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| <p>1 Monday, 23 March 2015 2 (10.30 am) 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 6 from the skeletons, I appear with Ms Hutton and 7 Ms Foskett for LBHI2. 8 LORD JUSTICE MOORE-BICK: Yes. 9 MR SNOWDEN: Reading across the court, Mr Isaacs appears for 10 LBHI; Mr Wolfson and Ms Shah appear for LBL; Mr Dicker, 11 Mr Fisher and Ms Cooke appear for CVI; and Mr Trower, 12 Mr Bayfield, Mr Robins and Mr Riddiford appear for the 13 administrators of LBIE. 14 LORD JUSTICE MOORE-BICK: Thank you. 15 MR SNOWDEN: Your Lordship will also know these are appeals 16 against a decision of David Richards J. There are 17 various appeals and cross appeals. You should have had 18 a timetable of submissions, which, subject to the court, 19 we would propose to follow. 20 LORD JUSTICE MOORE-BICK: Yes. 21 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: -- to be followed by the other appellants on</p> <p style="text-align: center;">Page 1</p> | <p>1 Other housekeeping matters, your Lordships did ask 2 for and I apprehend, I hope, will you have been provided 3 with copies of what I think is the 2009 Insolvency 4 Handbook which we will work from -- 5 LORD JUSTICE MOORE-BICK: Yes, thank you very much. 6 MR SNOWDEN: -- which we will work from. 7 So if I can start with an overview, there are 8 a number of broad topics which are to be covered during 9 the course of the appeal. If I am to characterise them 10 under the following headings, the first is subordination 11 and that's my appeal. 12 LORD JUSTICE MOORE-BICK: Yes. 13 MR SNOWDEN: The second set of topics relate to currency 14 conversion claims. The third relate to the liability of 15 a member under section 74 of the Insolvency Act and then 16 there is an issue relating to proof of the contingent 17 section 74 liability in LBIE2's administration. Now 18 there are various sub issues and again if I can sketch 19 them. The first issue of subordination is essentially 20 to what rights, to what claims, are LBI2's subordinated 21 debt subordinated. 22 We say that our subordinated debt is subordinated 23 only to the claims of unsubordinated creditors and that 24 thereafter we rank equally with them for payment of 25 statutory interest under the Insolvency Rule 288, and we</p> <p style="text-align: center;">Page 3</p> |
| <p>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 7 disciplined, have they, and sit down at whatever 8 relevant time they are supposed to sit down? Or sooner 9 possibly. 10 MR SNOWDEN: Well, certainly discipline is hoped for. 11 Obviously, we can't anticipate quite what interventions 12 or other we will get from the court, but as between us 13 we anticipate on this side of the courtroom to be 14 occupying up to two days, and then my learned friends on 15 the other side the same; and then we have the replies on 16 Friday. Obviously, if we go quicker, so be it. 17 LORD JUSTICE MOORE-BICK: Yes. 18 Now, I see we're getting a transcript and 19 I understand that those who are dealing with it would 20 like a short break during the morning and the afternoon. 21 MR SNOWDEN: I will endeavour to remind myself, if not 22 I will be kicked by Mr Isaacs at an appropriate moment. 23 LORD JUSTICE MOORE-BICK: Try and find a suitable moment, at 24 about 11.15 and 3.15 roughly. 25 MR SNOWDEN: I am obliged.</p> <p style="text-align: center;">Page 2</p> | <p>1 rank pari passu with them for payment of that statutory 2 interest, and only thereafter would questions of 3 non-provable claims or the like come into play. 4 The second and third issues are the currency 5 conversion claims. We say currency conversion claims 6 don't exist at all. The judge found they did, we say 7 they don't. They are not a species of non-provable 8 claim. But if we're wrong on that, then as I've already 9 indicated we say they rank behind statutory interest on 10 all proved debts, which would include LBHI2's 11 subordinated debt. 12 The fourth and fifth issues relate to the question 13 of whether, if LBIE were to go into liquidation, 14 interest is payable under statute or as a non-provable 15 claim in respect of the period of LBIE's administration. 16 Now, we won on the statutory interest point, the 17 judge held that statutory interest wouldn't be payable 18 in those circumstances. There is an appeal on that and 19 I will deal with that in reply. 20 Mr Isaacs will deal with our appeal on the fifth of 21 the issues because the judge held that interest would be 22 a non-provable claim in respect of that period, and we 23 appeal on that. 24 The sixth issue relates to LBHI2's potential 25 liability as a contributory to a call by a liquidator</p> <p style="text-align: center;">Page 4</p> |

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

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

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| <p>1 the maintenance of capital in the broad sense to protect</p> <p>2 the interests of creditors. But I don't think you can</p> <p>3 shortcut the analysis by saying 'is it effectively</p> <p>4 treating it as equity' because it's quite clear that it</p> <p>5 isn't equity.</p> <p>6 LORD JUSTICE MOORE-BICK: It's obviously not equity, but --</p> <p>7 MR SNOWDEN: It's something which --</p> <p>8 LORD JUSTICE MOORE-BICK: In some ways the language used</p> <p>9 here could be said to be a recognition that assets can</p> <p>10 be obtained by subordinated lending but in order to</p> <p>11 satisfy the regulatory requirements it's got to be</p> <p>12 subordinated to the point where nothing else ranks ahead</p> <p>13 of it, as would be the case for equity capital.</p> <p>14 MR SNOWDEN: Yes. The answer to that we say is no, because</p> <p>15 we'll see that when we look at what is actually</p> <p>16 required, and the way that the regulations have</p> <p>17 implemented this, there's no restriction, for example,</p> <p>18 on proof of debt. In fact, that's one of the</p> <p>19 characteristics that a subordinated lender can -- is one</p> <p>20 of the benefits he can enjoy. The way in which the</p> <p>21 regulations are drafted is drafted by reference to the</p> <p>22 English statutory insolvency process, and the loan</p> <p>23 agreements themselves recognise, we say, the type of</p> <p>24 English insolvency process. When we look at what</p> <p>25 an English insolvency process involves and means, it is</p> <p style="text-align: center;">Page 13</p> | <p>1 this may be the intention, I don't know, to that extent</p> <p>2 it does not give you the protection which possibly you</p> <p>3 might have thought you ought to have.</p> <p>4 MR SNOWDEN: Well, if you are a creditor on this hypothesis</p> <p>5 what you would expect is that that which is treated as</p> <p>6 capital in this way is something which doesn't compete</p> <p>7 with you in the collective process into which you would</p> <p>8 expect to participate.</p> <p>9 This notional creditor, this person who is</p> <p>10 a creditor who we are postulating, is somebody who would</p> <p>11 expect to have a provable claim. It's a very unusual</p> <p>12 person who becomes a non-provable creditor.</p> <p>13 LORD JUSTICE MOORE-BICK: Yes.</p> <p>14 MR SNOWDEN: The postulate that you're putting to me is, if</p> <p>15 you like, the trade creditor, or somebody who is</p> <p>16 a regular creditor; and that is somebody who would</p> <p>17 expect, in to order be able to get payment, to have to</p> <p>18 participate in the statutory scheme.</p> <p>19 LORD JUSTICE BRIGGS: They may be mainly in involuntary</p> <p>20 creditors. At the moment I am grappling to get a full</p> <p>21 understanding of what currently are or are alleged to be</p> <p>22 non-provable claims. We obviously have a couple of</p> <p>23 contenders to deal with here, one of which is said to be</p> <p>24 not a contender at all.</p> <p>25 MR SNOWDEN: Yes.</p> <p style="text-align: center;">Page 15</p> |
| <p>1 a collective process for the enforcement of debts which</p> <p>2 are proved.</p> <p>3 We say it would be very surprising if in fact the</p> <p>4 type of non-provable claims or statutory interest were</p> <p>5 to be in the minds of the regulators as something which</p> <p>6 the loan agreement was designed to cover. It is</p> <p>7 designed, as I said at the outset, to sit behind the</p> <p>8 unsubordinated loans but only as regards principal but</p> <p>9 definitely not as regards statutory interest and</p> <p>10 a fortiori not as regards non-provable claims in that</p> <p>11 insolvency.</p> <p>12 LORD JUSTICE MOORE-BICK: So if you actually have a claim</p> <p>13 against the company of an unprovable type, the</p> <p>14 subordinated loan assets don't give you any protection?</p> <p>15 MR SNOWDEN: That's right. The subordinated loan agreements</p> <p>16 would fall to be paid before non-provable claims, that's</p> <p>17 right. Non-provable claims are very much, as we all</p> <p>18 know the, exception and a very rare exception to the</p> <p>19 statutory scheme.</p> <p>20 LORD JUSTICE MOORE-BICK: But if they exist they do</p> <p>21 represent a creditor who is going to lose out, don't</p> <p>22 they?</p> <p>23 MR SNOWDEN: That's correct.</p> <p>24 LORD JUSTICE MOORE-BICK: If the subordinated loan ranks</p> <p>25 ahead of unprovable debts then, to that extent -- and</p> <p style="text-align: center;">Page 14</p> | <p>1 LORD JUSTICE BRIGGS: I believe in Waterfall II there's</p> <p>2 a great list of them, isn't there, standing up and</p> <p>3 asking to be counted?</p> <p>4 MR SNOWDEN: I think that's essentially right. One of the</p> <p>5 points I will make is that when one is asking whether</p> <p>6 the regulatory or legislative structure that was devised</p> <p>7 in 1986 could have envisaged or even contemplated the</p> <p>8 possibility of a mass of unprovided for, non-provable</p> <p>9 claims where there is no regime to have them</p> <p>10 adjudicated -- other than in fact by a process of the</p> <p>11 ordinary process of issuing a claim form, as I will show</p> <p>12 your Lordships. But there is certainly no other process</p> <p>13 to determine how these claims should be treated, dealt</p> <p>14 with, adjudicated, how they rank as between themselves,</p> <p>15 how categories of them rank as between each other. It's</p> <p>16 a complete morass, which we say the court should</p> <p>17 recognise that the legislature didn't intend to create.</p> <p>18 Where non-provable claims have come about, as we've</p> <p>19 seen from the legislative history, and in 1986, when</p> <p>20 non-provable claims have been shown to exist, Parliament</p> <p>21 has almost invariably stepped in pretty smartly and has</p> <p>22 legislated to make them provable. They did that after</p> <p>23 T&N in relation to the asbestos liabilities.</p> <p>24 LORD JUSTICE LEWISON: So every time a judge invents some</p> <p>25 category, the rules cater for it.</p> <p style="text-align: center;">Page 16</p> |

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

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

6 (Pages 21 to 24)

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| <p>1 The regulatory origins of the wording that we're 2 going to find is important -- because the wording that 3 we're all going to be focusing on in a short while is, 4 as your Lordships appreciate, the wording that's in 5 clause 5 of the subordinated loan agreement at page 205 6 of the bundle, bundle D1, and going over the page to 7 206; in particular, the definition of "solvency" or the 8 concept of solvency, the borrower being solvent. Its 9 explanation in clause 5.2(a): 10 "The borrower shall be solvent if it is able to pay 11 its liabilities in full, disregarding obligations which 12 are not payable or capable of being established or 13 determined in the insolvency of the borrower." 14 We say that it is important to appreciate what that 15 actually is referring to and we do say that that is 16 referring to provable debts. We say you can see that 17 when you look at the origins of this agreement and the 18 drafting of this agreement. 19 The regulatory origins of this agreement, you can 20 trace back or we've traced back in bundle -- in old TSA 21 and AFBF standard forms. The wording obviously is 22 a very specific type of wording, it doesn't come from 23 the statute but it can be traced back to these older 24 documents of the previous regulatory bodies that 25 existed.</p> <p style="text-align: center;">Page 25</p> | <p>1 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." 5 And: 6 "In determining whether the borrower is solvent for 7 the purposes of this sub-paragraph, there shall be 8 disregarded obligations which are not payable or capable 9 of being established or determined in the insolvency of 10 the borrower and the excluded liabilities." 11 Just pausing there, my Lord Lord Justice Briggs will 12 instantly recognise the reference to the words "debt 13 payment and debts in full as and when they become due" 14 because that wording, the "as and when they become due", 15 was a new addition in the Insolvency Act 1986 to the 16 statutory definition of "insolvency" which my Lord 17 Lord Justice Briggs had to grapple with in a case called 18 <i>Cheyne Finance</i>. 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. 23 Your Lordships can see that, if you wanted to turn 24 up the Butterworths Insolvency Law Handbook -- which we 25 have -- you'll see that those words feature in</p> <p style="text-align: center;">Page 27</p> |
| <p>1 We have set out the analysis in the skeleton but can 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 AFBF. 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 ..." 22 And this is in very similar wording -- again if you 23 have it still open -- to clause 5.1 and 5.2 of our 24 actual loan agreement. Then in particular you'll see, 25 under clause 6.1(b) of this agreement, towards the end</p> <p style="text-align: center;">Page 26</p> | <p>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 8 or established in the Insolvency as defined", capital I, 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, 13 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. 19 LORD JUSTICE BRIGGS: Can you just give me the date of the 20 AFBF 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</p> <p style="text-align: center;">Page 28</p> |

7 (Pages 25 to 28)

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

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

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

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| <p>1 prove but after non-provable claims. We say that that, 2 with respect, is just not a tenable construction of this 3 type of subordination agreement. 4 LORD JUSTICE LEWISON: Yes. 5 LORD JUSTICE BRIGGS: Proving after could mean two different 6 things. It could mean proving with an acknowledgement 7 that you're subordinated but proving on day one, or it 8 could mean only submitting a proof at the time when the 9 senior debtor has been paid in full. That has 10 a temporal consequence. 11 MR SNOWDEN: Yes. 12 LORD JUSTICE BRIGGS: If either in this case it would be the 13 latter, wouldn't it, if 7(e) has the effect the judge 14 said it has? You can't do anything which would impair 15 the payment out in full of the senior debt, and 16 therefore you couldn't submit a proof. I suppose it 17 might be you could just submit a proof that says, "By 18 the way, don't take any notice of this until the senior 19 debt has been paid out in full". 20 MR SNOWDEN: Of course the judge says -- I keep coming back 21 to it. As you see he put us behind statutory interest 22 and behind non-provable claims. 23 LORD JUSTICE LEWISON: I think the way you were putting it 24 a few minutes ago was that you can lodge a proof -- 25 MR SNOWDEN: Correct.</p> <p style="text-align: center;">Page 41</p> | <p>1 MR SNOWDEN: Yes. 2 LORD JUSTICE LEWISON: So the agreement must contemplate 3 that if the borrower is insolvent you get something, 4 otherwise what is the point of petitioning? 5 MR SNOWDEN: Yes. Again, I will come back to this as 6 a theme, the whole concept of a statutory process of 7 insolvency is based around the idea that people can 8 prove their debts and then participate in the collective 9 process. If we weren't entitled to participate in the 10 process, but in fact had to stand behind people who have 11 non-provable liabilities who are not catered for by the 12 statutory scheme at all, then, as your Lordship says, 13 what would be the point? We are expressly entitled to 14 prove. In the regulator's rules that's what the 15 regulator has envisaged that we would be able to do. 16 More to the point, the clause just simply doesn't 17 stop us doing it. The only clause that the judge has to 18 fasten on to stop us proving was clause 7. Perhaps we 19 can just look at that, as it were, now. 20 The judge found, in the judgment, that it was 21 clause 7(d) and (e) which prohibited us from proving or 22 at least proving now. We say that actually that's 23 requiring these clauses to do rather too much work. 24 Clause 7(d) says on and after the date of this agreement 25 the lender shall not without the prior written consent</p> <p style="text-align: center;">Page 43</p> |
| <p>1 LORD JUSTICE LEWISON: At the moment that the proof is 2 lodged it's a contingent debt. 3 MR SNOWDEN: Correct. 4 LORD JUSTICE LEWISON: And as it becomes clear, if it ever 5 does, that the other proved creditors will be paid in 6 full, you can revalue your proof on the basis of the 7 hindsight principle. 8 MR SNOWDEN: Your Lordship, essentially that's right, 9 although I think the actual clause requires the other 10 obligations -- yes, that's right. Clause 5.2 requires 11 as a definition of "solvency" that the borrower shall be 12 able to pay its liabilities, other than the Subordinated 13 Liabilities, in full, disregarding -- and so 14 your Lordship is right. Then the revaluation point is 15 exactly what I was going to take you to when we look at, 16 for example, Wight v Eckhardt Marine where that point is 17 made and then there's a couple of other cases as well. 18 So that's the way it would happen. We would say once 19 the other proved debts are paid or indeed are capable of 20 being paid in full, then our proof is revalued. We then 21 became a proved debt -- 22 LORD JUSTICE LEWISON: The only mechanism that you have to 23 enforce your debt under clause 4(5) is to institute 24 proceedings for the insolvency of the borrower. I think 25 that's all you can do.</p> <p style="text-align: center;">Page 42</p> | <p>1 of the FSA: 2 "Attempt to obtain repayment of any of the 3 Subordinated Liabilities otherwise than in accordance 4 with the terms of this Agreement." 5 LORD JUSTICE LEWISON: That begs the question: if the 6 agreement allows you to prove, then 7(d) doesn't stop 7 you. If it doesn't, then you can't. 8 MR SNOWDEN: Your Lordship has the point. It is interesting 9 to note these are ancillary -- there's no doubt at all 10 these are ancillary clauses. If you actually look, they 11 are in precisely the same sort of terms for both 12 borrower and the lender. If you go back one page to 13 clause 6, on page 206, under the heading 14 "Representations and undertakings of Borrower", you'll 15 see the borrower has an exactly sort of mirror -- has 16 sort of a mirror of the same (d) as the lender does. 17 But it does just beg the question. 18 We say that to suggest that actually this is 19 an effective part and the substantive part of the 20 subordination clause is requiring this clause to do do 21 far too much work. The subordination is what it is 22 under clause 5 and what this clause is doing is simply 23 saying, "You shouldn't seek to bypass it in some way by 24 trying to get repayment in some other way". 25 LORD JUSTICE MOORE-BICK: What would it have in mind?</p> <p style="text-align: center;">Page 44</p> |

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| <p>1 MR SNOWDEN: For example, I suspect that you shouldn't try 2 to grab other in other jurisdictions outside the English 3 insolvency process. 4 LORD JUSTICE MOORE-BICK: Okay. 5 MR SNOWDEN: Likewise, (e): 6 "Take or omit to take any action whereby the 7 subordination of the Subordinated Liabilities or any 8 part of them might be terminated, impaired or adversely 9 affected." 10 It is the same point. You have to understand what 11 the subordination is, which you do from looking at 12 clause 5 before you then define it is being in any way 13 impaired or affected? But this does not inform you as 14 to what the subordination actually amounts to. 15 But the judge had to bend this agreement to fit his 16 thesis, because what he realised, of course, is that if 17 we can prove our debts, for reasons I have already 18 trailed a number of times, it causes insuperable 19 problems as to how fit this agreement within the English 20 statutory process and particularly in relation to 21 payment of statutory interest. 22 Just going back to clause -- sorry, before going 23 back to clause 5, would that be a convenient moment 24 to -- 25 LORD JUSTICE MOORE-BICK: Is it convenient to you?</p> <p style="text-align: center;">Page 45</p> | <p>1 of wording that is designed to prohibit a proof of debt, 2 as opposed to payment, is one which is well known not 3 only to the draftsman of commercial documents but to the 4 legislator as well. If you were to look at Insolvency 5 Rule 12.3, which in the Red Book is I think at page 990 6 to 991, you will see the heading "Provable debts". 7 Particularly you can, for example, pick up Rule 2A, 8 which says: 9 "The following are not provable, except at a time 10 when all other claims of creditors in the insolvency 11 proceedings have been paid in full with interest under 12 section 189(2), 288 or as the case may be. 13 LORD JUSTICE BRIGGS: Which book are you in? 14 MR SNOWDEN: It is 991 of my Red Book. 15 LORD JUSTICE BRIGGS: Oh, I've got it, it is right in the -- 16 MR SNOWDEN: Yes. 17 LORD JUSTICE LEWISON: 3919 in the bold numbers. 18 MR SNOWDEN: I think the ones in the bold in the square 19 brackets are the paragraph numbers, the provision 20 numbers. 21 LORD JUSTICE LEWISON: Yes, I have it. 22 MR SNOWDEN: It is 991 in the top middle of the book and 23 I was drawing your attention to what is 12.3(2A): 24 "The following are not provable except at a time 25 when all other claims of creditors in the insolvency</p> <p style="text-align: center;">Page 47</p> |
| <p>1 MR SNOWDEN: I am going to back to make some submissions now 2 on the specific meaning of clause 5.2(a). 3 LORD JUSTICE MOORE-BICK: We rise for five minutes. 4 (11.42 am) 5 (A short break) 6 (11.47 am) 7 LORD JUSTICE MOORE-BICK: Yes, Mr Snowden. 8 MR SNOWDEN: Just before turning to the particular 9 provisions I was going to deal with, can I just draw 10 your attention to one other -- sorry, I need to make one 11 correction and one point. Apparently just before the 12 short adjournment I said that insuperable problems would 13 be caused. Of course my submission was insuperable 14 problems are caused by the judge's conclusion, by my 15 learned friends' argument. I gather on the transcript 16 it came out looking as if I was contending that 17 insuperable problems would be caused by my solution. 18 LORD JUSTICE MOORE-BICK: That would be a novel submission. 19 MR SNOWDEN: It would be a novel submission and it's not, 20 for any avoidance of doubt, one which I make. Before 21 passing on, just for completeness, I was going to 22 mention that if there was any doubt about this 23 distinction between proof on the one hand and payment on 24 the other, if the draftsman had looked, for example, in 25 the Insolvency Rules they would have seen that the type</p> <p style="text-align: center;">Page 46</p> | <p>1 proceedings have been paid in full with interest under 2 section 189(2) Rule 288 or as the case may be." 3 I am just making the point that there the draftsman 4 of the rules makes the very clear distinction first of 5 all between proof and payment and also, for it is worth, 6 as well acknowledges that statutory interest under 7 section 189(2) and Rule 288 is not a claim of a creditor 8 in the insolvency proceeding, because otherwise -- 9 LORD JUSTICE MOORE-BICK: Does this agreement draw the same 10 distinction between proof and payment? 11 MR SNOWDEN: Yes, we say it does. 12 LORD JUSTICE MOORE-BICK: I mean the language. Does the 13 language? 14 MR SNOWDEN: The language specifies that we shan't receive 15 payment. It contains no restriction on proof. There's 16 no express reference to proof of debt being prohibited 17 anywhere in the subordinated debt agreement. The point 18 I am making is if the draftsman had wanted to prohibit 19 proof, he could have done so in one of two very easy 20 ways. He could have looked at the type of agreement in 21 SSSL Realisations, which is a fairly standard form, 22 which would have referred expressly to a prohibition on 23 proof, or he could have looked at this rule which again 24 contains express an express prohibition on proof. 25 LORD JUSTICE BRIGGS: It contains an implied restriction on</p> <p style="text-align: center;">Page 48</p> |

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| <p>1 proof because you can't prove pari passu with the senior 2 creditors.</p> <p>3 MR SNOWDEN: No, we can't be paid pari passu. The point 4 I was making, we prove but our claim will be valued at 5 zero because the contingency, namely the other provable 6 debts should be paid in full, has not been satisfied. 7 So that the distributions that will then take place will 8 take place to them, not us. When they have been paid 9 their proved debts, the condition is satisfied, our 10 proof of debt is then revalued in accordance with the 11 rules that I'll show you in a short while, and we then 12 rank as a proved debt. We then are paid and then 13 together, constituting all the proved debts, we qualify 14 for statutory interest under Rule 288. Your Lordships 15 will have appreciated that Rule 288 says statutory 16 interest is payable on all proved debts, irrespective of 17 how they rank.</p> <p>18 LORD JUSTICE BRIGGS: But the effect of proof of your debt 19 in a particular case -- I am not sure whether this is 20 one of them or not. It could be that nobody gets any 21 statutory interest because the proof of your 22 subordinated debt exhausts the fund.</p> <p>23 MR SNOWDEN: It is possible that the fund may be sufficient 24 to pay other proved debts first, before us, and then be 25 exhausted when we come in and then nobody gets statutory</p> <p style="text-align: center;">Page 49</p> | <p>1 all creditors on the same footing, irrespective of how 2 their claims rank. And that we say gives you the 3 clearest possible indication that, from the legislative 4 point of view, being kept out of your money during the 5 period of an insolvency is something that affects all 6 creditors equally, irrespective of how they rank and 7 therefore they should qualify for statutory interest 8 together.</p> <p>9 Therefore, to take my Lord Lord Justice Briggs' 10 point, it is not unfair, it is not unjust, that the 11 imposition of my client's subordinated debt behind other 12 proved debts might exhaust the fund that would otherwise 13 be available to pay statutory interest or that we have 14 to rank equally, because we all suffer the same.</p> <p>15 LORD JUSTICE BRIGGS: But if in clause 5.1 Senior 16 Liabilities includes an interest liability -- you're 17 going to say I suppose that statutory interest isn't 18 part of the senior liability?</p> <p>19 MR SNOWDEN: Correct.</p> <p>20 LORD JUSTICE BRIGGS: Otherwise it would not knock a large 21 hole in the apparent effect of clause 5.1.</p> <p>22 MR SNOWDEN: Because it's not -- the judge had to strain 23 again to say that it was. The direction to pay 24 statutory interest is a direction as to how to 25 distribute a surplus. It's not even regarded under the</p> <p style="text-align: center;">Page 51</p> |
| <p>1 interest.</p> <p>2 LORD JUSTICE BRIGGS: So no one gets any interest.</p> <p>3 MR SNOWDEN: Correct. Just so your Lordship understands 4 where I am going to go on that, in a sense -- I will 5 give you what I am going to say on that. Statutory 6 interest is payable to compensate creditors for being 7 kept out of their money during the period of 8 an administration. As against members, you can sort of 9 understand why statutory interest should be payable 10 because if the process of winding up the affairs of the 11 company has taken some time, then the members 12 effectively have to foot the bill for that as regards 13 creditors.</p> <p>14 But crucially, as between creditors, they all suffer 15 equally be kept being kept out of their claims by the 16 process taking a period of time and, therefore, as 17 between creditors, whether subordinated or 18 unsubordinated, they all suffer the same and therefore 19 statutory interest should be payable pari passu as 20 between them; and that's exactly what Rule 288 and 21 exactly what section 189 says. So that as between 22 creditors, irrespective of whether they are subordinated 23 or unsubordinated, they should be compensated equally 24 for being kept out of their money. Therefore the whole 25 statutory regime for payment of statutory interest puts</p> <p style="text-align: center;">Page 50</p> | <p>1 rules that I've just shown you, for example, as a claim 2 in the insolvency. So I do say that it doesn't fall 3 within the concept of liabilities that rank ahead of us.</p> <p>4 With respect, this is where, as I said at the 5 outset, the judge fundamentally -- this is a very good 6 example of the judge fundamentally confusing the 7 position of a secured creditor with the position of 8 a member. All my Lord Lord Justice Briggs' points to me 9 a moment ago would have been perfectly well made, if 10 I may say, had they been made between a member and 11 a creditor. If the creditor was saying as against 12 a member, "Look I've been kept out of my money for 13 a period of time by this insolvency of your company, you 14 shouldn't get a return until I have been paid statutory 15 interest", one perfectly well understands that.</p> <p>16 But so far as creditors go, the statutory policy is 17 absolutely crystal clear: they all suffer in the same 18 way, irrespective of rank. I have said that many times. 19 Can I just show your Lordships where that is in the 20 statute --</p> <p>21 LORD JUSTICE MOORE-BICK: The concept is not difficult to 22 understand. At the moment it seems to me the question 23 is really revolving around the definition of 24 "liabilities".</p> <p>25 MR SNOWDEN: We certainly say that liabilities does not</p> <p style="text-align: center;">Page 52</p> |

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| <p>1 include the direction which is given to the relevant 2 office holder to pay a surplus. 3 LORD JUSTICE MOORE-BICK: That I understand, but that's the 4 question, isn't it? 5 MR SNOWDEN: It is one of the questions. But the 6 alternative causes all sorts of problems. For example, 7 not least for that little section I've just shown you of 8 the rules, which seems to plainly distinguish between 9 the claims you make in an insolvency and the payment of 10 statutory interest. But it also doesn't fit the wording 11 of the very section and the rules. I am sure you've 12 looked at them, but section 189, which is the section on 13 statutory interest in a liquidation, which was the first 14 one to be introduced, and I will come back to show you 15 the regulatory -- 16 LORD JUSTICE MOORE-BICK: Which page are you now on? 17 MR SNOWDEN: Page 100 in the middle. (Pause). 18 LORD JUSTICE MOORE-BICK: Yes. 19 MR SNOWDEN: It is section 189(2) -- well, first of all 20 section 189(1): 21 "In a winding up interest is payable in accordance 22 with the section on any debt proved in the winding-up 23 including so much of any debt as represents interest on 24 the remainder." 25 And then (2):</p> <p style="text-align: center;">Page 53</p> | <p>1 "All interest payable under (7) ranks equally 2 whether or not the debts on which it is payable rank 3 equally." 4 I say that is absolutely crystal clear and that's 5 why the judge's demotion of the subordinated debt below 6 statutory interest to the other proved debts, below even 7 non-provable claims, we say can't, with respect, stand 8 within this statutory structure; and, more importantly, 9 it doesn't stand within the policy of the Act. 10 LORD JUSTICE MOORE-BICK: It depends on what may have been 11 agreed, doesn't it? There is no reason in principle why 12 they shouldn't have agreed that the subordinated debt 13 should come into play after statutory interest. 14 MR SNOWDEN: If they had done so very clearly that would be 15 right, but with respect they didn't. 16 LORD JUSTICE MOORE-BICK: Well, that's the question. 17 MR SNOWDEN: But the way -- 18 LORD JUSTICE MOORE-BICK: I am not sure I quite followed 19 your last point. All right, we see how the statutory 20 interest is dealt with. We can see that debts rank -- 21 for interest regardless of their ranking. 22 MR SNOWDEN: Yes. 23 LORD JUSTICE MOORE-BICK: But I don't follow the next step 24 in the -- 25 MR SNOWDEN: In a sense -- first of all I am responding to</p> <p style="text-align: center;">Page 55</p> |
| <p>1 "Any surplus remaining after the payment of the 2 debts proved shall, before being applied for any other 3 purpose, be applied in paying interest on those debts in 4 respect of the periods during which they have been 5 outstanding since the company went into liquidation." 6 Your Lordship of course appreciates that if 7 contractual interest is payable on the debt, it is 8 included within the proof up to the point of 9 liquidation. 10 Then (3): 11 "All interest under this section ranks equally, 12 whether or not the debts on which it is payable rank 13 equally." 14 LORD JUSTICE MOORE-BICK: Yes. 15 MR SNOWDEN: That wording is replicated in the Insolvency 16 Rule that we're dealing with, Rule 288. It is 17 Rule 288(8), which you'll see at page 731 of the book. 18 You'll see it is in Rule 288(8). The provision for 19 payment of interest is 288(7): 20 "Any surplus remaining after payment of the debts 21 proved shall, before being applied for any purpose, be 22 applied in paying interest on those debts in respect of 23 the periods during which they have been outstanding 24 since the company entered into administration." 25 And then (8):</p> <p style="text-align: center;">Page 54</p> | <p>1 my Lord Lord Justice Briggs' point which I think was 2 essentially if you, the subordinated creditor, get 3 yourself in between the unsubordinated creditors and 4 statutory interest to them, that's all very unfair. 5 LORD JUSTICE MOORE-BICK: You wipe out their interest. 6 MR SNOWDEN: Wipe out their statutory interest, isn't that 7 very unfair? I paraphrase. 8 LORD JUSTICE BRIGGS: I didn't say that very unfair. I was 9 want to make it clear it was understood -- I can't 10 recall whether the predicted fund is big enough to pay 11 all the subordinated debts and leave anything over for 12 statutory interest in this particular case. It might 13 be. 14 MR SNOWDEN: It depends, I think -- 15 LORD JUSTICE BRIGGS: We're still talking of a range, 16 I think, aren't we? 17 MR SNOWDEN: Yes, we are. There is a range and also there 18 are variables, I think, in terms of recovery. We 19 haven't looked at the numbers. It becomes very 20 difficult to give any sort of clear answer to that 21 question. 22 LORD JUSTICE BRIGGS: In purely commercial terms it still 23 makes quite a big hole in the concept of keeping the 24 Senior Liabilities protected against the consequences of 25 the bank's failure?</p> <p style="text-align: center;">Page 56</p> |

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| <p>1 MR SNOWDEN: Well, with respect, no.</p> <p>2 LORD JUSTICE BRIGGS: If there's a seven or eight-year</p> <p>3 period of administration and you don't get any statutory</p> <p>4 interest.</p> <p>5 MR SNOWDEN: Except you have just assumed, in a sense, what</p> <p>6 with respect, you need to prove, which is the payment of</p> <p>7 statutory interest is in the concept of liabilities.</p> <p>8 LORD JUSTICE BRIGGS: Oh, sure. I am just stepping back</p> <p>9 from the agreement and just saying if you were a senior</p> <p>10 creditor and you incurred not merely being kept out of</p> <p>11 your money but the substitution of your contractual</p> <p>12 right to interest for a statutory right to interest, but</p> <p>13 the contractual right to interest would be a protected</p> <p>14 liability under the meaning of the agreement but the</p> <p>15 substitute statutory one isn't you say, and that isn't</p> <p>16 protected against a claim for the full principal of the</p> <p>17 subordinated debt.</p> <p>18 MR SNOWDEN: Right. But the subordinated debt is still --</p> <p>19 he's still a creditor and, you know, in terms of the</p> <p>20 policy that underpins this Act, if the policy for</p> <p>21 payment of statutory interest is, which it clearly is,</p> <p>22 to compensate creditors for being kept out of their</p> <p>23 money during the period of insolvency, that affects</p> <p>24 subordinated and unsubordinated creditors equally.</p> <p>25 LORD JUSTICE BRIGGS: I understand, but absent any contract</p> <p style="text-align: center;">Page 57</p> | <p>1 about what to do with the money. Why is that no more</p> <p>2 than a direction to the administrator?</p> <p>3 MR SNOWDEN: It is to be contrasted with the assertion of</p> <p>4 a claim for a debt or a liability --</p> <p>5 LORD JUSTICE LEWISON: Sure, but the definition of</p> <p>6 "liabilities" in the agreement includes any sum payable</p> <p>7 under an enactment by the borrower. So unless you can</p> <p>8 say this isn't payable by the borrower -- it is</p> <p>9 difficult to see why it is payable by the administrator</p> <p>10 since it is not coming out of his pocket -- why doesn't</p> <p>11 it fall within the definition of liabilities in the</p> <p>12 agreement?</p> <p>13 MR SNOWDEN: Because the concept of liabilities relates to</p> <p>14 things that are payable by the borrower as opposed to</p> <p>15 being paid as a requirement of --</p> <p>16 LORD JUSTICE LEWISON: Does administration remove any</p> <p>17 interest that the borrower has in the assets like</p> <p>18 a liquidation does?</p> <p>19 MR SNOWDEN: Well, I'll answer the question first of all by</p> <p>20 reference to the liquidation because we know what the</p> <p>21 answer to that is in the liquidation because of Ayerst.</p> <p>22 LORD JUSTICE LEWISON: Yes.</p> <p>23 MR SNOWDEN: In Ayerst the borrower doesn't have the</p> <p>24 right --</p> <p>25 LORD JUSTICE LEWISON: That's why I asked about Rule 288 no</p> <p style="text-align: center;">Page 59</p> |
| <p>1 to the contrary if all you agree to do is to subordinate</p> <p>2 your debt behind the principal of some other debt, you</p> <p>3 will share pari passu on statutory interest.</p> <p>4 MR SNOWDEN: Yes. That's why it is important to go back,</p> <p>5 it's important to understand whether we are prevented</p> <p>6 from proving that.</p> <p>7 LORD JUSTICE MOORE-BICK: That is critical, isn't it?</p> <p>8 MR SNOWDEN: It is.</p> <p>9 LORD JUSTICE MOORE-BICK: Your argument is you can prove at</p> <p>10 the outset even if the proof is valued at nil --</p> <p>11 MR SNOWDEN: Yes.</p> <p>12 LORD JUSTICE MOORE-BICK: -- but the fact you can prove</p> <p>13 means if the assets are sufficient to get down to the</p> <p>14 level of statutory interest, you're in there ahead of</p> <p>15 statutory interest.</p> <p>16 MR SNOWDEN: Yes.</p> <p>17 LORD JUSTICE MOORE-BICK: And you share in the statutory</p> <p>18 interest.</p> <p>19 MR SNOWDEN: Yes.</p> <p>20 LORD JUSTICE LEWISON: Depending on what the agreement</p> <p>21 means.</p> <p>22 MR SNOWDEN: Yes.</p> <p>23 LORD JUSTICE LEWISON: Why is Rule 288 no more than</p> <p>24 a direction to the administrator? He is not mentioned</p> <p>25 in it, it just tells you what to do or issues a command</p> <p style="text-align: center;">Page 58</p> | <p>1 section 189.</p> <p>2 MR SNOWDEN: I will go back to it because in a sense --</p> <p>3 I don't think there's been a case that's answered the</p> <p>4 question in an administration in the way that Ayerst</p> <p>5 answered it in a liquidation. But this regime that</p> <p>6 we're looking at under the agreement has to apply,</p> <p>7 obviously, equally whether it is a liquidation or</p> <p>8 an administration. The provisions in relation to</p> <p>9 statutory interest first came in -- sorry, they came in</p> <p>10 in 1986 when administrations were invented and they are</p> <p>11 equally as applicable to liquidations as</p> <p>12 administrations.</p> <p>13 I would say that the entitlement under the statutory</p> <p>14 scheme to have a surplus applied by the person who is in</p> <p>15 control of the surplus, whether that be the liquidator</p> <p>16 or the administrator, is not a liability of the</p> <p>17 borrower.</p> <p>18 LORD JUSTICE LEWISON: Because it's not payable by the</p> <p>19 borrower?</p> <p>20 MR SNOWDEN: That's right. It's not in the normal</p> <p>21 parlance -- in any normal sense of that expression. It</p> <p>22 is a direction as to what to do to the person who is in</p> <p>23 control, which must be the liquidator or the</p> <p>24 administrator, to apply a surplus.</p> <p>25 LORD JUSTICE LEWISON: Liabilities includes future sums</p> <p style="text-align: center;">Page 60</p> |

15 (Pages 57 to 60)

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| <p>1 payable by the borrower. It's a sum and it's payable, 2 but you say it's not payable by the borrower. I am 3 looking at the definition of "liabilities" in the 4 agreement on page 203. 5 (Pause). 6 MR SNOWDEN: The answer to my Lord's question is, yes, we do 7 say it's not a liability because of the way in which the 8 statute approaches the requirement for the surplus to be 9 paid. 10 LORD JUSTICE LEWISON: But which bit of the contractual 11 definition of "liability" does it fall outside? It is 12 a sum, is it not? 13 MR SNOWDEN: It is a sum but it is not -- 14 LORD JUSTICE LEWISON: And it is payable? 15 MR SNOWDEN: But it's not payable by the borrower. 16 LORD JUSTICE LEWISON: So you say it is not payable by the 17 borrower and that's why it's not in the definition. 18 MR SNOWDEN: Indeed, if you go back to, for example, the 19 Rule 12.3(2A) that I referred you to, that doesn't treat 20 it as part of the claim in the insolvency. 21 LORD JUSTICE LEWISON: I understand that, but the point I am 22 putting to you is: does it have to be a claim within the 23 insolvency if it is a sum payable by the borrower? Just 24 to fall within the definition of "liabilities". I think 25 your answer is it's not payable by the borrower.</p> <p style="text-align: center;">Page 61</p> | <p>1 statutory process. 2 LORD JUSTICE BRIGGS: Yet again that's just part of the 3 definition of solvency, to see whether you can get paid 4 without an insolvency process, isn't it? 5 MR SNOWDEN: No. In determining whether we can get paid the 6 borrower has to be solvent, both before and after 7 payment, and in determining whether the borrower is 8 solvent you disregard non-provable claims. Therefore, 9 once we've paid everything up to non-provables, we get 10 paid. So far as non-provables are concerned in fact, 11 because they don't constitute liabilities, we say we get 12 paid because the conditions are satisfied at the earlier 13 stage, namely when the provable debts have been paid to 14 the other unsubordinated creditors. 15 So it is different answer. Of course we accept 16 statutory interest is part of the statutory scheme, 17 necessarily it's provided for. But non-provable 18 liabilities, by definition, are outside the statutory 19 scheme. So there's a different reason why you ignore 20 them. 21 I've made my submissions in relation to statutory 22 interest because, as I say, it is important as a matter 23 of policy because the judge also came back to this 24 policy question to ask: is it fair, if you like, is it 25 right? Could the contracting parties have envisaged --</p> <p style="text-align: center;">Page 63</p> |
| <p>1 MR SNOWDEN: It's not. 2 LORD JUSTICE BRIGGS: You presumably say the same in 3 relation to non-provable debts. Although they are if 4 anything only a liability of the borrower, you say they 5 fall outside the definition of "liabilities" do you, 6 because they're not provable? 7 MR SNOWDEN: Yes. I mean, they are -- non-provable 8 liabilities, as we'll see when we look at what 9 David Richards J said in T&N, they are liabilities of 10 the borrower which he said -- if they're not provable, 11 they can be asserted after the end of the statutory 12 process, when he said the court might lift the embargo 13 on proceedings and allow the claimant to issue 14 proceedings and possibly seek to execute or attach. 15 LORD JUSTICE BRIGGS: So how do they fall outside 16 liabilities under clause 1 of the agreement? I am 17 assuming you're going to say they do. 18 MR SNOWDEN: No, they don't fall outside liabilities but 19 they are excluded because they are not under 5.2(a) 20 payable or capable of being established or determined in 21 the insolvency. 22 LORD JUSTICE LEWISON: You say they are only established 23 after the insolvency has run its course? 24 MR SNOWDEN: Without wishing to label things too tritely, 25 they are non-provable because they are not part of the</p> <p style="text-align: center;">Page 62</p> | <p>1 LORD JUSTICE LEWISON: Your point is you're claiming as 2 a creditor, not as a member? 3 MR SNOWDEN: Correct. 4 LORD JUSTICE LEWISON: If regulators had wanted banks to 5 increase their equity capital they would have said so, 6 since they were allowing them to have loans. 7 MR SNOWDEN: Yes, and the subordination provisions don't 8 prevent us proving. They expressly adopt a different 9 type of technique, well recognised, to allow us to prove 10 but just not receive payment until certain conditions 11 are satisfied. That extract from Goode I showed you 12 explains precisely how it works. 13 So it is a well recognised provision and it's not 14 surprising, with respect, that a subordinated loan 15 should simply come behind the unsubordinated provable 16 debts of other creditors. As I put it at the outset of 17 the appeal, the test is as if the subordinated lender is 18 not the member. Why should you assume that that 19 particular creditor, who is prepared to stand in the 20 queue behind other creditors also takes the hit and 21 stands behind them as regards statutory interest or 22 indeed those people who have non-provable claims? 23 There's absolutely no commercial reason why you should 24 make that assumption at all. 25 LORD JUSTICE MOORE-BICK: Yes.</p> <p style="text-align: center;">Page 64</p> |

16 (Pages 61 to 64)

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| <p>1 MR SNOWDEN: I suspect that in the course of that exchange 2 we have dealt with -- if you just give me one moment. 3 (Pause). 4 I think it's probably convenient for me actually to 5 go to some of the authorities now that just slightly 6 underpin a number of the points that I've made during 7 that exchange, because I think we've dealt with it on 8 the basis that I was trying to explain the rationale for 9 the structure. 10 Can I first of all make good the point that I think 11 is actually common ground, or at least certainly the 12 bald point is common ground, which is that a liquidation 13 or an administration is a collective process for 14 enforcement of provable debts, that is it is concerned 15 with distributing assets of the company amongst 16 creditors who have proved their debts. I think my 17 learned friend Mr Dicker's skeleton, paragraph 6, sub 2 18 and sub 3 make that point; for which we say it is 19 important to understand that to get into the collective 20 process you need to prove your debt. 21 A liquidator or an administrator has no statutory 22 power or remit to pay debts which have not been proved 23 in the course of the distribution. There are a number 24 of cases that demonstrate that. Perhaps I can pick 25 briefly on the most important. I think the first is</p> <p style="text-align: center;">Page 65</p> | <p>1 established that at least temporarily they existed 2 almost, that's the T&N case. 3 LORD JUSTICE LEWISON: I am just wondering if you were 4 saying T&N is in some way wrong, or is there no such 5 thing? 6 MR SNOWDEN: It is possible for them to be a non-provable 7 debt, although very much by way of oversight or 8 exception because Parliament inevitably tries to make 9 everything fit within the statutory process. But my 10 point is (a) concurrency conversion claims are not 11 such -- and that's for this afternoon. 12 LORD JUSTICE LEWISON: Yes. 13 MR SNOWDEN: But in any event my important point currently 14 for the purpose of the subordination argument is that 15 they are not by definition provable and they do not 16 feature in any way, shape or form in the statutory 17 insolvency regime. 18 LORD JUSTICE MOORE-BICK: Well, yes. 19 LORD JUSTICE BRIGGS: Save in the general sense I suppose 20 that the liquidator can apply to the court for 21 directions, which is presumably what is happening in the 22 administration context in Waterfall II? 23 MR SNOWDEN: The administrator is applying for directions, 24 that's right. What appears to be happening is the court 25 is giving the sort of directions that it might give --</p> <p style="text-align: center;">Page 67</p> |
| <p>1 probably Government of India v Taylor. 2 LORD JUSTICE MOORE-BICK: Is this in dispute, that the 3 liquidator can't pay debts which haven't been proved? 4 MR SNOWDEN: Well, in a sense my learned friends duck the 5 question because -- 6 LORD JUSTICE MOORE-BICK: I just find it slightly 7 surprising, not being an expert in this field, but 8 still -- 9 MR SNOWDEN: I don't think they would dispute that bald 10 proposition. But what they duck is the question, 11 particularly in relation to the non-provable claims, as 12 to how those non-provable claims, if they exist, are 13 then to be dealt with. We say there is simply no 14 mechanism -- there is certainly no mechanism in the 15 Insolvency Act or rules that empowers a liquidator to 16 deal with non-provable claims. There's no mechanism for 17 them to be determined or adjudicated within the 18 insolvency framework. If they are to be enforced at 19 all, as we'll see, it is outside the statutory 20 insolvency framework. 21 LORD JUSTICE LEWISON: Are you saying there is no such thing 22 as a non-provable debt or are you saying there may be 23 but currency conversion claims are not amongst them? 24 MR SNOWDEN: There may be such a thing as a non-provable 25 debt. I know that because I was in a case which</p> <p style="text-align: center;">Page 66</p> | <p>1 LORD JUSTICE BRIGGS: But I think you say it has no business 2 to be giving. 3 MR SNOWDEN: There doesn't seem to be an awful lot of 4 jurisdictional basis for it, if I may put it that way. 5 Certainly it's not under the insolvency regime at all. 6 These aren't assets which are held on some sort of trust 7 because, as we know from Ayerst, the statutory trust 8 under the statutory regime is for the purpose of people 9 who prove their debts. These are not assets which are 10 held on some sort of express trust, like you would have 11 in Berkeley Applegate or anything like that it, where 12 a liquidator might say, "Well, I know that the company 13 holds these assets on an express trust and so as trustee 14 the company can apply to the court to determine how 15 beneficial interest should be dealt with. 16 LORD JUSTICE BRIGGS: They are the company's monies. 17 MR SNOWDEN: The non-provable debts -- 18 LORD JUSTICE BRIGGS: The liquidator is an officer of the 19 company. 20 MR SNOWDEN: The non-provable debts by definition are just 21 debt claims. They are just claims. 22 LORD JUSTICE BRIGGS: Yes. 23 MR SNOWDEN: They are not proprietary claims, everybody 24 accepts that. 25 LORD JUSTICE BRIGGS: No, but the liquidator is the office</p> <p style="text-align: center;">Page 68</p> |

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| <p>1 holder of the company which has a surplus which, unless 2 it to be paid back to the shareholders, is in principle 3 available to meet those claims. You're saying that it's 4 no part of the process for the court to give directions 5 or to quantify, or to assist in the quantification or 6 anything like that, of those additional non-provable 7 claims before the money is either paid back to the 8 shareholders or what happens to it? 9 MR SNOWDEN: What I am actually saying, because -- to say it 10 is no part of the court's -- I am sure the court will 11 find a way to do something which it may think is 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. 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</p> <p style="text-align: center;">Page 69</p> | <p>1 part of the insolvency process? You sort of step out of 2 it and then step back out of it again for the purpose of 3 paying members. 4 MR SNOWDEN: Even if in a sense your Lordship were right on 5 that proposition -- 6 LORD JUSTICE BRIGGS: I am not sure I am, I am asking you -- 7 I'm taking it in stages. 8 MR SNOWDEN: What wouldn't be the case is to look at clause 9 5.2(a), which is the subordination provision, which 10 requires -- sorry, which excludes from consideration 11 obligations which are not payable or capable of being 12 established or determined in an insolvency. 13 LORD JUSTICE BRIGGS: But I am looking at 5.2(a) and I am 14 saying if the insolvency process does, in statutory 15 black letter terms, deal with payment of the ultimate 16 surplus to the members, if it does, but the existence of 17 a non-provable debt raises a proper question whether 18 that should or all of it should be paid to the members 19 without taking any account of the non-provable claim, 20 which appears to feature on Lord Neuberger's waterfall 21 ahead of the members, why is not the ascertainment of 22 the quantification of the amount of that claim and 23 deciding any dispute about whether that claim is prior 24 in the waterfall to the members claims not part of the 25 insolvency process, merely because there isn't a rule</p> <p style="text-align: center;">Page 71</p> |
| <p>1 end of 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" -- 6 LORD JUSTICE LEWISON: Isn't that effectively 7 an inter-pleader? 8 MR SNOWDEN: Perhaps that's one way of looking at it, but 9 the critical point from my perspective on the question 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 5.2(a). 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. 17 MR SNOWDEN: It is capital I, don't forget. It's 18 an Insolvency process. 19 LORD JUSTICE LEWISON: Yes. 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</p> <p style="text-align: center;">Page 70</p> | <p>1 about it in the Insolvency Rules, other than the rule 2 that says if you have a problem not dealt with by these 3 rules you go along to the court and get directions? 4 MR SNOWDEN: The statutory scheme is for the benefit of 5 people who prove their claims. That's the collective 6 process. Anybody who doesn't prove his claim is shut 7 out from enforcing their claim. So it's a collective 8 club, if you like. 9 LORD JUSTICE BRIGGS: They are shut out until those with 10 provable debts have all been paid and have got their 11 statutory interest. 12 MR SNOWDEN: Yes. At that stage, as T&N makes clear, what 13 happens is simply it happens as it were in spite of the 14 fact that there is a statutory insolvency process, 15 because you have to ask for the stay to be lifted to 16 allow an ordinary claim, an ordinary process of 17 execution to issue, if you are -- let's assume there's 18 only one non-provable claimant. To establish or to have 19 his claim established or determined or to determine 20 whether the company is under an obligation to him, it's 21 not a process of insolvency that's used at all. It is 22 simply the ordinary writ claim form process, which he 23 would have to institute adversely to the company in 24 liquidation, adversely to whoever is in control of it. 25 Can I show you what David Richards J said --</p> <p style="text-align: center;">Page 72</p> |

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| <p>1 LORD JUSTICE BRIGGS: He may have said that in T&N but is 2 that what has happened in Waterfall II? 3 MR SNOWDEN: It doesn't appear to be, no. 4 LORD JUSTICE BRIGGS: Which I think has been heard. 5 MR SNOWDEN: Yes. 6 LORD JUSTICE BRIGGS: We don't know what happened during the 7 hearing. 8 MR SNOWDEN: No. 9 LORD JUSTICE BRIGGS: But presumably that wasn't a process 10 of the adjudication of a series of risks in relation to 11 which a stay had been lifted? 12 MR SNOWDEN: No. But the important point is that the 13 obligations that are being determined -- he was 14 answering a series of questions that were posed by the 15 administrators -- 16 LORD JUSTICE LEWISON: Your point really is that clause 17 5.2(a) must have been intended to exclude something 18 which was otherwise the liability of the borrower. 19 MR SNOWDEN: Correct. 20 LORD JUSTICE LEWISON: If is not excluding non-provable 21 claims, what is it supposed to be doing? 22 MR SNOWDEN: Absolutely. That's why liabilities can't mean 23 in the sense that the judge thought it meant as meaning 24 everything, something has to be excluded. I am about to 25 show you Government of India v Taylor because it is</p> <p style="text-align: center;">Page 73</p> | <p>1 of the process or, as it were, at the last minute of the 2 process. 3 LORD JUSTICE BRIGGS: Before the last stage in the statutory 4 process occurs, namely the payment to members. 5 MR SNOWDEN: That's right. 6 LORD JUSTICE BRIGGS: My problem is the statutory nature of 7 the obligation to pay the members. 8 MR SNOWDEN: But their assertion of rights is adverse to the 9 person conducting the insolvency process. It's not 10 a co-operative process for him in the same way proof of 11 debt is, where he is statutorily -- a liquidator, for 12 example, is statutorily empowered to determine, subject 13 to appeal to the court, the proof. 14 LORD JUSTICE BRIGGS: Yes. 15 MR SNOWDEN: This is something that says the claim will be 16 put in and it will put in against the company, of which 17 he happens to be the controller for the time being, 18 because he hasn't remitted the funds; but it's a claim 19 against the company and it's an adverse claim. The 20 determination -- or establishment or determination of 21 that obligation on the company is just not part of this 22 Insolvency with a capital I. That is why I do say that 23 currency conversion claims or -- any non-provable claim 24 falls outside clause 5.2(a). 25 Can I show you very quickly Government of</p> <p style="text-align: center;">Page 75</p> |
| <p>1 accepted, that, for example, foreign revenue claims 2 which are not provable I think would fall within 3 clause 5.2(a). 4 LORD JUSTICE BRIGGS: Could you pursue those by an ordinary 5 claim? 6 MR SNOWDEN: No, they are not enforceable, they are not 7 provable. 8 LORD JUSTICE BRIGGS: In any way; it is not just they are 9 not provable in insolvency, you could not establish them 10 by any process? 11 MR SNOWDEN: Not in this country; but you could in the 12 foreign country, obviously. 13 LORD JUSTICE BRIGGS: But then they wouldn't be enforceable? 14 MR SNOWDEN: Sorry? 15 LORD JUSTICE BRIGGS: They wouldn't be enforced here. 16 MR SNOWDEN: That's right. 17 LORD JUSTICE BRIGGS: Even if it was established within the 18 EU. 19 MR SNOWDEN: Which indicates that one is looking at this 20 statutory insolvency process in this country. The point 21 is the statutory insolvency process doesn't exist for 22 the benefit of people who are not beneficiaries under 23 the statutory scheme because they can't prove their 24 claims or don't prove their claims. If they have 25 a right, it is a right which they can assert at the end</p> <p style="text-align: center;">Page 74</p> | <p>1 India v Taylor and then work my way through to T&N? 2 LORD JUSTICE BRIGGS: Yes. 3 MR SNOWDEN: Just simply so you've seen the authorities that 4 I have referred to. 5 It's in bundle 1A of the authorities at tab 45. 6 (Pause). 7 The facts, as your Lordships appreciate, are 8 essentially just an attempt to prove -- it was actually 9 a rejection of a proof claim. You can see that because 10 at page 492 of the report -- the first paragraph on 11 page 492, this was an appeal against a rejection of 12 proof. 13 For present purposes I can get what I need from 14 page 508 to 509, Viscount Simmons, and the argument, as 15 you'll see, in the passage that's highlighted just 16 towards the foot of page 508 is that the respondents 17 were saying that it means -- it says: 18 "On the one hand it is said by the respondents that 19 it means only those obligations which were enforceable 20 in the English court and on the other hand its meaning 21 is extended, at least so far as to cover liabilities for 22 foreign tax in respect of which the company might have 23 been sued in the courts of the country imposing it. 24 "My Lords I have no hesitation in adopting the 25 former of these meanings. I conceive that it is the</p> <p style="text-align: center;">Page 76</p> |

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

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| <p>1 a winding-up is not engaged in proceedings to establish 2 the company's liability or the quantum of the liability 3 but to enforce the liability." 4 He says: 5 "The winding up leaves the debts of the creditors 6 untouched. It only affects the way in which they can be 7 enforced." 8 Now, just pausing there, what Lord Hoffmann meant 9 when he said "The winding leaves the debts of the 10 creditors untouched", I respectfully suggest, is that 11 the winding-up order leaves the debts of the creditors 12 untouched because that's what he has been talking about. 13 That's the question in front of him. He goes on: 14 "When the order is made, ordinary proceedings 15 against the company are stayed, although the stay can be 16 enforced only as against creditors, subject to the 17 personal jurisdiction of the court. The creditors are 18 confined to a collective enforcement procedure that 19 results in pari passu distribution of the company's 20 assets. The winding up does not either create new 21 substantive rights in the creditors or destroy old ones. 22 Their debts, if they are owing, remain debts throughout. 23 They are discharged by the winding up only to the extent 24 that they are paid out of dividends. But when the 25 process of distribution is complete, there are no</p> <p style="text-align: center;">Page 81</p> | <p>1 enforced." 2 He must have in mind there that it's completed, in 3 a case of a company with a surplus over provable debts 4 and statutory interest, by payment to the shareholders. 5 MR SNOWDEN: Yes. 6 LORD JUSTICE BRIGGS: So if you'd asked him to unpick his 7 thought process, which he probably didn't have to on the 8 facts of that case -- 9 MR SNOWDEN: No. 10 LORD JUSTICE BRIGGS: -- there probably wasn't a surplus. 11 MR SNOWDEN: And he wasn't dealing with a non-provable 12 claim. 13 LORD JUSTICE BRIGGS: He would appear to be saying that the 14 completion of the insolvency process necessarily leads 15 to the company having no assets. 16 LORD JUSTICE MOORE-BICK: I just wonder if that's right, 17 because the whole context of this is actually 18 an insolvent winding up, isn't it? 19 MR SNOWDEN: Yes. 20 LORD JUSTICE MOORE-BICK: And the reference to "the 21 discharge of a personal bankrupt extinguishing debts" 22 suggests that he's actually contemplating a case where 23 the debts are not -- 24 MR SNOWDEN: That's right. 25 LORD JUSTICE MOORE-BICK: All the debts are not paid. The</p> <p style="text-align: center;">Page 83</p> |
| <p>1 further assets against which they can be enforced, there 2 is no equivalent of the discharge of a personal bankrupt 3 which extinguishes his debts. When the company is 4 dissolved, there is no longer an entity which the 5 creditors can sue. But even then, the discovery of 6 an asset can result in the company being restored for 7 the process to continue." 8 Then he refers to the decision of Oliver J in 9 Dynamics, about the process of valuation during the 10 process of proof in order to give effect to a pari passu 11 distribution. 12 What we say is that you read this entirely as 13 an explanation of the process by reference to the 14 participation in the collective process. As he said, 15 anybody who doesn't participate in the collective 16 process is stayed and creditors are confined to the 17 collective enforcement process, which, as we know, is 18 the proof of debt process. 19 LORD JUSTICE BRIGGS: But Lord Hoffmann obviously imagined 20 that there would fall within the insolvency process 21 every step and process necessarily finally to distribute 22 all the assets. That's why he says at the bottom of -- 23 yes, just above B on 156: 24 "But when the process of distribution is complete, 25 there are no further assets against which they can be</p> <p style="text-align: center;">Page 82</p> | <p>1 interesting question, as I see it, here is what the 2 implications of this are for the non-provable debts. 3 MR SNOWDEN: Yes -- 4 LORD JUSTICE BRIGGS: Yes. 5 LORD JUSTICE MOORE-BICK: -- which, on this analysis, remain 6 in being and, presumably, can be sued for if the stay 7 can be lifted. 8 MR SNOWDEN: Which is precisely what David Richards J dealt 9 with in T&N. I will take you to T&N because I have 10 referred to it so many times. It is three further tabs 11 on at tab 79. 12 David Richards J was here dealing with a series of 13 questions, but arising out of the administration of T&N 14 and the possibility that it had exposed workers and 15 others to asbestos and that they were developing 16 asbestos illnesses, but was having to cater for the 17 probability that there were people who had been exposed 18 but had not yet developed compensatable harm and 19 therefore hadn't an accrued cause of action yet in tort. 20 There were at least two questions he was facing. 21 One was, can you scheme that type of claim? Does that 22 person fall within the scope of the Companies Act scheme 23 jurisdiction? And he held that, yes, they did, because 24 was a very wide scheme jurisdiction. But he then also 25 had to deal with the question about whether they had</p> <p style="text-align: center;">Page 84</p> |

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

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| <p>1 this case there is the possibility of a surplus, or at 2 least non-provable claims are being litigated about in 3 the expectation that there's a surplus. But the point 4 that Mr Justice -- 5 LORD JUSTICE BRIGGS: There may well be a shortfall as 6 against the totality of the non-provable claims, and the 7 major problem which he is there contemplating is: how do 8 you just prevent a rush to judgment once the stay is 9 lifted? 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. 13 MR SNOWDEN: You see, the point is there's nothing in the 14 statute -- there's nothing in the insolvency framework 15 that caters for that at all. I will come on to this 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</p> <p style="text-align: center;">Page 89</p> | <p>1 by the liquidator, as he is required to do. But if you 2 have a non-provable claim, you can't participate in the 3 process and your only way of getting your hands on the 4 money is to do something which you could have done, 5 irrespective of the insolvency process and entirely 6 outside the insolvency process, namely issue a claim. 7 Therefore, if you answer the question: is this 8 within the scope of clause 5.2(a)? Are non-provable 9 claims ones which the contracting parties would have 10 thought were capable of being established or determined 11 in the Insolvency (capital I)? The answer is "No". 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 15 sought is entirely outside the Insolvency Act. It's 16 like, as was said in Government of India, the liquidator 17 has no power to pay non-enforceable claims -- 18 LORD JUSTICE BRIGGS: But that's quite different. 19 MR SNOWDEN: But, with respect, he doesn't have power, 20 because there's nothing in the statute that authorises 21 him to do so, to determine off his own bat and pay 22 non-provable claims. What jurisdiction is he 23 exercising? 24 LORD JUSTICE LEWISON: Suppose somebody with a tort claim 25 which accrues after the date of the making of the order</p> <p style="text-align: center;">Page 91</p> |
| <p>1 statutorily provided for as a duty of the liquidator? 2 MR SNOWDEN: Yes. 3 LORD JUSTICE BRIGGS: So the very end is provided for. 4 MR SNOWDEN: Yes. 5 LORD JUSTICE BRIGGS: What has happened is not so much that 6 the insolvency process just ceases where there is 7 a surplus, because there is statutory machinery for 8 dealing with the surplus; as I understand it, it is that 9 it doesn't deal with all the problems that then arise as 10 to who should get it. 11 MR SNOWDEN: Your Lordships should, in my respectful 12 submission, put to one side the entirely understandable 13 sense that everybody would have that something needs to 14 be done constructively to avoid, as your Lordship said, 15 the lift of the starting gate and the rush to judgment. 16 Judges throughout the ages have sought, in some way, 17 shape or form, to avoid that. Something -- 18 LORD JUSTICE BRIGGS: That, in a sense, is where insolvency 19 processes originate. 20 MR SNOWDEN: But the insolvency process that we actually 21 have doesn't deal with it at all by definition, because 22 it is a process which deals with proof of debt. It's 23 a collective process. To get into the club and 24 participate, you have to prove. If you're a member, you 25 can sit and wait for a surplus to be distributed to you</p> <p style="text-align: center;">Page 90</p> | <p>1 does in fact sue and does in fact get a judgment -- 2 MR SNOWDEN: Yes. 3 LORD JUSTICE LEWISON: -- after everybody else had even 4 paid. Who signs the cheque? 5 MR SNOWDEN: It will be paid by, presumably, a process of 6 execution, which is what David Richards J envisaged. 7 LORD JUSTICE LEWISON: He goes to somebody and says, "Look, 8 I have a judgment from a court for £10,000", or whatever 9 it is -- 10 MR SNOWDEN: There's no provision of the Insolvency Act 11 setting out the liquidator's powers and duties which 12 authorises him to sign that check. 13 LORD JUSTICE LEWISON: So who does? Or has the judgment 14 creditor now got to resort to some sort of impersonal 15 way of getting his money? 16 MR SNOWDEN: In a sense, the answer is -- certainly 17 David Richards J, I don't think, envisaged that the 18 liquidator would simply be able to determine -- say, for 19 example, admit it. I mean, the liquidator couldn't say, 20 for example, if faced with a claim on behalf of the 21 company, "Oh, I think you've got a jolly good claim. 22 I think I will just pay it." 23 LORD JUSTICE BRIGGS: What if the non-provable creditor has 24 got a slum-dunk claim? Are you saying the liquidator 25 has to put everybody through the completely unnecessary</p> <p style="text-align: center;">Page 92</p> |

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| <p>1 wasted costs of the issue of proceedings, a summary 2 judgment application and an enforcement process, and 3 simply not lock the door in the bailiff's face? Rather 4 than simply facing up to the reality at the start of the 5 process and saying, "Well, my statutory duty to pay the 6 shareholders at the end of the day doesn't stop me 7 recognising this inevitable prior claim in the 8 waterfall?" That is prior, ahead of the shareholders. 9 MR SNOWDEN: I keep coming back, though, to the point: in 10 what sense is that determination being under the 11 insolvency regime? 12 LORD JUSTICE BRIGGS: I hate to be forced back to ex parte 13 James, which strikes me as a position of last recourse 14 when all else fails. 15 MR SNOWDEN: My learned friend's skeleton does the same, 16 I think it is in paragraph 9.2, possibly, where he says 17 in a sense it has to be determined or established in the 18 liquidation because it has to be. 19 LORD JUSTICE BRIGGS: Yes. 20 MR SNOWDEN: But, with respect, that isn't anything more 21 than just bootstrapping. 22 LORD JUSTICE MOORE-BICK: He will execute it, won't he, 23 unless, in order to deal with the problem of multiple 24 claimants and insufficient surplus, the court is 25 persuaded by an interested party to stay execution or</p> <p style="text-align: center;">Page 93</p> | <p>1 envisaged was the issue of ordinary claim proceedings. 2 LORD JUSTICE BRIGGS: Otherwise you don't just have a sort 3 of Grand National, you also have the liquidator in the 4 starting blocks seeking to get the money out of the 5 shareholders before any of the creditors can issue their 6 claims. That can't be right, can it? 7 MR SNOWDEN: In a sense that rather proves the point, that 8 he's not acting -- if you like, his duty is -- 9 LORD JUSTICE BRIGGS: What? To rush the money off to the 10 shareholders before any of these deserving but not 11 non-provable tort claimants can get their writs issued 12 and some sort of Mareva injunction against the 13 liquidator? 14 MR SNOWDEN: He will point to the fact that the statutory 15 provision in the Insolvency Act requires the surplus to 16 be paid to members. 17 LORD JUSTICE BRIGGS: Yes. 18 MR SNOWDEN: I am not suggesting, of course, that 19 a liquidator would try and forestall the court reaching 20 an appropriate judgment. But the point I am making is 21 that it's not the process that's envisaged by 22 clause 5.2(a). The idea that the parties, the 23 contracting parties, to 5.2(a), excluding, as they had 24 to -- clause 5.2(a) does obviously exclude something. 25 The idea --</p> <p style="text-align: center;">Page 95</p> |
| <p>1 possibly to stay it, save up to a certain of level, in 2 order to exercise a sort of a pari passu distribution 3 itself? But essentially the judgment will be executed, 4 won't it, in whatever is the appropriate way? 5 MR SNOWDEN: Yes. It may be that the appropriate analogy is 6 that the court would in some way regard it as some form 7 of inter-pleader between a relative claimant -- a number 8 of claimants, for example, having claims to a particular 9 sum of money. 10 LORD JUSTICE BRIGGS: But it's not a proprietary claim, is 11 it? It's a debt claim against the company. 12 MR SNOWDEN: And this is the problem. 13 LORD JUSTICE BRIGGS: It's not a true inter-pleader. 14 MR SNOWDEN: But the problem is it's not the insolvency 15 regime either, because it's just not there at all. 16 LORD JUSTICE BRIGGS: Why isn't it a sort of unwritten, 17 unimplied part of the regime, implied necessarily 18 because such claims would have to be faced up to before, 19 under the statutory scheme, the shareholders get what is 20 left? 21 MR SNOWDEN: As I say, I think the correct analysis is the 22 one that David Richards J set out in T&N, which was not 23 the idea that the court has to face up to it as part of 24 the insolvency process and organise some 25 insolvency-based solution. The solution that he</p> <p style="text-align: center;">Page 94</p> | <p>1 LORD JUSTICE BRIGGS: It could easily exclude, couldn't it, 2 the sort of things that were excluded in the Government 3 of India and Art Reproduction cases. So it excludes 4 statute-barred claims that couldn't be enforceable in 5 the court having jurisdiction over the insolvency. 6 MR SNOWDEN: But we would say why is it materially different 7 in relation to these types of claims, given that the 8 words are "obligations which are not payable or capable 9 of being established or determined in the insolvency of 10 the borrower"? If they had just wanted to say "claims 11 which are not enforceable against the borrower", they 12 would have said so. It is very specific. It is a point 13 I was making earlier that, when we looked at the 14 statutory origins of this agreement, I drew your 15 attention to how the forerunner of this clause had come 16 into being at the same time as the 1986 Act, or shortly 17 thereafter, in relation to the question of insolvency. 18 Well, it's not surprising that the draftsman of this 19 clause, when he was trying to figure out how to define 20 "solvency" or whether the borrower would be solvent for 21 the purposes of this clause before and after the payment 22 so that the condition could be satisfied, turned to the 23 Insolvency Act -- that he turned to the Insolvency Act 24 for the obvious place to get a definition. 25 He found in the Insolvency Act a scheme under which</p> <p style="text-align: center;">Page 96</p> |

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| <p>1 claims against the company are provable and they are 2 provable if they are either presently payable, i.e. 3 payable, or if they are not presently payable but are 4 capable of being established or determined by the 5 process of proof. 6 LORD JUSTICE BRIGGS: You say that obviously includes future 7 and contingent. 8 MR SNOWDEN: Future and contingent. This is an exact 9 parallel to the statutory scheme for proof of debts. 10 What he wouldn't have had in mind, and what is excluded 11 in 5.2(a), are unenforceable claims that couldn't 12 participate in that statutory process -- so we all agree 13 on that -- but also non-provable claims because they're 14 not part of the statutory process. This whole -- 15 LORD JUSTICE BRIGGS: I suppose it could be said against you 16 that if that what's he had meant he would have just said 17 "proved" instead of "established or determined". Your 18 interpretation of 5.2(a) does treat the "established or 19 determined" as a rather long-winded synonym for 20 "proved", doesn't it? 21 MR SNOWDEN: It is. Maybe that was a slightly wider 22 expression to at least cater for the possibility of 23 insolvency procedures in other jurisdictions. I don't 24 know, to pick the judge's point up. But it is certainly 25 not -- I mean, he could certainly have said "proved".</p> <p style="text-align: center;">Page 97</p> | <p>1 over statutory interest is determined, not by 5.2(a), 2 but by the rules. Is that how it works? 3 MR SNOWDEN: In a sense, 5.2(a) will have run its course 4 then because we have come in. 5 LORD JUSTICE LEWISON: Right. 6 MR SNOWDEN: And then -- 7 LORD JUSTICE LEWISON: Once you're in proving, then the 8 rules take over -- 9 MR SNOWDEN: That's right. 10 LORD JUSTICE LEWISON: -- and you rank equally with the 11 provables, because that's what the rule says. 12 MR SNOWDEN: With the unsubordinateds, yes, because that's 13 what the rules said and the draftsman would have 14 envisaged that that's how it works. It's a good 15 commercial reason, as well as policy reason, because all 16 creditors suffer in the same way by the delay. 17 LORD JUSTICE MOORE-BICK: Thank you. A convenient moment 18 Thank you very much. 2 o'clock, please. 19 (1.03 pm) 20 (The short adjournment) 21 (2.00 pm) 22 LORD JUSTICE MOORE-BICK: Yes, Mr Snowden. 23 MR SNOWDEN: My Lord, can I just pick up two or three little 24 points arising out of this morning and then complete my 25 review of one or two of the cases.</p> <p style="text-align: center;">Page 99</p> |
| <p>1 It would have perhaps been rather more straightforward 2 if he had have said that, although that's not normally, 3 I think, a method of contractual interpretation which my 4 Lord Lord Justice Lewison certainly encourages. I speak 5 from experience and I was hesitating not to. In 6 a sense, you have to construe the words that are there 7 and not the ones that might have been there, I think, is 8 putting it another way. 9 But we say when you actually look at what he did put 10 on to the page and where it has come from and the hints 11 you have, it is actually perfectly clear that what he's 12 talking about is the statutory process that 13 an insolvency envisages. If you're not in the statutory 14 collective process, you can be excluded under 5.2(a). 15 That's a convenient moment. 16 LORD JUSTICE MOORE-BICK: It seemed like a peroration, so 17 maybe that's the point at which we should stop. 18 MR SNOWDEN: I will try to keep it to summarise, rather than 19 peroration. 20 LORD JUSTICE LEWISON: Sorry to delay everybody. You say 21 5.2(a) clearly excludes non-provable liabilities. 22 Clearly that's what it does as a matter of construction. 23 MR SNOWDEN: Yes. 24 LORD JUSTICE LEWISON: Once you've got to that point, the 25 question whether the debt owed to you takes priority</p> <p style="text-align: center;">Page 98</p> | <p>1 Just picking up the point that was raised before 2 lunchtime, just before lunchtime, by Lord Justice Briggs 3 the point about, well, as it were, surely if 4 a liquidator has an obligation to pay to members it must 5 implicitly authorise him to sort out non-provable claims 6 in the middle. 7 LORD JUSTICE BRIGGS: Putting it another way, 8 Lord Neuberger's waterfall I think includes, doesn't it, 9 non-provable claims? 10 MR SNOWDEN: It does. I will come on -- let me just do that 11 now. 12 LORD JUSTICE BRIGGS: Don't take yourself out of your 13 course, but it just struck me as a parallel. 14 MR SNOWDEN: Lord Neuberger's paragraph you have to take in 15 context. It's a summary introductory paragraph -- 16 LORD JUSTICE BRIGGS: Yes. 17 MR SNOWDEN: -- and in a sense the waterfall -- I would, as 18 the waterfall in the statutory Insolvency Act, accept 19 non-provable claims as it were are somebody sticking 20 their finger in the water and sort of it letting it run 21 down either side. They're not actually in the waterfall 22 itself, it is somebody trying to get in. To be honest, 23 it's not -- you know, it's not supposed to be a sort of 24 analytical discursus on the statutory scheme. It's 25 an introductory point, it indicates --</p> <p style="text-align: center;">Page 100</p> |

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| <p>1 LORD JUSTICE BRIGGS: You will come to that, but I don't 2 know what submissions there were about the waterfall or 3 whether it was just a means of introduction or something 4 that wasn't thought to be very contentious. 5 MR SNOWDEN: I wouldn't know either because I regret to say 6 I didn't get there either, but some no doubt -- 7 LORD JUSTICE 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. 10 But the point I was going then to develop, and we 11 will look at that paragraph 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 he'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 a 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 dealing with the non-provable claims of creditors in</p> <p style="text-align: center;">Page 101</p> | <p>1 pursue it in the ordinary way. But even if he hadn't 2 managed to rescue it as a going concern but there was 3 nevertheless a surplus, then the company could as it 4 were start a new business, if you like, or put its 5 assets to new purposes, new corporate purposes. 6 So it does illustrate -- certainly not in 7 an administration -- you cannot say that dealing with 8 non-provable claims forms part of the statutory regime. 9 LORD JUSTICE BRIGGS: Because you can hand back the company 10 to the members at the end of the distribution stage of 11 the administration? 12 MR SNOWDEN: Yes, in fact it goes back to the directors. 13 LORD JUSTICE BRIGGS: Well, yes. 14 MR SNOWDEN: Yes. It goes back -- 15 LORD JUSTICE BRIGGS: To the directors but chosen by the 16 members. 17 MR SNOWDEN: Yes, that's right. 18 The second point I needed to pick up was a point on 19 statutory interest that my Lord Lord Justice Lewison 20 asked me and I give him an answer in relation to 21 liabilities. Of course what I forgot to go on to deal 22 with is the point that's made also in our skeleton that, 23 even if it's a liability, it doesn't fall within the 24 wording of clause -- sorry, it should be excluded 25 pursuant to clause 5.2(a). When one looks at 5.2(a)</p> <p style="text-align: center;">Page 103</p> |
| <p>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 5 discharged from office because actually the company in 6 those circumstances would have a surplus as regards 7 proved claims. In fact the administration regime, as we 8 all know, is designed to return a company in that state 9 to its owners and controllers. 10 It would be for them to sort out non-provable claims 11 because, as David Richards J said in T&N, they would 12 then be issued by way of ordinary writ claim form 13 against the company; a very good illustration of 14 precisely why it's not part of the administrator's 15 function to conduct the process that David Richards J 16 identified, albeit with respect to a liquidation, in 17 T&N. 18 LORD JUSTICE LEWISON: That would be particularly so, 19 I suppose, if he managed to preserve it as a going 20 concern? 21 MR SNOWDEN: Yes. That's absolutely right. Because 22 essentially he would have -- yes. Either there would be 23 a going concern company which definitely ought to be 24 handed back and allowed then to deal with any people who 25 claimed they had non-provable claims because they could</p> <p style="text-align: center;">Page 102</p> | <p>1 I have been making the submissions that it is a mimic, 2 if you like, of the statutory regime for proof of debts. 3 It is debts which are payable or capable of 4 determination or establishment in the insolvency. 5 Statutory interest is neither payable in the way in 6 which a debt currently due and payable is payable, it is 7 simply something which falls to be done once all the 8 debts have been established or determined in the 9 insolvency. It's just something that the administrator 10 then has to do with the surplus in his hands. So it 11 doesn't fall within clause 5.2(a) either -- even if it 12 was a liability it would fall to be disregarded under 13 5.2(a). 14 It's the point we make in our skeleton at 15 paragraphs 11 and 12. 16 LORD JUSTICE LEWISON: If it's not payable in the 17 insolvency, how is it payable? 18 MR SNOWDEN: That was the judge's error. He construed that 19 phrase as meaning payable in the insolvency and sort of 20 ignored the words in the middle. That's not actually 21 what the clause means. It's payable or capable of being 22 determined or established in the insolvency. 23 LORD JUSTICE LEWISON: All right. Why isn't the quantum of 24 statutory interest determined in the insolvency, 25 established in the insolvency?</p> <p style="text-align: center;">Page 104</p> |

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

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| <p>1 inherently unlikely that the draftsman, the statutory 2 draftsman, would have promulgated a test that would 3 require the people who are having to look at it and then 4 decide whether it is satisfied -- which would require 5 them to make guesstimates, not only of, for example, 6 whether there would be a surplus and how much statutory 7 interest might be payable, in which case they would have 8 to understand the interest payments under each of the 9 contractual provisions as against the statutory rate. 10 They would have to guess how long it would apply for 11 and, on the judge's test, they would also have to 12 venture a view as to what the non-provable liabilities 13 might be. 14 We say that's just wholly uncommercial as a test to 15 be applied or which the regulator might have thought 16 would be appropriate. Whereas a much better and 17 appropriate test is one which says no, it's your 18 provable debts. You know what your provable debts are. 19 They are the people who you can identify, they are 20 standing there, the company ought to know who they are. 21 They're not the unknown tort claimant, for example, but 22 they are people who have traded with the company, who 23 have counterparty relationships. You don't have to 24 speculate about how long the liquidation might last for. 25 The only thing you would have to, I think, apply some</p> <p style="text-align: center;">Page 109</p> | <p>1 LORD JUSTICE LEWISON: Yes. 2 MR SNOWDEN: The references to our skeleton -- well, sorry, 3 the point I've just made is in the skeleton. I'm sure 4 you'll see it when you have read through it again. 5 I was going to just briefly take you to Danka, which 6 simply is an authority which deals with, again, the 7 scope of a liquidator's obligation and particularly in 8 relation to contingent claims. Danka is in bundle 1C at 9 tab 91. (Pause). 10 Danka was the case of a members' voluntary 11 liquidation where there was a surplus, which on the face 12 of it was due to be paid to the members. A creditor 13 with a contingent claim had proved his contingent claim 14 and the liquidator had assessed it, valuing the 15 contingency, but the creditor said, "No, what you 16 actually have got to do is you've got to set aside a sum 17 of money which would be sufficient to cover the entirety 18 of the debt if it becomes due, if the contingency is 19 satisfied. You can't just give me a discounted amount 20 on the footing of assessing the chance of the 21 contingency coming due and you've got to set aside that 22 fund in full before you make a distribution to the 23 members". 24 So you'll see just from the headnote under the 25 holding:</p> <p style="text-align: center;">Page 111</p> |
| <p>1 form of -- take a view of is what the costs and expenses 2 of the liquidation or an insolvency process might be. 3 I can't get away from that. You've got to do that, 4 I think on -- because they come at the top of the 5 waterfall. 6 But that's a wholly different order of difficulty to 7 the one that is postulating taking into account, as 8 I say, statutory interest for an unknown period in 9 relation to an unknown number of contracts, still less 10 non-provable claims. Yet the judge's test would have 11 the person have to make all those estimates and that is 12 a point we make in the skeleton. 13 LORD JUSTICE LEWISON: If you're right about the 14 significance of payable by the borrower in the 15 definition of "liabilities", might that not exclude the 16 expenses of liquidation? 17 MR SNOWDEN: Well, I think the liquidator would -- I think 18 his expenses -- 19 LORD JUSTICE LEWISON: Are his expenses payable by the 20 borrower? 21 MR SNOWDEN: I think it is. It's an obligation which is 22 incurred by, for example, an administrator who is 23 an agent to the company to a third party in the course 24 of the administration and so it is payable by the 25 borrower. It is through the agency of an administrator.</p> <p style="text-align: center;">Page 110</p> | <p>1 "A liquidator in a members' voluntary liquidation 2 was under an obligation to complete the liquidation even 3 though the effect of the winding-up might be to defeat 4 the contingent claims of its creditors. Such 5 a liquidator who had already valued a contingent claim 6 and so admitted it to proof in the amount of the 7 valuation was not therefore obliged to provide for the 8 contingency in full by making a reserve against any 9 distribution to members, and that therefore the 10 liquidators were entitled to proceed to a distribution 11 to members under section 107 of the Insolvency Act on 12 the basis of the debts admitted to proof." 13 If I could just pick up the relevant passages, there 14 is a reliance to a decision of Hoffmann LJ, as he then 15 was, in Stanhope at page 520. Could I just ask your 16 Lordships very quickly to read the highlighted passages 17 between B and F, which is a quote from Hoffmann LJ in 18 Stanhope. (Pause). 19 It picks up a point that Lord Justice Lewison was 20 making to me this morning about the mechanism for 21 dealing with, for example, the proof of debt which we 22 say we're entitled to put in for our subordinated claim 23 and that it should be valued as zero, and then when the 24 contingency is satisfied it is revalued and allowed into 25 the process of distribution. That's the mechanism that</p> <p style="text-align: center;">Page 112</p> |

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| <p>1 my Lord had in mind, I think.</p> <p>2 Then the relevant parts for the current purposes are</p> <p>3 to be found in paragraphs 36 and 37, the highlighted</p> <p>4 passages, at page 521 to 522. Just picking up the</p> <p>5 critical points that in paragraph 37, where Patten LJ</p> <p>6 indicated at the end of paragraph 37 of the judgment,</p> <p>7 just between E and F on page 522:</p> <p>8 "The reference to the company's liabilities in</p> <p>9 section 107 must be to the liabilities as determined in</p> <p>10 accordance with the 1986 Rules. Otherwise they serve no</p> <p>11 useful purpose."</p> <p>12 Then:</p> <p>13 "The effect of the 1986 Rules is to allow the</p> <p>14 liquidator after the disposal of any appeal against</p> <p>15 valuation to distribute the assets of the company free</p> <p>16 from any further claims by creditors."</p> <p>17 LORD JUSTICE LEWISON: Taken literally that would knock out</p> <p>18 non-provable claims, wouldn't it?</p> <p>19 MR SNOWDEN: Well, as I've indicated, non-provable claims</p> <p>20 don't exist in the liquidation. So what in fact has to</p> <p>21 happen is that the non-provable claimant has to get his</p> <p>22 claim in against the company, asking for the proceedings</p> <p>23 to be allowed to continue, or indeed just to issue the</p> <p>24 proceedings which I think are not automatically stayed</p> <p>25 in a members' voluntary liquidation and then pursue them</p> <p style="text-align: center;">Page 113</p> | <p>1 though, in a sense the point which almost comes with the</p> <p>2 name, that a non-provable claim is by definition not</p> <p>3 part of the statutory process of proof.</p> <p>4 The judge in his judgment dealt with the point -- in</p> <p>5 a sense actually he dealt with the sort of point we've</p> <p>6 been debating now, not actually in the context of</p> <p>7 subordination at all. He did make a comment under the</p> <p>8 heading of "Section 74", which I think I must deal with</p> <p>9 as the final sort of point on this area, in</p> <p>10 paragraph 152 of the judgment.</p> <p>11 This is where we will end up with Lord Neuberger's</p> <p>12 paragraph in Nortel, because in the judgment at</p> <p>13 paragraph 152 the judge said:</p> <p>14 "The purpose of a liquidation is to realise, to best</p> <p>15 advantage, all the assets of the company and to</p> <p>16 distribute the proceeds of sale amongst those entitled</p> <p>17 to them in the order of priority in which they are</p> <p>18 entitled to receive them. As the liquidation of</p> <p>19 a company ends with its dissolution, nothing as a matter</p> <p>20 of principle should be left unresolved for the future.</p> <p>21 This is in contrast to individuals who are discharged</p> <p>22 from bankruptcy and who can therefore, for example,</p> <p>23 continue to be liable for such pre-bankruptcy</p> <p>24 liabilities as the law may prescribe. It is the purpose</p> <p>25 of a liquidation to pay all the liabilities of the</p> <p style="text-align: center;">Page 115</p> |
| <p>1 in the ordinary way. So they're not knocked out, in the</p> <p>2 sense they're just not in -- they're not in the</p> <p>3 insolvency process in the first place.</p> <p>4 LORD JUSTICE MOORE-BICK: But Patten LJ didn't have to</p> <p>5 address that point.</p> <p>6 MR SNOWDEN: No, no.</p> <p>7 LORD JUSTICE MOORE-BICK: So I'm not sure what we can get</p> <p>8 out of it.</p> <p>9 MR SNOWDEN: It's because, just picking up the final</p> <p>10 sentence of paragraph 38:</p> <p>11 "The liquidator is entitled to proceed to</p> <p>12 a distribution to members on the basis the debt is</p> <p>13 admitted to proof."</p> <p>14 There is no mention in this examination of the</p> <p>15 statutory scheme of the liquidator having a duty to deal</p> <p>16 with non-provable claims.</p> <p>17 LORD JUSTICE BRIGGS: But were there any non-provable claims</p> <p>18 in that case?</p> <p>19 MR SNOWDEN: No, I understand that, but by definition --</p> <p>20 LORD JUSTICE MOORE-BICK: You can proceed on the assumption</p> <p>21 that every time a judge deals with a point he writes</p> <p>22 a textbook on it and tries to have an exhaustive survey</p> <p>23 of the field. Judges tend to deal with the issues</p> <p>24 before them.</p> <p>25 MR SNOWDEN: Yes. It is simply trying to illustrate,</p> <p style="text-align: center;">Page 114</p> | <p>1 company, including those which are not capable of</p> <p>2 proof."</p> <p>3 That echoes a point that was made to me by my Lord</p> <p>4 Lord Justice Briggs this morning, which we, with</p> <p>5 respect, don't agree with if by that one is looking at</p> <p>6 the statutory insolvency process. The statutory</p> <p>7 insolvency process does not include as part of its</p> <p>8 purpose the payment of non-provable claims. That's the</p> <p>9 debate we had this morning.</p> <p>10 LORD JUSTICE BRIGGS: Yes.</p> <p>11 MR SNOWDEN: He doesn't deal, of course, with the actual</p> <p>12 case we're dealing with with administrations which is</p> <p>13 a point I made just after lunch. He then says:</p> <p>14 "The payment or compromise of non-provable tort</p> <p>15 claims in re T&N was as much a purpose of the</p> <p>16 administration to the T&N companies as the payment of</p> <p>17 their provable debts."</p> <p>18 He was, with respect, actually talking about -- in</p> <p>19 T&N the question was whether there could be a scheme of</p> <p>20 arrangement proposed by the administrators. He said,</p> <p>21 well, it was within the statutory scope of a scheme of</p> <p>22 arrangement to deal with those claims but he actually</p> <p>23 held that the claims fell outside the process of proof.</p> <p>24 LORD JUSTICE MOORE-BICK: So you would argue with that</p> <p>25 passage, would you?</p> <p style="text-align: center;">Page 116</p> |

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

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

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| <p>1 your Lordships can just remind yourselves of 2 paragraph 86. 3 (Pause). 4 We went over a lot of this ground this morning, so 5 your Lordships probably won't be surprised by my 6 response to this. With respect, this is the a non 7 sequitur and completely missed the point. As far as 8 contractual interest goes pre-insolvency, of course the 9 subordinated creditors gets priority because that's part 10 of their proved debt which we accept has priority. But 11 statutory interest performs a different function. 12 Statutory interest performs the function of compensating 13 all creditors equally for being kept out of their money 14 by an insolvency. As between creditors, indeed we would 15 say it would be surprising if, bearing in mind what 16 statutory interest is supposed to do and the way it is 17 structured, one creditor subordinated himself to payment 18 of statutory interest to another without at least some 19 express acknowledgement or recognition of that; and 20 there is none in the agreement. 21 But the judge's analysis seems simply to be to 22 equate contractual interest and statutory interest and 23 then treat the subordinated creditor very much as in the 24 position of a member. 25 So far as the second point goes, in paragraph 87,</p> <p style="text-align: center;">Page 125</p> | <p>1 My Lords, I was going then to move on to the 2 question of currency conversion claims unless your 3 Lordships have anything more for me at this stage. 4 I've already made the point that, given the 5 statutory scheme, non-provable debts are very rare, 6 undesirable, not really what the legislature likes to 7 see hanging around and, whenever it can do, seeks to 8 bring within the statutory scheme. 9 We say that currency conversion claims are even 10 rarer still, to the extent of actually being patently 11 illogical. We'll see that Parliament intended in 1986 12 to introduce for the first time a new and carefully 13 debated process for the conversion of foreign currency 14 claims in a liquidation or an administration. The idea 15 that Parliament should be taken to have intended to 16 thereby create the possibility of a derivative 17 non-provable claim by somebody who says, "Well, I want 18 compensation because the statutory scheme you've put in 19 place for conversion of my currency claim and proof of 20 debt has actually caused me loss as against the 21 underlying contract and its currency", we say is 22 something that one simply can't attribute to Parliament 23 or the legislative intent. It's completely contrary to 24 the whole ethos of the 1986 legislation and the 25 approach., what's more, this isn't a situation in which</p> <p style="text-align: center;">Page 127</p> |
| <p>1 the judge seems to have postulated a question based upon 2 what the Supreme Court might have held if it didn't 3 actually hold what it did hold. Perhaps I can put it 4 this way, to suggest the parties to the subordinated 5 loan agreement might have actually had in mind the 6 possibility of non-provable debts is pretty far-fetched, 7 but to suggest that they might have had in mind 8 an incorrect view of the law on non-provable debts, 9 contrary to the decision in Nortel, is, with respect, 10 constructing a hypothesis which is a very shaky 11 foundation for a piece of analysis. 12 The actual reasoning in Nortel would lead to the 13 view that there was no difference whenever the notice 14 that the judge is referring to in paragraph 87 was 15 served. So the difference that he identifies as the 16 basis for his reasoning simply falls away on the basis 17 of the actual decision in Nortel. 18 With respect, not only on the wording, properly 19 looked at, but also when one looks at the policy and 20 keeps separately in mind the status of creditor and 21 member and the importance of the relevance of statutory 22 interest and what it is actually doing, we say the judge 23 came to the wrong conclusion on the subordination. To 24 use my Lord Lord Justice Lewison's waterfall, we're at 25 5B, not 7B.</p> <p style="text-align: center;">Page 126</p> | <p>1 that might have happened by accident because it had 2 fallen through the cracks, if you like, or because, for 3 example, like the asbestos claimants nobody had quite 4 envisaged that there might be, when the Rules were put 5 in place, these very long tail illnesses. 6 It's not something that's not foreseen. The 7 legislative history in the court committee and the 8 Law Commission, as we'll see in a moment, actually 9 spotted the potential problem of somebody saying, "Well, 10 if you convert my claim at the start of the liquidation, 11 I might want compensation for the assets of the company 12 because of the currency fluctuations", and had said, "We 13 don't think that's desirable". 14 So the idea that Parliament would have actually 15 allowed a completely unregulated, vague and indistinct 16 situation to arise when currency conversion claims could 17 actually be made for compensation against the assets of 18 the company we just say just defies logic and the judge 19 was wrong to accept that there are the possibility of 20 such claims. 21 That's the sketch. Can I start just very quickly 22 by -- I don't know whether you still have Nortel open. 23 If you have Nortel open you can see at paragraphs 92 and 24 93 -- this is bundle 1C, tab 96. Lord Neuberger said at 25 92 to 93 -- well in fact I can probably pick it up at</p> <p style="text-align: center;">Page 128</p> |

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

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| <p>1 Then, 344, they say:</p> <p>2 "On the assumption that the present law remains</p> <p>3 unaltered three minor matters remain."</p> <p>4 The first of those relates to a voluntary winding up</p> <p>5 of an insolvent company. The second, in 345, relates to</p> <p>6 the conversion of foreign debts in a liquidation,</p> <p>7 whether voluntary or compulsory, of solvent companies.</p> <p>8 Then they go on to deal with that point, which of course</p> <p>9 is relevant to us, and they say at the end of 345:</p> <p>10 "In the case of winding up, we don't think it would</p> <p>11 be practicable to devise different conversion dates</p> <p>12 depending on the solvency of the company. The initial</p> <p>13 conversion date must in our view be that of the</p> <p>14 winding-up order in every case. We believe that similar</p> <p>15 rules should be applied in bankruptcy cases where it</p> <p>16 transpires the debtor is solvent."</p> <p>17 Then the critical paragraphs, 346 and 347:</p> <p>18 "It may turn out in a small minority of cases that</p> <p>19 conversion of foreign currency debts having been duly</p> <p>20 made at the date of the winding-up order, the company is</p> <p>21 found to be solvent. This raises a third question,</p> <p>22 namely whether in such cases foreign currency creditors</p> <p>23 should be compensated from the assets of the company or</p> <p>24 the bankrupt for the adverse exchange rate fluctuations</p> <p>25 between the date of the relevant order and the date of</p> <p style="text-align: center;">Page 133</p> | <p>1 transpires the debtor is solvent."</p> <p>2 So we say, first of all, that the Law Commission --</p> <p>3 whatever else can be said, the Law Commission has</p> <p>4 undoubtedly turned its mind to the very question. On</p> <p>5 that basis alone, the idea that Parliament would have</p> <p>6 left it unregulated when it was introducing three years</p> <p>7 later -- sorry, when it was five years later considering</p> <p>8 on the back of this report the very statutory enactment</p> <p>9 of currency conversion that enacted Oliver J's decision,</p> <p>10 and should have left unresolved and unregulated the sort</p> <p>11 of currency conversion compensation claim, we say is</p> <p>12 just fanciful.</p> <p>13 They also drew attention to some point I'll come</p> <p>14 back to in a moment that actually currency conversion</p> <p>15 claims that are said to exist actually do act in a very</p> <p>16 odd way as between creditors and also, in fact, as</p> <p>17 regards members as well. It's instructive to consider</p> <p>18 the position of creditors who are both advantaged by the</p> <p>19 currency conversion that occurs at the start and those</p> <p>20 that are disadvantaged. But the Law Commission was live</p> <p>21 to the potential for inequality between creditors.</p> <p>22 Now, the Cork Committee, if you turn on to the next</p> <p>23 tab, which was the foundation for the insolvency</p> <p>24 legislation in 1986, published their report in 1982.</p> <p>25 Just to --</p> <p style="text-align: center;">Page 135</p> |
| <p>1 actual payment. This would involve a second later</p> <p>2 conversion of these debts as at the date of actual</p> <p>3 payment or as close thereto as is practicable. We've</p> <p>4 explained in paragraph 341 to 343 why we don't favour</p> <p>5 this approach in regard to a foreign currency debt,</p> <p>6 irrespective of whether in terms of sterling it has</p> <p>7 increased or decreased in value after its original</p> <p>8 conversion.</p> <p>9 "To apply a later conversion date only in the case</p> <p>10 where the change in the relative value has been adverse</p> <p>11 to the creditor in question would in our view be even</p> <p>12 more unacceptable, since it would involve</p> <p>13 a discrimination between foreign currency debts,</p> <p>14 depending on whether the exchange rates have moved to</p> <p>15 the advantage or disadvantage of creditors, and there</p> <p>16 appears to be no justification in principle for such</p> <p>17 a step."</p> <p>18 So they say it should remain, the conversion date at</p> <p>19 the start of the liquidation. In 347:</p> <p>20 "To summarise, we support the view of Oliver J in</p> <p>21 Dynamics that the date of the winding-up order is the</p> <p>22 appropriate once for all date for the conversion of</p> <p>23 every foreign currency debt on the winding up of both</p> <p>24 solvent and insolvent companies and we believe a similar</p> <p>25 rule should apply to bankruptcy, whether or not it</p> <p style="text-align: center;">Page 134</p> | <p>1 LORD JUSTICE LEWISON: I think they reported in the previous</p> <p>2 year to the Secretary of State. There's some debate in</p> <p>3 the skeleton arguments about whether Lines Brothers had</p> <p>4 or haven't been decided in the Court of Appeal when the</p> <p>5 Cork Committee reported. I think if you look at the</p> <p>6 front of the Cork Committee report, their letter to the</p> <p>7 Secretary of State pre-dates the decision in the Court</p> <p>8 of Appeal. (Pause).</p> <p>9 MR SNOWDEN: Your Lordship's right. The letter is</p> <p>10 30 April 1981.</p> <p>11 LORD JUSTICE LEWISON: That was before Lines Brothers in the</p> <p>12 Court of Appeal.</p> <p>13 MR SNOWDEN: That's correct.</p> <p>14 LORD JUSTICE LEWISON: So I think when that particular</p> <p>15 paragraph everybody has homed in on talks about two</p> <p>16 cases, they are talking about Dynamics and</p> <p>17 Lines Brothers at first instance.</p> <p>18 MR SNOWDEN: That's right. But then the Law Commission's</p> <p>19 final report --</p> <p>20 LORD JUSTICE LEWISON: Post-dates Lines Brothers in the</p> <p>21 Court of Appeal.</p> <p>22 MR SNOWDEN: -- which came after that definitely looked at</p> <p>23 the Court of Appeal.</p> <p>24 LORD JUSTICE LEWISON: Yes, exactly.</p> <p>25 MR SNOWDEN: That's right.</p> <p style="text-align: center;">Page 136</p> |

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| <p>1 In the Cork Committee report at paragraph 1289 -- 2 first of all, paragraph 1289 is the passage you've 3 already seen cited in Lord Neuberger's judgment in 4 Nortel. 5 But then turning through, under the heading "Foreign 6 money liabilities" at page 298 of this extract, 7 paragraphs 1308 and 1309, you'll see that there's 8 reference in 1308 to Miliangos v George Frank (Textiles) 9 and the two subsequent cases, as my Lord has just 10 indicated, which I think must be Dynamics and 11 Lines Brothers at first instance. Then, at 1309: 12 "We are firmly of the view that the principle stated 13 in the two most recent cases provide an appropriate 14 solution to the problem of conversion of foreign money 15 claims into sterling in the context of insolvency 16 proceedings. We strongly recommend that any future 17 Insolvency Act should expressly provide that the 18 conversion of debts in foreign currencies should be 19 effected as at the date of commencement of the relevant 20 insolvency proceedings. 21 "Furthermore, we take the same view as the 22 Law Commission working paper that conversion as at that 23 date should continue to apply, even if the debtor is 24 subsequently found to be solvent. To apply a later 25 conversion date only in the case where the exchange rate</p> <p style="text-align: center;">Page 137</p> | <p>1 resulted in him being paid in his foreign currency under 2 his underlying contract, in other words he's benefited 3 from the statutory provision for conversion, there is no 4 basis upon which that creditor can be asked to repay the 5 benefit which he's had over and above his contractual 6 entitlement. 7 That's the basis on which the judge deals with it 8 and I don't think anybody has suggested to the contrary. 9 But the answer to that is because the creditor has 10 an entitlement under the statute to be paid in sterling 11 in that way. So if one proposed the question in terms 12 of restitution, for example, would he be unjustly 13 enriched as against other creditors or as against 14 members or -- 15 LORD JUSTICE BRIGGS: We're only really concerned with 16 members aren't, we? 17 MR SNOWDEN: Then the answer would be he would be enriched 18 because that extra has undoubtedly prejudiced the 19 members, there's less left in the pot. Indeed to some 20 extent -- it might actually be creditor as well if it's 21 a partial distribution. So there is a potential 22 prejudice but the point is he can't be asked to repay. 23 And why? Because it's not unjust because it's what he's 24 statutory entitled to. 25 Now if the statute has that substantive effect, it</p> <p style="text-align: center;">Page 139</p> |
| <p>1 has moved to the advantage of the creditor, but 2 necessarily not where it had moved against him, would in 3 our view be discriminatory and unacceptable." 4 That's a direct reference back, in fact those words 5 are a direct reference back, to the Law Commission 6 paragraphs that I showed you. 7 We say that this discrimination point you can flesh 8 out a little bit in the way that we do in our skeleton 9 at -- I have just lost my note. (Pause). 10 In fact, the judge I think also dealt with this in 11 paragraphs 96 and 97 of the judgment. 12 He was here dealing with some submissions that were 13 made by Mr Wolfson, and I am going to try do this very 14 quickly and not as it were trample on Mr Wolfson's toes 15 but I am sure he can do this better than me. Can I just 16 make the point in my own submissions that if you follow 17 the judge's reasoning, if you take a creditor who has 18 a foreign currency claim which is converted to sterling 19 at the start of the liquidation or administration and 20 which appreciates -- sorry, if sterling appreciates 21 against the foreign currency. So as a result of the 22 conversion the creditor is better off because he's been 23 converted into sterling and he's paid in sterling, so 24 that at the end of the day he receives more in sterling 25 than the then prevailing exchange rate would have</p> <p style="text-align: center;">Page 138</p> | <p>1 gives him rights which allow him to hold on to the 2 sterling which he's been paid and to make a profit, in 3 inverted commas, as compared to his original contract, 4 why is it that apparently the judge says, "No, but when 5 you look at currency conversion operating in respect of 6 somebody whose currency has subsequently appreciated 7 against sterling", that that's just a procedural thing 8 for the purpose of proof of the debts and the creditor 9 can claim for compensation from the assets of the 10 company -- precisely the thing that the Law Commission 11 considered and said was not a good idea. Why is it that 12 creditor can levy an extra compensation claim against 13 the assets? 14 In effect the judge is saying one is of substantive 15 effect, the creditor can benefit in sterling, and the 16 other only procedural. 17 So far as the judge's answer was concerned it, is 18 the one that my Lord Lord Justice Briggs was I think 19 putting to me, he gave the answer in paragraph 98 of the 20 judgment. He said, dealing with the submission that was 21 made that in liquidation there are a number of 22 circumstances, winners and losers: 23 "The purpose of liquidation is to achieve a broad 24 justice but in achieving that some creditors may find 25 themselves in a worse position, but equally some</p> <p style="text-align: center;">Page 140</p> |

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

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

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| <p>1 LORD JUSTICE LEWISON: No, I follow.</p> <p>2 MR SNOWDEN: And it had to be dealt with in the way -- the</p> <p>3 judge made law of Lord Oliver, Oliver J as he then was.</p> <p>4 But the Cork Committee said, very firmly, "We think</p> <p>5 there should be legislation on this point". For them</p> <p>6 then to have left open this possibility that lurking --</p> <p>7 that they bifurcated the debt as it were and left</p> <p>8 lurking, unresolved, unregulated, extraneous</p> <p>9 non-provable liability is what we say is baffling as</p> <p>10 a concept of legislation in this particular field</p> <p>11 whereas we've seen what they were trying to do was</p> <p>12 legislate comprehensively.</p> <p>13 LORD JUSTICE MOORE-BICK: Is that a convenient moment for</p> <p>14 the five-minute break?</p> <p>15 MR SNOWDEN: Yes, it is.</p> <p>16 LORD JUSTICE MOORE-BICK: Yes, we well rise for five</p> <p>17 minutes.</p> <p>18 (3.18 pm)</p> <p>19 (A short break)</p> <p>20 (3.23 pm)</p> <p>21 LORD JUSTICE MOORE-BICK: Yes, Mr Snowden.</p> <p>22 MR SNOWDEN: Three little points. Apparently Briggs J's, as</p> <p>23 he then was, decision in Nortel is in the bundle I am</p> <p>24 told at 1C, 88, which it is indeed.</p> <p>25 LORD JUSTICE MOORE-BICK: You want us to look at it then?</p> <p style="text-align: center;">Page 149</p> | <p>1 Brightman LJ postulated the scenario that we're now in</p> <p>2 fact looking at, which is a solvent company where there</p> <p>3 has been a movement in exchange rates.</p> <p>4 At 21, between C and D, he says this:</p> <p>5 "This is not a problem with which we are directly</p> <p>6 concerned and I wish to guard against expressing any</p> <p>7 concluded view upon it. But when the problem arises for</p> <p>8 decision, it may be relevant to observe that the view</p> <p>9 has been repeatedly expressed in relation to interest</p> <p>10 that once the provable debts have been satisfied in full</p> <p>11 so that the company has in that sense a surplus of</p> <p>12 assets, the duty of the liquidator is to discharge the</p> <p>13 contractual indebtedness of the company in respect of</p> <p>14 such debts to the extent that the contractual</p> <p>15 indebtedness exceeds the provable indebtedness."</p> <p>16 Then he quotes:</p> <p>17 "As soon as it is ascertained that there is</p> <p>18 a surplus, the creditor whose debt carries interest is</p> <p>19 remitted to his rights under the contract: see</p> <p>20 Giffard LJ in Humber Ironworks and Selwyn LJ to the same</p> <p>21 effect."</p> <p>22 This is obviously a central passage that is relied</p> <p>23 upon or these are the central authorities relied upon.</p> <p>24 Just noting that the idea that there might be a currency</p> <p>25 conversion claim, i.e. based upon this notion of the</p> <p style="text-align: center;">Page 151</p> |
| <p>1 MR SNOWDEN: No, I mentioned it this morning and said it</p> <p>2 wasn't in the bundle. I am told it was.</p> <p>3 Just a point, currency conversion claims of course</p> <p>4 wouldn't just impact upon members or have an impact upon</p> <p>5 members. They would also have an impact upon other</p> <p>6 non-provable claims. One of the big issues that no</p> <p>7 doubt will have to be resolved is how all the</p> <p>8 non-provable claims, if they are held to exist in this</p> <p>9 current case, fight it out as between themselves.</p> <p>10 LORD JUSTICE BRIGGS: It will have an impact on non-provable</p> <p>11 claims if there is a shortfall as against all</p> <p>12 non-provable claimants.</p> <p>13 MR SNOWDEN: Yes.</p> <p>14 LORD JUSTICE BRIGGS: Yes.</p> <p>15 MR SNOWDEN: Then the situation of whether there was</p> <p>16 a surplus -- when there is a surplus didn't arise for</p> <p>17 decision, of course, in Lines Brothers. But it was</p> <p>18 alluded to by Brightman LJ in Lines Brothers and that's</p> <p>19 where I was going to go next.</p> <p>20 So if we can go, please, to Lines Brothers first and</p> <p>21 then -- in fact it will just be a paragraph and then off</p> <p>22 to Humber Ironworks. But in authorities bundle 1B at</p> <p>23 tab 57. (Pause).</p> <p>24 You'll see that Lines Brothers itself was</p> <p>25 an insolvent company, but starting at page 20 at H,</p> <p style="text-align: center;">Page 150</p> | <p>1 contract continuing to exist notwithstanding conversion</p> <p>2 for the purposes of proof, first of all was uttered by</p> <p>3 Brightman LJ before there was express statutory</p> <p>4 legislation dealing with currency conversion. So he was</p> <p>5 dealing with it at a time when Parliament had not spoken</p> <p>6 and put in place a statutory regime to deal with</p> <p>7 currency conversion.</p> <p>8 He is drawing a parallel to Humber Ironworks and the</p> <p>9 cases in relation to interest. As we will also see,</p> <p>10 Humber Ironworks was a case which was decided at a time</p> <p>11 when there was no provision in the statute for the</p> <p>12 payment of post-liquidation interest. Again, interest</p> <p>13 was specifically, as we have seen, catered for by the</p> <p>14 insolvency legislation in 1986.</p> <p>15 So right at the outset of this I continue to make</p> <p>16 very, very clear that this line of cases originates from</p> <p>17 a time when there was no express statutory scheme in</p> <p>18 place dealing with either currency conversion or</p> <p>19 interest at the time. Certainly it is my submission</p> <p>20 that, since Parliament has adopted an express statutory</p> <p>21 scheme, this line of case law is no longer good or</p> <p>22 applicable. It's been ousted by the statutory scheme.</p> <p>23 Humber Ironworks is at authorities bundle 1A,</p> <p>24 divider 12.</p> <p>25 LORD JUSTICE BRIGGS: Have you finished with Lines Brothers</p> <p style="text-align: center;">Page 152</p> |

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| <p>1 or are we coming back?</p> <p>2 MR SNOWDEN: I'm sorry.</p> <p>3 LORD JUSTICE BRIGGS: Are we coming back to Lines Brothers</p> <p>4 or are we finished with it?</p> <p>5 MR SNOWDEN: We will, I think, be coming back to it in</p> <p>6 passing.</p> <p>7 LORD JUSTICE BRIGGS: I just wondered whether to put it</p> <p>8 away, that's all.</p> <p>9 MR SNOWDEN: I should have been much better with my</p> <p>10 documentation management in order to help you keep your</p> <p>11 desks clear. Certainly for the time being I am going to</p> <p>12 stick with Humber Ironworks, so you can put bundle 1B</p> <p>13 away.</p> <p>14 It's an 1869 case --</p> <p>15 LORD JUSTICE LEWISON: Sorry, which tab was it, Mr Snowden?</p> <p>16 MR SNOWDEN: Sorry, tab 12.</p> <p>17 LORD JUSTICE LEWISON: Tab 12. Thank you.</p> <p>18 MR SNOWDEN: It comes from a period of time when there is no</p> <p>19 statutory provision for the payment of post-insolvency</p> <p>20 interest. There was no relevant statutory provision</p> <p>21 here, you can see that from two things. One is at</p> <p>22 page 644, there's a reference, just before Selwyn LJ</p> <p>23 starts his judgment, to a submission made by</p> <p>24 Mr Southgate in reply that:</p> <p>25 "Section 170 of the Act relates to a mode of</p> <p style="text-align: center;">Page 153</p> | <p>1 consider the case under two aspects: first where there</p> <p>2 is and next where there is not a surplus. I apprehend</p> <p>3 that in whatever manner the payments may have been made,</p> <p>4 whether originally they may have been made in respect of</p> <p>5 capital or in respect of interest, still in as much as</p> <p>6 they have all been paid in process of law and without</p> <p>7 any contract or agreement between the parties, the</p> <p>8 account must in the event of there being an ultimate</p> <p>9 surplus be taken as between the company and the</p> <p>10 creditors in the ordinary way, that is in the manner</p> <p>11 pointed out in Bower v Marris, by treating the dividends</p> <p>12 as ordinary payments on account and applying each</p> <p>13 dividend in the first place to the payment of interest</p> <p>14 and in the surplus if any to the reduction of the</p> <p>15 principal."</p> <p>16 He's basically saying that if there's nothing in the</p> <p>17 statutory scheme you just apply the normal contractual</p> <p>18 provision for allocation of payments that have been made</p> <p>19 against the contractual debt. That is in essence also</p> <p>20 what Gifford LJ said in his judgment at 647, at the</p> <p>21 bottom of the page:</p> <p>22 "For these reasons, I am of the opinion that</p> <p>23 dividends ought to be paid on the debts as they stand at</p> <p>24 the date of winding up or, when the estate is insolvent,</p> <p>25 this rule distribute the assets in the fairest way."</p> <p style="text-align: center;">Page 155</p> |
| <p>1 procedure. That is clear from Re East of England</p> <p>2 Banking Company where the 26th rule of the General Order</p> <p>3 of the 11th of November 1862 as to interest on simple</p> <p>4 contract debts was held to be ultra vires."</p> <p>5 You also see it from Selwyn LJ's judgment at</p> <p>6 page 645, the first highlighted passage just by the</p> <p>7 first hole punch. He says that:</p> <p>8 "The question as to what essentially to do with</p> <p>9 post-insolvency interest comes before us so we may</p> <p>10 decide so far as the authority of this court can decide</p> <p>11 what should be the rule applicable to such cases for the</p> <p>12 future. It is satisfactory that in forming the decision</p> <p>13 we are not fettered by any rule that obliges us to</p> <p>14 depart from what appears to us to be the justice of the</p> <p>15 case."</p> <p>16 Giffard LJ, said at the very start of his judgment</p> <p>17 at page 647:</p> <p>18 "It's quite clear that the 170th section of the</p> <p>19 Companies Act has no reference to the matter before us."</p> <p>20 There was therefore no statutory regime that they</p> <p>21 were interpreting.</p> <p>22 What Selwyn LJ observed is at the foot of page 645.</p> <p>23 He says, just at the hole punch, the highlighted</p> <p>24 passage:</p> <p>25 "In the first place it occurs to me that we must</p> <p style="text-align: center;">Page 154</p> | <p>1 That's dealing with the question of pre-insolvency</p> <p>2 interest. Then he continued:</p> <p>3 "And where the estate is solvent it works with equal</p> <p>4 fairness because as soon as it ascertained that there is</p> <p>5 a surplus the creditor whose debt carries interest is</p> <p>6 remitted to his rights under his contract, and on the</p> <p>7 other hand a creditor who has not stipulated for</p> <p>8 interest doesn't get it."</p> <p>9 So they did see it as essentially -- in the absence</p> <p>10 of anything in statutory provisions to cater for</p> <p>11 interest, where the company is solvent they simply say,</p> <p>12 "Well, you apply the ordinary rules".</p> <p>13 That was the position, of course, when Brightman LJ</p> <p>14 made his comments in Lines Brothers and there was no</p> <p>15 provision for statutory interest. But there was</p> <p>16 a provision for payment of statutory interest in</p> <p>17 bankruptcy and that did not follow a reversion to</p> <p>18 contract process. So what the Cork Committee or the</p> <p>19 legislature in 1986 was faced with was, "We ought to do</p> <p>20 something about post-insolvency interest. What do we</p> <p>21 do?" The answer was, "We don't adopt the reversion to</p> <p>22 contract regime". They adopted very specifically --</p> <p>23 they brought bankruptcy and the corporate regime into</p> <p>24 line and they adopted a regime which does not amount to</p> <p>25 reversion to contract. It's a different statutory</p> <p style="text-align: center;">Page 156</p> |

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| <p>1 regime.</p> <p>2 I'll show you first of all why that is as a matter</p> <p>3 of law and then I will illustrate why in fact reversion</p> <p>4 of contract no longer works in corporate insolvency.</p> <p>5 The first thing I can probably do is to ask you, if</p> <p>6 you could, to turn up -- you can put Humber Ironworks</p> <p>7 away and go back, please, to the Cork Committee and</p> <p>8 that's in bundle 4, tab 9.</p> <p>9 I don't know whether your Lordships have had</p> <p>10 inserted into your bundles -- apparently not. Can</p> <p>11 I simply hand you up some pages from the Cork Committee</p> <p>12 report which -- because rather bizarrely in your bundle</p> <p>13 at the moment you have page 314 and 316.</p> <p>14 LORD JUSTICE BRIGGS: Yes.</p> <p>15 MR SNOWDEN: Can I hand you up pages 313 and 315 so you have</p> <p>16 a set.</p> <p>17 LORD JUSTICE BRIGGS: They will not be a consecutive set.</p> <p>18 MR SNOWDEN: I'm afraid not entirely, but we can -- if you</p> <p>19 want them properly copied. (Handed).</p> <p>20 I hope we handed up 13 and 15.</p> <p>21 LORD JUSTICE MOORE-BICK: I think we all have 13 and 15 and</p> <p>22 those are spares.</p> <p>23 MR SNOWDEN: Just picking it up at the foot of page 313, if</p> <p>24 I may, because that's the lead-in, under the heading</p> <p>25 "Statutory interest out of surplus assets":</p> <p style="text-align: center;">Page 157</p> | <p>1 where you can't find it if you wanted it.</p> <p>2 LORD JUSTICE MOORE-BICK: Yes, thank you.</p> <p>3 MR SNOWDEN: What the Cork Committee then recommended was</p> <p>4 that the two regimes be brought into line and, indeed,</p> <p>5 they were in the Insolvency Act 1986. So far as</p> <p>6 corporate insolvency is concerned -- the same regime</p> <p>7 operates in both, but so far as corporate insolvency is</p> <p>8 concerned, the regime that they had chose to adopt is</p> <p>9 the one that we've seen in section 189 and in Insolvency</p> <p>10 Rule 288 -- which has subsequently been picked up in</p> <p>11 Insolvency Rule 288, 7 to 9. When you look at</p> <p>12 section 189 in relation to liquidations, it's of course</p> <p>13 quite clear that it's not based on a reversion to</p> <p>14 contract, because, irrespective of whether you had</p> <p>15 contracted for interest, if there is surplus you are</p> <p>16 paid statutory interest at a prescribed rate or</p> <p>17 contractual rate, whichever is the greater.</p> <p>18 I think your Lordships have undoubtedly got</p> <p>19 section 189 well in mind. But the point I am making is</p> <p>20 that there is no longer in relation to -- post-1986</p> <p>21 there is no longer any possibility of asserting</p> <p>22 a reversion to contract line of argument in relation to</p> <p>23 statutory interest. That was the entire foundation of</p> <p>24 course of what Brightman LJ had said when he made his</p> <p>25 observations in Lines Brothers in pre-1986 about how,</p> <p style="text-align: center;">Page 159</p> |
| <p>1 "Section 33(8) of the Act of 1914 [that's the</p> <p>2 bankruptcy Act 1914] provides that if after all the</p> <p>3 proving creditors have been paid in full the bankrupt's</p> <p>4 estate still has a surplus, it is to applied first in</p> <p>5 paying interest and after the date of the receiving</p> <p>6 order at the rate of 4 per cent per annum on all debts</p> <p>7 proved in the bankruptcy, any balance then belongs to</p> <p>8 the bankrupt."</p> <p>9 Just pausing there, thinking back to Humber</p> <p>10 Ironworks, of course that's different from Humber</p> <p>11 Ironworks right at the start. Humber Ironworks, the</p> <p>12 point is if you didn't contract for interest you didn't</p> <p>13 get it after the commencement of insolvency, even if</p> <p>14 there's a surplus. In bankruptcy, whether you</p> <p>15 contracted for it or not, you got a 4 per cent rate on</p> <p>16 all debts proved in the bankruptcy; and then any balance</p> <p>17 then belongs to the bankrupt. They said:</p> <p>18 "There is no similar provision in the winding-up</p> <p>19 code."</p> <p>20 And they then made the point that -- sorry, it is</p> <p>21 easier to ask you to read to yourselves very quickly.</p> <p>22 If you could read 1384 and down to 1386. (Pause).</p> <p>23 Just for your note, the section 33(8) of the</p> <p>24 Bankruptcy Act is actually in authorities bundle 3,</p> <p>25 tab 14. I am not going to take you to it but that's</p> <p style="text-align: center;">Page 158</p> | <p>1 perhaps, one might fill a void. But there is no void.</p> <p>2 Parliament has spoken.</p> <p>3 LORD JUSTICE BRIGGS: It's a slight fudge, isn't it, in 189,</p> <p>4 compared to the Bankruptcy Act at any rate, because of</p> <p>5 the differential provision for the rate in 189(4)(b)?</p> <p>6 It's not the source of the obligation, you don't revert</p> <p>7 to contract in the sense that's your entitlement but it</p> <p>8 helps -- is it the higher of the two rates? Whichever</p> <p>9 is the greater, yes.</p> <p>10 MR SNOWDEN: Yes. But you see the point is, as we</p> <p>11 illustrate in our skeleton argument, that could</p> <p>12 actually, as between creditors who are proving and</p> <p>13 competing for payment of statutory interest --</p> <p>14 LORD JUSTICE BRIGGS: Oh yes.</p> <p>15 MR SNOWDEN: That could mean that the creditor who has his</p> <p>16 contractual right for interest will have to share the</p> <p>17 surplus with those who don't.</p> <p>18 LORD JUSTICE BRIGGS: Yes.</p> <p>19 MR SNOWDEN: So we make the point in our skeleton</p> <p>20 argument -- there's a worked examples sample in our</p> <p>21 skeleton which -- I hesitate to take you to at the</p> <p>22 moment but it is there with numbers. But the basic</p> <p>23 point can be explained very simply. If you have two</p> <p>24 creditors, one of whom contracted for interest and one</p> <p>25 who did not, and there is a surplus in the liquidation</p> <p style="text-align: center;">Page 160</p> |

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| <p>1 which is just enough to pay the one his contractual rate 2 of interest but no more, under the reversion to contract 3 approach he would get it and the chap who had not 4 contracted for interest would get no statutory interest 5 at all.</p> <p>6 Whereas under the current statutory scheme, because 7 both creditors have a right to statutory interest, they 8 will share and therefore there is no reversion to 9 contract which the one creditor can insert against the 10 other.</p> <p>11 So the reversion to contract approach simply is that 12 in that sense inconsistent with and it can't have 13 survived the enactment of the statutory scheme for 14 interest.</p> <p>15 Now, we say you must apply precisely the same logic 16 when you look at currency conversion claims because 17 Parliament has legislated for currency conversion, in 18 the same way in 1986 it did for statutory interest, and 19 the parallel which was drawn in Humber Ironworks or 20 Lines Brothers just can't be drawn any more. Indeed, as 21 I demonstrated from looking at Humber Ironworks, it only 22 ever was, as the judges put it, "Well, what do we, the 23 judge's, do if there was no legislation in order to 24 achieve the justice of the case?"</p> <p>25 So that the idea that there is still floating around</p> <p style="text-align: center;">Page 161</p> | <p>1 creditor is entitled to be paid the balance of his full 2 contractual debt before shareholders receive anything." 3 So they simply allude to that there. 4 But then turning to the relevant bit, it's at 5 pages 37 and 38 under the heading "Claims to a share in 6 a fund". First of all, they refer to what had 7 previously been said at paragraph 334: 8 "In our working paper we expressed agreement with 9 the approach that there should be conversion at the date 10 of liquidation. And in their final report, which was 11 published some months after our working paper, the 12 Insolvency Law and Practice Review Committee also 13 supported the principles that have been laid down by the 14 courts, strongly recommending that any future 15 Insolvency Act should expressly provide that the 16 conversion of debts in foreign currency should be 17 effected as at the date of the commencement of the 18 relevant insolvency proceedings."</p> <p>19 The footnote is: 20 "The committee specifically endorsed our view that 21 conversion as at that day should continue to apply, even 22 if the debtor was subsequently found to be solvent." 23 Then, at 336: 24 "On consultation, opinion was divided." 25 There were two different approaches:</p> <p style="text-align: center;">Page 163</p> |
| <p>1 this bifurcated penumbra or regime which is operating 2 independently and underneath the statutory regime 3 actually, we simply say, can't survive 1986 and the 4 judge was wrong to essentially take up the suggestion of 5 Brightman LJ in Lines Brothers, (a) because it was made 6 at a different time but (b) because since then there had 7 been the legislative intervention.</p> <p>8 Just to complete the legislative intervention, 9 because I didn't show you it, while we're in bundle 4 we 10 should just look at the Law Commissions final report -- 11 sorry, it's actually in 5 I am told.</p> <p>12 Sorry, you can put bundle 4 away.</p> <p>13 LORD JUSTICE LEWISON: We have more of it, have we, in 14 bundle 5?</p> <p>15 MR SNOWDEN: Yes. There is more of it, I'm afraid. The 16 more that we need is in bundle 5, sorry.</p> <p>17 LORD JUSTICE LEWISON: That's all right.</p> <p>18 MR SNOWDEN: In fact, I think we'll find bundle 5 hopefully 19 has the whole lot. (Pause).</p> <p>20 It's in tab 17, bundle 5, but just to complete the 21 picture.</p> <p>22 This actually is the whole lot. The bit that was 23 previously in bundle 4 is paragraph 223, where they drew 24 attention to the obiter suggestion in Lines Brothers: 25 "It might be well be that a foreign currency</p> <p style="text-align: center;">Page 162</p> | <p>1 "But we remain of the view which we expressed in the 2 working paper ..."</p> <p>3 Sorry, I should ask you to read 335 before 336. I'm 4 sorry.</p> <p>5 LORD JUSTICE LEWISON: So 335 is looking at multiple 6 conversion dates every time you declare and pay 7 a dividend.</p> <p>8 MR SNOWDEN: Yes. They remained of the view expressed in 9 the working paper and expressed the conclusion: 10 "The present law in relation to the conversion of 11 sterling and foreign currency claims in relation to 12 solvent and insolvent companies and to bankruptcy is 13 satisfactory."</p> <p>14 There's no indication, and this is probably why the 15 judge said he thought it was left open -- it's true 16 enough there is no express rejection of the 17 Lines Brothers' suggestion, but by the same token there 18 is also no proposal in the context of the legislation 19 that was about to be enacted that there should be any 20 currency conversion claim or any adjustment. The 21 overwhelming sense of this is the rejection of the idea 22 that somebody should be able to ask the court or indeed 23 anybody to look at the exchange rates on multiple 24 occasions, as is necessary in order to run a currency 25 conversion claim.</p> <p style="text-align: center;">Page 164</p> |

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

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| <p>1 parties against each other." 2 But then, dropping down the page to between D and E: 3 "Bankruptcy set-off on the other hand affects the 4 substantive rights of the parties by enabling the 5 bankrupt's creditor to use his indebtedness to the 6 bankrupt as a form of security. Instead of having to 7 prove with other creditors for the whole of his debt in 8 the bankruptcy he can set off pound for pound what he 9 owes to the bankrupt and prove for or pay only the 10 balance." 11 That was then followed through into the actual 12 decision in the case. The case raised the question 13 about whether either of the two cross-debts that would 14 be the subject of insolvency set-off continued to 15 survive and therefore could be assigned, for example, or 16 the like. He dealt with that at page 255, under the 17 heading "8. Do the causes of action survive?" You'll 18 see his analysis at the end of the first paragraph: 19 "If set-off is mandatory and self-executing and 20 results as of the bankruptcy date in only a net balance 21 being owing, I find it impossible to understand how the 22 cross-claims can as choses in action each continue to 23 exist." 24 Then there is a reference to a decision of Neil J in 25 Farley Housing v Commercial Developments which he Page 169</p> | <p>1 being ascertained by fixed rules or as a matter of 2 opinion." 3 Then the subsequent sub-paragraphs of the rule deal 4 with those various debts. Rule 281 shall apply for the 5 purposes of this rule to any obligation to or from the 6 company which by reason of its being subject to any 7 contingency or for any other reason does not bear 8 a certain value. Rules 286 to 288 shall apply for the 9 purposes of this rule in relation to any sums due to the 10 company which are payable in a currency other than 11 sterling." 12 So that brings in the currency conversion claims 13 into the substantive rule. Then: 14 "Rule 2105 shall apply for the purposes of the rule 15 to future debts due either to or from the company." 16 And then sub 8: 17 "Only the balance, if any, of the account owed to 18 the creditor is provable in the administration. 19 Alternatively, the balance, if any, owed to the company 20 shall be paid to the administrator as part of the 21 assets, except where all or any part of the balance 22 results in a contingent or prospective debt." 23 We'll come back to that in the context of another 24 authority in a moment. 25 But the point for present purposes is that the Page 171</p> |
| <p>1 endorses. At the foot of the page, at G, he makes it 2 clear at the end of the section again: 3 "The only chose in action which continued to exist 4 as an assignable item of property was the claim to a net 5 balance." 6 We'll see in a minute that the bankruptcy set-off 7 provisions are drafted on this footing, that set-off in 8 insolvency effects a substantive change in the rights of 9 the parties. You can see that because if you then go to 10 the Insolvency Rules -- the relevant rules for our 11 purposes here are Insolvency Rule 285, which is at 12 page 729. 13 You'll see that 729 sets out the requirements for 14 set-off of mutual credits and mutual dealings. The 15 important parts of this rule -- which I'll come back to 16 for another reason in a moment. At the top of the page, 17 730: 18 "An account is taken as at the date of the notice, 19 [that's the date of intention to make a distribution] of 20 what is due from each party from other in respect of the 21 mutual dealings and the sums due from one party shall be 22 set off against the sums due from the other." 23 Then sums due are regarded as including: 24 "Present and future debts, contingent debts or 25 unliquidated debts to the extent they are capable of Page 170</p> | <p>1 substantive effect of insolvency set-off that 2 Lord Hoffmann referred to in Stein v Blake is now 3 encapsulated in the latest iteration of insolvency 4 set-off relevant to this case, the Rule 288, and it is 5 only the balance of the account that is taken that is 6 either on the one hand provable or on the other hand 7 owing by the creditor, in inverted commas -- the 8 creditor who has turned out to be a debtor -- to the 9 company. 10 So for that reason alone Lord Hoffmann's words in 11 Wight v Eckhardt can't be taken to signify that there is 12 no part of the insolvency regime that has substantive 13 effect. It's quite clear that, for example, where there 14 is insolvency set-off the underlying contractual debts 15 are extinguished. They do not exist. 16 LORD JUSTICE LEWISON: Disclaimer would be another obvious 17 example. Disclaimer would be another example. 18 MR SNOWDEN: We say disclaimer in our skeleton, absolutely 19 right. It's a power given in the insolvency legislation 20 to bring an end to the proprietary rights of the 21 landlord and to terminate the lease or in fact return to 22 the property to the landlord, but it terminates the 23 property interests on a basis that there will be 24 a proved debt for the balance. That undoubtedly brings 25 about a substantive change. The landlord can't say, Page 172</p> |

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

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| <p>1 other way" --</p> <p>2 MR SNOWDEN: That's the point. I understand the point that</p> <p>3 your Lordship is making and I chose my --</p> <p>4 LORD JUSTICE BRIGGS: But the value of the benefit may be</p> <p>5 different in different cases.</p> <p>6 MR SNOWDEN: I chose the example because -- your Lordship is</p> <p>7 absolutely right, you saw the point, that apparently as</p> <p>8 soon as -- well, we know as soon as there is insolvency</p> <p>9 set-off, no matter how much --</p> <p>10 LORD JUSTICE BRIGGS: It is mandatory and self-executing.</p> <p>11 MR SNOWDEN: Absolutely. Therefore you don't have a choice</p> <p>12 about it. Therefore, the person with a \$1 liability to</p> <p>13 the company is immediately placed into a different</p> <p>14 situation than the creditor who has no debt to the</p> <p>15 company.</p> <p>16 The simple point here is Parliament could not have</p> <p>17 intended to create, by currency conversion, such</p> <p>18 a bizarre regime. I mean, the currency conversion is</p> <p>19 necessary in order to have pari passu distribution and,</p> <p>20 indeed, as part of that to have insolvency set-off. It</p> <p>21 is well understood, and has been since <i>Stein v Blake</i>,</p> <p>22 that set-off is mandatory, self-executing, automatic,</p> <p>23 and extinguishes underlying contractual rights.</p> <p>24 If it were thought that there was any difference</p> <p>25 about it when that Insolvency Rule 288 was introduced --</p> <p style="text-align: center;">Page 177</p> | <p>1 sorry, it didn't involve currency conversion. Sorry, it</p> <p>2 involved future debts and set-off.</p> <p>3 What insolvency set-off now requires is that all</p> <p>4 debts are brought into the account, present and future.</p> <p>5 In order to understand I need to show you, first of all,</p> <p>6 the rules that are the background to the case. The</p> <p>7 first rule that you will need to look at is Insolvency</p> <p>8 Rule 289.</p> <p>9 LORD JUSTICE BRIGGS: Yes. "Future of debts."</p> <p>10 MR SNOWDEN: "Debt payable at a future time", which is</p> <p>11 page 731. It says:</p> <p>12 "A creditor may prove for a debt of which payment</p> <p>13 was not yet due on the date when the company entered</p> <p>14 administration, subject to Rule 2105, adjustment of</p> <p>15 dividend where payment made before time."</p> <p>16 So the first point to note is that if you have</p> <p>17 a future debt I owed to you by the company, you can</p> <p>18 prove for it at the full amount. What, however, happens</p> <p>19 is that when a dividend is to be declared, you move</p> <p>20 forward in the rules to Rule 2105 to see how that proved</p> <p>21 debt is dealt with when dividends are paid. Rule 2105</p> <p>22 at page 735 says:</p> <p>23 "Where a creditor has proved for a debt of which</p> <p>24 payment is not due at the date of the declaration of the</p> <p>25 dividend, he is entitled to dividend equally with other</p> <p style="text-align: center;">Page 179</p> |
| <p>1 sorry, the currency conversion requirements were</p> <p>2 introduced into the Insolvency Rules for administration,</p> <p>3 it was well understood that insolvency set-off was</p> <p>4 mandatory and self-executing. They came in later.</p> <p>5 If somebody had thought that there was such a claim</p> <p>6 as this currency conversion claim, somebody would be</p> <p>7 bound to have said, "Well, hang on a second. How does</p> <p>8 this work?" The answer is because nobody thought that</p> <p>9 there was such a possibility because the statute had</p> <p>10 made express provision to the contrary.</p> <p>11 The answer my learned friends give to this point is</p> <p>12 to say, "Oh, there's a decision of the Court of Appeal</p> <p>13 in <i>Kaupthing</i>". If your Lordships can bear with me just</p> <p>14 for a few minutes, it may take slightly longer than</p> <p>15 quarter past 4. That the only warning I will give.</p> <p>16 I ask you whether you want me to start.</p> <p>17 LORD JUSTICE MOORE-BICK: See how you go.</p> <p>18 MR SNOWDEN: <i>Kaupthing</i> is at 1C, page 85. If I don't finish</p> <p>19 it I'll have to return to it in the morning. I hesitate</p> <p>20 to do it this late in the day, but I think it follows</p> <p>21 the sequence. (Pause).</p> <p>22 In order to follow this, your Lordships will have to</p> <p>23 have the insolvency handbook as well to hand.</p> <p>24 The issue in the case involved not simply currency</p> <p>25 conversion, but involved the question of future --</p> <p style="text-align: center;">Page 178</p> | <p>1 creditors, but subject as follows:</p> <p>2 "(2) For the purpose of dividend and no other</p> <p>3 purpose, the amount of the creditor's admitted proof or,</p> <p>4 if a distribution has previously been made to him, the</p> <p>5 amount remaining outstanding in respect of his admitted</p> <p>6 proof shall be reduced by applying the following</p> <p>7 formula ..."</p> <p>8 Then there is a formula applied. Basically, the</p> <p>9 formula discounts the amount of the proof in respect of</p> <p>10 the future debt on the basis of a 5 per cent return per</p> <p>11 annum to the date of the insolvency.</p> <p>12 It is said to be for the purpose of dividend -- and</p> <p>13 I'll say that's i.e. for the purpose of paying</p> <p>14 a dividend -- and no other purpose. You'll see that</p> <p>15 this, Rule 205, is in a group of little rules dealing</p> <p>16 with the payment of dividends.</p> <p>17 The issue in the case in <i>Kaupthing</i> was a creditor</p> <p>18 who owed money to <i>Kaupthing</i> on a term loan -- i.e. it</p> <p>19 was payable in the future -- who said that the way that</p> <p>20 that had to be dealt with in the insolvency set-off rule</p> <p>21 was to have the debt discounted back to the date of the</p> <p>22 commencement of the administration, because Rule 2105 is</p> <p>23 applied by cross-reference in the set-off rule that we</p> <p>24 saw a little earlier in Rule 2285(7), so that it is</p> <p>25 brought into the account at a discounted value. He</p> <p style="text-align: center;">Page 180</p> |

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| <p>1 said, the creditor, "The net balance that results" --</p> <p>2 which resulted in Kaupthing's (inaudible) against him,</p> <p>3 he said, at the discounted level -- "is what I now owe</p> <p>4 Kaupthing, but I still only owe it in the future."</p> <p>5 So he was trying to take advantage of the fact that</p> <p>6 he only wanted to pay, as it were, the net balance but</p> <p>7 he wasn't prepared to pay it there and then. Because if</p> <p>8 you look at Rule 285(8), it says:</p> <p>9 "Alternatively ..."</p> <p>10 And it's the "alternatively":</p> <p>11 "... the balance, if any, owed to the company shall</p> <p>12 be paid to the administrator as part of the assets</p> <p>13 except where all or part of the balance results from</p> <p>14 a contingent or prospective debt owed by the creditor</p> <p>15 and in such case the balance or that part of it which</p> <p>16 results in a contingent or prospective debt shall be</p> <p>17 paid if and when the debt becomes due and payable."</p> <p>18 Now --</p> <p>19 LORD JUSTICE BRIGGS: Does "prospective" mean "future"?</p> <p>20 MR SNOWDEN: Yes. Well, it means "prospective" in the sense</p> <p>21 of "payable in the future", yes, i.e. not subject to</p> <p>22 contingency but just not payable today, payable next</p> <p>23 week.</p> <p>24 LORD JUSTICE BRIGGS: Yes.</p> <p>25 MR SNOWDEN: That's what I have always understood</p> <p style="text-align: center;">Page 181</p> | <p>1 with the fact it is a Court of Appeal decision.</p> <p>2 MR SNOWDEN: Yes. Certainly in a sense --</p> <p>3 LORD JUSTICE LEWISON: I am not asking you to do that now,</p> <p>4 Mr Snowden, but we are obviously bound by it, whatever</p> <p>5 it decides.</p> <p>6 MR SNOWDEN: It's distinguishable. It's on a different set</p> <p>7 of facts, so I am certainly not going to ask you to</p> <p>8 overturn it. But the critical thing is it doesn't</p> <p>9 actually say what I think my learned friends want it to</p> <p>10 say for the purpose of overcoming the Stein v Blake</p> <p>11 argument. They say this is the magic bullet that</p> <p>12 overcomes the Stein v Blake argument that I have been</p> <p>13 putting to you and I say on no basis does it do that.</p> <p>14 In fact, Etherton LJ is right in one part, which is all</p> <p>15 I need. Then, with respect to him, I might suggest he</p> <p>16 probably should have adopted a slightly different tack</p> <p>17 on his current --</p> <p>18 LORD JUSTICE MOORE-BICK: We'll look forward to hearing all</p> <p>19 about that tomorrow, shall we? You are bowling along</p> <p>20 quite well?</p> <p>21 MR SNOWDEN: Fractionally behind where I thought I would be,</p> <p>22 but, with a bit of discussion with Mr Isaacs and</p> <p>23 Mr Wolfson, I hope I can make sure we finish on time.</p> <p>24 LORD JUSTICE MOORE-BICK: Very good. Thank you very much.</p> <p>25 10.30 am tomorrow, please.</p> <p style="text-align: center;">Page 183</p> |
| <p>1 "prospective" means. In a sense a contingent debt is</p> <p>2 also in some sense a future debt because if the</p> <p>3 contingency has not yet happened --</p> <p>4 LORD JUSTICE BRIGGS: I just wonder why they don't use</p> <p>5 "prospective debt" in 2.89, but I think it's the same.</p> <p>6 MR SNOWDEN: Yes. Unsurprisingly, the Court of Appeal</p> <p>7 rejected that rather adventurous gambit by the person</p> <p>8 who in fact would turn out after insolvency set-off to</p> <p>9 be a debtor, which in a sense is obviously the right</p> <p>10 result, albeit we say that the result was reached by the</p> <p>11 wrong route.</p> <p>12 It's going to now take me -- having set the scene</p> <p>13 for Kaupthing and left it in abeyance, I can either deal</p> <p>14 with it, but it will take me a few more minutes or else</p> <p>15 I can --</p> <p>16 LORD JUSTICE MOORE-BICK: Would you rather have some fresh</p> <p>17 minds on the job in the morning?</p> <p>18 MR SNOWDEN: It is not the most straightforward part of the</p> <p>19 Insolvency Rules, although the point I have to make</p> <p>20 ultimately is a very simple one on it. But I'm afraid</p> <p>21 fresh minds would probably benefit us.</p> <p>22 LORD JUSTICE MOORE-BICK: We'll give ourselves a break,</p> <p>23 shall we?</p> <p>24 LORD JUSTICE LEWISON: If you're going to say the reasoning</p> <p>25 is in some way wrong, you will obviously have to deal</p> <p style="text-align: center;">Page 182</p> | <p>1 (4.20 pm)</p> <p>2 (The court adjourned until 10.30 am</p> <p>3 on Tuesday, 24 March 2015)</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 184</p> |

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