

<p>1 Wednesday, 13 November 2013</p> <p>2 (10.30 am)</p> <p>3 Submissions by MR TROWER QC</p> <p>4 MR JUSTICE DAVID RICHARDS: Mr Trower.</p> <p>5 MR TROWER: May it please your Lordship. Just a couple of</p> <p>6 points from yesterday, if I may.</p> <p>7 MR JUSTICE DAVID RICHARDS: Certainly.</p> <p>8 MR TROWER: The first was that your Lordship asked about</p> <p>9 Commonwealth authorities in relation to the currency</p> <p>10 conversion claim.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR TROWER: The position is that we haven't done</p> <p>13 a comprehensive trawl, but we think that our normal</p> <p>14 research would have picked up the cases on -- MacPherson</p> <p>15 and that kind of thing(?).</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TROWER: We understand though that Allen Overy may have</p> <p>18 done such an exercise. So there may have been a trawl</p> <p>19 done, but I can't say more than that.</p> <p>20 MR JUSTICE DAVID RICHARDS: Very well.</p> <p>21 MR TROWER: The second point is your Lordship asked about</p> <p>22 the rule-making power in relation to the definitions in</p> <p>23 13.12.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes. Yes, thank you.</p> <p>25 MR TROWER: The section is Section 4(11)(1) and (2) and</p> <p style="text-align: center;">Page 1</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TROWER: So may be proved includes what may and what may</p> <p>3 not and so on and so forth.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes, thank you very much. Thank</p> <p>5 you. Yes.</p> <p>6 MR TROWER: My Lord that, I think, was all I had arising out</p> <p>7 of yesterday. I am going to now turn, with</p> <p>8 his Lordship's leave, to the application of the</p> <p>9 contributory rule. If I can just say some words of</p> <p>10 introduction first, and then what I was going to do was</p> <p>11 take your Lordship to the cases and work through them.</p> <p>12 I am afraid there is not really a short cut to that.</p> <p>13 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>14 MR TROWER: It is a firmly established rule which we say</p> <p>15 applies to protect the position of those entitled to</p> <p>16 a distribution out of the company's assets, and operates</p> <p>17 to prevent a contributory from claiming or proving in</p> <p>18 competition with them, until such time as he has</p> <p>19 discharged his obligations to the contributor to the</p> <p>20 extent of his liability. One of the cases we will look</p> <p>21 at briefly describes the rule as being by one which</p> <p>22 a person liable as a contributory must first discharge</p> <p>23 himself in that capacity before he is entitled to</p> <p>24 receive anything in his capacity as a creditor. That is</p> <p>25 the West Coast Gold Fields case, Mr Justice Buckley.</p> <p style="text-align: center;">Page 3</p>
<p>1 schedule 8, paragraph 12.</p> <p>2 MR JUSTICE DAVID RICHARDS: Right, and they create that</p> <p>3 link?</p> <p>4 MR TROWER: What they do is schedule 8 -- well, perhaps</p> <p>5 I can take your Lordship to the bits that matter. Does</p> <p>6 your Lordship have the red book there?</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, I do, yes.</p> <p>8 MR TROWER: If we start with 4(11).</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR TROWER: "Rules may be made for the purpose of giving</p> <p>11 effect to parts 1 to 7 of this Act."</p> <p>12 So that includes the bits that we are concerned</p> <p>13 with. Then 2:</p> <p>14 "Without prejudice to the generality of 1 or to any</p> <p>15 provision of ... (reading to the words) ... necessary or</p> <p>16 expedient."</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: Then if you go to schedule 8.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, I see, paragraph 12.</p> <p>20 MR TROWER: Paragraph 12.</p> <p>21 MR JUSTICE DAVID RICHARDS: "Provision as to the debts that</p> <p>22 may be proved in the winding up."</p> <p>23 MR TROWER: "It is the manner and conditions of</p> <p>24 proving ... "</p> <p>25 Et cetera.</p> <p style="text-align: center;">Page 2</p>	<p>1 Now the rule is derived from the seminal case of</p> <p>2 Grissell, where it was founded on the pari passu</p> <p>3 principle, and that is important and will be theme that</p> <p>4 runs through what we are saying, and protection for the</p> <p>5 rights of that principle was -- and the protection of</p> <p>6 those people's rights is the reason the principle has</p> <p>7 actually been developed in the way that it has. It has</p> <p>8 the clear approval, as a principle, of the Supreme Court</p> <p>9 in Kaupthing. Now in the present case, we say that this</p> <p>10 means that neither LBL nor LBHI 2 are entitled to</p> <p>11 receive a dividend on any of their claims, until such</p> <p>12 time as the amounts for which they are liable under</p> <p>13 Section 74 have been discharged. Now it is clear that</p> <p>14 in a liquidation of LBIE, once a call has been made,</p> <p>15 a contributory may not prove until he has satisfied the</p> <p>16 court. That is clear. As we understand it, none of the</p> <p>17 other parties challenge that principle. What they say</p> <p>18 is that the principle has no application pre-call, which</p> <p>19 can only occur in the case of calls on the fully paid</p> <p>20 members of an unlimited liability once it has gone into</p> <p>21 liquidation. Now the cases, of course, are mostly</p> <p>22 dealing with calls made on contributories, where the</p> <p>23 contribution is payable on unpaid shares, as opposed to</p> <p>24 payment by contributories with unlimited liability, and</p> <p>25 where the company is in liquidation. The position of</p> <p style="text-align: center;">Page 4</p>

<p>1 LBIE, of course, is different on both points. But 2 stepping back, we say, it would very surprising and 3 would not cast very much credit on the law in this area 4 if a radically result were to be reached as a result of 5 these two differences. As to the fact that at present 6 LBIE is in a distributing administration, and not 7 liquidation, both involve a pari passu distribution 8 regime, and both involve the protection of the interests 9 of persons whose claims may not be proveable, but whose 10 rights will be payable before a distribution to members. 11 Both can lead to the dissolution of the company without 12 more. It is entirely adventitious from the perspective 13 of the members that LBIE happens to be in 14 administration. If it were to be in liquidation, not 15 a distributing administration, many of the arguments 16 they make would not be available to them. The fact is 17 that LBIE is in administration because the joint 18 administrators, and the court for that matter, for the 19 matter, continue to consider that it is in the best 20 interests of the estate as a whole that that should 21 continue to be the case, the estate being the collective 22 constitution of those persons for whom the contributory 23 rule is intended to protect. In these circumstances, it 24 is very difficult to see any sensible policy reason why 25 the contributory should be able to prove in</p> <p style="text-align: center;">Page 5</p>	<p>1 obviously very well. The statutory provisions which 2 contain it are Section 107, and we don't need to turn it 3 up, but just for your note, Section 107 for voluntaries, 4 4.181 for compulsories and 2.69 for administrations. So 5 the first one are sections, the second two rules. Now 6 the rules applies in an administration from the moment 7 in time at which the administrators give notice of 8 distribution under rule 2.95. Your Lordship has found 9 to that effect in the Football League case which we put 10 in the bundle at tab 98. I don't think it is necessary 11 to turn it up, but it is there for your Lordship. When 12 I talk about the pari passu distribution rule, it is 13 important that one should not look at this too narrowly 14 as a rule, we say. Because it is part of the statutory 15 scheme which also makes provision for interest to be 16 paid out of the assets, and for payments of that 17 interest to rank weekly amongst the creditors. We have 18 already looked at that in 2.88. That is part of the 19 total scheme which is an essential part of the scheme 20 and the protection of those rights are equally 21 important.</p> <p>22 Now Grisell's Case, as we will see, is based on the 23 importance of the rule, to which one needs to add the 24 cogent principle that in this context, members come 25 after creditors, which is the way it is put by</p> <p style="text-align: center;">Page 7</p>
<p>1 an administration, if they could not take that course in 2 a liquidation. That is the first point.</p> <p>3 As to the fact that the members have unlimited 4 liability, and so unlike members with unpaid shares 5 can't be subject to calls on their shares 6 pre-liquidation, because that is the consequence, it 7 would be very odd if the rule worked in a way which 8 operated to put those members in a better position than 9 they would have been in if they had amounts unpaid on 10 their shares, or otherwise in the position of members of 11 the liability. Now we do, of course, accept that there 12 is no precedent for the application of the rule where 13 the company concerned is an unlimited liability in 14 administration and the call hasn't been made. But we do 15 say that once the principles which underpin the rule are 16 appreciated, it can easily be seen that the rule of 17 equity ought to be applied in the present case. More 18 importantly because it is a rule of equity or an 19 equitable rule which flows from both basic equitable 20 principles, and the construction of the statute. We 21 will see that in the cases as we work through them, 22 because its non-application would be said to constitute 23 an interference with the pari passu distribution 24 rule(?). So that is the most important underlying 25 principle, the rule, and your Lordship knows the rule</p> <p style="text-align: center;">Page 6</p>	<p>1 Lord Walker in Kaupthing. I quite appreciate in other 2 contexts it is put slightly differently, particularly in 3 Soden(?), and one understand that submission. But that 4 is not the point. The point here is in this context, 5 the context of the application of the contributory rule. 6 It actually is the case that members come after 7 creditors.</p> <p>8 Can I just add this on the general principles? 9 Your Lordship gets some help, we suggest, from the way 10 the statutory scheme was looked at in Dynamics. Now 11 Dynamics preceded Lines Bros, as your Lordship will 12 recall. It establishes, and I don't think we need to 13 turn it up, that the commencement of the winding up is 14 the date on which the scheme provides that all debts and 15 liabilities are notionally to be ascertained. There is 16 a sort of notional ascertainment of that.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: It is from that time as well that the shortfall 19 which the contributories of an unlimited company are 20 liable to discharge is notionally to be treated as 21 having arisen, because it is in relation to that date 22 that the quantification of the liabilities must relate. 23 Exactly the same situation must apply in 24 an administration. The law notionally treats the 25 liabilities which arise for the purposes of distribution</p> <p style="text-align: center;">Page 8</p>

<p>1 in an administration at the stage -- well, there are two 2 actual possibilities. It is either at the stage at 3 which notice has been given, or at the commencement of 4 the administration. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR TROWER: It doesn't matter for present purposes. But the 7 law notionally treats the liabilities, and therefore we 8 would say the ultimate shortfall already having been 9 identified. So it is another way of thinking about the 10 way in which the statutory scheme has been imposed. Now 11 it is, of course, said by the other side, and it is the 12 core of their case, that the fact that the liability is 13 not immediately payable, ie the liability of the 14 contributory, is a bar to the operation of the 15 contributory rule, and there is authority consistent 16 with that position, albeit in very different 17 circumstances, as we will see. But as a matter of 18 principle, there is no such bar in all circumstances, 19 because none of the cases, for perfectly obvious 20 reasons, contemplate that it may be necessary to 21 consider the contributory rule in the context of 22 a pari passu distribution scheme, other than 23 a liquidation, where a dividend might be being paid 24 before it is possible for the company to make a call. 25 So where there is a distributing administration, the</p> <p style="text-align: center;">Page 9</p>	<p>1 Now my Lord can I start with Kaupthing? What 2 I thought I would do is start with Kaupthing and then go 3 back to the beginning. 4 MR JUSTICE DAVID RICHARDS: Yes, okay. 5 MR TROWER: Kaupthing is at tab 94. Now Kaupthing was not 6 on the contributory rule per se when the interface 7 (inaudible) rule against Doubleproof and the rule in 8 Cherry v Boulton -- 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: -- and which your Lordship gets from the 11 headnote. But just to take you to the passages that are 12 relevant to what we actually need to discuss, pausing -- 13 a pithy summary of what actually happened in Kaupthing, 14 although I don't think we need to read it now, is 15 paragraphs 4 and 5 of Lord Walker's judgment, which is 16 just the facts as to what was going on. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR TROWER: But I don't think we need it for the purposes of 19 understanding the bit that matters. 20 MR JUSTICE DAVID RICHARDS: No. 21 MR TROWER: The bit that matters starts at paragraph 18. It 22 is paragraphs 18 to 20, then 51 to 53. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR TROWER: Would your Lordship like to read that to 25 yourself?</p> <p style="text-align: center;">Page 11</p>
<p>1 rule should apply, we submit, if the effect of not 2 applying it is to remove from the creditors generally 3 all or part of the fund which should be available to pay 4 their debts. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR TROWER: Now one further point, just before we turn to 7 the cases some of the cases discuss the differences 8 between a company seeking a contribution which is 9 limited and the company where the contributories have 10 unlimited liability. It is sometimes said that this 11 means that the rule doesn't apply, although one needs to 12 look carefully as to why it is that is said in those 13 cases, and we will have to look at some of the sections. 14 We submit that there is no principled reason why the 15 rule should not apply in the context of unlimited 16 liability. There remains a pari passu scheme in place, 17 and also although the company is unlimited, there is no 18 reason why it is that the appropriate administration -- 19 there is no basic reason why it is that the appropriate 20 administration of the estate should not enable the court 21 to require those required to contribute to do so before 22 receiving anything back. Now in the case of a solvent 23 unlimited company, it may not make any difference as to 24 whether the contributory rule applies or not. That 25 doesn't affect the underlying principle.</p> <p style="text-align: center;">Page 10</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes, I will certainly. So 18 2 when he says "The rule was applied", which rule is he 3 talking about? 4 MR TROWER: He is there talking about the rule in 5 Cherry v Boulton. 6 MR JUSTICE DAVID RICHARDS: Very well. Thank you. Yes. 7 MR TROWER: I think it is probably worth looking at 48 next 8 and then 51 to 53. 9 MR JUSTICE DAVID RICHARDS: Yes, I read 51 to 53. 48? 10 MR TROWER: 48, it is a sort of helpful summary of the 11 equitable rule. 12 MR JUSTICE DAVID RICHARDS: Which equitable rule is he 13 referring to -- 14 MR TROWER: Now he is there referring to the rule in 15 Cherry v Boulton. 16 MR JUSTICE DAVID RICHARDS: Yes, certainly, I understand 17 that. 18 MR TROWER: The only reason I wanted just to mention that is 19 one of the points is that in paragraph 51, the way 20 Lord Walker puts it, it is clear that he is regarding 21 the contributory rule as a special instance -- 22 MR JUSTICE DAVID RICHARDS: That is how I read it, yes. 23 MR TROWER: -- of the overall equitable rule derived from 24 Cherry v Boulton, as he puts it. Now there will be 25 characteristics the same, but it has obviously developed</p> <p style="text-align: center;">Page 12</p>

<p>1 in a different way. One of the characteristics which is</p> <p>2 different in relation to the contributory rule, is that</p> <p>3 it is based, as we will see, from Overend and Gurney on</p> <p>4 a construction of the statute, which obviously doesn't</p> <p>5 apply in relation to the rule in Cherry v Boulton, so</p> <p>6 you have to weave into the operation of the rule in</p> <p>7 Cherry v Boulton, the impact of the pari passu</p> <p>8 distribution rule that is provided for by the statute.</p> <p>9 MR JUSTICE DAVID RICHARDS: So far as I could see, the rule</p> <p>10 in Cherry v Boulton creates a sort of set off.</p> <p>11 I wasn't clear how much further than that it went,</p> <p>12 whereas the contributory rule, as you call it, clearly</p> <p>13 is quite (inaudible), it is quite different.</p> <p>14 MR TROWER: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: Because it is saying "You must</p> <p>16 pay before you are paid".</p> <p>17 MR TROWER: Yes, the way it is put in 13 -- perhaps we</p> <p>18 should look, on that point, the description of the rule</p> <p>19 in Cherry v Boulton at paragraph 13 in Lord Walker's</p> <p>20 judgment, because he approves what</p> <p>21 Mr Justice Karpovitch(?) said in Akinah.</p> <p>22 MR JUSTICE DAVID RICHARDS: Right.</p> <p>23 MR TROWER: So it is not dissimilar.</p> <p>24 MR JUSTICE DAVID RICHARDS: Oh yes, it's not. I see. Well,</p> <p>25 I mean the first sentence I find quite easy to follow.</p> <p style="text-align: center;">Page 13</p>	<p>1 MR JUSTICE DAVID RICHARDS: But if you have a case of</p> <p>2 an insolvent company -- I think the question I am not</p> <p>3 clear about with Cherry v Boulton is whether the</p> <p>4 fund-holder, the executors or whoever they are, can</p> <p>5 enforce the liability the beneficiary. Presumably the</p> <p>6 beneficiary owes money as a creditor.</p> <p>7 MR TROWER: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: Presumably the executor can</p> <p>9 enforce that liability --</p> <p>10 MR TROWER: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: -- against the beneficiary in</p> <p>12 his capacity as a debtor.</p> <p>13 MR TROWER: Yes.</p> <p>14 MR JUSTICE DAVID RICHARDS: That's right.</p> <p>15 MR TROWER: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: But I just don't quite</p> <p>17 understand how the rule in Cherry v Boulton really --</p> <p>18 I am not quite sure exactly how it works. Anyway, yes.</p> <p>19 MR TROWER: It is more about a retention right than it is</p> <p>20 about a recovery by the fund.</p> <p>21 MR JUSTICE DAVID RICHARDS: The fund can retain?</p> <p>22 MR TROWER: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR TROWER: That to which the contributory claims.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p style="text-align: center;">Page 15</p>
<p>1 MR TROWER: Yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: But I don't find the next</p> <p>3 sentence very easy to follow. Because the first</p> <p>4 sentence looks like the contributory rule.</p> <p>5 MR TROWER: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: But the next sentence. I mean</p> <p>7 when I read this before, I just wasn't sure I understood</p> <p>8 what he was saying. The contributory is paid by holding</p> <p>9 in his own hand a part of the mass, which if the mass</p> <p>10 were completed, he would receive back. What does that</p> <p>11 mean?</p> <p>12 MR TROWER: Well, the way I have always understood that is</p> <p>13 that you ask yourself the question; what is the totality</p> <p>14 of the mass? The totality of the mass is what the</p> <p>15 fund-holder has, plus what is in the hands of the</p> <p>16 contributor.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: You add those two together and you say to</p> <p>19 yourself to the extent that the contributor is retaining</p> <p>20 within his hands that part of the mass --</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: -- he is himself paid.</p> <p>23 MR JUSTICE DAVID RICHARDS: Well, it all depends on the size</p> <p>24 of the fund and the surplus.</p> <p>25 MR TROWER: Yes.</p> <p style="text-align: center;">Page 14</p>	<p>1 MR TROWER: That is the way --</p> <p>2 MR JUSTICE DAVID RICHARDS: That is the way you see it.</p> <p>3 Yes.</p> <p>4 MR TROWER: That is way I would see it.</p> <p>5 MR JUSTICE DAVID RICHARDS: Okay, okay.</p> <p>6 MR TROWER: But I might be wrong. Mr Zacaroli is looking as</p> <p>7 if I might be right.</p> <p>8 MR JUSTICE DAVID RICHARDS: Well, yes, I think that is</p> <p>9 consistent with the way it is expressed in a number of</p> <p>10 places, although not -- yes.</p> <p>11 MR TROWER: Yes. Which is why although there is sometimes</p> <p>12 language which is used by some of the judges in actually</p> <p>13 explaining how they see it, which can be a little bit</p> <p>14 impenetrable.</p> <p>15 MR JUSTICE DAVID RICHARDS: Cherry v Boulton?</p> <p>16 MR TROWER: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, but I mean your point is,</p> <p>18 isn't it, we are not, at this stage of the debate at any</p> <p>19 rate, terribly concerned with the rule in</p> <p>20 Cherry v Boulton, we are concerned with a different</p> <p>21 rule --</p> <p>22 MR TROWER: Correct.</p> <p>23 MR JUSTICE DAVID RICHARDS: -- which derives from the</p> <p>24 statutory scheme for companies.</p> <p>25 MR TROWER: Yes, but which draws on Cherry v Boulton and</p> <p style="text-align: center;">Page 16</p>

4 (Pages 13 to 16)

<p>1 you get that from Grissell's Case.</p> <p>2 MR JUSTICE DAVID RICHARDS: Right, okay.</p> <p>3 MR TROWER: Shall we go there next?</p> <p>4 MR JUSTICE DAVID RICHARDS: Certainly.</p> <p>5 MR TROWER: And it is back to 1A.</p> <p>6 MR JUSTICE DAVID RICHARDS: This is at tab --</p> <p>7 MR TROWER: This is tab 10.</p> <p>8 MR JUSTICE DAVID RICHARDS: 10, thank you.</p> <p>9 MR TROWER: Like a number of these cases, I just want to say</p> <p>10 this before we look at it, this case was all about</p> <p>11 whether or not the person liable to contribute was</p> <p>12 entitled to a set off, because he would be in a better</p> <p>13 position if there was a set off. One very often finds</p> <p>14 that with these cases that that is what is going on.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR TROWER: Because the way the contributory rule operates</p> <p>17 is more beneficial to the estate than the operation of</p> <p>18 the set off.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR TROWER: So just working through the central parts of the</p> <p>21 opening, the headnote itself describes that, and</p> <p>22 your Lordship gets the essential facts in the second</p> <p>23 paragraph, the facts of the case. If your Lordship</p> <p>24 reads the second, third and fourth paragraphs on the</p> <p>25 facts.</p> <p style="text-align: center;">Page 17</p>	<p>1 middle of the next page "In the first place".</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR TROWER: Which is of relevance in the sense that it is</p> <p>4 dealing with the equivalent of what is now Section 80.</p> <p>5 The bits matter on the formulation of contributory rules</p> <p>6 start in the next paragraph --</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR TROWER: -- and really go onto the end of the judgment.</p> <p>9 It is one of those cases where --</p> <p>10 MR JUSTICE DAVID RICHARDS: You've really got to read it.</p> <p>11 Okay, well I will read that, yes.</p> <p>12 MR TROWER: I will come to a point on Section 101.</p> <p>13 MR JUSTICE DAVID RICHARDS: Right. Yes.</p> <p>14 MR TROWER: On the 101 point, I think we just need to look</p> <p>15 at 101, because it is a slightly odd way of putting at</p> <p>16 it in the light of the way 101 is drafted. It is in</p> <p>17 bundle 2 of the authorities bundles at tab 3. This is</p> <p>18 the then equivalent of what is now in Section 149, which</p> <p>19 is that section your Lordship just looked at yesterday.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes, which itself has been</p> <p>21 amended.</p> <p>22 MR TROWER: Itself has been recently amended, yes. So</p> <p>23 tab 3, three or four pages in.</p> <p>24 MR JUSTICE DAVID RICHARDS: Section 10.</p> <p>25 MR TROWER: "The court may, at any time ... (reading to the</p> <p style="text-align: center;">Page 19</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TROWER: Then if your Lordship would turn on to</p> <p>3 Lord Chelmsford's judgment that starts page 533 and read</p> <p>4 the first two paragraphs. He sets out what is going on.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TROWER: I don't know how far your Lordship has got?</p> <p>7 MR JUSTICE DAVID RICHARDS: Well, I read those two</p> <p>8 paragraphs.</p> <p>9 MR TROWER: The two paragraphs.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TROWER: There your Lordship sees he then goes on in the</p> <p>12 next two paragraphs to bring out the construction of the</p> <p>13 Companies Act point.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TROWER: Then you get the three options that he describes</p> <p>16 as to what might happen:</p> <p>17 "Wanting to pay the full amount remaining unpaid on</p> <p>18 the shares before receiving any dividends in respect of</p> <p>19 the debt due to him, or before receiving payment of any</p> <p>20 dividend to pay out any calls that may have been made</p> <p>21 upon these shares, or is he entitled to deduct the</p> <p>22 amount of calls which have been made, but not paid by</p> <p>23 him from the debt which is due to him and receive</p> <p>24 a dividend upon the balance."</p> <p>25 Then the conclusion in the paragraph starting in the</p> <p style="text-align: center;">Page 18</p>	<p>1 words) ... in pursuance of this part of this Act."</p> <p>2 So pausing there, the order available under 101 is:</p> <p>3 "... exclusive of calls made or to be made by the</p> <p>4 court in pursuance of this part of the act."</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TROWER: And then you go and see:</p> <p>7 "... and it may, in making such order, when the</p> <p>8 company is not limited, ie unlimited, allow to such</p> <p>9 contributory by way of set off any monies due to him and</p> <p>10 the estate which he represents."</p> <p>11 Et cetera.</p> <p>12 MR JUSTICE DAVID RICHARDS: Just let me -- one moment. Yes.</p> <p>13 DEFENCE: Now in the light of that, what is actually said by</p> <p>14 the Lord Chancellor in the middle of page 536 is</p> <p>15 a little difficult to understand expressed in precisely</p> <p>16 exactly the way in which it is expressed, because it is</p> <p>17 tolerably plain from the wording at 101, the order that</p> <p>18 can be made does not extend to orders made by virtue of</p> <p>19 any call made or to be made by the court in pursuance of</p> <p>20 this part of this Act.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: So it may be that on its true construction of</p> <p>23 what -- maybe what the Lord Chancellor was thinking</p> <p>24 about here was where you have unlimited liability and</p> <p>25 pre-liquidation calls, but that is a slightly odd</p> <p style="text-align: center;">Page 20</p>

<p>1 concept.</p> <p>2 MR JUSTICE DAVID RICHARDS: I don't know whether that was</p> <p>3 possible under the 1862 Act.</p> <p>4 MR TROWER: No, so one can quite see why he might have</p> <p>5 thought that in the context of unlimited liability, and</p> <p>6 no issues in relation to the solvency of contributory,</p> <p>7 it didn't make any difference whether you had</p> <p>8 a contributory rule or not, because there was always</p> <p>9 going to be full unlimited liability in respect of</p> <p>10 everything.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes, I understand that.</p> <p>12 MR TROWER: But we are puzzled, and one comes back to this</p> <p>13 a little bit later, but it doesn't appear to work</p> <p>14 terribly well as a statement of principle in relation to</p> <p>15 unlimited liability companies.</p> <p>16 MR JUSTICE DAVID RICHARDS: No, was this ever commented on</p> <p>17 by --</p> <p>18 MR TROWER: Yes, well there have been one or two cases</p> <p>19 subsequently where we get some sort of help on it, but</p> <p>20 it is not really dealt with expressly anywhere on this</p> <p>21 point.</p> <p>22 MR JUSTICE DAVID RICHARDS: Did any of the great</p> <p>23 19th century textbook writers pick up what</p> <p>24 Lord Chelmsford said? There was Mr Lindley, of course.</p> <p>25 MR TROWER: Of course.</p> <p style="text-align: center;">Page 21</p>	<p>1 MR JUSTICE DAVID RICHARDS: Right. So the first paragraph</p> <p>2 of his judgment?</p> <p>3 MR TROWER: Yes, it is quite a long one.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes. Lord Romily, his reading</p> <p>5 of the section seems correct.</p> <p>6 MR TROWER: Yes. Now the next case which does bear more</p> <p>7 directly on the unlimited liability point is Gibbs and</p> <p>8 West's Case, which is tab 19. There were two judgments</p> <p>9 in Gibbs and West's Case, and the one that matters is</p> <p>10 the second of the judgments which starts at page 327.</p> <p>11 MR JUSTICE DAVID RICHARDS: Right.</p> <p>12 MR TROWER: Your Lordship can there see that the claimants,</p> <p>13 West and Gibbs -- general creditors of the company:</p> <p>14 "The only question I have now to decide is whether</p> <p>15 in the event ... (reading to the words) ... to be made."</p> <p>16 Would your Lordship then read to almost the end of</p> <p>17 328?</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes, certainly. So he then goes</p> <p>19 on to discuss whether it is a limited or an unlimited</p> <p>20 company.</p> <p>21 MR TROWER: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: What does he conclude there?</p> <p>23 MR TROWER: He then says it is unlimited.</p> <p>24 MR JUSTICE DAVID RICHARDS: He says it's unlimited, yes.</p> <p>25 MR TROWER: Then at the very end, the last paragraph.</p> <p style="text-align: center;">Page 23</p>
<p>1 MR JUSTICE DAVID RICHARDS: Mr Palmer and Mr Buckley.</p> <p>2 MR TROWER: Well, we can certainly look into that.</p> <p>3 MR JUSTICE DAVID RICHARDS: Well, they may or may not.</p> <p>4 MR TROWER: My Lord, I have not done that, and that is</p> <p>5 certainly an exercise we can carry out.</p> <p>6 MR JUSTICE DAVID RICHARDS: No, well don't worry. I mean on</p> <p>7 the face of it, it does look as if he has mis-read</p> <p>8 Section 101.</p> <p>9 MR TROWER: It does, doesn't it.</p> <p>10 MR JUSTICE DAVID RICHARDS: Anyway, there we are, yes.</p> <p>11 MR TROWER: The next case on the list is Calisher's Case,</p> <p>12 tab 12. This is another relatively short judgment:</p> <p>13 "A contributory of a limited company had been wound</p> <p>14 out, but the court under the Companies Act is not</p> <p>15 entitled in the absence of a special agreement to set</p> <p>16 off monies due to him from the company against a call</p> <p>17 made before the winding up."</p> <p>18 One of the questions that arose in this case was</p> <p>19 whether a special contract in relation to this issue</p> <p>20 affected the operation of the principle. It is</p> <p>21 Lord Romily, it starts at page 217. Again, it is</p> <p>22 a relatively short judgment, I think, which touches on</p> <p>23 the 101 point at the end, but not in a particularly</p> <p>24 clear way. It is really just the main first paragraph</p> <p>25 that your Lordship should read.</p> <p style="text-align: center;">Page 22</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. Yes, I see.</p> <p>2 MR TROWER: So that an approach that is adopted in relation</p> <p>3 to unlimited liability company in the light of his</p> <p>4 construction of 101, which again is a slightly</p> <p>5 surprising construction of 101, but that is the way he</p> <p>6 has approached it. Now it may well be if you go back to</p> <p>7 page 328, your Lordship will see the reference to the</p> <p>8 passage in Lord Chelmsford's judgment which Mr Higgins</p> <p>9 said was erroneous, though I confess I was unable to</p> <p>10 follow him when said so, is in these terms.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR TROWER: The passage where that argument was made starts</p> <p>13 at page 325 of the argument.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TROWER: Your Lordship sees in particular Lord Chelmsford</p> <p>16 dictums(?) he made under the erroneous supposition in</p> <p>17 the first part apply to cause. Now that may be what it</p> <p>18 was that the Vice Chancellor didn't understand.</p> <p>19 MR JUSTICE DAVID RICHARDS: I think it clearly is, yes.</p> <p>20 MR TROWER: My Lord, the next point is the Black & Co which</p> <p>21 is tab 23.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TROWER: Your Lordship again can get I think what you</p> <p>24 need from the headnote on the facts.</p> <p>25 MR JUSTICE DAVID RICHARDS: Where do you suppose Paragrasu</p> <p style="text-align: center;">Page 24</p>

<p>1 is or was?</p> <p>2 MR TROWER: I would guess South America, I might be wrong.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes (inaudible), it has</p> <p>4 a Joseph Conrad ring to it.</p> <p>5 MR TROWER: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, sorry, page?</p> <p>7 MR TROWER: Yes, if you just read the headnote, just because</p> <p>8 that will give what the case is about.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR TROWER: Then there are two passages in the judgment for</p> <p>11 your Lordship to read. One starts on page 260 and goes</p> <p>12 over the page to halfway down 261, and the other starts</p> <p>13 at the top of the first half of the page 262.</p> <p>14 MR JUSTICE DAVID RICHARDS: So 260 starts --</p> <p>15 MR TROWER: 260 starts "I pass therefore."</p> <p>16 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>17 MR TROWER: Then halfway down 261, and then if you read the</p> <p>18 first half of 262.</p> <p>19 MR JUSTICE DAVID RICHARDS: Right. Then on 262 read from --</p> <p>20 MR TROWER: From the top to the end of the paragraph.</p> <p>21 MR JUSTICE DAVID RICHARDS: What, the moment the winding up</p> <p>22 takes place?</p> <p>23 MR TROWER: Yes.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR TROWER: And then there is a passage in the judgment of</p> <p style="text-align: center;">Page 25</p>	<p>1 a particular unlimited liability company. Your Lordship</p> <p>2 sees in relation to what Lord Justice Mellish has said</p> <p>3 here, that the reason that you distinguish between the</p> <p>4 two, or the reasonable distinction between the two is</p> <p>5 that other creditors' rights are not prejudiced in any</p> <p>6 way in the context of unlimited liability. Now, of</p> <p>7 course, that does actually pre-suppose that the</p> <p>8 unlimited contributory is itself going to be solvent(?).</p> <p>9 Would your Lordship just give me one moment?</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes, certainly.</p> <p>11 MR TROWER: My Lord, the next case is Whitehouse that we</p> <p>12 need to look at. I am looking at it for a couple of</p> <p>13 reasons, including the fact that it is then subsequently</p> <p>14 distinguished and said to be wrong on one point. But</p> <p>15 Whitehouse was a case in which the rule was applied.</p> <p>16 The contributory was not permitted to set off a debt due</p> <p>17 to him from the company against calls made against him.</p> <p>18 I think we looked at this briefly yesterday.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR TROWER: Where one needs to start is on page 596.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: The application is described starting on the</p> <p>23 second paragraph. What the Master of the Rolls was</p> <p>24 concerned with was the question of whether or not a set</p> <p>25 off was available, and if it wasn't, why it wasn't.</p> <p style="text-align: center;">Page 27</p>
<p>1 Lord Justice Mellish at page 265 dealing with the</p> <p>2 unlimited liability point, about halfway down.</p> <p>3 MR JUSTICE DAVID RICHARDS: Right, Lord Selbourne doesn't</p> <p>4 comment on that at all?</p> <p>5 MR TROWER: No, he doesn't.</p> <p>6 MR JUSTICE DAVID RICHARDS: No. So page 265:</p> <p>7 "In the case of unlimited liability ... "</p> <p>8 Is that right?</p> <p>9 MR TROWER: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: Hold on, sorry, where should</p> <p>11 I start?</p> <p>12 MR TROWER: 265.</p> <p>13 MR JUSTICE DAVID RICHARDS: Perhaps I shall start at the</p> <p>14 top.</p> <p>15 MR TROWER: Start at the top, that is probably easiest, yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TROWER: So what your Lordship sees going on here is the</p> <p>18 articulation of a couple of points. The first is that</p> <p>19 the right of set off is excluded, essentially by</p> <p>20 implication, because of the way 101 is actually drafted.</p> <p>21 So when one comes back in, they tend to be looking --</p> <p>22 with the exception of the Malinn(?) decision -- at the</p> <p>23 question of the operation of 101 for that purpose,</p> <p>24 rather than necessarily for the purpose of deciding</p> <p>25 whether or not there is to be a set off in respect of</p> <p style="text-align: center;">Page 26</p>	<p>1 MR JUSTICE DAVID RICHARDS: Right.</p> <p>2 MR TROWER: If you go to page 599 at, the paragraph starting</p> <p>3 "if therefore" and read down to the end of the paragraph</p> <p>4 at the top of page 600 your Lordship will there see his</p> <p>5 reasoning.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TROWER: But part of this reasoning was subsequently</p> <p>8 disapproved by the Court of Appeal.</p> <p>9 MR JUSTICE DAVID RICHARDS: Right. Yes.</p> <p>10 MR TROWER: The only other paragraph I think your</p> <p>11 Lordship -- well, no, if you could read the first</p> <p>12 paragraph at the top of page 601.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes. Yes.</p> <p>14 MR TROWER: That point about the lack of similarity in the</p> <p>15 identity of the debtor and creditor is a point which is</p> <p>16 picked up in Pyle in the Court of Appeal, which I will</p> <p>17 show you in a moment and is said to be wrong. But then</p> <p>18 he deals on page 601 further down with Section 101.</p> <p>19 There is a passage about 10 lines up where it appears</p> <p>20 that he at least understood the point on the true</p> <p>21 construction of 101.</p> <p>22 MR JUSTICE DAVID RICHARDS: Right, sorry, so that is on the</p> <p>23 same page?</p> <p>24 MR TROWER: The same page, down to the bottom. So that</p> <p>25 sentence, that excludes calls and the winding up, but</p> <p style="text-align: center;">Page 28</p>

<p>1 would include a call made before the winding up, is</p> <p>2 where he seems to (inaudible) up.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR TROWER: I think that was all I wanted to get out of</p> <p>5 Whitehouse. The next case is behind tab 27 is</p> <p>6 Gill's Case. Now there is a very short sentence really,</p> <p>7 no more than that, that I wanted to draw your Lordship's</p> <p>8 attention to in that. This was another case on</p> <p>9 contributory rule, and was a case where it was held that</p> <p>10 the Judicita Act set off right had not interfered with</p> <p>11 the operation of the contributory rule. The way</p> <p>12 Vice Chancellor Bacon puts it on page 757, and it is not</p> <p>13 directly in the context of the operation of the</p> <p>14 contributory rule, but it is the way in which he</p> <p>15 describes the statutory obligation of the contributor.</p> <p>16 He describes it as the statutory obligation springing</p> <p>17 from the contract to take shares, which you see about</p> <p>18 10 lines down context.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p>20 MR TROWER: Your Lordship may find it helpful in that</p> <p>21 context. Then can we go to Re Pyle Works which is</p> <p>22 tab 34. Now Pyle was a case about mortgaging calls on</p> <p>23 shares, so the extent to which the company could</p> <p>24 mortgage calls. Before we get to the judgment, there is</p> <p>25 just one comment made in the argument by</p> <p style="text-align: center;">Page 29</p>	<p>1 Down to the end of that paragraph.</p> <p>2 MR JUSTICE DAVID RICHARDS: I see, yes.</p> <p>3 MR TROWER: So he said that the Master of the Rolls was</p> <p>4 right on one way of looking at it, based on Black's</p> <p>5 Case, but when he talked about a call being something</p> <p>6 which accrues to the liquidator and not really due to</p> <p>7 the company, he was wrong.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR TROWER: Then on page 576 he comes back to the capital</p> <p>10 point again in the context of simply citing what</p> <p>11 Lord Cairns said in Webb v Wiffin. It is really the</p> <p>12 passage starting:</p> <p>13 "He therefore in distinct terms ... "</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR TROWER: This, of course, is all being said in a context</p> <p>16 of an assessment as to what was available to the company</p> <p>17 as a mortgage. That is what one has to bear in mind.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes, right.</p> <p>19 MR TROWER: Then Lord Justice Lindley also deals with</p> <p>20 questions of capital and questions of what Whitehouse</p> <p>21 decided. 582, starting in the middle of the page.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes. Yes.</p> <p>23 MR TROWER: So there he is talking about the nature of the</p> <p>24 capital. He then talks about how it has got in under</p> <p>25 the various provisions and the materiality of the form</p> <p style="text-align: center;">Page 31</p>
<p>1 Lord Justice Lindley at 560 which your Lordship might</p> <p>2 find of assistance.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR TROWER: Where he characterises:</p> <p>5 "The capital of an unlimited company is the capital</p> <p>6 which has been called up and so much more as the company</p> <p>7 wants."</p> <p>8 Is the way he puts it. He puts it that way. Lord</p> <p>9 Justice Cotton had a slightly different sort of approach</p> <p>10 which I will show you as well.</p> <p>11 MR JUSTICE DAVID RICHARDS: Right.</p> <p>12 MR TROWER: We then go to the judgments of Lord Justices</p> <p>13 Cotton and Lindley, and Lord Justice Cotton starts at</p> <p>14 573. Now the passage I was going to show you, perhaps</p> <p>15 just for completeness, Lord Justice Cotton takes</p> <p>16 a slightly different approach to what is the capital of</p> <p>17 an unlimited company, which your Lordship see at 5674 at</p> <p>18 the bottom of the page, "But it was said that", perhaps</p> <p>19 stop at the end of the first sentence. Well, possibly,</p> <p>20 yes. The bit I really wanted your Lordship to see was</p> <p>21 what he says about Whitehouse.</p> <p>22 MR JUSTICE DAVID RICHARDS: Oh right.</p> <p>23 MR TROWER: Halfway down:</p> <p>24 "It is very true ... (reading to the words) ...</p> <p>25 before the late Master of the Rolls."</p> <p style="text-align: center;">Page 30</p>	<p>1 of procedure.</p> <p>2 (11.45 am)</p> <p>3 He then summarises over the page, at page 583, in</p> <p>4 the paragraph beginning, "A careful study", the first</p> <p>5 three points.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, I have that.</p> <p>7 MR TROWER: Then finally in this judgment at page 585, the</p> <p>8 bottom paragraph, is where Lord Justice -- well, it's</p> <p>9 the bottom two paragraphs where he deals with the Master</p> <p>10 of the Rolls in Whitehouse.</p> <p>11 MR JUSTICE DAVID RICHARDS: Right. Yes.</p> <p>12 MR TROWER: So further confirmation, if it be needed, that</p> <p>13 the significance of the contributory rule arises in the</p> <p>14 context of the statutory prohibition on set-off or the</p> <p>15 fact there is no right to set-off in the light of the</p> <p>16 statutory code taken as a whole.</p> <p>17 My Lord, a convenient moment?</p> <p>18 MR JUSTICE DAVID RICHARDS: Certainly. I will rise for five</p> <p>19 minutes.</p> <p>20 (11.47 am)</p> <p>21 (Short break)</p> <p>22 (11.55 am)</p> <p>23 MR TROWER: My Lord, I think we can move to the next</p> <p>24 authorities bundle which is 1(b). The next case in the</p> <p>25 list is the first of the Auriferous cases. This is a</p> <p style="text-align: center;">Page 32</p>

<p>1 case about two companies in liquidation.</p> <p>2 MR JUSTICE DAVID RICHARDS: So this is tab?</p> <p>3 MR TROWER: Tab number 38.</p> <p>4 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>5 MR TROWER: The G company is the member. The A company is</p> <p>6 the company, for the purposes of looking at this.</p> <p>7 MR JUSTICE DAVID RICHARDS: Right.</p> <p>8 MR TROWER: The first case deals with set-off.</p> <p>9 MR JUSTICE DAVID RICHARDS: Right.</p> <p>10 MR TROWER: They are both judgments of Mr Justice Wright.</p> <p>11 Once your Lordship has read the headnote, again it's</p> <p>12 a relatively short judgment, I think there probably</p> <p>13 isn't very much of a shortcut to just reading the</p> <p>14 judgment.</p> <p>15 MR JUSTICE DAVID RICHARDS: Very well.</p> <p>16 MR TROWER: Then Auriferous 2, which is behind the next tab,</p> <p>17 is what happens where the company declared a dividend</p> <p>18 and the contributory sought to prove. So that is more</p> <p>19 the application of the contributory rule. Again, it is</p> <p>20 a short judgment. It starts at page 430.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: There is a point at the top of page 431 which is</p> <p>23 worth perhaps just noting.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR TROWER: "The call has been made in a liquidation but</p> <p style="text-align: center;">Page 33</p>	<p>1 MR TROWER: That passage at the end of Mr Justice Buckley's</p> <p>2 judgment I think was picked up and used by Lord Walker</p> <p>3 in Kaupthing.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR TROWER: Then tab 48, and we are nearly there.</p> <p>6 MR JUSTICE DAVID RICHARDS: Right.</p> <p>7 MR TROWER: Tab 48 is Rhodesia Goldfields. Again, we are</p> <p>8 looking at it, as much as anything else, because it was</p> <p>9 one of Lord Walker's cases. It's actually a slightly</p> <p>10 different context in which the principle arises. If</p> <p>11 your Lordship would just read the headnote you will see</p> <p>12 what it is.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR TROWER: So what this is about is in a retention context</p> <p>15 the question is, where a debt is not immediately</p> <p>16 payable, what the consequences are so far as the ability</p> <p>17 of the debtor to share in the distribution of funds</p> <p>18 concerned. If we go to the judgment of Mr Justice</p> <p>19 Swinfen Eady and your Lordship sees the first paragraph</p> <p>20 on page 245, the nature of the claim against the debtor</p> <p>21 seeking to contribute.</p> <p>22 MR JUSTICE DAVID RICHARDS: Sorry, where are you? "One of</p> <p>23 the claims against Partridge."</p> <p>24 MR TROWER: "One of the claims against Partridge", and then</p> <p>25 down to the bottom there.</p> <p style="text-align: center;">Page 35</p>
<p>1 when it was made there was only a contingent liability</p> <p>2 which might never become enforceable and could not be</p> <p>3 set off unless perhaps after some process of</p> <p>4 evaluation."</p> <p>5 Now, of course at that stage they were not thinking</p> <p>6 about valuing particular claims in quite the way that we</p> <p>7 do now.</p> <p>8 The next case behind tab 45 is West Coast Gold</p> <p>9 Fields. Now, this is a case which bears on the question</p> <p>10 of future liability, although in a rather different</p> <p>11 context than the one we are concerned with. Again, the</p> <p>12 headnote is a reasonably clear exposition of the issue.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR TROWER: So the claim against the company in this case</p> <p>15 was in its capacity as a shareholder rather than a claim</p> <p>16 for a debt. So that was the difference. Mr Justice</p> <p>17 Buckley's judgment starts at 600. The first paragraphs</p> <p>18 recite matters in a fairly conventional form. Then your</p> <p>19 Lordship can pick up the reasoning at page 601 where he</p> <p>20 describes what the trustee says that he ought to</p> <p>21 receive. This is the trustee in bankruptcy.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TROWER: Actually if your Lordship would read to the end</p> <p>24 of the case again. I am sorry, but it is very short.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 34</p>	<p>1 There is no doubt it is a debt but at the moment</p> <p>2 it's not ascertained. This is really a case on Cherry v</p> <p>3 Boulton rather than ...</p> <p>4 MR JUSTICE DAVID RICHARDS: Right.</p> <p>5 MR TROWER: Then you have a description of the rule in</p> <p>6 Cherry v Boulton effectively at the top of page 246.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, this is</p> <p>8 Mr Justice Kekewich.</p> <p>9 MR TROWER: Yes, that's right. Then there is a paragraph if</p> <p>10 your Lordship would read starting at the bottom of 246,</p> <p>11 "Various cases".</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TROWER: Your Lordship may recall from the written</p> <p>14 submissions there was then a point that was made about</p> <p>15 how this didn't apply in relation to future calls, this</p> <p>16 kind of concept, and there was a reference to something</p> <p>17 Mr Justice Swinfen Eady had said. He actually said it</p> <p>18 in the context of the argument. Your Lordship, if you</p> <p>19 go back to 242:</p> <p>20 "The company could not set off a future debt, e.g.</p> <p>21 a future call. The present claim is for an existing</p> <p>22 debt."</p> <p>23 Now, that's a comment that was made in the context</p> <p>24 of the argument in relation to the set-off point.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 36</p>

<p>1 MR TROWER: Not, as far as one can tell, in relation to the 2 Cherry v Boulton issue. 3 MR JUSTICE DAVID RICHARDS: Well, yes, because that's what 4 he says at the top of 247, isn't it? 5 MR TROWER: Yes. The reason for drawing that to your 6 Lordship's attention is I think LBL make some point on 7 this and your Lordship has to be careful as to 8 exactly -- it's in the argument anyway and not in the 9 judgment -- but it seems to be in the context of 10 a debate about set-off in circumstances where set-off 11 rights were much tighter in the concept of future 12 maturity and contingency. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR TROWER: The only other case on this line I wanted to 15 take your Lordship to was White Star, behind tab 54, now 16 this case was all about how the introduction of 17 a set-off rule did not affect the contributory rule per 18 se. So, although this line obviously started on the 19 basis that you had to have the contributory rule in 20 order not to interfere or, sorry, in circumstances where 21 the set-off right had actually been excluded and the 22 pari passu rule was dominant, what this case makes clear 23 is that the mere introduction of a set-off rule across 24 the board does not of itself affect the operation of the 25 contributory rule. But in a sense that's obvious from</p> <p style="text-align: center;">Page 37</p>	<p>1 Sir William McLintock was appointed liquidator of the 2 Royal Mail company. 3 479, yes. Reading where, Mr Trower? 4 MR TROWER: Starting 479, "If the view above expressed", 5 just that one paragraph. 6 MR JUSTICE DAVID RICHARDS: Right. Yes. 7 MR TROWER: My Lord, those are the authorities which help on 8 the way in which the rule developed, how it's been 9 applied and quite a lot of which were referred to in the 10 judgment of Lord Walker, not all of them but quite a few 11 of them. We respectfully submit that one can see very 12 clearly from that line of authority that there are two 13 strands moving together. The first draws on the right 14 of retainer arising from the rule in Cherry v Boulton. 15 There is a clear link between the two concepts. The 16 second is to the operation of the statutory code in its 17 entirety, the focus of which is on the pari passu 18 distribution rule but a number of those cases, as your 19 Lordship will have seen, look at the code more 20 generally. 21 Now, we accept that there are a number of cases 22 which indicate that, in the normal course, the right of 23 retainer arising from the rule in Cherry v Boulton 24 wouldn't apply to entitle the fund owing a present debt 25 to retain an amount equal to a future liability of that</p> <p style="text-align: center;">Page 39</p>
<p>1 the fact that Kaupthing has actually confirmed that it 2 still exists. 3 This is the judgment of the Court of Appeal. If 4 your Lordship just reads the headnote because there are 5 two companies here. One of the companies is called the 6 Royal Mail company and the other is the White Star 7 company, a shipping company presumably. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR TROWER: The Royal Mail company is the holder of the 10 shares and the White Star company is the company. 11 MR JUSTICE DAVID RICHARDS: I think the White Star company 12 owned the Titanic. 13 MR TROWER: Yes, I think it did. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR TROWER: One of the basic points in the case was whether 16 or not there were unpaid shares, that was the factual 17 question, or whether or not there would be payment on 18 those shares. So the issue arose in that context. But 19 the statement of principle that your Lordship may find 20 helpful is on page 479, starting at, "If the view above 21 expressed be correct", that view being that there are 22 still unpaid shares. 23 MR JUSTICE DAVID RICHARDS: Sorry, page? 24 MR TROWER: 479. 25 MR JUSTICE DAVID RICHARDS: Sorry, my eye caught the fact</p> <p style="text-align: center;">Page 38</p>	<p>1 person to the fund. But that doesn't really help on 2 whether the contributory rule can ever apply in those 3 circumstances, because we submit that the contributory 4 rule can apply once an administrator of the company has 5 been appointed and the potential contributory then seeks 6 to prove in the distributing administration. 7 The contributory rule is stricter than the right of 8 retainer on this point. It's described by Lord Walker 9 in Kaupthing as "a special case" and it's stricter for 10 very good reason. The fund from which the contributory 11 seeks to recover the assets of the company is the very 12 fund which the contributory has undertaken to complete, 13 albeit at some stage in the future. It's the very fund 14 that is to be distributed amongst the creditors in 15 accordance with the statutory scheme. It follows that 16 if the contributory rule is not exercised, that 17 statutory scheme for distribution will be undermined in 18 exactly the same way in administration as it would be or 19 was in the context of a liquidation as formulated in the 20 Grissell's case. 21 Even though the statutory scheme, taken as a whole, 22 hasn't yet reached the stage at which the contributory's 23 liability to the company is payable under the statute, 24 because a call has not been made, the remaining elements 25 of the scheme are in place, the remaining relevant</p> <p style="text-align: center;">Page 40</p>

<p>1 elements. We submit that the contributory already has</p> <p>2 a clear contingent liability to contribute. Now, one of</p> <p>3 the points that is taken against us, which I touched on</p> <p>4 I think at the very beginning but I will mention again</p> <p>5 in this context, is that it's argued against us that the</p> <p>6 effect of our approach is that it drives a coach and</p> <p>7 horses through section 75.2(f), which restricts a member</p> <p>8 from proving in his capacity as such. I am sorry, I</p> <p>9 said 75. I meant --</p> <p>10 MR JUSTICE DAVID RICHARDS: 74.</p> <p>11 MR TROWER: -- 74, I am so sorry, which restricts a member</p> <p>12 from proving in his capacity as such. I say by way of</p> <p>13 supplement that it fails to give adequate emphasis to</p> <p>14 the fact that in Soden (?) the House of Lords made clear</p> <p>15 the rule was not that a shareholder should (inaudible)</p> <p>16 member. The reason they obviously say that is because</p> <p>17 that is the effect of what will happen if the</p> <p>18 contributory rule operates. They won't be entitled to</p> <p>19 come in to prove under the insolvency. But there is</p> <p>20 a very short answer to this submission.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: Actually, as it happens, a fairly similar</p> <p>23 submission was made in Grissell's case, as your Lordship</p> <p>24 may recall, which was rejected. The short answer is</p> <p>25 that 74.2(f) is doing a very different job from the</p> <p style="text-align: center;">Page 41</p>	<p>1 cases address the point as to where the company has gone</p> <p>2 into liquidation but a call has not yet been made.</p> <p>3 MR JUSTICE DAVID RICHARDS: They are all cases where a call</p> <p>4 has been made.</p> <p>5 MR TROWER: Where a call has been made, yes.</p> <p>6 If we are correct as to the application of the</p> <p>7 contributory rule, the members cannot prove in the LBIE</p> <p>8 liquidation until they have paid the amount for which</p> <p>9 they are liable. They are liable for the full amount of</p> <p>10 the deficiency. In practice, that probably does follow</p> <p>11 that, because they have unlimited liability, they may</p> <p>12 not be in a position to discharge that in order to</p> <p>13 prove, but that's not a particularly surprising</p> <p>14 consequence given that they are companies with unlimited</p> <p>15 liability.</p> <p>16 Looking at it the other way round, our claims</p> <p>17 against the members, the fact that the member is itself</p> <p>18 subject to an insolvency process -- I mean, we have been</p> <p>19 looking up till now in the context of the contributory</p> <p>20 rule, i.e. the claim coming into us.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR TROWER: What is the effect of the fact the member is</p> <p>23 itself subject to an insolvency process? Well, it's</p> <p>24 important in the sense of proof because it enables us to</p> <p>25 prove in respect of the contingent liability.</p> <p style="text-align: center;">Page 43</p>
<p>1 contributory rule. It simply applied so as to exclude</p> <p>2 a particular category of claim from competing against</p> <p>3 the claims of other outside creditors, full stop.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes. I mean, it's</p> <p>5 equally applicable in the case of a company where the</p> <p>6 capital is fully paid up.</p> <p>7 MR TROWER: Yes. So it has nothing to do with a situation</p> <p>8 in which a member of the company is under a liability to</p> <p>9 contribute and seeks to prove, notwithstanding that. So</p> <p>10 it really doesn't help at all on this point. Although</p> <p>11 it's put at the forefront of some of the submissions and</p> <p>12 that's why I felt it only right to deal with it.</p> <p>13 MR JUSTICE DAVID RICHARDS: I will see how it's put.</p> <p>14 Mr Trower, let us assume that LBIE was in liquidation</p> <p>15 but no call has yet been made.</p> <p>16 MR TROWER: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: Now, just the various cases you</p> <p>18 have shown me -- I appreciate there is obviously this</p> <p>19 distinction between limited and unlimited companies, but</p> <p>20 putting that on one side for the moment.</p> <p>21 MR TROWER: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: What do the cases demonstrate</p> <p>23 about that circumstance? So there is unpaid capital but</p> <p>24 no call yet made.</p> <p>25 MR TROWER: Yes. As far as I am aware, my Lord, none of the</p> <p style="text-align: center;">Page 42</p>	<p>1 Auriferous number 1 confirmed that the ruling in</p> <p>2 Grissell's case continues to apply in that kind of</p> <p>3 circumstance. The contributory cannot meet in that</p> <p>4 circumstance the company's inbound claim with a plea of</p> <p>5 set-off.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes. But presumably set-off is</p> <p>7 available in the claim made --</p> <p>8 MR TROWER: The other way round, into our --</p> <p>9 MR JUSTICE DAVID RICHARDS: -- into the member, yes. Hold</p> <p>10 on. That's Auriferous number 2, is it?</p> <p>11 MR TROWER: Yes. Now, my Lord, just for your Lordship's</p> <p>12 note, in paragraphs 51 to 60 of our supplemental</p> <p>13 submissions we deal with the position in relation to the</p> <p>14 application of insolvency set-off in circumstances in</p> <p>15 which the court might conclude the contributory rule</p> <p>16 doesn't apply, if your Lordship were to be of that view.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: The analysis is relatively clean I think in that</p> <p>19 part of the supplemental submissions. What it seeks to</p> <p>20 deal with is the argument that LBL appears to be making,</p> <p>21 which is that insolvency set-off doesn't operate as</p> <p>22 regards the members' contingent liability to contribute</p> <p>23 in a manner which enables LBL to prove in full in LBIE's</p> <p>24 administration without taking account of its contingent</p> <p>25 liability to contribute.</p> <p style="text-align: center;">Page 44</p>

<p>1 MR JUSTICE DAVID RICHARDS: Sorry, can you just run that</p> <p>2 past me again. Are we focusing for the moment on proofs</p> <p>3 in LBIE's, in LBIE's --</p> <p>4 MR TROWER: This is what their submission appears to be</p> <p>5 going to, yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: Right.</p> <p>7 MR TROWER: What LBL appears to be submitting is that it is</p> <p>8 entitled to prove against LBIE and receive 100p in the</p> <p>9 pound.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TROWER: But LBIE is prevented from proving against it</p> <p>12 until it has gone into liquidation and made a call.</p> <p>13 MR JUSTICE DAVID RICHARDS: This is because LBIE has no</p> <p>14 claim.</p> <p>15 MR TROWER: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: It's the liquidator of LBIE</p> <p>17 which would have the claim.</p> <p>18 MR TROWER: Yes, and the other arguments based on that</p> <p>19 proposition.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR TROWER: Which we simply say cannot be right. The reason</p> <p>22 it cannot be right is because the creditors of LBIE, for</p> <p>23 whatever reason, are not able to take the benefit of the</p> <p>24 contributory rule but it must be the case that in those</p> <p>25 circumstances a set-off at least is available.</p> <p style="text-align: center;">Page 45</p>	<p>1 MR TROWER: Yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: It is in that respect that Sir</p> <p>3 George Jessel was wrong in Re Whitehouse.</p> <p>4 MR TROWER: That's correct, yes.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TROWER: My Lord, I think I should make clear that, in</p> <p>7 relation to the set-off point, it's very much our</p> <p>8 secondary position.</p> <p>9 MR JUSTICE DAVID RICHARDS: I follow that. You say that the</p> <p>10 contributory rule applies not only in a liquidation but</p> <p>11 also in an administration, and it's only if you are</p> <p>12 wrong about that you say there could be a set-off at</p> <p>13 that point.</p> <p>14 MR TROWER: Yes. The same in the members' distributive</p> <p>15 administration as well. The set-off would work in both.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes. I don't think there is any</p> <p>17 doubt -- well, the same would work there. Yes, sorry,</p> <p>18 of course, it would. It's the same point, isn't it?</p> <p>19 MR TROWER: Yes.</p> <p>20 MR JUSTICE DAVID RICHARDS: No, I follow that. I am just</p> <p>21 trying to think through how the contributory rule</p> <p>22 applies in an administration which never proceeds to</p> <p>23 a liquidation.</p> <p>24 MR TROWER: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: I am just trying to think how --</p> <p style="text-align: center;">Page 47</p>
<p>1 MR JUSTICE DAVID RICHARDS: Sorry, in the cases we were</p> <p>2 looking at a moment ago.</p> <p>3 MR TROWER: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: Where Sir George Jessel was</p> <p>5 wrong in Whitehouse, wasn't it?</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: Is this a related point?</p> <p>8 MR TROWER: Well, it is related in the sense, yes, it sort</p> <p>9 of goes to that aspect of mutuality in the sense that --</p> <p>10 MR JUSTICE DAVID RICHARDS: Who was the claimant? I may</p> <p>11 have just misremembered this, sorry.</p> <p>12 MR TROWER: Sorry, this is Whitehouse.</p> <p>13 MR JUSTICE DAVID RICHARDS: Whitehouse was the Jessel case.</p> <p>14 MR TROWER: Whitehouse was the Jessel case.</p> <p>15 MR JUSTICE DAVID RICHARDS: Then in Pyle he said he was</p> <p>16 wrong on this point.</p> <p>17 MR TROWER: Yes, 34.</p> <p>18 MR JUSTICE DAVID RICHARDS: I think we have, for example, at</p> <p>19 the end ...</p> <p>20 You see, at page 585 Lord Justice Lindley says that</p> <p>21 a call made by a liquidator in a voluntary winding-up is</p> <p>22 a debt due to the company.</p> <p>23 MR TROWER: Yes.</p> <p>24 MR JUSTICE DAVID RICHARDS: Not a debt due to the</p> <p>25 liquidator.</p> <p style="text-align: center;">Page 46</p>	<p>1 you say, well, now the members cannot recover anything</p> <p>2 qua creditor without sort of making good the capital of</p> <p>3 the company. They are never under an actual liability</p> <p>4 to do so because the company never goes into</p> <p>5 liquidation. You say, well, if it's at all times clear</p> <p>6 that if the company went into liquidation they would be</p> <p>7 required to contribute, then they are in the position</p> <p>8 that the contributory rule applies.</p> <p>9 MR TROWER: Yes. There may be a difference. Where the</p> <p>10 contributory is in an insolvency procedure itself, the</p> <p>11 company could prove in respect of the obligation to</p> <p>12 contribute on which it may get 100p in the pound.</p> <p>13 MR JUSTICE DAVID RICHARDS: If it got 100p in the pound,</p> <p>14 then it would be paid.</p> <p>15 MR TROWER: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: But unless it receives its full</p> <p>17 debt --</p> <p>18 MR TROWER: At that stage --</p> <p>19 MR JUSTICE DAVID RICHARDS: The contributory rule still</p> <p>20 applies.</p> <p>21 MR TROWER: The contributory rule -- the contributor there</p> <p>22 would be able to prove for a dividend.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, that I follow. Yes, okay.</p> <p>24 MR TROWER: My Lord, I think I have probably almost come to</p> <p>25 the end.</p> <p style="text-align: center;">Page 48</p>

<p>1 MR JUSTICE DAVID RICHARDS: Of your submissions.</p> <p>2 MR TROWER: Of my submissions, yes. Can I just check there</p> <p>3 isn't anything I need to go back on?</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes, of course.</p> <p>5 MR TROWER: My Lord, I don't think there is anything else</p> <p>6 that I was proposing to draw to your Lordship's</p> <p>7 attention or make submissions to your Lordship on at</p> <p>8 this stage. If there are any further questions I can</p> <p>9 help you with?</p> <p>10 MR JUSTICE DAVID RICHARDS: If you just give me one moment.</p> <p>11 Could I take you back to the beginning and go back to</p> <p>12 the subordinated loan agreement.</p> <p>13 MR TROWER: Yes, of course.</p> <p>14 MR JUSTICE DAVID RICHARDS: So in volume 4.</p> <p>15 MR TROWER: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: Clause 5, the subordination</p> <p>17 clause. I just wanted to look again at clause 5.1(b),</p> <p>18 the solvency condition, as it were. Now, this condition</p> <p>19 applies whether or not the borrower is in an insolvency</p> <p>20 proceeding.</p> <p>21 MR TROWER: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: I just wanted to hear what you</p> <p>23 had to say about how it applies if the borrower is not</p> <p>24 in insolvency.</p> <p>25 MR TROWER: I can see what is very difficult is how you</p> <p style="text-align: center;">Page 49</p>	<p>1 have -- I suppose, first off you would look at the</p> <p>2 company's accounts.</p> <p>3 MR TROWER: I think you would.</p> <p>4 MR JUSTICE DAVID RICHARDS: Clearly it would have present</p> <p>5 liabilities spelt out, it would have future liabilities.</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: Now, of course the future</p> <p>8 liability might not arise for payment for some time. So</p> <p>9 maybe the exercise that's there undertaken is the</p> <p>10 exercise resulting from whichever Supreme Court case it</p> <p>11 was.</p> <p>12 MR TROWER: Eurocell.</p> <p>13 MR JUSTICE DAVID RICHARDS: Eurocell, thank you. There may</p> <p>14 be contingent liabilities to the extent that a provision</p> <p>15 is made. You would need to be satisfied that that could</p> <p>16 be met. I am just trying to get a feel for -- I mean,</p> <p>17 if there was an outstanding contribution notice under</p> <p>18 the pensions legislation, that would be a present</p> <p>19 liability so would have to be met.</p> <p>20 MR TROWER: Yes. I think there is a practical answer to</p> <p>21 this question which is, although it does apply in</p> <p>22 practice, if the company satisfies the financial</p> <p>23 resources requirement under (a), it's most unlikely to</p> <p>24 be insolvent.</p> <p>25 MR JUSTICE DAVID RICHARDS: That I don't -- because you were</p> <p style="text-align: center;">Page 51</p>
<p>1 bring in excluded liabilities is one question, but that</p> <p>2 may not be the point your Lordship is on.</p> <p>3 MR JUSTICE DAVID RICHARDS: I am slightly more general</p> <p>4 really. You cannot have a payment unless the borrower</p> <p>5 is solvent immediately after the payment.</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: In order to be solvent after the</p> <p>8 payment, the borrower must be able to pay its</p> <p>9 liabilities in full.</p> <p>10 MR TROWER: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: Disregarding (a) and (b) --</p> <p>12 well, I am not sure that it's necessarily that difficult</p> <p>13 to apply (a) and (b) outside an insolvency. But I am</p> <p>14 more concerned about what is meant by the liabilities in</p> <p>15 circumstances where the company is not in an insolvency</p> <p>16 and how the borrower goes about satisfying that</p> <p>17 requirement.</p> <p>18 MR TROWER: As a matter of practicality?</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, really.</p> <p>20 MR TROWER: It may well be one of those issues where it is</p> <p>21 simply -- I mean, borrowers are as likely to be</p> <p>22 concerned with evidencing their state of affairs</p> <p>23 pre-insolvency as they are post-insolvency. But maybe</p> <p>24 I have not quite grasped your Lordship's question.</p> <p>25 MR JUSTICE DAVID RICHARDS: I was thinking, for example, you</p> <p style="text-align: center;">Page 50</p>	<p>1 not very keen to go into that, and I am not encouraging</p> <p>2 you to go into the detail of it, but I feel perhaps I</p> <p>3 ought to know just a little bit about the financial</p> <p>4 resources requirement.</p> <p>5 MR TROWER: We can find it. Actually I am not sure it's</p> <p>6 going to -- I have looked at it.</p> <p>7 MR JUSTICE DAVID RICHARDS: By all means, give me the bottom</p> <p>8 line as to what it means.</p> <p>9 MR TROWER: It's basically a solvency question again but at</p> <p>10 a different level and taking into account particular</p> <p>11 categories of asset and liability for regulatory</p> <p>12 purposes.</p> <p>13 MR JUSTICE DAVID RICHARDS: I see.</p> <p>14 MR TROWER: So while conceptually a company may be both ways</p> <p>15 round. Conceptually a company may not be insolvent in</p> <p>16 circumstances in which it doesn't satisfy the financial</p> <p>17 resources requirement and it may also be the case that</p> <p>18 having the solvency test graphs an extra relevant</p> <p>19 requirement on to having to satisfy the financial</p> <p>20 resources requirement. It's I think most unlikely that</p> <p>21 a company would not be solvent but would still satisfy</p> <p>22 the financial resources requirement.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>24 MR TROWER: Now, it may be that others are able to -- we can</p> <p>25 certainly look and see if there is an easy way of giving</p> <p style="text-align: center;">Page 52</p>

<p>1 your Lordship a bit more of a feel about the financial</p> <p>2 resources requirement. I don't have that at my</p> <p>3 fingertips at the moment.</p> <p>4 MR JUSTICE DAVID RICHARDS: If there is some reasonably easy</p> <p>5 way of achieving that, I think that might be helpful.</p> <p>6 MR TROWER: I can understand that, my Lord, and we will do</p> <p>7 something on that, although not here and now I am</p> <p>8 afraid.</p> <p>9 MR JUSTICE DAVID RICHARDS: The other point is, although you</p> <p>10 do not yourself seek to make anything of the FSA</p> <p>11 materials, as we might call them, there cannot be any</p> <p>12 doubt, can there, that, to the extent they assist one</p> <p>13 way or another, these subordinated loan agreements are</p> <p>14 to be construed having regard to the regulatory regime</p> <p>15 against which they are made?</p> <p>16 MR TROWER: I think that must be right. There are a number</p> <p>17 of textual indications in the agreement itself in</p> <p>18 relation to that.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes, and it's a template we</p> <p>20 happen to know. We know that the whole point of the</p> <p>21 subordinated agreements is to provide tier two or three</p> <p>22 capital.</p> <p>23 MR TROWER: Yes. So, as a matter of principle, that must be</p> <p>24 right, although how far it is going to be legitimate to</p> <p>25 go with the materials will depend on what --</p> <p style="text-align: center;">Page 53</p>	<p>1 focus principally on the foreign currency claim. Now,</p> <p>2 Mr Trower has covered it and I won't be repeating things</p> <p>3 he's done. I may be repeating a sentence but I won't be</p> <p>4 going into it in any detail.</p> <p>5 With that introduction, the sub-topics within the</p> <p>6 foreign currency claim are really, first of all, the</p> <p>7 fact that there is such a claim, i.e. different to your</p> <p>8 claim that is proved, there is a claim which survives</p> <p>9 the fact you have proved for part of it in</p> <p>10 a liquidation.</p> <p>11 Secondly, the fact that that claim, which was</p> <p>12 envisaged possibly to occur at least by Lord Justice</p> <p>13 Brightman in 1982 has survived the Insolvency Act. So</p> <p>14 it's survived the passing of the Insolvency Act and the</p> <p>15 Insolvency Rules.</p> <p>16 The third point is whether the Law Commission</p> <p>17 working papers and reports my Lord was shown have in</p> <p>18 some way impacted on this claim. In a sense, it's</p> <p>19 linked to the last point. Has the insolvency, in light</p> <p>20 of those reports and working papers, rejected this claim</p> <p>21 as a matter of statute.</p> <p>22 Then two matters I will deal with very, very</p> <p>23 briefly -- well, one not at all in fact -- which is</p> <p>24 whether the liability is subordinated under the</p> <p>25 agreement. Mr Trower has dealt fully with that. I add</p> <p style="text-align: center;">Page 55</p>
<p>1 MR JUSTICE DAVID RICHARDS: Depends on the materials. It</p> <p>2 may be that they don't, in the end, shed a great deal of</p> <p>3 light.</p> <p>4 MR TROWER: No. That was our conclusion but we may be</p> <p>5 wrong.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes. Mr Trower, can I just</p> <p>7 check back. I don't think there is anything else</p> <p>8 I wanted to ask you. No, thank you very much indeed.</p> <p>9 MR TROWER: I am grateful.</p> <p>10 MR JUSTICE DAVID RICHARDS: Mr Zacaroli.</p> <p>11 Submissions by MR ZACAROLI</p> <p>12 MR ZACAROLI: My Lord, as my Lord knows, we are playing</p> <p>13 a very much supporting role in this application. As</p> <p>14 my Lord will have discovered by now, there has been no</p> <p>15 division, as it were, of issues between myself and</p> <p>16 Mr Trower. Mr Trower has covered everything, for</p> <p>17 reasons which I don't need to go into now. We have</p> <p>18 sought to liaise with them as much as possible to assist</p> <p>19 in that process. Therefore, I can be pretty short in my</p> <p>20 own submissions.</p> <p>21 What I propose to deal with, subject to your</p> <p>22 Lordship, is deal with everything I am going to deal</p> <p>23 with from the perspective of the foreign currency claim.</p> <p>24 That will mean touching a little, but only a little, on</p> <p>25 issues which go more broadly than that, but I intend to</p> <p style="text-align: center;">Page 54</p>	<p>1 nothing to that. Then whether the liability is one</p> <p>2 within section 74, i.e. the foreign currency claim, is</p> <p>3 that a liability that falls within the definition of</p> <p>4 liability in section 74 for the purposes of the</p> <p>5 obligation on the members to contribute. Again, that's</p> <p>6 been dealt with and I can deal with that very shortly.</p> <p>7 Then, finally, the impact or the relationship</p> <p>8 between the contributory rule and this claim. I have</p> <p>9 one or two points to add there.</p> <p>10 MR JUSTICE DAVID RICHARDS: Right.</p> <p>11 MR ZACAROLI: Taking the first of those points, which is the</p> <p>12 survival of this contractual right to be paid in</p> <p>13 a foreign currency, notwithstanding that a creditor has</p> <p>14 proved and is required to prove in insolvency.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR ZACAROLI: I start by developing a little of what this</p> <p>17 claim actually is because one starts with a debt, a debt</p> <p>18 that's payable in a foreign currency. We are talking</p> <p>19 here about a debt that's payable in a foreign currency</p> <p>20 because that's the contractual entitlement. This is</p> <p>21 a contractual right we are talking about.</p> <p>22 There is a neat explanation of the content of that</p> <p>23 right in Lord Justice Oliver's decision in Lines Bros</p> <p>24 itself. It's volume 1C, tab 66. It's page 22 at</p> <p>25 letters E to F. He is citing a submission from</p> <p style="text-align: center;">Page 56</p>

<p>1 Mr Stubbs, which obviously was ultimately rejected in 2 whole but the submission here he says is unanswerable. 3 Just above letter E, he says: 4 "[Mr Stubbs] he contends first, which is 5 unanswerable, that the Milianglos decision" -- 6 MR JUSTICE DAVID RICHARDS: I am terribly sorry, I am just 7 trying to get there. Yes, I have it. 8 MR ZACAROLI: "He contends first, which is unanswerable, 9 that the decision of the House of Lords in Milianglos 10 establishes beyond doubt that, apart from liquidation or 11 bankruptcy, the foreign currency creditor is, as a 12 matter of contract, owed foreign currency and not 13 sterling and is entitled if he elects to be paid in 14 sterling ...(Reading to the words)... exchange rate then 15 prevailing." 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR ZACAROLI: It follows from that that if -- well, just to 18 draw back a moment, that means the claim is the claim to 19 have your sterling equivalent paid, to the extent that's 20 not satisfied through the proof and distribution process 21 in the liquidation. That's what the nature of the claim 22 we are talking about is. You start off with the right 23 to be paid in foreign currency; that means entitlement 24 to have sterling equivalent at the date of payment. You 25 prove in an insolvency. It gets converted at the date</p> <p style="text-align: center;">Page 57</p>	<p>1 phrases such as "the debts are not affected, are not 2 touched by the winding-up process". The contractual 3 right, whatever it is, survives. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR ZACAROLI: The third point then is this contractual right 6 to be paid your sterling equivalent at the date of 7 payment insofar as there is a shortfall is itself not 8 provable. We are talking about a claim which is 9 inherently not provable. The reason for that is that 10 it's the result of the rule that, for the purposes of 11 proving and participating in the collective enforcement 12 of the claims (that's a winding-up), it has to be 13 converted at a single date. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR ZACAROLI: That's the decision in Lines Bros in the Court 16 of Appeal. Perhaps put most pithily by 17 Lord Justice Brightman himself at page 14, letter H, 18 tab 66. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR ZACAROLI: It's for the purposes of satisfying, applying 21 the company's proper satisfaction of its liabilities 22 pari passu. You need to convert it to a single date. 23 Now, one asks oneself why it's not provable. What's 24 the reasoning behind that rule the Court of Appeal 25 adopted? Of course it became statutory later on. The</p> <p style="text-align: center;">Page 59</p>
<p>1 of insolvency into X amount of sterling. If it turns 2 out that when you get paid that it's Y pounds or Y 3 dollars less than your dollar entitlement, for example, 4 that's your claim. 5 There is one other authority which sheds a bit of 6 light on this point. It's another Lines Bros, Lines 7 Bros at first instance in fact, Mr Justice Slade at 8 tab 65 in the same bundle. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR ZACAROLI: It's page 14 of the report as copied. The 11 first major paragraph at the top, "The Milianglos 12 decision precisely rejected", that's the paragraph. 13 It's the last six or so lines of that paragraph. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR ZACAROLI: You will see the words, "Accordingly, the 16 court has to decide what payment in sterling should be 17 made." If my Lord reads to the end of that paragraph. 18 MR JUSTICE DAVID RICHARDS: I will. Yes. 19 MR ZACAROLI: The second point in these sort of short steps, 20 as it were, as to how we achieve the result that 21 Lord Justice Brightman would like us to get to, the 22 second point is the contractual rights of creditors 23 subsist throughout a liquidation and survive. That's 24 the Wight v Eckhardt decision. Mr Trower took my Lord 25 to it. I don't need to take my Lord to it again. The</p> <p style="text-align: center;">Page 58</p>	<p>1 reasoning is very clearly set out in 2 Lord Justice Brightman's decision at page 16, letters C 3 through to E. Now, you have been shown this before so 4 my Lord will recognise it. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR ZACAROLI: There are two points. First of all, the 7 policy of the Milianglos decision was that the debtor 8 company should not be entitled to impose on the foreign 9 currency creditor the risk of a fall in value in 10 sterling. Lord Justice Brightman says at letter D: 11 "Justice demands that the risk shall be borne by the 12 debtor who is the party in default." 13 So that's the policy of Milianglos. But, said the 14 Court of Appeal in Lines Bros, that policy has no 15 application in the collective enforcement process which 16 is for the benefit of all creditors. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR ZACAROLI: The sterling creditors are not in default 19 vis-a-vis foreign currency creditors. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR ZACAROLI: So that's the principle underlying the result 22 in Lines Bros meaning this claim is not provable. 23 Now, the fourth point is that, as a matter of 24 principle, debts which subsist but are excluded from the 25 proof process, for whatever reason, are enforceable</p> <p style="text-align: center;">Page 60</p>

<p>1 against the company's property once all other creditors 2 have been paid in full. As a general principle, that is 3 clearly established by, for example, Humber Ironworks. 4 That's the case about interest. Again, perhaps we don't 5 need to turn it up, but Lord Justice Gifford made the 6 point that, once everyone else has been paid, the 7 creditor whose debt carries interest is remitted to his 8 rights under the contract.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR ZACAROLI: Now, of course that principle has been 11 overtaken by statute. So, in a sense, one doesn't look 12 to Lord Justice Gifford now for that proposition, one 13 looks at statute. But that's irrelevant. He is 14 addressing there the more general principle that if you 15 have a contractual right which survives, which exists 16 but is not provable, it can be paid after all of the 17 other creditors have been paid.</p> <p>18 The next step in the argument is that the rationale 19 which we have just seen for excluding the foreign 20 currency claim from proof provides the very reason why 21 it should be possible to assert that claim against the 22 company once all proved debts are paid. Because once 23 the risk of burden falling on other creditors has gone, 24 because they have all been fully satisfied, then the 25 policy in the Milianglos decision returns: justice</p> <p style="text-align: center;">Page 61</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR ZACAROLI: So if we were sitting here in 1983 I would be 3 submitting to my Lord it follows inexorably from the 4 reasoning in the Court of Appeal in Lines Bros this 5 claim does exist.</p> <p>6 But the next topic, as it were, is has that right 7 survived the Insolvency Act? My Lord, I notice the 8 time. Would that be a convenient moment?</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes, certainly. We will carry 10 on at 2 o'clock.</p> <p>11 (1.00 pm)</p> <p>12 (The short adjournment)</p> <p>13 (2.03 pm)</p> <p>14 MR ZACAROLI: My Lord, unfortunately we don't get any 15 benefit from Professor Goode's thinking on this.</p> <p>16 MR JUSTICE DAVID RICHARDS: We don't? Right.</p> <p>17 MR ZACAROLI: I was turning then to the question of whether 18 this right which we say existed certainly in 1983, 19 survived the passing of the Insolvency Act.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR ZACAROLI: What is said against us that because the 22 insolvency rules, rule 2.86, contains a rule providing 23 for conversion at the date of winding up, then in some 24 way this argument is now precluded. We say that is 25 wrong. All that has happened is that the rule that was</p> <p style="text-align: center;">Page 63</p>
<p>1 demands that the risk is borne by the debtor, the 2 company, as the party in default.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR ZACAROLI: Pausing there, the reason we say the claim 5 survives and is provable after all the other debts have 6 been paid, that reason is supported by the substantive 7 reasoning in the Court of Appeal in Lines Bros. It 8 follows logically that it is claimable and therefore 9 that is why Lord Justice Brightman thought it probably 10 was and Lord Justice Oliver thought it probably was. 11 They didn't have to decide that point. But we are not 12 relying purely on the dicta in the case. We are 13 actually relying on the substantive reasoning in the 14 Court of Appeal to reach the conclusion we say the court 15 should get to.</p> <p>16 Just to remind my Lord, the way it's put by 17 Lord Justice Brightman is at page 21, letter F.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR ZACAROLI: So, as a matter of principle, putting 20 ourselves back into 1983 --</p> <p>21 MR JUSTICE DAVID RICHARDS: Has Professor Goode speculated 22 on this issue in any of his books? Sorry for throwing 23 that out there.</p> <p>24 MR ZACAROLI: No, not that I am aware of. I will look. We 25 may have looked at it. I can't remember.</p> <p style="text-align: center;">Page 62</p>	<p>1 laid down in the Lines Bros appeal case itself has been 2 put on statutory footing, but no more. So the enactment 3 of that rule doesn't preclude the argument which 4 existed, notwithstanding the rule existed in judgment 5 form prior to that.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR ZACAROLI: My learned friend Mr Trower made a number of 8 submissions about the rule itself, in particular that it 9 starts with the words "For the purposes of proving". 10 I don't repeat those submissions, but I rely upon them. 11 Whilst the sterling equivalent of the debt is proveable, 12 for the reasons I gave this morning, the claim for the 13 difference is not proveable, any difference which may 14 arise, that is not proveable.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR ZACAROLI: So the conversion of the debt for the purposes 17 of proving, a fortiori, does not take away the right to 18 claim that which isn't proveable. The contrary 19 argument, my Lord, really rests on the proposition that 20 rule 2.86 was intended to discharge the contractual 21 entitlement to be paid in a foreign currency, which 22 would be flatly inconsistent, or at least would 23 contradict, the general principle with the highest 24 authority of Lord Hoffman behind it, that the winding up 25 process as a whole leaves debts untouched. So we say it</p> <p style="text-align: center;">Page 64</p>

<p>1 was very surprising if Parliament had by this rule 2 intended to have that effect.</p> <p>3 So I then turn next to the question of the reports, 4 the working paper, the report of the Law Commission and 5 the court report, where they at least got close to this 6 point.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ZACAROLI: First of all, we echo Mr Trower's point where 9 he said that what those papers collectively were 10 addressing was the possibility of a further conversion 11 date within a winding up process. So they first of all 12 deal with that there should be one date, that is the 13 winding up itself, for conversion of foreign debts. 14 They then go on to consider in the passage my Lord was 15 shown another question; should there be a further 16 conversion date to deal with this problem of changes in 17 fluctuation in currency thereafter, and they reject that 18 proposition. So they don't address this further 19 question which is notwithstanding all of that, once the 20 proof process has been completed, should a creditor who 21 is still suffering a loss, a shortfall on this currency 22 claim, be entitled to claim against the assets of the 23 company before they go back to those members? That 24 simply wasn't addressed, certainly not expressly, in 25 those working papers or the report. The first working</p> <p style="text-align: center;">Page 65</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR ZACAROLI: The first line of 3.34: 3 "As we explained in part 2, the decision 4 ... (reading to the words) ... clear why." 5 Then the footnote there is paragraphs 2.22 and 2.23, 6 footnote 2 and 4.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR ZACAROLI: So I am now showing my Lord paragraphs 2.22 to 9 2.25. In fact the important paragraph is 2.22, where 10 the report cites the Lines Bros, first of all, for the 11 main proposition about the single date for conversion. 12 If my Lord could read in detail, in full, paragraph 2.23 13 and footnote 73 at the end of it.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes. Yes.</p> <p>15 MR ZACAROLI: So there is a reference to it, without 16 approving it, without rejecting it, it is just noted.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR ZACAROLI: Paragraph 3.37 in the passage that was already 19 in the bundle, the conclusion of the Law Commission on 20 this point: 21 "Present law relating to the conversion of sterling 22 foreign currency payment in relation to solvent and 23 insolvent companies and to bankruptcy is satisfactory." 24 Now I don't suggest that means they are in anyway 25 approving the dicta of Lord Justice Brightman, but it is</p> <p style="text-align: center;">Page 67</p>
<p>1 paper my Lord was shown was 1980 or 1981, but it is 2 before the Court of Appeal in Lines Bros. The court 3 report, it is unclear precisely what date it was, but it 4 would be the same year as Lines Bros, but it doesn't 5 appear to refer to the Court of Appeal as such in Lines 6 Bros. The report of the law submission did, however. 7 That was post Lines Bros in the Court of Appeal, and it 8 did refer to Lines Bros. It is in a passage that is 9 cited in LBIE's supplemental reply submissions, but it 10 was missed out of the bundle. We put it on my Lord's 11 desk, I hope.</p> <p>12 MR JUSTICE DAVID RICHARDS: Oh yes, thank you.</p> <p>13 MR ZACAROLI: That should be put into bundle 3B at tab 13.</p> <p>14 MR JUSTICE DAVID RICHARDS: So what is in 13 at the moment?</p> <p>15 MR ZACAROLI: It is the same report. This is the 16 Law Commission report, number 124.</p> <p>17 MR JUSTICE DAVID RICHARDS: Right, right.</p> <p>18 MR ZACAROLI: This extract is paragraphs 2.22 --</p> <p>19 MR JUSTICE DAVID RICHARDS: I see, it is the same page.</p> <p>20 MR ZACAROLI: Yes, it is the same.</p> <p>21 MR JUSTICE DAVID RICHARDS: Okay, thank you. Yes, thank 22 you. Right, yes.</p> <p>23 MR ZACAROLI: There is a cross-reference to these two 24 paragraphs I am about to show my Lord, paragraph 3.34, 25 it is the passage that is already in the bundle.</p> <p style="text-align: center;">Page 66</p>	<p>1 very difficult to glean from all of this that they are 2 somehow rejecting that proposition. It was raised as 3 a possibility by Lord Justice Brightman. It is simply 4 not (inaudible).</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR ZACAROLI: It is very difficult to say that because this 7 report is in the form it is, Parliament somehow 8 responding to it must be taken to have adopted 9 a conclusion which says that the Lord Justice Brightman 10 picture is wrong.</p> <p>11 Now the second oddity about these passages in all of 12 the working paper and the court report is the conclusion 13 reached that there should not be a second conversion 14 date because of the risks still for discrimination. 15 Mr Trower made this point that it is odd that that 16 phrase is used, because one is talking about a case 17 where the credits have already been paid, and therefore 18 there is no longer any risk of discrimination.</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR ZACAROLI: My Lord it is important to put those passages 21 in the context of 1981 through 1983, when first of all 22 solvency, as we saw from the Lines Bros decision of Mr 23 Justice Mervyn Davies, was based on the company paying 24 all provable debts in full, but not paying 25 post-liquidation interest. So a company could be</p> <p style="text-align: center;">Page 68</p>

<p>1 solvent, but still have obligations by way of interest</p> <p>2 as liquidation.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR ZACAROLI: Secondly, that the concept of solvency in</p> <p>5 Section 283, which again my Lord saw yesterday, about</p> <p>6 statement of solvency for the purpose of a solvent</p> <p>7 winding up, that solvency there also excludes any</p> <p>8 reference to interest, which is there now. So at that</p> <p>9 time, the solvent company was one which could pay its</p> <p>10 proved debts in full, but could not necessarily pay any</p> <p>11 interest, post-liquidation interest. That point</p> <p>12 actually comes out of the passage I have just shown</p> <p>13 my Lord, paragraph 2.23 and the footnote, because the</p> <p>14 Lines Bros itself was, of course, a case where the</p> <p>15 question of a surplus was being considered in the</p> <p>16 context of you can pay all the provable debts, but you</p> <p>17 can't pay the interest, and there was a contractual</p> <p>18 right to interest which remained outstanding. So it was</p> <p>19 indeed the very case of there being a solvent company in</p> <p>20 the meaning of the words used there.</p> <p>21 MR JUSTICE DAVID RICHARDS: Lines Bros, yes.</p> <p>22 MR ZACAROLI: Lines Bros.</p> <p>23 MR JUSTICE DAVID RICHARDS: That's right.</p> <p>24 MR ZACAROLI: In the Law Commission report, where we are</p> <p>25 looking at the moment, paragraph 2.23, the second half</p> <p style="text-align: center;">Page 69</p>	<p>1 where the currency goes against a creditor, he has</p> <p>2 a shortfall claim. Where it goes in their favour, he</p> <p>3 hasn't got to pay it back what is benefited -- that the</p> <p>4 increase in payment is benefited by. My Lord, yes, of</p> <p>5 course that is right. We are talking about claims by</p> <p>6 creditors against the company. We are not here</p> <p>7 concerned with the question of whether the company could</p> <p>8 have a claim against any of its creditors, foreign</p> <p>9 currency creditors who have been "overpaid" on the basis</p> <p>10 of this theory. It will be very difficult to see on</p> <p>11 what basis the company could possibly reclaim, given</p> <p>12 those creditors have been in an amount based on</p> <p>13 a statutory scheme. There could be no -- a restitution</p> <p>14 claim in those circumstances.</p> <p>15 MR JUSTICE DAVID RICHARDS: Quite.</p> <p>16 MR ZACAROLI: It is right this is a one way bet, as it were.</p> <p>17 But it has always been a case that a person who is</p> <p>18 innocent, who is owed money, whether the counterparty</p> <p>19 had defaulted, if as a result of that default the</p> <p>20 innocent party has done better than they would have done</p> <p>21 if there had been no default, there is no principle in</p> <p>22 English law which requires the innocent party to re-pay</p> <p>23 that to the defaulting party. So it is not surprising</p> <p>24 that it has this result.</p> <p>25 Then another point taken against us is the</p> <p style="text-align: center;">Page 71</p>
<p>1 that paragraph refers to the case of a solvent company.</p> <p>2 The footnote refers to the fact that even though there</p> <p>3 is a surplus, nevertheless you have the creditors whose</p> <p>4 debts carried interest are remitted to their writing of</p> <p>5 the contract, and therefore get the surplus. So you</p> <p>6 will be competing with the creditors in relation to</p> <p>7 interest.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ZACAROLI: Therefore those passages must be read in that</p> <p>10 context. That makes sense of the conclusion or the</p> <p>11 reasoning that you should not have a further date</p> <p>12 because it would involve discrimination. That falls</p> <p>13 away if one is talking simply about claims once all</p> <p>14 other creditors, plus interest, have been paid. So we</p> <p>15 say that those reports are working papers in fact don't</p> <p>16 make the recommendation which my learned friend suggests</p> <p>17 they do, but if they did, in any event Parliament hasn't</p> <p>18 taken it up, because of the limited of the conversion,</p> <p>19 ie for the purpose of proving.</p> <p>20 I will just identify two points made against us by</p> <p>21 my learned friends in their written submissions. There</p> <p>22 are a number of points taken, most of which I would say</p> <p>23 get subsumed within what I have said. But two specific</p> <p>24 points, first of all, it is said we can't be right,</p> <p>25 because it is a one way argument only. In other words,</p> <p style="text-align: center;">Page 70</p>	<p>1 difficulties with the interplay between this proposition</p> <p>2 and set off. Now I don't fully understand this, because</p> <p>3 set off only operates in relation to proveable debts.</p> <p>4 Obviously a foreign currency creditor couldn't rely upon</p> <p>5 the non-provable aspect of this claim by bringing it</p> <p>6 into account for the purpose of set off. If the whole</p> <p>7 of its proveable claim is set off against the debt they</p> <p>8 were (inaudible), that is no different from it having</p> <p>9 been paid in full through a distribution process. So</p> <p>10 set off is merely one form of payment, in substance, in</p> <p>11 the insolvency process. But one has to remember that</p> <p>12 this claim only cuts in once all the proveable claims</p> <p>13 have been paid in full. So we don't understand there to</p> <p>14 be, or cannot see there to be any conflict between this</p> <p>15 claim existing and the way in which set off operates</p> <p>16 under the Act.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR ZACAROLI: That leaves just two further points. I said</p> <p>19 I was going to say nothing about the construction of</p> <p>20 this (inaudible) notion and I will stick by that. The</p> <p>21 question of whether this claim for liability in relation</p> <p>22 to a foreign currency shortfall claim is within</p> <p>23 Section 74 of the Act, and it is encompassed within the</p> <p>24 obligation of members.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p style="text-align: center;">Page 72</p>

<p>1 MR ZACAROLI: Now most of the argument before my Lord from 2 Mr Trower focused on interests here. But whatever one 3 says about interests and whether it is a liability of 4 the company, whatever one might say about that, this 5 clearly is a liability of the company. There is nobody 6 else whose liability it could possibly be. The fact 7 that the creditor is limited to proving for its sterling 8 equivalent as at the date of winding up, does not mean 9 the shortfall is not the liability. So on the simple 10 words of Section 74, it is clearly within it, it is 11 a liability. As a matter of principle, since the policy 12 behind the decision in Milliangos, which is really what 13 we are relying upon here, was that the company should 14 bear the currency risk where it has defaulted in 15 payment. We ask rhetorically why should the member's 16 obligation to contribute to the assets of the company 17 not extend to this? They have agreed to stand behind 18 the company, so that it can pay its liabilities in full. 19 Put another way, why should the member benefit from 20 a rule which restricts foreign currency creditors 21 proving a rule which is there are to prevent 22 discrimination between creditors. We can see no reason 23 why that should be the case. I echo here a point that 24 Mr Trower made, but I just want to add an illustration 25 of it. This is a more general point about both interest</p> <p style="text-align: center;">Page 73</p>	<p>1 for that purpose has not been used for that purpose. 2 MR JUSTICE DAVID RICHARDS: So I suppose if the right 3 construction of Section 74 is that it is restricted to 4 expenses, proveable debts and adjustments between 5 contributories, that doesn't include statutory interest 6 in non-provable claims, then perhaps the liquidator 7 would not be able to make a call, if the purpose to 8 which the call monies were put, were statutory interest 9 or non-proveable liabilities, because the call would be 10 made on a false basis. 11 MR ZACAROLI: But that would mean he could never make a call 12 against members, so I could only(?) make a call for the 13 purposes of adjusted rights. 14 MR JUSTICE DAVID RICHARDS: Of adjusting the rights between 15 the contributories, yes. 16 MR ZACAROLI: If any debts or liabilities prior to that were 17 outstanding. 18 MR JUSTICE DAVID RICHARDS: Yes, yes. Well, I suppose you 19 would not be getting to the point of adjusting rights 20 between contributories, would you, while you still had 21 unpaid liabilities, albeit ones not covered on this 22 basis by Section 74? 23 MR ZACAROLI: Well, then that is very odd, because then the 24 liquidation has a full stop, as it were, a force on it, 25 because you could not call in the money to pay</p> <p style="text-align: center;">Page 75</p>
<p>1 and the non-proveable foreign currency claim falling 2 within Section 74. He made the point that it would be 3 bizarre if the company's obligation or the member's 4 obligation to contribute for the purposes of adjusting 5 rights between contributories were covered, but matters 6 above that in the waterfall were not covered. A simple 7 illustration shows how that must be right. Imagine the 8 liquidator makes a call on contributory A, because he 9 will need a to make a contribution to contributory A or 10 a payment to contributory B. So he gets £1,000 in from 11 the contributory. That is a contribution to the assets 12 of the company, it is not a payment to be held on trust 13 for any specific purpose. It is a contribution of the 14 assets. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR ZACAROLI: In the hands of the liquidator it is therefore 17 an asset which represents, assuming other debts have all 18 been paid in full, a surplus. Rule 22.87 provides in 19 strict terms that any surplus must be used first before 20 anything else for paying interest. So the sum will be 21 paid, in effect, for interest, leaving the call still to 22 be made on the member, because there is still 23 a requirement to make a call on the member for the 24 purpose satisfying the adjustment between credits, 25 between members, because the money that was brought in</p> <p style="text-align: center;">Page 74</p>	<p>1 outstanding debts, notwithstanding the fact that you 2 could call in that money for the purpose of adjusting 3 rights between contributories. My Lord, the same point 4 obviously arises in relation to the non-proveable 5 liability, because on the Neuberger waterfall, as 6 I think it was been called, non-proveable liabilities 7 come before members again. 8 MR JUSTICE DAVID RICHARDS: I mean just to understand about 9 adjustments amongst contributories, what does really -- 10 how does it arise? It is presumably where you have got 11 members who have paid different amounts, and that some 12 equal out -- is that (inaudible). 13 MR ZACAROLI: Yes it is. 14 MR JUSTICE DAVID RICHARDS: That member A has paid more than 15 member B, although -- 16 MR ZACAROLI: Yes. 17 MR JUSTICE DAVID RICHARDS: -- they each sort of paid the 18 same, so the liquidator can make a call on member B to, 19 as it were, reimburse member A. 20 MR ZACAROLI: That is right, it doesn't apply -- I don't 21 think it applies on the facts in this case. 22 MR JUSTICE DAVID RICHARDS: Now, but obviously I just want 23 to understand how it works. 24 MR ZACAROLI: Yes, it does. I am trying to remember which 25 one it was. It was one of the cases we looked at this</p> <p style="text-align: center;">Page 76</p>

<p>1 morning, which involved a call for that very purpose, it</p> <p>2 explained exactly that. We have got some creditors,</p> <p>3 some members who have paid up in full on the shares.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p>5 MR ZACAROLI: And others who have not.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR ZACAROLI: Therefore to adjust rights between them, you</p> <p>8 need some money --</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes. I follow, yes.</p> <p>10 MR ZACAROLI: -- if you want to go back --</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR ZACAROLI: If we can find the reference for my Lord's</p> <p>13 notes. There is a case where that is actually</p> <p>14 (inaudible).</p> <p>15 So the last point I wanted to deal with was the</p> <p>16 contributory rule in this context.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR ZACAROLI: Recognising that the rationale for getting</p> <p>19 behind this claim existing at all in the liquidation</p> <p>20 context is that it is not competing with other</p> <p>21 creditors, ie once you have got beyond the stage of</p> <p>22 other creditors existing, then there can be no</p> <p>23 competition. It is merely the company left, therefore</p> <p>24 the claim comes back to into play.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 77</p>	<p>1 sufficiently to pay all of its debts."</p> <p>2 That, we say, is a principle which overrides any</p> <p>3 glitch that our claim only operates once all the other</p> <p>4 creditors have been paid, ie we are not allowed to</p> <p>5 compete without outside creditors. It is really part of</p> <p>6 the pari passu rule. You can't compete with those who</p> <p>7 genuinely form part of a pari passu distribution, but</p> <p>8 a member who has not contributed isn't entitled to share</p> <p>9 in that.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR ZACAROLI: Now if that is wrong, then in the case of</p> <p>12 an unlimited company, it doesn't matter in fact, because</p> <p>13 of the unlimited liability of the member. This is just</p> <p>14 to again illustrate a point Mr Trower made, because he</p> <p>15 made the point that the primary case for both of us is</p> <p>16 the contributory rule prevents a member from claiming</p> <p>17 any amount of its debt, whilst it has not contributed.</p> <p>18 But our fall back position, even if a member can claim,</p> <p>19 there will always be set off, which ensures the member</p> <p>20 cannot claim in competition with outside creditors for</p> <p>21 assets of the company. So one is assuming here that</p> <p>22 there are some assets of the company in existence, LBIE</p> <p>23 has some remaining assets.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR ZACAROLI: The simple question is can the members assert</p> <p style="text-align: center;">Page 79</p>
<p>1 MR ZACAROLI: Recognising that, and recognising also that we</p> <p>2 argue that this claim should come before the</p> <p>3 contributories debt claim.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ZACAROLI: So we recognise that there is a glitch to</p> <p>6 this, because there is a debt outstanding, namely a debt</p> <p>7 to contributory, or the subordinated debt in a sense</p> <p>8 falls away. That either goes as a matter of</p> <p>9 construction or not.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR ZACAROLI: But there is a debt owed to the members. We</p> <p>12 say that the justice here, one has two principles, you</p> <p>13 have got the contributory rule as matter of principle,</p> <p>14 and you have got the principle that the claim of</p> <p>15 a foreign currency creditor should not compete with</p> <p>16 other creditors. They are competing principles in this</p> <p>17 small area. We say that the right answer here is</p> <p>18 justice requires the claim for the creditor to be</p> <p>19 recognised above those of the member. It goes back</p> <p>20 really to the very rationale that Lord Justice Brightman</p> <p>21 mentioned in Lines Bros:</p> <p>22 "Justice demands that the risk shall be born by the</p> <p>23 debtor who is the party in default, and although the</p> <p>24 members themselves are not in default, they have agreed</p> <p>25 to stand behind the company, to contribute to its assets</p> <p style="text-align: center;">Page 78</p>	<p>1 a claim to those, in competition with outside creditors.</p> <p>2 This builds on the comments that were read this morning</p> <p>3 from Grissell's Case and from I think it is</p> <p>4 Black & Co's Case, where in the first case</p> <p>5 Lord Chelmsford and in the second, I forget the judge,</p> <p>6 both of them commented that in the case of an unlimited</p> <p>7 company, there is no need to prevent set off, because</p> <p>8 you make a call on the member, it pays, even if it</p> <p>9 claims for its debt, and there is still money</p> <p>10 outstanding to outside creditors, you have got a further</p> <p>11 call to make. So there is sort of circularity of calls.</p> <p>12 Now the way that this is expressed in our skeleton is at</p> <p>13 paragraph 31 of skeleton, we have got a short example.</p> <p>14 Because the idea of making repeat calls is the first way</p> <p>15 of looking at this. My Lord can remind himself at</p> <p>16 paragraph 31. It just gives a short worked example.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, I've got that.</p> <p>18 MR ZACAROLI: But it has been said that this doesn't work</p> <p>19 with a member who is insolvent. But in fact we say it</p> <p>20 works perfectly well whether the member is insolvent or</p> <p>21 not. There is a neater way of analysing what is</p> <p>22 happening here, and that is in our paragraph 32. Just</p> <p>23 to explain it first, a member has an obligation to</p> <p>24 contribute to all of the assets -- to the company to pay</p> <p>25 all of its liabilities. Let's assume for a moment there</p> <p style="text-align: center;">Page 80</p>

<p>1 are simply two liabilities, one to an outside creditor, 2 but one to the member well. The member's obligation 3 extends to providing enough money to the assets of the 4 company to pay all those liabilities. They will always, 5 therefore, when you take into set off, the member's own 6 claim and the member's own obligation to contribute -- 7 there will always be a set off between the member's call 8 obligation and the member's claim, because they are 9 obviously the same amount. So whatever the size of the 10 member's claim, it will always be set off against this 11 obligation to contribute where there are still 12 outstanding creditors.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR ZACAROLI: So allowing set off, whether the member be 15 solvent or insolvent, will always result in a member not 16 being a net creditor of the estate.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, I follow. I mean like your 18 example here plays out.</p> <p>19 MR ZACAROLI: Yes, exactly.</p> <p>20 MR JUSTICE DAVID RICHARDS: Exactly, yes.</p> <p>21 MR ZACAROLI: So it doesn't work only with a solvent member, 22 it works in the same way if a member is insolvent.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes, I see, okay.</p> <p>24 MR ZACAROLI: My Lord, that is all I wish to say, unless 25 my Lord has any further questions for me?</p> <p style="text-align: center;">Page 81</p>	<p>1 MR JUSTICE DAVID RICHARDS: That is fine, that is fine. 2 I have no problem with that at all.</p> <p>3 MR WOLFSON: My Lord, the structure of these submissions 4 will, I am afraid, be slightly different to that adopted 5 by my learned friend Mr Trower. I will give 6 your Lordship a road map. What we propose to do is 7 this, deal essentially with six points. First, the 8 liability under Section 74(1) and the liquidator's 9 ability to make calls. The second area in insolvency 10 set off in the context of the liability of 11 contributories, including in that issues of valuation 12 and discounting contingent debts. The third area is the 13 contributory rule, and what we say is its 14 inapplicability while LBIE is in administration. The 15 fourth area is the scope of this Section 74 liability, 16 and in particular whether it extends to statutory 17 interest. The fifth, is what we have called the 18 currency conversion claims. The sixth, which is 19 something which I don't think your Lordship has really 20 been addressed on orally to date, is the manner in which 21 the liability of the two members who are caught 22 (inaudible) Section 74 effects, which will be debated as 23 between themselves. That is the issue essentially 24 between me and my learned friend, Mr Trace.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 83</p>
<p>1 MR JUSTICE DAVID RICHARDS: No Mr Zacaroli, thank you very 2 much indeed. Yes, Mr Wolfson, you are going first.</p> <p>3 Submissions by MR WOLFSON QC</p> <p>4 MR WOLFSON: Yes. My Lord, we are significantly ahead of 5 schedule on the timetable. I hope that remains the case 6 when I have finished my submissions as well, because 7 what I am conscious of is that we have said rather a lot 8 in writing, and I am not going to repeat for you 9 everything that we said.</p> <p>10 MR JUSTICE DAVID RICHARDS: You have said a great deal in 11 writing.</p> <p>12 MR WOLFSON: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: Which in turn makes even more 14 important the oral submissions.</p> <p>15 MR WOLFSON: Well, that was the point I was coming to, which 16 is that your Lordship has been taken to a number of 17 authorities. Normally, I would not want to be taking 18 your Lordship back to authorities you have looked at 19 fairly recently, but I hope your Lordship will forgive 20 me if I do two things during the course of these oral 21 submissions. First, from time to time take your 22 Lordship to passages in my written opening and my 23 supplemental submissions, and secondly take your 24 Lordship back to authorities which your Lordship has 25 actually looked at fairly recently.</p> <p style="text-align: center;">Page 82</p>	<p>1 MR WOLFSON: That means therefore there are a number of 2 matters which I don't propose to address your Lordship 3 on orally, unless, of course, your Lordship wishes. The 4 first is LBHI 2 subject, other than in the context of 5 the liability of the members under Section 74, so I will 6 say something about it in that context. But I am not go 7 over the submissions on the construction points which my 8 learned friend Mr Trower dealt with. As your Lordship 9 will appreciate, on different issues, the line in this 10 court shifts.</p> <p>11 MR JUSTICE DAVID RICHARDS: Of course.</p> <p>12 MR WOLFSON: On this point, of course, we agree with my 13 learned friend, Mr Trower, and LBIE on two points. 14 First, that LBHI2 cannot prove in LBIE's estate, in 15 respect of the LBHI2 sub-debt before it ranks the 16 dividends.</p> <p>17 MR JUSTICE DAVID RICHARDS: So LBHI 2 cannot -- sorry.</p> <p>18 MR WOLFSON: Cannot prove in LBIE's estate in respect of the 19 LBHI 2 sub-debt before it ranks the dividend.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes, I see. Sorry. Yes, I am 21 with you.</p> <p>22 MR WOLFSON: The second point on which there is agreement 23 with my learned friend, Mr Trower, is that the LBHI 2 24 subject can only rank the dividends, once senior 25 liabilities, capital S, capital L, is defined, including</p> <p style="text-align: center;">Page 84</p>

<p>1 statutory interest, have been paid in full. Both of 2 those issues are essentially questions of construction 3 of the sub-debt agreements, and there is nothing that 4 I wish to add to what my learned friend Mr Trower has 5 said. Now there is an important point here, which is 6 where my affinity with Mr Trower stops and that is this; 7 while we agree with LBIE that as a matter of 8 construction of the sub-debt agreements, LBHI 2 cannot 9 prove in LBIE's estate until post-insolvency interest 10 has been paid in full, and that goes to interpretation 11 points about standard term 5 and the definitions in the 12 agreements. We do not agree with LBIE that 13 post-insolvency interest is a liability under 14 Section 74. I apprehend your Lordship has that point 15 already. But that is where the line comes. Nor do we 16 agree with LBIE that there exists alongside the 17 statutory interest code a concurrent contractual 18 liability for interest. So it is at that stage, so to 19 speak, the physical gap that we have in this court, so 20 to speak, reappears because that is where we disagree 21 with LBIE. I will return to both those points, the 22 Section 74 point and the current contractual right 23 point, later in the submissions, if I may. 24 The second set of issues which I don't propose to 25 address your Lordship on orally, because we have said Page 85</p>	<p>1 stories at least used to written, so let's do it that 2 way. First of all, on our primary case, our primary 3 case is that the contributory rule does not apply in 4 circumstances where the obligation to contribute to the 5 fund is only a contingent obligation. Our primary case 6 is if your obligation to contributing is only 7 contingent, the contributory rule simply does not apply, 8 full stop. Now there is a bit of common ground there. 9 LBIE accepts there is no present obligation to 10 contribute. On its case there is only a contingent 11 obligation, so that is a start. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR WOLFSON: The second point on our primary case is that 14 there is no insolvency set off in LBIE's administration, 15 because the insolvency legislation does not contemplate 16 a set off in respect of the liability of a contributory 17 for cause. We submit there is a long line of authority 18 establishing that. That is where we will need to go 19 back to the case as we look at it. 20 Now so far I think this has been a fairly fact free 21 hearing. I do not propose to take your Lordship through 22 the witness statements, but there is an important fact 23 which has not yet been mentioned about LBIE's 24 administration, but of which I remind the court, because 25 of course your Lordship is aware of it. The central and Page 87</p>
<p>1 quite a bit of them in writing, and they don't appear to 2 be really in dispute, are these -- there are really two 3 points. First, issues around the applicability of 4 Section 149. That is question seven. The reference in 5 our written opening is paragraphs 84 to 90. It doesn't 6 seem to us that it is really must in issue across the 7 court on that, so I don't propose to say anything about 8 it. The second issue the valuation of the potential 9 liability as contributory. That is question eight, the 10 reference is paragraphs 92 to 103 of our written 11 opening. The only submissions I will make in that 12 regard, I will say a few words, if I may, in relation to 13 the discounting of contingent debts. 14 MR JUSTICE DAVID RICHARDS: Right. 15 MR WOLFSON: And your Lordship has heard a little bit about 16 that, that is 2(105) point and what is N, et cetera. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR WOLFSON: Now if it turns out that my apprehension that 19 some of these issues are common ground is wrong, then 20 maybe I will need to say something in reply, but at the 21 moment it doesn't seem to be that is where the dispute 22 really is. Now before I get to the meat of this, 23 perhaps it might be helpful if I set out in summary what 24 we say the result ought to be. I hesitate to give away 25 the denouement first, but that is the way detective Page 86</p>	<p>1 indisputable fact is that no doubt for good reasons, 2 LBIE's administrators decided to start making 3 distributions, but they have declined either to reject 4 or to admit the members' claims against LBIE. They have 5 simply left them in limbo, and limbo is not a good place 6 to be, either theologically or commercially. The 7 problem with that approach is this, it is common ground 8 across the courts that the members' claims in LBIE are 9 not claims qua member. So they are not claims which are 10 subordinated under Section 74(2)F. Despite the fact, 11 however, that other creditors have been receiving 12 substantial sums, to date no distributions have been 13 made to the members. We, of course, submit that we 14 should be receiving distributions in LBIE's 15 administration. I think it is right to say that the 16 other unsecured creditors have received to date 68 and 17 a half pence in £1, so we are 68 and a half pence in £1 18 behind. So what we submit is that we should effectively 19 get a catch up dividend, and then we should continue to 20 receive dividends as and when declared by LBIE's 21 administrators, together with all the other unsecured 22 creditors. 23 Turning now to our administration, our submission on 24 our administration is that LBIE can't prove in our 25 administration, or a subsequent liquidation of LBL, in Page 88</p>

22 (Pages 85 to 88)

<p>1 respect of the Section 47 liability, unless and until</p> <p>2 LBIE itself goes into liquidation, and so a call can be</p> <p>3 made on LBL by LBIE's liquidators. If that happens --</p> <p>4 and as your Lordship will appreciate that if is rather</p> <p>5 big if -- if and when that happens, and LBIE does so</p> <p>6 prove in LBL's liquidation, we submit that there would</p> <p>7 be an insolvency set off in LBL's administration or</p> <p>8 liquidation, to the extent that LBL's claim against LBIE</p> <p>9 had not already been satisfied by dividends paid.</p> <p>10 Importantly, this is a point I will obviously come back</p> <p>11 to, the fact that there is no set off, as we submit, in</p> <p>12 LBIE's administration, does not mean that there is no</p> <p>13 set off in our administration, because our primary case</p> <p>14 is that there is no set off in LBIE's administration for</p> <p>15 the reasons I have explained, but there is a set off in</p> <p>16 our administration. I will seek to explain why as</p> <p>17 I proceed. Essentially, you have to consider separately</p> <p>18 for each estate whether insolvency set off operates.</p> <p>19 Now, of course, just to pause there for one second, just</p> <p>20 to make the obvious point, if there is, of course, a set</p> <p>21 off for one administration, the effect of that will</p> <p>22 obviously be taken into account elsewhere. But the</p> <p>23 question is if there is not been a set off in LBIE's</p> <p>24 administration, would there be or would not be a set off</p> <p>25 in LBL's administration. So that is essentially the</p> <p style="text-align: center;">Page 89</p>	<p>1 full value of LBIE's claim. The reason for that is</p> <p>2 because that dividend is all that LBIE, through its</p> <p>3 office holders, will ever be able to claim against LBL.</p> <p>4 So that is what you bring into account when the LBIE</p> <p>5 administrators are conducting that valuation exercise.</p> <p>6 We will look at a couple of authorities which deal with</p> <p>7 that. Without wishing to give away all my surprises at</p> <p>8 once, of course that is an answer, and we will come back</p> <p>9 to this, to Mr Zacaroli's worked example, because if you</p> <p>10 assume the insolvency of the contributory, and you</p> <p>11 recognise that what you are bringing into account is</p> <p>12 a dividend loan, the numbers don't play out the way he</p> <p>13 says. Maybe what is helpful is if I, so to speak,</p> <p>14 re-work the example. We will probably get to that</p> <p>15 tomorrow, I am afraid.</p> <p>16 MR JUSTICE DAVID RICHARDS: Okay, right.</p> <p>17 MR WOLFSON: So if therefore there is no contributory rule,</p> <p>18 there is a valuation exercise in LBIE's administration,</p> <p>19 you bring into account the dividend that LBIE would get</p> <p>20 in LBL's administration. The further consequence of</p> <p>21 that would be this that LBIE could not do two things.</p> <p>22 It could not both withhold distributions from LBL, and</p> <p>23 at the same time prove in LBL's insolvency for the</p> <p>24 Section 74 liability, because we submit that that would</p> <p>25 amount to a double proof effectively. But let me put it</p> <p style="text-align: center;">Page 91</p>
<p>1 prime case, starting from the proposition that the</p> <p>2 contributory rule does not apply.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR WOLFSON: Alternatively, if the contributory rule does</p> <p>5 apply in LBIE's administration, it doesn't have the</p> <p>6 effect which my learned friend Mr Trower submits that it</p> <p>7 does. In particular, if the contributory rule does</p> <p>8 apply, it does not have the effect that LBIE's</p> <p>9 administrators can, without carrying out any valuation</p> <p>10 exercise, simply sit back and refuse to pay us any</p> <p>11 dividend whatsoever. At the very least, what LBIE's</p> <p>12 administrators have to do is to conduct a valuation</p> <p>13 exercise and what are they valuing. They would have to</p> <p>14 compare a fair and genuine estimate of LBL's liability</p> <p>15 under Section 74, on the one hand, with a value of LBL's</p> <p>16 claim on the other hand. Once that valuation exercise</p> <p>17 is done, we are talking here obviously in LBIE's</p> <p>18 administration, you would see whether a balance is</p> <p>19 payable to LBL, and if a balance is payable, it should</p> <p>20 be paid. Now the critical point on this, that what is</p> <p>21 brought into account when you are doing that valuation</p> <p>22 on the LBL side of the equation, is the dividend in its</p> <p>23 insolvency on LBIE's claim. In other words, what you</p> <p>24 bring into account is the dividend that LBIE would</p> <p>25 attain in LBL's insolvency on LBIE's claim, and not the</p> <p style="text-align: center;">Page 90</p>	<p>1 more simply. If LBIE is withholding distributions, you</p> <p>2 can't also prove in LBL's insolvency. I make that last</p> <p>3 point for a commercial reason. That may have a very</p> <p>4 important effect for LBL's other creditors. If LBL</p> <p>5 can't receive dividends from LBIE because of the</p> <p>6 contributory role, contrary to our primary case, LBL</p> <p>7 would though be able to distribute the funds it</p> <p>8 currently has to its other unsecured creditors, without</p> <p>9 regard essentially to LBIE's claim, because LBIE</p> <p>10 wouldn't be able to withhold the LBIE administration and</p> <p>11 make the claim in LBL's administration. Again, I will</p> <p>12 come back to that point.</p> <p>13 So with that overview, let me deal with the first</p> <p>14 point, which is the point under Section 74(1), and</p> <p>15 starting from the top, so to speak, the proposition that</p> <p>16 only liquidators can make a call under Section 74. Now</p> <p>17 the court's power to make calls is delegated to</p> <p>18 liquidators. Your Lordship has been referred to the</p> <p>19 relevant sections. I don't think we need to go back to</p> <p>20 them. But just for your Lordship's note, the duty to</p> <p>21 settle a list of contributories is placed on the court.</p> <p>22 That is Section 148. That duty is delegated to the</p> <p>23 liquidator under rule 4.195, and a compulsory</p> <p>24 liquidation and Section 165(4)A in a voluntary</p> <p>25 liquidation. Similarly, in a winding up, the power of</p> <p style="text-align: center;">Page 92</p>

<p>1 making calls is vested in the court under Section 15. 2 It is worth reminding ourselves at the outset that 3 Section 150(1) applies in terms "at any time after 4 making a winding up order". So that is the starting 5 point. That is essentially the origin of the power. 6 That power, which is given by statute to the court, is 7 then delegated. But who is it delegated to. But who is 8 it delegated to? It is delegated to the liquidator. 9 That is Section 160 and rule 4.202 for a compulsory 10 liquidation and section 165(4)B for a voluntary 11 liquidation. So the starting point is that the 12 liquidator's power to make calls itself derives from the 13 court's power, which is provided by statute and applies 14 in terms "at any time after making the winding up 15 order". 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR WOLFSON: So the scheme is you have a power provided by 18 statute to the court, delegable by the court to the 19 liquidator. The statute clearly provides that only 20 liquidators and not administrators have that delegated 21 power to make calls. This reflects the fact that 22 looking at it, so to speak, from the other side of the 23 telescope, the source of the liability of 24 contributories, which is Section 74(1), expressly states 25 that the liability arises "when a company is wound up",</p> <p style="text-align: center;">Page 93</p>	<p>1 a penny(?) (inaudible) the operation of what he says is 2 the rule. I rely, for that submission, on paragraph 165 3 of LBIE's written opening. As I say, that possibility, 4 it is said against us, is enough to mean that we can get 5 nothing out of LBIE's state alone. 6 MR JUSTICE DAVID RICHARDS: Well, when you say if it is 7 solvent, if there were sufficient in the estate to make 8 returns to members, then it would not be said you could 9 not then claim, make a claim. 10 MR WOLFSON: Yes. No, but that is right. If there was no 11 possibility whatsoever of a call, my learned friend 12 would, it seems, agree. 13 MR JUSTICE DAVID RICHARDS: Yes, I see, I see. 14 MR WOLFSON: But, of course, you can have possibility, when 15 in fact the position is that there is enough money. 16 Sometimes you just don't know. 17 MR JUSTICE DAVID RICHARDS: Correct. 18 MR WOLFSON: Now at this stage, I can content myself with 19 saying that this would be a rather drastic effect 20 arising out of a scheme that doesn't appear anywhere in 21 the legislation itself. We submit it is contrary to the 22 statutory scheme. We submit it is contrary to 23 authority. In those circumstances, we say it is not 24 surprising that it appears to be contrary to commercial 25 common sense too.</p> <p style="text-align: center;">Page 95</p>
<p>1 so to speak, the other end of that telescope. So 2 without shirking from making what we submit is an 3 absolutely obvious point, it is a key and we say unique 4 feature of a liquidation that calls can be made on 5 contributories. It is simply not a feature of an 6 administration. That explains the illegal contortions 7 that my learned friend, Mr Trower, has to go through to 8 try and make good his argument in this application. 9 Because where he gets to is this -- it is important 10 your Lordship appreciates just where he gets to. 11 I think this may have been developed by my learned 12 friend, Mr Isaacs, I think, that LBIE's case amounts to 13 saying this; despite a carefully circumscribed statutory 14 scheme, the members, we can't prove against LBIE's 15 estate full stop. That is my learned friend's case. It 16 makes no difference, he says, for the purposes of 17 whether we can prove in LBIE's estate whether LBIE is in 18 liquidation or administration, or it would seem whether 19 LBIE is solvent or insolvent. That is because LBIE says 20 if suffices, even if there is a possibility -- not 21 a likelihood or certainty or anything like it, not even 22 a probability, it suffices if there is a possibility of 23 a shortfall. That itself is enough to prevent us making 24 any claim. So they can be in administration, they can 25 be solvent, and on my learned friend's case we don't get</p> <p style="text-align: center;">Page 94</p>	<p>1 My learned friend Mr Zacaroli goes even further. My 2 learned friend Mr Zacaroli says at paragraph 38 of his 3 written opening, that the absence of an equivalent 4 provision to Section 74 for a company in administration 5 "appears to be the result of an oversight, rather than 6 a deliberate policy decision". I hope I have quoted my 7 learned friend correctly. 8 MR JUSTICE DAVID RICHARDS: Which paragraph? 9 MR WOLFSON: 38, I hope, my learned friend Mr Zacaroli's -- 10 he has distinguished himself by only needing one set of 11 written submissions to say everything he needed to say. 12 Yes, there it is, the top of the page, it is the last 13 sentence. He accepts the point, as he has to, in the 14 penultimate sentence and then explains it in the last 15 sentence. Now with respect to my learned friend, it is, 16 of course, always tempting to say that the absence of 17 a statutory power is the result of an oversight. There 18 is no evidence of any such oversight. It is far from 19 clear -- and this is a point I will come back to 20 later -- that even if it was an oversight it would 21 actually LBIE -- I will come back to my point. Just to 22 make good my submission that it doesn't appear to be an 23 oversight, first, there is no authority, or anything 24 else frankly, cited in support of this suggestion that 25 it was an oversight. If there was an oversight in</p> <p style="text-align: center;">Page 96</p>

<p>1 omitting to empower administrators to make calls, it was 2 a pretty significant one and nobody seems to have 3 spotted it until now. To make the point which is 4 a corollary with the point in which I started this set 5 of submissions, in fact if such a power has been given 6 to administrators, in my submission, that would actually 7 have been a dramatic new power which would never have 8 previously been available to administrators. In other 9 words, the legislature would have been giving a power 10 formally, given expressly to the court, and also 11 expressly delegable to one set of people in one 12 circumstance vis liquidators in the liquidation, and 13 giving it to the new group of people in a different 14 circumstance vis to administrators in the 15 administration.</p> <p>16 MR JUSTICE DAVID RICHARDS: So in a creditor's voluntary 17 winding up, I think you gave me this reference earlier, 18 it still, is it, expressed to be the function of the 19 court to make calls, but that is delegated to the 20 voluntary liquidator?</p> <p>21 MR WOLFSON: It is all delegated from the court to the 22 liquidator.</p> <p>23 MR JUSTICE DAVID RICHARDS: You say there is no authority 24 that it is an oversight, is there any authority that it 25 is not an oversight?</p> <p style="text-align: center;">Page 97</p>	<p>1 companies, or it was commonplace to have unlimited 2 companies, frankly I would have thought something would 3 have been included.</p> <p>4 MR WOLFSON: Yes.</p> <p>5 MR JUSTICE DAVID RICHARDS: But I mean there it is. I mean 6 we are all agreed, it is not there.</p> <p>7 MR WOLFSON: With respect, I take your Lordship's points. 8 Of course, your Lordship is plainly right, if I may say, 9 with respect. We have here a case where you get halfway 10 through bundle 2 of the authorities bundles, and I think 11 you are still in 1904 or something.</p> <p>12 MR JUSTICE DAVID RICHARDS: Well, exactly, exactly. I mean 13 unlimited companies have been used in very limited -- 14 sorry, no pun intended -- circumstances really. I think 15 in recent times largely -- someone may be able to 16 suggest other reasons -- for tax planning, which was 17 clearly the reason here. There was a time when they 18 were used quite extensively oddly for state companies, 19 you know Downton Abbey might have been held by 20 an unlimited company. But they have had very limited 21 uses over the years.</p> <p>22 MR WOLFSON: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: One can see that even in the 24 19th century cases, because they are virtually all cases 25 involving companies limited by shares, on which there</p> <p style="text-align: center;">Page 99</p>
<p>1 MR WOLFSON: There is no authority that it is not 2 an oversight.</p> <p>3 MR JUSTICE DAVID RICHARDS: No.</p> <p>4 MR WOLFSON: My Lord, we are left with essentially the 5 statutory scheme.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, I mean administration came 7 into our law in 1986.</p> <p>8 MR WOLFSON: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: Distributing administrations 10 came into our law in 2003.</p> <p>11 MR WOLFSON: Yes.</p> <p>12 MR JUSTICE DAVID RICHARDS: No one can remember the case of 13 an insolvent unlimited company or an insolvent company 14 with amounts unpaid on shares. The authorities which 15 have been cited to me today, apart from Kaupthing where 16 the point is used, as it were, as a parallel argument. 17 The last time this was a live issue was in 1937, and 18 I think it was a pretty dead letter by then. It is 19 a 19th century concept. It doesn't surprise me that 20 nobody gave any thought at all as to whether or not 21 there should be a power in administrators to require 22 calls. I mean that doesn't alter your argument at all.</p> <p>23 MR WOLFSON: Absolutely.</p> <p>24 MR JUSTICE DAVID RICHARDS: Equally, if in fact it was 25 commonplace to have unpaid amounts on shares in</p> <p style="text-align: center;">Page 98</p>	<p>1 are unpaid amounts.</p> <p>2 MR WOLFSON: Yes, well, the screenwriters of Downton Abbey 3 have educated the public on the applicability of the 4 Settled Land Act.</p> <p>5 MR JUSTICE DAVID RICHARDS: They have indeed, yes, yes.</p> <p>6 MR WOLFSON: They may have been made (overspeaking) limited 7 companies as well.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, indeed (inaudible) and so 9 on, yes.</p> <p>10 MR WOLFSON: My Lord, where we get to, and taking, with 11 respect, your Lordship's points, he included that is 12 right. There are a number of areas here where, so to 13 speak, the statute is what the statute is. My learned 14 friend is inviting you, so to speak, to try to fill gaps 15 I make a submission to say if there is a gap it ought to 16 be filled by Parliament, and we will come later to 17 situations of Lacuna, and your Lordship has seen 18 a reference to the decision Mr Justice Briggs in 19 Blueman Pensions Regulator. We will come to that. But 20 there is a headline point there which is this. I put it 21 at a very high level. There are pros and cons for both 22 liquidation and administration, for the creditors, for 23 the office holders, frankly, for everybody with 24 an interest in the act. There are a number of factors 25 which the relevant decision makers must weigh in the</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 balance in deciding what to do, often under the court's 2 supervision and direction. However, once a particular 3 insolvency procedure has been settled and has been put 4 into effect, there must be an acceptance of the 5 consequences that flow from that process. What we do 6 object to is the idea that, so to speak, the insolvency 7 process is some form of pick and mix, when LBIE's office 8 holders can decide to act as administrators at one time, 9 but then adopt powers expressly reserved and delegated 10 by the court only to liquidators at another time. That 11 may be to repeat the submission I made earlier in 12 different words, but your Lordship sees the point 13 I make.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>15 MR WOLFSON: In this case, the decision was taken to put 16 LBIE into administration, and importantly, as I said 17 earlier, LBIE's administrators decided to start making 18 distributions to unsecured creditors, in the knowledge 19 first that members have their own unsecured claims 20 against LBIE, not qua member, and we submit that 21 administrators would not be able to make calls on the 22 members. Now there may well have been a number of 23 advantages to that route. No doubt there were good 24 reasons to start making distributions to unsecured 25 creditors, but we submit an inevitable consequence is</p> <p style="text-align: center;">Page 101</p>	<p>1 supplemental submissions, he makes a submission that we 2 are trying to engineer a situation where we can prove 3 against LBIE, and get 100 pence in £1 on our claim, but 4 they can't prove against us, until they have gone into 5 liquidation and made the call, by which time we will 6 have distributed assets, or would be paying out 7 considerable less than 100 pence in £1. I think he 8 reinforced that point orally this morning. The point 9 made against us is that this is unfair. Two points with 10 response to that. First, it is a feature of the fact 11 that LBIE's administrators took the two decisions I have 12 mentioned. They decided not to put LBIE into 13 liquidation, but to keep it in administration.</p> <p>14 Secondly, they decided to start making distributions to 15 creditors. Second, the consequences may be exacerbated 16 in this case because of the likely dividend rates in the 17 different estates. It looks like LBIE is going to pay 18 a high dividend, possibly 100 pence in £1 if the market 19 is right, and LBL might well pay a lower dividend from 20 its estate. But if I can put it demotically, that is 21 how the cookie crumbles. It doesn't make any 22 difference. It can't affect whether my submissions or 23 my learned friend Mr Trower's submissions are legally 24 right or legally wrong. The relevant dividend rates are 25 what they are. As I mentioned a moment ago that LBIE</p> <p style="text-align: center;">Page 103</p>
<p>1 you can't make calls at this stage on the members. This 2 is not a case -- to use the phrase adopted by 3 Lord Justice Selwin in Humber Iron Works, this is 4 a case, so to speak, of accidental delay. Your Lordship 5 recalls he was dealing there with the point that between 6 the date of the winding up and the date of actual 7 distribution, things may have moved on.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes, yes.</p> <p>9 MR WOLFSON: The situation which LBIE's administrators find 10 themselves is a result of a deliberate decisions or 11 a number of deliberate decisions on the part of the 12 relevant office holders, and essentially what they are 13 seeking to do is to secure in economic terms a key 14 benefit of the liquidation procedure, ie the ability to 15 make calls on the members, by contending that the 16 contributory rule applies in LBIE's administration, 17 without any of the downsides for them, and I assume 18 there are several, of a liquidation procedure. They are 19 trying to have their cake and eat it, and worse, they 20 are trying to make us pay for it. Now I say that with 21 respect to my learned friend, for good forensic reasons. 22 What my learned friend seeks to do is to adopt the old 23 maxim; the best form of defence is attack. What my 24 learned friend does to make this submission, at 25 paragraph 56 of my learned friend Mr Trower's</p> <p style="text-align: center;">Page 102</p>	<p>1 may be paying a dividend as high as 100 pence in £1, 2 your Lordship will have seen in the evidence that in 3 fact the market for LBIE debt is actually trading above 4 half.</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR WOLFSON: Your Lordship will appreciate why that is, 7 depending on how the interest -- the way it works at 8 8 per cent, we will come back to that.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR WOLFSON: It is worth making the point --</p> <p>11 MR JUSTICE DAVID RICHARDS: Is it 8 per cent?</p> <p>12 MR WOLFSON: It is the higher(?) of the Judgments Act rate 13 or the contractual right.</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes. The Judgments Act rate is 15 still 8 per cent, is it?</p> <p>16 MR WOLFSON: I think it is, I think it is.</p> <p>17 MR JUSTICE DAVID RICHARDS: Is it? I thought it had come 18 down to six at some point, but I may be wrong about 19 that. I don't want to say something that is market 20 sensitive, so people should check for themselves.</p> <p>21 MR WOLFSON: There was at one time some sort of scheme where 22 people used to pay money into court on the basis it 23 actually accrued better interest. So the 24 Lord Chancellor was operating the best interest rates in 25 town. The munificence of the Lord Chancellor has since</p> <p style="text-align: center;">Page 104</p>

26 (Pages 101 to 104)

<p>1 declined dramatically, I am afraid. But my Lord that</p> <p>2 point that LBIE may be paying 100 pence in £1 is</p> <p>3 extremely important in this context as well. We should</p> <p>4 remind ourselves that LBIE going into liquidation is</p> <p>5 neither certain or even probable. It is worth noting</p> <p>6 that LBIE's evidence, and let me just give your Lordship</p> <p>7 the reference, we need not go to it again, it is at</p> <p>8 bundle 3 --</p> <p>9 MR JUSTICE DAVID RICHARDS: But I mean the only issue that</p> <p>10 this would go to would be valuing a claim in your</p> <p>11 estate.</p> <p>12 MR WOLFSON: Yes, absolutely.</p> <p>13 MR JUSTICE DAVID RICHARDS: But I am not sure I can really</p> <p>14 approach the issues that I have got on this sort of</p> <p>15 estimation of the chances of LBIE going into</p> <p>16 liquidation. All the more so, the chances might change</p> <p>17 depending on the answers I give to the questions posed.</p> <p>18 MR WOLFSON: Absolutely, and I am not inviting your Lordship</p> <p>19 to do it. The submission I was going to make is this,</p> <p>20 there is a submission in Lidl's(?) position paper,</p> <p>21 a skeleton. It is paragraph 40 of my learned friend</p> <p>22 Mr Zacaroli's skeleton, where he submits that</p> <p>23 your Lordship sees towards the end of that paragraph,</p> <p>24 three lines up:</p> <p>25 "There could be no realistic doubt as to whether</p> <p style="text-align: center;">Page 105</p>	<p>1 MR WOLFSON: Yes.</p> <p>2 MR TROWERS: I think that is right, my Lord. It is on the</p> <p>3 list of issues. It is not actually one of the</p> <p>4 questions, but I think your Lordship is invited to</p> <p>5 decide it.</p> <p>6 MR JUSTICE DAVID RICHARDS: Right, okay, thank you. Of</p> <p>7 course, one can always decline an invitation.</p> <p>8 MR WOLFSON: I am pleased that my learned friend invited to</p> <p>9 your Lordship to (inaudible). So my Lord the effect of</p> <p>10 this, as your Lordship appreciates our case, is that if</p> <p>11 we give notice of our intentions to declare a dividend,</p> <p>12 or if we go into liquidation, no proof could be made in</p> <p>13 our estate from LBIE, unless and until LBIE goes into</p> <p>14 liquidation and makes a call. That is our point.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR WOLFSON: Now we say there are two problems for LBIE in</p> <p>17 that regard. I will develop both of them. The first is</p> <p>18 that there is no basis for proving an estimated</p> <p>19 liability for future calls against a corporate</p> <p>20 contributory. There is no equivalent in the Act or</p> <p>21 rules in respect of a corporate contributory to what we</p> <p>22 find in Section 82(4) for a bankrupt individual</p> <p>23 contributory. I will come back to this point.</p> <p>24 Section 82(4), perhaps it is worth turning it up</p> <p>25 just to remind ourselves what it says.</p> <p style="text-align: center;">Page 107</p>
<p>1 LBIE would go into liquidation."</p> <p>2 So there would no reason to discount the value</p> <p>3 contingent against the members. My Lord, if I may say,</p> <p>4 I entirely with your Lordship, that we are not going to</p> <p>5 get into the precise valuation issues of the contingent</p> <p>6 claims in this hearing. But, my Lord, I do make the</p> <p>7 point that that goes well beyond LBIE's own evidence.</p> <p>8 MR JUSTICE DAVID RICHARDS: No, I see. Yes.</p> <p>9 MR WOLFSON: Of course, as your Lordship just said, it</p> <p>10 depends how your Lordship rules on the various issues.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR WOLFSON: If post-administration interests under</p> <p>13 rule 2887 does not survive into a liquidation, that</p> <p>14 might be a good reason for LBIE not to go into</p> <p>15 liquidation.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes. Is that an issue I am</p> <p>17 invited to decide incidentally on this application, that</p> <p>18 particular point? Mr Trower took me carefully through</p> <p>19 the argument on it.</p> <p>20 MR WOLFSON: Yes, the oddity is that it is not formally in</p> <p>21 the joint application.</p> <p>22 MR JUSTICE DAVID RICHARDS: No.</p> <p>23 MR WOLFSON: But it did find its way onto the list of</p> <p>24 issues.</p> <p>25 MR JUSTICE DAVID RICHARDS: Oh, did it?</p> <p style="text-align: center;">Page 106</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR WOLFSON: It will be in volume 2, behind tab 12. 82.4</p> <p>3 provides:</p> <p>4 "There may be proved against the bankrupt estate the</p> <p>5 estimated value of his liability to future calls, as</p> <p>6 well as the calls already made."</p> <p>7 MR JUSTICE DAVID RICHARDS: Right.</p> <p>8 MR WOLFSON: The case of Re McMarr(?) on which my learned</p> <p>9 friend relies or refers to in this regard is a case of</p> <p>10 a bankrupt contributory. There was no authority to</p> <p>11 support the contention that a proof can be made in</p> <p>12 respect of future calls against a corporate</p> <p>13 contributory. Now my learned friend fairly recognises</p> <p>14 he has a problem here, and he deals with it in writing.</p> <p>15 I will give your Lordship the reference, paragraph 11 of</p> <p>16 his supplemental submissions. The point he makes in</p> <p>17 paragraph 11 is essentially this, he says presumably it</p> <p>18 was felt necessary to provide that notwithstanding the</p> <p>19 terms of the other sub-sections in Section 82, which</p> <p>20 transfer the status of contributory to the trustee and</p> <p>21 bankruptcy, that both an existing liability and also</p> <p>22 a liability in respect of future calls, were proveable</p> <p>23 against a bankrupt estate. I paraphrase, but I hope</p> <p>24 fairly that is the point he seeks to make.</p> <p>25 MR JUSTICE DAVID RICHARDS: Just let me read myself the</p> <p style="text-align: center;">Page 108</p>

<p>1 whole of Section 82.</p> <p>2 MR WOLFSON: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, okay. Yes.</p> <p>4 MR WOLFSON: My Lord, I am conscious of the time, but can</p> <p>5 I finish just this short point.</p> <p>6 MR JUSTICE DAVID RICHARDS: Absolutely, yes, certainly and</p> <p>7 then we will take a break. Yes.</p> <p>8 MR WOLFSON: My Lord, with respect to my learned friend,</p> <p>9 that explanation which he seeks to give, to explain why</p> <p>10 we have Section 82(4) for individuals, but we have</p> <p>11 nothing for call ups --</p> <p>12 MR JUSTICE DAVID RICHARDS: So the explanation is -- just</p> <p>13 remind me where it is? Paragraph 11.</p> <p>14 MR WOLFSON: Paragraph 11. You can probably better look at</p> <p>15 in his own words, rather than foist him with my spin on</p> <p>16 it. It is 11 of the supplemental submissions.</p> <p>17 Your Lordship sees it is the last sentence.</p> <p>18</p> <p>19 (3.13 pm)</p> <p>20 MR WOLFSON: Now, with respect to my learned friend, we</p> <p>21 submit that the explanation he gives in fact fails to</p> <p>22 explain why, given the existence of 82.2 and 82.3, 82.4</p> <p>23 is in fact necessary. In other words, if it's right</p> <p>24 that a proof can be made in respect of the liability to</p> <p>25 future calls for both individual and also corporate</p> <p style="text-align: center;">Page 109</p>	<p>1 at it I think is to say you are seeking to argue that,</p> <p>2 by reason of 82.4, there is an express exclusion of any</p> <p>3 right to prove in the insolvency of a company. But I</p> <p>4 imagine you would accept, certainly in the light of Re</p> <p>5 Nortel, that the ownership of unpaid shares gives rise</p> <p>6 to a provable debt in respect of the contingent</p> <p>7 liability.</p> <p>8 MR WOLFSON: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: So it is a contingent liability</p> <p>10 which is provable, and I would have thought it is</p> <p>11 provable whether or not the company is itself in</p> <p>12 liquidation, that's one of the contingencies, but you</p> <p>13 say what would otherwise be the position under the</p> <p>14 sections dealing with the provability of debts in</p> <p>15 a liquidation and so on is displaced by 82.4; is that</p> <p>16 right?</p> <p>17 MR WOLFSON: My Lord, if I may, I put it slightly</p> <p>18 differently. I think I get to the same submission</p> <p>19 perhaps by a slightly different use of words. We submit</p> <p>20 that the implication of the express statutory inclusion</p> <p>21 of liability for future calls in respect only of</p> <p>22 individual contributories indicates that the power is so</p> <p>23 limited and there is no power for a future call against</p> <p>24 a corporate contributory.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes. I think you have put more</p> <p style="text-align: center;">Page 111</p>
<p>1 insolvent contributories, it's very difficult to see why</p> <p>2 you need 82.4 at all.</p> <p>3 MR JUSTICE DAVID RICHARDS: I think what is being suggested</p> <p>4 in paragraph 11 is that it's the trustee who becomes the</p> <p>5 contributory.</p> <p>6 MR WOLFSON: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: So that it's the trustee who</p> <p>8 becomes liable.</p> <p>9 MR WOLFSON: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: If the trustee is liable the</p> <p>11 bankrupt is not.</p> <p>12 MR WOLFSON: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: So you need something to enable</p> <p>14 proof for future calls to be made against the bankrupt's</p> <p>15 estate. I think that's the argument. Whereas with</p> <p>16 a company of course there is no transfer of assets or</p> <p>17 liabilities at all.</p> <p>18 MR WOLFSON: My Lord, yes. But in our submission if the</p> <p>19 starting point is that both an individual and</p> <p>20 a corporate insolvent contributory -- I am sorry.</p> <p>21 MR JUSTICE DAVID RICHARDS: I think there is a danger in</p> <p>22 this because the regime for bankrupt individuals is</p> <p>23 different from the regime for insolvent companies.</p> <p>24 MR WOLFSON: Yes, because you have a trustee.</p> <p>25 MR JUSTICE DAVID RICHARDS: I think the other way of looking</p> <p style="text-align: center;">Page 110</p>	<p>1 elegantly the point I was making. Because were it not</p> <p>2 for 82.4 it seems to me you would be in difficulty in</p> <p>3 arguing that there was no provable contingent liability</p> <p>4 in respect of partly paid shares, for example.</p> <p>5 MR WOLFSON: If it was not for 82.4, I couldn't make the</p> <p>6 submission at all.</p> <p>7 MR JUSTICE DAVID RICHARDS: So the basic position is, isn't</p> <p>8 it, that there is a liability, there is a contingent</p> <p>9 liability which can be proved. You rely on 82.4 and by</p> <p>10 implication removing it in the case of an insolvent</p> <p>11 company.</p> <p>12 MR WOLFSON: Exactly. Your Lordship saw the Latin tag in</p> <p>13 one of the cases we looked at earlier this morning with</p> <p>14 section 101, exclusio -- I am afraid I am going to get</p> <p>15 it --</p> <p>16 MR JUSTICE DAVID RICHARDS: Exclusio -- no, inclusio,</p> <p>17 expressio exclusio alterius, yes.</p> <p>18 Very well. On that happy Latin note, let us pause</p> <p>19 for five minutes.</p> <p>20 (3.17 pm)</p> <p>21 (Short break)</p> <p>22 (3.25 pm)</p> <p>23 MR WOLFSON: My Lord, I was just making the submission on</p> <p>24 the section 82.4 point and saying that was the first</p> <p>25 problem the LBIE administrators have. The second of</p> <p style="text-align: center;">Page 112</p>

28 (Pages 109 to 112)

<p>1 course is my general point that they have no basis to 2 make a call at all.</p> <p>3 There is also, in this context, the absence of any 4 equivalent to paragraph 8 of schedule 4 for 5 administrators; that's the express power for a 6 liquidator to prove in the bankruptcy or insolvency of 7 a contributory. Your Lordship finds that at the end of 8 tab 12 in bundle 2, paragraph 8 of schedule 4. If your 9 Lordship just turns back from that tab about six pages, 10 there is a page which has page 673 in the top right-hand 11 corner.</p> <p>12 MR JUSTICE DAVID RICHARDS: Sorry, just give me a moment. 13 Yes.</p> <p>14 MR WOLFSON: It does not seem to say it on the page, but 15 that is paragraph 8 of schedule 4. This is the power 16 given to liquidators to prove in the bankruptcy, 17 insolvency or sequestration of any contributory. 18 My Lord, of course that ties in with my submission that 19 this is a power reserved only to liquidators and not 20 given to administrators.</p> <p>21 While we are on this, can I just invite your 22 Lordship to note, because we are coming back to this at 23 some point --</p> <p>24 MR JUSTICE DAVID RICHARDS: Sorry, just let me get it. So 25 this is another aspect of the submission that they</p> <p style="text-align: center;">Page 113</p>	<p>1 lines of the concept of the balance against the estate. 2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR WOLFSON: Does your Lordship see that in the second and 4 third lines? I will come back to that point, if I may, 5 when I am dealing with questions of set-off.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR WOLFSON: Your Lordship will see that will essentially 8 tie in with my submission that there is a set-off in 9 LBL's administration and that is one of the reasons why 10 this paragraph is talking about balance, but we will 11 come back to that.</p> <p>12 That also, as Ms Shah reminds me, ties into the last 13 point, and rateably with the other separate creditors, 14 but we will come back to those points when we are 15 dealing with set-off.</p> <p>16 Now, given that the administrator does not have the 17 schedule 4, paragraph 8 power, LBIE relies -- and the 18 reference to their submissions in this regard is 19 paragraphs 13 and 14 of their supplemental 20 submissions -- on other powers contained in schedule 1. 21 We say even if we haven't got paragraph 8 of schedule 4, 22 we do have others powers which we can use. The first 23 one is paragraph 20 of schedule 1 which --</p> <p>24 MR JUSTICE DAVID RICHARDS: So this is in their supplemental 25 submissions.</p> <p style="text-align: center;">Page 115</p>
<p>1 cannot prove, is it?</p> <p>2 MR WOLFSON: Yes, they cannot prove in our administration 3 unless and until there is a call, and a call can be 4 made --</p> <p>5 MR JUSTICE DAVID RICHARDS: Unless and until there is 6 a call, which necessarily means a liquidation.</p> <p>7 MR WOLFSON: Exactly.</p> <p>8 MR JUSTICE DAVID RICHARDS: So there is no basis for proving 9 an estimated liability for calls. I see. Just let me 10 get this right. So basically you are saying that the 11 LBIE administrators or LBIE while in administration --</p> <p>12 MR WOLFSON: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: -- cannot prove, cannot lodge, 14 is this right, cannot lodge a proof?</p> <p>15 MR WOLFSON: In LBL's administration, because that also is 16 a power given only to liquidators.</p> <p>17 MR JUSTICE DAVID RICHARDS: The first reason for that is the 18 section 82.4 point and the second is the absence of any 19 power in an administrator to do so.</p> <p>20 MR WOLFSON: Yes, c.f. liquidator, which has the power of 21 schedule 4, paragraph 8.</p> <p>22 MR JUSTICE DAVID RICHARDS: Let me think about this.</p> <p>23 MR WOLFSON: Now, as your Lordship sees, there is another 24 point which we will come back to arising out of this 25 paragraph, which is the use in the second and third</p> <p style="text-align: center;">Page 114</p>	<p>1 MR WOLFSON: In paragraphs 13 and 14. 2 Your Lordship finds paragraph 20 of schedule 1 on 3 the previous page, if your Lordship turns back a page in 4 the Act, the previous photocopied page, because only the 5 relevant bits have been photocopied.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, okay.</p> <p>7 MR WOLFSON: That's paragraph 20 of schedule 1: 8 "Power to rank a claim in bankruptcy, insolvency, 9 sequestration or liquidation of any person indebted to 10 the company", et cetera.</p> <p>11 Our submission on this is a short one, which is that 12 while LBIE is in administration the members are not 13 indebted to the company.</p> <p>14 MR JUSTICE DAVID RICHARDS: This is in, sorry?</p> <p>15 MR WOLFSON: Schedule 1. I think in your Lordship's copy 16 it's 277. Schedule 1, powers of administrator or 17 administrative receiver. The one LBIE seeks to rely on 18 is 20: 19 "The power to rank and claim in bankruptcy, 20 insolvency ... of any person indebted to the company." 21 The short point we make in that regard is that the 22 members are not, while LBIE is in administration, 23 indebted to the company. They are only liable to 24 contribute to the company's assets under section 74 when 25 LBIE is wound up.</p> <p style="text-align: center;">Page 116</p>

<p>1 The second power they seek to rely on --</p> <p>2 MR JUSTICE DAVID RICHARDS: Can I just understand this.</p> <p>3 MR WOLFSON: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: I am not quite sure how you are</p> <p>5 putting it. Are you saying that the liability to</p> <p>6 contribute to assets of the company is not something</p> <p>7 which can fall within the concept of indebtedness there</p> <p>8 used? Or are you saying and/or are you saying that</p> <p>9 although it may do so it's not an indebtedness to the</p> <p>10 company?</p> <p>11 MR WOLFSON: I mean, it's always tempting to say both, but</p> <p>12 really it is both, if I can have both, because they are</p> <p>13 independent arguments.</p> <p>14 MR JUSTICE DAVID RICHARDS: So be it, yes.</p> <p>15 MR WOLFSON: Unless and until there is a liquidation and</p> <p>16 a call, we have no liability to do anything at all.</p> <p>17 MR JUSTICE DAVID RICHARDS: No present liability.</p> <p>18 MR WOLFSON: No present liability to do anything at all, and</p> <p>19 it cannot be fairly said that we are indebted to the</p> <p>20 company.</p> <p>21 MR JUSTICE DAVID RICHARDS: But the trouble about</p> <p>22 indebtedness in an insolvency context is it goes far</p> <p>23 further than, you know, debitum in praesenti, if we are</p> <p>24 to continue with Latin. I mean, it includes contingent</p> <p>25 liabilities.</p> <p style="text-align: center;">Page 117</p>	<p>1 company.</p> <p>2 MR JUSTICE DAVID RICHARDS: Sorry, it's not a liability to</p> <p>3 the company. So, in any event, not a liability to the</p> <p>4 company.</p> <p>5 MR WOLFSON: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: Therefore, a company in</p> <p>7 administration cannot lodge a proof. Yes.</p> <p>8 MR WOLFSON: Of course the obvious point is it would have</p> <p>9 been the easiest thing in the world to give schedule 4,</p> <p>10 paragraph 8 power to the administrators. So what I am</p> <p>11 doing here is, so to speak, dealing with LBIE's</p> <p>12 submissions as to how they get round that. We should</p> <p>13 not lose sight of the starting point of the argument.</p> <p>14 The reason we are looking at these sections is because</p> <p>15 LBIE is saying, "Even though as administrator I don't</p> <p>16 have schedule 4, paragraph 8, or the equivalent thereof,</p> <p>17 I can use these other powers which I am given to get to</p> <p>18 the same end."</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR WOLFSON: The second way LBIE seeks to fill this gap,</p> <p>21 because that's in my submission what is happening, is to</p> <p>22 rely on section 59.1 of schedule B1 of the Act.</p> <p>23 MR JUSTICE DAVID RICHARDS: 59.1.</p> <p>24 MR WOLFSON: Of schedule B1.</p> <p>25 MR JUSTICE DAVID RICHARDS: Right.</p> <p style="text-align: center;">Page 119</p>
<p>1 MR WOLFSON: Quite. Exactly. Your Lordship will appreciate</p> <p>2 that I have dealt with and I will deal with more with</p> <p>3 the question of whether there is such a thing as whether</p> <p>4 you can have a contingent liability in this context</p> <p>5 within section 74.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes, but for these purposes what</p> <p>7 you are saying is, no, you cannot.</p> <p>8 MR WOLFSON: Exactly.</p> <p>9 MR JUSTICE DAVID RICHARDS: I mean, I don't know at what</p> <p>10 point you are going to make your submissions as to why</p> <p>11 that is so, whether to do it here or in the context of</p> <p>12 section 74, I am not sure. Wherever is convenient to</p> <p>13 you.</p> <p>14 MR WOLFSON: I am going to do it in the context of</p> <p>15 section 74.</p> <p>16 MR JUSTICE DAVID RICHARDS: That's fine. Okay. So you say</p> <p>17 a contingent liability in respect of calls is not a debt</p> <p>18 or indebtedness.</p> <p>19 MR WOLFSON: Is not indebtedness.</p> <p>20 MR JUSTICE DAVID RICHARDS: Is not indebtedness in this</p> <p>21 context.</p> <p>22 MR WOLFSON: Yes.</p> <p>23 MR JUSTICE DAVID RICHARDS: Okay. That was that. But you</p> <p>24 also say, do you, that it's not actually --</p> <p>25 MR WOLFSON: If necessary, it's not indebtedness to the</p> <p style="text-align: center;">Page 118</p>	<p>1 MR WOLFSON: In the authorities bundle, so to speak, that is</p> <p>2 at page 595 in the top right-hand corner.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR WOLFSON: So that's to do anything necessary or expedient</p> <p>5 for the management of the affairs, business and property</p> <p>6 of the company. Our submission in this regard is that</p> <p>7 contributions made pursuant to calls or to be made</p> <p>8 pursuant to calls are not "property of the company.</p> <p>9 "Property", as your Lordship knows, is defined in</p> <p>10 section 436 of the Act. There is a well-trodden</p> <p>11 distinction in this regard between assets vested in the</p> <p>12 company as at the time of winding-up and assets which</p> <p>13 are only recoverable by the liquidator subsequently in</p> <p>14 pursuance or the exercise of his statutory winding-up</p> <p>15 powers. The latter does not fall within the phrase, we</p> <p>16 submit, "the company's property".</p> <p>17 I am not sure that this last point I am making is</p> <p>18 actually controversial. It's established in an</p> <p>19 authority which I was not going to go to in detail, but</p> <p>20 for your Lordship's note it's Re Oasis Merchandising</p> <p>21 Limited. It's in authorities bundle 1C, tab 74. That</p> <p>22 was in the context of a liquidator's power of sale and</p> <p>23 an agreement with a litigation funding company. The</p> <p>24 short point was that the fruits of a claim for wrongful</p> <p>25 trading carried on by the liquidator wasn't within the</p> <p style="text-align: center;">Page 120</p>

<p>1 definition of "a company's property". My Lord, we 2 submit that proving in a contributory's insolvency does 3 not concern management of the property of the company. 4 Now, no it was doubt because of those provisions 5 that my learned friend Mr Trower yesterday suggested, 6 which was a point he had not taken in writing, that it 7 could be the company rather than the liquidator which 8 could prove in the members' insolvency. Your Lordship 9 will recall that. The reference to the transcript is 10 pages 92 and 94 of yesterday's transcript. 11 The problem with that submission is that the cases 12 to which he took your Lordship on this point in fact 13 make clear that it would have to be the liquidator's 14 claim in any event, even if the proceeding was for the 15 underlying liability other than by way of balance order. 16 If I recollect correctly in fact I think your Lordship 17 noted this point on the first case he took your Lordship 18 to which was Harrison. Perhaps we can just remind 19 ourselves of that. That's in supplemental authorities 20 tab 5. This was the decision of Mr Justice Vaughan 21 Williams. It's a short judgment. My learned friend 22 took your Lordship to about eight lines up: 23 "In the present case, however, on the receiver 24 undertaking to leave ...(Reading to the words)... in the 25 possession of the liquidator and indemnifying him Page 121</p>	<p>1 Now, this point also arose this morning when my 2 learned friend was addressing your Lordship on the 3 decision of Sir George Jessel, Master of the Rolls, in 4 Re Whitehouse in relation to the nature of the liability 5 of the contributory. We started dealing with this 6 yesterday when my learned friend made the point that 7 what was said by the Master of the Rolls in that case 8 should be "treated with caution". I am tempted to say 9 that one should treat with caution any submission that 10 anything said by Sir Georg Jessel should be treated with 11 caution, but of course my learned friend is saved by the 12 point that in fact it was one of the rare cases when the 13 learned judge did err. 14 But the critical point is this. The passages on 15 which we rely in that case -- and it's in authorities 16 1A, tab 24, and it's perhaps worth looking at it 17 again -- the passages are at 599, just by the first hole 18 punch, where the learned judge says: 19 "The debt due to the liquidator is distributable 20 among the creditors and the debt due to the individual 21 from the company ...(Reading to the words)... for the 22 creditor for the amount due. The two debts are not 23 applicable for the same purposes and could not possibly 24 be the subject of set-off." 25 The second passage at 601, over the page, at roughly Page 123</p>
<p>1 against costs, an order will be made that the receiver 2 should take the proceedings necessary for getting in 3 calls and should for that purpose use the liquidator's 4 name and, if necessary, the name of the company." 5 Attention was obviously focused on the name of the 6 company because your Lordship picked up it's 7 the preceding line which is the important one and that 8 "and" is a conjunctive and not a disjunctive "and". 9 So Harrison doesn't assist my learned friend at all. 10 The other case he took your Lordship to was 11 Westmoreland, which is in the prior tab, tab 4, 12 a decision of Mr Justice Kekowich in 1891 which then 13 went on appeal. 14 In the judgment of Lord Justice Lindley at page 25, 15 the judgment having started on the previous page, the 16 learned judge says: 17 "In former times, the court often refused to make 18 a balance order and directed the liquidator to bring the 19 action." 20 MR JUSTICE DAVID RICHARDS: Sorry, where is that? 21 MR WOLFSON: It's about -- 22 MR JUSTICE DAVID RICHARDS: "In former times", yes, I have 23 it. 24 MR WOLFSON: There again, it's the liquidator. It's the 25 liquidator who actually has the action. Page 122</p>	<p>1 the same point on the page, the first hole punch: 2 "It is a contribution to the assets enforceable by 3 the liquidator and not at all a debt. When you look at 4 the Act, there is really no question of set-off as 5 between calls, that is the amount unpaid on the shares, 6 and the debt due by the company to the contributory." 7 We submit that in those passages the learned judge 8 was, with respect, characteristically right. In order 9 for there to be a set-off, there must be a creditor 10 "proving or claiming to prove for a debt in the 11 administration", to use the language of rule 2.85(2). 12 In other words, you need to know if there is a provable 13 debt in order to know whether insolvency set-off 14 applies. 15 Just to make it clear -- 16 MR JUSTICE DAVID RICHARDS: Sorry, yes. 17 MR WOLFSON: We are not relying on the point which the Court 18 of Appeal in the Pyle case obviously said the learned 19 judge was wrong on, which is the point at the bottom of 20 599, which is the mutuality point. 21 MR JUSTICE DAVID RICHARDS: That's what he's referring to at 22 601. 23 MR WOLFSON: He is saying there is no set-off without 24 reason, but the point I do get out of 601, which 25 I submit is a different point, is he's talking there Page 124</p>

<p>1 about the assets enforceable by the liquidator.</p> <p>2 MR JUSTICE DAVID RICHARDS: What he is saying is that it's</p> <p>3 not a debt to the company.</p> <p>4 MR WOLFSON: Yes.</p> <p>5 MR JUSTICE DAVID RICHARDS: It's a contribution enforceable</p> <p>6 by the liquidator.</p> <p>7 MR WOLFSON: Yes.</p> <p>8 MR JUSTICE DAVID RICHARDS: Therefore, there cannot be</p> <p>9 a set-off.</p> <p>10 MR WOLFSON: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: With a debt due by the company</p> <p>12 to the contributory. Isn't that what he is saying</p> <p>13 there?</p> <p>14 MR WOLFSON: My Lord, I read that as making that point but</p> <p>15 also reinforcing my point that these are rights</p> <p>16 enforceable by the liquidator.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes, but I thought this was the</p> <p>18 point that you said he was to be wrong about.</p> <p>19 MR WOLFSON: I read the point he was said to be wrong about</p> <p>20 was the point at the bottom of 599.</p> <p>21 MR JUSTICE DAVID RICHARDS: We had better just have a look</p> <p>22 at Pyle, which I think is in 34. I think it's</p> <p>23 Lord Justice --</p> <p>24 MR WOLFSON: Lord Justice Lindley. I think it's at 585 and</p> <p>25 586.</p> <p style="text-align: center;">Page 125</p>	<p>1 you saying that it must be the liquidator's claim.</p> <p>2 MR WOLFSON: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: Now we have Lord Justice Lindley</p> <p>4 here saying that the call is a debt due to the company.</p> <p>5 That's what he says at the foot of page 585.</p> <p>6 MR WOLFSON: He says it's enforceable. The issue is that</p> <p>7 the only person who can enforce this right is the</p> <p>8 liquidator.</p> <p>9 MR JUSTICE DAVID RICHARDS: That may be so.</p> <p>10 MR WOLFSON: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: But he does say in terms, in the</p> <p>12 penultimate line, that the call was a debt due to the</p> <p>13 company.</p> <p>14 MR WOLFSON: Yes, and the question is who can enforce that</p> <p>15 right. We saw earlier in the previous two cases we</p> <p>16 looked at that it was the --</p> <p>17 MR JUSTICE DAVID RICHARDS: You must be right that it's only</p> <p>18 the liquidator who gets enforcement because that's what</p> <p>19 the statute says.</p> <p>20 MR WOLFSON: Yes. It may be that I am --</p> <p>21 MR JUSTICE DAVID RICHARDS: The issue is though whether</p> <p>22 there is a contingent liability to the company.</p> <p>23 MR WOLFSON: Yes, and whether the liability under section 74</p> <p>24 extends to the contingent liability is perhaps the</p> <p>25 issue.</p> <p style="text-align: center;">Page 127</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes. It is clear there, isn't</p> <p>2 it, that what Lord Justice Lindley was saying was that</p> <p>3 Sir Georg Jessel was wrong to say or to disagree with</p> <p>4 the view in Brighton Arcade that a call made by the</p> <p>5 liquidator was a debt due to the company. So I think</p> <p>6 what's being said is that if a call is made it is a debt</p> <p>7 due to the company.</p> <p>8 MR WOLFSON: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: Therefore, the basis on which</p> <p>10 Sir Georg Jessel said there could be no set-off was</p> <p>11 incorrect.</p> <p>12 MR WOLFSON: If I am trying to get too much out of sir</p> <p>13 George Jessel's judgment, so be it. But to make it</p> <p>14 clear, we are not taking the point that there is no</p> <p>15 set-off in LBIE's estate because of a mutuality issue.</p> <p>16 The reason why there is no set-off in LBIE's estate is</p> <p>17 because of essentially the pari passu point, which is</p> <p>18 a point we will come to, which we see from Grissell's</p> <p>19 case and thereafter, which is that a set-off, LBIE say,</p> <p>20 offends the pari passu principle because it effectively</p> <p>21 gives us a pound for pound return. I am certainly not</p> <p>22 taking the mutuality point. If your Lordship reads the</p> <p>23 passage at 601 as being part of the mutuality reasoning,</p> <p>24 then I am not relying on it. I can't rely on it.</p> <p>25 MR JUSTICE DAVID RICHARDS: I am sorry, this all began with</p> <p style="text-align: center;">Page 126</p>	<p>1 MR JUSTICE DAVID RICHARDS: We will see about that. Yes,</p> <p>2 okay. I am trying to see where we are going. Right.</p> <p>3 If you could remind me from time to time of the sort of</p> <p>4 scheme of the submissions, because obviously it's</p> <p>5 important all these references but I just want to be</p> <p>6 quite clear which submission they are going to.</p> <p>7 MR WOLFSON: Yes. One of the problems is that there is an</p> <p>8 interrelationship.</p> <p>9 MR JUSTICE DAVID RICHARDS: Of course there is.</p> <p>10 MR WOLFSON: The other point in Re Whitehouse, which I am</p> <p>11 not sure your Lordship really was taken to in any</p> <p>12 detail.</p> <p>13 MR JUSTICE DAVID RICHARDS: Right. Okay.</p> <p>14 MR WOLFSON: Which starts at 602 and goes through to the</p> <p>15 end, is a discussion on the Grissell's case.</p> <p>16 MR JUSTICE DAVID RICHARDS: Right. Sorry, just so I know</p> <p>17 exactly -- I am just looking back at my notes. The</p> <p>18 overall point here, the headline submission, is that the</p> <p>19 LBI administrators cannot lodge a proof in LBL's</p> <p>20 administration.</p> <p>21 MR WOLFSON: Exactly. Once I have made that point by</p> <p>22 reference to the statute, it may be that actually you</p> <p>23 don't get very much help by looking at any of the other</p> <p>24 cases, because that point at that level, so to speak, is</p> <p>25 either right or wrong and not much else is going to</p> <p style="text-align: center;">Page 128</p>

<p>1 change that.</p> <p>2 MR JUSTICE DAVID RICHARDS: Correct.</p> <p>3 MR WOLFSON: Let us see. The other separate point in re</p> <p>4 Whitehouse was a point I was making a moment ago, which</p> <p>5 is that because of the rule in Grissell's case there</p> <p>6 cannot be set off in the company's administration</p> <p>7 between the liability for calls, on the one hand, and an</p> <p>8 independent debt owing by the company to the</p> <p>9 contributory, on the other hand, because that gives</p> <p>10 a contributory 100p in the pound when the other</p> <p>11 creditors are getting less. That's the point where you</p> <p>12 offend the pari passu.</p> <p>13 MR JUSTICE DAVID RICHARDS: You say it cannot be set-off in</p> <p>14 LBIE's administration.</p> <p>15 MR WOLFSON: Between our claim in that estate and LBIE's</p> <p>16 call against us, assuming for these purposes that there</p> <p>17 is a valid call.</p> <p>18 MR JUSTICE DAVID RICHARDS: You wouldn't get to set-off in</p> <p>19 that case, would you, because if LBIE was in liquidation</p> <p>20 and a call was made, then you accept that the</p> <p>21 contributory rule would prevent you from proving or</p> <p>22 receiving and certainly prevent a set-off.</p> <p>23 MR WOLFSON: Yes, and the reason, if it arises, would be</p> <p>24 because it would crash through the pari passu --</p> <p>25 MR JUSTICE DAVID RICHARDS: Clearly the contributory rule</p> <p style="text-align: center;">Page 129</p>	<p>1 set-off". So that's what we are going to come to. As</p> <p>2 your Lordship sees, our primary position is that there</p> <p>3 is no set-off in LBIE's estate but there is set-off in</p> <p>4 LBL's estate. That's a point which my learned friend</p> <p>5 Mr Trower attacks as being, so to speak, me trying to</p> <p>6 have my cake and eat it, because he's saying I am</p> <p>7 getting 100p in the pound over here and only paying out</p> <p>8 10p in the pound or whatever it is on this side.</p> <p>9 Now, let me first deal with LBIE's administration.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR WOLFSON: Insolvency set-off does not operate in LBIE's</p> <p>12 administration or a subsequent liquidation in respect of</p> <p>13 the members' claims against LBIE and their contingent</p> <p>14 liability under section 74. There are a number of</p> <p>15 points in this regard. First, the absence of insolvency</p> <p>16 set-off is the premise of LBIE's case in respect of the</p> <p>17 contributory rule because the rule in Cherry v Boulton</p> <p>18 cannot apply when there is a set-off. The contributory</p> <p>19 rule cannot apply if there is a set-off.</p> <p>20 MR JUSTICE DAVID RICHARDS: Well, that's true.</p> <p>21 MR WOLFSON: I mean it's --</p> <p>22 MR JUSTICE DAVID RICHARDS: I was trying to think which is</p> <p>23 the chicken and which is the egg here.</p> <p>24 MR WOLFSON: Yes. The way Lord Walker put it in</p> <p>25 Kaupthing -- just for your Lordship's notes, this is</p> <p style="text-align: center;">Page 131</p>
<p>1 would then apply, but then that is not going to be in</p> <p>2 LBIE's administration.</p> <p>3 MR WOLFSON: No, exactly. On my case, yes, exactly.</p> <p>4 MR JUSTICE DAVID RICHARDS: Okay. So this submission is</p> <p>5 that there cannot be a set-off in LBIE's administration.</p> <p>6 MR WOLFSON: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: Between LBL's claim for its</p> <p>8 debt.</p> <p>9 MR WOLFSON: Yes.</p> <p>10 MR JUSTICE DAVID RICHARDS: Which it puts forward and LBIE's</p> <p>11 contingent claim.</p> <p>12 MR WOLFSON: On the call.</p> <p>13 MR JUSTICE DAVID RICHARDS: Contingent claim.</p> <p>14 MR WOLFSON: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: Now, this assumes that Mr Trower</p> <p>16 is wrong in his argument that the contributory rule</p> <p>17 applies in LBIE's administration, doesn't it?</p> <p>18 MR WOLFSON: Yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: So you are saying, well, the</p> <p>20 contributory rule doesn't apply and therefore LBL can</p> <p>21 prove for its claim but there cannot be a set-off.</p> <p>22 MR WOLFSON: Yes, exactly.</p> <p>23 MR JUSTICE DAVID RICHARDS: So your reason for that?</p> <p>24 MR WOLFSON: That is the next section of submissions I was</p> <p>25 coming to. The next page is headed "Insolvency</p> <p style="text-align: center;">Page 130</p>	<p>1 authorities 1D, tab 94, and the relevant paragraph is</p> <p>2 53 -- was that the equitable rule fills the gap left by</p> <p>3 the dis-application of set-off.</p> <p>4 Would it help us to turn up --</p> <p>5 MR JUSTICE DAVID RICHARDS: No, I remember that I think.</p> <p>6 Yes. That's paragraph?</p> <p>7 MR WOLFSON: Paragraph 53, my Lord. The point is dealt with</p> <p>8 a little more fully --</p> <p>9 MR JUSTICE DAVID RICHARDS: Maybe we should just look at it.</p> <p>10 MR WOLFSON: It's in D. The first sentence of --</p> <p>11 MR JUSTICE DAVID RICHARDS: Tab?</p> <p>12 MR WOLFSON: It's tab 94, my Lord, the first sentence of</p> <p>13 paragraph 53:</p> <p>14 "The equitable rule may be said to fill the gap left</p> <p>15 by dis-application of set-off but it does not work in</p> <p>16 opposition to set-off."</p> <p>17 It might be said that Lord Walker's chicken is the</p> <p>18 dis-application of set-off and his egg is the equitable</p> <p>19 rule, but the point is dealt with in a bit more detail</p> <p>20 and it may assist your Lordship to turn three tabs along</p> <p>21 and to look at a recent decision, a slightly more recent</p> <p>22 decision of Nicolas Strauss QC, sitting as -- sorry.</p> <p>23 MR JUSTICE DAVID RICHARDS: I slightly see it the other way</p> <p>24 round: that the contributory rule says that</p> <p>25 a contributory, let us say against whom there is a call</p> <p style="text-align: center;">Page 132</p>

<p>1 which has not been paid so a clear case, cannot claim</p> <p>2 against the estate qua creditor because the requirement</p> <p>3 that he contributes qua contributory comes ahead of</p> <p>4 that. Therefore, there cannot be set-off because</p> <p>5 otherwise set-off would actually defeat that. That's</p> <p>6 actually what Lord Walker says I think, isn't it?</p> <p>7 "It produces a similar netting off effect, except</p> <p>8 where some cogent principle of law requires one claim to</p> <p>9 be given strict priority to another ...(Reading to the</p> <p>10 words)... in the queue behind its creditors is one such</p> <p>11 principle."</p> <p>12 MR WOLFSON: Yes. With respect, I see the way your Lordship</p> <p>13 reads that second sentence. The way he puts it in the</p> <p>14 first sentence though is, in my submission, actually the</p> <p>15 other way round. What he's saying is there are two</p> <p>16 stages. The first is do you have set-off? If you</p> <p>17 don't, then the equitable rule comes in and fills that</p> <p>18 gap because otherwise -- and this is a point we need to</p> <p>19 come back to -- the contributory is in a better position</p> <p>20 than the other creditors. Certainly, with respect, the</p> <p>21 way I read that first line was to read it as saying that</p> <p>22 the first stage is there is no set-off and then the</p> <p>23 contributory rule comes in.</p> <p>24 MR JUSTICE DAVID RICHARDS: Some of those 19th Century cases</p> <p>25 were effectively saying you cannot have set-off because</p> <p style="text-align: center;">Page 133</p>	<p>1 MR WOLFSON: 69.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>3 MR WOLFSON: Perhaps I should show your Lordship in 68 the</p> <p>4 learned justice concluded there is no insolvency set-off</p> <p>5 but there is a straightforward legal set-off. Then I</p> <p>6 would invite your Lordship to read 69.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>8 MR WOLFSON: The way it's put there appears to be that it's</p> <p>9 where you have no set-off that the rule in <i>Cherry v</i></p> <p>10 <i>Boulton</i> applies. This may become a debate with -- I am</p> <p>11 not sure too much whether it matters actually which is</p> <p>12 the chicken and which is the egg, provided one</p> <p>13 ultimately decides (a) whether there is set-off or not</p> <p>14 and (b) whether the contributory rule applies and, if</p> <p>15 so, what is its effect. In my submission, the way it's</p> <p>16 generally approached is that for the rule to apply there</p> <p>17 is no set-off. So you first ask whether there is</p> <p>18 set-off or not. If there is no set-off, the question is</p> <p>19 whether the rule applies.</p> <p>20 I mean, it may also be, my Lord, that because the</p> <p>21 insolvency set-off is mandatory, so to speak, you have</p> <p>22 to ask that question first because that is -- and I am</p> <p>23 grateful to Ms Shah -- a question of a high order. It's</p> <p>24 an automatic question which applies. If the answer to</p> <p>25 that question is no, then, to use Lord Walker's</p> <p style="text-align: center;">Page 135</p>
<p>1 that will upset the basic position.</p> <p>2 MR WOLFSON: <i>Pari passu</i>.</p> <p>3 MR JUSTICE DAVID RICHARDS: Contributories to contribute so</p> <p>4 that the creditors can then share <i>pari passu</i>.</p> <p>5 MR WOLFSON: Yes.</p> <p>6 MR JUSTICE DAVID RICHARDS: If you allow the set-off, I mean</p> <p>7 it does two things actually. It, first of all, defeats</p> <p>8 the <i>pari passu</i> rule. Secondly, and perhaps even more</p> <p>9 fundamentally, it defeats the principle that it's for</p> <p>10 the contributories to provide the funds out of which the</p> <p>11 creditors are to be paid.</p> <p>12 MR WOLFSON: Yes. The contributory's right is his</p> <p>13 (inaudible) share of the fund as notionally increased by</p> <p>14 his contribution, which is a point we will come to.</p> <p>15 That's a point developed by Lord Justice (inaudible).</p> <p>16 Perhaps I can show your Lordship tab 97, which is</p> <p>17 the decision of Mr Nicolas Strauss QC in <i>MK Airlines v</i></p> <p>18 <i>Katz</i>. The way the deputy judge put it at</p> <p>19 paragraph 69 -- well, perhaps I can invite your Lordship</p> <p>20 to read -- your Lordship sees the heading above</p> <p>21 paragraph 69.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes. I will just quickly read</p> <p>23 the headnote, if I may. Yes, sorry, and then page?</p> <p>24 MR WOLFSON: It is page 261, paragraph 69.</p> <p>25 MR JUSTICE DAVID RICHARDS: Which paragraph, sorry?</p> <p style="text-align: center;">Page 134</p>	<p>1 formulation, you have to ask, well, I should be "filling</p> <p>2 the gap" by the application of the rule?</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR WOLFSON: Now, my Lord, as your Lordship mentioned</p> <p>5 a moment ago, it's the absence of insolvency set-off in</p> <p>6 the context of the liability of contributories that is</p> <p>7 such an important part in the <i>Grissell</i> case line of</p> <p>8 authority. That is the point I am now going to deal</p> <p>9 with. Perhaps this evening I won't be able to go much</p> <p>10 beyond what we have said in writing, but perhaps I can</p> <p>11 remind your Lordship of that, because it's paragraph 44</p> <p>12 of our written opening. We set out in some detail what</p> <p>13 we say is the effect of this line of authority. It's</p> <p>14 paragraph 44, pages 28 to 30.</p> <p>15 What we did here is to go through the decisions</p> <p>16 which Lord Walker referred to in <i>Kaupthing</i>. If I can</p> <p>17 just do it by reference to our written argument. Your</p> <p>18 Lordship sees first we dealt with <i>Grissell</i>'s case, which</p> <p>19 your Lordship looked at very recently. The bit we have</p> <p>20 put in italics is I think the passage which my learned</p> <p>21 friend Mr Trower showed your Lordship earlier today.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR WOLFSON: Then you see we have tried to set out --</p> <p>24 actually we have two <i>As</i> there -- (aa) and then (b), (c),</p> <p>25 the approach taken by Lord Chelmsford, the Lord</p> <p style="text-align: center;">Page 136</p>

<p>1 Chancellor, in Grissell's case. Your Lordship sees at 2 (b) on page 29: 3 "There could not be a set-off of the call because if 4 a debt due from the company to honour its members should 5 happen to be exactly the call made upon him, he would in 6 this way be paid 20 shillings in the pound upon his 7 debts while the other creditors might perhaps receive 8 a small dividend or even nothing at all; and because the 9 amount of an unpaid call could not be satisfied by 10 a set-off of an equivalent portion of the debt, it 11 followed that the amount of such call must be paid 12 before there can be any right to receive a dividend with 13 the other creditors. The amount of the call being paid 14 to the member of the company stands exactly on the 15 footing of the other creditors with respect to the 16 dividend upon the debt due to him from the company. The 17 dividend would be of course upon the whole debt and the 18 member of the company will from time to time, when 19 dividends are declared, receive them in like manner when 20 either no call has been made or, having been made, when 21 he has paid the amount of it." 22 The point of course we make, and that's why of 23 course the emphasis involved is ours and not the learned 24 judge's, is that the member can receive dividends from 25 the company when no call has been made.</p> <p style="text-align: center;">Page 137</p>	<p>1 with Auriferous Properties number 1 this morning, he did 2 nothing more than invite your Lordship to read it and 3 certainly didn't deal with any of our submissions that 4 it is wrongly decided, a submission supported by Dr 5 Derham in his book on set-off. I will take your 6 Lordship to those passages. 7 My learned friend also made the point in writing 8 that Auriferous Properties number 1 was approved by the 9 Court of Appeal in Re White Star Line, which was a case 10 we did look at this morning, but no submission was made 11 in that context that the decision there approved 12 Auriferous Properties number 1 and it doesn't. It says 13 nothing in the judgment about Auriferous Properties 14 number 1 at all. It's all about Auriferous Properties 15 number 2. 16 The reason why I say that is because that submission 17 is going to take a little bit of time. I am happy to 18 start it but I certainly won't be able to finish it. It 19 might well be easier -- albeit that it's now 1.35! -- 20 for the sake of two minutes, if your Lordship was to 21 rise now. Then what I would plan to do tomorrow would 22 be to deal with the Grissell's line of cases and, in 23 that context, make our submissions as to the 24 inapplicability of set-off in the LBIE administration 25 and the applicability of set-off in the LBL</p> <p style="text-align: center;">Page 139</p>
<p>1 MR JUSTICE DAVID RICHARDS: This is obviously a significant 2 part of your submissions on the application or 3 non-application of the contributory. 4 MR WOLFSON: It's critical. Exactly. My Lord, what I was 5 then going to go to, your Lordship sees the next 6 paragraph, sub section 2, deals with the Auriferous 7 Properties cases. 8 Now, actually time is going rather faster than I 9 ever thought possible, looking at that clock. 10 MR JUSTICE DAVID RICHARDS: Good heavens. It's 4.10. It 11 happens from time to time. I am not quite sure why. 12 MR WOLFSON: I hope your Lordship isn't in charge of the 13 clock and giving me a hint. 14 My Lord, what we do in the next paragraph is deal 15 with Auriferous Properties. I do want to take my time 16 over these cases because your Lordship appreciates there 17 were two Auriferous Properties cases. Auriferous 18 Properties number 1 deals with the question whether 19 there can be a set-off in the estate of the 20 contributory; so in these terms LBL. Auriferous 21 Properties number 2 is whether there can be a set-off in 22 the estate of the company, LBIE. Now, we submit that Re 23 Auriferous Properties number 1 is wrongly decided. Your 24 Lordship will, I am sure, have seen that in our written 25 submissions. But certainly when my learned friend dealt</p> <p style="text-align: center;">Page 138</p>	<p>1 administration. 2 MR JUSTICE DAVID RICHARDS: Yes. Very good. We will resume 3 at 10.30 tomorrow. 4 (4.14 pm) 5 (The court adjourned until Thursday, 14 November 2013 6 at 10.30 am) 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 140</p>

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