

<p>1 Friday, 27 March 2015 2 (10.00 am) 3 Submissions by MR DICKER (continued) 4 LORD JUSTICE MOORE-BICK: Yes, Mr Dicker. 5 MR DICKER: My Lords, there are three things I need to deal 6 with in my half an hour. First of all, the rules 7 dealing with future debts; secondly, set-off; and, 8 thirdly, the one-way bet. 9 So far as future debts are concerned, obviously if 10 you're going to have a liquidation rather than 11 a run-off, you can't simply wait for the future debt to 12 become due and payable. It needs to be capable of being 13 paid early. If that's to occur you obviously have to 14 discount it for the time value of money, otherwise 15 creditors will not be treated <i>pari passu</i>. As your 16 Lordships know, the rules provide that you prove for the 17 full amount of your debt, but that when it comes to 18 dividends, depending on when the future debt becomes 19 payable, that debt may then be discounted for the 20 purposes of dividend. 21 We're not sure, on this side, how my learned friend 22 says those rules take substantive effect, in the sense 23 of permanently discount your claim. They plainly can't 24 do so at the stage of proof because at that stage you 25 are proving for the full amount.</p> <p style="text-align: center;">Page 1</p>	<p>1 entitled to be paid on that date but it's the discounted 2 sum, effectively the present value of the debt as at the 3 date of the administration. 4 Your Lordships may immediately appreciate the 5 symmetry -- 6 LORD JUSTICE LEWISON: What do you mean by "the discounted 7 debt as at the date of the administration"? You 8 discount to the date of payment, don't you? 9 MR DICKER: When the liquidator calculates how much to pay 10 the creditor, he discounts the proved debt back to the 11 date of the administration; and he effectively says 12 "You're entitled to a dividend" -- 13 LORD JUSTICE LEWISON: Oh, is that right? I thought it was 14 to the date of payment. It's to the date of the 15 administration. 16 MR DICKER: Your Lordship is absolutely right, before 1986, 17 under the old rules, it used to be discounted back to 18 the date of payment and the discount was between the 19 date the debt should have been paid and the date that 20 the debt is in fact paid by way of dividends. 21 LORD JUSTICE LEWISON: Right. 22 MR DICKER: The new rules discount it all the way back to 23 the date of administration. 24 LORD JUSTICE LEWISON: Oh. Which is the relevant rule? 25 MR DICKER: My Lord, it is 2.105 in administration.</p> <p style="text-align: center;">Page 3</p>
<p>1 So presumably this substantive effect only occurs if 2 and when a dividend is payable and the rules require the 3 proved debt to be discounted for the purposes of paying 4 a dividend. 5 My Lords, as we understand it, however, my learned 6 friend's point essentially comes down to this, you are 7 only ever entitled to the dividends on the discounted 8 amount. If you receive dividends on the discounted 9 amount, you are effectively treated as having been paid 10 in full. We say there is nothing in the rules that 11 compels that conclusion, that prevents a creditor in the 12 event of a surplus from saying, "I haven't been paid in 13 full". 14 Can I just give one simple example of such 15 a situation. Assume you have a debt payable in 16 five years' time. To pick a figure, £1 million. You 17 prove for the £1 million. The liquidator decides 18 one day before the expiry of the five-year period to 19 declare a dividend and that's in full and final payment, 20 that's the final dividend. The payment he will make at 21 that stage, five years later, will be the discounted 22 amount in full. 23 So the creditor's debt was payable after five years. 24 Effectively on the date it was due for payment he 25 receives a sum which is not the 1 million which he was</p> <p style="text-align: center;">Page 2</p>	<p>1 LORD JUSTICE LEWISON: Oh, I see. 2 MR DICKER: And sub-rule 2: 3 "For the purpose of dividend and no other purpose, 4 the amount of the creditor's admitted proof shall be 5 reduced by applying the following formula, X divided by 6 1.05 to the power of N." 7 The important point is "N", your Lordship will see 8 from (b) below, is the period beginning with the 9 relevant date; and that's the date of the commencement 10 of the administration. 11 LORD JUSTICE BRIGGS: Presumably it is done that way to 12 produce fairness vis-à-vis other unsecured creditors. 13 MR DICKER: Absolutely. 14 LORD JUSTICE BRIGGS: Using the <i>uno flatu</i> approach. 15 MR DICKER: Absolutely. Everyone is presently valued as at 16 the same date. So five years on and the liquidator 17 wants to make his distribution and he says, "I have to 18 pay everyone in full in respect of their proved debts, 19 but for the purposes of making the dividend I have to 20 discount the future debt and I pay the discounted amount 21 in full but five years later". 22 We know from <i>Kaupthing</i> in the Court of Appeal that 23 that's not something which a creditor is entitled to say 24 if he owes the company money. He can't say, "I can have 25 my debt discounted to the date of the administration,</p> <p style="text-align: center;">Page 4</p>

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

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

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

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

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<p>1 is simply a net sum, which is his argument, either 2 a discounted net sum or an estimated net sum or 3 a converted net sum, one could add, carrying the logic 4 through. 5 So you came out of the other side of the set-off 6 with your rights having been substantively changed, such 7 that what was left was essentially shorn of its original 8 characteristics. 9 Now so far as Kaupthing was concerned there was one 10 qualification, because obviously, although the rules 11 relating to discounting required it to be discounted for 12 the purposes of the set-off, there was a specific rule, 13 your Lordships have seen, that said nevertheless if it 14 is a future debt it's only payable in the future. Thus 15 the argument I can pay the discounted amount but only on 16 the original future date. 17 As your Lordships know, the judge at first instance 18 accepted that, the Court of Appeal rejected it. Can 19 I just show your Lordship one paragraph from Court of 20 Appeal's judgment. It is bundle 1C, tab 85. (Pause). 21 The paragraphs that are relevant, 36 I ought to show 22 your Lordships as well 37. 23 36, Etherton LJ refers to Stein v Blake and says: 24 "I don't accept the principle in Stein v Blake that 25 on the taking of the account for the purpose of</p> <p style="text-align: center;">Page 9</p>	<p>1 notes into sterling, don't need to; and that was 2 essentially all Etherton LJ was saying. 3 Now 37 is also relevant: 4 "Mr Fisher's reliance on the present context on the 5 Stein v Blake analysis of the extinguishing effect of 6 the insolvency set-off on the original causes of action 7 presents him with a difficulty. He relies on the 8 judge's decision that interest is payable on the balance 9 of the debt due to the company as undermining the 10 administrators' case. The judge's interpretation has 11 such extraordinarily damaging results for the company 12 and the general body of creditors that it cannot reflect 13 the meaning and intent at 2.85. The judge, however, 14 came to that decision on interest on the basis that the 15 original contractual liability remains, save to the 16 extent it has been extinguished by the insolvency 17 set-off, rejecting Mr Fisher's submissions to the 18 contrary. The decision of the judge has not been 19 appealed, but Mr Fisher frankly submitted that 20 notwithstanding the absence of any appeal it is very 21 difficult to see the judge was right on that issue as 22 a matter of law." 23 The submission was there was is nothing in 2.85 or 24 2.88 which expressly provides for the payment of such 25 interest. In other words, we have a new statutory right</p> <p style="text-align: center;">Page 11</p>
<p>1 insolvency set-off the original cause of actions are 2 extinguished has any relevance to the present case." 3 Then he summarises what Stein v Blake was concerned 4 with. 5 Just between F and G he says: 6 "That has nothing to do with and cannot assist in 7 resolving the question whether, as a matter of the 8 proper interpretation of 2.85(7) and (8) the discounting 9 mechanism, 2.105, applies further than is necessary for 10 the purpose of establishing the amount of a distribution 11 to be made to the creditor." 12 What Etherton LJ was effectively saying is, if 13 you're going to set off claim against cross-claim, you 14 have to make sure that what you are actually setting off 15 is like and like. 16 You only have to ensure that what is like and like 17 is the actual amount that is being set off against each 18 other. One can imagine it graphically, if one had 19 a stack of English currency notes, which one party owed 20 to the other, and a stack of US dollars note, rather 21 larger in amount, which was owed in the other direction 22 and you wanted to effect a set-off, what you would do is 23 convert the US dollar notes to the extent necessary to 24 equal the value of the sterling notes. You wouldn't go 25 through the exercise of converting all of the US dollar</p> <p style="text-align: center;">Page 10</p>	<p>1 for the net balance and nowhere does it say it carries 2 contractual interest. 3 Etherton LJ's response to that is: 4 "Although Mr Fisher was relying on Stein v Blake, 5 the consequence that he contended for [in other words 6 without interest in the meantime], there could be no 7 policy justification for such a remarkable result." 8 Just dealing very quickly with my learned friend 9 Mr Snowden's arguments, his argument essentially has 10 two parts. First of all, insolvency set-off destroys 11 the claim and cross-claim and gives you a claim for the 12 net balance. But he also says effectively as part of 13 that process the original attributes of the claim and 14 cross-claim are stripped out. So that if you have 15 a foreign currency claim, it has been converted into 16 sterling and effectively is baked into sterling; and 17 that's what it is going forwards. 18 We agree that insolvency set-off involves payment, 19 to the extent of the set-off and thus produces a net 20 balance, but we say that doesn't have the consequences 21 for which my learned friend contends. What is left is 22 the outstanding part of the original claim which hasn't 23 been used for set-off, hasn't been paid, but that 24 retains all the characteristics of the original claim. 25 We say one can see that because, firstly, Rule 2.88</p> <p style="text-align: center;">Page 12</p>

<p>1 requires the same exercise to be done whether the debt 2 is owed by or to the company. You estimate, discount 3 and convert as necessary on both sides of the account. 4 Whether the claim is owed by the company or to the 5 company, to make sure you're setting off like against 6 like, you do the same thing to both sides: estimate if 7 necessary, discount if necessary, convert if necessary. 8 We know that my learned friend's analysis doesn't 9 apply where the net balance is owed to the company, 10 because that's the Court of Appeal in Kaupthing. So 11 what he has to say is, okay, you can distinguish 12 Kaupthing. That may be right where the balance is owed 13 by the creditor to the company, but it's different, he 14 says, where the balance is owed by the company to the 15 creditor. We say there's absolutely nothing in 16 Rule 2.85 to suggest that's the case. 17 As I say, the same exercise is done to both debts 18 that are taken into account and the rules simply provide 19 for a balance payable one way or the other to be due. 20 There's no logic in saying that if on one side the claim 21 retains its original characteristics, it is owed by the 22 creditor to the company, it doesn't retain its original 23 characteristics if it's the other way round. 24 It would also give rise to very odd consequences as 25 mentioned by my Lord Lord Justice Briggs yesterday. If</p> <p style="text-align: center;">Page 13</p>	<p>1 some sort of anti-deprivation principle preventing you 2 from relying on that because it's a work around the 3 effect of the rules? 4 The second is: how does it work in relation to 5 foreign currency claims governed by foreign law? Do we 6 end up with a situation in which some creditors can 7 bring proceedings abroad, if their claim is governed by 8 foreign law and they can establish jurisdiction, and 9 recover in full? It is only creditors with foreign 10 currency claims governed by English law who effectively 11 end up bearing the consequences of this effect. 12 In other words, if my learned friend is right, there 13 are two consequences, one of which is potentially 14 unequal treatment of creditors and the second would be 15 a plethora of proceedings in New York by those whose 16 foreign currency liabilities are governed by New York 17 law and who can establish jurisdiction in New York. 18 Finally, the one-way bet. 19 LORD JUSTICE LEWISON: Just before you come on to that, what 20 do you say about disclaimer and loss proved on 21 disclaimer? 22 MR DICKER: My Lord, the analysis is very similar to both 23 contingent and future, in the sense that if one looks at 24 the position before 178 was introduced back in 1929, 25 what the original provision was, a reserve had to be</p> <p style="text-align: center;">Page 15</p>
<p>1 you take a future debt, it's normally provable in full, 2 discounted only for the purposes of dividends. If my 3 learned friend is right, that's not the case. You now 4 have a debt which is effectively provable in its 5 discounted amount and I've no idea how 2.105 would 6 operate in relation to that. 7 The final point on this is even within the scope of 8 a set-off the taking of the account is not final, in the 9 sense that if you have a set-off based on an estimated 10 debt and further information comes to light, you can 11 revalue your estimate and effectively a new set-off can 12 be treated as having taken place automatically on the 13 date of the winding-up order. 14 None of these rules, we suggest, in any way suggest 15 that Rule 2.86 in relation to foreign currency 16 liabilities has a substantive effect of the sort 17 contended for by my learned friend. There are some very 18 difficult issues, if that were the case. Can I just 19 mention two, one of which is: what if there's a make 20 whole provision? As there is, for example, in an ISDA 21 master agreement. In other words, if for whatever 22 reason don't receive the currency to which you're 23 entitled, you have a claim for whatever is necessary to 24 make up difference. How is that treated? Is that also 25 somehow extinguished or does the court have to develop</p> <p style="text-align: center;">Page 14</p>	<p>1 made. So no extinguishment. Once the statute was 2 introduced, it had an effect for the purposes of 3 ensuring that the affairs of the company could be wound 4 up within a reasonable period. What it is essentially 5 doing, in the same way as an estimated claim is doing, 6 is trying to ensure, within the confines of having 7 a liquidation with a reasonable period, that creditors 8 are paid the full amount, the full commercial value to 9 which they are entitled. 10 LORD JUSTICE LEWISON: But you would accept that the 11 recovery of whatever you manage to prove for 12 extinguishes whatever rights you originally had? 13 MR DICKER: Well -- 14 LORD JUSTICE LEWISON: Wouldn't you? 15 MR DICKER: We would put it slightly differently, in the 16 sense that, as Lord Hoffmann indicated in 17 Wight v Eckhardt, the assets will be distributed on that 18 basis and there will be nothing left to proceed against. 19 LORD JUSTICE LEWISON: So in theory the landlord can come 20 back, can he, and say, "Well, rent would have fallen due 21 on such and such a day, you now have some money, pay 22 me"?. 23 MR DICKER: The difficulty with that is it would be 24 difficult for him to do that, given he has effectively 25 received the damages for which he's entitled.</p> <p style="text-align: center;">Page 16</p>

<p>1 LORD JUSTICE LEWISON: Yes.</p> <p>2 MR DICKER: It is difficult to imagine quite how one would</p> <p>3 establish you haven't effectively been paid the amount</p> <p>4 you should have been paid. If he had, then, again in</p> <p>5 theory, yes.</p> <p>6 My Lords, the one-way bet.</p> <p>7 LORD JUSTICE BRIGGS: Just before you do, the short point on</p> <p>8 disclaimer is that the damages will be full</p> <p>9 compensation.</p> <p>10 MR DICKER: Yes.</p> <p>11 LORD JUSTICE BRIGGS: There just isn't anything that he</p> <p>12 hasn't got, albeit it is converted into money.</p> <p>13 MR DICKER: In the same way as if the damages ultimately</p> <p>14 prove indeed to be full compensation, then that</p> <p>15 undoubtedly is an end of it.</p> <p>16 LORD JUSTICE BRIGGS: They will have been paid in full</p> <p>17 before you get to any surplus.</p> <p>18 MR DICKER: Correct.</p> <p>19 LORD JUSTICE BRIGGS: Yes.</p> <p>20 MR DICKER: So far as one-way bet is concerned, my Lords, we</p> <p>21 do respectfully say this is not a situation in which it</p> <p>22 is possible to achieve a perfect result. A perfect</p> <p>23 result would be the debtor pays what he agreed to pay,</p> <p>24 no more or less, and the creditor receives what he is</p> <p>25 entitled to receive, again no more, no less.</p> <p style="text-align: center;">Page 17</p>	<p>1 in Miliangos. It certainly would be unjust outside of</p> <p>2 a liquidation and, to the extent it occurs in</p> <p>3 a liquidation, needs a good and robust justification.</p> <p>4 The solution contended for by my learned friend, we</p> <p>5 say, may seem simple but it has nothing else to commend</p> <p>6 it and it is certainly not just as between debtor and</p> <p>7 creditor.</p> <p>8 The second possibility is the hybrid one identified</p> <p>9 by Brightman LJ, and that has two parts. The first</p> <p>10 part, as your Lordships know, is that for the purpose of</p> <p>11 distributing the assets pari passu you convert all</p> <p>12 foreign currency claims into sterling. That does impose</p> <p>13 an exchange rate risk on the creditor, but one says,</p> <p>14 well, that's necessary to achieve pari passu</p> <p>15 distribution. It's just the price which the creditor</p> <p>16 has to bear effectively in the interests of the general</p> <p>17 body of creditors.</p> <p>18 The second part is that is a robust justification,</p> <p>19 as between the competing interests of creditors, but</p> <p>20 that justification, as Brightman LJ indicated, ceases to</p> <p>21 exist when there's a surplus and one is back again to</p> <p>22 the position as between debtor and creditor.</p> <p>23 Your Lordships may just like to bear in mind this,</p> <p>24 a large part, the majority, of LBIE's assets and its</p> <p>25 claims were US dollar claims, so much so that an early</p> <p style="text-align: center;">Page 19</p>
<p>1 No one is suggesting that that is possible. The</p> <p>2 reason it's not possible is because the original</p> <p>3 agreement was that the debtor would pay the creditor in</p> <p>4 the foreign currency, but to achieve pari passu</p> <p>5 distribution foreign currency claims have had to be</p> <p>6 converted into sterling. It's that step that introduces</p> <p>7 an exchange risk into the bargain, one can put it that</p> <p>8 way, which the parties never originally agreed to.</p> <p>9 LORD JUSTICE BRIGGS: There was always an exchange risk but</p> <p>10 until the conversion it was borne by the debtor and what</p> <p>11 the conversion does is to transfer it to the creditor.</p> <p>12 MR DICKER: My Lord, I am very happy with that way of</p> <p>13 putting things. The question is essentially, who has to</p> <p>14 bear the risk, how and to what extent?</p> <p>15 We say there are only two possible approaches the</p> <p>16 parties have been able to identify. The first</p> <p>17 possibility, that contended for by my learned friend, is</p> <p>18 that foreign currency claims are converted into sterling</p> <p>19 as at the date of the winding-up order permanently,</p> <p>20 thereby throwing, my Lord Lord Justice Briggs said, the</p> <p>21 entirety of the exchange rate risk on to the creditor,</p> <p>22 which he will bear regardless of whether the company is</p> <p>23 insolvent or subsequently turns out to be solvent.</p> <p>24 We say that as between the debtor and the creditor</p> <p>25 is not just. One can see that from the House of Lords</p> <p style="text-align: center;">Page 18</p>	<p>1 proposal by the administrators was effectively to try</p> <p>2 and conduct the administration in US dollars, requiring</p> <p>3 creditors to submit claims in US dollars and to receive</p> <p>4 payment in US dollars. One consequence of my learned</p> <p>5 friend's case is that creditors' claims have been</p> <p>6 converted into sterling, but the underlying assets,</p> <p>7 which were, in US dollars will have continued to</p> <p>8 appreciate; that benefit, on his case, going to the</p> <p>9 shareholders, although actually, given that</p> <p>10 appreciation, it matches the appreciation of US dollars</p> <p>11 against sterling faced by the foreign currency</p> <p>12 claimants. So effectively having it, in one sense, both</p> <p>13 ways.</p> <p>14 My learned friend says it gives a creditor a one-way</p> <p>15 bet. We say the very short answer to that is, no, it</p> <p>16 doesn't. It's not a one-way bet if LBIE was insolvent.</p> <p>17 The creditor bears the risk if sterling depreciates, he</p> <p>18 won't profit if it appreciates. It is no answer to say</p> <p>19 that in one usually unlikely scenario, namely the</p> <p>20 company turning out to be solvent, the creditor will</p> <p>21 have the benefit of whichever currency has proved</p> <p>22 stronger in the meantime.</p> <p>23 All --</p> <p>24 LORD JUSTICE MOORE-BICK: Right, Mr Dicker.</p> <p>25 MR DICKER: I have 15 seconds.</p> <p style="text-align: center;">Page 20</p>

<p>1 LORD JUSTICE MOORE-BICK: I think we could allow you 2 15 seconds, if you mean it. 3 MR DICKER: All it really involves is the debtor saying to 4 the creditor, "I need to go into liquidation. One 5 consequence is I need to convert all claims into 6 sterling to make sure everyone is treated equally and as 7 result you may suffer. I'm sorry about that, but if it 8 turns out that I am solvent I will make sure that that 9 has not prejudiced you". That in essence is what one 10 would say is happening here and we say it's consistent 11 with principle, policy, authority and it's the right 12 result. 13 My Lords, those are my submissions. 14 LORD JUSTICE MOORE-BICK: Good. Thank you very much, 15 Mr Dicker. 16 Mr Snowden. 17 Submissions in reply by MR SNOWDEN 18 MR SNOWDEN: My Lord, on this side of the court we're going 19 to divide the reply, subject to your Lordships, this 20 way. I am going to deal with subordination, with the 21 question of the lacuna or the parked issue, if it may 22 become known that, and the contributory rule and mention 23 Cherry v Boulton in passing. Mr Wolfson will respond 24 on currency conversion claims and the scope of 25 section 74 and Mr Isaacs will deal with the point he</p> <p style="text-align: center;">Page 21</p>	<p>1 opening submissions, the reference in the transcript is 2 at page 12 of Day 1, and I will repeat it. We say that 3 it means at the time of the insolvency, i.e. at the time 4 of the commencement of the bankruptcy or liquidation. 5 That would mean, as we suggest, that the claims up until 6 that point are claims to which the subordinated loan is 7 subordinated. So that, for example, contractual 8 interest up to the point of bankruptcy and an insolvency 9 ranks ahead of the subordinated loan, but that statutory 10 interest, designed to compensate creditors for being 11 kept out of their money during the period of the 12 bankruptcy or insolvency, does not rank ahead of the 13 subordinated loan. That's for the reason I explained in 14 opening, which is a policy embodied in Rule 2.88(7), 15 namely that so far as creditors are concerned being kept 16 out of your money affects you equally and that therefore 17 you rank equally for statutory interest, irrespective of 18 how your underlying debts ranked. 19 Picking up a point in a way that my learned friend 20 Mr Dicker made, that's because companies go into 21 insolvency other than out of choice. It's not the 22 creditor's fault, it's not a subordinated creditor's 23 fault, for example, that a company has gone into 24 an insolvency process. It may not be "anything that the 25 company can be blamed for", but certainly so far as</p> <p style="text-align: center;">Page 23</p>
<p>1 dealt with in opening, the provability of section 74. 2 So if I can start with picking up the reply in 3 relation to subordination, my learned friend Mr Trower 4 took you to the directives very briefly. Can I ask you 5 to take up authorities bundle 5 just very quickly to 6 look at the terms of the directive, because we say that 7 you get something different from him, from the directive 8 in -- take the 1989 directive, which I think you put at 9 tab 19. 10 LORD JUSTICE MOORE-BICK: Yes. 11 MR SNOWDEN: We say that when you look at the relevant 12 provision of the directive, which is Article 4(3), it is 13 focusing on bankruptcy and liquidation. The words are: 14 "In the event of bankruptcy or liquidation of 15 a credit institution, they rank after the claims of all 16 other creditors and are not to be repaid until all other 17 debts outstanding at the time have been settled." 18 We make the point that the concept of bankruptcy or 19 liquidation is mentioned as the circumstance that this 20 clause is dealing with. It uses the expression 21 "ranking", which is an insolvency type of expression. 22 My learned friend was asked the question by my Lord 23 Lord Justice Lewison "What do you mean or what do you 24 say 'at the time means?'" My learned friend didn't 25 really give you an answer. I had an answer in my</p> <p style="text-align: center;">Page 22</p>	<p>1 creditors are concerned, as between subordinated 2 creditors and unsubordinated creditors, they are equally 3 affected by the fact that their debtor company has gone 4 into an insolvency process. 5 That is why we don't accept something that was said 6 by my learned friend Mr Trower on the first day of his 7 opening, Day 3, page 23 of the transcript, where he said 8 that being kept out of your money is just as much 9 a cause for concern for a subordinated -- sorry, I won't 10 misquote him. He said: 11 "Being kept out of your money post-insolvency is 12 just as much a cause for concern. Put another way, why 13 should the interest lost be absorbed only if and to the 14 extent it is sustained in respect of the pre-insolvency 15 period? Being kept out of your money post-insolvency is 16 just as much a cause for concern." 17 Our point is it is just as much a cause for concern 18 for the subordinated creditor as the unsubordinated 19 creditor. 20 That's why, when one is looking at the subordinated 21 loan agreement, there's no commercial reason to 22 presuppose that the subordinated creditor wishes to 23 subordinate himself to the payment of statutory interest 24 to the unsubordinated creditors. 25 So, having made that initial observation on the</p> <p style="text-align: center;">Page 24</p>

<p>1 directive, you can put bundle 5 away. I would like to 2 address in reply the twofold question on the 3 subordinated agreement. The first question is: is 4 statutory interest a liability at all? If so, is it 5 excluded under clause 5.2(a)? 6 My learned friend said in a discussion with the 7 court, at page 17 of Day 3, that statutory interest was 8 a liability of the company. I think there was a debate 9 about what alternatives there were. Your Lordships may 10 recall he said, well, it is either personal liability 11 for the administrator or else it's a liability of the 12 company. If there's no other choice, it must be 13 a liability of the company. Then we came into 14 a discussion about whether in fact it's a direction for 15 payment out of a fund and some sort of trust obligation. 16 We say that it is not a liability within the meaning 17 of the subordinated loan agreement because it's not 18 payable or owing by the borrower. That's the definition 19 of "liability" in the subordinated loan agreement. 20 Perhaps if your Lordships -- you probably have the 21 definition well in mind, but "liability" is defined as: 22 "Present and future sums, liabilities and 23 obligations payable or owing by the borrower." 24 We say it's not a liability owing by the borrower. 25 I will come back to explain a little bit more in detail</p> <p style="text-align: center;">Page 25</p>	<p>1 where the legislature wanted to impose a trust or 2 a charge upon the assets of the company in relation to 3 what the administrator has done, it does so specifically 4 and it doesn't so in relation to statutory interest. 5 If we could just start with Schedule B1 to the 6 Insolvency Act. Schedule B1 you'll find starts at 7 page 249 of the Red Book -- sorry, I'm sorry. 8 LORD JUSTICE LEWISON: 267. 9 MR SNOWDEN: That's the wrong schedule. It starts at 267, 10 I'm sorry. It is paragraph 1: 11 "For the purpose of this Act 'administrator of 12 a company' means a person appointed under this schedule 13 to manage the company's affairs, business and property." 14 You will see that we looked at the functions of the 15 administration which are set out in paragraph 3. 16 LORD JUSTICE BRIGGS: Where is the passage you've just 17 cited? 18 LORD JUSTICE LEWISON: 1(1). 19 MR SNOWDEN: 1(1): 20 "For the purposes of this Act 'administrator of 21 a company' means a person appointed under this schedule 22 to manage the company's affairs, business and property." 23 Then the purpose of the administration we know, we 24 have seen this set out in paragraph 3. You can skip 25 through to paragraphs 67 and 68, at page 279:</p> <p style="text-align: center;">Page 27</p>
<p>1 in a moment, by reference to the statutory scheme, why 2 that is so. 3 We also do not accept that the trust fund analysis 4 works. But in order to make this point good, you have 5 to look in a little bit more detail at the statutory 6 scheme for administrations than my learned friend did. 7 So can I ask you, please, to take up the Red Book. 8 The main point I am going to make is that the 9 structure of an administration and the structure of 10 a liquidation is that the assets of the company remain 11 the assets of the company but they are subjected to the 12 statutory regime, either for administration or 13 liquidation. The role of the administrator is simply 14 somebody who manages the property of the company. He 15 takes custody and control of the assets of the company 16 in administration. When he ceases to be administrator, 17 he just simply relinquishes control and in comes 18 a liquidator who takes control. 19 So far as the direction is concerned under the 20 statutory scheme, he is simply directed to do certain 21 things as part of his statutory management of the 22 company. The direction to pay statutory interest is 23 a direction to him, as to what to do in certain 24 circumstances with a surplus. 25 Just to give you a flavour of where I am going,</p> <p style="text-align: center;">Page 26</p>	<p>1 "The administration or a company shall on his 2 appointment take custody or control of all the property 3 to which he thinks the company is entitled." 4 Then, under 68, he manages: 5 "... its affairs, business and property in 6 accordance with proposals ..." 7 Certain proposals that have been approved. 8 Again, turning through now to the cessation of 9 administration, because although it has been talked of 10 we haven't actually looked at how it happens, it can 11 happen, for example, as set out in paragraph 79, where 12 the court ends the administration on the application of 13 an administrator. So under 79(1): 14 "On the application of the administrator of 15 a company the court may provide for the appointment of 16 an administrator of the company to cease to have effect 17 in a specified time." 18 So he simply ceases to have effect. Or 19 alternatively, for example, under paragraph 83, where 20 you move from an administration to a creditors' 21 voluntary liquidation, you'll see that it's done by the 22 filing of a notice. Under sub-paragraph (6): 23 "On registration of the notice the appointment of 24 the administrator in respect of the company shall cease 25 to have effect."</p> <p style="text-align: center;">Page 28</p>

<p>1 So it is simply done by a cessation of appointment, 2 cessation of control. 3 So there's no suggestion in any of the rules that 4 what happens when an administrator ceases to be 5 office -- that he does anything other than relinquishing 6 control. He doesn't hand over, he doesn't transfer 7 assets. The Act doesn't -- not in any legal sense. It 8 is very easy to talk in terms of handing over or 9 transferring. But in fact that's not what happens, it 10 is just simply on the making of an administration order, 11 the directors are ousted, control is exercised by the 12 administrator. On cessation of the administration 13 control is relinquished. 14 We then look at the situation in relation to 15 a liquidation and for that we need to look quickly at 16 Ayerst. If you keep the Red Book open but take up 17 quickly bundle 1B. If you look at tab 53, in Ayerst, 18 turning to the explanation given by Lord Diplock at the 19 very foot of page 176 and the very top of 177, he says: 20 "Upon the making of a winding-up order ..." 21 Sorry, you'll see that there's a highlighted passage 22 on section 176, where he sets out in background the 23 making of a winding-up order brings into operation 24 a statutory scheme for dealing with the assets of the 25 company and that extends now to voluntary as well as</p> <p style="text-align: center;">Page 29</p>	<p>1 of control and the assumption of control by a new office 2 holder, in relation to any of payments that need to be 3 made under the rules, they make expression provision if 4 they want to create a trust. That you can see of 5 paragraph 99 -- 6 LORD JUSTICE LEWISON: Of Schedule B1? 7 MR SNOWDEN: Of Schedule B1. This is the paragraph, that's 8 been much litigated about, which deals with the question 9 of expenses of the administration. 10 So under paragraph 99, the paragraph applies where 11 a person ceases to be the administrator of a company for 12 whatever reason. 13 You'll see that, for example, under sub-rule (3), so 14 paragraph (3): 15 "The former administrator's remuneration and 16 expenses shall be charged on and payable out of property 17 of which he had custody or control immediately before 18 cessation." 19 And then are payable in priority to any security. 20 Again under (4): 21 "A sum payable in respect of a debt or liability 22 arising out of a contract entered into shall be charged 23 on and payable out of property of which the former 24 administrator had custody or control immediately before 25 cessation ..."</p> <p style="text-align: center;">Page 31</p>
<p>1 compulsory winding-up. He says: 2 "Upon the making of a winding-up order (1) the 3 custody and control of all the property and choses of 4 action of the company are transferred from those persons 5 who are entitled under the memorandum and articles to 6 manage its affairs on its behalf to a liquidator charged 7 with the statutory duty of dealing with the company's 8 assets in accordance with the statutory scheme." 9 So, again, custody and control is transferred. The 10 liquidator is charged with a statutory duty of dealing 11 with company's assets in accordance with the statutory 12 scheme. 13 There's the well-known exposition that that is to be 14 carried out, under little sub(iii), just below (c): 15 "In so far as may be necessary for its beneficial 16 winding up and the powers are exercisable by the 17 liquidator for the benefit of those persons only who are 18 entitled to share in the proceeds of realisation of the 19 assets under the statutory scheme." 20 That was a point I made earlier. 21 A CVL is no different, in terms of the concept, as 22 Lord Diplock indicated. 23 You can put Ayerst away. You will see that where 24 you have -- back to the rules. Where the rules want to 25 make a specific provision, other than simply a cessation</p> <p style="text-align: center;">Page 30</p>	<p>1 Et cetera. 2 So you'll see that where the consequence of 3 something done by an administrator, or should have been 4 done by an administrator, is the creation of any 5 liability to expenses or one of the specified types and 6 it's intended that there should be a charge on the 7 assets of the company that were under his custody or 8 control, the rules make very specific provision for it. 9 Obviously the point I make is that you don't see 10 anything like that in relation to statutory interest. 11 We say that there is nothing to suggest that 12 Rule 2.88(7) is doing anything other than setting out 13 a rule which an administrator follows in a specific 14 circumstance in relation to a surplus which may have 15 arisen on the payment of the proved debts. But what it 16 doesn't do is to create some form of charge or trust 17 binding a fund which is transmissible into the hands or 18 enforceable as against a liquidator who simply assumes 19 control of the company's assets after cessation of 20 an administration. 21 LORD JUSTICE LEWISON: Could there be a situation in which 22 a surplus arises in the course of an administration and 23 the administrator decides to hand the company back to 24 its directors? 25 MR SNOWDEN: Did you mean surplus in the sense of a surplus</p> <p style="text-align: center;">Page 32</p>

<p>1 under 2.88(7) after payment of proved debts? 2 LORD JUSTICE LEWISON: Yes. 3 MR SNOWDEN: The rule requires him, before applying the 4 assets for any other purpose -- 5 LORD JUSTICE LEWISON: Right. 6 MR SNOWDEN: -- to pay statutory interest. If he does 7 nothing and simply pays the proved debts and then goes 8 out of office, if there's a creditor who says, "Well, 9 actually, there was a surplus from which I should have 10 been paid interest", it would be for the creditor to 11 bring proceedings against the administrator for breach 12 of statutory duty. But there's nothing that requires 13 the administrator affirmatively to pay statutory 14 interest, although I am bound to say -- 15 LORD JUSTICE BRIGGS: Then why would he be in breach of 16 statutory duty if he -- 17 MR SNOWDEN: The rule is simply predicated upon the -- it is 18 very difficult to see, if there was surplus, that 19 an administrator wouldn't then follow through and pay 20 it. That's perhaps the presumption in the rule, that he 21 would. But in fact the rule is simply drafted on the 22 basis that it's the thing he must do with the surplus 23 before he next applies it for any purposes. 24 LORD JUSTICE LEWISON: Right. But if he simply relinquishes 25 control, as you put it, by one of these ways --</p> <p style="text-align: center;">Page 33</p>	<p>1 make in that respect is that where any creditor 2 conceives that the office holder is breaching the 3 statutory scheme -- and this is the next point I was 4 going to make -- the remedy is not to sue the company. 5 In other words, if a creditor maintains that they should 6 be paid statutory interest and that the -- let's take 7 the plain vanilla case of an administrator who having 8 ascertained that there is a surplus then applies it for 9 some other reason, some other purpose, paying his own 10 administrator's fees and remuneration, for example. The 11 remedy in those circumstances the creditor has is not to 12 sue the company. The remedy in those circumstances is 13 to bring a claim against the office holder for breach of 14 statutory duty, either if he's still in office under the 15 provisions that allow for challenges to the office 16 holder's functions -- or in fact he's an officer of the 17 court, so he's under the control of the court. 18 LORD JUSTICE LEWISON: Move from plain vanilla to chocolate 19 chip, the administrator gives the company back to the 20 directors at the time when there is a surplus and the 21 directors decide, having received the company back, 22 they're going to invest in a nice new piece of 23 machinery. Why are they not bound by Rule 2.88(7) to 24 pay the interest before they apply the surplus to the 25 purpose of buying a nice new piece of machinery?</p> <p style="text-align: center;">Page 35</p>
<p>1 MR SNOWDEN: He's not applying -- 2 LORD JUSTICE LEWISON: -- and the company goes back to its 3 directors, that's the end of statutory interest, is it? 4 MR SNOWDEN: That's the way the rule appears to be drafted. 5 LORD JUSTICE BRIGGS: So the creditors would lose their 6 contractual right to interest from the date of the onset 7 of the administration, and they would lose their 8 statutory right to interest thereafter because the 9 administrator just gave the company back to the 10 directors and the statutory right to interest wasn't 11 a debt of the company or something the directors had to 12 take any notice of at all? 13 MR SNOWDEN: It's certainly not a debt of the company and 14 it's drafted as an obligation placed upon the 15 administrator before he does anything else with the 16 surplus. 17 But the point I am making is that it doesn't amount 18 to a trust -- it's not a proprietary charge or anything 19 else binding the assets of the company, which I think 20 was the suggestion that was being made. 21 LORD JUSTICE MOORE-BICK: Could the creditors take any 22 effective steps to stop the administrator resigning his 23 powers before he's complied with the requirements of the 24 rules? 25 MR SNOWDEN: The general proposition that I was going to</p> <p style="text-align: center;">Page 34</p>	<p>1 MR SNOWDEN: Because if the administration has ceased and 2 Rule 2.88(7) has not been breached, then Rule 2.88 is of 3 no -- it has no effect outside an administration. 4 Rule 2.88 -- and this is the point we were going to come 5 on to -- applies in an administration but it has no 6 effect outside an administration. 7 If you go to Rule 2 of the Insolvency Rules, which 8 is at page 702, you'll see that under Rule 2.1(1) there 9 are three listed cases set out. They all concern the 10 appointment of an administrator. Chapter 10, which 11 includes Rule 2.88(7), applies in all those cases. But 12 that is the scope of the application of Rule 2.88, when 13 the appointment has ceased the rule has no effect. 14 This is the fundamental point we're going to come on 15 to in relation to the parked point. Rule 2.88(7) simply 16 applies during an administration, but once the 17 appointment of the administrator has ceased it doesn't 18 apply. What's more, it definitely doesn't apply in 19 a liquidation, in a winding-up, because in a winding-up 20 section 189 says what is to be done and exclusively what 21 is to be done. 22 Certainly, in the chocolate chip example, if 23 an administrator was deliberately taking the step of 24 hading back a company with a surplus without paying 25 statutory interest, I imagine a creditor might say, for</p> <p style="text-align: center;">Page 36</p>

<p>1 example, that that's not fulfilling the purposes of the 2 administration order. The challenge, I suspect, would 3 be the purposes of an administration order as set out 4 are being defeated if you fail to take the step of 5 paying statutory interest before handing back a company 6 containing a surplus to its members. You haven't fully 7 fulfilled the statutory purpose.</p> <p>8 I can see the challenge would be mounted on that 9 basis, I am sure -- or as an officer of the court. If 10 it was thought he was doing so as to frustrate the 11 interests of creditors and handing back a surplus to 12 members, there would be undoubtedly be a challenge.</p> <p>13 But the point I am making for present purposes, 14 going back to the subordinated loan agreement, is 15 whatever the challenge the remedy is not to sue the 16 company.</p> <p>17 In a sense we've leapt ahead to the lacuna point, 18 but the point I am making is that the remedy is not 19 a liability -- you don't assert a claim against the 20 company. It's not a liability of the company. The 21 remedy is against the office holder and that you can 22 see --</p> <p>23 LORD JUSTICE MOORE-BICK: It's a remedy against the office 24 holder in respect of his control over the assets of the 25 company?</p> <p style="text-align: center;">Page 37</p>	<p>1 with a cross-border insolvency question of remission of 2 funds between the UK and Australia. It's the cases that 3 are set out between 115 and 121 which are of interest, 4 because what they illustrate is that in liquidation -- 5 and administration I say is no different, it's just 6 somebody else has control -- the creditors who have 7 rights don't have proprietary rights in the assets but 8 they do have, and I am picking it up just at page 704 9 at J:</p> <p>10 "... a personal right to the administration and 11 distribution of the assets in accordance with the 12 statutory scheme."</p> <p>13 Then that position was explained by Millett LJ in 14 <i>Mitchell v Carter</i> in terms that -- I just ask your 15 Lordships to cast your eyes very quickly down. It will 16 be very familiar.</p> <p>17 At 116:</p> <p>18 "If a liquidator causes loss to a creditor by 19 disregarding his personal rights, for example by 20 distributing assets without regard to a claim for which 21 the creditor has proved in time or which has not been 22 rejected, the creditor has a personal cause of action. 23 He has a personal claim for damages against the 24 liquidator for breach of statutory duty, certainly if 25 there are insufficient assets available in the</p> <p style="text-align: center;">Page 39</p>
<p>1 MR SNOWDEN: That's right, but it's a remedy for breach of 2 his statutory functions --</p> <p>3 LORD JUSTICE MOORE-BICK: When he performs his statutory 4 function and does distribute the surplus he is 5 distributing the company's assets, but you say there's 6 no liability on the company to distribute the assets?</p> <p>7 MR SNOWDEN: No, and I am going to show you -- I am going to 8 hand up a case called <i>HIH</i>, which my learned friends have 9 copies of, which shows there's a very well trodden path 10 for pursuing office holders who misdistribute assets of 11 a company in this way. It comes from cases usually in 12 liquidations where, for example, liquidators fail to pay 13 the preferential creditors ahead of ordinary creditors 14 or fail to pay a creditor and distribute the surplus to 15 members.</p> <p>16 This was dealt with by David Richards J in the <i>HIH</i> 17 case. I suggest you put it in bundle 5 again.</p> <p>18 This is a case, as my learned friend Mr Trower 19 reminded me before court, which went to the 20 House of Lords. He has fond memories of that 21 experience. But on this point the case didn't go 22 further and I use it simply because it's a convenient 23 recital of the relevant authorities.</p> <p>24 You can see that they are set out at paragraph 115. 25 The facts I don't think in a sense matter. It was to do</p> <p style="text-align: center;">Page 38</p>	<p>1 liquidation to make good the default."</p> <p>2 The position would be either you would -- if the 3 insolvency process is still in play, you go to the court 4 and say, "Look, your officer is misapplying the 5 statutory scheme. Please will you direct him to apply 6 the statutory scheme correctly". Or, if the assets have 7 gone and he's out of office, you sue him personally for 8 breach of statutory duty. But the one thing that you 9 don't do, because it's just not a proper cause of 10 action, is to sue the company for a failure to pay 11 statutory interest because it's not the company's 12 obligation. It's not the company's liability.</p> <p>13 LORD JUSTICE MOORE-BICK: Your argument is that this is not 14 a liability in the ordinary sense of the company, is 15 that right?</p> <p>16 MR SNOWDEN: Yes. It's not a liability in the sense of this 17 subordinated loan agreement --</p> <p>18 LORD JUSTICE MOORE-BICK: It's a different question.</p> <p>19 MR SNOWDEN: In either sense.</p> <p>20 LORD JUSTICE MOORE-BICK: Isn't it?</p> <p>21 MR SNOWDEN: In either sense it's not a liability.</p> <p>22 LORD JUSTICE MOORE-BICK: No, well, the question: is what 23 did the parties to the subordinated loan agreement have 24 in mind when they spoke of liabilities?</p> <p>25 MR SNOWDEN: We would say, of course, they understood and</p> <p style="text-align: center;">Page 40</p>

1 were using the concept of "liability" in exactly the way
 2 you would use it in an insolvency, given the
 3 requirements for subordinated loan agreements and also
 4 the references in the agreement to insolvency and the
 5 framework of the agreement. It's there, as everybody
 6 understands, to protect to some extent -- and the
 7 question is to what extent -- creditors in the event of
 8 bankruptcy or liquidation.
 9 LORD JUSTICE BRIGGS: Mr Snowden, you said a few moments ago
 10 that the Schedule B1 -- the administration legislation,
 11 taking it in its broadest sense, if it is going to
 12 create any charge or trust over the assets in
 13 administration it does so in express terms. You took us
 14 to an example of the express reference to a charge to
 15 cover a previous administrator's expenses.
 16 MR SNOWDEN: Or adopted contracts or --
 17 LORD JUSTICE BRIGGS: Or whatever.
 18 MR SNOWDEN: Yes.
 19 LORD JUSTICE BRIGGS: Is it possible that the words of
 20 2.88(7) are indeed apt words to create a Quistclose
 21 trust? What it says is:
 22 "Any surplus remaining shall, before being applied
 23 to any other purpose, be applied in [one can say for the
 24 purpose of] paying interest on those debts ..."
 25 Et cetera, et cetera, et cetera.

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1 Generally speaking, where the owner of an asset
 2 transfers it to somebody else and states it shall only
 3 be applied for that purpose, so that the recipient is
 4 not free to use them for any other purpose, that would
 5 create a Quistclose-type trust, wouldn't it?
 6 MR SNOWDEN: In general terms your Lordship is right if
 7 there's an obligation -- if somebody accepts a transfer
 8 of assets on those terms.
 9 LORD JUSTICE BRIGGS: All I am saying is that those words
 10 are the very words of the creation of a Quistclose-type
 11 trust, aren't they?
 12 MR SNOWDEN: In the context of a transfer, I think this --
 13 LORD JUSTICE BRIGGS: Yes, between private persons.
 14 MR SNOWDEN: It is, that's right, but it's --
 15 LORD JUSTICE BRIGGS: Why shouldn't the same words when used
 16 in a statute, it being, I think we all agree, common
 17 ground that Parliament can provide whatever it wants to
 18 provide about these assets, be taken as having a similar
 19 consequence?
 20 MR SNOWDEN: We say not because if Parliament had actually
 21 intended to create a trust-type obligation, i.e.
 22 a Quistclose-type obligation, we say it would have done
 23 so explicitly.
 24 LORD JUSTICE BRIGGS: It wouldn't have to say a Quistclose
 25 trust.

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1 MR SNOWDEN: No --
 2 LORD JUSTICE BRIGGS: Why doesn't it just use the words that
 3 the law says creates a Quistclose trust?
 4 MR SNOWDEN: It would have used the technique which it uses
 5 in Schedule B1 to the Insolvency Act.
 6 LORD JUSTICE BRIGGS: A Quistclose trust isn't the same as
 7 a charge.
 8 MR SNOWDEN: But where the --
 9 LORD JUSTICE BRIGGS: I quite accept that in a sense
 10 a charge has to have somebody who can enforce the
 11 charge. But a Quistclose trust is just -- it used to be
 12 thought of as a sort of purpose trust and for this
 13 purpose it is probably a convenient way to look at it.
 14 MR SNOWDEN: We say that that's a -- to suggest that
 15 Parliament is intending, by these words, to segregate
 16 out of the assets of the company in the course of this
 17 insolvency process a particular fund --
 18 LORD JUSTICE BRIGGS: No, it doesn't work that way,
 19 segregation. The purpose affects the whole fund. No
 20 part of the fund can be used until that purpose has been
 21 complied with.
 22 MR SNOWDEN: I think we would say that if Parliament had
 23 really been intending to create a trust obligation of
 24 that sort, binding presumably --
 25 LORD JUSTICE BRIGGS: Anyone into whose hands the fund

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1 comes.
 2 MR SNOWDEN: -- on the company.
 3 LORD JUSTICE BRIGGS: Yes, the company, its directors, the
 4 liquidator.
 5 MR SNOWDEN: It would have done so by far more explicit
 6 wording than this.
 7 LORD JUSTICE BRIGGS: Okay.
 8 MR SNOWDEN: With great respect, your Lordship is looking
 9 for a solution and working back to the words, as opposed
 10 to taking the words --
 11 LORD JUSTICE BRIGGS: I was really just bouncing off your
 12 point about you have to look to see the words used to
 13 see if a trust or a charge has been created.
 14 MR SNOWDEN: Yes. We say that you start with the words
 15 and -- as the judge said in the judgment, when he was
 16 looking at the lacuna point in fact -- they come in
 17 context in a series of rules dealing with the
 18 administration and how to -- as it were, constructing
 19 part of the administrator's statutory scheme.
 20 It's the scheme that the administrator follows in
 21 exercising the management, custody and control of the
 22 company's assets. We say it's naturally read as
 23 a direction to him as to how to perform his functions.
 24 They are not words that strike one at all as either
 25 creating a charge over a fund -- and I've indicated

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<p>1 where Parliament wanted to do that it was perfectly 2 capable of doing so explicitly as a consequence of what 3 the administrator did -- nor in fact the words of 4 a trust. 5 You only ever find a trust, even a Quistclose trust, 6 on the assumption that there is some intention behind 7 it. We say that Parliament just doesn't express that 8 sort of intention in this sort of wording. 9 LORD JUSTICE BRIGGS: Okay. 10 LORD JUSTICE MOORE-BICK: Your submission then is that 11 Parliament did intend that if the direction were not 12 complied with by the administrator, there would be no 13 remedy? 14 MR SNOWDEN: No. 15 LORD JUSTICE MOORE-BICK: Possibly a personal remedy against 16 the administrator. 17 MR SNOWDEN: It is part of the statutory scheme. If the 18 administrator declined to follow this, the remedy that 19 a creditor has is to come to court under the 20 Insolvency Act and challenge the actions of the 21 administrator or -- 22 LORD JUSTICE MOORE-BICK: He might simply have done whatever 23 he has to do to resign his powers. He may or may not be 24 able to do that without the court's consent. 25 MR SNOWDEN: In which case, if he breached his statutory</p> <p style="text-align: center;">Page 45</p>	<p>1 the barest legal title. In a distributing 2 administration, although I can't point you to 3 an authority like Ayerst, I suggest it must be the same. 4 The company has just the barest of legal title. 5 LORD JUSTICE LEWISON: Yes. In a private trust, for 6 instance, it is the trustees who will pay whatever the 7 trust fund has to pay. 8 MR SNOWDEN: But test it another way, if statutory interest 9 is payable it's payable irrespective of whether the 10 company had contracted for any interest to be payable. 11 LORD JUSTICE LEWISON: Yes. 12 MR SNOWDEN: It's entirely separated from any obligation 13 which the company assumed to the creditor. 14 LORD JUSTICE LEWISON: Yes. I am assuming in your favour 15 that it's not an obligation of the company, but the 16 definition extends to a sum which is payable by the 17 company. What I am putting to you is, if it is paid, it 18 is paid out of the company's assets by somebody acting 19 as the company's agent. So it is, I would suggest to 20 you, paid by the company and since that's the way in 21 which statutory interest is paid it is also payable by 22 the company, whether or not it's an obligation. 23 MR SNOWDEN: It is payable out of the assets which are 24 subject to the statutory trust in which the company has 25 no interest of any significance. It's the bare legal</p> <p style="text-align: center;">Page 47</p>
<p>1 duty and somebody has suffers loss, then the cases I was 2 in the process of showing you from HHH indicated that he 3 can be sued for breach of statutory duty and made 4 personally liable. But on no footing is there any 5 suggestion that the remedy is a remedy to sue the 6 company claiming that it's the company that's liable in 7 debt. 8 One answer I suppose to the trust obligation is that 9 your remedy, even if it was against the company, would 10 not be, as it were, to enforce a liability of the 11 company or a debt of the company, it would be to say, 12 "You, the company, are in possession of a trust fund, 13 you are a constructive trustee, you must give effect to 14 the trust obligation". But it's not a debt or 15 liability. 16 LORD JUSTICE LEWISON: Suppose for the sake of argument that 17 you're right and it's not an obligation of the company, 18 and suppose that the administrator pays the statutory 19 interest, he pays it out of assets to which the company 20 continues to have title, does he not? 21 MR SNOWDEN: Yes. The company has -- there are two points. 22 The first is, and perhaps -- 23 LORD JUSTICE LEWISON: Why isn't it paid by the company? 24 MR SNOWDEN: Because the company has title -- in 25 a liquidation, where interest is paid, the company has</p> <p style="text-align: center;">Page 46</p>	<p>1 title. In ordinary parlance one would not, I think, 2 say, with respect, that that is anything paid or payable 3 by the company. 4 LORD JUSTICE LEWISON: I don't see why you say that. 5 Executors would have no interest in the underlying 6 estate but they have to pay funeral expenses and the 7 like. That is what is payable by them as trustees. 8 MR SNOWDEN: Well -- 9 LORD JUSTICE LEWISON: That's a bad example because they are 10 executors not trustees, but a trustee of a private trust 11 fund -- 12 MR SNOWDEN: Is not payable by them in the sense that if you 13 asked the commercial man: is that their obligation, are 14 they making the payment? You would say, no, they are 15 not they are paying it from the trust fund. They are 16 paying it from assets which don't belong to them which 17 are impressed by a trust -- or a statutory trust in this 18 particular case, impressed by the statutory scheme. 19 They aren't paying, not in any meaningful sense, because 20 they no longer own the assets. 21 I think your Lordship put it to me in opening, whose 22 name is on the chequebook? Well, the answer is 23 interesting. It will either be the company 24 (in administration) or else it may be the administrators 25 acting on behalf -- as administrators of, if they have</p> <p style="text-align: center;">Page 48</p>

<p>1 had to open separate bank accounts because frequently 2 the company's bank accounts are frozen. But in a sense 3 that sort of obscures the real question. The real point 4 is that the liability is being discharged from the 5 assets which are subject to the statutory scheme. 6 LORD JUSTICE LEWISON: Yes, I understand. 7 MR SNOWDEN: So we do say if you're asking what the 8 draftsman or the commercial minds behind the 9 subordinated loan agreement would have understood by 10 that concept, they would have said, "No, it's only 11 payable by the company if it comes from the assets of 12 the company". Once they have been subjected to the 13 statutory trust, that's no longer the case. 14 The references to various statutory provisions, 15 I think it was mentioned by Mr Trower, for example, the 16 creditor can claim against the administrator for unfair 17 harm under paragraph 74. In any event administrators 18 and liquidators are officers of the court who can be 19 directed to comply with the statutory scheme or sued 20 personally after the event if they have misapplied 21 assets. 22 So we say that in the ordinary sense it is not 23 a liability of the company. 24 If I am wrong on that, we nonetheless go on to say 25 that it is excluded under clause 5.2(a). My learned Page 49</p>	<p>1 my learned friend didn't dissent from the origins of 2 these clauses. Against the background of the directives 3 we say that the draftsman was focusing on the insolvency 4 process and that this phrase "as a whole" is plainly 5 a phrase which connotes debts which are either presently 6 payable or, if not presently payable because they are 7 prospective or contingent, are capable of being 8 established or determined in the insolvency of the 9 borrower. So it is a phrase which is designed to 10 capture the concept of provable debts. 11 My learned friend's submissions that it's more 12 limited than that, much more limited than that, and all 13 that 5.2(a) is trying to exclude are debts such as 14 foreign revenue claims or statute-barred debts, with 15 respect, gives a very odd state of mind to the 16 draftsman. It presupposes the draftsman is focusing on 17 a very, very narrow category of claims, which it's not 18 easy to see why alone those types of claims should be 19 excluded. With respect, it's much more likely that the 20 draftsman is concentrating on the debts which would 21 rank, using the word from the directive, for payment in 22 an insolvency. Yes, in England we call it a process of 23 proof. That's a technical expression. But it is 24 a process which is perfectly captured by the expression 25 "capable of being established or determined". Page 51</p>
<p>1 friend Mr Trower, his interpretation of the phrase in 2 5.2(a), that's an obligation not payable or capable of 3 being established or determined in the insolvency of the 4 borrower, he said that was only intended to exclude 5 something for which a creditor has no remedy in the 6 insolvency proceedings. 7 I think he also said that would -- he focused on 8 non-enforceable debts. In essence what he's also saying 9 is anything which fell to be paid during the insolvency 10 process, that is from the beginning to the end, fell 11 outside that exclusion and therefore fell to be paid 12 ahead of the sub debt. 13 We say that that doesn't do full justice or it 14 doesn't give full effect to the words of that 15 clause 5.2(a), because what my learned friend was 16 effectively simply saying is that anything which was 17 payable during the period of the insolvency is ahead of 18 the subordinated debt. By saying that he fails to give 19 effect to the other words of the clause "capable of 20 being established or determined in the insolvency". He 21 gives no meaning to "capable of being established or 22 determined" and therefore no meaning to the clause of 23 the whole. 24 What we obviously say is that when one looks at the 25 origins of this clause -- and I took you to the origin, Page 50</p>	<p>1 That gives full meaning to the words of the clause, 2 because my learned friend really didn't, with respect, 3 give any meaning to those words. His formulation would 4 simply ignore them, because on his formulation you could 5 just as easily strike them through and achieve the same 6 result, because obviously debts which are unenforceable 7 are not payable. 8 Turning to non-provable claims, we say obviously 9 non-provable claims are excluded. They fall below the 10 subordinated debt, i.e. they are exactly the sort of 11 claims which are contemplated by the exclusion in 12 clause 5.2(a). 13 By definition they're not payable at the 14 commencement of the bankruptcy or the liquidation, 15 because if they were they would be provable. They would 16 either be payable or capable of being established or 17 determined. They are not capable of being established 18 or determined in -- and the word is "in", not "during" 19 but "in" -- the insolvency. 20 The exchange that took place between my learned 21 friend and my Lord Lord Justice Moore-Bick, and then 22 I think others joined in, about how a claimant with 23 a non-provable claim would have to go about getting 24 paid, we say demonstrates very well why non-provable 25 claims are not payable in the insolvency within the Page 52</p>

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

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

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

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1 loan agreement.

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

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

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

19 MR SNOWDEN: That's right.

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

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

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

6 LORD JUSTICE MOORE-BICK: No.

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

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

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

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

21 MR SNOWDEN: With respect --

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

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

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

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

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

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

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1 competition between the members and these non-provable
2 creditors.
3 Of course Humber Ironworks says you should pay your
4 non-provable interest -- sorry, this is the argument
5 that is put. I am not making that my submission, let me
6 make this perfectly clear. But it is said, "Oh, look,
7 Humber Ironworks says you should pay these non-provable
8 claims before you pay your members the surplus,
9 creditors before members". But we have drifted to that
10 and --
11 LORD JUSTICE LEWISON: You say you are creditors.
12 MR SNOWDEN: Exactly this problem --
13 LORD JUSTICE LEWISON: You are creditors, you are
14 subordinated. The extent to which you are subordinated
15 depends upon the interpretation of liabilities and
16 5.2(a).
17 MR SNOWDEN: From the perspective of a subordinated loan
18 agreement.
19 LORD JUSTICE LEWISON: Yes.
20 MR SNOWDEN: The perspective that I have been answering for
21 the last few minutes is the perspective which is
22 infected by the concept of competition between creditors
23 and members. I said that's the trap the judge fell into
24 and I urge the court not to fall into the same trap,
25 because this is all to do with one creditor agreeing to

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1 stand behind other creditors.
2 LORD JUSTICE MOORE-BICK: Is it possible that the duty on
3 the liquidator to pay liabilities owed to non-provable
4 creditors is implicit in the statutory scheme of
5 liquidation and the function of a liquidator and,
6 although there's no machinery to deal with it, it can be
7 discerned as something, as I say, which is implicit in
8 the whole structure?
9 MR SNOWDEN: (Pause). I can see that the court may think
10 that in certain circumstances it may be an appropriate
11 thing for a liquidator to involve himself in, and I put
12 that in a very natural way, in the sense of facilitating
13 payments to be made to people who have established their
14 non-provable claims in the way that David Richards J
15 described. Nobody is suggesting, for example, that the
16 administrators are acting in any way wrongfully in
17 conducting Waterfall II --
18 LORD JUSTICE BRIGGS: Why should they have to establish them
19 by litigation? Assume that it is plain as a pikestaff
20 that there is a non-provable claim. Why should they
21 have to go off and get some judgment for it at goodness
22 knows what expense? If it is obvious as between them
23 and the liquidator that they are entitled ahead of the
24 members, why isn't it his duty just to pay them?
25 MR SNOWDEN: But he's is not paying it in paragraph -- I am

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1 not going to repeat --
2 LORD JUSTICE BRIGGS: I quite understand your point. You
3 say he's not paying as part of the statutory scheme.
4 MR SNOWDEN: In the insolvency --
5 LORD JUSTICE BRIGGS: I am just looking at your explanation
6 that the right in every case depends on going and
7 getting a judgment. You're only going to get to go to
8 court if there's a dispute about it.
9 MR SNOWDEN: But I am sort of following, with respect -- the
10 judge, David Richards J, has a long history in this
11 territory.
12 LORD JUSTICE BRIGGS: I know.
13 MR SNOWDEN: Not just T&N, because he was in
14 R-R Realisations as well. He's grappled with this
15 problem over a number of years, going back to when he
16 was a junior.
17 LORD JUSTICE BRIGGS: Yes.
18 MR SNOWDEN: Of all the people you would have thought would
19 have a fairly sympathetic approach to the idea that
20 actually it was part of what an office holder could do,
21 he might be the person who would tumble to that. Yet he
22 is the one person who says, "No, this is isn't part of
23 the statutory scheme. If this is going to happen it has
24 to happen by the non-provable creditor asserting
25 a claim, getting the stay lifted and getting execution".

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1 I do urge upon your Lordships not to mix the logic
2 with, as it were, convenience -- not to mix the
3 structure of the Act and how it would have been looked
4 at from the perspective of the SLA with undoubtedly
5 convenient mechanisms.
6 My Lord, I was asked at 11.30, by the shorthand
7 writers, to have a break.
8 LORD JUSTICE MOORE-BICK: I was going to suggest that might
9 be a convenient moment. So thank you. We'll rise for
10 five minutes.
11 (11.34 am)
12 (A short break)
13 (11.39 am)
14 LORD JUSTICE MOORE-BICK: Yes, Mr Snowden.
15 MR SNOWDEN: My Lord, just a final point on subordination.
16 Why, my Lord Lord Justice Lewison said, does it matter
17 whether LBI to LBHI2 can prove? Before I answer the
18 question, just reminding you, we say it can and that the
19 analysis we've set out, and we refer to the extract from
20 Professor Goode's book, indicates that we can and it's
21 contingent claim.
22 We also remind you although it's not specifically
23 mentioned by INPRU that we could prove -- it is
24 mentioned by GENPRU but not INPRU. We do adopt the
25 point that's made that if you can petition, there's

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<p>1 actually not a great deal of point petitioning if you 2 can't prove. 3 My learned friend said, and where his submissions 4 boil down was, that if proving was going to affect the 5 subordination then we couldn't do it. With respect to 6 my learned friend, that is bootstrapping. The simple 7 question is if the subordination provision doesn't 8 prevent you from proving, and we say it doesn't, then 9 you can prove. 10 LORD JUSTICE LEWISON: Quite. The question is what can you 11 prove for? 12 MR SNOWDEN: Yes. 13 LORD JUSTICE LEWISON: You say you can prove for 14 a contingent debt and that leads on to the next 15 question, what are the contingencies? 16 MR SNOWDEN: The contingencies are satisfaction of 17 payment -- 18 LORD JUSTICE LEWISON: That's where we came in. 19 MR SNOWDEN: And that's an analysis we say is fine. But 20 what we do say is that the fact that we can prove 21 supports our interpretation of the extent of the 22 subordination, not least because of statutory interest, 23 because statutory interest is, at the risk of repeating 24 myself, payable -- 25 LORD JUSTICE LEWISON: Irrespective of rankings.</p> <p style="text-align: center;">Page 61</p>	<p>1 rules. I have already shown you Insolvency Rule 2, 2 which sets out that the part of the rules in which you 3 find Rule 2.88 applies in relation to the appointment of 4 an administrator. We say it is obvious that where the 5 appointment has ceased, the administration has ended, 6 Rule 2.88(7) has no further life. 7 I mentioned before the break, and I'll make it good 8 now, that when you look at liquidation it's also clear 9 that there is one regime that applies in liquidation and 10 tells the liquidator who then has control of the affairs 11 and property of the company how he is to act. That is 12 section 189. 13 Section 189(1), page 100 of the Red Book: 14 "In a winding-up interest is payable in accordance 15 with this section on any debt proved in the winding up, 16 including so much of any debt as represents interest on 17 the remainder." 18 That is, I respectfully suggest, a very clear 19 statutory indication that this is the regime that 20 applies in the winding up. There is no other. 21 Rule 2.88(7) is not part of the statutory scheme 22 which the liquidator takes control of the -- sorry, on 23 which terms the liquidator takes control of the assets 24 of the company. 25 The key, as we all know, is that when there were</p> <p style="text-align: center;">Page 63</p>
<p>1 MR SNOWDEN: -- irrespective of rankings to all people who 2 have proved. That is a very clear steer, we say, as to 3 where we are positioned in the waterfall at 5B, I think 4 we came out to figure it out, rather than 7B or whatever 5 it is. 6 It is said that proving is an important signpost to 7 answer the actual question of subordination. 8 I think unless your Lordships have anything more for 9 me, that's all I was going to say in reply on 10 subordination. To some extent I've already traversed 11 a little bit of the ground which I was next going to 12 cover which is Rule 2.88(7) and how it works. We say 13 the judge was right, in relation to interest during 14 an administration, that if the company goes into 15 liquidation statutory interest is not payable by the 16 liquidator for the period of the administration. In 17 other words, if it is going to be paid it should be paid 18 by the administrator. In many ways, that's the clear 19 and obvious intent of the rules. 20 So the problem only arises if the administrators do 21 not pay statutory interest. 22 The basic submission that was made to you by my 23 learned friend was that Rule 2.88(7) has a life of its 24 own independently of the duration of the administration. 25 We say that just simply isn't the structure of the</p> <p style="text-align: center;">Page 62</p>	<p>1 changes made to the insolvency legislation to deal with 2 the moving of a company from administration to 3 liquidation or from liquidation to administration, this 4 is something that came in as a possibility in the 5 Enterprise Act 2002, when administration was made 6 a distributing process potentially and it became 7 possible to move from one to the other. They did not 8 change section 189. It could have done but didn't. It 9 didn't change when they made subsequent changes to the 10 Insolvency Rules, which, again, tidied up some problems 11 which had been spotted. 12 So there's no indication, throughout any of the 13 legislative history or in any of the legislative 14 wording, that section 189 is to have any other meaning 15 than that which it bears on its face. It is simply 16 intended to be the regime by which a liquidator pays 17 statutory interest from the surplus which has arisen 18 once he has paid proved debts. 19 Really that is the submission that the judge 20 accepted and we say he was entirely right to accept it. 21 There are two separate regimes. The fact that there 22 are two separate regimes, and that that had been 23 appreciated by the draftsman, can be seen from the 24 provision in relation to proofs, i.e. it's the provision 25 of the Insolvency Rules that indicates that a creditor</p> <p style="text-align: center;">Page 64</p>

<p>1 proving in the administration is deemed to have proved 2 in the subsequent liquidation. 3 LORD JUSTICE MOORE-BICK: Does the statute deal with the 4 crossover? Does the statute deal with the crossover 5 from administration to liquidation? 6 MR SNOWDEN: No, it's dealt with in -- 7 LORD JUSTICE MOORE-BICK: Just in the rules. 8 MR SNOWDEN: It is dealt with in Schedule B1, which we saw. 9 LORD JUSTICE MOORE-BICK: Right. 10 MR SNOWDEN: It is Schedule B1 to the Insolvency Act which 11 makes the provision -- 12 LORD JUSTICE LEWISON: When moving from one to the other 13 MR SNOWDEN: -- when moving from one to the other. That's 14 essentially where you find the mechanism. I showed you 15 the mechanism a little earlier in Schedule B1 from 16 moving from one to the other. So they did amend the 17 Insolvency Act, by putting Schedule B1 there to make it 18 possible, but they didn't change section 189. 19 So far as section 189 is concerned, as far as 20 a liquidator is concerned, interest is only payable, 21 obviously, as we've seen, from the commencement of the 22 liquidation and that's it. 23 We say that that, and the combination of the rule 24 that says if you have proved your debt in the 25 administration you are deemed to have proved it in the</p> <p style="text-align: center;">Page 65</p>	<p>1 apply that surplus in the way set out in section 189 and 2 for no other purpose. 3 My learned friends would have you believe that what 4 he's actually also obliged to do, though, is to apply 5 the surplus in the way prescribed in Insolvency 6 Rule 2.88(7), because they say Rule 2.87 continues for 7 some creditors. But, with respect, that's simply 8 an inconsistency that they can't explain and the judge 9 rightly pointed that out. 10 The second point which the judge mentioned at the 11 end of paragraph 125 -- again under his heading I think 12 "Fourthly". He points this out, he says if 13 an administration is not a distributing administration, 14 in other words if it's a very plain vanilla and in fact 15 probably the situation that the draftsman of the 16 legislation had primarily in mind of a company that went 17 through an administration process to achieve a more 18 beneficial realisation of a trading business, but then 19 decided not to make a distribution but to put the 20 company into liquidation and for the distribution to be 21 made in the liquidation -- there may be advantages to 22 doing that, there may be remedies available in 23 a liquidation not available in an administration. 24 Disclaimer is an example; administrators can't disclaim, 25 liquidators can. So there may be a need to go into</p> <p style="text-align: center;">Page 67</p>
<p>1 winding up, means there is a unitary regime for payment 2 of statutory interest in a liquidation. There isn't 3 a bifurcated regime, as my learned friend would have you 4 agree, namely that there's one set of creditors who have 5 proved their claims in the administration who continue 6 to have rights under Rule 2.88(7) and then another set 7 of creditors who proved their claims in the liquidation 8 and therefore are governed by section 189. There is no 9 such bifurcation in the course of a winding-up. It's 10 a unitary regime, which is what you would expect. 11 The judge made a couple of quite telling points -- 12 I think he said himself very telling points, those were 13 his own words -- at paragraph 125. 14 The first of those which I would like to remind you 15 of in paragraph 125 of his judgment is where he says, 16 four lines, in "Secondly". Perhaps your Lordships would 17 just like to remind yourselves of what he said under the 18 heading "Secondly" in paragraph 125 and then I will just 19 illustrate what he means. (Pause). 20 The point the judge is making there is suppose the 21 first time that the question of what to do with the 22 surplus is asked is in the liquidation, that the first 23 time one actually finds that there is a surplus after 24 payment of all proved debts is when the liquidator pays 25 all proved debts. He is told, under section 189, to</p> <p style="text-align: center;">Page 66</p>	<p>1 liquidation. 2 In a very plain vanilla situation, where there is no 3 call for proofs of debt in an administration, the only 4 time that proofs of debt are called for is in the 5 liquidation. The only time that one can ever ascertain 6 whether there is a surplus after proved debts are paid 7 is in a liquidation. Nobody is suggesting, not anybody 8 in this court is suggesting, that anybody gets paid 9 interest for the period of the administration. That's 10 conceded, everybody accepts. 11 So, that on any view, Parliament has left as the way 12 the Act works. 13 LORD JUSTICE BRIGGS: While at the same time being deprived 14 of their contractual interest, even if the liquidation 15 cut-off date is later than the administration cut-off 16 date. You're saying nobody contends otherwise, but -- 17 MR SNOWDEN: Well, in this case -- 18 LORD JUSTICE BRIGGS: -- I am just -- 19 MR SNOWDEN: In this case, on your Lordship's reasoning in 20 Nortel, the proof of debt in the liquidation would 21 I think -- 22 LORD JUSTICE LEWISON: Allow interest up to the liquidation. 23 MR SNOWDEN: Allow interest up to the date of liquidation. 24 LORD JUSTICE BRIGGS: Would it, because of 4.93? It would 25 if you only looked at --</p> <p style="text-align: center;">Page 68</p>

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

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1 the onset of the liquidation.
 2 MR SNOWDEN: Correct.
 3 LORD JUSTICE BRIGGS: Under section 189.
 4 MR SNOWDEN: And that is the statutory scheme. If you are
 5 going to submit, as I suspect my learned friend is
 6 asking you to do, to a temptation to start writing
 7 things into the statute -- because I am going to submit
 8 to you that's exactly what he's trying to get you to do.
 9 This is exactly the exercise that my Lord
 10 Lord Justice Briggs refused to do in Nortel at first
 11 instance.
 12 LORD JUSTICE BRIGGS: Yes.
 13 MR SNOWDEN: I.e. this isn't correcting a drafting mistake,
 14 this is writing stuff in. Why not start writing it into
 15 that situation as well? You just can't do it, with
 16 respect.
 17 The Act is perfectly plain and nobody has suggested
 18 that there is any alternative solution to deal with that
 19 plain vanilla scenario. Once that is accepted, with
 20 respect my learned friends' argument must vanish.
 21 On Nortel, my learned friend -- we made the point in
 22 the skeleton, the judge made it in the judgment. You
 23 have heard no contrary argument.
 24 Actually just pausing for a second and dealing with
 25 the Nortel point before I go on to the parked point that

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1 arose during the course of argument. In Nortel at first
 2 instance Lord Justice Briggs set out, we say very
 3 clearly, the parameters and limits of the ability of the
 4 court to start rewriting bits of the statute and, for
 5 reasons which we say were very similar to the current
 6 situation, declined to engage in the exercise and we say
 7 rightly so.
 8 The reference in Nortel is 1C, 88, and the relevant
 9 paragraphs are at paragraphs 115 to 123. I will take
 10 your Lordships to it, if you would like to just briefly
 11 see it, but I suspect this may be fairly familiar
 12 territory. It is 1C, tab 88. It is between 115, the
 13 reference -- this was my learned friend Mr Dicker taking
 14 on the challenge of asking for the statute in effect to
 15 be rewritten or the rules to be rewritten to correct
 16 what was thought to be an obvious mistake.
 17 There's reference to Inco, which is pretty well
 18 known, and then Lord Justice Briggs declined to accede
 19 to that invitation at paragraph 116, and set out
 20 a number of reasons. Some of them we say are
 21 particularly relevant and pertinent here; particularly
 22 117, where the conclusion was that in that respect:
 23 "This is not a question ..."
 24 I am just reading at the end of paragraph 117:
 25 "The conclusion that the omission of any amendment

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1 was a mistake derives from the appreciation of the
 2 purpose behind the amendments to the rules as explained
 3 by the explanatory note."
 4 This was a situation where Parliament had said in
 5 an explanatory note what it was trying to achieve. The
 6 question was, well, if it was trying to achieve that it
 7 should have made some additional amendments. The
 8 mistake was said to be not to make the additional
 9 amendments. Lord Justice Briggs said:
 10 "This is not therefore a question of correcting
 11 a drafting mistake in an amendment actually made, but
 12 rather the insertion of a whole new and important
 13 provision which is quite simply not there."
 14 Similarly, in 120, pointing out that:
 15 "There is a subtle dividing line between dealing
 16 with drafting mistakes by construction, which is a task
 17 for the court, and dealing with them by subsequent
 18 amendment, which is a task for the legislature, and in
 19 my judgment the present task falls clearly on the
 20 legislature side of that dividing line."
 21 We do pray those in aid here, because what in effect
 22 my learned friends are trying to do is trying to give
 23 Rule 2.88(7) a life after it is plain it has no life in
 24 a process in which it has no life. They are actually
 25 trying to plug what they really see is the problem,

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

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1 thought that Inco can only apply to a mistake made in
 2 the legislation when it was introduced. There was no
 3 mistake in section 189 when it was introduced.
 4 MR SNOWDEN: No, that's why I am saying it's a writing in.
 5 They're having to try to write something in, rather than
 6 correct a mistake. That's exactly right, my Lord.
 7 LORD JUSTICE BRIGGS: It could be said that one might try
 8 and evade that by looking rather more closely at 4.93 --
 9 MR SNOWDEN: Which is where I will go in a moment.
 10 LORD JUSTICE BRIGGS: -- where you will no doubt go because
 11 if you like, for those creditors who had contractual
 12 interest running during the administration period, you
 13 could say, well, they are rotted up because section 189
 14 doesn't put statutory interest instead. The real reason
 15 they are rotted up is because they had contractual
 16 interest taken away by 4.93.
 17 MR SNOWDEN: The problem that has come about in relation to
 18 4.93 -- we can put away Inco. I think your Lordships
 19 have my point on that.
 20 LORD JUSTICE MOORE-BICK: The scheme is that a debt which
 21 has been proved in the administration, in this case at
 22 some antecedent time, is treated, is it, as having been
 23 proved in the liquidation at the time when the
 24 liquidation has obviously commenced rather in a sense
 25 antedating the proof in the liquidation?

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

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

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1 reason I raised what may seem a rather foolish question
 2 is because it seems to me that in a way the critical
 3 words of 1.89(2) are "since the company went into
 4 liquidation". It made me wonder whether there was the
 5 notion that the proof in the administration counts as
 6 proof in the liquidation gave rise to any sort of
 7 retrospective commencement of the liquidation for these
 8 purposes. That may be too imaginative. It probably is.
 9 MR SNOWDEN: I fear it is, in the sense that there's no
 10 doubt that one -- certainly too much in it for me.
 11 There's no doubt at all that if you prove in the
 12 administration you are deemed to have proved in the
 13 winding up. The direction, though, that is given to the
 14 liquidator, or the provision in section 189, is it is in
 15 respect of the periods during which "they" have been
 16 outstanding -- that is the debts.
 17 LORD JUSTICE MOORE-BICK: Yes.
 18 MR SNOWDEN: Since the company went into liquidation.
 19 LORD JUSTICE MOORE-BICK: Exactly. It's those words, isn't
 20 it?
 21 MR SNOWDEN: The timing period is undoubtedly tied to the
 22 debts, not the proof, and it's undoubted -- it is since
 23 the period --
 24 LORD JUSTICE MOORE-BICK: Yes.
 25 MR SNOWDEN: -- that they have been outstanding since the

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1 company went into liquidation. Hence my Lord
 2 Lord Justice Lewison's point, what if in the
 3 administration the proved debts had been paid in full?
 4 Does then the prohibition in Rule 4.93 on paying
 5 interest or the restriction bite? I can see the
 6 argument, which may provide some answer in a particular
 7 case, subject to this other point, as to which at the
 8 moment it's just not an argument that has been
 9 addressed. It was raised but argued differently in
 10 front of David Richards J, by the sound of it.
 11 I think all we're trying to say is there are very,
 12 very deep waters lurking around here --
 13 LORD JUSTICE MOORE-BICK: That's an in terrorem argument
 14 isn't it?
 15 MR SNOWDEN: I think it is only echoing --
 16 LORD JUSTICE MOORE-BICK: That's step into the water, it's
 17 terribly deep.
 18 MR SNOWDEN: It is an echo of what my learned friend
 19 Mr Trower said to you -- or perhaps it was Mr Dicker --
 20 Mr Dicker, in fact, when he was telling you a little bit
 21 of what was going on in Waterfall II, just in case --
 22 I was perhaps doing it less subtly than he did, but
 23 there are areas of argument which undoubtedly you
 24 haven't faced -- heard argument. We haven't and one of
 25 the things I would certainly would say is that we have

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1 encountered this problem, as it were, within the last
 2 48 hours.
 3 At the end of the hearing, we might simply ask your
 4 Lordships, if anything important occurs to us over the
 5 weekend on this particular point, if we might seek to
 6 supplement with a very short submissions in writing --
 7 if something arises. At the moment I am simply
 8 explaining as we see it, having had less than, say,
 9 48 hours to try to digest the implications of
 10 Mr Bayfield's intervention.
 11 But none of that we say actually, harking back,
 12 affects the position on the actual appeal. We say the
 13 judge was right to find that the statute is of the
 14 scheme that he described and right not to accede to any
 15 suggestion to engage in creative writing.
 16 LORD JUSTICE BRIGGS: Yes. (Pause).
 17 MR SNOWDEN: I have been handed my learned friend
 18 Mr Dicker's skeleton from Waterfall II. For the
 19 purposes of the record apparently paragraph 27 says
 20 this:
 21 "For the purpose of calculating the amount of the
 22 surplus to be applied in paying interest, the senior
 23 creditor group contends that dividends previously paid
 24 are notionally treated as having been allocated first to
 25 the payment of accrued interest at the dates of payment

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1 of the relevant dividends and then in reduction of
 2 principal."
 3 That is apparently question 2.
 4 LORD JUSTICE BRIGGS: That would only be accrued interest
 5 down to the date of the onset of the administration,
 6 presumably?
 7 LORD JUSTICE LEWISON: Not in a fully solvent company.
 8 MR SNOWDEN: No.
 9 LORD JUSTICE LEWISON: That's Humber Ironworks.
 10 MR DICKER: I am not going to address your Lordships on
 11 those, but if you want to see how the argument works
 12 essentially the last word on the subject, prior to the
 13 1986 Act, is Re Lines Bros (No 2) where Mervyn Davies J
 14 effectively adopted, as every single case had for the
 15 last 250 years, Bower v Marris and said there is
 16 effectively a notional recalculation for these purposes.
 17 That I think is all I will say.
 18 MR SNOWDEN: It is water in which I hasten even to dip
 19 a toe, save to say none of that, interesting though it
 20 is, should affect your Lordships' ruling on the
 21 particular issues that are subject of the actual appeal.
 22 I think I was going to turn, then, if I may, unless
 23 your Lordships have anything more for me on that, to the
 24 contributory rule. Again, I hope I can take this
 25 relatively shortly.

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<p>1 We respond in our respondent's skeleton, which is at 2 tab 7 of bundle E, on this issue. If I take this 3 shortly, because others I know need to have their say, 4 I will urge your Lordships to look at that skeleton 5 again. It is at paragraphs 13 to 34. 6 As we understand it, LBIE have appealed on this 7 issue on the basis that it only arises if they cannot 8 prove for a contingent claim in respect of the 9 section 74 liability in our administration. Mr Trower 10 said that at page 3 of yesterday. 11 I think LBIE recognises, if they can prove in our 12 administration for that contingent section 74 liability, 13 that we're into mandatory insolvency set-off territory. 14 LORD JUSTICE BRIGGS: At one end or the other, yes. 15 MR SNOWDEN: There's simply no room for the contributory 16 rule to operate, which is what we had said in 17 paragraph 33 of our skeleton. 18 LORD JUSTICE BRIGGS: Yes. 19 MR SNOWDEN: As we understand it, my learned friend 20 accepted, in response to a question from my Lord 21 Lord Justice Lewison, that if the contingent section 74 22 liability is not provable in our administration, for the 23 reason encapsulated in heading C of Lord Neuberger's 24 Nortel judgment, then the contributory rule doesn't 25 apply in LBIE's administration. That was what we</p> <p style="text-align: center;">Page 81</p>	<p>1 trying to do, is to take very well established rules, to 2 significantly expand them, as it were contrary to the 3 rules, outside the scope that they have, and it's all 4 driven by the desire of the administrators of LBIE to 5 have the benefits of being in a liquidation -- in fact 6 more than the benefits of being in a liquidation -- when 7 they're not in liquidation, when they have not yet 8 decided to go there. We say that that is unjust and 9 impermissible. 10 What they're trying to do, and I'll make no bones 11 about this -- and we put it in our skeleton, the judge 12 noted it, my learned friend has never contradicted it -- 13 is to keep us out of the LBIE administration simply on 14 the basis of the possibility that there may subsequently 15 be a liquidation and a call. In other words, they're 16 trying to have the economic effect of having made 17 a call, which is something that they cannot do. 18 Starting with the contributory rule. The 19 contributory rule, stated simply, is a rule that the 20 contributory cannot participate in a distribution in 21 a liquidation until he has paid a call which has been 22 made upon him by a liquidator. You can see that set 23 out, just very quickly, in the judgment of the judge 24 below. He extracts the two relevant passages from the 25 authorities. If you turn to the judgment below at</p> <p style="text-align: center;">Page 83</p>
<p>1 understood him to say on page 9 of yesterday. 2 If that's right, we think it is, then this is 3 a very, very narrow appeal. 4 LBIE first of all acknowledges it can point to no 5 authority in support of the case which it has put. My 6 learned friend was very candid in relation to that. We 7 say the authorities, both on the contributory rule and 8 to the extent that it is tracked or supplemented by the 9 rule in <i>Cherry v Boulton</i>, couldn't be clearer. They 10 establish that the rule only applies where there is 11 a present obligation on a contributory to contribute, 12 either, in the case of the contributory rule, because 13 there has been a call or, in the case of 14 <i>Cherry v Boulton</i>, because there is a present debt 15 payable -- not a future one, a present one. We say 16 that's very clear from all the cases that I will take 17 you to and it's also clear from the Supreme Court's in 18 <i>Re Kaupthing</i>. Therefore, the judge was entirely right 19 to find that the fundamental difficulty with this 20 contention that my learned friend is putting to you is 21 that there is no statutory mechanism for a call to be 22 made in an administration. That is fatal to my learned 23 friend's case and the judge was right to say that at 24 paragraph 188 of the judgment. 25 What LBIE is trying to do, what my learned friend is</p> <p style="text-align: center;">Page 82</p>	<p>1 paragraph 179 and 181. (Pause). 2 There are two statements. One is Buckley J in 3 <i>West Coast Gold Fields</i> and the other one is a passage 4 from Lord Walker's judgment in <i>Kaupthing</i>. The essence 5 of the rule is set out in the very last sentence of 6 Lord Walker's judgment in <i>Kaupthing</i>, which is at the end 7 of paragraph 181: 8 "Payment of the call is a condition precedent to the 9 shareholders' participation in any distribution." 10 And again: 11 "The shareholder is to that extent 12 disadvantaged ..." 13 LORD JUSTICE LEWISON: Underpinning this whole rule is that 14 the contributory can participate in the distribution by 15 discharging his debt, there is something that he can do 16 to get himself into the distribution. 17 MR SNOWDEN: Yes, and that's exactly the point the judge 18 made. Yes. 19 LORD JUSTICE LEWISON: If there is no more than 20 a contingency, what can he do? 21 MR SNOWDEN: Nothing and that's why the judge said it's very 22 unjust. Absolutely, your Lordship has that point 23 absolutely right. 24 My learned friend sort of said this is all to do 25 with <i>pari passu</i> and because it's all to do with</p> <p style="text-align: center;">Page 84</p>

<p>1 pari passu you can protect within what I think he at one 2 point described as "the envelope of insolvency", the 3 envelope. To include both the current administration 4 and the potential liquidation, the envelope. You can 5 protect the pari passu rule and you should protect the 6 pari passu rule. 7 With respect to him, he is wrong for two reasons. 8 First, that's not the foundation for the contributory 9 rule and I'll show you that in Grissell's case in 10 a moment. But secondly, and more importantly, when he 11 says "the pari passu rule" you have to actually 12 understand what he is talking about. 13 The pari passu rule is that as a creditor you have 14 a right to have the assets of the company distributed 15 pari passu amongst creditors. Unless or until you have 16 had a call and the call -- the whole point about this is 17 when there is a call, the call is for a contribution to 18 the assets; and at that stage then the pari passu rule 19 kicks in to protect the pari passu distribution of 20 assets. 21 But if you can't make a call, you can't swell the 22 assets in respect of it. Therefore the pari passu at 23 that stage in that respect has no application. It has 24 plenty of application for other reasons but not in 25 relation to the call, because you can't make one.</p> <p style="text-align: center;">Page 85</p>	<p>1 to that scheme to allow the contributory to set off 2 against the call. And that's it. It's very simple. As 3 my Lord Lord Justice Lewison put to me a few moments 4 ago, it is no more complicated than that. 5 He went on to deal with -- he supported his view, as 6 he said "in support of the view", he referred to the 7 pari passu distribution rule. But the point is it is 8 only distributing what you've got, i.e. a call. He is 9 saying that the consequence of allowing the set-off 10 would be, as he says -- if you can see towards the end 11 of the next paragraph, just at the second hole punch: 12 "But with respect to a member of a company with 13 limited liability, if a set-off were allowed against 14 a call it would have the effect of withdrawing 15 altogether from creditors part of the funds applicable 16 to the payment of their debts." 17 The position we have here, of course, is that there 18 are no funds available for payment of creditors' debts 19 in the administration resulting from a call, because 20 there can't be, because you can't make a call if you're 21 an administrator. The reason, therefore, that part of 22 the funds, as it were, which would otherwise be 23 applicable to payment of creditors' debts are not there 24 has nothing to do with us, the members. It's with the 25 fact that we are in administration and we can't be</p> <p style="text-align: center;">Page 87</p>
<p>1 (Pause). 2 If I turn to Grissell's case. Grissell's case is in 3 bundle 1A and it's at tab 6. We can do it quite 4 speedily. As my learned friend accepted, and as 5 Lord Chelmsford had said at page 534, the question 6 depends entirely on construction of the Companies Act 7 1862. That's the second full paragraph on the page. 8 Then if we turn to where he actually then addressed 9 that question, if you go to the bottom of page 535, he 10 said: 11 "It appears to me to be quite clear that the amount 12 of the call not paid cannot be set off against the debt. 13 The Act creates a scheme for the payment of the debts of 14 a company in lieu of the old course of issuing execution 15 against individual members. It removes the rights and 16 liabilities of parties out of the sphere of the ordinary 17 relation of debtor and creditor to which the law of 18 set-off applies. Taking the Act as a whole, the call is 19 to come into the assets of the company, to be applied 20 with the other assets in payment of debts. To allow 21 a set-off against the call would be contrary to the 22 whole scope of the Act." 23 That's the principle. If you have a right to make 24 a call because you're a liquidator for, as section 74 25 says, a contribution to the assets, it would be contrary</p> <p style="text-align: center;">Page 86</p>	<p>1 called upon to pay. It follows, because we can't be 2 called upon to pay, we can't do anything about 3 satisfying the call either. Yet what apparently is to 4 happen is that we are to be kept out of participation of 5 any distribution in circumstances where we haven't been 6 called and we can't do anything to satisfy the call. We 7 can't, for example, seek to take advantage or to have 8 put into effect the rule in <i>Cherry v Boulton</i> either, 9 which is the way in which you actually deal with, in 10 accordance with the pari passu principle, the netting 11 off -- 12 LORD JUSTICE BRIGGS: The retainer. 13 MR SNOWDEN: Yes. We can't do any of that. The reason we 14 can't do any of it is because we haven't had a call. 15 That's the mischief, that's the wickedness of what's 16 going on here, with this attempt to introduce into the 17 administration some rule allegedly based on the 18 contributory rule or some analogy of it or some 19 extension of it. 20 LORD JUSTICE BRIGGS: You presumably say if the inability to 21 make a call, looking at the process of administration 22 and liquidation as a whole, might mean that you prove 23 for and get more than you would do if a call had been 24 made against you, then the solution is to put the 25 company into liquidation.</p> <p style="text-align: center;">Page 88</p>

<p>1 MR SNOWDEN: Absolutely. It really is a case of trying to 2 have their cake and eat it. 3 That's it, that's exactly right. 4 LORD JUSTICE BRIGGS: Were it not for this interest 5 lacuna -- 6 MR SNOWDEN: It's all very well -- 7 LORD JUSTICE BRIGGS: -- and problems about knowing quite 8 what is payable to whom in the administration, so that 9 the interest can't yet be paid, it probably would have 10 been put into liquidation. 11 MR SNOWDEN: Perhaps. The point is you have to, as it were, 12 play the game in accordance with the rules as you find 13 them. There's one set of rules for administration, 14 there's one set of rules for liquidation. You can't say 15 "Well, actually, we would quite like to sort of pick and 16 choose. We would quite like to be in administration for 17 some reasons but actually we'd quite like to have the 18 benefit of the rules that are actually only in 19 a liquidation please". And to justify it, say, "Because 20 it's in the general interests of creditors". 21 I'm afraid the game doesn't work like that. 22 LORD JUSTICE LEWISON: Nortel in the Supreme Court tells you 23 don't start tinkering around with the scheme because you 24 don't like the answer. 25 MR SNOWDEN: That's another way of putting it, yes. Simply</p> <p style="text-align: center;">Page 89</p>	<p>1 LORD JUSTICE LEWISON: Preserving a discretion in the court. 2 MR SNOWDEN: Actually 149 doesn't deal with calls. 3 LORD JUSTICE LEWISON: Right. 4 MR SNOWDEN: Perhaps we should have a look at that. 5 LORD JUSTICE LEWISON: No, it deals with set-off. 6 MR SNOWDEN: Yes, but when you go to section 149 ... 7 (Pause). 8 Do you see at 149(1): 9 "The court may at any time after the making of 10 a winding-up make an order on a contributory for the 11 time being to pay in the manner directed by the order 12 any money due from him to the company exclusive of any 13 money payable by him by virtue of any call." 14 Then (2), just: 15 "The court in making such an order may ..." 16 The point is it's not dealing with calls. It's 17 dealing with other debts due from contributories, as the 18 title to the section suggests. It doesn't use the word 19 "other". But it is dealing with debts, it is not 20 dealing with calls. Lord Chelmsford, I'm afraid, 21 I think just -- the old section was in rather more 22 convoluted fashion and I think he just may have misread 23 it. 24 Anyway, none of that affects my argument but I just 25 didn't want to leave it there.</p> <p style="text-align: center;">Page 91</p>
<p>1 incanting the pari passu rule or the general interests 2 of creditors is not a solution. It doesn't get you to 3 where my learned friend needs to be. 4 Just en passant, because it's a passage which caused 5 an exchange between my Lord Lord Justice Lewison and my 6 learned friend but which has nothing to do with this 7 case, but just in case it is nagging away. In the 8 middle of page 536 there's an interesting reference by 9 Lord Chelmsford to section 101, and the position in 10 relation to a limited company, which might be taken to 11 suggest that actually the contributory rule didn't apply 12 to an unlimited company at all. We don't think that's 13 right. We do accept that the contributory rule can 14 apply to an unlimited company. 15 I think what Lord Chelmsford has actually done 16 is he's misread section 101, because section 101, if you 17 go to it, excludes calls from the provisions of 18 section 101. I don't know whether your Lordships wants 19 to see that, but we certainly don't suggest, and we 20 didn't suggest below, that the contributory rule 21 couldn't apply to an unlimited company. 22 LORD JUSTICE LEWISON: No, I think Mr Trower's position in 23 the end was that he was effectively arguing for the 24 application of section 149 by analogy. 25 MR SNOWDEN: Yes.</p> <p style="text-align: center;">Page 90</p>	<p>1 (Pause). 2 Again, my learned friends, I heard sotto voce, say 3 that subsection (3) deals with calls. Subsection (3) 4 does but that's a separate point. (Pause). 5 That's a call in the winding up, it's a subsequent 6 call. 7 LORD JUSTICE BRIGGS: That would be a sort of 8 Cherry v Boulton retainer exercise, or very similar? 9 MR SNOWDEN: Yes, the way that Cherry -- 10 LORD JUSTICE BRIGGS: You can say there's a subsequent call 11 coming your way, we can treat our liability to you as 12 set off against that call. 13 MR SNOWDEN: Would your Lordship give me just one moment 14 (Pause). 15 Your Lordship may be right. I didn't want to get 16 into it any fantastic detail because we say it doesn't 17 affect the main point. It may I will just come back -- 18 Miss Hutton has a point that she wants me to put but 19 I am not in command of it at the moment, so I will come 20 back to it if I may. 21 LORD JUSTICE BRIGGS: It does contemplate a liquidator 22 saying, "I know we owe you money, but we're going to 23 make a call against you in due course and we can set off 24 what we owe you against that call." It contemplates 25 some use of a future call --</p> <p style="text-align: center;">Page 92</p>

<p>1 MR SNOWDEN: Yes.</p> <p>2 LORD JUSTICE BRIGGS: -- to deal with a present liability of</p> <p>3 a company but only in the context of a liquidation.</p> <p>4 MR SNOWDEN: In a liquidation, yes.</p> <p>5 Insofar as the pari passu rule that my learned</p> <p>6 friend invoked, I have already made the point that the</p> <p>7 pari passu rule is actually a rule that is all to do</p> <p>8 with the pari passu distribution of the assets of the</p> <p>9 company. We say he cannot invoke it in</p> <p>10 an administration by reference to the future receipts</p> <p>11 from a call which he can't make, but might be made by</p> <p>12 an liquidator. It can only be made by a liquidator.</p> <p>13 The creditor has no pari passu right in respect to</p> <p>14 assets which are not assets of the company.</p> <p>15 The court may or may not decide to make a call in</p> <p>16 a liquidation, if there is one, and at that stage, if</p> <p>17 there is one, then the pari passu rule will apply to the</p> <p>18 assets of the company, swollen by the court, but not</p> <p>19 before.</p> <p>20 There are two other points that we just want to make</p> <p>21 by way of reference to Grissell's case. The first is it</p> <p>22 only applies where a call has been made, even on its own</p> <p>23 terms.</p> <p>24 So if we're still at page 536 you can see at the</p> <p>25 foot of page 536 it is said, in the last paragraph,</p> <p style="text-align: center;">Page 93</p>	<p>1 "It's clear from the judgment of Buckley J in</p> <p>2 West Coast Gold Fields that he understood the effect of</p> <p>3 Grissell's case to be that a contributory could not</p> <p>4 receive any payment out of the estate as a creditor</p> <p>5 until he had satisfied all his obligations as</p> <p>6 a shareholder and contributory by paying into the common</p> <p>7 fund all sums due from him in respect of calls."</p> <p>8 Again, it's entirely in terms of sums which are</p> <p>9 currently due.</p> <p>10 Then he went on in paragraph 193 to make the point</p> <p>11 that the position as regards the rule in</p> <p>12 Cherry v Boulton is the same. The rule in</p> <p>13 Cherry v Boulton is equivalent, I think it might be</p> <p>14 said -- or certainly it is a netting off, which can have</p> <p>15 a similar effect, but again -- and my learned friend</p> <p>16 drew the parallels in his own submissions between the</p> <p>17 two -- it can only operate where the debt to the estate</p> <p>18 is presently due and doesn't operate when the debt to</p> <p>19 the estate is only a future debt.</p> <p>20 You will see there that there are references the</p> <p>21 decision in Re Abrahams and Re Abrahams was stated to be</p> <p>22 correct by Lord Walker in Kaupthing at paragraph 45.</p> <p>23 I took you at the outset to what Lord Walker had</p> <p>24 said in Kaupthing and Lord Walker himself put it in</p> <p>25 terms, as I indicated to you, that payment of the call</p> <p style="text-align: center;">Page 95</p>
<p>1 picking it up just before the end:</p> <p>2 "The dividend will of course be upon the whole debt</p> <p>3 and the member of the company will from time to time,</p> <p>4 when dividends are declared, receive them in like manner</p> <p>5 when either no call has been made or, having been made,</p> <p>6 when he has paid the amount of it."</p> <p>7 Those words establish that the principle only</p> <p>8 applies where there is a call or has been a call and</p> <p>9 monies are owing, and it doesn't apply contingently. In</p> <p>10 other words, it can't be applied contingently even in</p> <p>11 a liquidation, the contributory rule. The judge dealt</p> <p>12 with this very clearly in paragraphs 190 and 191 of the</p> <p>13 judgment. (Pause).</p> <p>14 He says at 190:</p> <p>15 "There is no case in which the contributory rule has</p> <p>16 been invoked, except in relation to calls already made</p> <p>17 by the liquidator."</p> <p>18 He referred to Grissell's case and another passage</p> <p>19 which I think we've already shown you -- or you have</p> <p>20 already been shown -- at 536. He then sets out the</p> <p>21 facts of Grissell and the like, and then the concluding</p> <p>22 paragraph at 536 to 537, which is just at the foot of</p> <p>23 paragraph 191 of the judge's judgment, is the passage</p> <p>24 I've just taken you to.</p> <p>25 Then in 192 he says:</p> <p style="text-align: center;">Page 94</p>	<p>1 is a condition precedent, i.e. it's a call which has</p> <p>2 been made. There's no suggestion that the principles</p> <p>3 applied contingently in respect of future calls. So the</p> <p>4 references are there. I don't know whether your</p> <p>5 Lordships want me to go again to Kaupthing. I can</p> <p>6 certainly do that if you want but you've seen it</p> <p>7 a number of times. (Pause).</p> <p>8 So we say that there is simply no basis for the</p> <p>9 operation of the contributory rule in the administration</p> <p>10 contingently and the judge was right in his holding that</p> <p>11 it didn't apply.</p> <p>12 My learned friend didn't advance any separate</p> <p>13 arguments in his submissions to you in relation to</p> <p>14 Cherry v Boulton. I've already indicated that the</p> <p>15 judge's point was exactly the same: that it just doesn't</p> <p>16 apply.</p> <p>17 Can we just make one thing clear. If, contrary to</p> <p>18 my submissions, the contributory rule or something like</p> <p>19 it were to apply in the administration, then we say that</p> <p>20 the rule in Cherry v Boulton would be applicable in</p> <p>21 order to enable a netting off to occur.</p> <p>22 The effect of the rule in Cherry v Boulton is</p> <p>23 consistent with the pari passu principle. It is simply</p> <p>24 to achieve the same result by netting off as if the</p> <p>25 person liable to contribute to the estate had made the</p> <p style="text-align: center;">Page 96</p>

<p>1 contribution and then received a dividend from the 2 swollen estate.</p> <p>3 We give an example in our skeleton argument of 4 somebody who -- we give a mathematical example, which 5 I am not going to weary you with at the moment. But in 6 effect what it allows you to do is to go through the 7 notional exercise of paying in, swelling the estate and 8 seeing what the distribution would be on the debt, and 9 then netting off your liability to pay against the 10 distribution you would get and simply paying the 11 balance. None of that is consistent in any way with the 12 pari passu principle and it would operate if, contrary 13 to my main point, the contributory rule operated. So 14 there is no basis on which we could be kept out of or 15 should be deprived of the opportunity to use the rule in 16 <i>Cherry v Boulton</i>. It was the point my Lord 17 Lord Justice Briggs put to me. The effect of what the 18 administrators are trying to do is to say they can use 19 the contributory rule to keep us out and say we couldn't 20 use the rule in <i>Cherry v Boulton</i> either. We say that 21 can't be right.</p> <p>22 The final point, in case I missed it earlier on, is 23 to simply say it is quite clear from the all the 24 authorities that you've seen that the contributory rule 25 is a prohibition upon participating in a distribution;</p> <p style="text-align: center;">Page 97</p>	<p>1 we're in no position to --</p> <p>2 LORD JUSTICE LEWISON: To satisfy.</p> <p>3 MR SNOWDEN: -- satisfy it or even to ask the question that 4 <i>Cherry v Boulton</i> poses: what's the net effect here? So 5 the suggestion you can get over all this by some sort of 6 agreement, with respect, just doesn't answer that at 7 all.</p> <p>8 So, my Lords, that's --</p> <p>9 LORD JUSTICE LEWISON: So the consequence of your argumen 10 on this point is that there is nothing to prove for in 11 your administration? Or could there be something to 12 prove for, even if you are right?</p> <p>13 MR SNOWDEN: Others are going to --</p> <p>14 LORD JUSTICE LEWISON: I follow. I am just asking you.</p> <p>15 MR SNOWDEN: Sorry, yes. Others are going to deal with the 16 question about whether the section 74 liability is 17 provable but as a contingent claim in our 18 administration. Our point, putting it very bluntly on 19 that, of course, is that the right to make a call is not 20 vested in the administrator; it's vested in the court 21 where there's a liquidation. None of that has arisen, 22 and so there is simply nothing that they can assert on 23 behalf of the company over whom they have custody and 24 control.</p> <p>25 LORD JUSTICE LEWISON: Yes.</p> <p style="text-align: center;">Page 99</p>
<p>1 it's not a prohibition upon proving your debt.</p> <p>2 I don't think in the course of his submission my 3 learned friend actually suggested it was a prohibition 4 on proving the debt, although I think his skeleton 5 argument may have suggested it or in any event it has 6 been a contention that has been previously made. But we 7 certainly say that all the authorities that you've 8 seen -- and particularly, for example, Lord Walker, the 9 way he puts it in <i>Kaupthing</i> -- make it perfectly plain 10 that the rule is based upon, as my Lord 11 Lord Justice Lewison put to me, you can't participate in 12 a distribution of a fund until you have paid your debt 13 to it. But it says nothing about whether you are 14 disabled from proving your debt in the insolvency.</p> <p>15 LORD JUSTICE LEWISON: I would have thought you must be 16 entitled to prove it because there may be a dispute 17 about it, for one thing.</p> <p>18 MR SNOWDEN: Yes.</p> <p>19 LORD JUSTICE LEWISON: In which case, if it's not known for 20 sure how much the contributory owes, then there has to 21 be a process of establishing it before you can start 22 applying any rule.</p> <p>23 MR SNOWDEN: It goes to the judge's point, which I haven't 24 belaboured because I know my Lord has it, which is that 25 when a call hasn't been made because it can't be made,</p> <p style="text-align: center;">Page 98</p>	<p>1 MR SNOWDEN: It's not an asset of the company. True enough, 2 when the call is made and satisfied the proceeds are 3 assets of the company. That's what the section says. 4 But as it stands at the moment, they cannot make 5 a call --</p> <p>6 LORD JUSTICE LEWISON: So effectively you say --</p> <p>7 MR SNOWDEN: -- and they can't prove in a --</p> <p>8 LORD JUSTICE LEWISON: -- neither the company nor the 9 administrator is or will ever be a creditor for the 10 call, and you can't prove for somebody else's debt? 11 (Pause).</p> <p>12 MR SNOWDEN: Sorry, could your Lordship just give me that 13 one again, because it had a number of bits in it.</p> <p>14 LORD JUSTICE LEWISON: You say it is the liquidator, acting 15 on behalf of the court, who can make the call.</p> <p>16 MR SNOWDEN: That's right.</p> <p>17 LORD JUSTICE LEWISON: So it's the liquidator or the court 18 who is going to be the creditor when the call is made --</p> <p>19 MR SNOWDEN: Yes.</p> <p>20 LORD JUSTICE LEWISON: -- and you can't prove for somebody 21 else's debt?</p> <p>22 MR SNOWDEN: Yes.</p> <p>23 LORD JUSTICE LEWISON: It is the creditor who has to prove.</p> <p>24 MR SNOWDEN: Yes, albeit that the assets -- it is treated as 25 a debt and the assets --</p> <p style="text-align: center;">Page 100</p>

<p>1 LORD JUSTICE LEWISON: The fruits of the call will belong to 2 the company. 3 MR SNOWDEN: Yes. 4 LORD JUSTICE BRIGGS: But the liability once a call has been 5 made is a debt owed to the company, isn't it? 6 MR SNOWDEN: Well -- 7 LORD JUSTICE BRIGGS: I know this isn't really your part of 8 the ship because this is what Mr Isaacs is dealing with. 9 MR SNOWDEN: No. It is certainly a liability and I think my 10 learned friend was inclined to accept it was a debt owed 11 to the company. 12 LORD JUSTICE BRIGGS: Yes. 13 MR SNOWDEN: I certainly would go as far as to say that the 14 assets when received are assets of the company. The 15 question of whether it's actually owed to the company, 16 I think, is, with respect, more difficult, given the 17 origin of the call. 18 LORD JUSTICE BRIGGS: Yes. But the fact that it takes 19 a liquidator to trigger the liability may not stop it 20 being a future liability? That's the question. 21 MR SNOWDEN: Of itself that would be right -- 22 LORD JUSTICE BRIGGS: Yes. 23 MR SNOWDEN: -- but that doesn't affect the points I've been 24 making. 25 LORD JUSTICE BRIGGS: No, no, not at all.</p> <p style="text-align: center;">Page 101</p>	<p>1 selected as an exit route from LBIE's administration, 2 and my Lord said "Is it an exit or the exit route?" 3 I just wanted to pick up that point. I have the 4 proposals as agreed by creditors. They should be before 5 your Lordships. 6 LORD JUSTICE MOORE-BICK: Yes. Thank you. 7 MR ISAACS: On the second page, down at the bottom, (viii), 8 one sees how it was put and what was agreed. It's the 9 sentence that begins: 10 "The administrators may use any or a combination of 11 exit route strategies in order to bring the 12 administration to an end. The administrators wish to 13 retain a number of the options which are available to 14 them, including ..." 15 Then just summarising: number 1 is a scheme of 16 arrangement followed by dissolution; number 2 is 17 creditors' voluntary liquidation; number 3 is company 18 voluntary arrangement followed by dissolution; and 19 number 4 is distribution of surplus funds to creditors. 20 So there's nothing surprising about this. It's in 21 fairly standard terms, and the administrators retain 22 flexibility as to whether or not to go into liquidation. 23 That's all there is to that point. 24 LORD JUSTICE BRIGGS: I think that's what Mr Trower said. 25 MR ISAACS: Yes, I am not saying --</p> <p style="text-align: center;">Page 103</p>
<p>1 MR SNOWDEN: No. 2 LORD JUSTICE BRIGGS: You're really dealing with the 3 situation where they can't prove for the call as 4 a future liability. 5 MR SNOWDEN: Yes, that's right. That's what I have been 6 dealing with. 7 LORD JUSTICE BRIGGS: Because they accept that if they can 8 there's a set-off and no contributory rule applies. 9 MR SNOWDEN: That's right. That's where I came in. 10 LORD JUSTICE BRIGGS: Yes. 11 MR SNOWDEN: Yes, sorry. 12 LORD JUSTICE BRIGGS: A narrow but fascinating situation. 13 MR SNOWDEN: We've landed back where I came in. So unless 14 your Lordships have anything more for me, those are my 15 submissions. 16 LORD JUSTICE MOORE-BICK: Thank you very much, Mr Snowden. 17 Now, Mr Isaacs. 18 Submissions in reply by MR WOLFSON 19 MR ISAACS: My Lords, I propose to make three points in 20 relation to whether or not the section 74 liability is 21 provable and then one point in relation to non-provable 22 contractual interest. So I will be quite brief. 23 The first point is a short factual point. It picks 24 up the point made by my learned friend Mr Trower, who 25 said that it was relevant that liquidation has been</p> <p style="text-align: center;">Page 102</p>	<p>1 LORD JUSTICE BRIGGS: It is an exit route. 2 MR ISAACS: Yes, absolutely. I am not suggesting he 3 misrepresented the position in any way because he 4 didn't. 5 The second point, the more substantial point, is 6 that my learned friend Mr Trower submitted that it fell 7 within the statutory purpose of the administration to 8 prove for the section 74 liability. He referred to the 9 statutory purpose of achieving a better result for 10 creditors as a whole than would be likely if the company 11 were wound up without first being in administration. 12 I submit that that purpose is inapt to encompass 13 a proof for the statutory liability. The reason I say 14 that is as follows. 15 Firstly, if a proof by an administrator were 16 permissible -- obviously we say it isn't -- then the 17 amount of the proof would have to be discounted under 18 Rule 2.81 for the double contingencies of a winding-up 19 taking place and a call being made, and of course that 20 would include a discount for uncertainty and for 21 futurity. So it would not achieve a better result than 22 if the company were wound up, because if the company 23 were wound up there would be a single contingency, which 24 would be that of a call being made. So it wouldn't meet 25 it for that reason.</p> <p style="text-align: center;">Page 104</p>

<p>1 The second point is that my learned friend suggested 2 as one alternative that the proceeds of a proof might be 3 paid into a Quistclose trust. That was page 165, 4 lines 1 to 5.</p> <p>5 The problem with that alternative is, if they were 6 paid into such a trust, they wouldn't be available to 7 the administrator at all; so they wouldn't achieve 8 a better result in the administration for creditors.</p> <p>9 The second problem with that alternative is, if the 10 company did not subsequently go into winding up, 11 presumably they would have to be repaid by the 12 administrator to the insolvent contributory, which may 13 well by that stage have been dissolved. It is difficult 14 to conceive that this is what is contemplated by the 15 provisions of the Act.</p> <p>16 The third point is that if, as was suggested by my 17 learned friend Mr Trower in response to my Lord 18 Lord Justice Briggs (page 165, line 11) the proceeds 19 pass down the waterfall in the administration, then 20 there are a number of problems.</p> <p>21 In the first place, they would not be used to pay 22 the expenses in the winding-up and they would not be 23 used to pay for the adjustment because, ex hypothesi, 24 the company would be in administration, so they wouldn't 25 be used for the statutory purpose.</p> <p style="text-align: center;">Page 105</p>	<p>1 a fund which only comes into existence when the company 2 is in liquidation. Equally pertinent, Lopes LJ who 3 said, at 588, that there can be no anticipation of 4 future calls in any case so as to alter the 5 administration of assets under a winding-up.</p> <p>6 The third point I wanted to make here is to respond 7 to my learned friend's reference to the trend in 8 legislation and case law to expand the concept of 9 provable liabilities.</p> <p>10 A number of the advocates before your Lordships have 11 referred to this trend and, of course, it's a trend 12 which has been to include as provable debts which were 13 previously non-provable. Indeed, that's the point that 14 we rely on very heavily in relation to all of the 15 supposedly non-provable claims which are said to exist 16 by my learned friends: currency conversion claims; the 17 non-provable interest; the non-provable future claims 18 that my learned friend MR WOLFSON mooted for the first 19 time this morning.</p> <p>20 But in relation to the section 74 liability, the 21 debate is quite different. It is not about whether or 22 not this liability is provable or non-provable, because 23 my learned friend Mr Trower does not say it's 24 a non-provable liability of the contributory before LBIE 25 is wound up. He says it's provable. The debate here is</p> <p style="text-align: center;">Page 107</p>
<p>1 The second point is, if the company subsequently 2 went into liquidation, a call could presumably still be 3 made in the winding-up for a contribution to the debts 4 and liabilities of the company and the expenses of the 5 winding-up and the adjustment.</p> <p>6 If an amount had already been paid in respect of 7 a proof for the statutory liability in the 8 administration and the proceeds had been applied inter 9 alia to the expenses of the administration at the top of 10 the waterfall, there would be leakage in respect of 11 those administration expenses which do not fall within 12 section 74, and there's the possibility that the total 13 amount which would be claimed from the contributory in 14 the administration and in the winding-up would be 15 greater than that provided for by section 74, because 16 that, of course, is limited to the debts and liabilities 17 in the winding-up, the expenses of the winding-up, and 18 the adjustment.</p> <p>19 So the fact that there had been a proof in the 20 administration could enlarge the amount of the call 21 beyond that which is provided for by section 74.</p> <p>22 The last part of this submission is to say that what 23 my learned friend said is inconsistent with Pyle Works. 24 Your Lordships will remember I showed your Lordships 25 Lindley LJ's statement at page 584 that the monies form</p> <p style="text-align: center;">Page 106</p>	<p>1 whether, before LBIE is wound up, it is a provable 2 liability or whether it is not, as we say, a liability 3 at all.</p> <p>4 In that context, your Lordships will well aware that 5 we refer to a number of cases to the effect that the 6 section 74 liability does not exist at all unless and 7 until the company is wound up. I refer to Financial 8 Corporation, Mace Builders, Shoe Lace, and others, and 9 my learned friend has not responded to those cases at 10 all.</p> <p>11 That's all I propose to say about the section 74 12 liability.</p> <p>13 I then have something to say about the non-provable 14 contractual interest which is alleged to exist and, in 15 particular, to my learned friend's attempt to respond to 16 the submission that we've made that if there were 17 a reversion to contractual rights to interest it would 18 mean that a bankrupt could be repeatedly adjudged 19 bankrupt on the basis of contractual interest which 20 accrued after the commencement of each bankruptcy.</p> <p>21 If I understood my learned friend correctly, he said 22 that a contractual liability to pay interest is 23 a bankruptcy debt within section 382. If your Lordships 24 could briefly go to that, please.</p> <p>25 LORD JUSTICE LEWISON: 300 and --</p> <p style="text-align: center;">Page 108</p>

<p>1 MR ISAACS: Section 382 of the Act, which defines 2 "bankruptcy debts". 3 My learned friend's argument, as I understand it, is 4 to say non-provable contractual interest is a bankruptcy 5 debt and therefore it is released on the bankrupt's 6 discharge; and, if that's correct, he says 7 post-bankruptcy interest would not continue to run, so 8 the bankrupt couldn't be bankrupted again on the basis 9 of accruing interest. 10 I submit that the premise is wrong. The reason for 11 that is if one looks at section 382(1)(b) one finds that 12 the only interest which is said to be a bankruptcy debt 13 is interest provable as mentioned in section 322(2). If 14 one goes to section 322(2), we find that the only 15 interest that's provable as part of the debt is that 16 part before the commencement of the bankruptcy. In 17 other words, it does not extend to interest payable in 18 respect of the period after the commencement of the 19 bankruptcy. It follows that that post-bankruptcy 20 interest is not a bankruptcy debt, it is not released by 21 virtue of section 281 on the bankrupt's discharge and, 22 therefore, it continues to accrue and that's the 23 prospect of future bankruptcies, indefinite future 24 bankruptcies, as the interest continues to accrue. 25 This argument does not just apply to non-provable Page 109</p>	<p>1 reply, which are therefore on the currency conversion 2 claims and the section 74 point, and then I will say 3 a few words about the other points, which are really by 4 way of response because they are my learned friends' 5 appeals. 6 My Lords, on the currency conversion claims first, 7 we start with the proposition, as my learned friend 8 Mr Snowden submitted both on the first day of the appeal 9 and earlier today, that the legislative scheme is 10 a process for collective enforcement, but it is not just 11 that: it does affect substantive rights. 12 My learned friend Mr Dicker responded to that in 13 essentially two ways. He said if you look at contingent 14 claims, and then for the first time this morning future 15 claims, you can see, he said, that it doesn't affect 16 substantive rights but the underlying rights survive the 17 process. 18 So far as contingent claims are concerned, in my 19 respectful submission, the fact that the hindsight 20 principle enables the revaluation of contingent debts 21 does not assist my learned friend Mr Dicker's case. His 22 case is that this shows that the underlying debt remains 23 alive and payable in full, notwithstanding the statutory 24 scheme, and in this case the valuation of that debt, 25 given its contingent nature. Page 111</p>
<p>1 contractual interest; it also has implications for the 2 statutory interest that your Lordships have heard about, 3 because it establishes that statutory interest is only 4 payable to the extent of the surplus. It must be. The 5 amount of statutory interest must be defined by the 6 amount of surplus. 7 The reason for that is this. If statutory interest 8 were not defined by the amount of the surplus, so that 9 it applied, for example, at the judgment rate or 10 contractual rate, if higher, independently of a surplus, 11 then it would follow that there remained a non-provable 12 liability to pay that statutory interest where there was 13 no surplus. For the same reason as I've just explained, 14 any such interest obligation would not be discharged on 15 the bankrupt's discharge but would continue to accrue. 16 So, again, the bankrupt could be bankrupted indefinitely 17 and that's completely inconsistent with what I referred 18 to earlier as the accepted policy of the Act so far as 19 it applies to bankruptcy. 20 So unless your Lordships have any further questions, 21 that's all I propose to say. 22 LORD JUSTICE MOORE-BICK: Thank you very much, Mr Isaacs. 23 Yes, Mr Wolfson. 24 Submissions in reply by MR WOLFSON 25 MR WOLFSON: My Lords, I will first make submissions in Page 110</p>	<p>1 But so far as contingent debts are concerned, it is 2 part of the statutory scheme itself that contingent 3 debts can be revalued later. As your Lordships 4 appreciate, Rule 2.81 expressly envisages the 5 possibility of revaluation. In particular, 28.1(1) 6 provides that the administrator estimates the value of 7 a debt, and then goes on to say that he may revise any 8 estimate previously made, if he thinks fit, by reference 9 to any change of circumstances or to information 10 becoming available to him. 11 Rule 2.81(2) provides that: 12 "Where the value of a debt is estimated under this 13 rule, the amount provable in the administration in the 14 case of that debt is that of the estimate for the time 15 being." 16 And I emphasise "for the time being". 17 As I understood my learned friend Mr Dicker's 18 submission, it was that the hindsight rule provided 19 a useful analogy with currency claims. That's the way 20 he put it on yesterday's transcript at page 176, drawing 21 an analogy between the two. The argument appears to be 22 that the hindsight rules show that the claim remains 23 alive unless and until completely satisfied in full. 24 But the treatment of contingent claims and foreign 25 currency claims by the statutory scheme is completely Page 112</p>

1 different. For foreign currency claims, the rules
 2 expressly require conversion at the relevant date and
 3 there is no indication of any later revaluation or
 4 re-evaluation or a second conversion date.
 5 For contingent claims, however, the rules are not
 6 only compatible with but indeed expressly envisage
 7 a later revaluation based on the hindsight principle.
 8 So that's the contingent claim point.
 9 Dealing with future claims, if I can just deal with
 10 this briefly before your Lordships rise?
 11 LORD JUSTICE MOORE-BICK: Yes. All right.
 12 MR WOLFSON: My original note said this:
 13 "Future claims. No one is suggesting that if the
 14 statutory 5 per cent discount rate turns out to be
 15 insufficient because the creditor does not in fact
 16 achieve returns to get into the full sum over the
 17 relevant period in fact, he can come back and have
 18 a non-provable claim for the alleged deficiency."
 19 That remained true until Mr Dicker dealt with the
 20 point this morning. For the very first time it now
 21 appears to my learned friend's case that in relation to
 22 a future claim there would appear to be an unprovable
 23 claim for any deficiency caused by the fact that the
 24 statutory 5 per cent discount rate turns out to be
 25 insufficient.

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1 We respectfully say that that is wrong. The rules
 2 make no provision for any such claim and they do not
 3 even consider the possibility or provide any machinery
 4 in the way that they plainly do for contingent claims.
 5 Further, the nature of such a claim would be
 6 inherently problematic. The hypothesis is that the
 7 5 per cent discount has not essentially got you back --
 8 there's been too much of a discount so you haven't got
 9 back to your full sum. But, of course, during that
 10 period you would presumably, also as a non-provable
 11 claim, have a claim for interest which would run at
 12 8 per cent. I appreciate it may be 8 per cent simple
 13 and the discount rate is effectively compounded, because
 14 it's an annual discount rate, but quite how they tie
 15 together is very difficult to see. We respectfully
 16 submit that --
 17 LORD JUSTICE LEWISON: Why would you have a claim for
 18 interest on a non-provable claim?
 19 MR WOLFSON: No, sorry, the claim for interest would not be
 20 non-provable on this basis.
 21 LORD JUSTICE LEWISON: What, contractual interest you are
 22 talking about?
 23 MR WOLFSON: Contractual interest, yes. If Mr Dicker is
 24 right, which we say he isn't, it would seem to follow if
 25 he has a deficiency.

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1 LORD JUSTICE LEWISON: Right. So you've been paid your
 2 discounted dividend --
 3 MR WOLFSON: Yes.
 4 LORD JUSTICE LEWISON: -- and let's suppose you've been paid
 5 in full.
 6 MR WOLFSON: Yes.
 7 LORD JUSTICE LEWISON: You've been paid your statutory
 8 interest --
 9 MR WOLFSON: On that.
 10 LORD JUSTICE LEWISON: -- and you have a claim now for
 11 contractual interest on top all that now, have you?
 12 MR WOLFSON: Mr Dicker first says you would have a claim for
 13 the deficiency, if you can show there is one.
 14 I can probably stop there because we say there is no
 15 such claim and that's enough for my present purposes.
 16 Whether there would be a further claim for interest is
 17 perhaps something which I can consider over lunchtime.
 18 I am told that that again is a possibility being
 19 canvassed in the treacherous waters of Waterfall II. So
 20 maybe for present purposes we can leave it there.
 21 The short point I need to make for present purposes
 22 is this. Neither the submissions on contingent claims
 23 nor the submissions on future claims provide an example
 24 where there is a claim left over to make good
 25 Mr Dicker's submission that the statutory scheme does

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1 not operate substantively. We say it does operate
 2 substantively, for the reason I submitted and my learned
 3 friend Mr Snowden submitted. For present purposes,
 4 that's probably as far as I need to go.
 5 LORD JUSTICE MOORE-BICK: Is that a convenient moment?
 6 MR WOLFSON: My Lords, it is.
 7 LORD JUSTICE MOORE-BICK: I am going to say five past 2, at
 8 least by my watch. I don't think that clock is very
 9 reliable.
 10 MR WOLFSON: It is a bit slow, my Lord.
 11 (1.05 pm)
 12 (The short adjournment)
 13 (2.05 pm)
 14 LORD JUSTICE MOORE-BICK: Yes, Mr Wolfson.
 15 MR WOLFSON: My Lords, on the point as to contingent and
 16 future debts, we respectfully adopt the approach of the
 17 learned judge in paragraph 77 of the judgment, which
 18 I won't take the court to now.
 19 Moving back to currency converge, we, like LBH12,
 20 submit that currency conversion affects creditors'
 21 substantive rights as well, giving a discharge for the
 22 debt if paid at the converted rate and that therefore
 23 there is no room for a currency conversion claim.
 24 We respectfully submit that the statutory regime
 25 must affect substantive rights. We say that that's

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<p>1 illustrated by the fact that as, my learned friend 2 Mr Dicker candidly accepted, there is no means by which 3 the company could recover from a foreign currency 4 creditor the windfall -- and I think it's fair to say he 5 also accepted this effectively is a windfall -- that the 6 creditor would receive if sterling appreciates against 7 the foreign currency. 8 We submit that -- 9 LORD JUSTICE LEWISON: Might it be said that the reason why 10 you couldn't recover against the foreign creditor where 11 sterling had appreciated is because of the rule that 12 distributions can't be disturbed? 13 MR WOLFSON: Possibly, my Lord, but in a case where there 14 are other creditors who ex hypothesi might not be being 15 paid in full, and one creditor has received sums which 16 give them a windfall, it would be very strong 17 application of the rule that distributions cannot be 18 disturbed, not to claw that back. 19 LORD JUSTICE LEWISON: I suppose there might have been one 20 distribution and then another one. 21 MR WOLFSON: Precisely, yes. If there's -- 22 LORD JUSTICE LEWISON: There may have been no payment all. 23 MR WOLFSON: Yes. 24 LORD JUSTICE LEWISON: Yet. 25 MR WOLFSON: There are a number of different hypotheses. My</p> <p style="text-align: center;">Page 117</p>	<p>1 who thinks that his currency is going to depreciate 2 against sterling. 3 MR WOLFSON: My Lord, I was coming to that point, 4 absolutely. I can make this submission in a number of 5 different parts of the analysis but we always come back 6 to the same point. It does give the foreign currency 7 creditor a licence to play the foreign currency markets 8 at the expense -- and I will come to this point -- not 9 only of the members but of other creditors, and perhaps 10 of other foreign currency creditors as well if they're 11 all in the non-provable bracket. 12 My Lords, we do say, respectfully, that the lack of 13 symmetry is a powerful reason against permitting 14 currency conversion claims in the first place. As my 15 Lord Lord Justice Lewison pointed out in argument, if -- 16 for example, a dollar appreciates against the sterling 17 but the euro depreciates against sterling, the analysis 18 would appear to be that if currency conversion claims 19 are permitted the dollar creditors keep their windfall 20 but the euro creditors have a currency conversion claim. 21 Of course, not only is there lack of symmetry between 22 different groups of currency claimants but one creditor 23 might itself have claims denominated in different 24 currencies. Indeed, in LBIE that is not unlikely to be 25 the case.</p> <p style="text-align: center;">Page 119</p>
<p>1 Lord, we also do rely on the fact that, although as my 2 learned friend Mr Dicker said yesterday, I think four 3 times, that non-provable claims had been with us since 4 1542, so far -- I don't think he took up my Lord 5 Lord Justice Lewison's challenge to find another claim 6 which gives rise from a unitary obligation, both 7 provable and non-provable claims. 8 My Lords, the fact that my learned friend Mr Dicker 9 accepts that if sterling appreciates a creditor can keep 10 the windfall means that in our submission there is this 11 heads I win, tails you lose, one-way bet, and I can put 12 it in a number of different pejorative ways, position. 13 What was my learned friend's answer to that? His 14 answer when pressed by the court was this was the 15 "price" to be paid by LBIE for choosing to go into 16 an insolvency regime. 17 But the upside only option and the potential for 18 creditors to make a windfall gain if sterling 19 appreciates cannot simply, I submit, be dismissed as the 20 price of LBIE going into an insolvency regime, not least 21 because that process may be something chosen and 22 effected not by LBIE itself but by creditors or other 23 creditors, i.e. creditors including the foreign currency 24 creditors or non-foreign currency creditors. 25 LORD JUSTICE LEWISON: Including a foreign currency creditor</p> <p style="text-align: center;">Page 118</p>	<p>1 So let's say you have one creditor who has a claim 2 denominated in dollars and another claim denominated in 3 euros. On my learned friend's case, it would appear 4 that he would have a currency conversion claim in 5 relation to the claims in one currency but, and 6 importantly, he wouldn't have to give credit for the 7 windfall he obtains on the other currency. He wouldn't 8 have to bring a currency conversion claim in relation to 9 all of his claims or none of them, but he could 10 essentially cherry-pick between his claims to obtain 11 payment in the more favourable currency on a claim by 12 claim basis. 13 This is not, so to speak, at no cost to anybody 14 else, as my Lord Lord Justice Moore-Bick pointed out. 15 Currency conversion claims necessarily operate at 16 someone else's expense, whether the members or other 17 non-provable creditors. 18 It is in this context that I just want to pick up 19 one point which my learned friend made about 20 Re Lines Brothers. I don't think we need to go back to 21 it because I am sure the court has the passage firmly in 22 mind. My learned friend, with respect, mischaracterised 23 my submission as to what Brightman LJ was saying. The 24 reference is at 21(c), it's that section at the top of 25 the right-hand page, In re Lines Bros. We were not</p> <p style="text-align: center;">Page 120</p>

<p>1 saying that Brightman LJ himself considered it to be the 2 law that the liquidator could pay in foreign currency if 3 sterling appreciated. I accept he puts in brackets "it 4 is said", he is addressing the argument and he is saying 5 on that hypothesis. But I do maintain the submission 6 I made, which is that he was fashioning a remedy, so to 7 speak, on the basis that hypothesis was correct. 8 I wasn't submitting that the hypothesis was in fact 9 correct and in fact we know now it is not. But he was 10 fashioning a remedy, so to speak, to bring foreign 11 currency creditors from a position where he perceived 12 that they might be unfairly treated to a position where 13 they were being fairly treated. What my learned friend 14 now seeks to do is to use essentially the same reason, 15 either to leave them flat or to give them, as I've said, 16 a windfall. 17 My learned friend accepted in his submissions this 18 morning that one cannot have a perfect result, and at 19 some stage there is going to be something of rough with 20 the smooth or swings and roundabouts, and again there 21 are a number of metaphors we can use. 22 We respectfully submit that what the statutory 23 scheme does for currency conversion claims is justice in 24 the sense of the scheme. It operates substantively, 25 such that there is no remaining currency conversion</p> <p style="text-align: center;">Page 121</p>	<p>1 to the transcript, Day 4, page 131, lines 20 to 25. 2 But, my Lords, as I have submitted on a number of 3 occasions this isn't a two-horse race. My learned 4 friend, if I may say, elegantly dodged a number of 5 questions from the court as to where currency conversion 6 claims would rank vis-à-vis other non-provable claims; 7 for example, interest claims or post-administration 8 accident claims. 9 But, as my Lord Lord Justice Briggs pointed out, 10 asking and hopefully answering those questions is 11 a useful way of testing the proposition as to whether 12 currency conversion claims ought to exist in the first 13 place. To put it another way, the potential prejudice, 14 and we submit there will be prejudice, to other 15 non-provable creditors is relevant to the question as to 16 whether these claims should exist in the first place. 17 I note that the cases my learned friend Mr Dicker 18 relied on as to non-provable claims, both 19 Islington Metal at tab 58 and R-R Realisations at 59, 20 were two-horse races, in the sense the debate was 21 whether the money should go to the shareholders. 22 My Lords, taking that a stage further and echoing 23 the submission made by my learned friend Mr Snowden, 24 there is nothing in the statutory scheme, we submit, 25 which suggests that the court can make up for itself how</p> <p style="text-align: center;">Page 123</p>
<p>1 claim. 2 The lack of symmetry, in my respectful submission, 3 also undermines some of the authorities that my learned 4 friend relied on. I can just pick one. Again I don't 5 think we need to go back to it. The Choice Investments 6 case, your Lordships will remember, that's the case 7 about the garnishee order and the judgment of 8 Lord Denning MR. 9 In my submission, that is actually helpful for me 10 because it highlights that the creditor should not get 11 more than its debt. The court will recall the debt was 12 in sterling, the relevant account was in dollars, and 13 the Court of Appeal said that you can't execute the 14 garnishee order to obtain more than you are actually 15 owed. But, of course, that is the effect, in my 16 submission, as to what Mr Dicker is submitting here, 17 that if the foreign currency creditor makes a windfall 18 from the rates applicable as at the conversion date, he 19 can keep it. 20 As I anticipated when I opened my appeal on currency 21 conversion, my learned friend Mr Dicker did indeed 22 portray the situation repeatedly as a two-horse race and 23 framed the question as to who should receive 1.3 billion 24 as between the currency conversion claimants and the 25 shareholders, to give your Lordships just one reference</p> <p style="text-align: center;">Page 122</p>	<p>1 it thinks non-provable claims should rank as between 2 themselves. My learned friend Mr Dicker did not confirm 3 that currency conversion claims in general, or even his 4 client in this particular case, would rank or would be 5 prepared to rank after the non-provables. 6 So the existence of currency conversion claims must 7 be tested on the basis that they would rank with other 8 non-provables, whether they be the victim of 9 an industrial accident the day after the administrators 10 take over the factory, or interest creditors if the 11 court agrees with the judge that there is a lacuna and 12 the interest claim is non-provable. 13 My Lords, there is a further practical problem, if 14 there are currency conversion claims, as to how they are 15 to be calculated. Of course, there was a discussion 16 between the court and my learned friend on this. My 17 learned friend Mr Dicker said it would be the date of 18 payment, although I think later that was revised to as 19 close to the date of payment as possible. But this 20 gives rise to the problem that there is no machinery in 21 the Act or the Rules for the treatment of non-provable 22 claims and that, we submit, necessarily means that there 23 will not be one single date for payment of non-provables 24 in the way that there is for payment of proved debts. 25 One might have hoped that there would be a single</p> <p style="text-align: center;">Page 124</p>

<p>1 date for all foreign currency creditors on the basis 2 that equity is equality, or equality is equity, I think 3 it is put different ways, but there is no mechanism for 4 that. 5 My Lords, even if the date is the date of payment, 6 given that there is no process in the legislation for 7 the payment of non-provable debts, there will be, we 8 submit, a race to judgment and to enforcement. 9 So, given that there is no uniform date of payment 10 for non-provable claims, the date of payment would not, 11 as my learned friend suggested, place all the foreign 12 currency creditors in the same basket. Indeed, there 13 would be discrimination between creditors. 14 If that is not right and there is not a race to 15 judgment, it's really unclear what would happen. What 16 date would be chosen and on what basis? How would you 17 value a collection of foreign currency debts all 18 denominated in different currencies? 19 If the date of payment doesn't work, how could the 20 conversion be effected? My learned friend was at pains 21 to suggest he wasn't asking for a new currency 22 conversion date, something which, as we've seen, the 23 Law Commission expressly rejected. But we say that 24 there would need to be such a date in order to work out 25 how different currency conversion claims would be</p> <p style="text-align: center;">Page 125</p>	<p>1 and a claim was sought to be brought under the Third 2 Parties (Rights Against Insurers) Act or there was 3 a co-obligor. 4 My learned friend Mr Dicker suggested that the 5 notion that the foreign currency claim was paid in full 6 by a payment of sterling at the exchange rate as at the 7 date of liquidation would throw up problems, for 8 example, in cases of insurance, e.g. where you wanted to 9 get a judgment against the debtor to get the benefit of 10 his insurance under the Act. 11 My Lords, the same issue would arise for future 12 contingent claims where the claim has been valued and it 13 later turns out the valuation in the insolvency process 14 undervalued the claim. So it doesn't help Mr Dicker 15 because he can't say this is a problem unique, so to 16 speak, to conversion claims. 17 Although the point hasn't been argued fully before 18 your Lordships, we submit that the answer is probably 19 that the impact of the insolvency regime may operate 20 vis-à-vis the creditor and debtor only and not third 21 parties, but, my Lord, I offer that somewhat 22 tentatively. The short point for present purposes is 23 that these examples don't assist my learned friend 24 because they are not limited to currency conversion 25 claims.</p> <p style="text-align: center;">Page 127</p>
<p>1 valued. 2 All of this goes to show, we respectfully submit, 3 that currency conversion claims are unworkable and 4 uncertain and should be held not to exist. 5 Just picking up a couple of final points in this 6 connection. First, my learned friend suggested 7 yesterday, the reference is page 88 of the transcript, 8 lines 18 to 19, that I submitted that currency 9 conversion claims weren't a practical problem because 10 the claimants could hedge their exchange rate risk. My 11 Lords, I didn't recall making that submission and, 12 indeed, the transcript records I think that I never used 13 the word "hedge" at all. I wasn't making that point at 14 all. I was making a different point. I was responding 15 to a point on my learned friend's skeleton and the 16 reference 67/3 of his skeleton, bundle E, tab 8, 17 page 172. My learned friend made the point that if 18 members don't want to bear the exchange rate risk, they 19 can pay the foreign currency sums prior to the 20 liquidation. Do your Lordships recall, I made a few 21 submissions as to why that was not an answer to the 22 problem. But I wasn't making any submissions about 23 hedging at all. 24 My learned friend then made some submissions as to 25 the effect if the underlying claim was either insured</p> <p style="text-align: center;">Page 126</p>	<p>1 So, my Lords, unless your Lordships have any further 2 questions for me on currency conversion claims, I was 3 going to move to my second area of reply, which was the 4 section 74 liability point. 5 LORD JUSTICE MOORE-BICK: Yes, thank you very much. 6 MR WOLFSON: My Lords, on the section 74 liability point, of 7 course, again we are aligned with my learned friend 8 Mr Snowden and LBHI2. I should put one marker down, 9 which isn't a matter for this court and indeed it wasn't 10 before David Richards J. Our position on the 74 11 liability may turn out not to be exactly aligned as we 12 don't accept that we would be obliged to contribute in 13 respect of the sub debt, regardless of where it ranks. 14 That may be an issue that we'll have to argue out 15 between us, but certainly for present purposes we are 16 aligned with LBHI2. 17 My Lords, the first point here is this, and I can 18 take, I hope, this area fairly shortly because it has 19 been argued on a number of occasions now. First, my 20 Lord Lord Justice Briggs said there were two possible 21 comfortable resting places on this point, i.e., first, 22 that the subject of calls only extends to provable debts 23 and, second, it extends to everything in the waterfall. 24 My Lords, of course between those two we say the 25 first one is correct and the section 74 liability does</p> <p style="text-align: center;">Page 128</p>

<p>1 not include anything below provable debts. 2 My Lords, when I opened this appeal on section 74 3 I submitted to your Lordships that if section 74 were 4 not limited to provable liabilities, the company's 5 liquidators could, effectively on behalf of creditors in 6 LBIE with unprovable debts in LBIE, prove in the 7 contributories' insolvencies for types of debts which 8 are provable by the contributories' own creditors. So 9 creditors with unprovable debts in LBIE would be in 10 a better position vis-à-vis the assets of LBL than 11 creditors of LBL with the same type of unprovable debt. 12 My Lords, we do submit that this lack of symmetry is 13 a particular unfairness in this case because, unlike 14 LBIE's creditors, many of whom are traders and 15 distressed debt funds, et cetera, who bought the debt at 16 a discount, most of my creditors, LBL's creditors, are 17 employees and trade creditors. 18 As to the adjustment of the rights of contributories 19 inter se, my Lords, the fact that the section 74 20 liability extends to adjusting the rights of the 21 contributories amongst themselves, we submit, has no 22 bearing on whether the section 74 liability extends to 23 statutory interest and non-provable debts. 24 Section 154 of the Act provides that the court 25 adjusts the rights of the contributories among</p> <p style="text-align: center;">Page 129</p>	<p>1 In our written submissions before the judge, we 2 cited a number of authorities in relation to 3 a contributory's right to a contribution claim against 4 a co-contributory in circumstances where the first 5 contributory had paid more than his rateable share of 6 the shortfall. 7 My Lords, one of those cases is in the bundle and 8 it's the case at authorities bundle 1A/9, called a case 9 of Re Shields. 10 LORD JUSTICE BRIGGS: Are you citing this for the purpose of 11 showing that there would be contribution claims between 12 the contributories? 13 MR WOLFSON: I am citing it to show that you can have a call 14 simply to adjust the rights of the contributories and 15 there's nothing to stop a call being made for that 16 purpose. 17 So, my Lords, therefore what we say is the fact, 18 therefore, that the section 74 liability extends to 19 adjusting the rights of the contributories among 20 themselves doesn't show that the section 74 liability 21 necessarily extends to statutory interest and 22 non-provable debts. That's the way we put it. 23 So there are two parts of the argument. The first 24 is the proposition that you can have a call simply to 25 adjust the rights of the contributories and there's</p> <p style="text-align: center;">Page 131</p>
<p>1 themselves and distributes any surplus among the persons 2 entitled to it. Section 165(5) provides essentially the 3 same in the case of a voluntary winding-up. So the 4 court and the liquidator are obliged to adjust the 5 contributories' rights among themselves. We do submit 6 that there is nothing to stop the liquidators making 7 a separate call for adjusting the rights of the 8 contributories, and indeed they may need to do so. 9 For example, section 150(2) provides that in making 10 a call, the court has seen this, the court may take into 11 consideration the probability that some of the 12 contributories may partly or wholly fail to pay it. 13 That gives rise to the possibility that the liquidator, 14 by making calls, may actually turn out to raise more 15 money than is required to pay the proved debts if he 16 overestimates how much people will actually pay up. One 17 of the things he is asked to do is to take into account 18 the contributories may in fact pay less. So he makes 19 calls and he ends up with more than he needs -- 20 LORD JUSTICE BRIGGS: That's if he underestimates how much 21 they will pay. 22 MR WOLFSON: Sorry, he underestimates, yes. He ends up with 23 more than he needs. So one member may have effectively 24 contributed more than their fair share compared to the 25 other member.</p> <p style="text-align: center;">Page 130</p>	<p>1 nothing to stop separate calls being made for this 2 purpose. That's what I propose to get out of 3 Re Shields, although I'm not sure that's a particularly 4 controversial proposition. 5 The second is where I take that point. 6 Re Shields, if we can look at it briefly, perhaps. 7 Re Shields is at authorities bundle 1A at tab 9. My 8 Lords, we rely on the passage at page 372. Just by the 9 second hole punch, there's a sentence which begins 10 "Exactly in the same manner". This is a judgment of 11 Lord Romilly MR: 12 "Exactly in the same manner, in a company of limited 13 liability, where there many shares, some of which are 14 paid up, and the rest not paid up, the persons who have 15 paid up in full are not required to be on the list of 16 contributories, but as soon as it is found there are 17 assets more than sufficient to pay all the debts, then 18 calls may still be made on the persons who have not paid 19 up in full, in order to adjust the rights of the 20 shareholders between themselves; and persons are not 21 discharged from all liability as shareholders because 22 all claims against the society have been disposed of, if 23 the society has claims against them for the purpose of 24 setting right the contributions equally amongst the 25 members."</p> <p style="text-align: center;">Page 132</p>

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

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

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1 relied on it and I said it was wrongly decided.
 2 David Richards J said to me was I seriously suggesting
 3 that he should say a judgment which has stood for
 4 114 years, and had never been criticised, was wrongly
 5 decided? I said, well, yes, you should because for all
 6 about six months of that time nobody ever looked at it.
 7 In this area it is almost all new and, with great
 8 respect, to say that there is no case on the point
 9 really just emphasises the unusual situation we're in.
 10 We have an unlimited company with a surplus.
 11 LORD JUSTICE MOORE-BICK: Yes.
 12 MR WOLFSON: They are both unusual.
 13 So, my Lords, that is our submission on that point.
 14 The fact that the section 74 liability extends to
 15 adjusting the rights of the contributories between
 16 themselves does not mean, necessarily, we say they are
 17 not, that they must be liable under section 74 for
 18 statutory interest and non-provable debts.
 19 LORD JUSTICE LEWISON: To put it another way, you say we
 20 shouldn't get carried away by the metaphor of the
 21 waterfall.
 22 MR WOLFSON: Yes.
 23 LORD JUSTICE LEWISON: Look at it as a stream of stepping
 24 stones across it and you get a different result.
 25 MR WOLFSON: Yes, absolutely. We've had horses, we've had

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

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<p>1 on what basis could the rules purport to define the</p> <p>2 terms used in the Act? Does your Lordship recall --</p> <p>3 LORD JUSTICE BRIGGS: Yes, I was just looking to see whether</p> <p>4 there was something in the Rules that said they could</p> <p>5 help you understand what the Act meant.</p> <p>6 MR WOLFSON: Well, my Lord, we have done some research on</p> <p>7 this. The power to create the Rules appears to be</p> <p>8 deprived from section 411 and Schedule 8 to the Act.</p> <p>9 My Lords, if we turn first to section 411. Perhaps,</p> <p>10 my Lords, the quickest thing to do would be to invite</p> <p>11 the court to glance through section 411. (Pause).</p> <p>12 LORD JUSTICE BRIGGS: Quite a glance.</p> <p>13 MR WOLFSON: Yes.</p> <p>14 LORD JUSTICE BRIGGS: Is there any particular bit of it that</p> <p>15 helps?</p> <p>16 MR WOLFSON: My submission is going to be there is nothing</p> <p>17 here which enables you --</p> <p>18 LORD JUSTICE BRIGGS: Searching a haystack which doesn't</p> <p>19 have any needles in it.</p> <p>20 MR WOLFSON: I want to show the court where the power comes</p> <p>21 from and to show that the closest we get -- section 411</p> <p>22 sets out the power. Schedule 8 sets it out in more</p> <p>23 detail: Schedule 8, Provisions capable of inclusion in</p> <p>24 Company Insolvency Rules. As we see it, the closest you</p> <p>25 get to would be 12, Schedule 8 --</p> <p style="text-align: center;">Page 137</p>	<p>1 the meaning of liability in Rule 13.12 of the Rules</p> <p>2 cannot affect the proper interpretation of the word</p> <p>3 "liability" in section 74 of the Act.</p> <p>4 My Lords, finally in this context, and I am sure the</p> <p>5 court has this point already, your Lordships heard</p> <p>6 a number of submissions this morning on the word</p> <p>7 "liability" and "liabilities" in the context of the sub</p> <p>8 debt. Of course the court will be alive to this, but</p> <p>9 section 74 -- there's no part of any definition, whether</p> <p>10 in 13.12 or anywhere else, which says anything along the</p> <p>11 lines of "payable or owing by the borrower or the</p> <p>12 company". So the word "liabilities" and the sub debt</p> <p>13 and the word "liabilities" in section 74 may have</p> <p>14 different meanings and there is therefore necessarily</p> <p>15 a clear distinction between the two.</p> <p>16 My Lords, that is what I was going to say on</p> <p>17 section 74, unless I can assist the court further on</p> <p>18 that.</p> <p>19 LORD JUSTICE MOORE-BICK: Thank you very much.</p> <p>20 MR WOLFSON: I was then going to move to two short sets of</p> <p>21 what are now formally responses to my learned friend's</p> <p>22 appeals on Cherry v Boulton and the lacuna, black hole,</p> <p>23 Mr Bayfield's point. I appreciate some of this has been</p> <p>24 addressed by my learned friend Mr Snowden and I will try</p> <p>25 not to repeat points that he has already made.</p> <p style="text-align: center;">Page 139</p>
<p>1 LORD JUSTICE BRIGGS: Paragraph 12?</p> <p>2 MR WOLFSON: Paragraph 12, my Lord.</p> <p>3 LORD JUSTICE BRIGGS: Schedule 8?</p> <p>4 MR WOLFSON: Schedule 8, yes, which should start "Provision</p> <p>5 as to the debts". Schedule 8, paragraph 12, my Lords.</p> <p>6 LORD JUSTICE BRIGGS: Yes, "provisions capable of</p> <p>7 inclusion".</p> <p>8 MR WOLFSON: "Provision as to the debts that may be proved</p> <p>9 in a winding up, as to the manner and conditions of</p> <p>10 proving a debt and as to the manner and expenses of</p> <p>11 establishing the value of any debt or security."</p> <p>12 That's the closest we could find.</p> <p>13 This plainly authorises the creation of Rule 13.12,</p> <p>14 insofar as 13.12 defines what is provable. But we</p> <p>15 submit that it does not seem to permit using Rule 13.12</p> <p>16 to define or quantify what a contributory must fund</p> <p>17 under section 74, save to the extent, of course, that</p> <p>18 the obligation under 74 is to fund payment of provable</p> <p>19 debts, because then you're back into the definition</p> <p>20 which you can define.</p> <p>21 So, my Lords, prompted by that intervention of my</p> <p>22 Lord Lord Justice Briggs, we do reinforce our submission</p> <p>23 based on the meaning of liability in 13.12, not only by</p> <p>24 relying on the words "unless the context otherwise</p> <p>25 requires" but also the point I am on now, which is that</p> <p style="text-align: center;">Page 138</p>	<p>1 LORD JUSTICE MOORE-BICK: Yes, very well.</p> <p>2 MR WOLFSON: My Lord, on contributable and</p> <p>3 Cherry v Boulton, so far as we understand the position</p> <p>4 in the light of what Mr Trower said, I think for the</p> <p>5 first time on Day 3, that LBIE is now only contending</p> <p>6 that the contributory rule applies in LBIE's</p> <p>7 administration if LBHI2 and LBHI's appeals of the issues</p> <p>8 as to whether LBIE can prove in the members'</p> <p>9 administrations succeeds, such that there can be</p> <p>10 set-off -- in light of the fact he's saying that, of</p> <p>11 course this point is now only live for me if my learned</p> <p>12 friends here succeed on that appeal.</p> <p>13 Of course, that wasn't the way it was put below and</p> <p>14 that's why we, in our skeleton, have extensive</p> <p>15 submissions on the contributory rule and</p> <p>16 Cherry v Boulton. Although it was very interesting</p> <p>17 doing the research, I am not now proposing to labour</p> <p>18 your Lordships with the fruits of it.</p> <p>19 Can I just pick up one point, though, where I think,</p> <p>20 with respect to my learned friend Mr Trower, Homer</p> <p>21 nodded at one point. Although, as I've said, he</p> <p>22 repeatedly accepted on Day 3 and Day 4 that the</p> <p>23 contributory rule and Cherry v Boulton cannot apply if</p> <p>24 there is set-off in LBIE 's administration, at one</p> <p>25 point, in answer to a question from my Lord</p> <p style="text-align: center;">Page 140</p>

<p>1 Lord Justice Lewison, he suggested that his proposed 2 extension or development of the contributory rule would 3 apply irrespective of whether the contingent liability 4 under section 74 is provable. That was on Day 4 at 5 page 8. 6 But consistently with his position it would seem to 7 us that if the contingent liability is provable there 8 would be set-off in LBIE's administration and therefore, 9 consistent with his main position, no room for the 10 contributory rule or <i>Cherry v Boulton</i>. 11 Our position, therefore, is that even if your 12 Lordships allow LBHI2 and LBHI's appeals and conclude 13 that the section 74 liability is not provable by LBIE in 14 the members' administrations, such that there can be no 15 set-off, the contributory rule and <i>Cherry v Boulton</i> 16 still cannot apply in LBIE's administration. That is 17 because, as we've set out in writing, those rules only 18 apply where there is a present obligation to contribute 19 to the fund in question. 20 A fundamental assumption in LBIE's case on this 21 point, and I can just take this point briefly, I hope, 22 is that the potential liability which the members may 23 have under section 74 ought to form part of the fund 24 distributed to LBIE's creditors. That appears from 25 paragraph 51 of their appeal skeleton, where they say</p> <p style="text-align: center;">Page 141</p>	<p>1 Just to set this in some context, LBIE's case before 2 the judge, and indeed on this appeal until a couple of 3 days ago, was premised on the fact that there was 4 a lacuna in the rules because if LBIE was to go into 5 liquidation, interest for the period of the 6 administration, which wasn't paid in the administration, 7 would, so said LBIE, not be provable in a subsequent 8 liquidation or payable out of a surplus in the 9 liquidation under section 189. 10 No doubt the reason why LBIE took that position was 11 because of the clear terms of Rule 4.93(1). We submit 12 that the language of this provision is clear, that 13 interest from the date of administration is not provable 14 in a subsequent liquidation of LBIE. 15 My learned friend now appears to think that he's 16 found a means by which he can argue that the lacuna, 17 which was indeed the premise of his case before 18 David Richards J, isn't in fact a lacuna at all. We say 19 that the suggested means of filling or avoiding the 20 lacuna is not a permissible reading of the statute and 21 that this is an example of first thoughts being best 22 thoughts. I will explain that point to your Lordships 23 in a moment. 24 But I do respectfully join with Mr Snowden. We are 25 a little concerned that we've approached this point</p> <p style="text-align: center;">Page 143</p>
<p>1 this: 2 "The mischief which the contributory rule prevents, 3 that of removing from the creditors all or part of the 4 fund which should be available to pay their debts, is 5 present equally in an administration and a liquidation." 6 But, of course, that assumption, with respect, is 7 wrong. For reasons addressed in exchanges between my 8 Lord Lord Justice Lewison and my learned friend 9 Mr Snowden, because administrators cannot make calls on 10 the members, their potential liability under section 74 11 will never form part of the fund which the 12 administrators are distributing. That means that 13 neither the contributory rule nor the rule in 14 <i>Cherry v Boulton</i> can be engaged while LBIE is in 15 administration and your Lordships should not create 16 a judge-made rule, as LBIE is inviting your Lordships to 17 do. 18 But, my Lords, having said that and, given the very 19 limited way in which this point now arises, certainly 20 for my clients, I don't propose to say any more about 21 that. 22 (Pause). 23 My Lords, that brings me to the last remaining 24 point, which is the Rule 2.88(7) post-administration 25 interest, et cetera, point.</p> <p style="text-align: center;">Page 142</p>	<p>1 fairly quickly and there's a lot of money at stake. 2 Again, without wishing to turn this appeal into some 3 sort of run-off process, we do respectfully ask, if we 4 do have some further thoughts, they will put briefly if 5 we do have some, perhaps over the weekend or Monday, we 6 would be permitted to submit them to your Lordships and 7 perhaps we could discuss that at the end of the appeal. 8 My Lords, what -- 9 LORD JUSTICE BRIGGS: Can I just ask you one thing, since 10 you're here. It's not so easy to do if we only get it 11 in writing. If we go to 4.93. 12 MR WOLFSON: Yes. 13 (Pause). 14 LORD JUSTICE BRIGGS: (1), that's talking about 15 an interest-bearing debt and a cut-off for proof in 16 relation to interest in relation to that debt for 17 a period after the start of the administration. It 18 plainly contemplates contractual interest -- 19 MR WOLFSON: Yes. 20 LORD JUSTICE BRIGGS: Does it contemplate statutory 21 interest? 22 MR WOLFSON: That's the one -- 23 LORD JUSTICE BRIGGS: Is that the sort of point you want to 24 spend the weekend thinking about? 25 MR WOLFSON: That is one of the points we have been turning</p> <p style="text-align: center;">Page 144</p>

<p>1 over. It is not a straightforward point. 2 LORD JUSTICE BRIGGS: No. 3 MR WOLFSON: My Lord, if I may say respectfully we have been 4 considering that point. But I am reluctant to provide 5 a definitive answer because we really haven't got to the 6 bottom of it. 7 My Lord, I will be coming back to 4.93 later in 8 these submissions and it may be that in the course of 9 that -- 10 LORD JUSTICE BRIGGS: Inspiration -- 11 MR WOLFSON: -- inspiration will arise or one of your 12 Lordships will show me what the answer is. But that may 13 be one of the points -- 14 LORD JUSTICE BRIGGS: I'm afraid that was a rather open 15 cross-examination question from me. I don't know what 16 the answer is and I want your help. 17 MR WOLFSON: I wasn't presuming that your Lordship did not 18 know what the answer was to any question your Lordship 19 actually asked me. 20 LORD JUSTICE BRIGGS: You can assume that in this case. 21 MR WOLFSON: But, my Lords, if we can have a think about 22 that because this is a point of some complexity and it 23 really has arisen over the last 48 hours. 24 LORD JUSTICE BRIGGS: No, I can see that. 25 MR WOLFSON: Now, can I first start with what my learned Page 145</p>	<p>1 or the second alternative submission was that there is 2 a bifurcated regime whereby statutory interest is 3 payable in the winding up under Rule 2.88(7) to those 4 creditors who prove during the administration, whilst 5 statutory interest is payable under section 189(2) to 6 those creditors who prove during the winding up. 7 In my learned friend's submissions yesterday it 8 appeared to us that he had abandoned his primary case at 9 paragraph 12.1 of his appeal skeleton, because he said 10 that his argument based on Rule 2.88(7) only applied to 11 creditors who had actually lodged a proof in the 12 administration. 13 The case, therefore, put against me appears to be 14 that Rule 2.88(7) somehow survives into the winding up 15 following the administration. We respectfully submit 16 that that is an answer which flatly contradicts the 17 legislation itself. The Rules and the Act clearly 18 provide that Rule 2.88(7) only applies to a surplus in 19 the hands of the administrators and section 189 is both 20 the exclusive and the mandatory provision governing the 21 application of a surplus in the winding up after the 22 payment of unsecured claims. Section 189 tells the 23 liquidators what to do with the surplus. We submit that 24 there is no room for the continued existence of 25 Rule 2.88(7) in a winding up following the Page 147</p>
<p>1 friend's case was in writing, so to speak, i.e. he 2 proposed two construction arguments to deal with this 3 point and this is before we get to either of the other 4 two or perhaps I should say three putative solutions to 5 this problem; the other three being, if may call it -- 6 we're going to call it the Mr Bayfield point, 7 Lord Justice Lewison's charge argument, which 8 your Lordship has proposed, and this morning we had the 9 Quistclose -- 10 LORD JUSTICE BRIGGS: Type trust. 11 MR WOLFSON: -- type trust from my Lord Lord Justice Briggs. 12 So I am going to deal, if I may, with those later. Let 13 me first deal, if I may, with the point which was, so to 14 speak, on the papers before the court in the skeletons. 15 In my learned friend's written submissions, the 16 reference is paragraph 12 of LBIE's appeal skeleton, 17 LBIE argued that post-administration interest, which is 18 not paid in the administration, survives into the 19 winding-up and is payable out of a surplus on two 20 grounds. 21 First, the argument as written was that statutory 22 interest is payable, pursuant to Rule 2.88(7), to all 23 creditors who proved or prove whether during or after 24 the conclusion of the administration, and section 189 is 25 inapplicable in that regard in a subsequent winding up, Page 146</p>	<p>1 administration. 2 LORD JUSTICE LEWISON: It depends by what you mean by, "Does 3 it survive?" It is the accrued effect of Rule 2.88 4 which may or may not survive. The rule itself doesn't 5 need to survive. 6 MR WOLFSON: Yes. My Lord, I was going to come next to 7 your Lordship's suggestion of a charge or -- 8 LORD JUSTICE LEWISON: I don't think it matters what legal 9 label you put on it. Whether it is Quistclose trust, 10 charge or something else, there is a statutory 11 instruction which tells you what should happen to 12 a certain fund. 13 MR WOLFSON: Yes. Yes. My Lords, I was going to take, so 14 to speak, the charge argument or the charge suggestion 15 and the Quistclose trust suggestion, if I can put that 16 respectfully together, because it seemed to us that they 17 are essentially directed at the same underlying thesis 18 perhaps from different angles. 19 LORD JUSTICE LEWISON: I think my Lord and I are just using 20 different labels -- 21 MR WOLFSON: Precisely. 22 LORD JUSTICE LEWISON: -- for the same underlying concepts. 23 MR WOLFSON: Yes. With respect we have the same underlying 24 answer, which is that section 189 in its terms is 25 inconsistent with either any such charge or any such Page 148</p>

<p>1 trust, because section 189 is mandatorily and 2 exclusively telling the liquidator what he has to do 3 with the monies when he gets them. 4 LORD JUSTICE LEWISON: Well -- 5 MR WOLFSON: And you end up with a contradiction, that the 6 liquidator has been passed some monies which, if they 7 are impressed with a trust or a charge or a purpose for 8 which they are to applied, or whatever, conflicts with 9 what the legislature has told the liquidator he is to do 10 with the surplus in his hands. 11 LORD JUSTICE LEWISON: That can't be right, with respect. 12 Suppose the administrator ceases to give up his office, 13 there are some unpaid bills for his remuneration, 14 paragraph 99 attaches a charge. You can't say that's 15 inconsistent with section 189. What the liquidator now 16 has is a charged fund. 17 MR WOLFSON: Yes. That's the second point. If we are 18 talking about, so to speak, a formal charge on the fund, 19 to echo my learned friend Mr Snowden, when the scheme 20 imposes such a charge it does so expressly. 21 LORD JUSTICE LEWISON: That's a different point. 22 MR WOLFSON: I appreciate it's a different point, 23 absolutely. 24 LORD JUSTICE BRIGGS: Isn't the point that 189(2) 25 undoubtedly tells the liquidator what to do with any</p> <p style="text-align: center;">Page 149</p>	<p>1 MR WOLFSON: The submission is this, that there is nothing 2 in 189 which, so to speak, carves out of the surplus 3 which the liquidator receives anything other than 4 express charges which have previously been applied to 5 that surplus. 6 LORD JUSTICE BRIGGS: It depends on what you mean by 7 a surplus. 8 LORD JUSTICE LEWISON: As my Lord says it depends on what 9 a surplus is. 10 MR WOLFSON: Yes. 11 LORD JUSTICE MOORE-BICK: If a liquidator receives a fund 12 which is already impressed the with a trust for certain 13 purposes the assets or the fund may not contribute to 14 any surplus, may it? 15 MR WOLFSON: In the most extreme case it may not be the 16 company's money at all. 17 LORD JUSTICE MOORE-BICK: Well, all right. 18 MR WOLFSON: Absolutely. 19 LORD JUSTICE MOORE-BICK: At the moment I don't see why 20 section 189 is an answer to my Lord's Quistclose-type 21 trust or a charge. 22 MR WOLFSON: My Lord, I am just being ... (Pause). 23 My Lords, if one takes the example of preferential 24 debts, you Lordships may say to me the same problem 25 arises with this answer, but we would submit if one</p> <p style="text-align: center;">Page 151</p>
<p>1 monies after he's paid debts proved in the winding up? 2 But if the fund that comes to him for any of these 3 purposes is already affected by the administration 4 interest, trust charge, statutory direction, call it 5 what you will, that takes priority even over what will 6 be inevitably new proof of debts going on in the winding 7 up, because there will only be an administration 8 interest charge if debts have been proved in the 9 administration and indeed if there's a surplus after the 10 debts have been proved in the administration. 11 MR WOLFSON: Yes. 12 LORD JUSTICE BRIGGS: So that comes first, as indeed would 13 the remuneration charge that my Lord has just been 14 speaking of. 15 MR WOLFSON: The remuneration charge comes first because it 16 is expressly provided that it should come first. 17 LORD JUSTICE BRIGGS: The express or implied is, if I may 18 say so with respect, is a different point. 19 MR WOLFSON: Exactly. 20 LORD JUSTICE BRIGGS: But I am asking what your response is 21 to the notion that if 189 is affected it is only 22 affected because this comes before the payment of the 23 debts rather than gets shoehorned in between the payment 24 of debts and the payment of liquidation statutory 25 interest.</p> <p style="text-align: center;">Page 150</p>	<p>1 looks, for example, at section 175(1), which provides: 2 "In a winding-up the company's preferential debts 3 shall be paid in priority to all other debts." 4 LORD JUSTICE BRIGGS: Yes, but that means out of assets 5 available for that purpose. 6 MR WOLFSON: Exactly. 7 LORD JUSTICE BRIGGS: If there is some asset that has 8 a charge or a trust attaching to it, so what? 9 MR WOLFSON: In which case the fundamental point is: is the 10 proper construction of 2.88(7) so as to effectively 11 leave the monies impressed with that charge or trust? 12 LORD JUSTICE BRIGGS: Yes. 13 LORD JUSTICE LEWISON: Exactly. 14 MR WOLFSON: Exactly. 15 LORD JUSTICE BRIGGS: In the extremely rare event that the 16 administrator doesn't simply pay it. 17 MR WOLFSON: Well, yes. We make our submission that it 18 doesn't for the reasons which I have explained. 19 We also submit that 2.88(7) is a direction to the 20 administrator that he can't apply the monies for any 21 purpose other than the payment of interest and by not 22 distributing the surplus and by the administration then 23 being taken over by or replaced by a liquidation. That 24 is not an application of the monies and, as I've 25 submitted, when the monies come into the hands of</p> <p style="text-align: center;">Page 152</p>

<p>1 liquidator they are not impressed with any trust. 2 This is not a private transfer of assets. There is 3 one statutory scheme and then there is another statutory 4 scheme. We do submit that the scheme works as a whole 5 with particular rules applicable to the administrator 6 and particular rules applicable to the liquidator. 7 My Lords, we do submit that where the statute 8 intends for a charge to be imposed, it says so 9 expressly. The remedies, if I may say, fashioned in 10 argument by my Lord Lord Justice Lewison and 11 Lord Justice Briggs come very close to the effect, and 12 seemed to me have essentially the same effect, as the 13 express charge fashioned in, for example, Schedule B1, 14 paragraph 99, in circumstances where there is no express 15 charge here. 16 LORD JUSTICE LEWISON: Nor is there an express direction to 17 the administrator. 18 MR WOLFSON: No, there isn't an express -- that's a point 19 your Lordship went through with my learned friend 20 Mr Snowden. I am happy to tread the same ground, but 21 I suspect I will say the same thing that Mr Snowden said 22 and he probably said it better. 23 LORD JUSTICE BRIGGS: I am quibbling with the notion that if 24 the Quistclose trust is right -- I am quibbling with the 25 notion that it is not expressed. Agreed it does not say</p> <p style="text-align: center;">Page 153</p>	<p>1 LORD JUSTICE BRIGGS: Yes. 2 MR WOLFSON: We respectfully submit that there really is 3 nothing there to spell that out. What one is doing is 4 one is, with respect, saying, "I don't want this to fall 5 into a black hole, so this is a way through". But my 6 Lord, it just doesn't arise from the statute. It 7 doesn't arise from the rules. 8 (Pause). 9 My Lords, the learned judge below gave four reasons 10 for rejecting LBIE's argument. Of course the judge 11 below wasn't grappling with the commitment argument. My 12 learned friend Mr Snowden has dealt with I think three 13 of them. The learned judge said that they were all very 14 telling points. 15 The one which I should just say something about is 16 the third which the learned judge referred to. That was 17 if Rule 2.88(7) is restricted to the surplus in the 18 hands of the administrator, its effect could only be 19 limited to the amount of that surplus and to creditors 20 who actually lodged a proof in the administration. 21 Not only would that mean that LBIE's approach would 22 only go a limited way to meeting the problem, it would 23 give rise to discrepancies in the payment of interest as 24 regards creditors who had lodged a proof in the 25 administration and creditors who had only proved in the</p> <p style="text-align: center;">Page 155</p>
<p>1 "shall be subject to an Quistclose trust", but that's 2 just a label that the law gives to a situation where 3 somebody who has power over assets, here Parliament, 4 says they must not be used other than first for this 5 purpose. 6 MR WOLFSON: Yes. In circumstances where Parliament has 7 said -- 8 LORD JUSTICE BRIGGS: "Shall" is quite strong. 9 MR WOLFSON: My Lord, yes, in circumstances where Parliament 10 has told the liquidator in equally strong terms in 11 section 189 what he is to do with the same pounds, 12 shilling and pence when they arrive under his purview. 13 LORD JUSTICE LEWISON: Well -- 14 LORD JUSTICE BRIGGS: Subject to what Parliament may have 15 provided elsewhere as a prior commitment of that fund. 16 I am using commitment to avoid getting into charge or 17 trust territory, just use a neutral world. 18 MR WOLFSON: Where this argument boils down is to whether 19 one can properly spell out, of the words of 2.88(7), in 20 the context of (a) the fact that one has one scheme in 21 administration and a separate scheme in liquidation and 22 (b) the express and mandatory direction given in 23 section 189 in the liquidation context -- whether in 24 those circumstances one can spell out, to use 25 your Lordship's word, the commitment.</p> <p style="text-align: center;">Page 154</p>	<p>1 winding up. There would be twofold discrepancies. 2 First, creditors who didn't actually prove in the 3 administration could not be paid interest for the period 4 between the administration and the winding up from the 5 surplus in the liquidator's hands. Secondly, the pots 6 out of which interest would be payable in the winding-up 7 would differ depending on whether or not the creditor 8 had proved in the earlier administration, because assets 9 only realised in the winding-up would not be available 10 for distribution to creditors who had lodged proofs in 11 the administration. 12 So we respectfully agree that the third -- 13 LORD JUSTICE BRIGGS: Can you just give me the paragraph of 14 the judgment? 15 MR WOLFSON: Yes, it is all in 125. 16 LORD JUSTICE BRIGGS: Okay. 17 MR WOLFSON: There was a point where the judge said there 18 were some very telling points. 19 LORD JUSTICE BRIGGS: Yes. 20 MR WOLFSON: So we emphasise the third one, but my learned 21 friend Mr Snowden emphasised 1, 2 and 4. 22 Let me now turn to address some other arguments made 23 in this court by LBIE in support of its appeal -- 24 LORD JUSTICE MOORE-BICK: How are you getting on? 25 MR WOLFSON: We have only a few minutes left, I hope.</p> <p style="text-align: center;">Page 156</p>

<p>1 LORD JUSTICE MOORE-BICK: Because your time was due to run 2 out at 3 o'clock, that's all. 3 MR WOLFSON: It was. I think my learned friend Mr Trower 4 raises eyebrows. I finished early on Tuesday. He is 5 probably now going to blame me for finishing slightly 6 late today. My Lord, I don't anticipate being more than 7 ten minutes or so. What I do want to say a word about, 8 and it may be we can say a little more in writing -- 9 LORD JUSTICE MOORE-BICK: I think we would rather have it 10 orally. Would ten minutes do you? 11 MR WOLFSON: I hope so. 12 LORD JUSTICE MOORE-BICK: Mr Trower? 13 MR TROWER: My Lord, I think that will be all right. If it 14 goes much beyond ten minutes it won't be so all right. 15 LORD JUSTICE MOORE-BICK: Very well. 16 MR WOLFSON: What I want to do is to deal with Mr Trower's, 17 so to speak, new point, the Bayfield point which has 18 come as a surprise to everybody, including it seems 19 Mr Trower. 20 My Lords, just to finish the points I was on on the 21 construction point, we do make two other points. 22 First, that my learned friend's alternative 23 construction arguments through this problem involve 24 interpreting Rule 2.88(7) very broadly and section 189 25 very narrowly. We say, with respect, that there is no</p> <p style="text-align: center;">Page 157</p>	<p>1 proved in the liquidation. He said essentially the 2 purpose is to protect creditors so they don't have to 3 prove again in the liquidation. 4 But, my Lords, we respectfully submit that the 5 deeming provision is not qualified. There is no carve 6 out in the deeming provision for debts paid in the 7 administration. My Lords, in this case I rely on the 8 mandatory word "shall". Rule 4.73(8) uses the mandatory 9 word "shall" and does not suggest that you can simply 10 pick and choose, when you want a debt proved in the 11 administration, to be treated as having been proved in 12 the liquidation. 13 My Lords, we also say there are a number of problems 14 which have occurred to us with my learned friend's 15 approach, even over the last so to speak day. Can 16 I just set them out very quickly. 17 First, the hypothesis is that a person claiming 18 interest in the liquidation is not actually a creditor 19 as defined because he has had his principal debt paid in 20 the administration. On that basis, it is hard to see 21 how he would be able to vary or amend the proof in 22 relation to a contingent debt if it becomes clear in the 23 liquidation that his claim was worth more, because 24 that's something that only a creditor in the liquidation 25 can do.</p> <p style="text-align: center;">Page 159</p>
<p>1 basis for that inconsistent approach to construction. 2 That's the first point we make. 3 The second point we make is a short point on 4 Inco Europe which has been debated already, which is to 5 remind the court that in this case there are so to speak 6 two potential solutions when one is asking the question: 7 what would Parliament otherwise have done? Parliament 8 might have done something to section 189, it might have 9 done something to Rule 4.9(3). So it's not a case where 10 you're even focused on one particular section when you 11 ask the question: what would Parliament have done? One 12 doesn't know how Parliament would have tried to resolve 13 this problem. 14 My Lords, moving then to the new point about 15 provable claims. The basis appears to be that the 16 concession that interest in the administration wasn't 17 provable in the winding-up might have been wrongly made. 18 As soon as my learned friend made this submission, your 19 Lordships drew my learned friend's attention to the 20 deeming provision in Rule 4.73(8). My learned friend 21 said in response that Rule 4.73(8) is a deeming 22 provision for the protection of creditors. That's the 23 way he put it yesterday, page 50. It did not mean that 24 for all purposes you have to treat a creditor who has 25 proved in the administration as having had its debt</p> <p style="text-align: center;">Page 158</p>	<p>1 There is a further problem. Section 189(2) provides 2 for interest in respect of the period during which the 3 debt was outstanding since the company went into 4 liquidation. On the approach of my learned friend in 5 this part of the case, it would appear that because the 6 right to interest accrued during the administration is 7 now to be treated as a provable debt in the liquidation, 8 there would then be an entitlement to interest on 9 interest, i.e. an entitlement to interest in the 10 liquidation on the interest sum which had accrued but 11 had not been paid during the administration. 12 We respectfully submit that that cannot be right. 13 Finally in this regard, and more generally, we 14 submit that the new suggested provable claim is 15 inconsistent with the statutory scheme as a whole. Your 16 Lordships are familiar with the rules. To cut to the 17 main submission, we submit the intention behind these 18 rules is clear. Once a company is in an insolvency 19 process, whether administration or liquidation, which is 20 then followed by a different insolvency process, the 21 cut-off for provable interest in the second process 22 remains the commencement of the first insolvency 23 process. 24 Essentially, that sort of stops the clock as far as 25 interest is concerned and post-insolvency interest is</p> <p style="text-align: center;">Page 160</p>

<p>1 payable only if there is a surplus. 2 So the effect of the new case on provable 3 post-administration interest would be that in 4 a subsequent liquidation of LBIE interest for the 5 administration period is provable in LBIE's liquidation, 6 whereas interest for the liquidation period is only 7 payable if there's a surplus in LBIE's liquidation. 8 Again we submit that is not consistent with the 9 legislative scheme. 10 We take it a stage further and we submit it would 11 fundamentally undermine that scheme for this reason. If 12 LBIE were to go into liquidation, if a creditor were to 13 prove in LBIE's liquidation who had not proved in LBIE's 14 administration, the effect of the new argument would be 15 that the creditor for principal in LBIE's liquidation 16 would be competing as regards the assets in LBIE's 17 liquidator's hands with the claims for interest in 18 LBIE's administration, who would be claiming 19 post-insolvency interest on a contractual or maybe 20 a statutory basis, and that would arise out of the 21 provable claim. 22 We submit, therefore, with respect, that even in the 23 sort of day and a half that we've have to think about it 24 this is a false point. 25 LORD JUSTICE BRIGGS: Is a possible answer to that last</p> <p style="text-align: center;">Page 161</p>	<p>1 LORD JUSTICE BRIGGS: Quite. 2 MR WOLFSON: Really the whole reason why we're here in the 3 first place is that the administrators of LBIE have 4 plainly thought -- they may now be thinking they've made 5 the wrong decision for the last eight years, but they 6 plainly have thought that it was in the interests 7 overall of the creditors of LBIE not to move from 8 an administration to a liquidation, notwithstanding that 9 there will be, as we have discussed with the calls 10 point, options available in the liquidation but not in 11 the administration because there has to be an overall 12 balance. Therefore, when one picks any element of the 13 analysis and says, "Well, why should creditors be better 14 or worse off?" one has to remember that these decisions 15 are being taken for the general body of creditors as 16 a whole. 17 My Lord, I hope at least on that clock, which 18 I accept is one or two minutes slow, I am bang on the 19 time. Unless your Lordships have any further questions, 20 those are my submissions. 21 LORD JUSTICE MOORE-BICK: No. Thank you very much. We'll 22 take a five-minute break, shall we, at this point? 23 Then, Mr Trower, you will be on. 24 (3.13 pm) 25 (A short break)</p> <p style="text-align: center;">Page 163</p>
<p>1 point that new proofs of debt in the liquidation in the 2 bad years between 2005 and 2009, when there are 3 different cut-off dates for the same company between its 4 administration and its liquidation, would probably be 5 non-provable debts in the administration? Because if 6 they were provable in the administration, they would 7 probably approve them. It is not so surprising to see 8 administration interest having priority over 9 a non-provable debt if they both have to put side by 10 side in the liquidation, because the same consequence 11 would have occurred during the administration. 12 MR WOLFSON: Possibly. Possibly. I would like, if I may -- 13 LORD JUSTICE LEWISON: That may be another weekend problem. 14 MR WOLFSON: I'd like to think about that. 15 LORD JUSTICE LEWISON: Another possible answer is the 16 administrator might have paid the interest, in which 17 case the provable creditor and the liquidator couldn't 18 complain. 19 LORD JUSTICE BRIGGS: Yes. 20 MR WOLFSON: We only start with this whole analysis because 21 there is a surplus in the administration. 22 LORD JUSTICE LEWISON: Exactly. But why should the creditor 23 who can only prove in the liquidation be any better off 24 because the administrator has failed to pay the interest 25 which he should have paid in the administration?</p> <p style="text-align: center;">Page 162</p>	<p>1 (3.18 pm) 2 Submissions in reply by MR TROWER 3 LORD JUSTICE MOORE-BICK: Yes, Mr Trower. 4 MR TROWER: My Lords, can I first just deal with a few 5 remarks on the submissions that have been made in 6 relation to the Rule 2.88(7) point in the context of the 7 transfer of a company from administration to 8 liquidation, what has been called the lacuna point. 9 I don't want to say very much about this, in the light 10 of what my learned friends have said, because I don't 11 want to go over the same ground that I've already been 12 over. 13 The essence of it is that we do say that the right 14 continues to subsist, like any other right, until it is 15 taken away. The starting point when one is looking at 16 a statutory right of this sort is to ask yourself the 17 question not whether you can see that the right has 18 explicitly been permitted to continue to subsist, but 19 whether it has been removed. 20 If you have a right, you have to see how it has been 21 taken away from somebody. There is no sign on the face 22 of the rules or the legislation elsewhere that it has 23 been removed. 24 That's the first point. 25 The second point is that my learned friends looked</p> <p style="text-align: center;">Page 164</p>

<p>1 at paragraph 99 and they said, well, look in 2 a paragraph 99 context Parliament has made it explicit 3 provision for what should happen in relation to 4 administrators' costs and expenses where a company moves 5 from administration into liquidation, you would expect 6 something similar to be done in those circumstances. 7 One has to bear in mind what the paragraph 99 charge 8 is actually doing. It is imposed in circumstances where 9 there are a number of differently characterised costs 10 and expenses, and indeed the administrators' 11 remuneration, that have to be protected in respect of 12 a move from administration to liquidation. 13 In those circumstances, for perfectly understandable 14 reasons, it was thought appropriate both to include 15 an obligation to pay on the continuing -- on the 16 company -- not withstanding the intervention of the 17 liquidation and an explicit statutory charge which 18 covered the cost and expense, whatever its nature 19 happened to be. 20 Just for my Lords' note, we don't need to look it at 21 now, there's a long list of differently characterised 22 costs and expenses that are contained in Rule 2.67 of 23 the rules. In those circumstances one needs 24 an all-encompassing provision which actually protects 25 the position going forward in relation to those costs</p> <p style="text-align: center;">Page 165</p>	<p>1 administration -- and if we just turn it up in the red 2 book, which I have helpfully lost. 3 What happens at the end of an administration, and it 4 is Schedule B1, paragraph 83, page 284, is that -- 5 sub-paragraph (6) is: 6 "On the registration of a notice under sub-paragraph 7 (3) the appointment of an administrator in respect of 8 the company shall cease to have effect." 9 So the way Parliament has thought about this is the 10 concept of an appointment by an administrator ceasing. 11 A lot of the legislative provisions within the code 12 flow from the appointment of the administrator, if I can 13 put it that way. But what we respectfully submit is 14 that there's no concept within here of everything that 15 happened to the entity as a consequence of the 16 imposition of the statutory scheme in respect of 17 administration somehow no longer being in effect or 18 being forgotten about, or ignored, or discharged, or 19 released. 20 That's not the underlying principle. The underlying 21 principle is that an appointment of an office holder 22 ceases to have effect. So if you cannot see that the 23 necessary statutory consequence, that has to be relied 24 on by my learned friends, itself is released or 25 discharged in consequence of what is happening through</p> <p style="text-align: center;">Page 167</p>
<p>1 and expenses. 2 The position in relation to Rule 2.88(7) we 3 respectfully submit is different, simply in this sense. 4 On the face of the rule itself one can see all the 5 characteristics, applicable necessarily in 6 an administration as well because of the way the rule is 7 drafted, but which are sufficient to enable those rights 8 to subsist through to the subsequent liquidation. 9 In particular, the reference, on the face of the 10 rule, to the fact that the company's continuing 11 liability is to be satisfied out of an asset is itself 12 qualitatively different from what one normally finds in 13 relation to costs, charges and expenses, which is why 14 there is a need for a specific statutory charge in 15 relation to the paragraph 99 obligations. 16 So that was the first series of short submissions in 17 relation to your Lordships' analysis. 18 The second point is really a point which goes some 19 way, we suggest, towards helping thinking about what 20 happens at the end of an administration. There is 21 a clue one gets from the way it is characterised in 22 Schedule B1, paragraph 83, which I don't think your 23 Lordships -- I think Mr Snowden might have taken your 24 Lordships to it, but we didn't pause on it for more than 25 a moment or two. But what happens at the end</p> <p style="text-align: center;">Page 166</p>	<p>1 the operation of paragraph 83, that's a very strong 2 indicator that whatever it happens be, duty, obligation, 3 right, or so on, continues to subsist. 4 The third submission we just wanted to make -- and 5 I think my Lords have it, but just to make sure that it 6 is clear. One way of thinking about what is happening 7 in this context is: what is the actual surplus that one 8 is looking at at the stage at the end of the 9 administration and what is the actual surplus that one 10 is looking at when thinking about the true construction 11 of section 189? 12 A statutory charge or trust may be necessary to 13 secure the right, but there's nothing unprincipled or 14 uncertain or unusual about that. But that's fortified 15 by thinking what the charge attaches to. It attaches to 16 the surplus in the hands -- or at the moment of the 17 cessation of the administration, with the necessary 18 consequence that when you're looking at what the surplus 19 is for the purposes of section 189 you're looking at 20 a different animal. 21 (Pause). 22 My Lords, the final point on the pure construction 23 point I wanted to address in reply is this. We accept, 24 I think one has to, that there isn't a solution that's 25 provided by this construction, or by any construction,</p> <p style="text-align: center;">Page 168</p>

<p>1 in circumstances where the administration has not become 2 a distributing administration. It can't work in those 3 circumstances because the regime doesn't come into place 4 under the relevant part of the rules, and there is no 5 way round that. 6 But we do respectfully suggest that just because 7 there may be a difficulty in one situation you shouldn't 8 extend that difficulty any further than is absolutely 9 necessary. 10 LORD JUSTICE LEWISON: You say a partial solution is better 11 than no solution at all? 12 MR TROWER: A partial solution is certainly better than no 13 solution. Let me illustrate it in this way. Without 14 asserting in any way that an administrator should do 15 anything other than comply with what is required of him 16 when determining whether or not to go into 17 a distributing administration, in the very unusual 18 circumstance -- and one has to accept it would be a very 19 unusual circumstance where this might matter in a future 20 administration -- in order to comply with his duties he 21 would have to consider whether, all other things being 22 equal, you would go into a distributing administration 23 before you then move into liquidation, even if you 24 anticipated that you might have to go into liquidation 25 in due course.</p> <p style="text-align: center;">Page 169</p>	<p>1 Mr Wolfson was that, if one ended up in a situation 2 where because of the operation of the rule the next 3 thing to think about was whether or not one was able to 4 have a provable debt, the provable debt would be a debt 5 that ended up proved in the liquidation of LBIE, in this 6 case, and itself bore interest. So there was a sort of 7 interest on interest argument that my learned friend -- 8 LORD JUSTICE BRIGGS: That would apply whenever you get 9 statutory interest because contractual interest gets 10 added to your debt up until the cut-off point. 11 MR TROWER: Your Lordship has exactly the point. 12 The other slightly more general point that was made 13 was that there was a general inconsistency with the 14 statutory scheme. 15 We respectfully suggest that in this particular 16 context our solution gives as much substance to the 17 statutory scheme as a whole as it is possible to give in 18 the circumstances of the construction points that my 19 Lords are looking at. Stepping back, what's going on 20 here is imposing by one form of construction or another 21 a solution which ensures that those creditors who have 22 been left out of their money for a period during the 23 course of which the company is insolvent, and kept out 24 of their money, who under the overarching principles 25 behind the statutory scheme could expect to receive</p> <p style="text-align: center;">Page 171</p>
<p>1 But that would be no more than a function of the 2 administrator acting in accordance with the interests of 3 the creditors as a whole, which is what he has to do 4 when he's trying to decide whatever he has to do. 5 So we respectfully suggest, in a case where it might 6 matter, that is a thinking process that administrators 7 have to go through. It is something that, when my Lords 8 Lord Justice Briggs and Lord Justice Lewison were 9 sitting at first instance, they will have seen from time 10 to time applications by administrators where they had to 11 make decisions about how to use the statutory scheme in 12 a manner which was of most benefit to the creditors, 13 particularly at termination stages. That is a perfectly 14 legitimate process for administrators to have to go 15 through. 16 My Lords, that's all I was going to say about the 17 construction point, unless I can help any further. 18 The next point I wanted to deal with very, very 19 shortly, if I may, was just one or two submissions that 20 were made in relation to what has been called the new 21 point or, dare I even say, the Mr Bayfield point -- 22 I hesitate as his leader to say that, but in relation to 23 the provability and the operation of Rule 4.93 and the 24 like. 25 One of the points that was made by my learned friend</p> <p style="text-align: center;">Page 170</p>	<p>1 interest out of the surplus, are recompensed in respect 2 of that interest or compensation from being kept out of 3 their money in one form or another. 4 Of course, proving for interest in respect of the 5 administration period as a new debt in the liquidation 6 is a way which one might think is a complex method for 7 getting to the end result. But to say that that is 8 somehow inconsistent with the statutory scheme is, we 9 respectfully suggest, not the right way of looking at 10 it. 11 LORD JUSTICE LEWISON: It's a bit like the Cheshire cat, 12 isn't it, all that is left is the grin? 13 MR TROWER: My Lord, that is certainly one way of thinking 14 of it, yes. 15 So, my Lords, that I think was all I wanted to say 16 about that part of the case. 17 There are three other things that I wanted to deal 18 with. There are some submissions on the contributory 19 rule, then my Lords were given a new case in reply by 20 Mr Snowden which, if I may, I'll say just a few words 21 about because it was introduced in reply, and then there 22 was a short point, if my Lords would just permit me to 23 say a word or two about it, on section 4.11, which we 24 hadn't heard anything about before, and the ultra vires. 25 It came, I think, as a question from my Lord</p> <p style="text-align: center;">Page 172</p>

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

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

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

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

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<p>1 a member until it has, as the words in Lord Walker's 2 speech in Kaupthing, discharged itself as a member, 3 notwithstanding that the call is not yet presently 4 payable. 5 So, my Lords, that was all I was proposing to say 6 about the contributory rule. 7 In a sense, one can do no more than assert it as 8 a point of principle in order to protect a statutory 9 right. As I said in my submissions before, there's 10 nothing that any of us can do really to assist on the 11 authorities, apart from set out the broad parameters of 12 the rule. My learned friends Mr Snowden and Mr Wolfson 13 have pointed to a narrowness in the parameters of the 14 rule derived for its existing application, and we do not 15 shrink from the submission that your Lordships should 16 take this opportunity, in the very special circumstances 17 of this case, to give it a broader application. 18 My Lords, can I then turn on to -- unless my Lords 19 have any other questions in relation -- 20 LORD JUSTICE BRIGGS: Well, only this. 21 MR TROWER: Yes. 22 LORD JUSTICE BRIGGS: Why should this court or the court 23 extend a common law, non-statutory anyway, principle 24 which up until now has been defined in terms which don't 25 go far enough, as I think you accept, when the</p> <p style="text-align: center;">Page 177</p>	<p>1 cause of action that are available to creditors to 2 assist in the enforcement of the statutory scheme. 3 What quite a lot of these cases are about are what 4 are the circumstances in which individual creditors can 5 seek collectively to enforce a class right or do they 6 have their own independent cause of action for breach of 7 statutory duty? It's that sort of area that one is 8 thinking about. 9 The essential submission we make in relation to this 10 type of case is that the mere fact that you have a claim 11 for breach of statutory duty against the liquidator does 12 not mean to say that you don't also have enforceable 13 rights against the company in respect of which the 14 office holder is also in office. None of these cases 15 actually exclude the possibility, depending on the right 16 which you're concerned with, of a continuing claim 17 against the company. Indeed, some of them are cases 18 where the default that is alleged against the liquidator 19 is a default to do with the misapplication of assets for 20 the purposes of discharging an existing claim. For 21 example, IRC v Goldblatt, which is one of the cases 22 referred to, was a claim for breach of statutory duty in 23 circumstances in which there was a failure to pay 24 a preferential claim. There was a failure to pay, there 25 was a claim against the office holder to pay the</p> <p style="text-align: center;">Page 179</p>
<p>1 administrator's predicament of being faced with a proof 2 from someone who, when later they get asked to make 3 a call, will only pay a dividend -- 4 MR TROWER: Yes. 5 LORD JUSTICE BRIGGS: -- has the remedy of saying, "Fine. 6 We'll just put the company into liquidation?" 7 MR TROWER: Well, the answer to that is -- as my Lords know, 8 one of the problems is -- well, I think the short answer 9 to that is that if there are within the operations of 10 the statutory scheme in which the administrator is 11 actually operating restrictions of one sort of another 12 that make it otherwise unattractive for the company to 13 move from administration into liquidation, that is 14 a reason why the court should give an expansive 15 construction to the ability to protect that which 16 otherwise needs to be recovered for the benefit of the 17 unsecured creditors as a whole. I can't really put it 18 any other way. 19 LORD JUSTICE BRIGGS: No. Okay. 20 MR TROWER: My Lords, can I then turn briefly to HIH, which 21 my Lords were taken to in reply by Mr Snowden this 22 morning. 23 I think my Lords were taken to the passage in the 24 judgment of David Richards J beginning at paragraph 115. 25 This section of his judgment was explaining the types of</p> <p style="text-align: center;">Page 178</p>	<p>1 preferential claim, and there was also, co-existing with 2 those, the rights in respect of the underlying 3 preferential debt. 4 There is not an exact analogy with the circumstance 5 that we're looking at here, I think I would accept that, 6 but one of ways of testing the significance of this area 7 is to ask yourself this question. Posit a case where 8 there might have been a misapplication in some way of 9 the surplus which would otherwise have been applicable 10 to pay interest. Assume that circumstance. That might 11 give rise, one would accept that, to a claim by 12 a creditor against the person who was responsible for 13 misapplying the surplus, which meant that he suffered 14 loss in some form or other because the surplus had 15 dissipated. 16 It wouldn't necessarily mean to say that the 17 creditor had no claim against the person whose assets 18 had actually been misapplied in this way. Add a little 19 extra ingredient. Assume the misapplication was 20 a perfectly innocent, innocuous misapplication by the 21 office holder. No blame could be attached to him in 22 relation to it. One might expect that the office 23 holder, if liable to pay as a result of some breach of 24 statutory duty, would have a claim over for an indemnity 25 against the person who, on the law as I've showed my</p> <p style="text-align: center;">Page 180</p>

1 Lords, already is in fact his principal, namely the
 2 company, whose assets have been innocently misapplied in
 3 order to get recompense for what he has to pay to the
 4 creditor who has a claim against him for breach of
 5 statutory duty. So you may have that situation arise.
 6 If that is actually right -- and it is very
 7 difficult to see why as a matter of principle it isn't
 8 right -- it would be very peculiar for that to arise in
 9 circumstances in which the creditor didn't have a direct
 10 claim against the company.
 11 So we actually respectfully submit that these cases
 12 don't take you very much further -- this line of
 13 authority. They are simply authorities which
 14 demonstrate that there are certain categories of
 15 activity by office holders or non-activity by office
 16 holders which give rise to causes of action at the suit
 17 of creditors in order to enforce the statutory scheme.
 18 They don't go any further than that, as authorities.
 19 My Lords, would your Lordships just give me one
 20 moment?
 21 LORD JUSTICE MOORE-BICK: Yes, of course. (Pause).
 22 MR TROWER: My Lords, having told Mr Wolfson that I needed
 23 the time I did, I think I was perhaps being a little
 24 harsh. But then he finished early for me yesterday,
 25 so ...

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1 My Lords, I don't have any further submissions to
 2 make by way of reply.
 3 LORD JUSTICE MOORE-BICK: No. Thank you very much.
 4 MR TROWER: It is Friday afternoon and we finished a little
 5 bit early.
 6 LORD JUSTICE MOORE-BICK: That's always very welcome, isn't
 7 it?
 8 MR TROWER: Yes, indeed.
 9 LORD JUSTICE MOORE-BICK: Thank you very much.
 10 Now, there was a question as to whether people
 11 wanted to have thoughts about deep and interesting
 12 points.
 13 MR WOLFSON: My Lord, yes.
 14 LORD JUSTICE MOORE-BICK: Is it really, Mr Wolfson, or do
 15 others always also want to --
 16 MR WOLFSON: I am prepared to take the blame for it, my
 17 Lords.
 18 We were thinking, my Lords -- first of all, only if
 19 there is a new point which occurs to us. We will
 20 obviously keep it short. Obviously, we're in your
 21 Lordships' hands as to how quickly to get it in, but we
 22 were thinking very quickly.
 23 LORD JUSTICE MOORE-BICK: So we were.
 24 LORD JUSTICE BRIGGS: It is just the parked point, isn't it?
 25 MR WOLFSON: It is essentially the parked point. My learned

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1 friend Mr Snowden --
 2 MR TROWER: I am not sure I like the word "essentially".
 3 MR WOLFSON: Yes. The parked point, the Bayfield point,
 4 whatever we're going to call it, yes.
 5 LORD JUSTICE MOORE-BICK: Well, how quickly? How quickly
 6 can you do it without ...? (Pause).
 7 MR WOLFSON: My Lords, as I understand it, the last day of
 8 term is actually Wednesday.
 9 LORD JUSTICE MOORE-BICK: We were thinking of a little
 10 earlier than that.
 11 MR WOLFSON: Yes. My Lords, if we were to say the end of
 12 Tuesday, Tuesday lunchtime?
 13 LORD JUSTICE MOORE-BICK: We were thinking the end of
 14 Monday.
 15 MR WOLFSON: In which case that is fine.
 16 LORD JUSTICE MOORE-BICK: Can you do that?
 17 MR WOLFSON: Yes.
 18 LORD JUSTICE MOORE-BICK: 4 o'clock Monday.
 19 MR WOLFSON: 4 o'clock Monday. Of course, a matter of
 20 courtesy, if there isn't anything we will inform the
 21 court there is a nil return, so to speak.
 22 LORD JUSTICE MOORE-BICK: The other thing is how long do you
 23 envisage this note to be?
 24 MR WOLFSON: Short.
 25 LORD JUSTICE MOORE-BICK: Of course. But people's views

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1 about long and short differ.
 2 MR WOLFSON: My Lords --
 3 LORD JUSTICE MOORE-BICK: Can I just say, the first thing is
 4 you have to comply with the practice direction on
 5 skeleton arguments, in terms of font size and line
 6 spacing. So just take that into account.
 7 MR WOLFSON: My Lords, yes. My Lords, I certainly was not
 8 thinking of anything in the order of 25 pages.
 9 LORD JUSTICE MOORE-BICK: Certainly not.
 10 MR WOLFSON: My Lords, a maximum of five would be ample and
 11 I doubt we will get to five, but just in case.
 12 LORD JUSTICE MOORE-BICK: I think that's about as far as we
 13 were thinking of going anyway, so --
 14 LORD JUSTICE BRIGGS: To comply with the practice direction
 15 isn't just slavishness.
 16 LORD JUSTICE MOORE-BICK: No, we have to read it.
 17 LORD JUSTICE BRIGGS: It is dealing with the failing
 18 eyesight of elderly people, speaking for myself.
 19 LORD JUSTICE MOORE-BICK: Since my Lord raises the point,
 20 I wasn't going to raise this but since we have time for
 21 me to do so and my Lord has raised, I don't know whether
 22 anyone has looked, apart from us of course, at the
 23 copies of the skeletons in bundle E.
 24 MR WOLFSON: Yes.
 25 LORD JUSTICE MOORE-BICK: Has anyone looked at them?

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

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

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

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

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<p>1 considering these questions?</p> <p>2 MR TROWER: He does indeed, yes.</p> <p>3 LORD JUSTICE MOORE-BICK: That's about all we can say, isn't</p> <p>4 it?</p> <p>5 MR TROWER: I think it probably is.</p> <p>6 LORD JUSTICE MOORE-BICK: Well, once again, thank you all</p> <p>7 very much.</p> <p>8 (3.53 pm)</p> <p>9 (The court adjourned)</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 189</p>	
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