

<p>1 Tuesday, 12 November 2013.</p> <p>2 (10.30 am)</p> <p>3 Opening submissions by MR TROWER</p> <p>4 MR TROWER: May it please your Lordship, these are joint</p> <p>5 applications, a joint application under paragraph 63 of</p> <p>6 schedule B1. The joint administrators of Lehman</p> <p>7 Brothers International Europe, which is LIBE, two</p> <p>8 members of LIBE: LBL and LBHI2 for directions on</p> <p>9 a number of interlinked issues arising out of</p> <p>10 administrations.</p> <p>11 There are two respondents to the application, it</p> <p>12 being, as I said, a joint application. The two</p> <p>13 respondents are LBHI, Lehman Brothers Holdings Inc., and</p> <p>14 Lydian overseas partners' master fund. The</p> <p>15 representation before your Lordship on this matter is</p> <p>16 I appear with Mr Bayfield for the LBIE joint</p> <p>17 administrators; Mr Wolfson and Ms Shah appear for the</p> <p>18 LBL joint administrators; Mr Trace, Miss Hutton and Miss</p> <p>19 Foskett appear for the LBHI2 joint administrators;</p> <p>20 Mr Isaacs and Mr Arnold appear for LBHI and Mr Zacaroli</p> <p>21 and Mr Allison, sitting on my left, appear foy Lydian.</p> <p>22 Broadly speaking in these proceedings Lydian supports</p> <p>23 the position of LBIE. LBHI supports the position of</p> <p>24 LBHI2. So they are together. On most issues LBL and</p> <p>25 LBHI2 argue for the same result as each other and for</p> <p style="text-align: center;">Page 1</p>	<p>1 statement of facts and the chronology, as your Lordship</p> <p>2 has heard. There is a bit more colour and detail on the</p> <p>3 background in the Lomas witness statement, which is</p> <p>4 a witness statement produced in support of the</p> <p>5 application and was prepared, as your Lordship should</p> <p>6 know, in support of other documents, as you would expect</p> <p>7 in a joint application. Although, as your Lordship will</p> <p>8 have seen, there are some issues on which the office</p> <p>9 holders did not think it necessary to put in expert</p> <p>10 evidence of their own. My Lord, what I was proposing to</p> <p>11 do was --</p> <p>12 MR JUSTICE DAVID RICHARDS: Can I just interrupt you</p> <p>13 a moment?</p> <p>14 MR TROWER: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: Mr Trower, I was conscious that</p> <p>16 there are a number of people are standing. I do not</p> <p>17 know how long -- there are not going to be enough chairs</p> <p>18 to go round but I was just making inquiries, we can at</p> <p>19 some convenient time find some more chairs.</p> <p>20 MR TROWER: Yes.</p> <p>21 MR JUSTICE DAVID RICHARDS: Can I just in that regard ask is</p> <p>22 there a request for a mid-morning and mid-afternoon</p> <p>23 break from the transcribers or not?</p> <p>24 MR TROWER: I had not personally heard it but I would</p> <p>25 imagine the transcribers would like a break.</p> <p style="text-align: center;">Page 3</p>
<p>1 a different result to that contended for by Lydian.</p> <p>2 However, there are some issues relating to the</p> <p>3 construction of the sub debt agreements on which LBL</p> <p>4 argues for the same result as Lydian.</p> <p>5 There is a timetable which your Lordship will find</p> <p>6 I hope behind tab 6 of volume 1 which sets out the</p> <p>7 parties' positions in relation to the order of</p> <p>8 submissions and the timing of those submissions.</p> <p>9 MR JUSTICE HAMBLÉN: Very well.</p> <p>10 MR TROWER: So that is there. As matters presently stand,</p> <p>11 I do not think anyone feels there is any particular</p> <p>12 reason to think that the timetable will not be stuck to</p> <p>13 but, as your Lordship knows, one cannot be certain about</p> <p>14 these things. Since the commencement of the proceedings</p> <p>15 the parties have produced position papers; they have</p> <p>16 agreed a list of issues and a statement of agreed facts</p> <p>17 and chronology. Your Lordship will find all those</p> <p>18 documents in the same bundle as the timetable. The</p> <p>19 evidence, as your Lordship knows, is largely</p> <p>20 uncontroversial and is in volume 3 of the bundles. It</p> <p>21 preceded, all that evidence, the production of the</p> <p>22 chronology and the statement of agreed facts. It may be</p> <p>23 the case that some of the parties will take you to parts</p> <p>24 of it from time to time but it is thought that the</p> <p>25 essence of what the court is required is in the</p> <p style="text-align: center;">Page 2</p>	<p>1 MR JUSTICE DAVID RICHARDS: They would. Very well. It may</p> <p>2 be that some chairs can be obtained then.</p> <p>3 MR TROWER: My Lord, the way I was going to structure my</p> <p>4 submissions was to start with a relatively short</p> <p>5 introduction which will then lead fairly seamlessly I</p> <p>6 hope into the first area of substantive submission which</p> <p>7 relates to the construction of the subordinated loan</p> <p>8 agreements. I am then going to follow, and I hope it is</p> <p>9 useful to do it this way, given that we all have the</p> <p>10 benefit of written submissions from everybody, deal with</p> <p>11 it in the order in which the matters are dealt with in</p> <p>12 our written submissions. So your Lordship may be</p> <p>13 assisted having that on one side while I am saying what</p> <p>14 I have to say.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>16 MR TROWER: Just by way of introduction, there are two</p> <p>17 categories of relationship between the three applicant</p> <p>18 companies which affect the issues to be determined. The</p> <p>19 first category is the relationship of member and</p> <p>20 contributory, on the one hand, and the company, on the</p> <p>21 other. The second is the relationship of creditor.</p> <p>22 LBIE is an unlimited liability company which was</p> <p>23 originally incorporated as limited but was re-registered</p> <p>24 as unlimited on 21 December 1992. LBL and LBHI are its</p> <p>25 only members. The membership is that LBL holds a single</p> <p style="text-align: center;">Page 4</p>

<p>1 one dollar ordinary share of LIBE which it has done 2 since 1994. LBHI2 holds the remainder of LIBE shares 3 which are some 6.2 billion ordinary 1 dollar shares; 4 2 million, a thousand dollar agreement preference shares 5 and 5.1 million, a thousand dollar redeemable are 6 (Inaudible) shares. Those facts are set out, as 7 your Lordship would expect, in the statement of facts. 8 That is the relationship so far as contributory and 9 company is concerned. So far as the creditor 10 relationship is concerned, LBL and LBHI2 are also 11 creditors of LIBE. LBL claims to be, and this is dealt 12 with again in respect of that at paragraphs 55 and 56, 13 to be a creditor of LIBE for 363 million on a proof that 14 was lodged on 21 December 2011. Your Lordship will find 15 the proof, I do not think we need to turn it up, 16 at bundle 4, page 179. It has also reserved its 17 position in relation to potential claims in respect of 18 the pension scheme deficit, an issue which is described 19 by Mr Lomas in his witness statement at paragraph 22 and 20 there is an e-mail in the bundle at bundle 4, page 195, 21 reserving LBL's position in relation to that issue. So 22 far as LBHI2 is concerned, it has proved, and the proof 23 for your Lordship's note is bundle 4, page 197, for 24 1.29 billion which falls into two parts. 1.25 billion 25 is in respect of its claim quai creditor under one or</p> <p style="text-align: center;">Page 5</p>	<p>1 in any distributions by LBL is less clear. So far as 2 Lydian is concerned it claims to be a creditor of Lydian 3 in sums of \$218.5 million and 45 million -- actual 4 \$45 million contingent. That is in the statement of 5 agreed facts at 38. 6 MR JUSTICE DAVID RICHARDS: 200... 7 MR TROWER: \$218.5 million accrued, and a \$45 million 8 contingent claim. 9 MR JUSTICE DAVID RICHARDS: Which would be both be converted 10 into Sterling as at the date, as at which date for the 11 purposes of distribution? 12 MR TROWER: For the purposes of a distribution in the 13 administration it will be at the administration date. 14 MR JUSTICE DAVID RICHARDS: Thank you. Yes. 15 MR TROWER: Its position, as I said at the outset, continues 16 to argue in support of the arguments made by the Lydian 17 administrators. Now the parties have agreed, as 18 I indicated at the outset, and as your Lordship knows, 19 the issues which arise on the application are those 20 which are included in the agreed list of issues which 21 your Lordship has behind tab 3 in bundle 1. The 22 determination of those issues should then enable the 23 actual questions on the application to be answered as 24 well. They are closely interrelated, as your Lordship 25 would expect. We structured our written submissions by</p> <p style="text-align: center;">Page 7</p>
<p>1 more possibly, I think it asserts as 1, of three sub 2 debt agreements. Those subordinated debt agreement, and 3 we will obviously look at them in more detail in 4 a moment, were all dated on 1 November 2006, which is at 5 the time of what has been described as the 2006 6 restructuring when LBHI2 became a member of LIBE. Under 7 those agreements of course LBHI2 is the lender and LIBE 8 is the borrower. There are three of them in the 9 bundles. They start at bundle 4, pages 210, 225 and 10 241. The first two of them in the bundles are long-term 11 subordinated loan facilities, one for 3 billion Euros 12 and the second one for \$4.5 billion. The third one is 13 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 16 a general inter-company unsecured balance. 17 So far as the respondents' relationship with the 18 companies in administration is concerned, they do not of 19 themselves affect the legal issues with which the court 20 is concerned. Their interests are briefly as follows: 21 according to LBHI it estimates that it will receive 87% 22 of all distributions made by LBHI2. That is its 23 evidence from Mr Jones' witness statement. It therefore 24 stands behind LBHI2 on the issues in this application. 25 It also caveats that by saying in addition its interest</p> <p style="text-align: center;">Page 6</p>	<p>1 reference to the list of issues. Not everyone looked at 2 it in quite the same way, as your Lordship will have 3 seen. But in essence I intend, subject to your 4 Lordship's, continuing to make my submissions on the 5 basis of the list of issues. The order in which we have 6 approached issues in our written submissions is slightly 7 different from the list of issues. But whenever I am 8 dealing with a particular category of submission I will 9 identify for your Lordship which issue it primarily goes 10 to. The slight problem, as your Lordship is only too 11 well aware, I am sure, is that a lot of these issues are 12 interrelated and structuring the way in which to present 13 a case such as this has some difficulty because you have 14 in essence a series of circular arguments, all of which 15 interrelate to each other. But inevitably everyone has 16 done it slightly differently but I hope the way we have 17 done it is of some assistance. The issues as I am going 18 to deal with them can be grouped into four categories. 19 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 22 construction of the subordinated debt agreement; what is 23 the nature of LBHI2's rights under them, and to what 24 claims against LIBE are LBHI2 rights under the 25 subordinated debt agreements subordinated. I will also</p> <p style="text-align: center;">Page 8</p>

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

<p>1 payment of the debt to which a deferred payment of the 2 debtor, creditor or class of creditor B(?) and that is, 3 the passages that matter in MCC, and we can turn it up 4 if your Lordship wants to but I suspect your Lordship is 5 familiar, are pages 1411G to 1412C and 1416E and 1418G. 6 What is said I think by LBHI2, as I understand it, the 7 position may be different where rule 2.88 is a mandatory 8 direction as to how to apply a surplus in the hands of 9 the administrators. So this is the interest point. And 10 in circumstances, and where that obligation, the 11 mandatory direction to the liquidator is not a liability 12 of the companies. Now that second aspect of their 13 submission I am going to come back to in due course and 14 explain why we say that is wrong. But we do not really 15 understand the submissions in the context of this 16 particular point because given that there is no public 17 policy which prevents creditors from agreeing to waive 18 his rights to prove until after the unsubordinated 19 claims have been paid in full, it seems a bit strange 20 that there might be a public policy that prevents him 21 from agreeing to waive his right to prove until after 22 statutory interest has been paid. The effect is simply 23 to put him in a position where the surplus after payment 24 of the debt is proved is identified without regard to 25 his claim, because ex-hypothesi his claim will not be</p> <p style="text-align: center;">Page 13</p>	<p>1 standard term agreement should always apply. The 2 subordination provision is in clause, the primary 3 subordination provision, although I will come back to it 4 at clause 4 in a moment, but the primary subordination 5 provision is in clause 5. The way it works is that the 6 subordination is of the rights of LBHI2 in respect of 7 the subordinated liabilities are subordinated to the 8 senior liabilities. Then there is a payment being 9 conditional upon structure that I will come back to in 10 a moment. The subordinated liabilities are all 11 liabilities, and we have to go back to the definition 12 page for this, are: all liabilities to LBHI2 in respect 13 of advances made under agreement and interest payable on 14 them. If you go back to the previous page that is where 15 one sees subordinated liabilities. Senior liabilities 16 ie those to which the subordinated liabilities are 17 subordinated are all liabilities except subordinated 18 liabilities and excluded liabilities. So when you are 19 working out what gets the benefit of the subordination 20 you take everything except subordinated liabilities and 21 excluded liabilities. Excluded liabilities is on the 22 first page of the standard terms. 23 "Liabilities which are expressed to be and in the 24 opinion of the insolvency ...(Reading to the words)... 25 do rank junior to the subordinated liabilities in any</p> <p style="text-align: center;">Page 15</p>
<p>1 treated as having been proved. So we respectfully 2 suggest that there is no principled objection to this 3 form of subordination as against interest which is I 4 think where the guts of Mr Trace's argument comes from. 5 So the only point that matters in those circumstances is 6 what is the nature and extent of the subordination. Its 7 a construction question. What we submit is that the 8 terms of the agreement make clear that the sub debt is 9 subordinated to the following, all non-proveable claims, 10 the obligation to pay statutory interest, the currency 11 conversion claim, although that probably falls within 12 non-proveable claims, and the liabilities to members 13 which are subject to the contributory rule but not 14 caught by this agreement, ie the unsubordinated claims 15 by LBL and LBHI2 which are caught we say by the 16 contributory rule. 17 MR JUSTICE DAVID RICHARDS: I see, yes. 18 MR TROWER: Against that background can we look at the 19 agreement itself, my Lord. The way it works as an 20 agreement is that there are terms, there is a Part A 21 which is simply the front page. Part B is variable 22 terms and Part C is standard terms and that is the 23 structure of it. So obviously the variable terms 24 include specifics in relation to the particular 25 agreement and the idea is that standard terms being FSA</p> <p style="text-align: center;">Page 14</p>	<p>1 insolvency of the borrower." 2 So the first, there are two points that flow from 3 that. The first is as a definition it contemplates the 4 existence of insolvency at the time the definition has 5 to work and the second is that the concept there is that 6 the excluded liability is something which has to be 7 expressed to be junior, subordinated. Then the 8 definition of liabilities itself is: 9 "All present and future sums, liabilities and 10 obligations payable ...(Reading to the words)... jointly 11 or severally ...(Reading to the words)... or otherwise 12 howsoever." 13 So a very broad form of words, we would say, to 14 cover every possible form of liability and 15 distinguishing there or using the phrase "sums, 16 liabilities and obligations". The way the subordination 17 works (going back to clause 5) or the primary way it 18 works is by rendering conditional the obligation to pay 19 any subordinated liability. So the obligation to pay 20 does not arise unless and until the two circumstances 21 which are then described in A and B on the next page, 22 and A is only applicable where LIBE as borrower is not 23 subject to a formal insolvency process. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR TROWER: In those circumstances the obligation to pay</p> <p style="text-align: center;">Page 16</p>

4 (Pages 13 to 16)

<p>1 only arises if the financial resources condition in 2 paragraph 51A is satisfied. That basically means that 3 no amount is payable unless after it has been paid LIBE 4 continues to be in compliance with not less than 120% of 5 its financial resources requirement. I do not think its 6 necessary to go into the detail of what that actually 7 means for present purposes. The financial resources 8 requirement is itself a defined term and takes you to 9 the financial rules which itself takes you to the rules 10 in I Pru I(?) and B10 in the FSA handbook. So 11 effectively it is ensuring liquidity. It may be that 12 some of the other parties will want to go into that in 13 more detail but for my purposes I do not think it is 14 necessary. That is not relevant for present purposes 15 because the situation in brackets is not the present 16 situation because an order has been made for the 17 insolvency of the borrower. So we are not in 5(1)A. 18 I should say that insolvency here means formal 19 insolvency process. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR TROWER: B applies whether or not LIBE is subject to a 22 formal insolvency process and in that -- so we are in B, 23 and the solvency condition in paragraph 5(1)B has to be 24 satisfied. So no amount is payable unless after it has 25 been paid LIBE will still be solvent. What does that</p> <p style="text-align: center;">Page 17</p>	<p>1 established or determined in the insolvency of the 2 borrower. So this means, and I am obviously going to 3 come back to your Lordship to make some submissions 4 to your Lordship in a moment as to what exactly that is 5 all about, that in order for the principal and interest 6 obligations to be payable under the sub debt agreements 7 LIBE must be able to pay in full everything that amounts 8 to a liability within the meaning of paragraph 5(2) so 9 long as not falling within the disregarded categories. 10 So you look first of all to see whether its a liability 11 and you then see whether or not it's a disregarded 12 category. That is the way the subordination provision 13 works structurally. It is fortified by a number of 14 other provisions within the agreement. The first 15 fortifying provision to draw your Lordship's attention 16 to is paragraph 4(7) which bars any remedy other than 17 specifically provided for in the paragraph, a fairly 18 standard form of, and I will come back to what is 19 provided further in this paragraph in just a moment. 20 The other fortifications are contained in clause 7 of 21 the subordination agreement which prohibit without the 22 prior written consent of the FSA certain categories of 23 thing from occurring and, in particular, I draw 24 your Lordship's attention to B, D and E. B is the 25 prohibition of any retentions and set-offs. D is:</p> <p style="text-align: center;">Page 19</p>
<p>1 mean, insolvency is helpfully put in inverted commas to 2 express that its a defined term. If we go on to the 3 next clause we will see what that means. 4 "It will only be solvent if it's able to pay its 5 liabilities in full, excluding the subordinated 6 liabilities." 7 You can take that out of account when deciding 8 whether or not its able to pay its liabilities in full. 9 Disregarding two other categories of liability, the 10 first one is obligations which are not payable or 11 capable of being established or determined in the 12 insolvency of the borrower. The second one is excluded 13 liabilities, ie: 14 "Liabilities which are expressed to be and in the 15 opinion of the LIBE administrators do rank junior to the 16 sub liabilities in LIBE's administration." 17 What your Lordship will see from that is that there 18 is a partial mirroring of senior liabilities in the 19 sense that you do not take into account excluded 20 liabilities for the purposes of insolvency in the same 21 way that excluded liabilities are excluded from the 22 definition of senior liabilities. But it is only 23 partial because there is this other concept which is 24 included for the purposes of solvency which is the 25 obligations which are not payable or capable of being</p> <p style="text-align: center;">Page 18</p>	<p>1 "A prohibition to attempt to obtain repayment of any 2 of the subordinated ...(Reading to the words)... 3 otherwise than in accordance with the terms of this 4 agreement." 5 And E is: 6 "A prohibition of taking or omitting to take any 7 action whereby the ...(Reading to the words)... might be 8 terminated ...(Reading to the words)... or adversely 9 affected." 10 So quite a wide concept here of protecting the 11 subordination. Now going back to paragraph 4 it 12 provides, and your Lordship will recall number 7 was 13 a (Inaudible) on remedy. It provides for only one type 14 of remedy. So those words other than as specifically 15 provided by this paragraph 4 refers back to one type of 16 remedy which is the institution of proceedings for the 17 insolvency of the borrower ie the formal process of 18 administration or liquidation in two categories of 19 circumstance. Those circumstances are identified in 4 20 and 5. In 4 it is: 21 "Proceedings to insolvency of the borrower to 22 enforce a payment in respect of any advance ...(Reading 23 to the words)... or interest due." 24 And 5 is to enforce any other obligation, condition 25 or provision binding on LIBE.</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 So where an amount of principal or interest has 2 fallen due and not been paid a winding-up or 3 administration petition may be issued by LBHI2 and 4 doubtless proceeded with to order all that is necessary. 5 But that is the only available remedy. So the combined 6 effect of 4(7), 7(b), (d) and (e) is, we respectfully 7 submit, that LBHI2 cannot prove in LIBE's insolvency if 8 to do so would adversely affect the subordination of its 9 claim against LBIE. However, contrary to a submission 10 which is made by LBHI2 in paragraph 25 of their 11 submissions, we submit that once every liability that 12 ranks ahead as a matter of the true construction of the 13 sub debt agreement is paid there is nothing to stop 14 LBHI2 from putting a proof in in respect of that 15 liability or indeed from taking such other steps as may 16 be available to it for payment. The most obvious one, 17 and we will come on to develop this in due course, is 18 for an order of the winding up that it be paid before a 19 distribution of LIBE's numbers(?) The sort of relief 20 that the court might fashion, that your Lordship talked 21 about in our submission in T&N, which I will come on to 22 in a moment. So the question that now therefore arises 23 is whether the following are liabilities which do not 24 fall within the excluding words in 52A or B, ie which 25 are not payable or capable of being established or</p> <p style="text-align: center;">Page 21</p>	<p>1 summarises the position. It is a Government of India v 2 Taylor, tab 60: bundle 1B of the authorities. We only 3 need deal with that because it actually refers to both 4 statue barred debts and (Inaudible) contracts. There 5 are two issues in The Government of India v Taylor. One 6 related to the commencement of the process and the other 7 related to the identification of the liabilities to 8 which the liquidator is required to provide in the 9 liquidation accompanied by what was then section 302 and 10 the conclusion was that the liquidator was not required 11 to provide claims that were unenforceable in the English 12 courts. That part of the speech of Viscount Simmonds 13 starts at page 508. The first part of his speech deals 14 with the rule because there was a challenge to the 15 existence of the rule. Starting about a third of the 16 way down the paragraph beginning: 17 "We proceed upon an assumption there is a rule 18 ...(Reading to the words)... of other countries", 19 etcetera." 20 Then do you see a bit starting about 10 lines up 21 "But it is said that". 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR TROWER: If your Lordship will just read from there to 24 the end of Viscount Simmonds' speech which is just over 25 the page.</p> <p style="text-align: center;">Page 23</p>
<p>1 determined in the insolvency of the borrower. Those are 2 the four categories I identified before the 3 non-proveable claims, the statutory interest, the 4 currency conversion claims and the unsupported 5 liabilities to members. It is only if they are not such 6 liabilities that they will not be payable ahead of the 7 sub debt -- sorry to use not twice. If they are such 8 liabilities the sub debt will be subordinated to them. 9 Now we respectfully submit, and I will come on to this 10 and explain why in a moment, none of these categories of 11 liability fall within 52A or B. So that is 12 paragraph 52A or B: 13 "The obligations which are not payable or 14 ...(Reading to the words)... or excluded liabilities." 15 But it is worth identifying the sort of thing that 16 the draftsman may have had in mind because your Lordship 17 will, I am sure, want to understand that. We submit 18 that what 52A is really focusing on is obligations like 19 statute-barred debts and non-EC foreign revenue claims 20 which although strictly speaking are liabilities are 21 unpayable and unenforceable at any stage of the 22 insolvency process before a return to members. Can 23 I just make good that point briefly. It seems strange 24 to be going for the first time in the authorities to an 25 authority of this sort but I think it helpfully</p> <p style="text-align: center;">Page 22</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, certainly I will read that. 2 Yes. 3 MR TROWER: So they are the two categories of liability. 4 What is interesting about this is that the analyses is 5 on the basis that those are liabilities which are not 6 for the purposes of the section in the Act to be treated 7 as liabilities. Now one can see how in an agreement it 8 may have been thought necessary to ensure that even 9 though it might not have been thought for the purposes 10 of the Act to be a liability it was not regarded as 11 a liability for the purposes of this agreement either, 12 given the way in which they are actually analysed. It 13 is of some little interest, and it was not in point, but 14 he does give a little pithy summary, there are better 15 cases on this, about what liquidator is doing: 16 "Discharging the assets ...(Reading to the words)... 17 in the circumstances." 18 That is a sort of another, we will come across that 19 concept again in a number of contexts. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR TROWER: Your Lordship will have seen the reference to 22 our agreed productions, which is in the bundles but I do 23 not think we need to turn up. The same point arises in 24 relation to that, so that is what 52A -- we do 25 respectfully submit that it looks very likely that that</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 is the sort of thing the draftsman had in mind, given</p> <p>2 the similarity of the language that one finds in</p> <p>3 Viscount Simmonds' speech and the way in which that</p> <p>4 particular provision has been drafted.</p> <p>5 MR JUSTICE DAVID RICHARDS: Foreign tax liabilities is an</p> <p>6 example of a liability which the public quality or</p> <p>7 similar reasons is not enforceable in an English court</p> <p>8 but there could of course be others as well.</p> <p>9 MR TROWER: Yes, there could be many others, yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: Awards of triple damages, for</p> <p>11 example.</p> <p>12 MR TROWER: Yes, that is another good example. The reason</p> <p>13 I took your Lordship specifically to the way it was put</p> <p>14 by Viscount Simmonds is he plainly lays down the general</p> <p>15 principle here in relation to the meaning of the word.</p> <p>16 He is not just simply saying, "This is one we leave</p> <p>17 out".</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR TROWER: So going back then to paragraph 52B, which is</p> <p>20 the second category, what is most likely to have been in</p> <p>21 the mind there, and for that one gets the definition,</p> <p>22 go back to the definition of excluded liability on</p> <p>23 page 216. Now we respectfully suggest that the most</p> <p>24 obvious form of excluded liability is where some other</p> <p>25 subordination agreement specifically subordinates the</p> <p style="text-align: center;">Page 25</p>	<p>1 submission, and it is in our written submissions in</p> <p>2 paragraphs 45-50, is that non-proveable liabilities are</p> <p>3 liabilities for the purposes of the subordinated loan</p> <p>4 agreement full stop. It is worth just saying one or two</p> <p>5 things though about what is a non-proveable liability.</p> <p>6 I know your Lordship is very familiar with the concept,</p> <p>7 and what the concept flows from, the existence of</p> <p>8 non-proveable liabilities and their recognition within</p> <p>9 the insolvency scheme flows from certain basic</p> <p>10 principles that actually are going to reemerge from time</p> <p>11 to time in the course of my submission. The first is</p> <p>12 that not all liabilities of the company are proveable as</p> <p>13 debts. A liability is only proveable if it is</p> <p>14 a proveable debt within the meaning of Insolvency Rule</p> <p>15 12.31 and 13.12. The second is that that proof is not</p> <p>16 equivalent to payment. It is simply a record of the</p> <p>17 fact that an estate is liable for an amount and there is</p> <p>18 an entitlement to receive rateably with the other</p> <p>19 creditors. That is the West Coast Gold Fields' case</p> <p>20 where that is most pithily expressed which I do not</p> <p>21 think we need to turn up at the moment because we will</p> <p>22 come to it later. It is at tab 45. The third sort of</p> <p>23 probably most critical aspect of this is that winding up</p> <p>24 leaves the underlying liability to a creditor untouched.</p> <p>25 It simply opposes a process of collective execution. If</p> <p style="text-align: center;">Page 27</p>
<p>1 obligations payable under it, the advances and interest</p> <p>2 payable under the sub debt agreement. We respectfully</p> <p>3 suggest it's no more complicated than that. So dealing</p> <p>4 with each category.</p> <p>5 MR JUSTICE DAVID RICHARDS: One of the oddities of these</p> <p>6 agreements as far as I can work out is that the</p> <p>7 liabilities under the other subordination agreement,</p> <p>8 because three of them were entered into simultaneously,</p> <p>9 do not seem to have been expressly addressed. But</p> <p>10 fortunately we do not have to grapple with --</p> <p>11 MR TROWER: -- that problem.</p> <p>12 MR JUSTICE DAVID RICHARDS: I think the answer is probably</p> <p>13 pretty obvious but it is certainly not actually provided</p> <p>14 for.</p> <p>15 MR TROWER: No, that is right. So, my Lord, next on the</p> <p>16 list is dealing with each category of liability which</p> <p>17 matters for present purposes, what are their</p> <p>18 characteristics; why are they liabilities for the</p> <p>19 purposes of the agreement and why do they not fall</p> <p>20 within the exclusions. Can I deal first with some</p> <p>21 general submissions in relation to non-proveable</p> <p>22 liabilities generally because on one view one can put</p> <p>23 everything into the category of non-proveable</p> <p>24 liabilities. I will then look more specifically at</p> <p>25 interest and foreign currency claims. Now the essential</p> <p style="text-align: center;">Page 26</p>	<p>1 obviously a creditor gets paid in full it is touched in</p> <p>2 the sense it has been discharged by full payment. But</p> <p>3 that concept of the winding up leaving the debts of</p> <p>4 creditors untouched was the way in which Lord Hoffmann</p> <p>5 put it in Wight v Eckhard Marine which we will look at</p> <p>6 in a moment. I wonder whether it might be a good idea</p> <p>7 to look at Wight v Eckhard now because it underscores</p> <p>8 quite a lot of what I am going to say. Tab 79, so that</p> <p>9 is bundle 3. Sorry, it is 1C. I am so sorry. Decision</p> <p>10 of the Privy Council on appeal from the Cayman Islands.</p> <p>11 The issue, your Lordship is probably familiar with the</p> <p>12 case, but your Lordship gets the issue in proceedings</p> <p>13 from the headnote.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TROWER: But the bit that matters for present purposes</p> <p>16 starts I think at paragraph 20 is where one gets it so</p> <p>17 one can put the whole thing in context. If</p> <p>18 your Lordship would read F it is really to the end of 29</p> <p>19 that is relevant.</p> <p>20 MR JUSTICE DAVID RICHARDS: So 20 to 29.</p> <p>21 MR TROWER: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes, all right. Feel free to</p> <p>23 sit down if you want to, Mr Trower.</p> <p>24 MR TROWER: Thank you.</p> <p>25 MR TROWER: On the points, there are a number of concepts</p> <p style="text-align: center;">Page 28</p>

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

<p>1 that none of them are category of liability that falls 2 within the exclusion of 52 specifically, quite apart 3 from the generic concept of non-proveable liability are 4 not falling within that. In each of them they are 5 payable and capable of being established or determined 6 in insolvency of the borrower because each of them falls 7 within the statutory waterfall and the court will 8 fashion appropriate relief to ensure it is paid before 9 distribution to members. Furthermore, and I think this 10 is the point taken against us by LBHI2, none of them are 11 an excluded liability because nowhere are any of them 12 expressed to rank junior to the subordinated 13 liabilities. There is no particular reason as a matter 14 of principle why any of these categories of liabilities 15 were within the contemplation of the draftsman when 16 considering the nature of the liabilities to which the 17 subject should be subordinated. They are categories of 18 liability to which the company was subject and one, 19 there is no particular reason why the draftsman might 20 have thought it was appropriate to exclude them. 21 Just before I turn to each of them separately, we 22 are unable to discern anything in the FCA materials 23 which have been produced by LBHI2 and LBHI which 24 identify why it would be inappropriate to subordinate 25 the subordinated debt to these categories of</p> <p style="text-align: center;">Page 33</p>	<p>1 first is whether statutory interest is a liability and 2 therefore a senior liability for the purposes of the sub 3 debt agreements. Secondly, whether it has to be taken 4 into account for the purposes of assessing whether LIBE 5 is solvent for the purposes of section 512. As 6 I indicated at the outset of my submissions, some of the 7 points that I am going to address now, although not all 8 of them, will also arise later when addressing the 9 question of whether statutory interest is one of LIBE's 10 liabilities for purposes of section 74 and the members' 11 obligations to contribute under section 74 because of 12 the phrase "debts and liabilities" in section 74. Now 13 we submit that interest payable under 2.887 is one of 14 the sums, liabilities or obligations payable or owned by 15 the borrower within the meaning of the liabilities 16 definition. As I have said before, it is difficult to 17 think of a wider form of words. We of course accept 18 there is a need to characterise the nature of the 19 liability to pay statutory interest. Can we turn up 20 rule 2.88. It the first time we have looked at one of 21 the rules. I am very much in your Lordship's hands as 22 to what is most convenient. All the materials are in 23 this bundle. I am happy to use that. It is bundle 2 of 24 the authorities. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 35</p>
<p>1 non-proveable liability: statutory interest, foreign 2 currency claims and the like. There is nothing 3 uncommercial about the liabilities being subordinated to 4 all liabilities, whether proveable or not. It is 5 difficult to see why the language should not be given 6 its obvious straightforward meaning. But your Lordship 7 has had quite a lot of submission in relation to the FCA 8 material, although ultimately, if I may, we will reserve 9 our position to reply with any points made orally but we 10 were not able to discern anything we wanted to respond 11 to from the written submission. 12 MR JUSTICE HAMBLÉN: Was there anything in it which you rely 13 on? 14 MR TROWER: Nothing specific, no. It does not appear to 15 help one way or the other. So can I turn then to 16 statutory or non-proveable interest for the purposes of 17 the subordinated loan agreements. This just raises 18 questions which go to issue 21 as well as the other 19 issues. Now the question which the court is concerned 20 with relates to statutory interest payable under two 21 provisions: one is rule 2.887 which is the 22 administration provision, and the other is section 189, 23 which is the liquidation interest provision. I am going 24 to address initially my submissions by reference to the 25 two separate questions which arise on construction. The</p> <p style="text-align: center;">Page 34</p>	<p>1 MR TROWER: And the rules we find behind tab 3. 2 Your Lordship will not be surprised to hear that there 3 has been number of amendments in 4 and 6. What we have 4 done, I hope the parties have achieved this, I suspect 5 we will find the odd little lacuna. We have put in 6 the bundle the relevant versions that we hope we have 7 got it right. I suspect it's inevitable we will not 8 have got it right in every respect but 2.88, there are 9 two versions of it in the bundle and the one to look at 10 is the one which was in force between 1 April 2005 and 1 11 April 2010. The way rule 2.88 works is the first part 12 of the rule is dealing with provability of certain types 13 of debt. In other words the interest element on a debt 14 proved. 2.881 provides for how a particular liability 15 of the company, the most obvious example is a 16 contractual right to interest, is to be treated. 17 Proveable, but is excluded from the proveable element of 18 liability, so part of the interest is payable post 19 administration. That is the way it works. Then rules 20 2.882 to 4 expand a creditor's legal right to interest, 21 to interest in respect of debts due under written 22 instruments in cases where demands have been made, 23 although only for a period up to the date of 24 administration. So they expand from what was 25 a pre-existing legal right.</p> <p style="text-align: center;">Page 36</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TROWER: The reference to the creditor's claim and what</p> <p>3 may be claimed which your Lordship finds in rules 2 --</p> <p>4 at paragraphs 2 to 5 of rule 2.88 is a reference to its</p> <p>5 proveable debt. We do not need to turn it up first.</p> <p>6 That is rule 12.3. The effect of rule 2.887 is then to</p> <p>7 render the pre- existing liabilities in respect of the</p> <p>8 interest referred to in sub rule 1 enforceable in so far</p> <p>9 as it can be paid out of the surplus. That is the first</p> <p>10 thing it does. Secondly, it is an equivalent right to</p> <p>11 creditors in respect of all other proved debts. Sub</p> <p>12 rule 8 then makes provision for the ranking of what is</p> <p>13 payable under 7. This concept of the payability of</p> <p>14 interest tracks the earlier part of the rule in sub rule</p> <p>15 1 where it plainly means payable as a liability of the</p> <p>16 company. Then rule 9 just deals with rate. The effect</p> <p>17 of this is that the creditors' entitlement to interest</p> <p>18 of the post administration period is not proveable but</p> <p>19 is payable out of the company's assets as part of the</p> <p>20 statutory scheme, the purpose of which is to apply the</p> <p>21 company's assets in discharge of its liabilities in its</p> <p>22 ranking(?) in respect of Lord Neuberger. There are a</p> <p>23 number of arguments which are made against that being</p> <p>24 a liability. The first argument appears to be that</p> <p>25 interest is not payable at all until the subordinated</p> <p style="text-align: center;">Page 37</p>	<p>1 proved", I think I understood your argument to be from</p> <p>2 your written submissions that by virtue of the terms of</p> <p>3 the subordination agreement the subordinated creditor</p> <p>4 could not prove until those debts having priority under</p> <p>5 the agreement had been paid, so that at the time when</p> <p>6 this arises, as I understood it, there would not be</p> <p>7 a debt proved.</p> <p>8 MR TROWER: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: -- by the subordinated creditor.</p> <p>10 MR TROWER: That is very much our first line. It is</p> <p>11 paragraph 40 I think. We have also got it in</p> <p>12 paragraph 68 of our reply submissions.</p> <p>13 MR JUSTICE DAVID RICHARDS: Right.</p> <p>14 MR TROWER: That is very much the primary way we put it;</p> <p>15 there is an alternative way of putting it, simply by</p> <p>16 looking at the definition of what the concept of debts</p> <p>17 proved means. But on reflection I think the first way</p> <p>18 of putting it is a much more attractive way of putting</p> <p>19 it. Now the second submission which is made against us</p> <p>20 is that any contractual right to interest is brought to</p> <p>21 an end by the operation of 2.88. We say that is not</p> <p>22 correct as a matter of construction of the rule. It</p> <p>23 makes clear sub rule 1, that it is only concerned with</p> <p>24 what is proveable in contradistinction to what is</p> <p>25 payable. Ther is nothing which says that the liability</p> <p style="text-align: center;">Page 39</p>
<p>1 debt has been paid because the subordinated debt is</p> <p>2 itself a debt proved within the meaning of rule 2.887.</p> <p>3 This is wrong for the two reasons we give in our written</p> <p>4 submissions at paragraphs 40 to 42. On the true</p> <p>5 constructions of the subordinated debt agreement the</p> <p>6 obligation to pay interest is a senior liability to</p> <p>7 which the claims under the sub debt agreement are</p> <p>8 subordinated. That subordination involves an agreement</p> <p>9 to rank behind the obligation to pay interest and is</p> <p>10 enforceable as such. That is the first reason. The</p> <p>11 second is that on the true construction of rule 2.88(7)</p> <p>12 the reference to "debts proved" means debts which have</p> <p>13 been proved and which have not been paid because by</p> <p>14 agreement they rank the dividend behind the interest.</p> <p>15 So it is not, when you are talking about debts proved it</p> <p>16 is debts proved in respect of which payments can be</p> <p>17 made. If for some reason you have agreed to</p> <p>18 subordinate, it is not caught by that concept. So that</p> <p>19 is two different ways of looking at the point. You</p> <p>20 either look at it through the spectacles of the</p> <p>21 agreement and say to yourself the agreement actually has</p> <p>22 contracted in a matter which ensures that this works or</p> <p>23 you look at it by construing what the words "debt</p> <p>24 proved" means.</p> <p>25 MR JUSTICE DAVID RICHARDS: So you say the word "debts</p> <p style="text-align: center;">Page 38</p>	<p>1 to pay is extinguished. Put another way it is clear</p> <p>2 from the wording of sub rule 1 that the exclusion or</p> <p>3 limitation of any pre-existing entitlement to be paid</p> <p>4 interest is only for the purpose of the proof.</p> <p>5 (11.45 am)</p> <p>6 The principle that the contractual right to interest</p> <p>7 is not extinguished is entirely consistent with the</p> <p>8 general principle in Wight v Eckhardt, which I showed</p> <p>9 your Lordship, the winding-up leaves the debts of</p> <p>10 creditors untouched. It's particularly so in the light</p> <p>11 of the fact that Humber Iron, which is in tab 18, was</p> <p>12 a case about interest and was one of the main</p> <p>13 authorities on which Wight was based.</p> <p>14 MR JUSTICE DAVID RICHARDS: And that's a liquidation case.</p> <p>15 MR TROWER: It was a liquidation case.</p> <p>16 MR JUSTICE DAVID RICHARDS: And was there an equivalent</p> <p>17 provision.</p> <p>18 MR TROWER: No, rule at that stage. So at that stage -- and</p> <p>19 we will look at Humber Iron in a moment. I have just</p> <p>20 noticed what the time is. Maybe we should look at it</p> <p>21 after we have had a short break.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TROWER: The point is rule 2.88 and indeed 189 was</p> <p>24 materially pre-dated by Humber, but the approach that</p> <p>25 was taken in Humber is, we respectfully suggest, simply</p> <p style="text-align: center;">Page 40</p>

<p>1 reflected in the way in which the draftsman approached</p> <p>2 the underlying concepts in relation to the rule. There</p> <p>3 is no indication here that there was a deliberate</p> <p>4 attempt to alter the juridical basis of the pre-existing</p> <p>5 contractual right to interest.</p> <p>6 MR JUSTICE DAVID RICHARDS: Very well. Okay, I will rise</p> <p>7 for five minutes.</p> <p>8 (11.46 am)</p> <p>9 (Short break)</p> <p>10 (11.55 am)</p> <p>11 MR JUSTICE DAVID RICHARDS: Mr Trower.</p> <p>12 MR TROWER: Your Lordship, we will just look briefly at</p> <p>13 Humber.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>15 MR TROWER: Tab 18, bundle 1A. Otherwise known as the</p> <p>16 Warrant Finance Companies case. Its the decision of</p> <p>17 Lord Justices. It is a very short judgment. The</p> <p>18 headnote pithily sums up what the issue was. At</p> <p>19 page 646, Lord Justice Selwyn's judgment is I think the</p> <p>20 part of the judgment that is the most use. It's the bit</p> <p>21 beginning -- he has dealt with the concept of immediate</p> <p>22 realisation and distribution underpinning the</p> <p>23 winding-up. He then goes on and says:</p> <p>24 "Justice I think requires that no person should be</p> <p>25 prejudiced by the accidental delay which is the</p> <p style="text-align: center;">Page 41</p>	<p>1 reversed by the form of the rule because you get it now.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TROWER: So that case is entirely consistent with the</p> <p>4 concept that pre-enactment of legislation there was no</p> <p>5 question of the contractual right to interest being</p> <p>6 affected in any way.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR TROWER: We say there is nothing in the rule that comes</p> <p>9 near altering that underlying essential position.</p> <p>10 MR JUSTICE DAVID RICHARDS: I mean, if the rule is worked</p> <p>11 through fully, then it will satisfy, and in some cases</p> <p>12 more than satisfy, the contractual entitlement because</p> <p>13 of sub-rule 9.</p> <p>14 MR TROWER: Yes, there are some instances in which</p> <p>15 a contractual claimant will be entitled to more than</p> <p>16 that which is contracted.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, if the rate under</p> <p>18 paragraph 6 is greater than his contractual rate.</p> <p>19 MR TROWER: Yes, that's correct.</p> <p>20 Now, this point or this concept is also relevant to</p> <p>21 a further contention by LBHI2 that non-provable interest</p> <p>22 is not an obligation or liability of LBIE's at all.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR TROWER: Which is made in paragraph 32 of LBHI2's written</p> <p>25 submissions. It's no more than an obligation, so they</p> <p style="text-align: center;">Page 43</p>
<p>1 consequence of the necessary ...(Reading to the</p> <p>2 words)... debts as they existed.</p> <p>3 "I therefore think that nothing should be allowed</p> <p>4 for interest after that date. Consequently, in the</p> <p>5 present case ...(Reading to the words)... interest at</p> <p>6 the full rate."</p> <p>7 MR JUSTICE DAVID RICHARDS: That's a contractual right they</p> <p>8 had in this case.</p> <p>9 MR TROWER: Yes, and when there was a surplus of pay.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TROWER: "I think the tree lies where it falls. Of</p> <p>12 course it will be understood that we are laying down</p> <p>13 this rule ...(Reading to the words)... creditors actions</p> <p>14 are stayed", because there was a consequence of the stay</p> <p>15 that gave rise to this.</p> <p>16 Then Lord Justice Gifford, having at the end of the</p> <p>17 first paragraph said, "Convenience is in favour of</p> <p>18 stopping all communications at the date of winding-up",</p> <p>19 then he goes on and explains what happens when the</p> <p>20 estate is solvent: it works with equal fairness.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes, I see. He is remitted to</p> <p>22 his rights under his contract.</p> <p>23 MR TROWER: That's right, and the other creditor doesn't get</p> <p>24 it. Of course those last views of Lord Justice Gifford</p> <p>25 in relation to justice have now effectively been</p> <p style="text-align: center;">Page 42</p>	<p>1 say, imposed on the liquidator (or administrator in the</p> <p>2 case of rule 2.88) to apply an asset in a particular</p> <p>3 manner, which is a point that was also made by LBL in</p> <p>4 its submissions as to why statutory interest is not</p> <p>5 a liability for the purposes of section 74, although in</p> <p>6 LBL's case they only make it in that context rather than</p> <p>7 the context of the sub-debt agreement.</p> <p>8 Now, the first answer to this is that we submit that</p> <p>9 it's a perfectly natural use of language -- and I am</p> <p>10 addressing this point now generally rather than with</p> <p>11 specific reference to the pre-existing contractual</p> <p>12 right, which we say is just a suspension right -- but</p> <p>13 it's a perfectly natural use of language to describe</p> <p>14 interest payable out of a company's surplus as a future</p> <p>15 sum payable by the borrower within the meaning of the</p> <p>16 sub-debt agreement. If we go back and look at the way</p> <p>17 the words in the sub-debt agreement work, you have</p> <p>18 something called a "present and future sum", a "present</p> <p>19 and future liability", a "present and future obligation,</p> <p>20 payable or owing by the borrower, whether actual or</p> <p>21 contingent, joint or several or otherwise howsoever".</p> <p>22 We respectfully submit that, where a sum is payable out</p> <p>23 of a person's surplus assets, it's quite natural to</p> <p>24 refer to it as payable by that person, even where the</p> <p>25 right to payment is limited to an identified surplus</p> <p style="text-align: center;">Page 44</p>

<p>1 asset.</p> <p>2 In this context, it's important of course to</p> <p>3 recognise that the assets referred to remain the assets</p> <p>4 of LBIE's even subsequent to the administration or</p> <p>5 liquidation date. They are never assets of the</p> <p>6 liquidator or indeed anyone else. They are simply</p> <p>7 assets in respect of which the company becomes trustee</p> <p>8 for the creditors, in accordance with the statutory</p> <p>9 scheme, the terms of the trust being the statutory</p> <p>10 scheme for distribution. That's the way it was put by</p> <p>11 Lord Hoffmann in Wight v Eckhardt Marine. Your Lordship</p> <p>12 will be familiar with AS, which isn't in the bundles but</p> <p>13 it's the same sort of idea.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TROWER: Secondly, we say that this analysis is all the</p> <p>16 more likely when the sum concerned is a payment in the</p> <p>17 form of interest which is payable to a creditor to</p> <p>18 compensate it for being kept out of its money in</p> <p>19 relation to a provable debt which itself will, on any</p> <p>20 view, have been a liability or obligation payable or</p> <p>21 owing by the borrower. Put another way, given that the</p> <p>22 right of the creditor to interest clearly derives from</p> <p>23 an obligation that's payable by the borrower, that is</p> <p>24 the debt proved on which the interest is paid, the</p> <p>25 obligation to pay the interest should prima facie be</p> <p style="text-align: center;">Page 45</p>	<p>1 therefore it's a senior liability if it's within the</p> <p>2 meaning of the sub-debt agreement.</p> <p>3 What then happens -- and I am still on the</p> <p>4 contractual provision -- is that the scheme for</p> <p>5 collective enforcement provides that it will only become</p> <p>6 payable out of the surplus. The right is then further</p> <p>7 governed by the provisions of paragraphs 7 and 8 dealing</p> <p>8 with ranking and rate of interest. Again, thinking of</p> <p>9 it still about contractual, you have the concept within</p> <p>10 paragraph 7 of the interest under that paragraph being</p> <p>11 payable. What the draftsman seems to have done is to</p> <p>12 use the word "applied" in paragraph 7 to describe what</p> <p>13 has happened to an asset, vest is as it continues to be</p> <p>14 in the obligor company, albeit statutory trusts, but</p> <p>15 used the word "payable" in 8 and 9, which refers back to</p> <p>16 7 as a description of the obligation to make the</p> <p>17 payment. So you have the application of the surplus</p> <p>18 when the draftsman is thinking about the focus of the</p> <p>19 asset and you have the payment obligation when the</p> <p>20 draftsman is thinking about the payment obligation.</p> <p>21 In its context, this confirms, we submit, that there</p> <p>22 is at least an obligation on the persons whose asset it</p> <p>23 is to pay, albeit limiting that obligation in the manner</p> <p>24 reflected by the wording of the rule. Now, doubtless</p> <p>25 the rule also imposes duties on the administrator to see</p> <p style="text-align: center;">Page 47</p>
<p>1 treated as payable by the borrower as well.</p> <p>2 Thirdly, the submission that statutory interest</p> <p>3 doesn't amount to a sum payable by the borrower is also</p> <p>4 to misunderstand how the provisions as to statutory</p> <p>5 interest developed. It's worth considering in this</p> <p>6 context separately the position where sub-rule 7 is</p> <p>7 dealing with the creditors' existing contractual right</p> <p>8 to interest and that where sub-rule 7 is governing the</p> <p>9 (inaudible) statutory right.</p> <p>10 As to the contractual position I have mentioned one</p> <p>11 or two of these points already, but I will try and bring</p> <p>12 them together. Humber Iron provided that contractual</p> <p>13 interest was not payable for the period post admin. It</p> <p>14 was remitted to his rights under the contract in respect</p> <p>15 of any surplus.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TROWER: The principle to be derived from Humber in</p> <p>18 relation to interest was developed by Lord Hoffmann in</p> <p>19 Wight v Eckhardt. Because the underlying theory is that</p> <p>20 the winding-up leaves the debts untouched, it simply</p> <p>21 leaves the creditors with a collective enforcement</p> <p>22 procedure, any contractual entitlement to pay interest</p> <p>23 subsists. It follows therefore that the obligation to</p> <p>24 pay continues to subsist. It is and always has been</p> <p>25 a liability. It's not an excluded liability and</p> <p style="text-align: center;">Page 46</p>	<p>1 to it that the company's surplus is applied in</p> <p>2 accordance with the provisions of the rule, but he only</p> <p>3 does that as administrator, as agent for the company in</p> <p>4 fact because everything he does is as agent for the</p> <p>5 company. For your Lordship's note, that's schedule B1,</p> <p>6 paragraph 69. We don't need to turn it up. It's</p> <p>7 a well-known paragraph. So what he is doing, as agent</p> <p>8 for the company, is ensuring that a surplus of the</p> <p>9 company's assets, even though subject to his custody and</p> <p>10 control, is applied in a particular manner in discharge</p> <p>11 of an obligation of the companies.</p> <p>12 Now, that analysis has elements within it which are</p> <p>13 only capable of working in respect of the contractual</p> <p>14 right, particularly the subsistence part of the</p> <p>15 analysis, the Wight v Eckhardt part.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TROWER: But we respectfully suggest that it confirms</p> <p>18 that the same conclusion must be reached in relation to</p> <p>19 statutory interest where the right is a new right</p> <p>20 derived only from the provisions of 2.88(vii) and the</p> <p>21 reason for that is that 2.88(viii) provides for equal</p> <p>22 ranking of all interest payable under rule 2.88(vii),</p> <p>23 irrespective of the questions of priority or original</p> <p>24 entitlement, which confirms that if, as is plainly the</p> <p>25 case, the contractual right continues to subsist as a</p> <p style="text-align: center;">Page 48</p>

<p>1 liability, the same conclusion, albeit from the moment 2 in time at which the obligation arises, must be reached 3 in relation to the right given for the first time. You 4 think of it qualitatively as the same sort of right. 5 Now, there is one authority I do need to take your 6 Lordship to because it's inconsistent, on one reading 7 anyway, with this analysis, which is a decision of 8 Mr Justice Mervyn-Davies in Lines Bros which is referred 9 to by LBL and is behind tab 67. There is a fair bit of 10 litigation information in Lines Bros, as your Lordship 11 will know. 12 MR JUSTICE DAVID RICHARDS: There is. 13 MR TROWER: Now, Lines Bros, this part of Lines Bros was 14 concerned with a very different question. It was 15 concerned with the question of whether statutory 16 interest was a liability of the company for the purpose 17 of determining whether the company's assets were or were 18 not sufficient for paying its liabilities. It was only 19 if they were not sufficient, and the sort of oddity 20 about the case was that it was only if they were not 21 sufficient that the right to statutory interest arose at 22 all in the first place. The reason for that was that 23 there was no company insolvency provision for statutory 24 interest. You went back to the Bankruptcy Act, which 25 was section 33.8 at that stage, which only itself</p> <p style="text-align: center;">Page 49</p>	<p>1 MR JUSTICE DAVID RICHARDS: Right. So he sets out -- 2 MR TROWER: In fact, I will tell you what is even better. 3 If your Lordship would start on the previous page, 218H, 4 because he sets out the two statutory provisions. 5 MR JUSTICE DAVID RICHARDS: Yes, insolvent companies. Yes. 6 MR TROWER: Then he identifies the problems at C to D. 7 MR JUSTICE DAVID RICHARDS: Right. 8 MR TROWER: The first one being: is section 33.8, 9 entitlement to interest, a rule within the rules 10 referred to in 317, i.e. the company rule? Does it 11 apply at all? 12 MR JUSTICE DAVID RICHARDS: Presumably the answer to that is 13 yes. 14 MR TROWER: Yes. The second is whether or not the 15 liquidator is engaged in the winding-up of an insolvent 16 company. 17 The reason I went, and I went too quickly, to 18 section 10 of the 1875 Act is because he looked at that 19 for the purposes of determining whether or not this was 20 a winding-up of an insolvent company; and that is the 21 analysis that starts at page 220C, starting with 22 Rolls-Royce. 23 Then if your Lordship would just read from C on 24 page 220 down to the end of the citation from section 10 25 of the 1875 Act.</p> <p style="text-align: center;">Page 51</p>
<p>1 applied if the company's assets were not sufficient for 2 paying its liabilities. So you have the slightly odd 3 situation arising which is did you take into account 4 this interest obligation for the purposes of seeing 5 whether its assets were sufficient to pay its 6 liabilities, and it was only in that situation that the 7 entitlement to interest arose in the first place. 8 MR JUSTICE DAVID RICHARDS: Let me just read the headnote. 9 MR TROWER: Yes. 10 MR JUSTICE DAVID RICHARDS: Right. 11 MR TROWER: So it's a slightly odd context in which this 12 point is arising. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR TROWER: The relevant bit of the section you have to go 15 to is actually section 10 of the 1875 Act, the bit that 16 matters. It appears on page 220 to 221. 17 MR JUSTICE DAVID RICHARDS: Sorry, I am getting a bit lost 18 here. 19 MR TROWER: Yes, I am so sorry. 20 MR JUSTICE DAVID RICHARDS: Maybe we ought to take this a 21 little slowly. 22 MR TROWER: It might be worth starting, my Lord, then this 23 way. What one has to do, the problems, as identified by 24 Mr Justice Mervyn-Davies, start at page 219C. So that's 25 the place to start.</p> <p style="text-align: center;">Page 50</p>	<p>1 MR JUSTICE DAVID RICHARDS: All right, I will do that. 2 Sorry, I had just gone back to read again what 3 Mr Justice Vaisey had said. Yes. 4 MR TROWER: Then I think your Lordship can probably go on to 5 222H, which explains what the position was in relation 6 to Lines Bros at the beginning. The sort of critical 7 bit that's relied on is 223B down to 223G. 8 MR JUSTICE DAVID RICHARDS: Right. I shall read that. So 9 stop at G or carry on? 10 MR TROWER: It's probably actually just worth your Lordship 11 seeing what he then says in relation to contractual 12 interest. 13 MR JUSTICE DAVID RICHARDS: Yes, thank you. 14 MR TROWER: My Lord, it's obvious why that point is taken 15 against us in the light of the way 16 Mr Justice Mervyn-Davies characterises the first of the 17 two reasons that he gives because he says: 18 "This is not a debt or liability within section 10 19 for two reasons. The section speaks of 'its debts and 20 liabilities'. At no stage should statutory interest be 21 regarded as a debt or liability of the company." 22 Now, we do say that, if necessary, he was just wrong 23 on that point. It wasn't necessary for him to put it 24 that way in order to reach the conclusion that he did 25 because of the second reason, which is, with respect,</p> <p style="text-align: center;">Page 52</p>

<p>1 a rather more obvious reason. But the case, in any 2 event, is distinguishable because he was dealing with 3 a different statutory provision. He was dealing with 4 section 33, ultimately 8, of the Bankruptcy Act. Your 5 Lordship is here dealing with a differently drafted 6 rule, 2.88. He was dealing with this provision at 7 a time when there was no explicit statutory provision in 8 relation to the position of companies. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: And no explicit statutory provision in relation 11 to the position of companies where a company will be of 12 course the entity in which the assets in respect of 13 which the surplus has arisen will continue to be vested, 14 which is conceptually a little different from what one 15 may have in the context of a bankruptcy, which 16 was developed, where the law developed in a slightly 17 different way. 18 We respectfully submit that, for essentially those 19 two reasons, this case doesn't actually support the very 20 general proposition for which it is advanced. As I say, 21 it's distinguishable and there are other grounds on 22 which the judge could have reached the conclusion that 23 he did, and none of it ultimately detracts from the 24 analysis that we put before your Lordship in relation to 25 the true meaning and effect of rule 2.88.</p> <p style="text-align: center;">Page 53</p>	<p>1 there is no evidence that LBIE's insolvency officeholder 2 is of the opinion that it does, which is one of the 3 definitional hoops that one has to go through. It's 4 tolerably clear, as I submitted a bit earlier, that the 5 underlying concept behind excluded liabilities is 6 ensuring that the question of whether or not the company 7 is solvent is not determined by reference to liabilities 8 which have been agreed between LBIE and another ranked 9 junior to the sub-debt and there isn't any such -- that 10 doesn't apply in any way to the interest in this case. 11 My Lord, that's all I was going to say about 12 interest in the context of the agreement. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR TROWER: Can I now turn on to the other specific category 15 of claim which requires to be addressed in this context, 16 which is the currency conversion claim. We deal with 17 that in paragraphs 51 to 58 of our submissions. It's 18 a point on which Mr Zacaroli makes fairly extensive 19 submissions as well. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR TROWER: It relates to issue 22. Again, this is one of 22 those questions where the answer is relevant to both the 23 question of whether a particular claim is a liability 24 for the purposes of the agreement, which I am now going 25 to address, and also whether it's a liability for the</p> <p style="text-align: center;">Page 55</p>
<p>1 I ought also, in the context of the construction of 2 the sub-debt agreement, just to make -- and of course I 3 should say this before I come on to the point I was 4 going to make. What one is dealing with here 5 ultimately, as your Lordship knows, is whether or not 6 the phrase "sums, liabilities and obligations payable or 7 owing by the borrower", so that phrase "by the borrower" 8 is what we are focusing on here. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: For the purposes of section 74, when we come to 11 look at that question, it will be its debts and 12 liabilities, which is much more closely linked to 33.8 13 when we think about the 33.8 argument, although again 14 when we think about the analysis in relation to that 15 there are still the points that the underlying 16 liability, whether 33.8 in the bankruptcy context or 17 rule 2.88 in an administration context, are expressed in 18 rather different terms. 19 LBHI2 also contend -- and this is the final point on 20 the statutory interest as it relates to the sub-debt 21 agreement -- that if statutory interest is a liability, 22 it's an excluded liability. We say, respectfully, 23 that's wrong. Nowhere is it expressed to be junior to 24 the sub-liabilities. It does not really add anything, 25 we respectfully suggest, this argument. Furthermore,</p> <p style="text-align: center;">Page 54</p>	<p>1 purposes of section 74. 2 Can I first start by addressing the nature of the 3 claim. A creditor has a contractual right to payment in 4 a currency other than sterling; that's the starting 5 point. In the ordinary course, it's entitled to be paid 6 in that foreign currency, to obtain a judgment in that 7 foreign currency and to execute an amount equal to the 8 sterling equivalent on the date of execution. Those 9 were all established by Milianglos. We don't need to 10 look at that. It's in the bundles, for your Lordship's 11 note, at tab 63. 12 Now, in the ordinary course the debtor should not be 13 able to impose on the creditor the risk of a fall in the 14 value of sterling. That's the starting point. 15 Lord Justice Brightman put it like this in Lines, and we 16 will turn Lines up now because it's in the same bundles 17 as one your Lordship may have open. 18 "The debtor in default should not be excused from 19 his contractual obligation by payment of anything less 20 than the sterling equivalent of the money contractually 21 due at the date of payment." 22 That's the way it was put. If we go to Lines and 23 I can show you where that is, it's tab 66, the more 24 familiar Lines in my Lord's authority. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 56</p>

<p>1 MR TROWER: This point is made on page 16D. It's a summary 2 of the policy that underpins the Milianglos decision, in 3 the context of the case we need to look at anyway. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR TROWER: That passage and paragraph is between C and D 6 and D and E. 7 MR JUSTICE DAVID RICHARDS: The page number, sorry? 8 MR TROWER: 16, sorry. 9 MR JUSTICE DAVID RICHARDS: Thank you. 16, sorry? 10 MR TROWER: C to D and D to E, that quite short paragraph. 11 MR JUSTICE DAVID RICHARDS: Okay. 12 MR TROWER: So that's where one gets the policy. However, 13 the foreign currency claim, as your Lordship knows, is 14 only provable in sterling. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR TROWER: So it's possible that where a creditor is paid 17 in sterling in due course he will receive less than the 18 amount to which he would have been entitled were he to 19 be paid in the foreign currency for which he contracted. 20 That is the context in which this point arises. 21 Now, here again the underlying rationale for the way 22 in which the statutory conversion/currency conversion 23 works is explained by Lord Hoffmann in Wight v Eckhardt. 24 One can go back to that again in the same passage. The 25 assets held on the statutory trusts should be treated as</p> <p style="text-align: center;">Page 57</p>	<p>1 procedure. So, to the extent that there is 2 a contractual entitlement to be paid in a foreign 3 currency, that continues to subsist for all purposes 4 other than proof. 5 Now, the consequence of this was addressed in Lines 6 Bros on page 21 of Lord Justice Brightman's judgment. 7 It's the passage between C to D. Well, he is dealing 8 with an injustice, the description of which starts at H 9 on the previous page actually. 10 MR JUSTICE DAVID RICHARDS: Right. I will just read from 11 there. 12 MR TROWER: Down to the end, down to G on page 21. 13 MR JUSTICE DAVID RICHARDS: Yes, very well. Yes. 14 MR TROWER: Lord Justice Oliver touches on the point on 15 page 26 at E to G. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR TROWER: So where one is is that, having concluded that 18 Humber Iron was authority that a liquidator had a duty 19 to discharge contractual indebtedness to the extent it 20 exceeds the provable amount before making payment to the 21 shareholders, Lord Justice Brightman, sort of acceded in 22 by Lord Justice Oliver in a limited way, explained he 23 couldn't see a convincing objection to the submission 24 that such a duty would apply where a creditor received 25 less than his contractual foreign currency claim.</p> <p style="text-align: center;">Page 59</p>
<p>1 if they were collected and distributed at the relevant 2 date, which is to give effect to the underlying purpose 3 of the fair distribution. But that principle -- and 4 this is the critical point -- doesn't require to 5 continue once all of the proof claims have been paid in 6 full. Now, that that is the case is picked up by the 7 draftsman of the rule and is consistent with the fact 8 that the rule is only concerned with proof. The opening 9 words of the rule are clear on that, "for the purpose of 10 proving a debt". Your Lordship has that. That's 11 2861 -- 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR TROWER: -- in our bundle of authorities, behind tab 15. 14 It makes clear, we submit, that the conversion to 15 sterling as at the date the company enters 16 administration in this case -- and the equivalent is 17 rule 4.91 for liquidation -- is for proving purposes and 18 for proving purposes alone. There is nothing that 19 requires conversion for any other purpose and there is 20 nothing which affects the underlying right which 21 continues to subsist. Again, one has exactly the same 22 conceptual issue which relates to this claim as was 23 addressed by Lord Hoffmann in Wight v Eckhardt. It 24 leaves the debts of creditors untouched. It simply 25 leaves the creditors with collective enforcement</p> <p style="text-align: center;">Page 58</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR TROWER: Just one subsidiary point in relation to this. 3 Your Lordship sees there is a reference in the passage 4 in Lord Justice Oliver's judgment to House Property & 5 Investment Company Limited. Now, that's picked up -- it 6 may or may not be that reference, I am not sure, but 7 it's certainly referred to by LBHI in support of the 8 proposition that there are circumstances in a solvent 9 liquidation where a creditor might receive less than 10 their full contractual entitlement. They rely on House 11 Property & Investment and they also rely on a recent 12 decision of the Court of Appeal in Danka. The 13 submission seems to be that there are other analogous 14 circumstances in which a debt is de facto extinguished. 15 MR JUSTICE DAVID RICHARDS: Danka was a contingent 16 liability. 17 MR TROWER: Yes, it was. 18 MR JUSTICE DAVID RICHARDS: Was House Property? No, it 19 wasn't, was it? It was a liability under a lease or 20 something. 21 MR TROWER: Yes, that's right, but it was very uncertain how 22 the -- the question in both cases was whether a reserve 23 should be set aside. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR TROWER: And the answer was: no, we need to get on with</p> <p style="text-align: center;">Page 60</p>

<p>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 9 with the extinction of legal rights. Where a proof is 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</p> <p style="text-align: center;">Page 61</p>	<p>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 23 conversion date is the commencement of winding-up, but 24 whether you should have a later conversion date. 25 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p style="text-align: center;">Page 63</p>
<p>1 situation from the situation with which we are here 2 concerned. It doesn't support in any way the argument, 3 as I understand it to be, that, well, there are plenty 4 of examples of situations in which the underlying claim 5 is actually extinguished. 6 Going back just for a moment then, having made that 7 point, to Lines Bros, Lines Bros was decided before the 8 introduction of rule 2.86. We submit that the drafting 9 of the opening words of that rule make clear that the 10 foreign currency contractual rights are preserved. In 11 fact, we say the position is now stronger than it was 12 when Lord Justice Brightman expressed the view that he 13 did because rule 2.86 is legislative support that the 14 type of claim identified had been preserved. So, put 15 another way, the principled approach he suggested has 16 now been bolstered by legislation. 17 If we are right -- and we respectfully submit of 18 course that we are -- that there is an entitlement under 19 the contract to a foreign currency conversion claim, the 20 court should pause long and hard before concluding that 21 that contractual right is extinguished. It amounts to 22 a removal of something that is of value from the 23 creditor of course and the imposition of the scheme 24 should not be regarded as doing that unless it is clear 25 that it does it.</p> <p style="text-align: center;">Page 62</p>	<p>1 MR TROWER: Although they did consider whether there should 2 be two conversion dates. But when your Lordship reads 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 6 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 12 difficulties where the actual conversion date that is 13 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 16 issue only arises at all because the company has been in 17 default in not paying at the time it entered into 18 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</p> <p style="text-align: center;">Page 64</p>

<p>1 should survive. Is it discriminatory against the</p> <p>2 company and shareholders? Well, it's a bit difficult to</p> <p>3 see why it should be in circumstances in which the claim</p> <p>4 is only being made at all because the company has been</p> <p>5 in the process which has caused a delay in the payment</p> <p>6 of the obligation.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, it might be worth looking</p> <p>8 at the Law Commission working paper.</p> <p>9 MR TROWER: Yes. That is also behind -- we also have it</p> <p>10 here. It doesn't seem to have added very much. It's at</p> <p>11 tab 12, pages 3.45 and 3.46. Really 3.46 is the bit</p> <p>12 that deals with this point. This I think was the paper</p> <p>13 rather than the report here.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, it's a working paper</p> <p>15 I think, yes.</p> <p>16 MR TROWER: I think the --</p> <p>17 MR JUSTICE DAVID RICHARDS: So 34?</p> <p>18 MR TROWER: 3.46.</p> <p>19 MR JUSTICE DAVID RICHARDS: 3.46. Yes, okay, let me just</p> <p>20 have a look at that.</p> <p>21 MR TROWER: I mean, it is fair to say this working paper</p> <p>22 I think was produced before the decision of the Court of</p> <p>23 Appeal --</p> <p>24 MR JUSTICE DAVID RICHARDS: It looks like it.</p> <p>25 MR TROWER: -- in Lines Bros but after the decision at first</p> <p style="text-align: center;">Page 65</p>	<p>1 shifting the conversion date in certain circumstances</p> <p>2 rather than thinking about retaining the possibility of</p> <p>3 a claim for a non-provable liability.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR TROWER: In summary, we do respectfully suggest that</p> <p>6 because what we are really talking about here is</p> <p>7 competition between the foreign currency creditors and</p> <p>8 the members of the company, because that is when this</p> <p>9 issue arises once everything else has been paid, it's</p> <p>10 difficult to see why there should be any objection to</p> <p>11 this on discrimination or other grounds of that sort.</p> <p>12 The creditors concerned will undoubtedly have suffered</p> <p>13 a loss by reason of the company's default in only paying</p> <p>14 the sterling equivalent, and there is no discernible</p> <p>15 legislative intent to extinguish the liability. So, in</p> <p>16 those circumstances, we respectfully suggest that this</p> <p>17 is a perfectly sustainable claim that ought to be now</p> <p>18 appreciated as extant, that your Lordship should reach</p> <p>19 the conclusion that what Lord Justice Brightman</p> <p>20 tentatively suggested is correct, and should determine</p> <p>21 that that is indeed the law and that there are such</p> <p>22 claims and that they should be treated as non-provable</p> <p>23 liabilities and, furthermore, that they are liabilities</p> <p>24 which fall within the definition of liabilities in the</p> <p>25 subordinated debt agreement because they are a future</p> <p style="text-align: center;">Page 67</p>
<p>1 instance I think.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TROWER: So the discrimination is there articulated as</p> <p>4 whether the exchange rates have moved to the advantage</p> <p>5 or disadvantage of the creditor should not affect --</p> <p>6 well, there should be claims both ways, and if there</p> <p>7 cannot be claims both ways it's discriminatory to permit</p> <p>8 a claim by the creditor against the company but not</p> <p>9 otherwise. With respect, we just don't really</p> <p>10 understand that.</p> <p>11 MR JUSTICE DAVID RICHARDS: What is surprising in a way --</p> <p>12 I think you must be right. Well, I mean Lines Bros in</p> <p>13 the Court of Appeal was very early in 1982. It's</p> <p>14 possibly I suppose that the court committee report was</p> <p>15 so near to completion that it wasn't practical to amend</p> <p>16 it. But it is just slightly surprising that they don't</p> <p>17 refer to the discussion by Lord Justice Brightman which</p> <p>18 was supported by Lord Justice Oliver.</p> <p>19 MR TROWER: Yes, it is. I mean, the dates of the judgment,</p> <p>20 yes, February 11 was judgment. Maybe it had gone out</p> <p>21 for printing or who knows.</p> <p>22 MR JUSTICE DAVID RICHARDS: Who knows, yes.</p> <p>23 MR TROWER: But it's surprising, I agree. But what is</p> <p>24 striking is that the way the Law Commission and the Cork</p> <p>25 Report were thinking about this concept was all about</p> <p style="text-align: center;">Page 66</p>	<p>1 liability payable or owing by the borrower and because</p> <p>2 they do not fall within the concept contemplated by</p> <p>3 paragraph 5.2(a) in the sense that they are not</p> <p>4 obligations not payable or capable of being established</p> <p>5 or determined in the insolvency (inaudible). Indeed,</p> <p>6 quite the contrary, it is through the insolvency that</p> <p>7 they get discharged prior to a distribution to members.</p> <p>8 My Lord, that was all I was proposing to say about</p> <p>9 foreign currency claims.</p> <p>10 MR JUSTICE DAVID RICHARDS: Can I take it that this is not</p> <p>11 an issue which has been considered in other</p> <p>12 jurisdictions which have a similar approach to our own.</p> <p>13 I mean, I don't know whether there, but I mean, for</p> <p>14 example, perhaps in Australia, New Zealand, Hong Kong,</p> <p>15 Singapore, and I don't know about the United States,</p> <p>16 what the position is.</p> <p>17 MR TROWER: My Lord, I personally have not done that, but</p> <p>18 can I check over the short adjournment as to who has</p> <p>19 because I am sure it has been done.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes, very well.</p> <p>21 MR TROWER: My Lord, can I just then move on to the final</p> <p>22 category of specific claim which arises to fall within</p> <p>23 categories of liabilities under the sub-debt agreement,</p> <p>24 which is the non-subordinated claims of members. The</p> <p>25 reason that arises is that LBHI2 and LBL both have</p> <p style="text-align: center;">Page 68</p>

<p>1 claims against LBIE which are non-subordinated (in other 2 words, they are ordinary claims). 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR TROWER: But because of the contributory rule the 5 discharge of them will only be permitted once the debts 6 and liabilities caught by section 74 have been 7 discharged. That is what our case is. Now, they remain 8 liabilities within the meaning of the sub-debt 9 agreement. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR TROWER: Of course this is all on the assumption that we 12 are correct in relation to the operation of the 13 contributory rule, which I will be coming on to 14 obviously in due course. The position is that we submit 15 the non-subordinated claims by members will rank only 16 after all liabilities which have to be discharged under 17 section 74 have been paid in full, but they themselves 18 rank ahead of the subordinated element. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR TROWER: Actually I was going to make some submissions to 21 your Lordship on the Nortel Waterfall, but I don't think 22 there is anything specific that I want to say about 23 that, apart from this, because we have looked at the 24 Nortel Waterfall already. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 69</p>	<p>1 They even included the possibility that, even if there 2 was otherwise a black hole argument, that could be 3 rectified by the rule in Ex Parte James. 4 MR JUSTICE DAVID RICHARDS: That is often argued and never 5 seems to get anyone anywhere. 6 MR TROWER: Yes, it's extraordinary how often. 7 MR JUSTICE DAVID RICHARDS: I gather it forms no part of the 8 law of Scotland. 9 MR TROWER: Fortunately it forms no part of anyone's 10 submissions in this case. 11 MR JUSTICE DAVID RICHARDS: If the outcome in the Supreme 12 Court had been that contribution notices were neither an 13 expense, nor created, and were not provable, then it's 14 very likely probably that they would have concluded it 15 was a non-provable liability. 16 MR TROWER: Yes. 17 MR JUSTICE DAVID RICHARDS: So we would have the same 18 argument in relation to that presumably. 19 MR TROWER: Yes. I think the difference between the Supreme 20 Court and the Court of Appeal on that particular point 21 was that the Supreme Court seems to have been relatively 22 unfazed by the idea that it might have -- 23 MR JUSTICE DAVID RICHARDS: Gone down the black hole, yes. 24 MR TROWER: -- gone down the black hole. 25 MR JUSTICE DAVID RICHARDS: Yes, that's how I read it too.</p> <p style="text-align: center;">Page 71</p>
<p>1 MR TROWER: Your Lordship knows what the issue was in that 2 case. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR TROWER: I have already described it. The four 5 possible -- actually I think probably I just need to tie 6 it down in this way. Can we just go back to the 7 judgment -- this won't take a moment -- which is bundle 8 tab 101. Bundle 1D, I am sorry. I just wanted to tie 9 down the point that the description of the insolvency 10 waterfall in paragraph 39 and, in particular, questions 11 in relation to non-provable liabilities was an essential 12 part of the court's decision. This is not just 13 Lord Neuberger setting out something for the fun of it, 14 if I can put it that way, and that's clear from 15 paragraph 54 of his judgment when he describes the 16 possibilities which were canvassed before the Supreme 17 Court. 18 MR JUSTICE DAVID RICHARDS: One of them was that the 19 liability created by a contribution notice was 20 a non-provable liability. 21 MR TROWER: Indeed, it was. It was described as the black 22 hole argument, yes. 23 MR JUSTICE DAVID RICHARDS: The black holes, yes. 24 MR TROWER: Just for your Lordship's note, it all appears on 25 page 521 of paragraph 54, what the possibilities were.</p> <p style="text-align: center;">Page 70</p>	<p>1 Anyway, the point would be would we have this issue? 2 MR TROWER: Mr Bayfield has identified for me, it's 3 paragraph 114: 4 "I therefore would conclude that the liability in 5 this case ...(Reading to the words)... would not count 6 as an expense to administration." 7 MR JUSTICE DAVID RICHARDS: Yes, thank you. 8 MR TROWER: Would that be a convenient moment? 9 MR JUSTICE DAVID RICHARDS: That would be a convenient 10 moment, yes, certainly. Let me just put this away. We 11 will carry on at 2 o'clock. 12 (1.00 pm) 13 (The short adjournment) 14 (2.00 pm) 15 MR JUSTICE DAVID RICHARDS: Mr Trower? 16 MR TROWER: I have finished my submissions before the short 17 adjournment on the Nortel Nautical. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR TROWER: The next part, I now move to claim by Lydian, if 20 I can put it that way, which is essentially the scope of 21 the members' liability under section 74, which is the 22 claim by Lydian that we are concerned with. They were 23 late with the application but for pretty obvious reasons 24 but they are free-standing as well. What I am going to 25 do is go through with your Lordship the operation of</p> <p style="text-align: center;">Page 72</p>

<p>1 section 74, whether or not it is the case that the 2 members also have a claim for (Inaudible) by the 3 company. So what this part of the case gives rise to is 4 questions and for your Lordship's note it is primarily 5 issues 13, 14, and 9 to 12. They give rise to questions 6 which relate to the nature of the claim against LIBE's 7 contributory (Inaudible) and is proveable by insolvency 8 (Inaudible) and then questions as to the component 9 elements of the claim, what are they and how are they 10 quantified. At two separate stages, first of all once 11 LIBE's is in liquidation and, secondly, while LIBE still 12 is having a (Inaudible). The section itself is to be 13 found in the authorities bundle at bundle 2, behind 14 tab 12 and it imposes, as your Lordship knows: 15 "Liability on a past and present member to 16 contribute to the companies' assets to any amount 17 sufficient ...(Reading to the words)... for payments of 18 its debts and liabilities and payment of the expenses of 19 the winding up and for the adjustment of the rights of 20 contributors amongst themselves." 21 So you have four categories: debts, liabilities, 22 expenses and winding up and the adjustment of amounts(?) 23 Then of course within section 74 there are the 24 limitations of which your Lordship is well familiar. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 73</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR TROWER: "To an ordinary contract ...(Reading to the 3 words) speciality." 4 The transitional provisions which are dealt with at, 5 actually I think the clearest place your Lordship finds 6 them is in LBL's submissions at footnote 10. They 7 appear to provide that the amendment from speciality to 8 ordinary contract debt only takes effect in relation to 9 liabilities where the limitation period started to run 10 before the effective date. That is the way the 11 transitional provisions were dealt with. 12 MR JUSTICE DAVID RICHARDS: Yes, I see. 13 MR TROWER: That is set out in Mr Wolfson's submissions. So 14 what one has here is the section 74 liability is in the 15 nature now of an ordinary contract date, is due from: 16 "The time the liability commences but payable when 17 the court enforces ...(Reading to the words)... them." 18 Liability here, as in elsewhere in the Act, is 19 itself defined by the Insolvency Rules now, 13.12(3) and 20 (4) to include any contingent liability to pay money or 21 money's worth. The reason for that is if you go to 22 tab 15. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR TROWER: 13.12(3): 25 "For the purposes of references in any provision of</p> <p style="text-align: center;">Page 75</p>
<p>1 MR TROWER: The very last subsection under subsection 2 2 deals with a quite separate question in relation to the 3 non-deeming of debts due to members of a company in 4 their capacity as such. There are some points made by 5 LBL in relation to that and I will come back to that in 6 a moment. Section 80, which is the next section to look 7 at, is concerned with the nature of the liability under 8 section 74. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: I should perhaps say that section 79 of course, 11 as your Lordship has seen, has got the definition of 12 contributory within it. I am not sure that I have 13 anything in particular to say about that. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR TROWER: I do not think there is any doubt that LBL and 16 LBHI2 are contributories. The nature of the 17 contributories liability: 18 "The liability of a contributory creates a debt in 19 England and Wales in the nature of the speciality 20 accruing due from him at the time when his liability 21 commenced but payable at the times when calls are made 22 for enforcing the liability." 23 Now that is how the section was between December 29 24 1986 and 30 September 2009. It was then amended and 25 your Lordship sees that on the next page.</p> <p style="text-align: center;">Page 74</p>	<p>1 the Act ...(Reading to the words)... or liability." 2 It is immaterial whether ...(Reading to the 3 words)... contingent", 4 And so on. So when one is thinking about section 80 5 and how it works one has to think about it in the 6 context of the statutory definition which is contained 7 now in 13.12(3). Can I then invite your Lordship to go 8 to Nortel again at tab 101 and look at in this context 9 -- I do not know if it is convenient to look at the main 10 part of the judgment dealing with whether the potential 11 liability falls within rule 13.12(1)(b) in this context 12 which starts at paragraph 75 really of Lord Neuberger's 13 judgment. If your Lordship would then read down to -- 14 I mean some of this I am sure your Lordship is well 15 familiar with -- 81. 16 MR JUSTICE DAVID RICHARDS: 75 to 81? 17 MR TROWER: Yes. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR TROWER: And in particular in paragraph 81 your Lordship 20 will have seen the way in which Lord Neuberger 21 approaches Sutherland in this context and the close 22 nexus between what is a contingent liability and what is 23 an obligation by reason of which a contingent liability 24 arises. Our submission is, and this is consistent with 25 such old authority as there is on this point, is that</p> <p style="text-align: center;">Page 76</p>

<p>1 the liability arises and becomes a contingent liability</p> <p>2 of the contributories from the moment in time at which</p> <p>3 the members' membership is undertaken by being placed on</p> <p>4 the company's register of members.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TROWER: The commencement of that membership is the time</p> <p>7 at which -- one of two things, it is either the time at</p> <p>8 which the contributory incurs the obligation by reason</p> <p>9 of which it becomes subject to a section 74 liability or</p> <p>10 it is just simply the moment at which the contingent</p> <p>11 liability arises, whichever way one wants to analyse it.</p> <p>12 Now we say that in the light of the modern thinking on</p> <p>13 this that is now tolerably clear but it is actually</p> <p>14 consistent with what has long been established as well</p> <p>15 in a company law context. We refer to two cases in</p> <p>16 particular in our skeleton, two quite old cases and</p> <p>17 I just brought along, I hesitate to add to your</p> <p>18 Lordship's burden, a passage in Buckley which can we add</p> <p>19 to the bundles?</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes, so this will go into the --</p> <p>21 MR TROWER: This will go into the supplemental bundle.</p> <p>22 I~think we are up to tab 9.</p> <p>23 MR JUSTICE DAVID RICHARDS: Right.</p> <p>24 MR TROWER: Has your Lordship got it yet?</p> <p>25 MR JUSTICE DAVID RICHARDS: Just give me a moment. I have</p> <p style="text-align: center;">Page 77</p>	<p>1 more complex. Canwell, which is behind tab 6, is Lord</p> <p>2 Westbury. The judgment starts just at the bottom of the</p> <p>3 first page of the printout, but if we can turn straight</p> <p>4 over, the form of the Companies Act, the formal section</p> <p>5 he was then concerned with is section 75 of the 1862 Act</p> <p>6 which is in footnote 2 set out.</p> <p>7 MR JUSTICE DAVID RICHARDS: Right.</p> <p>8 MR TROWER: Which, as your Lordship will see, is almost</p> <p>9 identical to section 80.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TROWER: One of those sections that has not changed much</p> <p>12 in the last 100 years plus. Then the passage in his</p> <p>13 judgment that is relevant is about half-way down:</p> <p>14 "It is difficult to tell."</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR TROWER: Then the other case is a case called Williams v</p> <p>17 Harding which is a decision of the House of Lords behind</p> <p>18 tab 8. This is raised in a rather peculiar context</p> <p>19 because it arose in a bankruptcy context. I think the</p> <p>20 point is most clearly explained in the headnote. It is</p> <p>21 quite a good headnote.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>23 MR TROWER: So the point here was whether when the</p> <p>24 obligation was incurred for bankruptcy purposes, and if</p> <p>25 you go to page 22, where the first part of the paragraph</p> <p style="text-align: center;">Page 79</p>
<p>1 got a bundle here. I think we received Levy v The Legal</p> <p>2 Services Commission recently.</p> <p>3 MR TROWER: Yes, I think that goes behind 8.</p> <p>4 MR JUSTICE DAVID RICHARDS: Thank you very much. Right.</p> <p>5 MR TROWER: The passage from Buckley goes behind tab 9.</p> <p>6 MR TRACE: I am afraid we have not got that.</p> <p>7 MR TROWER: Have you not got Levy?</p> <p>8 MR TRACE: No.</p> <p>9 MR TROWER: It is not our case. I am sorry.</p> <p>10 MR TRACE: We will search for it.</p> <p>11 MR TROWER: Tab 9, just the passage from Buckley, if I can</p> <p>12 show your Lordship very quickly while it is open. It is</p> <p>13 on page 507, the nature of the liability. We have got</p> <p>14 the two cases already in the bundles that are referred</p> <p>15 to in that footnote.</p> <p>16 MR JUSTICE DAVID RICHARDS: So it is footnote, sorry, where</p> <p>17 are we?</p> <p>18 MR TROWER: Yes, I am sorry it is 12.</p> <p>19 MR JUSTICE DAVID RICHARDS: This is what was section 214 but</p> <p>20 is now --</p> <p>21 MR TROWER: 214 is the predecessor to section 80.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TROWER: And the cases referred to are in the bundle at</p> <p>24 tab 6, in the first bundle at tab 6 and 8. One is</p> <p>25 reassuringly shorter and pithy and the other is slightly</p> <p style="text-align: center;">Page 78</p>	<p>1 starting looking, where one is dealing with the</p> <p>2 Bankruptcy Act, and then there is a bit beginning:</p> <p>3 "If this be a just construction statute it is plain</p> <p>4 that".</p> <p>5 Down to the end of the paragraph.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TROWER: So at the time he entered into the obligations,</p> <p>8 becoming a shareholder of this company, he did not know</p> <p>9 that he could be made bankrupt in respect of this, his</p> <p>10 obligations. But he subsequently did. Then there is</p> <p>11 a slightly pithier description of the position on</p> <p>12 page 29 of Lord Kingsdown's judgment.</p> <p>13 MR JUSTICE DAVID RICHARDS: That is on page 29.</p> <p>14 MR TROWER: Towards the bottom of the Companies Act.</p> <p>15 MR JUSTICE DAVID RICHARDS: Oh, yes.</p> <p>16 MR TROWER: I am reminded by Mr Bayfield that I should have</p> <p>17 pointed out to you in relation to the Canwell case, just</p> <p>18 going back to that for a moment, the Lord Chancellor</p> <p>19 said at page 543 of the original report, which is just</p> <p>20 over half-way down the second page of the print, he did</p> <p>21 confirm that this was his opinion, he having expressed</p> <p>22 himself slightly more tentatively first time round. You</p> <p>23 see he says: "April 20th, on further consideration" --</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes, I do.</p> <p>25 MR TROWER: "... (Reading to the words)... opinion." That</p> <p style="text-align: center;">Page 80</p>

<p>1 is what I missed. It was originally March 16th I think 2 it was originally expressed. 3 MR JUSTICE DAVID RICHARDS: Thank you. 4 MR TROWER: He having said: "Reserve my final judgment upon 5 the point" -- adhered to his previous opinion -- 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR TROWER: Now there is some other old authority which 8 approaches section 80 slightly differently and the one 9 that is relied on I think by some of the other parties 10 is the case called McKenzie which is behind tab 17. 11 This was a case about set-off and assignment. The 12 passage which is relied on is at the bottom of page 243, 13 just where it recites section 75 of the 1862 Act. 14 After reciting it the Master of the Rolls, Lord Romilly 15 goes on to say: 16 "... (Reading to the words)... in the event of a 17 company being wound up and in that event only a debt is 18 created due from the shareholder but payable at the time 19 when the calls were made." 20 It is said on the basis of that that when you are 21 thinking about the nature of the liability and when it 22 arises it is only at the moment in time of winding up 23 seems to be what Lord Romilly might be said to be 24 saying. If he is saying that and it is not entirely 25 clear that that is in fact what he is saying, but if he</p> <p style="text-align: center;">Page 81</p>	<p>1 So: 2 "As soon as may be after making a winding up order 3 ...(Reading to the words)... rectify." 4 Just for your Lordship's note, that is where one 5 slightly surprisingly then finds one of the primary 6 duties of a liquidation -- 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: An odd place to find it but there it is. Then 9 section 150 is the power to make calls. 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR TROWER: "The court may at any time after making 12 a winding up order ...(Reading to the words)... make 13 calls on ...(Reading to the words)... in accordance so 14 made." 15 Now the reference there to making an order for 16 payment of any calls so made is a reference to what is 17 often called a balance order which you will see 18 reference to elsewhere. The settling of the list and 19 the making of the call is delegated to the liquidator as 20 an officer of the court. Your Lordship gets that from 21 rule 4.196 and 4.202 which we have got behind tab 15. 22 MR JUSTICE DAVID RICHARDS: So that is rule 4. 23 MR TROWER: 4.196, so he exercises the court's power to 24 settle a list of the companies contributors for the 25 purposes of 148.</p> <p style="text-align: center;">Page 83</p>
<p>1 is saying that that does not fit with the concept now of 2 what a liability is. So, with respect, that sort of 3 case, I do not think there is another one which puts it 4 quite like that, it does not really help very much. 5 I am going to come back to a point that is taken against 6 us as to the identity of the person to whom the 7 liability is owed. I will come back to that in a moment 8 but just to finish off what happens in relation to the 9 scheme. We have looked at section 74 and we have then 10 looked at section 80. In the normal course the first 11 step in enforcing the section 74 liability is by 12 settling the list of contributors under section 148. We 13 put section 148 in the bundle in the normal place so 14 your Lordship is aware of that. What that does is to 15 enable payment of the liability to be enforced by making 16 a call. The power to call is given to the court by 17 section 150. That power is given to call on any person 18 who is a contributory for the time being settled on the 19 list. So it is behind tab 12, so your Lordship can 20 track this through. 21 MR JUSTICE DAVID RICHARDS: Sorry, section? 22 MR TROWER: Section 148. 23 MR JUSTICE DAVID RICHARDS: 148. 24 MR TROWER: Is where we start. Then we go to section 150. 25 Section 148, I think there is only one version included.</p> <p style="text-align: center;">Page 82</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR TROWER: Then so far as calls are concerned, and there is 3 some sort of procedural bits that do not matter very 4 much, calls are dealt with by 4.202: 5 "Power to confer ...(Reading to the words)... as an 6 officer of the court, subject to the court's control." 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: Then once a call has been made thereby rendering 9 the existing liability payable under section 80 payment 10 is enforced through -- is enforceable through a summary 11 remedy which is as referred to under section 150 but you 12 also find reference to it in 4.205. 4.205(2): 13 "Payment of the amount due ...(Reading to the 14 words)... by order of the court." 15 Now what we do though respectfully suggest is that a 16 mechanism for enforcing the underlying liability to 17 contribute to the assets of the company is essentially 18 a procedural mechanism for enforcing a liability. It 19 does not of itself extinguish such other mechanisms that 20 might be available. There is of course no doubt that 21 once, and nobody contends, once LIBE is in liquidation 22 and a call is made section 74 liability is enforceable 23 by a balance order. We also say, and I am not sure how 24 much this is in issue or not, that its enforceable by 25 ordinary action and that the liability would be</p> <p style="text-align: center;">Page 84</p>

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

<p>1 looked at yet, but which is a section that I want to</p> <p>2 take you to. This is a section that has been amended</p> <p>3 in 2009 behind tab 12?</p> <p>4 MR JUSTICE DAVID RICHARDS: Section?</p> <p>5 MR TROWER: Section 149.</p> <p>6 MR JUSTICE DAVID RICHARDS: 149, yes.</p> <p>7 MR TROWER: This is doing something slightly different and</p> <p>8 may I just introduce your Lordship to this section</p> <p>9 anyway in order to make good this point:</p> <p>10 "The court may at any time after making a winding up</p> <p>11 order ...(Reading to the words)... call in pursuance of</p> <p>12 the Companies Act or this act."</p> <p>13 So what this subsection does is give a summary</p> <p>14 remedy against the contributory to pay sums except sums</p> <p>15 which are payable by him by virtue of a call in</p> <p>16 pursuance of the Companies Act or this act. Just so</p> <p>17 your Lordship sees the scheme of the way this works.</p> <p>18 MR JUSTICE DAVID RICHARDS: Sorry, I may have got --</p> <p>19 I should be looking at.</p> <p>20 MR TROWER: 149.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes, the unamended version.</p> <p>22 MR TROWER: Yes, look at the unamended version for the</p> <p>23 present time but you have to for the purposes of the</p> <p>24 point I am about to make. It has been amended to remove</p> <p>25 the words "in pursuance of the Companies Act or this</p> <p style="text-align: center;">Page 89</p>	<p>1 virtue of calls pursuant to this Act were money due from</p> <p>2 him to the company.</p> <p>3 MR JUSTICE DAVID RICHARDS: I see, yes.</p> <p>4 MR TROWER: So the draftsman seems to have thought that.</p> <p>5 Now I quite accept that it is a limited textual point</p> <p>6 but it is some indication.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>8 MR TROWER: We are going to come back, I am afraid, to</p> <p>9 section 149 a bit later but I think it is all we need it</p> <p>10 for at the moment.</p> <p>11 MR JUSTICE DAVID RICHARDS: Right, okay.</p> <p>12 MR TROWER: So although it is clear that a call must be made</p> <p>13 to render the section 80 liability payable, the</p> <p>14 obtaining of a balance order, we respectfully suggest,</p> <p>15 is -- well, there are two stages to this analysis. The</p> <p>16 first point is that:</p> <p>17 "Although it is clear that ...(Reading to the</p> <p>18 words)... a section 80 liability payable the obtaining</p> <p>19 of a balance order under the act [which is a summary</p> <p>20 procedure] is not of itself necessary. Calls in</p> <p>21 a winding up constitute a debt ...(Reading to the</p> <p>22 words)... or pursuance of a contract debt and that</p> <p>23 liability can only be enforced by action at law as well</p> <p>24 as by balance order."</p> <p>25 We found one case anyway where the company itself</p> <p style="text-align: center;">Page 91</p>
<p>1 act", although we were not able quite to understand why</p> <p>2 that was, but that is what happened.</p> <p>3 MR JUSTICE DAVID RICHARDS: Well, yes. I see. Because</p> <p>4 I think that -- the unamended version, is this right,</p> <p>5 excluded calls made after the commencement of the</p> <p>6 liquidation?</p> <p>7 MR TROWER: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: Whereas if you remove "in</p> <p>9 pursuance of the Companies Act or this act" presumably,</p> <p>10 I am not sure, it may exclude calls made before; I do</p> <p>11 not know; I am not sure.</p> <p>12 MR TROWER: No, because the pre-liquidation calls are likely</p> <p>13 to be in pursuance of the Companies Act because they are</p> <p>14 for unpaid capital. It may be this was an amendment</p> <p>15 that I think was introduced by one of those statutory</p> <p>16 instruments which allow people to tidy up without</p> <p>17 passing primary legislation because it is, if</p> <p>18 your Lordship sees, the words appear --</p> <p>19 MR JUSTICE DAVID RICHARDS: I see that, yes.</p> <p>20 MR TROWER: "Companies Act 2006." We have not quite been</p> <p>21 able to get to the bottom of whether it has any meaning</p> <p>22 or not. I was making a very limited point at the back</p> <p>23 of this subsection which is that the way in which it was</p> <p>24 drafted appears, originally drafted appears to</p> <p>25 contemplate that money payable by a contributory by</p> <p style="text-align: center;">Page 90</p>	<p>1 acting by its liquidator was the person who the judge</p> <p>2 contemplated could make the claim and that is a case</p> <p>3 called Harrison St Etienne Brewery company which is in</p> <p>4 the supplemental bundle, tab 5: a very short point. A</p> <p>5 decision of Mr Justice Vaughan Williams. It is just the</p> <p>6 little passage at the bottom. This was a case when the</p> <p>7 issue was whether or not a receiver could take, receive</p> <p>8 the necessary getting in calls.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>10 MR TROWER: Mr Justice Vaughan Williams said at the bottom:</p> <p>11 ...(Reading to the words)... to do what was necessary in</p> <p>12 the name of the company."</p> <p>13 MR JUSTICE DAVID RICHARDS: You should for that purpose use</p> <p>14 the liquidator's name and if necessary the name of the</p> <p>15 company."</p> <p>16 MR TROWER: Yes, I accept it does not take matters hugely</p> <p>17 further but Mr Justice Vaughan Williams thought this was</p> <p>18 the sort of thing the company could do. Can I say,</p> <p>19 my Lord, of course I accept that in a normal case the</p> <p>20 remedy of the balance order is going to be used. It is</p> <p>21 obviously what the scheme of the statute contemplates.</p> <p>22 But that is not the issue we respectfully suggest. The</p> <p>23 issue here is whether what is going on is that there is</p> <p>24 simply a remedial process that is available for the</p> <p>25 purpose of getting in the company's assets pursuant to</p> <p style="text-align: center;">Page 92</p>

<p>1 a claim that the company has or whether the scheme of</p> <p>2 the act as I think some of the other parties would</p> <p>3 contend for contemplates that there never has been</p> <p>4 anything that amounts to a liability to the company at</p> <p>5 all.</p> <p>6 MR JUSTICE DAVID RICHARDS: A liability, yes, but not to the</p> <p>7 company.</p> <p>8 MR TROWER: To the company, yes. That is the way it would</p> <p>9 go.</p> <p>10 MR JUSTICE DAVID RICHARDS: To the liquidator if and when</p> <p>11 appointed.</p> <p>12 MR TROWER: Yes. So I think it then would flow, it is then</p> <p>13 said that that means that prior to the commencement of</p> <p>14 the company's liquidation no steps can be taken by the</p> <p>15 company in order to preserve the asset in the</p> <p>16 contributories insolvency. That is how this point is</p> <p>17 relevant. Just one more case on this point, a case</p> <p>18 called Rusmaland(?) which again is in the new</p> <p>19 authorities bundle. Your Lordship sees the headnote.</p> <p>20 MR JUSTICE DAVID RICHARDS: Tab?</p> <p>21 MR TROWER: Sorry, tab 4. This was a slightly odd case</p> <p>22 because it was a case where a call was made before the</p> <p>23 winding up. A balance order was made in the winding up</p> <p>24 and the company then sued by specially endorsed writ</p> <p>25 subsequent to the winding up notwithstanding the balance</p> <p style="text-align: center;">Page 93</p>	<p>1 merger, and it is clear that it was the company's own</p> <p>2 claim on a call made before a liquidation.</p> <p>3 MR TROWER: Yes. The next case I think I need to take</p> <p>4 your Lordship to on this area is the decision in</p> <p>5 Whitehouse which is behind tab 24. Now this was a case</p> <p>6 which was decided in the context of set-off and which</p> <p>7 described the debt which arises under the predecessor of</p> <p>8 section 74 as a new debt payable to the liquidator. But</p> <p>9 it is important we suggest to be clear as to how far</p> <p>10 this case actually goes. It was decided in the context</p> <p>11 of arguments by contributories that they were entitled</p> <p>12 to set-off a debt due from the company against their</p> <p>13 payable obligation to contribute. So there are also</p> <p>14 cases, this is actually also a case in the line of</p> <p>15 authorities as to why the contributory rule does or does</p> <p>16 not apply. They were not concerned with the question of</p> <p>17 whether a company pre-liquidation might have the ability</p> <p>18 to prove in the insolvency of a contributor in respect</p> <p>19 of a future section 74 liability.</p> <p>20 But against that background the passage with which</p> <p>21 one is concerned starts I think at page 599, starting at</p> <p>22 the paragraph beginning:</p> <p>23 "If therefore you want a set-off at all you must</p> <p>24 show some provision in...(Reading to the words)... no</p> <p>25 such right."</p> <p style="text-align: center;">Page 95</p>
<p>1 order and the reason it did that was because it needed</p> <p>2 to enforce the order against somebody out of the</p> <p>3 jurisdiction and a balance order could not be enforced</p> <p>4 out of the jurisdiction and so it needed a judgment.</p> <p>5 The argument was made that there was some form of merger</p> <p>6 that meant the company could not consequently issue</p> <p>7 proceedings. That is the context in which the point</p> <p>8 arose, and really the judgment of Lord Justice Bowen at</p> <p>9 page 27. The passage beginning: "It was urged".</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TROWER: And the next passage. Now true it is that in</p> <p>12 this instance Rusmaland(?) was dealing with a situation</p> <p>13 in which there had been a pre-liquidation call. I quite</p> <p>14 accept that. But that does not adversely impact on the</p> <p>15 situation as to how it was post liquidation in</p> <p>16 circumstances in which it is asserted that the</p> <p>17 section 74 remedy succeeds to what was available prior</p> <p>18 to the liquidation. It does not affect the fact that</p> <p>19 the courts have treated that which is being exercised by</p> <p>20 the company subsequent to the liquidation date as</p> <p>21 something that is exercisable by the company rather than</p> <p>22 only through the medium of the liquidator.</p> <p>23 MR JUSTICE DAVID RICHARDS: I am not sure it does help very</p> <p>24 much. It seems to me it was a somewhat technical point,</p> <p>25 or a balance order was a judgment for the purposes of</p> <p style="text-align: center;">Page 94</p>	<p>1 Then if your Lordship would read down to the end of</p> <p>2 the paragraph at the top of page 600.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>4 MR TROWER: Yes. One has to be very careful as to exactly</p> <p>5 how far this goes particularly in the light of the fact</p> <p>6 that the Master of the Rolls was here concerned with</p> <p>7 construing a section in precisely the same terms which</p> <p>8 is the section we now have in terms of section 80. We</p> <p>9 know from that that the liability is due at the time the</p> <p>10 liability -- or the debt is due at the time the</p> <p>11 liability commences. Looked at on one view what he says</p> <p>12 in the passage of his judgment starting: "That is a new</p> <p>13 liability" is very difficult to square with the way in</p> <p>14 which section 80 is actually expressed because there</p> <p>15 plainly is a liability in section 80 which commences at</p> <p>16 the moment in time at which the contributory becomes</p> <p>17 a member of the company. In fact what he is -- but if</p> <p>18 one considers why it is that he is asking this question</p> <p>19 one perhaps gets a clue as to why it is that he has</p> <p>20 expressed himself in the way that he has. He is asking</p> <p>21 the question for set-off purposes. Set-off, if we then</p> <p>22 go on to page 601 one can see why that is significant</p> <p>23 because the question of set-off gives rise to very</p> <p>24 different considerations, to the question of whether or</p> <p>25 not there is a liability which is capable of being</p> <p style="text-align: center;">Page 96</p>

<p>1 proved. So we respectfully suggest that this sort of</p> <p>2 authority does not really help on the ultimate question</p> <p>3 with which we are concerned at the moment which is</p> <p>4 whether or not the pre-liquidation, a company in</p> <p>5 administration can take steps effectively to protect</p> <p>6 against an insolvent contributory to the right which it</p> <p>7 will have in the future to call and --</p> <p>8 MR JUSTICE DAVID RICHARDS: This particular point cannot</p> <p>9 have been the only basis of the decision, I take it,</p> <p>10 from the headnote, where he says that there cannot be</p> <p>11 a set-off against calls made either by the company</p> <p>12 before or by the liquidator after the resolution to wind</p> <p>13 up. So there must be some other reason why set-off is</p> <p>14 not permissible, I would have thought.</p> <p>15 MR TROWER: Yes, I am just looking for where this is.</p> <p>16 I think perhaps I can come back to that point.</p> <p>17 MR JUSTICE DAVID RICHARDS: Certainly. It may have been</p> <p>18 this point that if you are allowed set-off against a</p> <p>19 call on shares of a limited company you effectively</p> <p>20 destroy --</p> <p>21 MR TROWER: Which is a point I am going to come back to as a</p> <p>22 contributory rule.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR TROWER: That is absolutely right, and that is actually</p> <p>25 picked up at the bottom of page 602 with reference to</p> <p style="text-align: center;">Page 97</p>	<p>1 able to go into liquidation, distribute its assets,</p> <p>2 present them to shareholders, without regard to the fact</p> <p>3 that it has undertaken an unlimited liability to the</p> <p>4 company. The only way the company could stop that would</p> <p>5 be itself to go into liquidation and that seems a most</p> <p>6 surprising result. So, my Lord, against that background</p> <p>7 can I just look at the components of section 74 claims</p> <p>8 against the members because, as your Lordship knows, the</p> <p>9 claim is for:</p> <p>10 "Contribution of any amount sufficient ...(Reading</p> <p>11 to the words)... in the winding up."</p> <p>12 Much of what I have submitted on the meaning of</p> <p>13 liabilities for the purposes of the sub debt agreements</p> <p>14 is relevant here.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR TROWER: But it is of course right to look at the</p> <p>17 question again in its statutory context. I will try not</p> <p>18 to repeat the points I have already made but I think it</p> <p>19 is pretty obvious which points are likely to be</p> <p>20 relevant. But it is important to stress that a number</p> <p>21 of those points are relevant but the question for your</p> <p>22 Lordship is different because the question for your</p> <p>23 Lordship in relation to section 74 is what does the</p> <p>24 phrase "debts and liabilities" mean in that context.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 99</p>
<p>1 the Grazell's case. My Lord, I think the shorthand</p> <p>2 writer would appreciate a break.</p> <p>3 MR JUSTICE DAVID RICHARDS: Certainly.</p> <p>4 (3.03 pm)</p> <p>5 (A short break)</p> <p>6 (3.10 pm)</p> <p>7 MR TROWER: So, my Lord, we say the correct analysis is that</p> <p>8 there is a liability created under section 80. It is</p> <p>9 a liability which is capable of enforcement at any</p> <p>10 stage in circumstances in which that is possible</p> <p>11 pre-eminently the insolvency of its contributory member.</p> <p>12 MR JUSTICE DAVID RICHARDS: When you say capable of</p> <p>13 enforcement.</p> <p>14 MR TROWER: By proof.</p> <p>15 MR JUSTICE DAVID RICHARDS: By proof.</p> <p>16 MR TROWER: By proof. If this were not to be the case</p> <p>17 really quite an odd result would arise which would be</p> <p>18 illustrated in this way. If the contributory's</p> <p>19 liability was limited to the amount to be paid on its</p> <p>20 shares, and there was an unpaid amount at all to be made</p> <p>21 by the company and the claim could be proved in the</p> <p>22 insolvency whether or not LIBE was in litigation.</p> <p>23 However the existence of an unlimited liability would on</p> <p>24 LBHI's case be incapable of being preserved or protected</p> <p>25 against a winding up of a member. The member would be</p> <p style="text-align: center;">Page 98</p>	<p>1 MR TROWER: It is common ground in the present case that</p> <p>2 because LIBE is an unlimited company the cap imposed by</p> <p>3 those provisions in section 74(2) and (3) have no</p> <p>4 application. So amounts unpaid on shares and amounts</p> <p>5 undertaken to ...(Reading to the words)... a company</p> <p>6 limited by guarantee have no application. We are</p> <p>7 looking at this in the context of a liability to</p> <p>8 contribute being unlimited so long as the assets are</p> <p>9 insufficient to discharge what amounts to a debt or</p> <p>10 liability within the meaning of section 74. Now the</p> <p>11 ground or the area which is in issue between us is</p> <p>12 broadly speaking that LBHI and LBL contend that the</p> <p>13 phrase "debts and liabilities" in section 74 covers all</p> <p>14 proveable debts but it is submitted that it only extends</p> <p>15 to proveable debts and no further.</p> <p>16 (3.15 pm)</p> <p>17 That, as your Lordship will immediately appreciate,</p> <p>18 chimes with some of their submissions in relation to the</p> <p>19 meaning of liabilities under the sub-debt agreement.</p> <p>20 Now, our submission is that this is just wrong.</p> <p>21 Nowhere in section 74 is there any hint that the meaning</p> <p>22 of the phrase "debts and liabilities" is limited to</p> <p>23 debts and liabilities which are provable in the</p> <p>24 liquidation of the company seeking the contribution.</p> <p>25 The submission also ignores the way in which the words</p> <p style="text-align: center;">Page 100</p>

<p>1 are now defined in the Insolvency Rules. It is 2 pertinent to ask: what is a debt and what is 3 a liability? If we can just go back to the rules and 4 just look at that point in this context, behind tab 15. 5 MR JUSTICE DAVID RICHARDS: Just for completeness, 6 Mr Trower, there is obviously something in the 7 Insolvency Act that says that, perhaps amongst other 8 expressions, debts and liabilities can be defined by the 9 rules. I am just making that -- 10 MR TROWER: No, I certainly hope there is. 11 MR JUSTICE DAVID RICHARDS: It must be there somewhere, must 12 it not? 13 MR TROWER: Yes, I suspect it is in the schedule which 14 identifies -- 15 MR JUSTICE DAVID RICHARDS: Just sometime, not now but just 16 sometime if you could give me that link, yes. 17 MR TROWER: Yes. If we go back to 13.12, what is a debt is 18 defined in 13.12(1). It means: 19 "Debts to which the company is subject, debts to 20 which the company may become subject by reason of 21 obligations incurred and any interest provable, as 22 mentioned in rule 4.93(1)." 23 Liability doesn't of itself have that timing 24 restriction in it as a definition because liability has 25 a meaning which is provided for in sub-rule 4:</p> <p style="text-align: center;">Page 101</p>	<p>1 are thinking about two different concepts. The 2 inter-relationship -- and it's worth just turning back 3 to 12.3 -- between 12.3 and 13.12 has the essential 4 effect that if something is a debt it's provable and if 5 something is provable it's a debt. 6 MR JUSTICE DAVID RICHARDS: I see, yes. 7 MR TROWER: So the two work together. So where you see the 8 word "debt" you are in the realm of provability. When 9 you see the word "liability" you are in the realm of 10 something else, although liabilities are quite capable 11 of being provable debts if they have satisfied the 12 necessary characteristics. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR TROWER: So we suggest this is the clearest possible 15 indication that, for section 74 purposes, "liabilities" 16 must be referring to something other than provable 17 debts. So that's the first point. 18 There are other indications within section 74 that 19 this is the case; the further reference, for example, to 20 the adjustment of the rights of contributories amongst 21 themselves is a strong textual indication that the 22 obligation to contribute extends to any liabilities 23 which rank above members in the statutory waterfall. If 24 member A can be required to contribute under section 74 25 in order to adjust the rights as between it and member</p> <p style="text-align: center;">Page 103</p>
<p>1 "In any provision of the Act or the rules about 2 winding-up, except and insofar as the context otherwise 3 regards, liability means the liability to pay money or 4 moneys worth", et cetera, et cetera. 5 A point is made by LBHI that the word "liability" in 6 13.12(4) has to be read only in the context of 7 determining whether a liability is a provable debt. 8 Now, we say that's not right because it would be 9 inconsistent with the opening words of the sub-rule for 10 the purposes of references in the -- sorry, in any 11 provision of the Act or the rules about winding-up, and 12 with the fact that the definition appears in part 13 of 13 the rules dealing with general definitions. It's not in 14 rule 12.3 which is dealing with provable debts. Now, 15 that is obviously not a complete answer, that last 16 point, because you go to 13.12 in order to identify what 17 is a provable debt for the purposes of 12.3, but it's 18 some indication. 19 Now, questions relating, as your Lordship knows, to 20 the time at which an obligation was incurred in order 21 for the debt to be provable are at the heart of the 22 Nortel appeal. But what is clear, we say, is that 23 a debt which is defined by reference to the 24 characteristics of provability is a different animal 25 from a liability which may or may not be provable. They</p> <p style="text-align: center;">Page 102</p>	<p>1 B, it's difficult to see how the phrase "debts and 2 liabilities" isn't intended to extend to anything which 3 has to be paid first. 4 One of the points made on the other side is that the 5 reference in section 74 to the expenses of the 6 winding-up counts against LBIE's construction. But, 7 with respect, that isn't correct either. The reason 8 there is a need to refer to the expenses of the 9 winding-up is because a number of the expenses don't 10 naturally fall within the concept of a liability. You 11 only have to look -- and it's perhaps just worth briefly 12 looking at rule 4.21(8) to see that, the liabilities of 13 the company, behind tab 15, 4.21(8). 14 MR JUSTICE DAVID RICHARDS: Sorry, can you just give me that 15 reference again. 16 MR TROWER: 4.21(8). 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR TROWER: There are a number of expenses in the list that 19 plainly are not a liability of the companies. It's 20 a fairly obvious point. Yes, they are listed in 21 sub-rule 3. Now, LBHI and LBHI2 refer to a number of 22 statutory provisions elsewhere in the Act which are said 23 to support the idea that statutory interest is not 24 included within the concept of a liability for section 25 74 purposes, but when one actually looks at them none of</p> <p style="text-align: center;">Page 104</p>

27 (Pages 105 to 108)

<p>1 But one of the slight oddities about it is that,</p> <p>2 here, in the Companies Act, there is a summary remedy</p> <p>3 against a contributory in respect of an obligation which</p> <p>4 doesn't derive in any way from his status as</p> <p>5 a contributory and indeed excludes it.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, I suppose that may just be</p> <p>7 the point.</p> <p>8 MR TROWER: It's a very old section so far as its</p> <p>9 antecedents are concerned. It goes right back to the</p> <p>10 1862 Act. It certainly was first enacted at a time when</p> <p>11 there seems to have been, from a cultural perspective,</p> <p>12 more of an idea that contributories were often hammered</p> <p>13 quite hard in the context of a liquidation whereas</p> <p>14 nowadays we are quite unused to that.</p> <p>15 MR JUSTICE DAVID RICHARDS: Very well.</p> <p>16 MR TROWER: Would your Lordship just give me a moment?</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: My Lord, yes, just before we lose it, the point</p> <p>19 your Lordship raised on Lines Bros and the relationship</p> <p>20 between that and section 89, the relevant section at the</p> <p>21 time was section 283 of the Companies Act 1948, which</p> <p>22 you see referred to on page 219 of Lines Bros. It's in</p> <p>23 volume 2, tab 9 of the authorities bundle. 283 doesn't</p> <p>24 require (inaudible).</p> <p>25 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p style="text-align: center;">Page 109</p>	<p>1 company went into liquidation."</p> <p>2 So one has a situation where under section 107 you</p> <p>3 seem to go straight from the pari passu liabilities, on</p> <p>4 my learned friend's reading of the section, to the</p> <p>5 members, but under 189 you have to pay interest.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TROWER: So there has to be some sort of method of</p> <p>8 reconciling those two sections so that they work</p> <p>9 together in a satisfactory fashion. What we</p> <p>10 respectfully suggest is a sensible way of thinking about</p> <p>11 this is that 107 is actually concerned with all</p> <p>12 liabilities which have to be discharged prior to the</p> <p>13 distribution to members.</p> <p>14 MR JUSTICE DAVID RICHARDS: I am not quite sure what point</p> <p>15 is being made about section 107.</p> <p>16 MR TROWER: I think it is being said that, as I understand</p> <p>17 the submission, "liabilities" simply means provable</p> <p>18 debts in this section.</p> <p>19 MR JUSTICE DAVID RICHARDS: I see, but that wouldn't fit</p> <p>20 with Lord Neuberger's waterfall.</p> <p>21 MR TROWER: No, it doesn't. It cuts across all sorts of</p> <p>22 parts of the scheme if that's actually right. Yes, it's</p> <p>23 paragraph 57 of LBHI's written opening submissions:</p> <p>24 "The reference to liabilities in section 107 is</p> <p>25 a reference to provable debts or it is those debts which</p> <p style="text-align: center;">Page 111</p>
<p>1 MR TROWER: So the law seems to have changed.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TROWER: My Lord, so those are the two sections we</p> <p>4 thought your Lordship might get some assistance from.</p> <p>5 There are then some sections which are taken against us,</p> <p>6 if I can put it that way. The first one is section 107.</p> <p>7 That provides that, subject to the provisions of</p> <p>8 (inaudible) -- this is the pari passu distribution</p> <p>9 section.</p> <p>10 "The company's property in a voluntary winding up</p> <p>11 shall, on the winding-up, be applied in satisfaction of</p> <p>12 the company's liabilities pari passu and subject to that</p> <p>13 application shall, unless the Articles otherwise</p> <p>14 provide, be distributed among the members according to</p> <p>15 their rights and interests in the company."</p> <p>16 Now, one has to think about the way this section</p> <p>17 works in conjunction with section 189, which is the</p> <p>18 section which in winding-up provides for interest</p> <p>19 because subsection 2, as your Lordship will know, this</p> <p>20 is the one in winding-up that's equivalent to 2.88 we</p> <p>21 have looked at, provides:</p> <p>22 "Any surplus remaining after the payment of the</p> <p>23 debts proved in winding-up shall, before being applied</p> <p>24 for any other purpose, be applied in paying interest on</p> <p>25 those debts ...(Reading to the words)... since the</p> <p style="text-align: center;">Page 110</p>	<p>1 are approved and paid pari passu in accordance with the</p> <p>2 provisions of chapter 9."</p> <p>3 MR JUSTICE DAVID RICHARDS: I mean, either that is right,</p> <p>4 but in which case 107 isn't actually telling us the full</p> <p>5 story.</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: Or somehow, when it talks about</p> <p>8 the company's liabilities, it's not actually just</p> <p>9 talking about the provable liabilities because, in</p> <p>10 a sense, each tranche of payment is going to be made</p> <p>11 pari passu, one way or another. We know interest is to</p> <p>12 be paid pari passu, and I think that is what would</p> <p>13 happen with unprovable liabilities as well.</p> <p>14 MR TROWER: My Lord, yes, and that was actually the</p> <p>15 submission that we made in answer to this point in the</p> <p>16 reply submissions.</p> <p>17 MR JUSTICE DAVID RICHARDS: I see, yes.</p> <p>18 MR TROWER: And that's the sensible way of reading this</p> <p>19 provision.</p> <p>20 MR JUSTICE DAVID RICHARDS: Anyway, clearly any submission</p> <p>21 on 107 has to take account of what is said in Nortel.</p> <p>22 MR TROWER: Yes, indeed.</p> <p>23 My Lord, the next series of sections relate to</p> <p>24 descriptions of the statements of affairs. I don't</p> <p>25 think I need take your Lordship to them but they do</p> <p style="text-align: center;">Page 112</p>

<p>1 refer to -- actually perhaps I can just take your 2 Lordship to one of them to illustrate the point. It is 3 2.3(b). 4 MR JUSTICE DAVID RICHARDS: 2.3(b), sorry? 5 MR TROWER: Section 2.3(b). 6 MR JUSTICE DAVID RICHARDS: In? 7 MR TROWER: I am so sorry, tab 12, section 2.3(b) of the 8 Act. 9 MR JUSTICE DAVID RICHARDS: I see. 10 MR TROWER: It's right at the beginning, subsection. 11 MR JUSTICE DAVID RICHARDS: I see. Sorry, yes, I have it. 12 MR TROWER: We have real difficulty in seeing where this 13 takes them because we don't really understand why it is 14 that a statement of affairs shouldn't be required to 15 include non-provable debts. I mean, it really doesn't 16 help matters very much. There plainly is, here, being 17 used two different concepts, a debt and a liability. 18 There is then the provisions in relation to 19 insolvency. 214 I think is one we might go to, the 20 wrongful trading provision, 214.6, and there are a 21 number of other sections that are referred to by LBHI. 22 "For the purposes of this section, a company goes 23 into ...(Reading to the words)... debts and other 24 liabilities and expenses of the winding-up." 25 Again, we simply don't understand why it is that</p> <p style="text-align: center;">Page 113</p>	<p>1 He has done so in almost every case because testing the 2 relevant matter with reference only to provable debts 3 would not be appropriate. So we actually suggest that 4 all these kind of textual points in fact support our 5 case rather than LBHI's case. Section 74 cannot 6 sensibly be read as limited only to provable debts. 7 Then in LBHI's submissions, at paragraphs 70 to 76, 8 they refer to some categories of non-provable debt and 9 liability which cannot be caught by section 74 for 10 various reasons. So what they are effectively saying is 11 that there are a number of types of non-provable 12 liability which cannot be within the contemplation of 13 section 74. They say that that supports the proposition 14 that the liabilities referred to in section 74 are only 15 provable debts. 16 Now, quite apart from the fact that there is a hole 17 in the logic there, we say that the submission is wrong 18 because actually those so-called liabilities are not in 19 truth liabilities at all, either that or they are wholly 20 unenforceable. Just to deal with the five examples that 21 are given, the first example they give is the discounted 22 element of a future liability. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR TROWER: Now, that doesn't help because the whole debt 25 has been discharged by payment of the discounted amount.</p> <p style="text-align: center;">Page 115</p>
<p>1 a company's non-provable liabilities should not be taken 2 into account for the purposes of determining whether or 3 not it's insolvent in the context of wrongful trading 4 proceedings. I wasn't proposing to spend very much 5 further time on those points. In paragraph 38 of our 6 supplemental submissions, we make some further more 7 detailed points on them. 8 But another textual point that's made by LBHI is the 9 contrast between the absence of any reference to 10 statutory interest in section 74 and other provisions 11 where such a reference is made. So I think the 12 submission is that, where statutory interest is being 13 thought of as something which has to be encapsulated 14 within the section, it is spelt out. This argument 15 doesn't advance matters at all, in our submission, 16 because in none of the examples identified is the word 17 "interest" used in addition to the phrase "debts and 18 liabilities". So, in other words, the draftsman has 19 never thought where the phrase "debts and liabilities" 20 is used that he also needs to add in "and statutory 21 interest". There is nowhere where that is done that we 22 have been able to identify. 23 On each occasion on which the draftsman has referred 24 to liabilities instead of or in addition to provable 25 debts, we submit that the scheme looks tolerably clear.</p> <p style="text-align: center;">Page 114</p>	<p>1 There isn't a claim left. The only way it would -- and 2 certainly on that point. A similar point is an amount 3 in excess of the estimated amount of contingent 4 liability. I have already touched on that concept in 5 submissions this morning. Subject to any revaluation 6 when the revalued amount will be provable, exactly the 7 same analysis applies. It is not a non-provable 8 liability at all. It's either discharged because the 9 estimate is actually good and remains good or it's 10 revalued and becomes provable. 11 They then refer to statute-barred and non EC foreign 12 tax liabilities. Well, we have already touched on 13 those. We say they are simply not payable by the 14 company, whether in the course of the insolvency or at 15 all. 16 The fourth category is secured liabilities. They 17 don't help. They are all outside the scope of the Act 18 altogether. To the extent that there is any shortfall 19 in the security, the liabilities will be proven in the 20 normal way. 21 The final category is the shareholders' right to the 22 surplus, but we are not quite sure we understand that 23 because that is not a debt or liability of the company 24 within the meaning of section 74. Section 74.1 is of 25 course concerned with the adjustment of the rights of</p> <p style="text-align: center;">Page 116</p>

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

<p>1 MR TROWER: But, anyway, of course some level of discounting</p> <p>2 for maturity in a general estimation sense is required</p> <p>3 for estimating a claim, because there will have to be</p> <p>4 all sorts of questions that go into the estimation of</p> <p>5 the contingency claim (?), but it doesn't go any further</p> <p>6 than that.</p> <p>7 My Lord, there is one other point before I move on</p> <p>8 to the contributory rule and the members' obligation to</p> <p>9 contributory rights that I need just briefly to touch</p> <p>10 on, which is the inter-relationship between the claims</p> <p>11 to interest under section 189.1 and the claims to</p> <p>12 interest under rule 2.88(7). Now, it might be thought</p> <p>13 that there is a lacuna in the provisions for payment of</p> <p>14 statutory interest where the company moves from</p> <p>15 administration to liquidation. I don't know whether</p> <p>16 your Lordship followed this through in the written</p> <p>17 submissions.</p> <p>18 MR JUSTICE DAVID RICHARDS: I read it, but I didn't sort of</p> <p>19 put on the cold towel and go step-by-step through it.</p> <p>20 MR TROWER: It is a bit of a cold towel point, but I think</p> <p>21 your Lordship does need to understand it.</p> <p>22 MR JUSTICE DAVID RICHARDS: Very good.</p> <p>23 MR TROWER: It requires turning up the rule and the section,</p> <p>24 which is in volume 2. Can we start with insolvency rule</p> <p>25 4.93(1). The one that's applicable -- yes, it's</p> <p style="text-align: center;">Page 121</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TROWER: Now, this gives rise to an argument that</p> <p>3 interest accruing on debts during the period of</p> <p>4 administration is neither provable, because it's</p> <p>5 excluded, nor included within the scope of statutory</p> <p>6 interest. So interest accruing during the period of</p> <p>7 administration followed by winding-up would simply be</p> <p>8 lost if that were right.</p> <p>9 Now, there used to be a similar issue in rule 2.88</p> <p>10 but it has been corrected by amendment. If we go back</p> <p>11 to 2.88, the first one is April 1 2005 to April 5 2010.</p> <p>12 The reason of course it might have applied in this</p> <p>13 context as well is because, although this never happens</p> <p>14 insofar as one can tell, the rules had to make provision</p> <p>15 for circumstances in which administration was</p> <p>16 immediately preceded by winding-up.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: The first drafting of the rule under 2.88(1) for</p> <p>19 that period provided that the interest was provable as</p> <p>20 part of the debt:</p> <p>21 "Except insofar as it was payable in respect of any</p> <p>22 period after the company entered into administration or</p> <p>23 if the administration was immediately preceding by</p> <p>24 winding-up any period after the date the company went</p> <p>25 into liquidation."</p> <p style="text-align: center;">Page 123</p>
<p>1 4.93(1), the rule in force between 2005 and 2010.</p> <p>2 MR JUSTICE DAVID RICHARDS: Right.</p> <p>3 MR TROWER: "Where a debt proved in the liquidation bears</p> <p>4 interest, that interest is provable as part of the debt,</p> <p>5 except insofar as it is payable in respect of any period</p> <p>6 after the company went into liquidation or if the</p> <p>7 liquidation was immediately preceded by an</p> <p>8 administration in any period after the date the company</p> <p>9 entered into administration."</p> <p>10 So where one is talking about the provable element</p> <p>11 of the debt in a liquidation, you go back to the</p> <p>12 commencement of a preceding administration for the</p> <p>13 purposes of working out what is provable and what is</p> <p>14 not.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR TROWER: Then there are the provisions under 4.93(1)</p> <p>17 which extend the right to interest beyond the situation</p> <p>18 in which the debt actually bears interest.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR TROWER: Then you have to go to 189, which is behind</p> <p>21 tab 12, which is the section. The provision for payment</p> <p>22 of statutory interest is dealt with in subsection 2 and</p> <p>23 which permits the payment of statutory interest out of</p> <p>24 surplus in respect of periods for which they have been</p> <p>25 outstanding since the company went into liquidation.</p> <p style="text-align: center;">Page 122</p>	<p>1 But that wasn't tracked in sub-rule 7 because the</p> <p>2 surplus remaining was:</p> <p>3 "Before being applied for any purpose ...(Reading to</p> <p>4 the words)... since the company entered administration."</p> <p>5 So again there is the same lacuna, but it was</p> <p>6 corrected by the amendment which appears in the next</p> <p>7 page. The way it was done, as your Lordship may know,</p> <p>8 was to introduce a definition of relevant date in 2.88</p> <p>9 which applied to both. So there was a symmetry</p> <p>10 introduced.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR TROWER: Now, there is an obvious textual problem that we</p> <p>13 quite accept, but it does give rise to a quite bizarre</p> <p>14 situation which we respectfully suggest cannot possibly</p> <p>15 have been intended, that creditors should be entitled to</p> <p>16 interest accruing during an administration -- well,</p> <p>17 sorry, I will put it the other way round. It clearly</p> <p>18 must have been the case that creditors should be</p> <p>19 entitled to interest accruing during the administration</p> <p>20 before any return is made to members.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: And that must have been the policy. There is no</p> <p>23 logical or policy reasons to permit assets to be</p> <p>24 returned to members in priority to creditors' rights to</p> <p>25 interest accruing during a period when there is surplus</p> <p style="text-align: center;">Page 124</p>

<p>1 simply because the administration is converted into</p> <p>2 winding-up before distribution is made. So we have</p> <p>3 suggested one way of addressing what is a fairly obvious</p> <p>4 lacuna, which is a construction approach that we --</p> <p>5 MR JUSTICE DAVID RICHARDS: Sorry, can I be absolutely</p> <p>6 clear. We looked at 4.93.</p> <p>7 MR TROWER: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: In the form in which it was</p> <p>9 enacted between 2005 and 2010 or in force in that</p> <p>10 period.</p> <p>11 MR TROWER: Yes.</p> <p>12 MR JUSTICE DAVID RICHARDS: Then over the page is the</p> <p>13 revised 4.93.</p> <p>14 MR TROWER: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: Which has used the same formula</p> <p>16 of the relevant date.</p> <p>17 MR TROWER: Yes.</p> <p>18 MR JUSTICE DAVID RICHARDS: But has the problem been put</p> <p>19 right?</p> <p>20 MR TROWER: No, and the reason it has not been put right is</p> <p>21 because the statutory right to interest in a winding-up</p> <p>22 arises under section 189, i.e. a section in the Act,</p> <p>23 whereas -- I step back. In administration, all of the</p> <p>24 entitlements to interest, whether provable or statutory,</p> <p>25 are dealt with under rule 2.88.</p> <p style="text-align: center;">Page 125</p>	<p>1 dealt with in 4.93 and the right to interest out of the</p> <p>2 surplus is dealt with by section 189.</p> <p>3 MR JUSTICE DAVID RICHARDS: Okay. Right.</p> <p>4 MR TROWER: One can imagine that it may have been easier to</p> <p>5 amend the rules than the section, but I know not why it</p> <p>6 is.</p> <p>7 MR JUSTICE DAVID RICHARDS: That's certainly true, but --</p> <p>8 MR TROWER: Whether that's an explanation or not, I don't</p> <p>9 know, but we do suggest that there is a way through</p> <p>10 this.</p> <p>11 MR JUSTICE DAVID RICHARDS: Right.</p> <p>12 MR TROWER: Because we don't shrink from the fact that there</p> <p>13 appears, on the face of it, to be a lacuna, although we</p> <p>14 say it's a pretty obvious one. The way is this.</p> <p>15 Section 189 is only addressing what occurs in</p> <p>16 a winding-up. It doesn't contemplate a prior</p> <p>17 administration. It's limited to interest accruing on</p> <p>18 debts since the company went into liquidation. That's</p> <p>19 what it's about. Rule 2.88(7), which is the surplus</p> <p>20 rule in administration, applies once the administration</p> <p>21 has become a distributive administration because notice</p> <p>22 has been given under rule 2.95(1).</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR TROWER: What it does is it addresses interest on debts</p> <p>25 proved thereafter and provides for the payment of</p> <p style="text-align: center;">Page 127</p>
<p>1 MR JUSTICE DAVID RICHARDS: Right.</p> <p>2 MR TROWER: In a liquidation, there are two places you find</p> <p>3 the interest claimed; one is rule 4.93 and the other is</p> <p>4 section 189.</p> <p>5 MR JUSTICE DAVID RICHARDS: So let me just get this right.</p> <p>6 In 2.88, in the revised form.</p> <p>7 MR TROWER: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: A(1) is the relevant date.</p> <p>9 MR TROWER: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: Then (1) says that interest is</p> <p>11 not provable insofar as it's payable in respect of any</p> <p>12 period after the relevant date.</p> <p>13 MR TROWER: Yes.</p> <p>14 MR JUSTICE DAVID RICHARDS: Then --</p> <p>15 MR TROWER: Then you go all the way down to the end of 2.88.</p> <p>16 The critical difference --</p> <p>17 MR JUSTICE DAVID RICHARDS: Where does it deal with -- oh,</p> <p>18 it's 7.</p> <p>19 MR TROWER: Surplus is dealt with in 7.</p> <p>20 MR JUSTICE DAVID RICHARDS: I see, remaining after payment</p> <p>21 of the debts proved shall, before being applied in</p> <p>22 paying -- yes, okay. I understand. As you say, that is</p> <p>23 a complete code.</p> <p>24 MR TROWER: Whereas in a liquidation the code is split</p> <p>25 between 4.93 and section 189. The provable element is</p> <p style="text-align: center;">Page 126</p>	<p>1 interest accruing since the commencement of</p> <p>2 administration. Then the critical part of the analysis</p> <p>3 is that 2.88(7) doesn't cease to apply merely because</p> <p>4 the distributing administration is succeeded by a</p> <p>5 winding-up before creditors proofs of debt are paid in</p> <p>6 full. There is nothing in the wording which requires it</p> <p>7 to cease to apply upon the conversion of the</p> <p>8 administration into a winding-up or which limits the</p> <p>9 surplus remaining to surplus remaining in the hands of</p> <p>10 the administrators.</p> <p>11 Now, true it is -- and it may be, I think it</p> <p>12 probably is, helpful if your Lordship makes a note as to</p> <p>13 where we set this out in writing.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TROWER: It's in paragraphs 99 to 107 of our opening</p> <p>16 submissions. The real guts of the analysis are in 107.</p> <p>17 MR JUSTICE DAVID RICHARDS: Right.</p> <p>18 MR TROWER: Now, rule 4.73 -- there is one other rule which</p> <p>19 we just need to know about which I have not shown you</p> <p>20 yet, which is rule 4.73(8), which provides that where</p> <p>21 a winding-up -- and perhaps if we can just turn that</p> <p>22 up:</p> <p>23 "Where a winding-up is immediately preceded by an</p> <p>24 administration, a creditor proving the administration</p> <p>25 shall be deemed to have proved in the winding up."</p> <p style="text-align: center;">Page 128</p>

<p>1 Now, the consequence of that of course is that such 2 debts can be treated as debts proved in the winding-up 3 for the purposes of 189.2, there is no doubt about that, 4 but that's only a deeming provision and shouldn't be 5 read so as to deprive a creditor who had actually proved 6 in the administration and so fell within 2.88(7) from 7 the benefit of receiving interest on any surplus arising 8 before any return is made to members.</p> <p>9 The consequence of this approach is that if an 10 administrator has given notice of an intention to make a 11 distribution, which he has in the present case or in the 12 case of LBIE, and the company subsequently goes into 13 liquidation before all proofs of debt have been paid, 14 but there is then a surplus after payment of all the 15 debts proved, there are two ways of thinking about it. 16 Either 2.88(7) applies to all creditors who actually 17 proved thereafter, and 189 to that extent is simply 18 unnecessary, or 2.88(7) applies to creditors who 19 actually proved during the administration while 189.2 20 applies to those creditors who actually proved during 21 the winding-up. So if you didn't get around to proving 22 until the winding-up you lose your right but not 23 otherwise.</p> <p>24 It is also important in this context, to be clear, 25 that to the extent that creditors have a contractual</p> <p style="text-align: center;">Page 129</p>	<p>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.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>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.</p> <p>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.</p> <p>23 What might happen on the making of a call in a 24 liquidation is a different question, but that doesn't 25 affect the underlying liability and that, for present</p> <p style="text-align: center;">Page 131</p>
<p>1 entitlement to interest, then they wouldn't lose 2 completely the right to recover interest accruing during 3 the period of administration where a distribution then 4 occurs in the liquidation.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>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.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>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.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: My Lord, that was all I was going to say in 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</p> <p style="text-align: center;">Page 130</p>	<p>1 purposes, is all that matters from LBIE's point of view.</p> <p>2 My Lord, on this issue I would be grateful if we 3 could sort of reserve our position to hear how the 4 argument goes and deal with any points in reply. We 5 don't think there is anything further that we want to 6 deal with.</p> <p>7 MR JUSTICE DAVID RICHARDS: Which is the provision I am 8 thinking of, either in the Act or the rules, about 9 account being taken of the ability of members to meet 10 liability?</p> <p>11 MR TROWER: Yes, it's 150(2).</p> <p>12 MR JUSTICE DAVID RICHARDS: Right.</p> <p>13 MR TROWER: "In making a call, the court may take into 14 consideration the probability that some of the 15 contributories may partly or wholly fail to pay it."</p> <p>16 I think that's the only one that deals with it.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes. So I mean if you had two 18 obviously solvent members and you had a deficit of 50, 19 what would you do? Sorry, if you had two obviously 20 solvent members and a deficit of 100, would you call 100 21 on each or would you just call 50 on each, saying each 22 of them will pay 50 and treat them that way.</p> <p>23 MR TROWER: No, my Lord, we suggest you would call 100 on 24 each.</p> <p>25 MR JUSTICE DAVID RICHARDS: You would call 100 on each.</p> <p style="text-align: center;">Page 132</p>

<p>1 MR TROWER: Because the probability is that some of the</p> <p>2 contributories may partly or wholly fail to pay it. It</p> <p>3 is that way round.</p> <p>4 MR JUSTICE DAVID RICHARDS: Quite so. I am trying to work</p> <p>5 out what effect that has or how this works.</p> <p>6 MR TROWER: Yes. We couldn't recover any --</p> <p>7 MR JUSTICE DAVID RICHARDS: Obviously you cannot recover</p> <p>8 more than 100.</p> <p>9 MR TROWER: Well, they get it back anyway in the case of</p> <p>10 unlimited liabilities, but --</p> <p>11 MR JUSTICE DAVID RICHARDS: "In making a call, the court may</p> <p>12 take into consideration the probability that some of the</p> <p>13 contributories may partly or wholly fail to pay it."</p> <p>14 MR TROWER: We are all quite used to the concept in</p> <p>15 insolvency and winding-up of double dip and the idea</p> <p>16 that there is no reason why you cannot have a go at two</p> <p>17 people as long as you don't recover more than 100p. In</p> <p>18 a way, this is similar. The starting point is can go</p> <p>19 against anyone for the whole lot, but if there is</p> <p>20 a probability that somebody may partly or wholly fail to</p> <p>21 pay it we would take that into account. But it must be</p> <p>22 what one would have thought that -- well, actually, on</p> <p>23 reflection, perhaps it is a bit strange the way it</p> <p>24 works, we are otherwise entitled to call 100.</p> <p>25 MR JUSTICE DAVID RICHARDS: The only way I can see it</p> <p style="text-align: center;">Page 133</p>	<p>1 debate as to how it works as between LBL and LBHI2 where</p> <p>2 LBL has one share and LBHI2 has many billions, but that</p> <p>3 doesn't seem to be what this subsection is all about.</p> <p>4 This subsection seems to be all about simply the ability</p> <p>5 to pay.</p> <p>6 MR JUSTICE DAVID RICHARDS: I note of course in subsection 1</p> <p>7 that the power of the court is to make calls on all or</p> <p>8 any of the contributories.</p> <p>9 MR TROWER: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: So it might be said, well, we</p> <p>11 will simply make a call on the solvent contributory and</p> <p>12 he will then be able to pursue whatever rights he may</p> <p>13 have against the other contributories.</p> <p>14 MR TROWER: Yes. It may be that in the present case if LBL,</p> <p>15 despite having only one share, was highly solvent and</p> <p>16 LBHI2 wasn't, there is no reason under this section why</p> <p>17 the appropriate thing wouldn't be to just have a go at</p> <p>18 LBL.</p> <p>19 MR JUSTICE DAVID RICHARDS: All right. Okay.</p> <p>20 MR TROWER: My Lord, if that's a convenient --</p> <p>21 MR JUSTICE DAVID RICHARDS: This is a hypothetical example.</p> <p>22 MR TROWER: My Lord, if on that happy note it is</p> <p>23 a convenient moment?</p> <p>24 MR JUSTICE DAVID RICHARDS: Certainly, yes. 10.30 tomorrow.</p> <p>25 Thank you.</p> <p style="text-align: center;">Page 135</p>
<p>1 working is to say, well, actually you don't necessarily</p> <p>2 call 100 on everyone if you know that, between them,</p> <p>3 they are going to -- you can actually make a lower call</p> <p>4 on the basis that each will meet the full amount of the</p> <p>5 call.</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: They won't then have rights into</p> <p>8 C (?) because they will each have contributed on --</p> <p>9 well, let us assume they won't.</p> <p>10 MR TROWER: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: But on some rateable basis, but</p> <p>12 it will be different if you have one solvent member and</p> <p>13 one insolvent member: you will have to make a larger</p> <p>14 call in order to be sure of getting in the full amount.</p> <p>15 MR TROWER: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: Maybe.</p> <p>17 MR TROWER: Yes.</p> <p>18 MR JUSTICE DAVID RICHARDS: Plainly the total call cannot be</p> <p>19 more than the deficit, I don't think, but I am not sure.</p> <p>20 MR TROWER: That I think is probably right. I mean, what it</p> <p>21 does do is it makes plain that that is the factor that</p> <p>22 the court takes into account when assessing the amount</p> <p>23 of the call.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR TROWER: I think there has been a certain amount of</p> <p style="text-align: center;">Page 134</p>	<p>1 (4.16 pm)</p> <p>2 (The court adjourned until Wednesday, 13 November</p> <p>3 at 10.30 am)</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 136</p>

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