Friday, 27 March 2015
(10.00 am)
Submissions by MR DICKER (continued)
LORD JUSTICE MOORE-BICK: Yes, Mr Dicker.
MR DICKER: My Lords, there are three things I need to deal with in my half an hour. First of all, the rules dealing with future debts; secondly, set-off; and, thirdly, the one-way bet.

So far as future debts are concerned, obviously if you're going to have a liquidation rather than a run-off, you can't simply wait for the future debt to become due and payable. It needs to be capable of being paid early. If that's to occur you obviously have to discount it for the time value of money, otherwise creditors will not be treated pari passu. As your Lordships know, the rules provide that you prove for the full amount of your debt, but that when it comes to dividends, depending on when the future debt becomes payable, that debt may then be discounted for the purposes of dividend.

We're not sure, on this side, how my learned friend says those rules take substantive effect, in the sense of permanently discount your claim. They plainly can't do so at the stage of proof because at that stage you are proving for the full amount.

So presumably this substantive effect only occurs if and when a dividend is payable and the rules require the proved debt to be discounted for the purposes of paying a dividend.

My Lords, as we understand it, however, my learned friend's point essentially comes down to this, you are only ever entitled to the dividends on the discounted amount. If you receive dividends on the discounted amount, you are effectively treated as having been paid in full. We say there is nothing in the rules that compels that conclusion, that prevents a creditor in the event of a surplus from saying, "I haven't been paid in full".

Can I just give one simple example of such a situation. Assume you have a debt payable in five years' time. To pick a figure, £1 million. You prove for the £1 million. The liquidator decides one day before the expiry of the five-year period to declare a dividend and that's in full and final payment, that's the final dividend. The payment he will make at that stage, five years later, will be the discounted amount in full.

So the creditor's debt was payable after five years. Effectively on the date it was due for payment he receives a sum which is not the 1 million which he was

entitled to be paid on that date but it's the discounted sum, effectively the present value of the debt as at the date of the administration.

Your Lordships may immediately appreciate the symmetry --
LORD JUSTICE LEWISON: What do you mean by "the discounted debt as at the date of the administration"? You discount to the date of payment, don't you?
MR DICKER: When the liquidator calculates how much to pay the creditor, he discounts the proved debt back to the date of the administration; and he effectively says "You're entitled to a dividend" --
LORD JUSTICE LEWISON: Oh, is that right? I thought it was to the date of payment. It's to the date of the administration.
MR DICKER: Your Lordship is absolutely right, before 1986, under the old rules, it used to be discounted back to the date of payment and the discount was between the date the debt should have been paid and the date that the debt is in fact paid by way of dividends.
LORD JUSTICE LEWISON: Right.
MR DICKER: The new rules discount it all the way back to the date of administration.
LORD JUSTICE LEWISON: Oh. Which is the relevant rule?
MR DICKER: My Lord, it is 2.105 in administration.

LORD JUSTICE LEWISON: Oh, I see.
MR DICKER: And sub-rule 2:

"For the purpose of dividend and no other purpose, the amount of the creditor's admitted proof shall be reduced by applying the following formula, X divided by 1.05 to the power of N."

The important point is "N", your Lordship will see from (b) below, is the period beginning with the relevant date; and that's the date of the commencement of the administration.
LORD JUSTICE BRIGGS: Presumably it is done that way to produce fairness vis-à-vis other unsecured creditors.
MR DICKER: Absolutely.
LORD JUSTICE BRIGGS: Using the uno flatu approach.
MR DICKER: Absolutely. Everyone is presently valued as at the same date. So five years on and the liquidator wants to make his distribution and he says, "I have to pay everyone in full in respect of their proved debts, but for the purposes of making the dividend I have to discount the future debt and I pay the discounted amount in full but five years later".

We know from Kaupthing in the Court of Appeal that that's not something which a creditor is entitled to say if he owes the company money. He can't say, "I can have my debt discounted to the date of the administration,

but only pay it five years later".
On my learned friend's case, as we understand it, that's not true if the position is reversed. On his case all the creditor gets is the discounted amount, but paid five years later, on the date he should have received his full 1 million, he fact only receives whatever the discounted amount is.
We say that's absolutely --
LORD JUSTICE LEWISON: Is the balance a non-provable claim or can he --
MR DICKER: Absolutely. Your Lordship has got it in one. We say if one gets to the stage of there being a surplus, and the issue now is between the debtor and the creditor, there is nothing in Rule 2.105 -- which only says you discount for the purposes of dividends and only for that purpose -- to prevent the creditor saying "I was due to be paid £1 million after five years. On that date, the day before that date, you made a payment to me but it was only £750".
LORD JUSTICE MOORE-BICK: If it becomes a non-provable debt does he have to give any sort of credit for the fact he has been paid part of it at an accelerated moment?
MR DICKER: He hasn't on the example I gave your Lordship.
LORD JUSTICE BRIGGS: But he'll get statutory interest on the full debt.

MR DICKER: There are complications, and unfortunately we don't have to time to go into these, but they were dealt with at length before David Richards J as part of Waterfall II. There are differences between future debts which carry interest --
LORD JUSTICE BRIGGS: Ah.
MR DICKER: -- and future debts which don't, and it is quite complicated working out quite how they all work. They were dealt with in a case which I have to say I find quite difficult to understand, Theo Garvin, which is in fact in your Lordships' bundles. I don't have time to take your Lordships to it.
But I am just trying to illustrate the point that we say --
LORD JUSTICE MOORE-BICK: But you chose to take as your example the day before the debt was due. Let's take it as a five-year debt on which a dividend is payable after two and a half years.
MR DICKER: Then there's a more complicated question, we entirely accept, whether in that situation a creditor is effectively able to say, "I can demonstrate I haven't been paid in full". That may be more difficult because he may have to say, "The statutory rate of discount doesn't in fact generate sufficient to enable me to be paid in full".

What I was trying to give your Lordship, as I said, is at least a simple situation in which we say that there's nothing contrary to the rules, given the terms of 2.105, and nothing contrary to principle in a creditor being able to say in that situation, if there is a surplus, "On the date I was due to be paid, I didn't receive the full amount to which I was entitled and I should receive it".
My Lords, that's future debts.
Set-off, two cases I have to deal with here. First of all, Stein v Blake. Very shortly, it's important to understand the issue in the case and thus the scope of the decision. The point was a very short one. The trustee contended he could assign a claim free of the effect of insolvency set-off. The House of Lords held that he could not do so because set-off had taken place automatically at the commencement of the bankruptcy. Effectively the only thing the trustee could assign was the net balance.
Lord Hoffmann was not dealing with the nature of that net balance. There was no issue as to whether it had effectively been stripped of all its previous characteristics. In other words, having discounted or estimated, or converted it for the purposes of set-off, whether or not what emerged was shorn of its previous

attributes. The point in Stein v Blake was a very simple one, could the trustee assign effectively the full amount of his original claim? Answer, no, because part of it had been paid. Essentially no more than that.
LORD JUSTICE BRIGGS: Presumably a future debt sets off at its full amount?
MR DICKER: Well --
LORD JUSTICE BRIGGS: Because it is only for the purpose of dividend that the discounting is applied.
MR DICKER: This is the issue that Kaupthing dealt with, which I was going to come to next.
LORD JUSTICE BRIGGS: Okay.
MR DICKER: What happened in Kaupthing -- your Lordships know the facts, claim and cross-claim. The creditor had a deposit immediately repayable but owed a term loan, which is effectively a future liability. Mr Fisher, instructed to identify any arguments on behalf of creditors that could be made, submitted that the way it works is you first of all have to take the claim and cross-claim and to the extend they need to be discounted, estimated or converted -- in that case it was only discounted -- you do that to the entirety of the claim. Having done that exercise to the entirety of the claim, you then effect the set-off and what is left

is simply a net sum, which is his argument, either a discounted net sum or an estimated net sum or a converted net sum, one could add, carrying the logic through.

So you came out of the other side of the set-off with your rights having been substantively changed, such that what was left was essentially shorn of its original characteristics.

Now so far as Kaupthing was concerned there was one qualification, because obviously, although the rules relating to discounting required it to be discounted for the purposes of the set-off, there was a specific rule, your Lordships have seen, that said nevertheless if it is a future debt it's only payable in the future. Thus the argument I can pay the discounted amount but only on the original future date.

As your Lordships know, the judge at first instance accepted that, the Court of Appeal rejected it. Can I just show your Lordship one paragraph from Court of Appeal's judgment. It is bundle 1C, tab 85. (Pause).

The paragraphs that are relevant, 36 I ought to show your Lordships as well 37.

36, Etherton LJ refers to Stein v Blake and says:

"I don't accept the principle in Stein v Blake that on the taking of the account for the purpose of

insolvency set-off the original cause of actions are extinguished has any relevance to the present case."

Then he summarises what Stein v Blake was concerned with.

Just between F and G he says:

"That has nothing to do with and cannot assist in resolving the question whether, as a matter of the proper interpretation of 2.85(7) and (8) the discounting mechanism, 2.105, applies further than is necessary for the purpose of establishing the amount of a distribution to be made to the creditor."

What Etherton LJ was effectively saying is, if you're going to set off claim against cross-claim, you have to make sure that what you are actually setting off is like and like.

You only have to ensure that what is like and like is the actual amount that is being set off against each other. One can imagine it graphically, if one had a stack of English currency notes, which one party owed to the other, and a stack of US dollars note, rather larger in amount, which was owed in the other direction and you wanted to effect a set-off, what you would do is convert the US dollar notes to the extent necessary to equal the value of the sterling notes. You wouldn't go through the exercise of converting all of the US dollar

notes into sterling, don't need to; and that was essentially all Etherton LJ was saying.

Now 37 is also relevant:

"Mr Fisher's reliance on the present context on the Stein v Blake analysis of the extinguishing effect of the insolvency set-off on the original causes of action presents him with a difficulty. He relies on the judge's decision that interest is payable on the balance of the debt due to the company as undermining the administrators' case. The judge's interpretation has such extraordinarily damaging results for the company and the general body of creditors that it cannot reflect the meaning and intent at 2.85. The judge, however, came to that decision on interest on the basis that the original contractual liability remains, save to the extent it has been extinguished by the insolvency set-off, rejecting Mr Fisher's submissions to the contrary. The decision of the judge has not been appealed, but Mr Fisher frankly submitted that notwithstanding the absence of any appeal it is very difficult to see the judge was right on that issue as a matter of law."

The submission was there was is nothing in 2.85 or 2.88 which expressly provides for the payment of such interest. In other words, we have a new statutory right

for the net balance and nowhere does it say it carries contractual interest.

Etherton LJ's response to that is:

"Although Mr Fisher was relying on Stein v Blake, the consequence that he contended for [in other words without interest in the meantime], there could be no policy justification for such a remarkable result."

Just dealing very quickly with my learned friend Mr Snowden's arguments, his argument essentially has two parts. First of all, insolvency set-off destroys the claim and cross-claim and gives you a claim for the net balance. But he also says effectively as part of that process the original attributes of the claim and cross-claim are stripped out. So that if you have a foreign currency claim, it has been converted into sterling and effectively is baked into sterling; and that's what it is going forwards.

We agree that insolvency set-off involves payment, to the extent of the set-off and thus produces a net balance, but we say that doesn't have the consequences for which my learned friend contends. What is left is the outstanding part of the original claim which hasn't been used for set-off, hasn't been paid, but that retains all the characteristics of the original claim.

We say one can see that because, firstly, Rule 2.88

requires the same exercise to be done whether the debt is owed by or to the company. You estimate, discount and convert as necessary on both sides of the account. Whether the claim is owed by the company or to the company, to make sure you're setting off like against like, you do the same thing to both sides: estimate if necessary, discount if necessary, convert if necessary.

We know that my learned friend's analysis doesn't apply where the net balance is owed to the company, because that's the Court of Appeal in Kaupthing. So what he has to say is, okay, you can distinguish Kaupthing. That may be right where the balance is owed by the creditor to the company, but it's different, he says, where the balance is owed by the company to the creditor. We say there's absolutely nothing in Rule 2.85 to suggest that's the case.

As I say, the same exercise is done to both debts that are taken into account and the rules simply provide for a balance payable one way or the other to be due. There's no logic in saying that if on one side the claim retains its original characteristics, it is owed by the creditor to the company, it doesn't retain its original characteristics if it's the other way round.

It would also give rise to very odd consequences as mentioned by my Lord Lord Justice Briggs yesterday. If

you take a future debt, it's normally provable in full, discounted only for the purposes of dividends. If my learned friend is right, that's not the case. You now have a debt which is effectively provable in its discounted amount and I've no idea how 2.105 would operate in relation to that.

The final point on this is even within the scope of a set-off the taking of the account is not final, in the sense that if you have a set-off based on an estimated debt and further information comes to light, you can revalue your estimate and effectively a new set-off can be treated as having taken place automatically on the date of the winding-up order.

None of these rules, we suggest, in any way suggest that Rule 2.86 in relation to foreign currency liabilities has a substantive effect of the sort contended for by my learned friend. There are some very difficult issues, if that were the case. Can I just mention two, one of which is: what if there's a make whole provision? As there is, for example, in an ISDA master agreement. In other words, if for whatever reason don't receive the currency to which you're entitled, you have a claim for whatever is necessary to make up difference. How is that treated? Is that also somehow extinguished or does the court have to develop

some sort of anti-deprivation principle preventing you from relying on that because it's a work around the effect of the rules?

The second is: how does it work in relation to foreign currency claims governed by foreign law? Do we end up with a situation in which some creditors can bring proceedings abroad, if their claim is governed by foreign law and they can establish jurisdiction, and recover in full? It is only creditors with foreign currency claims governed by English law who effectively end up bearing the consequences of this effect.

In other words, if my learned friend is right, there are two consequences, one of which is potentially unequal treatment of creditors and the second would be a plethora of proceedings in New York by those whose foreign currency liabilities are governed by New York law and who can establish jurisdiction in New York.

Finally, the one-way bet.

LORD JUSTICE LEWISON: Just before you come on to that, what do you say about disclaimer and loss proved on disclaimer?

MR DICKER: My Lord, the analysis is very similar to both contingent and future, in the sense that if one looks at the position before 178 was introduced back in 1929, what the original provision was, a reserve had to be

made. So no extinguishment. Once the statute was introduced, it had an effect for the purposes of ensuring that the affairs of the company could be wound up within a reasonable period. What it is essentially doing, in the same way as an estimated claim is doing, is trying to ensure, within the confines of having a liquidation with a reasonable period, that creditors are paid the full amount, the full commercial value to which they are entitled.

LORD JUSTICE LEWISON: But you would accept that the recovery of whatever you manage to prove for extinguishes whatever rights you originally had?

MR DICKER: Well --

LORD JUSTICE LEWISON: Wouldn't you?

MR DICKER: We would put it slightly differently, in the sense that, as Lord Hoffmann indicated in Wight v Eckhardt, the assets will be distributed on that basis and there will be nothing left to proceed against.

LORD JUSTICE LEWISON: So in theory the landlord can come back, can he, and say, "Well, rent would have fallen due on such and such a day, you now have some money, pay me"?

MR DICKER: The difficulty with that is it would be difficult for him to do that, given he has effectively received the damages for which he's entitled.

LORD JUSTICE LEWISON: Yes.
MR DICKER: It is difficult to imagine quite how one would establish you haven't effectively been paid the amount you should have been paid. If he had, then, again in theory, yes.
My Lords, the one-way bet.
LORD JUSTICE BRIGGS: Just before you do, the short point on disclaimer is that the damages will be full compensation.
MR DICKER: Yes.
LORD JUSTICE BRIGGS: There just isn't anything that he hasn't got, albeit it is converted into money.
MR DICKER: In the same way as if the damages ultimately prove indeed to be full compensation, then that undoubtedly is an end of it.
LORD JUSTICE BRIGGS: They will have been paid in full before you get to any surplus.
MR DICKER: Correct.
LORD JUSTICE BRIGGS: Yes.
MR DICKER: So far as one-way bet is concerned, my Lords, we do respectfully say this is not a situation in which it is possible to achieve a perfect result. A perfect result would be the debtor pays what he agreed to pay, no more or less, and the creditor receives what he is entitled to receive, again no more, no less.

No one is suggesting that that is possible. The reason it's not possible is because the original agreement was that the debtor would pay the creditor in the foreign currency, but to achieve pari passu distribution foreign currency claims have had to be converted into sterling. It's that step that introduces an exchange risk into the bargain, one can put it that way, which the parties never originally agreed to.
LORD JUSTICE BRIGGS: There was always an exchange risk but until the conversion it was borne by the debtor and what the conversion does is to transfer it to the creditor.
MR DICKER: My Lord, I am very happy with that way of putting things. The question is essentially, who has to bear the risk, how and to what extent?
We say there are only two possible approaches the parties have been able to identify. The first possibility, that contended for by my learned friend, is that foreign currency claims are converted into sterling as at the date of the winding-up order permanently, thereby throwing, my Lord Lord Justice Briggs said, the entirety of the exchange rate risk on to the creditor, which he will bear regardless of whether the company is insolvent or subsequently turns out to be solvent.
We say that as between the debtor and the creditor is not just. One can see that from the House of Lords

in Miliangos. It certainly would be unjust outside of a liquidation and, to the extent it occurs in a liquidation, needs a good and robust justification.
The solution contended for by my learned friend, we say, may seem simple but it has nothing else to commend it and it is certainly not just as between debtor and creditor.
The second possibility is the hybrid one identified by Brightman LJ, and that has two parts. The first part, as your Lordships know, is that for the purpose of distributing the assets pari passu you convert all foreign currency claims into sterling. That does impose an exchange rate risk on the creditor, but one says, well, that's necessary to achieve pari passu distribution. It's just the price which the creditor has to bear effectively in the interests of the general body of creditors.
The second part is that is a robust justification, as between the competing interests of creditors, but that justification, as Brightman LJ indicated, ceases to exist when there's a surplus and one is back again to the position as between debtor and creditor.
Your Lordships may just like to bear in mind this, a large part, the majority, of LBIE's assets and its claims were US dollar claims, so much so that an early

proposal by the administrators was effectively to try and conduct the administration in US dollars, requiring creditors to submit claims in US dollars and to receive payment in US dollars. One consequence of my learned friend's case is that creditors' claims have been converted into sterling, but the underlying assets, which were, in US dollars will have continued to appreciate; that benefit, on his case, going to the shareholders, although actually, given that appreciation, it matches the appreciation of US dollars against sterling faced by the foreign currency claimants. So effectively having it, in one sense, both ways.
My learned friend says it gives a creditor a one-way bet. We say the very short answer to that is, no, it doesn't. It's not a one-way bet if LBIE was insolvent. The creditor bears the risk if sterling depreciates, he won't profit if it appreciates. It is no answer to say that in one usually unlikely scenario, namely the company turning out to be solvent, the creditor will have the benefit of whichever currency has proved stronger in the meantime.
All --
LORD JUSTICE MOORE-BICK: Right, Mr Dicker.
MR DICKER: I have 15 seconds.

LORD JUSTICE MOORE-BICK: I think we could allow you 15 seconds, if you mean it.
MR DICKER: All it really involves is the debtor saying to the creditor, "I need to go into liquidation. One consequence is I need to convert all claims into sterling to make sure everyone is treated equally and as result you may suffer. I'm sorry about that, but if it turns out that I am solvent I will make sure that that has not prejudiced you". That in essence is what one would say is happening here and we say it's consistent with principle, policy, authority and it's the right result.
My Lords, those are my submissions.
LORD JUSTICE MOORE-BICK: Good. Thank you very much, Mr Dicker.
Mr Snowden.
Submissions in reply by MR SNOWDEN
MR SNOWDEN: My Lord, on this side of the court we're going to divide the reply, subject to your Lordships, this way. I am going to deal with subordination, with the question of the lacuna or the parked issue, if it may become known that, and the contributory rule and mention Cherry v Boultbee in passing. Mr Wolfson will respond on currency conversion claims and the scope of section 74 and Mr Isaacs will deal with the point he

dealt with in opening, the provability of section 74.
So if I can start with picking up the reply in relation to subordination, my learned friend Mr Trower took you to the directives very briefly. Can I ask you to take up authorities bundle 5 just very quickly to look at the terms of the directive, because we say that you get something different from him, from the directive in -- take the 1989 directive, which I think you put at tab 19.
LORD JUSTICE MOORE-BICK: Yes.
MR SNOWDEN: We say that when you look at the relevant provision of the directive, which is Article 4(3), it is focusing on bankruptcy and liquidation. The words are:
"In the event of bankruptcy or liquidation of a credit institution, they rank after the claims of all other creditors and are not to be repaid until all other debts outstanding at the time have been settled."
We make the point that the concept of bankruptcy or liquidation is mentioned as the circumstance that this clause is dealing with. It uses the expression "ranking", which is an insolvency type of expression. My learned friend was asked the question by my Lord Lord Justice Lewison "What do you mean or what do you say 'at the time means?'" My learned friend didn't really give you an answer. I had an answer in my

opening submissions, the reference in the transcript is at page 12 of Day 1, and I will repeat it. We say that it means at the time of the insolvency, i.e. at the time of the commencement of the bankruptcy or liquidation. That would mean, as we suggest, that the claims up until that point are claims to which the subordinated loan is subordinated. So that, for example, contractual interest up to the point of bankruptcy and an insolvency ranks ahead of the subordinated loan, but that statutory interest, designed to compensate creditors for being kept out of their money during the period of the bankruptcy or insolvency, does not rank ahead of the subordinated loan. That's for the reason I explained in opening, which is a policy embodied in Rule 2.88(7), namely that so far as creditors are concerned being kept out of your money affects you equally and that therefore you rank equally for statutory interest, irrespective of how your underlying debts ranked.
Picking up a point in a way that my learned friend Mr Dicker made, that's because companies go into insolvency other than out of choice. It's not the creditor's fault, it's not a subordinated creditor's fault, for example, that a company has gone into an insolvency process. It may not be "anything that the company can be blamed for", but certainly so far as

creditors are concerned, as between subordinated creditors and unsubordinated creditors, they are equally affected by the fact that their debtor company has gone into an insolvency process.
That is why we don't accept something that was said by my learned friend Mr Trower on the first day of his opening, Day 3, page 23 of the transcript, where he said that being kept out of your money is just as much a cause for concern for a subordinated -- sorry, I won't misquote him. He said:
"Being kept out of your money post-insolvency is just as much a cause for concern. Put another way, why should the interest lost be absorbed only if and to the extent it is sustained in respect of the pre-insolvency period? Being kept out of your money post-insolvency is just as much a cause for concern."
Our point is it is just as much a cause for concern for the subordinated creditor as the unsubordinated creditor.
That's why, when one is looking at the subordinated loan agreement, there's no commercial reason to presuppose that the subordinated creditor wishes to subordinate himself to the payment of statutory interest to the unsubordinated creditors.
So, having made that initial observation on the

directive, you can put bundle 5 away. I would like to address in reply the twofold question on the subordinated agreement. The first question is: is statutory interest a liability at all? If so, is it excluded under clause 5.2(a)?

My learned friend said in a discussion with the court, at page 17 of Day 3, that statutory interest was a liability of the company. I think there was a debate about what alternatives there were. Your Lordships may recall he said, well, it is either personal liability for the administrator or else it's a liability of the company. If there's no other choice, it must be a liability of the company. Then we came into a discussion about whether in fact it's a direction for payment out of a fund and some sort of trust obligation.

We say that it is not a liability within the meaning of the subordinated loan agreement because it's not payable or owing by the borrower. That's the definition of "liability" in the subordinated loan agreement. Perhaps if your Lordships -- you probably have the definition well in mind, but "liability" is defined as:

"Present and future sums, liabilities and obligations payable or owing by the borrower."

We say it's not a liability owing by the borrower. I will come back to explain a little bit more in detail

in a moment, by reference to the statutory scheme, why that is so.

We also do not accept that the trust fund analysis works. But in order to make this point good, you have to look in a little bit more detail at the statutory scheme for administrations than my learned friend did. So can I ask you, please, to take up the Red Book.

The main point I am going to make is that the structure of an administration and the structure of a liquidation is that the assets of the company remain the assets of the company but they are subjected to the statutory regime, either for administration or liquidation. The role of the administrator is simply somebody who manages the property of the company. He takes custody and control of the assets of the company in administration. When he ceases to be administrator, he just simply relinquishes control and in comes a liquidator who takes control.

So far as the direction is concerned under the statutory scheme, he is simply directed to do certain things as part of his statutory management of the company. The direction to pay statutory interest is a direction to him, as to what to do in certain circumstances with a surplus.

Just to give you a flavour of where I am going,

where the legislature wanted to impose a trust or a charge upon the assets of the company in relation to what the administrator has done, it does so specifically and it doesn't so in relation to statutory interest.

If we could just start with Schedule B1 to the Insolvency Act. Schedule B1 you'll find starts at page 249 of the Red Book -- sorry, I'm sorry.

LORD JUSTICE LEWISON: 267.

MR SNOWDEN: That's the wrong schedule. It starts at 267, I'm sorry. It is paragraph 1:

"For the purpose of this Act 'administrator of a company' means a person appointed under this schedule to manage the company's affairs, business and property."

You will see that we looked at the functions of the administration which are set out in paragraph 3.

LORD JUSTICE BRIGGS: Where is the passage you've just cited?

LORD JUSTICE LEWISON: 1(1).

MR SNOWDEN: 1(1):

"For the purposes of this Act 'administrator of a company' means a person appointed under this schedule to mange the company's affairs, business and property."

Then the purpose of the administration we know, we have seen this set out in paragraph 3. You can skip through to paragraphs 67 and 68, at page 279:

"The administration or a company shall on his appointment take custody or control of all the property to which he thinks the company is entitled."

Then, under 68, he manages:

"... its affairs, business and property in accordance with proposals ..."

Certain proposals that have been approved.

Again, turning through now to the cessation of administration, because although it has been talked of we haven't actually looked at how it happens, it can happen, for example, as set out in paragraph 79, where the court ends the administration on the application of an administrator. So under 79(1):

"On the application of the administrator of a company the court may provide for the appointment of an administrator of the company to cease to have effect in a specified time."

So he simply ceases to have effect. Or alternatively, for example, under paragraph 83, where you move from an administration to a creditors' voluntary liquidation, you'll see that it's done by the filing of a notice. Under sub-paragraph (6):

"On registration of the notice the appointment of the administrator in respect of the company shall cease to have effect."

So it is simply done by a cessation of appointment, cessation of control.

So there's no suggestion in any of the rules that what happens when an administrator ceases to be office -- that he does anything other than relinquishing control. He doesn't hand over, he doesn't transfer assets. The Act doesn't -- not in any legal sense. It is very easy to talk in terms of handing over or transferring. But in fact that's not what happens, it is just simply on the making of an administration order, the directors are ousted, control is exercised by the administrator. On cessation of the administration control is relinquished.

We then look at the situation in relation to a liquidation and for that we need to look quickly at Ayerst. If you keep the Red Book open but take up quickly bundle 1B. If you look at tab 53, in Ayerst, turning to the explanation given by Lord Diplock at the very foot of page 176 and the very top of 177, he says:

"Upon the making of a winding-up order ..."

Sorry, you'll see that there's a highlighted passage on section 176, where he sets out in background the making of a winding-up order brings into operation a statutory scheme for dealing with the assets of the company and that extends now to voluntary as well as

compulsory winding-up. He says:

"Upon the making of a winding-up order (1) the custody and control of all the property and choses of action of the company are transferred from those persons who are entitled under the memorandum and articles to manage its affairs on its behalf to a liquidator charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme."

So, again, custody and control is transferred. The liquidator is charged with a statutory duty of dealing with company's assets in accordance with the statutory scheme.

There's the well-known exposition that that is to be carried out, under little sub(iii), just below (c):

"In so far as may be necessary for its beneficial winding up and the powers are exercisable by the liquidator for the benefit of those persons only who are entitled to share in the proceeds of realisation of the assets under the statutory scheme."

That was a point I made earlier.

A CVL is no different, in terms of the concept, as Lord Diplock indicated.

You can put Ayerst away. You will see that where you have -- back to the rules. Where the rules want to make a specific provision, other than simply a cessation

of control and the assumption of control by a new office holder, in relation to any of payments that need to be made under the rules, they make expression provision if they want to create a trust. That you can see of paragraph 99 --

LORD JUSTICE LEWISON: Of Schedule B1?

MR SNOWDEN: Of Schedule B1. This is the paragraph, that's been much litigated about, which deals with the question of expenses of the administration.

So under paragraph 99, the paragraph applies where a person ceases to be the administrator of a company for whatever reason.

You'll see that, for example, under sub-rule (3), so paragraph (3):

"The former administrator's remuneration and expenses shall be charged on and payable out of property of which he had custody or control immediately before cessation."

And then are payable in priority to any security.

Again under (4):

"A sum payable in respect of a debt or liability arising out of a contract entered into shall be charged on and payable out of property of which the former administrator had custody or control immediately before cessation ..."

Et cetera.

So you'll see that where the consequence of something done by an administrator, or should have been done by an administrator, is the creation of any liability to expenses or one of the specified types and it's intended that there should be a charge on the assets of the company that were under his custody or control, the rules make very specific provision for it.

Obviously the point I make is that you don't see anything like that in relation to statutory interest. We say that there is nothing to suggest that Rule 2.88(7) is doing anything other than setting out a rule which an administrator follows in a specific circumstance in relation to a surplus which may have arisen on the payment of the proved debts. But what it doesn't do is to create some form of charge or trust binding a fund which is transmissible into the hands or enforceable as against a liquidator who simply assumes control of the company's assets after cessation of an administration.

LORD JUSTICE LEWISON: Could there be a situation in which a surplus arises in the course of an administration and the administrator decides to hand the company back to its directors?

MR SNOWDEN: Did you mean surplus in the sense of a surplus

under 2.88(7) after payment of proved debts?
LORD JUSTICE LEWISON: Yes.
MR SNOWDEN: The rule requires him, before applying the assets for any other purpose --
LORD JUSTICE LEWISON: Right.
MR SNOWDEN: -- to pay statutory interest. If he does nothing and simply pays the proved debts and then goes out of office, if there's a creditor who says, "Well, actually, there was a surplus from which I should have been paid interest", it would be for the creditor to bring proceedings against the administrator for breach of statutory duty. But there's nothing that requires the administrator affirmatively to pay statutory interest, although I am bound to say --
LORD JUSTICE BRIGGS: Then why would he be in breach of statutory duty if he --
MR SNOWDEN: The rule is simply predicated upon the -- it is very difficult to see, if there was surplus, that an administrator wouldn't then follow through and pay it. That's perhaps the presumption in the rule, that he would. But in fact the rule is simply drafted on the basis that it's the thing he must do with the surplus before he next applies it for any purposes.
LORD JUSTICE LEWISON: Right. But if he simply relinquishes control, as you put it, by one of these ways --

MR SNOWDEN: He's not applying --
LORD JUSTICE LEWISON: -- and the company goes back to its directors, that's the end of statutory interest, is it?
MR SNOWDEN: That's the way the rule appears to be drafted.
LORD JUSTICE BRIGGS: So the creditors would lose their contractual right to interest from the date of the onset of the administration, and they would lose their statutory right to interest thereafter because the administrator just gave the company back to the directors and the statutory right to interest wasn't a debt of the company or something the directors had to take any notice of at all?
MR SNOWDEN: It's certainly not a debt of the company and it's drafted as an obligation placed upon the administrator before he does anything else with the surplus.
But the point I am making is that it doesn't amount to a trust -- it's not a proprietary charge or anything else binding the assets of the company, which I think was the suggestion that was being made.
LORD JUSTICE MOORE-BICK: Could the creditors take any effective steps to stop the administrator resigning his powers before he's complied with the requirements of the rules?
MR SNOWDEN: The general proposition that I was going to

make in that respect is that where any creditor conceives that the office holder is breaching the statutory scheme -- and this is the next point I was going to make -- the remedy is not to sue the company. In other words, if a creditor maintains that they should be paid statutory interest and that the -- let's take the plain vanilla case of an administrator who having ascertained that there is a surplus then applies it for some other reason, some other purpose, paying his own administrator's fees and remuneration, for example. The remedy in those circumstances the creditor has is not to sue the company. The remedy in those circumstances is to bring a claim against the office holder for breach of statutory duty, either if he's still in office under the provisions that allow for challenges to the office holder's functions -- or in fact he's an officer of the court, so he's under the control of the court.
LORD JUSTICE LEWISON: Move from plain vanilla to chocolate chip, the administrator gives the company back to the directors at the time when there is a surplus and the directors decide, having received the company back, they're going to invest in a nice new piece of machinery. Why are they not bound by Rule 2.88(7) to pay the interest before they apply the surplus to the purpose of buying a nice new piece of machinery?

MR SNOWDEN: Because if the administration has ceased and Rule 2.88(7) has not been breached, then Rule 2.88 is of no -- it has no effect outside an administration. Rule 2.88 -- and this is the point we were going to come on to -- applies in an administration but it has no effect outside an administration.
If you go to Rule 2 of the Insolvency Rules, which is at page 702, you'll see that under Rule 2.1(1) there are three listed cases set out. They all concern the appointment of an administrator. Chapter 10, which includes Rule 2.88(7), applies in all those cases. But that is the scope of the application of Rule 2.88, when the appointment has ceased the rule has no effect.
This is the fundamental point we're going to come on to in relation to the parked point. Rule 2.88(7) simply applies during an administration, but once the appointment of the administrator has ceased it doesn't apply. What's more, it definitely doesn't apply in a liquidation, in a winding-up, because in a winding-up section 189 says what is to be done and exclusively what is to be done.
Certainly, in the chocolate chip example, if an administrator was deliberately taking the step of hading back a company with a surplus without paying statutory interest, I imagine a creditor might say, for

example, that that's not fulfilling the purposes of the administration order. The challenge, I suspect, would be the purposes of an administration order as set out are being defeated if you fail to take the step of paying statutory interest before handing back a company containing a surplus to its members. You haven't fully fulfilled the statutory purpose.

I can see the challenge would be mounted on that basis, I am sure -- or as an officer of the court. If it was thought he was doing so so as to frustrate the interests of creditors and handing back a surplus to members, there would be undoubtedly be a challenge.

But the point I am making for present purposes, going back to the subordinated loan agreement, is whatever the challenge the remedy is not to sue the company.

In a sense we've leapt ahead to the lacuna point, but the point I am making is that the remedy is not a liability -- you don't assert a claim against the company. It's not a liability of the company. The remedy is against the office holder and that you can see --

LORD JUSTICE MOORE-BICK: It's a remedy against the office holder in respect of his control over the assets of the company?

MR SNOWDEN: That's right, but it's a remedy for breach of his statutory functions --

LORD JUSTICE MOORE-BICK: When he performs his statutory function and does distribute the surplus he is distributing the company's assets, but you say there's no liability on the company to distribute the assets?

MR SNOWDEN: No, and I am going to show you -- I am going to hand up a case called HIH, which my learned friends have copies of, which shows there's a very well trodden path for pursuing office holders who misdistribute assets of a company in this way. It comes from cases usually in liquidations where, for example, liquidators fail to pay the preferential creditors ahead of ordinary creditors or fail to pay a creditor and distribute the surplus to members.

This was dealt with by David Richards J in the HIH case. I suggest you put it in bundle 5 again.

This is a case, as my learned friend Mr Trower reminded me before court, which went to the House of Lords. He has fond memories of that experience. But on this point the case didn't go further and I use it simply because it's a convenient recital of the relevant authorities.

You can see that they are set out at paragraph 115. The facts I don't think in a sense matter. It was to do

with a cross-border insolvency question of remission of funds between the UK and Australia. It's the cases that are set out between 115 and 121 which are of interest, because what they illustrate is that in liquidation -- and administration I say is no different, it's just somebody else has control -- the creditors who have rights don't have proprietary rights in the assets but they do have, and I am picking it up just at page 704 at J:

"... a personal right to the administration and distribution of the assets in accordance with the statutory scheme."

Then that position was explained by Millett LJ in Mitchell v Carter in terms that -- I just ask your Lordships to cast your eyes very quickly down. It will be very familiar.

At 116:

"If a liquidator causes loss to a creditor by disregarding his personal rights, for example by distributing assets without regard to a claim for which the creditor has proved in time or which has not been rejected, the creditor has a personal cause of action. He has a personal claim for damages against the liquidator for breach of statutory duty, certainly if there are insufficient assets available in the

liquidation to make good the default."

The position would be either you would -- if the insolvency process is still in play, you go to the court and say, "Look, your officer is misapplying the statutory scheme. Please will you direct him to apply the statutory scheme correctly". Or, if the assets have gone and he's out of office, you sue him personally for breach of statutory duty. But the one thing that you don't do, because it's just not a proper cause of action, is to sue the company for a failure to pay statutory interest because it's not the company's obligation. It's not the company's liability.

LORD JUSTICE MOORE-BICK: Your argument is that this is not a liability in the ordinary sense of the company, is that right?

MR SNOWDEN: Yes. It's not a liability in the sense of this subordinated loan agreement --

LORD JUSTICE MOORE-BICK: It's a different question.

MR SNOWDEN: In either sense.

LORD JUSTICE MOORE-BICK: Isn't it?

MR SNOWDEN: In either sense it's not a liability.

LORD JUSTICE MOORE-BICK: No, well, the question: is what did the parties to the subordinated loan agreement have in mind when they spoke of liabilities?

MR SNOWDEN: We would say, of course, they understood and

were using the concept of "liability" in exactly the way you would use it in an insolvency, given the requirements for subordinated loan agreements and also the references in the agreement to insolvency and the framework of the agreement. It's there, as everybody understands, to protect to some extent -- and the question is to what extent -- creditors in the event of bankruptcy or liquidation.

LORD JUSTICE BRIGGS: Mr Snowden, you said a few moments ago that the Schedule B1 -- the administration legislation, taking it in its broadest sense, if it is going to create any charge or trust over the assets in administration it does so in express terms. You took us to an example of the express reference to a charge to cover a previous administrator's expenses.

MR SNOWDEN: Or adopted contracts or --

LORD JUSTICE BRIGGS: Or whatever.

MR SNOWDEN: Yes.

LORD JUSTICE BRIGGS: Is it possible that the words of 2.88(7) are indeed apt words to create a Quistclose trust? What it says is:

"Any surplus remaining shall, before being applied to any other purpose, be applied in [one can say for the purpose of] paying interest on those debts ..."

Et cetera, et cetera, et cetera.

Generally speaking, where the owner of an asset transfers it to somebody else and states it shall only be applied for that purpose, so that the recipient is not free to use them for any other purpose, that would create a Quistclose-type trust, wouldn't it?

MR SNOWDEN: In general terms your Lordship is right if there's an obligation -- if somebody accepts a transfer of assets on those terms.

LORD JUSTICE BRIGGS: All I am saying is that those words are the very words of the creation of a Quistclose-type trust, aren't they?

MR SNOWDEN: In the context of a transfer, I think this --

LORD JUSTICE BRIGGS: Yes, between private persons.

MR SNOWDEN: It is, that's right, but it's --

LORD JUSTICE BRIGGS: Why shouldn't the same words when used in a statute, it being, I think we all agree, common ground that Parliament can provide whatever it wants to provide about these assets, be taken as having a similar consequence?

MR SNOWDEN: We say not because if Parliament had actually intended to create a trust-type obligation, i.e. a Quistclose-type obligation, we say it would have done so explicitly.

LORD JUSTICE BRIGGS: It wouldn't have to say a Quistclose trust.

MR SNOWDEN: No --

LORD JUSTICE BRIGGS: Why doesn't it just use the words that the law says creates a Quistclose trust?

MR SNOWDEN: It would have used the technique which it uses in Schedule B1 to the Insolvency Act.

LORD JUSTICE BRIGGS: A Quistclose trust isn't the same as a charge.

MR SNOWDEN: But where the --

LORD JUSTICE BRIGGS: I quite accept that in a sense a charge has to have somebody who can enforce the charge. But a Quistclose trust is just -- it used to be thought of as a sort of purpose trust and for this purpose it is probably a convenient way to look at it.

MR SNOWDEN: We say that that's a -- to suggest that Parliament is intending, by these words, to segregate out of the assets of the company in the course of this insolvency process a particular fund --

LORD JUSTICE BRIGGS: No, it doesn't work that way, segregation. The purpose affects the whole fund. No part of the fund can be used until that purpose has been complied with.

MR SNOWDEN: I think we would say that if Parliament had really been intending to create a trust obligation of that sort, binding presumably --

LORD JUSTICE BRIGGS: Anyone into whose hands the fund

comes.

MR SNOWDEN: -- on the company.

LORD JUSTICE BRIGGS: Yes, the company, its directors, the liquidator.

MR SNOWDEN: It would have done so by far more explicit wording than this.

LORD JUSTICE BRIGGS: Okay.

MR SNOWDEN: With great respect, your Lordship is looking for a solution and working back to the words, as opposed to taking the words --

LORD JUSTICE BRIGGS: I was really just bouncing off your point about you have to look to see the words used to see if a trust or a charge has been created.

MR SNOWDEN: Yes. We say that you start with the words and -- as the judge said in the judgment, when he was looking at the lacuna point in fact -- they come in context in a series of rules dealing with the administration and how to -- as it were, constructing part of the administrator's statutory scheme.

It's the scheme that the administrator follows in exercising the management, custody and control of the company's assets. We say it's naturally read as a direction to him as to how to perform his functions. They are not words that strike one at all as either creating a charge over a fund -- and I've indicated

where Parliament wanted to do that it was perfectly capable of doing so explicitly as a consequence of what the administrator did -- nor in fact the words of a trust.

You only ever find a trust, even a Quistclose trust, on the assumption that there is some intention behind it. We say that Parliament just doesn't express that sort of intention in this sort of wording.

LORD JUSTICE BRIGGS: Okay.

LORD JUSTICE MOORE-BICK: Your submission then is that Parliament did intend that if the direction were not complied with by the administrator, there would be no remedy?

MR SNOWDEN: No.

LORD JUSTICE MOORE-BICK: Possibly a personal remedy against the administrator.

MR SNOWDEN: It is part of the statutory scheme. If the administrator declined to follow this, the remedy that a creditor has is to come to court under the Insolvency Act and challenge the actions of the administrator or --

LORD JUSTICE MOORE-BICK: He might simply have done whatever he has to do to resign his powers. He may or may not be able to do that without the court's consent.

MR SNOWDEN: In which case, if he breached his statutory

duty and somebody has suffers loss, then the cases I was in the process of showing you from HIH indicated that he can be sued for breach of statutory duty and made personally liable. But on no footing is there any suggestion that the remedy is a remedy to sue the company claiming that it's the company that's liable in debt.

One answer I suppose to the trust obligation is that your remedy, even if it was against the company, would not be, as it were, to enforce a liability of the company or a debt of the company, it would be to say, "You, the company, are in possession of a trust fund, you are a constructive trustee, you must give effect to the trust obligation". But it's not a debt or liability.

LORD JUSTICE LEWISON: Suppose for the sake of argument that you're right and it's not an obligation of the company, and suppose that the administrator pays the statutory interest, he pays it out of assets to which the company continues to have title, does he not?

MR SNOWDEN: Yes. The company has -- there are two points. The first is, and perhaps --

LORD JUSTICE LEWISON: Why isn't it paid by the company?

MR SNOWDEN: Because the company has title -- in a liquidation, where interest is paid, the company has

the barest legal title. In a distributing administration, although I can't point you to an authority like Ayerst, I suggest it must be the same. The company has just the barest of legal title.

LORD JUSTICE LEWISON: Yes. In a private trust, for instance, it is the trustees who will pay whatever the trust fund has to pay.

MR SNOWDEN: But test it another way, if statutory interest is payable it's payable irrespective of whether the company had contracted for any interest to be payable.

LORD JUSTICE LEWISON: Yes.

MR SNOWDEN: It's entirely separated from any obligation which the company assumed to the creditor.

LORD JUSTICE LEWISON: Yes. I am assuming in your favour that it's not an obligation of the company, but the definition extends to a sum which is payable by the company. What I am putting to you is, if it is paid, it is paid out of the company's assets by somebody acting as the company's agent. So it is, I would suggest to you, paid by the company and since that's the way in which statutory interest is paid it is also payable by the company, whether or not it's an obligation.

MR SNOWDEN: It is payable out of the assets which are subject to the statutory trust in which the company has no interest of any significance. It's the bare legal

title. In ordinary parlance one would not, I think, say, with respect, that that is anything paid or payable by the company.

LORD JUSTICE LEWISON: I don't see why you say that. Executors would have no interest in the underlying estate but they have to pay funeral expenses and the like. That is what is payable by them as trustees.

MR SNOWDEN: Well --

LORD JUSTICE LEWISON: That's a bad example because they are executors not trustees, but a trustee of a private trust fund --

MR SNOWDEN: Is not payable by them in the sense that if you asked the commercial man: is that their obligation, are they making the payment? You would say, no, they are not they are paying it from the trust fund. They are paying it from assets which don't belong to them which are impressed by a trust -- or a statutory trust in this particular case, impressed by the statutory scheme. They aren't paying, not in any meaningful sense, because they no longer own the assets.

I think your Lordship put it to me in opening, whose name is on the chequebook? Well, the answer is interesting. It will either be the company (in administration) or else it may be the administrators acting on behalf -- as administrators of, if they have

had to open separate bank accounts because frequently the company's bank accounts are frozen. But in a sense that sort of obscures the real question. The real point is that the liability is being discharged from the assets which are subject to the statutory scheme.

LORD JUSTICE LEWISON: Yes, I understand.

MR SNOWDEN: So we do say if you're asking what the draftsman or the commercial minds behind the subordinated loan agreement would have understood by that concept, they would have said, "No, it's only payable by the company if it comes from the assets of the company". Once they have been subjected to the statutory trust, that's no longer the case.

The references to various statutory provisions, I think it was mentioned by Mr Trower, for example, the creditor can claim against the administrator for unfair harm under paragraph 74. In any event administrators and liquidators are officers of the court who can be directed to comply with the statutory scheme or sued personally after the event if they have misapplied assets.

So we say that in the ordinary sense it is not a liability of the company.

If I am wrong on that, we nonetheless go on to say that it is excluded under clause 5.2(a). My learned

friend Mr Trower, his interpretation of the phrase in 5.2(a), that's an obligation not payable or capable of being established or determined in the insolvency of the borrower, he said that was only intended to exclude something for which a creditor has no remedy in the insolvency proceedings.

I think he also said that would -- he focused on non-enforceable debts. In essence what he's also saying is anything which fell to be paid during the insolvency process, that is from the beginning to the end, fell outside that exclusion and therefore fell to be paid ahead of the sub debt.

We say that that doesn't do full justice or it doesn't give full effect to the words of that clause 5.2(a), because what my learned friend was effectively simply saying is that anything which was payable during the period of the insolvency is ahead of the subordinated debt. By saying that he fails to give effect to the other words of the clause "capable of being established or determined in the insolvency". He gives no meaning to "capable of being established or determined" and therefore no meaning to the clause of the whole.

What we obviously say is that when one looks at the origins of this clause -- and I took you to the origin,

my learned friend didn't dissent from the origins of these clauses. Against the background of the directives we say that the draftsman was focusing on the insolvency process and that this phrase "as a whole" is plainly a phrase which connotes debts which are either presently payable or, if not presently payable because they are prospective or contingent, are capable of being established or determined in the insolvency of the borrower. So it is a phrase which is designed to capture the concept of provable debts.

My learned friend's submissions that it's more limited than that, much more limited than that, and all that 5.2(a) is trying to exclude are debts such as foreign revenue claims or statute-barred debts, with respect, gives a very odd state of mind to the draftsman. It presupposes the draftsman is focusing on a very, very narrow category of claims, which it's not easy to see why alone those types of claims should be excluded. With respect, it's much more likely that the draftsman is concentrating on the debts which would rank, using the word from the directive, for payment in an insolvency. Yes, in England we call it a process of proof. That's a technical expression. But it is a process which is perfectly captured by the expression "capable of being established or determined".

That gives full meaning to the words of the clause, because my learned friend really didn't, with respect, give any meaning to those words. His formulation would simply ignore them, because on his formulation you could just as easily strike them through and achieve the same result, because obviously debts which are unenforceable are not payable.

Turning to non-provable claims, we say obviously non-provable claims are excluded. They fall below the subordinated debt, i.e. they are exactly the sort of claims which are contemplated by the exclusion in clause 5.2(a).

By definition they're not payable at the commencement of the bankruptcy or the liquidation, because if they were they would be provable. They would either be payable or capable of being established or determined. They are not capable of being established or determined in -- and the word is "in", not "during" but "in" -- the insolvency.

The exchange that took place between my learned friend and my Lord Lord Justice Moore-Bick, and then I think others joined in, about how a claimant with a non-provable claim would have to go about getting paid, we say demonstrates very well why non-provable claims are not payable in the insolvency within the

meaning of the subordinated loan agreement, because they would have to be sued for outside the process of insolvency, if you like in the Queen's Bench Division rather than the Companies Court. True enough the Companies Court may say, well, for the purposes -- if it's a provable claim, then the Companies Court can use a normal process of a claim form with pleadings to resolve issues that arise, but they would have to be provable. But if it's not a non-provable claim there's just no question of that.

If it's a non-provable claim the only place that non-provable debt comes is after the statutory scheme has been followed and the non-provable claimant simply has to attempt to execute any judgment which he may obtain ahead of the remission of funds to members.

We saw a number of cases in which that type of process was allowed for. But what was candidly accepted by, for example, my learned friend Mr Dicker, was that there was simply no mechanism, no statutory process, certainly no process in the Insolvency Act or Rules, which prescribes how the court supervising this insolvency process deals with non-provable claims. That's because they're not part of the insolvency process. They may fall to be dealt with but not in the insolvency, and those are the words in the subordinated

loan agreement.

They fall to be dealt with in spite of the insolvency process. They can't interfere with the pari passu distribution and the other facets of the statutory scheme. They have to come after, as the judge said himself, it has been exhausted.

No authority has been cited to you to support the proposition that non-provable claims find any mechanism by which they can be dealt with as part of the statutory scheme. Everything which you have seen, T&N and any other case that you've seen, suggests that they take their place outside the statutory scheme and creditors will have to take their chance or the court may have to find some sort of mechanism. But whatever it is, it's not in the insolvency.

LORD JUSTICE MOORE-BICK: Yet on the ranking indicated in Nortel they come above members, distribution to whom is part of the statutory scheme?

MR SNOWDEN: That's right.

LORD JUSTICE MOORE-BICK: So how does one fit that bit --

MR SNOWDEN: Yes, it's an important distinction in a sense that they have rights which they can assert which, as it were, perhaps intervene, if you like. I used a rather clumsy expression perhaps in opening of somebody sticking their finger into the waterfall and diverting

some of the water. But in reality it is that. If there's a waterfall in the insolvency, it provides undoubtedly for payment of a number of things and then for the surplus to be distributed to the members, but it nowhere tells you how to deal with non-provable claims.

LORD JUSTICE MOORE-BICK: No.

MR SNOWDEN: If non-provable claimants have their right to assert, they assert it by, as it were, grabbing and extracting from that waterfall the assets which were otherwise being dealt with as part of the waterfall.

LORD JUSTICE BRIGGS: That's a very anarchic picture, if I may so respectfully --

MR SNOWDEN: I hesitate to describe my learned friend --

LORD JUSTICE BRIGGS: -- compared to the picture given in Humber Ironworks, which is it all turns out to be solvent and the duty of the office holder is to go on and -- is to continue to apply Lord Neuberger's waterfall, of course that was only referred as such so much later, for the purpose of ultimately paying the remaining assets to whoever is entitled to them.

MR SNOWDEN: With respect --

LORD JUSTICE BRIGGS: In other words, it is part of the liquidator's duty rather than just an anarchic situation in which people can have a shot before the members go away with residue.

MR SNOWDEN: But, with respect, where, I ask, anywhere in the Act or Rules, do you find --

LORD JUSTICE BRIGGS: I recognise the difficulty, that the mechanism is not spelt out.

MR SNOWDEN: It's entirely absent. In fact one could say that the actual responsibility of the liquidator, it may be to do one thing and non-provable claimants have a desire to prove their claims in an adverse fashion.

For my purposes, when we're looking at the subordinated loan agreement, and the wording is "capable of being established or determined in the Insolvency", capital I, meaning, as we discussed in opening, an English statutory process, you ask, well, what do people mean by that? I suggest respectfully they don't mean whatever process, anarchic or otherwise we're describing, by which people who don't feature in the statutory scheme assert rights and claims to assets.

It is important because when we're dealing with subordination, as I said at the outset, it is very important not to get into the mindset of thinking about this, as we have drifted to, as a competition between a subordinated creditor and the members, because that's what has been happening in these last two or three minutes. We've inexorably been drifting to that point of saying: isn't it all terrible? It's this

competition between the members and these non-provable creditors.

Of course Humber Ironworks says you should pay your non-provable interest -- sorry, this is the argument that is put. I am not making that my submission, let me make this perfectly clear. But it is said, "Oh, look, Humber Ironworks says you should pay these non-provable claims before you pay your members the surplus, creditors before members". But we have drifted to that and --

LORD JUSTICE LEWISON: You say you are creditors.

MR SNOWDEN: Exactly this problem --

LORD JUSTICE LEWISON: You are creditors, you are subordinated. The extent to which you are subordinated depends upon the interpretation of liabilities and 5.2(a).

MR SNOWDEN: From the perspective of a subordinated loan agreement.

LORD JUSTICE LEWISON: Yes.

MR SNOWDEN: The perspective that I have been answering for the last few minutes is the perspective which is infected by the concept of competition between creditors and members. I said that's the trap the judge fell into and I urge the court not to fall into the same trap, because this is all to do with one creditor agreeing to

stand behind other creditors.

LORD JUSTICE MOORE-BICK: Is it possible that the duty on the liquidator to pay liabilities owed to non-provable creditors is implicit in the statutory scheme of liquidation and the function of a liquidator and, although there's no machinery to deal with it, it can be discerned as something, as I say, which is implicit in the whole structure?

MR SNOWDEN: (Pause). I can see that the court may think that in certain circumstances it may be an appropriate thing for a liquidator to involve himself in, and I put that in a very natural way, in the sense of facilitating payments to be made to people who have established their non-provable claims in the way that David Richards J described. Nobody is suggesting, for example, that the administrators are acting in any way wrongfully in conducting Waterfall II --

LORD JUSTICE BRIGGS: Why should they have to establish them by litigation? Assume that it is plain as a pikestaff that there is a non-provable claim. Why should they have to go off and get some judgment for it at goodness knows what expense? If it is obvious as between them and the liquidator that they are entitled ahead of the members, why isn't it his duty just to pay them?

MR SNOWDEN: But he's is not paying it in paragraph -- I am

not going to repeat --

LORD JUSTICE BRIGGS: I quite understand your point. You say he's not paying as part of the statutory scheme.

MR SNOWDEN: In the insolvency --

LORD JUSTICE BRIGGS: I am just looking at your explanation that the right in every case depends on going and getting a judgment. You're only going to get to go to court if there's a dispute about it.

MR SNOWDEN: But I am sort of following, with respect -- the judge, David Richards J, has a long history in this territory.

LORD JUSTICE BRIGGS: I know.

MR SNOWDEN: Not just T&N, because he was in R-R Realisations as well. He's grappled with this problem over a number of years, going back to when he was a junior.

LORD JUSTICE BRIGGS: Yes.

MR SNOWDEN: Of all the people you would have thought would have a fairly sympathetic approach to the idea that actually it was part of what an office holder could do, he might be the person who would tumble to that. Yet he is the one person who says, "No, this is isn't part of the statutory scheme. If this is going to happen it has to happen by the non-provable creditor asserting a claim, getting the stay lifted and getting execution".

I do urge upon your Lordships not to mix the logic with, as it were, convenience -- not to mix the structure of the Act and how it would have been looked at from the perspective of the SLA with undoubtedly convenient mechanisms.

My Lord, I was asked at 11.30, by the shorthand writers, to have a break.

LORD JUSTICE MOORE-BICK: I was going to suggest that might be a convenient moment. So thank you. We'll rise for five minutes.

(11.34 am)

(A short break)

(11.39 am)

LORD JUSTICE MOORE-BICK: Yes, Mr Snowden.

MR SNOWDEN: My Lord, just a final point on subordination. Why, my Lord Lord Justice Lewison said, does it matter whether LBI to LBHI2 can prove? Before I answer the question, just reminding you, we say it can and that the analysis we've set out, and we refer to the extract from Professor Goode's book, indicates that we can and it's contingent claim.

We also remind you although it's not specifically mentioned by INPRU that we could prove -- it is mentioned by GENPRU but not INPRU. We do adopt the point that's made that if you can petition, there's

actually not a great deal of point petitioning if you can't prove.

My learned friend said, and where his submissions boil down was, that if proving was going to affect the subordination then we couldn't do it. With respect to my learned friend, that is bootstrapping. The simple question is if the subordination provision doesn't prevent you from proving, and we say it doesn't, then you can prove.

LORD JUSTICE LEWISON: Quite. The question is what can you prove for?

MR SNOWDEN: Yes.

LORD JUSTICE LEWISON: You say you can prove for a contingent debt and that leads on to the next question, what are the contingencies?

MR SNOWDEN: The contingencies are satisfaction of payment --

LORD JUSTICE LEWISON: That's where we came in.

MR SNOWDEN: And that's an analysis we say is fine. But what we do say is that the fact that we can prove supports our interpretation of the extent of the subordination, not least because of statutory interest, because statutory interest is, at the risk of repeating myself, payable --

LORD JUSTICE LEWISON: Irrespective of rankings.

MR SNOWDEN: -- irrespective of rankings to all people who have proved. That is a very clear steer, we say, as to where we are positioned in the waterfall at 5B, I think we came out to figure it out, rather than 7B or whatever it is.

It is said that proving is an important signpost to answer the actual question of subordination.

I think unless your Lordships have anything more for me, that's all I was going to say in reply on subordination. To some extent I've already traversed a little bit of the ground which I was next going to cover which is Rule 2.88(7) and how it works. We say the judge was right, in relation to interest during an administration, that if the company goes into liquidation statutory interest is not payable by the liquidator for the period of the administration. In other words, if it is going to be paid it should be paid by the administrator. In many ways, that's the clear and obvious intent of the rules.

So the problem only arises if the administrators do not pay statutory interest.

The basic submission that was made to you by my learned friend was that Rule 2.88(7) has a life of its own independently of the duration of the administration. We say that just simply isn't the structure of the

rules. I have already shown you Insolvency Rule 2, which sets out that the part of the rules in which you find Rule 2.88 applies in relation to the appointment of an administrator. We say it is obvious that where the appointment has ceased, the administration has ended, Rule 2.88(7) has no further life.

I mentioned before the break, and I'll make it good now, that when you look at liquidation it's also clear that there is one regime that applies in liquidation and tells the liquidator who then has control of the affairs and property of the company how he is to act. That is section 189.

Section 189(1), page 100 of the Red Book:

"In a winding-up interest is payable in accordance with this section on any debt proved in the winding up, including so much of any debt as represents interest on the remainder."

That is, I respectfully suggest, a very clear statutory indication that this is the regime that applies in the winding up. There is no other.

Rule 2.88(7) is not part of the statutory scheme which the liquidator takes control of the -- sorry, on which terms the liquidator takes control of the assets of the company.

The key, as we all know, is that when there were

changes made to the insolvency legislation to deal with the moving of a company from administration to liquidation or from liquidation to administration, this is something that came in as a possibility in the Enterprise Act 2002, when administration was made a distributing process potentially and it became possible to move from one to the other. They did not change section 189. It could have done but didn't. It didn't change when they made subsequent changes to the Insolvency Rules, which, again, tidied up some problems which had been spotted.

So there's no indication, throughout any of the legislative history or in any of the legislative wording, that section 189 is to have any other meaning than that which it bears on its face. It is simply intended to be the regime by which a liquidator pays statutory interest from the surplus which has arisen once he has paid proved debts.

Really that is the submission that the judge accepted and we say he was entirely right to accept it.

There are two separate regimes. The fact that there are two separate regimes, and that that had been appreciated by the draftsman, can be seen from the provision in relation to proofs, i.e. it's the provision of the Insolvency Rules that indicates that a creditor

proving in the administration is deemed to have proved in the subsequent liquidation.
LORD JUSTICE MOORE-BICK: Does the statute deal with the crossover? Does the statute deal with the crossover from administration to liquidation?
MR SNOWDEN: No, it's dealt with in --
LORD JUSTICE MOORE-BICK: Just in the rules.
MR SNOWDEN: It is dealt with in Schedule B1, which we saw.
LORD JUSTICE MOORE-BICK: Right.
MR SNOWDEN: It is Schedule B1 to the Insolvency Act which makes the provision --
LORD JUSTICE LEWISON: When moving from one to the other
MR SNOWDEN: -- when moving from one to the other. That's essentially where you find the mechanism. I showed you the mechanism a little earlier in Schedule B1 from moving from one to the other. So they did amend the Insolvency Act, by putting Schedule B1 there to make it possible, but they didn't change section 189.
So far as section 189 is concerned, as far as a liquidator is concerned, interest is only payable, obviously, as we've seen, from the commencement of the liquidation and that's it.
We say that that, and the combination of the rule that says if you have proved your debt in the administration you are deemed to have proved it in the

winding up, means there is a unitary regime for payment of statutory interest in a liquidation. There isn't a bifurcated regime, as my learned friend would have you agree, namely that there's one set of creditors who have proved their claims in the administration who continue to have rights under Rule 2.88(7) and then another set of creditors who proved their claims in the liquidation and therefore are governed by section 189. There is no such bifurcation in the course of a winding-up. It's a unitary regime, which is what you would expect.
The judge made a couple of quite telling points -- I think he said himself very telling points, those were his own words -- at paragraph 125.
The first of those which I would like to remind you of in paragraph 125 of his judgment is where he says, four lines, in "Secondly". Perhaps your Lordships would just like to remind yourselves of what he said under the heading "Secondly" in paragraph 125 and then I will just illustrate what he means. (Pause).
The point the judge is making there is suppose the first time that the question of what to do with the surplus is asked is in the liquidation, that the first time one actually finds that there is a surplus after payment of all proved debts is when the liquidator pays all proved debts. He is told, under section 189, to

apply that surplus in the way set out in section 189 and for no other purpose.
My learned friends would have you believe that what he's actually also obliged to do, though, is to apply the surplus in the way prescribed in Insolvency Rule 2.88(7), because they say Rule 2.87 continues for some creditors. But, with respect, that's simply an inconsistency that they can't explain and the judge rightly pointed that out.
The second point which the judge mentioned at the end of paragraph 125 -- again under his heading I think "Fourthly". He points this out, he says if an administration is not a distributing administration, in other words if it's a very plain vanilla and in fact probably the situation that the draftsman of the legislation had primarily in mind of a company that went through an administration process to achieve a more beneficial realisation of a trading business, but then decided not to make a distribution but to put the company into liquidation and for the distribution to be made in the liquidation -- there may be advantages to doing that, there may be remedies available in a liquidation not available in an administration. Disclaimer is an example; administrators can't disclaim, liquidators can. So there may be a need to go into

liquidation.
In a very plain vanilla situation, where there is no call for proofs of debt in an administration, the only time that proofs of debt are called for is in the liquidation. The only time that one can ever ascertain whether there is a surplus after proved debts are paid is in a liquidation. Nobody is suggesting, not anybody in this court is suggesting, that anybody gets paid interest for the period of the administration. That's conceded, everybody accepts.
So, that on any view, Parliament has left as the way the Act works.
LORD JUSTICE BRIGGS: While at the same time being deprived of their contractual interest, even if the liquidation cut-off date is later than the administration cut-off date. You're saying nobody contends otherwise, but --
MR SNOWDEN: Well, in this case --
LORD JUSTICE BRIGGS: -- I am just --
MR SNOWDEN: In this case, on your Lordship's reasoning in Nortel, the proof of debt in the liquidation would I think --
LORD JUSTICE LEWISON: Allow interest up to the liquidation.
MR SNOWDEN: Allow interest up to the date of liquidation.
LORD JUSTICE BRIGGS: Would it, because of 4.93? It would if you only looked at --

MR SNOWDEN: Sorry, that's --
LORD JUSTICE BRIGGS: -- section 189.
MR SNOWDEN: That's the point that's being put, I think, by my learned friends. They are saying that's the argument that is based upon Nortel.
LORD JUSTICE BRIGGS: Yes.
MR SNOWDEN: Your Lordship's ruling in Nortel. I am going to come on to 4.93 in a moment.
LORD JUSTICE BRIGGS: I am just sort of --
MR SNOWDEN: Sorry --
LORD JUSTICE BRIGGS: -- putting icing on your vanilla point.
MR SNOWDEN: -- I'll be careful what I'm arguing.
LORD JUSTICE BRIGGS: You say nobody has suggested any way around the lacuna which appears to arise if you have a simple non-distribution administration followed by a liquidation, which is that the creditors who prove for the first time in the liquidation have their contractual right to proof for interest cut off at the administration date under 4.93 --
MR SNOWDEN: Correct.
LORD JUSTICE BRIGGS: Get no interest during the administration period.
MR SNOWDEN: Correct.
LORD JUSTICE BRIGGS: And then only recover interest from

the onset of the liquidation.
MR SNOWDEN: Correct.
LORD JUSTICE BRIGGS: Under section 189.
MR SNOWDEN: And that is the statutory scheme. If you are going to submit, as I suspect my learned friend is asking you to do, to a temptation to start writing things into the statute -- because I am going to submit to you that's exactly what he's trying to get you to do. This is exactly the exercise that my Lord Lord Justice Briggs refused to do in Nortel at first instance.
LORD JUSTICE BRIGGS: Yes.
MR SNOWDEN: I.e. this isn't correcting a drafting mistake, this is writing stuff in. Why not start writing it into that situation as well? You just can't do it, with respect.

The Act is perfectly plain and nobody has suggested that there is any alternative solution to deal with that plain vanilla scenario. Once that is accepted, with respect my learned friends' argument must vanish.

On Nortel, my learned friend -- we made the point in the skeleton, the judge made it in the judgment. You have heard no contrary argument.

Actually just pausing for a second and dealing with the Nortel point before I go on to the parked point that

arose during the course of argument. In Nortel at first instance Lord Justice Briggs set out, we say very clearly, the parameters and limits of the ability of the court to start rewriting bits of the statute and, for reasons which we say were very similar to the current situation, declined to engage in the exercise and we say rightly so.

The reference in Nortel is 1C, 88, and the relevant paragraphs are at paragraphs 115 to 123. I will take your Lordships to it, if you would like to just briefly see it, but I suspect this may be fairly familiar territory. It is 1C, tab 88. It is between 115, the reference -- this was my learned friend Mr Dicker taking on the challenge of asking for the statute in effect to be rewritten or the rules to be rewritten to correct what was thought to be an obvious mistake.

There's reference to Inco, which is pretty well known, and then Lord Justice Briggs declined to accede to that invitation at paragraph 116, and set out a number of reasons. Some of them we say are particularly relevant and pertinent here; particularly 117, where the conclusion was that in that respect:

"This is not a question ..."

I am just reading at the end of paragraph 117:

"The conclusion that the omission of any amendment

was a mistake derives from the appreciation of the purpose behind the amendments to the rules as explained by the explanatory note."

This was a situation where Parliament had said in an explanatory note what it was trying to achieve. The question was, well, if it was tying to achieve that it should have made some additional amendments. The mistake was said to be not to make the additional amendments. Lord Justice Briggs said:

"This is not therefore a question of correcting a drafting mistake in an amendment actually made, but rather the insertion of a whole new and important provision which is quite simply not there."

Similarly, in 120, pointing out that:

"There is a subtle dividing line between dealing with drafting mistakes by construction, which is a task for the court, and dealing with them by subsequent amendment, which is a task for the legislature, and in my judgment the present task falls clearly on the legislature side of that dividing line."

We do pray those in aid here, because what in effect my learned friends are trying to do is trying to give Rule 2.88(7) a life after it is plain it has no life in a process in which it has no life. They are actually trying to plug what they really see is the problem,

which is the absence of any provision for payment of administration interest --
LORD JUSTICE BRIGGS: Period interest, coupled with a disapplication of any contractual right.
MR SNOWDEN: Yes.
LORD JUSTICE BRIGGS: The proof of the contractual right.
MR SNOWDEN: What they are in reality complaining about is section 189 does not include a requirement to pay interest to creditors for the period of the preceding administration. That's what they are really complaining about.
LORD JUSTICE BRIGGS: Or that 4.93 takes it away, takes away the contractual right.
MR SNOWDEN: Yes. But the point we're making is that this is Parliament that has had many occasions to look at this and if it had wanted to amend could have done so and hasn't. This isn't a question of construing existing pieces of legislation to try and achieve a result. This is actually effectively trying to amend section 189 to write in what they would dearly love to be there, namely a direction to the liquidator, who is the person who has a surplus after payment of proved debts, to pay statutory interest, sorry for the period of the preceding administration and it just isn't there.
LORD JUSTICE LEWISON: Apart from anything else I would have

thought that Inco can only apply to a mistake made in the legislation when it was introduced. There was no mistake in section 189 when it was introduced.
MR SNOWDEN: No, that's why I am saying it's a writing in. They're having to try to write something in, rather than correct a mistake. That's exactly right, my Lord.
LORD JUSTICE BRIGGS: It could be said that one might try and evade that by looking rather more closely at 4.93 --
MR SNOWDEN: Which is where I will go in a moment.
LORD JUSTICE BRIGGS: -- where you will no doubt go because, if you like, for those creditors who had contractual interest running during the administration period, you could say, well, they are rotted up because section 189 doesn't put statutory interest instead. The real reason they are rotted up is because they had contractual interest taken away by 4.93.
MR SNOWDEN: The problem that has come about in relation to 4.93 -- we can put away Inco. I think your Lordships have my point on that.
LORD JUSTICE MOORE-BICK: The scheme is that a debt which has been proved in the administration, in this case at some antecedent time, is treated, is it, as having been proved in the liquidation at the time when the liquidation has obviously commenced rather in a sense antedating the proof in the liquidation?

MR SNOWDEN: It is simply proved in the liquidation. Then, for the purposes of deciding what it is payable in respect of the proof, you look at the liquidation --
LORD JUSTICE LEWISON: It is has been paid, in full, then what? Doesn't Wight v Eckhardt say there isn't a debt anymore? There's just nothing left of the debt.
LORD JUSTICE BRIGGS: I think you can't prove.
MR SNOWDEN: This is where we do get to a difficulty on 4.93 because your Lordship is rightly assuming -- I was going to come on to this but I will deal with it now. In the course of the debate that you had with my learned friend on this, you did put that proposition, namely, let's suppose that a payment is made in the administration of the amount of the principal of the debt.
LORD JUSTICE LEWISON: That's I think the premise that we're working on --
MR SNOWDEN: Right.
LORD JUSTICE LEWISON: -- that there is a surplus.
MR SNOWDEN: Except it will come as some little surprise, perhaps, for you to know that what is actually being contended in that respect, for example, in Waterfall II, is that that payment isn't actually payment of the debt, but can be appropriated --
LORD JUSTICE BRIGGS: Under that funny old case, the name of which I have forgotten, that begins with B.

MR SNOWDEN: Bower v Marris.
LORD JUSTICE BRIGGS: Yes.
MR SNOWDEN: To payment of interest first rather than principal, so as to leave the maximum amount of the principal outstanding so as to allow people then, no doubt, to continue claiming interest.
So the solution that my Lord put, ingenious although it is, doesn't necessarily solve the problem.
LORD JUSTICE MOORE-BICK: That solution runs into difficulties with the notion of the surplus to pay interest, because that provision presumably seizes on the assumption of what has been paid of the debt, not something on account of interest.
MR SNOWDEN: I am not in Waterfall II, either personally or corporately, and therefore I am, in a sense, in others' hands who are better placed to tell you what has been reserved by David Richards J. I am reliably informed that that issue was raised, but if somebody tells me it wasn't, then I will ...
MR DICKER: My Lords, my friend's information is reliable in the sense that the issue was raised. His description of the issue and the argument wasn't. My Lords, it would be difficult to explain further without taking up more of your time.
LORD JUSTICE MOORE-BICK: Don't worry. Thank you. The

reason I raised what may seem a rather foolish question is because it seems to me that in a way the critical words of 1.89(2) are "since the company went into liquidation". It made me wonder whether there was the notion that the proof in the administration counts as proof in the liquidation gave rise to any sort of retrospective commencement of the liquidation for these purposes. That may be too imaginative. It probably is.

MR SNOWDEN: I fear it is, in the sense that there's no doubt that one -- certainly too much in it for me. There's no doubt at all that if you prove in the administration you are deemed to have proved in the winding up. The direction, though, that is given to the liquidator, or the provision in section 189, is it is in respect of the periods during which "they" have been outstanding -- that is the debts.

LORD JUSTICE MOORE-BICK: Yes.

MR SNOWDEN: Since the company went into liquidation.

LORD JUSTICE MOORE-BICK: Exactly. It's those words, isn't it?

MR SNOWDEN: The timing period is undoubtedly tied to the debts, not the proof, and it's undoubted -- it is since the period --

LORD JUSTICE MOORE-BICK: Yes.

MR SNOWDEN: -- that they have been outstanding since the

company went into liquidation. Hence my Lord Lord Justice Lewison's point, what if in the administration the proved debts had been paid in full? Does then the prohibition in Rule 4.93 on paying interest or the restriction bite? I can see the argument, which may provide some answer in a particular case, subject to this other point, as to which at the moment it's just not an argument that has been addressed. It was raised but argued differently in front of David Richards J, by the sound of it.

I think all we're trying to say is there are very, very deep waters lurking around here --

LORD JUSTICE MOORE-BICK: That's an in terrorem argument, isn't it?

MR SNOWDEN: I think it is only echoing --

LORD JUSTICE MOORE-BICK: That's step into the water, it's terribly deep.

MR SNOWDEN: It is an echo of what my learned friend Mr Trower said to you -- or perhaps it was Mr Dicker -- Mr Dicker, in fact, when he was telling you a little bit of what was going on in Waterfall II, just in case -- I was perhaps doing it less subtly than he did, but there are areas of argument which undoubtedly you haven't faced -- heard argument. We haven't and one of the things I would certainly would say is that we have

encountered this problem, as it were, within the last 48 hours.

At the end of the hearing, we might simply ask your Lordships, if anything important occurs to us over the weekend on this particular point, if we might seek to supplement with a very short submissions in writing -- if something arises. At the moment I am simply explaining as we see it, having had less than, say, 48 hours to try to digest the implications of Mr Bayfield's intervention.

But none of that we say actually, harking back, affects the position on the actual appeal. We say the judge was right to find that the statute is of the scheme that he described and right not to accede to any suggestion to engage in creative writing.

LORD JUSTICE BRIGGS: Yes. (Pause).

MR SNOWDEN: I have been handed my learned friend Mr Dicker's skeleton from Waterfall II. For the purposes of the record apparently paragraph 27 says this:

"For the purpose of calculating the amount of the surplus to be applied in paying interest, the senior creditor group contends that dividends previously paid are notionally treated as having been allocated first to the payment of accrued interest at the dates of payment

of the relevant dividends and then in reduction of principal."

That is apparently question 2.

LORD JUSTICE BRIGGS: That would only be accrued interest down to the date of the onset of the administration, presumably?

LORD JUSTICE LEWISON: Not in a fully solvent company.

MR SNOWDEN: No.

LORD JUSTICE LEWISON: That's Humber Ironworks.

MR DICKER: I am not going to address your Lordships on those, but if you want to see how the argument works essentially the last word on the subject, prior to the 1986 Act, is Re Lines Bros (No 2) where Mervyn Davies J effectively adopted, as every single case had for the last 250 years, Bower v Marris and said there is effectively a notional recalculation for these purposes. That I think is all I will say.

MR SNOWDEN: It is water in which I hasten even to dip a toe, save to say none of that, interesting though it is, should affect your Lordships' ruling on the particular issues that are subject of the actual appeal.

I think I was going to turn, then, if I may, unless your Lordships have anything more for me on that, to the contributory rule. Again, I hope I can take this relatively shortly.

We respond in our respondent's skeleton, which is at tab 7 of bundle E, on this issue. If I take this shortly, because others I know need to have their say, I will urge your Lordships to look at that skeleton again. It is at paragraphs 13 to 34.

As we understand it, LBIE have appealed on this issue on the basis that it only arises if they cannot prove for a contingent claim in respect of the section 74 liability in our administration. Mr Trower said that at page 3 of yesterday.

I think LBIE recognises, if they can prove in our administration for that contingent section 74 liability, that we're into mandatory insolvency set-off territory.

LORD JUSTICE BRIGGS: At one end or the other, yes.

MR SNOWDEN: There's simply no room for the contributory rule to operate, which is what we had said in paragraph 33 of our skeleton.

LORD JUSTICE BRIGGS: Yes.

MR SNOWDEN: As we understand it, my learned friend accepted, in response to a question from my Lord Lord Justice Lewison, that if the contingent section 74 liability is not provable in our administration, for the reason encapsulated in heading C of Lord Neuberger's Nortel judgment, then the contributory rule doesn't apply in LBIE's administration. That was what we

understood him to say on page 9 of yesterday.

If that's right, we think it is, then this is a very, very narrow appeal.

LBIE first of all acknowledges it can point to no authority in support of the case which it has put. My learned friend was very candid in relation to that. We say the authorities, both on the contributory rule and to the extent that it is tracked or supplemented by the rule in Cherry v Boultbee, couldn't be clearer. They establish that the rule only applies where there is a present obligation on a contributory to contribute, either, in the case of the contributory rule, because there has been a call or, in the case of Cherry v Boultbee, because there is a present debt payable -- not a future one, a present one. We say that's very clear from all the cases that I will take you to and it's also clear from the Supreme Court's in Re Kaupthing. Therefore, the judge was entirely right to find that the fundamental difficulty with this contention that my learned friend is putting to you is that there is no statutory mechanism for a call to be made in an administration. That is fatal to my learned friend's case and the judge was right to say that at paragraph 188 of the judgment.

What LBIE is trying to do, what my learned friend is

trying to do, is to take very well established rules, to significantly expand them, as it were contrary to the rules, outside the scope that they have, and it's all driven by the desire of the administrators of LBIE to have the benefits of being in a liquidation -- in fact more than the benefits of being in a liquidation -- when they're not in liquidation, when they have not yet decided to go there. We say that that is unjust and impermissible.

What they're trying to do, and I'll make no bones about this -- and we put it in our skeleton, the judge noted it, my learned friend has never contradicted it -- is to keep us out of the LBIE administration simply on the basis of the possibility that there may subsequently be a liquidation and a call. In other words, they're trying to have the economic effect of having made a call, which is something that they cannot do.

Starting with the contributory rule. The contributory rule, stated simply, is a rule that the contributory cannot participate in a distribution in a liquidation until he has paid a call which has been made upon him by a liquidator. You can see that set out, just very quickly, in the judgment of the judge below. He extracts the two relevant passages from the authorities. If you turn to the judgment below at

paragraph 179 and 181. (Pause).

There are two statements. One is Buckley J in West Coast Gold Fields and the other one is a passage from Lord Walker's judgment in Kaupthing. The essence of the rule is set out in the very last sentence of Lord Walker's judgment in Kaupthing, which is at the end of paragraph 181:

"Payment of the call is a condition precedent to the shareholders' participation in any distribution."

And again:

"The shareholder is to that extent disadvantaged ..."

LORD JUSTICE LEWISON: Underpinning this whole rule is that the contributory can participate in the distribution by discharging his debt, there is something that he can do to get himself into the distribution.

MR SNOWDEN: Yes, and that's exactly the point the judge made. Yes.

LORD JUSTICE LEWISON: If there is no more than a contingency, what can he do?

MR SNOWDEN: Nothing and that's why the judge said it's very unjust. Absolutely, your Lordship has that point absolutely right.

My learned friend sort of said this is all to do with pari passu and because it's all to do with

pari passu you can protect within what I think he at one point described as "the envelope of insolvency", the envelope. To include both the current administration and the potential liquidation, the envelope. You can protect the pari passu rule and you should protect the pari passu rule.

With respect to him, he is wrong for two reasons. First, that's not the foundation for the contributory rule and I'll show you that in Grissell's case in a moment. But secondly, and more importantly, when he says "the pari passu rule" you have to actually understand what he is talking about.

The pari passu rule is that as a creditor you have a right to have the assets of the company distributed pari passu amongst creditors. Unless or until you have had a call and the call -- the whole point about this is when there is a call, the call is for a contribution to the assets; and at that stage then the pari passu rule kicks in to protect the pari passu distribution of assets.

But if you can't make a call, you can't swell the assets in respect of it. Therefore the pari passu at that stage in that respect has no application. It has plenty of application for other reasons but not in relation to the call, because you can't make one.

(Pause).

If I turn to Grissell's case. Grissell's case is in bundle 1A and it's at tab 6. We can do it quite speedily. As my learned friend accepted, and as Lord Chelmsford had said at page 534, the question depends entirely on construction of the Companies Act 1862. That's the second full paragraph on the page.

Then if we turn to where he actually then addressed that question, if you go to the bottom of page 535, he said:

"It appears to me to be quite clear that the amount of the call not paid cannot be set off against the debt. The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the company, to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the Act."

That's the principle. If you have a right to make a call because you're a liquidator for, as section 74 says, a contribution to the assets, it would be contrary

to that scheme to allow the contributory to set off against the call. And that's it. It's very simple. As my Lord Lord Justice Lewison put to me a few moments ago, it is no more complicated than that.

He went on to deal with -- he supported his view, as he said "in support of the view", he referred to the pari passu distribution rule. But the point is it is only distributing what you've got, i.e. a call. He is saying that the consequence of allowing the set-off would be, as he says -- if you can see towards the end of the next paragraph, just at the second hole punch:

"But with respect to a member of a company with limited liability, if a set-off were allowed against a call it would have the effect of withdrawing altogether from creditors part of the funds applicable to the payment of their debts."

The position we have here, of course, is that there are no funds available for payment of creditors' debts in the administration resulting from a call, because there can't be, because you can't make a call if you're an administrator. The reason, therefore, that part of the funds, as it were, which would otherwise be applicable to payment of creditors' debts are not there has nothing to do with us, the members. It's with the fact that we are in administration and we can't be

called upon to pay. It follows, because we can't be called upon to pay, we can't do anything about satisfying the call either. Yet what apparently is to happen is that we are to be kept out of participation of any distribution in circumstances where we haven't been called and we can't do anything to satisfy the call. We can't, for example, seek to take advantage or to have put into effect the rule in Cherry v Boultbee either, which is the way in which you actually deal with, in accordance with the pari passu principle, the netting off --

LORD JUSTICE BRIGGS: The retainer.

MR SNOWDEN: Yes. We can't do any of that. The reason we can't do any of it is because we haven't had a call. That's the mischief, that's the wickedness of what's going on here, with this attempt to introduce into the administration some rule allegedly based on the contributory rule or some analogy of it or some extension of it.

LORD JUSTICE BRIGGS: You presumably say if the inability to make a call, looking at the process of administration and liquidation as a whole, might mean that you prove for and get more than you would do if a call had been made against you, then the solution is to put the company into liquidation.

MR SNOWDEN: Absolutely. It really is a case of trying to have their cake and eat it.
That's it, that's exactly right.
LORD JUSTICE BRIGGS: Were it not for this interest lacuna --
MR SNOWDEN: It's all very well --
LORD JUSTICE BRIGGS: -- and problems about knowing quite what is payable to whom in the administration, so that the interest can't yet be paid, it probably would have been put into liquidation.
MR SNOWDEN: Perhaps. The point is you have to, as it were, play the game in accordance with the rules as you find them. There's one set of rules for administration, there's one set of rules for liquidation. You can't say "Well, actually, we would quite like to sort of pick and choose. We would quite like to be in administration for some reasons but actually we'd quite like to have the benefit of the rules that are actually only in a liquidation please". And to justify it, say, "Because it's in the general interests of creditors".
I'm afraid the game doesn't work like that.
LORD JUSTICE LEWISON: Nortel in the Supreme Court tells you don't start tinkering around with the scheme because you don't like the answer.
MR SNOWDEN: That's another way of putting it, yes. Simply

incanting the pari passu rule or the general interests of creditors is not a solution. It doesn't get you to where my learned friend needs to be.
Just en passant, because it's a passage which caused an exchange between my Lord Lord Justice Lewison and my learned friend but which has nothing to do with this case, but just in case it is nagging away. In the middle of page 536 there's an interesting reference by Lord Chelmsford to section 101, and the position in relation to a limited company, which might be taken to suggest that actually the contributory rule didn't apply to an unlimited company at all. We don't think that's right. We do accept that the contributory rule can apply to an unlimited company.
I think what Lord Chelmsford has actually has done is he's misread section 101, because section 101, if you go to it, excludes calls from the provisions of section 101. I don't know whether your Lordships wants to see that, but we certainly don't suggest, and we didn't suggest below, that the contributory rule couldn't apply to an unlimited company.
LORD JUSTICE LEWISON: No, I think Mr Trower's position in the end was that he was effectively arguing for the application of section 149 by analogy.
MR SNOWDEN: Yes.

LORD JUSTICE LEWISON: Preserving a discretion in the court.
MR SNOWDEN: Actually 149 doesn't deal with calls.
LORD JUSTICE LEWISON: Right.
MR SNOWDEN: Perhaps we should have a look at that.
LORD JUSTICE LEWISON: No, it deals with set-off.
MR SNOWDEN: Yes, but when you go to section 149 ... (Pause).
Do you see at 149(1):
"The court may at any time after the making of a winding-up make an order on a contributory for the time being to pay in the manner directed by the order any money due from him to the company exclusive of any money payable by him by virtue of any call."
Then (2), just:
"The court in making such an order may ..."
The point is it's not dealing with calls. It's dealing with other debts due from contributories, as the title to the section suggests. It doesn't use the word "other". But it is dealing with debts, it is not dealing with calls. Lord Chelmsford, I'm afraid, I think just -- the old section was in rather more convoluted fashion and I think he just may have misread it.
Anyway, none of that affects my argument but I just didn't want to leave it there.

(Pause).
Again, my learned friends, I heard sotto voce, say that subsection (3) deals with calls. Subsection (3) does but that's a separate point. (Pause).
That's a call in the winding up, it's a subsequent call.
LORD JUSTICE BRIGGS: That would be a sort of Cherry v Boultbee retainer exercise, or very similar?
MR SNOWDEN: Yes, the way that Cherry --
LORD JUSTICE BRIGGS: You can say there's a subsequent call coming your way, we can treat our liability to you as set off against that call.
MR SNOWDEN: Would your Lordship give me just one moment (Pause).
Your Lordship may be right. I didn't want to get into it any fantastic detail because we say it doesn't affect the main point. It may I will just come back -- Miss Hutton has a point that she wants me to put but I am not in command of it at the moment, so I will come back to it if I may.
LORD JUSTICE BRIGGS: It does contemplate a liquidator saying, "I know we owe you money, but we're going to make a call against you in due course and we can set off what we owe you against that call." It contemplates some use of a future call --

MR SNOWDEN: Yes.
LORD JUSTICE BRIGGS: -- to deal with a present liability of a company but only in the context of a liquidation.
MR SNOWDEN: In a liquidation, yes.
Insofar as the pari passu rule that my learned friend invoked, I have already made the point that the pari passu rule is actually a rule that is all to do with the pari passu distribution of the assets of the company. We say he cannot invoke it in an administration by reference to the future receipts from a call which he can't make, but might be made by an liquidator. It can only be made by a liquidator. The creditor has no pari passu right in respect to assets which are not assets of the company.
The court may or may not decide to make a call in a liquidation, if there is one, and at that stage, if there is one, then the pari passu rule will apply to the assets of the company, swollen by the court, but not before.
There are two other points that we just want to make by way of reference to Grissell's case. The first is it only applies where a call has been made, even on its own terms.
So if we're still at page 536 you can see at the foot of page 536 it is said, in the last paragraph,

picking it up just before the end:
"The dividend will of course be upon the whole debt and the member of the company will from time to time, when dividends are declared, receive them in like manner when either no call has been made or, having been made, when he has paid the amount of it."
Those words establish that the principle only applies where there is a call or has been a call and monies are owing, and it doesn't apply contingently. In other words, it can't be applied contingently even in a liquidation, the contributory rule. The judge dealt with this very clearly in paragraphs 190 and 191 of the judgment. (Pause).
He says at 190:
"There is no case in which the contributory rule has been invoked, except in relation to calls already made by the liquidator."
He referred to Grissell's case and another passage which I think we've already shown you -- or you have already been shown -- at 536. He then sets out the facts of Grissell and the like, and then the concluding paragraph at 536 to 537, which is just at the foot of paragraph 191 of the judge's judgment, is the passage I've just taken you to.
Then in 192 he says:

"It's clear from the judgment of Buckley J in West Coast Gold Fields that he understood the effect of Grissell's case to be that a contributory could not receive any payment out of the estate as a creditor until he had satisfied all his obligations as a shareholder and contributory by paying into the common fund all sums due from him in respect of calls."
Again, it's entirely in terms of sums which are currently due.
Then he went on in paragraph 193 to make the point that the position as regards the rule in Cherry v Boultbee is the same. The rule in Cherry v Boultbee is equivalent, I think it might be said -- or certainly it is a netting off, which can have a similar effect, but again -- and my learned friend drew the parallels in his own submissions between the two -- it can only operate where the debt to the estate is presently due and doesn't operate when the debt to the estate is only a future debt.
You will see there that there are references the decision in Re Abrahams and Re Abrahams was stated to be correct by Lord Walker in Kaupthing at paragraph 45.
I took you at the outset to what Lord Walker had said in Kaupthing and Lord Walker himself put it in terms, as I indicated to you, that payment of the call

is a condition precedent, i.e. it's a call which has been made. There's no suggestion that the principles applied contingently in respect of future calls. So the references are there. I don't know whether your Lordships want me to go again to Kaupthing. I can certainly do that if you want but you've seen it a number of times. (Pause).
So we say that there is simply no basis for the operation of the contributory rule in the administration contingently and the judge was right in his holding that it didn't apply.
My learned friend didn't advance any separate arguments in his submissions to you in relation to Cherry v Boultbee. I've already indicated that the judge's point was exactly the same: that it just doesn't apply.
Can we just make one thing clear. If, contrary to my submissions, the contributory rule or something like it were to apply in the administration, then we say that the rule in Cherry v Boultbee would be applicable in order to enable a netting off to occur.
The effect of the rule in Cherry v Boultbee is consistent with the pari passu principle. It is simply to achieve the same result by netting off as if the person liable to contribute to the estate had made the

contribution and then received a dividend from the swollen estate.

We give an example in our skeleton argument of somebody who -- we give a mathematical example, which I am not going to weary you with at the moment. But in effect what it allows you to do is to go through the notional exercise of paying in, swelling the estate and seeing what the distribution would be on the debt, and then netting off your liability to pay against the distribution you would get and simply paying the balance. None of that is consistent in any way with the pari passu principle and it would operate if, contrary to my main point, the contributory rule operated. So there is no basis on which we could be kept out of or should be deprived of the opportunity to use the rule in Cherry v Boultbee. It was the point my Lord Lord Justice Briggs put to me. The effect of what the administrators are trying to do is to say they can use the contributory rule to keep us out and say we couldn't use the rule in Cherry v Boultbee either. We say that can't be right.

The final point, in case I missed it earlier on, is to simply say it is quite clear from the all the authorities that you've seen that the contributory rule is a prohibition upon participating in a distribution;

we're in no position to --

LORD JUSTICE LEWISON: To satisfy.

MR SNOWDEN: -- satisfy it or even to ask the question that Cherry v Boultbee poses: what's the net effect here? So the suggestion you can get over all this by some sort of agreement, with respect, just doesn't answer that at all.

So, my Lords, that's --

LORD JUSTICE LEWISON: So the consequence of your argument on this point is that there is nothing to prove for in your administration? Or could there be something to prove for, even if you are right?

MR SNOWDEN: Others are going to --

LORD JUSTICE LEWISON: I follow. I am just asking you.

MR SNOWDEN: Sorry, yes. Others are going to deal with the question about whether the section 74 liability is provable but as a contingent claim in our administration. Our point, putting it very bluntly on that, of course, is that the right to make a call is not vested in the administrator; it's vested in the court where there's a liquidation. None of that has arisen, and so there is simply nothing that they can assert on behalf of the company over whom they have custody and control.

LORD JUSTICE LEWISON: Yes.

it's not a prohibition upon proving your debt.

I don't think in the course of his submission my learned friend actually suggested it was a prohibition on proving the debt, although I think his skeleton argument may have suggested it or in any event it has been a contention that has been previously made. But we certainly say that all the authorities that you've seen -- and particularly, for example, Lord Walker, the way he puts it in Kaupthing -- make it perfectly plain that the rule is based upon, as my Lord Lord Justice Lewison put to me, you can't participate in a distribution of a fund until you have paid your debt to it. But it says nothing about whether you are disabled from proving your debt in the insolvency.

LORD JUSTICE LEWISON: I would have thought you must be entitled to prove it because there may be a dispute about it, for one thing.

MR SNOWDEN: Yes.

LORD JUSTICE LEWISON: In which case, if it's not known for sure how much the contributory owes, then there has to be a process of establishing it before you can start applying any rule.

MR SNOWDEN: It goes to the judge's point, which I haven't belaboured because I know my Lord has it, which is that when a call hasn't been made because it can't be made,

MR SNOWDEN: It's not an asset of the company. True enough, when the call is made and satisfied the proceeds are assets of the company. That's what the section says. But as it stands at the moment, they cannot make a call --

LORD JUSTICE LEWISON: So effectively you say --

MR SNOWDEN: -- and they can't prove in a --

LORD JUSTICE LEWISON: -- neither the company nor the administrator is or will ever be a creditor for the call, and you can't prove for somebody else's debt? (Pause).

MR SNOWDEN: Sorry, could your Lordship just give me that one again, because it had a number of bits in it.

LORD JUSTICE LEWISON: You say it is the liquidator, acting on behalf of the court, who can make the call.

MR SNOWDEN: That's right.

LORD JUSTICE LEWISON: So it's the liquidator or the court who is going to be the creditor when the call is made --

MR SNOWDEN: Yes.

LORD JUSTICE LEWISON: -- and you can't prove for somebody else's debt?

MR SNOWDEN: Yes.

LORD JUSTICE LEWISON: It is the creditor who has to prove.

MR SNOWDEN: Yes, albeit that the assets -- it is treated as a debt and the assets --

LORD JUSTICE LEWISON: The fruits of the call will belong to the company.
MR SNOWDEN: Yes.
LORD JUSTICE BRIGGS: But the liability once a call has been made is a debt owed to the company, isn't it?
MR SNOWDEN: Well --
LORD JUSTICE BRIGGS: I know this isn't really your part of the ship because this is what Mr Isaacs is dealing with.
MR SNOWDEN: No. It is certainly a liability and I think my learned friend was inclined to accept it was a debt owed to the company.
LORD JUSTICE BRIGGS: Yes.
MR SNOWDEN: I certainly would go as far as to say that the assets when received are assets of the company. The question of whether it's actually owed to the company, I think, is, with respect, more difficult, given the origin of the call.
LORD JUSTICE BRIGGS: Yes. But the fact that it takes a liquidator to trigger the liability may not stop it being a future liability? That's the question.
MR SNOWDEN: Of itself that would be right --
LORD JUSTICE BRIGGS: Yes.
MR SNOWDEN: -- but that doesn't affect the points I've been making.
LORD JUSTICE BRIGGS: No, no, not at all.

MR SNOWDEN: No.
LORD JUSTICE BRIGGS: You're really dealing with the situation where they can't prove for the call as a future liability.
MR SNOWDEN: Yes, that's right. That's what I have been dealing with.
LORD JUSTICE BRIGGS: Because they accept that if they can there's a set-off and no contributory rule applies.
MR SNOWDEN: That's right. That's where I came in.
LORD JUSTICE BRIGGS: Yes.
MR SNOWDEN: Yes, sorry.
LORD JUSTICE BRIGGS: A narrow but fascinating situation.
MR SNOWDEN: We've landed back where I came in. So unless your Lordships have anything more for me, those are my submissions.
LORD JUSTICE MOORE-BICK: Thank you very much, Mr Snowden. Now, Mr Isaacs.

Submissions in reply by MR WOLFSON

MR ISAACS: My Lords, I propose to make three points in relation to whether or not the section 74 liability is provable and then one point in relation to non-provable contractual interest. So I will be quite brief.
The first point is a short factual point. It picks up the point made by my learned friend Mr Trower, who said that it was relevant that liquidation has been

selected as an exit route from LBIE's administration, and my Lord said "Is it an exit or the exit route?" I just wanted to pick up that point. I have the proposals as agreed by creditors. They should be before your Lordships.
LORD JUSTICE MOORE-BICK: Yes. Thank you.
MR ISAACS: On the second page, down at the bottom, (viii), one sees how it was put and what was agreed. It's the sentence that begins:
"The administrators may use any or a combination of exit route strategies in order to bring the administration to an end. The administrators wish to retain a number of the options which are available to them, including ..."
Then just summarising: number 1 is a scheme of arrangement followed by dissolution; number 2 is creditors' voluntary liquidation; number 3 is company voluntary arrangement followed by dissolution; and number 4 is distribution of surplus funds to creditors.
So there's nothing surprising about this. It's in fairly standard terms, and the administrators retain flexibility as to whether or not to go into liquidation. That's all there is to that point.
LORD JUSTICE BRIGGS: I think that's what Mr Trower said.
MR ISAACS: Yes, I am not saying --

LORD JUSTICE BRIGGS: It is an exit route.
MR ISAACS: Yes, absolutely. I am not suggesting he misrepresented the position in any way because he didn't.
The second point, the more substantial point, is that my learned friend Mr Trower submitted that it fell within the statutory purpose of the administration to prove for the section 74 liability. He referred to the statutory purpose of achieving a better result for creditors as a whole than would be likely if the company were wound up without first being in administration.
I submit that that purpose is inapt to encompass a proof for the statutory liability. The reason I say that is as follows.
Firstly, if a proof by an administrator were permissible -- obviously we say it isn't -- then the amount of the proof would have to be discounted under Rule 2.81 for the double contingencies of a winding-up taking place and a call being made, and of course that would include a discount for uncertainty and for futurity. So it would not achieve a better result than if the company were wound up, because if the company were wound up there would be a single contingency, which would be that of a call being made. So it wouldn't meet it for that reason.

The second point is that my learned friend suggested as one alternative that the proceeds of a proof might be paid into a Quistclose trust. That was page 165, lines 1 to 5.

The problem with that alternative is, if they were paid into such a trust, they wouldn't be available to the administrator at all; so they wouldn't achieve a better result in the administration for creditors.

The second problem with that alternative is, if the company did not subsequently go into winding up, presumably they would have to be repaid by the administrator to the insolvent contributory, which may well by that stage have been dissolved. It is difficult to conceive that this is what is contemplated by the provisions of the Act.

The third point is that if, as was suggested by my learned friend Mr Trower in response to my Lord Lord Justice Briggs (page 165, line 11) the proceeds pass down the waterfall in the administration, then there are a number of problems.

In the first place, they would not be used to pay the expenses in the winding-up and they would not be used to pay for the adjustment because, ex hypothesi, the company would be in administration, so they wouldn't be used for the statutory purpose.

The second point is, if the company subsequently went into liquidation, a call could presumably still be made in the winding-up for a contribution to the debts and liabilities of the company and the expenses of the winding-up and the adjustment.

If an amount had already been paid in respect of a proof for the statutory liability in the administration and the proceeds had been applied inter alia to the expenses of the administration at the top of the waterfall, there would be leakage in respect of those administration expenses which do not fall within section 74, and there's the possibility that the total amount which would be claimed from the contributory in the administration and in the winding-up would be greater than that provided for by section 74, because that, of course, is limited to the debts and liabilities in the winding-up, the expenses of the winding-up, and the adjustment.

So the fact that there had been a proof in the administration could enlarge the amount of the call beyond that which is provided for by section 74.

The last part of this submission is to say that what my learned friend said is inconsistent with Pyle Works. Your Lordships will remember I showed your Lordships Lindley LJ's statement at page 584 that the monies form

a fund which only comes into existence when the company is in liquidation. Equally pertinent, Lopes LJ who said, at 588, that there can be no anticipation of future calls in any case so as to alter the administration of assets under a winding-up.

The third point I wanted to make here is to respond to my learned friend's reference to the trend in legislation and case law to expand the concept of provable liabilities.

A number of the advocates before your Lordships have referred to this trend and, of course, it's a trend which has been to include as provable debts which were previously non-provable. Indeed, that's the point that we rely on very heavily in relation to all of the supposedly non-provable claims which are said to exist by my learned friends: currency conversion claims; the non-provable interest; the non-provable future claims that my learned friend MR WOLFSON mooted for the first time this morning.

But in relation to the section 74 liability, the debate is quite different. It is not about whether or not this liability is provable or non-provable, because my learned friend Mr Trower does not say it's a non-provable liability of the contributory before LBIE is wound up. He says it's provable. The debate here is

whether, before LBIE is wound up, it is a provable liability or whether it is not, as we say, a liability at all.

In that context, your Lordships will well aware that we refer to a number of cases to the effect that the section 74 liability does not exist at all unless and until the company is wound up. I refer to Financial Corporation, Mace Builders, Shoe Lace, and others, and my learned friend has not responded to those cases at all.

That's all I propose to say about the section 74 liability.

I then have something to say about the non-provable contractual interest which is alleged to exist and, in particular, to my learned friend's attempt to respond to the submission that we've made that if there were a reversion to contractual rights to interest it would mean that a bankrupt could be repeatedly adjudged bankrupt on the basis of contractual interest which accrued after the commencement of each bankruptcy.

If I understood my learned friend correctly, he said that a contractual liability to pay interest is a bankruptcy debt within section 382. If your Lordships could briefly go to that, please.

LORD JUSTICE LEWISON: 300 and --

MR ISAACS: Section 382 of the Act, which defines "bankruptcy debts".

My learned friend's argument, as I understand it, is to say non-provable contractual interest is a bankruptcy debt and therefore it is released on the bankrupt's discharge; and, if that's correct, he says post-bankruptcy interest would not continue to run, so the bankrupt couldn't be bankrupted again on the basis of accruing interest.

I submit that the premise is wrong. The reason for that is if one looks at section 382(1)(b) one finds that the only interest which is said to be a bankruptcy debt is interest provable as mentioned in section 322(2). If one goes to section 322(2), we find that the only interest that's provable as part of the debt is that part before the commencement of the bankruptcy. In other words, it does not extend to interest payable in respect of the period after the commencement of the bankruptcy. It follows that that post-bankruptcy interest is not a bankruptcy debt, it is not released by virtue of section 281 on the bankrupt's discharge and, therefore, it continues to accrue and that's the prospect of future bankruptcies, indefinite future bankruptcies, as the interest continues to accrue.

This argument does not just apply to non-provable

contractual interest; it also has implications for the statutory interest that your Lordships have heard about, because it establishes that statutory interest is only payable to the extent of the surplus. It must be. The amount of statutory interest must be defined by the amount of surplus.

The reason for that is this. If statutory interest were not defined by the amount of the surplus, so that it applied, for example, at the judgment rate or contractual rate, if higher, independently of a surplus, then it would follow that there remained a non-provable liability to pay that statutory interest where there was no surplus. For the same reason as I've just explained, any such interest obligation would not be discharged on the bankrupt's discharge but would continue to accrue. So, again, the bankrupt could be bankrupted indefinitely and that's completely inconsistent with what I referred to earlier as the accepted policy of the Act so far as it applies to bankruptcy.

So unless your Lordships have any further questions, that's all I propose to say.

LORD JUSTICE MOORE-BICK: Thank you very much, Mr Isaacs. Yes, Mr Wolfson.

Submissions in reply by MR WOLFSON

MR WOLFSON: My Lords, I will first make submissions in

reply, which are therefore on the currency conversion claims and the section 74 point, and then I will say a few words about the other points, which are really by way of response because they are my learned friends' appeals.

My Lords, on the currency conversion claims first, we start with the proposition, as my learned friend Mr Snowden submitted both on the first day of the appeal and earlier today, that the legislative scheme is a process for collective enforcement, but it is not just that: it does affect substantive rights.

My learned friend Mr Dicker responded to that in essentially two ways. He said if you look at contingent claims, and then for the first time this morning future claims, you can see, he said, that it doesn't affect substantive rights but the underlying rights survive the process.

So far as contingent claims are concerned, in my respectful submission, the fact that the hindsight principle enables the revaluation of contingent debts does not assist my learned friend Mr Dicker's case. His case is that this shows that the underlying debt remains alive and payable in full, notwithstanding the statutory scheme, and in this case the valuation of that debt, given its contingent nature.

But so far as contingent debts are concerned, it is part of the statutory scheme itself that contingent debts can be revalued later. As your Lordships appreciate, Rule 2.81 expressly envisages the possibility of revaluation. In particular, 28.1(1) provides that the administrator estimates the value of a debt, and then goes on to say that he may revise any estimate previously made, if he thinks fit, by reference to any change of circumstances or to information becoming available to him.

Rule 2.81(2) provides that:

"Where the value of a debt is estimated under this rule, the amount provable in the administration in the case of that debt is that of the estimate for the time being."

And I emphasise "for the time being".

As I understood my learned friend Mr Dicker's submission, it was that the hindsight rule provided a useful analogy with currency claims. That's the way he put it on yesterday's transcript at page 176, drawing an analogy between the two. The argument appears to be that the hindsight rules show that the claim remains alive unless and until completely satisfied in full.

But the treatment of contingent claims and foreign currency claims by the statutory scheme is completely

different. For foreign currency claims, the rules expressly require conversion at the relevant date and there is no indication of any later revaluation or re-evaluation or a second conversion date.

For contingent claims, however, the rules are not only compatible with but indeed expressly envisage a later revaluation based on the hindsight principle.

So that's the contingent claim point.

Dealing with future claims, if I can just deal with this briefly before your Lordships rise?

LORD JUSTICE MOORE-BICK: Yes. All right.

MR WOLFSON: My original note said this:

"Future claims. No one is suggesting that if the statutory 5 per cent discount rate turns out to be insufficient because the creditor does not in fact achieve returns to get into the full sum over the relevant period in fact, he can come back and have a non-provable claim for the alleged deficiency."

That remained true until Mr Dicker dealt with the point this morning. For the very first time it now appears to my learned friend's case that in relation to a future claim there would appear to be an unprovable claim for any deficiency caused by the fact that the statutory 5 per cent discount rate turns out to be insufficient.

We respectfully say that that is wrong. The rules make no provision for any such claim and they do not even consider the possibility or provide any machinery in the way that they plainly do for contingent claims.

Further, the nature of such a claim would be inherently problematic. The hypothesis is that the 5 per cent discount has not essentially got you back -- there's been too much of a discount so you haven't got back to your full sum. But, of course, during that period you would presumably, also as a non-provable claim, have a claim for interest which would run at 8 per cent. I appreciate it may be 8 per cent simple and the discount rate is effectively compounded, because it's an annual discount rate, but quite how they tie together is very difficult to see. We respectfully submit that --

LORD JUSTICE LEWISON: Why would you have a claim for interest on a non-provable claim?

MR WOLFSON: No, sorry, the claim for interest would not be non-provable on this basis.

LORD JUSTICE LEWISON: What, contractual interest you are talking about?

MR WOLFSON: Contractual interest, yes. If Mr Dicker is right, which we say he isn't, it would seem to follow if he has a deficiency.

LORD JUSTICE LEWISON: Right. So you've been paid your discounted dividend --

MR WOLFSON: Yes.

LORD JUSTICE LEWISON: -- and let's suppose you've been paid in full.

MR WOLFSON: Yes.

LORD JUSTICE LEWISON: You've been paid your statutory interest --

MR WOLFSON: On that.

LORD JUSTICE LEWISON: -- and you have a claim now for contractual interest on top all that now, have you?

MR WOLFSON: Mr Dicker first says you would have a claim for the deficiency, if you can show there is one.

I can probably stop there because we say there is no such claim and that's enough for my present purposes. Whether there would be a further claim for interest is perhaps something which I can consider over lunchtime. I am told that that again is a possibility being canvassed in the treacherous waters of Waterfall II. So maybe for present purposes we can leave it there.

The short point I need to make for present purposes is this. Neither the submissions on contingent claims nor the submissions on future claims provide an example where there is a claim left over to make good Mr Dicker's submission that the statutory scheme does

not operate substantively. We say it does operate substantively, for the reason I submitted and my learned friend Mr Snowden submitted. For present purposes, that's probably as far as I need to go.

LORD JUSTICE MOORE-BICK: Is that a convenient moment?

MR WOLFSON: My Lords, it is.

LORD JUSTICE MOORE-BICK: I am going to say five past 2, at least by my watch. I don't think that clock is very reliable.

MR WOLFSON: It is a bit slow, my Lord.

(1.05 pm)

(The short adjournment)

(2.05 pm)

LORD JUSTICE MOORE-BICK: Yes, Mr Wolfson.

MR WOLFSON: My Lords, on the point as to contingent and future debts, we respectfully adopt the approach of the learned judge in paragraph 77 of the judgment, which I won't take the court to now.

Moving back to currency converge, we, like LBHI2, submit that currency conversion affects creditors' substantive rights as well, giving a discharge for the debt if paid at the converted rate and that therefore there is no room for a currency conversion claim.

We respectfully submit that the statutory regime must affect substantive rights. We say that that's

illustrated by the fact that as, my learned friend Mr Dicker candidly accepted, there is no means by which the company could recover from a foreign currency creditor the windfall -- and I think it's fair to say he also accepted this effectively is a windfall -- that the creditor would receive if sterling appreciates against the foreign currency.

We submit that --

LORD JUSTICE LEWISON: Might it be said that the reason why you couldn't recover against the foreign creditor where sterling had appreciated is because of the rule that distributions can't be disturbed?

MR WOLFSON: Possibly, my Lord, but in a case where there are other creditors who ex hypothesi might not be being paid in full, and one creditor has received sums which give them a windfall, it would be very strong application of the rule that distributions cannot be disturbed, not to claw that back.

LORD JUSTICE LEWISON: I suppose there might have been one distribution and then another one.

MR WOLFSON: Precisely, yes. If there's --

LORD JUSTICE LEWISON: There may have been no payment all.

MR WOLFSON: Yes.

LORD JUSTICE LEWISON: Yet.

MR WOLFSON: There are a number of different hypotheses. My

Lord, we also do rely on the fact that, although as my learned friend Mr Dicker said yesterday, I think four times, that non-provable claims had been with us since 1542, so far -- I don't think he took up my Lord Lord Justice Lewison's challenge to find another claim which gives rise from a unitary obligation, both provable and non-provable claims.

My Lords, the fact that my learned friend Mr Dicker accepts that if sterling appreciates a creditor can keep the windfall means that in our submission there is this heads I win, tails you lose, one-way bet, and I can put it in a number of different pejorative ways, position.

What was my learned friend's answer to that? His answer when pressed by the court was this was the "price" to be paid by LBIE for choosing to go into an insolvency regime.

But the upside only option and the potential for creditors to make a windfall gain if sterling appreciates cannot simply, I submit, be dismissed as the price of LBIE going into an insolvency regime, not least because that process may be something chosen and effected not by LBIE itself but by creditors or other creditors, i.e. creditors including the foreign currency creditors or non-foreign currency creditors.

LORD JUSTICE LEWISON: Including a foreign currency creditor

who thinks that his currency is going to depreciate against sterling.

MR WOLFSON: My Lord, I was coming to that point, absolutely. I can make this submission in a number of different parts of the analysis but we always come back to the same point. It does give the foreign currency creditor a licence to play the foreign currency markets at the expense -- and I will come to this point -- not only of the members but of other creditors, and perhaps of other foreign currency creditors as well if they're all in the non-provable bracket.

My Lords, we do say, respectfully, that the lack of symmetry is a powerful reason against permitting currency conversion claims in the first place. As my Lord Lord Justice Lewison pointed out in argument, if -- for example, a dollar appreciates against the sterling but the euro depreciates against sterling, the analysis would appear to be that if currency conversion claims are permitted the dollar creditors keep their windfall but the euro creditors have a currency conversion claim. Of course, not only is there lack of symmetry between different groups of currency claimants but one creditor might itself have claims denominated in different currencies. Indeed, in LBIE that is not unlikely to be the case.

So let's say you have one creditor who has a claim denominated in dollars and another claim denominated in euros. On my learned friend's case, it would appear that he would have a currency conversion claim in relation to the claims in one currency but, and importantly, he wouldn't have to give credit for the windfall he obtains on the other currency. He wouldn't have to bring a currency conversion claim in relation to all of his claims or none of them, but he could essentially cherry-pick between his claims to obtain payment in the more favourable currency on a claim by claim basis.

This is not, so to speak, at no cost to anybody else, as my Lord Lord Justice Moore-Bick pointed out. Currency conversion claims necessarily operate at someone else's expense, whether the members or other non-provable creditors.

It is in this context that I just want to pick up one point which my learned friend made about Re Lines Brothers. I don't think we need to go back to it because I am sure the court has the passage firmly in mind. My learned friend, with respect, mischaracterised my submission as to what Brightman LJ was saying. The reference is at 21(c), it's that section at the top of the right-hand page, In re Lines Bros. We were not

saying that Brightman LJ himself considered it to be the law that the liquidator could pay in foreign currency if sterling appreciated. I accept he puts in brackets "it is said", he is addressing the argument and he is saying on that hypothesis. But I do maintain the submission I made, which is that he was fashioning a remedy, so to speak, on the basis that hypothesis was correct.

I wasn't submitting that the hypothesis was in fact correct and in fact we know now it is not. But he was fashioning a remedy, so to speak, to bring foreign currency creditors from a position where he perceived that they might be unfairly treated to a position where they were being fairly treated. What my learned friend now seeks to do is to use essentially the same reason, either to leave them flat or to give them, as I've said, a windfall.

My learned friend accepted in his submissions this morning that one cannot have a perfect result, and at some stage there is going to be something of rough with the smooth or swings and roundabouts, and again there are a number of metaphors we can use.

We respectfully submit that what the statutory scheme does for currency conversion claims is justice in the sense of the scheme. It operates substantively, such that there is no remaining currency conversion

claim.

The lack of symmetry, in my respectful submission, also undermines some of the authorities that my learned friend relied on. I can just pick one. Again I don't think we need to go back to it. The Choice Investments case, your Lordships will remember, that's the case about the garnishee order and the judgment of Lord Denning MR.

In my submission, that is actually helpful for me because it highlights that the creditor should not get more than its debt. The court will recall the debt was in sterling, the relevant account was in dollars, and the Court of Appeal said that you can't execute the garnishee order to obtain more than you are actually owed. But, of course, that is the effect, in my submission, as to what Mr Dicker is submitting here, that if the foreign currency creditor makes a windfall from the rates applicable as at the conversion date, he can keep it.

As I anticipated when I opened my appeal on currency conversion, my learned friend Mr Dicker did indeed portray the situation repeatedly as a two-horse race and framed the question as to who should receive 1.3 billion as between the currency conversion claimants and the shareholders, to give your Lordships just one reference

to the transcript, Day 4, page 131, lines 20 to 25.

But, my Lords, as I have submitted on a number of occasions this isn't a two-horse race. My learned friend, if I may say, elegantly dodged a number of questions from the court as to where currency conversion claims would rank vis-à-vis other non-provable claims; for example, interest claims or post-administration accident claims.

But, as my Lord Lord Justice Briggs pointed out, asking and hopefully answering those questions is a useful way of testing the proposition as to whether currency conversion claims ought to exist in the first place. To put it another way, the potential prejudice, and we submit there will be prejudice, to other non-provable creditors is relevant to the question as to whether these claims should exist in the first place.

I note that the cases my learned friend Mr Dicker relied on as to non-provable claims, both Islington Metal at tab 58 and R-R Realisations at 59, were two-horse races, in the sense the debate was whether the money should go to the shareholders.

My Lords, taking that a stage further and echoing the submission made by my learned friend Mr Snowden, there is nothing in the statutory scheme, we submit, which suggests that the court can make up for itself how

it thinks non-provable claims should rank as between themselves. My learned friend Mr Dicker did not confirm that currency conversion claims in general, or even his client in this particular case, would rank or would be prepared to rank after the non-provables.

So the existence of currency conversion claims must be tested on the basis that they would rank with other non-provables, whether they be the victim of an industrial accident the day after the administrators take over the factory, or interest creditors if the court agrees with the judge that there is a lacuna and the interest claim is non-provable.

My Lords, there is a further practical problem, if there are currency conversion claims, as to how they are to be calculated. Of course, there was a discussion between the court and my learned friend on this. My learned friend Mr Dicker said it would be the date of payment, although I think later that was revised to as close to the date of payment as possible. But this gives rise to the problem that there is no machinery in the Act or the Rules for the treatment of non-provable claims and that, we submit, necessarily means that there will not be one single date for payment of non-provables in the way that there is for payment of proved debts.

One might have hoped that there would be a single

date for all foreign currency creditors on the basis that equity is equality, or equality is equity, I think it is put different ways, but there is no mechanism for that.

My Lords, even if the date is the date of payment, given that there is no process in the legislation for the payment of non-provable debts, there will be, we submit, a race to judgment and to enforcement.

So, given that there is no uniform date of payment for non-provable claims, the date of payment would not, as my learned friend suggested, place all the foreign currency creditors in the same basket. Indeed, there would be discrimination between creditors.

If that is not right and there is not a race to judgment, it's really unclear what would happen. What date would be chosen and on what basis? How would you value a collection of foreign currency debts all denominated in different currencies?

If the date of payment doesn't work, how could the conversion be effected? My learned friend was at pains to suggest he wasn't asking for a new currency conversion date, something which, as we've seen, the Law Commission expressly rejected. But we say that there would need to be such a date in order to work out how different currency conversion claims would be

valued.

All of this goes to show, we respectfully submit, that currency conversion claims are unworkable and uncertain and should be held not to exist.

Just picking up a couple of final points in this connection. First, my learned friend suggested yesterday, the reference is page 88 of the transcript, lines 18 to 19, that I submitted that currency conversion claims weren't a practical problem because the claimants could hedge their exchange rate risk. My Lords, I didn't recall making that submission and, indeed, the transcript records I think that I never used the word "hedge" at all. I wasn't making that point at all. I was making a different point. I was responding to a point on my learned friend's skeleton and the reference 67/3 of his skeleton, bundle E, tab 8, page 172. My learned friend made the point that if members don't want to bear the exchange rate risk, they can pay the foreign currency sums prior to the liquidation. Do your Lordships recall, I made a few submissions as to why that was not an answer to the problem. But I wasn't making any submissions about hedging at all.

My learned friend then made some submissions as to the effect if the underlying claim was either insured

and a claim was sought to be brought under the Third Parties (Rights Against Insurers) Act or there was a co-obligor.

My learned friend Mr Dicker suggested that the notion that the foreign currency claim was paid in full by a payment of sterling at the exchange rate as at the date of liquidation would throw up problems, for example, in cases of insurance, e.g. where you wanted to get a judgment against the debtor to get the benefit of his insurance under the Act.

My Lords, the same issue would arise for future contingent claims where the claim has been valued and it later turns out the valuation in the insolvency process undervalued the claim. So it doesn't help Mr Dicker because he can't say this is a problem unique, so to speak, to conversion claims.

Although the point hasn't been argued fully before your Lordships, we submit that the answer is probably that the impact of the insolvency regime may operate vis-à-vis the creditor and debtor only and not third parties, but, my Lord, I offer that somewhat tentatively. The short point for present purposes is that these examples don't assist my learned friend because they are not limited to currency conversion claims.

So, my Lords, unless your Lordships have any further questions for me on currency conversion claims, I was going to move to my second area of reply, which was the section 74 liability point.

LORD JUSTICE MOORE-BICK: Yes, thank you very much.

MR WOLFSON: My Lords, on the section 74 liability point, of course, again we are aligned with my learned friend Mr Snowden and LBHI2. I should put one marker down, which isn't a matter for this court and indeed it wasn't before David Richards J. Our position on the 74 liability may turn out not to be exactly aligned as we don't accept that we would be obliged to contribute in respect of the sub debt, regardless of where it ranks. That may be an issue that we'll have to argue out between us, but certainly for present purposes we are aligned with LBHI2.

My Lords, the first point here is this, and I can take, I hope, this area fairly shortly because it has been argued on a number of occasions now. First, my Lord Lord Justice Briggs said there were two possible comfortable resting places on this point, i.e., first, that the subject of calls only extends to provable debts and, second, it extends to everything in the waterfall.

My Lords, of course between those two we say the first one is correct and the section 74 liability does

not include anything below provable debts.
My Lords, when I opened this appeal on section 74 I submitted to your Lordships that if section 74 were not limited to provable liabilities, the company's liquidators could, effectively on behalf of creditors in LBIE with unprovable debts in LBIE, prove in the contributories' insolvencies for types of debts which are provable by the contributories' own creditors. So creditors with unprovable debts in LBIE would be in a better position vis-à-vis the assets of LBL than creditors of LBL with the same type of unprovable debt.
My Lords, we do submit that this lack of symmetry is a particular unfairness in this case because, unlike LBIE's creditors, many of whom are traders and distressed debt funds, et cetera, who bought the debt at a discount, most of my creditors, LBL's creditors, are employees and trade creditors.
As to the adjustment of the rights of contributories inter se, my Lords, the fact that the section 74 liability extends to adjusting the rights of the contributories amongst themselves, we submit, has no bearing on whether the section 74 liability extends to statutory interest and non-provable debts.
Section 154 of the Act provides that the court adjusts the rights of the contributories among

themselves and distributes any surplus among the persons entitled to it. Section 165(5) provides essentially the same in the case of a voluntary winding-up. So the court and the liquidator are obliged to adjust the contributories' rights among themselves. We do submit that there is nothing to stop the liquidators making a separate call for adjusting the rights of the contributories, and indeed they may need to do so.
For example, section 150(2) provides that in making a call, the court has seen this, the court may take into consideration the probability that some of the contributories may partly or wholly fail to pay it. That gives rise to the possibility that the liquidator, by making calls, may actually turn out to raise more money than is required to pay the proved debts if he overestimates how much people will actually pay up. One of the things he is asked to do is to take into account the contributories may in fact pay less. So he makes calls and he ends up with more than he needs --

LORD JUSTICE BRIGGS: That's if he underestimates how much they will pay.

MR WOLFSON: Sorry, he underestimates, yes. He ends up with more than he needs. So one member may have effectively contributed more than their fair share compared to the other member.

In our written submissions before the judge, we cited a number of authorities in relation to a contributory's right to a contribution claim against a co-contributory in circumstances where the first contributory had paid more than his rateable share of the shortfall.
My Lords, one of those cases is in the bundle and it's the case at authorities bundle 1A/9, called a case of Re Shields.

LORD JUSTICE BRIGGS: Are you citing this for the purpose of showing that there would be contribution claims between the contributories?

MR WOLFSON: I am citing it to show that you can have a call simply to adjust the rights of the contributories and there's nothing to stop a call being made for that purpose.
So, my Lords, therefore what we say is the fact, therefore, that the section 74 liability extends to adjusting the rights of the contributories among themselves doesn't show that the section 74 liability necessarily extends to statutory interest and non-provable debts. That's the way we put it.
So there are two parts of the argument. The first is the proposition that you can have a call simply to adjust the rights of the contributories and there's

nothing to stop separate calls being made for this purpose. That's what I propose to get out of Re Shields, although I'm not sure that's a particularly controversial proposition.
The second is where I take that point.
Re Shields, if we can look at it briefly, perhaps. Re Shields is at authorities bundle 1A at tab 9. My Lords, we rely on the passage at page 372. Just by the second hole punch, there's a sentence which begins "Exactly in the same manner". This is a judgment of Lord Romilly MR:
"Exactly in the same manner, in a company of limited liability, where there many shares, some of which are paid up, and the rest not paid up, the persons who have paid up in full are not required to be on the list of contributories, but as soon as it is found there are assets more than sufficient to pay all the debts, then calls may still be made on the persons who have not paid up in full, in order to adjust the rights of the shareholders between themselves; and persons are not discharged from all liability as shareholders because all claims against the society have been disposed of, if the society has claims against them for the purpose of setting right the contributions equally amongst the members."

LORD JUSTICE BRIGGS: But concealed within the expression "all the debts" is the question we're trying to get to grips with. It seems difficult to treat that passage as telling us much by way of an answer. He may have meant all of the debts and other liabilities ranking ahead of members.
MR WOLFSON: That's the second part of the argument. In other words, if I am right that you can make a separate call for this purpose, does it follow -- which is the second part of my argument -- that that doesn't mean that necessarily the section 74 liability extends to everything in the waterfall above it?
All I want to get out of the case itself is you can make a separate call. The question then is: what is the relevance of that? We submit that --
LORD JUSTICE BRIGGS: All this says is you can go on calling and calling until you have done everything you need to do under the waterfall.
MR WOLFSON: The last thing you do --
LORD JUSTICE BRIGGS: If the only thing you need to do is adjust the rights of contributories.
MR WOLFSON: But, my Lord, we respectfully say that's not, so to speak, under the waterfall itself. That's a separate thing you're doing at that stage. You're adjusting the rights of the contributories amongst

themselves. We respectfully submit it doesn't follow from that the section 74 liability necessarily extends to everything above that in the list.
Just for your Lordships' note, your Lordships will have picked up that's a limited liability case. The same principle applies to unlimited companies. The authority is Re Lancashire Brick and Tile Co. It's at footnote -- we cited it to the learned judge below. It's a case called Re Lancashire Brick and Tile Co.
LORD JUSTICE BRIGGS: There's no case that goes so far as saying that if there are non-provable liabilities further up the waterfall you can ignore them and just call to deal with the problem at the bottom, is there?
MR WOLFSON: There's no case on the point either way, my Lord.
LORD JUSTICE BRIGGS: Ours will be the first to say that --
MR WOLFSON: We submit --
LORD JUSTICE BRIGGS: -- if we say it.
MR WOLFSON: My Lords, I think it is fair to say that almost everything your Lordships say in this case may well be the first to say it. Your Lordships will have picked up from the judgment that below I respectfully submitted to David Richards J that a decision called Re Auriferous (No 1) -- my learned friend Mr Trower and I were arguing about whether it was wrongly decided. My learned friend

relied on it and I said it was wrongly decided. David Richards J said to me was I seriously suggesting that he should say a judgment which has stood for 114 years, and had never been criticised, was wrongly decided? I said, well, yes, you should because for all about six months of that time nobody ever looked at it.
In this area it is almost all new and, with great respect, to say that there is no case on the point really just emphasises the unusual situation we're in. We have an unlimited company with a surplus.
LORD JUSTICE MOORE-BICK: Yes.
MR WOLFSON: They are both unusual.
So, my Lords, that is our submission on that point. The fact that the section 74 liability extends to adjusting the rights of the contributories between themselves does not mean, necessarily, we say they are not, that they must be liable under section 74 for statutory interest and non-provable debts.
LORD JUSTICE LEWISON: To put it another way, you say we shouldn't get carried away by the metaphor of the waterfall.
MR WOLFSON: Yes.
LORD JUSTICE LEWISON: Look at it as a stream of stepping stones across it and you get a different result.
MR WOLFSON: Yes, absolutely. We've had horses, we've had

streams, we have waterfalls. My Lord, absolutely. What we do say respectfully is that the scheme set out in Nortel is not statutory. It's there as a summary. It's there as a convenient aide-memoire and we are not meant slavishly to apply it in every single circumstance. My Lords, we do say that when one is analysing the question, "What's in the section 74 liability?" that is a discrete question. You look at that, and you shouldn't be, so to speak, diverted by the Nortel waterfall.
My Lords, that brings me to the next point I was making with regard to section 74, because your Lordships will recall that I made a set of submissions, as did my learned friend Mr Snowden, on the meaning of "liability" within section 74.
LORD JUSTICE MOORE-BICK: Yes.
MR WOLFSON: Of course, much of the argument in this part of the debate turned on the meaning of "liabilities" and we looked at the definition in Rule 13.12.
The submission I was making was that the meaning there applies only, unless the context otherwise requires; and I made my submissions which I am not going to repeat.
My Lord Lord Justice Briggs threw somewhat of a grenade into that point by asking the question really:

on what basis could the rules purport to define the terms used in the Act? Does your Lordship recall --
LORD JUSTICE BRIGGS: Yes, I was just looking to see whether there was something in the Rules that said they could help you understand what the Act meant.
MR WOLFSON: Well, my Lord, we have done some research on this. The power to create the Rules appears to be deprived from section 411 and Schedule 8 to the Act.
My Lords, if we turn first to section 411. Perhaps, my Lords, the quickest thing to do would be to invite the court to glance through section 411. (Pause).
LORD JUSTICE BRIGGS: Quite a glance.
MR WOLFSON: Yes.
LORD JUSTICE BRIGGS: Is there any particular bit of it that helps?
MR WOLFSON: My submission is going to be there is nothing here which enables you --
LORD JUSTICE BRIGGS: Searching a haystack which doesn't have any needles in it.
MR WOLFSON: I want to show the court where the power comes from and to show that the closest we get -- section 411 sets out the power. Schedule 8 sets it out in more detail: Schedule 8, Provisions capable of inclusion in Company Insolvency Rules. As we see it, the closest you get to would be 12, Schedule 8 --

LORD JUSTICE BRIGGS: Paragraph 12?
MR WOLFSON: Paragraph 12, my Lord.
LORD JUSTICE BRIGGS: Schedule 8?
MR WOLFSON: Schedule 8, yes, which should start "Provision as to the debts". Schedule 8, paragraph 12, my Lords.
LORD JUSTICE BRIGGS: Yes, "provisions capable of inclusion".
MR WOLFSON: "Provision as to the debts that may be proved in a winding up, as to the manner and conditions of proving a debt and as to the manner and expenses of establishing the value of any debt or security."
That's the closest we could find.
This plainly authorises the creation of Rule 13.12, insofar as 13.12 defines what is provable. But we submit that it does not seem to permit using Rule 13.12 to define or quantify what a contributory must fund under section 74, save to the extent, of course, that the obligation under 74 is to fund payment of provable debts, because then you're back into the definition which you can define.
So, my Lords, prompted by that intervention of my Lord Lord Justice Briggs, we do reinforce our submission based on the meaning of liability in 13.12, not only by relying on the words "unless the context otherwise requires" but also the point I am on now, which is that

the meaning of liability in Rule 13.12 of the Rules cannot affect the proper interpretation of the word "liability" in section 74 of the Act.
My Lords, finally in this context, and I am sure the court has this point already, your Lordships heard a number of submissions this morning on the word "liability" and "liabilities" in the context of the sub debt. Of course the court will be alive to this, but section 74 -- there's no part of any definition, whether in 13.12 or anywhere else, which says anything along the lines of "payable or owing by the borrower or the company". So the word "liabilities" and the sub debt and the word "liabilities" in section 74 may have different meanings and there is therefore necessarily a clear distinction between the two.
My Lords, that is what I was going to say on section 74, unless I can assist the court further on that.
LORD JUSTICE MOORE-BICK: Thank you very much.
MR WOLFSON: I was then going to move to two short sets of what are now formally responses to my learned friend's appeals on Cherry v Boultbee and the lacuna, black hole, Mr Bayfield's point. I appreciate some of this has been addressed by my learned friend Mr Snowden and I will try not to repeat points that he has already made.

LORD JUSTICE MOORE-BICK: Yes, very well.
MR WOLFSON: My Lord, on contributable and Cherry v Boultbee, so far as we understand the position in the light of what Mr Trower said, I think for the first time on Day 3, that LBIE is now only contending that the contributory rule applies in LBIE's administration if LBHI2 and LBHI's appeals of the issues as to whether LBIE can prove in the members' administrations succeeds, such that there can be set-off -- in light of the fact he's saying that, of course this point is now only live for me if my learned friends here succeed on that appeal.
Of course, that wasn't the way it was put below and that's why we, in our skeleton, have extensive submissions on the contributory rule and Cherry v Boultbee. Although it was very interesting doing the research, I am not now proposing to labour your Lordships with the fruits of it.
Can I just pick up one point, though, where I think, with respect to my learned friend Mr Trower, Homer nodded at one point. Although, as I've said, he repeatedly accepted on Day 3 and Day 4 that the contributory rule and Cherry v Boultbee cannot apply if there is set-off in LBIE 's administration, at one point, in answer to a question from my Lord

Lord Justice Lewison, he suggested that his proposed extension or development of the contributory rule would apply irrespective of whether the contingent liability under section 74 is provable. That was on Day 4 at page 8.

But consistently with his position it would seem to us that if the contingent liability is provable there would be set-off in LBIE's administration and therefore, consistent with his main position, no room for the contributory rule or Cherry v Boultbee.

Our position, therefore, is that even if your Lordships allow LBHI2 and LBHI's appeals and conclude that the section 74 liability is not provable by LBIE in the members' administrations, such that there can be no set-off, the contributory rule and Cherry v Boultbee still cannot apply in LBIE's administration. That is because, as we've set out in writing, those rules only apply where there is a present obligation to contribute to the fund in question.

A fundamental assumption in LBIE's case on this point, and I can just take this point briefly, I hope, is that the potential liability which the members may have under section 74 ought to form part of the fund distributed to LBIE's creditors. That appears from paragraph 51 of their appeal skeleton, where they say

this:

"The mischief which the contributory rule prevents, that of removing from the creditors all or part of the fund which should be available to pay their debts, is present equally in an administration and a liquidation."

But, of course, that assumption, with respect, is wrong. For reasons addressed in exchanges between my Lord Lord Justice Lewison and my learned friend Mr Snowden, because administrators cannot make calls on the members, their potential liability under section 74 will never form part of the fund which the administrators are distributing. That means that neither the contributory rule nor the rule in Cherry v Boultbee can be engaged while LBIE is in administration and your Lordships should not create a judge-made rule, as LBIE is inviting your Lordships to do.

But, my Lords, having said that and, given the very limited way in which this point now arises, certainly for my clients, I don't propose to say any more about that.

(Pause).

My Lords, that brings me to the last remaining point, which is the Rule 2.88(7) post-administration interest, et cetera, point.

Just to set this in some context, LBIE's case before the judge, and indeed on this appeal until a couple of days ago, was premised on the fact that there was a lacuna in the rules because if LBIE was to go into liquidation, interest for the period of the administration, which wasn't paid in the administration, would, so said LBIE, not be provable in a subsequent liquidation or payable out of a surplus in the liquidation under section 189.

No doubt the reason why LBIE took that position was because of the clear terms of Rule 4.93(1). We submit that the language of this provision is clear, that interest from the date of administration is not provable in a subsequent liquidation of LBIE.

My learned friend now appears to think that he's found a means by which he can argue that the lacuna, which was indeed the premise of his case before David Richards J, isn't in fact a lacuna at all. We say that the suggested means of filling or avoiding the lacuna is not a permissible reading of the statute and that this is an example of first thoughts being best thoughts. I will explain that point to your Lordships in a moment.

But I do respectfully join with Mr Snowden. We are a little concerned that we've approached this point

fairly quickly and there's a lot of money at stake. Again, without wishing to turn this appeal into some sort of run-off process, we do respectfully ask, if we do have some further thoughts, they will put briefly if we do have some, perhaps over the weekend or Monday, we would be permitted to submit them to your Lordships and perhaps we could discuss that at the end of the appeal.

My Lords, what --

LORD JUSTICE BRIGGS: Can I just ask you one thing, since you're here. It's not so easy to do if we only get it in writing. If we go to 4.93.

MR WOLFSON: Yes.

(Pause).

LORD JUSTICE BRIGGS: (1), that's talking about an interest-bearing debt and a cut-off for proof in relation to interest in relation to that debt for a period after the start of the administration. It plainly contemplates contractual interest --

MR WOLFSON: Yes.

LORD JUSTICE BRIGGS: Does it contemplate statutory interest?

MR WOLFSON: That's the one --

LORD JUSTICE BRIGGS: Is that the sort of point you want to spend the weekend thinking about?

MR WOLFSON: That is one of the points we have been turning

over. It is not a straightforward point.
LORD JUSTICE BRIGGS: No.
MR WOLFSON: My Lord, if I may say respectfully we have been considering that point. But I am reluctant to provide a definitive answer because we really haven't got to the bottom of it.
My Lord, I will be coming back to 4.93 later in these submissions and it may be that in the course of that --
LORD JUSTICE BRIGGS: Inspiration --
MR WOLFSON: -- inspiration will arise or one of your Lordships will show me what the answer is. But that may be one of the points --
LORD JUSTICE BRIGGS: I'm afraid that was a rather open cross-examination question from me. I don't know what the answer is and I want your help.
MR WOLFSON: I wasn't presuming that your Lordship did not know what the answer was to any question your Lordship actually asked me.
LORD JUSTICE BRIGGS: You can assume that in this case.
MR WOLFSON: But, my Lords, if we can have a think about that because this is a point of some complexity and it really has arisen over the last 48 hours.
LORD JUSTICE BRIGGS: No, I can see that.
MR WOLFSON: Now, can I first start with what my learned

friend's case was in writing, so to speak, i.e. he proposed two construction arguments to deal with this point and this is before we get to either of the other two or perhaps I should say three putative solutions to this problem; the other three being, if may call it -- we're going to call it the Mr Bayfield point, Lord Justice Lewison's charge argument, which your Lordship has proposed, and this morning we had the Quistclose --
LORD JUSTICE BRIGGS: Type trust.
MR WOLFSON: -- type trust from my Lord Lord Justice Briggs. So I am going to deal, if I may, with those later. Let me first deal, if I may, with the point which was, so to speak, on the papers before the court in the skeletons.
In my learned friend's written submissions, the reference is paragraph 12 of LBIE's appeal skeleton, LBIE argued that post-administration interest, which is not paid in the administration, survives into the winding-up and is payable out of a surplus on two grounds.
First, the argument as written was that statutory interest is payable, pursuant to Rule 2.88(7), to all creditors who proved or prove whether during or after the conclusion of the administration, and section 189 is inapplicable in that regard in a subsequent winding up,

or the second alternative submission was that there is a bifurcated regime whereby statutory interest is payable in the winding up under Rule 2.88(7) to those creditors who prove during the administration, whilst statutory interest is payable under section 189(2) to those creditors who prove during the winding up.
In my learned friend's submissions yesterday it appeared to us that he had abandoned his primary case at paragraph 12.1 of his appeal skeleton, because he said that his argument based on Rule 2.88(7) only applied to creditors who had actually lodged a proof in the administration.
The case, therefore, put against me appears to be that Rule 2.88(7) somehow survives into the winding up following the administration. We respectfully submit that that is an answer which flatly contradicts the legislation itself. The Rules and the Act clearly provide that Rule 2.88(7) only applies to a surplus in the hands of the administrators and section 189 is both the exclusive and the mandatory provision governing the application of a surplus in the winding up after the payment of unsecured claims. Section 189 tells the liquidators what to do with the surplus. We submit that there is no room for the continued existence of Rule 2.88(7) in a winding up following the

administration.
LORD JUSTICE LEWISON: It depends by what you mean by, "Does it survive?" It is the accrued effect of Rule 2.88 which may or may not survive. The rule itself doesn't need to survive.
MR WOLFSON: Yes. My Lord, I was going to come next to your Lordship's suggestion of a charge or --
LORD JUSTICE LEWISON: I don't think it matters what legal label you put on it. Whether it is Quistclose trust, charge or something else, there is a statutory instruction which tells you what should happen to a certain fund.
MR WOLFSON: Yes. Yes. My Lords, I was going to take, so to speak, the charge argument or the charge suggestion and the Quistclose trust suggestion, if I can put that respectfully together, because it seemed to us that they are essentially directed at the same underlying thesis perhaps from different angles.
LORD JUSTICE LEWISON: I think my Lord and I are just using different labels --
MR WOLFSON: Precisely.
LORD JUSTICE LEWISON: -- for the same underlying concepts.
MR WOLFSON: Yes. With respect we have the same underlying answer, which is that section 189 in its terms is inconsistent with either any such charge or any such

trust, because section 189 is mandatorily and exclusively telling the liquidator what he has to do with the monies when he gets them.
LORD JUSTICE LEWISON: Well --
MR WOLFSON: And you end up with a contradiction, that the liquidator has been passed some monies which, if they are impressed with a trust or a charge or a purpose for which they are to applied, or whatever, conflicts with what the legislature has told the liquidator he is to do with the surplus in his hands.
LORD JUSTICE LEWISON: That can't be right, with respect. Suppose the administrator ceases to give up his office, there are some unpaid bills for his remuneration, paragraph 99 attaches a charge. You can't say that's inconsistent with section 189. What the liquidator now has is a charged fund.
MR WOLFSON: Yes. That's the second point. If we are talking about, so to speak, a formal charge on the fund, to echo my learned friend Mr Snowden, when the scheme imposes such a charge it does so expressly.
LORD JUSTICE LEWISON: That's a different point.
MR WOLFSON: I appreciate it's a different point, absolutely.
LORD JUSTICE BRIGGS: Isn't the point that 189(2) undoubtedly tells the liquidator what to do with any

monies after he's paid debts proved in the winding up? But if the fund that comes to him for any of these purposes is already affected by the administration interest, trust charge, statutory direction, call it what you will, that takes priority even over what will be inevitably new proof of debts going on in the winding up, because there will only be an administration interest charge if debts have been proved in the administration and indeed if there's a surplus after the debts have been proved in the administration.
MR WOLFSON: Yes.
LORD JUSTICE BRIGGS: So that comes first, as indeed would the remuneration charge that my Lord has just been speaking of.
MR WOLFSON: The remuneration charge comes first because it is expressly provided that it should come first.
LORD JUSTICE BRIGGS: The express or implied is, if I may say so with respect, is a different point.
MR WOLFSON: Exactly.
LORD JUSTICE BRIGGS: But I am asking what your response is to the notion that if 189 is affected it is only affected because this comes before the payment of the debts rather than gets shoehorned in between the payment of debts and the payment of liquidation statutory interest.

MR WOLFSON: The submission is this, that there is nothing in 189 which, so to speak, carves out of the surplus which the liquidator receives anything other than express charges which have previously been applied to that surplus.
LORD JUSTICE BRIGGS: It depends on what you mean by a surplus.
LORD JUSTICE LEWISON: As my Lord says it depends on what a surplus is.
MR WOLFSON: Yes.
LORD JUSTICE MOORE-BICK: If a liquidator receives a fund which is already impressed the with a trust for certain purposes the assets or the fund may not contribute to any surplus, may it?
MR WOLFSON: In the most extreme case it may not be the company's money at all.
LORD JUSTICE MOORE-BICK: Well, all right.
MR WOLFSON: Absolutely.
LORD JUSTICE MOORE-BICK: At the moment I don't see why section 189 is an answer to my Lord's Quistclose-type trust or a charge.
MR WOLFSON: My Lord, I am just being ... (Pause).
My Lords, if one takes the example of preferential debts, you Lordships may say to me the same problem arises with this answer, but we would submit if one

looks, for example, at section 175(1), which provides:
"In a winding-up the company's preferential debts shall be paid in priority to all other debts."
LORD JUSTICE BRIGGS: Yes, but that means out of assets available for that purpose.
MR WOLFSON: Exactly.
LORD JUSTICE BRIGGS: If there is some asset that has a charge or a trust attaching to it, so what?
MR WOLFSON: In which case the fundamental point is: is the proper construction of 2.88(7) so as to effectively leave the monies impressed with that charge or trust?
LORD JUSTICE BRIGGS: Yes.
LORD JUSTICE LEWISON: Exactly.
MR WOLFSON: Exactly.
LORD JUSTICE BRIGGS: In the extremely rare event that the administrator doesn't simply pay it.
MR WOLFSON: Well, yes. We make our submission that it doesn't for the reasons which I have explained.
We also submit that 2.88(7) is a direction to the administrator that he can't apply the monies for any purpose other than the payment of interest and by not distributing the surplus and by the administration then being taken over by or replaced by a liquidation. That is not an application of the monies and, as I've submitted, when the monies come into the hands of

liquidator they are not impressed with any trust.
This is not a private transfer of assets. There is one statutory scheme and then there is another statutory scheme. We do submit that the scheme works as a whole with particular rules applicable to the administrator and particular rules applicable to the liquidator.
My Lords, we do submit that where the statute intends for a charge to be imposed, it says so expressly. The remedies, if I may say, fashioned in argument by my Lord Lord Justice Lewison and Lord Justice Briggs come very close to the effect, and seemed to me have essentially the same effect, as the express charge fashioned in, for example, Schedule B1, paragraph 99, in circumstances where there is no express charge here.
LORD JUSTICE LEWISON: Nor is there an express direction to the administrator.
MR WOLFSON: No, there isn't an express -- that's a point your Lordship went through with my learned friend Mr Snowden. I am happy to tread the same ground, but I suspect I will say the same thing that Mr Snowden said and he probably said it better.
LORD JUSTICE BRIGGS: I am quibbling with the notion that if the Quistclose trust is right -- I am quibbling with the notion that it is not expressed. Agreed it does not say

"shall be subject to an Quistclose trust", but that's just a label that the law gives to a situation where somebody who has power over assets, here Parliament, says they must not be used other than first for this purpose.
MR WOLFSON: Yes. In circumstances where Parliament has said --
LORD JUSTICE BRIGGS: "Shall" is quite strong.
MR WOLFSON: My Lord, yes, in circumstances where Parliament has told the liquidator in equally strong terms in section 189 what he is to do with the same pounds, shilling and pence when they arrive under his purview.
LORD JUSTICE LEWISON: Well --
LORD JUSTICE BRIGGS: Subject to what Parliament may have provided elsewhere as a prior commitment of that fund.
I am using commitment to avoid getting into charge or trust territory, just use a neutral world.
MR WOLFSON: Where this argument boils down is to whether one can properly spell out, of the words of 2.88(7), in the context of (a) the fact that one has one scheme in administration and a separate scheme in liquidation and (b) the express and mandatory direction given in section 189 in the liquidation context -- whether in those circumstances one can spell out, to use your Lordship's word, the commitment.

LORD JUSTICE BRIGGS: Yes.
MR WOLFSON: We respectfully submit that there really is nothing there to spell that out. What one is doing is one is, with respect, saying, "I don't want this to fall into a black hole, so this is a way through". But my Lord, it just doesn't arise from the statute. It doesn't arise from the rules.
(Pause).
My Lords, the learned judge below gave four reasons for rejecting LBIE's argument. Of course the judge below wasn't grappling with the commitment argument. My learned friend Mr Snowden has dealt with I think three of them. The learned judge said that they were all very telling points.
The one which I should just say something about is the third which the learned judge referred to. That was if Rule 2.88(7) is restricted to the surplus in the hands of the administrator, its effect could only be limited to the amount of that surplus and to creditors who actually lodged a proof in the administration.
Not only would that mean that LBIE's approach would only go a limited way to meeting the problem, it would give rise to discrepancies in the payment of interest as regards creditors who had lodged a proof in the administration and creditors who had only proved in the

winding up. There would be twofold discrepancies.
First, creditors who didn't actually prove in the administration could not be paid interest for the period between the administration and the winding up from the surplus in the liquidator's hands. Secondly, the pots out of which interest would be payable in the winding-up would differ depending on whether or not the creditor had proved in the earlier administration, because assets only realised in the winding-up would not be available for distribution to creditors who had lodged proofs in the administration.
So we respectfully agree that the third --
LORD JUSTICE BRIGGS: Can you just give me the paragraph of the judgment?
MR WOLFSON: Yes, it is all in 125.
LORD JUSTICE BRIGGS: Okay.
MR WOLFSON: There was a point where the judge said there were some very telling points.
LORD JUSTICE BRIGGS: Yes.
MR WOLFSON: So we emphasise the third one, but my learned friend Mr Snowden emphasised 1, 2 and 4.
Let me now turn to address some other arguments made in this court by LBIE in support of its appeal --
LORD JUSTICE MOORE-BICK: How are you getting on?
MR WOLFSON: We have only a few minutes left, I hope.

LORD JUSTICE MOORE-BICK: Because your time was due to run out at 3 o'clock, that's all.
MR WOLFSON: It was. I think my learned friend Mr Trower raises eyebrows. I finished early on Tuesday. He is probably now going to blame me for finishing slightly late today. My Lord, I don't anticipate being more than ten minutes or so. What I do want to say a word about, and it may be we can say a little more in writing --
LORD JUSTICE MOORE-BICK: I think we would rather have it orally. Would ten minutes do you?
MR WOLFSON: I hope so.
LORD JUSTICE MOORE-BICK: Mr Trower?
MR TROWER: My Lord, I think that will be all right. If it goes much beyond ten minutes it won't be so all right.
LORD JUSTICE MOORE-BICK: Very well.
MR WOLFSON: What I want to do is to deal with Mr Trower's, so to speak, new point, the Bayfield point which has come as a surprise to everybody, including it seems Mr Trower.
My Lords, just to finish the points I was on on the construction point, we do make two other points.
First, that my learned friend's alternative construction arguments through this problem involve interpreting Rule 2.88(7) very broadly and section 189 very narrowly. We say, with respect, that there is no

basis for that inconsistent approach to construction.
That's the first point we make.
The second point we make is a short point on Inco Europe which has been debated already, which is to remind the court that in this case there are so to speak two potential solutions when one is asking the question: what would Parliament otherwise have done? Parliament might have done something to section 189, it might have done something to Rule 4.9(3). So it's not a case where you're even focused on one particular section when you ask the question: what would Parliament have done? One doesn't know how Parliament would have tried to resolve this problem.
My Lords, moving then to the new point about provable claims. The basis appears to be that the concession that interest in the administration wasn't provable in the winding-up might have been wrongly made. As soon as my learned friend made this submission, your Lordships drew my learned friend's attention to the deeming provision in Rule 4.73(8). My learned friend said in response that Rule 4.73(8) is a deeming provision for the protection of creditors. That's the way he put it yesterday, page 50. It did not mean that for all purposes you have to treat a creditor who has proved in the administration as having had its debt

proved in the liquidation. He said essentially the purpose is to protect creditors so they don't have to prove again in the liquidation.
But, my Lords, we respectfully submit that the deeming provision is not qualified. There is no carve out in the deeming provision for debts paid in the administration. My Lords, in this case I rely on the mandatory word "shall". Rule 4.73(8) uses the mandatory word "shall" and does not suggest that you can simply pick and choose, when you want a debt proved in the administration, to be treated as having been proved in the liquidation.
My Lords, we also say there are a number of problems which have occurred to us with my learned friend's approach, even over the last so to speak day. Can I just set them out very quickly.
First, the hypothesis is that a person claiming interest in the liquidation is not actually a creditor as defined because he has had his principal debt paid in the administration. On that basis, it is hard to see how he would be able to vary or amend the proof in relation to a contingent debt if it becomes clear in the liquidation that his claim was worth more, because that's something that only a creditor in the liquidation can do.

There is a further problem. Section 189(2) provides for interest in respect of the period during which the debt was outstanding since the company went into liquidation. On the approach of my learned friend in this part of the case, it would appear that because the right to interest accrued during the administration is now to be treated as a provable debt in the liquidation, there would then be an entitlement to interest on interest, i.e. an entitlement to interest in the liquidation on the interest sum which had accrued but had not been paid during the administration.
We respectfully submit that that cannot be right.
Finally in this regard, and more generally, we submit that the new suggested provable claim is inconsistent with the statutory scheme as a whole. Your Lordships are familiar with the rules. To cut to the main submission, we submit the intention behind these rules is clear. Once a company is in an insolvency process, whether administration or liquidation, which is then followed by a different insolvency process, the cut-off for provable interest in the second process remains the commencement of the first insolvency process.
Essentially, that sort of stops the clock as far as interest is concerned and post-insolvency interest is

payable only if there is a surplus.
So the effect of the new case on provable post-administration interest would be that in a subsequent liquidation of LBIE interest for the administration period is provable in LBIE's liquidation, whereas interest for the liquidation period is only payable if there's a surplus in LBIE's liquidation. Again we submit that is not consistent with the legislative scheme.
We take it a stage further and we submit it would fundamentally undermine that scheme for this reason. If LBIE were to go into liquidation, if a creditor were to prove in LBIE's liquidation who had not proved in LBIE's administration, the effect of the new argument would be that the creditor for principal in LBIE's liquidation would be competing as regards the assets in LBIE's liquidator's hands with the claims for interest in LBIE's administration, who would be claiming post-insolvency interest on a contractual or maybe a statutory basis, and that would arise out of the provable claim.
We submit, therefore, with respect, that even in the sort of day and a half that we've have to think about it this is a false point.
LORD JUSTICE BRIGGS: Is a possible answer to that last

point that new proofs of debt in the liquidation in the bad years between 2005 and 2009, when there are different cut-off dates for the same company between its administration and its liquidation, would probably be non-provable debts in the administration? Because if they were provable in the administration, they would probably approve them. It is not so surprising to see administration interest having priority over a non-provable debt if they both have to put side by side in the liquidation, because the same consequence would have occurred during the administration.
MR WOLFSON: Possibly. Possibly. I would like, if I may --
LORD JUSTICE LEWISON: That may be another weekend problem.
MR WOLFSON: I'd like to think about that.
LORD JUSTICE LEWISON: Another possible answer is the administrator might have paid the interest, in which case the provable creditor and the liquidator couldn't complain.
LORD JUSTICE BRIGGS: Yes.
MR WOLFSON: We only start with this whole analysis because there is a surplus in the administration.
LORD JUSTICE LEWISON: Exactly. But why should the creditor who can only prove in the liquidation be any better off because the administrator has failed to pay the interest which he should have paid in the administration?

LORD JUSTICE BRIGGS: Quite.
MR WOLFSON: Really the whole reason why we're here in the first place is that the administrators of LBIE have plainly thought -- they may now be thinking they've made the wrong decision for the last eight years, but they plainly have thought that it was in the interests overall of the creditors of LBIE not to move from an administration to a liquidation, notwithstanding that there will be, as we have discussed with the calls point, options available in the liquidation but not in the administration because there has to be an overall balance. Therefore, when one picks any element of the analysis and says, "Well, why should creditors be better or worse off?" one has to remember that these decisions are being taken for the general body of creditors as a whole.
My Lord, I hope at least on that clock, which I accept is one or two minutes slow, I am bang on the time. Unless your Lordships have any further questions, those are my submissions.
LORD JUSTICE MOORE-BICK: No. Thank you very much. We'll take a five-minute break, shall we, at this point? Then, Mr Trower, you will be on.
(3.13 pm)
(A short break)

(3.18 pm)
Submissions in reply by MR TROWER
LORD JUSTICE MOORE-BICK: Yes, Mr Trower.
MR TROWER: My Lords, can I first just deal with a few remarks on the submissions that have been made in relation to the Rule 2.88(7) point in the context of the transfer of a company from administration to liquidation, what has been called the lacuna point. I don't want to say very much about this, in the light of what my learned friends have said, because I don't want to go over the same ground that I've already been over.
The essence of it is that we do say that the right continues to subsist, like any other right, until it is taken away. The starting point when one is looking at a statutory right of this sort is to ask yourself the question not whether you can see that the right has explicitly been permitted to continue to subsist, but whether it has been removed.
If you have a right, you have to see how it has been taken away from somebody. There is no sign on the face of the rules or the legislation elsewhere that it has been removed.
That's the first point.
The second point is that my learned friends looked

at paragraph 99 and they said, well, look in a paragraph 99 context Parliament has made it explicit provision for what should happen in relation to administrators' costs and expenses where a company moves from administration into liquidation, you would expect something similar to be done in those circumstances.

One has to bear in mind what the paragraph 99 charge is actually doing. It is imposed in circumstances where there are a number of differently characterised costs and expenses, and indeed the administrators' remuneration, that have to be protected in respect of a move from administration to liquidation.

In those circumstances, for perfectly understandable reasons, it was thought appropriate both to include an obligation to pay on the continuing -- on the company -- not withstanding the intervention of the liquidation and an explicit statutory charge which covered the cost and expense, whatever its nature happened to be.

Just for my Lords' note, we don't need to look it at now, there's a long list of differently characterised costs and expenses that are contained in Rule 2.67 of the rules. In those circumstances one needs an all-encompassing provision which actually protects the position going forward in relation to those costs

and expenses.

The position in relation to Rule 2.88(7) we respectfully submit is different, simply in this sense. On the face of the rule itself one can see all the characteristics, applicable necessarily in an administration as well because of the way the rule is drafted, but which are sufficient to enable those rights to subsist through to the subsequent liquidation.

In particular, the reference, on the face of the rule, to the fact that the company's continuing liability is to be satisfied out of an asset is itself qualitatively different from what one normally finds in relation to costs, charges and expenses, which is why there is a need for a specific statutory charge in relation to the paragraph 99 obligations.

So that was the first series of short submissions in relation to your Lordships' analysis.

The second point is really a point which goes some way, we suggest, towards helping thinking about what happens at the end of an administration. There is a clue one gets from the way it is characterised in Schedule B1, paragraph 83, which I don't think your Lordships -- I think Mr Snowden might have taken your Lordships to it, but we didn't pause on it for more than a moment or two. But what happens at the end

administration -- and if we just turn it up in the red book, which I have helpfully lost.

What happens at the end of an administration, and it is Schedule B1, paragraph 83, page 284, is that -- sub-paragraph (6) is:

"On the registration of a notice under sub-paragraph (3) the appointment of an administrator in respect of the company shall cease to have effect."

So the way Parliament has thought about this is the concept of an appointment by an administrator ceasing.

A lot of the legislative provisions within the code flow from the appointment of the administrator, if I can put it that way. But what we respectfully submit is that there's no concept within here of everything that happened to the entity as a consequence of the imposition of the statutory scheme in respect of administration somehow no longer being in effect or being forgotten about, or ignored, or discharged, or released.

That's not the underlying principle. The underlying principle is that an appointment of an office holder ceases to have effect. So if you cannot see that the necessary statutory consequence, that has to be relied on by my learned friends, itself is released or discharged in consequence of what is happening through

the operation of paragraph 83, that's a very strong indicator that whatever it happens be, duty, obligation, right, or so on, continues to subsist.

The third submission we just wanted to make -- and I think my Lords have it, but just to make sure that it is clear. One way of thinking about what is happening in this context is: what is the actual surplus that one is looking at at the stage at the end of the administration and what is the actual surplus that one is looking at when thinking about the true construction of section 189?

A statutory charge or trust may be necessary to secure the right, but there's nothing unprincipled or uncertain or unusual about that. But that's fortified by thinking what the charge attaches to. It attaches to the surplus in the hands -- or at the moment of the cessation of the administration, with the necessary consequence that when you're looking at what the surplus is for the purposes of section 189 you're looking at a different animal.

(Pause).

My Lords, the final point on the pure construction point I wanted to address in reply is this. We accept, I think one has to, that there isn't a solution that's provided by this construction, or by any construction,

in circumstances where the administration has not become a distributing administration. It can't work in those circumstances because the regime doesn't come into place under the relevant part of the rules, and there is no way round that.

But we do respectfully suggest that just because there may be a difficulty in one situation you shouldn't extend that difficulty any further than is absolutely necessary.

LORD JUSTICE LEWISON: You say a partial solution is better than no solution at all?

MR TROWER: A partial solution is certainly better than no solution. Let me illustrate it in this way. Without asserting in any way that an administrator should do anything other than comply with what is required of him when determining whether or not to go into a distributing administration, in the very unusual circumstance -- and one has to accept it would be a very unusual circumstance where this might matter in a future administration -- in order to comply with his duties he would have to consider whether, all other things being equal, you would go into a distributing administration before you then move into liquidation, even if you anticipated that you might have to go into liquidation in due course.

But that would be no more than a function of the administrator acting in accordance with the interests of the creditors as a whole, which is what he has to do when he's trying to decide whatever he has to do.

So we respectfully suggest, in a case where it might matter, that is a thinking process that administrators have to go through. It is something that, when my Lords Lord Justice Briggs and Lord Justice Lewison were sitting at first instance, they will have seen from time to time applications by administrators where they had to make decisions about how to use the statutory scheme in a manner which was of most benefit to the creditors, particularly at termination stages. That is a perfectly legitimate process for administrators to have to go through.

My Lords, that's all I was going to say about the construction point, unless I can help any further.

The next point I wanted to deal with very, very shortly, if I may, was just one or two submissions that were made in relation to what has been called the new point or, dare I even say, the Mr Bayfield point -- I hesitate as his leader to say that, but in relation to the provability and the operation of Rule 4.93 and the like.

One of the points that was made by my learned friend

Mr Wolfson was that, if one ended up in a situation where because of the operation of the rule the next thing to think about was whether or not one was able to have a provable debt, the provable debt would be a debt that ended up proved in the liquidation of LBIE, in this case, and itself bore interest. So there was a sort of interest on interest argument that my learned friend --

LORD JUSTICE BRIGGS: That would apply whenever you get statutory interest because contractual interest gets added to your debt up until the cut-off point.

MR TROWER: Your Lordship has exactly the point.

The other slightly more general point that was made was that there was a general inconsistency with the statutory scheme.

We respectfully suggest that in this particular context our solution gives as much substance to the statutory scheme as a whole as it is possible to give in the circumstances of the construction points that my Lords are looking at. Stepping back, what's going on here is imposing by one form of construction or another a solution which ensures that those creditors who have been left out of their money for a period during the course of which the company is insolvent, and kept out of their money, who under the overarching principles behind the statutory scheme could expect to receive

interest out of the surplus, are recompensed in respect of that interest or compensation from being kept out of their money in one form or another.

Of course, proving for interest in respect of the administration period as a new debt in the liquidation is a way which one might think is a complex method for getting to the end result. But to say that that is somehow inconsistent with the statutory scheme is, we respectfully suggest, not the right way of looking at it.

LORD JUSTICE LEWISON: It's a bit like the Cheshire cat, isn't it, all that is left is the grin?

MR TROWER: My Lord, that is certainly one way of thinking of it, yes.

So, my Lords, that I think was all I wanted to say about that part of the case.

There are three other things that I wanted to deal with. There are some submissions on the contributory rule, then my Lords were given a new case in reply by Mr Snowden which, if I may, I'll say just a few words about because it was introduced in reply, and then there was a short point, if my Lords would just permit me to say a word or two about it, on section 4.11, which we hadn't heard anything about before, and the ultra vires.

It came, I think, as a question from my Lord

Lord Justice Briggs. There is just one submission which it might be helpful to make, if my Lords would permit me to do so.
LORD JUSTICE BRIGGS: This is the point about whether you can construe the Act by reference to the rules? If it already had a concrete meaning before the rule was passed?
MR TROWER: Yes. The only point I did just want to draw your attention to was that the distinction between "debt" and "liability" is tracked in the Act itself in relation to bankruptcy. The definition is there in the Act itself in the bankruptcy context, where you'll see the two concepts.
LORD JUSTICE LEWISON: I think you showed us that.
MR TROWER: I showed it to you for a very different reason.
LORD JUSTICE LEWISON: Yes.
MR TROWER: Yes.
So, my Lords, can I then turn to the contributory rule and our submissions in reply in relation to that.
First of all, what I had said about the interrelationship between the contributory rule and set-off is that they are mutually exclusive. What I said about the interrelationship between the contributory rule and provability of our section 74 debt in the insolvency of the contributory was slightly

different. I said it in response to a question that was raised with me by my Lord Lord Justice Lewison, and Mr Snowden referred, I think, in his submissions to what I had said. I think it is quite important that my Lords shouldn't go away thinking that I had said quite what Mr Snowden said.
What I said was that of course the concept of the application of the contributory rule and the provability of the section 74 debt in the contributory's insolvency were interrelated, and it may well be the case that the one would follow the other. But I don't want to accept for present purposes that in all circumstances the two stand and fall together. It is quite important, that, because one can conceive of situations in which there might be problems with probability but where you still need, in order to protect the statutory scheme, to ensure that the ability to call on contributories is protected.
So, with the greatest respect to Mr Snowden, I think he slightly oversimplified in his summary of what my position was in relation to the relationship between the two.
Of course it will often be the case that if you can't even prove because of the incidence of the liability, a rule such as the contributory rule couldn't

be justified because of the interrelationship between the two. But I don't accept that that's always going to be the case.
So having cleared that out of the way, one of the essential submissions that was made by my learned friends was that we have misapplied the principle because the call has not yet been made. That was at the very core of a lot of what they said.
Again, can I make quite clear on this aspect of the principle we accept that some form of development is required. We certainly don't contend to the contrary.
But what there is is that there is a contingent right to make a call, and that contingent right to make the call is the asset for these purposes that requires protection so that the pari passu principle can be satisfied.
That brings me to one point, which is, my Lords, with respect to what my learned friends have said, do need to bear this in mind that it was somehow said to be -- I think even the word "wickedness" was used -- that LBHI2 can do nothing about being able to prove in LBIE's administration because it can't discharge itself in its capacity as a contributory so as to enable it to participate. I think that was the way it was put.
It's not really that wicked -- and I am only using

this forensically -- when one considers what is actually going on here. What the members are seeking to do is prove and recover 100p in the pound on their debts plus interest, leaving a future liquidator of LBIE to only get a dividend on the call. That's actually what is happening here. Whether that's right or wrong is obviously a matter for application of such principles of law as there are in relation to this area, but to characterise it in the way that it has been characterised on the other side, as being a situation where, in effect, the two contributories are not able to discharge their obligations to the company or they're not able to get themselves into a position where they can actually recover an asset from the company is not really the right way of looking at it, particularly in circumstances in which they are an unlimited liability member who's ultimately is liable for the entirety of the indebtedness of LBIE.
So we don't shrink from the submission that in a case in which the members have unlimited liability in any event, not only is the principle capable of being applied, it's a principle that has real justice that underpins it. There is nothing surprising at all about not being able to participate in those circumstances in making claims against the company of which it is

a member until it has, as the words in Lord Walker's speech in Kaupthing, discharged itself as a member, notwithstanding that the call is not yet presently payable.

So, my Lords, that was all I was proposing to say about the contributory rule.

In a sense, one can do no more than assert it as a point of principle in order to protect a statutory right. As I said in my submissions before, there's nothing that any of us can do really to assist on the authorities, apart from set out the broad parameters of the rule. My learned friends Mr Snowden and Mr Wolfson have pointed to a narrowness in the parameters of the rule derived for its existing application, and we do not shrink from the submission that your Lordships should take this opportunity, in the very special circumstances of this case, to give it a broader application.

My Lords, can I then turn on to -- unless my Lords have any other questions in relation --

LORD JUSTICE BRIGGS: Well, only this.

MR TROWER: Yes.

LORD JUSTICE BRIGGS: Why should this court or the court extend a common law, non-statutory anyway, principle which up until now has been defined in terms which don't go far enough, as I think you accept, when the

administrator's predicament of being faced with a proof from someone who, when later they get asked to make a call, will only pay a dividend --

MR TROWER: Yes.

LORD JUSTICE BRIGGS: -- has the remedy of saying, "Fine. We'll just put the company into liquidation?"

MR TROWER: Well, the answer to that is -- as my Lords know, one of the problems is -- well, I think the short answer to that is that if there are within the operations of the statutory scheme in which the administrator is actually operating restrictions of one sort of another that make it otherwise unattractive for the company to move from administration into liquidation, that is a reason why the court should give an expansive construction to the ability to protect that which otherwise needs to be recovered for the benefit of the unsecured creditors as a whole. I can't really put it any other way.

LORD JUSTICE BRIGGS: No. Okay.

MR TROWER: My Lords, can I then turn briefly to HIH, which my Lords were taken to in reply by Mr Snowden this morning.

I think my Lords were taken to the passage in the judgment of David Richards J beginning at paragraph 115. This section of his judgment was explaining the types of

cause of action that are available to creditors to assist in the enforcement of the statutory scheme.

What quite a lot of these cases are about are what are the circumstances in which individual creditors can seek collectively to enforce a class right or do they have their own independent cause of action for breach of statutory duty? It's that sort of area that one is thinking about.

The essential submission we make in relation to this type of case is that the mere fact that you have a claim for breach of statutory duty against the liquidator does not mean to say that you don't also have enforceable rights against the company in respect of which the office holder is also in office. None of these cases actually exclude the possibility, depending on the right which you're concerned with, of a continuing claim against the company. Indeed, some of them are cases where the default that is alleged against the liquidator is a default to do with the misapplication of assets for the purposes of discharging an existing claim. For example, IRC v Goldblatt, which is one of the cases referred to, was a claim for breach of statutory duty in circumstances in which there was a failure to pay a preferential claim. There was a failure to pay, there was a claim against the office holder to pay the

preferential claim, and there was also, co-existing with those, the rights in respect of the underlying preferential debt.

There is not an exact analogy with the circumstance that we're looking at here, I think I would accept that, but one of ways of testing the significance of this area is to ask yourself this question. Posit a case where there might have been a misapplication in some way of the surplus which would otherwise have been applicable to pay interest. Assume that circumstance. That might give rise, one would accept that, to a claim by a creditor against the person who was responsible for misapplying the surplus, which meant that he suffered loss in some form or other because the surplus had dissipated.

It wouldn't necessarily mean to say that the creditor had no claim against the person whose assets had actually been misapplied in this way. Add a little extra ingredient. Assume the misapplication was a perfectly innocent, innocuous misapplication by the office holder. No blame could be attached to him in relation to it. One might expect that the office holder, if liable to pay as a result of some breach of statutory duty, would have a claim over for an indemnity against the person who, on the law as I've showed my

Lords, already is in fact his principal, namely the company, whose assets have been innocently misapplied in order to get recompense for what he has to pay to the creditor who has a claim against him for breach of statutory duty. So you may have that situation arise.

If that is actually right -- and it is very difficult to see why as a matter of principle it isn't right -- it would be very peculiar for that to arise in circumstances in which the creditor didn't have a direct claim against the company.

So we actually respectfully submit that these cases don't take you very much further -- this line of authority. They are simply authorities which demonstrate that there are certain categories of activity by office holders or non-activity by office holders which give rise to causes of action at the suit of creditors in order to enforce the statutory scheme. They don't go any further than that, as authorities.

My Lords, would your Lordships just give me one moment?

LORD JUSTICE MOORE-BICK: Yes, of course. (Pause).

MR TROWER: My Lords, having told Mr Wolfson that I needed the time I did, I think I was perhaps being a little harsh. But then he finished early for me yesterday, so ...

My Lords, I don't have any further submissions to make by way of reply.

LORD JUSTICE MOORE-BICK: No. Thank you very much.

MR TROWER: It is Friday afternoon and we finished a little bit early.

LORD JUSTICE MOORE-BICK: That's always very welcome, isn't it?

MR TROWER: Yes, indeed.

LORD JUSTICE MOORE-BICK: Thank you very much.

Now, there was a question as to whether people wanted to have thoughts about deep and interesting points.

MR WOLFSON: My Lord, yes.

LORD JUSTICE MOORE-BICK: Is it really, Mr Wolfson, or do others always also want to --

MR WOLFSON: I am prepared to take the blame for it, my Lords.

We were thinking, my Lords -- first of all, only if there is a new point which occurs to us. We will obviously keep it short. Obviously, we're in your Lordships' hands as to how quickly to get it in, but we were thinking very quickly.

LORD JUSTICE MOORE-BICK: So we were.

LORD JUSTICE BRIGGS: It is just the parked point, isn't it?

MR WOLFSON: It is essentially the parked point. My learned

friend Mr Snowden --

MR TROWER: I am not sure I like the word "essentially".

MR WOLFSON: Yes. The parked point, the Bayfield point, whatever we're going to call it, yes.

LORD JUSTICE MOORE-BICK: Well, how quickly? How quickly can you do it without ...? (Pause).

MR WOLFSON: My Lords, as I understand it, the last day of term is actually Wednesday.

LORD JUSTICE MOORE-BICK: We were thinking of a little earlier than that.

MR WOLFSON: Yes. My Lords, if we were to say the end of Tuesday, Tuesday lunchtime?

LORD JUSTICE MOORE-BICK: We were thinking the end of Monday.

MR WOLFSON: In which case that is fine.

LORD JUSTICE MOORE-BICK: Can you do that?

MR WOLFSON: Yes.

LORD JUSTICE MOORE-BICK: 4 o'clock Monday.

MR WOLFSON: 4 o'clock Monday. Of course, a matter of courtesy, if there isn't anything we will inform the court there is a nil return, so to speak.

LORD JUSTICE MOORE-BICK: The other thing is how long do you envisage this note to be?

MR WOLFSON: Short.

LORD JUSTICE MOORE-BICK: Of course. But people's views

about long and short differ.

MR WOLFSON: My Lords --

LORD JUSTICE MOORE-BICK: Can I just say, the first thing is you have to comply with the practice direction on skeleton arguments, in terms of font size and line spacing. So just take that into account.

MR WOLFSON: My Lords, yes. My Lords, I certainly was not thinking of anything in the order of 25 pages.

LORD JUSTICE MOORE-BICK: Certainly not.

MR WOLFSON: My Lords, a maximum of five would be ample and I doubt we will get to five, but just in case.

LORD JUSTICE MOORE-BICK: I think that's about as far as we were thinking of going anyway, so --

LORD JUSTICE BRIGGS: To comply with the practice direction isn't just slavishness.

LORD JUSTICE MOORE-BICK: No, we have to read it.

LORD JUSTICE BRIGGS: It is dealing with the failing eyesight of elderly people, speaking for myself.

LORD JUSTICE MOORE-BICK: Since my Lord raises the point, I wasn't going to raise this but since we have time for me to do so and my Lord has raised, I don't know whether anyone has looked, apart from us of course, at the copies of the skeletons in bundle E.

MR WOLFSON: Yes.

LORD JUSTICE MOORE-BICK: Has anyone looked at them?

This is where we play a little sort of guessing game.
Mr Trower, if you look at your skeleton in bundle E --
MR TROWER: Yes.
LORD JUSTICE MOORE-BICK: -- which I think is number 1 -- yes -- what size would you say the font is?
MR TROWER: Well, my Lords -- yes.
LORD JUSTICE MOORE-BICK: I don't mean what size did you produce it at.
MR TROWER: Yes. No, I --
LORD JUSTICE MOORE-BICK: What size is it in the document we're being asked to read?
MR TROWER: No, my Lords, I quite see what your Lordship is saying. On any view, it is smaller than 12.
LORD JUSTICE MOORE-BICK: It is not a very deep or sophisticated point, this, is it?
MR TROWER: No, I --
LORD JUSTICE BRIGGS: It is something that has happened during photography.
MR TROWER: Yes. No, it definitely has. When it left our machines it --
LORD JUSTICE MOORE-BICK: No, I can see what has happened. The reprographic system has reduced the size of the page in order to put the numbers on the bottom --

MR TROWER: Yes.
LORD JUSTICE MOORE-BICK: -- but no one seems to have taken in, or if they did they don't mind, the fact that the text comes out a lot smaller.
MR TROWER: Yes.
LORD JUSTICE MOORE-BICK: It is readable; it's not as easily readable as it would be if it conformed to the practice direction.
MR TROWER: Yes.
LORD JUSTICE MOORE-BICK: It becomes more of a problem -- I don't think it actually is in this case, particularly, but where one is dealing with documents, some of which start in fairly small print, by the time this has been done to them, they become almost illegible.
MR TROWER: Yes.
LORD JUSTICE MOORE-BICK: It is not your fault, it is not the fault of any counsel, but I just send out a plea to those sitting behind you to consider whether some other system of numbering can be devised that leaves us with documents that are in their original sizes.
MR TROWER: Yes.
LORD JUSTICE LEWISON: The problem with the footnotes is a little bit more acute.
MR TROWER: Yes. No, I can see that. It is exacerbated by the fact that the references to the appeal bundles tend

to go in after and in a separate process from the way --
LORD JUSTICE MOORE-BICK: They are much better.
MR TROWER: Yes. But I'm not quite sure technically how it is done, but they get superimposed, I think, is the problem.
LORD JUSTICE BRIGGS: It may be that process that causes the shrinkage of everything else.
MR TROWER: I think it is. I think that's exactly what happens. Yes. Because if you look down the right-hand side, it is something to do with they way they include them, because when I first --
LORD JUSTICE LEWISON: The margin gets increased and the text gets quashed.
LORD JUSTICE MOORE-BICK: I think it might be that.
MR TROWER: Yes, I think that's exactly what happens, but we will take it away.
LORD JUSTICE MOORE-BICK: As I say, we're not seeking to blame anyone, but if we don't raise these sort of questions life just goes on as before and we keep struggling.
MR TROWER: Your Lordships have quite a few firms of solicitors here who have quite a lot of experience of practising in this court and so I am sure it will be well heard.
LORD JUSTICE MOORE-BICK: That's why I thought it might be

worth just raising the point. Nothing else we need to deal with?
MR TROWER: My Lords, not from our point of view.
LORD JUSTICE MOORE-BICK: I think we should thank you all very much indeed for the arguments, which have been universally of a very high quality and you have given us a lot to think about.
Obviously, we're going to take time to consider our decision. We will hand something down in the usual way as soon as we can. I sense there is no particular urgency attaching to this matter, is there? It has been running along steadily for a little while.
MR TROWER: I don't think there's any particular urgency at all. The only point I would make is that there is a certain interrelationship, I suspect, between some of what your Lordships are being asked to determine and what David Richards J has under consideration in his judgment in Waterfall II.
LORD JUSTICE MOORE-BICK: Yes.
MR TROWER: That's the only point I would make. But I leave it like that.
LORD JUSTICE MOORE-BICK: And judgment was reserved in that matter last week? The week before?
MR TROWER: Three weeks ago, my Lord. Three weeks ago.
LORD JUSTICE MOORE-BICK: But anyway, he knows we're

considering these questions?
MR TROWER: He does indeed, yes.
LORD JUSTICE MOORE-BICK: That's about all we can say, isn't it?
MR TROWER: I think it probably is.
LORD JUSTICE MOORE-BICK: Well, once again, thank you all very much.
(3.53 pm)
(The court adjourned)

INDEX

PAGE

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