought to
21	company's assets in discharge of its liabilities in its	21	an end by the operation of 2.88. We say that is not
22	ranking(?) in respect of Lord Neuberger. There are a	22	correct as a matter of construction of the rule. It
23	number of arguments which are made against that being	23	makes clear sub rule 1, that it is only concerned with
24	a liability. The first argument appears to be that	24	what is proveable in contradistinction to what is
25	interest is not payable at all until the subordinated	25	payable. Ther is nothing which says that the liability
	Page 37		Page 39
1	debt has been paid because the subordinated debt is	1	to pay is extinguished. Put another way it is clear
2	itself a debt proved within the meaning of rule 2.887.	2	from the wording of sub rule 1 that the exclusion or
3	This is wrong for the two reasons we give in our written	3	limitation of any pre-existing entitlement to be paid
4	submissions at paragraphs 40 to 42. On the true	4	interest is only for the purpose of the proof.
5	constructions of the subordinated debt agreement the	5	(11.45 am)
6	obligation to pay interest is a senior liability to	6	The principle that the contractual right to interest
7	which the claims under the sub debt agreement are	7	is not extinguished is entirely consistent with the
8	subordinated. That subordination involves an agreement	8	general principle in Wight v Eckhardt, which I showed
9	to rank behind the obligation to pay interest and is	9	your Lordship, the winding-up leaves the debts of
10	enforceable as such. That is the first reason. The	10	creditors untouched. It's particularly so in the light
11	second is that on the true construction of rule 2.88(7)	11	of the fact that Humber Iron, which is in tab 18, was
12	the reference to "debts proved" means debts which have	12	a case about interest and was one of the main
13	been proved and which have not been paid because by	13	authorities on which Wight was based.
14	agreement they rank the dividend behind the interest.	14	MR JUSTICE DAVID RICHARDS: And that's a liquidation case.
17		1 ~	MR TROWER: It was a liquidation case.
15	So it is not, when you are talking about debts proved it	15	
15 16	is debts proved in respect of which payments can be	16	MR JUSTICE DAVID RICHARDS: And was there an equivalent
15	is debts proved in respect of which payments can be made. If for some reason you have agreed to		
15 16 17 18	is debts proved in respect of which payments can be made. If for some reason you have agreed to subordinate, it is not caught by that concept. So that	16 17 18	MR JUSTICE DAVID RICHARDS: And was there an equivalent provision. MR TROWER: No, rule at that stage. So at that stage and
15 16 17	is debts proved in respect of which payments can be made. If for some reason you have agreed to subordinate, it is not caught by that concept. So that is two different ways of looking at the point. You	16 17	MR JUSTICE DAVID RICHARDS: And was there an equivalent provision. MR TROWER: No, rule at that stage. So at that stage and we will look at Humber Iron in a moment. I have just
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1	reflected in the way in which the draftsman approached	1	reversed by the form of the rule because you get it now.
2	the underlying concepts in relation to the rule. There	2	MR JUSTICE DAVID RICHARDS: Yes.
3	is no indication here that there was a deliberate	3	MR TROWER: So that case is entirely consistent with the
4	attempt to alter the juridical basis of the pre-existing	4	concept that pre-enactment of legislation there was no
5	contractual right to interest.	5	question of the contractual right to interest being
6	MR JUSTICE DAVID RICHARDS: Very well. Okay, I will rise	6	affected in any way.
7	for five minutes.	7	MR JUSTICE DAVID RICHARDS: Yes.
8	(11.46 am)	8	MR TROWER: We say there is nothing in the rule that comes
9	(Short break)	9	near altering that underlying essential position.
10	(11.55 am)	10	MR JUSTICE DAVID RICHARDS: I mean, if the rule is worked
11	MR JUSTICE DAVID RICHARDS: Mr Trower.	11	through fully, then it will satisfy, and in some cases
12	MR TROWER: Your Lordship, we will just look briefly at	12	more than satisfy, the contractual entitlement because
13	Humber.	13	of sub-rule 9.
14	MR JUSTICE DAVID RICHARDS: Yes, certainly.	14	MR TROWER: Yes, there are some instances in which
15	MR TROWER: Tab 18, bundle 1A. Otherwise known as the	15	a contractual claimant will be entitled to more than
16	Warrant Finance Companies case. Its the decision of	16	that which is contracted.
17	Lord Justices. It is a very short judgment. The	17	MR JUSTICE DAVID RICHARDS: Yes, if the rate under
18	headnote pithily sums up what the issue was. At	18	paragraph 6 is greater than his contractual rate.
19	page 646, Lord Justice Selwyn's judgment is I think the	19	MR TROWER: Yes, that's correct.
20	part of the judgment that is the most use. It's the bit	20	Now, this point or this concept is also relevant to
21	beginning he has dealt with the concept of immediate	21	a further contention by LBHI2 that non-provable interest
22	realisation and distribution underpinning the	22	is not an obligation or liability of LBIE's at all.
23	winding-up. He then goes on and says:	23	MR JUSTICE DAVID RICHARDS: Yes.
24	"Justice I think requires that no person should be	24	MR TROWER: Which is made in paragraph 32 of LBHI2's written
25	prejudiced by the accidental delay which is the	25	submissions. It's no more than an obligation, so they
	Page 41		Page 43
1	consequence of the necessary(Reading to the	1	say, imposed on the liquidator (or administrator in the
2	words) debts as they existed.	2	case of rule 2.88) to apply an asset in a particular
3	"I therefore think that nothing should be allowed	3	manner, which is a point that was also made by LBL in
4	for interest after that date. Consequently, in the	4	its submissions as to why statutory interest is not
5	present case(Reading to the words) interest at	5	a liability for the purposes of section 74, although in
6	the full rate."	6	LBL's case they only make it in that context rather than
7	MR JUSTICE DAVID RICHARDS: That's a contractual right they	7	the context of the sub-debt agreement.
8	had in this case.	8	Now, the first answer to this is that we submit that
9	MR TROWER: Yes, and when there was a surplus of pay.	9	it's a perfectly natural use of language and I am
10	MR JUSTICE DAVID RICHARDS: Yes.	10	addressing this point now generally rather than with
11	MR TROWER: "I think the tree lies where it falls. Of	11	specific reference to the pre-existing contractual
12	course it will be understood that we are laying down	12	right, which we say is just a suspension right but
13	this rule(Reading to the words) creditors actions	13	it's a perfectly natural use of language to describe
14	are stayed", because there was a consequence of the stay	14	interest payable out of a company's surplus as a future
15	that gave rise to this.	15	sum payable by the borrower within the meaning of the
16	Then Lord Justice Gifford, having at the end of the	16	
17	first paragraph said, "Convenience is in favour of		sub-debt agreement. If we go back and look at the way
18	stopping all communications at the date of winding-up",	17	the words in the sub-debt agreement work, you have
		18	something called a "present and future sum", a "present
19 20	then he goes on and explains what happens when the estate is solvent: it works with equal fairness.	19	and future liability", a "present and future obligation,
20	MR JUSTICE DAVID RICHARDS: Yes, I see. He is remitted to	20 21	payable or owing by the borrower, whether actual or
22			contingent, joint or several or otherwise howsoever".
	his rights under his contract. MR TROWER: That's right, and the other creditor doesn't get	22	We respectfully submit that, where a sum is payable out
23 24	MR TROWER: That's right, and the other creditor doesn't get it. Of course those last views of Lord Justice Gifford	23	of a person's surplus assets, it's quite natural to
25	in relation to justice have now effectively been	24 25	refer to it as payable by that person, even where the right to payment is limited to an identified surplus
23	OF CARROLL OF HIS HAVE HOW ELICCHVELY DEEL	1.7.3	right to payment is infilled to an identified surbitis
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1	asset.	1	therefore it's a senior liability if it's within the
2	In this context, it's important of course to	2	meaning of the sub-debt agreement.
3	recognise that the assets referred to remain the assets	3	What then happens and I am still on the
4	of LBIE's even subsequent to the administration or	4	contractual provision is that the scheme for
5	liquidation date. They are never assets of the	5	collective enforcement provides that it will only become
6	liquidator or indeed anyone else. They are simply	6	payable out of the surplus. The right is then further
7	assets in respect of which the company becomes trustee	7	governed by the provisions of paragraphs 7 and 8 dealing
8	for the creditors, in accordance with the statutory	8	with ranking and rate of interest. Again, thinking of
9	scheme, the terms of the trust being the statutory	9	it still about contractual, you have the concept within
10	scheme for distribution. That's the way it was put by	10	paragraph 7 of the interest under that paragraph being
11	Lord Hoffmann in Wight v Eckhardt Marine. Your Lordship	11	payable. What the draftsman seems to have done is to
12	will be familiar with AS, which isn't in the bundles but	12	use the word "applied" in paragraph 7 to describe what
13	it's the same sort of idea.	13	has happened to an asset, vest is as it continues to be
14	MR JUSTICE DAVID RICHARDS: Yes.	14	in the obligor company, albeit statutory trusts, but
15	MR TROWER: Secondly, we say that this analysis is all the	15	used the word "payable" in 8 and 9, which refers back to
16	more likely when the sum concerned is a payment in the	16	7 as a description of the obligation to make the
17	form of interest which is payable to a creditor to	17	payment. So you have the application of the surplus
18	compensate it for being kept out of its money in	18	when the draftsman is thinking about the focus of the
19	relation to a provable debt which itself will, on any	19	asset and you have the payment obligation when the
20	view, have been a liability or obligation payable or	20	draftsman is thinking about the payment obligation.
21	owing by the borrower. Put another way, given that the	21	In its context, this confirms, we submit, that there
22	right of the creditor to interest clearly derives from	22	is at least an obligation on the persons whose asset it
23	an obligation that's payable by the borrower, that is	23	is to pay, albeit limiting that obligation in the manner
24	the debt proved on which the interest is paid, the	24	reflected by the wording of the rule. Now, doubtless
25	obligation to pay the interest should prima facie be	25	the rule also imposes duties on the administrator to see
	Page 45		Page 47
1	treated as payable by the borrower as well.	1	to it that the company's surplus is applied in
1 2	treated as payable by the borrower as well. Thirdly, the submission that statutory interest	1 2	to it that the company's surplus is applied in accordance with the provisions of the rule, but he only
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2 3	Thirdly, the submission that statutory interest doesn't amount to a sum payable by the borrower is also	2 3	accordance with the provisions of the rule, but he only does that as administrator, as agent for the company in
2 3 4	Thirdly, the submission that statutory interest doesn't amount to a sum payable by the borrower is also to misunderstand how the provisions as to statutory	2 3 4	accordance with the provisions of the rule, but he only does that as administrator, as agent for the company in fact because everything he does is as agent for the
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1	liability, the same conclusion, albeit from the moment	1	MR JUSTICE DAVID RICHARDS: Right. So he sets out
2	in time at which the obligation arises, must be reached	2	MR TROWER: In fact, I will tell you what is even better.
3	in relation to the right given for the first time. You	3	If your Lordship would start on the previous page, 218H,
4	think of it qualitatively as the same sort of right.	4	because he sets out the two statutory provisions.
5	Now, there is one authority I do need to take your	5	MR JUSTICE DAVID RICHARDS: Yes, insolvent companies. Yes.
6	Lordship to because it's inconsistent, on one reading	6	MR TROWER: Then he identifies the problems at C to D.
7	anyway, with this analysis, which is a decision of	7	MR JUSTICE DAVID RICHARDS: Right.
8	Mr Justice Mervyn-Davies in Lines Bros which is referred	8	MR TROWER: The first one being: is section 33.8,
9	to by LBL and is behind tab 67. There is a fair bit of	9	entitlement to interest, a rule within the rules
10	litigation information in Lines Bros, as your Lordship	10	referred to in 317, i.e. the company rule? Does it
11	will know.	11	apply at all?
12	MR JUSTICE DAVID RICHARDS: There is.	12	MR JUSTICE DAVID RICHARDS: Presumably the answer to that is
13	MR TROWER: Now, Lines Bros, this part of Lines Bros was	13	yes.
14	concerned with a very different question. It was	14	MR TROWER: Yes. The second is whether or not the
15	concerned with the question of whether statutory	15	liquidator is engaged in the winding-up of an insolvent
16	interest was a liability of the company for the purpose	16	company.
17	of determining whether the company's assets were or were	17	The reason I went, and I went too quickly, to
18	not sufficient for paying its liabilities. It was only	18	section 10 of the 1875 Act is because he looked at that
19	if they were not sufficient, and the sort of oddity	19	for the purposes of determining whether or not this was
20	about the case was that it was only if they were not	20	a winding-up of an insolvent company; and that is the
21	sufficient that the right to statutory interest arose at	21	analysis that starts at page 220C, starting with
22	all in the first place. The reason for that was that	22	Rolls-Royce.
23	there was no company insolvency provision for statutory	23	Then if your Lordship would just read from C on
24	interest. You went back to the Bankruptcy Act, which	24	page 220 down to the end of the citation from section 10
25	was section 33.8 at that stage, which only itself	25	of the 1875 Act.
23	Page 49		Page 51
	1450 17	-	1 450 51
		1	
1	applied if the company's assets were not sufficient for	1	MR JUSTICE DAVID RICHARDS: All right, I will do that.
1 2	applied if the company's assets were not sufficient for paying its liabilities. So you have the slightly odd	1 2	MR JUSTICE DAVID RICHARDS: All right, I will do that. Sorry, I had just gone back to read again what
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2 3	paying its liabilities. So you have the slightly odd situation arising which is did you take into account	2 3	Sorry, I had just gone back to read again what Mr Justice Vaisey had said. Yes.
2 3 4	paying its liabilities. So you have the slightly odd situation arising which is did you take into account this interest obligation for the purposes of seeing	2 3 4	Sorry, I had just gone back to read again what Mr Justice Vaisey had said. Yes. MR TROWER: Then I think your Lordship can probably go on to
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1 a rather more obvious reason. But the case, in any 1 there is no evidence that LBIE's insolvency officeholder 2 2 event, is distinguishable because he was dealing with is of the opinion that it does, which is one of the 3 3 a different statutory provision. He was dealing with definitional hoops that one has to go through. It's 4 4 tolerably clear, as I submitted a bit earlier, that the section 33, ultimately 8, of the Bankruptcy Act. Your 5 Lordship is here dealing with a differently drafted 5 underlying concept behind excluded liabilities is 6 rule, 2.88. He was dealing with this provision at 6 ensuring that the question of whether or not the company 7 7 a time when there was no explicit statutory provision in is solvent is not determined by reference to liabilities which have been agreed between LBIE and another ranked 8 8 relation to the position of companies. 9 MR JUSTICE DAVID RICHARDS: Yes. 9 junior to the sub-debt and there isn't any such -- that 10 MR TROWER: And no explicit statutory provision in relation 10 doesn't apply in any way to the interest in this case. 11 11 to the position of companies where a company will be of My Lord, that's all I was going to say about 12 12 course the entity in which the assets in respect of interest in the context of the agreement. 13 which the surplus has arisen will continue to be vested, 13 MR JUSTICE DAVID RICHARDS: Yes. 14 which is conceptually a little different from what one 14 MR TROWER: Can I now turn on to the other specific category 15 may have in the context of a bankruptcy, which 15 of claim which requires to be addressed in this context, 16 was developed, where the law developed in a slightly 16 which is the currency conversion claim. We deal with 17 17 that in paragraphs 51 to 58 of our submissions. It's different way. 18 We respectfully submit that, for essentially those 18 a point on which Mr Zacaroli makes fairly extensive 19 19 two reasons, this case doesn't actually support the very submissions as well. 20 general proposition for which it is advanced. As I say, 20 MR JUSTICE DAVID RICHARDS: Yes. 21 21 MR TROWER: It relates to issue 22. Again, this is one of it's distinguishable and there are other grounds on 22 which the judge could have reached the conclusion that 22 those questions where the answer is relevant to both the 23 he did, and none of it ultimately detracts from the 23 question of whether a particular claim is a liability 24 24 analysis that we put before your Lordship in relation to for the purposes of the agreement, which I am now going the true meaning and effect of rule 2.88. 25 25 to address, and also whether it's a liability for the Page 53 Page 55 1 I ought also, in the context of the construction of 1 purposes of section 74. 2 the sub-debt agreement, just to make -- and of course I 2 Can I first start by addressing the nature of the 3 should say this before I come on to the point I was 3 claim. A creditor has a contractual right to payment in 4 going to make. What one is dealing with here 4 a currency other than sterling; that's the starting 5 ultimately, as your Lordship knows, is whether or not 5 point. In the ordinary course, it's entitled to be paid 6 the phrase "sums, liabilities and obligations payable or 6 in that foreign currency, to obtain a judgment in that 7 owing by the borrower", so that phrase "by the borrower" 7 foreign currency and to execute an amount equal to the 8 is what we are focusing on here. 8 sterling equivalent on the date of execution. Those 9 MR JUSTICE DAVID RICHARDS: Yes. 9 were all established by Milianglos. We don't need to 10 MR TROWER: For the purposes of section 74, when we come to 10 look at that. It's in the bundles, for your Lordship's 11 look at that question, it will be its debts and 11 note, at tab 63. 12 liabilities, which is much more closely linked to 33.8 12 Now, in the ordinary course the debtor should not be 13 when we think about the 33.8 argument, although again 13 able to impose on the creditor the risk of a fall in the 14 when we think about the analysis in relation to that 14 value of sterling. That's the starting point. 15 there are still the points that the underlying 15 Lord Justice Brightman put it like this in Lines, and we 16 liability, whether 33.8 in the bankruptcy context or 16 will turn Lines up now because it's in the same bundles 17 rule 2.88 in an administration context, are expressed in 17 as one your Lordship may have open. 18 rather different terms. 18 "The debtor in default should not be excused from 19 LBHI2 also contend -- and this is the final point on 19 his contractual obligation by payment of anything less 20 the statutory interest as it relates to the sub-debt 20 than the sterling equivalent of the money contractually 21 agreement -- that if statutory interest is a liability, 21 due at the date of payment." 22 22 it's an excluded liability. We say, respectfully, That's the way it was put. If we go to Lines and 23 that's wrong. Nowhere is it expressed to be junior to 23 I can show you where that is, it's tab 66, the more 24 the sub-liabilities. It does not really add anything, 24 familiar Lines in my Lord's authority. 25 25 we respectfully suggest, this argument. Furthermore, MR JUSTICE DAVID RICHARDS: Yes. Page 54 Page 56

1 MR TROWER: This point is made on page 16D. It's a summary 1 procedure. So, to the extent that there is 2 of the policy that underpins the Milianglos decision, in 2 a contractual entitlement to be paid in a foreign 3 3 the context of the case we need to look at anyway. currency, that continues to subsist for all purposes 4 MR JUSTICE DAVID RICHARDS: Yes. 4 other than proof. 5 MR TROWER: That passage and paragraph is between C and D 5 Now, the consequence of this was addressed in Lines 6 and D and E. 6 Bros on page 21 of Lord Justice Brightman's judgment. 7 MR JUSTICE DAVID RICHARDS: The page number, sorry? 7 It's the passage between C to D. Well, he is dealing 8 MR TROWER: 16, sorry. 8 with an injustice, the description of which starts at H MR JUSTICE DAVID RICHARDS: Thank you. 16, sorry? 9 on the previous page actually. 10 MR JUSTICE DAVID RICHARDS: Right. I will just read from 10 MR TROWER: C to D and D to E, that quite short paragraph. 11 11 MR JUSTICE DAVID RICHARDS: Okay. there. 12 12 MR TROWER: So that's where one gets the policy. However, MR TROWER: Down to the end, down to G on page 21. 13 the foreign currency claim, as your Lordship knows, is 13 MR JUSTICE DAVID RICHARDS: Yes, very well. Yes. 14 only provable in sterling. 14 MR TROWER: Lord Justice Oliver touches on the point on 15 MR JUSTICE DAVID RICHARDS: Yes. 15 page 26 at E to G. 16 MR TROWER: So it's possible that where a creditor is paid 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR TROWER: So where one is is that, having concluded that in sterling in due course he will receive less than the 17 18 amount to which he would have been entitled were he to 18 Humber Iron was authority that a liquidator had a duty 19 19 be paid in the foreign currency for which he contracted. to discharge contractual indebtedness to the extent it 20 That is the context in which this point arises. 20 exceeds the provable amount before making payment to the 21 21 Now, here again the underlying rationale for the way shareholders, Lord Justice Brightman, sort of acceded in 22 in which the statutory conversion/currency conversion 22 by Lord Justice Oliver in a limited way, explained he 23 23 works is explained by Lord Hoffmann in Wight v Eckhardt. couldn't see a convincing objection to the submission 24 24 One can go back to that again in the same passage. The that such a duty would apply where a creditor received 25 assets held on the statutory trusts should be treated as 25 less than his contractual foreign currency claim. Page 57 Page 59 MR JUSTICE DAVID RICHARDS: Yes. 1 if they were collected and distributed at the relevant 2 2 date, which is to give effect to the underlying purpose MR TROWER: Just one subsidiary point in relation to this. 3 3 Your Lordship sees there is a reference in the passage of the fair distribution. But that principle -- and 4 this is the critical point -- doesn't require to 4 in Lord Justice Oliver's judgment to House Property & 5 5 continue once all of the proof claims have been paid in Investment Company Limited. Now, that's picked up -- it 6 6 full. Now, that that is the case is picked up by the may or may not be that reference, I am not sure, but 7 7 it's certainly referred to by LBHI in support of the draftsman of the rule and is consistent with the fact 8 that the rule is only concerned with proof. The opening 8 proposition that there are circumstances in a solvent 9 9 liquidation where a creditor might receive less than words of the rule are clear on that, "for the purpose of 10 proving a debt". Your Lordship has that. That's 10 their full contractual entitlement. They rely on House 11 Property & Investment and they also rely on a recent 11 2861 --12 12 MR JUSTICE DAVID RICHARDS: Yes. decision of the Court of Appeal in Danka. The MR TROWER: -- in our bundle of authorities, behind tab 15. 13 13 submission seems to be that there are other analogous 14 It makes clear, we submit, that the conversion to 14 circumstances in which a debt is de facto extinguished. 15 15 MR JUSTICE DAVID RICHARDS: Danka was a contingent sterling as at the date the company enters 16 administration in this case -- and the equivalent is 16 17 MR TROWER: Yes, it was. rule 4.91 for liquidation -- is for proving purposes and 17 18 for proving purposes alone. There is nothing that 18 MR JUSTICE DAVID RICHARDS: Was House Property? No, it 19 requires conversion for any other purpose and there is 19 wasn't, was it? It was a liability under a lease or 20 20 nothing which affects the underlying right which something. 21 21 continues to subsist. Again, one has exactly the same MR TROWER: Yes, that's right, but it was very uncertain how 22 22 conceptual issue which relates to this claim as was the -- the question in both cases was whether a reserve 23 23 addressed by Lord Hoffmann in Wight v Eckhardt. It should be set aside. 24 leaves the debts of creditors untouched. It simply 24 MR JUSTICE DAVID RICHARDS: Yes.

leaves the creditors with collective enforcement Page 58

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MR TROWER: And the answer was: no, we need to get on with

Page 60

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- 1 winding-up the company, particularly Danka. Danka is 2 a very clear statement of how that all works, even 3 though you might lose out in due course. But that is of 4 course, my Lord, a quite different situation from the 5 present situation, because what those cases were 6 concerned with was the procedural process for estimating 7 and paying out on proved claims and what you then do 8 once you have done that. It doesn't have anything to do with the extinction of legal rights. Where a proof is 9 10 going through an estimation process, all that is 11 happening is that the officeholder is putting an 12 estimated value on it. That estimated value can always 13 be revised under rule 2.81 where, in appropriate 14 circumstances -- and those circumstances arose in the 15 Danka case -- the court will say that the company's 16 affairs can be fully wound up on the back of the 17 estimated figure, even though it may prove to be the 18 case in due course that the estimate was an 19 underestimate. Theoretically, what may happen in those 20 circumstances is that, if an asset were subsequently to 21 come in, the company could even be restored and wound up 22 again, if necessary for the purposes of distributing the 23 asset amongst those people whose re-estimated claims 24 proved to be greater than they were at the time of the 25 original estimation. So that is a completely different Page 61 situation from the situation with which we are here 1
 - 1 Now, the other aspect to this that I need to address 2 in a little bit of detail is that LBHI submitted that 3 there are passages in the Cork Report and the Law 4 Commission Paper which preceded it which are 5 inconsistent with this conclusion. It does so in 6 paragraphs 136 to 140. I think, if we can turn that up, 7 it's bundle 3, tab 11. It's important to see exactly 8 what was going on. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: 3B, tab 11, I am sorry. The Cork Report was I 11 think published shortly after Lines Bros was actually 12 decided. The bit that matters for these purposes is 13 paragraphs 138 and 139. I would invite your Lordship to 14 read those paragraphs. 15 MR JUSTICE DAVID RICHARDS: Sorry, where are you again? 16 MR TROWER: 1308 and 1309. 17 MR JUSTICE DAVID RICHARDS: Okay. 18 MR TROWER: Can I just say this before your Lordship reads 19 them. The issue that was being considered in the Cork 20 Report was not the question of whether or not 21 a contractual claim should subsist once everybody has 22 been paid in full, in circumstances in which the

situation from the situation with which we are here concerned. It doesn't support in any way the argument, as I understand it to be, that, well, there are plenty of examples of situations in which the underlying claim is actually extinguished.

Going back just for a moment then, having made that point, to Lines Bros, Lines Bros was decided before the introduction of rule 2.86. We submit that the drafting of the opening words of that rule make clear that the foreign currency contractual rights are preserved. In fact, we say the position is now stronger than it was when Lord Justice Brightman expressed the view that he did because rule 2.86 is legislative support that the type of claim identified had been preserved. So, put another way, the principled approach he suggested has now been bolstered by legislation.

If we are right -- and we respectfully submit of course that we are -- that there is an entitlement under the contract to a foreign currency conversion claim, the court should pause long and hard before concluding that that contractual right is extinguished. It amounts to a removal of something that is of value from the creditor of course and the imposition of the scheme should not be regarded as doing that unless it is clear that it does it.

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1 MR TROWER: Although they did consider whether there should

Page 63

conversion date is the commencement of winding-up, but

2 be two conversion dates. But when your Lordship reads

whether you should have a later conversion date.

MR JUSTICE DAVID RICHARDS: Yes, I see.

- 3 1308 and 1309 it is important to bear that in mind.
- 4 MR JUSTICE DAVID RICHARDS: Yes.
- 5 MR TROWER: Now, the concept of discriminatory which is used
 - there is then picked up in the submissions and developed
- 7 into a slightly, I think, more general submission in
- 8 relation to the discriminatory consequences of applying
- 9 what is suggested by Lord Justice Brightman as an
- 10 appropriate approach. We don't really understand the
- 11 discrimination. One can see how there may be
 - difficulties where the actual conversion date that is
- used across the board fluctuates depending on whether or
- 14 not the company is solvent, but the reason we don't
- 15 really understand the discrimination point is that the
- issue only arises at all because the company has been in
- 17 default in not paying at the time it entered into
- administration and the creditors have been kept out of
- 19 their money by operation of the statutory scheme. This
- 20 particular issue only arises at all where all of the
- 21 proved debts have been paid. So it cannot be
- 22 discriminatory against the other creditors because the
- 23 proved creditors will have been paid.
- 24 MR JUSTICE DAVID RICHARDS: Yes.
- $\,$ 25 $\,$ MR TROWER: The only question is whether a cause of action $\,$ Page 64 $\,$

16 (Pages 61 to 64)

should survive. Is it discriminatory against the company and shareholder? Well, it is a bit difficult to see why it should be in circumstances in which the chain in the process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which has caused a delay in the payment of the obligation. The process which was a caused a delay in the payment of the obligation. The process which was a real was the was the payment of the obligation of the process which the payment of the obligation and the process which has a similar payment in the section of the process which has a similar payment in the many the payment of the process which has a similar payment in the process which has a similar payment in the payment of the payment of the payment of the payment payment in the pa				
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4 IM RUSTICE DAVID RICHARDS: Yes, the servicing shows the service of the obligation. 5 In the process which has caused a delay in the payment of the process which has caused a delay in the payment of the process which has caused a delay in the payment of the process which has caused a delay in the payment of the process which has caused a delay in the payment of the process what we are really talking about here is competition between the foreign currency creditors and in the proper here is the proper than the proper here is the proper of the company, because that is when this issue arises once everything else has been paid, it's insure a ready that deals with this point. This I think was the paper a rather than the report here are than the report here are than the report here are than the the proper there are the than the report here are the proper than the proper there are the than the proper here are the than the proper here are the than the proper there are the think, yes. 14 MR RUSTICE DAVID RICHARDS: Yes, it's a working paper and the proper the proper than the proper the proper than the proper there are the decision of the Court of 2 pages 4.7 Appeal — 1 think was produced before the decision of the Court of 2 page 6.5 Appeal — 2 page 6.5	2		2	rather than thinking about retaining the possibility of
in the process which has caused a delay in the payment of or the robligation. MR JUSTICE DAVID RICHARDS: Yes, it might be worth looking at the Law Commission working paper. MR TROWER! Yes. That is also behind—we also have it bere. It doesn't seem to have added very much. It's at that deals with this point. This think was the paper that deals with this point. This think was the paper that deals with this point. This think was the paper that deals with this point. This think was the paper that deals with this point. This think was the paper that deals with this point. This think was the paper that deals with this point. This think was the paper that deals the report here. MR JUSTICE DAVID RICHARDS: Yes, it's a working paper that deals with the point of the court of MR JUSTICE DAVID RICHARDS: 3.46. Yes, okay, let me just have a look at that. MR JUSTICE DAVID RICHARDS: It looks like it. MR TROWER: In summary, we do respectfully suggest that the difficult to see what we are really talking about here is of compening the the benepind, it's difficult to see why there should be any objection to this on discrimination or other grounds of that sort. This state of this control of the court	3	-	3	a claim for a non-provable liability.
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sissue of this competition between the foreign currency creditors and the Law Commission working paper. MR TROWER: Yes. That is also behind — we also have it before the decision of the foreign currency preditors and difficult to see why there should be any objection to the members of the company, because that is when this issue arises once everything else has been paid, it's difficult to see why there should be any objection to the advantage of the Court of Appeal was very early in 1982. It's possibly I suppose that the court commistee report was so near to completion that. MR AUSTICE DAVID RICHARDS: Yes, it's a working paper life in this to discrimination or the grounds of that sort. The creditors concerned will undoubtedly have suffered the decision of the company's default in only paying the the sterning equivalent, and there is no discrimination or their growth and there is not described the decision of the court of 15 legislative intent to extinguish the liability. So, in the court of the decision of the Court of 15 legislative intent to extinguish the liability. So, in the court of the court of 15 legislative intent to extinguish the liability. So, in the court of the court of the decision of the Court of 15 legislative intent to extinguish the liability. So, in the court of Appeal was very early in 1982. It's possibly I suppose that the court committee report was so near to completion that it wasn't practical to amend to otherwise. With respect, we just don't really understand that. MR INSTITCE DAVID RICHARDS: What is surprising in a way the court of Appeal was very early in 1982. It's possibly I suppose that the court committee report was so near to completion that it wasn't discrimination is there are substituted to otherwise. With respect, we just don't re	5	in the process which has caused a delay in the payment	5	MR TROWER: In summary, we do respectfully suggest that
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15 Ithink, yes. 16 MR TROWER: I think the	13	rather than the report here.	13	a loss by reason of the company's default in only paying
16 MR TROWER: I think the — 16 those circumstances, we respectfully suggest that this is a perfectly sustainable claim that ought to be now appreciated as extant, that your Lordship should reach appreciated as extant, that your Lordship should reach the conclusion that what Lord Justice Brightman tentatively suggested is correct, and should determine that that is indeed the law and there are such that that is indeed the law and there are such claims and that they should be treated as non-provable liabilities and, furthermore, that they are liabilities and, furthermore, that they are liabilities and. furthermore, that they are labilities and. furthermore, that they are not obtained debt agreement because they are a future Page 67 1 instance I think. 1 1 liabilities and, furthermore, that they are liabilities and. furthermore, that they are liabilities and. furthermore, that they are liabilities and. furthermore, that they are a future Page 67 1 instance I think. 1 1 liabilities and, furthermore, that they are liabilities and. furthermore, that they should be claims to obtain a future of the substraint they should be claims to during a future of the claim that out the page 67	14	MR JUSTICE DAVID RICHARDS: Yes, it's a working paper	14	the sterling equivalent, and there is no discernible
17 MR JUSTICE DAVID RICHARDS: So 34? 18 MR TROWER: 3.46. 19 MR TROWER: 3.46. 20 have a look at that. 21 MR TROWER: I san, it is fair to say this working paper 22 I think was produced before the decision of the Court of 23 Appeal 24 MR JUSTICE DAVID RICHARDS: It looks like it. 25 MR JUSTICE DAVID RICHARDS: It looks like it. 26 MR TROWER: I in Lines Bros but after the decision at first 27 Page 65 1 I instance I think. 28 MR TROWER: So the discrimination is there articulated as whether the exchange rates have moved to the advantage of the creditor should not affect 29 otherwise. With respect, we just don't really understand that. 29 I think you must be right. Well, I mean Lines Bros in the Court of Appeal was very early in 1982. It's so near to completion that it wasn't practical to amend it. But it is just slightly surprising that they don't for protection of the court committee report was susported by Lord Justice Oliver. 20 MR JUSTICE DAVID RICHARDS: Who knows, yes. 30 MR TROWER: So the discrimination is there articulated as a claim by the creditor should not affect 31 to the court of Appeal was very early in 1982. It's so near to completion that it wasn't practical to amend it. But it is just slightly surprising that they don't for printing or who knows. 40 MR JUSTICE DAVID RICHARDS: Who knows, yes. 41 Think you must be right. Well, I mean Lines Bros in the Court of Appeal was very early in 1982. It's so near to complete on that it wasn't practical to amend it. But it is just slightly surprising that they don't for printing or who knows. 41 MR JUSTICE DAVID RICHARDS: Who knows, yes. 42 MR JUSTICE DAVID RICHARDS: Who knows, yes. 43 MR TROWER: Yes, it is. I mean, the dates of the judgment, yes, February II was judgment. Maybe it had gone out for for printing or who knows. 44 Which is the the vary of specific claim which arises to fall within the claims both have a similar approach to out of the final category of specific claim which arises to fall within the contradustion. The claim of the court of App	15	I think, yes.	15	legislative intent to extinguish the liability. So, in
18 MR TROWER: 3.46. 19 MR JUSTICE DAVID RICHARDS: 3.46. Yes, okay, let me just 20 have a look at that. 20 have a look at that. 21 MR TROWER: I mean, it is fair to say this working paper 21 think was produced before the decision of the Court of 22 claims and that they should be treated as non-provable 23 Appeal 22 Appeal 23 Appeal 24 MR JUSTICE DAVID RICHARDS: It looks like it. 24 which fall within the definition of liabilities in the 32 which fall within the definition of liabilities in the 32 subordinated debt agreement because they are a future 32 before 33 mR TROWER: in Lines Bros but after the decision at first 42 page 65 25 MR TROWER: in Lines Bros but after the decision at first 42 page 65 26 MR JUSTICE DAVID RICHARDS: Yes. 27 It instance I think. 28 MR JUSTICE DAVID RICHARDS: Yes. 29 Welther the exchange rates have moved to the advantage 4 whether the exchange rates have moved to the advantage 5 or disadvantage of the creditor should not affect 29 continued that 4 was a laim by the creditor against the company but not 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 possibly I suppose that the court committee report was 4 poss	16	MR TROWER: I think the	16	those circumstances, we respectfully suggest that this
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20	18	MR TROWER: 3.46.	18	appreciated as extant, that your Lordship should reach
21 Ithink was produced before the decision of the Court of 22 Appeal 23 Appeal 24 MR JUSTICE DAVID RICHARDS: It looks like it. 25 MR TROWER: in Lines Bros but after the decision at first 26 Page 65 1 Instance I think. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: in Lines Bros but after the decision at first 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: So the discrimination is there articulated as 4 whether the exchange rates have moved to the advantage 5 or disadvantage of the creditor should not affect 6 well, there should be claims both ways, and if there 7 cannot be claims both ways it's discriminatory to permit otherwise. With respect, we just don't really 10 understand that. 11 MR JUSTICE DAVID RICHARDS: What is surprising in a way- 11 other wise. With respect, we just don't really 12 I that that is indeed the law and that there are such claims and that they should be treated as non-provable liabilities and, furthermore, that they are lot which fall within the definition of liabilities in the subordinated debt agreement because they are a future Page 67 1 instance I think. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: So the discrimination is there articulated as 4 whether the exchange rates have moved to the advantage of the creditor should not affect 5 or disadvantage of the creditor should not affect 6 well, there should be claims both ways, and if there 4 obligations not payable or owing by the borrower and because they are a future Page 67 1 liabilities and, furthermore, that they are not Page 67 1 liabilities and, furthermore, that they are not Page 67 1 liabilities and, furthermore, that they are not Page 67 1 liabilities and, furthermore, that they are labilities on the page 67 1 liabilities and, furthermore, that they subortion to bliabilities in the exclamable of being established of ordermined in the insolvency (inaudible) pageagraph 5.2(a) in the sense that they are not page 67 1 liabilities and, furthermore, that they don fall within the concept cannot because	19	MR JUSTICE DAVID RICHARDS: 3.46. Yes, okay, let me just	19	the conclusion that what Lord Justice Brightman
1 Ithink was produced before the decision of the Court of Appeal - 23	20	have a look at that.	20	tentatively suggested is correct, and should determine
Appeal	21	MR TROWER: I mean, it is fair to say this working paper	21	that that is indeed the law and that there are such
24 MR JUSTICE DAVID RICHARDS: It looks like it. 25 MR TROWER: — in Lines Bros but after the decision at first Page 65 1 instance I think. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: So the discrimination is there articulated as 4 whether the exchange rates have moved to the advantage 5 or disadvantage of the creditor should not affect — 5 or disadvantage of the creditor should not affect — 5 or disadvantage of the creditor should not affect — 5 or disadvantage of the creditor should not affect — 5 or disadvantage of the creditor should not affect — 5 or disadvantage of the creditor against the company but not 6 or distribution to members. 8 a claim by the creditor against the company but not 1 MR JUSTICE DAVID RICHARDS: What is surprising in a way — 1 1 think you must be right. Well, I mean Lines Bros in 1 the Court of Appeal was very early in 1982. It's 1 the Court of Appeal was very early in 1982. It's 1 the court of Appeal was very early in 1982. It's 1 the court of Appeal was very early in 1982. It's 1 the Court of Appeal was very early in 1982. It's 1	22	I think was produced before the decision of the Court of	22	claims and that they should be treated as non-provable
25 MR TROWER: — in Lines Bros but after the decision at first Page 65 1 instance I think. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: So the discrimination is there articulated as whether the exchange rates have moved to the advantage whether the exchange rates have moved to the advantage of disadvantage of the creditor should not affect— 6 well, there should be claims both ways, and if there a cannot be claims both ways it's discriminatory to permit a calim by the creditor against the company but not understand that. 10 understand that. 11 liability payable or owing by the borrower and because they do not fall within the concept contemplated by paragraph 5.2(a) in the sense that they are not obligations not payable or capable of being established or determined in the insolvency (inaudible). Indeed, quite the contrary, it is through the insolvency (inaudible). Indeed, quite the contrary, it is through the insolvency that they get discharged prior to a distribution to members. 4 MR JUSTICE DAVID RICHARDS: What is surprising in a way—otherwise. With respect, we just don't really understand that. 10 MR JUSTICE DAVID RICHARDS: What is surprising in a way—the Court of Appeal was very early in 1982. It's an issue which has been considered in other jurisdictions which have a similar approach to our own. 11 Image, I don't know whether there, but I mean, for example, perhaps in Australia, New Zealand, Hong Kong, Singapore, and I don't know about the United States, what the position is. 17 refer to the discussion by Lord Justice Brightman which was supported by Lord Justice Oliver. 18 was supported by Lord Justice Oliver. 19 MR TROWER: My Lord, I personally have not done that, but was supported by Lord Justice Oliver. 20 yes, February II was judgment. Maybe it had gone out yes, February II was judgment. Maybe it had gone out yes, February II was judgment. Maybe it had gone out yes, February II was judgment. Maybe it had gone out of or printing or who knows. 21 MR TROWER: Sut it's surprising, I agree. But what is acra	23	Appeal	23	liabilities and, furthermore, that they are liabilities
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1	claims against LBIE which are non-subordinated (in other	1	They even included the possibility that, even if there
2	words, they are ordinary claims).	2	was otherwise a black hole argument, that could be
3	MR JUSTICE DAVID RICHARDS: Yes.	3	rectified by the rule in Ex Parte James.
4	MR TROWER: But because of the contributory rule the	4	MR JUSTICE DAVID RICHARDS: That is often argued and never
5	discharge of them will only be permitted once the debts	5	seems to get anyone anywhere.
6	and liabilities caught by section 74 have been	6	MR TROWER: Yes, it's extraordinary how often.
7	discharged. That is what our case is. Now, they remain	7	MR JUSTICE DAVID RICHARDS: I gather it forms no part of the
8	liabilities within the meaning of the sub-debt	8	law of Scotland.
9	agreement.	9	MR TROWER: Fortunately it forms no part of anyone's
10	MR JUSTICE DAVID RICHARDS: Yes.	10	submissions in this case.
11	MR TROWER: Of course this is all on the assumption that we	11	MR JUSTICE DAVID RICHARDS: If the outcome in the Supreme
12	are correct in relation to the operation of the	12	Court had been that contribution notices were neither an
13	contributory rule, which I will be coming on to	13	expense, nor created, and were not provable, then it's
14	obviously in due course. The position is that we submit	14	very likely probably that they would have concluded it
15	the non-subordinated claims by members will rank only	15	was a non-provable liability.
16	after all liabilities which have to be discharged under	16	MR TROWER: Yes.
17	section 74 have been paid in full, but they themselves	17	MR JUSTICE DAVID RICHARDS: So we would have the same
18	rank ahead of the subordinated element.	18	argument in relation to that presumably.
19	MR JUSTICE DAVID RICHARDS: Yes.	19	MR TROWER: Yes. I think the difference between the Supreme
20	MR TROWER: Actually I was going to make some submissions to	20	Court and the Court of Appeal on that particular point
21	your Lordship on the Nortel Waterfall, but I don't think	21	was that the Supreme Court seems to have been relatively
22	there is anything specific that I want to say about	22	unfazed by the idea that it might have
23	that, apart from this, because we have looked at the	23	MR JUSTICE DAVID RICHARDS: Gone down the black hole, yes.
24	Nortel Waterfall already.	24	MR TROWER: gone down the black hole.
25	MR JUSTICE DAVID RICHARDS: Yes.	25	MR JUSTICE DAVID RICHARDS: Yes, that's how I read it too.
	Page 69		Page 71
1	MR TROWER: Your Lordship knows what the issue was in that	1	Anyway, the point would be would we have this issue?
2			
2	case.	2	MR TROWER: Mr Bayfield has identified for me, it's
3	case. MR JUSTICE DAVID RICHARDS: Yes.	2 3	MR TROWER: Mr Bayfield has identified for me, it's paragraph 114:
3 4	case. MR JUSTICE DAVID RICHARDS: Yes. MR TROWER: I have already described it. The four	2 3 4	MR TROWER: Mr Bayfield has identified for me, it's paragraph 114: "I therefore would conclude that the liability in
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			AD HIGHER DAVID STOWARDS AT
1	section 74, whether or not it is the case that the	$\begin{vmatrix} 1 \\ 2 \end{vmatrix}$	MR JUSTICE DAVID RICHARDS: Yes.
2	members also have a claim for (Inaudible) by the	2	MR TROWER: "To an ordinary contract(Reading to the
3	company. So what this part of the case gives rise to is	3	words) speciality."
4	questions and for your Lordship's note it is primarily	4	The transitional provisions which are dealt with at,
5	issues 13, 14, and 9 to 12. They give rise to questions	5	actually I think the clearest place your Lordship finds
6	which relate to the nature of the claim against LIBE's	6	them is in LBL's submissions at footnote 10. They
7	contributory (Inaudible) and is proveable by insolvency	7	appear to provide that the amendment from speciality to
8	(Inaudible) and then questions as to the component	8	ordinary contract debt only takes effect in relation to
9	elements of the claim, what are they and how are they	9	liabilities where the limitation period started to run
10	quantified. At two separate stages, first of all once	10	before the effective date. That is the way the
11	LIBE's is in liquidation and, secondly, while LIBE still	11	transitional provisions were dealt with.
12	is having a (Inaudible). The section itself is to be	12	MR JUSTICE DAVID RICHARDS: Yes, I see.
13	found in the authorities bundle at bundle 2, behind	13	MR TROWER: That is set out in Mr Wolfson's submissions. So
14	tab 12 and it imposes, as your Lordship knows:	14	what one has here is the section 74 liability is in the
15	"Liability on a past and present member to	15	nature now of an ordinary contract date, is due from:
16	contribute to the companies' assets to any amount	16	"The time the liability commences but payable when
17	sufficient(Reading to the words) for payments of	17	the court enforces(Reading to the words) them."
18	its debts and liabilities and payment of the expenses of	18	Liability here, as in elsewhere in the Act, is
19	the winding up and for the adjustment of the rights of	19	itself defined by the Insolvency Rules now, 13.12(3) and
20	contributors amongst themselves."	20	(4) to include any contingent liability to pay money or
21	So you have four categories: debts, liabilities,	21	money's worth. The reason for that is if you go to
22	expenses and winding up and the adjustment of amounts(?)	22	tab 15.
23	Then of course within section 74 there are the	23	MR JUSTICE DAVID RICHARDS: Yes.
24	limitations of which your Lordship is well familiar.	24	MR TROWER: 13.12(3):
25	MR JUSTICE DAVID RICHARDS: Yes.	25	"For the purposes of references in any provision of
	Page 73		Page 75
1	MR TROWER: The very last subsection under subsection 2	1	the Act(Reading to the words) or liability."
1 2	MR TROWER: The very last subsection under subsection 2 deals with a quite separate question in relation to the	1 2	the Act(Reading to the words) or liability." It is immaterial whether(Reading to the
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1	the liability arises and becomes a contingent liability	1	more complex. Canwell, which is behind tab 6, is Lord
2	of the contributories from the moment in time at which	2	Westbury. The judgment starts just at the bottom of the
3	the members' membership is undertaken by being placed on	3	first page of the printout, but if we can turn straight
4	the company's register of members.	4	over, the form of the Companies Act, the formal section
5	MR JUSTICE DAVID RICHARDS: Yes.	5	he was then concerned with is section 75 of the 1862 Act
6	MR TROWER: The commencement of that membership is the time	6	which is in footnote 2 set out.
7	at which one of two things, it is either the time at	7	MR JUSTICE DAVID RICHARDS: Right.
8	which the contributory incurs the obligation by reason	8	MR TROWER: Which, as your Lordship will see, is almost
9	of which it becomes subject to a section 74 liability or	9	identical to section 80.
10	it is just simply the moment at which the contingent	10	MR JUSTICE DAVID RICHARDS: Yes.
11	liability arises, whichever way one wants to analyse it.	11	MR TROWER: One of those sections that has not changed much
12	Now we say that in the light of the modern thinking on	12	in the last 100 years plus. Then the passage in his
13	this that is now tolerably clear but it is actually	13	judgment that is relevant is about half-way down:
14	consistent with what has long been established as well	14	"It is difficult to tell."
15	in a company law context. We refer to two cases in	15	MR JUSTICE DAVID RICHARDS: Yes.
16	particular in our skeleton, two quite old cases and	16	MR TROWER: Then the other case is a case called Williams v
17	I just brought along, I hesitate to add to your	17	Harding which is a decision of the House of Lords behind
18	Lordship's burden, a passage in Buckley which can we add	18	tab 8. This is raised in a rather peculiar context
19	to the bundles?	19	because it arose in a bankruptcy context. I think the
20	MR JUSTICE DAVID RICHARDS: Yes, so this will go into the	20	point is most clearly explained in the headnote. It is
21	MR TROWER: This will go into the supplemental bundle.	21	quite a good headnote.
22	I~think we are up to tab 9.	22	MR JUSTICE DAVID RICHARDS: Yes, I see.
23	MR JUSTICE DAVID RICHARDS: Right.	23	MR TROWER: So the point here was whether when the
24	MR TROWER: Has your Lordship got it yet?	24	obligation was incurred for bankruptcy purposes, and if
25	MR JUSTICE DAVID RICHARDS: Just give me a moment. I have	25	you go to page 22, where the first part of the paragraph
	Page 77		Page 79
1	got a bundle here. I think we received Levy v The Legal	1	starting looking, where one is dealing with the
2	Services Commission recently.	2	Bankruptcy Act, and then there is a bit beginning:
3	MR TROWER: Yes, I think that goes behind 8.	3	"If this be a just construction statute it is plain
4	MR JUSTICE DAVID RICHARDS: Thank you very much. Right.	4	that".
5	MR TROWER: The passage from Buckley goes behind tab 9.	5	Down to the end of the paragraph.
6	MR TRACE: I am afraid we have not got that.	6	MR JUSTICE DAVID RICHARDS: Yes.
7	MR TROWER: Have you not got Levy?	7	MR TROWER: So at the time he entered into the obligations,
8	MR TRACE: No.	8	1 ' 1 1 1 1 0 1 1 1 1 1 1
9			becoming a shareholder of this company, he did not know
_	MR TROWER: It is not our case. I am sorry.	9	that he could be made bankrupt in respect of this, his
10		9	, , , , , , , , , , , , , , , , , , ,
	MR TROWER: It is not our case. I am sorry.		that he could be made bankrupt in respect of this, his
10	MR TROWER: It is not our case. I am sorry. MR TRACE: We will search for it.	10	that he could be made bankrupt in respect of this, his obligations. But he subsequently did. Then there is
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1 is what I missed. It was originally March 16th I think 1 So: 2 it was originally expressed. 2 "As soon as may be after making a winding up order 3 MR JUSTICE DAVID RICHARDS: Thank you. 3 ...(Reading to the words)... rectify." MR TROWER: He having said: "Reserve my final judgment upon 4 4 Just for your Lordship's note, that is where one 5 the point" -- adhered to his previous opinion --5 slightly surprisingly then finds one of the primary 6 MR JUSTICE DAVID RICHARDS: Yes. 6 duties of a liquidation --7 MR TROWER: Now there is some other old authority which 7 MR JUSTICE DAVID RICHARDS: Yes. 8 approaches section 80 slightly differently and the one 8 MR TROWER: An odd place to find it but there it is. Then 9 that is relied on I think by some of the other parties 9 section 150 is the power to make calls. 10 is the case called McKenzie which is behind tab 17. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 This was a case about set-off and assignment. The 11 MR TROWER: "The court may at any time after making 12 passage which is relied on is at the bottom of page 243, 12 a winding up order ...(Reading to the words)... make 13 just where it recites section 75 of the 1862 Act. 13 calls on ...(Reading to the words)... in accordance so 14 After reciting it the Master of the Rolls, Lord Romilly 14 15 goes on to say: 15 Now the reference there to making an order for 16 "...(Reading to the words)... in the event of a 16 payment of any calls so made is a reference to what is 17 company being wound up and in that event only a debt is 17 often called a balance order which you will see 18 created due from the shareholder but payable at the time 18 reference to elsewhere. The settling of the list and 19 when the calls were made." 19 the making of the call is delegated to the liquidator as 20 It is said on the basis of that that when you are 20 an officer of the court. Your Lordship gets that from 21 thinking about the nature of the liability and when it 21 rule 4.196 and 4.202 which we have got behind tab 15. 22 arises it is only at the moment in time of winding up 22 MR JUSTICE DAVID RICHARDS: So that is rule 4. 23 seems to be what Lord Romilly might be said to be 23 MR TROWER: 4.196, so he exercises the court's power to 24 saying. If he is saying that and it is not entirely 24 settle a list of the companies contributors for the 25 clear that that is in fact what he is saying, but if he 25 purposes of 148. Page 81 Page 83 MR JUSTICE DAVID RICHARDS: Yes. 1 is saying that that does not fit with the concept now of 2 2 MR TROWER: Then so far as calls are concerned, and there is what a liability is. So, with respect, that sort of 3 3 case, I do not think there is another one which puts it some sort of procedural bits that do not matter very 4 quite like that, it does not really help very much. 4 much, calls are dealt with by 4.202: 5 I am going to come back to a point that is taken against 5 "Power to confer ...(Reading to the words)... as an 6 6 officer of the court, subject to the court's control." us as to the identity of the person to whom the 7 liability is owed. I will come back to that in a moment 7 MR JUSTICE DAVID RICHARDS: Yes. 8 but just to finish off what happens in relation to the 8 MR TROWER: Then once a call has been made thereby rendering 9 9 the existing liability payable under section 80 payment scheme. We have looked at section 74 and we have then 10 looked at section 80. In the normal course the first 10 is enforced through -- is enforceable through a summary 11 step in enforcing the section 74 liability is by 11 remedy which is as referred to under section 150 but you 12 also find reference to it in 4.205. 4.205(2): 12 settling the list of contributors under section 148. We 13 13 "Payment of the amount due ...(Reading to the put section 148 in the bundle in the normal place so 14 your Lordship is aware of that. What that does is to 14 words)... by order of the court." 15 15 enable payment of the liability to be enforced by making Now what we do though respectfully suggest is that a 16 16 a call. The power to call is given to the court by mechanism for enforcing the underlying liability to 17 17 section 150. That power is given to call on any person contribute to the assets of the company is essentially 18 who is a contributory for the time being settled on the 18 a procedural mechanism for enforcing a liability. It 19 list. So it is behind tab 12, so your Lordship can 19 does not of itself extinguish such other mechanisms that 20 20 track this through. might be available. There is of course no doubt that 21 once, and nobody contends, once LIBE is in liquidation 21 MR JUSTICE DAVID RICHARDS: Sorry, section? 22 22 MR TROWER: Section 148. and a call is made section 74 liability is enforceable 23 23 MR JUSTICE DAVID RICHARDS: 148. by a balance order. We also say, and I am not sure how 24 MR TROWER: Is where we start. Then we go to section 150. 24 much this is in issue or not, that its enforceable by 25 25 Section 148, I think there is only one version included. ordinary action and that the liability would be Page 82 Page 84

1	proveable in the insolvency of the member. We submit	1	paragraphs.
2	that even pre-liquidation, the liability gives rise to a	2	MR TROWER: Yes, if your Lordship would.
3	provable contingent debt in the liquidation or	3	MR JUSTICE DAVID RICHARDS: To see if they are at all
4	administration of the member. Its a contingent	4	familiar to me. Yes.
5	liability for the purposes of the member's	5	MR TROWER: As we understand it, the analogy that is drawn
6	administration within the meaning of 13.12. The way it	6	by LBHI is in the same way that the employee could not
7	simply works is that LIBE would prove in the	7	interfere with rights which a future dependent had in
8	administration or liquidation of the contributory in	8	that case, so it is that the company cannot utilise or
9	order to recover in that administration or liquidation	9	interfere or deal in the rights that have not yet
10	of the contributory the estimated value of the debt. It	10	crystallised in respect of section 74 liabilities. I am
11	would of course be an estimated claim. Now it is	11	sure if I have mischaracterised the way the submissions
12	objected by LBHI that it cannot be such a liability	12	have been put they will put me right. But in the
13	because that would impose on LBHI2 obligation of	13	present case this is a very different situation because
14	a member before LIBE goes into liquidation. In	14	the liability to contribute to the company's assets is
15	substance though we respectfully submit that that	15	obviously for the benefit of the company and is for the
16	objection amounts to a complaint that the liability to	16	purposes of swelling the pool of assets which throughout
	pay is accelerated in the part of (Inaudible) of	17	remain assets of the company, albeit subject to
17		18	statutory trusts. We do submit and this is to move on
18	necessary contingent. So that is one that has happened		•
19	but such objection cannot really be about substance	19 20	to one of the points, a slightly different point that is
20	because it would apply to any contingent claim. That is	21	made against us, that it is LIBE that is the creditor entitled to prove in respect of the contribution claim
21	often what happens when you prove a contingent claim in		
22	the insolvency of a person under an obligation to pay	22	even though the claim is enforceable post-liquidation
23	when that obligation is still contingent or future. It	23	through the statutory mechanism provided for under the
24	is also said that our case is objectionable because the	24 25	Act. It is said by other parties to these proceedings
25	contributory would not have the necessary right to share Page 85	23	LBHI2 and LBHI in particular, but I think LBL as well, Page 87
	1 age 65		1 age 67
1	in the adjustment of contributories amongst themselves	1	that the liability under section 74 is only ever payable
2	if such a proof were to be advanced. But we say that is	2	to the liquidator and not to the company and therefore
3	not a substantial objection either because the valuation	3	does not give rise to a debt payable by the contributory
4	of LIBE's contingent claim to prove it would take into	4	to the company. We respectfully suggest that that
5	account the fact that any call made by the liquidator	5	submission is to mischaracterise the situation. The
6	exercised in the court's power under section 150 would	6	first point is that what matters is the fact that the
7	affect the right to adjust. The next point that is made	7	obligation exists, as it undoubtedly does, not the
8	is, and this I think is LBHI's supplementary submission,	8	essentially secondary question of whether the person to
9	they draw an analogy with T&N number 3, which I will	9	whose assets the contribution must be made is or is not
10	take your Lordship to in a moment, in which	10	yet in liquidation. The appointment of a liquidator of
11	your Lordship held in response to submissions made by me	11	a company leaves the assets in the ownership of the
12	actually that it was:	12	company but subject to the statutory scheme. Slightly
13	"An employee's future dependent or spouse with	13	more fundamentally, in any normal use of English we
14	respect to personal rights under the(Reading to the	14	suggest the liability to contribute to a person's assets
15	words) act could not have those rights compromised by	15	ought normally to be characterised as the liability to
16	the employee."	16	that person particularly where that person continues
17	Can we just quickly look at that point?	17	throughout the period of existence of the liability and
18	MR JUSTICE DAVID RICHARDS: Yes.	18	particularly in circumstances where section 80 provides
19	MR TROWER: So one can see how it works. I hope I have got	19	that the liability under section 74 creates the debt
20	the reference, the right ones this time, it is tab 83.	20	that is in the nature of an ordinary contract debt,
21	It is paragraphs 82 and 83 of your Lordship's judgment.	21	formally in the nature of speciality, at a time
22	82 deals with what might be the case. 83 was my	$\begin{vmatrix} 21 \\ 22 \end{vmatrix}$	necessarily prior to the time at which the liquidator is
23	submission and your Lordship's comprehensive rejection	23	necessarily appointed, even though it may not become
24	of it. (Laughter)	24	payable until subsequently. There is also a textual
25	MR JUSTICE DAVID RICHARDS: Yes. So if I read those two	25	point on section 149 which is a section we have not
	Page 86		Page 88
	<u> </u>		22 (Pages 85 to 88)

1	looked at yet, but which is a section that I want to	1	virtue of calls pursuant to this Act were money due from
2	take you to. This is a section that has been amended	2	him to the company.
3	in 2009 behind tab 12?	3	MR JUSTICE DAVID RICHARDS: I see, yes.
4	MR JUSTICE DAVID RICHARDS: Section?	4	MR TROWER: So the draftsman seems to have thought that.
5	MR TROWER: Section 149.	5	Now I quite accept that it is a limited textual point
6	MR JUSTICE DAVID RICHARDS: 149, yes.	6	but it is some indication.
7	MR TROWER: This is doing something slightly different and	7	MR JUSTICE DAVID RICHARDS: Yes, I see.
8	may I just introduce your Lordship to this section	8	MR TROWER: We are going to come back, I am afraid, to
10	anyway in order to make good this point: "The court may at any time after making a winding up	9	section 149 a bit later but I think it is all we need it for at the moment.
	order(Reading to the words) call in pursuance of		
11 12	the Companies Act or this act."	11 12	MR JUSTICE DAVID RICHARDS: Right, okay. MR TROWER: So although it is clear that a call must be made
13	So what this subsection does is give a summary	13	to render the section 80 liability payable, the
14	remedy against the contributory to pay sums except sums	14	obtaining of a balance order, we respectfully suggest,
15	which are payable by him by virtue of a call in	15	is well, there are two stages to this analysis. The
16	pursuance of the Companies Act or this act. Just so	16	first point is that:
17	your Lordship sees the scheme of the way this works.	17	"Although it is clear that(Reading to the
18	MR JUSTICE DAVID RICHARDS: Sorry, I may have got	18	words) a section 80 liability payable the obtaining
19	I should be looking at.	19	of a balance order under the act [which is a summary
20	MR TROWER: 149.	20	procedure] is not of itself necessary. Calls in
21	MR JUSTICE DAVID RICHARDS: Yes, the unamended version.	21	a winding up constitute a debt(Reading to the
22	MR TROWER: Yes, look at the unamended version for the	22	words) or pursuance of a contract debt and that
23	present time but you have to for the purposes of the	23	liability can only be enforced by action at law as well
24	point I am about to make. It has been amended to remove	24	as by balance order."
25	the words "in pursuance of the Companies Act or this	25	We found one case anyway where the company itself
	Page 89		Page 91
	<u> </u>		
1	act", although we were not able quite to understand why	1	acting by its liquidator was the person who the judge
1 2	act", although we were not able quite to understand why that was, but that is what happened.	1 2	contemplated could make the claim and that is a case
	-		contemplated could make the claim and that is a case called Harrison St Etienne Brewery company which is in
2	that was, but that is what happened. MR JUSTICE DAVID RICHARDS: Well, yes. I see. Because I think that the unamended version, is this right,	2 3 4	contemplated could make the claim and that is a case called Harrison St Etienne Brewery company which is in the supplemental bundle, tab 5: a very short point. A
2 3	that was, but that is what happened. MR JUSTICE DAVID RICHARDS: Well, yes. I see. Because	2 3	contemplated could make the claim and that is a case called Harrison St Etienne Brewery company which is in the supplemental bundle, tab 5: a very short point. A decision of Mr Justice Vaughan Williams. It is just the
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1	a claim that the company has or whather the scheme of	1	manage and it is alread that it was the commonster own
1 2	a claim that the company has or whether the scheme of the act as I think some of the other parties would	$\begin{vmatrix} 1 \\ 2 \end{vmatrix}$	merger, and it is clear that it was the company's own
		$\begin{vmatrix} 2 \\ 2 \end{vmatrix}$	claim on a call made before a liquidation.
3	contend for contemplates that there never has been	3	MR TROWER: Yes. The next case I think I need to take
5	anything that amounts to a liability to the company at all.	4	your Lordship to on this area is the decision in
		5	Whitehouse which is behind tab 24. Now this was a case
6	MR JUSTICE DAVID RICHARDS: A liability, yes, but not to the	6	which was decided in the context of set-off and which
7	company.	7	described the debt which arises under the predecessor of
8	MR TROWER: To the company, yes. That is the way it would	8	section 74 as a new debt payable to the liquidator. But
9	go.	9	it is important we suggest to be clear as to how far
10	MR JUSTICE DAVID RICHARDS: To the liquidator if and when	10	this case actually goes. It was decided in the context
11	appointed.	11	of arguments by contributories that they were entitled
12	MR TROWER: Yes. So I think it then would flow, it is then	12	to set-off a debt due from the company against their
13	said that that means that prior to the commencement of	13	payable obligation to contribute. So there are also
14	the company's liquidation no steps can be taken by the	14	cases, this is actually also a case in the line of
15	company in order to preserve the asset in the	15	authorities as to why the contributory rule does or does
16	contributories insolvency. That is how this point is	16	not apply. They were not concerned with the question of
17	relevant. Just one more case on this point, a case	17	whether a company pre-liquidation might have the ability
18	called Rusmaland(?) which again is in the new	18	to prove in the insolvency of a contributor in respect
19	authorities bundle. Your Lordship sees the headnote.	19	of a future section 74 liability.
20	MR JUSTICE DAVID RICHARDS: Tab?	20	But against that background the passage with which
21	MR TROWER: Sorry, tab 4. This was a slightly odd case	21	one is concerned starts I think at page 599, starting at
22	because it was a case where a call was made before the	22	the paragraph beginning:
23	winding up. A balance order was made in the winding up	23	"If therefore you want a set-off at all you must
24	and the company then sued by specially endorsed writ	24	show some provision in(Reading to the words) no
25	subsequent to the winding up notwithstanding the balance	25	such right."
	Page 93		Page 95
1	order and the reason it did that was because it needed	1	Then if your Lordship would read down to the end of
1 2	order and the reason it did that was because it needed to enforce the order against somebody out of the	1 2	Then if your Lordship would read down to the end of the paragraph at the top of page 600.
2	to enforce the order against somebody out of the	2	the paragraph at the top of page 600.
2 3	to enforce the order against somebody out of the jurisdiction and a balance order could not be enforced	2 3	the paragraph at the top of page 600. MR JUSTICE DAVID RICHARDS: Yes, certainly.
2 3 4	to enforce the order against somebody out of the jurisdiction and a balance order could not be enforced out of the jurisdiction and so it needed a judgment.	2 3 4	the paragraph at the top of page 600. MR JUSTICE DAVID RICHARDS: Yes, certainly. MR TROWER: Yes. One has to be very careful as to exactly
2 3 4 5	to enforce the order against somebody out of the jurisdiction and a balance order could not be enforced out of the jurisdiction and so it needed a judgment. The argument was made that there was some form of merger	2 3 4 5	the paragraph at the top of page 600. MR JUSTICE DAVID RICHARDS: Yes, certainly. MR TROWER: Yes. One has to be very careful as to exactly how far this goes particularly in the light of the fact
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7	5	administration can take steps effectively to protect	5	be itself to go into liquidation and that seems a most
Section Sect	6	against an insolvent contributory to the right which it	6	surprising result. So, my Lord, against that background
10	7	will have in the future to call and	7	can I just look at the components of section 74 claims
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1	9	have been the only basis of the decision, I take it,	9	claim is for:
before or by the liquidator after the resolution to wind up. So there must he some other reason why set-off is not permissible. I would have thought. MR TROWER: Yes, I am just looking for where this is. If I think perhaps can come back to that point. MR TROWER Yes, I am just looking for where this is. If I think perhaps can come back to that point. MR JUSTICE DAVID RICHARDS: Certainly. It may have been this point that if you are allowed set-off against a call on shares of a limited company you effectively to destroy. MR TROWER: Which is a point I am going to come back to as a contributory rule. MR TROWER: Which is a point I am going to come back to as a great that the question for your contributory rule. MR TROWER: That is absolutely right, and that is actually picked up at the bottom of page 602 with reference to writer would appreciate a break. MR TROWER: That is absolutely right, and that is actually writer would appreciate a break. MR JUSTICE DAVID RICHARDS: Certainly. MR JUSTICE DAVID RICHARDS: When you say capable of plooking at the intended to a liability or care to plook and	10	from the headnote, where he says that there cannot be	10	"Contribution of any amount sufficient(Reading
13	11	a set-off against calls made either by the company	11	to the words) in the winding up."
13	12	before or by the liquidator after the resolution to wind	12	Much of what I have submitted on the meaning of
14 MR TROWER: Yes, I am just looking for where this is. 16 MR TROWER: Set, I am just looking for where this is. 16 MR TROWER: But it is of course right to look at the 17 MR JUSTICE DAVID RICHARDS: Certainly. It may have been 18 this point that if you are allowed set-off against a 18 to repeat the points I have already made but I think it 18 this point that if you are allowed set-off against a 18 to repeat the points I have already made but I think it 18 this point that if you are allowed set-off against a 18 to repeat the points I have already made but I think it 18 this point that if you are allowed set-off against a 18 to repeat the points I have already made but I think it 18 to repeat the points I have already made but I think it 18 to repeat the points are likely to be 19 think it 18 this point I am going to come back to as a 20 those points are relevant but the question for your 22 contributory rule. 22 Lordship in inferent because the question for your 23 MR TROWER: That is absolutely right, and that is actually 24 phrase "debts and liabilities" mean in that context. 25 MR JUSTICE DAVID RICHARDS: Yes. Page 99 25 MR JUSTICE DAVID RICHARDS: Certainly. 25 MR JUSTICE DAVID RICHARDS: Certainly. 26 this point 27 this point 28 this point 29 this	13		13	
15 MR TROWER: Yes, I am just looking for where this is. 16 I think perhaps I can come back to that point. 17 MR JUSTICE DAVID RICHARDS: Certainly. It may have been this point that if you are allowed set-off against a call on shares of a limited company you effectively destroy— 20 destroy— 21 MR TROWER: Which is a point I am going to come back to as a contributory rule. 22 contributory rule. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR TROWER: That is absolutely right, and that is actually picked up at the bottom of page 602 with reference to Page 97 1 the Grazell's case. My Lord, I think the shorthand with Grazell's case. My Lord, I think the shorthand with Grazell's case. My Lord, we say the correct analysis is that a liability created under section 80. It is mediately appreciate, and inability which is capable of enforcement at any stage in circumstances in which that is possible of moreoment. 24 MR TROWER: By proof. 25 MR TROWER: Sy proof. 26 MR TROWER: By proof. If this were not to be the case reloy whether or not LIBE was in litigation. 27 MR TROWER: By proof. If this were not to be the case plant and old result would arise which would be preciated in this way. If the contributory's liabilities in singlificant to discharge what amounts to a debt or preaminently the insolvency of its contributory member. 28 MR TROWER: By proof. If this were not to be the case inforcement at any singlificant contributor which will be proved in the capable of enforcement at any singlificant contributory in the contributory's liability within the meaning of section 74. Now the preaminently the insolvency of its contributory member. 29 MR TROWER: By proof. If this were not to be the case inforcement and check and under several many singlificant to discharge what amounts to a debt or liability within the meaning of section 74. Now the preaminently the insolvency of its contributory will be proved in the proved be debts and no further. 30 MR TROWER: By proof. If this were not to be the case in liability will be company and the claim	14		14	
16 I think perhaps I can come back to that point. 17 MR JUSTICE DAVID RICHARDS: Certainly. It may have been it it is of course right to look at the question again in its statutory context. I will try not expect the points I have already made but I think it is pretty obvious which points are likely to be destroy— 20 destroy— 21 MR TROWER: Which is a point I am going to come back to as a contributory rule. 22 contributory rule. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR TROWER: That is absolutely right, and that is actually be placed by a place of the Grazell's case. My Lord, I think the shorthand writer would appreciate a break. 23 MR JUSTICE DAVID RICHARDS: Certainly. 24 Was a special state of the Grazell's case. My Lord, I think the shorthand writer would appreciate a break. 25 (A short break) 26 (3.03 pm) 27 (A short break) 28 (3.10 pm) 38 MR TROWER: So, my Lord, we say the correct analysis is that there is a liability created under section 80. It is there is a liability created under section 80. It is pre-eminently the insolvency of its contributory member. 26 MR JUSTICE DAVID RICHARDS: When you say capable of enforcement at any stage in circumstances in which that is possible pre-eminently the insolvency of its contributory member. 27 MR TROWER: By proof. 28 MR JUSTICE DAVID RICHARDS: When you say capable of enforcement. 29 I liability was limited to the amount to be paid on its enforcement. 30 MR JUSTICE DAVID RICHARDS: By proof. 31 MR TROWER: By proof. If this were not to be the case enforcement. 32 MR JUSTICE DAVID RICHARDS: When you say capable of stage in circumstances in which that is possible to pre-eminently the insolvency of its contributory member. 31 MR TROWER: By proof. If this were not to be the case enforcement. 32 MR JUSTICE DAVID RICHARDS: When you say capable of stage in circumstances in which the defined and the provention of the area which is in it is suspe between us is broadly speaking that LBHI and LBL contend that the phrase 'debts and inabilities' in section 74 covers all proveable deb	15		15	MR JUSTICE DAVID RICHARDS: Yes.
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1	are now defined in the Insolvency Rules. It is	1	are thinking about two different concepts. The
2	pertinent to ask: what is a debt and what is	2	inter-relationship and it's worth just turning back
3	a liability? If we can just go back to the rules and	3	to 12.3 between 12.3 and 13.12 has the essential
4	just look at that point in this context, behind tab 15.	4	effect that if something is a debt it's provable and if
5	MR JUSTICE DAVID RICHARDS: Just for completeness,	5	something is provable it's a debt.
6	Mr Trower, there is obviously something in the	6	MR JUSTICE DAVID RICHARDS: I see, yes.
7	Insolvency Act that says that, perhaps amongst other	7	MR TROWER: So the two work together. So where you see the
8	expressions, debts and liabilities can be defined by the	8	word "debt" you are in the realm of provability. When
9	rules. I am just making that	9	you see the word "liability" you are in the realm of
10	MR TROWER: No, I certainly hope there is.	10	something else, although liabilities are quite capable
11	MR JUSTICE DAVID RICHARDS: It must be there somewhere, must		of being provable debts if they have satisfied the
12	it not?	12	necessary characteristics.
13	MR TROWER: Yes, I suspect it is in the schedule which	13	MR JUSTICE DAVID RICHARDS: Yes.
14	identifies	14	MR TROWER: So we suggest this is the clearest possible
15	MR JUSTICE DAVID RICHARDS: Just sometime, not now but just	15	indication that, for section 74 purposes, "liabilities"
16	sometime if you could give me that link, yes.	16	must be referring to something other than provable
17	MR TROWER: Yes. If we go back to 13.12, what is a debt is	17	debts. So that's the first point.
18	defined in 13.12(1). It means:	18	There are other indications within section 74 that
19	"Debts to which the company is subject, debts to	19	this is the case; the further reference, for example, to
20	which the company may become subject by reason of	20	the adjustment of the rights of contributories amongst
21	obligations incurred and any interest provable, as	21	themselves is a strong textual indication that the
22	mentioned in rule 4.93(1)."	22	obligation to contribute extends to any liabilities
23	Liability doesn't of itself have that timing	23	which rank above members in the statutory waterfall. If
24	restriction in it as a definition because liability has	24	member A can be required to contribute under section 74
25	a meaning which is provided for in sub-rule 4:	25	in order to adjust the rights as between it and member
	Page 101	_	Page 103
1	"In any provision of the Act or the rules about	1	B, it's difficult to see how the phrase "debts and
2	winding-up, except and insofar as the context otherwise	2	liabilities" isn't intended to extend to anything which
3	regards, liability means the liability to pay money or	3	has to be paid first.
4	moneys worth", et cetera, et cetera.	4	One of the points made on the other side is that the
5	A point is made by LBHI that the word "liability" in	5	reference in section 74 to the expenses of the
6	13.12(4) has to be read only in the context of	6	winding-up counts against LBIE's construction. But,
7	determining whether a liability is a provable debt.	7	with respect, that isn't correct either. The reason
8	Now, we say that's not right because it would be	8	there is a need to refer to the expenses of the
9	inconsistent with the opening words of the sub-rule for	9	winding-up is because a number of the expenses don't
10	the purposes of references in the sorry, in any	10	naturally fall within the concept of a liability. You
11	provision of the Act or the rules about winding-up, and	11	only have to look and it's perhaps just worth briefly
12	with the fact that the definition appears in part 13 of	12	looking at rule 4.21(8) to see that, the liabilities of
13	the rules dealing with general definitions. It's not in	13	the company, behind tab 15, 4.21(8).
14	rule 12.3 which is dealing with provable debts. Now,	14	MR JUSTICE DAVID RICHARDS: Sorry, can you just give me that
15	that is obviously not a complete answer, that last	15	reference again.
16	point, because you go to 13.12 in order to identify what	16	MR TROWER: 4.21(8).
17	is a provable debt for the purposes of 12.3, but it's	17	MR JUSTICE DAVID RICHARDS: Yes.
18	some indication.	18	MR TROWER: There are a number of expenses in the list that
19	Now, questions relating, as your Lordship knows, to	19	plainly are not a liability of the companies. It's
20	the time at which an obligation was incurred in order	20	a fairly obvious point. Yes, they are listed in
21	for the debt to be provable are at the heart of the	21	sub-rule 3. Now, LBHI and LBHI2 refer to a number of
22	Nortel appeal. But what is clear, we say, is that	22	statutory provisions elsewhere in the Act which are said
23	a debt which is defined by reference to the	23	to support the idea that statutory interest is not
24	characteristics of provability is a different animal	24	included within the concept of a liability for section
25	from a liability which may or may not be provable. They	25	74 purposes, but when one actually looks at them none of
	Page 102		Page 104

1 MR JUSTICE DAVID RICHARDS: Yes. them really stand up to scrutiny or undermine our MR TROWER: Then if the court makes such an order, (2), in 2 submission. 3 But before looking in more detail at what they rely 3 the case of an unlimited company, there can be an 4 4 allowance by way of set-off and in the case of a limited on, can I just take your Lordship to two other sections 5 which indicate that statutory interest is intended to be 5 company, in certain defined categories, the same point 6 6 in relation to a limited company where a director or a a liability for the purposes of that section, i.e. 74, 7 7 manager has unlimited liability, that rather peculiar because they support the idea that the payment of 8 8 circumstance which doesn't very often arise any more. interest is required before the members are able to 9 9 In fact, I have never seen it. exercise rights that would be available to them. Those 10 10 are section 89 and section 149. Tab 12, section 89. Then (3) is the one that matters: 11 11 "In the case of any company, whether limited or These are really points on the scheme of the legislation 12 12 rather than very precise textual arguments. unlimited, when all the creditors are paid in full 13 13 MR JUSTICE DAVID RICHARDS: Yes. together with interest at the official rate, any money 14 14 MR TROWER: But the point here on section 89.1 is that due on any account whatever to a contributory in the 15 15 company may be allowed to him by way of a set-off a statutory declaration of solvency (which, as your 16 Lordship knows, when it's sworn or declared means that 16 against any subsequent call." 17 17 Now, the point simply here is that, once one has the company can go into members' voluntary liquidation) 18 the directors have to form the opinion that the company 18 reached the stage of payment in full together with 19 19 interest at the official rate, the contributories' right will be able to pay its debts in full together with 20 interest at the official rate. So the payment of 20 of set-off which would not otherwise exist is given 21 21 back, which is a sort of indication of when it is that interest at the official rate is required before it is 22 regarded by this part of the scheme as a winding up in 22 the contributories' rights are regarded by the statutory 23 23 which the members are the people who have the rights to scheme as rights which need to be exercised or should 24 24 speak. continue to be exercised within the winding up. 25 25 MR JUSTICE DAVID RICHARDS: I am just slightly puzzled at Then if we go back to 149, which was the section we Page 105 Page 107 were looking at a short while ago on another point, your 1 the moment by this section 149. Subsection 1, the 1 2 2 Lordship will recall that this was the section that gave money, when it refers to an order that the contributory 3 3 pay any money due from him to the company, but exclusive the summary remedy against a contributory in respect of 4 debts payable, apart from money payable to the estate by 4 of any money payable by him by virtue of any call, is it 5 virtue of a call. 5 just referring to, as it were, ordinary debts due from 6 Subsection 2 --6 the contributory to the company? 7 MR JUSTICE DAVID RICHARDS: Just one moment. I was just 7 MR TROWER: That is what we think it is, yes, and there 8 trying to work out whether 89.1 had any impact in 8 doesn't seem to be anything else. 9 relation to Mr Justice Mervyn-Davies's conclusion in Re 9 MR JUSTICE DAVID RICHARDS: It's very odd. 10 10 MR TROWER: It's an odd section. Lines Bros. I mean, assuming the language of the 11 provision was the same then as it is now. Because he 11 MR JUSTICE DAVID RICHARDS: Why shouldn't a contributory 12 12 was saying, well, the company is solvent if it can pay just be able to prove -- sorry, that's the wrong way 13 all its provable debts, wasn't it? So you can then get 13 round. 14 to the provisions for payment of interest. 14 MR TROWER: That's the wrong way round. 15 15 MR JUSTICE DAVID RICHARDS: Sorry, I see. But then why this MR TROWER: I think the language was different. MR JUSTICE DAVID RICHARDS: The language was different. very limited -- so what sort of right of set-off is 16 16 17 there? 17 MR TROWER: The language was different, but what we will do, 18 your Lordship, we will go back and compare, because it 18 MR TROWER: The right of set-off is only allowed in the case 19 was different. 19 of an unlimited company. 20 MR JUSTICE DAVID RICHARDS: Yes, I think it must be, all 20 MR JUSTICE DAVID RICHARDS: Yes, the court --21 21 MR TROWER: We will come back to that point in the context right. Sorry, section 89, yes. 22 22 MR TROWER: 149.3. 149.1 is, as I say, the summary cause of of the contributory rule because the distinction between 23 23 action against a contributory in relation to money unlimited companies and limited companies in the context 24 24 payable by him or the estate -- exclusive of money of the contributory rule is touched on in some of the 25 25 authorities and we need just to see how far that goes. payable by him or the estate by virtue of any call. Page 106 Page 108

bere, in the Companies Act, there is a summary remedy a gainst a contributory in respect of an obligation which deneal derive in any way from his status as a contributory and indeed excludes it. Am a contributory and indeed excludes it. MR INSTOCE DAVID RICHARDS. Yes, I suppose that may just be paper. MR INSTOCE DAVID RICHARDS was free cased at a firm when there seems to have been, more a cultural perspective, in the corner of an elutinal perspective, and in the context of a lighted some whereas a contributory was first enacted at a firm when there seems to have been, from a cultural perspective, in the corner of an elutinal perspective, and in the context of a lighted some whereas a contributory was first enacted at a firm when there seems to have been, from a cultural perspective, and in the context of a lighted some whereas are quite unused to that. MR INSTICE DAVID RICHARDS. Very well. MR INSTICE DAVID RICHARDS. Yes, and a light the summary of	1	But one of the clight addition about it is that	1	company want into liquidation "
a quanta a contributory in respect of an obligation which doesn't derive in any way from his stants as a contributory and indeed excludes it. MR TROWER: It's a very old section so far as its an accedents are concerned. It goes right back to the 1862 Act. It certainly was first enacted at a time when 1 these seems to have been, from a cultural perspective, more of an ide that contributors were often hammered 1 quite hard in the context of a liquidation whereas 1 more against and the context of a liquidation whereas 1 more against and the context of a liquidation whereas 1 more against and section 89, the relevant section 107. MR TROWER: Would your Lordship just give me a moment 2 more of an india section 189, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section at the 2 more of an indiance and section 89, the relevant section 107. MR TROWER: My Lord, so those are the two sections we 4 mount of 2 more of an indiance and section 89, the relevant section 109 more of an indiance and section 89, the relevant section 109 more of an indiance and section 89, the relationship between the analysis and section 109 more of an indiance and section 89, the relationship between the analysis and section 109 more of an indiance and section 89, the relationship more of the company's trainfries consider and section 89, the relationship more of the company's liabilities and interests in the company's 1 more of a	1 2	But one of the slight oddities about it is that,	1 2	company went into liquidation."
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15 MR JUSTICE DAVID RICHARDS: Very well. 16 MR TROWER: Would your Lordship just give me a moment? 17 MR JUSTICE PAVID RICHARDS: Yes. 18 MR TROWER: My Lord, yes, just before we lose it, the point 19 your Lordship raised on Lines Bros and the relationship 20 between that and section 89, the relevant section at the 21 time was section 283 of the Companies Act 1948, which 22 you see referred to on page 219 of Lines Bros. It's in 23 volume 2, tab 9 of the authorities bundle. 283 doesn't 24 require (inaudible). 25 MR JUSTICE DAVID RICHARDS: Thank you. 26 Page 109 1 MR TROWER: So the law seems to have changed. 27 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: My Lord, so those are the two sections well thought your Lordship might get some assistance from. 4 thought your Lordship might get some assistance from. 5 There are then some sections which are taken against us, if I can put it that way. The first one is section 107. 7 That provides that, subject to the provisions of the (inaudible) — this is the pari passu distribution section. 10 "The company's property in a voluntary winding up shall, on the winding-up, be applied in satisfaction of the reprish and interest in the company." 11 Shall, on the winding-up ball, before being applied for any other purpose, be applied in paying interest on the section winding-up shall, before being applied for any other purpose, be applied in paying interest on the sections provides: 10 "Any surplus remaining after the payment of the debts proved in winding-up shall, before being applied for any other purpose, be applied in paying interest on the submission in table about the way this section and moment and subject to the provisions of the scheme if that is shall, and the way this section were the section shall, unless the Articles otherwise provide, be distributed among the members according to the reights and interests in the company." 15 MR TROWER: I think it is being ablouts debts in this submits sortion. 16 MR TROWER: I think it is being mans provable in abl				
16 MR TROWER: Would your Lordship just give me a moment? 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR TROWER: My Lord, yes, just before we lose it, the point 19 your Lordship raised on Lines Bros and the relationship 20 between that and section 89, the relevant section at the 21 time was section 283 of the Companies Act 1948, which 22 you see referred to on page 219 of Lines Bros. It's in 23 volume 2, tab 9 of the authorities bundle. 283 doesn't 24 require (inaudible). 25 MR JUSTICE DAVID RICHARDS: Thank you. 26 Page 109 27 Page 111 28 MR TROWER: So the law seems to have changed. 29 MR TROWER: So the law seems to have changed. 30 MR TROWER: So the law seems to have changed. 40 MR TROWER: So the law seems to have changed. 41 thought your Lordship might get some assistance from. 42 There are then some sections which are taken against us, if if can put it that way. The first one is section 107. 43 That provides that, subject to the provisions of (inaudible) this is the pari passu distribution 44 shall, on the winding-up, be applied in satisfaction of their rights and interests in the company. 45 The company's liabilities pari passu and subject to that application shall, unless the Articles otherwise provide, be distributed among the members according to their rights and interests in the company. 46 Section. 47 Works: no that a source and paid pari passu, and I think that is what would happen with unprovable labilities as well. 48 TROWER: No, it doesn't. It cuts across all sorts of yparts of the scheme if that's actually right. Yes, it's paragraph 57 of LBHTs written opening submissions: 48 TROWER: So the law section 180. 49 The reference to labilities in section 107 is a reference to labilities in section 107 is a reference to provable debts or it is those debts which page and paid pari passu in accordance with the provisions of chapter 9.* 40 MR TROWER: My Lord, so those are the two sections we way the full story. 41 Am TROWER: My Lord, so those are the two sections of the company's liabilities, and the relationsh				
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1 refer to -- actually perhaps I can just take your 1 He has done so in almost every case because testing the 2 Lordship to one of them to illustrate the point. It is 2 relevant matter with reference only to provable debts 3 3 2.3(b). would not be appropriate. So we actually suggest that 4 4 MR JUSTICE DAVID RICHARDS: 2.3(b), sorry? all these kind of textual points in fact support our 5 MR TROWER: Section 2.3(b). case rather than LBHI's case. Section 74 cannot MR JUSTICE DAVID RICHARDS: In? 6 sensibly be read as limited only to provable debts. 7 MR TROWER: I am so sorry, tab 12, section 2.3(b) of the 7 Then in LBHI's submissions, at paragraphs 70 to 76, 8 Act. 8 they refer to some categories of non-provable debt and 9 MR JUSTICE DAVID RICHARDS: I see. 9 liability which cannot be caught by section 74 for 10 10 MR TROWER: It's right at the beginning, subsection. various reasons. So what they are effectively saying is 11 MR JUSTICE DAVID RICHARDS: I see. Sorry, yes, I have it. 11 that there are a number of types of non-provable 12 MR TROWER: We have real difficulty in seeing where this 12 liability which cannot be within the contemplation of 13 takes them because we don't really understand why it is 13 section 74. They say that that supports the proposition 14 14 that a statement of affairs shouldn't be required to that the liabilities referred to in section 74 are only 15 include non-provable debts. I mean, it really doesn't 15 provable debts. 16 help matters very much. There plainly is, here, being 16 Now, quite apart from the fact that there is a hole 17 used two different concepts, a debt and a liability. 17 in the logic there, we say that the submission is wrong 18 There is then the provisions in relation to 18 because actually those so-called liabilities are not in 19 insolvency. 214 I think is one we might go to, the 19 truth liabilities at all, either that or they are wholly 20 wrongful trading provision, 214.6, and there are a 20 unenforceable. Just to deal with the five examples that 21 21 number of other sections that are referred to by LBHI. are given, the first example they give is the discounted 22 "For the purposes of this section, a company goes 22 element of a future liability. 23 into ...(Reading to the words)... debts and other 23 MR JUSTICE DAVID RICHARDS: Yes. 24 24 liabilities and expenses of the winding-up." MR TROWER: Now, that doesn't help because the whole debt 25 Again, we simply don't understand why it is that 25 has been discharged by payment of the discounted amount. Page 113 Page 115 a company's non-provable liabilities should not be taken 1 There isn't a claim left. The only way it would -- and 1 2 into account for the purposes of determining whether or 2 certainly on that point. A similar point is an amount 3 3 not it's insolvent in the context of wrongful trading in excess of the estimated amount of contingent 4 4 proceedings. I wasn't proposing to spend very much liability. I have already touched on that concept in 5 5 further time on those points. In paragraph 38 of our submissions this morning. Subject to any revaluation 6 supplemental submissions, we make some further more 6 when the revalued amount will be provable, exactly the 7 7 detailed points on them. same analysis applies. It is not a non-provable 8 But another textual point that's made by LBHI is the 8 liability at all. It's either discharged because the 9 9 contrast between the absence of any reference to estimate is actually good and remains good or it's 10 10 statutory interest in section 74 and other provisions revalued and becomes provable. 11 11 where such a reference is made. So I think the They then refer to statute-barred and non EC foreign 12 submission is that, where statutory interest is being 12 tax liabilities. Well, we have already touched on 13 thought of as something which has to be encapsulated 13 those. We say they are simply not payable by the 14 14 company, whether in the course of the insolvency or at

statutory interest in section 74 and other provisions where such a reference is made. So I think the submission is that, where statutory interest is being thought of as something which has to be encapsulated within the section, it is spelt out. This argument doesn't advance matters at all, in our submission, because in none of the examples identified is the word "interest" used in addition to the phrase "debts and liabilities". So, in other words, the draftsman has never thought where the phrase "debts and liabilities" is used that he also needs to add in "and statutory

have been able to identify.

On each occasion on which the draftsman has referred to liabilities instead of or in addition to provable debts, we submit that the scheme looks tolerably clear.

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interest". There is nowhere where that is done that we

in the security, the liabilities will be proven in the normal way.

The final category is the shareholders' right to the surplus, but we are not quite sure we understand that because that is not a debt or liability of the company within the meaning of section 74. Section 74.1 is of

The fourth category is secured liabilities. They

don't help. They are all outside the scope of the Act

course concerned with the adjustment of the rights of

altogether. To the extent that there is any shortfall

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29 (Pages 113 to 116)

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all.

1 1 approach. In their written submission, that seems to be contributories, but it doesn't really take matters very 2 accepted that it's the right way of doing it. 2 much further. 3 3 Can I then move on to another point, which relates What is the present evidence in relation to the 4 4 liquidation contingency in the present case? Your to the issues which your Lordship has been asked in 5 5 relation to the quantification of the section 74 claim. Lordship will find that -- I don't think we need turn it 6 6 I have not got very much to say about this, but it's 7 7 MR JUSTICE DAVID RICHARDS: I mean, how far am I concerned simply that one of the questions is how the claim under 8 8 with that? section 74 is to be valued for the purposes of proving 9 9 MR TROWER: Your Lordship is not, in the sense we are not the administration of the member contributories. Now, 10 10 asking you -- to this extent, nobody is asking you to we accept the fact that this may be relatively complex 11 11 assess how this should work. in practice but in principle the process is relatively 12 MR JUSTICE DAVID RICHARDS: Yes. 12 straightforward. The rules make provision for the 13 valuation of the claim as a contingent claim; that is 13 MR TROWER: The reason I am just spending two or three 14 14 minutes on it is so that your Lordship can see how it clear from rule 2.81. The administrator if it's 15 15 would be done. a distributing administration or the liquidator of the 16 contributing member is required to estimate the value of 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR TROWER: Insofar as you will need to be told this. It 17 the debt, the claim, because it will be a claim which 18 18 may be these are unnecessary submissions, in which case doesn't bear a certain value and be subject to the 19 19 contingency, and he will revise any estimate previously I apologise. 20 made if he thinks fit. The value of the debt under 20 There is, however, one subsidiary point. Sorry, I 21 21 didn't give you the reference. Just so you have it, it sub-rule 2, as your Lordship knows, is the amount 22 22 is Mr Downes's witness statement, paragraphs 64 and 65. provable in the administration. 23 23 The bottom line is there is no settled intention to go In estimating the value of the contingent claim in 24 24 the present case, the administrators would, at the into liquidation but it may well happen. That's where 25 25 we are. relevant time, have to take into account the likelihood Page 117 Page 119 of LBIE going into liquidation if it was still in 1 1 There is though just one subsidiary point in 2 2 administration and estimate the extent of LBIE's relation to this. Perhaps I should say this to your 3 deficiencies as regards the debts and liabilities owed 3 Lordship. Neither LBL nor LBHI2 are yet in any form of 4 by it to its creditors and any likely expenses of the 4 distributing process. 5 liquidation process. That is something which is an 5 MR JUSTICE DAVID RICHARDS: Yes, I see. 6 exercise they would obviously carry out in conjunction 6 MR TROWER: So we are not at that stage yet. 7 with whatever evidence was going to be put before them 7 MR JUSTICE DAVID RICHARDS: Yes, right. 8 to assist in that process by the LBIE administrators. 8 MR TROWER: There is one subsidiary point on valuation. 9 MR JUSTICE DAVID RICHARDS: Yes. 9 There is a question I think that has been asked or an 10 MR TROWER: Your Lordship may like to note -- I don't think 10 issue been raised, issues in relation to rule 2.105 and 11 we need -- actually there is one passage in it which is 11 whether it applies for the purposes of estimating 12 quite helpful. The most recent decision of the Court of 12 a contingent claim in these circumstances. The short 13 Appeal in the Danka case is at tab 100, which is 1D. 13 answer is that we cannot see how it does. 14 Lord Justice Patten at paragraph 43 gives a useful 14 MR JUSTICE DAVID RICHARDS: Rule, sorry? 15 description of the correct approach. I think your 15 MR TROWER: Rule 2.105. This is a point that's dealt with 16 Lordship may be familiar with this paragraph. 16 in paragraphs 122 to 125 of our written submissions. 17 MR JUSTICE DAVID RICHARDS: Yes. It may be that Mr Arnold 17 This is the rule that applies a discounting formula for 18 will be reprising some of his recent submissions to me. 18 the purposes of paying dividends in relation to future 19 We will see. 19 debts. The discounting formula is --20 MR TROWER: It will be a pleasure to listen to. 20 MR JUSTICE DAVID RICHARDS: Yes, I saw the point. 21 My Lord, that is the approach which the 21 MR TROWER: It simply doesn't work in the context of 22 administrators of LBHI2 and LBL would have to take were 22 contingent claims because you cannot use the formula 23 they to become distributing administrations and a proof 23 because one of elements of the formula requires you to 24 be put in by LBIE. As I read it, LBL, in particular, 24 know when it is that the debt would be paid. 25 25 doesn't really take issue with that being the correct MR JUSTICE DAVID RICHARDS: Yes. Page 118 Page 120

purposes of working out what is provable and what is not. 13 quite accept, but it does give rise to a quite bizarre 14 situation which we respectfully suggest cannot possibly 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR TROWER: Then there are the provisions under 4.93(1) 17 which extend the right to interest beyond the situation 18 in which the debt actually bears interest. 18 quite accept, but it does give rise to a quite bizarre 19 situation which we respectfully suggest cannot possibly 10 have been intended, that creditors should be entitled to 11 interest accruing during an administration well, 12 sorry, I will put it the other way round. It clearly 13 must have been the case that creditors should be			MD HIGTIGE DAVID DIGHADDS, V.,
all sorts of questions that go into the estimation of be configency claim (?), but it doesn't goan further than that. Now, there is one other point before I move on to the contributory rights that I need just briefly to touch on, which is the inter-relationship between the claims to interest under section 189.1 and the claims to contributory rights that I need just briefly to touch on, which is the inter-relationship between the claims to interest under section 189.1 and the claims to laterest under section 189.1 and the claims to lo but interest under section 189.1 and the claims to laterest under section 189.1 and the claims to lo but interest under section 189.1 and the claims to lo but interest under section 189.1 and the claims to laterest under section 189.1 and the claims to lo but interest under section 189.1 and the claims to laterest under section 189.1 and the claims to lo but interest under section 189.1 and the claims to laterest under section 189.1 and the claims to laterest section 189.1 and the claims to lo but it as been corrected by amendment. If we go back latered to 2.88, the first one is April 1 2005 to April 5 2010. The reason of course it might have applied in this course the first section 189.1 and the section 189.1 and the virtue 150 course can tell, the rules had to make provision for circumstances in which administration was insofar as one can tell, the rules had to make provision for circumstances in which administration for circumstances in which administration laterest accruing ondebts during the period of administration will make the provable as part of the debt:		-	
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19 MR IUSTICE DAVID RICHARDS: Yes 19 entitled to interest accruing during the administration 1	•		
20 MR TROWER: Then you have to go to 189, which is behind 20 before any return is made to members.			
tab 12, which is the section. The provision for payment 21 MR JUSTICE DAVID RICHARDS: Yes.			
of statutory interest is dealt with in subsection 2 and 22 MR TROWER: And that must have been the policy. There is no			
which permits the payment of statutory interest out of logical or policy reasons to permit assets to be			
surplus in respect of periods for which they have been 24 returned to members in priority to creditors' rights to			
25 outstanding since the company went into liquidation. 25 interest accruing during a period when there is surplus		25	
Page 177 Page 174	Page 122		Page 124

1				
3	1	simply because the administration is converted into	1	dealt with in 4.93 and the right to interest out of the
4 MR TROWER: One can imagine that it may have been easier to memory the lost of the second and 493. 5 MR JUSTICE DAVID RICHARDS: In the form in which it was cancered between 2005 and 2010 or in force in that period. 5 Page 125 6 MR JUSTICE DAVID RICHARDS: Then over the page is the revised 493. 6 AND TROWER: Yes. 6 MR TROWER: Yes. 6 MR TROWER: Yes. 7 MR ROWER: Yes. 8 MR JUSTICE DAVID RICHARDS: Then over the page is the revised 493. 8 MR JUSTICE DAVID RICHARDS: Which has used the same formula for the relevant date. 9 MR TROWER: Yes. 10 MR TROWER: Yes. 11 MR TROWER: Yes. 12 MR TROWER: Yes. 13 MR JUSTICE DAVID RICHARDS: But has the problem been part right is because the statutory right to interest in a winding-up and administration. Its limited to interest accuraing on administration. Its limited to interest accuraing on administration because notice has been given under rule 2.95(1). 2 MR TROWER: No, and the reason it has not been put right is because the statutory right to interest in a winding-up are dealt with under rule 2.95 between 4 MR JUSTICE DAVID RICHARDS: So let me just get this right. 6 In 2.88, in the revised form. 1 MR TROWER: Yes. 1 MR JUSTICE DAVID RICHARDS: So let me just get this right. 6 In 2.88, in the revised form. 2 MR TROWER: Yes. 3 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is a few first than the relevant date. 3 MR TROWER: Yes. 4 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is a few first than the relevant date. 4 MR TROWER: Yes. 4 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is a few first than the first payment of the definition of t	2	winding-up before distribution is made. So we have	2	surplus is dealt with by section 189.
5	3	suggested one way of addressing what is a fairly obvious	3	MR JUSTICE DAVID RICHARDS: Okay. Right.
6 clear. We looked at 4.93. 7 MR TROWER: Yes. 8 MR JUSTICE DAVID RICHARDS: In the form in which it was exerted between 2005 and 2010 or in force in that operated between 2005 and 2010 or in force in that operated between 2005 and 2010 or in force in that of part of the 2005 and 2010 or in force in that of part of the 2005 and 2010 or in force in that of part of the 2005 and 2010 or in force in that of part of the 2005 and 2010 or in force in that of part of the 2005 and 2010 or in force in that of the 2005 and 2010 or in force in that of the 2005 and 2010 or in force in that of the 2005 and 2010 or in force in that of the 2005 and 2010 or in force in that of the 2005 and 2010 or in force in that there appears to the 2005 and 2010 or in force in that there appears to the 2005 and 2010 or in force in that there appears to the 2005 and 2010 or in force in that there appears to the 2005 and 2010 or in force in that there appears to the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there appears to the 2005 and 2010 or in force in that there appears to 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there appears to 2005 and 2010 or in force in that there is appears to 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there appears to 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in that there appears to 2005 and 2010 or in force in the 2005 and 2010 or in force in that there is a way through the 2005 and 2010 or in force in the 2005 and 2010 o	4	lacuna, which is a construction approach that we	4	MR TROWER: One can imagine that it may have been easier to
7 MR TROWER: Yes 2 Provided 93. 8 MR TROWER: Where a sit addresses in dead with — oh or power of the debts proved the sit in the critical difference — MR TROWER: Surplus RICHARDS: Right. 9 MR TROWER: Nes. 10 MR TROWER: Nes. 11 MR TROWER: Meether that's an explanation or not, I don't sits. 10 miss. 11 MR TROWER: Meether that's an explanation or not, I don't sits. 11 MR TROWER: Nes. 12 MR TROWER: Nes. 13 my rivised 493. 13 my rivised 493. 14 MR TROWER: Nes. 14 MR TROWER: Nes. 15 MR TROWER: Nes. 15 MR TROWER: Nes. 16 MR TROWER: Nes. 16 MR TROWER: Nes. 16 MR TROWER: Nes. 17 MR TROWER: No. and the reason it has not been put right is fight? 18 MR TROWER: No. and the reason it has not been put right is 21 because the statutory right to interest in a winding-up 21 has become a distributive administration. That's whereas — I see place, In administration, all of the entire to interest increase, whether provable or statutory, 22 marks under section 189, i.e. a section in the Act, 23 whereas — I see place, In administration, all of the entire the interest of the method of the interest claimed, one is rule 4.93 and the other is 4 section 189. Section 189. Section 189. Section 189. Section 189. The method of the interest claimed, one is rule 4.93 and the other is 4 section 189. The provable in respect of any 2 period after the relevant date. 18 MR TROWER: Yes. 19 MR TROWER: Yes. 10 MR TROWER: Yes. 10 MR TROWER: Yes. 10 MR TROWER: Yes. 11 mot provable insofar as it's payable in respect of any 2 period after the relevant date. 11 mot provable insofar as it's payable in respect of any 2 period after the relevant date. 19 MR TROWER: Yes, 10 MR TROWER: Yes, 10 MR TROWER: Surplus is dealt with in 7. 18 MR TROWER: Surplus is dealt with in 7. 19 MR TROWER: Surplus is dealt with in 7. 19 MR TROWER: Surplus is dealt with in 7. 19 MR TROWER: Surplus is dealt with in 7. 19 MR TROWER: Surplus is dealt with in 7. 19 MR TROWER: Surplus is dealt with in 7. 19 MR TROWER: Surplus is dealt with in 7. 19 MR TROWER: Surplus is dealt with in 7. 1	5	MR JUSTICE DAVID RICHARDS: Sorry, can I be absolutely	5	amend the rules than the section, but I know not why it
8 MR TROWER: Whether that's an explanation or not, I don't enacted between 2005 and 2010 or in force in that period period. 10 period. 11 MR TROWER: Yes. 11 MR TROWER: Yes. 12 MR TROWER: Yes. 13 revised 4.93. 14 MR TROWER: Yes. 15 MR TROWER: Yes. 16 of the relevant date. 17 MR TROWER: Yes. 18 MR TROWER: Yes. 19 may be the first of the relevant date. 19 district of the relevant date. 20 may be the standard of the relevant date. 21 district of the relevant date. 22 arises under section 189, i.e. a section in the Act. 23 are dealt with under rule 2.88. 25 are dealt with under rule 2.88. 26 are dealt with under rule 2.88. 27 are dealt with under rule 2.88. 28 MR TROWER: What it does is it addresses interest on debts proved the realter and provides for the payment of administration. Then the critical part of the analysis is shart. 2.88(7) doesn't cease to apply upon the conversion of the distributing administrations. 28 MR TROWER: Yes. 29 MR TROWER: Yes. 20 MR TROWER: Yes. 21 MR TROWER: Yes. 24 MR TROWER: Yes. 25 MR TROWER: Yes. 26 MR TROWER: Yes. 27 MR TROWER: Yes. 28 MR TROWER: Yes. 38 MR TROWER: Yes. 39 MR TROWER: What it does is it addresses interest on debts proved thereafter and provides for the payment of Page 127 10 MR RUSTICE DAVID RICHARDS: Right. 11 mot provable insofar as it's payable in respect of any period after the relevant date. 19 MR TROWER: Yes. 20 MR TROWER: Yes. 30 MR TROWER: Yes. 31 MR TROWER: Yes. 32 MR TROWER: Yes. 33 MR TROWER: Yes. 34 MR TROWER: Yes. 35 MR TROWER: Yes. 36 MR TROWER: Yes. 37 MR TROWER: Yes. 38 MR TROWER: Yes. 39 MR TROWER: Yes. 30 MR TROWER: Yes. 31 MR TROWER: Yes. 32 MR TROWER: Yes. 33 MR TROWER: Yes. 34 MR TROWER: Yes. 35 MR TROWER: Yes. 36 MR TROWER: Yes. 37 MR TROWER: Yes. 38 MR TROWER: Yes. 39 MR TROWER: Yes. 30 MR TROWER: Yes. 31 MR TROWER: Yes. 32 MR TROWER: Yes. 33 MR TROWER: Yes. 34 MR TROWER: Yes. 35 MR TROWER: Yes. 36 MR TROWER: Yes. 37 MR TROWER: Yes. 38 MR TROW	6	clear. We looked at 4.93.	6	is.
9	7	MR TROWER: Yes.	7	MR JUSTICE DAVID RICHARDS: That's certainly true, but
this. The probability of the page of th	8	MR JUSTICE DAVID RICHARDS: In the form in which it was	8	MR TROWER: Whether that's an explanation or not, I don't
MR TROWER: Yes.	9	enacted between 2005 and 2010 or in force in that	9	know, but we do suggest that there is a way through
13	10	period.	10	this.
12 MR TROWER: Because we don't shrink from the fact that there revised 493. 13 revised 493. 14 MR TROWER: Yes. 15 MR JUSTICE DAVID RICHARDS: Which has used the same formula to the relevant date. 16 of the relevant date. 17 diministration. Its limited to interest accruing on debts since the company went into liquidation. That's what it's about. Rule 2.88(7), whereas — I step back. In administration all of the entire the surplus rule 2.98 in a section in the Act. 22 arises under section 189, i.e. a section in the Act. 23 whereas — I step back. In administration, all of the entitlements to interest, whether provable or statutory, are dealt with under rule 2.98(7). Whether are two places you find in 1.288, in the revised form. 24 section 189. 25 MR TROWER: In a liquidation, there are two places you find in 1.288, in the revised form. 26 MR JUSTICE DAVID RICHARDS: Right. 27 MR TROWER: In a liquidation, there are two places you find in 1.288, in the revised form. 28 MR JUSTICE DAVID RICHARDS: No let me just get this right. 39 MR JUSTICE DAVID RICHARDS: No let me just get this right. 40 In 2.88, in the revised form. 41 MR TROWER: Yes. 42 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is not provable insider as it's payable in respect of any period after the relevant date. 43 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is not provable insider as it's payable in respect of any period after the relevant date. 44 MR JUSTICE DAVID RICHARDS: Where does it deal with —oh, it's 7. 45 MR JUSTICE DAVID RICHARDS: Where does it deal with —oh, it's 7. 46 MR JUSTICE DAVID RICHARDS: Where does it deal with —oh, it's 7. 47 MR JUSTICE DAVID RICHARDS: Where does it deal with —oh, it's 7. 48 MR JUSTICE DAVID RICHARDS: Here does it deal with —oh, it's 7. 49 MR JUSTICE DAVID RICHARDS: Where does it deal with —oh, it's 7. 40 MR JUSTICE DAVID RICHARDS: Here does it deal with —oh, it's 7. 40 MR JUSTICE DAVID RICHARDS: Here does it deal with —oh, it's 7. 41 MR JUSTICE DAVID RICHARDS: Here does it deal with —oh, it's 7. 42 MR	11	MR TROWER: Yes.	11	MR JUSTICE DAVID RICHARDS: Right.
14 Say it's a pretty obvious one. The way is this.	12	MR JUSTICE DAVID RICHARDS: Then over the page is the	12	
14 Say it's a pretty obvious one. The way is this.	13	revised 4.93.	13	appears, on the face of it, to be a lacuna, although we
15 MR JUSTICE DAVID RICHARDS: Which has used the same formula of the relevant date. 16 of the relevant date. 17 MR TROWER: Yes. 18 MR JUSTICE DAVID RICHARDS: But has the problem been put right? 19 right? 20 MR TROWER: No, and the reason it has not been put right is because the statutory right to interest in a winding-up arises under section 189, i.e. a section 189, i.e. a section in the Act, 22 arises under section 189, i.e. a section in the Act, 22 arises under section 189, i.e. a section in the Act, 22 arises under section 189, i.e. a section in the Act, 23 whereas - 1 step back. In administration, all of the 23 are dealt with under rule 2.88. 24 entitlements to interest, whether provable or statutory, 24 MR TROWER: What it does is it addresses interest on debts 25 proved thereafter and provides for the payment of Page 127 1 MR JUSTICE DAVID RICHARDS: Right. 24 MR TROWER: In a liquidation, there are two places you find 3 the interest claimed; one is rule 4.93 and the other is 24 section 189. 25 winding-up - in the page 127 administration. Then the critical part of the analysis is that 2.88(7) doesn't cease to apply merely because the distributing administration is succeeded by a winding-up before creditors proofs of debt are paid in full. There is nothing in the wording which requires it to cease to apply upon the conversion of the administrations. 3 is that 2.88(7) doesn't cease to apply merely because the distributing administration is succeeded by a winding-up before creditors proofs of debt are paid in full. There is nothing in the wording which requires it to cease to apply upon the conversion of the administrators. 4 administration in a winding-up or which limits the surplus remaining in the hands of the administrations. 4 where we set this out in writing. 4 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is 10 full. There is nothing in the wording which requires it to cease to apply upon the conversion of the administrations. 4 many part of the analysis are in 107. 1 MR JUSTICE DAVID RICHARDS:	14	MR TROWER: Yes.	14	
16 of the relevant date. 17 MR TROWER: Yes. 18 MR JUSTICE DAVID RICHARDS: But has the problem been put right is page 125 19 MR JUSTICE DAVID RICHARDS: Right. 20 MR TROWER: No, and the reason it has not been put right is page 125 10 MR JUSTICE DAVID RICHARDS: Right. 21 MR JUSTICE DAVID RICHARDS: Right. 22 Interest claimed; one is rule 4.93 and the other is section 189. 23 MR JUSTICE DAVID RICHARDS: Right. 24 MR TROWER: Yes. 25 MR TROWER: Yes. 26 MR TROWER: When the provable or statutory, are dealt with under rule 2.88. 27 David MR TROWER: When the provable or statutory, are dealt with under rule 2.89. 28 MR TROWER: When it does is it addresses interest on debts proved the reaffert and provides for the payment of Page 127 10 MR JUSTICE DAVID RICHARDS: Right. 21 Interest accruing since the commencement of administration. Then the critical part of the analysis is that 2.88(7), which is the surplus rule in administration administration because notice has been given under rule 2.95(1). 26 MR JUSTICE DAVID RICHARDS: Right. 27 MR TROWER: Has a liquidation, there are two places you find the interest accruing since the commencement of administration. Then the critical part of the analysis is that 2.88(7) which is the surplus remaining to administration administration because notice has been given under rule 2.95(1). 28 MR JUSTICE DAVID RICHARDS: Right. 29 MR JUSTICE DAVID RICHARDS: Right. 30 Interest accruing since the commencement of administration. Then the critical part of the analysis is that 2.88(7) doesn't case to apply ment because notice has been given under rule 2.95(1). 31 MR JUSTICE DAVID RICHARDS: Right. 32 Interest accruing since the commencement of administration. Then the critical part of the analysis is that 2.88(7) doesn't case to apply ment because notice has been given under rule 2.95(1). 32 MR JUSTICE DAVID RICHARDS: Right. 33 Interest accruing since the commencement of administration is succeeded by a winding-up or which fininist the administration in succeeded by a winding-up or which fininist th	15	MR JUSTICE DAVID RICHARDS: Which has used the same formula		
17 MR TROWER: Yes. 18 MR JUSTICE DAVID RICHARDS: But has the problem been put 18 18 obecause the statutory right to interest in a minding-up 22 arises under section 189, i.e. a section in the Act, 23 whereas — I step back. In administration, all of the 23 mr. are dealt with under rule 2.88. 28 Page 125 19 MR JUSTICE DAVID RICHARDS: Right. 29 MR JUSTICE DAVID RICHARDS: Right. 20 MR TROWER: No, and the reason it has not been put right is because the statutory right to interest in a minding-up 21 has beeome a distributive administration because notice has been given under rule 2.95(1). 30 MR JUSTICE DAVID RICHARDS: Right. 31 MR JUSTICE DAVID RICHARDS: Right. 42 MR TROWER: In a liquidation, there are two places you find 4 section 189. 43 section 189. 44 section 189. 45 MR JUSTICE DAVID RICHARDS: So let me just get this right. 46 In 2.88, in the revised form. 46 In 2.88, in the revised form. 47 MR TROWER: Yes. 48 MR JUSTICE DAVID RICHARDS: A(1) is the relevant date. 49 MR TROWER: Yes. 40 MR TROWER: Yes. 41 MR JUSTICE DAVID RICHARDS: A(1) is the relevant date. 49 MR TROWER: Yes. 40 MR TROWER: Yes. 41 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is 10 not provable insofar as it's payable in respect of any 12 period after the relevant date. 40 MR TROWER: Then you go all the way down to the end of 2.88. 41 MR JUSTICE DAVID RICHARDS: Then — 42 MR TROWER: Surplus is dealt with in 7. 43 MR JUSTICE DAVID RICHARDS: Where does it deal with — oh. it's 7. 44 MR JUSTICE DAVID RICHARDS: Then — 45 MR JUSTICE DAVID RICHARDS: Then — 46 MR JUSTICE DAVID RICHARDS: Right. 46 MR JUSTICE DAVID RICHARDS: Then — 47 MR JUSTICE DAVID RICHARDS: Then — 48 MR JUSTICE DAVID RICHARDS: Then — 49 MR JUSTICE DAVID RICHARDS: See, remaining after payment of 22 where we set this out in writing. 40 MR JUSTICE DAVID RICHARDS: He way down to the end of 2.88. 41 MR JUSTICE DAVID RICHARDS: See, remaining after payment of 24 where we set this out in writing. 42 MR JUSTICE DAVID RICHARDS: He way down to the end of 2.88. 43 MR JUSTICE DAVID RICHARDS	16	of the relevant date.		
18 MR JUSTICE DAVID RICHARDS: But has the problem been put right? 19 right? 20 MR TROWER: No, and the reason it has not been put right is 20 because the statutory right to interest in a winding-up 21 has become a distributive administration because notice 22 arises under section 189, i.e. a section in the Act, 22 has been given under rule 2.95(1). 23 whereas — I step back. In administration, all of the 23 whereas — I step back. In administration, all of the 24 entitlements to interest, whether provable or statutory, 24 entitlements to interest, whether provable or statutory, 25 are dealt with under rule 2.88. 25 Page 125 1 MR JUSTICE DAVID RICHARDS: Right. 26 MR TROWER: In a liquidation, there are two places you find 3 the interest claimed; one is rule 4.93 and the other is 3 to the interest claimed; one is rule 4.93 and the other is 3 to east one 189. 3 MR JUSTICE DAVID RICHARDS: So let me just get this right. 6 In 2.88, in the revised form. 4 MR TROWER: Yes. 5 MR TROWER: Yes. 6 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is not provable insofar as it's payable in respect of any 12 period after the relevant date. 19 MR TROWER: Yes. 10 MR TROWER: Then you go all the way down to the end of 2.88. 11 MR TROWER: Then you go all the way down to the end of 2.88. 12 MR TROWER: Surplus is dealt with in 7. 13 MR TROWER: Surplus is dealt with in 7. 14 MR JUSTICE DAVID RICHARDS: Then — 14 MR JUSTICE DAVID RICHARDS: Then — 15 MR TROWER: Surplus is dealt with in 7. 15 MR TROWER: Surplus is dealt with in 7. 16 MR JUSTICE DAVID RICHARDS: I see, remaining after payment of 22 paying — yes, okay. I understand. As you say, that is 22 a complete code. 21 MR TROWER: What it does is the surplus is in administration because notice has been given under rule 2.95(1). 22 MR JUSTICE DAVID RICHARDS: Then — 14 MR JUSTICE DAVID RICHARDS: Then — 15 MR TROWER: It's in paragraphs 90 to 107 of our opening substitution. The substitution administration in the administration because in items and its ributions in the administration in t				
19 right? 20 MR TROWER: No, and the reason it has not been put right is 21 because the stanutory right to interest in a winding-up 22 arises under section 189, i.e. a section in the Act, 23 whereas — I step back. In administration, all of the 24 entitlements to interest, whether provable or statutory, 25 are dealt with under rule 2.88. 26 Page 125 1 MR JUSTICE DAVID RICHARDS: Right. 27 MR TROWER: In a liquidation, there are two places you find 3 the interest claimed; one is rule 4.93 and the other is 4 section 189. 5 MR JUSTICE DAVID RICHARDS: So let me just get this right. 6 In 2.88, in the revised form. 7 MR TROWER: Yes. 8 MR JUSTICE DAVID RICHARDS: A(I) is the relevant date. 9 MR TROWER: Yes. 18 MR JUSTICE DAVID RICHARDS: Then (I) says that interest is 19 not provable insofar as it's payable in respect of any 11 MR TROWER: Yes. 12 period after the relevant date. 13 MR TROWER: Then you go all the way down to the end of 2.88. 15 MR TROWER: Then you go all the way down to the end of 2.88. 16 The critical difference — 17 MR TROWER: Surplus is dealt with in 7. 18 MR TROWER: Surplus is dealt with in 7. 29 MR TROWER: Surplus is dealt with in 7. 20 MR TROWER: Surplus is dealt with in 7. 21 MR TROWER: Surplus is dealt with in 7. 22 MR JUSTICE DAVID RICHARDS: Isee, remaining after payment of Page 127 19 MR TROWER: Yes. 10 The debts proved shall, before being applied in paying — yes, okay. I understand. As you say, that is 22 a complete code. 24 MR TROWER: What it does is distributive administration and provable insofar as it's payable in respect of any winding up or which limits the surplus remaining in the hording winding up." 25 MR TROWER: What it does is it addresses interest to debts proved thereafter and provides for the payment of Page 127 1 MR JUSTICE DAVID RICHARDS: So let me just get this right. 2 period after the relivent date. 3 MR TROWER: Yes. 4 MR TROWER: Yes. 5 MR TROWER: Yes. 6 MR JUSTICE DAVID RICHARDS: Then — 10 supplus remaining in the wording which requires it to cease to apply upon the conversio		MR JUSTICE DAVID RICHARDS: But has the problem been put		
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24 entitlements to interest, whether provable or statutory, are dealt with under rule 2.88. Page 125 1 MR JUSTICE DAVID RICHARDS: Right. 2 MR TROWER: In a liquidation, there are two places you find the interest claimed; one is rule 4.93 and the other is section 189. 3 the section 189. 4 section 189. 5 MR JUSTICE DAVID RICHARDS: So let me just get this right. 6 In 2.88, in the revised form. 7 MR TROWER: Yes. 8 MR JUSTICE DAVID RICHARDS: A(1) is the relevant date. 9 MR TROWER: Yes. 8 MR TROWER: Yes. 10 MR TROWER: Yes. 11 interest accruing since the commencement of administration. Then the critical part of the analysis is that 2.88(7) doesn't cease to apply merely because the distributing administration is succeeded by a winding-up before creditors proofs of debt are paid in full. There is nothing in the wording which requires it to cease to apply upon the conversion of the administration into a winding-up or which limits the surplus remaining to surplus remaining in the hands of the administrators. 10 MR TROWER: Yes. 11 not provable insofar as it's payable in respect of any period after the relevant date. 12 period after the relevant date. 13 MR TROWER: Yes. 14 MR TUSTICE DAVID RICHARDS: Then				
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deal with.

liability?

MR TROWER: Yes, it's 150(2).

MR JUSTICE DAVID RICHARDS: Right.

consideration the probability that some of the

contributories may partly or wholly fail to pay it."

I think that's the only one that deals with it.

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Now, the consequence of that of course is that such debts can be treated as debts proved in the winding-up for the purposes of 189.2, there is no doubt about that, but that's only a deeming provision and shouldn't be read so as to deprive a creditor who had actually proved in the administration and so fell within 2.88(7) from the benefit of receiving interest on any surplus arising before any return is made to members.

The consequence of this approach is that if an administrator has given notice of an intention to make a distribution, which he has in the present case or in the case of LBIE, and the company subsequently goes into liquidation before all proofs of debt have been paid, but there is then a surplus after payment of all the debts proved, there are two ways of thinking about it. Either 2.88(7) applies to all creditors who actually proved thereafter, and 189 to that extent is simply unnecessary, or 2.88(7) applies to creditors who actually proved during the administration while 189.2 applies to those creditors who actually proved during the winding-up. So if you didn't get around to proving until the winding-up you lose your right but not otherwise.

It is also important in this context, to be clear, that to the extent that creditors have a contractual Page 129

- 1 say but I can perhaps just deal with that before your
- 2 Lordship rises is the members' obligation to contribute
- 3 in their rights and to say (?). Then I will start
- 4 tomorrow, if that is convenient to your Lordship, with
- 5 the contributory rule.
- 6 MR JUSTICE DAVID RICHARDS: Yes.
- 7 MR TROWER: The members' obligation to contribute in their
- 8 rights and to say we deal with simply in our main
- 9 submissions at paragraph 130 and 132. It's issues 15
- 10 and 16. It's primarily an issue as between LBL and
- 11 LBHI, for fairly obvious reasons.
- 12 But so far as LBIE is concerned, we simply submit
- 13 this: that the members' liability under section 74 is
- 14 unlimited because LBIE is an unlimited company. It is
- 15 a joint and several liability in the sense that each of
- 16 the members is each liable for the full amount of LBIE's
- 17 debts and liabilities and the expenses of its
- 18 liquidation. Each is liable to contribute to LBIE's
- 19 assets to any amount sufficient to the claimant in its
- 20 debts and liabilities and expenses of the winding-up.
- 21 That's the way it's phrased. We respectfully suggest
- 22 that the liability cannot be construed any other way.
- 23 What might happen on the making of a call in a
- 24 liquidation is a different question, but that doesn't
 - affect the underlying liability and that, for present
 - Page 131

purposes, is all that matters from LBIE's point of view.

My Lord, on this issue I would be grateful if we

argument goes and deal with any points in reply. We

MR JUSTICE DAVID RICHARDS: Which is the provision I am

don't think there is anything further that we want to

thinking of, either in the Act or the rules, about

account being taken of the ability of members to meet

MR TROWER: "In making a call, the court may take into

MR JUSTICE DAVID RICHARDS: Yes. So I mean if you had two

could sort of reserve our position to hear how the

- entitlement to interest, then they wouldn't lose 1
- 2 completely the right to recover interest accruing during
- 3 the period of administration where a distribution then
- occurs in the liquidation. 4
- 5 MR JUSTICE DAVID RICHARDS: Yes.
- 6 MR TROWER: Because, for the reasons we have already
- 7 addressed, the contractual liability accruing
- 8 post-administration, even though not provable, remains
- 9 a liability of the company and must be paid once all
- 10 proved debts and statutory interest have been paid.
- 11 That flows from the submissions that we have already
- 12 made in relation to the way the interest provisions
- 13 work.
- 14 MR JUSTICE DAVID RICHARDS: Yes.
- 15 MR TROWER: It follows from that that, if a contractual
- 16 entitlement is not otherwise satisfied by the rules
- 17 applicable in the admin or the winding-up, it will be
- 18 payable, we submit, as a liability of the company before
- 19 distribution to members. It is a classic non-provable
- 20 debt in those circumstances.
- 21 MR JUSTICE DAVID RICHARDS: Yes.
- 22 MR TROWER: My Lord, that was all I was going to say in

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- 23 relation to the outward claim by LBIE against LBIE's
- 24 members pursuant to section 74. The next category of
- 25 submission on which there is really not a great deal to
- 25
- 23 MR TROWER: No, my Lord, we suggest you would call 100 on

obviously solvent members and you had a deficit of 50,

solvent members and a deficit of 100, would you call 100

what would you do? Sorry, if you had two obviously

on each or would you just call 50 on each, saying each

of them will pay 50 and treat them that way.

- 24 each.
- MR JUSTICE DAVID RICHARDS: You would call 100 on each. Page 132

33 (Pages 129 to 132)

1	MR TROWER: Because the probability is that some of the	1	debate as to how it works as between LBL and LBHI2 where
2	contributories may partly or wholly fail to pay it. It	2	LBL has one share and LBHI2 has many billions, but that
3	is that way round.	3	doesn't seem to be what this subsection is all about.
4	MR JUSTICE DAVID RICHARDS: Quite so. I am trying to work	4	This subsection seems to be all about simply the ability
5	out what effect that has or how this works.	5	to pay.
6	MR TROWER: Yes. We couldn't recover any	6	MR JUSTICE DAVID RICHARDS: I note of course in subsection 1
7	MR JUSTICE DAVID RICHARDS: Obviously you cannot recover	7	that the power of the court is to make calls on all or
8	more than 100.	8	any of the contributories.
9	MR TROWER: Well, they get it back anyway in the case of	9	MR TROWER: Yes.
10	unlimited liabilities, but	10	MR JUSTICE DAVID RICHARDS: So it might be said, well, we
11	MR JUSTICE DAVID RICHARDS: "In making a call, the court may	11	will simply make a call on the solvent contributory and
12	take into consideration the probability that some of the	12	he will then be able to pursue whatever rights he may
13	contributories may partly or wholly fail to pay it."	13	have against the other contributories.
14	MR TROWER: We are all quite used to the concept in	14	MR TROWER: Yes. It may be that in the present case if LBL,
15	insolvency and winding-up of double dip and the idea	15	despite having only one share, was highly solvent and
16	that there is no reason why you cannot have a go at two	16	LBHI2 wasn't, there is no reason under this section why
17	people as long as you don't recover more than 100p. In	17	the appropriate thing wouldn't be to just have a go at
18	a way, this is similar. The starting point is can go	18	LBL.
19	against anyone for the whole lot, but if there is	19	MR JUSTICE DAVID RICHARDS: All right. Okay.
20	a probability that somebody may partly or wholly fail to	20	MR TROWER: My Lord, if that's a convenient
21	pay it we would take that into account. But it must be	21	MR JUSTICE DAVID RICHARDS: This is a hypothetical example.
22	what one would have thought that well, actually, on	22	MR TROWER: My Lord, if on that happy note it is
23	reflection, perhaps it is a bit strange the way it	23	a convenient moment?
24	works, we are otherwise entitled to call 100.	24	MR JUSTICE DAVID RICHARDS: Certainly, yes. 10.30 tomorrow.
25	MR JUSTICE DAVID RICHARDS: The only way I can see it	25	Thank you.
	Page 133		Page 135
1	working is to say, well, actually you don't necessarily	1	(4.16 pm)
_			
2	call 100 on everyone if you know that, between them,	2	(The court adjourned until Wednesday, 13 November
3	call 100 on everyone if you know that, between them, they are going to you can actually make a lower call	2 3	(The court adjourned until Wednesday, 13 November at 10.30 am)
3	they are going to you can actually make a lower call	3	
3 4	they are going to you can actually make a lower call on the basis that each will meet the full amount of the	3 4	
3 4 5	they are going to you can actually make a lower call on the basis that each will meet the full amount of the call.	3 4 5 6	
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