

<p>1 Monday, 24 July 2017</p> <p>2 (10.00 am)</p> <p>3 MR JUSTICE HILDYARD: Ms Toube.</p> <p>4 MS TOUBE: Yes.</p> <p>5 MR JUSTICE HILDYARD: I have read as promised the</p> <p>6 transcripts and gone through your submissions, including</p> <p>7 the additional material supplied by Mr Beswetherick.</p> <p>8 There is one issue on which I would just like some</p> <p>9 comfort from you, with apologies that this is now the</p> <p>10 third or fourth time of asking -- not of you but just of</p> <p>11 trying to get my mind round it.</p> <p>12 Really, it is a single point but in two parts. The</p> <p>13 problem I have had, and to some extent have always had,</p> <p>14 is that all this is to operate in the future when the</p> <p>15 surplus is ultimately revealed, subject to any reserves</p> <p>16 which may enable further surplus to be made available</p> <p>17 according to whatever contingencies arise.</p> <p>18 At whatever point or points that is, the directors</p> <p>19 on your model in option 1 will then have the surplus,</p> <p>20 such as by then established, released to them in order</p> <p>21 for them to exercise their powers as directors under the</p> <p>22 Companies Act, the mode envisaged for the exercise of</p> <p>23 those powers being to apply to the court for a reduction</p> <p>24 of capital to enable the sum to be released.</p> <p>25 MS TOUBE: As your Lordship will understand, I don't need to</p> <p>Page 1</p>	<p>1 they do what the reserves are for the creditors, will be</p> <p>2 able to reserve fully and know what the surplus is.</p> <p>3 Now, there may be more surplus in relation to further</p> <p>4 distributions, but they will know what the surplus is at</p> <p>5 that time.</p> <p>6 MR JUSTICE HILDYARD: Yes, but this is a point in the</p> <p>7 future.</p> <p>8 MS TOUBE: Not very far in the future.</p> <p>9 MR JUSTICE HILDYARD: No, but it is in the future.</p> <p>10 MS TOUBE: Yes, but probably in the next week or so.</p> <p>11 MR JUSTICE HILDYARD: Right.</p> <p>12 MS TOUBE: The directors will put together the interim</p> <p>13 accounts -- the director, sorry, will put together the</p> <p>14 interim accounts. The director will be provided with</p> <p>15 information by the administrators to do that. So that,</p> <p>16 those figures will all be set in stone at that point.</p> <p>17 The director will pass the resolutions, the</p> <p>18 shareholders will approve the resolutions and the</p> <p>19 distribution can be made. In point of fact, the monies</p> <p>20 are not going to be handed over by the administrators to</p> <p>21 the director, the director will direct the</p> <p>22 administrators to make the distribution.</p> <p>23 So the point that your Lordship is concerned about,</p> <p>24 one of the points your Lordship is concerned about,</p> <p>25 which is that it will go into the director's hands</p> <p>Page 3</p>
<p>1 apply to the court.</p> <p>2 MR JUSTICE HILDYARD: No, I'm sorry, you are quite right;</p> <p>3 for them to exercise their powers as a private company.</p> <p>4 The difficulty I had previously and to some extent</p> <p>5 still have is this: that the directors cannot state in</p> <p>6 advance, can they, how they will exercise their powers</p> <p>7 in advance, they must judge it at the time?</p> <p>8 Furthermore, for it to be a real choice they have to</p> <p>9 have dominion over the funds to determine what they</p> <p>10 think is in the best interests of the company, adopting</p> <p>11 your test. If you release the money to them subject to</p> <p>12 a conditional undertaking, which I envisage you would</p> <p>13 have to do, does that not show the element of</p> <p>14 artificiality in the whole thing, that the</p> <p>15 administrators, albeit they are envisaging that</p> <p>16 directors will exercise their powers under the Companies</p> <p>17 Act in a certain way, are in fact controlling the entire</p> <p>18 thing, so it is, in point of substance and possibly in</p> <p>19 point of form, doing that which Mr Justice Briggs as he</p> <p>20 then was says they couldn't do.</p> <p>21 Submissions by MR TOUBE</p> <p>22 MS TOUBE: Well, the first thing is to deal with the</p> <p>23 futurity point. What is anticipated and will happen in</p> <p>24 fairly short order, if we get an order from your</p> <p>25 Lordship, is that the administrators of LBEL, knowing as</p> <p>Page 2</p>	<p>1 subject to a conditional undertaking, that will not</p> <p>2 happen because the monies are not going to actually pass</p> <p>3 from the administrators to the director. The point your</p> <p>4 Lordship is worried about, which is doesn't that look</p> <p>5 like the administrators are doing what they can't</p> <p>6 otherwise do, is in a way amplified because it is the</p> <p>7 administrators making the payment, but they are always</p> <p>8 making the payment on behalf of the director because</p> <p>9 they have no power to do it otherwise.</p> <p>10 So we go back to the point which I made to your</p> <p>11 Lordship no doubt ad nauseam that the question is, is</p> <p>12 the fact that the Insolvency Act doesn't let the</p> <p>13 administrators make the distribution themselves by using</p> <p>14 something in the Insolvency Act, is that the no entry</p> <p>15 sign or is there something which allows the director and</p> <p>16 the shareholders to do what they would otherwise be</p> <p>17 entitled to under the Companies Act. If the answer to</p> <p>18 that is yes, then it doesn't matter how the mechanics of</p> <p>19 that happen. If the decisions that are taken under the</p> <p>20 Companies Act are taken under the Companies Act and if</p> <p>21 the distribution that is made is made by the director,</p> <p>22 in accordance with the Companies Act, even if the money</p> <p>23 is passed from the hands of the administrators to the</p> <p>24 hands of the shareholder, that doesn't matter any more</p> <p>25 than giving a direction to a bank doesn't mean the bank</p> <p>Page 4</p>

1 is making the payment, it means the person giving
2 direction is making the payment.

3 But I think your Lordship said to me at an earlier
4 hearing, "Doesn't this look like a construct". And
5 I said, well, in a way it is, because if there was
6 something in the Act which said the administrators could
7 make the distributions, the administrators would make
8 the distributions, but that is not the question. The
9 question is, does the thing that we have come up with
10 work or not? And that really depends on the two points
11 that your Lordship put to me at the last hearing: one is
12 it no entry and, two, if it is not no entry, is this
13 the proper case?

14 And your Lordship knows that in circumstances where
15 the Companies Act provides the statutory architecture,
16 where the Insolvency Act does not provide a no entry
17 sign, and we are in this very unusual circumstance where
18 a distribution is to be made by a director to
19 a shareholder for the purposes of benefiting the
20 creditors, it is difficult to imagine many other
21 circumstances, if any, in which that would be the case
22 but this is one of those circumstances.

23 MR JUSTICE HILDYARD: But another way of putting the point
24 in general, and this was the second part, is does the
25 Companies Act provision for reduction of capital survive

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1 administration?

2 MS TOUBE: My Lord, yes. And we say there is nothing to say
3 it doesn't for two reasons. First of all, because there
4 is nothing in the Companies Act which says this is not
5 exercised except for when the company is solvent.

6 MR JUSTICE HILDYARD: It does --

7 MS TOUBE: Outside an insolvency process. So you have to be
8 solvent because otherwise you would not have
9 distributable profits, but there is nothing that says
10 there is a bar.

11 The other point is we know that the powers of the
12 directors and the powers of the shareholders do exist in
13 insolvency, so the question is, when can those be used?
14 We debated that on the last hearing, and we say they can
15 be used whether for the benefit of the company and also
16 because of this overlay of being in administration where
17 it is the administrators are facilitating this for the
18 purposes of the administration. So you get -- it is
19 facilitated for the purposes of the administration
20 because it is for the benefit of the creditors, and then
21 all the director has to do is look at the members
22 because by very definition the creditor's interests are
23 being met by the administrators. So all the director
24 has to do is say, is this in the interest of the
25 shareholder? Answer: yes. And in fact, we know

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1 factually LBH is supportive of this, for all the reasons
2 we have identified before.

3 So that is why we say we know that the powers in the
4 Companies Act do survive insolvency, and there is no
5 reason why these powers should not survive insolvency.
6 And then the only question is, is this an appropriate
7 case in which they should be exercised? And we say yes,
8 for all the reasons we have debated at length.

9 MR JUSTICE HILDYARD: Put another way, you say this power,
10 and all powers relating to surplus, properly so-called,
11 ie monies returnable to shareholders, remain in the
12 directors to be exercised in the interests of the only
13 constituency in which they are interested, which is the
14 shareholders?

15 MS TOUBE: Yes, as long as it is in support of the purposes
16 of the administration for the administrators to
17 facilitate, and we say it is.

18 MR JUSTICE HILDYARD: Yes.

19 Now --

20 MS TOUBE: Mr Trower is adding a point I made to your
21 Lordship on an earlier occasion, which is that also it
22 is the administrators not only facilitating but
23 consenting to the directors using those powers.

24 MR JUSTICE HILDYARD: Yes.

25 MS TOUBE: So it is not that the director just goes off on

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1 a frolic of their own doing these things. We know they
2 cannot just say "I am going to distribute a surplus"
3 because apart from anything else they wouldn't have it.

4 MR JUSTICE HILDYARD: No.

5 MS TOUBE: So you have to have gone through these stages,
6 you have to have gone through the proving process,
7 working out who your creditors are, working out what
8 your surplus is, making sure that all your creditors are
9 paid or reserved for, making sure that the distribution
10 to members would be for the benefit of the creditors,
11 and then those powers which the director and shareholder
12 indubitably do still have, we say, those can be
13 exercised.

14 MR JUSTICE HILDYARD: And as a subset of what I have been
15 asking you and now recognising that the funds will be
16 retained by the administrators, you say that funds so
17 retained are nevertheless funds out of which capital
18 may, as it were, be reduced?

19 MS TOUBE: Yes.

20 We have gone through that process, because that is
21 the process of working out what the debts are and who --

22 MR JUSTICE HILDYARD: That is a matter for calculation?

23 MS TOUBE: Yes.

24 MR JUSTICE HILDYARD: Yes. But what is to be done is that
25 share capitalists be identified and then reduced by

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1 payment out of the surplus so identified, which is not
2 under the control of the directors?
3 MS TOUBE: So the capital will be reduced, and then there
4 will be distributable profits and then they will be
5 distributed.
6 MR JUSTICE HILDYARD: And those are subject to the control
7 of the directors exclusively?
8 MS TOUBE: If they are surplus to the administration, yes.
9 MR JUSTICE HILDYARD: Yes.
10 Do you think, in the light of our discussions, were
11 I to approve it, you would need a more focused order
12 than the rather general wand which the application
13 notice envisages?
14 MS TOUBE: We are certainly content to have any wording that
15 would allow us to do what we need to do, so that if it
16 said that the administrators can permit the director and
17 the shareholder to reduce capital and make distribution
18 to LBH, in circumstances where that would be for the
19 purposes of the administration --
20 MR JUSTICE HILDYARD: I am not drafting but I think when
21 I looked at the application notice, which was after all
22 crafted back in May or whenever it is, water having
23 passed under the bridge and more focus having been
24 brought to the various issues there could be, I wonder
25 whether a more targeted approval, which is effectively

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1 what the application seeks, would be appropriate.
2 MS TOUBE: We would be content with that. We can come up
3 with a full --
4 MR JUSTICE HILDYARD: I think we will have to work something
5 out over the course of time to make sure that that fits
6 the bill.
7 MS TOUBE: That is no problem, my Lord.
8 MR JUSTICE HILDYARD: Yes.
9 I will get back to you in a second.
10 Mr Beswetherick, thank you for your submissions. I hope
11 I have done them sufficient justice but I only got them
12 late last night; I was travelling.
13 MR BESWETHERICK: We are grateful, my Lord.
14 MR JUSTICE HILDYARD: The long and the short of it is, for
15 all sorts of reasons that really come down ultimately to
16 an assessment of the mathematical benefit, you are in
17 favour of all this, and can for your part not see any
18 startling objection to it.
19 MR BESWETHERICK: Yes, that is exactly our position,
20 my Lord. There is a cocktail of reasons which have led
21 us to the conclusion that we support option 1.
22 MR JUSTICE HILDYARD: Yes. And it would suffice for your
23 purposes if a targeted order and a revised application
24 were, as it were, approved, you having added your name
25 and weight to the application?

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1 MR BESWETHERICK: If I might turn around for a minute.
2 Yes, my Lord, that would suit us. We are perfectly
3 happy and we would welcome an order that provided
4 clarity as to how the option is going to work.
5 MR JUSTICE HILDYARD: Yes. Have you got something to add?
6 MS TOUBE: I am just --
7 MR JUSTICE HILDYARD: Are you looking at the reduction of
8 capital provision?
9 MS TOUBE: My Lord, I am not. (Pause).
10 I was just seeing if Mr Trower had an additional
11 point that I might press your Lordship with, but it is
12 simply the point that we have been dealing with about
13 the management powers of the directors surviving, and
14 that is why I say that the Insolvency Act makes it clear
15 that there are those powers in the director which
16 survive. But your Lordship knows that that is --
17 MR JUSTICE HILDYARD: I think my question was more confined
18 than that.
19 MS TOUBE: I understand, my Lord.
20 The question you have is, why this power?
21 MR JUSTICE HILDYARD: Why this power -- is it right that
22 that power to reduce capital, which isn't a power one
23 would associate with a company administration, as it
24 appears unlikely in all ordinary circumstances to arise
25 in that context, is that one which is legitimately said

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1 to survive?
2 MS TOUBE: My Lord, yes, I understand that. And I think in
3 a way, this brings together the two concerns that your
4 Lordship has --
5 MR JUSTICE HILDYARD: Yes.
6 MS TOUBE: -- which is, first of all, you are worried about
7 setting a precedent, to which our answer is, it is going
8 to happen with vanishing irregularity, and in fact this
9 may be the only case in which it does happen.
10 MR JUSTICE HILDYARD: I am not too worried about setting
11 a precedent as such, I am worried about setting a jolly
12 bad precedent.
13 MS TOUBE: My Lord, yes. The answer to that we say is, as
14 I have just said to your Lordship, it is clear that
15 powers continue. There is nothing in the Companies Act
16 which says they don't continue in insolvency, and if
17 there is not a no entry sign, then the court has the
18 power to determine the question of whether this gap can
19 be filled or not.
20 MR JUSTICE HILDYARD: The court has even at the highest
21 level not spoken with an entirely sonorous voice on
22 this.
23 On the one hand, Lord Neuberger says that the
24 Insolvency Act is not a complete and exclusive code, and
25 you rely on that; on the other hand, in the actual

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3 (Pages 9 to 12)

1 decision, the decision was ultimately based, at least in
2 part, on the thesis that administrators are not given
3 certain powers, including the power -- they do not have
4 the power to make cause. So on the one hand you have
5 a let's plug the gap if it is necessary, and on the
6 other hand not that gap.

7 The question is, are we on the left or the right
8 side in this particular case?

9 MS TOUBE: Yes, my Lord. I understand that.

10 It is true to say that sometimes navigating these
11 waters is rather difficult, but in this case, what we
12 say is that in circumstances where it is for the purpose
13 of the administration, and these powers do still exist,
14 that there is no reason at all why one should not
15 continue to use them. Filling the gap where there is
16 nothing anywhere we can see might cause more difficulty,
17 but the Companies Act is the statutory furniture for
18 doing this.

19 MR JUSTICE HILDYARD: Can you just read me the provision for
20 reduction of capital. I have not got the Companies Act
21 with me.

22 MS TOUBE: This is section 6(4)(i) of the Companies Act:
23 "A limited company having a share capital may reduce
24 its share capital (a), in the case of a private company
25 limited by shares, by special resolution supported by

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1 a solvency statement."

2 That is really what it says.

3 Then if you look at section 6(4)(ii), reduction of
4 capital supported by solvency statement:

5 "A resolution for reducing share capital of
6 a private company limited by shares is supported by
7 a solvency statement if the directors of the company
8 make a statement of the solvency of the company in
9 accordance with 6(4)(iii) not more than 15 days before
10 the date on which the resolution is passed and the
11 resolution and solvency statement are registered in
12 accordance with section 6(4)(iv)."

13 And then 6(4)(iii) is the provisions for the
14 solvency statement, and then 6(4)(iv) is the
15 registration and simply says within 15 days, et cetera.

16 So it is not limited in any way, it just simply says
17 one can do this if you have a solvency statement, and
18 the solvency statement says as long as they cannot say
19 it is solvent, and your Lordship knows those can be
20 interim accounts.

21 MR JUSTICE HILDYARD: Finally, I hope, what protection does
22 the single director have? The administrators can always
23 come for momentous blessing.

24 MS TOUBE: The director has the shareholders' resolutions.

25 MR JUSTICE HILDYARD: So he has been blessed by the only

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1 constituency to whom he owes duty?

2 MS TOUBE: Yes.

3 MR JUSTICE HILDYARD: And as a matter of fact, he will also
4 have the administrator's bossy blessing.

5 MS TOUBE: Facilitating blessing, yes.

6 MR JUSTICE HILDYARD: Facilitating blessing, yes.

7 Well, Ms Toube I have indicated that I found this
8 an awkward question. I don't think that this has arisen
9 before. My assistant and I have combed, as you have, to
10 see whether there are provisions which might fortify one
11 in supposing that a coordinate power resided in the
12 directors which could be exercised irrespective of any
13 prospect of returning to going concern, but there seems
14 to be a complete blank. It may have happened but there
15 is no record of it.

16 I think that this is a novel point and I think it is
17 a difficult point, but in all the circumstances, I am
18 proposing to permit you to adopt this point for reasons
19 which I will set out in a reasoned judgment in due
20 course.

21 If there were need for this judgment earlier rather
22 than later, which I wouldn't imagine there is within
23 reasonable time -- I would still hope to get it out
24 by September if not before, while I remember things, and
25 probably this week -- you must let me know. But as it

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1 is in essence ex parte or agreed by all parties,
2 I should imagine it is not one of those occasions where
3 someone is thirsting to see what the judge said in order
4 to show him wrong.

5 MS TOUBE: My Lord, no. Not at all. In fact, everyone
6 wished to see it to see your Lordship is correct. But
7 I think we do need to have a go at the wording of the
8 order.

9 MR JUSTICE HILDYARD: My anxiety is to ensure that the evils
10 of commitment before -- of fettering your discretion,
11 I am bothered about fettering discretion, and partly
12 because of that and partly because of my anxiety as to
13 only using this in very confined circumstances, the
14 precise mechanics need to be adumbrated, and I think the
15 director -- I would propose to give in essence beyond my
16 powers to do so, the director power to apply if he were
17 concerned at any stage.

18 MS TOUBE: I think the best thing to do, my Lord, may simply
19 be to replicate the steps which it is intended to take
20 and say that the administrators have the power to cause
21 a transaction to be entered into in which the following
22 steps will happen.

23 MR JUSTICE HILDYARD: Yes, to approve that that happens and
24 the directors say that they have considered it and
25 presently, on present circumstances, that is what they

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<p>1 think is right. But if they at any stage regarded his</p> <p>2 duty as in conflict with that, notwithstanding the</p> <p>3 approval of the shareholders, I think he should resort</p> <p>4 to court unless you say I can't do that. He is not</p> <p>5 an officer, but I should have thought that bearing in</p> <p>6 mind he is down to take this special task directed by</p> <p>7 the administrators, he should have at least</p> <p>8 theoretically that ability.</p> <p>9 MS TOUBE: My Lord, if we give the director and</p> <p>10 administrators liberty to apply, that should deal with</p> <p>11 that.</p> <p>12 MR JUSTICE HILDYARD: I am very grateful to you.</p> <p>13 I am sorry again to have made heavy weather of it.</p> <p>14 I think it is a curious position, but let us do that.</p> <p>15 The question as to whether it is beneficial is much,</p> <p>16 much easier than whether it is available.</p> <p>17 MS TOUBE: I understand that, my Lord.</p> <p>18 We are all very grateful and I think that will</p> <p>19 enable us to go forward with option 1.</p> <p>20 MR JUSTICE HILDYARD: Good. All right. That means I have</p> <p>21 eaten eight minutes into your respective times.</p> <p>22 I think I should also admit that I have read the</p> <p>23 skeleton arguments. I have not lavished the care and</p> <p>24 intention which I would ordinarily wish to do on the</p> <p>25 three witness statements which you directed me to and</p> <p style="text-align: center;">Page 17</p>	<p>1 court's approval for it and its administrators to enter</p> <p>2 into the relevant transaction documents, it also seeks</p> <p>3 the court's approval for it to take the steps required</p> <p>4 to put into effect option 1.</p> <p>5 My Lord, there are two entities which are parties to</p> <p>6 Backstop 2 who are not represented today: there is LBHI,</p> <p>7 which acts as plan administrator in modified joint</p> <p>8 chapter 11 plan of LBHI and its affiliates, and it is</p> <p>9 the largest subordinated creditor and the largest</p> <p>10 unsubordinated creditor of LBHI2.</p> <p>11 My Lord, LBHI has inevitably been closely involved</p> <p>12 in the negotiations and the drafting of the documents</p> <p>13 and it is present by its solicitors in court today, but</p> <p>14 it has also conveyed its support for Backstop 2 in some</p> <p>15 detail by a letter sent by its solicitors Weil Gotshal</p> <p>16 to those instructing me on 19 July. My Lord, that</p> <p>17 letter has been exhibited to Ms Bruce's fifth witness</p> <p>18 statement, and the letter itself can be found in the</p> <p>19 bundles. I won't take your Lordship to it but for your</p> <p>20 Lordship's reference, it is bundle 2, tab 13, page 143.</p> <p>21 My Lord, there are also the Wentworth parties, and</p> <p>22 your Lordship will see that they are the assignees of</p> <p>23 LBHI2's senior debt and subordinated debt originally</p> <p>24 owed by LBIE to LBHI2, and your Lordship will have seen</p> <p>25 they are also an integral part of the deal and they have</p> <p style="text-align: center;">Page 19</p>
<p>1 therefore between you I will need your special help in</p> <p>2 this respect.</p> <p>3 Mr Trower, are you compère as ever?</p> <p>4 MR TROWER: On this occasion we thought Mr Arden might</p> <p>5 start, but I am very happy to do whatever is required.</p> <p>6 MR JUSTICE HILDYARD: I would like to follow what you have</p> <p>7 prescribed.</p> <p>8 Submissions by MR ARDEN</p> <p>9 MR ARDEN: My Lord, I am grateful. As your Lordship knows,</p> <p>10 there are now four applications before your Lordship</p> <p>11 relating to the Backstop deal. All of them seek the</p> <p>12 court's approval for the administrators -- ask for the</p> <p>13 administrators to be at liberty to enter into the</p> <p>14 various transactions which are the components of what</p> <p>15 has been described as the Backstop 2 deal.</p> <p>16 My client, LBHI2 and LBL also ask that the court</p> <p>17 direct the administrators be at liberty to make</p> <p>18 distributions without reserves in respect of any</p> <p>19 liability to contribute under section 74 of the 1986</p> <p>20 Act, and their ability to do so is, as your Lordship</p> <p>21 will have appreciated, an integral part of the Backstop</p> <p>22 deal.</p> <p>23 LBH, I think following discussions on Friday, LBH</p> <p>24 has also issued its application; that is the fourth.</p> <p>25 In the case of LBH, as well as asking for the</p> <p style="text-align: center;">Page 18</p>	<p>1 also participated in its negotiation and drafting of</p> <p>2 documents, and your Lordship can take it they support</p> <p>3 the deal.</p> <p>4 My Lord, in the usual way details of the deal and</p> <p>5 details of this hearing have been advertised on the</p> <p>6 website of LBIE, LBHI2 and LBL and there are details of</p> <p>7 those given in the witness statements. So, for example,</p> <p>8 Ms Bruce deals with it at paragraph 7 of her witness</p> <p>9 statement and that is volume 1, tab 7.3.</p> <p>10 My Lord, importantly, as far as the contribution</p> <p>11 element of all of this is concerned, your Lordship will</p> <p>12 have seen that the LBIE administrators in particular</p> <p>13 have had discussions with their creditor groups and, in</p> <p>14 particular, with the representatives of the SCG and</p> <p>15 York, who, as your Lordship knows, have been active</p> <p>16 participants in the Waterfall proceedings.</p> <p>17 My Lord, as we understand, the position taken by</p> <p>18 those creditors or creditor groups is that they do not</p> <p>19 oppose Backstop deal or the relief being sought by the</p> <p>20 applications and, again, this is dealt with in</p> <p>21 particular in Mr Downs' 11th witness statement between</p> <p>22 paragraphs 61 and 71 and your Lordship will find that in</p> <p>23 bundle 1, pages 19 to 21.</p> <p>24 MR JUSTICE HILDYARD: Shall we have a quick look at that?</p> <p>25 MR ARDEN: Yes. It is volume 1, tab 9, Mr Downs' 11th</p> <p style="text-align: center;">Page 20</p>

1 statement. Page 19, section H, headed "Engagement with
2 LBIE creditors".
3 MR JUSTICE HILDYARD: Yes.
4 MR ARDEN: It is the whole section running through to 71;
5 paragraph 71, I should say.
6 MR JUSTICE HILDYARD: I will just read it quickly. (Pause).
7 Yes.
8 MR ARDEN: My Lord, just while we are on this, Mr Trower has
9 just indicated to me that there has been a little bit
10 more correspondence and it might be best if he updates
11 you on that now, while we are on this and before I move
12 on, if that seems --
13 MR JUSTICE HILDYARD: Is this for the single creditor?
14 MR TROWER: It is just we have had a couple of emails back
15 and they all make exactly the same point, which is
16 a point in relation to our creditor constituency hoping
17 we are not going to allow LBIE to go into liquidation at
18 this stage. There was just a concern about the way
19 a point was expressed on the website.
20 If I can just briefly indicate the point or develop
21 the point just a tiny little bit, it is simply this:
22 that it is obvious one of the reasons why we cannot do
23 anything by way of asserting our contribution claim at
24 this stage is because LBIE is not in liquidation and the
25 position of those of our stakeholders who have responded

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1 to this deal is that they very much hope that we will
2 not go into liquidation at this stage. The reason they
3 don't want to us go into liquidation at this stage is
4 because of the lacuna point on statutory interest.
5 So in a sense this correspondence actually fortifies
6 the nature of the submissions that we are making as to
7 why this is a sensible deal overall.
8 But I can hand up what I have -- just so your
9 Lordship has a complete picture, it is a little file of
10 the responses that we have had.
11 MR JUSTICE HILDYARD: Thank you. (Handed).
12 Is there anything I should particularly look at?
13 MR TROWER: The responses -- I think what I realise, I think
14 I've got mine possibly in a slightly different order.
15 I don't think your Lordship probably needs to know
16 very much, apart from the fact that all of these
17 responses are concerned to simply ensure that it remains
18 the LBIE administrator's position that LBIE will not go
19 into liquidation at this stage, so I don't think we need
20 to look at anything specific.
21 The only other thing I should say, and it is not
22 dealt with in the evidence, there is some correspondence
23 there with the Financial Conduct Authority, who we are
24 required to notify of any application in the
25 administration, under the Act, and they are aware of

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1 this application and have nothing to contribute to it.
2 So that just completes the notification picture, if
3 I can put it that way, and there is nothing in this
4 correspondence which indicates anything other than
5 contentment or non-opposition to the proposal.
6 MR JUSTICE HILDYARD: Your obligations to the FCA, are they
7 individual or are they by statute or other provision?
8 MR TROWER: They are by statute. Under FSMA we are required
9 to notify the FSA of any application made in the
10 administration. So your Lordship will see there is
11 a response from the relevant FCA individual there,
12 Mr Gareth Reed.
13 MR JUSTICE HILDYARD: That applies to all persons before me?
14 MR TROWER: No, it only applies to us. I think we are the
15 only authorised person.
16 MR JUSTICE HILDYARD: It is in light of that?
17 MR TROWER: It is in light of that that we are required to
18 notify them.
19 MR JUSTICE HILDYARD: Yes.
20 MR TROWER: So that is really just to give your Lordship the
21 complete picture of the response that we have had to the
22 notifications that have gone on our website, and they
23 are responses from at least one member of the senior
24 creditor group, another individual creditor which is
25 also an affiliate, the FCA, and that in essence is it.

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1 As your Lordship will see, the response is only on this
2 one issue; there is no response to the substance of the
3 deal.
4 MR JUSTICE HILDYARD: Yes, I mean it highlights, on the one
5 hand, liquidation would enable the contribution claim;
6 on the other hand, the statutory interest goes down the
7 drain.
8 MR ARDEN: Yes.
9 MR JUSTICE HILDYARD: That central tension is presumably the
10 one you have had to grapple with in achieving a proposed
11 resolution?
12 MR ARDEN: My Lord, I think the damage that liquidation
13 causes the statutory interests and lacuna point is --
14 well, it is one of a number of reasons why LBIE is not
15 going to go into liquidation.
16 That in turn feeds into the assessment -- there are
17 other factors that are relevant to this as well -- that
18 the possibility of a contribution claim at all or of any
19 substance is extremely remote, and that is a combination
20 of factors, in part the size of the surplus in the LBIE
21 estate, but as your Lordship knows, in part also as
22 a result of the way in which the Supreme Court dealt
23 with Waterfall I and what one extracts from the Supreme
24 Court's decision. So your Lordship is right about the
25 tension and that is a relevant part of the parties'

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<p>1 assessment, the assessment the parties have made about</p> <p>2 the contribution, but there are other factors, important</p> <p>3 factors as well which are identified in evidence and in</p> <p>4 the skeletons.</p> <p>5 MR JUSTICE HILDYARD: But the other factors come down to:</p> <p>6 best to get the money out earlier rather than later.</p> <p>7 The only way is if you clear out litigation, which could</p> <p>8 go up to the Supreme Court and last for years.</p> <p>9 MR ARDEN: My Lord, the factors in favour of making the</p> <p>10 distributions are the need or the desire to distribute</p> <p>11 cash reserves that we have been sitting on for a very</p> <p>12 long time now.</p> <p>13 The question, or a question, one of the questions is</p> <p>14 whether there needs to be a reserve and the parties'</p> <p>15 assessment, as I said, in part based upon the lack of --</p> <p>16 MR JUSTICE HILDYARD: A reserve against -- a respective</p> <p>17 contribution claim itself dependent on liquidation which</p> <p>18 no one wants?</p> <p>19 MR ARDEN: Yes, exactly.</p> <p>20 So if one -- at the moment there is no claim and no</p> <p>21 creditor. What the parties, what all parties have</p> <p>22 sought to do is to address the question, well, is</p> <p>23 a claim of any substance likely? For various reasons</p> <p>24 all of the parties have concluded that it is not. One</p> <p>25 of the reasons, or one of the reasons that underpins</p> <p style="text-align: center;">Page 25</p>	<p>1 a theoretical possibility of a contribution claim.</p> <p>2 MR JUSTICE HILDYARD: I mean, Mr Trower will probably</p> <p>3 explain this in greater detail but I am rather ignorant</p> <p>4 of the arithmetics. I mean, supposing my judgment in</p> <p>5 Waterfall IIC were reversed and the gate were opened to</p> <p>6 costs of funding claims, potentially infinite, ie not</p> <p>7 capped by any known interest rate --</p> <p>8 MR ARDEN: Yes.</p> <p>9 MR JUSTICE HILDYARD: -- would that affect things?</p> <p>10 MR ARDEN: My Lord, I think probably Mr Trower is best able</p> <p>11 to deal with the figures.</p> <p>12 MR JUSTICE HILDYARD: I will leave that. It is something</p> <p>13 dealt with in his skeleton, along with the Semptra Metals</p> <p>14 issue, which I will need some assistance on. But there</p> <p>15 are certain imponderables. They can be pondered but</p> <p>16 they cannot be assessed with absolute accuracy.</p> <p>17 MR ARDEN: Yes, there are a number of claims against LBIE's</p> <p>18 estate which are yet to be resolved and so there is the</p> <p>19 Bower v Marris point that will not affect the</p> <p>20 contribution claim, but as we accept and point out in</p> <p>21 our evidence, in the skeleton, there are on that appeal</p> <p>22 still being run arguments to the effect that there are</p> <p>23 non-provable claims by way of an alternative to Bower v</p> <p>24 Marris and so that is yet to be determined, and your</p> <p>25 Lordship has identified a further point. I think I am</p> <p style="text-align: center;">Page 27</p>
<p>1 that conclusion, is that LBIE for a number of reasons,</p> <p>2 but including the very important one relating to</p> <p>3 statutory interest, will not go into liquidation,</p> <p>4 because that will damage the interests of the creditors.</p> <p>5 But my Lord, as I said, on top of that, there are other</p> <p>6 reasons why it is thought that the contribution claim is</p> <p>7 unlikely. Those are the sort of economic factors and</p> <p>8 they relate to the size of LBIE's estate and the loss of</p> <p>9 the foreign currency conversion claims and the fact</p> <p>10 that, as we now know, the members cannot -- the</p> <p>11 liability to contribute does not extend to statutory</p> <p>12 interests, and so one is now looking at a contribution</p> <p>13 claim only if, which seems unlikely, LBIE's surplus is</p> <p>14 insufficient to pay statutory interest, plus what now</p> <p>15 looks to be a fairly theoretical possibility of</p> <p>16 a species of unprovable claims. That is the</p> <p>17 Waterfall II point.</p> <p>18 So what the parties have done, as I said, what the</p> <p>19 parties have done is to assess the likelihood of</p> <p>20 a contribution claim arising by reference to various</p> <p>21 factors and concluded that the claim is unlikely or</p> <p>22 highly unlikely and that the advantages to all estates,</p> <p>23 not just the affiliates but also to LBIE, the advantages</p> <p>24 to all estates outweigh whatever objection could be made</p> <p>25 to a distribution without a reserve on the basis of</p> <p style="text-align: center;">Page 26</p>	<p>1 right in saying that Mr Trower can deal with this, but</p> <p>2 I think I am right in saying that it is thought that,</p> <p>3 even if one factors in the imponderables, there is</p> <p>4 a likelihood that the surplus will be sufficient to</p> <p>5 cover all elements of LBIE's liabilities above the</p> <p>6 subordinated debt and it could get down as far as the</p> <p>7 subordinated debt itself. I am not sure anybody would</p> <p>8 go as far as to say that is a certain outcome, there are</p> <p>9 imponderables, but that is the way it is looking at the</p> <p>10 moment.</p> <p>11 MR JUSTICE HILDYARD: As far as creditors are concerned, the</p> <p>12 position is this, isn't it, from what you have shown me,</p> <p>13 that they were notified of the first version and its</p> <p>14 abandonment in light of the Supreme Court's decision.</p> <p>15 They were on the 12th and 13th told of the revised</p> <p>16 proposal. They were told of the date of this hearing.</p> <p>17 They were not told -- it may well be impossible to tell</p> <p>18 them for all I know -- that it is now or never and to</p> <p>19 put up or shut up. One or two of them have put up but</p> <p>20 only in terms of noises against liquidation, which is in</p> <p>21 effect in favour of the proposals, and that is where the</p> <p>22 matter lies.</p> <p>23 MR ARDEN: Yes. But nobody -- if one were trying to</p> <p>24 identify creditor groups most likely to oppose, they</p> <p>25 would be creditor groups within LBIE rather than the</p> <p style="text-align: center;">Page 28</p>

<p>1 affiliates.</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR ARDEN: And the two most active, or what I understand to</p> <p>4 be the two most active groups, the SCG and York, are the</p> <p>5 ones with whom there has been a direct engagement, so</p> <p>6 not just solely reliant on what appears on the website,</p> <p>7 and they do not object. And obviously your Lordship</p> <p>8 will appreciate no one else has objected in response to</p> <p>9 what has appeared on the website on any website.</p> <p>10 MR JUSTICE HILDYARD: That doesn't strike one as surprising</p> <p>11 given the lie of the land, ie the lie of the land is</p> <p>12 likely that they are benefitted by these --</p> <p>13 MR ARDEN: My Lord, certainly a deal which results in</p> <p>14 distributions being made from the affiliates' estates is</p> <p>15 undoubtedly for their creditors a significant</p> <p>16 improvement on the current position where distributions</p> <p>17 simply have been frozen now for a considerable period of</p> <p>18 time and, indeed, none have been made in LBHI2's</p> <p>19 administration at all, as your Lordship knows.</p> <p>20 So your Lordship is right, one would not expect</p> <p>21 I think objections from the affiliates' status; the</p> <p>22 objections, if they were to come, would come from LBIE's</p> <p>23 estate, but your Lordship knows what has happened there.</p> <p>24 MR JUSTICE HILDYARD: Mr Trower will elaborate on the</p> <p>25 various potential, additional factors which might impel</p> <p style="text-align: center;">Page 29</p>	<p>1 agreement. I have not read those.</p> <p>2 MR ARDEN: No.</p> <p>3 Your Lordship, they are, as one would expect them to</p> <p>4 be, not light reading.</p> <p>5 MR JUSTICE HILDYARD: No.</p> <p>6 MR ARDEN: My Lord, as far as background is concerned, as</p> <p>7 I just told your Lordship and I think your Lordship</p> <p>8 knows, the affiliates, by which I mean the four other of</p> <p>9 us other than LBIE, currently hold something in the</p> <p>10 order of £1.4 billion in cash reserves. My Lord, the</p> <p>11 position in relation to each affiliate is summarised in</p> <p>12 Mr Downs' 11th witness statement at paragraph 20, so</p> <p>13 that is volume 1, tab 9 and I think page 5.</p> <p>14 At the bottom your Lordship will see it starts with</p> <p>15 LBL sitting on 390 million, LBHI2 704 million, LBH</p> <p>16 63 million and LBEL 270 million.</p> <p>17 My Lord, in the same paragraph and for each company,</p> <p>18 your Lordship will see what distributions have been made</p> <p>19 to date from each estate. So LBL has paid 1.8 million.</p> <p>20 That is a small dividend on account of preferential</p> <p>21 creditors. LBHI2 has paid no dividend. That is 20.2.</p> <p>22 LBH has paid in aggregate 63 million, and LBEL has paid</p> <p>23 its unsecured 100p in the pound, but nothing on account</p> <p>24 of statutory interest.</p> <p>25 My Lord, the reason why no dividends have been paid</p> <p style="text-align: center;">Page 31</p>
<p>1 liquidation, but beyond that -- and I also have to</p> <p>2 remember I suppose that my function is, as you have all</p> <p>3 explained to me, relatively limited. I must simply test</p> <p>4 to see whether there is any conceivable argument of</p> <p>5 irrationality or whether there is an argument of</p> <p>6 conflict of interest such as to undermine the structure.</p> <p>7 MR ARDEN: Yes.</p> <p>8 MR JUSTICE HILDYARD: Beyond that it is not for me to wonder</p> <p>9 whether some other deal might have been preferable, even</p> <p>10 if I could. Those are the tests. They are almost sort</p> <p>11 of Wednesbury tests.</p> <p>12 MR ARDEN: That is right, it is a limited function.</p> <p>13 My Lord, what I was going to do was to just give</p> <p>14 your Lordship the background and some references to the</p> <p>15 evidence.</p> <p>16 MR JUSTICE HILDYARD: Yes, thank you.</p> <p>17 MR ARDEN: And once I have done that, I will tell your</p> <p>18 Lordship where in the evidence and the skeletons the</p> <p>19 various parties have assessed the merits or otherwise of</p> <p>20 the deal and expressed a view and then, my Lord, I think</p> <p>21 it is right that I should take your Lordship, and I will</p> <p>22 try to do this briefly, to the transaction documents, so</p> <p>23 you can see how the package is put together.</p> <p>24 MR JUSTICE HILDYARD: Yes, because I mean I can't remember</p> <p>25 how many there were, six or eight, under the framework</p> <p style="text-align: center;">Page 30</p>	<p>1 or why payments or distributions once made have been</p> <p>2 suspended very slightly, according to which company one</p> <p>3 looks at, but essentially it is this, and your Lordship</p> <p>4 will see the detail of what I am about to say from</p> <p>5 paragraphs 21 and 28 of Mr Downs' statement and also at</p> <p>6 appendix 4 to that statement where he summarises the</p> <p>7 claims that are being made amongst or between LBIE and</p> <p>8 the affiliate. That is not numbered, but it is 6 or 7</p> <p>9 or 8 pages in from the back of the witness statement,</p> <p>10 same tab. It is appendix 4 claims among LBIE and the</p> <p>11 affiliates, if your Lordship has that.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR ARDEN: My Lord, the position is this, that as far as the</p> <p>14 members were concerned, LBHI2 and LBL, as your Lordship</p> <p>15 knows, proofs were submitted by LBIE in those estates on</p> <p>16 the basis of the contributory liability.</p> <p>17 My Lord, again as your Lordship knows, the amount of</p> <p>18 the proofs was calculated on the basis that the law was</p> <p>19 as stated by the Court of Appeal in Waterfall I and on</p> <p>20 a worst case basis.</p> <p>21 Against each estate LBIE claimed 100 per cent of the</p> <p>22 shortfall calculated on that basis, which resulted in</p> <p>23 a claim against a contributory claim against each in the</p> <p>24 order of about £10 billion, and that for all practical</p> <p>25 purposes had the effect of preventing or freezing</p> <p style="text-align: center;">Page 32</p>

1 distributions from those two estates. My Lord, that is
2 a point which is made by Mr Downs at paragraph 21, which
3 I have already referred your Lordship to but without
4 reading it. It is also made by Ms Bruce in her
5 statement at paragraph 10, dealing with the position of
6 LBHI2.

7 My Lord, separate from the contribution claim, then,
8 LBL has asserted initially principally against LBIE and
9 LBEL a right to recharge various items, and those are
10 the bad debt claims and the administration costs claims,
11 but as your Lordship knows, possibly extending beyond
12 those items.

13 My Lord, again, your Lordship may recall that the
14 amount of those claims, even as originally formulated
15 ran to many hundreds of millions of pounds. My Lord,
16 that obviously creates an issue for LBIE because it is
17 something that LBIE has to deal with, but also it has
18 frozen the further distributions that would otherwise
19 have been made by LBEL on account of its statutory
20 interests and hence Ms Toubé's submissions to your
21 Lordship about how LBEL was particularly concerned to
22 get on with Waterfall III.

23 My Lord, in addition to that recharge claim -- and
24 I am using "recharge" not in any defined way but as
25 a convenient way of dealing with it, of describing it --

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1 in addition to the recharge claim as originally
2 formulated and confined to the two items I have
3 mentioned, LBL has asserted a wider right of recharge,
4 which in its widest form extends to LBHI2 and LBH and
5 includes its liabilities as a contributory. Your
6 Lordship will recall all of this in Waterfall III. It
7 is simply an attempt to pass on in one form or another
8 whatever liability LBL has as a contributory and that
9 wider alleged right of recharge obviously creates, or it
10 compounds the effect that the existing claims already
11 have on the estates and their ability to distribute. It
12 is a further impediment to the distribution of the cash
13 reserves.

14 My Lord, that obviously operates to the detriment of
15 the third party creditors of each of the estates but it
16 also has an effect on the estates themselves because
17 many of the debts are intercompany debts, intercompany
18 balances and the like. So, for example, a significant
19 asset in LBHI2's estate is a claim of around 277 million
20 against LBL, which is an intercompany claim, which
21 essentially cannot be admitted and won't be paid for as
22 long as the rights of recharge coming the other way
23 remain.

24 Now, my Lord, the objectives, Backstop, as your
25 Lordship knows, has been around in two forms and it has

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1 been the two forms have been the subject of negotiation,
2 starting from about the end of last year. The objective
3 of the Backstop deals in both forms was to try to find
4 a solution to the problem that I have just identified
5 and to permit the affiliates to commence or recommence
6 the process of distribution.

7 My Lord, Backstop 1 was negotiated before the
8 Supreme Court decision and the proposal there, as your
9 Lordship probably recalls, was to create a fund which
10 would be available to meet shortfalls, a shortfall in
11 the LBIE estates, and that fund would effectively take
12 the place of the contributory's liability, leaving the
13 contributories free to distribute.

14 The background and broad outline of Backstop 1 in
15 the evidence is dealt with, firstly by Ms Bruce at
16 paragraphs 40 to 42 and it is touched upon by Mr Downs
17 at paragraph 22.

18 My Lord, Backstop 2 has been overtaken. It was
19 premised upon the Court of Appeal's decision in material
20 respects being upheld and the Supreme Court decision
21 overtook it and, as your Lordship knows, changed the
22 legal landscape. But my Lord, it is worth bearing
23 Backstop 1 in mind because if one takes both Backstops
24 what one can see is that Backstop 2 is the product of
25 a very long period of negotiation. It is not something

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1 which has simply started with the Supreme Court; it
2 extends for some five months beyond that. So now for
3 some seven-odd months the parties have been trying to
4 find a solution and Backstop 2 represents what they
5 believe to be the right one, so the product of a long
6 negotiation.

7 As far as Backstop 2 is concerned, the immediate
8 background was the Supreme Court judgment and, my Lord,
9 there are various summaries both of the effect and
10 impact of the Supreme Court judgment and its
11 consequences, various summaries which all pretty much
12 say the same thing but sometimes with different angles
13 and they appear both in the witness statements and in
14 the skeletons. So, for example, Ms Bruce summarises the
15 position at paragraphs 33, 38 to 39 and 56 of her
16 witness statement; Mr Downs at paragraphs 32 to 34 and
17 54 to 59 of his statement.

18 That analysis is then repeated and sometimes
19 expanded upon in the skeletons. So, for example, if one
20 takes the LBIE skeleton, your Lordship will find the
21 impact dealt with -- I have lost it for the moment.

22 My Lord, the analysis is in the part of the skeleton
23 which deals with the LBIE administrators' view and it is
24 dealt with particularly in section, I think, C,
25 paragraphs 32 and onwards.

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<p>1 My Lord, in our skeleton, it is dealt with</p> <p>2 particularly at paragraph 19, where we deal particularly</p> <p>3 with the position of the contributories and the</p> <p>4 contributory liability.</p> <p>5 So my Lord, that is the immediate background to</p> <p>6 Backstop 2, and Backstop 2 reflects the Supreme Court's</p> <p>7 decision about the nature of the contributories'</p> <p>8 liability or is intended to reflect it.</p> <p>9 As far as the deal itself is concerned, the overall</p> <p>10 effect of Backstop 2 is summarised by Ms Bruce at</p> <p>11 paragraph 43. She then identifies the transaction</p> <p>12 documents at paragraph 44. My Lord, there is a longer</p> <p>13 summary in Mr Downs' witness statement, paragraphs 48 to</p> <p>14 60.</p> <p>15 My Lord, the transaction documents, which is what</p> <p>16 I was going to take your Lordship to now, are in</p> <p>17 volume 4 of the bundles.</p> <p>18 MR JUSTICE HILDYARD: Volume 4?</p> <p>19 MR ARDEN: It is a ring binder.</p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR ARDEN: My Lord, page 1 and 2, this is the heads of</p> <p>22 terms, so not itself a transaction document. But your</p> <p>23 Lordship may find this a useful summary of the principal</p> <p>24 terms of the whole of Backstop 2.</p> <p>25 So, for example, you will see at paragraph 1, this</p> <p style="text-align: center;">Page 37</p>	<p>1 then 10 refers to a share transfer. LBL is to transfer</p> <p>2 its shares in LBIE to LBHI2.</p> <p>3 My Lord, as far as then the transaction documents</p> <p>4 are concerned, there is a master framework agreement,</p> <p>5 which I will take your Lordship to first, not the first</p> <p>6 in the bundle but your Lordship will see that between 67</p> <p>7 and 98.</p> <p>8 My Lord, if I can just pick up the recitals. They</p> <p>9 start on page 70 and your Lordship will see that, from H</p> <p>10 onwards, it describes, the recitals describe both what</p> <p>11 this deed is intended to do and also the other</p> <p>12 agreements that the parties are to execute, which are</p> <p>13 the other component parts of Backstop 2. Then the</p> <p>14 significant provisions are to be found at clause 3.</p> <p>15 That is an obligation to execute the other documents.</p> <p>16 And 4 is the execution of a consent order disposing of</p> <p>17 Waterfall III.</p> <p>18 So that is a framework deed, which then provides</p> <p>19 also for dismissal of Waterfall III, and then the next</p> <p>20 document is the deed of settlement.</p> <p>21 My Lord, I am taking your Lordship through this at</p> <p>22 fairly high level because, as your Lordship will have</p> <p>23 picked up from the skeletons, there is an application</p> <p>24 that the court file be sealed in respect of these</p> <p>25 documents, which are confidential. My Lord, what I am</p> <p style="text-align: center;">Page 39</p>
<p>1 is Wentworth's agreement to limit its recourse in</p> <p>2 respect of the subordinated debt to the assets, to</p> <p>3 LBIE's assets, so doing away with the need to make</p> <p>4 a contribution claim in respect of the subordinated</p> <p>5 debt, which was a point which might otherwise have</p> <p>6 arisen in Waterfall III.</p> <p>7 Paragraph 2 deals with the position between LBL and</p> <p>8 LBIE and paragraph 3 deals with notice of intention to</p> <p>9 distribute. Paragraph 4, liquidation. At paragraph 5</p> <p>10 there is a reference to the interaffiliate settlement,</p> <p>11 which is the way in which distributions -- or the</p> <p>12 agreement which governs distributions between the</p> <p>13 affiliates, and it would be based on values which we</p> <p>14 calculated according to a financial model and, my Lord,</p> <p>15 I will come on to that in due course.</p> <p>16 Paragraph 6, my Lord, LBL is dropping its recharge</p> <p>17 and indemnity claims and withdrawing claims made against</p> <p>18 the parties identified. Paragraph 7, LBHI will give</p> <p>19 LBIE an uncollateralised indemnity to cover any</p> <p>20 shortfall for LBIE's senior creditors and capped at</p> <p>21 62 million.</p> <p>22 Then 8, Waterfall III. Over the page, Waterfall III</p> <p>23 will be terminated by dismissal by consent, no order as</p> <p>24 to costs.</p> <p>25 9 relates to a LBIE claim, a LBIE/LBH claim. And</p> <p style="text-align: center;">Page 38</p>	<p>1 trying to do is to point your Lordship to the clauses,</p> <p>2 the relevant clauses, without going into them in too</p> <p>3 much detail. I need to do that, but if I do not descend</p> <p>4 into detail --</p> <p>5 MR JUSTICE HILDYARD: When do you wish to deal with the</p> <p>6 issue of confidentiality?</p> <p>7 MR ARDEN: Because it relates to the court file, it is not</p> <p>8 proposed that your Lordship deals with this or sit in</p> <p>9 private. Because it simply relates to the court file</p> <p>10 I was going to deal with it at the end.</p> <p>11 MR JUSTICE HILDYARD: So you must help me from my ignorance,</p> <p>12 ordinarily any document referred to in open court is</p> <p>13 available generally.</p> <p>14 MR ARDEN: For inspection, my Lord, yes, but then the court</p> <p>15 can restrict the right of inspection.</p> <p>16 MR JUSTICE HILDYARD: Without its permission?</p> <p>17 MR ARDEN: Yes.</p> <p>18 MR JUSTICE HILDYARD: Presumably that is an agreed</p> <p>19 application?</p> <p>20 MR ARDEN: My Lord, every party supports it, yes.</p> <p>21 Obviously when one starts digging down into the</p> <p>22 figures, those can become obviously more confidential,</p> <p>23 but I am not proposing -- I will show you where the</p> <p>24 figures are but I am not proposing to go through them.</p> <p>25 MR JUSTICE HILDYARD: Anyway, you say I don't have to make</p> <p style="text-align: center;">Page 40</p>

1 a direction at this stage?

2 MR ARDEN: My Lord, I think, as I said, it relates to the

3 parties only want a restriction on the right of

4 inspection, so I don't think your Lordship needs to deal

5 with it now, it can be dealt with at the end of my

6 submissions.

7 MR JUSTICE HILDYARD: What would be the objection to

8 inspection if it has already been referred to in open

9 court?

10 MR ARDEN: The objection is it is in the detail, my Lord.

11 It is the --

12 MR JUSTICE HILDYARD: It is good for people to know the

13 generality but not to test it by reference to the

14 particular?

15 MR ARDEN: Well, my Lord, yes, your Lordship needs to know,

16 as I said, your Lordship needs to know what the relevant

17 clauses are and what --

18 MR JUSTICE HILDYARD: If I need to know, surely other people

19 should be entitled to know what I need to know?

20 MR ARDEN: My Lord, if they have a good reason for needing

21 to know --

22 MR JUSTICE HILDYARD: Curiosity.

23 MR ARDEN: My Lord, that would not be, in my submission,

24 a good reason.

25 MR JUSTICE HILDYARD: Wishing to be satisfied that justice

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1 was done and seen to be done.

2 MR ARDEN: My Lord, then an application -- it is open to

3 an interested party, a party that can demonstrate

4 a legitimate interest, which may be the one that your

5 Lordship has identified, it would be open to that party

6 to apply for permission and then for the court to deal

7 with it. But what the protection that the party seeks

8 simply prevents somebody for any reason, good or bad,

9 turning up and trying to inspect documents that the

10 parties agree are commercially sensitive.

11 MR JUSTICE HILDYARD: I only raise it for your own

12 protection.

13 MR ARDEN: My Lord, I understand.

14 MR JUSTICE HILDYARD: I am envisaging what happens when

15 someone says "I would like to have a look at those

16 documents, please" and they say they have been referred

17 to in open court, it was an important issue, lots of

18 money, certain residual public interest after 2008 in

19 the whole matter, "Why shouldn't I have them?"

20 MR ARDEN: My Lord, sufficient detail -- in the way in which

21 I am covering it, I am hoping to give your Lordship

22 sufficient detail to enable --

23 MR JUSTICE HILDYARD: You and I can nod and wink at each

24 other as much as we like, but other people may be

25 interested on the basis on which we did so.

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1 I just want to know whether any further protection

2 is required, having given the warning that I can quite

3 understand seeing in the court files, saying it should

4 be monitored, but I am not quite sure what the answer

5 would be to an application. There may be answers, I am

6 not dealing with that, I just want to -- I am asking to

7 you pause and think whether this is sufficient for your

8 purposes and, if it is, whether it is any good.

9 MR ARDEN: Well, my Lord, as I said, it gives us some

10 protection in the sense that we can then, in response to

11 an application, we will be able to identify the interest

12 sought to be promoted by inspection, and to oppose if we

13 think it is right or perhaps to oppose in part. "Well,

14 if you want to see this, that is fine, but not this",

15 something like that.

16 It is not perfect, but my Lord, I think the

17 alternative would be for this hearing to be dealt with

18 in private, which seems, and I think seemed to all of

19 us, to be perhaps going too far the other way.

20 MR JUSTICE HILDYARD: I think you are right that it would be

21 very difficult to have these sorts of applications in

22 private. The question is whether there is anything

23 between that and this.

24 Now, it is a matter for all of you. I can't

25 personally assess whether it will be worthy of further

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1 protection. I agree with you that these hearings need

2 to be public hearings, but if you are content with this

3 and it can be dealt with in effect at the end of the

4 day, simply by my directing that the file is not to be

5 released without permission of the court, well and good,

6 but I am just querying this. Are you all right with

7 this?

8 MR ARDEN: My Lord, I am. I am not sure, my Lord, if anyone

9 else wants to -- whether any other party wishes to

10 pursue a more stringent form of protection --

11 MR JUSTICE HILDYARD: Are you all content?

12 MR MARSHALL: Certainly, my Lord, on our part we are happy

13 for the matter to be dealt with in that way.

14 MR JUSTICE HILDYARD: Happy, Mr Trower?

15 MR TROWER: Yes.

16 MR JUSTICE HILDYARD: Everyone else happy?

17 All right.

18 MR ARDEN: My Lord, can I just double check behind me?

19 MR JUSTICE HILDYARD: Yes, of course.

20 MR ARDEN: Well, my Lord, we are content to proceed in the

21 way I have just suggested.

22 MR JUSTICE HILDYARD: That is fine.

23 MR ARDEN: My Lord, I was going to take your Lordship to the

24 deed of settlement. I have touched on the framework.

25 MR JUSTICE HILDYARD: Can I just say this: that if you are

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1 happy with that, to some extent you must take me to
 2 those points quite openly which you say are relevant to
 3 the adjudication application.
 4 MR ARDEN: Yes.
 5 MR JUSTICE HILDYARD: Yes.
 6 Can I just ask this while it is on my mind. Apart
 7 from wondering why it was all called "Backstop", which
 8 no doubt you will let me know, but there is provision
 9 for waiver by Wentworth, is that in the document?
 10 MR ARDEN: Yes. That is the limited recourse -- it is in
 11 the limited recourse.
 12 MR JUSTICE HILDYARD: That is all within the limited
 13 recourse?
 14 MR ARDEN: Yes.
 15 MR JUSTICE HILDYARD: It caps it, of course, but also --
 16 I see. Thank you.
 17 MR ARDEN: My Lord, as for "Backstop", I think it was
 18 an expression which probably worked for the first one
 19 but doesn't for the second. It is just easy to keep
 20 using the same term and just adding a number afterwards.
 21 MR JUSTICE HILDYARD: I am still being stupid about why it
 22 was called Backstop, but my assistant will tell me.
 23 MR ARDEN: I think backstop was the idea of the provision of
 24 the fund in Backstop 1 which would take place, which
 25 would respond to a shortfall, so that was the backstop.

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1 MR JUSTICE HILDYARD: I see, thank you.
 2 MR ARDEN: But it is a sort of backstop. There is the 62 or
 3 63 million, it is a rather less significant part of the
 4 transaction.
 5 MR JUSTICE HILDYARD: Yes.
 6 MR ARDEN: My Lord, the deed of settlement then is between
 7 pages 3 and 26 of volume 4. What this deals with is it
 8 settles the claims as between LBIE on the one hand and
 9 LBL, LBHI2 and LBH on the other hand, and you see that
 10 between clauses 3 to -- well, it is 3 to 5 and
 11 essentially it is a series of releases and discharges as
 12 between the various estates, and one of the advantages
 13 seen by all estates, one of the advantages of Backstop 2
 14 is that it is intended to settle the position as
 15 between, as far as possible, the various estates either
 16 by eliminating claims in their entirety or agreeing the
 17 value of claims for distribution purposes, and this
 18 agreement is one of the documents intended to achieve
 19 that.
 20 My Lord, the other clause I should draw your
 21 Lordship's attention to is then clause 7. This is LBIE
 22 and LBIE's administrators' waiver of the notice period
 23 required to be given by them before the LBHI2
 24 administrators serve a distribution notice or a notice
 25 of intention to distribute in LBHI2. My Lord, that is

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1 the requirement that is reflected or contained in the
 2 order that your Lordship made.
 3 MR JUSTICE HILDYARD: That was for their protection, and
 4 they no longer seek it?
 5 MR ARDEN: That's right.
 6 MR JUSTICE HILDYARD: I am not sure they ever did but
 7 I landed them with it.
 8 MR ARDEN: My Lord, as your Lordship will recall, in the
 9 course of that hearing, one was trying to sort of
 10 identify, in relation to any contributory liability, who
 11 would be the right person or party to object, and by
 12 default I think one alit upon LBIE and its
 13 administrators because there really is no one else who
 14 could sensibly object.
 15 The idea of giving them four weeks' notice was to
 16 enable them to turn up to object if they thought they
 17 should, and note it is before we pulled the distribution
 18 trigger which leads you into the structure and the
 19 process stipulated by the rules. So under 7.1, the
 20 notice period is waived, or they agreed to waive it.
 21 MR JUSTICE HILDYARD: Yes.
 22 MR ARDEN: Then 7.2, your Lordship will see that there is
 23 a confirmation that LBIE and its administrators do not
 24 object to the LBHI2, LBL and LBEL and LBH
 25 administrators. And then it is:

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1 "Making or deeming to make distributions or paying
 2 statutory interest in accordance with the distribution
 3 model, pursuant to clause 6 of the interaffiliate
 4 settlement deed ..."
 5 And, my Lord, I will come to that in a moment.
 6 "... paying relevant actual net payment amounts,
 7 making distributions to other unsecured creditors ..."
 8 I'm taking that fairly quickly.
 9 "... in each case without provisions or reserve in
 10 connection with any actual or potential claims from
 11 LBIE, LBIE administrators and/or any liquidator
 12 appointed to LBIE or any contributory claim."
 13 So that is the confirmation that your Lordship will
 14 have seen addressed in all of the skeletons and it is
 15 a confirmation, as I said, that in making the
 16 distributions that are governed by the -- in making
 17 distributions, no reserve need be made.
 18 MR JUSTICE HILDYARD: And does that take account of the fact
 19 that it is proposed that distributions be made by
 20 directors?
 21 MR ARDEN: My Lord, I don't think, as far as the
 22 distribution -- my Lord, LBEL is not I think on
 23 anybody's argument a contributory, and so it is
 24 difficult to see how --
 25 MR JUSTICE HILDYARD: It wouldn't arise; is that right?

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<p>1 MR ARDEN: It simply doesn't arise. The only entities in 2 respect of which it could arise, LBL no, LBHI2 and 3 arguably LBH, but that would depend on whether LBL is 4 right about rectification. 5 MR JUSTICE HILDYARD: Right. Anyway, I do not have to worry 6 about the position of Mr -- 7 MR ARDEN: No. 8 My Lord, that is the deed of settlement. Then there 9 is the interaffiliate deed and this governs the 10 distributions that have been made amongst the 11 affiliates. Essentially this proceeds on the basis that 12 it is possible to identify all the claims as between the 13 various estates and all the estates' other liabilities 14 and their assets, and then, on the basis of that 15 information, to agree net amounts which will then be 16 paid by a relevant affiliate to a relevant affiliate. 17 My Lord, this is at page 27 onwards. If I could 18 just draw your Lordship's attention to recitals J and K, 19 and if your Lordship would read that. 20 MR JUSTICE HILDYARD: Where is recitals J and K? 21 MR ARDEN: Bundle-page 31, the last two recitals on that 22 page, and going over to 32. (Pause). 23 MR JUSTICE HILDYARD: So there is a sort of rolled-up single 24 dividend, distribution? 25 MR ARDEN: That's right.</p> <p style="text-align: center;">Page 49</p>	<p>1 three clauses in the document. 2 MR JUSTICE HILDYARD: But I am not asked to consider or 3 approve the modelling, nor the amounts which follow from 4 the model? 5 MR ARDEN: No, it is really so your Lordship understands the 6 way the components work and then that perhaps just gives 7 you a bit more detail and machinery. 8 MR JUSTICE HILDYARD: It is to see what is happening rather 9 than approve the details? 10 MR ARDEN: Absolutely, otherwise one is in a sort of dull 11 drafting session, and it is probably not a very 12 productive one at that. 13 MR JUSTICE HILDYARD: Right. 14 Well, let's pause there. You have had a quite 15 a time. How long would you like? 16 (11.45 am) 17 (A short adjournment) 18 (11.50 am) 19 MR ARDEN: My Lord, we were in the interaffiliate settlement 20 deed and, I think I explained to your Lordship, as far 21 as distributions are concerned, they will be calculated 22 and then modelled so that one arrives at single figures 23 or single sums going from one estate to the other and 24 the modelling in the calculation take place at a number 25 of different stages until you get to the sort of final</p> <p style="text-align: center;">Page 51</p>
<p>1 What it is possible to do, what will appear as 2 a schedule, there is a current draft at the moment, but 3 what will appear as a schedule, it is possible just to 4 financially model so that rather than have a series, 5 a sort of round sequence of actual payments, one simply 6 takes the sequence and then has ten notional sequences 7 and then you arrive at a net figure at the end of it. 8 That is what it is intended so, as I said, rather than 9 have the money just keep going round over and over, you 10 just simply have, as I said, you financially model it 11 and then you can arrive at net payments. 12 My Lord, before I move away from the recitals, 13 I have just been reminded, I wonder if it might be 14 a convenient moment for the shorthand writers ... 15 MR JUSTICE HILDYARD: Yes, I am sorry not to have asked. 16 What is my role with respect to the affiliate settlement 17 deed? 18 MR ARDEN: My Lord, I just want your Lordship to see how the 19 transaction works and I think I do need to take your 20 Lordship to -- I can do this fairly briefly, but one of 21 the matters that is governed by the interaffiliate 22 settlement deed is the LBEL distribution and I think 23 your Lordship should see that clause as well, as well as 24 the other clauses which provide for distributions. 25 But I am only going to ask -- there are probably</p> <p style="text-align: center;">Page 50</p>	<p>1 effective date or the final date where the last 2 calculation is made which takes into account everything 3 that has happened up to that date and then produces the 4 net figures. 5 My Lord, there is an order in which things are done 6 and the first in terms of first significant step or the 7 first in time is the capital reduction, which is dealt 8 with at clause 5. Clause 5, there are two things in 9 that, it is the capital reduction, and clause 5 deals 10 with a series of steps, which are LBL, in clause 5.1, is 11 required to procure that the director does, and then LBH 12 is dealt with at 5.2. And you will see then between 5.2 13 and then 5.5 are the steps required, or the matters 14 required to be dealt with for the purposes of putting 15 into effect the LBEL option 1. 16 And then, my Lord, at clause 6, it's essentially the 17 mechanism which deals with and then leads to the 18 payments that are to be made both by LBEL by way of 19 distribution to its members but also as between the 20 various estates, and in fact, as far as net payments are 21 concerned, there are only going to be two payers, which 22 is LBL and LBEL, and that is why the obligations, the 23 payment obligations, in clause 6 extend only to those 24 two companies. The rest, the other affiliates are net 25 recipients.</p> <p style="text-align: center;">Page 52</p>

<p>1 So what this does, what clause 6 does with effect, 2 particularly 6.4, with effect from the final effective 3 time, there are a series of admissions to proof. And 4 then 6.5 is a release of claims other than those that 5 are to be dealt with. That is 6.5, 6.6, 6.7 and 6.8. 6 And then the payments are dealt with at 6.14 and 6.15. 7 6.14 is statutory interest, the payment by LBEL of 8 statutory interest. And then 6.15, the opening words of 9 6.15 give effect to -- there are deeming provisions and 10 the intention of that is you deem payments to be made 11 rather than to require them to be made, and that is to 12 give effect to the 10 notional distributions leading to 13 a net amount due or to be paid at the end of that 14 process. 15 Then the payment obligations. 6.15.1, LBL is to pay 16 what it is required to pay, and then 6.15.2, it is back 17 to LBEL. You see reference to the accounts at (i), 18 broad resolution at (ii) and then (iii) is the 19 obligation to pay. 20 My Lord, that deals with the position as far as the 21 affiliates are concerned and then distributions to other 22 creditors is dealt with by clause 7. So the complicated 23 ones are the affiliates because they are the payments of 24 the product of a settlement of balances and letting off 25 and so on.</p> <p style="text-align: center;">Page 53</p>	<p>1 parties are entering into this upon assumptions as to 2 what the likely outcome will be. 3 It is unlikely that that will change but it is 4 possible and so over the course of the working out of 5 the agreement, a fairly short period of time, statements 6 will be produced, and if the statements disclose 7 a position which is materially different and materially 8 worse than the figures that the parties are working on 9 in entering into the agreement, there is a right to 10 terminate. And, my Lord, the final effective date is 11 defined by reference to the final point at which 12 a parties can terminate for a material adverse effect 13 and so it relates back to 6.1 and that is the last of 14 the certificates that I have mentioned to your Lordship. 15 So once the last of the certificates is produced, 16 which is after the capital reduction takes place, there 17 is a short period of time to terminate. Once that is 18 over, that is the final effective date and then 19 everything rolls on from there. 20 MR JUSTICE HILDYARD: And any business day is right, 9.00 am 21 on any business day after the certification? 22 MR ARDEN: My Lord, when I looked at it I thought it was 23 right but ... 24 So under 6.1 you have to produce -- 25 MR JUSTICE HILDYARD: 6.1 you have the certificates and then</p> <p style="text-align: center;">Page 55</p>
<p>1 The distributions to other creditors will be made on 2 the same basis, in other words at the same rate and in 3 accordance with paragraph 7, so there will be 4 a distribution to all creditors, including affiliates. 5 My Lord, I was next going to take your Lordship to 6 the limited recourse deed. This is the Wentworth deed. 7 That is at page 99 of the bundle through to 118. 8 MR JUSTICE HILDYARD: I am just trying to get my head 9 round -- I apologise because it is drafting -- the final 10 effective term. 11 MR ARDEN: My Lord, that is defined, in the deed it is 12 defined by reference to -- 13 MR JUSTICE HILDYARD: Any business day after the 14 certifications required by clause 6.1 provided I suppose 15 no certification has occurred. Is that right? 16 MR ARDEN: My Lord, final effective time is -- 17 MR JUSTICE HILDYARD: It is 6.3 but it clocks back to 6.1, 18 is that right? 19 MR ARDEN: My Lord, that is right. 20 At various points, as I indicated but took it fairly 21 quickly, at various points in the process, so at the 22 beginning and then as it starts and then at this point, 23 the parties are required to essentially sort of produce 24 statements which will convey to the other parties where 25 things stand as far as their estates are concerned. The</p> <p style="text-align: center;">Page 54</p>	<p>1 you have 6.2, which is changes of mind; then you have to 2 wait 14 hours -- 3 MR ARDEN: Yes. 4 MR JUSTICE HILDYARD: -- to make sure there are not further 5 changes in mind. 6 MR ARDEN: Yes. 7 MR JUSTICE HILDYARD: Is it the business day or a business 8 day? 9 MR ARDEN: Well, it sounds to me like it should be "the", 10 I would have thought, rather than ... 11 MR JUSTICE HILDYARD: Any business day carries on ad 12 infinitum. 13 MR ARDEN: Your Lordship is right. 14 MR JUSTICE HILDYARD: Do you want to have a think about that 15 over the short adjournment -- there will be other 16 drafting minutiae, I am sure, but I noticed that this 17 "final effective time" carries through the other 18 documents without further definition. So it just struck 19 me as one where we might as well try and get it right. 20 MR ARDEN: Yes. 21 MR JUSTICE HILDYARD: Just have a think about that. 22 MR ARDEN: My Lord, it is right to say, your Lordship is 23 looking at documents that are still in a draft form, 24 albeit reasonably advanced, and there are matters which 25 are incomplete, schedules, for example, which need to be</p> <p style="text-align: center;">Page 56</p>

<p>1 dealt with, and this, and probably other drafting</p> <p>2 issues, or corrections, will probably arise in the</p> <p>3 course of the next few days.</p> <p>4 MR JUSTICE HILDYARD: Well, I hope I would not be as</p> <p>5 ambitious or even pretentious as to try to look at the</p> <p>6 drafting, but just as we were on that --</p> <p>7 MR ARDEN: My Lord, it is helpful because it is easily</p> <p>8 missed.</p> <p>9 MR JUSTICE HILDYARD: Okay, well have a think about it and</p> <p>10 let me know.</p> <p>11 MR ARDEN: My Lord, yes.</p> <p>12 My Lord, subject to your Lordship, I was just going</p> <p>13 to take your Lordship to the limited recourse deed,</p> <p>14 which was the Wentworth, page 99.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR ARDEN: The relevant clause there is clause 3 and so it</p> <p>17 is a limited recourse for release -- and release.</p> <p>18 My Lord, I don't think I need to go to the</p> <p>19 definitions. I think the point will be fairly clear and</p> <p>20 it has been discussed in the context of Waterfall III.</p> <p>21 But you will see that it is a claim limited to assets</p> <p>22 and no contribution claim in respect of a shortfall.</p> <p>23 My Lord, the other thing that this document does at</p> <p>24 5 and 6 is just to settle on the quantum of the two</p> <p>25 claims, the relatively small senior claim and then the</p> <p style="text-align: center;">Page 57</p>	<p>1 Its nature I think is derived, will be derived from</p> <p>2 the wording of clause 5. What is required is that the</p> <p>3 joint administrators -- it is confirmation that in the</p> <p>4 joint administrators' reasonable opinion there is no</p> <p>5 prospect of a distribution.</p> <p>6 My Lord, I think that probably puts it in the</p> <p>7 category of perhaps I would challenge for irrationality,</p> <p>8 no reasonable administrator could have formed that</p> <p>9 opinion, but beyond that I don't see that there would be</p> <p>10 scope for challenge. I can't say I have really thought</p> <p>11 it through in any detail but that would be my immediate</p> <p>12 reaction to clause 5, 5.1.</p> <p>13 MR JUSTICE HILDYARD: That may very well not have got the</p> <p>14 full glory of it but the shortfall certificate is really</p> <p>15 sort of the nub of it, isn't it, the nub of the</p> <p>16 agreement, really? And again it is a draft. The</p> <p>17 question sometimes is what the power of the certificate</p> <p>18 should be.</p> <p>19 MR ARDEN: Yes, well, I mean it is something that vexed your</p> <p>20 Lordship in Waterfall IIIC.</p> <p>21 MR JUSTICE HILDYARD: It did, yes.</p> <p>22 MR ARDEN: Yes.</p> <p>23 Well, my Lord, I think my instant and probably not</p> <p>24 particularly well thought out reaction was that it would</p> <p>25 be challengeable on the basis of irrationality only but</p> <p style="text-align: center;">Page 59</p>
<p>1 much larger subordination claim; that is clauses 5 and</p> <p>2 6.</p> <p>3 Then the other document I was going to take your</p> <p>4 Lordship to is the indemnity agreement. This is the</p> <p>5 62 million fund -- not fund, it is an agreement to</p> <p>6 indemnify LBIE against a shortfall provided by LBHI.</p> <p>7 Sorry, this is pages 119 onwards of the bundle and the</p> <p>8 indemnity is at clause 3 and it is fairly -- it is just</p> <p>9 the lower of -- on certification, LBHI, has to pay the</p> <p>10 shortfall amount or the cap, whichever is the lower.</p> <p>11 My Lord, just so your Lordship knows, the way in</p> <p>12 which the definitions work mean I think that this covers</p> <p>13 very senior claims, but also non-provable liabilities</p> <p>14 derived from senior claims, and one gets that -- they</p> <p>15 are the two definitions, senior claims and non-provable</p> <p>16 liabilities. And the shortfall amount, on page 124, the</p> <p>17 shortfall amount includes, if your Lordship will see,</p> <p>18 senior claims, including statutory interest and, if</p> <p>19 applicable, non-provable liabilities. So it covers the</p> <p>20 sort of three layers, as it were, above the subordinated</p> <p>21 debt and not just the first.</p> <p>22 MR JUSTICE HILDYARD: And the shortfall certificate is</p> <p>23 intended, subject to the constraints of reasonableness</p> <p>24 and good faith, to be definitive, is it?</p> <p>25 MR ARDEN: My Lord, I would have thought so.</p> <p style="text-align: center;">Page 58</p>	<p>1 not beyond that, but I can't, as I said to your</p> <p>2 Lordship, I can't say I have thought it through but it</p> <p>3 may be that, it may be something that the two parties to</p> <p>4 that agreement --</p> <p>5 MR JUSTICE HILDYARD: Can have a think about.</p> <p>6 MR ARDEN: That the LBHI might want to have a think about.</p> <p>7 MR JUSTICE HILDYARD: Was it a case called Socimer in the</p> <p>8 Court of Appeal as to the extent as to which you could</p> <p>9 build in a non-challenge? Anyway, I will leave that</p> <p>10 with you.</p> <p>11 MR ARDEN: My Lord noted I think and perhaps we will see</p> <p>12 whether that point can be clarified if it is thought</p> <p>13 desirable.</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR ARDEN: My Lord, I think those are the transaction</p> <p>16 documents. My Lord, I am sorry it is taking your</p> <p>17 Lordship through fairly quickly. It is not necessary</p> <p>18 for your Lordship to get into the detail because</p> <p>19 otherwise it almost becomes a sort of drafting exercise,</p> <p>20 which is not very helpful, but I thought it was</p> <p>21 important that your Lordship just see the structure and</p> <p>22 the important terms and that was the purpose of taking</p> <p>23 you to those.</p> <p>24 My Lord, as far as the --</p> <p>25 MR JUSTICE HILDYARD: They are all governed by English law</p> <p style="text-align: center;">Page 60</p>

<p>1 with English jurisdiction clauses? I have been trying</p> <p>2 to spot as we go through but I think they are, aren't</p> <p>3 they?</p> <p>4 MR ARDEN: I think Mr Marshall has pointed out that the</p> <p>5 indemnity at 134 is --</p> <p>6 MR JUSTICE HILDYARD: New York?</p> <p>7 MR ARDEN: New York. (Pause).</p> <p>8 My Lord, Mr Trower points out that it is both -- so</p> <p>9 jurisdiction is both here and New York, and New York is</p> <p>10 the governing law. That is for indemnity.</p> <p>11 MR JUSTICE HILDYARD: Is there any reason I should bother</p> <p>12 myself with as to why it is the odd man out as to the</p> <p>13 choice of law?</p> <p>14 MR ARDEN: My Lord, I would assume I think that this would</p> <p>15 be -- it is a familiar candidate for a choice of law.</p> <p>16 This court does retain jurisdiction. And, my Lord,</p> <p>17 I would assume that that would have been the subject of</p> <p>18 a negotiation between those parties and that the LBIE</p> <p>19 administrators, who will need to enforce it if</p> <p>20 necessary, were satisfied with that outcome. There is</p> <p>21 nothing, certainly in my submission, nothing that leaps</p> <p>22 out of that choice of law and makes one think, "Well,</p> <p>23 why on earth are you doing that?"</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MR ARDEN: My Lord, those are the documents. In terms of</p> <p style="text-align: center;">Page 61</p>	<p>1 that objective, a speedy distribution or as speedy as</p> <p>2 possible a distribution, as being consistent with their</p> <p>3 statutory duties, which is, even in a case as</p> <p>4 complicated as this, to get on with things and reach</p> <p>5 a point where they could distribute as soon as</p> <p>6 reasonably possible.</p> <p>7 My Lord, all of those matters are matters that we</p> <p>8 advance in support of our application. As I say, they</p> <p>9 are shared by many. We have, as your Lordship knows,</p> <p>10 separately dealt with the question of the contributory</p> <p>11 liability and as to whether or not there should be</p> <p>12 a reserve. My Lord, in our submission, the short answer</p> <p>13 to that is no, there is no claim against which we can</p> <p>14 currently reserve and there is no prospect of that claim</p> <p>15 vesting in anybody in the near to medium future, if at</p> <p>16 all.</p> <p>17 Those were all points I covered with your Lordship</p> <p>18 earlier and then, on top of that, and this is something</p> <p>19 all of the evidence in the skeletons suggests, on top of</p> <p>20 that, the ability to distribute or a distribution</p> <p>21 without a reserve is, as I have described it, it is</p> <p>22 an integral part of Backstop 2 and the financial</p> <p>23 modelling is based upon it and if it doesn't happen,</p> <p>24 Backstop 2 will collapse. All of the parties identify</p> <p>25 benefits to Backstop 2 which, in the opinion of the</p> <p style="text-align: center;">Page 63</p>
<p>1 this application, your Lordship summarised the</p> <p>2 principles that are applicable and I agree with --</p> <p>3 MR JUSTICE HILDYARD: I read Nortel and its summary of the</p> <p>4 trust jurisdiction and Mr Justice David Richards'</p> <p>5 analysis in MF, I think it was. Was it MF Global?</p> <p>6 MR ARDEN: MF Global.</p> <p>7 MR JUSTICE HILDYARD: Yes. You are not surrendering your</p> <p>8 discretion, you are simply putting it forward as</p> <p>9 a momentous decision, as obviously it is. Nevertheless,</p> <p>10 however momentous my role, the court's role is limited</p> <p>11 to determining whether there is any blot in terms of</p> <p>12 irrationality or of this conflict of interest which</p> <p>13 could give rise to difficulties. That is the end of it,</p> <p>14 isn't it?</p> <p>15 MR ARDEN: My Lord, that is right and it can be very shortly</p> <p>16 stated, and I think in most of the skeletons it is</p> <p>17 stated exactly as your Lordship has said.</p> <p>18 My Lord, as far as LBHI2 is concerned, each party</p> <p>19 looks at this from a perspective of their own estate,</p> <p>20 but in many respects the estates identify the same</p> <p>21 benefits in terms of settlement of claims, disposal of</p> <p>22 the Waterfall III proceedings, and all of the affiliates</p> <p>23 identify the ability now to move to distribute the cash</p> <p>24 that they are holding on to as being a positive and</p> <p>25 obvious benefit to the creditors, and they would regard</p> <p style="text-align: center;">Page 62</p>	<p>1 various office-holders, outweigh any possible prejudice</p> <p>2 which might be said to arise as a consequence of the</p> <p>3 distribution taking place without any reserve being</p> <p>4 made, even if it were possible to make one.</p> <p>5 So even if it were a relevant factor, nevertheless,</p> <p>6 particularly the LBIE administrators expressed the view</p> <p>7 that that would not be something which would dissuade</p> <p>8 them from entering into Backstop 2 because of the other</p> <p>9 benefits it secures, in particular for LBIE and its</p> <p>10 estate.</p> <p>11 My Lord --</p> <p>12 MR JUSTICE HILDYARD: This is not really a re Danka case, is</p> <p>13 it?</p> <p>14 MR ARDEN: I think you can use re Danka, you could get</p> <p>15 something out of re Danka, but it is not the same</p> <p>16 because there there was a claim which could be -- there</p> <p>17 was a provable claim, the liquidators has initiated the</p> <p>18 distribution process, and the Court of Appeal's decision</p> <p>19 was to the effect that they were entitled to do that and</p> <p>20 what followed from that under the statutory scheme was</p> <p>21 a valuation of contingent claims and payments on the</p> <p>22 value of those claims as estimated, and the argument in</p> <p>23 that case by the creditor that a reserve should be made</p> <p>24 was simply inconsistent with that scheme and the way in</p> <p>25 which the scheme dealt with contingent debts. But</p> <p style="text-align: center;">Page 64</p>

<p>1 my Lord, I think what one can draw from that is this.</p> <p>2 Firstly, there is the point made -- and it is the</p> <p>3 submission I have already made about the duty to get on</p> <p>4 with this, the duty to just -- you start a liquidation</p> <p>5 process or you are in a distributing administration and</p> <p>6 then really you just get on with it and you cannot wait</p> <p>7 forever and a day to see if a claim pops up.</p> <p>8 Shall I take your Lordship -- is your Lordship</p> <p>9 looking for --</p> <p>10 MR JUSTICE HILDYARD: I mean, I need to remind myself --</p> <p>11 I thought Danka was really a case on valuation of</p> <p>12 contingent claims and the duty to strike a valuation</p> <p>13 figure and then get on with it, whereas this is not that</p> <p>14 case, is it? This is a case where you are told by the</p> <p>15 Supreme Court that there is none that you can take</p> <p>16 a view about, there is just no incoming claim.</p> <p>17 Now, of course, one doesn't know what the position</p> <p>18 is, if the administrators already have the view that</p> <p>19 actually the exit is going to be liquidation. I am not</p> <p>20 sure Lord Neuberger explains exactly what is going to</p> <p>21 happen in those circumstances, but ours is not to reason</p> <p>22 why and I am told that there isn't that exit in</p> <p>23 contemplation.</p> <p>24 It is a you cannot reserve case, isn't it? It is</p> <p>25 not a take a view and live with it, it is a: look, in</p> <p style="text-align: center;">Page 65</p>	<p>1 a liquidator being appointed, so your Lordship doesn't</p> <p>2 have to grapple with what might --</p> <p>3 MR JUSTICE HILDYARD: I know, but at present it seems that</p> <p>4 even if there were, too bad, it is an administration and</p> <p>5 there we are. But, you know, that is beyond my level.</p> <p>6 MR ARDEN: Well, as has been pointed out on various</p> <p>7 occasions here, it seems that that consequence was</p> <p>8 something which Lord Neuberger contemplated at</p> <p>9 paragraph 165 of the judgment.</p> <p>10 MR JUSTICE HILDYARD: He said it didn't put him off his</p> <p>11 decision.</p> <p>12 MR ARDEN: He said it didn't put him off, despite the</p> <p>13 consequences. It just was one of those things that</p> <p>14 happened. It just happens, it follows from the</p> <p>15 analysis, which follows from the way in which the</p> <p>16 statute has approached all of this.</p> <p>17 MR JUSTICE HILDYARD: Hmm.</p> <p>18 MR ARDEN: So my Lord, it is stronger than Danka. The</p> <p>19 reason I think one gets some assistance from Danka, it</p> <p>20 is more to do with the expression principle or the way</p> <p>21 in which the Court of Appeal rejects the notion that</p> <p>22 somehow it is all right to hang on and wait and one</p> <p>23 should be reserving against future possible claims. The</p> <p>24 Court of Appeal simply flatly rejects that as</p> <p>25 an appropriate way or an appropriate approach to the</p> <p style="text-align: center;">Page 67</p>
<p>1 case you have got any idea about that being an incoming</p> <p>2 reservable claim, you are wrong.</p> <p>3 MR ARDEN: Yes. My Lord, it is stronger than Danka because,</p> <p>4 as your Lordship points out, in Danka there was</p> <p>5 a creditor and then the choice was between just doing</p> <p>6 what the rules tell you, value the contingent claim and</p> <p>7 pay, or what the creditor wanted, which is: please will</p> <p>8 you reserve, please will you reserve for my claim and</p> <p>9 protect my contractual rights in their entirety, and the</p> <p>10 Court of Appeal said no --</p> <p>11 MR JUSTICE HILDYARD: It is a valuation issue.</p> <p>12 MR ARDEN: It is valuation and not reserve.</p> <p>13 MR JUSTICE HILDYARD: Yes.</p> <p>14 MR ARDEN: And as your Lordship points out, whereas here</p> <p>15 there cannot be a valuation or a --</p> <p>16 MR JUSTICE HILDYARD: The apparent dictat -- that sounds</p> <p>17 rude -- the apparent decision is when you are in the</p> <p>18 administration world, you must shut your eyes to others</p> <p>19 and even if it is not impossible, that the</p> <p>20 administration will move into liquidation. For as long</p> <p>21 as it is an administration, there is no creditor and</p> <p>22 there is no claim.</p> <p>23 MR ARDEN: No, and I think your Lordship -- this case is</p> <p>24 a case where there is no imminent prospect, and nothing</p> <p>25 said about an imminent or immediate prospect, of</p> <p style="text-align: center;">Page 66</p>	<p>1 legislation. It is simply not what one does when one is</p> <p>2 dealing with proofs and distributing. It is not a wait</p> <p>3 and see structure.</p> <p>4 MR JUSTICE HILDYARD: Of course but for option 1, and I keep</p> <p>5 forgetting which company is involved with it, and with</p> <p>6 Ms Toubé's silver-tongued advocacy one might be</p> <p>7 contemplating the proposal of a liquidation as the exit</p> <p>8 route.</p> <p>9 MR ARDEN: For LBEL?</p> <p>10 MR JUSTICE HILDYARD: For LBEL, yes. Of course, I suppose</p> <p>11 that is by the by in terms of this particular context.</p> <p>12 MR ARDEN: Because LBIE's position is so very different from</p> <p>13 LBEL's. Liquidation for LBIE would be frankly suicidal</p> <p>14 for its creditors as matters stand, which is why, as</p> <p>15 your Lordship will have seen from the exchanges, they</p> <p>16 are so concerned. But their main concern about this</p> <p>17 application is to avoid LBIE going into liquidation,</p> <p>18 which it will not.</p> <p>19 My Lord, essentially those are my submissions on</p> <p>20 benefits generally and the distributing without</p> <p>21 a reserve in particular. My Lord, I think I have</p> <p>22 covered it over rather a long time, both matters more</p> <p>23 than once, but if there is anything I can assist your</p> <p>24 Lordship on, I would be happy to do so, but if not,</p> <p>25 those are my submissions.</p> <p style="text-align: center;">Page 68</p>

<p>1 MR JUSTICE HILDYARD: No, I think that is very helpful.</p> <p>2 I mean, the court is in a slightly difficult</p> <p>3 position in capturing all the nuances of even the</p> <p>4 framework. Descending into the details of the other</p> <p>5 agreements, though I don't criticise you at all, it was</p> <p>6 necessary for me to see them, is I think beyond really</p> <p>7 any reasonable proportionate assessment. But I take it,</p> <p>8 really, that my job is to see that the pros and cons</p> <p>9 have been sensibly adumbrated and that a decision in</p> <p>10 favour of the proposal is not barmy.</p> <p>11 MR ARDEN: My Lord, yes, my Lord, neatly put.</p> <p>12 My Lord, that is right, and I wouldn't for my part,</p> <p>13 and I don't think anyone would, encourage you to descend</p> <p>14 to the level of detail that I descended to this morning,</p> <p>15 that is just simply to give you some idea of the</p> <p>16 mechanics. All of the skeletons and the witness</p> <p>17 statements in their own way summarise what the</p> <p>18 Backstop 2 is intended to achieve. As I say, there are</p> <p>19 sort of slight nuances depending on which estate you are</p> <p>20 looking at, but they do that at the level of detail</p> <p>21 which I think is probably sufficient for your Lordship.</p> <p>22 If your Lordship is satisfied that the transaction</p> <p>23 documents look like they are trying to achieve that,</p> <p>24 then probably you can take the more general descriptions</p> <p>25 from, as I said, the witness statements and the</p> <p style="text-align: center;">Page 69</p>	<p>1 had already arisen in the context of Waterfall III and</p> <p>2 so a separate unconnected PWC representative was</p> <p>3 appointed, an additional administrator, and separate</p> <p>4 legal advice was taken from Lovells. As it applied to</p> <p>5 water -- it was a way of managing the possible conflict</p> <p>6 between LBH and LBHI2 in the Waterfall III proceedings,</p> <p>7 but similarly, in my submission, manages the potential</p> <p>8 conflict of the crossover of administrators in this case</p> <p>9 as well. As your Lordship will have seen from the most</p> <p>10 recent application from LBH, they have now separately</p> <p>11 considered Backstop 2 and taken advice and now seek your</p> <p>12 approval, but on the basis of a separate consideration</p> <p>13 independently of Ms Bruce. And although I am not sure</p> <p>14 I can tell you -- that is the conflict --</p> <p>15 MR JUSTICE HILDYARD: The evidence as to the separate</p> <p>16 consideration by isolated individuals is sparse.</p> <p>17 I don't quite know what it is, do I?</p> <p>18 MR ARDEN: Well, I think in terms of -- for LBHI2, Ms Bruce</p> <p>19 did deal with it -- she dealt with it in her witness</p> <p>20 statement and then, you know, from the content of</p> <p>21 Mr Lewis' statement --</p> <p>22 MR JUSTICE HILDYARD: Yes, the weekend one explains that</p> <p>23 there has been in effect a delegation.</p> <p>24 MR ARDEN: Yes, and I think Ms Bruce dealt with it "As</p> <p>25 administrator I do think it is in the interests of LBH</p> <p style="text-align: center;">Page 71</p>
<p>1 skeletons.</p> <p>2 MR JUSTICE HILDYARD: Two curiosities, if I can put it that</p> <p>3 way are, one, the difficult task as regards the "Is it</p> <p>4 rational?" is to try and identify whether there are any</p> <p>5 material considerations which have simply been ignored.</p> <p>6 MR ARDEN: Yes.</p> <p>7 MR JUSTICE HILDYARD: That is one question as far as just</p> <p>8 your endeavours go. One has not been able to identify</p> <p>9 any, but obviously if there were, that would upset the</p> <p>10 apple cart.</p> <p>11 The other is that conflict of interest is much</p> <p>12 easier to assess in the trust context or in the single</p> <p>13 proposal context than where you have a great many</p> <p>14 interrelating arrangements with, I think, some</p> <p>15 cross-administrators acting for the companies. But</p> <p>16 I think what is really meant there is no personal or</p> <p>17 disqualifying individual conflict of interest, rather</p> <p>18 than the essence of the deal, which is a reasonable</p> <p>19 balance between conflicting concerns.</p> <p>20 MR ARDEN: My Lord, I think most of the conflicts have been</p> <p>21 addressed in I suppose what is the usual way, by which</p> <p>22 I mean this: one of my administrators, Ms Bruce, is also</p> <p>23 an LBH administrator.</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MR ARDEN: But to address the conflict that arises there, it</p> <p style="text-align: center;">Page 70</p>	<p>1 but there is somebody else acting", and then Mr Lewis</p> <p>2 does flesh that out.</p> <p>3 MR JUSTICE HILDYARD: Could you just show me that, I am</p> <p>4 sorry.</p> <p>5 MR ARDEN: Yes. For Ms Bruce, it is volume 1, tab 7, and it</p> <p>6 is paragraph 52 at page 17. It runs through to 54.</p> <p>7 MR JUSTICE HILDYARD: 50 to 54?</p> <p>8 MR ARDEN: Yes, 52 and 53 she deals with her views, and then</p> <p>9 at 54, what she says, she mentions Mr Lewis:</p> <p>10 "Safeguard independent interests, separately ...</p> <p>11 Whilst Mr Lewis and his legal team have not participated</p> <p>12 in the day-to-day negotiation of transaction documents,</p> <p>13 they have been informed of the overall architecture of</p> <p>14 Backstop 2".</p> <p>15 MR JUSTICE HILDYARD: Thank you, I had forgotten that, that</p> <p>16 is helpful. Thank you.</p> <p>17 MR ARDEN: I think it does go slightly further in terms of</p> <p>18 the separate consideration, when one looks at the</p> <p>19 weekend statement.</p> <p>20 MR JUSTICE HILDYARD: Yes, and I suppose I have the further</p> <p>21 comfort of notification and no creditor turning up and</p> <p>22 saying "Actually, this is absolutely wrong by my</p> <p>23 lights".</p> <p>24 MR ARDEN: No one is saying it plainly benefits, for</p> <p>25 example, LBHI2 at the expense of LBH.</p> <p style="text-align: center;">Page 72</p>

<p>1 MR JUSTICE HILDYARD: Yes, equating them to beneficiaries if 2 you like. 3 MR ARDEN: Yes. 4 MR JUSTICE HILDYARD: Yes. 5 Mr Arden, thank you very much. 6 MR ARDEN: Thank you very much. 7 MR JUSTICE HILDYARD: Mr Trower, are you next? 8 Submissions by MR TROWER 9 MR TROWER: My Lord, I am going to go next, if that is all 10 right. Mr Arden has covered a lot of the ground so 11 hopefully I can be reasonably short. If your Lordship 12 will turn up our skeleton at paragraph 16, just so I can 13 just quickly start with that. In paragraph 16 to 25, we 14 provide what we hope is a helpful summary of the test 15 your Lordship was applying. 16 MR JUSTICE HILDYARD: Yes. 17 MR TROWER: If your Lordship has any questions on that, 18 I would be happy to discuss them with your Lordship, but 19 otherwise, having heard the debate between your Lordship 20 and Mr Arden, it has been encapsulated, the tests that 21 my Lord has to apply. 22 Now, the one issue that I perhaps should briefly 23 dwell on is the one that you have just been discussing 24 with Mr Arden, which is the position of each separate 25 estate.</p> <p style="text-align: center;">Page 73</p>	<p>1 are looking at this through the perspective of the 2 individual estates, although of course inevitably it is 3 against the background of thinking about the group as 4 a whole, but it is because of the benefit to the group 5 as a whole and the knock-on benefit to the individual 6 estates that one has in some respects the best of both 7 worlds in a structure of administrations in this way. 8 MR JUSTICE HILDYARD: It may be I am wrong about this, but 9 I suppose in that way it differs from the trust model -- 10 MR TROWER: It does. 11 MR JUSTICE HILDYARD: -- because the trustees have to act 12 together, as it were, when I suppose under the 13 administrator it is really a question of whether that is 14 a permissible -- not delegation, but sort of segregation 15 of function. 16 MR TROWER: One way of thinking about it really is this. In 17 the ultimate analysis it is in relation to each specific 18 estate; of that there is no doubt. But as part of the 19 process of satisfying themselves that it is in the 20 interests of a particular estate, they are able to look 21 at it through the spectacles of the group as a whole 22 because there will inevitably be knock-on benefits. 23 MR JUSTICE HILDYARD: Yes. But there is no problem, in the 24 context of administration, of making the ultimate 25 decision, as it were, so far as it is a focused decision</p> <p style="text-align: center;">Page 75</p>
<p>1 Now, we know there are five separate office-holders 2 who have a primary duty to look at this from the 3 perspective of each of the five estates. In LBIE's case 4 it is Mr Downs, who is the maker of the witness 5 statement, and he deals with the issue in relation to 6 separate consideration at paragraph 60 of his witness 7 statement, where he summarises his conclusion and deals 8 with the conflict issue towards the second part of that 9 paragraph. 10 MR JUSTICE HILDYARD: Yes. 11 MR TROWER: There obviously are a number of individual 12 administrators who act for more than one estate in the 13 Lehman insolvencies, but a very careful structure has 14 been adopted in relation to these proceedings to ensure 15 that there is one lead administrator who is the person 16 and the only person with responsibility: it is Mr Downs 17 for LBIE, it is Ms Bruce for LBHI2, it is Mr Jervis for 18 LBL, it is Mr Lewis for LBH and it is Mr Schwarzmans for 19 LBEL. 20 MR JUSTICE HILDYARD: Could you give me those again, sorry. 21 MR TROWER: Not at all. 22 Mr Downs for LBIE, Ms Bruce for LBHI2, Mr Jervis for 23 LBL, Mr Lewis for LBH and Mr Schwarzmans for LBEL. 24 Each of them in their own ways is conscious of -- or 25 says in their evidence that they are conscious that they</p> <p style="text-align: center;">Page 74</p>	<p>1 on behalf of the particular entity, for providing for 2 that to be ultimately taken by a single one of the 3 various joint administrators. 4 MR TROWER: No, on two bases. First of all, it may be in 5 the interests of the estate as a whole for that to be 6 agreed. And secondly, the legislation anyway 7 contemplates that the administrators can act jointly and 8 severally and a declaration to that effect is made at 9 the beginning of an insolvency. 10 MR JUSTICE HILDYARD: I remember that, and in these cases it 11 was. 12 MR TROWER: Yes. 13 So, my Lord, that is the starting bit and then 14 I thought I would just simply take my Lord, against that 15 background, to the settlement from LBIE's perspective, 16 which is dealt with in the evidence in Mr Downs' witness 17 statement from paragraph 48 onwards. 18 It is in our skeleton from paragraph 32 onwards. 19 Can I summarise -- 20 MR JUSTICE HILDYARD: Downs 48? 21 MR TROWER: Downs 48 onwards, skeleton 32 onwards. 22 MR JUSTICE HILDYARD: Yes. 23 MR TROWER: What I was going to do was just summarise the 24 benefits and then just address what might be perhaps 25 most accurately characterised as the quid pro quo for</p> <p style="text-align: center;">Page 76</p>

<p>1 the benefits, which is we are giving up a "right", in</p> <p>2 inverted commas, to object to a distribution by LBHI2</p> <p>3 and LBL.</p> <p>4 As far as the benefits are concerned, the first one</p> <p>5 is that Wentworth waives its right to be paid the</p> <p>6 subdebt from anything other than LBIE's free assets,</p> <p>7 which reduces or limits LBIE's exposure under the</p> <p>8 subdebt, removes the possibility of a subdebt</p> <p>9 contribution claim and --</p> <p>10 MR JUSTICE HILDYARD: This is 29 of your skeleton?</p> <p>11 MR TROWER: That's right. And it means that a number of the</p> <p>12 3A issues do not require determination at all.</p> <p>13 That is the first benefit.</p> <p>14 The second is it settles the interaffiliate dispute</p> <p>15 with LBL at zero, and it removes the possibility, from</p> <p>16 LBIE's point of view, of any recharge claims, which</p> <p>17 amount to just in excess of 900 million, excluding the</p> <p>18 contribution claim element.</p> <p>19 There is an indemnity which you were looking at with</p> <p>20 Mr Arden from LBHI up to the amount, and just so your</p> <p>21 Lordship knows about the figure, the limited figure of</p> <p>22 62 million is the amount that LBIE thinks it is owed by</p> <p>23 LBL. Can I just, as you touched on it, can I just</p> <p>24 briefly make two submissions in relation to the deed of</p> <p>25 indemnity, because you asked Mr Arden about it.</p> <p style="text-align: center;">Page 77</p>	<p>1 a New York voluntary case or a US law voluntary case.</p> <p>2 So we respectfully suggest it is not that surprising</p> <p>3 that one finds it being governed by New York law. But</p> <p>4 at the end of the day, it was one of the terms of the</p> <p>5 agreement that was negotiated, and at the end of the</p> <p>6 day, conceptually it might, one supposes, affect the</p> <p>7 extent of the obligation, but it is what it is and it is</p> <p>8 New York law and it is maybe rather different as</p> <p>9 a result from some other legal systems that the parties</p> <p>10 might in a case such as this irrationally have chosen.</p> <p>11 We respectfully submit that your Lordship need not</p> <p>12 be concerned about that point.</p> <p>13 The final benefit is a relatively small one but it</p> <p>14 goes in the mix all together in any event, which is that</p> <p>15 LBIE has a claim against LBH and it will free up money</p> <p>16 to pay a dividend to LBIE in respect of that.</p> <p>17 Now, probably the more important aspect is the quid</p> <p>18 pro quo, what are we giving up?</p> <p>19 The crucial point here is that we have no present</p> <p>20 right to make a contribution claim in any form and no</p> <p>21 right to prove. We do not have standing. And that is</p> <p>22 clear from the passages in the decision of the Supreme</p> <p>23 Court that we have identified in our skeleton argument.</p> <p>24 We only acquire standing if LBIE goes into liquidation,</p> <p>25 but it cannot go into liquidation for two reasons</p> <p style="text-align: center;">Page 79</p>
<p>1 MR JUSTICE HILDYARD: Yes.</p> <p>2 MR TROWER: If we turn up -- I think the first one related</p> <p>3 to, well, not so much what is this shortfall certificate</p> <p>4 but what does it do.</p> <p>5 MR JUSTICE HILDYARD: Yes.</p> <p>6 MR TROWER: We think it is all right really for this reason,</p> <p>7 that the shortfall certificate is linked into the</p> <p>8 concept of the shortfall amount, and the shortfall</p> <p>9 amount is defined on page 124:</p> <p>10 "To an amount equal to the amount by which the joint</p> <p>11 administrators anticipate in acting reasonably and in</p> <p>12 good faith the administration state(?) surplus is</p> <p>13 insufficient."</p> <p>14 Your Lordship gets from that the concept that the</p> <p>15 draftsmen had in mind when thinking about the</p> <p>16 certificate. This is a reasonable good faith</p> <p>17 certificate, is the words that have been used.</p> <p>18 That, we respectfully submit, is what provides the</p> <p>19 parameters of the certification exercise that is going</p> <p>20 on.</p> <p>21 The second point in relation to the deed of</p> <p>22 indemnity is the use of New York law. My Lord, this is</p> <p>23 a New York law document and the circumstances are that</p> <p>24 the payer, the paying party under the indemnity is LBHI,</p> <p>25 which is a New York institution, subject to I think</p> <p style="text-align: center;">Page 78</p>	<p>1 actually, and we have concentrated on the first one,</p> <p>2 which is obviously a very important one. The first one</p> <p>3 is it would bring the entitlement to statutory interest</p> <p>4 to an end in respect of the administration period, the</p> <p>5 lacuna point. So we need to pay first the interest</p> <p>6 before going into liquidation, and we cannot do that</p> <p>7 until all the arguments going right through to whatever</p> <p>8 level of appeal is appropriate have been resolved. So</p> <p>9 Bower v Marris, cost of funding and so on, through the</p> <p>10 Court of Appeal up to the Supreme Court, as doubtless</p> <p>11 they would otherwise go.</p> <p>12 The second one is there are some adverse tax</p> <p>13 consequences of going into liquidation in any event,</p> <p>14 which although not of themselves as significant, one</p> <p>15 suspects, they go into the melting pot, they are</p> <p>16 described in Mr Downs in paragraph 57.2, and they were</p> <p>17 a factor that went into the mix when the administrators</p> <p>18 of LBIE were considering the position.</p> <p>19 Now, even if, against all that, LBIE were to go into</p> <p>20 liquidation, the value of any contribution claim is very</p> <p>21 doubtful, because it would necessarily -- there is one</p> <p>22 point I just need to correct on the evidence in relation</p> <p>23 to this. It is referred to in our skeleton, but if your</p> <p>24 Lordship turns up paragraph 36 of Mr Downs' witness</p> <p>25 statement. It describes the significance of the</p> <p style="text-align: center;">Page 80</p>

1 Waterfall II application, and would your Lordship just
2 read that. (Pause).
3 MR JUSTICE HILDYARD: Yes.
4 MR TROWER: Now, the 36.2.1 is no longer quite right in the
5 light of the way the SCG have put their case before the
6 Court of Appeal, the point being, they now argue the
7 point in relation to compounding of interest as a matter
8 of construction of rule 2.88, not as giving rise to
9 a non-provable claim.
10 Now, that was a change in the way they put their
11 case in a document that went into the Court of Appeal at
12 the end of June and it was missed when this was being
13 put together. It actually strengthens though, if I can
14 put it this way, the unlikelihood of a non-provable
15 claim being made, because the only non-provable claim
16 that is now asserted is a Sempra Metals argument, which
17 is the point made in 36.2.2.
18 Now, the relevance of that is that a contributory
19 claim under section 74 can only be made against our own
20 members in respect of the non-provable element. It
21 cannot be made in respect of any shortfall in statutory
22 interest. That was one of the decisions of the Supreme
23 Court.
24 So it is only if a Sempra Metals claim is made and
25 there is a shortfall in our surplus, such that the

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1 Sempra Metals claim cannot be paid, that a contribution
2 claim could even get off the ground against our own
3 members.
4 So there are two elements here. First of all, you
5 have got to get to a stage where there is a shortfall in
6 the surplus in respect of any non-provable claim, and
7 that will only arise if there is success on Bower v
8 Marris in the Court of Appeal or the success on the cost
9 of funding in the Court of Appeal so as to increase the
10 amount of statutory interest payable, then you might get
11 to a stage where there wasn't enough in our existing
12 surplus to pay non-provable claims and you then have to
13 get to the stage where the Sempra Metal argument
14 succeeds.
15 So that is why not only do we not have standing at
16 the moment in relation to stopping a distribution, there
17 are real question marks. It is very doubtful -- it is
18 put in different ways in the evidence by various
19 people -- that one will ever get to a stage where
20 a claim economically can ever be made. We cannot rule
21 it out, but the economics do not look promising at the
22 moment.
23 So when you set that against the fact that we have
24 no standing to make a claim, the right that we are
25 actually giving up to object to a distribution seems

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1 like a right that is not a particularly problematical
2 right to give up, and it is the reason why Mr Arden's
3 clients are content that it is appropriate for no
4 reserve to be made in respect of it.
5 MR JUSTICE HILDYARD: What is the present state of things
6 with respect to Waterfall II? I mean, I had heard
7 through the grapevine that that was being argued in the
8 Court of Appeal further to the Supreme Court decision.
9 This week?
10 MR TROWER: Yes, there is a hearing tomorrow at which
11 submissions are being made on the impact of the Supreme
12 Court decision, and it was in the context of those
13 submissions that we heard about the change that I have
14 referred to in 36.2.1. It was in that context, because
15 the Court of Appeal directed further written
16 submissions.
17 MR JUSTICE HILDYARD: That goes to 2A and B?
18 MR TROWER: It goes to 2A and B. And that then conceptually
19 could go on up to the --
20 MR JUSTICE HILDYARD: That is Bower v Marris as well?
21 MR TROWER: Yes.
22 MR JUSTICE HILDYARD: And then costs of funds, which is
23 other uncertainty, that is not until next year?
24 MR TROWER: I think so. Can I just take instructions.
25 July next year in the Court of Appeal, and then we

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1 have the obvious problem that there is potential for the
2 Supreme Court after that.
3 So the exercise your Lordship has to think about,
4 with respect, and the exercise of thinking that we have
5 been through is we are thinking, well, if we were
6 imminently going to go into liquidation, maybe the court
7 would find a way of ensuring that a reserve was kept for
8 a period of time; or might -- query even that because of
9 the way Lord Neuberger expresses himself. But we are so
10 far removed from that in this case, both in timing terms
11 and in terms of the likelihood of the issue arising,
12 that it is an application that it would be very
13 difficult to make.
14 MR JUSTICE HILDYARD: But would the -- I think, was it
15 Goldman Sachs put it? No, it was SCG were arguing for
16 costs of funds not being limited by any commercial
17 interest rate. Or have I got it wrong?
18 MR TROWER: I can't remember who was arguing for that.
19 MR JUSTICE HILDYARD: Mr Dicker was appearing for the SCG
20 and Mr Zacaroli for --
21 MR TROWER: For Wentworth.
22 MR JUSTICE HILDYARD: And Wentworth succeeded on that point
23 and SCG lost on that point, before me at any rate.
24 MR TROWER: That's correct.
25 MR JUSTICE HILDYARD: If Mr Dicker or whoever were to

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1 prevail at whatever level, would his claim be snookered?
 2 MR TROWER: Well, his claim in respect of costs of funding,
 3 no, because that just goes to increase the interest. It
 4 is not a non-provable claim.
 5 MR JUSTICE HILDYARD: If the surplus is distributed?
 6 MR TROWER: Well, no, because we are not concerned here
 7 about the distribution of our surplus. That is not
 8 before your Lordship.
 9 MR JUSTICE HILDYARD: Only the --
 10 MR TROWER: The only issue before your Lordship as far as we
 11 are concerned is whether or not we should say we cannot
 12 stop our own members making a distribution because we
 13 have a future contribution claim.
 14 That is the only question.
 15 And the reason --
 16 MR JUSTICE HILDYARD: So the only person who would be
 17 snookered is you?
 18 MR TROWER: The only person who might at some stage in the
 19 future suffer as a consequence of this is in
 20 circumstances where -- let's assume, on your Lordship's
 21 hypothesis, the cost of funding works as an argument --
 22 MR JUSTICE HILDYARD: Yes.
 23 MR TROWER: -- ie Dicker is successful in the Court of
 24 Appeal. There is then, as a consequence of that, there
 25 is a shortfall within our surplus.

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1 MR JUSTICE HILDYARD: Yes.
 2 MR TROWER: The only person who could then conceptually have
 3 a go is somebody in respect of a non-provable claim
 4 which was not going to be paid because the surplus had
 5 all been used up in paying statutory interest, but it is
 6 only to the extent of the non-provable claim because we
 7 cannot make a contribution claim in respect of statutory
 8 interest. So even if the amount of statutory interest
 9 is increased enormously, either as a result of Bower v
 10 Marris or as a result of cost of funding, we cannot make
 11 a contribution claim in respect of that because the
 12 Supreme Court has said we can't. What we can make
 13 a contribution claim in respect of, theoretically, is
 14 any non-provable claim. We now know that the only
 15 non-provable claim that might be out there is the
 16 Sempra Metals argument, which is in 36.2.2, which is why
 17 there are a whole series of contingencies, that have to
 18 occur and a whole series of circumstances which have to
 19 give rise to some form of, well, effectively the SCG
 20 winning across the line in respect of all their
 21 arguments that this issue then arises, at all. Then we
 22 have got to get into liquidation as well.
 23 That is why the notification point becomes of
 24 further relevance to my Lord because your Lordship can
 25 see there has been correspondence with the SCG and, if

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1 anyone was going to think that the balance came down in
 2 favour of not going along with this, one would think it
 3 would be them.
 4 So that, if you like, gives you the interested
 5 parties' comfort, which is an aspect to the process
 6 which my Lord is going through.
 7 MR JUSTICE HILDYARD: Yes.
 8 MR TROWER: Does that sort of give the shape of it?
 9 MR JUSTICE HILDYARD: It does, but I am ashamed to say it
 10 goes in and out of my mind as to what the threats are,
 11 if you like, and this difference between the provable
 12 and non-provable claims, but your only interest, the
 13 only thing you are giving up is the right to stop
 14 a distribution without provision for your claim in
 15 respect of a non-provable claim which would only be
 16 provable in the event of liquidation?
 17 MR TROWER: Your Lordship has summarised it, if I may say
 18 so, very concisely and clearly and that is right.
 19 MR JUSTICE HILDYARD: That is what it comes to, yes.
 20 Yes.
 21 MR TROWER: But having understood the commercial context and
 22 the sort of -- people put it differently -- the extent
 23 of the unlikelihood, it may be that your Lordship's most
 24 sort of absolute comfort comes from the fact that we
 25 simply don't have standing to stop it anyway.

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1 MR JUSTICE HILDYARD: Because you must live in the
 2 administrative world, the administration world?
 3 MR TROWER: I have to live in the land of administration.
 4 I cannot go into liquidation and the Supreme Court has
 5 told me that, in the land of administration, I don't
 6 have a claim.
 7 So, whatever one may feel about that --
 8 MR JUSTICE HILDYARD: It is probably unusual but
 9 nevertheless in the unusual world, it is a sort of
 10 uncomfortable --
 11 MR TROWER: Of course, and that was one of the sort of
 12 discomforts that Lord Neuberger addressed in his
 13 judgment.
 14 MR JUSTICE HILDYARD: He just said "It is not enough and
 15 made me change my mind", but he didn't prescribe what
 16 was to happen.
 17 MR TROWER: Yes, one accepts that and that is why I said
 18 there might be some circumstances where something
 19 imaginative would be dreamt up, but it is very difficult
 20 to see how that could be done in a case such as this
 21 where we are some considerable period of time away from
 22 ultimate resolution and I agree, with respect, with what
 23 Mr Arden said about Danko on this point. One has to
 24 bear this in mind throughout this ...
 25 This is actually we are one step further down the

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1 line than even Danka. Danka was obviously a valuation
 2 case but Danka, set against the duty to get on with
 3 making a distribution, is a case where you did at least
 4 have a claim. This is case where I don't even have
 5 a claim.
 6 So that really is the shape of it.
 7 MR JUSTICE HILDYARD: The nub of it, yes.
 8 MR TROWER: And it is, you know, a consequence of what the
 9 Supreme Court has decided where, although instinctively
 10 of course one can see that there is a bit of an oddity
 11 about it on one level, but the logic is, we would
 12 respectfully submit, pretty inexorable and, taking into
 13 account all those factors, it is plain we say against
 14 that background that the administrators' decision to do
 15 this deal is rational, which is what your Lordship is
 16 primarily concerned with.
 17 MR JUSTICE HILDYARD: For the acceptance or at least if we
 18 are not objecting, what is the best thing to look at
 19 from the point of view of the SCG?
 20 MR TROWER: Of the SCG? Let me take you through that,
 21 actually, quickly.
 22 MR JUSTICE HILDYARD: I can read it over the short
 23 adjournment, if that would help?
 24 MR TROWER: Of course. There is an is that little file --
 25 MR JUSTICE HILDYARD: This one? Should I read that?

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1 MR TROWER: If you wouldn't mind, that would be fine, and
 2 then if I could just give you the bit in the evidence is
 3 in Downs' paragraph 68, I think, of my note.
 4 Yes, it is 61 to 71 of Downs. 61 to 71.
 5 MR JUSTICE HILDYARD: Right.
 6 How are we doing on time? I didn't realise you were
 7 in the Court of Appeal tomorrow.
 8 MR TROWER: I am not.
 9 MR JUSTICE HILDYARD: You are not?
 10 MR TROWER: I am not. Others are doing that. I don't think
 11 anyone else is, either? No.
 12 MR JUSTICE HILDYARD: Okay. You have nearly done?
 13 MR TROWER: I am nearly done. I was just going to address
 14 you on notification and then I was going to sit down.
 15 MR JUSTICE HILDYARD: All right. I will do that homework
 16 and then we should be able to complete within the time.
 17 Mr Marshall?
 18 MR MARSHALL: My Lord, I don't think I will be very long.
 19 MR JUSTICE HILDYARD: Right.
 20 Ms Toube, you are really here as an interested
 21 observer?
 22 MS TOUBE: My Lord, I am, but I was just speaking to my
 23 instructing solicitor about maybe -- we have actually
 24 started drafting on the order. So I might be able to
 25 put that before your Lordship while we are here today.

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1 MR JUSTICE HILDYARD: You might not get an educated response
 2 from me.
 3 MS TOUBE: I understand that, my Lord, but I think it will
 4 at least give you the parameters of how we are thinking
 5 the order might look.
 6 MR JUSTICE HILDYARD: That is very kind.
 7 Mr Beswetherick, you will just remind me of your
 8 application and that shouldn't take too long.
 9 MR BESWETHERICK: My Lord, I anticipate being very brief.
 10 MR JUSTICE HILDYARD: So we should be all right. Thanks
 11 very much. 2.00.
 12 (1.00 pm)
 13 (The Luncheon Adjournment)
 14 (2.00 pm)
 15 MR TROWER: So, my Lord, I finished by drawing your
 16 Lordship's attention to parts of the Downs witness
 17 statement and the correspondence dealing with
 18 notification.
 19 You will have seen from that that there has been
 20 a mixed series of notifications, part notification on
 21 the website and part email correspondence with specific
 22 people.
 23 Just one little extra bit in relation to the
 24 website, just so your Lordship knows this, what happens
 25 when something goes up on the website is an email goes

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1 out to everyone who has registered and they get told
 2 there is a new little notification gone on to the
 3 website.
 4 So what is disclosed in that little clip of
 5 correspondence is the only issue that has been raised by
 6 anybody in relation to the notifications and that is why
 7 we respectfully submit that you can be satisfied that
 8 those with an interest who might be expected to say
 9 something have either had an adequate opportunity to do
 10 so or have actually done so in a way that doesn't give
 11 rise to a difficulty with what it is that we are asking
 12 the court to do.
 13 So, my Lord --
 14 MR JUSTICE HILDYARD: Which letter or email do you
 15 particularly rely on as far as SCG, the SCG?
 16 MR TROWER: Yes, do you see the one, the member of the SCG
 17 is the gentleman from DK, which is -- sorry, I do not
 18 have exactly the same file so I am not sure which tab it
 19 is in, but it is headed "Reproposed settlement of W3,
 20 Gabriel Schwartz."
 21 So he is the SCG man.
 22 But in a way we don't really rely -- in a way that
 23 is sort of put in there just to show your Lordship what
 24 has come back. What I really rely on is what has not
 25 come back by way of response to what has been notified,

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<p>1 that is really rather more important because this</p> <p>2 particular point doesn't in any way undermine what we</p> <p>3 all want to do; in fact, if anything, it gives a bit of</p> <p>4 support to it.</p> <p>5 MR JUSTICE HILDYARD: What, the "All we mind about is no</p> <p>6 liquidation"?</p> <p>7 MR TROWER: Indeed, and that just serves to fortify that we</p> <p>8 cannot get ourselves into a position of having standing.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 There was a bit in Mr Downs' witness statement which</p> <p>11 I possibly haven't quite got the hang of, in</p> <p>12 paragraph 12.</p> <p>13 MR TROWER: Yes. That is a completely different point, and</p> <p>14 actually has now been resolved. It relates to a claim</p> <p>15 that emerged at the last minute as a potential claim and</p> <p>16 the parties are simply agreed in principle how that is</p> <p>17 going to be dealt with. It doesn't have any effect on</p> <p>18 the substance of the deal per se, but Mr Downs felt it</p> <p>19 was appropriate just to mention it because, had the</p> <p>20 parties not agreed how to deal with it, there might have</p> <p>21 been more difficulty in relation to how these things are</p> <p>22 going to work out.</p> <p>23 MR JUSTICE HILDYARD: He puts it in quite high terms, that</p> <p>24 is to say in order to proceed with the settlement, it</p> <p>25 will need to be resolved satisfactorily.</p> <p style="text-align: center;">Page 93</p>	<p>1 Sempra Metals.</p> <p>2 MR JUSTICE HILDYARD: Right.</p> <p>3 MR TROWER: One and two are not now, or indeed are not at</p> <p>4 all, non-provable claim issues per se. They are</p> <p>5 statutory interest issues. So although they will, if</p> <p>6 the decision goes the other way at an appellate level,</p> <p>7 that will increase the amount of the claim on the</p> <p>8 existing surplus, it has no effect on the contribution</p> <p>9 claim because we cannot make a contribution claim in</p> <p>10 respect of statutory interest.</p> <p>11 So the Bower v Marris point and the cost of funding</p> <p>12 point are both arguments that go to increase the amount</p> <p>13 of the inbound claims, which might reduce the surplus,</p> <p>14 but they don't permit a contribution claim to be made,</p> <p>15 in respect of them.</p> <p>16 The non-provable Sempra Metals claim does</p> <p>17 conceptually operate as it says it is, as a non-provable</p> <p>18 claim, and a contribution claim can be made in theory in</p> <p>19 respect of that, if there is a need to do so.</p> <p>20 But the evidence is that a non-provable claim under</p> <p>21 Sempra Metals will only or could only, even if it had</p> <p>22 any legs to it, give rise to a contribution claim by us</p> <p>23 against our own members in circumstances in which there</p> <p>24 was also success on Bower v Marris or cost of funding,</p> <p>25 because the effect of there being success on Bower v</p> <p style="text-align: center;">Page 95</p>
<p>1 MR TROWER: It has been resolved satisfactorily in that the</p> <p>2 burden of the claim, if it were to be established, and</p> <p>3 there are big question marks over whether or not it</p> <p>4 would be established, is going to be shared between the</p> <p>5 parties in a manner which is acceptable to them.</p> <p>6 MR JUSTICE HILDYARD: I see, right.</p> <p>7 MR TROWER: If you like it is another point that simply</p> <p>8 goes to figures, which, as Mr Arden said, is not</p> <p>9 something your Lordship is in a position to reach</p> <p>10 a concluded view on.</p> <p>11 My Lord, that I think --</p> <p>12 MR JUSTICE HILDYARD: Was there any more you wanted to say</p> <p>13 about the Waterfall IIC cost of funds issue?</p> <p>14 MR TROWER: I don't think so, unless there was any</p> <p>15 particular aspect of it that was troubling your</p> <p>16 Lordship. The cost of funding issue simply goes to the</p> <p>17 quantum of the statutory interest claim.</p> <p>18 So all I wanted just -- it is just worth stressing</p> <p>19 that there are really, for present purposes, three --</p> <p>20 and this may be one helpful way of thinking about it --</p> <p>21 three outstanding issues: one is Bower v Marris and two</p> <p>22 is cost of funding. Those two don't directly affect</p> <p>23 what we want to do in this sense --</p> <p>24 MR JUSTICE HILDYARD: Which is the third?</p> <p>25 MR TROWER: The third is non-provable claim based on</p> <p style="text-align: center;">Page 94</p>	<p>1 Marris or cost of funding is to reduce the surplus that</p> <p>2 would otherwise be available to us without making</p> <p>3 a contribution claim.</p> <p>4 So that is the sort of -- can I say straight away,</p> <p>5 my Lord, it takes a little bit to get one's head round</p> <p>6 the way they work together, these points, and we quite</p> <p>7 understand that, but the critical point, ultimately, is</p> <p>8 that they have all got to work in a way that we</p> <p>9 presently don't anticipate they will, in order for there</p> <p>10 to be even the prospect of a contribution claim made by</p> <p>11 a liquidator of LBIE in due course.</p> <p>12 MR JUSTICE HILDYARD: Right.</p> <p>13 MR TROWER: The reason, one of the reasons we cannot give</p> <p>14 any sensible assessment of the figures in relation to</p> <p>15 this is because the Sempra Metals claim has never been</p> <p>16 quantified and --</p> <p>17 MR JUSTICE HILDYARD: This is interest on --</p> <p>18 MR TROWER: This is interest for delay in paying interest.</p> <p>19 MR JUSTICE HILDYARD: And the resolution of that at first</p> <p>20 instance was?</p> <p>21 MR TROWER: Was in favour of LBIE. So in other words, there</p> <p>22 isn't a claim.</p> <p>23 MR JUSTICE HILDYARD: Yes.</p> <p>24 MR TROWER: That is why, in a sense -- of course at the end</p> <p>25 of the day, the standing issue is what gives rise to</p> <p style="text-align: center;">Page 96</p>

<p>1 a pretty insuperable problem, but in a sense one feels</p> <p>2 one's instinctive feeling, we submit, in a case such as</p> <p>3 this is that on the facts it doesn't give rise to the</p> <p>4 sort of extreme consequences that in some factual</p> <p>5 situations one might be more concerned about; even if</p> <p>6 one could do anything about it, which one cannot because</p> <p>7 of what Lord Neuberger said.</p> <p>8 So, my Lord, that was really pretty much it, and</p> <p>9 unless there is anything else you would like me to deal</p> <p>10 with?</p> <p>11 MR JUSTICE HILDYARD: No, Mr Trower. You are quite right in</p> <p>12 perceiving that the problem with these sorts of cases,</p> <p>13 rather like schemes of arrangement, is that one sees the</p> <p>14 tip of the iceberg which has been carefully fashioned,</p> <p>15 if that is not to mix metaphors, over the course of</p> <p>16 time, the intricacies of which are all beneath the</p> <p>17 surface. It doesn't mean they have been obscured in any</p> <p>18 way, simply that they are not evident to the 24-hour</p> <p>19 observer.</p> <p>20 MR TROWER: Yes.</p> <p>21 MR JUSTICE HILDYARD: So I am very grateful to you for your</p> <p>22 help. If I get muddled again I shall call on any of you</p> <p>23 to rescue me, but thank you very much.</p> <p>24 Yes, Mr Marshall.</p> <p>25</p> <p style="text-align: center;">Page 97</p>	<p>1 an intention to make a distribution, and then</p> <p>2 in December 2014, there was a first interim dividend of</p> <p>3 1.66p in the pound to ordinary unsecured creditors with</p> <p>4 proved claims. And that has really remained the</p> <p>5 position ever since. Your Lordship will see the table,</p> <p>6 the different categories of creditor, in paragraph 29,</p> <p>7 quite a substantial amount is third party suppliers,</p> <p>8 debt traders to some extent employees, HM Revenue and</p> <p>9 Customs, and then also Lehman affiliates, but quite</p> <p>10 a large body of third party suppliers and ordinary</p> <p>11 creditors of that kind who have remained in the position</p> <p>12 since December 2014 of only having received 1.66p in the</p> <p>13 pound.</p> <p>14 My Lord, in terms of the view of the proposed</p> <p>15 transactions and their benefit from LBL's point of view,</p> <p>16 Mr Jervis has addressed that in paragraph 32 to 35 of</p> <p>17 his witness statement, beginning at page 8. Your</p> <p>18 Lordship will see in particular at paragraph 33 that the</p> <p>19 LBL administrators have concluded that the terms of the</p> <p>20 proposed settlement would result in a payment of 100p in</p> <p>21 the pound to the LBL creditors, plus 7.4 per cent of</p> <p>22 accrued statutory interest to ordinary unsecured</p> <p>23 creditors, with it being anticipated the dividend could</p> <p>24 be declared in September 2017.</p> <p>25 Then he goes on in paragraph 34 to outline</p> <p style="text-align: center;">Page 99</p>
<p>1 Submissions by MR MARSHALL</p> <p>2 MR MARSHALL: My Lord, I will be quite short, just a couple</p> <p>3 of points to clarify the position in connection with</p> <p>4 LBL. First of all, in terms of possible conflict, we</p> <p>5 respectfully submit that is certainly not the position</p> <p>6 in relation to LBL. Mr Jervis and Mr Hussein are the</p> <p>7 administrators, the joint administrators of LBL and they</p> <p>8 are only administrators of that company, not of any of</p> <p>9 the others. And Mr Jervis confirms in his witness</p> <p>10 statement in paragraph 32 that they have sought advice</p> <p>11 from Dechert, who are representing LBL alone, and as far</p> <p>12 as Mr Jervis is concerned, he has not been affected by</p> <p>13 any conflict of interest in coming to his conclusions.</p> <p>14 My Lord, in terms of the creditor position regarding</p> <p>15 LBL, if I could just take your Lordship to Mr Jervis'</p> <p>16 witness statement; that is in bundle 1 at tab 8.</p> <p>17 Your Lordship will be kind enough to go to page 7,</p> <p>18 paragraph 26. There your Lordship will see that LBL's</p> <p>19 administrators have paid a dividend of 100p in the pound</p> <p>20 to former employees with preferential unsecured claims,</p> <p>21 comprising claims of unpaid wages and holiday pay. It</p> <p>22 doesn't have any secure creditors.</p> <p>23 In addition to that, paragraph 28, your Lordship</p> <p>24 will see reference to the fact that on 8 July 2014,</p> <p>25 there was notice given to all known creditors of</p> <p style="text-align: center;">Page 98</p>	<p>1 particular aspects of the proposed settlement which are</p> <p>2 of importance from the LBL perspective. There is</p> <p>3 a withdrawal of proof which is described in</p> <p>4 paragraph 34.1 by LBL and that is in connection with</p> <p>5 proofs related to the contribution claim and pension</p> <p>6 debt, which is a matter which was the subject of a proof</p> <p>7 in the LBL's estate by LBIE. There is a reciprocal</p> <p>8 withdrawal by LBIE of its proof in LBL's estate. And</p> <p>9 then in 34.2 and 34.3, there is a reference to the</p> <p>10 agreement of intercompany balances. Then in 34.4, the</p> <p>11 fact that the LBL administrators and LBIE administrators</p> <p>12 will withdraw their respective proof of debts so far as</p> <p>13 those proofs relate to an intercompany balance, which</p> <p>14 was another important aspect of the proof received in</p> <p>15 LBL's estate from LBIE, so there will be an agreed zero</p> <p>16 balance between the two.</p> <p>17 Then also perhaps specific to LBL, paragraph 34.5,</p> <p>18 the LBL administrators will withdraw their proofs of</p> <p>19 debt in LBIE and LBEL's estate as far as those proofs</p> <p>20 relate to bad debts. The LBL administrators have</p> <p>21 concluded that that is an appropriate concession to</p> <p>22 make. It will facilitate the distribution from the</p> <p>23 estate of LBH of some £475 million in respect of</p> <p>24 an admitted claim and that would then have a reduction</p> <p>25 of the bad debt balance in LBL's estate.</p> <p style="text-align: center;">Page 100</p>

<p>1 In relation to that particular aspect, which is 2 rather special to LBL, Mr Jervis provides some further 3 observations a little bit later in the witness statement 4 at page 12, paragraph 40. He refers to the withdrawal 5 of claims against other parties on the basis of recharge 6 arrangements and concludes that that is considered to be 7 balanced as against the matters set out earlier in 8 paragraph 34.5 above and the benefits inherent in the 9 settlement, including the avoidance of delay, further 10 legal and professional costs and associated litigation 11 risk.</p> <p>12 So fundamentally the administrators of LBL have 13 concluded that it is worth giving up the recharge 14 claims, in particular that for bad debts, in return for 15 the withdrawal of proofs on the part of LBIE and the 16 avoidance of delay and greater certainty and avoidance 17 of further costs which will thereby result. The net 18 outcome will be, as described in paragraph 33, a payment 19 of 100p in the pound, plus a significant amount of 20 accrued statutory interest to unsecured creditors.</p> <p>21 My Lord, we have had no objections from creditors, 22 notwithstanding having given quite extensive notice of 23 what is proposed, and your Lordship will see the details 24 of that in paragraphs 41 through to 50 of Mr Jervis' 25 statement at pages 13 to 14.</p> <p style="text-align: center;">Page 101</p>	<p>1 quite extensive discussions with the creditors' 2 committee along the way.</p> <p>3 My Lord, in terms of the critical features of the 4 proposal from LBL's point of view, I think it is 5 summarised in the skeleton argument, which I hope your 6 Lordship received, at paragraph 9. We have set out in 7 I think seven subparagraphs particular aspects of the 8 transaction which are important from LBL's point of 9 view. Important and key amongst those is the release 10 and withdrawal of any proof of debt on the part of LBIE 11 and the LBIE administrators, which we refer to in 12 paragraph 9.3, and also the transfer of a share from 13 LBIE to LBHI2, which is referred to in paragraph 9.6, 14 which in our submission really removes the -- well, 15 virtually removes the possibility of any contribution 16 claim coming LBL's way.</p> <p>17 So, my Lord, bearing those factors in mind, we would 18 respectfully submit to your Lordship that we certainly 19 pass the rationality test and there is no conflict and 20 there is no reason therefore why, applying the 21 appropriate analysis in the authorities, that your 22 Lordship shouldn't be able to provide the relevant 23 approval which we seek to the procedure that the parties 24 are wishing to engage in.</p> <p>25 MR JUSTICE HILDYARD: The uncollateralised indemnity</p> <p style="text-align: center;">Page 103</p>
<p>1 Mr Jervis draws attention to the first notice having 2 been posted on the website in March of this year. There 3 was then a seventh progress report referring to the 4 potential settlement of these proceedings, in 5 paragraph 43. He refers to that.</p> <p>6 Then there was a meeting with the creditors' 7 committee of LBL on 9 June, which he draws attention to 8 in paragraph 44, with progress update being given. And 9 then in paragraph 45, 10 July, a further notice posted 10 on behalf of LBL administrators on the PWC website 11 concerning the transaction documents that are proposed 12 to be entered into. And then a further notification to 13 the creditors' committee attaching a copy of the heads 14 of terms was sent on 11 July, and there was also 15 a conference call with the creditors' committee on 16 13 July, which is referred to in paragraph 47 and in 17 which no objections were raised by any members of the 18 creditors' committee. Then there was notification of 19 the hearing, as your Lordship sees, on the previous note 20 of notices, as is described in paragraph 48. And in 21 fact, there was also a further notification given on 22 14 July, which is described in paragraph 49.</p> <p>23 So extensive notification given of what was proposed 24 and of this application and no objection has been raised 25 by any creditor to what is proposed. That is having had</p> <p style="text-align: center;">Page 102</p>	<p>1 referred to in paragraph 9.2 covers shortfall in LBIE's 2 estate. It is probably an unfair question to you, but 3 how is that dealt with in terms of its ranking or 4 treatment in the administration of LBHI? Who appears 5 for LBHI?</p> <p>6 MR MARSHALL: That's Mr -- well, actually I'm not sure --</p> <p>7 MR JUSTICE HILDYARD: Mr Arden is LBHI2, isn't that right?</p> <p>8 MR MARSHALL: I am not sure, my Lord.</p> <p>9 MR TROWER: They are subject to proceedings in the 10 United States. It is not an English issue.</p> <p>11 MR JUSTICE HILDYARD: I am so sorry. They are in chapter 12 11, are they?</p> <p>13 MR TROWER: Yes, they are the New York entity.</p> <p>14 MR MARSHALL: This, of course, is the New York --</p> <p>15 MR JUSTICE HILDYARD: Do we know how that --</p> <p>16 MR TROWER: I can't tell you off the top of my head but 17 I think the prospects of LBHI, through its relevant 18 organs, if I can put it that way, doing anything which 19 exposed the decision-makers to a situation where they 20 were committing to do something which they could not 21 honour is very slim, to put it at its ...</p> <p>22 I don't know the short answer. Plainly if the 23 entity was in insolvency proceedings over here, it would 24 be an expense of that insolvency because it would be 25 undertaken by the relevant office-holder in accordance</p> <p style="text-align: center;">Page 104</p>

1 with his duties as part of the conduct of the
2 insolvency. Therefore applying ordinary principles,
3 that would constitute an expense.
4 I can't tell you what the position is here and now,
5 but I will see if anyone who is sitting behind me can
6 help. I can't tell you here and now in relation to
7 LBHI.
8 MR JUSTICE HILDYARD: LBHI is under the direction of its
9 directors, is it? It is a debt in possession, is it?
10 MR TROWER: It is subject to a voluntary case. I am not
11 quite sure what its status is. Can I find out and
12 I will see what I can help you with?
13 MR JUSTICE HILDYARD: Yes. (Pause).
14 MR TROWER: Can we come back to you, my Lord, on that?
15 MR JUSTICE HILDYARD: Of course.
16 Yes. Again, this may be unfair to load you with
17 this, Mr Marshall, but others can have a go at it if
18 they want --
19 MR MARSHALL: Okay.
20 MR JUSTICE HILDYARD: I was just wondering over the short
21 adjournment about the equivalence drawn, particularly in
22 Nortel, between the customary application by
23 office-holders, including administrators, for directions
24 to the court, on the one hand, and the trustee position
25 where there is no surrender of discretion on the other

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1 hand.
2 MR MARSHALL: Yes.
3 MR JUSTICE HILDYARD: In the latter case, however, often the
4 advisability or commercial wisdom is reviewed but it is
5 reviewed with the benefit of quite often separate
6 applications and the production of, for example,
7 opinions from counsel assessing the merits taken in the
8 round, including of any adverse litigation sought to be
9 compromised. In this case there is no such thing.
10 For example, in paragraph 40 I think it was of
11 Mr Jervis' witness statement, there was a sort of good
12 example which appears to involve an assessment of the
13 strength or not of the recharge claims.
14 MR MARSHALL: Yes.
15 Well, there is an element of that, but there is also
16 quite a lot of commercial input as well because it is
17 a matter of balancing against one type of claim other
18 commercial benefits that would come in the other
19 direction, and among those, of course, are all the other
20 elements of these transactions whereby there is full
21 proof of the ability to transfer the share across. The
22 reduction in the length of delay which may result, which
23 may come about through the appellate process continuing,
24 for example.
25 MR JUSTICE HILDYARD: I understand there are an awful lot of

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1 commercial factors, and I understand in picking
2 paragraph 40 out I am only taking one string from what
3 is obviously a complex cat's cradle of engagements.
4 I understand all that.
5 MR MARSHALL: Yes.
6 MR JUSTICE HILDYARD: I was just trying to work out what,
7 just reflecting on my function, and just getting
8 a little bit anxious about the trust side of the
9 analogy, which does seem to me to involve a somewhat
10 more confidential in-depth approach to the various
11 possible legal claims as distinct from what really is
12 the focus of process. In the corporate or insolvency
13 field, I just wondered for your response really, it
14 seems more process really. Have the relevant
15 office-holders approached their task diligently, free of
16 a disqualifying conflict of interest, taking account of
17 considerations worthy of being taken into account, not
18 failing to take into account considerations which should
19 have been taken into account and not taking into account
20 irrelevant considerations.
21 MR MARSHALL: Yes, rather a Wednesbury-like --
22 MR JUSTICE HILDYARD: It is processed, really.
23 MR MARSHALL: Yes.
24 MR JUSTICE HILDYARD: Which do you say is the proper
25 approach?

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1 On reflection I just wondered whether Nortel was in
2 line with MF Global, really?
3 MR MARSHALL: Yes, I mean in some contexts -- of course, in
4 a trust situation, one might have something equivalent
5 to a Beddoe summons or something of that nature which
6 results with the court being provided with opinions and
7 having to look at the matter in a confidential way, but
8 I think the line of authority which we are following is
9 one which is a process, a different type of process in
10 the sense that the court looks at it without necessarily
11 having the benefit of opinions or confidential material
12 because it is adopting more of a Wednesbury-type of
13 approach that your Lordship described earlier, which is
14 check whether there is any conflict, check whether
15 anyone is moving outside of the ambit of what is
16 a rational outcome and, having done those things, the
17 court is not taking on the job of actually exercising
18 the discretion, but giving a degree of approval, given
19 the importance of the decisions being made, but that is
20 the limit of it.
21 MR JUSTICE HILDYARD: Even in trust litigation, it is rare
22 for discretions to be landed with the court.
23 Normally --
24 MR MARSHALL: Of course, yes.
25 MR JUSTICE HILDYARD: It is very seldom that the court

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1 accepts a surrender discretion but nevertheless it gets
2 into much more of the detail on a confidential basis.
3 But your answer is, if it does, it really is
4 a process matter. It is seeing to it that the decision
5 it made after addressing the relevant factors,
6 addressing to those factors the weight that the
7 ministers in their judgment consider is appropriate.
8 MR MARSHALL: Plus what your Lordship has got is a situation
9 where obviously the parties have all got legal advice
10 and have taken it before proposing these transactions.
11 They have all been looked at in considerable detail.
12 MR JUSTICE HILDYARD: That is a great comfort, but it is not
13 for me to second guess or even to verify its process, is
14 it?
15 MR MARSHALL: I would submit to your Lordship it is. It is
16 checking that the parameters have not been exceeded and
17 factors like conflict don't arise, and once we have got
18 past that point, that is largely the objectives
19 achieved.
20 MR JUSTICE HILDYARD: Yes.
21 MR MARSHALL: My Lord, unless you have some particular
22 questions with regard to LBL's position, that was all
23 I was proposing to say.
24 From our point of view --
25 MR JUSTICE HILDYARD: Are there any responses from any of

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1 the constituency that you want me to consider?
2 MR MARSHALL: Not at all, my Lord. They are all very happy,
3 it would seem, from the discussions we have had. There
4 is no one to raise any objection.
5 MR JUSTICE HILDYARD: Yes.
6 MR MARSHALL: In a sense we are -- if LBHI2 is a happy case,
7 we are a fortiori a happy case because we in fact
8 achieve a complete withdrawal of the possibility of
9 a contribution claim by the transfer of the share and
10 withdrawal of the (Inaudible), which occurs in our
11 estate, so it is even more obviously for our benefit
12 than perhaps in the case of some of the others.
13 MR JUSTICE HILDYARD: Yes, thank you very much.
14 Submissions by MR BESWETHERICK
15 MR BESWETHERICK: My Lord, I hope to be very brief. You
16 will have seen we have issued an application. That came
17 out of the discussion before your Lordship on Friday in
18 the context of LBEL's application.
19 MR JUSTICE HILDYARD: Yes.
20 MR BESWETHERICK: I sought to explain to your Lordship the
21 reasons why LBH are supporting option 1, and those
22 reasons have been fleshed out in the evidence of
23 Mr Lewis and are addressed in my skeleton argument,
24 which I hope you have received.
25 MR JUSTICE HILDYARD: Yes, I am just trying to find your --

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1 MR BESWETHERICK: It should be in a separate bundle,
2 my Lord, that you probably only received this morning.
3 I am told it will be blue.
4 MR JUSTICE HILDYARD: It will be blue?
5 And you are Hogan?
6 MR BESWETHERICK: Yes, Hogan Lovells.
7 By way of reminding you, my Lord --
8 MR JUSTICE HILDYARD: Somewhere I've got your skeleton
9 argument which was sent to me over the weekend, so
10 I haven't got this marked up unfortunately.
11 MR BESWETHERICK: It ought to be at tab 5 of this bundle.
12 MR JUSTICE HILDYARD: I see that.
13 MR BESWETHERICK: My Lord, essentially, what we are seeking
14 is liberty -- and it was put in the application
15 notice -- to support and take such further steps as may
16 be considered desirable and appropriate to give effect
17 to option 1, and liberty to enter into and perform the
18 proposed settlement agreement.
19 My Lord, in light of the discussion you had with
20 Ms Toube this morning in relation to the application and
21 your judgment that option 1 is available and you will
22 sanction it, and also the discussion you had with me
23 this morning, what we propose is this: Ms Toube is going
24 to be producing an order which sets out the specific
25 steps for which you are going to be granting sanction,

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1 and what we had in mind is once we have seen what those
2 specific steps are, that we would identify those which
3 require our input, and we have in mind in particular the
4 passing of the resolution for the reduction of capital,
5 and then we would have, if your Lordship is happy,
6 a mirror-image order on our application which provides
7 that we have sanction to take those particular steps.
8 I have just been handed a draft of the order, which
9 I understand is going to be handed to you as well, in
10 relation to Ms Toube's application. I haven't had
11 an opportunity to look at it but I will do so.
12 MR JUSTICE HILDYARD: Yes. And your second paragraph?
13 MR BESWETHERICK: Yes, what we are seeking there, it flows
14 in fact from the first, is liberty to enter into the
15 proposed settlement documents. In our case, those will
16 be the final versions of the deed of settlement, the
17 interaffiliate settlement deed and the master framework
18 deed.
19 MR JUSTICE HILDYARD: To some extent, by giving you or not
20 preventing you, as it were, from doing anything in terms
21 of performing the relevant settlement deed, which do
22 cater for option 1, you may have what you want, mayn't
23 you?
24 MR BESWETHERICK: My Lord, yes, that is right. The edges
25 between them are not hard edges. Because we were

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<p>1 specifically discussing with your Lordship the rationale 2 for why we were adopting option 1 and explaining our 3 reasons for it, we would seek, if your Lordship was 4 minded to give it, specific liberty to adopt the 5 position that we indicated we wished to adopt. 6 In relation to the actual settlement agreements 7 themselves, it is in our case in fact only really the 8 option 1 issue that is the important issue, because we 9 are going to be receiving sums of money, we are going to 10 be -- as presently projected, we anticipate receiving 11 a significant sum from LBHI2, because we are 12 an unsecured creditor in LBHI2, and also, as your 13 Lordship is aware, a significant distribution from LBEL. 14 Those monies, there is going to be a flowing around. 15 We are not giving up any existing rights, other than 16 settling certain intercompany positions, but if we are 17 giving up anything that is possibly tangible, we are not 18 going to seek to run an argument that seeks to put LBEL 19 into liquidation against the wishes of its office-holder 20 in order to try and crystallise and bring about the 21 effect of the statutory lacuna, and you have seen, and 22 you understand our reasons for that, that it is 23 a combination of us seeing that as a very difficult 24 application to make, but also one which, for wider 25 commercial considerations, it is not one we wish to</p> <p>Page 113</p>	<p>1 she refers to the advantages she has already outlined. 2 She gives some detail about those, which is further 3 expanded upon by Mr Lewis, and I will take you to his 4 evidence in a moment. And then in paragraph 54, 5 Ms Bruce addresses Mr Lewis' role. Perhaps I could ask 6 your Lordship to read that. 7 MR JUSTICE HILDYARD: Yes, read that. 8 MR BESWETHERICK: If I can now ask your Lordship to turn to 9 Mr Lewis' witness statement, which is at tab 3 of the 10 blue bundle. 11 MR JUSTICE HILDYARD: Yes. 12 MR BESWETHERICK: Thank you. He explains that which I have 13 just said to you in paragraph 8, how he became involved 14 in October 2016. 15 MR JUSTICE HILDYARD: Yes. 16 MR BESWETHERICK: And then he explains in paragraph 9 -- 17 MR JUSTICE HILDYARD: Yes. 18 MR BESWETHERICK: -- that he has not had responsibility for 19 all aspects, but he is familiar with the general 20 position. 21 Then if I could ask your Lordship to skip forward to 22 paragraph 26. He then goes on to identify the various 23 aspects of the proposed settlement which are of clear 24 benefit to LBH Plc and its creditors. I do not propose 25 to take your Lordship through all of those; they are</p> <p>Page 115</p>
<p>1 make. I will address your Lordship on that and 2 I address it in my skeleton argument again. 3 But because we are here, if I can put it that way, 4 what we are seeking then is permission to enter into the 5 specific transaction documents in the same way as the 6 other parties are seeking as well. Our evidence in 7 relation to that is put forward by Mr Lewis. 8 Now, Mr Lewis is not one of the joint administrators 9 of LBH and, as your Lordship knows and you have seen and 10 Mr Arden took you to it, Mr Bruce's evidence -- 11 Ms Bruce, who is an administrator of LBH and LBHI2, she 12 explains -- it is probably useful if I just show you it. 13 It is in volume 1, tab 7 and if we could pick it up 14 page 17 and it is paragraph 52. 15 I should explain, Mr Lewis has been tasked with the 16 responsibility for dealing with the Waterfall III 17 application, and he has not been involved in the 18 day-to-day negotiation of the settlement agreements, but 19 he has been kept informed about them and he has filed 20 the evidence in support of our application. As Ms Bruce 21 explains in paragraph 52, she has participated in 22 negotiations in her capacity as a joint administrator of 23 LBH, as well as joint administrator of LBHI2, and she 24 confirms that she considers the proposed arrangements to 25 be in the best interests of LBH, as well as LBHI2, and</p> <p>Page 114</p>	<p>1 familiar to you because they are the same sorts of 2 factors that your Lordship has seen are relied upon by 3 the other estates. He does give details of the specific 4 monetary sums which come to this estate, which I have 5 mentioned to you. They are in subparagraphs D and E, 6 the references to the sums anticipate to flow through 7 from LBHI2; and E is the distribution expected from 8 LBEL. 9 He then says in paragraph 28 that: 10 "It will be appreciated from the foregoing summary 11 that the LBH administrators consider the proposed 12 settlement to be in the best interests of LBH and its 13 creditors." 14 He cross-refers there to Ms Bruce's statement. 15 Finally, my Lord, if I could ask you to turn to 16 paragraph 33, just over the page, this is when he 17 specifically addresses the option 1 issue. 18 You will see that he says that: 19 "[He] and the LBH administrators consider that the 20 interests of LBH Plc and its creditors are best served 21 by seeking support and give effect to option 1." 22 Those are the reasons given and those are the 23 reasons that you have heard. 24 So what we say, my Lord, as you see, steps have been 25 taken to manage the possibility of a conflict and the</p> <p>Page 116</p>

<p>1 view has been reached, and you see the reasons here, 2 which, in my submission, are perfectly sensible reasons, 3 for why it is considered this settlement is in the 4 interests of LBH's creditors as a whole.</p> <p>5 MR JUSTICE HILDYARD: Well, first of all, I mean it is very 6 useful for me to see this from your own particular 7 perspective, your client's perspective.</p> <p>8 In saying that option 1 is available, I will go 9 further than I will go in any of the applications, that 10 is to say it is available and its adoption is not 11 unreasonable or the product of any conflict of interest, 12 lest(?) it would go too far.</p> <p>13 MR BESWETHERICK: Yes.</p> <p>14 MR JUSTICE HILDYARD: The third is I am not -- this may be 15 my ignorance -- entirely convinced by 33A, because I am 16 not quite sure how realistic it is. I mean, what we are 17 looking at in the context of option 1 is the position 18 that funds to which ex hypothesi creditors are not 19 entitled, proposed to be released by option 1 to 20 shareholders, contributories.</p> <p>21 At that point, prospectively, only the shareholders 22 are interested. If they say they would rather 23 liquidation, what is to stop them?</p> <p>24 MR BESWETHERICK: So the position we are in at the moment is 25 that LBEL is in administration. The effect of</p> <p style="text-align: center;">Page 117</p>	<p>1 to interest would go down the plug opened up by the 2 liquidation and therefore there would be a straight 3 fight between creditors' interests and the 4 contributories' interest. At that point the court would 5 say -- well, it might well say "I am not going to open 6 that". But that's the point, isn't it? I was not quite 7 sure that the --</p> <p>8 MR BESWETHERICK: My Lord, it is slightly more nuanced than 9 that, if I may say so. Because what will happen is 10 explained -- I address it in my skeleton. But if LBEL 11 were to enter liquidation now, with no settlement of the 12 Waterfall III proceedings --</p> <p>13 MR JUSTICE HILDYARD: Yes?</p> <p>14 MR BESWETHERICK: -- then a liquidator of LBEL is not going 15 to be making a distribution to the shareholders of LBEL 16 because a liquidator of LBEL is going to have to wait to 17 find out what the outcome is of the Waterfall III 18 litigation to establish whether or not there are prior 19 claims and LBL has made claims into the estate for bad 20 debts, the expense of the administration and to pass on 21 any contribution liability.</p> <p>22 So a liquidator of LBEL is not going to be in 23 a position where suddenly the monies get paid out, so 24 one would then be into the scenario that is discussed in 25 the evidence, where the settlement would be off the</p> <p style="text-align: center;">Page 119</p>
<p>1 paragraph 42 --</p> <p>2 MR JUSTICE HILDYARD: I understand the statute says during 3 the course of administration you cannot have a winding 4 up, but somehow the administration process has to be 5 brought to an end. If the contributories said, "Well, 6 actually we would rather a liquidation", what could the 7 administrators say against that?</p> <p>8 MR BESWETHERICK: The administrators of LBL have in their 9 hands monies which could be available to pay statutory 10 interest, which are monies that would be payable to 11 creditors, and the interests of the creditors are at the 12 forefront of the administration regime.</p> <p>13 We are shareholders. And if the administrators of 14 LBL wished to continue administration similar to the 15 stance that is adopted by the LBIE administrators, that 16 they would not move into liquidation where the result of 17 that would be to prejudice or damage the interests of 18 the creditors, then if the administrators of LBL wish to 19 continue, the only way that we could seek to try and 20 make them do otherwise would be to make an application 21 to court, where we would have to seek to establish 22 essentially that our interests as shareholders are being 23 unfairly harmed.</p> <p>24 MR JUSTICE HILDYARD: The problem is that a liquidation 25 would open the -- I will put it another way. The claim</p> <p style="text-align: center;">Page 118</p>	<p>1 table because LBEL's participation in the settlement is 2 an important aspect of it, and we would be having then 3 Waterfall III continuing on into the future, and unless 4 another settlement agreement were to emerge, we would 5 potentially be wrapped up for the next four or five 6 years in the Waterfall III litigation with no certainty 7 as to what the outcome of that litigation will be.</p> <p>8 So that is why, aside from reaching the view that we 9 think it would be something of a difficult application 10 to make, to try and persuade a court to bounce LBEL into 11 liquidation where it would damage the interests of 12 creditors against the wishes of the administrators, just 13 because the fortuitous circumstances of the possible 14 impact of the lacuna, we see that as being a difficult 15 application, but also, as your Lordship has seen, we see 16 that as being something that in the wider commercial 17 setting is not in the interests of LBH's creditors as a 18 whole.</p> <p>19 MR JUSTICE HILDYARD: That I understand.</p> <p>20 MR BESWETHERICK: It is necessary, of course, to look at all 21 of these ingredients together. Your Lordship's 22 expression is this is a cat's cradle. There are various 23 different factors which are weighed up here, and overall 24 that is a view we have reached is in the best interests 25 of the creditors.</p> <p style="text-align: center;">Page 120</p>

<p>1 It leads in the case of LBH to the release of</p> <p>2 significant sums, anticipated release into our estate of</p> <p>3 significant sums which we can then distribute to our own</p> <p>4 creditors in the relatively near future, which is not</p> <p>5 the world that we would otherwise be in. It also</p> <p>6 removes all the other risks around that as to whether or</p> <p>7 not there could be significant reductions in what might</p> <p>8 be available at some unspecified time in the future.</p> <p>9 MR JUSTICE HILDYARD: But beyond committing to the</p> <p>10 settlement agreements, which envisage and provide for</p> <p>11 option 1, amongst other things, but really from your</p> <p>12 point of view provide for option 1, what other things do</p> <p>13 you have to do in achieving option 1 or in facilitating</p> <p>14 option 1? You would have to pass a resolution --</p> <p>15 MR BESWETHERICK: Yes, the steps that would be taken are</p> <p>16 addressed in Mr Schwartzmann's sixth witness statement</p> <p>17 in support of LBL's application. But it might be useful</p> <p>18 if I may briefly look at the draft order that the</p> <p>19 Ms Toube's prepared because this probably is --</p> <p>20 MS TOUBE: Would it be helpful for your Lordship to have</p> <p>21 a copy?</p> <p>22 MR JUSTICE HILDYARD: Yes. (Handed).</p> <p>23 Thank you.</p> <p>24 MS TOUBE: Your Lordship will see it is the passing of the</p> <p>25 resolution in 1.3. That is really all LBH has to do for</p> <p style="text-align: center;">Page 121</p>	<p>1 I haven't got the material and I don't think it is my</p> <p>2 proper remit to do so. So what I want to do is make</p> <p>3 sure that -- I wanted you to be -- well, I left it to</p> <p>4 you, but I can see the reasons why you would wish to be</p> <p>5 included within the steps of option 1 as a proper</p> <p>6 participating party and I am not sure I can do more than</p> <p>7 that. Do you see what I mean?</p> <p>8 MR BESWETHERICK: I do, my Lord.</p> <p>9 What we are not seeking, of course -- and it</p> <p>10 wouldn't be for us anyway -- is some order from you that</p> <p>11 blesses the steps that the director would take. The</p> <p>12 step we would be taking is voting in favour of the</p> <p>13 resolution to make a reduction in capital. What we are</p> <p>14 inviting your Lordship to do is to confirm that that is</p> <p>15 a step that we have liberty to take.</p> <p>16 MR JUSTICE HILDYARD: You are at liberty to take?</p> <p>17 MR BESWETHERICK: Yes.</p> <p>18 MR JUSTICE HILDYARD: Yes. Yes.</p> <p>19 MR BESWETHERICK: Is that what we have --</p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR BESWETHERICK: If your Lordship is happy with that, that</p> <p>22 is essentially what we are seeking.</p> <p>23 MR JUSTICE HILDYARD: The wisdom of taking it is something</p> <p>24 for you. Yes.</p> <p>25 That is what I want. I simply want to by my</p> <p style="text-align: center;">Page 123</p>
<p>1 option 1. Everything else is done by the director and</p> <p>2 subsequently the administrators causing the company to</p> <p>3 make the payment and LBH will receive it.</p> <p>4 MR BESWETHERICK: My Lord, that appears to be right, and ...</p> <p>5 MR JUSTICE HILDYARD: I would like to meditate on this</p> <p>6 order, but it is all you need, isn't it? You don't need</p> <p>7 any separate order, do you? You, being included in the</p> <p>8 hearing recitation, you could add your application if</p> <p>9 you wanted, yes?</p> <p>10 MR BESWETHERICK: Yes, my Lord. I think as drafted,</p> <p>11 paragraph 1, which then sets out the steps that could be</p> <p>12 taken by the administrators, I suppose the question</p> <p>13 arises whether that covers my clients as well.</p> <p>14 MR JUSTICE HILDYARD: Right.</p> <p>15 MR BESWETHERICK: But subject to just making clarifications</p> <p>16 on that, and perhaps even just having a new paragraph 2</p> <p>17 within this order that provides that the administrators</p> <p>18 of LBH may have liberty to take the step identified in</p> <p>19 paragraph ...</p> <p>20 MR JUSTICE HILDYARD: What I can see myself to be approving</p> <p>21 is the availability of option 1. And the purpose of</p> <p>22 this order is to identify what option 1 comprises. I am</p> <p>23 not blessing the decision to adopt option 1, nor the</p> <p>24 directors' assessment as to what that director thinks</p> <p>25 about the solvency or otherwise or anything else because</p> <p style="text-align: center;">Page 122</p>	<p>1 judgment explain how I've got to the conclusion that</p> <p>2 option 1 is, in the exceptional circumstances of this</p> <p>3 case, an available means of dealing with surplus</p> <p>4 arising, as to whether that is the right and best way to</p> <p>5 do that for you?</p> <p>6 MR BESWETHERICK: One moment, my Lord, if I may.</p> <p>7 My Lord, that is good for us. I have mentioned</p> <p>8 several times obviously we are acting in the interests</p> <p>9 of the creditors and I ought to probably show you what</p> <p>10 we say about creditors. If I could ask you to turn up</p> <p>11 Mr Lewis' witness statement again.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR BESWETHERICK: It is paragraph 14, where the creditors</p> <p>14 are dealt with.</p> <p>15 As he explains, there our unsecured,</p> <p>16 non-preferential unsubordinated creditors total just</p> <p>17 over a billion pounds. LBL is the largest creditor.</p> <p>18 Its admitted unsecured claim of 709 million, so over</p> <p>19 50 per cent. That, of course, does not include -- that</p> <p>20 is the admitted claim, that is not any of the</p> <p>21 recharge-type claims that are the subject of</p> <p>22 Waterfall III litigation.</p> <p>23 Our other unsecured, unsubordinated creditors</p> <p>24 include LBIE, LBHI and various other Lehman Brothers</p> <p>25 group companies which are subsidiaries of LBHI and thus</p> <p style="text-align: center;">Page 124</p>

<p>1 under its control and influence. By value, all of those</p> <p>2 entities taken together, control, influence, over</p> <p>3 95 per cent of our unsecured, unsubordinated creditors</p> <p>4 by value. And of the remainder, although we don't have</p> <p>5 the breakdown here, some of the others are also Lehman</p> <p>6 Brothers entities in one form or another.</p> <p>7 In terms of the steps we are proposing to take,</p> <p>8 there is a large constituency here seeking sanction,</p> <p>9 mirror-image sanction.</p> <p>10 My Lord, that was all I proposed to say, unless</p> <p>11 there is anything I can assist you with?</p> <p>12 MR JUSTICE HILDYARD: No, that is very helpful.</p> <p>13 MR BESWETHERICK: Thank you, my Lord.</p> <p>14 MR JUSTICE HILDYARD: Thank you very much for doing this.</p> <p>15 Yes.</p> <p>16 Further submissions by MS TOUBE</p> <p>17 MS TOUBE: Your Lordship, we are certainly not seeking</p> <p>18 an order that we shall do these things, we have</p> <p>19 deliberately used the word "may". We don't have</p> <p>20 an issue at all with adding this, so that it covers</p> <p>21 LBH's application as well.</p> <p>22 MR JUSTICE HILDYARD: It is the neatest way I think.</p> <p>23 MS TOUBE: I am quite happy to do that. And again, as your</p> <p>24 Lordship says, we don't need the wording to this to be</p> <p>25 nailed down now but we wanted your Lordship to see the</p> <p style="text-align: center;">Page 125</p>	<p>1 to amend that and send that into your Lordship.</p> <p>2 MR JUSTICE HILDYARD: If you could send that through, if</p> <p>3 I have anything, I will let you know.</p> <p>4 Does anyone want to say anything, including "No, you</p> <p>5 are wrong about that, judge", on the question as to</p> <p>6 whether the assimilation of the sort of trust approval</p> <p>7 route with the office-holder green light -- does anyone</p> <p>8 want to say anything about that?</p> <p>9 MR TROWER: Only this I think, my Lord, that we set out in</p> <p>10 our skeleton two passages, one from the MF Global case,</p> <p>11 I think --</p> <p>12 MR JUSTICE HILDYARD: And one from Nortel?</p> <p>13 MR TROWER: I was not thinking of the Nortel one. Sorry,</p> <p>14 I will just turn up my skeleton, just a moment. It is</p> <p>15 paragraphs 22 and 23, the two citations I was thinking</p> <p>16 of.</p> <p>17 MR JUSTICE HILDYARD: Hold on, I've got myself in the usual</p> <p>18 muddle. 22 and 23?</p> <p>19 MR TROWER: Yes.</p> <p>20 The important point is that there is a -- what has</p> <p>21 happened is Mr Justice David Richards in 21 has looked</p> <p>22 at what you do with administrators generally, and then</p> <p>23 we go on in 22 to say the approach is similar and then</p> <p>24 refer to those two passages. And the similarity of the</p> <p>25 approach is the point that was made by</p> <p style="text-align: center;">Page 127</p>
<p>1 sort of way in which we are thinking about it, so that</p> <p>2 if you had any objection to this sort of order, you</p> <p>3 would let us know now. But obviously if you have any</p> <p>4 objection to any of the particular wording, you can let</p> <p>5 us know as appropriate.</p> <p>6 MR JUSTICE HILDYARD: No, I will meditate on it, but as it</p> <p>7 seems to me, it adumbrates those things which option 1</p> <p>8 comprises and says that option 1 would be a lawful thing</p> <p>9 to adopt.</p> <p>10 MS TOUBE: My Lord, that is very helpful.</p> <p>11 What we will do is we will amend it to add the LBH</p> <p>12 application and email that to your clerk so you have the</p> <p>13 latest version of it.</p> <p>14 MR JUSTICE HILDYARD: Both of you will have the further</p> <p>15 comfort -- you are not actually a party to any of</p> <p>16 the ... but certainly Mr Beswetherick's clients would</p> <p>17 have the further comfort that their participation as</p> <p>18 parties will, to the like extent as the others, assuming</p> <p>19 I give the requisite green light, as they do.</p> <p>20 MS TOUBE: My Lord, yes.</p> <p>21 Obviously we have not participated in this because</p> <p>22 we had our own -- we have troubled your Lordship enough</p> <p>23 with our particular question.</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MS TOUBE: So unless you had anything else, we just propose</p> <p style="text-align: center;">Page 126</p>	<p>1 Mr Justice Snowden in Nortel, but I think we would</p> <p>2 certainly agree with my Lord that it is not an identical</p> <p>3 approach, but you get some help from it. And what is</p> <p>4 interesting about both of those two passages, they</p> <p>5 don't -- it is not a sort of necessary prerequisite,</p> <p>6 even to the trustee approach, for the court to see</p> <p>7 confidential legal advice in relation to deals. It is</p> <p>8 something that is very often done when you are settling</p> <p>9 legal proceedings or seeking a Beddoe order, but it is</p> <p>10 not -- it does depend on all the circumstances. And it</p> <p>11 would be slightly odd in this rather usual case, where</p> <p>12 we have got five separate estates all separately legally</p> <p>13 advised, if we all presented our legal advice to you,</p> <p>14 particularly as you were going to hear the trial. That</p> <p>15 is obviously not a complete answer because one might in</p> <p>16 an appropriate case have to go off to another judge.</p> <p>17 But the jurisdiction is slightly different and I think</p> <p>18 all Mr Justice Snowden was really saying in Nortel at</p> <p>19 the end of the day was you get a bit of help when you</p> <p>20 are thinking about the nature of the jurisdiction on the</p> <p>21 point about the court not actually deciding itself that</p> <p>22 it is the right thing to do but looking at the process.</p> <p>23 Does that help at all?</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MR TROWER: The only other thing I wanted to say while I am</p> <p style="text-align: center;">Page 128</p>

1 on my feet, when my Lord has finished, the only other
 2 thing I thought I would just mention is in relation to
 3 the indemnity you asked about the position of LBHI.
 4 MR JUSTICE HILDYARD: Yes.
 5 MR TROWER: We gave a bit of a lead into this in the
 6 indemnity deed, paragraph 4.3.
 7 MR JUSTICE HILDYARD: Is this 127?
 8 MR TROWER: 127, yes.
 9 "All sums payable ..."
 10 My Lord can read that.
 11 Now, what has happened with LBHI is in December 2011
 12 a plan was approved by the US court and that plan is
 13 still working through, claims are being paid under it
 14 and assets are being got in order to satisfy claims.
 15 What this does is provide for the obligation under the
 16 indemnity to be a cost of carrying out the provisions of
 17 the plan.
 18 MR JUSTICE HILDYARD: I see. So the costs, as you said, it
 19 is the analogue to our expenses and the administration.
 20 MR TROWER: Indeed. And so I am afraid we haven't got the
 21 plan itself, but that is what section 1.5 of the
 22 chapter 11 plan does.
 23 MR JUSTICE HILDYARD: That was my interest. It was just to
 24 see at what level they came --
 25 MR TROWER: I understand. You wanted to know whether or not

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1 this was an indemnity that was worth the paper it was
 2 written on.
 3 MR JUSTICE HILDYARD: Yes.
 4 MR TROWER: Yes, I understand that.
 5 Obviously at the end of the day that is a commercial
 6 decision as well for the administrators and they are
 7 satisfied as to the prospects of the indemnity being
 8 satisfied when called on.
 9 MR JUSTICE HILDYARD: Yes.
 10 Tell me about timing. There is a PTR in the
 11 Waterfall III this coming Friday.
 12 MR TROWER: Yes, indeed.
 13 MR JUSTICE HILDYARD: Assuming that you get -- I am not sure
 14 what to call it; it is not sort of permission --
 15 MR TROWER: "Permission" may be better than "sanction"
 16 because permission doesn't imply anything other than you
 17 can do it if you want to.
 18 MR JUSTICE HILDYARD: Yes. Assuming you get whatever it is
 19 you are entitled to, the whole thing goes?
 20 MR TROWER: Yes. What we for our part would suggest -- and
 21 we have had a brief discussion amongst some of us but
 22 not everybody -- what we for our part will suggest is
 23 that there are the documents themselves to execute and
 24 there are one or two Ts to cross and Is to dot, and with
 25 a fair wind that will all be done very immediately, that

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1 we should keep the hearing on Friday for the moment --
 2 MR JUSTICE HILDYARD: That is at 10.30?
 3 MR TROWER: Yes, I think so, yes. All anticipating that we
 4 will be able to come to your Lordship on Friday,
 5 possibly in very short order or even through the usual
 6 channels, if that is appropriate, to invite by consent
 7 your Lordship to adjourn the hearing in September --
 8 I shouldn't say sine die, should I, but anyway adjourn
 9 it generally, the point being that the actual dismissal
 10 of that application is the last thing that happens when
 11 all the points, the things have been worked you through.
 12 So we cannot invite your Lordship to dismiss it, but it
 13 would be sensible, we respectfully suggest, as long as
 14 there hasn't been a blockage which nobody anticipated
 15 and as long as we are where we need to be for the thing
 16 to be adjourned on Friday.
 17 So that is what we would suggest happens: we keep
 18 the hearing for the moment, hoping we just come back and
 19 ask you to adjourn it on Friday.
 20 MR JUSTICE HILDYARD: When do you need the permission
 21 letter, let's call it that, and what sort of judgment
 22 are you envisaging in terms of sort of detail given the
 23 constituencies to whom you answer?
 24 MR TROWER: As far as we are concerned -- there may be two
 25 separate questions there: one is the decision and the

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1 second is the reasoning.
 2 MR JUSTICE HILDYARD: Yes.
 3 MR TROWER: I don't think, from my client's perspective,
 4 that we would need the reasoning before the decision.
 5 If your Lordship has made a decision, we would very much
 6 welcome the decision as soon as your Lordship ever can
 7 give it, but the reasons aren't necessary.
 8 As to the elaborateness of the reasons, again,
 9 I don't think for our part we require or expect anything
 10 elaborate. The Nortel judgment was quite a lengthy one.
 11 I certainly would not envisage it being necessary for
 12 your Lordship to --
 13 MR JUSTICE HILDYARD: The Nortel one raised an interesting
 14 point of principle as to whether administrators could
 15 deal with expenses claims. Is that right?
 16 MR TROWER: Indeed it did, and it raised all sorts of really
 17 quite difficult questions, including the fact that a lot
 18 of these estates had potential conflicts within them and
 19 were not separately represented in the same way. It was
 20 a different case from this one. For our part, I think
 21 we would be content with something relatively
 22 abbreviated, if that helps.
 23 MR JUSTICE HILDYARD: Are there any other places, either
 24 jurisdictions or otherwise, in which you would have to
 25 make good the course that has been taken?

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1 MR TROWER: No, because --
 2 MR JUSTICE HILDYARD: It is all internal.
 3 MR TROWER: Yes, and I can be straightforward about this in
 4 this sense, that it was a fairly finely balanced
 5 question for the LBIE administrators as to whether or
 6 not to seek permission at all. We decided it was the
 7 appropriate thing to do, but it is not as momentous for
 8 the LBIE administration as it is for some of the others.
 9 MR JUSTICE HILDYARD: No.
 10 Does anyone wish to add to that or does that broadly
 11 encapsulate your positions?
 12 MR MARSHALL: It encapsulates our position, my Lord, yes.
 13 MR ARDEN: And ours.
 14 MR BESWETHERICK: And ours.
 15 MR JUSTICE HILDYARD: One other clarification, and this is
 16 the most self-interested question that I have for you.
 17 MR TROWER: Yes?
 18 MR JUSTICE HILDYARD: The January hearings were adjourned,
 19 as I recall.
 20 MR TROWER: Yes.
 21 MR JUSTICE HILDYARD: Pending the decisions of the Supreme
 22 Court.
 23 MR TROWER: Yes.
 24 MR JUSTICE HILDYARD: In the event, that was probably not
 25 a wrong thing to have occurred.

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1 MR TROWER: Quite.
 2 MR JUSTICE HILDYARD: They were very much affected by it.
 3 MR TROWER: Yes.
 4 MR JUSTICE HILDYARD: Of course you would be interested in
 5 what my judgment might have been, but I take it that it
 6 will no longer be required?
 7 MR TROWER: Not so far as my clients are concerned, and in
 8 fact we are asking your Lordship to dismiss -- or will
 9 be in due course, and if there is a dismissal before the
 10 argument is complete, that is a pretty good reason not
 11 to give a judgment.
 12 MR JUSTICE HILDYARD: Exactly, yes.
 13 I just wanted to make sure that I had recollected
 14 that I hadn't adjourned it for a reserved judgment,
 15 I had adjourned it for further argument.
 16 MR TROWER: You had.
 17 MR JUSTICE HILDYARD: Yes. My goodness, I was wise
 18 in January.
 19 Now, I tell you what I propose to do and you must
 20 tell me whether this causes a difficulty. I have had
 21 a limited time to read this. I think that if it is
 22 worth reserving and asking the court for its decision at
 23 all, it is also to be expected that the court does its
 24 proper homework, having heard from you.
 25 I would I propose therefore to read today's

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1 transcript and go through the witness statements once
 2 more before giving you my answer. I would hope then to
 3 give a short judgment, possibly on Friday. I would hope
 4 to get you the answer before then.
 5 I think, without wishing to bind myself and make
 6 redundant the homework which I have set myself, I have
 7 seen nothing which militates against granting the
 8 permission, if that is the proper word for it, to the
 9 intricate arrangements reflecting a pretty intricate set
 10 of balances, which seem to be the best way of assuring
 11 for creditors of all the relevant entities the most
 12 expeditious resolution of matters which may affect them
 13 and, ultimately, shareholders in the event of
 14 a continuing surplus, presently estimated I think, what,
 15 at 7 or 8 billion in respect of LBIE, is that right?
 16 MR TROWER: Yes.
 17 MR JUSTICE HILDYARD: Yes.
 18 So what I am saying to you is proceed as you have
 19 proceeded, upon the footing that the matter will receive
 20 the permission. If a sudden electric bolt descended on
 21 me, I would let you know, but I wanted to give you
 22 a sort of provisional estimate, so that you are not
 23 wasting your time or wondering whether it is worth it.
 24 MR TROWER: Yes.
 25 MR JUSTICE HILDYARD: Obviously, part of my reasoning is

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1 that I can see that a very great deal of thought has
 2 gone into this, a thought which I will never be able to
 3 replicate in the time available. It is to be commended
 4 that so much sort of constructive work has been done to
 5 resolve what has been a movable feast, in the event,
 6 dealing with a number of moving fundamental points.
 7 MR TROWER: Yes.
 8 The only point, my Lord, that just occurs to me,
 9 I think there were one or two things that were going to
 10 happen during the course of this week, in the run-up to
 11 the PTR, and can we take it from your Lordship's
 12 indication that it would be a sensible saving of costs
 13 not to carry on with that exercise?
 14 MR JUSTICE HILDYARD: It is.
 15 MR TROWER: Yes.
 16 MR JUSTICE HILDYARD: I would let you know by tomorrow, or
 17 latest Wednesday. If suddenly something had emerged,
 18 I would let you know by email what it was. Frankly,
 19 I do not expect it. I was half minded simply to approve
 20 it now but, as we went through it, I felt that I should
 21 just make doubly sure, partly so all concerned know
 22 I have done.
 23 MR TROWER: Yes.
 24 MR JUSTICE HILDYARD: But I haven't seen anything which
 25 causes me concern which has not been explained by all of

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<p>1 you, and I am very grateful to you.</p> <p>2 Was there anything else?</p> <p>3 I will let you know tomorrow or Wednesday what the</p> <p>4 decision is -- if you proceed upon the footing it will</p> <p>5 be approved -- and let us keep the fixture for Friday</p> <p>6 for the purposes of signing off on all the has to be</p> <p>7 signed off, which is I think is what you proposed,</p> <p>8 Mr Trower, is that right?</p> <p>9 MR TROWER: Indeed.</p> <p>10 MR JUSTICE HILDYARD: I would anticipate that would be</p> <p>11 a short event. I will tell Listing of the likelihood</p> <p>12 that September will be released but I will maintain it</p> <p>13 in the books against eventuality.</p> <p>14 MR TROWER: And, hopefully, we can then dispose of it on</p> <p>15 Friday.</p> <p>16 MR JUSTICE HILDYARD: And we can then dispose of it.</p> <p>17 MR TROWER: Yes.</p> <p>18 MR JUSTICE HILDYARD: Anything else?</p> <p>19 Your order you will get on Friday, if not before.</p> <p>20 MS TOUBE: My Lord, thank you very much.</p> <p>21 MR JUSTICE HILDYARD: Do you need it before then?</p> <p>22 MS TOUBE: Well, we only need it at the same time as the</p> <p>23 permission, because we are the first to go.</p> <p>24 MR JUSTICE HILDYARD: You are the first to go, yes.</p> <p>25 Are there any steps between now and Friday beyond</p> <p style="text-align: center;">Page 137</p>	<p>1 INDEX</p> <p>2</p> <p>3 Submissions by MR TOUBE2</p> <p>4 Submissions by MR ARDEN18</p> <p>5 Submissions by MR TROWER73</p> <p>6 Submissions by MR MARSHALL98</p> <p>7 Submissions by MR BESWETHERICK110</p> <p>8 Further submissions by MS TOUBE125</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 139</p>
<p>1 litigation steps that are being taken?</p> <p>2 MS TOUBE: No, my Lord.</p> <p>3 MR TROWER: There are obviously the documents to be</p> <p>4 finalised and executed but we will ...</p> <p>5 Yes.</p> <p>6 MR JUSTICE HILDYARD: Very good.</p> <p>7 Thank you all very much indeed.</p> <p>8 (3.18 pm)</p> <p>9 (The hearing adjourned)</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 138</p>	

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