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3 Submissions by MR SNOWDEN 4 LORD JUSTICE MOORE-BICK: Yes, Mr Snowden. 5 MR SNOWDEN: My Lords, in this matter, as I expect you know from the skeletons, I appear with Ms Hutton and Mx Foskett for LBHI2. 6 LORD JUSTICE MOORE-BICK: Yes. 7 MR SNOWDEN: Reading across the court, Mr Isaacs appears for LBHI; Mr Wolfson and Ms Shah appear for CVI; and Mr Trower. 8 LORD JUSTICE MOORE-BICK: Yes. 9 MR SNOWDEN: Reading across the court, Mr Isaacs appears for LBHI; Mr Wolfson and Ms Shah appear for CVI; and Mr Trower. 10 LBHI; Mr Wolfson and Ms Shah appear for CVI; and Mr Trower. 11 Mr Bayfield, Mr Robins and Mr Riddiford appear for the administrators of LBIE. 12 Mr Bayfield, Mr Robins and Mr Riddiford appear for the administrators of LBIE. 13 Administrators of LBIE. 14 LORD JUSTICE MOORE-BICK: Thank you. 15 MR SNOWDEN: Your Lordship will also know these are appeal against a decision of David Richards J. There are 17 various appeals and cross appeals. 16 LORD JUSTICE MOORE-BICK: Yes. 17 MR SNOWDEN: That will, I regret to say, probably mean that 22 I will be occupying some substantial part of today, if 23 not all of today 24 LORD JUSTICE MOORE-BICK: Yes. 25 MR SNOWDEN: That will, I regret to say, probably mean that 29 least one of the points I'll explain how they break 30 down in a moment and then Mr Wolfson, and then it 30 down in a moment and then Mr Wolfson, and then it 30 down in a moment and then Mr Wolfson, and then it 31 disciplined, have they, and sit down at whatever 32 relevant time they are supposed to sit down? Or sooner 34 rightled with them for payment of that interest, and only thereafter would questions of non-provable claims or the like come into pla 10 they don't. They are not a species of non-provable claims or the like come into pla 10 they don't. They are not a species of non-provable claims or the like come into pla 10 they don't. They are not a species of non-provable claims or the like come into pla 10 they don't. They are not a species of non-provable claims or the like come into pla 1	ery much. during em ation
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24 LORD JUSTICE MOORE-BICK: Yes. 25 MR SNOWDEN: to be followed by the other appellants on Page 1  26 Page 3  1 our side: Mr Isaacs, who I think will be dealing with at 2 least one of the points I'll explain how they break 3 down in a moment and then Mr Wolfson, and then it 4 will be Mr Dicker and Mr Trower to respond and open 5 their appeals. 6 LORD JUSTICE MOORE-BICK: Everyone has agreed to be very 6 disciplined, have they, and sit down at whatever 7 disciplined, have they, and sit down? Or sooner 8 relevant time they are supposed to sit down? Or sooner 9 possibly.  24 thereafter we rank equally with them for payment of the statutory interest under the Insolvency Rule 288, 1	
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Page 1  Page 3  1 our side: Mr Isaacs, who I think will be dealing with at 2 least one of the points I'll explain how they break 3 down in a moment and then Mr Wolfson, and then it 4 will be Mr Dicker and Mr Trower to respond and open 5 their appeals. 6 LORD JUSTICE MOORE-BICK: Everyone has agreed to be very 6 don't exist at all. The judge found they did, w 7 disciplined, have they, and sit down at whatever 8 relevant time they are supposed to sit down? Or sooner 9 possibly.  Page 3  1 rank pari passu with them for payment of that 2 interest, and only thereafter would questions of non-provable claims or the like come into pla 4 The second and third issues are the currence of conversion claims. We say currency conversion they don't exist at all. The judge found they did, w 6 don't exist at all. The judge found they did, w 7 they don't. They are not a species of non-provable claim. But if we're wrong on that, then as I've indicated we say they rank behind statutory in	
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their appeals.  LORD JUSTICE MOORE-BICK: Everyone has agreed to be very disciplined, have they, and sit down at whatever relevant time they are supposed to sit down? Or sooner possibly.  5 conversion claims. We say currency conversion to conversion claims. We say currency conversion to conversion claims. We say currency conversion claims.	
6 LORD JUSTICE MOORE-BICK: Everyone has agreed to be very 7 disciplined, have they, and sit down at whatever 8 relevant time they are supposed to sit down? Or sooner 9 possibly. 9 don't exist at all. The judge found they did, we they don't. They are not a species of non-proving claim. But if we're wrong on that, then as I've indicated we say they rank behind statutory in	r
disciplined, have they, and sit down at whatever relevant time they are supposed to sit down? Or sooner possibly.  they don't. They are not a species of non-proving claim. But if we're wrong on that, then as I've indicated we say they rank behind statutory in	on claims
8 relevant time they are supposed to sit down? Or sooner 8 claim. But if we're wrong on that, then as I've possibly. 9 indicated we say they rank behind statutory in	say
9 possibly. 9 indicated we say they rank behind statutory in	able
The state of the s	already
10 MR SNOWDEN: Well, certainly discipline is hoped for. 10 all proved debts, which would include LBHI2	erest on
	s
Obviously, we can't anticipate quite what interventions 11 subordinated debt.	
or other we will get from the court, but as between us  12 The fourth and fifth issues relate to the que	tion
we anticipate on this side of the courtroom to be 13 of whether, if LBIE were to go into liquidation	ι,
occupying up to two days, and then my learned friends on 14 interest is payable under statute or as a non-principle.	ovable
the other side the same; and then we have the replies on 15 claim in respect of the period of LBIE's admin	istration.
Friday. Obviously, if we go quicker, so be it.  16 Now, we won on the statutory interest points.	, the
17 LORD JUSTICE MOORE-BICK: Yes. 17 judge held that statutory interest wouldn't be j	
Now, I see we're getting a transcript and 18 in those circumstances. There is an appeal or	ayable
19 I understand that those who are dealing with it would 19 I will deal with that in reply.	
20 like a short break during the morning and the afternoon. 20 Mr Isaacs will deal with our appeal on the	
21 MR SNOWDEN: I will endeavour to remind myself, if not 21 the issues because the judge held that interest	that and
22 I will be kicked by Mr Isaacs at an appropriate moment. 22 a non-provable claim in respect of that period	that and
23 LORD JUSTICE MOORE-BICK: Try and find a suitable moment, at 23 appeal on that.	that and  ifth of would be
24 about 11.15 and 3.15 roughly. 24 The sixth issue relates to LBHI2's potential	that and  ifth of would be
25 MR SNOWDEN: I am obliged. 25 liability as a contributory to a call by a liquidate of the contributory to a c	that and  ifth of would be
Page 2 Page 4	that and ifth of would be and we

1 1 who might -- and I stress the word "might" --But, with great respect to the judge, as we'll see 2 2 subsequently be appointed to LBIE. The statutory on a number of occasions during my submissions, that was 3 provision, as I've already said, is section 74 of the 3 a distinction that he failed to maintain. On a number 4 4 Insolvency Act and we submit that that call, were it to of points his reasoning was infected by an inability to 5 5 be made, would not extend to sums required to pay distinguish between the two capacities. 6 6 statutory interest; in other words, LBHI2 couldn't be To put it bluntly, a subordinated debt is still 7 7 a debt, a creditor in respect of a subordinated loan is required in effect to create a surplus out of which 8 8 statutory would be paid and it certainly wouldn't extend still a creditor; and a lender simply as such is not 9 to non-provable claims, such as currency conversion 9 a member. 10 10 claims if they were held to exist. When your Lordships are considering the questions 11 I will deal mainly with that question, although 11 and the submissions that are made, I would respectfully 12 I think Mr Isaacs may have something to add in relation 12 suggest that it is perhaps helpful to consider the 13 to the question of whether the section 74 liability 13 situation that would arise if the subordinated lender 14 14 extends to statutory interest but we'll see how we go. were not the member. It's perfectly possible, as in 15 15 The seventh issue relates to the contributory rule fact we'll see when we look at the regulatory source 16 in Cherry v Boultbee, there is an appeal which I will be 16 books, and indeed when we look at the loan agreement, 17 responding to in due course, and the eighth issue is 17 for a subordinated lender to be somebody entirely 18 whether LBIE's administrators can file a proof of debt 18 different from the member of the company. 19 19 in LBHI2's administration, were they to be called upon To give one illustration, which will come back into 20 20 my submissions a number of times, the position of to do so, in respect of the call that might be made by 21 21 a liquidator of LBIE in the future. We say the a subordinated creditor is simply a creditor who has 22 administrators can't file any such proof, that would be 22 agreed in respect of his debt to stand behind other 23 23 solely the responsibility of a liquidator because creditors. But once he's done that in respect of the 24 24 section 74 applies only in a liquidation. principal on his debt, for example, he ranks equally, 25 My learned friend Mr Isaacs will deal mainly with 25 pari passu, irrespective of ranking, for statutory Page 5 Page 7 1 that appeal. 1 interest. And that's a distinction that the judge, for 2 Now, as a preliminary observation to a good number 2 example, failed to carry through in his analysis. 3 3 of the themes that will run through some of my If I was to put it another way, the judge again in 4 4 the judgment referred regularly to the fact that submissions, I would start at the outset by asking the 5 court to distinguish between the two capacities that 5 a subordinated loan can be treated for regulatory 6 LBHI2 is acting in. I am here in one body and it is 6 purposes as regulatory capital. But it plainly isn't 7 7 very easy to lose sight of the fact that LBHI2 has two capital. It is not equity share capital. There 8 8 wouldn't be a need for it to exist as a separate species distinct capacities. The first is as a lender under the 9 9 subordinated loan agreements and in that capacity it is were it simply to be treated as capital and, yet again, 10 10 a subordinated creditor. The question is to what extent we say the judge on a number of occasions failed to make 11 as a creditor it is subordinating its claim. The second that distinction. 11 12 12 LORD JUSTICE LEWISON: I think the phrase used in the FSA capacity in which LBHI2 appears is as a member. 13 PRU handbook, whatever it is called, was financial 13 The judge in the judgment at the end of paragraph 63 14 of the judgment accepted that there was a distinction. 14 resources rather than any species of capital. 15 His own words were, in paragraph 63. He said: 15 MR SNOWDEN: In the GENPRU --16 "All of this is consistent with the concept that 16 LORD JUSTICE LEWISON: GENPRU, sorry. 17 MR SNOWDEN: In GENPRU the point is made that this type of 17 subordinated loan capital qualifying as part of the 18 institution's regulatory capital is as against creditors 18 instrument is a hybrid and it has characteristics -- it 19 19 to be treated as part of the capital of the institution. is structured as debt but it has some of the 20 20 characteristics of equity, but it is undoubtedly It is not, of course, part of the share capital of the 21 structured as a debt instrument. Its legal 21 company and it ranks ahead of any share capital in terms 22 22 characteristic is a debt instrument. It just so 23 Now, implicitly he was probably accepting there that 23 happens, for regulatory purposes, that it can be treated 24 there is the distinction that I've just drawn between 24 as a tier of financial resources, as capital. But it is 25 a creditor and a member. 25 confusing to, as it were -- as so often happens, a label Page 8 Page 6

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1	is put upon something and then the label rather takes	1	I don't think in fact the Council directives are in
2	over and confuses the analysis.	2	the authorities bundles, but I don't think that we
3	LORD JUSTICE MOORE-BICK: It may depend from whose	3	need they can be provided if your Lordships are
4	perspective you're looking at it, may it not? From the	4	interested. For present purposes, the judge quotes the
5	ordinary third party creditor point of view, it is	5	relevant provision and it is a short provision in
6	effectively capital, isn't it?	6	paragraph 37 of the judgment.
7	MR SNOWDEN: From the ordinary third party well, as long	7	LORD JUSTICE LEWISON: I think I would like to see a copy of
8	as it stands behind him in the queue he doesn't mind.	8	the directives.
9	LORD JUSTICE MOORE-BICK: That's the whole point.	9	MR SNOWDEN: The first one is short, its 5 pages, no problem
10	MR SNOWDEN: As long as it stands behind him, but only as	10	at all. The second one is 200 pages.
11	regards the repayment of his debt because he would have	11	LORD JUSTICE LEWISON: I don't think I want to read
12	every expectation, for example, that there if there was	12	200 pages of EU directive if I can possibly avoid it.
13	a surplus irrespective of ranking he would then have to	13	MR SNOWDEN: Shall we extract the relevant pages?
14	share equally in the payment of statutory interest.	14	LORD JUSTICE LEWISON: Please.
15	LORD JUSTICE MOORE-BICK: Yes.	15	LORD JUSTICE MOORE-BICK: But is this directed to anything
16	MR SNOWDEN: So it ranks behind him and in that respect,	16	other than establishing the extent of the bank's
17	yes, absolutely, that is what he's interested in. But	17	required financial assets for meeting its liabilities?
18	it doesn't actually rank down at the bottom of the pile	18	MR SNOWDEN: The judge took some weight from the wording
19	which is where the judge put it very firmly, as it were,	19	that is set out Article 4(3), for example, of the
20	only just ahead of equity capital.	20	first directive, that is set out there. In
21	LORD JUSTICE BRIGGS: But for anyone thinking of giving	21	paragraphs 60 to 63 he drew some support from that
22	credit to the bank they are going to think of it as part	22	wording for his very broad construction of the word
23	of its capital in the sense of part of it that which	23	"liabilities".
24	protects them, to some extent, from its insolvency.	24	We, with respect to the judge, disagree. I won't
25	MR SNOWDEN: Or they will think of it in terms of	25	dwell on this because we'll come on to the actual
	Page 9		Page 11
1	whatever it is, it's not somebody who is competing.	1	documents in a little while that implement this, but we
2	LORD JUSTICE BRIGGS: Yes.	2	say that from the wording that you see in paragraph 37
3	MR SNOWDEN: In a sense the money has been lent, but the	3	of the judgment, for example we say that the
4	lender is not somebody who is competing with me for what	4	directive is directing one's mind to the situation that
5	is left.	5	would exist in a bankruptcy or liquidation. In other
6	LORD JUSTICE BRIGGS: Yes.	6	words, you could treat subordinated loans as own funds
7	MR SNOWDEN: That, with respect, I think is a rather a more	7	if binding agreements exist under which, in the event of
8	conventional way of looking at subordination: you come	8	bankruptcy or liquidation of the credit institution,
9	behind me sort of in respect of what is left. But	9	they rank after the claims of other creditors and are
10	beyond that, the creditor probably doesn't need to	10	not to be repaid until all other debts outstanding at
11	worry.	11	the time have been settled.
12	As I say, if we perhaps look at the regulatory	12	We say that actually that was aimed, as we will see,
13	background as a start, the judge dealt at some length	13	at the situation that would arise in an insolvency
14	with the regulatory background in his judgment. In	14	process and that the claims that are being spoken about
15	terms of simply the way in which the regulatory	15	there are the claims that would prove or participate in
16			
	materials are set out, I don't think that we have any	16	the collective insolvency process. They are not, for
17	materials are set out, I don't think that we have any dispute with the judge. Where we do part company with	16 17	the collective insolvency process. They are not, for example, non-provable claims and the time at which that
17 18	•		
	dispute with the judge. Where we do part company with	17	example, non-provable claims and the time at which that
18	dispute with the judge. Where we do part company with the judge is in his analysis of the relevant regulatory	17 18	example, non-provable claims and the time at which that is directed is the time at which the insolvency
18 19	dispute with the judge. Where we do part company with the judge is in his analysis of the relevant regulatory provisions.	17 18 19	example, non-provable claims and the time at which that is directed is the time at which the insolvency intervenes.
18 19 20	dispute with the judge. Where we do part company with the judge is in his analysis of the relevant regulatory provisions.  Just by way of background and start, if I could ask	17 18 19 20	example, non-provable claims and the time at which that is directed is the time at which the insolvency intervenes.  LORD JUSTICE MOORE-BICK: Is the purpose of this part of the
18 19 20 21	dispute with the judge. Where we do part company with the judge is in his analysis of the relevant regulatory provisions.  Just by way of background and start, if I could ask you to look at the judgment quickly at paragraphs 35 and	17 18 19 20 21	example, non-provable claims and the time at which that is directed is the time at which the insolvency intervenes.  LORD JUSTICE MOORE-BICK: Is the purpose of this part of the directive to equate as far as possible this form of loan
18 19 20 21 22 23 24	dispute with the judge. Where we do part company with the judge is in his analysis of the relevant regulatory provisions.  Just by way of background and start, if I could ask you to look at the judgment quickly at paragraphs 35 and onwards, you'll see that under the heading "Capital adequacy rules" the judge referred to a number of the Basel Accords, the two Basel Accords, and the	17 18 19 20 21 22 23 24	example, non-provable claims and the time at which that is directed is the time at which the insolvency intervenes.  LORD JUSTICE MOORE-BICK: Is the purpose of this part of the directive to equate as far as possible this form of loan asset to equity?  MR SNOWDEN: Well, in a sense it's not to equate it to equity. It is to allow it to be treated as part of own
18 19 20 21 22 23	dispute with the judge. Where we do part company with the judge is in his analysis of the relevant regulatory provisions.  Just by way of background and start, if I could ask you to look at the judgment quickly at paragraphs 35 and onwards, you'll see that under the heading "Capital adequacy rules" the judge referred to a number of the	17 18 19 20 21 22 23	example, non-provable claims and the time at which that is directed is the time at which the insolvency intervenes.  LORD JUSTICE MOORE-BICK: Is the purpose of this part of the directive to equate as far as possible this form of loan asset to equity?  MR SNOWDEN: Well, in a sense it's not to equate it to

5 isn't equity. 6 LORD JUSTICE MOORE-BICK: It's obviously not equity, but 7 MR SNOWDEN: It's something which 8 LORD JUSTICE MOORE-BICK: In some ways the language used 9 here could be said to be a recognition that assets can 10 be obtained by subordinated lending but in order to 11 satisfy the regulatory requirements it's got to be 12 subordinated to the point where nothing else ranks ahead 13 of it, as would be the case for equity capital. 14 MR SNOWDEN: Yes. The answer to that we say is no, because 15 we'll see that when we look at what is actually 16 required, and the way that the regulations have 17 implemented this, there's no restriction, for example, 18 on proof of debt. In fact, that's one of the  10 what you would expect is that that which is treated as 16 capital in this way is something which doesn't compete 27 with you in the collective process into which you would 28 expect to participate. 29 This notional creditor, this person who is 20 a creditor who we are postulating, is somebody who would 21 expect to have a provable claim. It's a very unusual 22 person who becomes a non-provable creditor. 21 LORD JUSTICE MOORE-BICK: Yes. 21 MR SNOWDEN: The postulate that you're putting to me is, if 22 you like, the trade creditor, or somebody who would 23 implemented this, there's no restriction, for example, 24 16 aregular creditor; and that is somebody who would 25 implemented this, there's no restriction, for example, 26 17 expect, in to order be able to get payment, to have to 27 participate in the statutory scheme.				
shortcut the analysis by saying 'is it effectively treating it as equity' because it's quite clear that it sin's equity.  LORD JUSTICE MOORE-BICK: It's obviously not equity, but— NE SNOWDEN: It's something which— Developed the said to be a recognition that assets can be obtained by subordinated lending but in order to subordinated to the point where nothing else ranks ahead if is, as would be the case for equity capital.  MR SNOWDEN: Yes. The answer to that we say is no, because we'll see that when we look at what is actually required, and the way that the regulations have for hereafted this, there's no restriction, for example, of the benefits he can enjoy. The way in which the regulations are drafted is drafted by reference to the English insolvency process, and the loan a generoment themselves recognise, we say, the type of an English insolvency process, and the loan We say it would be very surprising if in fact the type of non-provable claims or statutory interest were to be in the minds of the regulators as something which doesn't compete with you in the collective process into which you would expect to participate. This notional creditor, this person who is a creditor who we are postulating, is somebody who would to person who becomes a non-provable claim. It's a very unsusual person who becomes a non-provable claim. It's a very unsusual to consider the regulations have for a required, and the way that the regulations have for the penaltory expenditure that way the way is something which doesn't compete with you in the collective process into which you would be the participate in the sway is something which doesn't compete with you in the collective process into which you would expect to participate, is somebody who would to prove the case for equity capital.  In MR SNOWDEN: This fail to sure the weap is no, because we'll see that when we look at what to prove the case for equity capital.  In CRD JUSTICE BRIGGS: They may be mainly in involuntar to require the statutory intered to the to require the partic	1	the maintenance of capital in the broad sense to protect	1	this may be the intention, I don't know, to that extent
4 meating it as equity because it's quite clear that it 5 isn't equity. 5 LORD JUSTICE MOORE-BICK: It's obviously not equity, but— 7 MR SNOWDEN: It's something which — 8 LORD JUSTICE MOORE-BICK: In's obviously not equity, but— 8 LORD JUSTICE MOORE-BICK: In's obviously not equity, but— 9 here could be said to be a recognition that ascets can 10 be obtained by subordinated lending but in order to 11 satisfy the regulatory requirements it's got to be 12 subordinated to the point where nothing else ranks ahead 13 of it, as would be the case for equity capital. 14 MR SNOWDEN: Yes. The answer to that we say is no, because 15 we'll see that when we look at what is actually 16 required, and the way that the regulations have 17 implemented this, there's no restriction, for example, 18 on proof debt. In fact, that's one of the 19 characteristics that a subordinated lender can—is one 20 of the benefits he can enjoy. The way in which the 21 regulations are darfled is drafted by reference to the 22 English insolvency process. Men we look at what 23 agreements themselves recognise, we say, the type of 24 English insolvency process. When we look at what 25 an English insolvency process for the enforcement of debts which 26 are proved. 27 a collective process for the enforcement of debts which 28 the provided definition of the regulations have 29 to characteristics that a subordinated lender can—is one 30 of the benefits he can enjoy. The way in which the 31 a collective process for the enforcement of debts which 42 tregulations are darfled is drafted by reference to the 43 tregulations are darfled is drafted by reference to the 44 type of non-provable claims or statutory interest were 45 to be in the minds of the regulations as something which 46 the loan agreement was designed to cover. It is 47 designed, as I said at the outset, to sit behind the 48 unsubordinated loans but only as regards principal but 49 definitely not as regards seligend to cover. It is 40 definitely not as regards seligend to cover. It is 41 designed, a	2	the interests of creditors. But I don't think you can	2	it does not give you the protection which possibly you
biant equity.  Charles JUSTICE MOORE-BICK: It is obviously not equity, but—  MR SNOWDEN: It is something which—  Biant SNOWDEN: It is some ways the language used beer could be said to be a recognition that assets can be obtained by subordinated lending but in order to be obtained by subordinated lending but in order to a startify the regulatory requirements it's got to be subordinated lending but in order to a startify the regulatory requirements it's got to be subordinated lone point where nothing else ranks ahead in it, as would be the case for equity capital.  MR SNOWDEN: Yes. The answer to that we say is no, because the subordinated lending but in order to a startify the regulations have the case for equity capital.  MR SNOWDEN: Yes. The answer to that we say is no, because the subordinated lender can be can be caused that when we look at what is actually required, and the way that the regulations have the capital capital in this way to make the capital reduction. The same that we say is no, because the well see that when we look at what is actually required, and the way that the regulations have the capital capital in this way is something which doesn't competed with you in the collective process into which you would expect is that that which is treated as capital in this way is something which doesn't competed with you in the collective process into which you would on the collective process into which you would on the collective process into which you would a creditor, this person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very unusual person who becomes a non-provable claim. It's a very	3	shortcut the analysis by saying 'is it effectively	3	might have thought you ought to have.
capital in this way is something which doesn't compete with you in the collective process into which you would expect to participate:  Responsible to the point where nothing else ranks ahead of it, as would be the case for equity capital.  MR SNOWDEN: Yes. The answer to that we say is no, because of it, as would be the case for equity capital.  MR SNOWDEN: Yes. The answer to that we say is no, because of it, as would be the case for equity capital.  MR SNOWDEN: Yes. The answer to that we say is no, because of it, as would be the case for equity capital.  MR SNOWDEN: Yes. The answer to that we say is no, because of it, as would the way that the regulations have in implemented this, there's no restriction, for example, of the benefits he can enjoy. The way in which the conditions are drafted is drafted by reference to the legislative history insolvency process, and the loan agreements themselves recognise, we say, the type of a greenests themselves recognise, we say, the type of a greenests themselves recognise, we say, the type of a collective process for the enforcement of debts which a collective process for the enforcement of debts which the type of non-provable claims or satutory interest were type of non-provable claims or satutory interest were to be in the minds of the regulatory as regards principal but designed, as I said at the outset, to sit behind the unsubordinated loans but only as regards principal but designed, as I said at the outset, to sit behind the unsubordinated loans but only as regards principal but a facility of an asset sound you are provable claims in that insolvency.  MR SNOWDEN: That's right, The subordinated loan agreement was designed to cover. It is a collective process of the enforcement of the behalf of the provable claims in that insolvency.  MR SNOWDEN: That's right, The subordinated loan agreement was designed to cover. It is a unsubordinated loan assets don't give you any procection?  MR SNOWDEN: That's right, The subordinated loan agreement was designed to cover. It is a un	4	treating it as equity' because it's quite clear that it	4	MR SNOWDEN: Well, if you are a creditor on this hypothesis
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22 English statutory insolvency process, and the loan 23 agreements themselves recognise, we say, the type of 24 English insolvency process. When we look at what 25 an English insolvency process involves and means, it is 26 Page 13  1 a collective process for the enforcement of debts which 2 are proved. 3 We say it would be very surprising if in fact the 4 type of non-provable claims or statutory interest were 5 to be in the minds of the regulators as something which 6 the loan agreement was designed to cover. It is 7 designed, as I said at the outset, to sit behind the 8 unsubordinated loans but only as regards principal but 9 definitely not as regards statutory interest and 10 a fortiori not as regards statutory interest and 10 a fortiori not as regards non-provable claims in that 11 insolvency. 12 LORD JUSTICE BRIGGS: I believe in Waterfall II there's 13 against the company of an unprovable very surprising if in fact the 14 subordinated loan subt only as regards principal but 15 mostly of a mass of unprovided for, non-provable claims where there is no regime to have them 16 a fortiori not as regards non-provable claims in that 17 insolvency. 18 LORD JUSTICE BRIGGS: I believe in Waterfall II there's 2 a great list of them, isn't there, standing up and 3 asking to be counted? 4 MR SNOWDEN: I think that's essentially right. One of the 4 points I will make is that when one is asking whether 5 points I will make is that when one is asking whether 6 the regulatory or legislative structure that was devised 6 in 1986 could have envisaged or even contemplated the 8 possibility of a mass of unprovided for, non-provable 9 claims where there is no regime to have them 10 adjudicated — other than in fact by a process of the 11 ordinary process of issuing a claim form, as I will show 12 your Lordships. But there is certainly no other process 13 to determine how these claims should be treated, dealt 14 with, adjudicated, how they rank as between each other. It's 15 a complete morass, which we say the court should 16 recogni	20		20	creditors. At the moment I am grappling to get a full
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Page 13  Page 15  LORD JUSTICE BRIGGS: I believe in Waterfall II there's a great list of them, isn't there, standing up and asking to be counted?  We say it would be very surprising if in fact the type of non-provable claims or statutory interest were to be in the minds of the regulators as something which the loan agreement was designed to cover. It is definitely not as regards to the outself of the unsubordinated loans but only as regards principal but definitely not as regards statutory interest and a fortiori not as regards non-provable claims in that loan of the company of an unprovable type, the subordinated loan assets don't give you any protection?  MR SNOWDEN: That's right. The subordinated loan agreements would fall to be paid before non-provable claims, that's right. Non-provable claims are very much, as we all the company of an in 1986, when	24		24	not a contender at all.
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right. Non-provable claims are very much, as we all know the, exception and a very rare exception to the statutory scheme.  17 recognise that the legislature didn't intend to create.  18 Where non-provable claims have come about, as we've seen from the legislative history, and in 1986, when	15	MR SNOWDEN: That's right. The subordinated loan agreements	15	how categories of them rank as between each other. It's
18 know the, exception and a very rare exception to the 19 statutory scheme. 18 Where non-provable claims have come about, as we've 19 seen from the legislative history, and in 1986, when	16	would fall to be paid before non-provable claims, that's	16	a complete morass, which we say the court should
19 statutory scheme. 19 seen from the legislative history, and in 1986, when	17	right. Non-provable claims are very much, as we all	17	recognise that the legislature didn't intend to create.
	18	know the, exception and a very rare exception to the	18	Where non-provable claims have come about, as we've
20 LORD JUSTICE MOORE-BICK: But if they exist they do 20 non-provable claims have been shown to exist, Parliament	19	statutory scheme.	19	seen from the legislative history, and in 1986, when
	20	LORD JUSTICE MOORE-BICK: But if they exist they do	20	non-provable claims have been shown to exist, Parliament
21 represent a creditor who is going to lose out, don't 21 has almost invariably stepped in pretty smartly and has	21	represent a creditor who is going to lose out, don't	21	has almost invariably stepped in pretty smartly and has
22 they? 22 legislated to make them provable. They did that after	22	they?	22	legislated to make them provable. They did that after
23 MR SNOWDEN: That's correct. 23 T&N in relation to the asbestos liabilities.	23		23	T&N in relation to the asbestos liabilities.
24 LORD JUSTICE MOORE-BICK: If the subordinated loan ranks 24 LORD JUSTICE LEWISON: So every time a judge invents som	24	LORD JUSTICE MOORE-BICK: If the subordinated loan ranks	24	LORD JUSTICE LEWISON: So every time a judge invents some
25 ahead of unprovable debts then, to that extent and 25 category, the rules cater for it.	25	-	25	
Page 14 Page 16		Page 14		Page 16

	I		
1	MR SNOWDEN: The general principle is that the statutory	1	agreement is the first one, 10.1, which you will
2	insolvency regime, as we will see your Lordships have	2	encounter.
3	seen, I am sure is designed to be an exhaustive	3	Simply for comparison, you can see that that looks
4	statement of those persons who can participate in the	4	not dissimilar to the agreement which we are actually
5	collective enforcement process.	5	concerned with.
6	I have been trying to grapple with the questions	6	LORD JUSTICE LEWISON: Use of that form was required by the
7	that seem to postulate a creditor standing out there	7	rule, by Rule 10.63.
8	asking himself, "What is in it for me from this	8	MR SNOWDEN: It was and it was referred to the rules,
9	subordinated loan thing?"	9	your Lordship is of course right, are referred to in the
10	The answer is that any normal creditor who you can	10	recital to the agreement which I'm about just to go to
11	postulate will recognise that the subordinated loan does	11	very quickly.
12	stand behind him, and that's the function it serves,	12	LORD JUSTICE LEWISON: 10.63.
13	whereas the person who is a non-provable creditor is	13	MR SNOWDEN: We can probably put one or other of those
14	either an involuntary creditor who won't have that	14	right, if you keep bundle 4 out and then just turn
15	thought process at all and therefore in a sense the	15	through in the rule, you'll see sorry, turn back in
16	question never arises.	16	the rules. The rule to which it is referring is at
17	If I can turn on relatively quickly to the origins	17	page 17 of 72.
18	of the subordinated loan agreement. Can I ask you to	18	That's tab 3, 17 of 72. You'll see Rule 10.63,
19	take up bundle D1. The subordinated loan agreement,	19	which is, "The firm may include a subordinated loan in
20	your Lordships may have already have extracted some form	20	its financial resources."
21	of the subordinated loan agreement, I don't know, but	21	That was the expression my Lord Lord Justice Lewison
22	the one I was going to refer to is the one that starts	22	picked up. The point I was making about the fact that
23	in tab 5 at page 197.	23	the subordinated loan can be somebody other than the
24	LORD JUSTICE MOORE-BICK: Not the one I have extracted, bu	24	member of the company, is picked up in Rule 10.63(3).
25	it doesn't matter. Is the language the same in all?	25	LORD JUSTICE LEWISON: I assume from the italics that
	Page 17		Page 19
1	MR SNOWDEN: They are essentially. They are standard form	1	"financial resources" is a defined term but I couldn't
2	and certainly I will show you the history. But in	2	find the definition in the extract from the rulebook
3	a sense	3	that we have, unless I've missed it.
4	LORD JUSTICE MOORE-BICK: You want to use the one at 100	4	MR SNOWDEN: (a) your Lordship is right and (b) I think
5	and	5	that's because I haven't seen it either in the bundles.
6	MR SNOWDEN: Well	6	Would your Lordship
7	LORD JUSTICE MOORE-BICK: That's all right.	7	LORD JUSTICE LEWISON: It may be that nothing turns on it.
8	MR SNOWDEN: In sense if everybody is using	8	MR SNOWDEN: Your Lordship is I think going to follow it
9	LORD JUSTICE MOORE-BICK: I will extract yours as well.	9	with a question that you'd like us to find. We will.
10	MR SNOWDEN: If everyone is using another one I will fit in	10	LORD JUSTICE LEWISON: It might be just be helpful to look
11	with the crowd.	11	at it and see what it says, unless it is completely
12	LORD JUSTICE MOORE-BICK: Did you say 197?	12	irrelevant.
13	MR SNOWDEN: 197, that's right. In a sense I'm afraid	13	MR SNOWDEN: We'll have a look and see if we can find it.
14	you're going to have to keep, as it were, that open.	14	Unless somebody else can tell me where it is in the
15	The judge said in paragraph 48 of the judgment they are	15	existing bundle (Pause) .
16	in a standard form and he's of course right.	16	Mr Trower points to page 13 and 14, where there is
17	The standard form you will see, and for comparison	17	a table and a calculation of financial resources.
18	if you take up authorities bundle 4 you'll see that	18	LORD JUSTICE LEWISON: No, I looked at that.
19	the if you turn in bundle 4 to tab 3 and in tab 3	19	MR SNOWDEN: But I think it is the definition you want.
20	probably just about halfway through the tab I'm	20	LORD JUSTICE LEWISON: Rule 10.62 says that you have to
21	afraid the pages are not numbered, or at least they are	21	maintain financial resources and then 62(2) says
22	numbered initially up to 72 in the bottom. But just	22	calculated in accordance with the table, and that allows
23	beyond 72 you'll see that there is a bold page "Interim	23	you to include all sorts of things like retained
	, ,		
24	Prudential Sourcebook for Businesses: required forms"	24	earnings and interim net profits, and goodness knows
24 25	, ,	24 25	earnings and interim net profits, and goodness knows what else, and debt. But Page 20

1	MR SNOWDEN: There's no definition.	1	prescribed by the relevant UK regulator. It is
2	LORD JUSTICE LEWISON: is that the definition of	2	undoubtedly the case, we say, that what the parties
3	"financial resources"?	3	would have in mind by this agreement, complying as it
4	MR SNOWDEN: I suspect the answer is not, but we will find	4	did with the regulator's requirement, is an English
5	the answer to it.	5	insolvency, namely a liquidation or administration.
6	LORD JUSTICE LEWISON: It is the formula at the bottom, my	6	That would undoubtedly be the prime, main insolvency
7	Lord says, C plus D minus E plus F minus G equals	7	proceeding in relation to the regulated entity.
8	financial resources.	8	True it is that the judge pointed to the fact that
9	MR SNOWDEN: Yes, and of course the definition may include	9	the directive is a it is more than English, in
10	something as helpful "as defined in the table in 10.62".	10	a sense it applies more generally, and indeed he pointed
11	But if there is a definition we will find it.	11	to the fact that the definition of "insolvency" in the
12	IPRU, as it was, was then, as you will know,	12	agreement, which you can see at page 202 of bundle D1,
13	replaced, after the agreements that we are concerned	13	included at the end of the definition:
14	with were put into place, by GENPRU. Just for note	14	" or the equivalent in any other jurisdiction to
15	while we're in bundle 4, at tab 4, if I could ask you	15	which the borrower may be subject."
16	just to look quickly at GENPRU. You'll see that GENPRU	16	Thus, undoubtedly, given the genesis of this
17	at guidance note 22158 at the top of the second page in	17	agreement in these rules that we have seen promulgated
18	tab 4 describes tier 2 instruments as:	18	by this regulator for this institution, we say the judge
19	"Capital instruments that combine the features of	19	failed to give adequate weight when he was then
20	debt and equity and they are structured like debt but	20	construing its importance to the fact that the main and
21	exhibit some of the loss absorption and funding	21	indeed almost invariably the dominant and only
22	flexibility features of equity."	22	insolvency that would come about in relation to this
23	Then there is a rule which is the replacement rule	23	institution was an English insolvency process.
24	that sets out the requirements for subordinated loan or	24	Although I think in my learned friend Mr Trower's
25	subordinated loans:	25	skeleton there is a reference made to other
	Page 21		Page 23
1	"The claims of the creditors must rank behind those	1	jurisdictions, insolvencies in other jurisdictions,
2	of all unsubordinated creditors."	2	nobody has actually focused or made any specific point
3	And then there is:	3	about what other relevant insolvency jurisdictions there
4	"The only events of default must be non-payment of	4	might be.
5	any amount falling due under the terms of the capital	5	LORD JUSTICE LEWISON: As a matter of language, would it be
6	instrument or the winding-up of the firm."	6	right to say that liquidation, winding-up, bankruptcy
7	In any such event a default must not prejudice the	7	sequestration, administration, and these list of words
8	subordination. And then 3:	8	mean, either English and Welsh or UK? Otherwise what
9	"To the fullest extent permitted under the laws of	9	does the word "other" jurisdiction refer to? Other than
10	the relevant jurisdiction the remedies available to the	10	what?
11	subordinated creditor in the event of non-payment must	11	MR SNOWDEN: Yes. Yes, that's a well, I would agree. It
12	be limited to petitioning for the winding up of the firm	12	can't sensibly be read as anything else. It's
13	or proving for the debt in the liquidation or	13	an extraordinary reading to think it is anything else,
14	administration."	14	given the background as well. So, yes, I see
15	One of the points that we make is that this	15	your Lordship's point and would adopt it.
16	regulatory regime is undoubtedly designed to cater	16	Now, we say that, again, once you come to that
17	primarily for an English insolvency process, namely	17	conclusion and you have appreciated where this comes
18	liquidation or administration.	18	from, it is important also then to understand where
19	Just to make that point, you have already seen that	19	other wording in this agreement comes from. I am going
20	there is reference in well, you've seen reference for	20	to look particularly now at the way in which this
21	example in GENPRU to 221951 to the concept of ranking.	21	agreement is derived and incorporates provisions from
22	You saw it was the word used in the directive in	22	the insolvency legislation of England and Wales; and
23	relation to bankruptcies and liquidation. Just stepping	23	particularly from the 1986 changes that were made in
24	back, evidently the agreements that we are concerned	24	relation to the definition of "solvency" or "insolvency"
25	with relate to a UK-regulated entity and the form is	25	in the insolvency legislation.
	Page 22		Page 24

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The regulatory origins of the wording that we're going to find is important -- because the wording that we're all going to be focusing on in a short while is, as your Lordships appreciate, the wording that's in clause 5 of the subordinated loan agreement at page 205 of the bundle, bundle D1, and going over the page to 206; in particular, the definition of "solvency" or the concept of solvency, the borrower being solvent. Its explanation in clause 5.2(a): "The borrower shall be solvent if it is able to pay

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its liabilities in full, disregarding obligations which are not payable or capable of being established or determined in the insolvency of the borrower."

We say that it is important to appreciate what that actually is referring to and we do say that that is referring to provable debts. We say you can see that when you look at the origins of this agreement and the drafting of this agreement.

The regulatory origins of this agreement, you can trace back or we've traced back in bundle -- in old TSA and AFBD standard forms. The wording obviously is a very specific type of wording, it doesn't come from the statute but it can be traced back to these older documents of the previous regulatory bodies that existed.

We have set out the analysis in the skeleton but can

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2 I simply show you those previous documents. They are in 3 authorities bundle 4. If you go in authorities bundle 4 4 to tab 14, first of all, you'll see that there's 5 a short-term subordinated loan facility agreement which 6 was from the Association of Futures Brokers & Dealers, 7 the AFBD. This is a document which originated in 1987. 8 It's in, again, very similar types of -- there's 9 some very similar types of language and the structure of 10 the document is very, very similar to the one we've been 11 looking at. In particular the subordination provision, 12 which you'll see appears on page 3 of 5, says: 13 "Notwithstanding the provisions of paragraph 5, the 14 rights of the lender in respect of the subordinated 15 liabilities are subordinated to the senior liabilities 16 and accordingly payment of any amount is conditional 17 upon ..." 18 And then (a) and (b): 19 "If an order has not been made or an effective

20 resolution passed for the insolvency of the

21 borrower ..."

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And this is in very similar wording -- again if you have it still open -- to clause 5.1 and 5.2 of our actual loan agreement. Then in particular you'll see, under clause 6.1(b) of this agreement, towards the end

Page 26

it says:

2 "For the purposes of this sub-paragraph the borrower 3 shall be solvent if it is able to pay its debts in full 4 as and when they become due."

And:

"In determining whether the borrower is solvent for the purposes of this sub-paragraph, there shall be disregarded obligations which are not payable or capable of being established or determined in the insolvency of the borrower and the excluded liabilities."

Just pausing there, my Lord Lord Justice Briggs will instantly recognise the reference to the words "debt payment and debts in full as and when they become due" because that wording, the "as and when they become due", was a new addition in the Insolvency Act 1986 to the statutory definition of "insolvency" which my Lord Lord Justice Briggs had to grapple with in a case called Cheyne Finance.

19 Those words, those particular words, had never 20 featured before in any English insolvency concept, but 21 they were brought into section 123 of the 1986 22 Insolvency Act.

Your Lordships can see that, if you wanted to turn up the Butterworths Insolvency Law Handbook -- which we have -- you'll see that those words feature in

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1 section 123 of the Insolvency Act.

2 LORD JUSTICE LEWISON: The point you're making is what, the

3 standard agreements attract the insolvency legislation?

4 MR SNOWDEN: Yes, the standard agreement is very definitely

5 drafted by reference to specific concepts of English

6 insolvency law. So when you actually look at the

7 critical phrase "payable or capable of being determined

or established in the Insolvency as defined", capital I, 8

9 i.e. an English Insolvency process, we say one is

10 looking at the question of proof, proof of debts, which

11 was the specific thing that a subordinated lender could

12 do. It's the very thing that the judge below here,

David Richards J, said we were not entitled to do.

14 My point is, no, this loan agreement is drafted in

15 a way which, properly construed, permits us to prove for 16 our subordinated loan agreement and I'll explain to you

17 by reference in a moment as to the consequences for

18 that.

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19 LORD JUSTICE BRIGGS: Can you just give me the date of the

20 AFBD agreement again?

21 MR SNOWDEN: 1987.

22 LORD JUSTICE BRIGGS: 1987. Thanks.

23 MR SNOWDEN: The definition of "insolvency" was changed in

24 1986, section 123(1)(e):

25 "The company is deemed unable to pay its debts if it

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1	is proved to the satisfaction of the court that the	1	acknowledge. It is critical because when we actually
2	company is unable to pay its debts as they fall due."	2	look at how they fit, they fit the English insolvency
3	That concept of debts falling due came in only in	3	legislation perfectly on our interpretation; they do not
4	1986. Prior to that it wasn't there. In 1986 the	4	fit on the interpretation that the judge gave them.
5	statutory test of insolvency was expressly bifurcated or	5	If you perhaps put away bundle 4, just having made
6	expressly expanded out, shall I say, to make specific	6	that point, going back to the actual loan agreement
7	reference to what is often referred to as cash flow	7	itself, bundle D1. Turning back to the definitions
8	insolvency and balance sheet insolvency.	8	section, I have already made the point about the
9	LORD JUSTICE LEWISON: I notice on page 5 of 5 of this		well, we've been over the point about insolvency. Our
10	standard form there is a date 24.3.88. I don't know if	10	submission is obviously that it is primarily designed
11	that signifies anything.	11	for the specific English insolvency processes that are
12	MR SNOWDEN: Okay. I thought, I have to say, that our	12	set out there. We accept, because it's obviously very
13	researches had shown it came into effect in 1987, but	13	wide, that the definition of "Liabilities" at page 203
14	·		
15	I'm sorry, I will check that. I thought we'd got it from 1987.	14	of the bundle is very broad. But, with respect, that
		15	doesn't answer the question, because if what we were
16	LORD JUSTICE LEWISON: Perhaps it is a later version.	16	talking about were not liabilities, then we wouldn't be
17	MR SNOWDEN: But it doesn't affect the point I'm making	17	subordinated to them at all. The question is what
18	LORD JUSTICE LEWISON: No.	18	liabilities can be disregarded for the purposes of the
19	MR SNOWDEN: The point I am making is that this is very	19	subordination provision.
20	shortly after some equivalent wording was used.	20	Before we get to the subordination provision can
21	Now, true it is that those words then, as we'll see,	21	I just again draw your attention to the repayment
22	disappear from the relevant provision of the clause.	22	provision which is at clause 4 on page 204:
23	But nevertheless the origins of the clause, the rest of	23	"The provisions of this paragraph are subject in all
24	the clause, we say are absolutely plain. You can see	24	respects to the provisions of paragraph 5
25	that they disappear from the relevant clause because if	25	(subordination)."
	Page 29		Page 31
1	you turn through to 1990, which is the next tab in the	1	That's the first indication one gets that this is
2	authorities bundle 4, you'll see that this is a loan	2	a subordination clause which operates as a restriction
3	agreement in a form promulgated by the Securities and	3	on payment, not as a restriction on proof of debt. And
4	Investment Board, the SIB. You'll see at the top this	4	that is a very important distinction, because it's
5	is from 1990. It is a standard format for	5	an express qualification to the ability to be repaid.
6	a subordinated loan agreement. The relevant provision	6	That is then followed through into the subordination
7	is at page 4 of 21. Again, it's exactly the same	7	provisions themselves, which are the ones that we're
8	structure:	8	looking at at clause 5. It says:
9	"For the purposes of this sub-paragraph, the	9	"Notwithstanding the provisions of paragraph 4, the
10	borrower shall be solvent if it's able to pay its debts	10	rights of the lender in respect of the Subordinated
11	in full and in determining whether the borrower is	11	Liabilities are subordinated to the Senior Liabilities."
12	solvent for the purposes of this sub-paragraph there	12	I'll just pause there. If that's all it said, it
13	shall be disregarded obligations"	13	would tell you nothing at all because it wouldn't tell
14	Et cetera.	14	you what subordinated actually means or involves.
15	We say that what you get from these agreements,	15	Subordination is a concept, it's not a precise
		16	definition. You need to look at the rest of the clause
16	though, is that somebody is obviously closely looking	17	
17	at, as you would expect them to do, the way in which		to understand to what extent the subordination operates.
18	this agreement is going to operate in an English	18	There is floating both through the judge's judgment and
19	insolvency. These are the earliest examples of the very	19	my learned friends' submissions a suggestion that one
20	specific type of wording that this court is now	20	could almost stop this clause at the end of the second
21	concerned with, promulgated by regulators in very	21	line and be done with it.
22	similar forms.	22	LORD JUSTICE BRIGGS: It wouldn't have been meaningless if
23	All I am doing is indicating to your Lordships that	23	it had, would it?
24	these agreements have a much closer affinity with	24	MR SNOWDEN: You would need to ask to what extent the
25		25	subordination operated, subordinated in what respects?
23	English insolvency law than the judge was prepared to Page 30	23	Page 32

1	Where does it fit in an insolvency waterfall, for	1	conditions to payment. I will show you in a moment
2	example. You can tell that, because it goes on to set	2	there are three well-recognised types of subordination,
3	out very specifically that the repayment that we've been	3	of which this is one, but it is written as a condition
4	looking at is conditional upon certain specific	4	to the right to receive payment. It's not written, for
5	requirements.	5	example, as a right sorry, as a restriction on your
6	Now, it's at least apparent, for example	6	right to prove in an insolvency, which is what the judge
7	LORD JUSTICE BRIGGS: Sorry can I just press you.	7	in essence held this agreement prevented. Nor is it
8	MR SNOWDEN: Yes.	8	written as a turnover subordination, which is another
9	LORD JUSTICE BRIGGS: You're not, I think, submitting, are	9	right of subordination. It is written as a restriction
10	you that if clause 5 had just stopped at the end of	10	upon payment and that is important when we come to
11	saying "the rights of a lender in respect of the	11	consider the question of what ranking the subordinated
12	Subordinated Liabilities are subordinated to the Senior	12	debt has, because I say that we're entitled to prove the
13	Liabilities", but incorporating the definition of Senior	13	debt and, having proved it, we rank behind other proved
14	Liabilities, that it would have been meaningless or void	14	debts but we share with other proved debts in the
15	for uncertainty or incapable of operation?	15	payment of statutory interest.
16	MR SNOWDEN: I suppose in a sense you're right. Perhaps the		Just to make good my point about the different types
17	better point to put is if it stopped there it would be	17	of subordination agreement, perhaps as a preface, can
18	contradictory to what follows in a sense.	18	I ask you to look at the description of this in
19	LORD JUSTICE BRIGGS: Yes. I can quite understand you	19	Professor Goode's work, which you'll find in the bundle
20	saying the apparent generality of that is cut down by	20	of authorities, bundle 2, at tab 4.
21	what follows. It is another thing to say that that on	21	LORD JUSTICE LEWISON: Bundle 2, did you say?
22	its own is meaningless.	22	MR SNOWDEN: Bundle 2, tab 4.
23	MR SNOWDEN: Yes, sorry, I probably put it too high. In the	23	LORD JUSTICE MOORE-BICK: Yes.
24	context of the clause as a whole if you stopped it there	24	MR SNOWDEN: This is "Legal problems of credit and
25	and just ignored the rest of it, you would be doing, we	25	security".
	Page 33		Page 35
1	say, the clause a disservice, it would render the rest	1	The page that we have as page 210. The discussion
2	of it otiose, because it go on to specify the	2	on page 209 is under the heading "Does contractual
3	circumstances actually in which repayment can be made.	3	subordination contravene the pari passu principle?" But
4	For example, as we'll see, it does recognise that you	4	the discussion that is informative is on page 210 and
5	can make repayment of a subordinated loan even though	5	there it is said:
6	certain liabilities cannot be paid.	6	"Despite these decisions"
7	The certain liabilities are the ones that are set	7	And those decisions are references to British
8	out in clause 5.2(a) and (b). My Lord	8	Eagle v National Westminster Bank, i.e. the pari passu
9	Lord Justice Briggs is I think right	9	principle no contracting out line of cases:
10	LORD JUSTICE BRIGGS: That's just defining solvency. It	10	" it has been clear in a number of subsequent
11	defines what you disregard for the purpose of assessing	11	cases that none of the forms of contractual
12	solvency.	12	subordination commonly used contravene the principle."
13	MR SNOWDEN: Yes.	13	Then the work sets out the three different,
14	LORD JUSTICE BRIGGS: But it is not a part of the	14	well-recognised types of contractual subordination:
15	description of the meaning of subordination.	15	"The more straightforward situation from this point
16	MR SNOWDEN: In a sense it is because you well, it is	16	of view is that of turnover subordination where the
17	because	17	subordinated creditor agrees to hold the dividends and
18	LORD JUSTICE BRIGGS: It has a working effect in that way	18	distributions it receives on trust for the senior
19	but it doesn't set out to do that.	19	creditor and it is clear that this doesn't infringe the
20	MR SNOWDEN: The point is you can't make the repayment.	20	pari passu rule since the subordinated creditor proves
21	Your rights to repayment are conditional upon being	21	in the insolvency in the normal way."
22	solvent and then solvency is defined. So it is	22	But again just pausing, because it requires the
23	a condition to repayment. It is part of the condition	23	creditor to prove to do is then turn over the dividends
24	to repayment.	24	received
25	The subordination agreement operates as a series of	25	LORD JUSTICE LEWISON: You get your dividend but you hold Page 36
	Page 34		

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1	your dividend on trust.	1	LORD JUSTICE BRIGGS: And he did.
2	MR SNOWDEN: That's it. As the work there goes on to say:	2	MR SNOWDEN: And he did which we say he was wrong to do. He
3	"This form is the most advantageous for the senior	3	found it in another clause which if it was supposed to
4	creditor since it results in him obtaining a double	4	be part of the subordination agreement is an odd place
5	dividend and the subordination benefits only him and not	5	to find it. I say that it is very clear that this
6	all the other creditors as well, as is the case in other	6	agreement is crafted and structured as this type of
7	forms of subordination."	7	subordination and not as the next type of subordination,
8	So, in other words, it actually has the effect of	8	which is what the author goes on to deal with. It goes
9	elevating, if you like, the senior creditor by a double	9	on:
10	dip.	10	"The most controversial formulation is a plain
11	Then the next bit is important for present purposes:	11	contractual subordination where the subordinated
12	"Another reasonably straightforward form is where	12	creditor agrees not to claim or prove until the senior
13	the subordinated form is expressed as a contingent	13	creditor has been fully paid."
14	obligation so at that it is only payable if the senior	14	Now, that form of subordination, that "don't prove"
15	creditor is paid in full or if the debtor has sufficient	15	is usually expressed in precisely those sort of words.
16	assets to pay the senior creditor in full. This doesn't	16	There's a reference, if you see a little further down
17	infringe the pari passu rule since if the contingency is	17	the paragraph at the foot of the page, to
18	not satisfied the subordinated debt is valued at nil by	18	SSSL Realisations. The clause in SSSL Realisations, as
19	the liquidator and if the contingency is satisfied the	19	my Lord Lord Justice Briggs is well aware, was in
20	subordinated creditor is paid pari passu with the other	20	precisely the form don't prove, you mustn't prove.
21	creditors."	21	We have that in the bundle if your Lordships want to
22	LORD JUSTICE LEWISON: Is that what you say the agreement is	22	see it. But it's an example of a very clear and very
23	in this case?	23	different type of subordination agreement.
24	MR SNOWDEN: We do say that is what this agreement is. I'll	24	This structure is important because we say that this
25	come on to in a little while how contingent claims are	25	agreement that we are dealing with in its subordination
	Page 37		Page 39
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1	valued and dealt with. But we say that's exactly what	1	provisions is dealing with a conditional payment-type
2	this type of agreement is, it's a very-well recognised	2	subordination, i.e. you will not be paid unless
3	form. But what it critically doesn't prevent the	3	a condition is satisfied, but in the subordination
4	creditor from doing is proving. He can prove but his	4	provision, clause 5, there is no restriction on proof.
5	claim will be valued at zero because it is subject to	5	I go back to the point I made earlier from the
6	a contingency. When the contingency is satisfied, it is	6	regulatory provisions, the regulatory provisions
7	a proved debt. This puts this subordinated loan firmly	7	expressly acknowledge that one of the things that
8	into the category of proved debts, puts it behind other	8	a subordinated creditor could do was to prove his debt.
9	proved debts but puts it equally with them for payment	9	He had two remedies, one was to petition for winding up
10	of statutory interest.	10	and the other was to prove his debt.
11	LORD JUSTICE BRIGGS: You say this agreement doesn't prevent	11	LORD JUSTICE LEWISON: But is the judge saying you can't
12	you from proving on the assumption that 7(e) does not	12	prove or just that you can't prove yet?
13	have that consequence?	13	MR SNOWDEN: He said you can't prove at all.
14	MR SNOWDEN: Correct. I will come on to that. That's	14	LORD JUSTICE LEWISON: At all.
15	exactly right. The judge	15	MR SNOWDEN: Sorry, until all the other relevant debts had
16	LORD JUSTICE BRIGGS: That in a sense begs the whole	16	been paid.
17	question because at least a central question of	17	LORD JUSTICE LEWISON: So is he saying you can't prove yet
18	construction is whether this agreement taken as a whole	18	MR SNOWDEN: Yes, that's right, at the relevant time. We
19	does prevent the subordinated creditor proving until	19	say he's wrong in that because we can prove. Where it
20	after	20	is important is it has the important effect that if we
21	MR SNOWDEN: Yes.	21	do prove, together with other debts, then we should rank
22	LORD JUSTICE BRIGGS: X, Y, Z has happened.	22	equally with them for payment of statutory interest and
23	MR SNOWDEN: I am going to make this submission. The	23	there's a very good policy reason why that should be so.
24	subordination clause does not. The judge had to find	24	But we rank ahead of then non-provable claims, whereas
25	the prohibition on proving in another clause.	25	the judge put us as subordinated loan he said you can
	Page 38		Page 40

1	prove but after non-provable claims. We say that that,	1	MR SNOWDEN: Yes.
2	with respect, is just not a tenable construction of this	2	LORD JUSTICE LEWISON: So the agreement must contemplate
3	type of subordination agreement.	3	that if the borrower is insolvent you get something,
4	LORD JUSTICE LEWISON: Yes.	4	otherwise what is the point of petitioning?
5	LORD JUSTICE BRIGGS: Proving after could mean two different	5	MR SNOWDEN: Yes. Again, I will come back to this as
6	things. It could mean proving with an acknowledgement	6	a theme, the whole concept of a statutory process of
7	that you're subordinated but proving on day one, or it	7	insolvency is based around the idea that people can
8	could mean only submitting a proof at the time when the	8	prove their debts and then participate in the collective
9	senior debtor has been paid in full. That has	9	process. If we weren't entitled to participate in the
10	a temporal consequence.	10	process, but in fact had to stand behind people who have
11	MR SNOWDEN: Yes.	11	non-provable liabilities who are not catered for by the
12	LORD JUSTICE BRIGGS: If either in this case it would be the	12	statutory scheme at all, then, as your Lordship says,
13	latter, wouldn't it, if 7(e) has the effect the judge	13	what would be the point? We are expressly entitled to
14	said it has? You can't do anything which would impair	14	prove. In the regulator's rules that's what the
15	the payment out in full of the senior debt, and	15	regulator has envisaged that we would be able to do.
16	therefore you couldn't submit a proof. I suppose it	16	More to the point, the clause just simply doesn't
17	might be you could just submit a proof that says, "By	17	stop us doing it. The only clause that the judge has to
18	the way, don't take any notice of this until the senior	18	fasten on to stop us proving was clause 7. Perhaps we
19	debt has been paid out in full".	19	can just look at that, as it were, now.
20	MR SNOWDEN: Of course the judge says I keep coming back	20	The judge found, in the judgment, that it was
21	to it. As you see he put us behind statutory interest	21	clause 7(d) and (e) which prohibited us from proving or
22	and behind non-provable claims.	22	at least proving now. We say that actually that's
23	LORD JUSTICE LEWISON: I think the way you were putting it	23	requiring these clauses to do rather too much work.
24	a few minutes ago was that you can lodge a proof	24	Clause 7(d) says on and after the date of this agreement
25	MR SNOWDEN: Correct.	25	the lender shall not without the prior written consent
	Page 41		Page 43
1	LORD JUSTICE LEWISON: At the moment that the proof is	1	of the FSA:
1 2	LORD JUSTICE LEWISON: At the moment that the proof is lodged it's a contingent debt.	1 2	of the FSA:  "Attempt to obtain repayment of any of the
	· ·		
2	lodged it's a contingent debt.	2	"Attempt to obtain repayment of any of the
2	lodged it's a contingent debt.  MR SNOWDEN: Correct.	2	"Attempt to obtain repayment of any of the Subordinated Liabilities otherwise than in accordance
2 3 4	lodged it's a contingent debt.  MR SNOWDEN: Correct.  LORD JUSTICE LEWISON: And as it becomes clear, if it ever	2 3 4	"Attempt to obtain repayment of any of the Subordinated Liabilities otherwise than in accordance with the terms of this Agreement."
2 3 4 5	lodged it's a contingent debt.  MR SNOWDEN: Correct.  LORD JUSTICE LEWISON: And as it becomes clear, if it ever does, that the other proved creditors will be paid in	2 3 4 5	"Attempt to obtain repayment of any of the Subordinated Liabilities otherwise than in accordance with the terms of this Agreement." LORD JUSTICE LEWISON: That begs the question: if the
2 3 4 5 6	lodged it's a contingent debt.  MR SNOWDEN: Correct.  LORD JUSTICE LEWISON: And as it becomes clear, if it ever does, that the other proved creditors will be paid in full, you can revalue your proof on the basis of the	2 3 4 5 6	"Attempt to obtain repayment of any of the Subordinated Liabilities otherwise than in accordance with the terms of this Agreement." LORD JUSTICE LEWISON: That begs the question: if the agreement allows you to prove, then 7(d) doesn't stop
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1	MR SNOWDEN: For example, I suspect that you shouldn't try	1	of wording that is designed to prohibit a proof of debt,
2	to grab other in other jurisdictions outside the English	2	as opposed to payment, is one which is well known not
3	insolvency process.	3	only to the draftsman of commercial documents but to the
4	LORD JUSTICE MOORE-BICK: Okay.	4	legislator as well. If you were to look at Insolvency
5	MR SNOWDEN: Likewise, (e):	5	Rule 12.3, which in the Red Book is I think at page 990
6	"Take or omit to take any action whereby the	6	to 991, you will see the heading "Provable debts".
7	subordination of the Subordinated Liabilities or any	7	Particularly you can, for example, pick up Rule 2A,
8	part of them might be terminated, impaired or adversely	8	which says:
9	affected."	9	"The following are not provable, except at a time
10	It is the same point. You have to understand what	10	when all other claims of creditors in the insolvency
11	the subordination is, which you do from looking at	11	proceedings have been paid in full with interest under
12	clause 5 before you then define is it being in any way	12	section 189(2), 288 or as the case may be.
13	impaired or affected? But this does not inform you as	13	LORD JUSTICE BRIGGS: Which book are you in?
14	to what the subordination actually amounts to.	14	MR SNOWDEN: It is 991 of my Red Book.
15	But the judge had to bend this agreement to fit his	15	LORD JUSTICE BRIGGS: Oh, I've got it, it is right in the
16	thesis, because what he realised, of course, is that if	16	MR SNOWDEN: Yes.
17	we can prove our debts, for reasons I have already	17	LORD JUSTICE LEWISON: 3919 in the bold numbers.
18	trailed a number of times, it causes insuperable	18	MR SNOWDEN: I think the ones in the bold in the square
19	problems as to how fit this agreement within the English	19	brackets are the paragraph numbers, the provision
20	statutory process and particularly in relation to	20	numbers.
21	payment of statutory interest.	21	LORD JUSTICE LEWISON: Yes, I have it.
22	Just going back to clause sorry, before going	22	MR SNOWDEN: It is 991 in the top middle of the book and
23	back to clause 5, would that be a convenient moment	23	I was drawing your attention to what is 12.3(2A):
24	to	24	"The following are not provable except at a time
25	LORD JUSTICE MOORE-BICK: Is it convenient to you?	25	when all other claims of creditors in the insolvency
	Page 45		Page 47
1	MR SNOWDEN: I am going to back to make some submissions now	1	proceedings have been paid in full with interest under
2	on the specific meaning of clause 5.2(a).	2	section 189(2) Rule 288 or as the case may be."
3	LORD JUSTICE MOORE-BICK: We rise for five minutes.	3	I am just making the point that there the draftsman
4	(11.42 am)	4	of the rules makes the very clear distinction first of
5	(A short break)	5	all between proof and payment and also, for it is worth,
6	(11.47 am)	6	as well acknowledges that statutory interest under
7	LORD JUSTICE MOORE-BICK: Yes, Mr Snowden.	7	section 189(2) and Rule 288 is not a claim of a creditor
8	MR SNOWDEN: Just before turning to the particular	8	in the insolvency proceeding, because otherwise
9	provisions I was going to deal with, can I just draw	9	LORD JUSTICE MOORE-BICK: Does this agreement draw the same
10	your attention to one other sorry, I need to make one	10	
			distinction between proof and payment?
11	correction and one point. Apparently just before the	11	MR SNOWDEN: Yes, we say it does.
11 12	correction and one point. Apparently just before the short adjournment I said that insuperable problems would	11 12	
			MR SNOWDEN: Yes, we say it does.
12	short adjournment I said that insuperable problems would	12	MR SNOWDEN: Yes, we say it does.  LORD JUSTICE MOORE-BICK: I mean the language. Does the
12 13	short adjournment I said that insuperable problems would be caused. Of course my submission was insuperable	12 13	MR SNOWDEN: Yes, we say it does.  LORD JUSTICE MOORE-BICK: I mean the language. Does the language?
12 13 14 15 16	short adjournment I said that insuperable problems would be caused. Of course my submission was insuperable problems are caused by the judge's conclusion, by my	12 13 14 15 16	MR SNOWDEN: Yes, we say it does.  LORD JUSTICE MOORE-BICK: I mean the language. Does the language?  MR SNOWDEN: The language specifies that we shan't receive
12 13 14 15	short adjournment I said that insuperable problems would be caused. Of course my submission was insuperable problems are caused by the judge's conclusion, by my learned friends' argument. I gather on the transcript	12 13 14 15	MR SNOWDEN: Yes, we say it does.  LORD JUSTICE MOORE-BICK: I mean the language. Does the language?  MR SNOWDEN: The language specifies that we shan't receive payment. It contains no restriction on proof. There's
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1	proof because you can't prove pari passu with the senior	1	all creditors on the same footing, irrespective of how
2	creditors.	2	their claims rank. And that we say gives you the
3	MR SNOWDEN: No, we can't be paid pari passu. The point	3	clearest possible indication that, from the legislative
4	I was making, we prove but our claim will be valued at	4	point of view, being kept out of your money during the
5	zero because the contingency, namely the other provable	5	period of an insolvency is something that affects all
6	debts should be paid in full, has not been satisfied.	6	creditors equally, irrespective of how they rank and
7	So that the distributions that will then take place will	7	therefore they should qualify for statutory interest
8	take place to them, not us. When they have been paid	8	together.
9	their proved debts, the condition is satisfied, our	9	Therefore, to take my Lord Lord Justice Briggs'
10	proof of debt is then revalued in accordance with the	10	point, it is not unfair, it is not unjust, that the
11	rules that I'll show you in a short while, and we then	11	imposition of my client's subordinated debt behind other
12	rank as a proved debt. We then are paid and then	12	proved debts might exhaust the fund that would otherwise
13	together, constituting all the proved debts, we qualify	13	be available to pay statutory interest or that we have
14	for statutory interest under Rule 288. Your Lordships	14	to rank equally, because we all suffer the same.
15	will have appreciated that Rule 288 says statutory	15	LORD JUSTICE BRIGGS: But if in clause 5.1 Senior
16	interest is payable on all proved debts, irrespective of	16	Liabilities includes an interest liability you're
17	how they rank.	17	going to say I suppose that statutory interest isn't
18	LORD JUSTICE BRIGGS: But the effect of proof of your debt	18	part of the senior liability?
19	in a particular case I am not sure whether this is	19	MR SNOWDEN: Correct.
20	one of them or not. It could be that nobody gets any	20	LORD JUSTICE BRIGGS: Otherwise it would not knock a large
21	statutory interest because the proof of your	21	hole in the apparent effect of clause 5.1.
22	subordinated debt exhausts the fund.	22	MR SNOWDEN: Because it's not the judge had to strain
23	MR SNOWDEN: It is possible that the fund may be sufficient	23	again to say that it was. The direction to pay
24	to pay other proved debts first, before us, and then be	24	statutory interest is a direction as to how to
25	exhausted when we come in and then nobody gets statutory	25	distribute a surplus. It's not even regarded under the
	Page 49		Page 51
1	interest.	1	rules that I've just shown you, for example, as a claim
1 2	interest.  LORD JUSTICE BRIGGS: So no one gets any interest.	1 2	rules that I've just shown you, for example, as a claim in the insolvency. So I do say that it doesn't fall
		2	· · · · · · · · · · · · · · · · · · ·
2	LORD JUSTICE BRIGGS: So no one gets any interest.	2	in the insolvency. So I do say that it doesn't fall
2 3	LORD JUSTICE BRIGGS: So no one gets any interest.  MR SNOWDEN: Correct. Just so your Lordship understands	2 3	in the insolvency. So I do say that it doesn't fall within the concept of liabilities that rank ahead of us.
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	24	since the company entered into administration."	24	Senior Liabilities protected against the consequences of
D = -:	25	And then (8):	25	the bank's failure?
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1	MR SNOWDEN: Well, with respect, no.	1	about what to do with the money. Why is that no more
2	LORD JUSTICE BRIGGS: If there's a seven or eight-year	2	than a direction to the administrator?
3	period of administration and you don't get any statutory	3	MR SNOWDEN: It is to be contrasted with the assertion of
4	interest.	4	a claim for a debt or a liability
5	MR SNOWDEN: Except you have just assumed, in a sense, what,	5	LORD JUSTICE LEWISON: Sure, but the definition of
6	with respect, you need to prove, which is the payment of	6	"liabilities" in the agreement includes any sum payable
7	statutory interest is in the concept of liabilities.	7	under an enactment by the borrower. So unless you can
8	LORD JUSTICE BRIGGS: Oh, sure. I am just stepping back	8	say this isn't payable by the borrower it is
9	from the agreement and just saying if you were a senior	9	difficult to see why it is payable by the administrator
10	creditor and you incurred not merely being kept out of	10	since it is not coming out of his pocket why doesn't
11	your money but the substitution of your contractual	11	it fall within the definition of liabilities in the
12	right to interest for a statutory right to interest, but	12	agreement?
13	the contractual right to interest would be a protected	13	MR SNOWDEN: Because the concept of liabilities relates to
14	liability under the meaning of the agreement but the	14	things that are payable by the borrower as opposed to
15	substitute statutory one isn't you say, and that isn't	15	being paid as a requirement of
16	protected against a claim for the full principal of the	16	LORD JUSTICE LEWISON: Does administration remove any
17	subordinated debt.	17	interest that the borrower has in the assets like
18	MR SNOWDEN: Right. But the subordinated debt is still	18	a liquidation does?
19	he's still a creditor and, you know, in terms of the	19	MR SNOWDEN: Well, I'll answer the question first of all by
20	policy that underpins this Act, if the policy for	20	reference to the liquidation because we know what the
21	payment of statutory interest is, which it clearly is,	21	answer to that is in the liquidation because of Ayerst.
22	to compensate creditors for being kept out of their	22	LORD JUSTICE LEWISON: Yes.
23	money during the period of insolvency, that affects	23	MR SNOWDEN: In Ayerst the borrower doesn't have the
24	subordinated and unsubordinated creditors equally.	24	right
25	LORD JUSTICE BRIGGS: I understand, but absent any contract	25	LORD JUSTICE LEWISON: That's why I asked about Rule 288 no
	Page 57		Page 59
1	to the contrary if all you agree to do is to subordinate	1	section 189.
2	your debt behind the principal of some other debt, you	2	MR SNOWDEN: I will go back to it because in a sense
3	will share pari passu on statutory interest.	3	I don't think there's been a case that's answered the
4	MR SNOWDEN: Yes. That's why it is important to go back,	4	question in an administration in the way that Ayerst
5	it's important to understand whether we are prevented	5	answered it in a liquidation. But this regime that
6	from proving that.	6	we're looking at under the agreement has to apply,
7	LORD JUSTICE MOORE-BICK: That is critical, isn't it?	7	obviously, equally whether it is a liquidation or
8	MR SNOWDEN: It is.	8	an administration. The provisions in relation to
9	LORD JUSTICE MOORE-BICK: Your argument is you can prove a		statutory interest first came in sorry, they came in
10	the outset even if the proof is valued at nil	10	in 1986 when administrations were invented and they are
11	MR SNOWDEN: Yes.	11	equally as applicable to liquidations as
12	LORD JUSTICE MOORE-BICK: but the fact you can prove	12	administrations.
13	means if the assets are sufficient to get down to the	13	I would say that the entitlement under the statutory
13 14	means if the assets are sufficient to get down to the level of statutory interest, you're in there ahead of	13 14	·
			I would say that the entitlement under the statutory scheme to have a surplus applied by the person who is in control of the surplus, whether that be the liquidator
14	level of statutory interest, you're in there ahead of	14	scheme to have a surplus applied by the person who is in
14 15	level of statutory interest, you're in there ahead of statutory interest.	14 15	scheme to have a surplus applied by the person who is in control of the surplus, whether that be the liquidator
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1	payable by the borrower. It's a sum and it's payable,	1	statutory process.
2	but you say it's not payable by the borrower. I am	2	LORD JUSTICE BRIGGS: Yet again that's just part of the
3	looking at the definition of "liabilities" in the	3	definition of solvency, to see whether you can get paid
4	agreement on page 203.	4	without an insolvency process, isn't it?
5	(Pause).	5	MR SNOWDEN: No. In determining whether we can get paid the
6	MR SNOWDEN: The answer to my Lord's question is, yes, we do	6	borrower has to be solvent, both before and after
7	say it's not a liability because of the way in which the	7	payment, and in determining whether the borrower is
8	statute approaches the requirement for the surplus to be	8	solvent you disregard non-provable claims. Therefore,
9	paid.	9	once we've paid everything up to non-provables, we get
10	LORD JUSTICE LEWISON: But which bit of the contractual	10	paid. So far as non-provables are concerned in fact,
11	definition of "liability" does it fall outside? It is	11	because they don't constitute liabilities, we say we get
12	a sum, is it not?	12	paid because the conditions are satisfied at the earlier
13	MR SNOWDEN: It is a sum but it is not	13	stage, namely when the provable debts have been paid to
14	LORD JUSTICE LEWISON: And it is payable?	14	the other unsubordinated creditors.
15	MR SNOWDEN: But it's not payable by the borrower.	15	So it is different answer. Of course we accept
16	LORD JUSTICE LEWISON: So you say it is not payable by the	16	statutory interest is part of the statutory scheme,
17	borrower and that's why it's not in the definition.	17	necessarily it's provided for. But non-provable
18	MR SNOWDEN: Indeed, if you go back to, for example, the	18	liabilities, by definition, are outside the statutory
19	Rule 12.3(2A) that I referred you to, that doesn't treat	19	scheme. So there's a different reason why you ignore
20	it as part of the claim in the insolvency.	20	them.
21	LORD JUSTICE LEWISON: I understand that, but the point I am	21	I've made my submissions in relation to statutory
22	putting to you is: does it have to be a claim within the	22	interest because, as I say, it is important as a matter
23	insolvency if it is a sum payable by the borrower? Just	23	of policy because the judge also came back to this
24	to fall within the definition of "liabilities". I think	24	policy question to ask: is it fair, if you like, is it
25	your answer is it's not payable by the borrower.	25	right? Could the contracting parties have envisaged
	Page 61		Page 63
1	MR SNOWDEN: It's not.	1	LORD JUSTICE LEWISON: Your point is you're claiming as
2	LORD JUSTICE BRIGGS: You presumably say the same in	2	a creditor, not as a member?
	relation to non-provable debts. Although they are if		· · · · · · · · · · · · · · · · · · ·
3		3	MR SNOWDEN: Correct.
4	anything only a liability of the borrower, you say they	3 4	MR SNOWDEN: Correct.  LORD JUSTICE LEWISON: If regulators had wanted banks to
	anything only a liability of the borrower, you say they fall outside the definition of "liabilities" do you,		
4		4	LORD JUSTICE LEWISON: If regulators had wanted banks to
4 5	fall outside the definition of "liabilities" do you,	4 5	LORD JUSTICE LEWISON: If regulators had wanted banks to increase their equity capital they would have said so,
4 5 6	fall outside the definition of "liabilities" do you, because they're not provable?	4 5 6	LORD JUSTICE LEWISON: If regulators had wanted banks to increase their equity capital they would have said so, since they were allowing them to have loans.
4 5 6 7	fall outside the definition of "liabilities" do you, because they're not provable?  MR SNOWDEN: Yes. I mean, they are non-provable	4 5 6 7	LORD JUSTICE LEWISON: If regulators had wanted banks to increase their equity capital they would have said so, since they were allowing them to have loans.  MR SNOWDEN: Yes, and the subordination provisions don't
4 5 6 7 8	fall outside the definition of "liabilities" do you, because they're not provable?  MR SNOWDEN: Yes. I mean, they are non-provable liabilities, as we'll see when we look at what	4 5 6 7 8	LORD JUSTICE LEWISON: If regulators had wanted banks to increase their equity capital they would have said so, since they were allowing them to have loans.  MR SNOWDEN: Yes, and the subordination provisions don't prevent us proving. They expressly adopt a different
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1	MR SNOWDEN: I suspect that in the course of that exchange		established that at least temporarily they existed
2	we have dealt with if you just give me one moment.	2	almost, that's the T&N case.
3	(Pause).	3	LORD JUSTICE LEWISON: I am just wondering if you were
4	I think it's probably convenient for me actually to	4	saying T&N is in some way wrong, or is there no such
5	go to some of the authorities now that just slightly	5	thing?
6	underpin a number of the points that I've made during	6	MR SNOWDEN: It is possible for them to be a non-provable
7	that exchange, because I think we've dealt with it on	7	debt, although very much by way of oversight or
8	the basis that I was trying to explain the rationale for	8	exception because Parliament inevitably tries to make
9	the structure.	9	everything fit within the statutory process. But my
10	Can I first of all make good the point that I think	10	point is (a) concurrency conversion claims are not
11	is actually common ground, or at least certainly the	11	such and that's for this afternoon.
12	bald point is common ground, which is that a liquidation	12	LORD JUSTICE LEWISON: Yes.
13	or an administration is a collective process for	13	MR SNOWDEN: But in any event my important point currently
14	enforcement of provable debts, that is it is concerned	14	for the purpose of the subordination argument is that
15	with distributing assets of the company amongst	15	they are not by definition provable and they do not
16	creditors who have proved their debts. I think my	16	feature in any way, shape or form in the statutory
17	learned friend Mr Dicker's skeleton, paragraph 6, sub 2	17	insolvency regime.
18	and sub 3 make that point; for which we say it is	18	LORD JUSTICE MOORE-BICK: Well, yes.
19	important to understand that to get into the collective	19	LORD JUSTICE BRIGGS: Save in the general sense I suppose
20	process you need to prove your debt.	20	that the liquidator can apply to the court for
21	A liquidator or an administrator has no statutory	21	directions, which is presumably what is happening in the
22	power or remit to pay debts which have not been proved	22	administration context in Waterfall II?
23	in the course of the distribution. There are a number	23	MR SNOWDEN: The administrator is applying for directions,
24	of cases that demonstrate that. Perhaps I can pick	24	that's right. What appears to be happening is the court
25	briefly on the most important. I think the first is	25	is giving the sort of directions that it might give
	Page 65		Page 67
1	probably Government of India v Taylor.	1	LORD JUSTICE BRIGGS: But I think you say it has no business
2	LORD JUSTICE MOORE-BICK: Is this in dispute, that the	2	to be giving.
3	liquidator can't pay debts which haven't been proved?	3	MR SNOWDEN: There doesn't seem to be an awful lot of
4	MR SNOWDEN: Well, in a sense my learned friends duck the	4	jurisdictional basis for it, if I may put it that way.
	MR SNOWDEN: Well, in a sense my learned friends duck the question because	4 5	
4			jurisdictional basis for it, if I may put it that way.
4 5	question because	5	jurisdictional basis for it, if I may put it that way.  Certainly it's not under the insolvency regime at all.
4 5 6	question because LORD JUSTICE MOORE-BICK: I just find it slightly	5 6	jurisdictional basis for it, if I may put it that way.  Certainly it's not under the insolvency regime at all.  These aren't assets which are held on some sort of trust
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1 bioder of the company which has a surplus which, unless 2 it to be paid back to the startory direct should be a variable to meet those claims. You're saying that it's 3 no part of the process for the court to give discetions 4 on part of the process for the court to give discetions 5 or to quantify, or to askis in the quantification of 6 arrything like that, of those additional mon-provable 1 claims before the money's either paid hack to the 8 shareholders or what happens to it? 9 MR SNOWDEN: What I am actually saying, because — to say if 10 is no part of the court's — I must are the court will 11 find a way to do something which it muy think is 12 entitely sensible and it has to be done in some way. 13 But the important point is, whatever it is doing, it's 14 not determining or establishing those claims in the 15 importancy. 16 LORD JUSTICE IEMSON: Isa' it a sort of inter-pleader? 17 Here is liquidator who says. "The got a surplus on my 18 hands. I know it doesat belong to me. On the one hand 19 there are the members who say! should give it to them 20 and on the other hand there are tort victims, or whoever 21 it is, who say! should give it to them 22 and on the other hand there are tort victims, or whoever 23 to do." 24 To Dovid Richards I in EAN envisaged it would happen 25 because his analysis, as well lise, is you get to the 26 Page 69  1 end of the statutory process and then in fact the 27 stantory process requires the romines to he push to the 28 stantory process requires the romines to he push to the 29 conversion claims, but critically for subordination — 20 po back to the woodle of claims of the currency 21 of the critical point from my perspective on the question 22 of the court and per directively 23 non-provible claims they could intervene and say "Please 24 non-provable claims they could intervene and say "Please 25 will you fifthe stay" — 26 LORD JUSTICE LEWISON: But that effectively 27 an inter-pleader? 28 MR SNOWDEN: Perhaps hark one way of looking at it, but 29 the critical point from my per				
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and on the other hands there are tort victims, or whoever to too."  MR SNOWDEN: That is not actually the way that I think to and not here there there was well to a surface in Incite to a surface of the sustatory process and then in fact the page 69  MR SNOWDEN: That's not actually the way that I think to a members. It's at that stage, he says, that if there are non-provable claims they could intervene and say "Please will you filt the says" of subordination—and indeed when we come to currency of the critical point from my perspective on the question of subordination—and indeed when we come to currency of MR SNOWDEN: It is capital I, don't forget. It's an incorprovable debts in the critical point from my perspective on the question of subordination—and indeed when we come to currency of MR SNOWDEN: It is capital I, don't forget. It's mon-provable debts if the pumment is part of the insolvency, you say they are the final stage of the insolvency, you say they are the final stage of the insolvency, you say they are the final stage of the insolvency process. that the trinces is an insolvency process. The company is under an object of the case is to look at clause of the case is to look at clause of 5.2(a), which is the subordination of may insolvency and in the case is to look at clause of 5.2(a), which is the subordination provision, which is the case is to look at clause of 5.2(a), which is the subordination provision, which is the case is to look at clause of 5.2(a), which is the subordination provision, which is the case is to look at clause of 5.2(a), which is the subordination provision, which is the case is to look at clause of 5.2(a), which is the subordination provision, which is the case is to look at clause of 5.2(a), which is the subordination provision, which is the sabordination in solution is doing at it is doing, it's doing it is doing. It is doing, it's doing it is doing it is doing. It	4	no part of the process for the court to give directions	4	MR SNOWDEN: Even if in a sense your Lordship were right on
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shareholders or what happens to it?  MR SNOWDEN: What I am actually saying, because — to say it 9  MR SNOWDEN: What I am actually saying, because — to say it 9  is no part of the courts — I am sure the court will 10  is in op art of the courts — I am sure the court will 10  if find a way to do something which it may think, is 11  entirely sensible and it has to be done in some way. 12  entirely sensible and it has to be done in some way. 13  But the important point is, whatever it is doing, it's 14  not determining or establishing those claims in the 15  insolvency. 15  I LORD JUSTICE HEWISON: Isn't it a sort of inter-pleader? 16  Here is liquidator who says, Tve got a surplus on my 17  Here is liquidator who says, Tve got a surplus on my 18  MR SNOWDEN: Isn't it a sort of inter-pleader? 17  Here is liquidator who says, Tve got a surplus on my 19  MR SNOWDEN: Isn't it a sort of inter-pleader? 19  I who say I should give it to them 19  David Richards Jin T&N envisaged it would happen 19  David Richards Jin T&N envisaged it would happen 19  David Richards Jin T&N envisaged it would happen 19  David Richards Jin T&N envisaged it would happen 19  David Richards Jin T&N envisaged it would happen 19  Page: 69  10  David Richards Jin T&N envisaged it would happen 19  a members. If's at thut stage, he says, that if there are not payable of cear in the plant of the tear in the standard or all of it should be paid to the member 19  a montprovable claims they say that I think 19  a miner-pleader? 19  an inter-pleader? 19  MR SNOWDEN: That's not actually the way that I think 19  a mater-pleader? 19  MR SNOWDEN: That's not actually the way that I think 19  a miner-pleader? 19  a miner-pleader? 19  MR SNOWDEN: That's not actually the way that I think 19  a miner-pleader? 19  a miner-pleader? 19  MR SNOWDEN: The statutory process and then in fact the 19  a miner-pleader? 19  MR SNOWDEN: The statutory scenes are protected in the pleader 19  a miner-pleader? 19  MR SNOWDEN: The statutory scenes is for the benefit of people who	6	anything like that, of those additional non-provable	6	LORD JUSTICE BRIGGS: I am not sure I am, I am asking you
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But the important point is, whatever it is doing, it's insolvency.  12	10	is no part of the court's I am sure the court will	10	requires sorry, which excludes from consideration
But the important point is, whatever it is doing, it's not determining or establishing those claims in the not determining or establishing those claims in the lisinsolvency.  16 LORD JUSTICE LEWISON: Isn't it a sort of inter-pleader? Here is liquidator who says. "Two got a surplus on my labels letter terms, deal with payment of the ultimate surplus to the members, if it does, but the existence of a non-provable debt mises a proper question whether there are the members who say I should give it to them and on the other hand there are tort victims, or whoever it is, who say I should give it to them. Tell me what 21 to do."  20 and on the other hand there are tort victims, or whoever 22 to do."  21 to do."  22 to do."  23 MR SNOWDEN: That's not actually the way that I think 24 David Richards J in T&N envisaged it would happen 24 because his analysis, as well see, is you get to the Page 69 Page 71  1 end of the statutory process and then in fact the 2 statutory process requires the monies to be paid to the 2 members. It's at that stage, he says, that if there are 3 members. It's at that stage, he says, that if there are 4 non-provable claims they could intervene and say "Please 4 non-provable claims they could intervene and say "Please 5 will you lift the stay" - 5 people who prove their claims. That's the collective 2 process. Anybody who doesn't prove his claim is shut 3 of subordination - and indeed when we come to currency 5 to 4 substitutely 10 go back to the wording of clause 5.2(a). These are not 11 conversion claims, but critically for subordination - 4 provided the statutory interest. 1 says of the insolvency process. 1 say it were in spite of the 4 determined in the Insolvency.  11 LORD JUSTICE LEWISON: In the insolvency, you say they are 6 to 4 minute of the stabilished or 6 subordination - 4 minute of the subordination - 4 minute of the subordination - 4 minute of the subordination - 5 minute of the subordination - 4 minute of the subordination - 5 minute of the subordination - 4 minute of the subordina	11	find a way to do something which it may think is	11	obligations which are not payable or capable of being
14 saying if the insolvency process does, in statutory 15 liasolvency. 16 LORD JUSTICE LEWISON: Isn't it a sort of inter-pleader? 17 Here is liquidator who says. "I've got a surplus on my 18 hands. I know it doesn't belong to me. On the one hand 19 there are the members who say I should give it to them 20 and on the other hand there are tort victims, or whoever 21 it is, who say I should give it to them. Tell me what 22 to do." 23 MR SNOWDEN: That's not actually the way that I think 24 David Richards J in T&N envisaged it would happen 25 because his analysis, as we'll see, is you get to the 26 Page 60 27 to do the statutory process and then in fact the 28 statutory process requires the monies to be paid to the 29 statutory process requires the monies to be paid to the 30 members. It's at that stage, he says, that if there are 4 non-provable claims they could intervene and say "Please 4 non-provable claims they could intervene and say "Please 4 will you lift the stays" - 5 will you lift the stays - 6 LORD JUSTICE LEWISON: Isn't that effectively 9 an inter-pleader? 8 MR SNOWDEN: Perhaps that's one way of looking at it, but 10 of subordination - and indeed when we come to currency 11 conversion claims, but critically for subordination - 12 go back to the wording of clause \$2.4a). These are not 13 claims which are capable of being established or 14 determined in the Insolvency. 15 LORD JUSTICE LEWISON: In the insolvency, you say they are 16 established, if at all, outside the insolvency, you say they are 17 non-provable debts, if the payment of the surplus back 28 to the wording of clause \$2.4a). These are not 19 LORD JUSTICE LEWISON: Yes. 29 LORD JUSTICE LEWISON: Yes. 20 LORD JUSTICE LEWISON: Set, in a case where there are not 21 conversion claims, but critically for subordination - 22 to the members is part of the insolvency, you say they are 29 to the members is part of the insolvency process, taking 20 the final stage of the insolvency process, taking 21 to the members is part of the insolvency process, taking	12	entirely sensible and it has to be done in some way.	12	established or determined in an insolvency.
15 black letter terms, deal with payment of the ultimate surplus to the members, if it does, but the existence of a non-provable debt raises a proper question whether there are the members who say! should give it to them and on the other hand there are tort victims, or whoever it is do."  16 LORD JUSTICE LEWISON: Isn't it a sort of inter-pleader?  17 Here is liquidator who says, "Tve got a surplus on my and on the other hand there are tort victims, or whoever it to them and on the other hand there are tort victims, or whoever it is do."  20 and on the other hand there are tort victims, or whoever it to do."  21 tit is, who say! should give it to them. Tell me what to do."  22 to do."  23 MK SNOWDEN: That's not actually the way that I think pages as the sandysis, as well see, is you get to the page 69  24 David Richards J in T&N envisaged it would happen at the quantification of the amount of that claim and deciding any dispute about whether that claim is prior in the waterfall to the members claims not part of the insolvency process, merely because there isn't a rule page 71  11 end of the statutory process and then in fact the statutory process, merely because there isn't a rule page 71  11 end of the statutory process and then in fact the statutory process and then in fact the statutory process, merely because there isn't a rule page 71  12 about it in the Insolvency Rules, other than the rule tha	13	But the important point is, whatever it is doing, it's	13	LORD JUSTICE BRIGGS: But I am looking at 5.2(a) and I am
Here is liquidator who says, "Twe got a surplus on my hands. I know it doesn't belong to me. On the one hand there are the members who say I should give it to them and on the other hand there are tort victims, or whoever ti tis, who say I should give it to them and on the other hand there are tort victims, or whoever ti tis, who say I should give it to them and on the other hand there are tort victims, or whoever to do."  MR SNOWDEN: That's not actually the way that I think because his analysis, as we'll see, is you get to the Page 69  end of the statutory process and then in fact the statutory process and then in fact the members. It's at that stage, he says, that if there are non-provable claims they could intervene and say "Please liquid the critical point from my perspective on the question of subordination— and indeed when we come to currency of a babordination— and indeed when we come to currency to determined in the Insolvency.  MR SNOWDEN: Perhaps that's one way of looking at it, but determined in the Insolvency.  LORD JUSTICE LEWISON: Yes. LORD JUSTICE HEWISON: Yes. LORD JUSTICE HEWISON: Yes. LORD JUSTICE HEWISON: Yes. LORD JUSTICE REGGS: But, in a case where there are no to prove the fermine what the resolution of any issue whether there should be that the resolution of any issue whether there should be that the resolution of any issue whether there should be that the resolution of any issue whether there should be that the rink about the members who say is not an norther	14	not determining or establishing those claims in the	14	saying if the insolvency process does, in statutory
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there are the members who say I should give it to them and on the other hand there are tort victims, or whoever it is, who say I should give it to them there are the members who say I should give it to them to other hand there are tort victims, or whoever it is, who say I should give it to them there are to members who say I should give it to them there are tort victims, or whoever to do."  MR SNOWDEN: That's not actually the way that I think the page 69  Page 69  The end of the statutory process and then in fact the statutory process requires the monies to be paid to the members. It's at that stage, he says, that if there are members. It's at that stage, he says, that if there are the LORD JUSTICE LEWISON: Isn't that effectively an inter-pleader?  MR SNOWDEN: Perhaps that's one way of looking at it, but the critical point from my perspective on the question of subordination and indeed when we come to currency to of subordination and indeed when we come to currency to determined in the Insolvency, you say they are conversion claims, but critically for subordination the determined in the Insolvency, you say they are conversion claims, but critically for subordination the determined in the Insolvency, you say they are conversion claims, but critically for subordination the determined in the Insolvency, you say they are conversion claims, but critically for subordination the conversion claims, but critically for subordination the determined in the Insolvency, you say they are conversion claims, but critically for subordination the determined in the Insolvency, you say they are conversion claims, but critically for subordination the page 69  LORD JUSTICE LEWISON: Yes.  LORD JUSTICE LEWISON: Yes.  LORD JUSTICE LEWISON: In the insolvency, you say they are conversion claims, but critically for subordination the page 69  LORD JUSTICE BRIGGS: But, in a case where there are no non-provable debts, if the payment of the surplus back to the members at that primary stage not be  LORD JUSTICE BRI	16	LORD JUSTICE LEWISON: Isn't it a sort of inter-pleader?	16	surplus to the members, if it does, but the existence of
there are the members who say I should give it to them and on the other hand there are tort victims, or whoever it is, who say I should give it to them. Tell me what to do."  MR SNOWDEN: That's not actually the way that I think David Richards J in T&N envisaged it would happen because his analysis, as we'll see, is you get to the Page 69  end of the statutory process and then in fact the statutory process requires the monies to be paid to the statutory process requires the monies to be paid to the mon-provable claims they could intervene and say "Please will you lift the stay" —  LORD JUSTICE LEWISON: Isn't that effectively the critical point from my perspective on the question of subordination — and indeed when we come to currency for subordination — and indeed when we come to currency local claims which are capable of being established or determined in the Insolvency.  MR SNOWDEN: It is capital I, don't forget. It's an Insolvency process, the new condition of any issue whether there are no non-provable claims. The statutory insolvency process, claim established of determined or to determine which are capable of being established or determined i	17	Here is liquidator who says, "I've got a surplus on my	17	a non-provable debt raises a proper question whether
and on the other hand there are tort victims, or whoever it it is, who say I should give it to them. Tell me what to do."  22 to do."  23 MR SNOWDEN: That's not actually the way that I think 24 David Richards J in T&N envisaged it would happen 25 because his analysis, as we'll see, is you get to the Page 69  24 David Richards J in T&N envisaged it would happen 26 because his analysis, as we'll see, is you get to the Page 70  25 David Richards J in T&N envisaged it would happen 27 in the waterfall to the members claims not part of the insolvency process and then in fact the 28 statutory process requires the monies to be paid to the 29 that says if you have a problem not dealt with by these 29 and 19 to the court and get directions?  4 non-provable claims they could intervene and say "Please 29 will you lift the stay" — 5 people who prove their claims. That's the collective 29 process. Anybody who doesn't prove his claim is shut 20 out from enforcing their claim. So it's a collective 20 process. Anybody who doesn't prove his claim is shut 20 out from enforcing their claim. So it's a collective 20 provable claims, but critically for subordination — 11 statutory interest.  20 Subordination — and indeed when we come to currency 20 go back to the wording of clause 5.2(a). These are not 21 daims which are capable of being established or 21 daims which are capable of being established or 22 daims which are capable of being established or 23 determined in the Insolvency. 14 fact that there is a statutory insolvency process of 24 non-provable clebts, if the payment of the unsolvency, process, then how can 24 the resolution of any issue whether there should be that 24 liquidation, adversely to whoever is in control of it. 25 payment back to the members at that primary stage not be 25 can I show you what David Richards J said —	18	hands. I know it doesn't belong to me. On the one hand	18	that should or all of it should be paid to the members
ti is, who say I should give it to them. Tell me what to do."  22	19	there are the members who say I should give it to them	19	without taking any account of the non-provable claim,
to do."  22 the quantification of the amount of that claim and deciding any dispute about whether that claim is prior in the waterfall to the members claims not part of the insolvency process, merely because there isn't a rule Page 69  23 deciding any dispute about whether that claim is prior in the waterfall to the members claims not part of the insolvency process, merely because there isn't a rule Page 71  1 end of the statutory process and then in fact the statutory process and then in fact the 2 statutory process requires the monies to be paid to the 3 members. It's at that stage, he says, that if there are 4 non-provable claims they could intervene and say "Please 5 will you lift the stay" 5 people who prove their claims. That's the collective people who prove their claims. That's the collective people who prove their claims. That's the collective out from enforcing their claim. So it's a collective out from enforcing their claim. So it's a collective out from enforcing their claim. So it's a collective out from enforcing their claim. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a collective out from enforcing their claims. So it's a colle	20	and on the other hand there are tort victims, or whoever	20	which appears to feature on Lord Neuberger's waterfall
David Richards J in T&N envisaged it would happen because his analysis, as we'll see, is you get to the Page 69  end of the statutory process and then in fact the statutory process requires the monies to be paid to the members. It's at that stage, he says, that if there are mon-provable claims they could intervene and say "Please will you lift the stay"  CARD JUSTICE LEWISON: Isn't that effectively an inter-pleader?  MR SNOWDEN: Perhaps that's one way of looking at it, but conversion claims, but critically for subordination go back to the wording of clause 5.2(a). These are not claims which are capable of being established or established, if at all, outside the insolvency, you say they are established. If at all, outside the insolvency.  LORD JUSTICE LEWISON: In the insolvency, you say they are established. If at all, outside the insolvency.  LORD JUSTICE LEWISON: It is capital I, don't forget. It's non-provable debts, if the payment of the surplus back to the members is part of the payment back to the members at that primary stage not be  ARR SNOWDEN: The statutory scheme is for the benefit of people who prove their claims. That's the collective for people who prove their claims. That's the collective people who prove their claims. So it's a collective club, if you like.  LORD JUSTICE BRIGGS: They are shut out until those with provable debts have all been paid and have got their statutory interest.  MR SNOWDEN: Yes. At that stage, as T&N makes clear, what happens is simply it happens as it were in spite of the fact that there is a statutory insolvency process, only one non-provable claimant. To establish or to have so mon-provable debts, if the payment of the surplus back to the members is part of the insolvency, process, then how can the final stage of the insolvency process, then how can the final stage of the insolvency process, then how can the final stage of the insolvency process, then how can the final stage of the insolvency process, then how can	21	it is, who say I should give it to them. Tell me what	21	ahead of the members, why is not the ascertainment of
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19 LORD JUSTICE LEWISON: Yes. 19 his claim established or determined or to determine 20 LORD JUSTICE BRIGGS: But, in a case where there are no 21 non-provable debts, if the payment of the surplus back 22 to the members is part of the insolvency process, taking 23 the final stage of the insolvency process, then how can 24 the resolution of any issue whether there should be that 25 payment back to the members at that primary stage not be 26 whether the company is under an obligation to him, it's 27 not a process of insolvency that's used at all. It is 28 simply the ordinary writ claim form process, which he 29 would have to institute adversely to the company in 20 liquidation, adversely to whoever is in control of it. 21 Can I show you what David Richards J said				·
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	20 21 22 23	LORD JUSTICE BRIGGS: But, in a case where there are no non-provable debts, if the payment of the surplus back to the members is part of the insolvency process, taking the final stage of the insolvency process, then how can	20 21 22 23	whether the company is under an obligation to him, it's not a process of insolvency that's used at all. It is simply the ordinary writ claim form process, which he would have to institute adversely to the company in
Page /0 Page /2	20 21 22 23 24	LORD JUSTICE BRIGGS: But, in a case where there are no non-provable debts, if the payment of the surplus back to the members is part of the insolvency process, taking the final stage of the insolvency process, then how can the resolution of any issue whether there should be that	20 21 22 23 24	whether the company is under an obligation to him, it's not a process of insolvency that's used at all. It is simply the ordinary writ claim form process, which he would have to institute adversely to the company in liquidation, adversely to whoever is in control of it.
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	I		
1	LORD JUSTICE BRIGGS: He may have said that in T&N but is	1	of the process or, as it were, at the last minute of the
2	that what has happened in Waterfall II?	2	process.
3	MR SNOWDEN: It doesn't appear to be, no.	3	LORD JUSTICE BRIGGS: Before the last stage in the statutory
4	LORD JUSTICE BRIGGS: Which I think has been heard.	4	process occurs, namely the payment to members.
5	MR SNOWDEN: Yes.	5	MR SNOWDEN: That's right.
6	LORD JUSTICE BRIGGS: We don't know what happened during the	6	LORD JUSTICE BRIGGS: My problem is the statutory nature of
7	hearing.	7	the obligation to pay the members.
8	MR SNOWDEN: No.	8	MR SNOWDEN: But their assertion of rights is adverse to the
9	LORD JUSTICE BRIGGS: But presumably that wasn't a process	9	person conducting the insolvency process. It's not
10	of the adjudication of a series of risks in relation to	10	a co-operative process for him in the same way proof of
11	which a stay had been lifted?	11	debt is, where he is statutorily a liquidator, for
12	MR SNOWDEN: No. But the important point is that the	12	example, is statutorily empowered to determine, subject
13	obligations that are being determined he was	13	to appeal to the court, the proof.
14	answering a series of questions that were posed by the	14	LORD JUSTICE BRIGGS: Yes.
15	administrators	15	MR SNOWDEN: This is something that says the claim will be
16	LORD JUSTICE LEWISON: Your point really is that clause	16	put in and it will put in against the company, of which
17	5.2(a) must have been intended to exclude something	17	he happens to be the controller for the time being,
18	which was otherwise the liability of the borrower.	18	because he hasn't remitted the funds; but it's a claim
19	MR SNOWDEN: Correct.	19	against the company and it's an adverse claim. The
20	LORD JUSTICE LEWISON: If is not excluding non-provable	20	determination or establishment or determination of
21	claims, what is it supposed to be doing?	21	that obligation on the company is just not part of this
22	MR SNOWDEN: Absolutely. That's why liabilities can't mean	22	Insolvency with a capital I. That is why I do say that
23	in the sense that the judge thought it meant as meaning	23	currency conversion claims or any non-provable claim
24	everything, something has to be excluded. I am about to	24	falls outside clause 5.2(a).
25	show you Government of India v Taylor because it is	25	Can I show you very quickly Government of
	Page 73		Page 75
1	accepted, that, for example, foreign revenue claims	1	India v Taylor and then work my way through to T&N?
2	which are not provable I think would fall within	2	LORD JUSTICE BRIGGS: Yes.
3	clause 5.2(a).	3	MR SNOWDEN: Just simply so you've seen the authorities tha
4	LORD JUSTICE BRIGGS: Could you pursue those by an ordinary	4	I have referred to.
5	claim?	5	It's in bundle 1A of the authorities at tab 45.
6	MR SNOWDEN: No, they are not enforceable, they are not	6	(Pause).
7	provable.	7	The facts, as your Lordships appreciate, are
8	LORD JUSTICE BRIGGS: In any way; it is not just they are	8	essentially just an attempt to prove it was actually
9	not provable in insolvency, you could not establish them	9	a rejection of a proof claim. You can see that because
10	by any process?	10	at page 492 of the report the first paragraph on
11	MR SNOWDEN: Not in this country; but you could in the	11	page 492, this was an appeal against a rejection of
12	foreign country, obviously.	12	proof.
13	LORD JUSTICE BRIGGS: But then they wouldn't be enforceable?	13	For present purposes I can get what I need from
14	MR SNOWDEN: Sorry?	14	page 508 to 509, Viscount Simmons, and the argument, as
15	LORD JUSTICE BRIGGS: They wouldn't be enforced here.	15	you'll see, in the passage that's highlighted just
16	MR SNOWDEN: That's right.	16	towards the foot of page 508 is that the respondents
17			
	LORD JUSTICE BRIGGS: Even if it was established within the	17	were saying that it means it says:
18	EU.	18	"On the one hand it is said by the respondents that
19	EU.  MR SNOWDEN: Which indicates that one is looking at this	18 19	"On the one hand it is said by the respondents that it means only those obligations which were enforceable
19 20	EU.  MR SNOWDEN: Which indicates that one is looking at this statutory insolvency process in this country. The point	18 19 20	"On the one hand it is said by the respondents that it means only those obligations which were enforceable in the English court and on the other hand its meaning
19 20 21	EU.  MR SNOWDEN: Which indicates that one is looking at this statutory insolvency process in this country. The point is the statutory insolvency process doesn't exist for	18 19 20 21	"On the one hand it is said by the respondents that it means only those obligations which were enforceable in the English court and on the other hand its meaning is extended, at least so far as to cover liabilities for
19 20 21 22	EU.  MR SNOWDEN: Which indicates that one is looking at this statutory insolvency process in this country. The point is the statutory insolvency process doesn't exist for the benefit of people who are not beneficiaries under	18 19 20 21 22	"On the one hand it is said by the respondents that it means only those obligations which were enforceable in the English court and on the other hand its meaning is extended, at least so far as to cover liabilities for foreign tax in respect of which the company might have
19 20 21 22 23	EU.  MR SNOWDEN: Which indicates that one is looking at this statutory insolvency process in this country. The point is the statutory insolvency process doesn't exist for the benefit of people who are not beneficiaries under the statutory scheme because they can't prove their	18 19 20 21 22 23	"On the one hand it is said by the respondents that it means only those obligations which were enforceable in the English court and on the other hand its meaning is extended, at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.
19 20 21 22 23 24	EU.  MR SNOWDEN: Which indicates that one is looking at this statutory insolvency process in this country. The point is the statutory insolvency process doesn't exist for the benefit of people who are not beneficiaries under the statutory scheme because they can't prove their claims or don't prove their claims. If they have	18 19 20 21 22 23 24	"On the one hand it is said by the respondents that it means only those obligations which were enforceable in the English court and on the other hand its meaning is extended, at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.  "My Lords I have no hesitation in adopting the
19 20 21 22 23	EU.  MR SNOWDEN: Which indicates that one is looking at this statutory insolvency process in this country. The point is the statutory insolvency process doesn't exist for the benefit of people who are not beneficiaries under the statutory scheme because they can't prove their	18 19 20 21 22 23	"On the one hand it is said by the respondents that it means only those obligations which were enforceable in the English court and on the other hand its meaning is extended, at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.

1	duty of the liquidator to discharge out of the assets in	1	would be a correct statement of the law."
2	his hands those claims which are legally enforceable and	2	We then move on to Wight v Eckhardt Marine. You see
3	to hand over any surplus to the contributories. I find	3	that in authorities bundle 1C. (Pause).
4	no words which vest in him a discretion to meet claims	4	It is tab 75.
5	which are not legally enforceable."	5	The facts of this case are perhaps your Lordships
6	And then on to the rest of it	6	may well know the facts but can I briefly summarise
7	LORD JUSTICE BRIGGS: Thus far it would accommodate any	7	them. The company concerned was a Cayman Islands
8	claim against the company which could be enforced in	8	company. It was subject to a debt which was governed by
9	a court, even if not by way of proof in the liquidation.	9	the law of Bangladesh. There was a scheme of
10	MR SNOWDEN: But we know the process of insolvency is	10	arrangement in Bangladesh under which the debt was
11	a collective process and the method of enforcement of	11	extinguished and the question was whether the debt was
12	claims is through the process of proof of debt, unless	12	provable in the Cayman Islands' insolvency. The
13	the court otherwise ordered.	13	argument the Privy Council was dealing with was that on
14	LORD JUSTICE BRIGGS: Yes, but his distinction, and you car	14	the making of the winding-up order in the Cayman Islands
15	see that from looking at the argument, is between that	15	a statutory scheme came into existence under which, by
16	which is enforceable in this country and that which is	16	the making of the winding-up order, the debts of all the
17	isn't.	17	creditors were replaced by a statutory right to prove in
18	MR SNOWDEN: Correct. I understand	18	the insolvency of the company in the Cayman Islands. So
19	LORD JUSTICE BRIGGS: The classic example, as you said,	19	it was said what subsequently happened in Bangladesh in
20	being foreign currency claims of the latter class.	20	relation to the scheme extinguishing the underlying debt
21	MR SNOWDEN: I understand the point. There are a series of	21	is irrelevant: we are entitled to continue to prove our
22	these cases.	22	claims because we have new claims in the insolvency in
23	LORD JUSTICE BRIGGS: Yes.	23	the Cayman Islands. The Privy Council said, no, the
24	MR SNOWDEN: This is a case which basically circumscribes	24	making of a winding-up order does not alter or have
25	the power of the liquidator to pay claims.	25	a substantive effect upon the continuing existence of
	Page 77		Page 79
1	The next authority I was going to refer you he	1	the underlying debt.
2	also refers to the Art Reproduction Co case. You'll see	2	We say that's as far as it goes because what it
3	at the end of his judgment at page 509 in the middle he	3	certainly doesn't go on to say, for reasons I'll come on
4	affirms Art Reproduction Co. That's a similar authority	4	to, is that no part of the insolvency regime can have
5	but on the basis of a statute-barred claim. I don't	5	a substantive effect upon the existence of an underlying
6	think we need to turn it up. It's in the previous tab	6	debt.
7	in the bundle, if your Lordships needed it, and	7	But that was the issue that the Privy Council were
8	particularly I simply refer to the passage between 93	8	facing. It was simply a question of, is the making of
9	and 94. Perhaps if you go in the previous tab and	9	a winding-up order sufficient, if you like, to change
10	simply look at page 94 in the Art Reproduction case,	10	the governing law of whatever relevant obligation there
11	after reference to the relevant sections of what was	11	was?
12	then the Companies Act, he says in the middle of the	12	In the course of the authority, Lord Hoffmann,
13	page:	13	speaking for the Privy Council, at paragraphs 26 through
14	"In Buckley on the Companies Act in the notes to	14	to 29 made some general observations about the nature of
15	section 316 it is said 'but of course a debt barred at	15	an insolvency. At paragraph 26, at page 155, he said:
16	the date of the order can't be proved'."	16	"This argument"
17	Then the citation to Mitchell's case, and the note	17	That's the one I've just put for the creditor:
18	continues:	18	" was skilfully deployed but their Lordships
19	"And it cannot even in a solvent voluntary	19	think that it is wrong. It is first necessary to
20	liquidation properly be paid against the wishes of the	20	remember that a winding-up order is not the equivalent
21	contributories. Mr Sykes for the liquidator contended	21	of a judgment against the company which converts the
22	that that statement in its present form was if anything	22	creditor's claim into something juridically different,
23	too cautious and ought to read 'and it appears cannot	23	like a judgment debt. Winding-up is, as Brightman LJ
24	even in a solvent voluntary liquidation properly be paid	24	said in Lines Brothers, a process of collective
25	unless the contributories consent'. In my judgment that	25	enforcement of debts. The creditor who petitions for
	Page 78		Page 80

1	a winding-up is not engaged in proceedings to establish	1	enforced."
2	the company's liability or the quantum of the liability	2	He must have in mind there that it's completed, in
3	but to enforce the liability."	3	a case of a company with a surplus over provable debts
4	He says:	4	and statutory interest, by payment to the shareholders.
5	"The winding up leaves the debts of the creditors	5	MR SNOWDEN: Yes.
6	untouched. It only affects the way in which they can be	6	LORD JUSTICE BRIGGS: So if you'd asked him to unpick his
7	enforced."	7	thought process, which he probably didn't have to on the
8	Now, just pausing there, what Lord Hoffmann meant	8	facts of that case
9	when he said "The winding leaves the debts of the	9	MR SNOWDEN: No.
10	creditors untouched", I respectfully suggest, is that	10	LORD JUSTICE BRIGGS: there probably wasn't a surplus.
11	the winding-up order leaves the debts of the creditors	11	MR SNOWDEN: And he wasn't dealing with a non-provable
12	untouched because that's what he has been talking about.	12	claim.
13	That's the question in front of him. He goes on:	13	LORD JUSTICE BRIGGS: He would appear to be saying that the
14	"When the order is made, ordinary proceedings	14	completion of the insolvency process necessarily leads
15	against the company are stayed, although the stay can be	15	to the company having no assets.
16	enforced only as against creditors, subject to the	16	LORD JUSTICE MOORE-BICK: I just wonder if that's right,
17	personal jurisdiction of the court. The creditors are	17	because the whole context of this is actually
18	confined to a collective enforcement procedure that	18	an insolvent winding up, isn't it?
19	results in pari passu distribution of the company's	19	MR SNOWDEN: Yes.
20	assets. The winding up does not either create new	20	LORD JUSTICE MOORE-BICK: And the reference to "the
21	substantive rights in the creditors or destroy old ones.	21	discharge of a personal bankrupt extinguishing debts"
22	Their debts, if they are owing, remain debts throughout.	22	suggests that he's actually contemplating a case where
23	They are discharged by the winding up only to the extent	23	the debts are not
24	that they are paid out of dividends. But when the	24	MR SNOWDEN: That's right.
25	process of distribution is complete, there are no	25	LORD JUSTICE MOORE-BICK: All the debts are not paid. The
	Page 81		Page 83
1	further assets against which they can be enforced, there	1	interesting question, as I see it, here is what the
2	is no equivalent of the discharge of a personal bankrupt	2	implications of this are for the non-provable debts.
3	which extinguishes his debts. When the company is	3	MR SNOWDEN: Yes
4	dissolved, there is no longer an entity which the	4	LORD JUSTICE BRIGGS: Yes.
5	creditors can sue. But even then, the discovery of	5	LORD JUSTICE MOORE-BICK: which, on this analysis, remain
6	an asset can result in the company being restored for	6	in being and, presumably, can be sued for if the stay
7	the process to continue."	7	can be lifted.
8	Then he refers to the decision of Oliver J in	8	MR SNOWDEN: Which is precisely what David Richards J dealt
9	Dynamics, about the process of valuation during the	9	with in T&N. I will take you to T&N because I have
10	process of proof in order to give effect to a pari passu	10	referred to it so many times. It is three further tabs
11	distribution.	11	on at tab 79.
12	What we say is that you read this entirely as	12	David Richards J was here dealing with a series of
13	an explanation of the process by reference to the	13	questions, but arising out of the administration of T&N
14	participation in the collective process. As he said,	14	and the possibility that it had exposed workers and
15	anybody who doesn't participate in the collective	15	others to asbestos and that they were developing
16	process is stayed and creditors are confined to the	16	asbestos illnesses, but was having to cater for the
17	collective enforcement process, which, as we know, is	17	probability that there were people who had been exposed
18	the proof of debt process.	18	but had not yet developed compensatable harm and
19	LORD JUSTICE BRIGGS: But Lord Hoffmann obviously imagined	1 19	therefore hadn't an accrued cause of action yet in tort.
20	that there would fall within the insolvency process	20	There were at least two questions he was facing.
21	every step and process necessarily finally to distribute	21	One was, can you scheme that type of claim? Does that
22	all the assets. That's why he says at the bottom of	22	person fall within the scope of the Companies Act scheme
23	yes, just above B on 156:	23	jurisdiction? And he held that, yes, they did, because
Ì	"But when the process of distribution is complete,	24	was a very wide scheme jurisdiction. But he then also
24	But when the process of distribution is complete,		y y
24 25	there are no further assets against which they can be	25	had to deal with the question about whether they had
	·		·

1	provable claims under the then provisions of the	1	solvent because you could then take advantage of
2	Insolvency Act and Rules, and he held that they did not	2	section 316, as he says in paragraph 87 at the bottom of
3	have provable claims. As I have indicated, very quickly	3	page 1760 and the top of page 1761.
4	the legislature came round and put in place an amendment	4	But that mechanism was eliminated in 1986, and you
5	to the Rules to make such claims provable.	5	just have one proof of debt process and that's the basis
6	But what's of interest is what David Richards J said	6	on which this submission was made. I don't think that's
7	in relation to how non-provable claims would fare if	7	controversial. That's the basis on which everybody
8	there were to be a proposal to return assets to	8	said, "This is the problem you've got. There is only
9	shareholders. He did that, if you go into the middle of	9	one type of proof of debt process that covers all
10	the judgment	10	companies."
11	LORD JUSTICE BRIGGS: Sorry, which tab are we on?	11	So he went on:
12	MR SNOWDEN: It is tab 79.	12	"It would indeed be extraordinary if a company's
13	LORD JUSTICE BRIGGS: Thank you.	13	assets could be and were required to be distributed to
14	MR SNOWDEN: 1C, tab 79.	14	shareholders without paying tort claims which had
15	LORD JUSTICE BRIGGS: Yes, I have it.	15	accrued since the liquidation date or other claims not
16	MR SNOWDEN: We can probably pick it up, for present	16	provable in a liquidation, such as costs incurred in
17	purposes, at paragraph 106 at page 1765, where the	17	litigation against the company before the liquidation
18	submissions were being made, by I think a good number of	18	date but not then the subject of an order.
19	the people currently in the court, that this should be	19	"In my judgment, this is not the position. The
20	a provable debt and a number of consequences were being	20	statutory duties of liquidators are part of and subject
21	pressed upon the judge. At 106 he says:	21	to all the provisions of the Insolvency Act and the
22	"I was pressed with a fifth consequence. It was	22	Insolvency Rules. The voluntary liquidation of
23	submitted that if all the provable debts and liquidation	23	a company does not operate as an automatic stay of
24	expenses were paid in full, the balance of assets would	24	proceedings or the enforcement of judgments. The court
25	be distributed among shareholders and no payment or	25	may stay or restrain proceedings against the company by
	Page 85		Page 87
1	provision would be made for non-provable claims, such as	1	exercise of its powers under section 112 of the
2	claims in tort accruing after the liquidation date. It	2	Insolvency Act. This power will generally be exercised
3	was submitted that this results from, first, the	3	to prevent a creditor obtaining by execution
4	liquidator's statutory duty to distribute the assets in	4	an advantage over other creditors. However, where all
5	accordance with section 107 and sections 148 and 154 and	5	provable debts have been paid in full and there is
6	Rule 4181 of the Insolvency Rules and, secondly, the	6	a surplus otherwise available for shareholders, I can
7	changes made by the Insolvency Act and Rules in 1986,	7	see no reason why the court would restrain a tort
8	which meant that there was no longer any mechanism for	8	claimant from obtaining or executing a judgment. In the
9	proving such tort claims, even in a solvent	9	case of a compulsory liquidation, section 128(1) of the
10	liquidation."	10	Insolvency Act provides that any execution put in force
11	LORD JUSTICE LEWISON: Does that mean there had been one	11	after the commencement of a winding-up is void.
12	that was taken away?	12	However, it is well established that the court may
13	MR SNOWDEN: There was a very odd mechanism which he deal	13	exercise powers under section 130(2) to permit execution
14	with at paragraph 87 and 88. There were essentially two	14	to proceed: see The Constellation.
15	mechanisms by which claims could have been proved in the	15	"Again, if there was a surplus which would otherwise
16	event of a company's liquidation turning out to be	16	be distributed to shareholders, I see no reason why
17	solvent. Perhaps I could just ask you to read	17	a court would not give leave to a tort claimant to
18	paragraphs 87 and 88. That is what he was referring to.	18	obtain or execute a judgment. This deals with the point
19	(Pause).	19	put to me. But in a case where there was surplus but it
20	Then in fact, in order to have a full understanding	20	was insufficient to pay all tort claims in full, the
21	of the problem, you need in fact to read on down to	21	court would face a major issue as to how best to deal
22	Islington Metal and Plating Works as well, Harman J's	22	with this situation in a fair and sensible manner. It
23	case. The point is that there was prior to 1986	23	is not an issue for this case, where there is no
24	a possibility, if you could liquidate your claim, to	24	realistic prospect of a surplus."
25	prove but only if it was discovered that the company was	25	Of course, those were prophetic words because in
	Page 86		Page 88

this cuse there is the possibility of a surplins, or at  the expectation that there's a surplus. But the point  that Mr Justice —  LORD DUSTICE BRIGGS: There may well be a shortfull as  against the totality of the non-provable claims, and the  major problem which he is there contemplating is; how do  you just prevent a multi oldgament once the stay is  littled?  MR SNOWDEN: Correct. Absolutely.  MR SNOWDEN: Correct. Absolutely.  MR SNOWDEN: You see, the point is there's nothing in the  stratum - there's nothing in the insolvency framework  that cares for that at all, I will come on to this  cares. But even where there are non-provable claims, it  cares as enormous problem, as he put if, for the  court. But it's quite clear that the mechanism which he  process and enormous problem, as he put if, for the  court. But it's quite clear that the mechanism which he  process of the insolvency process of the  sisten of a claim form.  LORD JUSTICE BRIGGS: But is the payment to the members  Page 89  The stantorily provided for as a duty of the liquidator?  A MR SNOWDEN: You can the mechanism of the claim is  stored a claim form.  LORD JUSTICE BRIGGS: But is the payment to the members  Page 89  The stantorily provided for as a duty of the liquidator?  A MR SNOWDEN: You can the mechanism from one way, the stant of the making of the order  process of the insolvency process in the server is a comprovable claims, it  are creates an enormous problem, as he put it, for the  process of the insolvency by the ordinary process of the  sisten of a claim form.  LORD JUSTICE BRIGGS: But is the posyment to the members  Page 89  The stantorily provided for as a duty of the liquidator?  MR SNOWDEN: You.  LORD JUSTICE BRIGGS: But is the payment to the members  Page 89  The dome of the making of the order provided for.  MR SNOWDEN: You can the carries as a condition of the claim is not one on the fine this starting gate and the runk or any process of the  section of the insolvency by the ordinary process of the  section of the insolvency by	1	Ī		
the expectation that there's a surplus. But the point that Mr Justice  LORD JUSTICE BRIGGS: There may well be a shortfall as against the totality of the non-provable claims, and the against the totality of the non-provable claims, and the against the totality of the non-provable claims, and the against the totality of the non-provable claims, and the against the totality of the non-provable claims, and the you just prevent a rush to judgment once the stay is been do you just prevent a rush to judgment once the stay is lifed?  MR SNOWDEN: Correct. Absolutely.  MR SNOWDEN: Not see, the point is there's nothing in the statute of they all go.  MR SNOWDEN: You see, the point is there's nothing in the statute - there's nothing in the insolvency framework. It shat cares for that at all. I will come on to his far against the transport of the insolvency control of the statute are not even within this range of the statute are not provable claims, it creates an enormous problem, as he pair, it, for the was envisaging which respectfully I finish the was right in envisaging which respectfully I finish the was right in envisaging which respectfully I finish the was right in envisaging which respectfully I finish the was right in envisaging which respect the ordinary process of the issolvency process of the issolvency the ordinary process of the issolvency to the insolvency process of the issolvency to the insolvency process in the payment to the members Page 89  1 statutority provided for as a duty of the liquidator?  2 MR SNOWDEN: Yes.  LORD JUSTICE BRIGGS: What has happened is not so much that the intended what all the problems that then arise as it does not not be all the mechanism which the the intended what all the problems that then arise as it is a mark to the insolvency process in the payment to the members Page 89  1 statutority provided for as a duty of the liquidator?  2 MR SNOWDEN: Yes.  LORD JUSTICE BRIGGS: What has happened is not so much that the inching the properties of the insolvency of th	1	this case there is the possibility of a surplus, or at	1	by the liquidator, as he is required to do. But if you
than Mr Justice -  LORD IUSTICE BRIGGS: There may well be a shortfall as a gainst the totality of the non-provable claims, and the major problem which he is there contemplating is how do you just prevent a rush to judgment once the stay is lithed?  MR SNOWDEN: Correct. Absolutely.  LORD DUSTICE BRIGGS: A bit like the start of the Grand National: you lift the stay and off they all go.  MR SNOWDEN: Correct. Absolutely.  LORD DUSTICE BRIGGS: A bit like the start of the Grand National: you lift the stay and off they all go.  MR SNOWDEN: You see, the point is there's nothing in the statute which shade the statute - there's nothing in the stay and off they all go.  MR SNOWDEN: You see, the point is there's nothing in the statute of the statute and the statute - there's nothing in the statute of t	2	least non-provable claims are being litigated about in	2	have a non-provable claim, you can't participate in the
5 LORD JUSTICE BRIGGS: There may well be a shortfall as gainst the totality of the non-provable claims, and the major problem which be is there contemplating its how do you just prevent a rush to judgment once the stay is lifted?  9 fifted?  10 MR SNOWDEN: Correct. Absolutely.  11 LORD JUSTICE BRIGGS: A bit like the start of the Grand National; you lift the stay and off they all go.  12 National; you lift the stay and off they all go.  13 MR SNOWDEN: You see, the point is there's nothing in the statute of the front is there's nothing in the issue one to this question about whether currency — we say certainly question dout whether currency — we say certainly required to the cares for that at all. I will come on to this question about whether currency — we say certainly question bout whether currency — we say certainly required to the cares for that at all. I will come on to this question about whether currency — we say certainly question dout whether currency — we say certainly required to the care in on-provable claims. It is the transparency conversion claims are not even within this range of the insolvency by the ordinary process of the insolvency process just ceases where there is a fact that an almorises him to do so, to determine off his own bat and pay non-provable claims. What jurisdiction is he exercising?  11 Statutorily provided for as a dury of the liquidator?  22 MR SNOWDEN: Yes.  23 LORD JUSTICE BRIGGS: Subt is the payment to the members provided process of the insolvency process just ceases where there is the final problems that then arise as to does in fact use and does in fact got a judgment — does in fact well and the problems that then arise as to whome the process of the insolvency process in the cases w	3	the expectation that there's a surplus. But the point	3	process and your only way of getting your hands on the
against the totality of the non-provable claims, and the major problem which he is there contemplating it: how do 7 major problem which he is there contemplating it: how do 7 major problem which he is there contemplating it: how do 7 major provent a rush to judgment once the stay is 1 lithed?  MR SNOWDEN: Correct. Absolutely. 10 how proved the stay is 1 lithed?  MR SNOWDEN: You see, the point is there's nothing in the stay and off they all go. 11 miles are not even within the statute — there's nothing in the insolveney framework. 14 which payment is sought or determination of the claim is 6 question about whether currency — we say certainly 17 currency conversion claims are not even within this 18 range. But even where there are non-provable claims, 18 range. But even where there are non-provable claims, 18 range are normous problem, as he put it, for the 20 court. But it's quite clear that the mechanism which he 21 was envisaging — to which operates outside the 22 right in envisaging — is one which operates outside the 23 process of the insolvency by the ordinary process of the insolvency by the ordinary process of the insolvency by the ordinary process of the insolvency process just ceases where there is a subtutorly provided for as a duty of the liquidator? 11 does in fact sue and does in fact get a judgment — Was NOWDEN: Yes. 12 LORD JUSTICE BRIGGS: Subt as bappened is not so much that the impolence process just ceases where there is a submission, put to one side the entirely understandable 12 submission, put to one side the entirely understandable 13 sense that everybody would have that something needs to be done constructively to avoid, as your Lorothips should, in my respectful 3 submission, put to one side the entirely understandable 13 sense that everybody would have that something needs to be done constructively to avoid, as your Lorothips said, 18 sense that everybody would have that something needs to be done constructively to avoid, as your Lorothips said, 18 sense that everybody would have that so	4	that Mr Justice	4	money is to do something which you could have done,
major problem which he is there contemplating is: how do you just prevent a rush to judgment once the stay is jiffed?  MR SNOWDEN: Currect. Absolutely.  MR SNOWDEN: Currect. Absolutely.  Nat SNOWDEN: Currect. Absolutely.  Nat SNOWDEN: Sou see, the point is there's nothing in the statute - there's nothing in the insolvency framework.  that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will come on to this that caters for that at all. I will be part by a more payable in it. The mechanism through which payment is sought or determination of the claim is sought is entirely outside the Insolvency Act. It's like as was said in Government of India, the liquidator has no power to pay non-enforceable claims.  ToRDIVITICE BRIGGS: But the mechanism which he was envisaging - which respectfully I think he was right in envisaging - which respectfully I think he was right in envisaging - which respectfully I think he was right in envisaging - which respectfully I think he was right in envisaging - which respectfully I think he was right in envisaging - which respectfully I think he was right in envisaging - which respectfully I think he was right in envisaging - which respectfull	5	LORD JUSTICE BRIGGS: There may well be a shortfall as	5	irrespective of the insolvency process and entirely
8   within the scope of clause 5.2(a)? Are non-provable claims ones which the contracting parties would have been somewhere capils of the contracting parties would have been somewhere the stant of the Grand to thought were capils of the size stabilised or determined in the Insolvency (capital I)? The answer is 'No'.  12 National' you lift the stary and off they all go. 12 They are not payable them. They are not payable in it.  13 National' you lift the stary and off they all go. 14 They are not payable in it.  14 statute - there's nothing in the insolvency framework that caters for that at all. I will come not this sought is entirely outside the Insolvency Act. It's like, as was sail in Government of India, the liquidator has no power to pay non-enforceable claims - I LORD JUSTICE BRIGGS: But that the mechanism which he as a corross going - which respectfully I think he was 'grid in the statute that authorises have a contracting only in the statute that authorises have a contracting only in the statute that authorises have been somewhered by the ordinary process of the insolvency by the ordinary process of the insolvency by the ordinary process of the sauce of a claim form.  14 Statutorily provided for as a duty of the liquidator?  25 LORD JUSTICE BRIGGS: But is the payment to the members Page 89  15 statutorily provided for as a duty of the liquidator?  26 MR SNOWDEN: Yes.  27 LORD JUSTICE BRIGGS: What has happened is not so much that the insolvency process just ceases where there is a contractively to avoid, as your Lordship said, the insolvency process just ceases where there is a contractively to avoid have that something needs to to who should ger it.  28 MR SNOWDEN: It will be paid by, pessamably, a process of execution, which is what David Richards	6	against the totality of the non-provable claims, and the	6	outside the insolvency process, namely issue a claim.
10 MR SNOWDEN: Correct. Absolutely.   10 MR SNOWDEN: Correct. Absolutely.   10 MR SNOWDEN: Correct. Absolutely.   11 LORD JUSTICE BRIGGS: A bit like the start of the Grand   12 National: you lift the stay and off they all go.   12 They are not payable then. They are not payable in it.   13 They are payable in spite of it. The mechanism through   14 which payment is sought or determination of the claim is statuse. The early of the claim is sought is entirely outside the Insolvency Act. It's   16 question about whether currency - we say certainly   16 currency conversion claims are not even whithin this   17 currency conversion claims are not even whithin this   18 range. But even where there are non-provable claims, it   19 creates an enormous problem, as he put it, for the   19 court. But it's quite clear that the mechanism which he   19 was envisaging - which respectfully 1 think he was   12 court. But it's quite clear that the mechanism which he   22 process of the insolvency by the ordinary process of the   23 exercising   24 court. But it's quite clear by the ordinary process of the   24 issue of a claim form.   25 LORD JUSTICE BRIGGS: But is the payment to the members   26 Page 89   27   28 exercising   28 exercising   29   29   20   20   20   20   20   20	7	major problem which he is there contemplating is: how do	7	Therefore, if you answer the question: is this
10 MR SNOWDEN: Correct. Absolutely. 11 LORD JUSTICE BRIGGS: A bit like the start of the Grand 12 National; youl lift the shy and off they all go. 13 MR SNOWDEN: You see, the point is there's nothing in the statute -there's nothing in the insolvency framework that caters for that at all. I will come on to this question about whether currency — we say certainly currency conversion claims are not even within this country. The currency conversion claims are not even within this country and the process of the insolvency to the claims in the save and the country of the claims are not even within the country of the currency conversion claims are not even within the country of the currency conversion claims are not even within this currency conversion claims. The part of the claims is sought or determination of the claim is sought	8	you just prevent a rush to judgment once the stay is	8	within the scope of clause 5.2(a)? Are non-provable
LORD JUSTICE BRIGGS: A bit like the start of the Grand National; you lift the stay and off they all go. National; you lift the stay and off they all go. They are not payable then. They are not payable in it. They are not payable then. They are not payable in spite of it. The mechanism through which paymen is sought or determination of the claim is sought is entirely outside the Insolvency Act. It's die, as was said in Government of India, the liquidator has no power to pay non enforceable claims. They are payable in spite of it. The mechanism through which paymen is sought or determination of the claim is sought is entirely outside the Insolvency Act. It's like, as was said in Government of India, the liquidator has no power to pay non enforceable claims.  National; where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims, it range. But even where there are non-provable claims.  National provable of the insolvency between the provable claims.  National provable districts and the same of the same power, because there's nothing in the statute that authorises because there's nothing in the statute that author	9	lifted?	9	claims ones which the contracting parties would have
12 National: you lift the stay and off they all go.   12 They are not payable then. They are not payable in it.   13 May SNOWDEN: You see, the point is there's nothing in the statute - there's nothing in the insolvency framework   14 which payment is sought of externismin of the claim is stated on the claim is that caters for that at all. I will come on to this   15 that caters for that at all. I will come on to this   16 question about whether currency - we say certainly   16 like, as was said in Government of India, the liquidator   18 kapes or covers ion claims are not even within this   18 range. But even where there are non-provable claims, it   18 creates an enormous problem, as he put it, for the   19 may so were to pay non-affectable claims -   18 court of the insolvency has been used in the case an enormous problem, as he put it, for the   19 may so were to pay non-affectable claims -   18 court of the insolvency has been used in the case an enormous problem, as he put it, for the   19 may so were to pay non-affectable claims -   18 court of the insolvency has been used in the case an enormous problem, as he put it, for the   19 may so were to pay non-affectable claims -   18 court of the insolvency has been used in the search in the put in the event which he was   18 court of the insolvency has been used in the search in the insolvency has been used in the insolvency has	10	MR SNOWDEN: Correct. Absolutely.	10	thought were capable of being established or determined
MR SNOWDEN: You see, the point is there's nothing in the statute there's nothing in the insolvency framework that caters for that at all. I will come on to this question about whether currency we say certainly currency conversion claims are not even within this currency conversion claims are not even within this range. But even where there are non-provable claims, it currency conversion claims are not even within this range. But even where there are non-provable claims, it creates an enormous problem, as he put it, for the court. But it's quite clear that the mechanism which he was envisaging which respectfully I think he was 21 right in envisaging is one which operates outside the 22 right in envisaging is one which operates outside the 22 right in envisaging is one which operates outside the 22 right in envisaging is one which operates outside the process of the insolvency by the ordinary process of the issue of a claim form.  LORD JUSTICE BRIGGS: But is the payment to the members Page 89  1 statutorily provided for as a duty of the liquidator?  MR SNOWDEN: Yes.  LORD JUSTICE BRIGGS: So the very end is provided for.  MR SNOWDEN: Yes.  LORD JUSTICE BRIGGS: What has happened is not so much that the insolvency process just ceases where there is a surplus, because there is statutory machinery for dealing with the surplus; as I understand it, it is that if doesn't deal with all the problems that then arise as to who should get it.  MR SNOWDEN: Yes to who should get it.  MR SNOWDEN: Yes to who should get it.  MR SNOWDEN: To consthips should, in my respectful the bed one constructively to avoid, as your Lordships sid, the lift of the starring gate and the rush to judgment.  MR SNOWDEN: Yes that the surplus as a funderstandiable sense that everybody would have that something needs to be done constructively to avoid, as your Lordships sid.  MR SNOWDEN: To consthips should, in my respectful the bed one constructively to avoid, as your Lordships sid.  MR SNOWDEN: But the insolvency process flat we a	11	LORD JUSTICE BRIGGS: A bit like the start of the Grand	11	in the Insolvency (capital I)? The answer is "No".
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that caters for that at all. I will come on to this  question about whether currency - we say certainly currency conversion claims are not even within this  range. But even where there are non-provable claims, it creates an enormous problem, as he put it, for the creates an enormous problem, as he put it is on the subtle and pay court. It is not so to desarch the attacle that adulorises  LORD JUSTICE ERIGGS: But is the payment to the members  Page 91  1	13	MR SNOWDEN: You see, the point is there's nothing in the	13	They are payable in spite of it. The mechanism through
16 question about whether currency — we say certainly 17 currency conversion claims are not even within this 18 range. But even where there are non-provable claims, it 19 creates an enormous problem, as he put it, for the 20 court. But it's quite clear that the mechanism which he 21 was envisaging — which respectfully I think he was 22 right in envisaging — is one which operates outside the 23 process of the insolvency by the ordinary process of the 24 issue of a claim form. 25 LORD JUSTICE BRIGGS: But is the payment to the members 26 Page 89  1 statutorily provided for as a duty of the liquidator? 27 MR SNOWDEN: Yes. 28 LORD JUSTICE BRIGGS: So the very end is provided for. 39 LORD JUSTICE BRIGGS: What has happened is not so much that 30 the insolvency process just ceases where there is 31 LORD JUSTICE BRIGGS: What has happened is not so much that 32 it dealing with the surplus; as I understand it, it is that 33 it doesn't deal with all the problems that then arise as 34 it doesn't deal with all the problems that then arise as 35 to who should get it. 36 Jugges throughout the ages have sought, in some way, 37 the lift of the starting gate and the rush to judgment. 38 Jugges throughout the ages have sought, in some way, 39 large and the rush to judgment. 30 Justice BRIGGS: What has leaven processes originate. 31 LORD JUSTICE LEWISON: A goes to somebody and says, "Look dealing with the surplus; as I understandable as the entirely understandable should, in my respectful the lift of the starting gate and the rush to judgment. 31 LORD JUSTICE LEWISON: So who does? Or has the judgment to submission, put to one side the entirely understandable as the verybody would have that something needs to be done constructively to avoid, as your Lordship said, the lift of the starting gate and the rush to judgment. 31 LORD JUSTICE LEWISON: So who does? Or has the judgment to make the entirely understandable as process which deals with proof of debt. It's example, in dead with it at all by definition, because it is a process which	14	statute there's nothing in the insolvency framework	14	which payment is sought or determination of the claim is
towns of the insolvency process in a statutorily provided for as a duty of the liquidator?  In the insolvency process is a statutory machinery for a surplus, because there is nothrough the surplus it doesn't deal with all the problems that then arise as to who should get it.  May SNOWDEN: It will be paid by, presumably, a process of the insolvency process in the insolvency process in the into of the starting gate and the rush to judgment.  May SNOWDEN: It will be paid by, presumably, a process of the insolvency process in the insolvency process in the into of the starting gate and the rush to judgment.  May SNOWDEN: Yes.  LORD JUSTICE BRIGGS: But is the payment to the members Page 89  In the into of the insolvency process in the payment to the members of the insolvency process in the payment to the members of the insolvency process in the insolvency proces in the insolvency process in the	15	that caters for that at all. I will come on to this	15	sought is entirely outside the Insolvency Act. It's
18 range. But even where there are non-provable claims, it creates an enormous problem, as he put it, for the 20 court. But it's quite clear that the mechanism which he 21 was envisaging — which respectfully I think he was 21 right in envisaging — is one which operates outside the 22 right in envisaging — is one which operates outside the 23 process of the insolvency by the ordinary process of the 24 issue of a claim form. 24 issue of a claim form. 25 LORD JUSTICE BRIGGS: But is the payment to the members Page 89 LORD JUSTICE LEWISON: Suppose somebody with a tort claim which accrues after the date of the making of the order Page 91 does in fact sue and does in fact get a judgment — which accrues after the date of the making of the order Page 91 LORD JUSTICE BRIGGS: So the very end is provided for. 4 MR SNOWDEN: Yes. 2 MR SNOWDEN: Yes. 4 paid. Who signs the cheque? 4 LORD JUSTICE ERRIGGS: What has happened is not so much that 6 the insolvency process just ceases where there is 2 it doesn't deal with all the problems that then arise as 2 it own should get it. 4 be done constructively to avoid, as your Lordship said, 15 the lift of the statute that authorises him to do so, to determine off his own bet and pay non-provable claims. What jurisdiction is he exercising? 2 LORD JUSTICE LEWISON: Suppose somebody with a tort claim which accrues after the date of the making of the order Page 91 LORD JUSTICE LEWISON: Suppose somebody with a tort claim which accrues after the date of the making of the order Page 91 LORD JUSTICE LEWISON: Suppose somebody with a tort claim which accrues after the date of the making of the order Page 91 LORD JUSTICE LEWISON: Suppose somebody with a tort claim which accrues after the date of the making of the order Page 91 LORD JUSTICE LEWISON: How signs the cheave? 4 MR SNOWDEN: It will be paid by, presumably, a process of execution, which is what David Richards J envisaged. 4 LORD JUSTICE LEWISON: He goes to somebody and says, "Look Lowes the page have sought, in some way. 4 LORD JUSTICE LEWIS	16	question about whether currency we say certainly	16	like, as was said in Government of India, the liquidator
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1	wasted costs of the issue of proceedings, a summary	1	envisaged was the issue of ordinary claim proceedings.
2	judgment application and an enforcement process, and	2	LORD JUSTICE BRIGGS: Otherwise you don't just have a sort
3	simply not lock the door in the bailiff's face? Rather	3	of Grand National, you also have the liquidator in the
4	than simply facing up to the reality at the start of the	4	starting blocks seeking to get the money out of the
5	process and saying, "Well, my statutory duty to pay the	5	shareholders before any of the creditors can issue their
6	shareholders at the end of the day doesn't stop me	6	claims. That can't be right, can it?
7	recognising this inevitable prior claim in the	7	MR SNOWDEN: In a sense that rather proves the point, that
8	waterfall?" That is prior, ahead of the shareholders.	8	he's not acting if you like, his duty is
9	MR SNOWDEN: I keep coming back, though, to the point: in	9	LORD JUSTICE BRIGGS: What? To rush the money off to the
10	what sense is that determination being under the	10	shareholders before any of these deserving but not
11	insolvency regime?	11	non-provable tort claimants can get their writs issued
12	LORD JUSTICE BRIGGS: I hate to be forced back to ex parte	12	and some sort of Mareva injunction against the
13	James, which strikes me as a position of last recourse	13	liquidator?
14	when all else fails.	14	MR SNOWDEN: He will point to the fact that the statutory
15	MR SNOWDEN: My learned friend's skeleton does the same,	15	provision in the Insolvency Act requires the surplus to
16	I think it is in paragraph 9.2, possibly, where he says	16	be paid to members.
17	in a sense it has to be determined or established in the	17	LORD JUSTICE BRIGGS: Yes.
18	liquidation because it has to be.	18	MR SNOWDEN: I am not suggesting, of course, that
19	LORD JUSTICE BRIGGS: Yes.	19	a liquidator would try and forestall the court reaching
20	MR SNOWDEN: But, with respect, that isn't anything more	20	an appropriate judgment. But the point I am making is
21	than just bootstrapping.	21	that it's not the process that's envisaged by
22	LORD JUSTICE MOORE-BICK: He will execute it, won't he,	22	clause 5.2(a). The idea that the parties, the
23	unless, in order to deal with the problem of multiple	23	contracting parties, to 5.2(a), excluding, as they had
24	claimants and insufficient surplus, the court is	24	to clause 5.2(a) does obviously exclude something.
25	persuaded by an interested party to stay execution or	25	The idea
	Page 93		Page 95
	-		-
1	possibly to stay it, save up to a certain of level, in	1	LORD JUSTICE BRIGGS: It could easily exclude, couldn't it,
2	order to exercise a sort of a pari passu distribution	2	the sort of things that were excluded in the Government
3	itself? But essentially the judgment will be executed,	3	of India and Art Reproduction cases. So it excludes
4	won't it, in whatever is the appropriate way?	4	statute-barred claims that couldn't be enforceable in
5	MR SNOWDEN: Yes. It may be that the appropriate analogy is	5	the court having jurisdiction over the insolvency.
6	that the court would in some way regard it as some form	6	MR SNOWDEN: But we would say why is it materially different
7	of inter-pleader between a relative claimant a number	7	in relation to these types of claims, given that the
8	of claimants, for example, having claims to a particular	8	words are "obligations which are not payable or capable
9	sum of money.	9	of being established or determined in the insolvency of
10	LORD JUSTICE BRIGGS: But it's not a proprietary claim, is	10	the borrower"? If they had just wanted to say "claims
11	it? It's a debt claim against the company.	11	which are not enforceable against the borrower", they
12	MR SNOWDEN: And this is the problem.	12	would have said so. It is very specific. It is a point
13	LORD JUSTICE BRIGGS: It's not a true inter-pleader.	13	I was making earlier that, when we looked at the
14	MR SNOWDEN: But the problem is it's not the insolvency	14	statutory origins of this agreement, I drew your
15	regime either, because it's just not there at all.	15	attention to how the forerunner of this clause had come
16	LORD JUSTICE BRIGGS: Why isn't it a sort of unwritten,	16	into being at the same time as the 1986 Act, or shortly
17	unimplied part of the regime, implied necessarily	17	thereafter, in relation to the question of insolvency.
18	because such claims would have to be faced up to before,	18	Well, it's not surprising that the draftsman of this
19	under the statutory scheme, the shareholders get what is	19	clause, when he was trying to figure out how to define
20	left?	20	"solvency" or whether the borrower would be solvent for
21	MR SNOWDEN: As I say, I think the correct analysis is the	21	the purposes of this clause before and after the payment
22	one that David Richards J set out in T&N, which was not	22	so that the condition could be satisfied, turned to the
23	the idea that the court has to face up to it as part of	23	Insolvency Act that he turned to the Insolvency Act
24	the insolvency process and organise some	24	for the obvious place to get a definition.
1.6		~~	
25	insolvency-based solution. The solution that he Page 94	25	He found in the Insolvency Act a scheme under which Page 96

1	claims against the company are provable and they are	1	over statutory interest is determined, not by 5.2(a),
2	provable if they are either presently payable, i.e.	2	but by the rules. Is that how it works?
3	payable, or if they are not presently payable but are	3	MR SNOWDEN: In a sense, 5.2(a) will have run its course
4	capable of being established or determined by the	4	then because we have come in.
5	process of proof.	5	LORD JUSTICE LEWISON: Right.
6	LORD JUSTICE BRIGGS: You say that obviously includes future	6	MR SNOWDEN: And then
7	and contingent.	7	LORD JUSTICE LEWISON: Once you're in proving, then the
8	MR SNOWDEN: Future and contingent. This is an exact	8	rules take over
9	parallel to the statutory scheme for proof of debts.	9	MR SNOWDEN: That's right.
10	What he wouldn't have had in mind, and what is excluded	10	LORD JUSTICE LEWISON: and you rank equally with the
11	in 5.2(a), are unenforceable claims that couldn't	11	provables, because that's what the rule says.
12	participate in that statutory process so we all agree	12	MR SNOWDEN: With the unsubordinateds, yes, because that's
13	on that but also non-provable claims because they're	13	what the rules said and the draftsman would have
14	not part of the statutory process. This whole	14	envisaged that that's how it works. It's a good
15	LORD JUSTICE BRIGGS: I suppose it could be said against you	15	commercial reason, as well as policy reason, because all
16	that if that what's he had meant he would have just said	16	creditors suffer in the same way by the delay.
17	"proved" instead of "established or determined". Your	17	LORD JUSTICE MOORE-BICK: Thank you. A convenient moment
18	interpretation of 5.2(a) does treat the "established or	18	Thank you very much. 2 o'clock, please.
19	determined" as a rather long-winded synonym for	19	(1.03 pm)
20	"proved", doesn't it?	20	(The short adjournment)
21	MR SNOWDEN: It is. Maybe that was a slightly wider	21	(2.00 pm)
22	expression to at least cater for the possibility of	22	LORD JUSTICE MOORE-BICK: Yes, Mr Snowden.
23	insolvency procedures in other jurisdictions. I don't	23	MR SNOWDEN: My Lord, can I just pick up two or three little
24	know, to pick the judge's point up. But it is certainly	24	points arising out of this morning and then complete my
25	not I mean, he could certainly have said "proved".	25	review of one or two of the cases.
	Page 97		Page 99
1	It would have perhaps been rather more straightforward	1	Just picking up the point that was raised before
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2	if he had have said that, although that's not normally,	2	lunchtime, just before lunchtime, by Lord Justice Briggs
2 3	if he had have said that, although that's not normally,  I think, a method of contractual interpretation which my	2 3	lunchtime, just before lunchtime, by Lord Justice Briggs the point about, well, as it were, surely if
2 3 4	if he had have said that, although that's not normally, I think, a method of contractual interpretation which my Lord Lord Justice Lewison certainly encourages. I speak	2 3 4	lunchtime, just before lunchtime, by Lord Justice Briggs the point about, well, as it were, surely if a liquidator has an obligation to pay to members it must
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2 3 4 5 6 7	if he had have said that, although that's not normally, I think, a method of contractual interpretation which my Lord Lord Justice Lewison certainly encourages. I speak from experience and I was hesitating not to. In a sense, you have to construe the words that are there and not the ones that might have been there, I think, is	2 3 4 5 6 7	lunchtime, just before lunchtime, by Lord Justice Briggs the point about, well, as it were, surely if a liquidator has an obligation to pay to members it must implicitly authorise him to sort out non-provable claims in the middle.  LORD JUSTICE BRIGGS: Putting it another way,
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But the point I was going then to develop, and we will look at that paragraph in a moment, is that — take 11 madministration?  andministration for example. In an administration  there is no equivalent of section 107 because the 12 madministration is simply performing the functions which 13 there is no equivalent of section 107 because the 14 administrator is simply performing the functions which 15 he's given at the start of an administration.  15 he's given at the start of an administration.  16 If you look at the start of an administration.  17 an administration, they are rescuing the company as 18 a going concern, achieving a better result for the 20 company's creditors as whole than would be likely if 20 company's creditors as whole than would be likely if 21 administration, or realising property in order to make 21 administration, or realising property in order to make 22 a distribution to one or more secured or preferential 22 are distribution to one or more secured or preferential 22 are distribution to readitors who have proved their 23 creditors.  24 We say you can't read those purposes as encompassing 24 claims does so, then he ought to be applying to be 25 dealing with the non-provable claims of creditors who have proved their 24 claims does so, then he ought to be applying to be 26 discharged from office because actually the company in this state 29 to its owners and controllers.  10 If would be for them to sort out non-provable claims because, as David Richards J said in T&N, they would 15 precisely why it's not part of the administrator? 14 precisely why it's not part of the administrator? 15 function to conduct the process that David Richards J is dientified, albeit with respect to a liquidation, in 17 T&N.  10 I suppose, if he managed to preserve it as a going 20 concern? 20 managed to preserve it as a going 20 concern? 20 managed to preserve it as a going 20 concern? 20 managed to preserve it as a going 20 concern? 20 managed to preserve it as a going 20 concern? 20 managed to preserve it as a				1
whether it was just a means of introduction or something that wasn't dought to be very contentions.  MR SNOWDEN: I would that own with the company could as it were start a new basiness. If you like, or put its assess to new pursones, new carponed purposes.  I didn't get there either, hat some no doubt —  I doubt JUSTICE BRIGGS: There must be some here who were.  MR SNOWDEN: I um start in the assertibled multitate there must be some who were.  MR SNOWDEN: I um start in the assertibled multitate there must be some who were.  I will look at that paragraph in a moment, is that — take and ministration for example. In an administration is a magnificant of the campany of the magnificant of the campany and the statutory purposes of an administration is equivalent of section 107 because the administration is equivalent of section 107 because the administration is equivalent of section 107 because the administration is an administration is a substitute of the company as a point of the members.  If you look at the stantory purposes of an administration is a whole than would be likely if the company were wound up without first being in a going concern, achieving a better essulf for the administration, or realising property in order to make a distribution to one or more secured or preferential cride one or more secured or p	1	LORD JUSTICE BRIGGS: You will come to that, but I don't	1	pursue it in the ordinary way. But even if he hadn't
that wasn't thought to be very contentions.  MR SNOWDEN: I wouldn't know either because I reget to say 1 didn't get there either, but some to doubt — 1. A state of the distribution of the same there who were.  MR SNOWDEN: I am sure in the assembled multitude there must be some who were.  But the point I was going then to develop, and we 10 will look at that prunagraph in a moment, is that — take 11 will look at that prunagraph in a moment, is that — take 12 an administration for example. In an administration in the six on equivalent of section 107 because the 4 administration is simply performing the functions which be be given at the start of an administration.  MR SNOWDEN: Yes, in fact it goes back to the directors. 13 LORD JUSTICE BRIGGS: Because you can hand back the company as a point content of the stantory purposes of 14 administration, they are resulting the company as a point goncern. achieving a better result for the 20 and administration, they are resulting the company as a point of the stantory purposes of 15 LORD JUSTICE BRIGGS: Because you can bread the distribution or serving the company as 15 LORD JUSTICE BRIGGS: Because you can bread the company as 16 LORD JUSTICE BRIGGS: Because you can bread the company as 16 LORD JUSTICE BRIGGS: Because you can bread the company as 2 LORD JUSTICE BRIGGS: Because you can bread the company as 2 LORD JUSTICE BRIGGS: Because you can bread the company as 2 LORD JUSTICE BRIGGS: Because you can bread the company as 2 LORD JUSTICE BRIGGS: Because you can bread the stantory purposes of 11 LORD JUSTICE BRIGGS: Because you can bread the company as 2 LORD JUSTICE BRIGGS: Because you can bread the stantory purposes of 12 LORD JUSTICE BRIGGS: Because you can bread the stantory purposes of 12 LORD JUSTICE BRIGGS: Because you can bread the stantory purposes of 12 LORD JUSTICE BRIGGS: Well, yes. 12 MR SNOWDEN: Yes, that's right. 13 LORD JUSTICE BRIGGS: Well, yes. 14 LORD JUSTICE BRIGGS: Because you can bread the stantory purpose of 14 LORD JUSTICE BRIGGS: Because you can bre	2	know what submissions there were about the waterfall or	2	managed to rescue it as a going concern but there was
5 MR SNOWDEN: I wouldn't know either because I regret to say 6 I didn't get there either, but some an doubt — 7 LORD LUSTICE BRIGGS: There must be some here who were. 8 MR SNOWDEN: I am sure in the assembled multitude there must 9 be some who were. 9 USB of the point I was going then to develop, and we will look at that prangraph in a moment, is that — take 11 will look at that prangraph in a moment, is that — take 12 an administration for example. In an administration 13 there is no equivalent of section 107 because the 14 administrator is simply performing the functions which 15 be 'given at the start of an administration 16 If you look at the statutory purposes of 17 an administration, they are rescuing the company as 18 a going concern, achieving a better result for the 19 company were wound up without first being in 20 administration, or realising perpety in order to make 21 administration, or realising property in order to make 22 a distribution to one or more secured or preferential 23 creditors. 24 We say you can't read those purposes as encompassing 25 dealing with the non-provable claims of creditors in 26 page 101  1 a process of making a distribution. Indeed, we would 2 say that once the administrator who is determined to its owners and controllers. 2 and its once the administrator who is determined to its owners and controllers. 3 make a distribution to creditors who have proved their claims does so, then he ought to be applying to be discharged from office because actually the company in those circumstances would have a surplus as regards for proved claims. In fact the administration rof the administration of the statutory regime for proof of debts. 4 It is debts which are payable or capable of the same of the statutory regime for proof of debts. 5 It is debts which are payable in the way in which a debt currently due and payable is payable, it is simply something which falls to be done once all the debtes have been established or demrinated to the ministrator of the hard administration of the pay	3	whether it was just a means of introduction or something	3	nevertheless a surplus, then the company could as it
I didn't get there either, but some no doubt— LORD JUSTICE BRIGGOS: There must be some here who were.  MR SNOWDEN: I am sure in the assembled multitude there must be some here who were.  But the point I was going then to develop, and we will not provide claims for example. In an administration of rexample, In an administration of rexample. In an administration of rexample, In an administration of rexample, In an administration and administration of seating the functions which a diministration of seating the functions which less given at the start of an administration.  If you look at the saturopy purposes of a going concern, achieving a better result for the company were wound up without first being in the company were wound up without first being in administration to more more secured or preferential ending with the non-provable claims of creditors in Page 101  Apper 101  I have been making the submissions that it is a mimic, a proved claims. In fact the administrator who is determined to make a distribution to creditors who have proved their claims does so, then he ought to be applying to be discharged from office because actually the company in the same proved their then be issued by way of ordinary writ claims form the because, as David Richards J aid in PKRN, they would then be issued by way of ordinary writ claims form of the same provable claims of creditors in proved claims. In fact the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrator of the processly why if's not part of the administrato	4	that wasn't thought to be very contentious.	4	were start a new business, if you like, or put its
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8 MR SNOWDEN: I am sure in the assembled multitude there muss 9 be some who were. 10 But the point I was going then to develop, and we 11 will look at that paragraph in a moment, is that — take 11 an administration for example. In an administration 12 an administration for example. In an administration 13 there is no equivalent of sciention [07 because the 14 administrator is simply performing the functions which 15 be's given at the start of an administration. 16 If you look at the statutory purposes of 17 an administration, they are rescuing the company as 18 a going concern, achieving a better result for the 19 company's creditors as whole than would be likely if 20 the company were wound up without first being in 21 administration, or realising property in order to make 22 a distribution to one or more secured or preferential 23 creditors. 24 We say you can't read those purposes as encompassing 25 decaling with the non-provable claims of creditors in 26 Page 101  11 a process of making a distribution. Indeed, we would 27 say that once the administrator who is determined to 28 claims does so, then he ought to be applying to be 29 discharged from office because actually the company in 29 the work of the administrator with original process of making a distribution to regime, as we all know, is designed to return a company in that state 29 to its owners and controllers. 20 If would be for them to sort out non-provable claims of creditors in 20 administration, for example, in a administrator with the ton-provable claims of creditors in provide the distribution of the distribution of the original property in the function to creditors who have proved their 3 make a distribution to creditors who have proved their 4 claims does so, then be ought to be applying to be 5 discharged from office because actually the company in that state 5 to its owners and controllers. 6 the object of the managed to preserve it as a going 6 to company a very good illustration or gain, as we are all know, is designed to return a company	6	I didn't get there either, but some no doubt	6	So it does illustrate certainly not in
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Page 101  1 a process of making a distribution. Indeed, we would 2 say that once the administrator who is determined to 3 make a distribution to creditors who have proved their 4 claims does so, then he ought to be applying to be 4 determination or establishment in the insolvency. 3 It is debts which are payable or capable of 4 determination or establishment in the insolvency. 4 determination or establishment in the insolvency. 5 Statutory interest is neither payable in the way in 4 which a debt currently due and payable is payable, it is 5 simply something which falls to be done once all the 4 debts have been established or determined in the 6 insolvency. 1 It would be for them to sort out non-provable claims 5 because, as David Richards J said in T&N, they would 6 then be issued by way of ordinary writ claim form 6 against the company; a very good illustration of 7 precisely why it's not part of the administrator's 6 function to conduct the process that David Richards J 6 identified, albeit with respect to a liquidation, in 7 T&N. 1 LORD JUSTICE LEWISON: That would be particularly so, 19 I suppose, if he managed to preserve it as a going 6 concern? 1 MR SNOWDEN: Yes. That's absolutely right. Because 6 essentially he would have yes. Either there would be 6 handed back and allowed then to deal with any people who 6 claimed they had non-provable claims because they could 6 the insolvency?	24			· ·
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claimed they had non-provable claims because they could 25 established in the insolvency?		a going concern company which definitely ought to be		LORD JUSTICE LEWISON: All right. Why isn't the quantum of
			24	statutory interest determined in the insolvency
Page 102   Page 104	24			
1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	24	claimed they had non-provable claims because they could		established in the insolvency?

1 MR SNOWDEN: Statutory interest is simply -- it's a surplus 1 insolvency process the company is going to go into. It 2 which has to be distributed to the creditors in 2 may never go into an insolvency process. 3 accordance with a formula. So that's the reason. We 3 MR SNOWDEN: Absolutely. We say it is quite clear when you 4 say it's neither liability or it falls to be excluded 4 look at 5.2(a) -- in fact you look at 5 as a clause. 5 under 5.2(a). Yes, the amount which may have to be paid 5 It's clear, if you look at 5.1(a) -- sorry, I think 6 to a particular claimant -- I think my Lord is putting 6 my Lord's question was actually directed at 5.1(b) probably rather than 5.1(a). 7 to me -- will have to be in some way determined in the 7 8 insolvency. But we say it's not an obligation of the LORD JUSTICE BRIGGS: Yes, you're right. 8 9 company which is capable of determining, it's the 9 MR SNOWDEN: It is the point I'm about to make, we make the 10 10 wording of 5.2(a). point in our skeleton, that actually, if you look at the 11 LORD JUSTICE LEWISON: That was why you said it wasn't 11 structure of the clause, 5.1(a) on page 205 is expressly 12 12 a liability because it wasn't payable by the borrower. only applicable outside of insolvency. 13 MR SNOWDEN: And I think the --13 LORD JUSTICE BRIGGS: Yes. LORD JUSTICE LEWISON: But if it is payable by the 14 14 MR SNOWDEN: By implication, everybody accepts that 5.1(b) 15 borrower -- because 5.2(a) is your fallback, as it were. 15 is applicable in an insolvency, the critical link word 16 MR SNOWDEN: Yes. 16 is "and", which appears right at the foot of the page. LORD JUSTICE LEWISON: Assuming it is a liability, that is 17 It is the case that 5.1(b) has to be applied outside 17 18 to say it is a sum which is payable by the borrower, you 18 an insolvency as well and it's not limited to -- one of 19 19 then say even if it is a liability it is excluded by the earlier formulations of the clause that we looked at 20 20 this morning did have similar words, is in the brackets 5.2(a) --21 MR SNOWDEN: Because --21 at the beginning of 5.1(b) but they were extracted. LORD JUSTICE LEWISON: -- because it's not established or --LORD JUSTICE BRIGGS: If that's right --22 22 23 MR SNOWDEN: Yes. MR SNOWDEN: Sorry. 23 24 LORD JUSTICE LEWISON: It's not established or determined in 24 LORD JUSTICE BRIGGS: -- what you're trying to understand 25 the insolvency. 25 for 5.1(b) is a single solvency test --Page 105 Page 107 MR SNOWDEN: It's not an obligation which is capable of MR SNOWDEN: Yes. 1 1 2 2 being established or determined in the insolvency. The LORD JUSTICE BRIGGS: -- which isn't dependent upon the 3 3 phrase is: particular form of insolvency process that the company 4 4 is or might be subject to. Assume you were trying to "Obligations which are not payable or capable of 5 being established or determined in the insolvency of the 5 see whether the company was solvent at a time it was 6 borrower." 6 trading perfectly happily, no perception by anybody it 7 7 It's not an obligation which is capable of being was going to go bust --8 established or determined. It is simply what the 8 MR SNOWDEN: Yes. 9 statute requires the office holder to do with its 9 LORD JUSTICE BRIGGS: -- you wouldn't know at that stage 10 10 whether it would go into liquidation or administration, LORD JUSTICE MOORE-BICK: It is really just a way of saying 11 11 for example. 12 that 5.2(a) is concerned with what you might call 12 MR SNOWDEN: Right. primary obligations and isn't concerned just with 13 LORD JUSTICE BRIGGS: Even if you confine yourself to a UK 13 14 interest. 14 insolvency picture, as you say we should. 15 MR SNOWDEN: Yes, it is concerned with provable debts. 15 MR SNOWDEN: Yes. 16 That's right, yes. 16 LORD JUSTICE BRIGGS: So one has to try and get a single LORD JUSTICE BRIGGS: Can you help me, does 5.2(a) bite only 17 concept of obligations out of the definition, doesn't 17 18 in an insolvency situation or is it simply the test by 18 one? 19 19 which you decide whether you can make a payment of MR SNOWDEN: We say --20 a subordinated debt? It's the latter, isn't it? 20 LORD JUSTICE BRIGGS: That is going to be used for 21 MR SNOWDEN: That was the next point I had on my sheet. 21 a solvency test of a company that nobody is thinking of 22 LORD JUSTICE BRIGGS: So you're looking presumably, 22 putting into any kind of insolvency process. 23 therefore, for a single unitary understanding of what 23 MR SNOWDEN: But this is why this is a point in our favour. 24 obligations this is referring to, because at the time 24 LORD JUSTICE BRIGGS: That's what I am wondering. 25 you might have to apply it you don't know what kind of 25 MR SNOWDEN: We make the point in our skeleton that it's Page 106 Page 108

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1	inherently unlikely that the draftsman, the statutory	1	LORD JUSTICE LEWISON: Yes.
2	draftsman, would have promulgated a test that would	2	MR SNOWDEN: The references to our skeleton well, sorry,
3	require the people who are having to look at it and then	3	the point I've just made is in the skeleton. I'm sure
4	decide whether it is satisfied which would require	4	you'll see it when you have read through it again.
5	them to make guesstimates, not only of, for example,	5	I was going to just briefly take you to Danka, which
6	whether there would be a surplus and how much statutory	6	simply is an authority which deals with, again, the
7	interest might be payable, in which case they would have	7	scope of a liquidator's obligation and particularly in
8	to understand the interest payments under each of the	8	relation to contingent claims. Danka is in bundle 1C at
9	contractual provisions as against the statutory rate.	9	tab 91. (Pause).
10	They would have to guess how long it would apply for	10	Danka was the case of a members' voluntary
11	and, on the judge's test, they would also have to	11	liquidation where there was a surplus, which on the face
12	venture a view as to what the non-provable liabilities	12	of it was due to be paid to the members. A creditor
13	might be.	13	with a contingent claim had proved his contingent claim
14	We say that's just wholly uncommercial as a test to	14	and the liquidator had assessed it, valuing the
15	be applied or which the regulator might have thought	15	contingency, but the creditor said, "No, what you
16	would be appropriate. Whereas a much better and	16	actually have got to do is you've got to set aside a sum
17	appropriate test is one which says no, it's your	17	of money which would be sufficient to cover the entirety
18	provable debts. You know what your provable debts are.	18	of the debt if it becomes due, if the contingency is
19	They are the people who you can identify, they are	19	satisfied. You can't just give me a discounted amount
20	standing there, the company ought to know who they are.	20	on the footing of assessing the chance of the
21	They're not the unknown tort claimant, for example, but	21	contingency coming due and you've got to set aside that
22	they are people who have traded with the company, who	22	fund in full before you make a distribution to the
23	have counterparty relationships. You don't have to	23	members ".
24	speculate about how long the liquidation might last for.	24	So you'll see just from the headnote under the
25	The only thing you would have to, I think, apply some	25	holding:
	Page 109		Page 111
			<u> </u>
1	form of take a view of is what the costs and expenses	1	"A liquidator in a members' voluntary liquidation
2	of the liquidation or an insolvency process might be.	2	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even
2 3	of the liquidation or an insolvency process might be.  I can't get away from that. You've got to do that,	2 3	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even though the effect of the winding-up might be to defeat
2 3 4	of the liquidation or an insolvency process might be.  I can't get away from that. You've got to do that,  I think on because they come at the top of the	2 3 4	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even though the effect of the winding-up might be to defeat the contingent claims of its creditors. Such
2 3 4 5	of the liquidation or an insolvency process might be.  I can't get away from that. You've got to do that,  I think on because they come at the top of the waterfall.	2 3 4 5	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even though the effect of the winding-up might be to defeat the contingent claims of its creditors. Such a liquidator who had already valued a contingent claim
2 3 4 5 6	of the liquidation or an insolvency process might be.  I can't get away from that. You've got to do that,  I think on because they come at the top of the waterfall.  But that's a wholly different order of difficulty to	2 3 4 5 6	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even though the effect of the winding-up might be to defeat the contingent claims of its creditors. Such a liquidator who had already valued a contingent claim and so admitted it to proof in the amount of the
2 3 4 5 6 7	of the liquidation or an insolvency process might be.  I can't get away from that. You've got to do that,  I think on because they come at the top of the waterfall.  But that's a wholly different order of difficulty to the one that is postulating taking into account, as	2 3 4 5 6 7	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even though the effect of the winding-up might be to defeat the contingent claims of its creditors. Such a liquidator who had already valued a contingent claim and so admitted it to proof in the amount of the valuation was not therefore obliged to provide for the
2 3 4 5 6 7 8	of the liquidation or an insolvency process might be. I can't get away from that. You've got to do that, I think on because they come at the top of the waterfall.  But that's a wholly different order of difficulty to the one that is postulating taking into account, as I say, statutory interest for an unknown period in	2 3 4 5 6 7 8	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even though the effect of the winding-up might be to defeat the contingent claims of its creditors. Such a liquidator who had already valued a contingent claim and so admitted it to proof in the amount of the valuation was not therefore obliged to provide for the contingency in full by making a reserve against any
2 3 4 5 6 7 8 9	of the liquidation or an insolvency process might be.  I can't get away from that. You've got to do that,  I think on because they come at the top of the waterfall.  But that's a wholly different order of difficulty to the one that is postulating taking into account, as  I say, statutory interest for an unknown period in relation to an unknown number of contracts, still less	2 3 4 5 6 7 8	"A liquidator in a members' voluntary liquidation was under an obligation to complete the liquidation even though the effect of the winding-up might be to defeat the contingent claims of its creditors. Such a liquidator who had already valued a contingent claim and so admitted it to proof in the amount of the valuation was not therefore obliged to provide for the contingency in full by making a reserve against any distribution to members, and that therefore the
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1	my Lord had in mind, I think.	1	though, in a sense the point which almost comes with the
2	Then the relevant parts for the current purposes are	2	name, that a non-provable claim is by definition not
3	to be found in paragraphs 36 and 37, the highlighted	3	part of the statutory process of proof.
4	passages, at page 521 to 522. Just picking up the	4	The judge in his judgment dealt with the point in
5	critical points that in paragraph 37, where Patten LJ	5	a sense actually he dealt with the sort of point we've
6	indicated at the end of paragraph 37 of the judgment,	6	been debating now, not actually in the context of
7	just between E and F on page 522:	7	subordination at all. He did make a comment under the
8	"The reference to the company's liabilities in	8	heading of "Section 74", which I think I must deal with
9	section 107 must be to the liabilities as determined in	9	as the final sort of point on this area, in
10	accordance with the 1986 Rules. Otherwise they serve no	10	paragraph 152 of the judgment.
11	useful purpose."	11	This is where we will end up with Lord Neuberger's
12	Then:	12	paragraph in Nortel, because in the judgment at
13	"The effect of the 1986 Rules is to allow the	13	paragraph 152 the judge said:
14	liquidator after the disposal of any appeal against	14	"The purpose of a liquidation is to realise, to best
15	valuation to distribute the assets of the company free	15	advantage, all the assets of the company and to
16	from any further claims by creditors."	16	distribute the proceeds of sale amongst those entitled
17	LORD JUSTICE LEWISON: Taken literally that would knock out	17	to them in the order of priority in which they are
18	non-provable claims, wouldn't it?	18	entitled to receive them. As the liquidation of
19	MR SNOWDEN: Well, as I've indicated, non-provable claims	19	a company ends with its dissolution, nothing as a matter
20	don't exist in the liquidation. So what in fact has to	20	of principle should be left unresolved for the future.
21	happen is that the non-provable claimant has to get his	21	This is in contrast to individuals who are discharged
22	claim in against the company, asking for the proceedings	22	from bankruptcy and who can therefore, for example,
23	to be allowed to continue, or indeed just to issue the	23	continue to be liable for such pre-bankruptcy
24	proceedings which I think are not automatically stayed	24	liabilities as the law may prescribe. It is the purpose
25	in a members' voluntary liquidation and then pursue them	25	of a liquidation to pay all the liabilities of the
	Page 113		Page 115
1	in the and in the control of the con	1	
1	in the ordinary way. So they're not knocked out, in the	1	company, including those which are not capable of
3	sense they're just not in they're not in the insolvency process in the first place.	2	proof."
4	LORD JUSTICE MOORE-BICK: But Patten LJ didn't have to	3 4	That echoes a point that was made to me by my Lord
5	address that point.	5	Lord Justice Briggs this morning, which we, with
6	MR SNOWDEN: No, no.	6	respect, don't agree with if by that one is looking at the statutory insolvency process. The statutory
7	LORD JUSTICE MOORE-BICK: So I'm not sure what we can get	7	insolvency process does not include as part of its
8	out of it.	8	purpose the payment of non-provable claims. That's the
9	MR SNOWDEN: It's because, just picking up the final	9	debate we had this morning.
10	sentence of paragraph 38:	10	LORD JUSTICE BRIGGS: Yes.
11	"The liquidator is entitled to proceed to	11	MR SNOWDEN: He doesn't deal, of course, with the actual
12	a distribution to members on the basis the debt is	12	case we're dealing with with administrations which is
13	admitted to proof."	13	a point I made just after lunch. He then says:
14	There is no mention in this examination of the	14	"The payment or compromise of non-provable tort
	and the state of the		
רו	statutory scheme of the liquidator having a duty to deal	15	claims In re T&N was as much a nurpose of the
15 16	statutory scheme of the liquidator having a duty to deal with non-provable claims.	15 16	claims In re T&N was as much a purpose of the administration to the T&N companies as the payment of
16	with non-provable claims.	16	administration to the T&N companies as the payment of
	, , , , , , , , , , , , , , , , , , , ,	16 17	administration to the T&N companies as the payment of their provable debts."
16 17 18	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?	16 17 18	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in
16 17	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?  MR SNOWDEN: No, I understand that, but by definition	16 17 18 19	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in T&N the question was whether there could be a scheme of
16 17 18 19	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?  MR SNOWDEN: No, I understand that, but by definition  LORD JUSTICE MOORE-BICK: You can proceed on the assumption	16 17 18 19	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in T&N the question was whether there could be a scheme of arrangement proposed by the administrators. He said,
16 17 18 19 20	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?  MR SNOWDEN: No, I understand that, but by definition	16 17 18 19 20	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in T&N the question was whether there could be a scheme of arrangement proposed by the administrators. He said, well, it was within the statutory scope of a scheme of
16 17 18 19 20 21	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?  MR SNOWDEN: No, I understand that, but by definition  LORD JUSTICE MOORE-BICK: You can proceed on the assumption that every time a judge deals with a point he writes	16 17 18 19 20 21	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in T&N the question was whether there could be a scheme of arrangement proposed by the administrators. He said,
16 17 18 19 20 21 22	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?  MR SNOWDEN: No, I understand that, but by definition  LORD JUSTICE MOORE-BICK: You can proceed on the assumptior that every time a judge deals with a point he writes a textbook on it and tries to have an exhaustive survey	16 17 18 19 20 21 22	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in T&N the question was whether there could be a scheme of arrangement proposed by the administrators. He said, well, it was within the statutory scope of a scheme of arrangement to deal with those claims but he actually held that the claims fell outside the process of proof.
16 17 18 19 20 21 22 23	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?  MR SNOWDEN: No, I understand that, but by definition  LORD JUSTICE MOORE-BICK: You can proceed on the assumption that every time a judge deals with a point he writes a textbook on it and tries to have an exhaustive survey of the field. Judges tend to deal with the issues	16 17 18 19 20 21 22 23	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in T&N the question was whether there could be a scheme of arrangement proposed by the administrators. He said, well, it was within the statutory scope of a scheme of arrangement to deal with those claims but he actually held that the claims fell outside the process of proof.
16 17 18 19 20 21 22 23 24	with non-provable claims.  LORD JUSTICE BRIGGS: But were there any non-provable claims in that case?  MR SNOWDEN: No, I understand that, but by definition  LORD JUSTICE MOORE-BICK: You can proceed on the assumptior that every time a judge deals with a point he writes a textbook on it and tries to have an exhaustive survey of the field. Judges tend to deal with the issues before them.	16 17 18 19 20 21 22 23 24	administration to the T&N companies as the payment of their provable debts."  He was, with respect, actually talking about in T&N the question was whether there could be a scheme of arrangement proposed by the administrators. He said, well, it was within the statutory scope of a scheme of arrangement to deal with those claims but he actually held that the claims fell outside the process of proof.  LORD JUSTICE MOORE-BICK: So you would argue with tha

1	MR SNOWDEN: Yes. And:	1	Then the final case that the judge referred to in
2	"In re R-R Realisations the final distribution to	2	this context is Nortel.
3	members was delayed while provision was made for tort	3	LORD JUSTICE BRIGGS: Yes.
4	claims made by the estates of persons killed in the	4	MR SNOWDEN: Lord Neuberger's comment in Nortel and that
5	crash of the aircraft powered by Rolls-Royce engines	5	is in bundle 1C. It's at tab 96 of bundle 1C.
6	which incurred well into the liquidation."	6	Lord Neuberger's paragraph is at paragraph 39. We
7	That's the case that was referred to in T&N by the	7	simply say that it shouldn't be regarded, with respect
8	judge himself. I think he had been junior counsel in	8	to Lord Neuberger, as anything more than it obviously
9	the case. But again the point was the analysis is not	9	was, which was, in his own words, a summary of what he
10	that there is a structure or part of the insolvency	10	regarded as the effect of the insolvency legislation.
11	process that deals with those claims, it's just the	11	But he's in no way saying that the insolvency
12	distribution to members was stayed to allow claims to be	12	legislation or the scheme that it provides for actually
13	pursued outside the statutory process.	13	contains any provision in relation to non-provable
14	LORD JUSTICE BRIGGS: It says "provision was made". Is the	14	liabilities.
15	case in the bundle?	15	LORD JUSTICE BRIGGS: He's not saying it contains any
16	MR SNOWDEN: It is.	16	machinery, but he clearly thinks it contains provision
17	LORD JUSTICE LEWISON: Wasn't it one of those cases where	17	which requires them to be paid ahead of shareholders.
18	the judge said you've moved out of the insolvency	18	MR SNOWDEN: With respect, my Lord
19	process, because now there's a surplus? Isn't it one of	19	LORD JUSTICE BRIGGS: It is put in such compressed form one
20	those cases?	20	slightly doubts whether there was much dispute about it.
21	MR SNOWDEN: I think what it was was the liquidator had	21	MR SNOWDEN: I suspect that. In reality I don't believe any
22	advertised to make a distribution to members in the	22	of the provisions that he there refers to touches on
23	usual way because there was a surplus, he'd dealt with	23	that point, even remotely.
24	all the claims. Then when he'd advertised that he was	24	LORD JUSTICE LEWISON: His list doesn't include subordinated
25	going to make a distribution, all a sudden some	25	creditors.
	Page 117		Page 119
1	creditors who were the dependants of people who had been	1	MR SNOWDEN: It doesn't, that's true.
2	killed in the air crash suddenly popped up and issued	2	LORD JUSTICE BRIGGS: They would come in under unsecured
3	claims, writ actions. The liquidator said, "Well, what	3	provable debts, because a subordinated debt is in
4	do I do? Do I go ahead and distribute to members or do	4	principle provable, and that gets you into all the
5	I not?" And the court said "Don't distribute".	5	problems about statutory interest.
6	That's all it said. It didn't say, "And go ahead	6	MR SNOWDEN: That's right. We would be perfectly happy to
7	and deal with them in the ordinary way" et cetera,	7	take our place at five in the waterfall.
8	et cetera. It simply said, "Don't distribute because	8	LORD JUSTICE MOORE-BICK: Is this argument really one,
9	these claims are out there". So I don't think there was	9	because Lord Neuberger does or doesn't say something
10	any debate in the case at all about a provision in the	10	about the order of events, that casts some light on the
11	sense of a reserve or anything like that.	11	construction of the agreement?
12	LORD JUSTICE BRIGGS: Can you just give us the case number	12	MR SNOWDEN: No, it's because
13	where it appears in the bundle?	13	LORD JUSTICE MOORE-BICK: I have grave doubt about that.
14	MR SNOWDEN: Yes.	14	MR SNOWDEN: I agree. My Lord, with respect, that's right.
15	LORD JUSTICE BRIGGS: I am not asking you to go to it.	15	A lot of store is placed on this paragraph by my learned
16	MR SNOWDEN: It is bundle 5, tab 9. Authorities bundle 5,	16	friends.
17	tab 9.	17	LORD JUSTICE BRIGGS: And by the judge.
18	LORD JUSTICE BRIGGS: That was the (inaudible). (Pause).	18	MR SNOWDEN: And by the judge, so I am simply saying
19	MR SNOWDEN: You see, the summons that was issued by the	19	LORD JUSTICE BRIGGS: In a sense he structures his whole
20	liquidator was simply asking the Companies Court for	20	judgment by starting with it.
21	leave to distribute or not, and it was held "no".	21	MR SNOWDEN: Yes. Your Lordship knows as well as anybody in
22	But there's no discussion, as I see it, about	22	this courtroom the problem that was in Nortel of the
23	a provision in the sense of I think perhaps as my	23	pensions liabilities that potentially fell into a black
24	Lord Lord Justice Lewison thought there might be;	24	hole, as it was put.
25	a provision as reserve, if you like. (Pause).	25	LORD JUSTICE BRIGGS: Yes. I'm afraid so, yes. A dark grey
	Page 118		Page 120

1	hole I think it possibly changed to during the course	1	wording.
2	of	2	LORD JUSTICE BRIGGS: Thinking back in Nortel, I think it
3	MR SNOWDEN: It was a very different issue which was	3	was probably common ground at first instance that if the
4	difficult enough but certainly the judgment is	4	FSD fell into it what wasn't an expense or provable
5	structured in this way, but it really isn't an analysis	5	debt, then it would be a non-provable debt. If there
6	of the issue that's facing this court.	6	was a surplus it would have to be dealt with, but only
7	LORD JUSTICE LEWISON: One way of looking at it is to ask	7	if there was a surplus.
8	you whether you are in category 5A or 7A, because you're	8	MR SNOWDEN: We're back at Nortel?
9	not in the list, as it stands, anywhere.	9	LORD JUSTICE BRIGGS: Yes, sorry, just for the purpose of
10	MR SNOWDEN: Well, yes. Yes. Well, we're not separately	10	trying to remind myself whether there was any argument
11	identified for sure. We say we are unsecured provable	11	about that bit of the waterfall.
12	debts and we say, you're quite right, we do fall	12	MR SNOWDEN: Yes. I will be taking your Lordship very
13	within actually, we probably would be 5B. I think 5A	13	shortly to currency conversion claims. The point
14	would be the unsubordinated provable debts.	14	your Lordship I think made at first instance, there's
15	LORD JUSTICE LEWISON: Quite.	15	a general assumption that Parliament would prefer to see
16	MR SNOWDEN: 5B is us and then the rest follows.	16	claims either payable as provable debts or as
17	LORD JUSTICE BRIGGS: You could, as a matter of contract,	17	an expense, but the idea that actually it creates or
18	have a subordinated creditor who had promised not to get	18	allows to exist non-provable liabilities lurking around
19	in the way of statutory interest, promised to	19	the statutory scheme, having to be dealt with in this
20	subordinate his claim to statutory interest to the	20	rather ad hoc way is surprising.
21	unsubordinated creditors.	21	LORD JUSTICE BRIGGS: Yes. I think the surprise didn't go
22	MR SNOWDEN: Yes.	22	much farther than having to deal it with in a context in
23	LORD JUSTICE BRIGGS: It's really just a matter of contract	23	which there wouldn't be any money.
24	where you come.	24	MR SNOWDEN: We'll see
25	MR SNOWDEN: I have to say I think he probably ought to do	25	LORD JUSTICE BRIGGS: But that's just my best recollection
	Page 121		Page 123
1	that be way of a turnover subordination because	1	MR SNOWDEN: We'll see, when I come on to it, non-provable
2	otherwise it becomes very difficult to apply	2	claims I will be coming on to it very shortly are
3	LORD JUSTICE BRIGGS: How you do it in a sense	3	as rare as hen's teeth and they're not what Parliament
4	MR SNOWDEN: Yes, I agree.	4	desires. But, for sure, currency conversion claims
5	LORD JUSTICE BRIGGS: doesn't matter. As a matter of	5	which are said not just to be pre-existing ones which
6	contract	6	slip through the cracks, but are said to be the product
7	MR SNOWDEN: You could.	7	of the very statutory scheme that Parliament enacted,
8	LORD JUSTICE BRIGGS: it is not one of those provisions	8	is, with respect, a pretty extraordinary proposition for
9	which you can't contract out of falling short of.	9	the judge to have accepted, i.e. that Parliament could
10	MR SNOWDEN: I agree. But I think he would probably have to	10	have intended or meant to create, as a byproduct of its
11	do it by way of a turnover subordination in relation to	11	express statutory scheme to deal with currency
12	statutory interest so as to enable the rule to be	12	conversion, a type of non-provable liability.
13	complied with.	13	My Lord, I think the only point I was going to then
14	That was actually the treatment that the judge gave	14	finish on in relation to the subordination point is what
15	to that question, but actually in a different part of	15	I would call the questions of policy. The judge dealt
16	his judgment, because he didn't really, with great	16	with these in paragraphs 86 and 87.
17	respect to him, actually grapple with the question of	17	The judge made two points at the end of this section
18	payable or capable of being determined or established in	18	on the subordination. The first point he made in
19	an insolvency. Other than very shortly in relation to	19	paragraph 86 was essentially this. He said, well, if
20	statutory interest, he just said, "It's payable in	20	LBHI2's debt is subordinated to the principle of other
21	an insolvency", that's it, and "and not at all in	21	debts and contractual interest while LBIE is a going
22	relation to currency conversion claims". There's	22	concern, surely it should also be subordinated to
23	actually no analysis at all as to how currency	23	statutory interest which compensates creditors for being
	· · · · · · · · · · · · · · · · · · ·		
24	conversion claims, as he found them to exist, as	24	kept out of their money by the insolvency. That's
24 25	conversion claims, as he found them to exist, as non-provable claims, fitted within the subordinated loan Page 122	24 25	kept out of their money by the insolvency. That's essentially what he is saying in paragraph 86. Perhaps  Page 124

1 your Lordships can just remind yourselves of 1 My Lords, I was going then to move on to the 2 2 paragraph 86. question of currency conversion claims unless your 3 (Pause). 3 Lordships have anything more for me at this stage. 4 4 We went over a lot of this ground this morning, so I've already made the point that, given the 5 5 your Lordships probably won't be surprised by my statutory scheme, non-provable debts are very rare, 6 6 response to this. With respect, this is the a non undesirable, not really what the legislature likes to sequitur and completely missed the point. As far as 7 7 see hanging around and, whenever it can do, seeks to 8 8 contractual interest goes pre-insolvency, of course the bring within the statutory scheme. 9 subordinated creditors gets priority because that's part 9 We say that currency conversion claims are even 10 10 rarer still, to the extent of actually being patently of their proved debt which we accept has priority. But 11 11 illogical. We'll see that Parliament intended in 1986 statutory interest performs a different function. 12 Statutory interest performs the function of compensating 12 to introduce for the first time a new and carefully 13 all creditors equally for being kept out of their money 13 debated process for the conversion of foreign currency 14 14 by an insolvency. As between creditors, indeed we would claims in a liquidation or an administration. The idea 15 15 that Parliament should be taken to have intended to say it would be surprising if, bearing in mind what 16 statutory interest is supposed to do and the way it is 16 thereby create the possibility of a derivative 17 17 structured, one creditor subordinated himself to payment non-provable claim by somebody who says, "Well, I want 18 of statutory interest to another without at least some 18 compensation because the statutory scheme you've put in 19 19 express acknowledgement or recognition of that; and place for conversion of my currency claim and proof of 20 20 debt has actually caused me loss as against the there is none in the agreement. 21 2.1 But the judge's analysis seems simply to be to underlying contract and its currency", we say is 22 equate contractual interest and statutory interest and 22 something that one simply can't attribute to Parliament 23 then treat the subordinated creditor very much as in the 23 or the legislative intent. It's completely contrary to 24 24 position of a member. the whole ethos of the 1986 legislation and the 25 So far as the second point goes, in paragraph 87, 25 approach., what's more, this isn't a situation in which Page 125 Page 127 1 the judge seems to have postulated a question based upon 1 that might have happened by accident because it had 2 what the Supreme Court might have held if it didn't 2 fallen through the cracks, if you like, or because, for 3 3 actually hold what it did hold. Perhaps I can put it example, like the asbestos claimants nobody had quite 4 4 this way, to suggest the parties to the subordinated envisaged that there might be, when the Rules were put 5 loan agreement might have actually had in mind the 5 in place, these very long tail illnesses. 6 possibility of non-provable debts is pretty far-fetched, 6 It's not something that's not foreseen. The 7 but to suggest that they might have hard in mind 7 legislative history in the court committee and the 8 8 an incorrect view of the law on non-provable debts, Law Commission, as we'll see in a moment, actually 9 9 contrary to the decision in Nortel, is, with respect, spotted the potential problem of somebody saying, "Well, 10 constructing a hypothesis which is a very shaky 10 if you convert my claim at the start of the liquidation, 11 foundation for a piece of analysis. 11 I might want compensation for the assets of the company 12 12 The actual reasoning in Nortel would lead to the because of the currency fluctuations", and had said, "We 13 13 view that there was no difference whenever the notice don't think that's desirable". 14 that the judge is referring to in paragraph 87 was 14 So the idea that Parliament would have actually 15 served. So the difference that he identifies as the 15 allowed a completely unregulated, vague and indistinct 16 basis for his reasoning simply falls away on the basis 16 situation to arise when currency conversion claims could 17 of the actual decision in Nortel. 17 actually be made for compensation against the assets of 18 With respect, not only on the wording, properly 18 the company we just say just defies logic and the judge 19 19 looked at, but also when one looks at the policy and was wrong to accept that there are the possibility of 20 20 keeps separately in mind the status of creditor and such claims. 21 member and the importance of the relevance of statutory 21 That's the sketch. Can I start just very quickly 22 interest and what it is actually doing, we say the judge 22 by -- I don't know whether you still have Nortel open. 23 came to the wrong conclusion on the subordination. To 23 If you have Nortel open you can see at paragraphs 92 and 24 use my Lord Lord Justice Lewison's waterfall, we're at 24 93 -- this is bundle 1C, tab 96. Lord Neuberger said at

5B, not 7B.

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92 to 93 -- well in fact I can probably pick it up at

1 1 90. He made exactly the point about the background the conversion of foreign currency claims that were 2 2 approach to insolvency legislation that Briggs J, as he proved should take place by reference to the prevailing 3 3 exchange rate at the date of liquidation, because only then was, made at first instance. 4 In 90 he makes the point, just below E, paragraph 90 4 in that way, he said, can you have a pari passu 5 5 just below E on the page: distribution between all creditors who prove their 6 6 "Over the past 300 years the legislature has claims. In other words, you have to get them all into 7 7 progressively widened the definition of provable debts a base currency by reference to the same exchange date. 8 8 and narrowed the class of non-provable liabilities, to That was also approved by Slade J and by the Court 9 9 quote from the written case of Mr Phillips QC, who of Appeal in Lines Brothers. Lines Brothers is in 10 10 bundle 1B at tabs 56 and 57. There's a summary in the relied on those cases." 11 He then referred at paragraph 92, at the foot of the 11 judge's judgment, which for this purpose I don't dissent 12 12 page, to the Cork Committee, describing it as: from, in paragraphs 88 and 89. So I have summarised 13 "A basic of principle of the law of insolvency that 13 just orally what the judge said in paragraphs 88 and 89 14 14 every debt or liability capable of being expressed in of his judgment. (Pause). 15 15 LORD JUSTICE BRIGGS: May we assume that there was no money terms should be eligible for proof so that the 16 insolvency administration should deal comprehensively 16 question of a surplus beyond provable debts in any of 17 with and in one way or another discharge all such debts 17 those cases? So that the particular problem that has 18 and liabilities." 18 more recently --19 19 MR SNOWDEN: Absolutely. Yes. In fact very specific --Then the notion that all possible liabilities within 20 reason should be provable: 20 LORD JUSTICE BRIGGS: -- arisen needn't really have crossed 2.1 "Helps achieve equal access to all creditors and 21 anybody's mind. 22 potential creditors in an insolvency and in bankruptcy 22 MR SNOWDEN: Very specifically in Lines Brothers, that's 23 proceedings helps ensure the former bankrupt can in due 23 right, there was no surplus. That's right. 24 But it did cross the mind of the Law Commission and course start afresh." 24 25 That passage picks up points that I will just simply 25 the Cork Committee. So it hadn't cross the minds of the Page 129 Page 131 1 1 give you the reference to. In T&N at tab 79 of the same judges in that case. 2 2 bundle David Richards J traced the same sort of point Can I take you first of all to the Law Commission 3 3 working paper which is in the authorities bundle at -through paragraphs 76 and 84, and my Lord 4 4 Lord Justice Briggs, when he was at first instance in it is bundle 4, tab 8. (Pause). 5 Nortel, said something very similar in his own judgment 5 LORD JUSTICE BRIGGS: Gosh, it looks like pre-computer days 6 at paragraph 66. That's not in the bundle but it can be 6 this would be. 7 7 supplied if the first instance decision is needed. MR SNOWDEN: Yes. 8 8 LORD JUSTICE BRIGGS: Electric typewriter. Can I just stick So we say it is absolutely perfectly clear that 9 9 a date on the front of this? Parliament has consistently sought to eliminate MR SNOWDEN: It is 1981. It's facing the --10 non-provable claims and to make debts wherever possible 10 11 LORD JUSTICE BRIGGS: Oh, yes. Sorry, right, I have it. provable. 11 12 12 MR SNOWDEN: Now in fact, the hold -- as is apparent in As I said, we distinguish the situation where 13 something comes up in an unforeseen way and turns out to 13 a sense the whole extract needs to be read. If I can 14 be non-provable, like the asbestos claimants, from this 14 skim and just pick the main parts, but I do urge your 15 current situation. When you look at the legislative 15 Lordships to perhaps read the entirety. 16 history, it's quite clear that the whole question of 16 They have referred, first of all, to Dynamics in 17 17 currency conversion was gone over at some length prior paragraph 339 and onwards, where Oliver J said it should 18 18 to the 1986 legislation. be conversion at the start of the liquidation. Then 19 19 Prior to 1986, there was no provision in the they rehearse, the Law Commission rehearses, the 20 20 arguments that might be made to justify conversion at insolvency legislation for dealing with foreign currency 21 21 a later date, namely the date of distribution, for claims, in the sense that there was no express provision 22 22 as to how they should be dealt with. That situation led example. They come down to the conclusion at 23 to the decision In re Dynamics, which we saw referred to 23 paragraph 343, at the end, and 344 that it would be 24 24 undesirable to propose any alteration of the rule laid this morning. I don't need to take you to it, I think. 25 It's in bundle 1B at tab 55, where Oliver J held that 25 down in Dynamics. Page 130 Page 132

1 Then, 344, they say: 1 transpires the debtor is solvent." 2 2 "On the assumption that the present law remains So we say, first of all, that the Law Commission --3 3 whatever else can be said, the Law Commission has unaltered three minor matters remain." 4 4 The first of those relates to a voluntary winding up undoubtedly turned its mind to the very question. On 5 5 of an insolvent company. The second, in 345, relates to that basis alone, the idea that Parliament would have 6 left it unregulated when it was introducing three years 6 the conversion of foreign debts in a liquidation, 7 whether voluntary or compulsory, of solvent companies. 7 later -- sorry, when it was five years later considering 8 8 Then they go on to deal with that point, which of course on the back of this report the very statutory enactment 9 is relevant to us, and they say at the end of 345: 9 of currency conversion that enacted Oliver J's decision, 10 10 "In the case of winding up, we don't think it would and should have left unresolved and unregulated the sort 11 11 be practicable to devise different conversion dates of currency conversion compensation claim, we say is 12 depending on the solvency of the company. The initial 12 iust fanciful. 13 13 They also drew attention to some point I'll come conversion date must in our view be that of the 14 14 winding-up order in every case. We believe that similar back to in a moment that actually currency conversion 15 15 claims that are said to exist actually do act in a very rules should be applied in bankruptcy cases where it 16 transpires the debtor is solvent." 16 odd way as between creditors and also, in fact, as 17 17 Then the critical paragraphs, 346 and 347: regards members as well. It's instructive to consider 18 "It may turn out in a small minority of cases that 18 the position of creditors who are both advantaged by the 19 19 conversion of foreign currency debts having been duly currency conversion that occurs at the start and those 20 made at the date of the winding-up order, the company is 20 that are disadvantaged. But the Law Commission was live 21 found to be solvent. This raises a third question, 21 to the potential for inequality between creditors. 22 namely whether in such cases foreign currency creditors 22 Now, the Cork Committee, if you turn on to the next 23 should be compensated from the assets of the company or 23 tab, which was the foundation for the insolvency 24 the bankrupt for the adverse exchange rate fluctuations 24 legislation in 1986, published their report in 1982. 25 between the date of the relevant order and the date of 25 Just to --Page 133 Page 135 LORD JUSTICE LEWISON: I think they reported in the previous 1 actual payment. This would involve a second later 2 2 conversion of these debts as at the date of actual year to the Secretary of State. There's some debate in 3 3 payment or as close thereto as is practicable. We've the skeleton arguments about whether Lines Brothers had 4 4 or haven't been decided in the Court of Appeal when the explained in paragraph 341 to 343 why we don't favour 5 this approach in regard to a foreign currency debt, 5 Cork Committee reported. I think if you look at the 6 irrespective of whether in terms of sterling it has 6 front of the Cork Committee report, their letter to the 7 7 increased or decreased in value after its original Secretary of State pre-dates the decision in the Court 8 8 of Appeal. (Pause). conversion. 9 9 MR SNOWDEN: Your Lordship's right. The letter is "To apply a later conversion date only in the case 10 10 where the change in the relative value has been adverse 30 April 1981. LORD JUSTICE LEWISON: That was before Lines Brothers in the to the creditor in question would in our view be even 11 11 12 12 more unacceptable, since it would involve Court of Appeal. 13 MR SNOWDEN: That's correct. 13 a discrimination between foreign currency debts, 14 depending on whether the exchange rates have moved to 14 LORD JUSTICE LEWISON: So I think when that particular 15 the advantage or disadvantage of creditors, and there 15 paragraph everybody has homed in on talks about two 16 appears to be no justification in principle for such 16 cases, they are talking about Dynamics and 17 Lines Brothers at first instance. 17 a step." MR SNOWDEN: That's right. But then the Law Commission's 18 So they say it should remain, the conversion date at 18 19 19 the start of the liquidation. In 347: final report --20 20 LORD JUSTICE LEWISON: Post-dates Lines Brothers in the "To summarise, we support the view of Oliver J in 21 Court of Appeal. 21 Dynamics that the date of the winding-up order is the 22 MR SNOWDEN: -- which came after that definitely looked at 22 appropriate once for all date for the conversion of 23 23 every foreign currency debt on the winding up of both the Court of Appeal. 24 solvent and insolvent companies and we believe a similar 24 LORD JUSTICE LEWISON: Yes, exactly.

rule should apply to bankruptcy, whether or not it

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MR SNOWDEN: That's right.

1	In the Cork Committee report at paragraph 1289	1	resulted in him being paid in his foreign currency under
2	first of all, paragraph 1289 is the passage you've	2	his underlying contract, in other words he's benefited
3	already seen cited in Lord Neuberger's judgment in	3	from the statutory provision for conversion, there is no
4	Nortel.	4	basis upon which that creditor can be asked to repay the
5	But then turning through, under the heading "Foreign	5	benefit which he's had over and above his contractual
6	money liabilities" at page 298 of this extract,	6	entitlement.
7	paragraphs 1308 and 1309, you'll see that there's	7	That's the basis on which the judge deals with it
8	reference in 1308 to Miliangos v George Frank (Textiles)	8	and I don't think anybody has suggested to the contrary.
9	and the two subsequent cases, as my Lord has just	9	But the answer to that is because the creditor has
10	indicated, which I think must be Dynamics and	10	an entitlement under the statute to be paid in sterling
11	Lines Brothers at first instance. Then, at 1309:	11	in that way. So if one proposed the question in terms
12	"We are firmly of the view that the principle stated	12	of restitution, for example, would he be unjustly
13	in the two most recent cases provide an appropriate	13	enriched as against other creditors or as against
14	solution to the problem of conversion of foreign money	14	members or
15	claims into sterling in the context of insolvency	15	LORD JUSTICE BRIGGS: We're only really concerned with
16	proceedings. We strongly recommend that any future	16	members aren't, we?
17	Insolvency Act should expressly provide that the	17	MR SNOWDEN: Then the answer would be he would be enriched
18	conversion of debts in foreign currencies should be	18	because that extra has undoubtedly prejudiced the
19	effected as at the date of commencement of the relevant	19	members, there's less left in the pot. Indeed to some
20	insolvency proceedings.	20	extent it might actually be creditor as well if it's
21	"Furthermore, we take the same view as the	21	a partial distribution. So there is a potential
22	Law Commission working paper that conversion as at that	22	prejudice but the point is he can't be asked to repay.
23	date should continue to apply, even if the debtor is	23	And why? Because it's not unjust because it's what he's
24	subsequently found to be solvent. To apply a later	24	statutory entitled to.
25	conversion date only in the case where the exchange rate	25	Now if the statute has that substantive effect, it
	Page 137		Page 139
1	has moved to the advantage of the creditor, but	1	gives him rights which allow him to hold on to the
2	necessarily not where it had moved against him, would in		sterling which he's been paid and to make a profit, in
3	our view be discriminatory and unacceptable."	3	inverted commas, as compared to his original contract,
4	That's a direct reference back, in fact those words	4	why is it that apparently the judge says, "No, but when
5	are a direct reference back, to the Law Commission	5	you look at currency conversion operating in respect of
6	paragraphs that I showed you.	6	somebody whose currency has subsequently appreciated
7	We say that this discrimination point you can flesh	7	against sterling", that that's just a procedural thing
8	out a little bit in the way that we do in our skeleton	8	for the purpose of proof of the debts and the creditor
9	at I have just lost my note. (Pause).	9	can claim for compensation from the assets of the
10	In fact, the judge I think also dealt with this in	10	company precisely the thing that the Law Commission
11	paragraphs 96 and 97 of the judgment.	11	considered and said was not a good idea. Why is it that
12	He was here dealing with some submissions that were	12	creditor can levy an extra compensation claim against
13	made by Mr Wolfson, and I am going to try do this very	13	the assets?
14	quickly and not as it were trample on Mr Wolfson's toes	14	In effect the judge is saying one is of substantive
		15	66
15	but I am sure he can do this better than me. Can I just	10	effect, the creditor can benefit in sterling, and the
15 16	make the point in my own submissions that if you follow	16	_
	make the point in my own submissions that if you follow		other only procedural.  So far as the judge's answer was concerned it, is
16	· .	16	other only procedural.
16 17	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has	16 17	other only procedural.  So far as the judge's answer was concerned it, is
16 17 18	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has a foreign currency claim which is converted to sterling	16 17 18	other only procedural.  So far as the judge's answer was concerned it, is the one that my Lord Lord Justice Briggs was I think
16 17 18 19	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has a foreign currency claim which is converted to sterling at the start of the liquidation or administration and	16 17 18 19	other only procedural.  So far as the judge's answer was concerned it, is the one that my Lord Lord Justice Briggs was I think putting to me, he gave the answer in paragraph 98 of the
16 17 18 19 20	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has a foreign currency claim which is converted to sterling at the start of the liquidation or administration and which appreciates sorry, if sterling appreciates	16 17 18 19 20	other only procedural.  So far as the judge's answer was concerned it, is the one that my Lord Lord Justice Briggs was I think putting to me, he gave the answer in paragraph 98 of the judgment. He said, dealing with the submission that was
16 17 18 19 20 21	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has a foreign currency claim which is converted to sterling at the start of the liquidation or administration and which appreciates sorry, if sterling appreciates against the foreign currency. So as a result of the	16 17 18 19 20 21	other only procedural.  So far as the judge's answer was concerned it, is the one that my Lord Lord Justice Briggs was I think putting to me, he gave the answer in paragraph 98 of the judgment. He said, dealing with the submission that was made that in liquidation there are a number of
16 17 18 19 20 21 22	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has a foreign currency claim which is converted to sterling at the start of the liquidation or administration and which appreciates sorry, if sterling appreciates against the foreign currency. So as a result of the conversion the creditor is better off because he's been	16 17 18 19 20 21 22	other only procedural.  So far as the judge's answer was concerned it, is the one that my Lord Lord Justice Briggs was I think putting to me, he gave the answer in paragraph 98 of the judgment. He said, dealing with the submission that was made that in liquidation there are a number of circumstances, winners and losers:
16 17 18 19 20 21 22 23	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has a foreign currency claim which is converted to sterling at the start of the liquidation or administration and which appreciates sorry, if sterling appreciates against the foreign currency. So as a result of the conversion the creditor is better off because he's been converted into sterling and he's paid in sterling, so	16 17 18 19 20 21 22 23	other only procedural.  So far as the judge's answer was concerned it, is the one that my Lord Lord Justice Briggs was I think putting to me, he gave the answer in paragraph 98 of the judgment. He said, dealing with the submission that was made that in liquidation there are a number of circumstances, winners and losers:  "The purpose of liquidation is to achieve a broad
16 17 18 19 20 21 22 23 24	make the point in my own submissions that if you follow the judge's reasoning, if you take a creditor who has a foreign currency claim which is converted to sterling at the start of the liquidation or administration and which appreciates sorry, if sterling appreciates against the foreign currency. So as a result of the conversion the creditor is better off because he's been converted into sterling and he's paid in sterling, so that at the end of the day he receives more in sterling	16 17 18 19 20 21 22 23 24	other only procedural.  So far as the judge's answer was concerned it, is the one that my Lord Lord Justice Briggs was I think putting to me, he gave the answer in paragraph 98 of the judgment. He said, dealing with the submission that was made that in liquidation there are a number of circumstances, winners and losers:  "The purpose of liquidation is to achieve a broad justice but in achieving that some creditors may find

1 1 creditors may find themselves in a better position than are different obviously variants of subordination. 2 2 their strict contractual rights." Obviously if a subordination agreement was plainly 3 3 meant -- if it plainly meant that the debt was He says: 4 4 subordinated to non-provable claims, then, you're right, "I accept this is so and it is necessary to ensure 5 5 pari passu distribution of assets among creditors with the competition is between the currency conversion 6 6 proved claims, but I don't understand why it should creditor and -- well, ultimately the member. 7 7 LORD JUSTICE BRIGGS: The member, yes. prevent those creditors who have not received their 8 MR SNOWDEN: But that would be, with respect, a very unusual 8 contractual entitlement from pressing their claims 9 against the company once the statutory regime for pari 9 case; but this case actually illustrates that you can't 10 just dismiss the issue of this differential effect 10 passu distributions has run its course. It is no answer 11 to a creditor with a contractual claim which has not 11 between creditors on the basis that it's only referable 12 12 been met to say either that in other circumstances he to members -- you know, it's a competition between 13 13 creditors and members. might have done better or that other creditors have in 14 What the judge has acknowledged is created or has 14 fact done better. As Brightman LJ made clear In re 15 15 held is created is, as an adjunct to the statutory Lines Brothers: 16 "Individual creditors may not achieve their full 16 scheme, a situation in which some creditors substantively benefit from the statutory scheme and can 17 17 contractual rights when they are in competition with 18 other creditors, but there is no justice in them not 18 keep their benefits, and others lose out, it would be 19 19 said, as against their contractual entitlements -doing so when they are in competition only with the 20 20 LORD JUSTICE LEWISON: Your point is this is like set off, debtor." 21 it's an interference with substantive rights, this 21 With respect to the judge, that is too simplistic 22 and our case illustrates why it is too simplistic, 22 particular part of the statutory code? 23 MR SNOWDEN: Yes. because the competition that actually exists in this 23 24 LORD JUSTICE LEWISON: Your entitlement to be paid in 24 case is between -- on the judge's view -- a subordinated 25 creditor, my clients, and other creditors who are 25 foreign currency is replaced by an entitlement to be Page 141 Page 143 paid in sterling as at the date of the winding-up. 1 non-subordinated but now want to have their currency 1 2 conversion claims paid ahead of our subordinated claims. 2 MR SNOWDEN: Yes. 3 3 LORD JUSTICE LEWISON: That's why the creditor is entitled So the competition in this case is not between one 4 4 creditor and a member, it's between a creditor who has to keep his sterling and that, you say, is why the creditor is not entitled to come back for more currency? 5 already been paid his full statutory entitlement under 5 6 the rules and my client who is a creditor. 6 MR SNOWDEN: Correct. 7 7 LORD JUSTICE BRIGGS: Only if your client has agreed so to LORD JUSTICE MOORE-BICK: Is there any legal fiction as to 8 8 when the payment is made or when it relates to? I ask subordinate his debt. Your main position is --9 9 the question because I was struck by a passage in MR SNOWDEN: Absolutely, yes. Absolutely, yes. Sorry, of 10 10 course. I mean, if --Wight v Eckhardt in which Lord Hoffmann refers to LORD JUSTICE BRIGGS: Generally speaking, as a matter of 11 an image of collecting and una flauta(?) distributing 11 12 12 statutory interpretation, i.e. the question whether the the assets of the company, suggesting in a sense it is 13 13 all considered to be referable to the date of the statutory conversion date does or does not rule out 14 a subsequent claim, only creates a problem between the 14 winding-up order, although there is a statutory 15 15 claimant and members. provision for distributing surplus funds as interest. 16 MR SNOWDEN: If there's no subordinated debt, that's right. 16 I don't know, is that how it is viewed? 17 LORD JUSTICE BRIGGS: On subordinated, if you choose to 17 MR SNOWDEN: Yes. 18 contract out of that, well, you've contracted out, why 18 LORD JUSTICE MOORE-BICK: If it is, you see, it has 19 19 should anybody weep for you? The real point is, surely, a potential effect on this argument because the foreign 20 that unless you have contracted out of it, it is only 20 currency creditor can be treated as having had his money members who stand to be affected. 21 at the date of the winding-up --21 MR SNOWDEN: Yes, although as I say -- in general terms 22 MR SNOWDEN: Yes 22 LORD JUSTICE MOORE-BICK: -- which of course he hasn't had 23 your Lordship is right, but it's not going to be the 23 24 case in every case. Even if you have contractually 24 but that would be the fiction, so he has suffered no 25 subordinated to, let's say, statutory interest -- there 25 currency loss by virtue of the lapse of time. What he Page 142 Page 144

1 will get is interest, statutory interest, if there's the 1 the period during which you're not being paid you're 2 2 funds to pay it. treated as having an accrued entitlement in a different MR SNOWDEN: Yes. 3 3 currency which you never agreed to be in in the first 4 LORD JUSTICE MOORE-BICK: I don't know --4 5 5 MR SNOWDEN: Yes. MR SNOWDEN: Yes, that's right. To achieve a pari passu 6 distribution between proved claimants the fiction is, as 6 LORD JUSTICE BRIGGS: So --7 Lord Hoffmann said, that the distribution of assets 7 MR SNOWDEN: Not just. 8 LORD JUSTICE BRIGGS: -- it's not just a loss caused by the takes place by reference to, and claims are determined 8 by reference to, and currency conversion is converted by 9 statute. It's a loss caused by not being where you 10 reference to, and set-off operates by reference to --10 would be if your contractual right had been honoured in 11 LORD JUSTICE MOORE-BICK: Well, set-off is always a problem 11 12 because that does operate at the date of the 12 MR SNOWDEN: It is a necessary part of the complaint that 13 liquidation, anyway, doesn't it? No, it's the 13 the statute operated on your claim in the way that it 14 winding-up order. 14 15 MR SNOWDEN: Set-off operates notionally by reference to the 15 LORD JUSTICE BRIGGS: Oh, yes. 16 date of the liquidation, albeit --16 MR SNOWDEN: What I am drawing attention to is the fact that 17 LORD JUSTICE MOORE-BICK: There you get full value at 17 people are quite happy to substantively take the benefit 18 whatever the current rate of exchange is. 18 of that but apparently not to take any detriment and say 19 19 MR SNOWDEN: At the date of liquidation. In administration "Well, it's actually the process, it's just procedural", 20 it's the same -- well, sorry, it's slightly different 20 and I am saying the process is what the process is. The 21 because in administration it's done by reference to the 21 process is a substantive replacement of the foreign 22 22 date on which the company -- sorry, it is only triggered currency debt by the sterling equivalent as at the date 23 23 by reference to the decision of the administrator to of the insolvency. It's that that forms the basis for 24 make a distribution and then it is backdated. 24 payments and entitlement thereafter. 25 LORD JUSTICE MOORE-BICK: Yes. 25 LORD JUSTICE LEWISON: Is there any other instance of Page 145 Page 147 1 MR SNOWDEN: But in all respects, to answer your Lordship's 1 a unitary obligation to pay a particular sum of money in 2 2 point, it is right that the whole ethos of the dollars which can give rise to both a provable and 3 3 insolvency legislation to achieve pari passu a non-provable claim arising out of exactly the same 4 4 obligation to pay exactly the same sum of money? distribution between proved claims is premised upon the 5 basis that there is a one date for all purposes, and 5 I understand that a tort claimant has a claim which is 6 then statutory interest is paid for the period of the 6 non-provable but that's because a set of facts has 7 7 insolvency to compensate people for being out of their happened after the relevant date. I more or less 8 8 understand that somebody who is entitled to contractual money. What the currency conversion claimants want to 9 9 interest can have a claim which is accruing from day to do is to say "Yes, we'll have all that, thank you very 10 10 much, but we'll also keep our contractual entitlement day. But this particular non-provable claim arises out 11 of a unitary obligation to pay a particular sum of money notionally running under the radar and, as and when we 11 12 12 in a foreign currency. I find it difficult to see how are actually paid our sterling dividend, we will compare 13 13 the statutory scheme can split that into something which that to the then prevailing exchange rate or to whenever 14 our contract would have required payment to be paid, and 14 is at the same time both provable and non-provable. 15 decide whether we've suffered a loss as a consequence of 15 MR SNOWDEN: Well, I share your Lordship's puzzlement at it. 16 the statutory scheme". 16 Particularly, in circumstances where the legislation 17 So, as the Law Commission put it, it is a claim for 17 follow, people looking carefully at this area and saying 18 "No, this is the scheme we want". They actually made --18 compensation caused by the operation of the statutory 19 as we've just seen in the Cork Committee -- an express 19 scheme, the statutory scheme that requires conversion. 20 LORD JUSTICE BRIGGS: Not just by the operation of the 20 decision to legislate for this, not just to leave it. 21 LORD JUSTICE LEWISON: The judge said the Law Commission's 21 statutory scheme. It is caused by (a) being kept out of 22 22 the currency which you would have been in had the final report fudged it. MR SNOWDEN: The point about legislating for the conversion, 23 23 contract had been performed, let's say in dollars is the 24 currency you want to contract to, and you're kept out of 24 before 1986 there was no provision at all for 25 it both because you're not being paid and because for 25 conversion. Page 146 Page 148

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1	LORD JUSTICE LEWISON: No, I follow.	1	Brightman LJ postulated the scenario that we're now in
2	MR SNOWDEN: And it had to be dealt with in the way the	2	fact looking at, which is a solvent company where there
3	judge made law of Lord Oliver, Oliver J as he then was.	3	has been a movement in exchange rates.
4	But the Cork Committee said, very firmly, "We think	4	At 21, between C and D, he says this:
5	there should be legislation on this point". For them	5	"This is not a problem with which we are directly
6	then to have left open this possibility that lurking	6	concerned and I wish to guard against expressing any
7	that they bifurcated the debt as it were and left	7	concluded view upon it. But when the problem arises for
8	lurking, unresolved, unregulated, extraneous	8	decision, it may be relevant to observe that the view
9	non-provable liability is what we say is baffling as	9	has been repeatedly expressed in relation to interest
10	a concept of legislation in this particular field	10	that once the provable debts have been satisfied in full
11	whereas we've seen what they were trying to do was	11	so that the company has in that sense a surplus of
12	legislate comprehensively.	12	assets, the duty of the liquidator is to discharge the
13	LORD JUSTICE MOORE-BICK: Is that a convenient moment for	13	contractual indebtedness of the company in respect of
14	the five-minute break?	14	such debts to the extent that the contractual
15	MR SNOWDEN: Yes, it is.	15	indebtedness exceeds the provable indebtedness."
16	LORD JUSTICE MOORE-BICK: Yes, we well rise for five	16	Then he quotes:
17	minutes.	17	"As soon as it is ascertained that there is
18	(3.18 pm)	18	a surplus, the creditor whose debt carries interest is
19	(A short break)	19	remitted to his rights under the contract: see
20	(3.23 pm)	20	Giffard LJ in Humber Ironworks and Selwyn LJ to the same
21	LORD JUSTICE MOORE-BICK: Yes, Mr Snowden.	21	effect."
22	MR SNOWDEN: Three little points. Apparently Briggs J's, as	22	This is obviously a central passage that is relied
23	he then was, decision in Nortel is in the bundle I am	23	upon or these are the central authorities relied upon.
24	told at 1C, 88, which it is indeed.	24	Just noting that the idea that there might be a currency
25	LORD JUSTICE MOORE-BICK: You want us to look at it then?	25	conversion claim, i.e. based upon this notion of the
	Page 149		Page 151
1	MR SNOWDEN: No, I mentioned it this morning and said it	1	contract continuing to exist notwithstanding conversion
	wasn't in the bundle. I am told it was.	2	· · · · · · · · · · · · · · · · · · ·
3		3	for the purposes of proof, first of all was uttered by
4	Just a point, currency conversion claims of course	4	Brightman LJ before there was express statutory legislation dealing with currency conversion. So he was
5	wouldn't just impact upon members or have an impact upon members. They would also have an impact upon other	5	dealing with it at a time when Parliament had not spoken
	non-provable claims. One of the big issues that no		
6 7	doubt will have to be resolved is how all the	6 7	and put in place a statutory regime to deal with
8	non-provable claims, if they are held to exist in this	8	currency conversion.  He is drawing a parallel to Humber Ironworks and the
9	current case, fight it out as between themselves.	9	cases in relation to interest. As we will also see,
10	LORD JUSTICE BRIGGS: It will have an impact on non-provable		Humber Ironworks was a case which was decided at a time
11	claims if there is a shortfall as against all	11	when there was no provision in the statute for the
12	non-provable claimants.	12	payment of post-liquidation interest. Again, interest
13	MR SNOWDEN: Yes.	13	was specifically, as we have seen, catered for by the
14	LORD JUSTICE BRIGGS: Yes.	14	insolvency legislation in 1986.
15	MR SNOWDEN: Then the situation of whether there was	15	So right at the outset of this I continue to make
16	a surplus when there is a surplus didn't arise for	16	very, very clear that this line of cases originates from
17	decision, of course, in Lines Brothers. But it was	17	a time when there was no express statutory scheme in
18	alluded to by Brightman LJ in Lines Brothers and that's	18	place dealing with either currency conversion or
19	where I was going to go next.	19	interest at the time. Certainly it is my submission
20	So if we can go, please, to Lines Brothers first and	20	that, since Parliament has adopted an express statutory
21	then in fact it will just be a paragraph and then off	21	scheme, this line of case law is no longer good or
22	to Humber Ironworks. But in authorities bundle 1B at	22	applicable. It's been ousted by the statutory scheme.
23	tab 57. (Pause).	23	Humber Ironworks is at authorities bundle 1A,
24	You'll see that Lines Brothers itself was	24	divider 12.
25	an insolvent company, but starting at page 20 at H,	25	LORD JUSTICE BRIGGS: Have you finished with Lines Brothers
	Page 150		Page 152
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1	or are we coming back?	1	consider the case under two aspects: first where there
2	MR SNOWDEN: I'm sorry.	2	is and next where there is not a surplus. I apprehend
3	LORD JUSTICE BRIGGS: Are we coming back to Lines Brothers	3	that in whatever manner the payments may have been made,
4	or are we finished with it?	4	whether originally they may have been made in respect of
5	MR SNOWDEN: We will, I think, be coming back to it in	5	capital or in respect of interest, still in as much as
6	passing.	6	they have all been paid in process of law and without
7	LORD JUSTICE BRIGGS: I just wondered whether to put it	7	any contract or agreement between the parties, the
8	away, that's all.	8	account must in the event of there being an ultimate
9	MR SNOWDEN: I should have been much better with my	9	surplus be taken as between the company and the
10	documentation management in order to help you keep your	10	creditors in the ordinary way, that is in the manner
11	desks clear. Certainly for the time being I am going to	11	pointed out in Bower v Marris, by treating the dividends
12	stick with Humber Ironworks, so you can put bundle 1B	12	as ordinary payments on account and applying each
13	away.	13	dividend in the first place to the payment of interest
14	It's an 1869 case	14	and in the surplus if any to the reduction of the
15	LORD JUSTICE LEWISON: Sorry, which tab was it, Mr Snowden	15	principal."
16	MR SNOWDEN: Sorry, tab 12.	16	He's basically saying that if there's nothing in the
17	LORD JUSTICE LEWISON: Tab 12. Thank you.	17	statutory scheme you just apply the normal contractual
18	MR SNOWDEN: It comes from a period of time when there is no	18	provision for allocation of payments that have been made
19	statutory provision for the payment of post-insolvency	19	against the contractual debt. That is in essence also
20	interest. There was no relevant statutory provision	20	what Gifford LJ said in his judgment at 647, at the
21	here, you can see that from two things. One is at	21	bottom of the page:
22	page 644, there's a reference, just before Selwyn LJ	22	"For these reasons, I am of the opinion that
23	starts his judgment, to a submission made by	23	dividends ought to be paid on the debts as they stand at
24	Mr Southgate in reply that:	24	the date of winding up or, when the estate is insolvent,
25	"Section 170 of the Act relates to a mode of	25	this rule distribute the assets in the fairest way."
	Page 153		Page 155
1	procedure. That is clear from Re East of England	1	That's dealing with the question of pre-insolvency
2	Banking Company where the 26th rule of the General Order	2	interest. Then he continued:
3	of the 11th of November 1862 as to interest on simple	3	"And where the estate is solvent it works with equal
4	contract debts was held to be ultra vires."	4	fairness because as soon as it ascertained that there is
5	You also see it from Selwyn LJ's judgment at	5	a surplus the creditor whose debt carries interest is
6	page 645, the first highlighted passage just by the	6	remitted to his rights under his contract, and on the
7	first hole punch. He says that:	7	other hand a creditor who has not stipulated for
8	"The question as to what essentially to do with	8	interest doesn't get it."
9	post-insolvency interest comes before us so we may	9	So they did see it as essentially in the absence
10	decide so far as the authority of this court can decide	10	of anything in statutory provisions to cater for
11	what should be the rule applicable to such cases for the	11	interest, where the company is solvent they simply say,
12	future. It is satisfactory that in forming the decision	12	"Well, you apply the ordinary rules".
13	we are not fettered by any rule that obliges us to	13	That was the position, of course, when Brightman LJ
14	depart from what appears to us to be the justice of the	14	made his comments in Lines Brothers and there was no
15	case."	15	provision for statutory interest. But there was
16	Giffard LJ, said at the very start of his judgment	16	a provision for payment of statutory interest in
17	at page 647:	17	bankruptcy and that did not follow a reversion to
18	"It's quite clear that the 170th section of the	18	contract process. So what the Cork Committee or the
19	Companies Act has no reference to the matter before us."	19	legislature in 1986 was faced with was, "We ought to do
20	There was therefore no statutory regime that they	20	something about post-insolvency interest. What do we
21	were interpreting.	21	do?" The answer was, "We don't adopt the reversion to
22	What Selwyn LJ observed is at the foot of page 645.	22	contract regime". They adopted very specifically
23	He says, just at the hole punch, the highlighted	23	they brought bankruptcy and the corporate regime into
24	passage:	24	line and they adopted a regime which does not amount to
25	"In the first place it occurs to me that we must	25	reversion to contract. It's a different statutory
	Page 154		Page 156
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1	regime.	1	where you can't find it if you wanted it.
2	I'll show you first of all why that is as a matter	2	LORD JUSTICE MOORE-BICK: Yes, thank you.
3	of law and then I will illustrate why in fact reversion	3	MR SNOWDEN: What the Cork Committee then recommended was
4	of contract no longer works in corporate insolvency.	4	that the two regimes be brought into line and, indeed,
5	The first thing I can probably do is to ask you, if	5	they were in the Insolvency Act 1986. So far as
6	you could, to turn up you can put Humber Ironworks	6	corporate insolvency is concerned the same regime
7	away and go back, please, to the Cork Committee and	7	operates in both, but so far as corporate insolvency is
8	that's in bundle 4, tab 9.	8	concerned, the regime that they had chose to adopt is
9	I don't know whether your Lordships have had	9	the one that we've seen in section 189 and in Insolvency
10	inserted into your bundles apparently not. Can	10	Rule 288 which has subsequently been picked up in
11	I simply hand you up some pages from the Cork Committee	11	Insolvency Rule 288, 7 to 9. When you look at
12	report which because rather bizarrely in your bundle	12	section 189 in relation to liquidations, it's of course
13	at the moment you have page 314 and 316.	13	quite clear that it's not based on a reversion to
14	LORD JUSTICE BRIGGS: Yes.	14	contract, because, irrespective of whether you had
15	MR SNOWDEN: Can I hand you up pages 313 and 315 so you have	: 15	contracted for interest, if there is surplus you are
16	a set.	16	paid statutory interest at a prescribed rate or
17	LORD JUSTICE BRIGGS: They will not be a consecutive set.	17	contractual rate, whichever is the greater.
18	MR SNOWDEN: I'm afraid not entirely, but we can if you	18	I think your Lordships have undoubtedly got
19	want them properly copied. (Handed).	19	section 189 well in mind. But the point I am making is
20	I hope we handed up 13 and 15.	20	that there is no longer in relation to post-1986
21	LORD JUSTICE MOORE-BICK: I think we all have 13 and 15 and	21	there is no longer any possibility of asserting
22	those are spares.	22	a reversion to contract line of argument in relation to
23	MR SNOWDEN: Just picking it up at the foot of page 313, if	23	statutory interest. That was the entire foundation of
24	I may, because that's the lead-in, under the heading	24	course of what Brightman LJ had said when he made his
25	"Statutory interest out of surplus assets":	25	observations in Lines Brothers in pre-1986 about how,
	Page 157		Page 159
1	"Section 33(8) of the Act of 1914 [that's the	1	perhaps, one might fill a void. But there is no void.
2	bankruptcy Act 1914] provides that if after all the	2	Parliament has spoken.
3	proving creditors have been paid in full the bankrupt's	3	LORD JUSTICE BRIGGS: It's a slight fudge, isn't it, in 189,
4	estate still has a surplus, it is to applied first in	4	compared to the Bankruptcy Act at any rate, because of
5	paying interest and after the date of the receiving	5	the differential provision for the rate in 189(4)(b)?
6	order at the rate of 4 per cent per annum on all debts	6	It's not the source of the obligation, you don't revert
7	proved in the bankruptcy, any balance then belongs to	7	to contract in the sense that's your entitlement but it
8	the bankrupt."	8	helps is it the higher of the two rates? Whichever
9	Just pausing there, thinking back to Humber	9	is the greater, yes.
10	Ironworks, of course that's different from Humber	10	MR SNOWDEN: Yes. But you see the point is, as we
11	Ironworks right at the start. Humber Ironworks, the	11	illustrate in our skeleton argument, that could
12	point is if you didn't contract for interest you didn't	12	actually, as between creditors who are proving and
13	get it after the commencement of insolvency, even if	13	competing for payment of statutory interest
14	there's a surplus. In bankruptcy, whether you	14	LORD JUSTICE BRIGGS: Oh yes.
15	contracted for it or not, you got a 4 per cent rate on	15	MR SNOWDEN: That could mean that the creditor who has his
16	all debts proved in the bankruptcy; and then any balance	16	contractual right for interest will have to share the
17	then belongs to the bankrupt. They said:	17	surplus with those who don't.
18	"There is no similar provision in the winding-up	18	LORD JUSTICE BRIGGS: Yes.
19	code."	19	MR SNOWDEN: So we make the point in our skeleton
20	And they then made the point that sorry, it is	20	argument there's a worked examples sample in our
21	easier to ask you to read to yourselves very quickly.	21	skeleton which I hesitate to take you to at the
22	If you could read 1384 and down to 1386. (Pause).	22	moment but it is there with numbers. But the basic
23	Just for your note, the section 33(8) of the	23	point can be explained very simply. If you have two
24	Bankruptcy Act is actually in authorities bundle 3,	24	creditors, one of whom contracted for interest and one
25	tab 14. I am not going to take you to it but that's	25	who did not, and there is a surplus in the liquidation
			-
	Page 158		Page 160

1	which is just enough to pay the one his contractual rate	1	creditor is entitled to be paid the balance of his full
2	of interest but no more, under the reversion to contract	2	contractual debt before shareholders receive anything."
3	approach he would get it and the chap who had not	3	So they simply allude to that there.
4	contracted for interest would get no statutory interest	4	But then turning to the relevant bit, it's at
5	at all.	5	pages 37 and 38 under the heading "Claims to a share in
6	Whereas under the current statutory scheme, because	6	a fund". First of all, they refer to what had
7	both creditors have a right to statutory interest, they	7	previously been said at paragraph 334:
8	will share and therefore there is no reversion to	8	"In our working paper we expressed agreement with
9	contract which the one creditor can insert against the	9	the approach that there should be conversion at the date
10	other.	10	of liquidation. And in their final report, which was
11	So the reversion to contract approach simply is that	11	published some months after our working paper, the
12	in that sense inconsistent with and it can't have	12	Insolvency Law and Practice Review Committee also
13	survived the enactment of the statutory scheme for	13	supported the principles that have been laid down by the
14	interest.	14	courts, strongly recommending that any future
15	Now, we say you must apply precisely the same logic	15	Insolvency Act should expressly provide that the
16	when you look at currency conversion claims because	16	conversion of debts in foreign currency should be
17	Parliament has legislated for currency conversion, in	17	effected as at the date of the commencement of the
18	the same way in 1986 it did for statutory interest, and	18	relevant insolvency proceedings."
19	the parallel which was drawn in Humber Ironworks or	19	The footnote is:
20	Lines Brothers just can't be drawn any more. Indeed, as	20	"The committee specifically endorsed our view that
21	I demonstrated from looking at Humber Ironworks, it only	21	conversion as at that day should continue to apply, even
22	ever was, as the judges put it, "Well, what do we, the	22	if the debtor was subsequently found to be solvent."
23	judge's, do if there was no legislation in order to	23	Then, at 336:
24	achieve the justice of the case?"	24	"On consultation, opinion was divided."
25	So that the idea that there is still floating around	25	There were two different approaches:
23	Page 161	23	Page 163
	1 age 101		1 age 103
1	this bifurcated penumbra or regime which is operating	1	"But we remain of the view which we expressed in the
2	independently and underneath the statutory regime	2	working paper"
3	actually, we simply say, can't survive 1986 and the	3	Sorry, I should ask you to read 335 before 336. I'm
4	judge was wrong to essentially take up the suggestion of	4	sorry.
5	Brightman LJ in Lines Brothers, (a) because it was made	5	LORD JUSTICE LEWISON: So 335 is looking at multiple
6	at a different time but (b) because since then there had	6	conversion dates every time you declare and pay
7	been the legislative intervention.	7	a dividend.
8	Just to complete the legislative intervention,	8	MR SNOWDEN: Yes. They remained of the view expressed in
9	because I didn't show you it, while we're in bundle 4 we	9	the working paper and expressed the conclusion:
10	should just look at the Law Commissions final report	10	"The present law in relation to the conversion of
11	sorry, it's actually in 5 I am told.	11	sterling and foreign currency claims in relation to
12			8
	Sorry, you can put bundle 4 away.	12	solvent and insolvent companies and to bankruptcy is
	Sorry, you can put bundle 4 away.  LORD JUSTICE LEWISON: We have more of it have we in	12 13	solvent and insolvent companies and to bankruptcy is satisfactory."
13	LORD JUSTICE LEWISON: We have more of it, have we, in	13	satisfactory."
13 14	LORD JUSTICE LEWISON: We have more of it, have we, in bundle 5?	13 14	satisfactory."  There's no indication, and this is probably why the
13 14 15	LORD JUSTICE LEWISON: We have more of it, have we, in bundle 5?  MR SNOWDEN: Yes. There is more of it, I'm afraid. The	13 14 15	satisfactory."  There's no indication, and this is probably why the judge said he thought it was left open it's true
13 14 15 16	LORD JUSTICE LEWISON: We have more of it, have we, in bundle 5?  MR SNOWDEN: Yes. There is more of it, I'm afraid. The more that we need is in bundle 5, sorry.	13 14 15 16	satisfactory."  There's no indication, and this is probably why the judge said he thought it was left open it's true enough there is no express rejection of the
13 14 15 16 17	LORD JUSTICE LEWISON: We have more of it, have we, in bundle 5?  MR SNOWDEN: Yes. There is more of it, I'm afraid. The more that we need is in bundle 5, sorry.  LORD JUSTICE LEWISON: That's all right.	13 14 15 16 17	satisfactory."  There's no indication, and this is probably why the judge said he thought it was left open it's true enough there is no express rejection of the Lines Brothers' suggestion, but by the same token there
13 14 15 16 17 18	LORD JUSTICE LEWISON: We have more of it, have we, in bundle 5?  MR SNOWDEN: Yes. There is more of it, I'm afraid. The more that we need is in bundle 5, sorry.  LORD JUSTICE LEWISON: That's all right.  MR SNOWDEN: In fact, I think we'll find bundle 5 hopefully	13 14 15 16 17 18	satisfactory."  There's no indication, and this is probably why the judge said he thought it was left open it's true enough there is no express rejection of the Lines Brothers' suggestion, but by the same token there is also no proposal in the context of the legislation
13 14 15 16 17 18 19	LORD JUSTICE LEWISON: We have more of it, have we, in bundle 5?  MR SNOWDEN: Yes. There is more of it, I'm afraid. The more that we need is in bundle 5, sorry.  LORD JUSTICE LEWISON: That's all right.  MR SNOWDEN: In fact, I think we'll find bundle 5 hopefully has the whole lot. (Pause).	13 14 15 16 17 18	satisfactory."  There's no indication, and this is probably why the judge said he thought it was left open it's true enough there is no express rejection of the Lines Brothers' suggestion, but by the same token there is also no proposal in the context of the legislation that was about to be enacted that there should be any
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13 14 15 16 17 18 19 20 21 22 23	LORD JUSTICE LEWISON: We have more of it, have we, in bundle 5?  MR SNOWDEN: Yes. There is more of it, I'm afraid. The more that we need is in bundle 5, sorry.  LORD JUSTICE LEWISON: That's all right.  MR SNOWDEN: In fact, I think we'll find bundle 5 hopefully has the whole lot. (Pause).  It's in tab 17, bundle 5, but just to complete the picture.  This actually is the whole lot. The bit that was previously in bundle 4 is paragraph 223, where they drew	13 14 15 16 17 18 19 20 21 22 23	satisfactory."  There's no indication, and this is probably why the judge said he thought it was left open it's true enough there is no express rejection of the Lines Brothers' suggestion, but by the same token there is also no proposal in the context of the legislation that was about to be enacted that there should be any currency conversion claim or any adjustment. The overwhelming sense of this is the rejection of the idea that somebody should be able to ask the court or indeed anybody to look at the exchange rates on multiple

1	LORD JUSTICE LEWISON: Well, footnote 207 plus the comment	, 1	it, as you recall, by looking at and comparing it in 26		
2	"We remain of the view that we express in the working	2	with the judgment. But he says in 27:		
3	paper", would suggest that they thought that a single	3	"The winding up leaves the debts of creditors		
4	date should continue to apply, even if it turned out the	4	untouched. It only affects the way in which they could		
5	company was solvent.	5	be enforced"		
6	MR SNOWDEN: Yes, and that anything else would require you	6	And at the top of the next page:		
7	to look at more than one conversion claim to have the	7	"The winding-up does not either create new		
8	frame of reference for a currency conversion claim and	8	substantive rights in the creditors or destroy old ones.		
9	they said "no". So we say that the judge, in saying it	9	Their debts if they are owing remain debts throughout.		
10	was left open, didn't really do full justice to the	10	They are discharged by the winding up only to the extent		
11	debate. But, more than that, if there had have been any	11	they are paid out of dividends."		
12	intention to allow this type of extra claim for	12	What he is dealing with there, primarily, is the		
13	compensation against the assets of the company, to use	13	question of the effect of the order itself. He is, true		
14	the very words of the Law Commission in their first	14	enough, drawing attention to the fact that the debts		
15	report, you would have expected there to be something	15	will be discharged in the ordinary way only by payment.		
16	said about it expressly in the legislation or, indeed,	16	But we say he cannot be taken to have excluded the		
17	in these reports and there's not a trace of it; not	17	possibility that any provision of the insolvency		
18	a trace.	18	legislation could have substantive effect. The reason		
19	Wight v Eckhardt Marine is replied upon by the	19	that he couldn't be taken to have excluded that, amongst		
20	proponents of currency conversion claims for	20	others, is Stein v Blake and there are in fact a number		
21	a suggestion that Lord Hoffmann accepted that a contract	21	of other areas which it is perfectly obvious that the		
22	will continue to exist during the course of	22	Act has substantive effect. But Stein v Blake is the		
23	an insolvency, so, they say, founding the basis for	23	most obvious one, because Lord Hoffmann himself had		
24	a currency conversion claim.	24	decided in Stein v Blake that the effect of insolvency		
25	I have already shown you Wight v Eckhardt Marine	25	set-off is substantive and does, when it is applied,		
	Page 165		Page 167		
1	this morning. The point I was making was obviously	1	extinguish the underlying debts.		
2	Lord Hoffmann was dealing with a different point. It	2	We'll see that in Stein v Blake, if you go back in		
3	was referable to the question of whether the making of	3	the authorities bundles to bundle 1B. (Pause).		
4	an order turned a Bangladeshi debt into a Cayman law	4	It's tab 66 of bundle 1B. Just pausing for		
5	governed right to prove, such that it became irrelevant	5	a second, Stein v Blake is a bankruptcy case but		
6	that the Bangladeshi debt had been discharged by	6	Lord Hoffmann himself decided in the House of Lords in		
7	a scheme. So he wasn't dealing with the type of	7	the subsequent BCCI (No 8) case that the same principle		
8	situation that we are here dealing with.	8	applies in corporate insolvency. It's not in the bundle		
9	What we say is you must look at Lord Hoffmann's	9	but the reference, if you needed it, was [1998] AC 214,		
10	comments in that context. What he was not saying, and	10	at 222 to 223, where Lord Hoffmann simply said:		
11	this is key, is that no part of the insolvency	11	"The original claims are extinguished and only the		
12	legislation can have substantive effect, because, for	12	net balance remains owing one way or another: see		
13	reasons I'll explain in a moment, that would have been	13	Stein v Blake."		
14	a remarkable volte-face by Lord Hoffmann.	14	So there is no doubt at all that it was applicable.		
15	Wight v Eckhardt Marine is in 1C at paragraph 75	15	LORD JUSTICE BRIGGS: The year?		
16	sorry, at tab 75 and we say that the paragraphs that are	16	MR SNOWDEN: [1998] AC 214, at 222 to 223. Again we can		
17	relied upon by my learned friends in their submissions	17	supply it if necessary; but it is a one-liner just		
18	and in particular those paragraphs that we looked at	18	saying Stein v Blake applies in corporate insolvency,		
19	this morning, 26 through to 29	19	What I would ask you to look at first of all is		
20	LORD JUSTICE BRIGGS: So sorry, could you give me the		What I would ask you to look at first of all is		
21	reference again? I was making a note.	21	Lord Hoffmann's speech at 251, where he compares		
22	MR SNOWDEN: 1C at tab 75.	22	bankruptcy set-off with statutory legal set-off. After		
23	LORD JUSTICE BRIGGS: Thank you.	23	having introduced bankruptcy set-off provisions and		
24	MR SNOWDEN: Great store is placed in what was said by	24	legal set-off also, he said at just above C:		
25	Lord Hoffmann, particularly paragraph 27. He introduced	25	"Legal set-off does not affect substantive rights of		
Ī	Page 166		Page 168		

butters, dropping down the page to between D and E  Butters, dropping down the deal subtlement of the butters, the page to down the three to an action of security. Instead of having to company which by reason of its being subject to any contingency or for any other reason of see not be an activate. Rule 328 that page for the purposes of this rule in relation to any sums due to the company which by reason of its being subject to any contingency or for any other reason of see not be a certain value. Rules 328 to 288 shall apply for the purposes of this rule in relation to any sums due to the company which they reason of its being subject to any contingency or for any other reason of its being subject to any contingency or for any other reason of its being subject to any contingency or for any other reason of its being subject to any contingency or for any other reason of its being subject to				
"Bankruptys ser-off on the other hand affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebedness to the bankrupt's as a form of security. Instead of having to propose of this rule to any obligation to of from the bankrupt's precedition to use his indebedness to the bankrupt's as a form of security. Instead of having to propose of this rule to any obligation to of from the bankrupt's precedition to the security. Instead of having to propose of this rule in early obligation to of from the company which by reason of its being subject to any contingency or for any other reason does not been company which by reason of its rule in capta, which by reason of its rule in capta obligation to of from the company which by reason of its rule in only and the care of the rule to any sums due to the company which be the subject of nay other reason does not been company which be reason does not been company which are payable in a currency other than section.  If a continue of the time of the rule to trivial to any sums due to the company which are payable in a currency other than section.  If a continue of the first paragraphs of the first paragraphs of the first paragraphs.  If a continue of the first paragraphs.  If a continue of the first paragraphs.  If a condition of the back in only a net balance.  If a condition of the back in only a net balance.  If a condition of the back in only a net balance.  If a condition of the back in only a net balance.  If a condition of the back in only a net balance.  If a condition of the back in only a net balance.  If a condition of the back in only a net balance.  If a condition of the back in the cor	1	parties against each other."	1	being ascertained by fixed rules or as a matter of
substantive rights of the parties by enabling the bankrupt's creditor to use his indebteches to the bankrupt's arcditor to use his indebteches to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankrupty he can set off pound for pound what he owns to the bankrupt and prove for or pay only the balance."  9 owes to the bankrupt and prove for or pay only the balance."  10 decision in the case. The case raised the question about whether either of the two cross-debts that would be the unshipted of insofteney set-off continued to survive and therefore could be assigned, for example, or the like. He dealt with that at page 255, under the heading 8. Do the causes of action survive?" Yorl! see his analysis at the end of the first paragraph:  11 set off is mandatory and self-executing and results as of the bankrupty due in only a net balance creative as of the bankrupty due in only an er balance creative as choses in action each continue to exist.  12 exist."  13 arbon by hose in action which continue to exist.  14 and one shadow which continued to exist as an assignable item of property was the claim to a not balance."  15 Brack Housing v Commercial Developments which be Page 169  16 the parties. You can see that because if you then go to the pages, at G, he makes it clear at the end of this rele - which ITI come back to for another reason in a moment. At the top of the page, 730.  17 off or another reason in a moment. At the top of the page, 730.  18 "An account is taken as at the date of the notice, 11 that she date of the section to make a distribution of what is due from each party from other in respect of the wintun dealings and the sums due from one party shall be set of the landed of the section, absolutely right. It is a power given the insolvency given the i	2	But then, dropping down the page to between D and E:	2	opinion."
bankrupt's creditor to use his indebtedness to the bankrupt as a form of accurity. Instead of having to prove with other creditions for the whole of his debt in the bankruptex be can set off pound for pound what he owes to the bankrupt and prove for or pay only the balance."  That was then followed through into the actual to decision in the case. The case raised the question about whether either of the two cross-debts that would be the subject of insolvency set-off continued to survive?" You'll see had analysis at the end of the first paragraph:  That was the followed through into the actual to the case and therefore could be assigned, for example, or the like. He dealt with that at page 255, under the leading "8. Do the causes of action survive?" You'll see his analysis at the end of the first paragraph:  The heading "8. Do the causes of action survive?" You'll see he bankruptcy date in only a net balance being owing, I find it impossible to understand how the cross-claims can as choses in action each continue to exist.  Then there is a reference to a decision of Neil J in Page 169  The endorses. At the foot of the page, at G, he makes it clear at the end of the section again:  The only chose in action which continued to exist as an assignable item of property was the claim to a net balance."  Well see in a minute that the bankruptcy set-off provisions are drafted on this footing, that set-off in insolvency Rule 28, which is at page 729.  You'll see that 729 sets out the requirements for the parties, You can see that because if you then go to the page, 730:  "An account is taken as at the date of the notice, [that's the date of intention to make a distribution] of what is due from each party from other in respect of the mutual dealings and the sums due from the other."  The sums due are regarded as including:  The number of a gainst the sums due from the other."  The number of the page, at G, he makes it company so the page, 730:  The number of the page, at G, he makes it clear to the company so the page 729.	3	"Bankruptcy set-off on the other hand affects the	3	Then the subsequent sub-paragraphs of the rule deal
bankrupt as a form of security. Instead of having to review with other creditors for the whole of his debt in the harkruptey he can set off pound for pound what he owes to the hankrupt and prove for or pay only the balance."  10	4	substantive rights of the parties by enabling the	4	with those various debts. Rule 281 shall apply for the
prove with other creditors for the whole of his debt in the bankruptcy he can set off pound for pound what he owns to the bankrupt and prove for or pay only the balance."  That was then followed through into the actual decision in the case. The case raised the question about whether either of the two cross-debts that would be the subject of involvency set-off continued to the survive and therefore could be assigned, for example, or the like. He dealt with that at page 255, under the being owing, I find if impossible to understand how the be either of the cases of action survive?" You'll see his analysis at the end of the first paragraph:  Tif set-off is mandatory and self-executing and present of the being owing, I find if impossible to understand how the prospective debt."  Then there is a reference to a decision of Neil J in characteristic provides in the assignable item of property was the claim to a net balance.  The only chose in action which continued to exist as an assignable item of property was the claim to a net balance."  We'll see in a minute that the bankruptcy set-off in provisions are drafted on this footing, that set-off in provisions are drafted on this footing, that set-off in provisions are drafted on this footing, that set-off in provisions are drafted on this footing, that set-off in provisions are drafted on this footing, that set-off in the page 739.  You'll see that 729 sets out the requirements for the page 739.  You'll see that Page 85, which is at page 729.  You'll see that 729 sets out the requirements for a set-off of mutual credits and mutual dealings. The important parts of this relieve which are page 729.  You'll see that 729 sets out the requirements for a set-off of mutual credits and mutual dealings. The important parts of this rule — which I'll come back to the insolvency regime that has abstantive effect. I've apper 730.  You'll see that 729 sets out the requirements for a set-off of mutual credits and mutual dealings. The important parts of this rule — which I'll come back	5	bankrupt's creditor to use his indebtedness to the	5	purposes of this rule to any obligation to or from the
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	24	"Present and future debts, contingent debts or	24	a proved debt for the balance. That undoubtedly brings
Page 170 Page 172	25	unliquidated debts to the extent they are capable of	25	about a substantive change. The landlord can't say,
		Page 170		Page 172

1	"Well, actually, you know, that rent was payable in	1	where there is insolvency set-off has to have his claim
2	another currency and I've got a claim". He has to prove	2	converted to sterling for the purposes of set-off. The
3	his debt.	3	claim is that the claims are then set-off to result in
4	LORD JUSTICE LEWISON: He has to prove it at the date of	4	a sterling balance and the underlying debt claims are
5	disclaimer, I think, does he not?	5	extinguished. If the underlying debt claims are
6	MR SNOWDEN: Yes.	6	extinguished and what you have is a sterling claim,
7	LORD JUSTICE LEWISON: He can't come back later on and say	7	there is no currency conversion claim.
8	"Well, actually rents have fallen since then, I'll have	8	So the judge's judgment would produce the
9	a bit more"?	9	extraordinary result that wherever set-off operates
10	MR SNOWDEN: It's a once and for all. The whole ethos, as	10	there's no currency conversion claim, but even if you
11	your Lordship knows from it's Barbara Hindcastle,	11	were in the same net position at the start, if you just
12	I think, and the other cases on disclaimer. The whole	12	have a straightforward debt claim, you somehow get
13	ethos is it is done on a once and for all basis and it	13	a currency conversion claim. With respect, that's
14	enables the estate to be wound up on a timely basis.	14	absurd.
15	But, again, it is an example which we give in our	15	It is certainly not pari passu distribution as
16	skeleton.	16	I know it or as any normal person would know it. As
17	LORD JUSTICE LEWISON: Yes.	17	between the two creditors, it produces very different
18	MR SNOWDEN: We say that's a fundamental problem for the	18	results.
19	supporters of currency conversion claims, because the	19	LORD JUSTICE LEWISON: I think your point really here is
20	whole basis of the judge's judgment was to sort of say,	20	that the judge said, "Well, once pari passu has run its
21	well, actually, this currency conversion provision in	21	course, there's no real question of discrimination
22	the rules is just for procedural effect, for proof of	22	between creditors". But I think what you're saying is
23	debt, and it doesn't actually have any substantive	23	there is, so to speak, retrospective discrimination if
24	effect on the underlying contract.	24	a currency claim is allowed?
We say, well, not so. It does have substantive		25	MR SNOWDEN: Yes, because two people who at least on the
	Page 173		Page 175
1	effect, it was intended to have substantive effect.	1	face of it would appear to be in the same net position
2	Were it otherwise, there would be extraordinary	2	with a foreign currency balance end up in different
3	differences created between creditors. We give	3	positions, in terms of what they can extract from the
4	an example in our skeleton at paragraph 53 and this is	4	assets of the company. Of course, it is the case that
5	the example of two creditors, each of whose net position	5	in order to effect set-off, which is of substantive
6	against the company is the same, one of whom has a claim	6	effect, of claims in foreign currencies I mean,
7	against the company for \$100; but the other has a net	7	I made it a very easy example by just choosing
8	claim of \$100 but it is made up of two cross-claims, one	8	US dollars but, of course, the only way you can effect
9	for 110 that he has but the company has a cross-claim	9	insolvency set-off, i.e. to give effect to it, is to do
10	against him for 10. This is a very likely scenario in	10	the conversion. There may be cross-claims in more than
11	this particular case because, as your Lordships will	11	one currency. You have to get them into a base currency
12	appreciate, in Lehmans people used to run trading	12	and then set-of, and they will all disappear and you'll
13	accounts and there used to be many open contracts which	13	have a sterling balance.
14	could result in debts owing in different directions.	14	LORD JUSTICE BRIGGS: Could it be said that a possible
15	But take those two creditors. Both of them have	15	reason why a conclusion that in a set-off situation you
16	a net position of \$100 claim against the company. On	16	can't then pursue currency conversion, whereas you might
17	the judge's view, the person who proves his debt for	17	otherwise, is that the benefit to the creditor of the
18	\$100 and is converted to sterling at the date due for	18	company in an insolvency process of insolvency set-off
19	conversion would have a currency conversion claim, if	19	is that he gets an immediate self-executed, if you like,
20	sterling was to depreciate against the dollar, because	20	payment of what he is owed, equivalent to the amount he
21	he would say, "Well, actually, if my contractual debt	21	owes back and in full?
22	wasn't due until some point in the future, I can say	22	MR SNOWDEN: Yes.
23	I've lost out because I was converted to sterling at	23	LORD JUSTICE BRIGGS: Whereas the pure dollar creditor.
24	relevant date and so I am entitled to assert a currency	24	let's say, with no set-off doesn't. Albeit that you may
25			
23	conversion claim against the surplus". But the person Page 174	25	say, "Yes, but there's a set-off if there's \$1 owed the  Page 176

offer way" —  MR SNOWDEN: That's the point. I understand the point that your Lordship is making and I chose my —  Lord DLUSTICE BRIGGS: for the value of the henefit may be different in different cases  MR SNOWDEN: I chose the example henause — your Lordship is absolutely right, you save the point, that apparently as soon as — well, we know as ons me there is insinvency as ends, no matter how much —  LORD LUSTICE BRIGGS: his mandatory and self-executing.  MR SNOWDEN: I chose the example henause — your Lordship is a soon as — well, we know as ons so there is insinvency as ends, no matter how much —  LORD LUSTICE BRIGGS: his mandatory and self-executing.  MR SNOWDEN: Debt payable at a future time? —  LORD LUSTICE BRIGGS: his mandatory and self-executing.  MR SNOWDEN: Debt payable at a future time? —  MR SNOWDEN: Debt payable at a future time? —  I have the certain value of the henefit may be a should be company is immediately placed into a different as a hazare regime. I mean, the currency conversion, auch a hazare regime. I mean, the currency conversion is necessary in order to have part passa distribution and, indeed, as part of that ho have currency conversion is necessary in order to have part passa distribution and, indeed, as part of that ho have and ordered and the second in mandatory, self-executing, automatic.  The sure though that there was any difference and the second in the flandouse, and the second in the case involved the question of the contrary.  The sure though that there was any difference a should not have said, "Well, hang on a second. How does this work." The answer is because nobody though that there was any difference a should not have said, "Well, hang on a second. How does this work." The answer is because nobody though that free was such a possibility because the starter had made express provision to the contrary.  The sumser my learned friends give to this point is in the way and which the pay that the pay well that the way that this for a few minutes, it may take alightly longer than t				
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debts are brought into the account, present and future.  different in different cases.  MR SNOWENS those the example because — your Londship is absolutely right, you saw he proint, that apparently as soon as — well, we know as soon as there is insolvency  set off, no matter how much —  10 LORD JUSTICE BRIGGS: It is mandatory and self-executing.  11 MR SNOWENS Absolutely. Therefore you don't have a choice about it. Therefore, the person with a \$1 liability to 13 the company is immediately placed into a different 14 simulation has the exclidior who has no debt to the 14 simulation has the exclidior who has no debt to the 15 company.  12 The simple point here is Parliament could not have 16 indeed to lone, and the company entered administration. Subject to Red 2105, adjustment of dividend where payment made before time."  13 a bizarre expline. I mean, the currency conversion, such 16 induced, as part of that to have isoslevency set off. I 20 induced, as part of that to have isoslevency set off. I 21 is well understood, and has been since Stein y Blake, 14 is well understood, and has been since Stein y Blake, 15 is well understood, and has been since Stein y Blake, 16 is well understood, and has been since Stein y Blake, 16 is well understood, and has been since Stein y Blake, 16 is well understood, and has been since Stein y Blake, 16 is well understood, and has been since Stein y Blake, 16 is well understood, and has been since Stein y Blake, 16 is well understood, and has been since Stein y Blake, 16 is well understood, and has been since Stein y Blake, 16 is well understood that insolvency Reles for administration, 17 is well understood that insolvency Reles for administration, 18 it was well understood that insolvency set off was 3 this unreles of the sequence of the declaration of the dividend, where a creditor has proved for a debt of which payment is not due at the date of the declaration of the dividend, where a creditor has proved for or, if apage 735 says:  14 star well understood, and subserves yest-off	2	MR SNOWDEN: That's the point. I understand the point that	2	involved future debts and set-off.
different in different cases.  MR SNOWDEN: I chose the example because — your Lordship is absolutely right, you saw the point, that apparently as soon as — well, we know as soon as there is insolvency set off, no mater how much — "  Soon as — well, we know as soon as there is insolvency set off, no mater how much — "  Set off, no mater how much — "  LORD IJSTICE BRIGGS: Yes. "Future of debts." "  MR SNOWDEN: Absolutely. Therefore, you don't have a choice the company is immediately placed into a different the company is immediately placed into a different the situation than the creditor who has no debt to the the simple point here is Parliament could not have intended to create, by currency conversion, such in the company. I have the company of the proposed of the declaration of the dividend where payment made before time."  To indeed, as part of that to have insolvency set-off. It is with the proposed of the declaration of the dividend, he is entitled to dividend and no other payment is not due at the date of the declaration of the dividend, which payment is not due at the date of the declaration of the dividend, he is entitled to dividend and no other payments in so due at the date of the declaration of the dividend, well, have said. "Well, hang on a second. How does this work." The answer my learned friends give to this point is to say, 'Oh, there's a decision of the Court of Appeal in Many and self-executing. They came in later.  The answer my learned friends give to this point is to say, 'Oh, there's a decision of the Court of Appeal in Many and self-executing in the contrary.  The answer my learned friends give to this point is to say, 'Oh, there's a decision of the Court of Appeal in Many and self-executing in the contrary.  The answer my learned friends give to this point is to say	3	your Lordship is making and I chose my	3	What insolvency set-off now requires is that all
he MR SNOWDEN: I chose the example because — your Lordship is a soon as—well, we know a soon as there is insolvency as soon as—well, we know a soon as there is insolvency as set off, no matter how much—  LORD JUSTICE BRIGGS: It is mandatory and self-executing.  MR SNOWDEN: Absolutely. Therefore you don't have a choice about it. Therefore, the person with a \$1 liability to the company is immediately placed into a different assuration than the creditor who has no debt to the disturbed to croups.)  In the simple point here is Parliament could not have in intended to create, by currency conversion, such in company in order to have pair pass udsiribution and, in it was not used to the disturbed had to self-executing, and extinguishes underlying contractual rights.  It is well understood, and has been since Stein v Blake, and extinguishes underlying contractual rights.  If it were thought that there was any difference about it when that insolvency Rules for administration, it was well understood that insolvency Rules for administration, it was well understood that insolvency Rules for administration, as this work? The answer is because nobody thought that there was such a possibility because the statute had the sevence of contracy.  The there was such a possibility because the statute had the sevence (Pause).  The about to have said, "Well, hang on a second. How does this work?" The answer is because nobody thought that for a deep that the provision to the contracy.  The there was such a possibility because the statute had the sequence, (Pause).  The there was such a possibility because the statute had the sequence, (Pause).  The there was such a possibility because the statute had the sequence, (Pause).  The there was such a possibility because the statute had the sequence, (Pause).  The there was such a possibility because the statute had the sequence, (Pause).  The there was such a possibility because the statute had the sequence, (Pause).  The there was such a possibility because the statute had the sequence, (Pa	4	LORD JUSTICE BRIGGS: But the value of the benefit may be	4	debts are brought into the account, present and future.
absolutely right, you saw the point, that apparently as so on as — well, we know as soon as there is insolvency ses off, on matter how much — 10 LORD JUSTICE BRIGGS: It is mandatory and self executing. 11 MR SNOWDEN: Absolutely. Therefore, you don't have a choice of the company is immediately placed into a different situation than the creditor who has no debt to the stitution than the stitution than the creditor who has no debt to the stitution than the stitution than the creditor who the stitution was not yet due on the date when the company centered administration, subject to Rule 2105, and prove for it at the full amount. What, however, happens is that when a dividend is to be declared, you move for it at the full amount. What, however, happens is that when a dividend is to be declared, you move for it at the full amount. What, however, happens is that when a dividend star pale. Rule 2105 and extinguishes underlying contractual rights.  21 this were thought that there was any difference about it when that it	5	different in different cases.	5	In order to understand I need to show you, first of all,
soon as — well, we know as soon as there is insolvency set-off, no matter how much —  IORD DISTICE BRIGGS: Yes. "Future of debts."  MR SNOWDEN: 'Debt payable at a future time", which is page 731. It says:  "A creditor may prove for a debt of which payment is the company is immediately placed into a different distinction than the creditor who has no debt to the company is immediately placed into a different distinction than the creditor who has no debt to the company is immediately placed into a different distinction than the creditor who has no debt to the company is immediately placed into a different distinction than the creditor who has no debt to the company is immediately placed into a different distinction than the creditor who has no debt to the company is immediately placed into a different distinction than the creditor who has no debt to the company is immediately placed into a different distinction that the creditor who has no debt to the company in defending the propose of dividend where payment made before time."  So the first point to note is that if you have a future debt I owed to you by the company, you can prove for it at the full amount. What, however, happens is that when a dividends are paid. Rule 2105 at page 735 says:  It is well understood, and has been since Stein v Blake, and extinguishes underlying contractual rights.  If it were thought that there was surflerence 24 about it when that Insolvence yet-off was a mandatory and self-executing, automatic.  If was well understood that insolvency set-off was 3 it was well understood that insolvency set-off was 3 it was well understood that insolvency set-off was 3 it was well understood that insolvency set-off was 4 mandatory and self-executing. They came in later.  If somebody had thought that there was such a claim 5 the was well as a future debt on the basis of a 5 per cent return per a mount of the creditor's admitted proof of shall be reduced by applying the following formal a formal payment is a formula applied. Basically, the formula d	6	MR SNOWDEN: I chose the example because your Lordship is	6	the rules that are the background to the case. The
set off, no matter how much —  10 LORD JUSTICE BRIGGS: It is mandatory and self-executing.  11 MR SNOWDEN: Absolutely. Therefore, the person with a \$1 liability to  12 about it. Therefore, the person with a \$1 liability to  13 the company is immediately placed into a different  14 situation than the creditor who has no debt to the  15 company.  16 The simple point here is Parliament could not have  16 intended to create, by carrency conversion, such  17 intended to create, by carrency conversion, such  18 a bizarre regime. I mean, the currency conversion is  19 necessary in order to have pair passu distribution and,  20 indeed, as part off ant to have insolveney set-off. It  21 is well understood, and has been since Strein v Blake,  22 if this set-off is mandatory, self-executing, automatic,  23 and extinguishes underlying contractual rights.  24 If it were thought that there was any difference  25 about it when that Insolvency Rules 288 was introduced —  26 page 177  1 sorry, the currency conversion requirements were  27 introduced into the Insolvency Rules for administration,  28 this work?" The answer is because nobody thought that there was such a possibility because the statute had  29 there was such a possibility because the statute had  20 to say, 'Oh, there's a decision of the Court of Appeal  21 in Kaupthing'. If your Lordships can be servith me just  22 for a few minutes, it may take slightly longer than  23 in Kaupthing'. If your Lordships can be servith me just  24 for a few minutes, it may take slightly longer than  25 this work?" The answer is because nobody thought that  26 there was such a possibility because the statute had  27 to say, 'Oh, there's a decision of the Court of Appeal  28 in order to friends give to this point is  29 quarter past 4. That the only warning I will give.  20 In order to follow this, your Lordships can be servith me just  21 for a few minutes, it may take slightly longer than  22 to say, 'Oh, there's a decision of the Court of Appeal  23 in Kaupthing'. If your Lordship	7	absolutely right, you saw the point, that apparently as	7	first rule that you will need to look at is Insolvency
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MR SNOWDEN: Absolutely. Therefore you don't have a choice about it. Therefore, the person with a \$1 liability to the about it. Therefore, the person with a \$1 liability to the about it. Therefore, the person with a \$1 liability to the company is immediately placed into a different as the company is mimediately placed into a different as the company is mimediately placed into a different as the company is mimediately placed into a different administration, subject to Rule 2105, adjustment of dividend where payment made before time."  So the first point to note is that if you have a fauture debt I owed to you by the company, you can prove for it at the full amount. What, however, happens is that when a dividend is to be declared, you move to indeed, as part of that to have insolvency set-off. It is well understood, and has been since Stein v Blake, 21 is well understood, and has been since Stein v Blake, 22 and eatinguishes underlying contractual rights. 23 and eatinguishes underlying contractual rights. 24 If it were thought that there was any difference 25 about it when that Insolvency Rule 288 was introduced—  Page 177  The sorry, the currency conversion requirements were introduced into the Insolvency Rules for administration. 22 introduced into the Insolvency set-off was 33 it was well understood that insolvency set-off was 34 mandatory and self-executing. They came in later. 45 If somebody had thought that there was such a claim as this work? The answer is because nobody thought that the was such a claim and the proof of the Court of Appeal to say, "Oh, there's a decision of the Court of Appeal to was you," The newer is because nobody thought that the was such a possibility because the statute had quarter past 4. That the only warning I will give. 15 to say, "Oh, there's a decision of the Court of Appeal to to do it this late in the day, but I think it follows 10 to do it this late in the day, but I think it follows 10 to do it this late in the day, but I think it follows 10 to do it this late in the day, b	9	set-off, no matter how much	9	LORD JUSTICE BRIGGS: Yes. "Future of debts."
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25 conversion, but involved the question of future 25 brought into the account at a discounted value. He	23	have the insolvency handbook as well to hand.	23	applied by cross-reference in the set-off rule that we
	24	The issue in the case involved not simply currency	24	saw a little earlier in Rule 2285(7), so that it is
Page 178 Page 180	25	conversion, but involved the question of future	25	brought into the account at a discounted value. He
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1	said, the creditor, "The net balance that results"	1	with the fact it is a Court of Appeal decision.
2	which resulted in Kaupthing's (inaudible) against him,	2	MR SNOWDEN: Yes. Certainly in a sense
3	he said, at the discounted level "is what I now owe	3	LORD JUSTICE LEWISON: I am not asking you to do that now,
4	Kaupthing, but I still only owe it in the future."	4	Mr Snowden, but we are obviously bound by it, whatever
5	So he was trying to take advantage of the fact that	5	it decides.
6	he only wanted to pay, as it were, the net balance but	6	MR SNOWDEN: It's distinguishable. It's on a different set
7	he wasn't prepared to pay it there and then. Because if	7	of facts, so I am certainly not going to ask you to
8	you look at Rule 285(8), it says:	8	overturn it. But the critical thing is it doesn't
9	"Alternatively"	9	actually say what I think my learned friends want it to
10	And it's the "alternatively":	10	say for the purpose of overcoming the Stein v Blake
11	" the balance, if any, owed to the company shall	11	argument. They say this is the magic bullet that
12	be paid to the administrator as part of the assets	12	overcomes the Stein v Blake argument that I have been
13	except where all or part of the balance results from	13	putting to you and I say on no basis does it do that.
14	a contingent or prospective debt owed by the creditor	14	In fact, Etherton LJ is right in one part, which is all
		15	I need. Then, with respect to him, I might suggest he
15	and in such case the balance or that part of it which		1 2 20
16	results in a contingent or prospective debt shall be	16	probably should have adopted a slightly different tack
17	paid if and when the debt becomes due and payable."	17	on his current
18	Now	18	LORD JUSTICE MOORE-BICK: We'll look forward to hearing all
19	LORD JUSTICE BRIGGS: Does "prospective" mean "future"?	19	about that tomorrow, shall we? You are bowling along
20	MR SNOWDEN: Yes. Well, it means "prospective" in the sense		quite well?
21	of "payable in the future", yes, i.e. not subject to	21	MR SNOWDEN: Fractionally behind where I thought I would be,
22	contingency but just not payable today, payable next	22	but, with a bit of discussion with Mr Isaacs and
23	week.	23	Mr Wolfson, I hope I can make sure we finish on time.
24	LORD JUSTICE BRIGGS: Yes.	24	LORD JUSTICE MOORE-BICK: Very good. Thank you very much
25	MR SNOWDEN: That's what I have always understood	25	10.30 am tomorrow, please.
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1	"prospective" means. In a sense a contingent debt is	1	(4.20 pm)
2	also in some sense a future debt because if the	2	(The court adjourned until 10.30 am
3	contingency has not yet happened	3	on Tuesday, 24 March 2015)
4	LORD JUSTICE BRIGGS: I just wonder why they don't use	4	on ruesday, 24 March 2013)
5	"prospective debt" in 2.89, but I think it's the same.	5	
6	MR SNOWDEN: Yes. Unsurprisingly, the Court of Appeal	6	
7	rejected that rather adventurous gambit by the person	7	
8	who in fact would turn out after insolvency set-off to	8	
9	be a debtor, which in a sense is obviously the right	9	
10	result, albeit we say that the result was reached by the	10	
11	wrong route.	11	
12	It's going to now take me having set the scene	12	
13	for Kaupthing and left it in abeyance, I can either deal	13	
14	with it, but it will take me a few more minutes or else	14	
15	I can	15	
16	LORD JUSTICE MOORE-BICK: Would you rather have some fresh		
17	minds on the job in the morning?		
18	MR SNOWDEN: It is not the most straightforward part of the	17	
19	Insolvency Rules, although the point I have to make	18	
20	ultimately is a very simple one on it. But I'm afraid	19	
21	fresh minds would probably benefit us.	20	
22	LORD JUSTICE MOORE-BICK: We'll give ourselves a break,	21	
23	shall we?	22	
		23	
24	LORD JUSTICE LEWISON: If you're going to say the reasoning	24	
25	is in some way wrong, you will obviously have to deal	25	
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