Tuesday, 24 March 2015
(10.30 am)
Submissions by MR SNOWDEN (continued)
LORD JUSTICE MOORE-BICK: Yes, Mr Snowden.
MR SNOWDEN: My Lord, just before we tear into the delights of Kaupthing, Singer and Friedlander, can I do a bit of housekeeping from yesterday?
LORD JUSTICE MOORE-BICK: Yes.
MR SNOWDEN: One point of detail that came up, there was an exchange about the date of the AFB Rules and the standard form in the AFB Rules. The correct position is as set out in our skeleton.

The Rules were promulgated at the end of 1987. They were to come into effect in 1988, I think about April, and the agreement that you saw was indeed dated just before the Rules came into force, i.e. 24 March 1988.
LORD JUSTICE MOORE-BICK: Thank you.
MR SNOWDEN: That was just a point of clarification or detail, but it's our skeleton --
LORD JUSTICE BRIGGS: 88 not 87, which is the slight adjustment to what you said yesterday?
MR SNOWDEN: That's correct. The correct dates are in our skeleton at paragraph 28. So it's a slight correction. Apologies for -- I don't think it changes the point I made.

The next thing is the directives. In front of you there should be three documents. I don't know which sequence you have them in, but the shortest document should be the Council Directive of 1989.
LORD JUSTICE MOORE-BICK: Yes.
MR SNOWDEN: The relevant provision is to be found on page 4, Article 4(3). So that's the penultimate page of the document.

The next document I think is the longer one, which is the 2006 directive, which we've extracted pages from, including the recitals and some of the definitional sections at the start, but the relevant provision that the judge referred to and that we were referring to is to be found on again the penultimate page of the extract, which is numbered 28 of 177 in the top left-hand corner.

The relevant provision is on the right-hand column, 3, starting "Member states or the competent authorities". You'll see that that's the similar provisions to the previous directive.

Then, finally, I don't know where your Lordships might wish to insert those extracts. There is a supplemental bundle 5 for authorities.
LORD JUSTICE MOORE-BICK: Probably. Better to put them somewhere where we can all find them.

MR SNOWDEN: It may be best to find it.
LORD JUSTICE BRIGGS: This is authorities 5?
MR SNOWDEN: Authorities 5, yes.
LORD JUSTICE MOORE-BICK: Shall we make a new tab 19, et cetera?
MR SNOWDEN: Yes. If that's convenient. I dare say some tabs can be sourced at some point and inserted if your Lordships wish. But if we say perhaps tab 19 for the shorter one and tab 20 for the slightly longer extract.

Then I think you can probably put that bundle away and -- because the next document is the glossary of terms, which accompanied the IPRU Rules. My Lord Lord Justice Lewison was curious as to the definition of "financial resources". I predicted it might be somewhat unrevealing.
LORD JUSTICE LEWISON: Yes, it just takes us back to the table.
MR SNOWDEN: It does indeed take us back to the table as your Lordship has seen, page 14 of 35, the definition of "financial resources" is, as so often defined, to mean the financial resources of the institution thus calculated in the accordance with the table.
LORD JUSTICE MOORE-BICK: Where does that go?
MR SNOWDEN: I was going to suggest that should go with the IPRU Rules which are in --

LORD JUSTICE LEWISON: Bundle 4, tab 3?
MR SNOWDEN: Yes, in bundle 4, tab 3. (Pause).
LORD JUSTICE MOORE-BICK: Right. Thank you.
MR SNOWDEN: So, with that, if I now ask you to turn to Kaupthing. It's bundle 1C at tab 85.

Just to recap from late yesterday, the case concerned the set-off of -- how to deal with the set-off of future claims. This was somebody who was a depositor, therefore a creditor of Kaupthing, in relation to one amount, but was also a borrower from Kaupthing in relation to a loan that was repayable only in the future.

I identified to you yesterday that the Insolvency Rules require for a debt payable at a future time to be proved at its full amount. Now, of course, the liability which this person would owe to Kaupthing in the future of course is not a provable debt, as he owes it to the company. It's not a claim he has against the company but that will become relevant, as you'll see in a moment.

The requirement for insolvency set-off in Rule 285 requires all sums, both present and future, to be brought into the account. But where there are future liabilities owing either way they are to be the subject of Rule 2105, because, as you see from the Red Book,

Rule 285(7) says:
"Rule 2105 shall apply for the purposes of this Rule to any sum due to or from the company which is payable in the future."
That is slightly bending Rule 2105 because 2105 in fact is actually on its terms I think only -- it only deals with debts payable to a creditor at a future time which are proved at their full amount, but then when a dividend comes to be paid they are discounted for the purpose of computing how much should be the base for the distribution of dividend.
2105, it says:
"Where a creditor has proved for a debt of which payment is not due at the date of declaration of dividend he's entitled to dividend equally with other creditors but subject as follows ..."
And then at 2105(2):
"For the purpose of dividend and no other purpose, the amount of the creditor's admitted proof [i.e. the higher amount] shall be reduced by applying the following formula."
Then there is a discounting formula.
But in fact the clear intent of Rule 285(7) is that you apply that discounting to debts due both to and from -- or to or from the company so as to bring all

future debts either way back into one base date, which is the date for set-off.
The issue in Kaupthing was that the creditor was claiming that, that discounting and set-off having taken place, it resulted in a net balance in the Kaupthing case owing by him to Kaupthing, i.e. not a provable debt but owing by him to Kaupthing. He said, "Well, it should only be the net balance, i.e. the discounted effectively net balance, but I don't have to pay it until the date on which my original debt was due."
That contention was based upon a reading of Rule 285(8), which I drew your attention to yesterday, which said:
"If the balance is owing to the creditor, it's provable in the administration."
I will come back to that, because that is actually the crucial part for my argument, but the relevance of Kaupthing or the decision concerned the second part of Rule 285(8) which says:
"Alternatively, the balance if any owed to the company shall be paid to the administrator of parts of the assets except where all or part of the balance results from a contingent or prospective debt owed by the creditor and in such case the balance or that part of it which results from the contingent or prospective

debt shall be paid if and when that debt becomes due and payable."
So his argument was he wanted effectively to have his cake and eat it, i.e. discounted balance, or balance on the basis of the discounted set-off --

LORD JUSTICE MOORE-BICK: And pay later.

MR SNOWDEN: And pay later. Unsurprisingly he didn't succeed, which is why I said -- you'll see why. It's an entirely correct result. But when we actually go to the decision in Kaupthing, perhaps I can just then take you to the way the Chancellor decided it, you'll see why I say in fact it actually supports my argument, albeit that, when he actually went on to decide the actual case on the facts, I say that perhaps the reasoning is one that I would differ from.
If you turn first of all simply to paragraph 1 of the decision of the Chancellor, he set out the problem in a way that I hope corresponds to the way I've set it out. (Pause).
Then passing from paragraph 1, I can go I think straight to the critical paragraphs which are paragraphs 34 and 35. At paragraph 34, the Chancellor said:
"Contrary to the approach of the judge and the submissions of Mr Fisher, I consider that it is

perfectly possible to interpret Rule 285(7) and (8) without straining their language, so as to produce a sensible meaning in accordance with the sound policy objective and general principles of insolvency administration."
His reference to that, you'll see at paragraph 32 he sets out that it couldn't conceivably be the policy of the legislation to allow the creditor to do that which he was contending for.
Then he continues:
"Rule 2105(2) provides for the discount of a future debt to current value by the application of the statutory formula for the purpose of dividend and no other purpose. That is consistent with the purpose of Rule 285 which, as appears from the express provisions of Rule 285(1), is triggered by and is for the purpose of making a distribution. I see no difficulty in the circumstances in reading the words 'for the purposes of this Rule' in Rule 285 as confining the effect of the incorporation of Rule 2105 to what is necessary to calculate what should be paid by way of dividend to the creditor and for that purpose the making of the insolvency set-off, and as not touching at all upon what remains due to the company after the insolvency set-off has taken place."

1 Just pausing there, I'll stress just for now,
2 because I'll come back to it in a minute, "as not
3 touching at all upon what remains due to the company
4 after insolvency set-off has taken place", and then he
5 said:
6 "In the course of his oral submissions, Mr Dicker QC
7 for the administrators adopted that as an alternative
8 way as putting the administrators' case on this appeal.
9 I do not accept that such an interpretation is
10 inconsistent with the words 'any sum due to or from the
11 company' in Rule 285(7) or with the provisions of the
12 taking of the account in Rule 285(3) and (4)."
13 Then he says this:
14 "It follows that I do not accept the administrators'
15 first line of argument that the words in Rule 2105(2) in
16 the present context mean 'for the purpose of set-off and
17 no other purpose', not least because any balance due in
18 favour of the creditor after the set-off has been
19 calculated will plainly be proved in the discounted
20 amount."
21 Now, can I just pause there. That, in my
22 submission, last sentence plainly is correct --
23 LORD JUSTICE LEWISON: Plainly is correct?
24 MR SNOWDEN: Is correct because -- and the Chancellor is
25 there accepting that which is right, which is if there

1 is a balance due in favour of the creditor, i.e. owing
2 by the company to the creditor, it is proved in the
3 discounted amount and that follows the express wording
4 of Rule 285(8), the first sentence:
5 "Only the balance if any of the account owed to the
6 creditor is provable in the administration."
7 Now, that is important and right for our -- is the
8 relevant part of the decision for our current case
9 because the whole basis of a currency conversion claim
10 of course depends upon the creditor being a creditor,
11 actually somebody who is owed money by the company after
12 set-off or somebody who is owed money by the company.
13 The Chancellor accepts that in that situation, as is
14 right, it's the balance that is provable; it's not any
15 part of the original claim that might have been owed by
16 the company to the creditor in the future.
17 That's entirely consistent with Stein v Blake and
18 you can see that that must be the case because, as
19 Rule 285(8) says, it's the balance owing to the creditor
20 that's provable at the discounted amount. It's not any
21 part of the undiscounted future debt which would have
22 been provable at the undiscounted amount as a future
23 debt under Rule 289. As I pointed out at the start, if
24 you have a future debt owed to you by a company you
25 prove for the full amount, the undiscounted amount, of

1 the debt even though it's only payable in the future.
2 But, no, when there's set-off and the balance is left
3 owing to the creditor, irrespective of whether it
4 resulted from an amount owing to him in the future, it's
5 provable at the discounted amount as a presently
6 discounted sum. That's what Rule 285(8) says, it's what
7 the Chancellor accepted, and that's why he rejected the
8 administrators' first line of argument.
9 That's why, where you're dealing with somebody who
10 is left claiming to be a creditor in respect of a future
11 debt owed to him, Stein v Blake set-off or this
12 insolvency set-off does destroy the underlying claim.
13 He's left only to prove for the discounted balance.
14 Now, what the Chancellor actually had to deal with
15 was the entirely different situation which we're not
16 concerned with, which is where the net balance is left
17 owing the other way and where the customer is left in
18 fact as a debtor to the company, which of course is not
19 the situation that's relevant for claims of currency
20 conversion.
21 So where there's the balance is -- the person is
22 a debtor, he's obviously not going to have a currency
23 conversion claim under any guise.
24 In that respect the Chancellor did have to grapple
25 with the wording of the second half of Rule 285(8). If

1 you do have the second part of sub-rule eight there, it
2 says:
3 "Alternatively ..."
4 So after we've dealt with everything which is
5 relevant to this case, which is why I said to my Lord
6 Lord Justice Lewison at the very end of yesterday, the
7 Chancellor is right on the only part that matters for
8 our case, but I will just go on and point out how he
9 dealt with the part that is not relevant for our case.
10 The Rule says:
11 "Alternatively the balance if any owed to the
12 company shall be paid to the administrator as part of
13 the assets, except where all or part of the balance
14 results from a contingent or prospective debt owed by
15 the creditor."
16 Now, just pausing there, the rule thus far of course
17 is giving you no hint or clue that actually anything
18 other than the balance is what's at stake or at issue
19 here. It's not suggesting in fact that the underlying
20 debt has survived the insolvency set-off and, indeed, it
21 would be very difficult to do so, given Stein v Blake.
22 What it goes on to say is:
23 "In such a case the balance [again the balance] or
24 that part of it which results in the prospective or
25 contingent debt shall be paid if and when the debt

1 becomes due and payable."
2 The Chancellor adopted a an approach which said you
3 actually apply the discounting to the extent necessary
4 to effect the set-off and he effectively said that the
5 original debt, that part of the original debt that was
6 unaffected by insolvency set-off, remains payable in the
7 future. But, with respect, that is I think not possible
8 to reconcile with Stein v Blake.
9 But, with respect, what the Chancellor could have
10 said, I suspect, is that the Rule is obviously not very
11 well worded but the intention of the Rule is obvious.
12 It's the balance is payable but, as it were, in
13 an amount which reflects the effect of the discounting
14 that had taken place. In other words, you need
15 effectively just to gross it up to the point in time at
16 which the original debt would have been payable. But
17 the Rule is not well worded. I think I have to accept
18 that.
19 LORD JUSTICE BRIGGS: What would happen where the effective
20 of the discounting produced a very small balance owing
21 to the creditor, so that the first half of sub-rule (8)
22 applies --
23 MR SNOWDEN: Yes.
24 LORD JUSTICE BRIGGS: -- so he would, if you like -- whereas
25 if you looked forward and looked at the whole debt when

1 it become due and payable the balance would be the other
2 way?
3 MR SNOWDEN: The point is the first part of the rule is
4 clearly and unambiguously --
5 LORD JUSTICE BRIGGS: Is applicable.
6 MR SNOWDEN: -- and, as the Chancellor accepted, is a basis
7 for not accepting the first line of argument advanced
8 for the administrators is applicable.
9 LORD JUSTICE BRIGGS: He has some extraordinary distinctions
10 at various levels. If there's a £2 billion debt and
11 a £1 set-off, then you apply discounting for the
12 purposes of proof; whereas if there's a £2 billion debt
13 and a no-pound set-off you don't. It does have the most
14 extraordinary effects in minutely different situations.
15 MR SNOWDEN: But what, you see, I get from this, and for
16 present purposes all I need to get from this, is that
17 there is a clear acknowledgement in the rules, it's
18 drafted plainly on the basis that Stein v Blake is
19 applicable.
20 LORD JUSTICE BRIGGS: Yes.
21 MR SNOWDEN: Nobody has ever suggested that the rules have
22 been drafted in order to do away with the decision in
23 Stein v Blake and frankly they've been applied on the
24 basis -- and they are plainly drafted on the basis that
25 Stein v Blake is correct because there is obvious

1 repetition repeatedly to the proving of the balance or
2 the claiming of the balance. In fact in the case that
3 is going to be relevant for the vast majority if not all
4 of the situations where a currency conversion claim
5 might be said to exist, it will be that the net balance
6 is what's provable at the discounted price -- sorry, in
7 a sense I am dealing with this -- this is a case
8 obviously dealing with future debts --
9 LORD JUSTICE BRIGGS: Future debts.
10 MR SNOWDEN: -- not currency conversion. But it is because
11 it was relied upon by my learned friends to try and get
12 themselves out of the problem that otherwise
13 Stein v Blake causes for their argument on currency
14 conversion, because what they're trying to say is, "Oh,
15 look, this case effectively demonstrates that insolvency
16 set-off can in part just be procedural and can
17 acknowledge that there's a debt left owing". One of the
18 original debts left owing, because that has to be the
19 basis of their currency conversion claim, because
20 otherwise they must accept, as we suggest is the case,
21 that the effect of insolvency set-off is substantive
22 and, as we say, so is the effect of currency conversion.
23 They're all designed to have the same result.
24 LORD JUSTICE BRIGGS: Putting it crudely, you say whatever
25 this case may decide about the situation where the

1 creditor is in fact a net debtor --
2 MR SNOWDEN: Correct.
3 LORD JUSTICE BRIGGS: -- it's Stein v Blake rules okay if
4 he's a net creditor.
5 MR SNOWDEN: Correct.
6 LORD JUSTICE BRIGGS: Yes.
7 MR SNOWDEN: There's nothing in fact in here which in
8 reality suggests that Stein v Blake is in any way to be
9 doubted or moved away from. In fact, the Chancellor, as
10 you see from the remaining part of the highlighted
11 passage on page 24, did in paragraph 36 deal or attempt
12 to deal with Stein v Blake but did so in such a way that
13 in no way suggested that Stein v Blake didn't still, as
14 it were, rule okay in relation to insolvency set-off.
15 (Pause).
16 Now, my Lord, I have dealt with it upfront because
17 it is obviously a point I suspect my learned friends are
18 going to deal with and in a sense I will hold fire on
19 anything more in relation to Kaupthing unless your
20 Lordships want me to say anything more at this stage.
21 But I've made my basic points in relation to it.
22 So what we say is that it is clear that, as I said
23 yesterday, there are parts of the insolvency regime,
24 substantial parts, which have substantive effect. We
25 discussed yesterday -- we've now been discussing

set-off, disclaimer was mentioned yesterday. We say that currency conversion, which was the new regime introduced or the express regime introduced in 1986, has just such an effect and that there is no warrant for reading the rules to admit the possibility that the underlying claims continue to exist in some spectral form to be revived as the basis for a compensation claim against the surplus assets of the company at some later stage, and I do adopt the point that was put to me by Lord Justice Lewison. It would be a remarkable statutory scheme that, as it were, bifurcated or created two sets of rights by one statutory process.

It is interesting that the judge also in fact accepted himself in the judgment, at paragraph 77, that there could be other aspects of the statutory scheme that had substantive effect. If one looks at paragraph 77 of the judgment, he took the view that it -- he said:

"In my view it is clear that the payment of the estimated value of ..."

Sorry, it is paragraph 77. He said:

"It's in my view clear that the payment of the estimated value of contingent debts and the discounted value of future debts in an administration or liquidation is payment of those debts in full. The

contractual right of a contingent creditor is not to a payment of the maximum amount which may become payable but is a payment if, but only if, the contingency occurs. The Rules provide a mechanism for placing a present value on that right. Likewise, the contractual right of a creditor ..."

Sorry, just pausing there, we looked at the cases yesterday, particularly Danka, which established that a creditor can't insist, even where there's a surplus, that the liquidator make a reserve or a provision in the full amount of his potential contingent liability, but is only entitled to ask for distribution of the estimated amount. The point was made that obviously if the contingency falls in and the distribution has been made, he may be out of luck if the assets have all gone. I'll come back to that when we think about the question of whether a member could be liable to make a call to pay for certain types of liability, but that the mechanism, if the contingency does fall in, while there are still assets left, is not for him to assert some sort of residual contractual claim but is actually to put in a new proof of debt and ask for the estimate to be adjusted. So that, again, the statutory regime operates entirely through the concept, even where there's a surplus, of proof of debt.

You saw that both in the passage from Stanhope and indeed there's a passage in -- I think we saw there's a passage in Wight v Eckhardt Marine to similar effect from Lord Hoffmann. Do your Lordships recall that passage?

Yes. Then, anyway, returning to paragraph 77 of the judgment, the judge continued. He said:

"Likewise, the contractual right of a creditor with a future debt is to payment on the due date but not before it. In order to bring administrations and liquidations to a conclusion as quickly as practicable, future debts are discounted. The creditor receives the full present value of the debt, calculated as provided by the Insolvency Rules. The contractual rights of contingent and future creditors are clearly compromised by the insolvency process but their claims are, for the reasons I have given, properly regarded as paid in full.

"As to the return of any surplus to shareholders, the obligation on the administrator or liquidator to make such a return is in my view clearly not a liability or obligation payable or owing by the borrower for the purposes of the subordinated loan agreements."

He was dealing here with a subordination point but his analysis of the substantive effect of, for example, the insolvency regime on contingent and future debts is,

with respect, we say correct. So why is it, we ask, that apparently the currency conversion alone amongst all these provisions of the Insolvency Act and Rules that is designed to achieve the purposes of a pari passu distribution in a speedy and efficient way should, because it turns out that there's a surplus, allow for the assertion of an additional compensatory claim against the company, based upon the supposed continued existence of contractual rights which, as the judge said, have been compromised?

LORD JUSTICE BRIGGS: Well, is there this possible distinction? The policy benefit of speed is plainly there for all to see in relation to dealing with future or contingent debts, not having to wait until it becomes payable or the contingency resolves itself one way or the other. It's not so clear, is it, that any speed efficiency concept is achieved by the currency conversion rule, which as I understand it is mainly there to ensure fairness as between all unsecured creditors?

MR SNOWDEN: But the difficulty that arises -- I mean, in a sense I understand -- yes, I can see your Lordship's point. But it's not, with respect, a justification for allowing currency conversion claims because what in effect they do --

1 LORD JUSTICE BRIGGS: No, all I am saying is that --
2 MR SNOWDEN: Sorry.
3 LORD JUSTICE BRIGGS: You said all these things are there to
4 achieve a fair and speedy resolution of the insolvency.
5 MR SNOWDEN: Okay.
6 LORD JUSTICE BRIGGS: I am just quibbling slightly at the
7 notion that speed can be said to be an achieved
8 objective in relation to currency conversion in the same
9 way it is in relation to contingent and future debts.
10 MR SNOWDEN: I can't remember how I spoke, but if that's the
11 way I came across I take the correction. I can see
12 that. But that's only one part of the statutory scheme,
13 obviously the other part is achieving pari passu
14 distribution.
15 LORD JUSTICE BRIGGS: Oh, yes, of course.
16 MR SNOWDEN: That is of course is what currency conversion
17 goes through. It is going back, perhaps, to what my
18 Lord Lord Justice Moore-Bick said yesterday when he
19 asked about the question of this notion of the uno flatu
20 distribution as at a single date. In a sense that is
21 what the insolvency regime envisages as the mechanism of
22 achieving pari passu distribution, but it also in effect
23 is something which then informs the desire of the
24 insolvency legislation to have everything done, as it
25 were, speedily as well, for which, for example,

1 disclaimer is the most obvious example, i.e. you allow
2 for disclaimer with substantive effect because you
3 actually in practice want to be achieved that which is
4 done in theory, namely the simultaneous realisation of
5 assets and distribution to creditors.
6 We just simply say that, given that Parliament
7 expressly turned its mind to the introduction of
8 currency conversion for that process in 1986, it would
9 be extraordinary if it in fact had left out there
10 a possibility of compensation for the very operation of
11 that statutory scheme.
12 Just a tail end, and it really is a tail end, we do
13 make the point in our skeleton -- although I think we
14 probably put it just as a preliminary point, but it is
15 this, that there shouldn't be any preconceived idea that
16 one should compensate for currency conversion
17 fluctuations. The law in ordinary enforcement
18 mechanisms does allow for the possibility that
19 a creditor who seeks to enforce his own claim by
20 a private enforcement process might "lose out" because
21 he converts his foreign currency claim at the start of
22 the execution process and there's no mechanism by which
23 he can -- if he follows the ordinary procedure that's
24 set out in the practice direction, there's no mechanism
25 by which he can then have a further go at saying "Oh,

1 actually, having seen the way currency has gone, I would
2 quite like to have another little payment, please". The
3 court, of course, might, and there is authority that the
4 court might in a particular case, depart from the
5 practice statement. But that's not the point. The
6 point I am making is that one doesn't start from the
7 proposition that of necessity --
8 LORD JUSTICE LEWISON: The point I think you're making is if
9 you convert, that's it.
10 MR SNOWDEN: Yes.
11 LORD JUSTICE LEWISON: You may not need to convert, the
12 court may not require you to convert, but if you do
13 convert you can't then come back.
14 MR SNOWDEN: Yes. Yes, there's no -- there should be no
15 predisposition to, as it were, allowing the creditor --
16 what I think has been said by others -- to have
17 a one-way bet and to, as it were, convert on the basis
18 if sterling does well he's to the good and he can keep
19 the benefit, and if sterling does badly he can come back
20 with a currency conversion claim.
21 I mean, that's really what is happening here. The
22 people who are with their hands out now with the
23 currency conversion claims are the ones who have claims
24 in currencies which have increased against sterling.
25 There may be many who are quite happily sitting

1 elsewhere thinking, "Thank goodness I was converted to
2 sterling or my claim was converted to sterling".
3 LORD JUSTICE LEWISON: The recent movements of the dollar
4 and the euro have gone in different conditions.
5 MR SNOWDEN: I dare say at some point a Greek creditor might
6 well, if there were such a person, be quite happy with
7 the result. But it is the point that one doesn't and
8 shouldn't interfere with the statutory scheme that's
9 been put in place after consideration to try and make
10 tweaks simply because there are people in front of the
11 court saying, "Look at this. This is all terribly
12 unfair to me."
13 The other point that's made in the Cork Report, very
14 firmly at the end of the sections we looked at, is that
15 Parliament was looking for certainty. And certainty is
16 achieved by everybody knowing, you know, what the
17 conversion is, it's into sterling at the relevant date.
18 People can then take steps if they so wish to protect
19 themselves against currency fluctuations during the
20 course of an insolvency. But the point is there has to
21 be certainty. The one thing that allowing currency
22 conversion claims has given rise to is uncertainty and
23 a whole barrage of further issues that will then require
24 to be sorted out.
25 Now, that was all I think I was going to say about

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1 currency conversion. I was going to move then on to
2 section 74, unless you --
3 LORD JUSTICE MOORE-BICK: Yes.
4 MR SNOWDEN: -- you have anything more for me on currency
5 conversion at this stage.
6 Again, as I said yesterday, it's helpful, we say,
7 during this part of the analysis, just to make sure we
8 don't have confusion, to postulate the difference
9 between somebody who is a subordinated lender and
10 somebody who is a member. I'm now dealing obviously --
11 LORD JUSTICE LEWISON: You now move into members.
12 MR SNOWDEN: I am now moving into member. The judge's
13 starting point in the judgment to the question that I am
14 about to address -- which is: what is the scope of
15 section 74 liability? My submission will be that
16 section 74 and the liability that a member may be
17 subject to as a consequence of section 74 does not
18 include sums to pay statutory interest and does not
19 include non-provable debts.
20 The judge's starting point was in paragraph 153 --
21 well, actually, sorry, his starting point was in
22 paragraph 152, but I've already dealt with that and
23 looked at that in a slightly different context. But
24 I will come back to that.
25 LORD JUSTICE MOORE-BICK: Yes.

1 MR SNOWDEN: Paragraph 153 starts "Secondly". Can I ask you
2 to in fact read just quickly, remind yourself of what
3 the judge said in paragraph 153 and probably 154,
4 I think, as well. (Pause).
5 LORD JUSTICE BRIGGS: Where do we stop?
6 MR SNOWDEN: Well, in fact I am going to address what he
7 starts of 153 first, but I am quite happy for you just
8 to remind yourself of 153 and 154 ...
9 LORD JUSTICE LEWISON: Right.
10 LORD JUSTICE BRIGGS: I am still on 154.
11 MR SNOWDEN: Yes. I am sure you've read it a number of
12 times but it is just to remind yourself. (Pause).
13 Just starting at 153, the judge said:
14 "While acknowledging that of course the extent of
15 any liability is a matter of construction of the
16 relevant statutory provisions, one might suppose that if
17 a member of an unlimited company is to be liable to
18 contribute to the assets of the company for the payment
19 of its debts and liabilities without limit, such
20 liability would extend to all its debts and liabilities
21 whether or not they were capable of proof."
22 With respect to the judge, that rather begs the
23 question. The question is: what do the relevant parts
24 of the statutory scheme mean? In that approach he's
25 actually wrapped, if you like, the answer to the

1 question into the question because the real question is:
2 what actually does section 74 mean? It says:
3 "When a company is wound up, every present and past
4 member is liable to contribute to its assets to any
5 amount sufficient for the payment of its debts and
6 liabilities and the expenses of winding up and for the
7 adjustment of the rights of contributories among
8 themselves".
9 The question is essentially: what do debts and
10 liabilities mean? How does that work as a matter of
11 timing where you have, on the one hand, statutory
12 interest, which is payable only where there is a surplus
13 after payment of proved debts and then, secondly,
14 non-provable claims?
15 Now, we say that, first of all, the statutory scheme
16 of which section 74 is a part is, as we've seen,
17 premised and based upon the payment pari passu of proved
18 debts. That's the starting point for the statutory
19 scheme.
20 LORD JUSTICE MOORE-BICK: Is your submission in a nutshell
21 that the whole of the contribution provisions in
22 section 74 are only related to debts and liabilities
23 which the scheme recognises as provable?
24 MR SNOWDEN: Yes. And I am going to say that, for example,
25 in relation to statutory interest, statutory interest is

1 only payable where there is a surplus after payment of
2 proved debts; and if there is no surplus, existing
3 surplus, you can't create one by making a call.
4 LORD JUSTICE MOORE-BICK: The surplus would arise, what,
5 because all the contributories have been required to
6 contribute to the full extent and, having done so, the
7 fund is greater than required to meet the provable
8 debts?
9 MR SNOWDEN: The trouble is that, with respect, puts the
10 cart before the horse.
11 LORD JUSTICE MOORE-BICK: That's why I am asking the
12 question to you.
13 MR SNOWDEN: Yes. When we look at Rule 288(7) in relation
14 to statutory interest, it says "Where there is ..."
15 LORD JUSTICE LEWISON: Effectively you saying you can't pull
16 yourself up by your own bootstraps.
17 MR SNOWDEN: Correct. Rule 288(7) in terms talks about
18 a surplus remaining after payment of proved debts. So
19 you only get to have to do something in relation to
20 statutory interest if there is a surplus remaining and
21 that must mean a surplus of the company's assets
22 remaining --
23 LORD JUSTICE MOORE-BICK: That's a simple concept in a case
24 where all the shares are paid up, all the contributions
25 are therefore -- there are no further contributions to

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1 be made and the company is solvent.
2 MR SNOWDEN: That's right, yes.
3 LORD JUSTICE MOORE-BICK: The next step is: how does this
4 work where you have a company limited by shares where
5 the shares are not fully paid up? So you have the
6 contributories. Are they simply called on to the extent
7 necessary to pay the provable debts and no more? Is
8 that the submission?
9 MR SNOWDEN: That's right, and in fact --
10 LORD JUSTICE MOORE-BICK: One can't call them to create
11 a fund which will produce a surplus -- to produce
12 a surplus?
13 MR SNOWDEN: Yes. But in any event we are here talking, of
14 course, about a statutory -- this is a purely statutory
15 basis for the claim.
16 LORD JUSTICE MOORE-BICK: Yes.
17 MR SNOWDEN: Sorry, for the call. In fact, the statutory
18 basis, as the judge sets out earlier in the judgment --
19 I will just take you to quickly. It is section 150.
20 The way the judge got round this problem was to say --
21 this circularity point, the bootstraps point, the way
22 the judge got round it was to say, "Ah, but the right to
23 make a call is an asset of the company". That's the way
24 he tried to --
25 LORD JUSTICE MOORE-BICK: Well, yes.

1 MR SNOWDEN: And with respect --
2 LORD JUSTICE MOORE-BICK: For what purpose?
3 MR SNOWDEN: And it's got to be wrong, with respect to the
4 judge that's definitely wrong, because the right to make
5 a call under section 150 is actually -- it's not a right
6 as such. It's a power given to the court to order
7 payment and the power is delegated to the liquidator to
8 exercise, but as an officer of the court. It's not
9 an asset of the company. True it is, of course, because
10 of what section 74 says, when you answer a call and make
11 a payment it is in fact a contribution to the assets.
12 That's what section 74 says. So at that stage what is
13 received is then capable of being applied, has to be
14 applied to the statutory purpose. But prior to receipt
15 there is nothing which could constitute a surplus within
16 the meaning of Rule 288(7) because Rule 288(7) is quite
17 plainly talking about a surplus remaining, that's the
18 word, after payment of proved debts. It is remaining
19 from whatever it was you started with as cash to pay
20 your proved debts. You can't pay debts with a right to
21 make a call. That's a sort of trite observation. You
22 pay them with cash.
23 The simple operation of 288, as in fact all the
24 legislative history shows, and I'll go back to it very
25 quickly in a moment, is that it was always ever

1 envisaged that statutory interest would simply be
2 payable if the liquidation threw up, that was the
3 word -- or that was the expression, threw up a surplus.
4 Nobody ever gave any consideration in any of the
5 legislative history to the fact that the introduction of
6 statutory interest -- which could create an additional
7 burden over and above contractual interest, because as
8 we know statutory interest is payable irrespective of
9 whether you had contracted for interest. Nobody ever
10 discussed the question about whether it could have
11 an additional burden for contributories of any sort.
12 And that, we say, is a very telling point because
13 when one is looking at the statutory scheme, again, if
14 it had been thought that contributories would be in any
15 way affected by the introduction of statutory interest,
16 or could be, you would have expected, perhaps, one of
17 the committees or somebody at some point to say, "Does
18 this mean that contributories have to now contribute
19 more, i.e. to fund the payment of statutory interest?"
20 And the answer is no, there was no discussion about that
21 at all.
22 LORD JUSTICE LEWISON: That would be a much more powerful
23 argument if there weren't such things as non-provable
24 claims. You have to eliminate non-provable claims,
25 don't you, because of their ranking after statutory

1 interest? If contributories are liable to stump up in
2 order to pay non-provable debts, it is very difficult to
3 see how they're not liable to stump up for statutory
4 interest, given the ranking of non-provable claims.
5 MR SNOWDEN: If you're assuming that the ranking is in the
6 same insolvency scheme, and that of course is what the
7 judge -- in fact, the judge applied the same logic in
8 relation to the little bit about adjustment of the
9 rights of contributories amongst themselves. He applied
10 the same logic, saying if a call can be made for that
11 purpose then by definition, although silently, it must
12 be capable of being made for things which rank in the
13 waterfall ahead.
14 LORD JUSTICE LEWISON: Yes.
15 MR SNOWDEN: True that would be if non-provable debts were
16 part of the statutory regime. But, as we've discussed
17 on a number of occasions by now, they are not catered
18 for in the statutory scheme.
19 LORD JUSTICE LEWISON: Yes.
20 LORD JUSTICE MOORE-BICK: It has to follow, doesn't it, from
21 your earlier submissions that you can't make calls in
22 order to pay non-provable debts?
23 LORD JUSTICE BRIGGS: Well, you do say that.
24 MR SNOWDEN: I did say that.
25 LORD JUSTICE BRIGGS: Indeed you said that a few moments

1 ago.
2 MR SNOWDEN: I did. I'm afraid I may say it again.
3 LORD JUSTICE BRIGGS: In fact I'm sure you will.
4 MR SNOWDEN: That is exactly what I say. We do say that, in
5 short, the statutory mechanism for a call, which has
6 existed in the same terms for a long time, existed
7 before statutory interest and was never thought to be
8 affected or does not seem to have been contemplated as
9 affected by the introduction of statutory interest.
10 There's certainly no authority at all which you will
11 be shown that suggests that a call can be made to pay
12 non-provable debts. We would say actually the
13 authorities you have seen demonstrate that that isn't
14 the expectation at all. I can explain that this way.
15 Apart from the fact that non-provable debts are, by
16 definition, outside the statutory scheme of which
17 section 74 is a part, and section 4 by its opening words
18 is triggered -- is only applicable in a winding-up.
19 That means a winding up under the Insolvency Act. It's
20 not capable of being exercised in any other circumstance
21 but it's a very specific tool for that very specific
22 statutory scheme. Not even in administrations, very
23 specific.
24 LORD JUSTICE BRIGGS: And not by the directors while the
25 company is up and running.

1 MR SNOWDEN: And not by the directors even when --
2 LORD JUSTICE BRIGGS: Although they can make a call for
3 any -- subject to the terms of the particular company's
4 articles, if the shares are not fully paid.
5 MR SNOWDEN: Going back to my Lord Lord Justice Moore-Bick's
6 point, contractually directors could make a call on
7 non-paid shares if the articles allowed it.
8 LORD JUSTICE BRIGGS: Which was traditionally was the main
9 type of call, not a call against shareholders in
10 an unlimited company.
11 MR SNOWDEN: Absolutely, but we're dealing with a different
12 type of call here. It's a statutory call and it's
13 a statutory -- because that's the way it is provided
14 for. Of course, if you stop and think a little bit
15 about the cases that we saw like Danka and Stanhope, and
16 what Lord Hoffmann said in Wight v Eckhardt about the
17 situation that might arise, for example, in relation to
18 a contingent claimant who had put a contingent proof of
19 debt in, had had it estimated, had been paid
20 a distribution in relation to the estimated amount and
21 then the assets were distributed to members -- as
22 David Richards J said in this case, that's a substantive
23 change. Lord Hoffmann was prepared to accept that what
24 could happen is if before the assets are distributed the
25 contingency fell in and revised proof of debt could be

1 put in -- and it may be that you couldn't disturb prior
2 distributions but you might be then able to catch up
3 before the final distribution. But if the final
4 distribution was made to members and then the
5 contingency fell in, tough.
6 Now, nobody said --
7 LORD JUSTICE BRIGGS: But in a sense --
8 MR SNOWDEN: -- hang on.
9 LORD JUSTICE BRIGGS: -- there's a protection mechanism for
10 the contingent creditor, which is that he can go on
11 reviewing his claim --
12 MR SNOWDEN: Yes.
13 LORD JUSTICE BRIGGS: -- right up until the moment of
14 payment, subject to the problem about interim
15 distributions.
16 MR SNOWDEN: Yes. But nobody suggested: but hang on
17 a second, if this contingency does actually fall in
18 after the surplus have been distributed to members, the
19 members have to hand it back, have to hand something
20 back.
21 LORD JUSTICE BRIGGS: No. He will have been paid out the
22 full value of his claim, valued at the time he was paid.
23 One can quite well understand that should be
24 acquittance.
25 MR SNOWDEN: But there's never any discussion, in any of

1 this, that contributories are liable a call or that
2 there could be protection, if you like, for somebody in
3 that situation.
4 LORD JUSTICE BRIGGS: No, but why should they need
5 protection? They have received full value for their
6 right --
7 MR SNOWDEN: Yes.
8 LORD JUSTICE BRIGGS: -- at the time of payment.
9 MR SNOWDEN: Yes. We say exactly that's what happened under
10 the statutory scheme. The point I am making is nobody
11 has ever suggested, if the statutory scheme operates in
12 the way that it does, that somebody can say, "Well
13 actually that statutory scheme caused me a problem
14 because it operated, as it turns out, to my detriment,
15 whether by reference to the contingency or the exchange
16 rate, my underlying contract, and I am entitled in some
17 way to call upon the members to return" -- nobody has
18 ever suggested -- I am sort of in a sense saying nobody
19 has ever suggested, nor could they suggest, that
20 members, even in those circumstances, are liable to fund
21 what in reality would be a non-provable claim, i.e. the
22 claim for the difference between the underlying contract
23 and what you'd actually got out of the insolvency
24 scheme.
25 I mean, that's the non-provable claim point. You

1 have something -- there's a difference between your
2 underlying contract and what you got out of the
3 statutory scheme. That's the whole ethos or basis of
4 these currency conversion claims as a species of
5 non-provable claim.
6 LORD JUSTICE LEWISON: Leave aside currency conversion
7 claims, what about the tort claimant who suffers
8 a personal injury after the date of the winding up?
9 I mean, he just goes uncompensated.
10 MR SNOWDEN: In the circumstances where there has been
11 a final distribution, the answer is, yes, he would have
12 to either follow some other --
13 LORD JUSTICE LEWISON: Even if there hadn't been, on your
14 argument he would still go uncompensated.
15 LORD JUSTICE BRIGGS: It's not just based on final
16 distribution. Your tort claimant gets something if his
17 cause of action isn't complete, save for a loss, on the
18 cut-off date, which may be years and years before any
19 distribution takes place.
20 MR SNOWDEN: If his claim is not provable, then that's
21 right. (Pause).
22 Of course, in a sense I'm having to make submissions
23 by reference to two very, very different creatures here.
24 LORD JUSTICE BRIGGS: But your submission is a very
25 monolithic structure that either applies to all of them

1 or none. Your submission that you can't make a call to
2 fund payment of a non-provable debt has to be either
3 a good or a bad submission.
4 MR SNOWDEN: Yes.
5 LORD JUSTICE BRIGGS: You can therefore test it against the
6 most deserving type of non-provable debt, not just what
7 you call undeserving ones where you have already had
8 a claim fully valued against the value of a contingency
9 minutes before payment.
10 MR SNOWDEN: I accept that, but there are circumstances in
11 which in fact the insolvency regime operates in that
12 way. That's why in relation, for example, to the
13 asbestos claimants in T&N there was a very quick desire
14 to ensure that the rules were altered so as to make them
15 provable, because otherwise there would be the
16 possibility that people would go uncompensated.
17 LORD JUSTICE BRIGGS: But it was quite another situation if
18 there would be a surplus in such a situation. I mean,
19 the main purpose of the statutory amendment was to
20 ensure that such claimants could share in the inadequate
21 fund.
22 MR SNOWDEN: Yes. But the point is if there is a surplus
23 which has been distributed, the authorities do indicate
24 that in a sense that is the end -- nobody has suggested
25 that there's a mechanism for regathering the

1 distribution that's made to members. The solution is,
2 in relation to a tort claimant, for example, they would
3 restore the company to the register for the purpose of
4 taking advantage of the third party rights against
5 insurers, if there was insurance covering the position,
6 or if they could find some other assets. Those are the
7 solutions that are offered by the authorities.
8 But --
9 LORD JUSTICE BRIGGS: Are there any authorities where there
10 was a right to make a call because the company was
11 unlimited, or because the shares hadn't been paid up in
12 full, where that solution to this problem was, as it
13 were, not imagined by any of them although it was there
14 for the asking if it could have been used? Or are we
15 simply in the first situation where that solution is
16 a potential solution?
17 MR SNOWDEN: Yes, I don't think anybody is suggesting that
18 there's any close authority on the facts of this case.
19 LORD JUSTICE BRIGGS: No.
20 MR SNOWDEN: It may be in part because of the rare
21 concatenation of events, namely -- well, solvency for
22 a start which is pretty rare.
23 LORD JUSTICE BRIGGS: And an unlimited company.
24 MR SNOWDEN: Yes, or the suggestion in fact that there are
25 non-provable claims which again is very rare.

1 Just to make a couple of the points -- just on the
2 statutory wording, just going to the statutory interest
3 just for a second, Rule 288(7), as I've indicated, does
4 expressly refer to surplus remaining after payment.
5 Obviously we say that the extent to which a call
6 could be made only extends so far as -- sorry, it is not
7 possible to make a call to create a surplus and that
8 wouldn't fit with the rule which we say expressly
9 envisages surplus remaining after payment. All those
10 words are important. It's a surplus remaining after
11 payment.
12 I need to show you quickly the relevant part of the
13 judgment. The judge's comment as to how he dealt with
14 that problem is in paragraph 165 of the judgment.
15 I think I've made my submissions on that, but just so
16 you can see it. (Pause).
17 You'll see in the middle of 165, the judge describes
18 as -- assets available to a liquidator to meet the
19 claims of creditors includes the right to make calls.
20 We say that that is not accurate and not a solution
21 for a number of reasons. First of all, the call
22 mechanism is not an asset of the company. It never was,
23 never will be. What it is, in section 150, power to
24 make calls, is:
25 "The court may, at any time after the making of

a winding-up order, make calls on any of the contributories."

As the judge himself said -- he set this out in paragraph 146 -- the power is vested in the court but it is delegated to the office holder. That delegation, so that you have the reference, is in Insolvency Rule 4.202. Rule 4.202 of the Insolvency Rules, it is page 822 in the middle, says:

"Subject as follows, the powers conferred by the Act with respect to the making of calls on contributories are exercisable by the liquidator as an officer of the court subject to the court's control."

It's not an asset vested in the company, although, as section 74 makes clear, and the authorities are equally clear, what may result from a call plainly does form part of the assets because section 74 itself talks about making a contribution to the assets.

So far as the judge's policy points, the policy points which he made in paragraph 153 and 154, we say first of all there was no authority to support the judge's view. He referred to Humber Ironworks in the middle of paragraph 154. Of course, Humber Ironworks was not a case concerning calls at all. The judge said that the same approach should follow for statutory interest, which replaced contractual interest where

proved debts had been paid in full.

Our answer to that is that again is, with respect, a little too simplistic. Statutory interest did replace in part or to some extent the possibility of asserting a claim for contractual interest for the period post-liquidation if there was a surplus. But it went further than that because it also gave a right to people who would not have a claim if there was a reversion to contract approach, because it gave everybody a right to statutory interest.

The point that I was making is that, given that potential effect, if it had been thought that statutory interest could impose an additional burden upon contributories -- because it could produce an additional burden of interest post-insolvency. If substantial numbers, for example, had either contracted for debts at lower than the statutory rate or had not contracted at all for interest, there would be potentially an additional burden if a call could be made to fund that payment of statutory interest; but there was no discussion in the Cork Report.

Just so you can see it, it's at authorities bundle 4, tab 9. It's a passage we've touched on before. If you turn to page 314, at paragraph 1384, the Cork Committee set out what was understood to be the

then state of the law, namely that there was no provision for statutory interest in the winding-up code, equivalent to that which existed prior to 1986 in the bankruptcy regime, and the authorities had indicated that where the company was solvent you couldn't recover the Bankruptcy Act type of interest and there was, if there was anything at all, a reversion to contract.

I think that's what is probably meant by:

"This means that the creditor who is entitled to interest on the debt for which he has proved may recover the interest accruing after the presentation of the winding-up petition as if there had been no winding up at all, and on the other hand the creditor who is not entitled to interest has no means of recovering interest at a later stage."

That's drawing the Humber Ironworks problem, as it were. But then going on:

"Looking at what was then said by Sir John Pennycuick in Rolls-Royce ..."

The extract is here, but I will just give you the reference so you can annotate it. It is in the bundles at 1B, tab 52, and the passages cited here from the Cork Committee are at page 1591. That's 1B, 52, at 1591. Again, the whole discussion is in terms of the liquidation throwing up a surplus. Those are actually

the words that Sir John Pennycuick himself used on page 1591. Indeed he then went on:

"It seems fair that a creditor should be compensated for being kept out of his money during the period of administration if there turns out to be a surplus."

There's no contemplation there that this could have any effect upon contributories.

LORD JUSTICE LEWISON: I suppose you could say that the whole thrust of this report is to place corporate insolvency on the same footing as personal insolvency. In the case of a personal insolvent, there's nobody else you could look to to make up deficiencies; you just got what you got.

MR SNOWDEN: Yes.

LORD JUSTICE LEWISON: So why it should be different in the case of a corporate insolvency?

MR SNOWDEN: Well, I mean --

LORD JUSTICE LEWISON: If the purpose is to have a common code in situations which occur both in personal insolvency and in winding up?

MR SNOWDEN: As indeed they said in 1386.

LORD JUSTICE LEWISON: Yes. (Pause).

MR SNOWDEN: I think my Lord, I am --

LORD JUSTICE MOORE-BICK: Unlimited companies --

MR SNOWDEN: Sorry.

LORD JUSTICE BRIGGS: Unlimited companies, the idea that unlimited companies would have been more than a very, very tiny dark cloud in the minds of those discussing all this seems rather a long shot in this part of the discussion.

MR SNOWDEN: Unlimited companies perhaps, but members and contributories definitely not. Members and contributories were right in this debate, because of the appreciation of the effect that statutory interest could have on members. And so --

LORD JUSTICE BRIGGS: Yes, just in reducing what they would otherwise receive.

MR SNOWDEN: Correct. But it's not as if they don't feature in the debate at all. I accept your Lordship's point that at the time of the Cork Committee it may well have been that unlimited companies were not used in the same way as they have come to be.

LORD JUSTICE BRIGGS: And the notion of partly paid shares was also pretty well obsolete, dead and gone, by that stage.

MR SNOWDEN: But the idea of the effect of these changes to the regime on members was certainly in the Cork Committee's mind and you had some obvious -- it goes without saying, you've got some distinguished people on the Cork Committee --

LORD JUSTICE BRIGGS: Oh, yes.

MR SNOWDEN: -- who would be expected to have at least thought about the issue. I mean, not least because they were, for example, considering at the same time the problems that were thrown up in Lines Brothers for example. Again, what do we do if there is a solvent liquidation, all that sort of thing, when they are doing currency conversion claims.

So, you know, they are looking quite collectively -- I appreciate not with the specific lens of an unlimited company, perhaps. But the idea that they weren't interested in the effect that this new regime would have on the entirety of corporate insolvency and indeed the interests of members, that can't, with respect, be right. I don't think that is quite what you're putting to me.

LORD JUSTICE BRIGGS: No, but all one can detect, in their desire to have a proper interest provision in corporate insolvency, is an indifference to the thought that this will reduce the take by the members. They are quite content that it should reduce the take by members because statutory interest is the first call on the surplus. All there is a silence about is the question whether in that extremely rare case of an unlimited company or a company where there are partly paid shares,

which is almost as rare -- well, probably was as rare by this stage, by the time the Cork Committee was reporting -- there should be that additional burden on members who in an unlimited company have undertaken, at least at first blush, to be responsible for the whole of the debts and liabilities of the company.

MR SNOWDEN: My Lord, I can only point to what was there before the statutory regime and what came out of the statutory regime, which we say when you look at the working and the language used -- perhaps I will sign off, if I may, with one final point on the language actually used -- doesn't really allow for this.

The one other point that the judge made, sort of right at the outset of his analysis on this, he said, well, if you look at section 74, it talks about -- the critical words are "debts and liabilities", i.e. you make a contribution -- sorry, I will make sure I get it right. You make a contribution of an amount sufficient for the payment of its debts and liabilities.

Now, debts, it was accepted, means provable debts. In the judgment the judge accepted Mr Trower's submission that debts there meant provable debts. That is paragraph 156 of the judgment. But what the judge said is that, after an analysis of the statute, he concluded that where -- and this is paragraph 175. He

says:

"I consider Mr Trower is correct in his submission that where the legislation refers to liabilities instead of or as an addition to debts it does so because a reference only to provable debts would not be appropriate."

Just one signing off point, but in relation to liquidations we looked yesterday at section 107. Section 107 talks about:

"Subject to the provisions of this Act as to preferential payments, the company's property in a voluntary winding up shall on the winding up be applied in satisfaction of the company's liabilities pari passu."

No reference to debts at all. We have seen the authorities which indicate -- that's Danka and others. Danka, specifically at paragraphs 37 and 38, says that means the provable debts, the debts that result from the statutory process of proof.

Indeed, I will point out that it cannot include, in that wording, statutory interest. There are two reasons. One is statutory interest has come into being long after this wording has been employed in previous Acts and therefore in a sense acts as a separate direction to the liquidator as to what to do with the

1 surplus, but it's a separate statutory direction.
2 The one thing that definitely doesn't happen is that
3 statutory interest is certainly not paid pari passu with
4 provable debts. You pay provable debts pari passu and
5 then if there's a surplus you then pay statutory
6 interest, irrespective of the ranking of the debts.
7 So there's liabilities being used in an overriding
8 provision of the insolvency legislation in a way that
9 cannot encompass the payment of statutory interest and
10 used on its own.
11 So, with respect, the linguistic route that -- the
12 answer that the judge found just also is one that is
13 flawed.
14 I should just say by way of footnote, if I have
15 mentioned throughout this morning -- when I've been
16 talking obviously about liquidations, if I slipped and
17 mentioned Rule 228(7), of course that was an error.
18 That's the administration provision for statutory
19 interest. The liquidation provision is section 189.
20 Sorry, I think I may, thinking back, have slipped.
21 First of all, I think that's probably time for
22 a shorthand break.
23 LORD JUSTICE MOORE-BICK: Yes. Have you just about finished
24 your submissions?
25 MR SNOWDEN: I think I have. I will use it to check whether

1 anybody else wants me to make any other submissions at
2 this stage, but otherwise I anticipate handing over to
3 Mr Isaacs.
4 LORD JUSTICE MOORE-BICK: Thank you very much. We will rise
5 for five minutes.
6 (11.46 am)
7 (A short break)
8 (11.51 am)
9 MR SNOWDEN: My Lord, there's one sign off point, which is
10 simply I have dealt I think in the course of argument
11 with the point about whether the provision in section 74
12 for the adjustment of the rights of contributories
13 necessarily means that everything above that in the
14 waterfall, as it was put, must also be included within
15 a call. I have made the point that it's not the same
16 waterfall, certainly so far as non-provable liabilities
17 are concerned, and I've already made my submissions
18 about the express reason why statutory interest isn't
19 included in section 74.
20 The other points that we would want to make in
21 relation to that are made briefly in our skeleton at
22 paragraphs 70 to 72 and, because I know time is limited,
23 I would simply ask you to re-read those.
24 We do say it is, for example, quite possible to make
25 a call and, unlike -- the judge thought not, but we say

1 it is perfectly possible to make a call for a specific
2 purpose. We cite, for example, Yagerphone as an example
3 of where a recovery was made and treated as being made
4 for the benefit of particular creditors, rather than the
5 secured creditor. So it is perfectly possible for the
6 court to take the view that a receipt of monies by
7 a liquidator is for a particular purpose and to
8 ring-fence the call for that purpose.
9 That in outline are the points we make and I'm not
10 going to delay my learned friends at this stage. I will
11 come back to what may become more focused.
12 LORD JUSTICE BRIGGS: Could I just ask you one question?
13 I think I've understood your submissions about the
14 limitations on the scope of the statutory power to make
15 calls as applicable to all types of calls, that is
16 a call that reflects a contractual liability on a partly
17 paid share and a call that reflects the -- I'm not sure
18 it's contractual or not liability of a shareholder or
19 member of an unlimited company. Am I right in thinking
20 that that's the way you structure your submissions?
21 There's no separate power to make calls against the
22 contractual liability of a partly paid-up shareholder,
23 is there, that escapes this analysis?
24 MR SNOWDEN: At the risk of being accused of ducking the
25 submission -- and I will come back if I need to --

1 Mr Isaacs is saying to me he's about to deal with that
2 point.
3 LORD JUSTICE BRIGGS: Okay, fine.
4 MR SNOWDEN: So can I allow him to deal with that point.
5 LORD JUSTICE BRIGGS: It is just you've been making
6 submission, I wanted to understand what you were saying
7 when you made your submissions.
8 MR SNOWDEN: I have to say I've been focusing on the
9 relevant provisions for calls in this case and
10 I obviously can see there is a possibility that
11 a liquidator can make a call in relation to contractual
12 entitlements that the company might have, which I think
13 is what your Lordship is postulating, i.e. in relation
14 to partly paid shares.
15 LORD JUSTICE BRIGGS: We might have to look into the
16 difference, if there is one, between the contractual
17 liability on a partly paid share and the liability of
18 a member of an unlimited company.
19 MR SNOWDEN: Yes. But for present purposes, and it may be
20 we'll come back to it, Mr Isaacs may deal with it and he
21 may be able better to deal with it.
22 LORD JUSTICE BRIGGS: All right.
23 MR SNOWDEN: But I say that the judge's solution, namely
24 that the right to make the call was what belonged to the
25 company as an asset, can't be the right solution on any

1 footing. It's the assets when received or it's the
2 monies when received that form part of the assets.
3 Therefore, as far as statutory interest is concerned,
4 you cannot bootstrap yourself to create a surplus by
5 making a call. That's what it amounts to. I'm very
6 conscious, otherwise I am treading on other people's
7 toes. Unless your Lordships have anything more for me
8 at this stage --
9 LORD JUSTICE MOORE-BICK: No, thank you very much indeed.
10 Yes, Mr Isaacs.
11 Submissions by MR ISAACS
12 MR ISAACS: My Lords, I will make submissions on
13 paragraphs 8 and 5 of the judge's order in that order.
14 I will start with paragraph 8, by which the judge held
15 that LBIE acting by its administrators may prove in
16 a distributing administration or liquidation of its
17 contributories in respect of those companies'
18 liabilities under section 74(1) of the Insolvency Act.
19 Following the judge, I will call that liability the
20 statutory liability.
21 I submit that the judge was wrong because the
22 statutory liability is not a contingent liability within
23 the meaning of Rule 12.3(1) of the Insolvency Rules.
24 Rule 12.31(1) provides amongst other things that
25 contingent claims are provable as debts against the

1 company, and whether the statutory liability is
2 contingent depends on whether or not it falls within
3 Rule 13.12(1)(b).
4 It might be worth having that open.
5 LORD JUSTICE MOORE-BICK: Yes.
6 MR ISAACS: The question there is whether it is a debt or
7 liability to which the company may become subject after
8 the insolvency date by reason of any obligation incurred
9 before that date. That's the question that the court
10 has to focus on and that's the question that I will
11 focus on.
12 The meaning of that rule, Rule 13.12(1)(b) was the
13 subject of the recent decision of the Supreme Court In
14 re Nortel and Lord Neuberger distinguished in that case
15 between the liability arising after an insolvency event
16 as a result of contract and one arising pursuant to
17 a statute. I would like to refer to that. It's in
18 bundle 1C, tab 96. (Pause).
19 It is page 238. (Pause).
20 Now picking it up at paragraph 74, where he says:
21 "That issue thus centres on the meaning of the word
22 'obligation' in Rule 13.12(1)(b)."
23 And going down to 75:
24 "Where a liability arises after the insolvency event
25 as a result of a contract entered into by a company,

1 there's no real problem. The company insofar as it
2 imposes any actual or contingent liabilities on the
3 company can fairly be said to impose the incurred
4 obligation. Accordingly, in such a case the question
5 whether the liability falls within paragraph (b) will
6 depend on whether the contract was entered before or
7 after the insolvency event."
8 Then he carries on in 76:
9 "Where the liability arises other than under
10 a contract, the position is not necessarily so
11 straightforward. There can be no doubt that
12 an arrangement other than a contractual one can give
13 rise to an obligation for the purposes of
14 paragraph (b)."
15 He quotes from the Frid case and he says in 7F:
16 "However, the mere fact that a company could become
17 under a liability pursuant to a provision in a statute
18 which was enforced before the insolvency event cannot
19 mean that where the liability arises after the
20 insolvency event it falls within 13.12(1)(b). It would
21 be dangerous to try and suggest a universally applicable
22 formula, given the many different statutory and other
23 liabilities and obligations which exist. However,
24 I would suggest at least normally in order for a company
25 to have incurred a relevant obligation it must be taken

1 or have been subjected to some step or combination of
2 steps which ..."
3 And then he sets out three requirements.
4 It is the first and the third which are of
5 significance in this case. Number 1:
6 "Had some legal effect such as putting it under some
7 legal duty or into some legal relationship."
8 Then he sets out (b). And then:
9 "If these two requirements are satisfied it is also
10 I think relevant to consider (c), whether it would be
11 consistent with the regime under which the liability is
12 imposed to conclude that the step or combination of
13 steps gave rise to an obligation under 13.12(1)(b)."
14 In relation to that third requirement, if you turn
15 over to page 240, you see, at paragraph 86, he says:
16 "So far as the third requirement is concerned,
17 I would simply refer back to paragraphs 58 to 63."
18 It is necessary to go back to those paragraphs to
19 see what sort of considerations he had in mind. I would
20 be grateful if your Lordships could please read those
21 paragraphs.
22 LORD JUSTICE MOORE-BICK: 58 to --
23 MR ISAACS: 63. (Pause).
24 So what Lord Neuberger was doing there is looking at
25 the features of the statutory regime under which the

1 particular liability in that case was imposed. There
2 are three points I would like to make.
3 In 58, you see he considered whether or not it was
4 sensible and fair, to use his words, for a liability to
5 be treated as provable. In paragraph 61, he considered
6 the consequences if the particular liability under
7 consideration was in fact provable. In paragraph 63, he
8 was considering whether it was likely that it was
9 intended by the legislature that the liability would be
10 provable.
11 I submit that an analysis of the scheme and the
12 features of the statutory liability which are under
13 consideration in the present case show that it is not
14 one which is provable. I will first refer to the scheme
15 which creates the statutory liability and, secondly,
16 I will address a number of significant features of the
17 statutory liability to make that point good.
18 So if I can start with the statutory scheme itself,
19 what I would like to do is go through the principal
20 features of --
21 LORD JUSTICE LEWISON: Have you finished with Nortel?
22 MR ISAACS: I have, yes.
23 LORD JUSTICE BRIGGS: This is all for the purposes of
24 Lord Neuberger's test (c).
25 MR ISAACS: Yes, and also one. There are two requirements

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1 which are relevant, the third requirement which I've
2 just addressed you on --
3 LORD JUSTICE BRIGGS: That's (c).
4 MR ISAACS: That's (c) and I will pick up the first
5 requirement as well.
6 LORD JUSTICE BRIGGS: (a).
7 MR ISAACS: Not the second.
8 LORD JUSTICE BRIGGS: The concept of there being
9 a relationship with some legal effect.
10 MR ISAACS: Yes, what is the relationship. But the thrust
11 of my submissions will be on point (c), my Lord, and
12 I will submit it is clear from the features of the
13 scheme that statutory liability can't be provable unless
14 the company is in winding up.
15 So I will start by going through the relevant
16 provisions of the Act and the Rules pretty quickly. My
17 learned friend Mr Snowden has already touched on some of
18 them.
19 It starts at section 73 and the reason I mention
20 that one is that's the first section in Part 4 of the
21 Act which is "Winding up of companies registered under
22 the Companies Act". Section 73(1) provides that:
23 "Part 4 applies to the winding up of a company
24 registered under the Companies Act in England and Wales
25 or Scotland."

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1 And 73(3) provides that:
2 "This chapter and chapters 7 to 10 relate to winding
3 up generally except otherwise stated."
4 Consistently with this, the opening words of
5 section 74, which is the relevant provision, are:
6 "When a company is wound up."
7 Mr Snowden has read the rest of that section.
8 Then if we can turn over, please, to section 148
9 which relates to settling the list of contributories in
10 the application of the assets:
11 "As soon as may be after the making up of
12 a winding-up order, the court shall settle a list of
13 contributories with power to rectify the register in all
14 cases where rectification is required and shall cause
15 the company's assets to be collected and applied in
16 discharge of its liabilities."
17 Then section 149 provides that:
18 "The court may at any time after the making of
19 a winding-up order make an order on any contributory for
20 the time being on the list to pay in a manner directed
21 by the order any money due from him or from the estate
22 of a person who represents to the company exclusive of
23 any monies payable by him or the estate by virtue of any
24 call."
25 Then section 150, "Power to make calls":

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1 "The court may at any time after making a winding-up
2 order, and either before or after it is has ascertained
3 the sufficiency of the company's assets, make calls on
4 any or all of its contributories for the time being
5 settled on the list to the extent of their
6 liability ..."
7 And so on.
8 Section 154, which is "Adjustment of the rights of
9 contributories":
10 "The court shall adjust the rights of the
11 contributories amongst themselves and distribute any
12 surplus amongst the persons entitled to it."
13 Section 160(1):
14 "Provision may be made by rules for enabling or
15 require all or any of the following powers and
16 duties ..."
17 And then (b) is:
18 "The settling of lists of contributories and the
19 rectifying of the register of members where required and
20 the collection and application of the assets."
21 (d) is the making of calls:
22 "To be exercised or performed by the liquidator as
23 an officer of the court and subject to the court's
24 control."
25 162:

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1 "The liquidator shall not without special leave
2 rectify the register and shall not make a call without
3 either that special leave or the sanction of the
4 liquidation committee."
5 And then section 165 "Voluntary winding-up",
6 subsection (3):
7 "The liquidator may without sanction exercise any of
8 the powers specified in Part 2 and any of the general
9 powers specified in Part 3."
10 The power in Part 3 of Schedule 4 includes the power
11 under paragraph 6(a) --
12 LORD JUSTICE LEWISON: Schedule 4, isn't it?
13 MR ISAACS: Yes, this is Schedule 4, Part 3,
14 paragraph 6(a) --
15 LORD JUSTICE MOORE-BICK: Sorry, which page are we looking
16 at?
17 LORD JUSTICE BRIGGS: Give me -- ah, 4ZB.
18 LORD JUSTICE LEWISON: Paragraph 298. (Pause).
19 MR ISAACS: I might have a different section, I will come
20 back to that.
21 Yes, the liquidator may exercise the court's power
22 of settling a list of contributories, exercise the
23 court's power of making calls.
24 LORD JUSTICE LEWISON: Where are you?
25 MR ISAACS: I beg your pardon, I'm in 165. I've gone back

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1 one. Section 165, I beg your pardon.
2 LORD JUSTICE LEWISON: 165(4).
3 MR ISAACS: Yes.
4 LORD JUSTICE BRIGGS: 4(a) and (b).
5 MR ISAACS: 4(a) and (b) and section 165(5):
6 "The liquidator shall pay the company's debts and
7 adjust the rights of the contributories amongst
8 themselves."
9 And then Rules 4.195 --
10 LORD JUSTICE LEWISON: Are we looking at Schedule 4 or not?
11 MR ISAACS: No, I'm sorry, this is the rules now.
12 LORD JUSTICE LEWISON: Rule?
13 MR ISAACS: Rule 4.195 and following, and these rules
14 provide -- 4.195 says:
15 "The duties of the courts with regard to the
16 settling of the list of contributories are by virtue of
17 the rules delegated to the liquidator."
18 Then you'll see there are a number of rules
19 following which relate to the duty to settle the lists.
20 That takes you up to 4.201 and then 4.202 relates to
21 calls by the liquidator subject as follows:
22 "The powers conferred by the Act with respect to the
23 making of calls on contributories are exercisable by the
24 liquidator as an officer of the court subject to the
25 court's control."

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1 Which I believe Mr Snowden read.
2 There are further provisions, 4.203, 4.204 and 4.205
3 relating to the making and the enforcement of the call.
4 So that's the scheme of the Act governing calls and
5 the list and the adjustment. It will be seen that the
6 statutory scheme is a very comprehensive one and that it
7 imposes duties on the court, such as the duty to settle
8 the list and to make calls, which are delegated to the
9 liquidator and only to the liquidator.
10 In contrast, the Act and the Rules give no power to
11 the administrator to settle a list or to make calls in
12 respect of the statutory liability or to compromise
13 calls and liabilities to calls. (Pause).
14 LORD JUSTICE BRIGGS: What about paying surpluses back to
15 members at the end of a distributing administration
16 which produces a surplus? Do they have to put the
17 company into liquidation for that purpose? I should
18 know, but I confess I can't --
19 MR ISAACS: I don't think they do, my Lord. I will check on
20 that. But I believe that they do ... (Pause).
21 I will check the position, my Lord, on that.
22 I don't have the answer at my fingertips. Thank you.
23 The administrator does have a power to call up
24 unpaid capital and that's a power under Schedule 1,
25 paragraph 19.

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1 LORD JUSTICE LEWISON: Schedule?
2 MR ISAACS: Schedule 1, paragraph 19. That picks up
3 a distinction that I will come back to, and it's
4 a distinction which I believe my Lord
5 Lord Justice Briggs raised with Mr Snowden, which is the
6 distinction between the contractual liability to pay up
7 capital and the statutory liability under section 74.
8 That's an important distinction and it's one to which
9 I will return.
10 I will now turn to the features of the statutory
11 liability which have been established by case law.
12 There are four features I will focus on which relate to
13 the monies paid in respect of the statutory liability.
14 The first three of these features are helpfully
15 summarised and described by Lindley LJ in a case called
16 re Pyle Works and that's in bundle 1A at tab 24.
17 (Pause).
18 Your Lordship sees from the headnote at page 34 the
19 question in that case, reading from the paragraph which
20 starts:
21 "In 1889 a compulsory order was made for the winding
22 up of the company, the £4 per share being then uncalled.
23 The question then arose whether the several mortgagees
24 were entitled have to the calls to be made by the
25 liquidator in the winding up applied in payment of their

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1 mortgage debts in priority to the unsecured creditors."
2 The decision, held by the Court of Appeal, affirming
3 Stirling J:
4 "The calls to be made by the liquidator in the
5 winding up, including the calls on the shares of such of
6 the mortgagees as were shareholders were bound by the
7 mortgages and that the several mortgagees were entitled
8 to have the calls applied in payment of their mortgage
9 debts in priority to the general creditors."
10 Now, the first feature that I would like to draw
11 attention to is at page 582.
12 LORD JUSTICE LEWISON: I can't help noticing that the
13 judgment at first instance was given on January 13 and
14 the appeal was heard on March 18. That's pretty rapid.
15 MR ISAACS: It's an important case as well.
16 At 582 the point being made there is that the monies
17 are not caught by a power to deal with the capital of
18 the company. If I can pick up the point up at the
19 sentence starting "A power", which is about a third of
20 the way down. It says this:
21 "A power conferred by the articles of the company to
22 call up or to mortgage or otherwise deal with its
23 capital extends to it nominal capital and (unless
24 restricted in terms) to the whole of such capital. But
25 such a power does not extend to other monies, which,

1 although raisable in the event of a winding-up, form no
2 part of the capital of the company."
3 On that point also, just turning back to what
4 Cotton LJ said at page 574, at the bottom of the page.
5 Picking it up seven lines from the bottom, he says:
6 "We are considering the case of a call made in the
7 winding-up of a limited company ... In the case of
8 an unlimited or of a guarantee company, what can be
9 called for in the winding-up may not be, and I think is
10 not, considered as part of the capital of the company."
11 That's the first feature. The second feature is
12 that the monies paid in respect of the statutory
13 liability are never under the control of the directors
14 of the company and cannot be dealt with by them in any
15 way. The third feature is that those monies form
16 a statutory fund which only comes into existence when
17 the company is wound up.
18 We get both of those from Lindley LJ at page 584.
19 It's the first paragraph, where he says:
20 "There being no prohibition in terms against
21 mortgaging uncalled-up capital, is such a transaction
22 forbidden by necessary implication? That is, are there
23 provisions in the Act to which full effect cannot be
24 given if such a transaction is upheld? I can find none.
25 Those monies which are payable only on a winding-up, and

1 which by the Act are excluded from the capital of the
2 company, are never under the control of the directors,
3 and cannot, I apprehend, be dealt with them in any way
4 by them. Those monies form a statutory fund which only
5 comes into existence when the company is in liquidation,
6 that is to say when the powers of the directors have
7 ceased. But the uncalled-up capital is in a totally
8 different position. The liability to pay it up does not
9 depend on the contingency of liquidation. The power to
10 call it up can be exercised by the directors and all
11 money realisable in respect of it is an asset of the
12 company."
13 And also Lopes LJ at page 588. He refers to
14 Black & Co's case in the second paragraph and what
15 Mellish LJ had said. Then he goes on in the next
16 paragraph, referring to Lord Selborne:
17 "Lord Selborne, in the most clear and comprehensive
18 language, sums up his opinion at the end of his judgment
19 thus: 'I am clearly of opinion that it is not competent
20 for any persons whatever, by any antecedent contract, to
21 alter the administration of the assets of the company
22 under such a winding-up'."
23 Then he says in the next paragraph, Lopes LJ:
24 "I cannot help thinking that Lord Selborne, when he
25 used these words, intended to express an opinion that

1 there could be no anticipation of future calls in any
2 case so as to alter the administration of assets under
3 a winding-up."
4 I submit that those words are particularly apposite,
5 because a proof in respect of the statutory liability by
6 the directors or the administrator is in anticipation of
7 future calls which would alter the administration of
8 assets under a winding-up.
9 The fourth feature is that the monies payable in
10 respect of the statutory liability may only be called
11 for by the liquidator to meet the special demands of the
12 fund created on winding up.
13 The authority for that proposition is a case called
14 Ex parte Branwhite which is at tab 19 of this bundle,
15 a decision of Fry J. The issue in that case was whether
16 in the winding up of an unlimited company a contributory
17 had a right to set off debts due to him by a company
18 against calls made on him. The statutory liability is
19 discussed on page 653 in the left-hand column. If I
20 can pick it up where Fry J says:
21 "Then it is provided by the 75th section ..."
22 That's now section 80 of the Insolvency Act and he
23 sets out what that is.
24 LORD JUSTICE LEWISON: Sorry, 17th section?
25 MR ISAACS: I am sorry, my Lord, I am halfway down which

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1 says, "Then it is provided by the 75th section ..."
2 LORD JUSTICE LEWISON: 75th section, yes, got it.
3 MR ISAACS: He quotes that and I'm picking it up after that
4 He says:
5 "It appears to me to be clear that the liability to
6 contribute to the assets of the company while it is
7 a going concern and the liability to contribute to the
8 assets of the company when it is being wound up are
9 separate and distinct liabilities. The one created in
10 effect by the articles of association of the company and
11 the deed of settlement and its registration under the
12 16th section, the other arising only in the event of the
13 company being wound up. Those two liabilities appear to
14 me to be very different in their nature. The one
15 requires payment of the amount of the calls to the
16 company, the other requires payment of the amount of the
17 calls to the liquidator or officer of the court; in
18 a voluntary winding-up, to the voluntary liquidator. In
19 the one case the payment must be made according to the
20 discretion of the directors and in the other not, but
21 under the direction of the court or the voluntary
22 liquidator. One is for the general purposes of the
23 company and the other is to meet the special demands of
24 the fund created by the statute."
25 My Lords can put that bundle away, please. So in

1 each of those four respects, the statutory liability is
2 to be contrasted with the members' contractual liability
3 to pay unpaid capital and the distinction is reflected
4 in the wording of the relevant statutory provisions,
5 then as now. If one compares section 16 of the 1862 Act
6 with section 75 of the 1862 Act one sees the difference
7 and that's at bundle 3, tab 9. (Pause).
8 Section 16 is on the second page, down at the bottom
9 under "Articles of Association". It provides towards
10 the end of that long provision, after the semi-colon,
11 four lines up:
12 "All monies payable by any member to the company in
13 pursuance of the conditions and regulations of the
14 company or any other such conditions or regulations
15 shall be deemed to be a debt due from such member to the
16 company."
17 So crucial words "to the company" and that provision
18 survives and is now to be found in section 33 of the
19 Companies Act 2006. It is to be contrasted with
20 section 75 of the Companies Act, which is over the page,
21 and that provides:
22 "The liability of any person to contribute to the
23 assets of the company under this Act in the event of the
24 same being wound up shall be deemed to create a debt
25 accruing due from such person at the time when his

1 liability commenced."
2 And so on.
3 The keywords there are it's a liability to
4 contribute to the assets of the company, and not said to
5 be a debt due to the company but said to be accruing due
6 from such person.
7 LORD JUSTICE BRIGGS: It's a debt due to someone,
8 presumably.
9 LORD JUSTICE MOORE-BICK: What's the difference?
10 LORD JUSTICE BRIGGS: You can't have a debt that doesn't
11 have a person to whom it is due.
12 MR ISAACS: No, but the difference is the distinction that
13 I have been drawing, which is that one is a debt due to
14 the company for its general purposes and the other is
15 a liability to contribute to a special fund, which is --
16 LORD JUSTICE BRIGGS: It's still a debt.
17 MR ISAACS: Yes, it is still a debt.
18 LORD JUSTICE BRIGGS: So there must be a creditor.
19 MR ISAACS: Yes. It is payable to the company, but it is
20 a liability to contribute to a fund which is only set up
21 when the company is --
22 LORD JUSTICE BRIGGS: But you accept then it is still a debt
23 where the company is the creditor?
24 MR ISAACS: I do.
25 LORD JUSTICE BRIGGS: Right.

1 LORD JUSTICE LEWISON: Where the company is the creditor?
2 MR ISAACS: I'm sorry?
3 LORD JUSTICE LEWISON: You accept that the company is the
4 creditor.
5 MR ISAACS: I do accept that the company is the creditor.
6 So there are a number of consequences which follow
7 from the features of the statutory liability which are
8 set out in Pyle Works and In re Branwhite and each of
9 them is inconsistent with the learned judge's view that
10 the statutory liability is provable in an administration
11 of the company. It shows that it can't be provable
12 unless the company is in winding up. I will go through
13 each of those, there are six points I want to make.
14 The first relates to a sale or assignment of the
15 statutory liability and I would like to make that point
16 by reference a case called Ayala Holdings which is in
17 bundle 1B.
18 LORD JUSTICE BRIGGS: Just before you do, you very helpfully
19 gave us the modern equivalent of section 16 of the 1862
20 Act. I am assuming there is a modern equivalent of
21 section 75.
22 MR ISAACS: Yes, my Lord, it is section 80.
23 LORD JUSTICE BRIGGS: Section.
24 MR ISAACS: 80.
25 LORD JUSTICE BRIGGS: Of the Companies Act?

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1 MR ISAACS: Of the Insolvency Act.
2 LORD JUSTICE BRIGGS: The Insolvency Act.
3 MR ISAACS: You can put away bundle 3 and take out
4 bundle 1B, tab 62. This was a case which concerned the
5 effectiveness of an assignment by the liquidator of the
6 right to assert that dispositions of the company's
7 property after the commencement of the winding up were
8 void under section 127 of the Insolvency Act and that
9 charges on the company's property were void under
10 section 395 of the Companies Act.
11 I would like to pick it up at page 480. At
12 letter I, down at the bottom, where Knox J says:
13 "In my judgment, Mr Menzes' argument overlooks
14 an important distinction between property of the company
15 on the one hand and the rights and powers of
16 a liquidator on the other. The property of a company
17 includes rights of action against third parties vested
18 in the company at the commencement of the winding up
19 [and so on]. What is to be distinguished in my view are
20 the statutory privileges and liberties conferred upon
21 liquidators as such and indeed upon trustees in
22 bankruptcy who are officers under the court and act
23 under the court's direction."
24 If your Lordships turn over to 483B, he again then
25 refers to what he describes as the fundamental

1 distinction between the assets of the company and rights
2 conferred upon a liquidator in relation to the conduct
3 of the liquidation. The former are assignable by sale
4 under paragraph 6 of Schedule 4, the latter are not
5 because they are an incident of the office of
6 liquidator."
7 I submit that the right to monies paid in respect of
8 the statutory liability is of the latter kind, not the
9 former; and if the judge was correct the right to the
10 money paid in respect of the statutory liability could
11 be sold or assigned by the company, but on the authority
12 of Pyle Works and the distinction in this case it
13 cannot.
14 This case was considered by the Court of Appeal in
15 Oasis Merchandising which is at tab 67 of the bundle.
16 At page 182, a similar distinction was drawn by the
17 Court of Appeal at letter F, page 182 --
18 LORD JUSTICE LEWISON: 184?
19 MR ISAACS: 182, letter F.
20 LORD JUSTICE LEWISON: 182.
21 MR ISAACS: Agreeing with what was said by Robert Walker J
22 in an earlier case and the Court of Appeal say:
23 "It supports the distinction we would draw between
24 the property of the company at the commencement of the
25 obligation and property representing the same and

1 property which is subsequently acquired by the
2 liquidator through the exercise of rights conferred on
3 him alone by a statute and which is to be held on the
4 statutory trust for distribution by the liquidator."
5 Then your Lordships see in the next paragraph
6 reference to the case I've just referred to, you
7 Ayala Holdings.
8 The court held in this case that the liquidator had
9 no power to assign the fruits of an action for wrongful
10 trading and at 181, letter C to D, the court said:
11 "It would be very surprising if an administrator or
12 an administrative receiver who could continue to act
13 after a liquidator was appointed was empowered to sell
14 the fruits of a future action under section 213 or
15 section 214 by the liquidator."
16 We say exactly the same is true of the fruits of
17 a future call in respect of the statutory liability. It
18 is property which, in quoting from the Court of Appeal,
19 is subsequently acquired by the liquidator through the
20 exercise of rights convert on him alone by statute and
21 which is to be held on the statutory trust for
22 distribution by the liquidator.
23 I submit that the directors and administrators of
24 a company have no power to deal with a claim in respect
25 of the section 74 liability in exactly the same way as

1 they have no power to deal with the property held on
2 trust for distribution by the liquidator considered both
3 in Oasis and Ayala.
4 The second feature relates to charges and it follows
5 from the nature of the statutory liability and from
6 Pyle Works, we've already seen, that monies paid in
7 respect of the statutory liability can't be paid to
8 a chargee following the enforcement of a charge and that
9 the statutory liability itself or the asset representing
10 it can't be the subject of a charge or a mortgage.
11 My learned friend Mr Snowden referred earlier to
12 Re Yagerphone. That's authority for the proposition
13 that the fruits of a preference action, if charged, are
14 received by the liquidator, impressed in his hands with
15 the trust for those creditors amongst whom he has to
16 distribute the assets of the company. I don't need to
17 go to that but for your Lordships' note it is bundle 1A,
18 tab 41, page 392 and 396.
19 That is referred to in Oasis Merchandising at
20 page 181, down at the bottom, where their Lordships
21 refer to what Bennett J said In re Yagerphone that
22 a debenture charging the assets of a company didn't
23 cover money recovered by the liquidators from
24 fraudulently preferred creditors because it never became
25 part of the general assets of the company:

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1 "But when received by the liquidators was impressed
2 in their hands with the trust for those creditors
3 amongst whom they had to distribute the assets of the
4 company."
5 If the judge's decision below were correct on this
6 point and the directors or administrators of the company
7 were free to proof or -- and receive the fruits of
8 a call in respect of the statutory liability, they would
9 also be free to charge it and receive the proceeds; and
10 they're not.
11 LORD JUSTICE BRIGGS: Why do the two necessarily go
12 completely hand in hand?
13 MR ISAACS: Well, once you allow that the administrators or
14 the directors have the power to prove, you have to allow
15 that they have the power to deal with the asset. Once
16 they have the power to deal with the asset, they would
17 have the power to charge it.
18 LORD JUSTICE BRIGGS: Might they be obliged to put it in
19 a sort of pre-winding-up fund so as to be available for
20 the liquidator when the company went into liquidation?
21 So as to avoid, for example, the liquidator being quite
22 unable to recover in the insolvency of the member
23 because it is, for example, too late.
24 MR ISAACS: There are a number of problems with that,
25 my Lord, part from the fact that one doesn't find it

1 anywhere in the very comprehensive provisions which
2 govern calls and all the rest of it.
3 LORD JUSTICE BRIGGS: Well, no, because those provisions
4 aren't concerned with the solvent or otherwise corporate
5 or otherwise status of a member. You wouldn't expect to
6 find them there.
7 MR ISAACS: The fund is said on the authority of Pyle Works
8 to come into existence when the company goes into
9 a winding up.
10 LORD JUSTICE BRIGGS: I understand.
11 MR ISAACS: And Pyle Works is also authority for the
12 proposition that the asset can't be dealt with before
13 the winding up. So if the asset can't be dealt with it
14 can't be charged.
15 LORD JUSTICE BRIGGS: No, I understand all that. I am just
16 looking to see whether it follows, as night follows day,
17 though I can understand the analogy, that because you
18 can't charge or assign it, nonetheless it can't be
19 proved for in the insolvency of what Parliament
20 describes as the relevant debtor.
21 MR ISAACS: I accept that, my Lord. I think my approach --
22 it's not a logical syllogism in that sense, A implies B.
23 LORD JUSTICE BRIGGS: No, you may right be the analogy is
24 compelling. I'm just looking to see, if you like,
25 whether it is compelling.

1 MR ISAACS: I think the analysis, the logical analysis that
2 I am going through, is: you can't do this, you can't do
3 this, you can't do this and why can't you do it? They
4 are all examples of how you can't actually deal with the
5 asset before winding up of the company.
6 LORD JUSTICE LEWISON: Well, if you can prove for it, if the
7 administrator can prove for it, it wouldn't follow,
8 I imagine, that the proof could be valued one way or
9 another; and if it can be valued then those who are
10 administering the insolvent contributory would be able
11 to pay out the valuation. The question then is: if the
12 administrator receives something as a result of his
13 proof, what is he to do with it?
14 LORD JUSTICE BRIGGS: Yes.
15 MR ISAACS: Yes, quite, and where do you get the answer to
16 that? There is no -- the answer anywhere (sic). Of
17 course the main problem you have here is that, as
18 I believe your Lordship said yesterday, a company in
19 administration may emerge and continue to trade. So
20 what does it do with this money if it's going to emerge
21 to trade? And if it doesn't continue to trade, it's in
22 administration, it may never go into a winding up. I'll
23 come on to this later, but you have an asset which is
24 payable only in a winding-up that's paid in
25 an administration of a company which never goes in

1 winding up. The reason it is to be paid is to pay the
2 debts and liabilities in the winding-up and the expenses
3 of the winding-up, and for the adjustment of
4 contributories, and there may never be any.
5 LORD JUSTICE BRIGGS: But a possible answer might be that
6 an administrator wishing to prove might have to commit
7 to putting the company into winding up at the end of the
8 administration, if it flowed from these cases that any
9 proceeds of the proof, any realisation of what
10 Parliament calls a debt, which you accept is owed to the
11 company, is then to be held on a statutory trust in
12 accordance with the insolvency scheme, a sort of
13 Quistclose type of trust.
14 MR ISAACS: Well, my Lord, that's a creative solution --
15 LORD JUSTICE BRIGGS: I can quite see that that's a problem
16 if the administrator can do something completely
17 different with the money.
18 MR ISAACS: That is a very real problem.
19 LORD JUSTICE BRIGGS: Assume it's a distributing
20 administration. He would be distributing in the same
21 way, broadly speaking, as the liquidator would be
22 distributing if, instead of going into distributing
23 administration, he had simply put the money into
24 liquidation once it couldn't be rescued as a going
25 concern.

1 MR ISAACS: Yes. The problem is not at that end, it's at
2 the other end. The problem doesn't relate to the status
3 of the contributory, it relates to the status of the
4 company, because the company receives the proceeds of
5 a call and it doesn't have to be in administration at
6 all. The judge said it could be the directors who could
7 prove. Then it may be in a bad spot when he makes the
8 proof for the call because it is looks like it's going
9 to into liquidation but it doesn't, it emerges somehow
10 as a healthy trading company because it recovers
11 an asset, then it's got this money --
12 LORD JUSTICE BRIGGS: I can see all the problems about the
13 company itself by its directors proving; I am trying to
14 focus on where we are here, which is the company by its
15 administrator proving.
16 MR ISAACS: Yes. But if we're looking at the company, it
17 doesn't have to be a distributing administration, does
18 it? It could be a non-distributing administration.
19 LORD JUSTICE BRIGGS: Well, it happens to be here. Let's
20 focus on where we are here.
21 MR ISAACS: We have to test it against a non-distributing
22 administration. The judge said the directors can prove,
23 but even if you accept that's wrong and you say, "Okay,
24 it's just an administrator", then it has to be
25 an administrator in a distributing or non-distributing

1 administration. In a non-distributing administration,
2 what do you do? Does he have to pay the money back?
3 Your Lordship's creative answer is seeking to find
4 a solution to the problem where, really, the solution is
5 in Pyle Works, which is that you can do nothing to alter
6 the future administration in relation to calls. That's
7 what Lopes LJ says: you just can't do that. You can
8 only play around with the statutory liability when the
9 company is in winding up. Before then, it's completely
10 out of bounds for all purposes. That's the
11 straightforward answer to the question, rather than
12 assuming a different answer and then trying to --
13 LORD JUSTICE BRIGGS: But the purpose behind those
14 conclusions is that the proceeds of the debt must be
15 applied for the identified statutory purposes. If you
16 like, to serve, I think as you helpfully called it, the
17 demands of the fund created by the statute.
18 MR ISAACS: On winding up?
19 LORD JUSTICE BRIGGS: Yes. But if your contributory is
20 being wound up, such that, if you don't prove, it's
21 going to be dissolved and then you'll get nothing, why
22 are those statutory purposes served by a conclusion that
23 the -- the office holder, the administrator, in this
24 context, who is already in office and in a distributing
25 administration, can't get in in time by proving, which

1 seems to be far more destructive of the statutory
2 purpose to say in this particular context, "Well, the
3 fund will never get the money because it will be too
4 late", let's say, than to say, "Yes, it can be proved
5 for as a contingent debt, but it will have to be held on
6 a very special trust to serve the statutory purposes
7 thereafter".
8 MR ISAACS: Well, it's a question of statutory construction.
9 I would submit that the proper construction is the fund
10 doesn't come into existence until winding up. The
11 section has no bite. It's retroactive, like
12 section 127, and it just doesn't apply until you get to
13 a winding-up and that's the proper way to construe it.
14 You can't bring it back. I mean, the short answer --
15 LORD JUSTICE BRIGGS: But a distributing administrator is
16 creating a fund for statutory purposes which are almost,
17 but possibly not quite, indistinguishable from the
18 statutory purposes of the liquidation fund. Because a
19 (inaudible) is, as we currently sit here, a rather
20 half-thought-out solution to the problem, "Well, why
21 bother to put the company into liquidation if the
22 administrator can distribute?"
23 MR ISAACS: If your Lordship were correct, you would expect
24 to see the provisions that I have referred you to, which
25 all say something like "in the winding up of a company",

1 with -- in another section of the Act which say "in the
2 distributing administration of the company" and they
3 don't say it. In our submission would be you shouldn't
4 be rewriting the Insolvency Act. I will go on to --
5 LORD JUSTICE BRIGGS: I am just focusing on the bit that you
6 say is a debt which you accept is owed to the company.
7 MR ISAACS: Yes. But it's --
8 LORD JUSTICE BRIGGS: Because it must be a contingent debt
9 owed to the company, mustn't it?
10 MR ISAACS: That's the point I'm on. Whether or not it is
11 a contingent debt depends on Nortel and what is the
12 contingency? When is the obligation incurred?
13 LORD JUSTICE BRIGGS: Sorry, I wasn't meaning
14 a Nortel-compliant contingency. It is a debt which is
15 described as owing to the company when the call is
16 made --
17 MR ISAACS: Yes.
18 LORD JUSTICE BRIGGS: -- so that at least in abstract theory
19 at an earlier date it's a contingent debt.
20 MR ISAACS: Yes.
21 LORD JUSTICE BRIGGS: Whether it satisfies Nortel
22 I appreciate is the big question.
23 MR ISAACS: Thank you. Yes, that's exactly right. It is
24 a contingent debt and we say it is contingent on the
25 winding-up taking place.

1 LORD JUSTICE BRIGGS: Sorry, I have taken you out of your
2 course. (Pause).
3 MR ISAACS: The third feature relates to compromise.
4 I submit that the company is unable, before it is wound
5 up, to compromise its future statutory liability. If it
6 were and it made a full and final settlement of that
7 liability, it would render a subsequently appointed
8 liquidator unable to make a call on the member in
9 respect of the statutory liability. As I said above,
10 the liquidator is given the power to compromise calls
11 and liability to calls, but the administrator has no
12 such express power.
13 The fourth feature is dealing in the course of the
14 member's business. As I said in answer to my Lord
15 Lord Justice Briggs' question, the amount of the
16 statutory liability is, by section 74, sufficient for
17 the payment of the company debts and liabilities and the
18 expenses of the winding-up and for the adjustment of the
19 rights of the contributories amongst themselves. That's
20 what it says.
21 Now, if those monies were payable to the company
22 before it was wound up, the company could dispose of
23 them without restriction unless there were some implied
24 trust or sub-fund which one could fashion -- well, maybe
25 I am repeating the point. But the scheme relating to

1 calls and the list and the adjustment is a comprehensive
2 one, and I would submit it would be very surprising if
3 it were necessary to add to that in the way that would
4 be required if there were one of these trusts.
5 If there isn't a trust, the problem is that the
6 company might not use the money to discharge its current
7 debts and liabilities. In any event, there would be no
8 possibility of applying them in payment of the expenses
9 of the winding-up or the adjustment if the company never
10 went into winding up. That would be meaningless.
11 A company of doubtful solvency could remedy its
12 financial position by receiving such monies and, in
13 doing so, it would avoid the only situation in which
14 a call might be made -- that's to say winding up --
15 because it would get the monies and wouldn't go into
16 winding up. And it would at the same time undermine the
17 purpose for which the statutory liability is imposed,
18 which is to contribute to the statutory fund created on
19 the winding up.
20 The fifth point I would like to make relates to the
21 protections available to contributories in a winding-up
22 but not elsewhere. I want to make this point by
23 reference to Ayala Holdings. We've looked at that once
24 already, but I would like to show you something else in
25 a slightly different context. It's at 1B/62. (Pause).

1 483 letter G, where Knox J referred to what he
2 called the special provisions of section 167(3) and he
3 sets them out below. You see they provide that:
4 "The exercise by the liquidator in a winding-up by
5 the court of the powers conferred by this section is
6 subject to the control of the court and any creditor or
7 contributory may apply to the court with respect to any
8 exercise or proposed exercise of any of these powers."
9 LORD JUSTICE BRIGGS: Is that replicated in administration?
10 (Pause).
11 MR ISAACS: I will check, my Lord.
12 LORD JUSTICE BRIGGS: Don't do it now, but I would like to
13 know at some stage.
14 MR ISAACS: Yes.
15 What Knox J said in that case at letter I is:
16 "If Mr Menzies is right in submitting that
17 a liquidator can assign any of his powers, the assignee,
18 who is not a liquidator, would be free from any such
19 control and I find it very difficult to envisage that
20 Parliament could have contemplated that that was
21 a permissible state of affairs."
22 We say the same applies to the statutory liability.
23 The scheme imposing the statutory liability provides
24 protections and qualifications for the benefit of
25 contributories, and they apply only where the company is

1 in winding up.
2 LORD JUSTICE LEWISON: Subject to your answer to my Lord's
3 point?
4 MR ISAACS: Subject to the answer to my Lord, which may be
5 section 74.
6 Yes. Section 74, Schedule B1, allows a creditor or
7 a member to challenge the administrator's conduct. It
8 provides that:
9 "A creditor or member may apply to the court
10 claiming the administrator is acting or has acted so
11 unfairly as to harm the applicant's interests or
12 proposes to act in a way which would unfairly harm his
13 interests."
14 LORD JUSTICE BRIGGS: So a member could say, "By making
15 an administration" -- let's say it wasn't a distributing
16 administration and there was necessity for the company
17 to go into winding up, could then come along and say,
18 "You shouldn't be proving for this. It would unfairly
19 prejudice the protections afforded to me in the
20 winding-up."
21 MR ISAACS: It could say that, subject to the two answers to
22 that. The first, of course, is that would apply to
23 administrators not to a director.
24 LORD JUSTICE BRIGGS: No, I understand everything you say
25 about what directors can and can't do.

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1 MR ISAACS: The second point I will come on to is that the
2 provisions that I've already gone to, I went to at the
3 beginning of my submissions, are rather detailed and
4 they set out various protections in relation to the list
5 and the calls and the adjustment. This is a very
6 general provision.
7 Those provisions which I read actually all apply
8 only in the winding-up. So it may be that the court
9 would say "Ah, yes. Well, they apply in a winding-up
10 and we're in a distributing administration and I am
11 going to apply the rules as if we were in a winding-up."
12 But the rules don't say that they apply in
13 a distributing administration, so again you're having to
14 rewrite the Act and the Rules.
15 So there are two groups of protections I had in
16 mind. I've just said what the first are. They relate
17 to settling the list and making calls, those are the
18 provisions in Rule 4.202 and sections 148 and 165(4), so
19 I don't need to go back to them.
20 The protections provided for contributories in
21 a winding-up are those in Rules 4.196, 198, 199, 202 and
22 203, which I've taken your Lordships to.
23 The second point is a more general one. There isn't
24 an answer along the lines that your Lordships suggested,
25 because it relates to the adjustment of the rights of

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1 contributories amongst themselves. That is an even
2 greater problem for the judge's analysis, because the
3 court and the liquidator alone have the power to adjust
4 the rights of contributories under sections 154 and
5 165(5), and the directors and the administrators most
6 definitely do not.
7 Now, if the judge were correct, a contributory of
8 a company which was not in winding up, which has paid
9 a sum in respect of its statutory liability, does not
10 have the benefit of the adjustment.
11 LORD JUSTICE BRIGGS: If the company doesn't get wound up?
12 MR ISAACS: Yes.
13 LORD JUSTICE BRIGGS: Yes. But if a contributory had been
14 called upon or, rather, the contributory was in
15 an insolvency process and subject to proof at the hands
16 of the administrator, then, if the administrator's
17 company then went into liquidation, could he not seek to
18 have that taken into account on the adjustment of
19 rights?
20 MR ISAACS: But if this case is anything to go by, it might
21 be ten years later. It might be a bit late.
22 LORD JUSTICE BRIGGS: Yes.
23 MR ISAACS: In practical terms, that wouldn't help and it
24 might never go into winding up.
25 LORD JUSTICE BRIGGS: It might never have anything for --

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1 yes.
2 MR ISAACS: The point is you could have some other
3 contributories who were rather wealthy and you would
4 want to adjust inter se and you wouldn't be able to do
5 that because there is no mechanism for it, because the
6 mechanism for adjustment only works in a winding-up.
7 The point of the adjustment is to take account of
8 different amounts which contributories are paid. The
9 authority for that is a case called Moore's case, 1A,
10 tab 9. I don't need to go to it.
11 The judge sought to fashion an answer to this
12 conundrum. He said, at paragraphs 218 and 223, that
13 this could be reflected in the estimate of the member's
14 contingent liability. If we could turn it up, bundle C,
15 tab 4, page 89.
16 He said at the bottom of paragraph 218:
17 "Insofar as the member would be entitled to look to
18 other members to share in the liability in the event of
19 calls made in the liquidation, this can be factored into
20 the estimate of the member's contingent liability for
21 the purposes of proof."
22 He says the same thing over the page at
23 paragraph 223:
24 "This appears to be a matter which can be taken into
25 account in estimating the value of the claim, having

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1 regard to the amount which the company would be likely
2 to recover from other contributories."
3 The problem with that is there's no mechanism for
4 taking it into account in the estimate of the member's
5 contingent liability for the purpose of proof, nor is
6 there any mechanism for ascertaining how much the
7 company would be able to recover from other
8 contributories if it entered winding up at some
9 indeterminate future date and/or if other contributories
10 entered winding up at some indeterminate further dates.
11 Indeed, the list itself may never be settled and the
12 adjustment may never happen because they are features of
13 the winding up which may never happen, and because the
14 administrator has no power to settle a list or adjust
15 the rights of contributories.
16 So coming back to what Knox J said in
17 Ayala Holdings:
18 "If the power to prove in respect of a statutory
19 liability were exercisable by a director or
20 an administrator, these provisions would be bypassed and
21 it is difficult to envisage that Parliament could have
22 intended this."
23 The sixth point relates to the qualification of the
24 statutory liability, which is set out in section 74(2).
25 Will your Lordships please turn to section 74. (Pause).

1 The scheme of section 74 is that the liability to
2 contribute created by section 74(1) is subject to the
3 qualifications set out in section 74(2). Some of those
4 are better known than others, for example the
5 qualification that no contribution is required exceeding
6 the amount unpaid on the shares is very well known.
7 That's section 74(2)(d). But there are others and
8 I would like to focus on two of those.
9 The first is the qualification in section 74(2)(a),
10 which provides that:
11 "The statutory liability is subject to the
12 qualification that a past member is not liable to
13 contribute if he has ceased to be a member for a year or
14 more before the commencement of the winding-up."
15 That's inconsistent with the judge's decision.
16 I can illustrate it by reference to an example. Suppose
17 that in 2011 a member enters winding up and that the
18 company proves in the member's winding-up in respect of
19 the member's statutory liability to the company. That
20 all takes place in 2011.
21 In 2012 the member ceases to be a member of the
22 company and in 2014 C is wound up. Now, if the judge is
23 right, C was entitled to prove in M's winding-up in 2011
24 in respect of the statutory liability, but the effect of
25 section 74(2)(a) is that M has no liability to

1 contribute because it ceased to be a member of the
2 company more than a year before the commencement of the
3 company's winding-up.
4 LORD JUSTICE BRIGGS: But isn't that inherent in any
5 contingent debt?
6 LORD JUSTICE MOORE-BICK: I was going to say it is reverse
7 contingency.
8 LORD JUSTICE BRIGGS: You prove for a contingent debt,
9 recognising -- and that's a cardinal issue in the
10 valuation of your proof -- that the contingency may
11 never occur. So that in every case where someone
12 successfully proves and is paid out a distribution on
13 account of a contingency of a contingent debt, there is
14 the possibility that in the fullness of time and with
15 the benefit of hindsight it will be shown that the
16 contingency actually was never going to arise.
17 MR ISAACS: What you have in this case is you have
18 a liability in circumstances in which the statute
19 expressly provides there won't be a liability.
20 LORD JUSTICE BRIGGS: Yes. But that would apply to any
21 statutory liability which depended upon a contingency.
22 I think the logic --
23 LORD JUSTICE LEWISON: This is part of your Nortel point,
24 though, isn't it? That if the statute says "no
25 liability", it can't have been intended it should be

1 a contingent liability within the meaning of the rule.
2 MR ISAACS: Yes.
3 LORD JUSTICE LEWISON: Your overarching submission is, don't
4 start with the answer you want and work backwards to
5 find out how you get there; start with the scheme of the
6 Act and see where it takes you.
7 MR ISAACS: Well, I am grateful my Lord. That is certainly
8 my answer to my Lord Lord Justice Briggs' question, yes,
9 That is so. It is a question of statutory construction.
10 LORD JUSTICE MOORE-BICK: Is that a convenient point,
11 Mr Isaacs?
12 MR ISAACS: Thank you, my Lord.
13 LORD JUSTICE MOORE-BICK: Just help us, how are you getting
14 along?
15 MR ISAACS: I am getting along well, my Lord. I am on track
16 and I think we'll finish today.
17 LORD JUSTICE MOORE-BICK: We can't sit late this afternoon,
18 I am afraid.
19 MR ISAACS: I am grateful. I will talk to my learned
20 friend.
21 LORD JUSTICE MOORE-BICK: 2 o'clock.
22 (1.04 pm)
23 (The short adjournment)
24
25 (2.00 pm)

1 LORD JUSTICE MOORE-BICK: Is that clock right, or are we
2 just overenthusiastic?
3 MR ISAACS: I think the latter, my Lord.
4 LORD JUSTICE BRIGGS: It is slow.
5 LORD JUSTICE LEWISON: I make it 2 o'clock.
6 LORD JUSTICE MOORE-BICK: You are not going to get
7 two minutes after all.
8 MR ISAACS: I am grateful for that extra minute.
9 I would like to start with two points made to me by
10 my Lord Lord Justice Briggs this morning. The first
11 related to whether or not there's a power in
12 an administrator to make a payment to members.
13 LORD JUSTICE BRIGGS: Yes, thank you.
14 MR ISAACS: The answer to that I submit is no. The reason
15 to that distributions by an administrator are dealt with
16 under paragraph 65 of Schedule B1, which is at page 279
17 of the Red Book. What that provides is that:
18 "The administrator may make a distribution to
19 a creditor and permission is required if the creditor is
20 neither secured nor preferential."
21 LORD JUSTICE BRIGGS: That's paragraph --
22 MR ISAACS: Paragraph 65.
23 LORD JUSTICE BRIGGS: Yes.
24 MR ISAACS: Paragraph 66 says:
25 "The administrator may make a payment otherwise than

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1 in accordance with paragraph 65 if he thinks it's likely
2 to assist achievement of the purpose of the
3 administration."
4 That brings me on to my second point, which relates
5 to the trust that my Lord Lord Justice Briggs suggested
6 might be a way round this, a trust of the proceeds of
7 a court held by the administrator. I would submit there
8 is no power in an administrator or an administration to
9 create such a trust. The reason for that is because it
10 would not be consistent with the purpose of
11 administration.
12 The purpose of administration is set out in
13 paragraph 3 of Schedule B1. That provides, page 267 of
14 the Red Book:
15 "The administrator must perform its functions with
16 objective of:
17 "(a) rescuing the company as a going concern;
18 "(b) achieving a better result for creditors as
19 a whole than would be likely if the company were wound
20 up without first being in administration."
21 And (c) is:
22 "... realising property in order to make
23 a distribution to secured or preferential creditors."
24 The trust in the form contemplated by my Lord,
25 I would submit, does not fall within any of those.

1 I would like now to continue with my submissions.
2 I was on the qualifications to the statutory liability
3 in section 74. The second one I will address is the
4 qualification in section 74(2)(c).
5 What that provides is that a past member is not
6 liable to contribute unless it appears to the court that
7 the existing members are unable to satisfy the
8 contributions required to be made by them."
9 I submit that that provision can't operate unless
10 the court is able to form a view as to whether existing
11 members are unable to satisfy the contributions required
12 to be made by them. If each member is subject to proof
13 in respect of its statutory liability in its own
14 distributing administration or liquidation before the
15 company is wound up, the proofs will be payable on
16 variety of indeterminate dates, if at all, and the court
17 won't be able to form a view.
18 In contrast, if every member is subject to
19 a statutory liability when calls are made in the
20 company's liquidation, the statutory liability would be
21 payable by every member at the same time and the court
22 will be able to form a view. So that's another reason
23 why you can't prove before the company goes into
24 a winding up.
25 So those are the six features of the scheme that

1 I wanted to address, and I now propose to turn to
2 two cases that were relied on by my learned friends
3 below and also by the judge. They were relied on at
4 paragraph 143 of the judgment, which is at page 69 at
5 tab 4, bundle C.
6 (Pause).
7 The judge set out section 80 at paragraph 142.
8 That's the provision that provides:
9 "The liability of a contributory creates a debt
10 accruing due from him at a time when his liability
11 commenced but payable at the times when calls are made
12 for enforcing the liability."
13 He referred, at paragraph 143, to two cases which he
14 said held the liability of a member as a contributory
15 commences for the purposes of the section when he
16 becomes a member. They are Ex parte Canwell and
17 Williams v Harding. He said:
18 "The liability of a member to pay calls made before
19 a winding and in a winding up are both created at the
20 same time."
21 I make four submissions in relation to that
22 paragraph and they are as follows. The first is that
23 the two cases referred to are not authority in relation
24 to the proper construction of section 74 of the
25 Insolvency Act. They were both decisions on the meaning

1 of section 90 of the Bankruptcy Act 1861, and in
2 particular on whether a petitioner's debt was contracted
3 after the passing of that Act. That can be seen clearly
4 from the first of the two cases, Ex parte Canwell, which
5 is in bundle 1A, at tab 3. (Pause).
6 It is a very short report and picking up the facts
7 halfway down page 1028 at tab 3:
8 "The respondent who was a non-trader was an original
9 shareholder in the company which was being wound up as
10 an unregistered company under the Companies Act 1862 and
11 upon him, as a contributory, a call was made under the
12 order in the winding up. The call he neglected to pay,
13 he left the country under circumstances which it was
14 contended constituted an act of bankruptcy on his part.
15 If the court constituted a good petitioning creditor's
16 debt within the meaning of section 90 of the 1861 Act,
17 the Commissioner held the debt was contracted after the
18 passing of the Act and the present appeal was from his
19 decision."
20 The reasoning is over the page. Your Lordships see
21 about a third of the way down his Lordship read:
22 "The terms of the section proceeded thus. It is
23 difficult to tell when the liability referred to in this
24 section is to be considered as commencing, but my
25 present impression is that the legislature must be held

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1 to consider it as relating back to the date of the
2 contracts. But whereas under this section the
3 commencement of the liability must clearly be held to be
4 a period different from the time of the call being made
5 and it cannot be the date of the winding-up order, no
6 other date can be assigned for the commencement of such
7 liability than the date of the contract under which the
8 contributory became member. In that view of the
9 provisions of the 1862 Act, there would not be in this
10 case a petitioning creditor's debt within the definition
11 of the 90th section of the 1861 Act. There would be no
12 debt contracted."
13 LORD JUSTICE BRIGGS: Do we see section 75 set out anywhere?
14 MR ISAACS: Footnote 2. Yes, they are just below, "Debt
15 must be a debt contracted after the passing of the Act".
16 He says he will reserve the final judgment and then
17 your Lordship sees the final judgment which is two and
18 a half lines:
19 "Upon further consideration I adhere to the opinion
20 which I expressed at the conclusion of the arguments.
21 The Commissioner's order therefore was right."
22 So the reasoning in that case is exiguous in the
23 extreme. There is slightly lengthier reasoning in the
24 next case, which is Williams v Harding which is at the
25 next tab.

1 That case is different in this sense, that it was
2 a decision which related to the position before the
3 passing of the 1862 Act. There are two different ratios
4 in that case. The issue was the same as it was in the
5 case that we've already looked at. I would like to
6 start with the judgment of Lord Cranworth, the
7 Lord Chancellor, which is at page 21.
8 Please, my Lords, if you would read the paragraph
9 starting, "The question on the 90th section turned it
10 would be observed ..." and over the page, all the way
11 down to the paragraph that begins, "The conclusion".
12 (Pause).
13 So, my Lords, the Lord Chancellor decided the case
14 on the basis of a purposive construction of section 90,
15 which he said was intended to avoid the hardship which
16 would be inflicted on persons not in trade who, having
17 contracted debts before the passing of the Act, might,
18 by its operation, be subject to penal and other
19 consequences. That was the basis for his decision.
20 Lord Chelmsford decided the case on a different
21 basis and that's at page 26 at the top. Your Lordships
22 see there:
23 "Upon a review then of all the sections of the
24 winding up acts ..."
25 That's the acts before the 1862 Act. He took the

1 view that the case should be decided on the basis of
2 whether or not the official manager to whom the call was
3 paid was a creditor.
4 Your Lordships see down at the bottom of the page:
5 "The view of the question which I have taken
6 precludes the necessity of considering the elaborate
7 arguments which have been addressed to your Lordships
8 upon antecedent liability ..."
9 And so on.
10 And then at paragraph 28 is Lord Kingsdown and he
11 decided the point on the same basis as Lord Cranworth.
12 Your Lordships see that at the top of page 28 and your
13 Lordships see, halfway down page 29, he also took
14 a purposive construction and has regard to the object of
15 the Act which he says was to protect persons from the
16 consequences of ex post facto legislation.
17 So we say those cases are a very long, long way away
18 from whether or not the statutory liability is
19 a contingent liability for the purposes of the
20 Insolvency Act. That's the first point.
21 The second point is that we say that even if the
22 judge's reading of those two cases was correct, it
23 doesn't follow that the statutory liability is provable
24 before the company is wound up, having regard to the
25 features of the statutory liabilities which I've

1 addressed.
2 As I've said, Pyle Works is authority for the
3 proposition that monies payable in respect of the
4 statutory liability form a fund which comes into
5 existence only when the company is in liquidation.
6 So if one looks at Lord Neuberger's first
7 requirement now, rather than his third which I've been
8 focusing on, we would say that the relevant steps to
9 which LBIE must have been subjected that has legal
10 effect is the winding up, not the contract itself. The
11 legal relationship that one looks for and which
12 Lord Neuberger identified as being a requirement is
13 between the contributory and the liquidator, not between
14 the contributory and the company.
15 The third point we make is that the better view of
16 section 74 of the Insolvency Act is that it has
17 retrospective effect and it simply has no effect unless
18 and until the company is wound up. In this respect it's
19 like section 127, which invalidates dispositions of the
20 company's property after the commencement of the winding
21 up but only if the company goes into winding up.
22 I would like to refer to a few authorities to support
23 this proposition.
24 The first one is a case which was decided at much
25 the same time as Williams v Harding in the 1860s and

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1 also in bundle 1A at tab 13. It's called the
2 Financial Corporation Ltd v Lawrence. (Pause).
3 I refer to page 737, at the bottom,
4 Montague Smith J, who describes it in terms we would
5 commend to your Lordships. He says at the bottom of the
6 page:
7 "The clauses in Part 4 of the Companies Act 1862
8 speak only from the commencement of the winding-up of
9 a company. When they begin to speak no doubt for some
10 purposes they have a retrospective effect but at the
11 date of this deed they had not begun to speak."
12 There's more recent authority in which analogous
13 reasoning was applied --
14 LORD JUSTICE LEWISON: What are the clauses in Part 4 of the
15 Companies Act?
16 MR ISAACS: I'm sorry, they include the clauses that I'm
17 talking about in relation to contribution.
18 LORD JUSTICE LEWISON: Right.
19 Is this a section 127-type clause he's talking about
20 or a section 74-type?
21 MR ISAACS: Section 74.
22 LORD JUSTICE LEWISON: Right.
23 MR ISAACS: Yes, I am grateful. At the bottom of 733, my
24 Lord, he sets out the provisions he is considering,
25 section 74 and 75.

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1 LORD JUSTICE LEWISON: Oh, right, yes.
2 MR ISAACS: Which is provisions I've already taken
3 your Lordship to.
4 Then if we can jump forward to more modern times for
5 analogous reasoning in bundle 1B at tab 60, this is
6 a case called Mace Builders v Lunn. The question in
7 that case related to section 32(1) of the 1948 Companies
8 Act which invalidated certain floating charges. That
9 provision is now in section 245 of the Insolvency Act.
10 At page 199 the Master of the Rolls went to the
11 section and he said:
12 "I am left only with the section itself ..."
13 This is between B and C on 199:
14 "The opening words are where the company is being
15 wound up. The section thus has no application unless
16 and until the company is wound up."
17 We say the same thing applies to section 74. This
18 decision was followed by the Court of Appeal in a case
19 called Shoe Lace, Re Shoe Lace, which is at tab 63 of
20 this file, on different wording. If your Lordships go
21 to page 622, you'll see what the Court of Appeal there
22 said at letters C to E:
23 "It is true that the phrase 'where a company is
24 being wound up' which appears in section 322(1) at first
25 sight appears to denote a period which begins at the

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1 commencement of the winding up, namely in the case of
2 a compulsory winding-up the date of presentation of the
3 petition. In truth, however, as Mr Serota QC for the
4 liquidator pointed out, despite its wording,
5 section 322(1) like section 245 of the 1986 Act was
6 incapable of applying in the case of compulsory
7 liquidation until the winding-up order was actually
8 made. As soon as the order was made, it would relate
9 back to earlier transactions."
10 The fourth submission we make on those two cases is
11 that what I have just submitted to you is actually
12 consistent with what the judge said in relation to when
13 the obligation in relation to section 74 is in fact
14 incurred. I ask you, please, take the judgment,
15 bundle C, tab 4, page 75. (Pause).
16 At paragraph 167, down at the bottom, your Lordships
17 see that the judge actually said:
18 "Like the obligation to pay statutory interest, the
19 obligation of contributories under section 74(1) arises
20 only in a liquidation."
21 At paragraph 170, over the page, last sentence,
22 again he says the same thing:
23 "This does not, however, shed light on the extent of
24 the obligation imposed by section 74(1) which itself
25 only arises in the liquidation."

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1 And paragraph 182, page 79, where the judge says in
2 explaining why the contributory rule applies only in
3 winding up:
4 "The contributory rule was developed by the courts
5 on the basis of the statutory provisions relating to the
6 liability of contributories. It is a rule dictated by
7 the nature and the purpose of the obligation imposed on
8 contributories by the legislation in a winding-up."
9 So, my Lords, that's all I was proposing to say on
10 that paragraph of the judge's order. Subject to your
11 Lordships I was now proposing to turn to paragraph 5 of
12 the judge's order.
13 LORD JUSTICE MOORE-BICK: Right.
14 MR ISAACS: Now that was dealt with by the judge at
15 paragraph 127, which is at page 65 of this tab.
16 I can tell you first what the judge held. He held
17 that in a winding-up immediately following
18 an administration, creditors with interest bearing debts
19 are entitled to claim interest for the period of the
20 administration as a non-provable liability."
21 So, again, it's a question of whether there exists
22 a non-provable liability. LBHI submits that the judge
23 was wrong and there is no claim. We say that for two
24 reasons. The first is that the premise of the judge's
25 reasoning, namely that where there is a surplus

1 creditors are remitted to their contractual rights to
2 interest, is wrong. The second is that the consequences
3 of the judge's decision are inconsistent with the policy
4 of the Act.
5 I will take those two points in turn. If I could
6 then with the judge's reasoning in that single paragraph
7 and your Lordships see very clearly that the premise is
8 that creditors are remitted to their contractual rights
9 when there is a surplus.
10 We say that premise is false and it's inconsistent
11 with the statutory scheme which comes into effect upon
12 winding up. Now, this point was addressed by my learned
13 friend Mr Snowden to some extent and I will restrict
14 myself to points that he has not made.
15 I would like, first, to start by making reference to
16 Lines Brothers in the Court of Appeal.
17 LORD JUSTICE LEWISON: Can I just understand the factual
18 premise? The factual premise is that there is a surplus
19 in the hands of the administrator, that's the factual
20 situation we're considering?
21 MR ISAACS: We're considering the situation where the
22 company goes into liquidation and the question is
23 whether interest is payable in respect of the period of
24 the administration.
25 LORD JUSTICE LEWISON: Yes, but at the time it goes into

1 liquidation is there or is there not a surplus in the
2 hands of the administrator? Or immediately before it
3 goes into liquidation.
4 MR ISAACS: Yes.
5 LORD JUSTICE LEWISON: There is?
6 MR ISAACS: Yes.
7 LORD JUSTICE LEWISON: Right.
8 MR ISAACS: So if I can start then by reference to
9 Lines Brothers because that's puts the position neatly
10 in both the Court of Appeal and at first instance.
11 It's at 1B, tab 57. (Pause).
12 In the Court of Appeal I'd like to refer to what
13 Oliver LJ said at page 26, E to F. It's just the
14 dictum:
15 "This is the scheme of the statute and it does
16 undoubtedly result in certain circumstances in the
17 possibility of creditors getting less than their full
18 contractual entitlement, even in a fully solvent
19 liquidation."
20 There's a lengthier explanation of that at first
21 instance in the same case, the decision of Slade J,
22 which is in the previous tab, tab 56, at page 24. If
23 I can read the paragraph that starts just after halfway:
24 "When the winding up occurs the creditor obtains new
25 statutory rights to participate under the statutory

1 scheme of distribution in respect of his debt as it
2 exists at the winding-up date. For reasons already
3 given, however, the nature of this right will not
4 necessarily be the same as his original contractual
5 right. The statute may compel some adjustment of that
6 right, so that practical effects may be given to what
7 I have described as the two central features of the
8 statutory scheme. In some cases, the adjustment will in
9 the event be shown to have operated to the advantage of
10 the creditor concerned. In other cases it will be shown
11 to have operated to his disadvantage, as it has
12 unfortunately operated to the disadvantage of the bank
13 in the present case. The creditor, however, who lodges
14 with the liquidator a claim to be admitted as a creditor
15 must in my judgment accept the rights convert on him by
16 the statutory scheme of distribution in respect of
17 pre-liquidation debts, for better or for worse. Once
18 the liquidation has intervened, it is a fallacy for him
19 to assume that his original contractual rights against
20 the company are necessarily preserved intact under the
21 statutory scheme, even if in the event there proves to
22 be a surplus available for him for return to the
23 contributories or the payment of post-liquidation
24 interest."
25 That, we submit, is a correct statement of the law.

1 It can be illustrated by a number of different
2 categories of debt. My learned friend has referred to
3 set-off and disclaimer. He also referred to future
4 debts, contingent debts. The same can be said about
5 currency claims and interest claims.
6 As my learned friend Mr Snowden also said, the judge
7 accepted that payment of the amount proved in relation
8 to a future debt is payment of the debt in full.
9 So, for example, to take a simple example, if
10 there's a debt that's payable in 20 years and it is for
11 £1,000, it's discounted to £376 and, if that £376 is
12 paid, then the creditor receives £376 at the date of the
13 winding up, not £1,000. That £376 is a complete
14 discharge of his debt. He is never entitled to more
15 than £376, regardless of how solvent the company is; and
16 that shows that the creditor's rights are most
17 definitely affected by the statutory scheme. (Pause).
18 My learned friend says, quite rightly, he can't come
19 back for a second bite of the cherry. He's discounted
20 at 5 per cent because that's the interest rate provided
21 in the statute; and it doesn't matter what interest he
22 could get in the markets, it's fixed once and for all.
23 In relation to this part of the order, the judge
24 relied for the premise of his reasoning on the decision
25 in Humber Ironworks. He quoted what Giffard LJ said in

1 paragraph 127. He said:
2 "As Giffard LJ put it, the creditor whose debt
3 carries rights is remitted to his under his contract or
4 I would add to any other rights to interest which he may
5 enjoy."
6 As we've seen, the position under the -- sorry,
7 we've seen the judgment in Humber Ironworks. It's at
8 1A/12. I would just like to refer your Lordships to one
9 sentence, which is the sentence Giffard LJ quoted --
10 LORD JUSTICE MOORE-BICK: It is going to help us, is it, to
11 look at this for just one sentence?
12 MR ISAACS: I will tell you what it says.
13 LORD JUSTICE MOORE-BICK: I do sometimes question the value
14 of referring to an authority for what the judge has
15 actually said in one sentence because we all know that
16 sometimes --
17 MR ISAACS: Its significance --
18 LORD JUSTICE MOORE-BICK: -- these things take a lot of
19 colour from their context.
20 MR ISAACS: They do, my Lord. The reason I make this point
21 is because what the judge did, in paragraph 127, is
22 quote a half of a sentence, and I wanted to show you the
23 other half of the sentence because that rather informs
24 the judge's approach.
25 LORD JUSTICE MOORE-BICK: I see. Right. Which bundle?

1 MR ISAACS: It is 1A/12 page 647. The bit that the judge
2 quoted is down at the bottom. It says:
3 "The creditor whose debt carries interest is
4 remitted to his rights under his contract."
5 And then he stops. What he doesn't quote is:
6 "And on the other hand a creditor who has not
7 stipulated for interest does not get it."
8 Now, it is rather important that you actually have
9 regard to the whole of the sentence because that bit
10 that he didn't quote is no longer true. It's false.
11 The creditor who has not stipulated for interest does
12 get it now and that makes the point very nicely that
13 Humber Ironworks is no longer good law because the
14 rights to interest have been replaced by the statutory
15 rights to interest --
16 LORD JUSTICE LEWISON: Strictly speaking he quoted a sixth
17 of a sentence and you've quoted a third.
18 MR ISAACS: Yes. That's very helpful from my learned
19 friend, he said I've discounted it to the present value.
20 But, yes, you're quite right, my Lord. I accept that
21 I didn't quote the whole thing either.
22 The reason for that, as I say, is because the
23 contractual right for interest is actually replaced or
24 substituted by a statutory right to receive interest out
25 of any surplus and indeed the judge himself accepted in

1 other parts of his judgment that that was the case.
2 So if my Lords turn to page 53 of the judgment, he
3 says in paragraph 86 about two-thirds of the way down --
4 there's a sentence that's starts a third of the way
5 along the line:
6 "Such interest ceases to be payable from the date of
7 the commencement of the insolvency process and is in
8 effect replaced by the right to payment of statutory
9 interest out of the surplus remaining after payment in
10 full of approved debts."
11 Similarly, at page 72, paragraph 154, at the end of
12 paragraph 154 he refers to the substitution under the
13 insolvency legislation of statutory right for
14 non-provable contractual interest. (Pause).
15 So we say that a creditor is most definitely not
16 remitted to his contractual rights and is not remitted
17 to his contractual rights to interest. The creditor's
18 right to interest is that set out in the Act and the
19 Rules, and that's it. There's no bifurcated obligation
20 or entitlement to interest. It's the rules or nothing.
21 Indeed, perhaps unwittingly, LBIE would appear to
22 accept this in its skeleton argument, bundle E, tab 1,
23 page 11, paragraph 32, where they say:
24 "Rule 288 provides a complete code for the payment
25 of statutory interest relating to the period of

1 an administration and section 189 is in this context
2 inapplicable and unnecessary."
3 We say that that's right and the Insolvency Act and
4 the Insolvency Rules provide a complete code for the
5 payment of interest.
6 The second point I want to make in relation to the
7 judge's order --
8 LORD JUSTICE BRIGGS: You say what might be thought of at
9 first sight as the lacuna under which -- if
10 a liquidation follows administration, then even though
11 there was a surplus in the administration, if it hasn't
12 been used to pay interest then the right to interest
13 during the administration period disappears, is, albeit
14 on one view a lacuna, on another view just part of the
15 code.
16 MR ISAACS: I would say that, my Lord, and there's authority
17 to the effect that if that is the proper construction of
18 the Act and the Rules, then it's not for the court to
19 seek to fill the gap. That's the Nortel case and
20 Portsmouth City FC. Just for your Lordship's note it is
21 1C, tabs 95 and 96, paragraph 125 to 127 of Nortel and
22 paragraph 35 of the Portsmouth case. (Pause).
23 Your Lordship may remember that.
24 LORD JUSTICE BRIGGS: Yes.
25 MR ISAACS: So the second point relates to the consequences

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1 of the judge's decision. I say there's a significant
2 consequence which is inconsistent with the policy of the
3 Act if creditors revert to their contractual rights to
4 interest.
5 The way this arises is the position as regards
6 statutory interest in administration under Rule 288(7)
7 and winding up under section 189(2) is in materially the
8 same terms as in bankruptcy under section 328(4).
9 In each case, statutory interest is payable from the
10 surplus remaining after payment of the debts proved
11 since the commencement of the insolvency process. My
12 Lord Lord Justice Lewison read the part of the Cork
13 Report where it talked about interest being a consistent
14 scheme in personal bankruptcy and corporate insolvency,
15 and indeed it is.
16 Now the problem with that is if an unpaid
17 contractual liability to pay interest did survive the
18 insolvency process, a bankrupt would not be released
19 from that liability upon his discharge. The reason for
20 that is that the bankrupt is only released from
21 bankruptcy debts under section 281(1) and any such
22 interest would not be a bankruptcy debt. I would like
23 to make that goodbye reference to section 382 of the Act
24 which defines bankruptcy debts. (Pause).
25 Section 382(1) in relation to a bankrupt means

1 subject to an exception "any of the following".
2 Your Lordships see that under (d) it says:
3 "Any interest provable as mentioned in
4 section 322(2)."
5 Section 322(2) is interest prior to the commencement
6 of the bankruptcy, pre-bankruptcy interest.
7 So we say that if there was any interest which was
8 to fall within a bankruptcy debt, it would be treated
9 separately, just as pre-bankruptcy interest is treated
10 separately.
11 If post-bankruptcy interest or statutory interest
12 were to be treated as a bankruptcy debt, it would also
13 be in a separate subsection and it isn't. The reason
14 for that is because it's not a bankruptcy debt. So the
15 bankrupt isn't released from the liability to pay
16 statutory interest. If that's right, if he was still
17 subject to an obligation to pay contractual interest,
18 that would continue to run, it wouldn't be paid and he
19 would be liable to be adjudged bankrupt again on the
20 petition of a creditor in the first bankruptcy, save
21 where that interest had been paid in full. That would
22 go on and on until all his interest was paid and he
23 would be exposed to further bankruptcies based on unpaid
24 statutory interest.
25 This would undermine one of the main aims of the

1 bankruptcy regime. My learned friend Mr Snowden took
2 you to one or two cases in which it was set out.
3 Another one is Ex parte Hide -- I won't go to it, but it
4 is at bundle 1A, tab 14, page 32 -- where James LJ said
5 that one of the main aims of the bankruptcy regime was
6 to enable the bankrupt to be freed from debts,
7 contracts, liabilities, engagements and contingencies of
8 every kind.
9 I would submit that it can't have been intended by
10 Parliament when it passed the 1986 Acts that that was
11 the effect, and the reason that that isn't the effect is
12 because that creditors don't revert to their contractual
13 rights to interest. Rather, the Act and Rules provide
14 a comprehensive code.
15 That's what I wanted to say about that part of the
16 judge's order. My learned friend Mr Wolfson will pick
17 up some points in relation to the extent of the members'
18 liability under section 74, and that's also been
19 addressed by my learned friend Mr Snowden.
20 LORD JUSTICE LEWISON: Can I ask you about Rule 288?
21 MR ISAACS: Yes, my Lord.
22 LORD JUSTICE LEWISON: The factual premise that we're
23 working on is that the administrator has paid provable
24 debts and there is a surplus in his hands, if I've
25 understood correctly. That's what I asked you before.

1 MR ISAACS: I'm not sure if he's paid provable debts. Yes,
2 okay, my Lord.
3 LORD JUSTICE LEWISON: Sub-rule (7) says:
4 "Any surplus remaining after payment of the debts
5 proved shall, before being applied for any purpose, be
6 applied in paying interest."
7 Why is that not a general statement of what is to
8 happen to the money? So that before, for example, it is
9 given to the liquidator or even when it reaches the
10 liquidator, it is charged with a statutory requirement
11 to pay interest since the date on which the company
12 entered administration -- before it can be used for
13 anything else at all, including liquidation expenses.
14 MR ISAACS: I think my target, my Lord, was the idea that
15 there's --
16 LORD JUSTICE LEWISON: Reversion to contract.
17 MR ISAACS: -- a reversion.
18 LORD JUSTICE LEWISON: I understand that. But assume
19 there's no reversion to contract and Rule 288 is the
20 complete code. Why doesn't sub-rule (7) tell you that
21 before you do anything else with the surplus in the
22 administration, you must pay statutory interest? It's
23 not framed as a direction to the administrator, it's
24 just framed as a general statutory command.
25 MR ISAACS: I think if there is a surplus, that may well be

1 right, my Lord, if there is a surplus.
2 LORD JUSTICE LEWISON: Right. That's why I asked you, what
3 was the factual premise that we were working on? If
4 there is no surplus in the hands of the administrator,
5 then I can see that Rule 288(7) doesn't really get you
6 anywhere. But if there is, I don't at the moment see
7 why sub-rule (7) doesn't tell you exactly what you do
8 with it.
9 MR ISAACS: My Lord, I was on a slightly point which is it
10 depends what one means by the surplus. I think your
11 Lordship may have it in mind that the surplus means the
12 surplus in cash.
13 LORD JUSTICE LEWISON: I mean the surplus after payment of
14 the proved debts.
15 MR ISAACS: Yes, but then the question is whether that means
16 there's a cash surplus or whether it means the surplus
17 of assets -- which may not be cash, may not yet be
18 realised. Then how does one decide whether there is
19 a surplus where there are unrealised assets? I think
20 your Lordship would be right if the surplus means
21 surplus in cash.
22 LORD JUSTICE LEWISON: Right.
23 LORD JUSTICE BRIGGS: In that sort of context, if it was
24 a cash surplus, the administrator would presumably be
25 paid out in statutory interest before handing over to

1 the -- before putting the company into liquidation?
2 MR ISAACS: Yes, that, as I understand it, is the point made
3 by --
4 LORD JUSTICE BRIGGS: No, I think my Lord's point was even
5 if he didn't hand the surplus over to the liquidator
6 288(7) would still bite. I think that's my
7 understanding. It simply binds the fund and charges the
8 fund with that payment, using charge with a small "c",
9 perhaps.
10 But the sort of situation we're concerned with here,
11 as I understand it, is where the process of identifying
12 whether there are any and if so what debts payable prior
13 to statutory interest is still ongoing. One of the
14 reasons we're here is to see whether the subordinated
15 debts get paid before statutory interest.
16 Therefore, there might, in philosophically abstract
17 theory, be a surplus; but until this has all been
18 finally decided there isn't something which the
19 administrator can say: here is the surplus now available
20 today. Yet, if he thinks, well, nonetheless for all
21 sorts of other good reasons the time has come to put
22 this company into liquidation, say for example the
23 liquidator made a call on contributories, that would
24 kill off any prospect, if a surplus then accrued, of
25 that surplus being applied in satisfaction of the

1 statutory interest apparent entitlement of the creditors
2 in the administration. But that's the problem we're
3 currently in, isn't it?
4 MR ISAACS: Yes.
5 LORD JUSTICE BRIGGS: To which the concept of a charge on
6 an identified surplus might not apply, you say, or
7 wouldn't apply.
8 MR ISAACS: As I understand the position that's correct,
9 my Lord.
10 Sorry, there was one last point --
11 LORD JUSTICE BRIGGS: Just following this through, there may
12 even be a cash fund. The assets may all be in cash by
13 this stage, but the administrator still doesn't know
14 whether it's a surplus or not.
15 MR ISAACS: Yes. Yes. My Lords, I want to make one last
16 point, if I may. My learned friend Mr Snowden made the
17 point that consistently with the natural meaning of the
18 words "any surplus remaining" in section 189 or
19 Rule 288(7) statutory interest is payable to the extent
20 that there is a surplus remaining after payment of the
21 debts proved, such that the company has no liability to
22 pay statutory interest independently of the surplus.
23 That's a very important point and it's important to note
24 that LBIE actually concede that point.
25 If your Lordships turn to bundle E, tab 5, page 104,

1 paragraph 75, your Lordships see the sentence halfway
2 down:
3 "LBIE does not say that the obligation to pay
4 statutory interest arises independently of the surplus.
5 The obligation is one to pay statutory interest to the
6 extent of surplus."
7 Now, the reason that is a significant and important
8 concession is because this is an acceptance that the
9 obligation to pay statutory interest replaces any prior
10 obligation to pay contractual interest. Let me explain
11 by reference to an example. Suppose the debts proved in
12 an insolvency are £1 million and they bear contractual
13 interest at 10 per cent, and the date of payment is
14 a year after the winding up. Suppose also that there's
15 a surplus of £50,000. Now, if statutory interest
16 existed independently of the surplus, the interest
17 payable would be the contractual interest of 10 per cent
18 on 1 million, which is £100,000. But if, as LBIE
19 concedes, the statutory interest is payable to the
20 extent of the surplus, then statutory interest of only
21 £50,000 is payable.
22 In other words, once it is accepted that statutory
23 interest replaces contractual interest, it's accepted
24 that there's no reversion to contractual rights in the
25 event of a surplus. We would submit it is inconsistent

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1 with LBIE's position in relation to paragraph 4 of the
2 order, which is based on contractual rights to interest,
3 and also inconsistent with its position on currency
4 conversion claims.
5 LORD JUSTICE MOORE-BICK: I have to say I hadn't read
6 paragraph 75 in that sense because I hadn't fully
7 understood it.
8 MR ISAACS: It is an important point, my Lord, you can see
9 because there are two ways of doing it. One is there is
10 a replacement of one right with another.
11 LORD JUSTICE MOORE-BICK: I just hadn't read paragraph 75 as
12 containing the concession which you identify. But
13 perhaps I --
14 MR ISAACS: The key point is the obligation is to pay
15 statutory interest to the extent of the surplus.
16 LORD JUSTICE MOORE-BICK: Just the quantification of it?
17 MR ISAACS: It says the obligation, my Lord. It may be that
18 I've misunderstood it. But if what's being said is
19 there's no replacement so that there is still
20 a contractual right to interest at 10 per cent in my
21 example, then you have the bifurcated obligation and you
22 have the problem that there is no reversion to
23 contractual rights. But I will come back to that, if
24 I have misunderstood it, in reply.
25 So, my Lord, that's all I was proposing to say,

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1 unless there were any further questions?
2 LORD JUSTICE MOORE-BICK: No, thank you very much indeed.
3 MR ISAACS: Thank you.
4 LORD JUSTICE MOORE-BICK: Mr Wolfson.
5 Submissions by MR WOLFSON
6 MR WOLFSON: As your lordships know we appeal on two issues,
7 the currency conversion claims point and the scope of
8 the liability of contributories under section 74.
9 Of course, as your Lordships will appreciate,
10 certain of the issues which LBHI2 and LBHI are appealing
11 but we are not will, if successful, also enure to our
12 benefit and some of those are declarations 5, 8, 9 and
13 10.
14 Your Lordships will also appreciate, perhaps this is
15 why I am seated in the place I am, that on the
16 subordinated debt point -- of course on that point I'm
17 allied with the gentlemen on my right. I'm not going to
18 say anything about it but that's the way the scheme is.
19 LORD JUSTICE MOORE-BICK: Yes.
20 MR WOLFSON: So, my Lords, in the time I have I propose to
21 make submissions on the currency conversion point and
22 then the section 74 point. This is now fairly
23 well-trodden ground so I am going to try to focus on
24 points which really are new or different, but obviously
25 we adopt what has been said before.

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1 My Lords, we have seven points. I'm not going to
2 develop them all, but just to identify the seven key
3 points we make.
4 First, the legislation expressly requires conversion
5 to take place at the date of entry into administration
6 or liquidation and that applies whether the company is
7 solvent or insolvent.
8 Second, we rely on what the Law Commission and the
9 Cork Committee report said about there being a once for
10 all conversion date both for solvent and insolvent
11 proceedings.
12 Third, the Act and the Rules make no provision for
13 a residual currency conversion claim.
14 My Lords, those three points have been developed in
15 some detail by Mr Snowden, so I'm not going to say
16 anything more about any of those.
17 Fourth, allowing such claims will give rise to
18 asymmetry and injustice because it provides the foreign
19 currency creditors with what we've called the one-way
20 bet option.
21 I do want to take your Lordships to the actual issue
22 that Brightman LJ that was dealing with
23 In re Lines Brothers to make good that point. In short,
24 as we'll see, he was operating on the basis that to
25 allow these claims would give rise to symmetry because

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1 of the particular way the point had been put to him and
2 that's a point which I don't think has been impressed on
3 your Lordships so far.
4 Fifth, the one-way bet would operate unfairly
5 against the members. I will develop that shortly.
6 Sixthly, and importantly, the one-way bet would
7 impose the risk of future exchange rate fluctuations,
8 not only on the members. I will develop this point if
9 I may. This has been characterised as a sort of
10 a two-horse race between the foreign currency creditors
11 and the members, but of course it's not. This is said
12 to be a non-provable claim. Therefore, the tort
13 claimant who has a non-provable claim -- who has, for
14 example, suffered a catastrophic injury the day after
15 the company went into administration but is still
16 trading -- also takes the risk of the foreign currency
17 movements because the currency conversion claims we are
18 told will rank essentially as an unprovable claim and
19 certainly the way it has been put is that they will be
20 pari passu within that class.
21 Seventh, and last, we submit there will be
22 fundamental difficulties in valuing currency conversion
23 claims. We'll draw attention to some of the points
24 which have been made in Waterfall II in that regard.
25 So, my Lords, to take the particular points I seek

to address your Lordships on in order. First, the one-way bet point.

As the learned judge noted, at paragraph 97 of the judgment, if sterling appreciates against the foreign currency between the date of conversion and the date of payment, there's no suggestion that anybody is going to pay anything in. To quote the learned judge:

"There is no suggestion by anyone that in those circumstances the foreign currency creditor must refund the amount of the excess to the company in liquidation."

Indeed, I don't understand my learned friend Mr Dicker, who I think is going to lead on this point, to acknowledge that in this court either.

My Lord, this point is critical not only as an abstract point of fairness or unfairness, but because it goes to the very way the point was argued and put to Brightman LJ in Re Lines Brothers itself. The potential problem of asymmetry was not appreciated by Brightman LJ in making the obiter remarks he did In re Lines Brothers and indeed quite the contrary. His Lordship there was assuming that in the scenario of appreciating sterling, the liquidator could discharge the obligation in the currency of the contract.

Let me make that good by taking your Lordships to Lines Brothers itself. (Pause).

My Lords, that's at 1B, at tab 57. If we pick it up, my Lords, the central passage really starts at the bottom of page 20 and goes over to sort of halfway down on page 21. As your Lordships see, if we pick it up at 20, H the example is put -- I'm not going to read it out, your Lordships have seen it. Then just between A and B on 21:

"Suppose wherever a company goes into voluntary liquidation ..."

He is now dealing with a case where it is devalued, sterling has gone down.

"And the Swiss creditor would on the liquidator's argument receive less than his due entitlement in Swiss francs."

And then the important sentence, "per contra":

"Per contra, if sterling had been revalued upwards [i.e. appreciated] it would, it is said, be open to the liquidator, like any other foreign currency debtor, to discharge the company's obligation in the currency of the contract."

Then we get the next important sentence:

"So, in the end, the foreign currency creditor will get the worst of both worlds. He will gain nothing if the exchange rate moves against the currency of the contract and he will lose if it moves in favour of the

currency of the contract."

Then he says:

"This is not a problem we're directly concerned with."

What is "this"? This is the problem that the foreign currency creditor is going to be worse off. For your Lordships' note the same point had been addressed by Slade J, as he then was, in the first instance judgment. Because of time can I just give your Lordships the reference, it's at tab 56 and it is page 17 of that report.

Your Lordships will see that there's an exchange between the learned judge and Mr Stubbs QC essentially on the same point.

So it is important to appreciate, in my respectful submission, quite what the issue was In re Lines Brothers that the learned judge was dealing with. But, of course, in light of the express provision in the rules requiring conversion into sterling as at the date of the winding up, Rules 286 and 491, this would not be open to a liquidator anymore. The liquidator has to pay in sterling and, indeed, the unsecured claims in LBIE's administration have been paid in sterling.

So, my Lords, the point is this. Brightman LJ

considered currency conversion claims might be a solution to the problem posed, but the problem put to the learned judge was the lack of symmetry if the claims were not to exist, on the premise that if sterling appreciated the liquidator could pay in foreign currency. That premise, my Lords, is no longer a good one for the reasons I have submitted.

Therefore, we say, with respect, that Brightman LJ's obiter consideration of this issue was on a fundamentally different premise to that now before your Lordships.

So that's the point we make on the one-way bet arising out of the issue before Brightman LJ and the approach he took to resolve the issue which had been put to him.

My Lord, the second submission we make in the context of currency conversion claims is that it operates unfairly vis-à-vis the members.

Necessarily, of course, if the creditor gets paid a certain sum in sterling but because of currency movements since the date of the winding up, at which time obviously the rate is set, he should have received in fact less than that sum and there is a surplus after paying all other creditors, the effect is that the creditor has taken funds from the members because the

1 surplus will now be lower than it otherwise would have
2 been.
3 Now, my Lords, Brightman LJ in Re Lines Brothers
4 used the adjective "undeserving" when referring to the
5 members. And, with respect, the members are not
6 undeserving --
7 LORD JUSTICE LEWISON: That's the argument.
8 MR WOLFSON: Well, absolutely. Exactly. The members are
9 not undeserving. The right to a surplus is the incident
10 of being a member --
11 LORD JUSTICE LEWISON: No, Brightman LJ is summarising the
12 argument in this paragraph.
13 MR WOLFSON: Yes. I should be fairer to Brightman LJ, yes,
14 he is summarising the argument. It would be wrong to
15 proceed on the basis that the members are undeserving,
16 especially in an unlimited company where the right to
17 a surplus in a winding up may well be seen as part of
18 the consideration for the liability you undertake as
19 a member of an unlimited company.
20 The members are deserving of being paid their
21 interest in the company once the creditors have been
22 paid what they're due in the winding up and not more
23 than what they're due in the winding up.
24 So we submit, respectfully, that the learned judge
25 in this case was wrong to conclude, as he did in

1 paragraph 90 of the judgment, that the underlying
2 rationale behind conversion at the date of the winding
3 up "loses its force once all the proved debts and
4 post-liquidation interest have been paid".
5 Of course --
6 LORD JUSTICE LEWISON: Can I backtrack a little bit,
7 Mr Wolfson.
8 MR WOLFSON: Yes.
9 LORD JUSTICE LEWISON: What is it that stops the
10 administrator or a liquidator paying the debt in foreign
11 currency? One it has been converted and valued in
12 sterling, what's to stop him going out and buying
13 dollars to the equivalent sterling amount and paying it?
14 MR WOLFSON: Ah, that's a point which Slade J made at first
15 instance In re Lines Brothers. He made the point that
16 if the liquidator happens to have foreign currency, he
17 could discharge the debt in foreign currency; but
18 technically what would be happening would be that he
19 would be providing -- he will be using the creditor as
20 his foreign currency and exchange merchant because he
21 will be saying to the creditor, "I owe you £100.
22 I happen to have $150. Here's $150 which you, so to
23 speak, convert it into £100 instead of having to use
24 another foreign currency merchant".
25 Rule 286 and 491 provide that the debts are

1 converted into sterling as at the date of winding up,
2 and therefore should thereafter be discharged in
3 sterling. I accept that technically so to speak you
4 could use a different currency and use the creditor as
5 your foreign currency merchant, but you would in my
6 respectful submission actually be discharging in
7 sterling. You would have to have a proper rate. Indeed
8 that's what Slade J says in the judgment.
9 So, my Lord, I think I made the point that there is
10 an adverse effect on the members insofar as it reduces
11 their right to the surplus. Of course, if non-provable
12 liabilities including currency conversion claims are
13 also within the scope of the contributories' liability
14 under section 74, then, so to speak, that takes the
15 matter a stage further because not only do we not get
16 cash back but we, so to speak, have to put our hands in
17 our pockets as well.
18 That therefore would have the effect that the
19 members, and when they are insolvent their creditors,
20 pay for the one-way bet of the foreign currency
21 creditors in LBIE. So the question is not, as the judge
22 put it at paragraph 110, whether the debtor should take
23 the advantage or the benefit of the decline in the value
24 of sterling. It is whether the foreign currency
25 creditors should be entitled to a further currency

1 conversion to the detriment of the members and their
2 creditors, which can only work to the advantage of those
3 foreign currency creditors.
4 My learned friend Mr Dicker suggests in his skeleton
5 at paragraph 67, sub-paragraph 3, that if the members
6 don't want to bear this exchange rate risk they could
7 have discharged the claims by payment of the relevant
8 foreign currency sum prior to the liquidation, for
9 example.
10 My Lords, with respect, there are a number of
11 obvious problems with that suggestion. First, the
12 members are not liable for the debts of the company and
13 their obligation is to their own creditors. Second, the
14 members may not know the company is about to go into
15 liquidation. Third, even if they did, paying foreign
16 currency creditors in a potential insolvency situation
17 may well involve discrimination between creditors.
18 Therefore that solution doesn't work and I haven't
19 even touched on the interesting issue as to whether in
20 fact payment by the members in those circumstances would
21 discharge the debt anyway, given that it's a debt owed
22 by somebody else.
23 So, my Lord, that isn't an answer to the point.
24 (Pause).
25 My Lords, the third submission we seek to make in

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1 the context of currency conversion claims is the point
2 that this isn't a two-horse race. This isn't just
3 a competition between the foreign currency creditors and
4 the members. My Lords, this is an important point,
5 certainly forensically, because it was assumed by the
6 judge, and appears to be assumed on this appeal by my
7 learned friend Mr Dicker, that the competition here is
8 really only between the worthy foreign currency
9 creditors and the, if I can use the word, undeserving
10 members. That's really the argument put by my learned
11 friend Mr Dicker. He says why should we lose out when
12 the choice is between paying us our foreign currency
13 losses and giving the members what he then characterises
14 as a windfall?
15 LORD JUSTICE LEWISON: That's the same point Mr Snowden
16 made.
17 MR WOLFSON: It is.
18 LORD JUSTICE LEWISON: You're here as a creditor; albeit
19 subordinated but a creditor nonetheless.
20 MR WOLFSON: Yes, can I just take it a stage further,
21 though. Let me, because of the time, just give your
22 Lordships the references to the way this -- where this
23 has been put in this way so your Lordships, so to speak
24 it, have it. The judgments makes this point at
25 paragraph 98 and 110. My learned friend's skeleton at

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1 tab 8 of bundle E --
2 LORD JUSTICE MOORE-BICK: Which learned friend?
3 MR WOLFSON: They are all terribly learned. The one
4 immediately to my right, Mr Dicker, who has taken the
5 lead on this point.
6 LORD JUSTICE MOORE-BICK: Sorry, I interrupted you, where in
7 his skeleton?
8 MR WOLFSON: It is at footnote 4, my Lord, which is at E/8,
9 171, and also at paragraph 3 of the same skeleton E/8,
10 148, paragraph 3.
11 I think also there were a number of interventions
12 yesterday when I think my Lord Lord Justice Briggs also
13 asked --
14 LORD JUSTICE BRIGGS: I am guilty of it too, am I?
15 MR WOLFSON: It's not a question of guilty. The way it has
16 been put is it has been always been put on the basis
17 that this is a two-horse race. I think your Lordship
18 said we're only really concerned with members, i.e. the
19 question is if the foreign currency claims are not paid,
20 it enures to the benefit of the members. I.e. the
21 battle here, so to speak, is between the foreign
22 currency creditors and the members.
23 But, my Lord, it isn't a two-horse race. To
24 continue the equine analogy and to pick up I think
25 a reference from yesterday, it is a lot more like the

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1 Grand National. There are various horses, anybody with
2 a non-provable claim has a horse in this race.
3 My learned friend Mr Dicker says that he is going to
4 rank for his currency conversion claims with the
5 non-provables. If we want to play the forensic game of
6 saying, "Well, why should the members get a surplus?" we
7 can play the game of saying why should the gentleman who
8 works in a factory that went into administration a month
9 ago, and the administrators are properly continuing the
10 business, who suffers a catastrophic injury, and as
11 I understand it would have -- insofar as he has a tort
12 claim, it would no be a non-provable tort claim since it
13 occurs after the relevant date. He's in competition now
14 with these currency conversion claims.
15 LORD JUSTICE BRIGGS: There are various reasons why it is
16 quite interesting to know what other kinds of
17 non-provable claimants there may be and whether they are
18 true claimants or impostors or usurpers.
19 MR WOLFSON: Yes.
20 LORD JUSTICE BRIGGS: All that, as I understand it, is going
21 on Waterfall II.
22 MR WOLFSON: Absolutely. As your Lordship I think said
23 yesterday, there is a great list of them standing up and
24 asking to be counted. Yes, there are, and some of them
25 are absolutely exotic and we've now got, as I understand

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1 it -- I don't have the privilege of being involved in
2 Waterfall II, we're sitting that one out at the moment.
3 As I understand it, there are currency conversion claims
4 based on the interest payments now as well.
5 So if the currency conversion claims go in, it's not
6 a question of just this currency conversion claim and
7 just being in competition with the members. There are
8 going to be several sorts of currency conversion claims,
9 several sorts of non-provable claims and they're in
10 competition, as we understand, it with each other.
11 So your Lordships shouldn't proceed on the basis,
12 attractive though it may be, to say, well, foreign
13 currency creditors have suffered a loss because they
14 haven't got their dollars in the same value and why
15 should the members get a windfall? That simply is not
16 the way it is going to work.
17 The real question is: should foreign currency
18 creditors, should those claims exist, given that they
19 will fall into non-provables and be in competition
20 essentially with the other non-provables?
21 LORD JUSTICE BRIGGS: I thought the real thrust of the
22 judge's analysis wasn't so much that it is a two-horse
23 race, in the way you've described it, but that the
24 reason for the conversion at the cut-off date was to
25 ensure that all provable debts get dealt with on a fair,

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1 level playing field in the same way. The problems that
2 arose under the statutory trusts in the Lehman client
3 money case, I think, as far as I can dimly recall, the
4 solution was reached that unless you have a common
5 currency and a common date, you can't do the pari passu
6 distribution or at least it's not as easy to do
7 a pari passu distribution.
8 The common feature all the horses in your Grand
9 National is that they are racing along behind the
10 proving creditors, whether they are subordinated
11 creditors, non-provable claimants or members.
12 MR WOLFSON: Yes.
13 LORD JUSTICE BRIGGS: Yes. In relation to whom the same
14 policy reason for doing a currency conversion may not
15 apply.
16 MR WOLFSON: I accept that and, my Lord, I will be dealing
17 with that point a moment when I deal with the other
18 incidents of a winding-up procedure. Your Lordship will
19 have seen from the judgment that one of the points we
20 put to the learned judge was, well, there are upsides
21 and downsides. I don't mean to be dismissive about it
22 and if I may I'll develop it in a moment. If I may say,
23 can I come back to that point as part of that because
24 that's essentially going to be the answer.
25 LORD JUSTICE BRIGGS: Okay.

1 MR WOLFSON: So, my Lord, just to wrap up this submission,
2 the foreign currency claims are going to be within the
3 other non-provable claims, is not just a battle between
4 the foreign currency claims and the members. Indeed, as
5 I said, certainly we read my learned friend Mr Dicker's
6 skeleton as assuming that those currency conversion
7 claims will rank equally with the other non-provables.
8 We get that from paragraphs 10, sub-paragraph 4 and
9 paragraph 50.
10 Indeed, that appears to be deliberate because
11 elsewhere in my learned friend Mr Dicker's skeleton he
12 notes the point that prior to 1986 some non-provable
13 claims ranked ahead of others with respect to interest.
14 That's at 13.3 of his skeleton. So certainly we
15 understand his submission to be that if these claims
16 exist they're not going to come after other
17 non-provables, they're going to be within the class of
18 non-provables.
19 So, my Lord, it is not only the members who may lose
20 out; it is other creditors. Of course if we think back
21 to Re Lines Brothers itself, the policy behind the
22 actual decision In re Lines Brothers, which is that
23 foreign currency claims could not be paid in priority to
24 claims for post-insolvency interest, because it wouldn't
25 be fair to impose upon the interest creditors the risk

1 of foreign exchange fluctuations, operates against the
2 existence of currency conversion claims.
3 So, my Lord, it isn't a two-horse race. There are
4 other people around as well.
5 The next point in this regard is the difficulty of
6 valuing currency conversion claims. This is a point
7 which was recognised by the learned judge at
8 paragraph 99 of the judgment. He acknowledged:
9 "There may be some difficulties in working out the
10 consequences of allowing particular claims."
11 The merit of the once and for all conversion is
12 certainty, finality and simplicity. So we would say,
13 respectfully, it goes beyond the obvious purpose also of
14 ensuring that you're comparing apples with apples and
15 oranges with oranges. There is an underlying purpose
16 here that it is a once and for all conversion, and
17 I appreciate my learned friend Mr Snowden has made this
18 point as well by reference to the Law Commission and the
19 Cork Report. But allowing these claims would give rise
20 to complex and difficult further enquiries.
21 Now, in this regard we should bear in mind that the
22 foreign currency creditors will only be paid after
23 statutory interest is paid in full.
24 LORD JUSTICE LEWISON: If there's a conversion claim?
25 MR WOLFSON: Yes -- assuming -- that's right. Assuming

1 there is a claim, I am asking: where does it rank? Yes,
2 after statutory interest is paid in full, that's
3 Re Lines Brothers itself. So those creditors will have
4 received post-insolvency interest of 8 per cent on their
5 claims.
6 Now, there's a number of points here. First, the
7 difference between the contractual interest rate and the
8 8 per cent rate you're given under statute may well
9 compensate the creditors for any FX losses they have
10 suffered, in the sense that the theory here -- the
11 theory here for the 8 per cent is that you could have
12 get judgment and you'll get Judgment Act interest at
13 8 per cent.
14 In the real world, certainly in the Commercial
15 Court, you don't get Judgment Act interest at
16 8 per cent. You get Judgment Act interest at the rate
17 you borrow and that will be referable, in certain
18 circumstances, to particular currency.
19 LORD JUSTICE BRIGGS: Only until judgment.
20 MR WOLFSON: Only until judgment.
21 LORD JUSTICE BRIGGS: After that you get the judgment rate.
22 MR WOLFSON: After I get the judgment I won't. But being
23 kept out of your money hasn't actually cost you
24 necessarily -- if your contracted interest rate is
25 3 per cent, you are 5 per cent better off because you as

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1 a foreign currency creditor are also entitled to the
2 8 per cent.
3 Furthermore, although I accept the 8 per cent rate
4 has not been changed for some time, one would expect
5 that when the relevant rate is set it's set having
6 regard to the fact that we are dealing with sterling
7 claims. You could therefore have a foreign currency
8 claim where the relevant interest rate referable to that
9 foreign currency is significantly less than the
10 8 per cent. The 8 per cent is a real benefit which
11 a creditor --
12 LORD JUSTICE LEWISON: That might depend on the currency.
13 MR WOLFSON: It will depend on the currency, I accept that.
14 LORD JUSTICE LEWISON: If your debt is in Zimbabwean dollars
15 or roubles you might have a different view.
16 MR WOLFSON: I appreciate -- it cuts both ways. But the
17 position of my learned friend, as I under understand it,
18 in Waterfall II is that no credit at all is to be given
19 with regard to the foreign currency claim for the fact
20 that they have already received interest at 8 per cent.
21 LORD JUSTICE LEWISON: The judge left that open, didn't he?
22 MR WOLFSON: Sorry?
23 LORD JUSTICE LEWISON: The judge left that open in this
24 case.
25 MR WOLFSON: Yes, but that's certainly the submission that

1 was made. That's certainly their position.
2 So the foreign currency creditors get paid the
3 statutory interest at 8 per cent. Second, for future
4 claims in a foreign currency the statutory discount rate
5 of 5 per cent may well be more advantageous than the
6 market discount rate for the relevant claim.
7 LORD JUSTICE BRIGGS: I'm not sure how much help we get from
8 this sort of argument. It may be better, it may be
9 worse. What does that tell us?
10 MR WOLFSON: What it tells you, my Lord, is this, that there
11 are so to speak up and downs in the process and you take
12 the rough with the smooth. That is the short point.
13 LORD JUSTICE BRIGGS: All right.
14 MR WOLFSON: Therefore, the answer to one of the ways the
15 point is put against me, which is we've got a bit of
16 rough here, is to say, well, there's lots of smooth as
17 well.
18 LORD JUSTICE LEWISON: That was a point Oliver LJ was making
19 in Lines Brothers.
20 MR WOLFSON: He was, exactly.
21 LORD JUSTICE MOORE-BICK: Might that be a convenient moment
22 for the shorthand writers' respite?
23 MR WOLFSON: Yes.
24 LORD JUSTICE MOORE-BICK: We'll take five minutes.
25 (3.17 pm)

1 (A short break)
2 (3.22 pm)
3 LORD JUSTICE MOORE-BICK: Yes, Mr Wolfson.
4 MR WOLFSON: My Lords, before we rose for a moment I was
5 making a submission based on the statutory discount rate
6 of 5 per cent. Your Lordship asked me, well, does this
7 really go any further than the rough and the smooth?
8 My Lord, there are two points we make. The first is the
9 rough and the smooth point but the second point is this,
10 that just as the creditor with a future claim who is
11 discounted at the rate of 5 per cent can't come back
12 later and say, "Well, as matters turned out and as rates
13 were available in the market, I wasn't able to get from
14 the sum I was given in the insolvency to the value of my
15 real debt over the two-year period of the discount, even
16 if there's a surplus leftover," so also here in currency
17 conversion claims. There is a once and for all
18 conversion and it operates in that way.
19 The learned judge said at paragraph 99 of the
20 judgment, when we put similar points to the learned
21 judge, i.e. statutory interest at 8 per cent and the
22 discount rate:
23 "It may well be that in asserting a non-provable
24 currency conversion claim the creditor in this example
25 might have to give credit for the benefits which he has

1 received under the insolvency regime."
2 My Lord, we make two points in relation to that.
3 First, the point I referred to briefly earlier,
4 which is that in Waterfall II the creditors and LBIE's
5 joint administrators argued that, in the calculation of
6 these claims, no credit need be given for statutory
7 interest. For your Lordships note the application --
8 LORD JUSTICE LEWISON: Has that submission been adjudicated
9 upon?
10 MR WOLFSON: It has not yet, as I understand it.
11 LORD JUSTICE LEWISON: How does that help?
12 MR WOLFSON: That's their position.
13 The second point, which is a substantive point,
14 my Lord, is this. If the judge is right that the
15 foreign currency creditor has to give credit for other
16 benefits received under the insolvency regime, then the
17 currency conversion claim is in effect a claim for
18 damages arising out of that insolvency regime. That's
19 a very odd sort of claim and it goes back to the point
20 I made a minute ago, that we don't see any other claim
21 of this nature arising elsewhere if you've lost out
22 because of the discount rate or anything else.
23 So not only is this claim odd in the way that
24 my Lord Lord Justice Lewison put it yesterday, that you
25 have a unitary obligation which can give rise to both

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a provable and unprovable claim, but it is also odd because it appears to be founded on the premise that the insolvency regime has operated unfairly against me and I should be compensated in some way.

So, my Lords, for those reasons and of course we adopt what has been said earlier by my learned friend Mr Snowden, and I think Mr Isaacs dealt with this as well shortly, we submit that currency conversion claims should not exist and on that point your Lordships should allow the appeals and make the first declaration set out in section 8 of our appellant's notice.

I was then going to move to the scope of the section 74 liability.

LORD JUSTICE MOORE-BICK: Yes.

MR WOLFSON: My Lord, our case on this appeal is that the "debts and liabilities referred to in section 74 only encompass provable debts" and, contrary to declaration 6, do not include statutory interest or non-provable claims which would include currency conversion claims if, contrary to our appeal on that point, they actually exist.

So, my Lord, the first point, debts and liabilities in section 74 is limited to provable debts. I appreciate obviously this has been touched on a little already. Section 74 is part of the statutory scheme

providing for creditors to receive a pari passu distribution in payment of proved debts.

The liability of contributories under section 47 only arises in the winding up and is therefore part of that statutory scheme. We say it therefore follows that the ambit of section 74 is circumscribed by the provisions which limit the debts that are provable in a winding-up.

The learned judge put it this way at paragraph 152 of the judgment:

"It is the purpose of a liquidation to pay all liabilities of the company, including those which are not capable of proof."

This goes back to the point made by Mr Snowden I think yesterday afternoon. We submit that that is wrong. If a liability is not capable of proof in a liquidation, one cannot say that it is the purpose of that liquidation to pay the liability.

What we would invite your Lordships to do is just to go through a couple of the definitions here. The definition of "debts", I think this point is common ground, in Rule 13.12, which is at authorities bundle 3, tab 21, page 85, is limited to provable debts.

LORD JUSTICE LEWISON: You have it in the Red Book, presumably?

MR WOLFSON: I'm sorry?

LORD JUSTICE LEWISON: You have it in the Red Book, presumably?

MR WOLFSON: Yes.

LORD JUSTICE LEWISON: 13.12?

MR WOLFSON: Yes, 13.12, page 998.

As debts are provable debts, the learned judge relied on the definition of "liability" in Rule 13.12(4).

Now, this was touched on earlier. Rule 13.12(4) expressly includes the words "except insofar as the context otherwise requires". So the word "liabilities" does not always have the meaning set out in 13.12(4) and Mr Snowden gave the example earlier of section 107, where, as I think LBIE accepts, liabilities in that section must mean provable liabilities.

We say that just as a reference in 107 to liabilities means provable liabilities, so too does the reference in section 74, which is part of that statutory scheme.

The fact that section 74 refers to liabilities is unsurprising where the definition of "debt" of course in 13.12(1) itself at (a) and (b) also refers to liabilities.

Now, if section 74 were not limited to provable

liabilities, the company's liquidators could effectively on behalf of creditors in LBIE with unprovable debts in LBIE prove in the contributories' insolvencies for types of debts which are not provable by the contributories' own creditors. So that would necessarily follow.

That would lead to an asymmetry, we submit, between the two insolvent estates, that of the company and that of the member, because there would be a discrepancy between the treatment of the respective creditors of those estates, such that creditors with unprovable debts in LBIE would be in a better position vis-à-vis the assets of LBL than the creditors of LBL with the same type of unprovable debt.

My Lord, we submit that that would be an odd result and that is a further reason why debts and liabilities in section 74 should be limited to provable claims.

One of the reasons the learned judge gave for construing section 74 to include non-provable liabilities was the fact that section 74 provides for the adjustment of the rights of contributories among themselves. With respect, on a proper analysis, that is entirely irrelevant to the construction of the phrase "debts and liabilities". Calls can be made on members to adjust their rights inter se, for example when one member has paid more than his proper share, but that

1 does not mean -- it doesn't follow from that that
2 members must be liable for every part of the waterfall.
3 There are two points here. First, the judge
4 considered that there was no provision in the Act or the
5 Rules for segregation by the liquidator out of a larger
6 call for the amount required for the adjustment of the
7 rights among contributories after provable debts had
8 been paid in full or for making further calls
9 specifically for the purpose of the adjustment of the
10 rights of the contributories. That's paragraph 159 of
11 the judgment.
12 But we say, respectfully, that there is no reason
13 why there could not be a segregation by the liquidator
14 of the amount required for the adjustment of rights
15 among contributories after provable debts had been paid
16 in full or, indeed, separate calls by the liquidator.
17 Amounts received pursuant to calls made in order to
18 adjust the rights of the contributories among themselves
19 would never form part of the assets available for the
20 liquidator to distribute to other creditors.
21 LORD JUSTICE LEWISON: Isn't one problem with segregation by
22 the liquidator that he's required by statute to use any
23 surplus to pay statutory interest before he does
24 anything else with it, like adjust rights of
25 contributories?

1 MR WOLFSON: The question would be for that purposes that
2 would then form part of the "surplus" if it had been
3 raised for another purpose. But you could certainly do
4 it by way of separate calls, which wouldn't raise that
5 problem.
6 LBIE, in its respondent's skeleton at paragraph 74,
7 suggests that the adjustment of the rights of the
8 contributories among themselves concerns the last stage
9 of the waterfall, i.e. the distribution of the surplus
10 to the members. But the adjustment of the rights of the
11 contributories concerns adjusting the right of either
12 fully and partly paid shares, if that is the nature of
13 the contribution, or between contributories who have
14 paid more than their fair share, so to speak, and those
15 who have paid less.
16 My Lords, we make that point by reference to the
17 decision of Roxburgh J in Phoenix Oil, which is at 1A of
18 the authorities at tab 48.
19 My Lords, if we pick it up at 563 to 564, if you
20 would just, please, read the highlighted passage from
21 essentially the last third, so to speak, on page 583 and
22 to the end of that paragraph at the top of 564.
23 (Pause).
24 So your Lordships see that the learned judge rejects
25 the submission that the distribution of the surplus

1 assets of itself involves an adjustment of the rights of
2 the contributories among themselves on two grounds.
3 First of all, the section contemplates two processes and
4 not one. The second was that the apportionment of the
5 surplus could not reasonably be described as
6 an adjustment of the rights of the contributories among
7 themselves, whereas the words precisely fit
8 an adjustment between holders of fully and partly paid
9 shares or an adjustment between contributories who paid
10 more or less than their fair share.
11 So, my Lords, it doesn't follow, we submit, from the
12 fact that the section 74 liability extends to adjusting
13 the rights of the contributories inter se that it must
14 also encompass statutory interest and non-provable
15 liabilities which come earlier.
16 For those reasons, we say the debts and liabilities
17 of section 74 must be limited to provable debts.
18 (Pause).
19 My Lords, secondly in this regard under section 74
20 we make a separate submission that statutory interest is
21 not a liability of the company in any event. Again,
22 this ground has been trodden on a little bit.
23 Section 189(2) tells the liquidator what to do with
24 "any surplus remaining after the payment of the debts
25 proved in the winding-up" and we say that's not

1 a provision which imposes a liability on the company.
2 It's an instruction to the liquidator as to how to apply
3 a surplus or leftover amount after payment of debts
4 proved in the winding up.
5 Now, as your Lordships have seen earlier today, at
6 paragraph 163 of the judgment the judge says that he saw
7 the linguistic argument for saying that section 189(2)
8 constitutes a direction to the liquidator, rather than
9 creating a liability of the company. That's at 163 of
10 the judgment. But he said that he did not accept that
11 the terms in which section 189(2) is expressed has the
12 effect of excluding statutory interest from the
13 obligations of the contributories.
14 My Lords, we submit it is not simply the language of
15 section 189 which excludes statutory interest from the
16 obligations of the contributories under section 74.
17 It's the very nature of statutory interest itself.
18 As your Lordships have heard, the submission is that
19 statutory interest replaces any contractual entitlement
20 to interest and the fact that the status of the interest
21 liabilities under the debts are changed is highlighted
22 by two obvious points.
23 First, the interest payable ranks equally whether or
24 not the debts on which they are based rank equally.
25 That's Rule 288(8).

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1 The second, the fact that statutory interest will
2 apply to debts in respect of which interest would not
3 have been payable but for the insolvency. Of course,
4 we've looked at this. This marks a fundamental change
5 from the position In re Humber Ironworks.
6 So the position under the rules is now that, if
7 there is a surplus, interest is payable to all creditors
8 regardless of whether their debts carried interest
9 contractually or not. We also therefore submit that
10 what Giffard LJ said in Humber Ironworks as to being
11 remitted to rights under the contract is no longer good
12 law following changes to the insolvency legislation.
13 All of this emphasises that there is no liability of
14 the company for post-insolvency interest. There's only
15 a direction to the liquidator as to the application of
16 a surplus.
17 LORD JUSTICE LEWISON: But why do you call it a direction to
18 the liquidator? It's not mentioned in section 189.
19 MR WOLFSON: It's a direction to the relevant office holder.
20 LORD JUSTICE LEWISON: It's just a statutory requirement
21 about what happens to the money.
22 MR WOLFSON: But the person who's --
23 LORD JUSTICE LEWISON: I follow that the liquidator is in
24 charge of the money; but it's a statutory charge on the
25 money, isn't it? It wouldn't matter into hands it came,

1 the statute says that's what you do with it.
2 MR WOLFSON: The statute says that's what you do with it,
3 but it's not a liability of the company itself. There
4 was no liability before the company entered into the
5 insolvency.
6 LORD JUSTICE LEWISON: I understand that, but why do you
7 call it a direction to the liquidator? That's what
8 I don't quite understand.
9 MR WOLFSON: Because it's a direction to the liquidator as
10 to what he is to do with the surplus. He is holding
11 a surplus and the statute is telling him what to do with
12 it. In my respectful submission, the statute is not
13 thereby imposing a liability on the company itself. The
14 statute is directing the liquidator as to how to deal
15 with the fund he is holding, in this case being the
16 surplus.
17 My Lord, this point is not entirely free of
18 authority. I was going to take your Lordship to the
19 first instance judgment In re Lines Brothers, where
20 a similar point was argued and that's at 1B, 59.
21 (Pause).
22 This is the first instance judgment of
23 Mervyn Davies J. As your Lordships see, the context
24 here is section 33(8) of the Bankruptcy Act 1914 and
25 that is set out at page 219, B of the report:

1 "If there is any surplus after payment of the
2 foregoing debts, it shall be applied in payment of
3 interest at the date of the receiving order at the rate
4 of £4 per centum per annum on all debt proved in the
5 bankruptcy."
6 The question was whether the provisions then
7 contained in the Bankruptcy Act 1914 for the payment of
8 interest on debts proved in the bankruptcy were
9 applicable to the winding-up of the company in this case
10 by reason of the provisions of section 317 of the
11 Companies Act 1948, which applied only "in the winding
12 up of an insolvent company". So the question was
13 whether the company was for these purposes insolvent,
14 where there was a surplus of assets overall proved
15 debts.
16 The judge held that the company was not insolvent
17 for the purposes of section 317 once its debts and
18 liabilities as existing at the date of the commencement
19 of the winding up had been paid or met in full. Your
20 Lordships see that at page 225, H to I, at the bottom of
21 that page:
22 "It follows that my conclusion is that this company
23 is not now an insolvent company within section 317, in
24 that there is now a sufficiency of assets over the debts
25 and liabilities of the company as they existed at the

1 commencement of the winding up."
2 Section 33(8) of the Bankruptcy Act, which the
3 learned judge was considering here, is similar to the
4 provisions for statutory interest in section 189 and
5 Rule 288(7) of the Rules.
6 As your Lordships see, the judge goes back into the
7 statutory history to section 10 of the Supreme Court of
8 Judicature Act 1875. The question was whether
9 post-liquidation interest, statutory or contractual,
10 constituted:
11 "Debts or liabilities for the purposes of that
12 section."
13 The judge concluded that neither statutory nor
14 contractual post-liquidation interest fell within that
15 expression for the purposes of section 10."
16 My Lords, I would invite the court to pick it up at
17 page 223, at the highlighted passage. His Lordship
18 rejects the submission made by counsel for Hamleys:
19 "It seems to me that what I have to do is consider
20 what is meant by the words 'debts and liabilities' in
21 the company limb of section 10 of the 1875 Act. So do
22 the words 'debts and liabilities' in the company limb of
23 section 10 include any post-liquidation interest
24 statutory or contractual? If they do not, then
25 Lines Brothers is not now insolvent because all debts

1 and liabilities as due at the commencement of the
2 winding up have been paid in full. So I turn to the
3 question and take first statutory interest. This is not
4 a debt or liability within section 10 for two reasons.
5 "First of all, the section speaks of its debts and
6 liabilities. At no stage can statutory interest be
7 regarded as a debt or liability of the company.
8 A liquidator's obligation under section 33(8) to pay
9 interest out of a surplus is pursuant to a statutory
10 direction to him, being an obligation which is part of
11 the statutory scheme for dealing with the company's
12 assets which comes into operation at the outset of the
13 winding up. Statutory scheme is a phrase used by
14 Lawton LJ in re Lines Brothers.
15 "Two, it is not right to consider insufficiency or
16 insolvency by reference to any obligation to pay
17 statutory interest under section 33(8) because that is
18 to be suppose that section 33(8) applies in the winding
19 up. The true position is that one decides whether or
20 not the winding up is the winding up of an insolvent
21 company before one takes account of the rules that will
22 be brought into account if it is insolvent."
23 My Lords, we respectfully submit that
24 Mervyn Davies J was correct to characterise statutory
25 interest in this way and that it is not a debt or

1 liability of the company. The obligation is pursuant to
2 a statutory direction to the office holder, but not
3 a liability of the company.
4 My Lords, taking it a stage further, perhaps, the
5 fact that statutory interest is not a liability of the
6 company is also inherent in the nature of such interest
7 because it's only payable if there is a surplus in the
8 liquidator's hands. A surplus is something that's left
9 over, not something that is brought in; and if calls
10 need to be made on contributories, by definition there
11 can be no surplus.
12 The judge's approach, imposing liability on the
13 member to contribute in relation to statutory interest,
14 has the, we would say, with respect, odd result that the
15 contribution of the member creates the very liability to
16 which the contribution is intended to relate.
17 The concept of a deficiency in a surplus is
18 an oxymoron. So the idea that you can call on
19 a contributory to create a surplus is entirely circular.
20 The other reasons the learned judge gave for the
21 inclusion of statutory interest within the ambit of the
22 contributory liability in section 74 are, with respect,
23 non sequiturs.
24 First, at paragraph 160 of the judgment the learned
25 judge relied on the fact that section 89(1) provides for

1 a statutory declaration of solvency to be made by the
2 directors of a company if its voluntary winding up is to
3 proceed as a members' voluntary winding-up and that the
4 declaration requires the directors to state they have
5 formed the opinion that:
6 "The company will be able to pay its debts in full,
7 together with interest at the official rate, within
8 a period not exceeding 12 months from the commencement
9 of the winding up."
10 We say respectfully that that doesn't really shed
11 any light on whether statutory interest is or is not
12 included within the scope of section 74.
13 The other point the learned judge relied on was
14 section 149(3), which my learned friend Mr Snowden has
15 already dealt with. This is the provision which
16 provides:
17 "When all creditors are paid in full, together with
18 interest at the official rate, any money due on any
19 account whatever to a contributory from the company may
20 be allowed to him by way of set-off against any
21 subsequent call."
22 The learned judge himself acknowledged that the
23 point was not decisive. But, with respect, it doesn't
24 advance the debate at all. The question of when
25 a contributory may set off sums such as dividends owed

1 to the contributory does not assist in deciding the
2 scope of the section 74 liability.
3 So, my Lords, we say, therefore, that
4 Mervyn Davies J was correct in his characterisation. We
5 also rely on the fact that there has to be a surplus and
6 you can't sensibly create a surplus by having to make
7 a call on a contributory.
8 I should also deal, I think, in this regard with the
9 decision in Re Overnight Ltd, which LBIE rely on in this
10 regard to support their argument that the liability of
11 members extends to post-liquidation interest. It's at
12 paragraph 71 of LBIE's respondent's skeleton at tab 5 of
13 bundle E. The case is at authorities bundle 3 -- sorry,
14 it's 1C, forgive me.
15 LORD JUSTICE LEWISON: 1C?
16 MR WOLFSON: Yes, I'm sorry, 1C at tab 86. It's a decision
17 of Roth J. As your Lordships see, it is a section 213
18 case, "Liability for fraudulent trading". Picking up
19 the judgment right at the beginning:
20 "I gave judgment on application by the liquidator of
21 Overnight Ltd under the fraudulent trading provision in
22 section 213. I held the first respondent to should
23 contribute to the company's assets the full loss caused
24 to HMRC as creditor. The second respondent should on
25 a joint and several basis contribute as to 50 per cent

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1 of that loss."
2 The learned judge appears to --
3 LORD JUSTICE LEWISON: They were directors, were they?
4 MR WOLFSON: I'm sorry?
5 LORD JUSTICE LEWISON: They were directors, were they?
6 MR WOLFSON: Yes, I think they were both directors.
7 He appears to have assumed that the liability to
8 contribute to the assets of the company under
9 section 213 extended to post-liquidation interest. If
10 we go through to the judgment at paragraph 5, your
11 Lordships see under the general heading "Quantification
12 of loss" there's a reference to section 189:
13 "Accordingly the liquidator is bound to pay
14 interest, if the company has sufficient assets, on the
15 debt to the Revenue at the rate of 8 per cent. [No
16 discretion.] That liability forms part of the company's
17 loss in respect of which the liquidator applies for
18 a contribution to the company's assets."
19 Over the page, at paragraphs 9 and 10, he deals with
20 the point that there's been some delay and then makes
21 a contribution, so to speak, in the full amount.
22 So the learned judge certainly appears to have
23 assumed that the liability to contribute to the assets
24 of a company under section 213 extended to
25 post-liquidation interest. That's the point, as

1 I understand it, that my learned friend Mr Trower relies
2 on this case for.
3 But as your Lordships will appreciate, the terms of
4 section 213 are very different to the terms of
5 section 74. Section 213(2) -- this is in bundle 3,
6 tab 20, page 36, but of course it's also in the
7 Red Book. 213(2) is in these terms:
8 "The court on the application of the liquidator may
9 declare that any persons who are knowingly party to the
10 carrying on of the business in the manner
11 above-mentioned are liable to make ..."
12 And then these words:
13 "... such contributions, if any, to the company's
14 assets as the court thinks proper."
15 So this is not limited to debts and liabilities.
16 So section 213 gives the court a wide discretion,
17 well understandable in the context of a section 213
18 application, but section 74 is in very different terms.
19 Further, there doesn't actually appear to have been any
20 argument in the point In re Overnight in any event.
21 We say, obviously, section 74 is very different.
22 That provision circumscribes in terms the liability of
23 the members. It is important that their liability is
24 carefully defined, so that there is some certainty when
25 you become a member of an unlimited company what your

1 potential exposure is.
2 Had it been intended that statutory interest would
3 be within the scope of the liability under section 74(1)
4 one might have expected it to say so in the same way as
5 it expressly extends to the expenses of the winding up.
6 So for those reasons we say that statutory interest
7 is not a liability of the company and, therefore, is not
8 within the scope of the liability under section 74.
9 My Lords, those are the submissions I was going to
10 make without repeating what my learned friends have
11 already said --
12 LORD JUSTICE MOORE-BICK: Good.
13 MR WOLFSON: -- tempting though it is. Unless I can assist
14 your Lordships further --
15 LORD JUSTICE MOORE-BICK: No, thank you very much indeed.
16 Now, we're getting ahead of ourselves, aren't we?
17 MR TROWER: I think your Lordships are because I have
18 20 minutes to go and I wasn't expecting to go until
19 tomorrow morning, but I am very happy to start if your
20 Lordships would like me to.
21 LORD JUSTICE MOORE-BICK: Yes. I think we'd like to start
22 but we would be amenable to a suggestion that we rise
23 promptly or possibly slightly early.
24 MR TROWER: If your Lordships would just give me a half a
25 moment because I was taken by surprise by that slightly

1 earlier finish and I have not prepared myself for
2 getting my box up.
3 LORD JUSTICE MOORE-BICK: Take your time.
4 Submissions by MR TROWER
5 MR TROWER: My Lords, I am going to address to begin with,
6 if I may, the contractual construction point. So what
7 I was going to do was -- and perhaps I can give your
8 Lordships a brief outline of the order in which I am
9 going to deal with the appeals which I have to deal
10 with.
11 The first will be the contractual construction
12 point. I will then deal with declarations 4 and 5,
13 which is the lacuna and the consequence of the judge
14 being upheld on the lacuna, namely the non-provable
15 claim.
16 I will then deal with the scope of the section 74
17 liability, and then I will deal with the issues relating
18 to provability and the like at the end.
19 LORD JUSTICE MOORE-BICK: Yes.
20 MR TROWER: My learned friend Mr Dicker is going to deal
21 entirely with questions of currency conversion claims.
22 I am not going to say anything to your Lordships about
23 at all, although during the course of my submissions in
24 relation to declaration 5, which is whether or not
25 there's a non-provable claim in the event that the

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1 judge's decision on the lacuna is upheld, I will be
2 travelling over a little bit of the same ground as
3 Mr Dicker, although we have discussed it between
4 ourselves and I hope that there won't be too much
5 repetition.
6 My Lords, against that background, can we start with
7 the sub debt argument. If your Lordships would like to
8 get out the sub debt agreement, because we will be
9 spending a little bit of time just looking at it --
10 LORD JUSTICE MOORE-BICK: Yes.
11 MR TROWER: -- given that this, at the end of the day,
12 a construction argument.
13 LORD JUSTICE MOORE-BICK: Are you using the one at page 211?
14 MR TROWER: I am, my Lord. Actually, I'm not quite sure
15 which numbering. I have two numbers on the bottom
16 right-hand of mine. It is 196 and 197 at the very
17 bottom right, and then there is 210 and 211 number
18 immediately above it.
19 LORD JUSTICE MOORE-BICK: Yes.
20 MR TROWER: Is that the same as your Lordships?
21 LORD JUSTICE MOORE-BICK: I couldn't see any difference in
22 the relevant terms between this one and the next one in
23 the bundle, which I had actually started marking up, but
24 I am quite happy to use 211 and 197.
25 MR TROWER: Indeed. (Pause).

1 My Lord, it is important before looking at the
2 provisions of the agreement not to lose sight of the
3 fact as to what the sub debt agreement formed part of.
4 It formed part of LBIE's regulatory capital. The judge
5 put it very clearly and cleanly at paragraph 33 of his
6 judgment:
7 "The purpose of capital adequacy rules is, so far as
8 possible, to ensure that firms provide financial
9 resources to protect their customers and other
10 stakeholders against failure ..."
11 And there's been a certain amount of avoidance of
12 the concept of "against failure" that I will come back
13 to during the course of my submissions:
14 "... and enable them to withstand some level of
15 loss."
16 The sub debt, as your Lordships will know, was
17 advanced on a subordinated basis so as to help LBIE to
18 meet its capital adequacy requirements and those capital
19 adequacy requirements, as your Lordships know, were
20 primarily in place to protect clients.
21 The two directives that are referred to by the
22 learned judge in his judgment, paragraphs 37 and 40 --
23 which we've now had put in the bundles this morning --
24 express it in clear terms. "Subordinated loan capital
25 is in concept and in order to achieve its purpose meant

1 to rank after the claims of all other creditors" --
2 that's the phrase that is used -- "and is not to be
3 repaid until all other debts outstanding at the time
4 have been settled."
5 Again, that's the phrase used "all other". "All
6 other."
7 In this context we submit that it would be wrong to
8 read "debts", where it appears in the directives, as
9 meaning only provable debts, not least because capital
10 adequacy requirements are set at EC level, not at
11 a domestic level, such that UK insolvency law concepts
12 are not necessarily relevant. I will obviously come
13 back to the drafting points that my learned friend
14 Mr Snowden has made in due course.
15 A similar point can be made with reference to
16 Basel II, which is referred to in the learned judge's
17 judgment at paragraph 39, which refers to short-term
18 subordinated debt:
19 "... needing to be capable of becoming part of
20 a bank's permanent capital and thus be available to
21 absorb losses in the event of insolvency."
22 We respectfully submit that losses in the event of
23 insolvency as a concept encapsulates, not just principal
24 and interest accruing up to the date of insolvency, but
25 losses arising out of the loss of the use of money for

1 which statutory interest is meant to compensate, as well
2 as other losses under which in the event of
3 an insolvency a creditor suffers, whether or not those
4 losses are provable.
5 Any attempt to limit the purposes behind capital
6 adequacy to the estimation of an institution's solvency
7 and the absorption of losses in a going concern context
8 is, we would respectfully submit, too narrow
9 an approach. The absorption of losses is required par
10 excellence in the context of insolvency.
11 It's trite, of course, that in a general sense
12 capital is repayable only after debts owed to creditors,
13 whether provable or not. As the judge put it,
14 subordination was a characteristic of all three tiers of
15 a firm's capital resources, and those resources being
16 resources which a firm is required to hold to meet the
17 requirements of GENPRU.
18 The only point I do want to make in relation to
19 GENPRU and what my learned friend said about that -- and
20 I will come back to it in detail at some stage -- is
21 that GENPRU set out the capital adequacy requirements
22 applicable to LBIE at the time it went into
23 administration, which is what the learned judge said.
24 But it was IPRU(INV), which is referred to on the face
25 of the agreement on page 2, which was the relevant code

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1 at the time the sub debt agreements were entered into.
2 There are a couple of points which I will come back to
3 as a matter of construction to which this is relevant.
4 So against that background, can I invite your
5 Lordships to go to clause 5.1. The core part of 5.1 is
6 the first two lines. We respectfully submit that the
7 flaws at the heart of LBHI2's case are to ignore -- or
8 not to give sufficient weight, I think, rather than to
9 ignore -- not to give sufficient weight to the purpose
10 for which the sub debt was advanced, the points I was
11 addressing as I started, and, secondly, to seek to play
12 down the opening words of clause 5.1, the first two
13 lines.
14 Now, of course, we accept that the opening words in
15 the first two lines are not the end of the matter, but
16 those words capture the fact that the sub debt is lent
17 on a subordinated basis and, critically, that it ranks
18 behind Senior Liabilities, whatever they may be. We'll
19 obviously look at them again in a moment.
20 5.1(a) and 5.1(b) have to be read in that context.
21 The use of the phrase "and accordingly", which your
22 Lordships will have noticed at the end of the second
23 line and the beginning of the third line, the use of
24 that phrase stresses the pre-eminence of the first two
25 lines as a matter of construction.

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1 Now, because of the width of the definition --
2 LORD JUSTICE LEWISON: Though the word "accordingly" would
3 suggest, to me at any rate, that what is in (1)(a) and
4 (1)(b) is the consequence of what has been stated in the
5 first two lines --
6 MR TROWER: Yes.
7 LORD JUSTICE LEWISON: -- and that I must read the clause as
8 a whole, so that the consequences mesh with what has
9 been stated in the first part of the clause.
10 MR TROWER: Indeed, my Lord. I quite accept that. I quite
11 accept that, in a sense, what's going on in the latter
12 part of the clause is how the subordination is given
13 effect.
14 LORD JUSTICE LEWISON: Yes.
15 MR TROWER: But what I also say in relation to "and
16 accordingly" is that when how you're looking at how the
17 subordination is given effect you do look back to the
18 first two lines to work out how it is that the giving
19 effect ought to be construed. That's what I mean by
20 "pre-eminence".
21 LORD JUSTICE MOORE-BICK: You say that what follows the "and
22 accordingly" is meant to be the working out of the
23 concept in the first two lines.
24 MR TROWER: Indeed, my Lord, that's the way I am putting it.
25 My Lord has put it much more concisely.

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1 Now, because of the width of the definition of
2 "Senior Liabilities", the subordinated debt is
3 subordinated behind all liabilities other than the
4 excluded liabilities, which are irrelevant for present
5 purposes. You get that, just flicking back in the
6 agreement, to the definition in paragraph 1(1),
7 page 203.
8 Excluded liabilities are, I think, irrelevant for
9 present purposes. The learned judge briefly explains
10 what the position is in relation to excluded liabilities
11 in paragraph 75 of his judgment. "Excluded
12 liabilities", just so your Lordships know what we submit
13 they mean (page 202) is what they're designed to deal
14 with is other subordinated debt that ranks junior to the
15 existing subordinated debt. So the agreement
16 contemplates the possibility of further subordinated
17 debt arising. That's what is written.
18 LORD JUSTICE BRIGGS: In the definition those are cumulative
19 requirements, aren't they? They must be (a) expressed
20 to be and, in the opinion of the officer, actually do?
21 MR TROWER: Yes, indeed. So there is a slight level of sort
22 of uncertainty about it, in the sense that it's not
23 an absolute context, but presumably the insolvency
24 office holder has to act reasonably and so on in
25 relation to his conclusion. But if there's uncertainty,

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1 that's right, there is a cumulative effect of that
2 definition.
3 LORD JUSTICE BRIGGS: Yes.
4 MR TROWER: One thing that is plain, we respectfully submit,
5 is that "liabilities" is a term which is defined very
6 broadly and doesn't limit liabilities to provable
7 liabilities. There can be no real argument in relation
8 to that, we suggest.
9 Now, as I mentioned, my Lord, we agree that
10 clauses 5.1(a) and 5.1(b) provide for how the
11 subordination is achieved, if one likes. We also agree
12 that the structure of these subclauses renders the
13 subordinated debt not repayable in certain defined
14 circumstances. That's the way the subordination is
15 achieved.
16 But we do not agree that that means, as LBHI2 would
17 have it, that the sub debt is necessarily provable. It
18 will only be provable if and to the extent that the
19 proof of the debt does not interfere with the
20 subordination identified in the first two lines of
21 clause 5.1.
22 LORD JUSTICE BRIGGS: That's provability or not as a matter
23 of contractual obligation, as I understand it --
24 MR TROWER: Indeed.
25 LORD JUSTICE BRIGGS: -- rather than as a matter of anything

1 in the insolvency code.
2 MR TROWER: At the end of the day, one way of analysing it
3 is that it's a contracting out of what they would
4 otherwise be entitled to do.
5 LORD JUSTICE BRIGGS: Because it is clearly a provable debt
6 under the code.
7 MR TROWER: I think it must be, yes.
8 LORD JUSTICE BRIGGS: Yes.
9 LORD JUSTICE MOORE-BICK: So what are we looking for?
10 An undertaking not to prove?
11 MR TROWER: Yes. I'm happy to characterise it that way.
12 So the subordination which is imposed by clause 5.1
13 and which is worked through in the mechanism in 5.1(a)
14 and 5.1(b) is supported by clause 4, which I will return
15 to, and by clause 7. And in particular clause 7(e),
16 which the learned judge refers to, which prevents the
17 lender from taking or omitting to take any action
18 whereby the subordination of the subordinated
19 liabilities or any part of them to the Senior
20 Liabilities might be terminated, impaired or adversely
21 affected.
22 LORD JUSTICE LEWISON: The judge also referred to 7(d).
23 MR TROWER: He did.
24 LORD JUSTICE LEWISON: Do you say that that adds anything --
25 MR TROWER: It doesn't add anything --

1 LORD JUSTICE LEWISON: -- or does it just beg the question
2 what's permitted under the agreement?
3 MR TROWER: I'm not sure it adds a great deal to 7(e). 7(e)
4 is drafted in much wider terms. We don't, with respect,
5 accept that the use of 7(d) and (e) together,
6 particularly when read with 4 -- which I'll come on to
7 a bit later -- begs the question. What they are doing
8 is they are actually supporting the subordination. You
9 have to ask yourself what the position is in relation to
10 the subordination in the first two lines. Then you ask
11 yourself whether what is being done by the creditor
12 actually causes the subordination no longer to have
13 effect, and if it does cause the subordination no longer
14 to have effect, he can't do it.
15 Where this, I submit, is particularly relevant
16 relates to the argument to statutory interest. Because
17 in relation to statutory interest the argument is
18 effectively that they can prove, having proved their
19 debt has to be taken into account before statutory
20 interest becomes payable. If the consequence of them
21 proving has that effect, they can't do it under 7(e).
22 So it doesn't beg the question --
23 LORD JUSTICE LEWISON: Under 7(d)?
24 MR TROWER: Or (d). It doesn't beg the question, it
25 supports the subordination, the subordination otherwise

1 being threatened by the way in which the statutory code
2 provides for interest to become payable. (Pause).
3 Against that background, can I turn, then, to the
4 significance of the borrower being solvent? What LBHI
5 seeks to do to overcome the problem is it seeks to focus
6 on that part of clause 5 which defines when a borrower
7 is solvent for the purposes of identifying the
8 circumstances in which the debt is repayable.
9 The way this works is that 5.1(b) provides that
10 repayment of the debt is conditional upon the borrower
11 being solvent at the time of and immediately following
12 the repayment of the subordinated debt. So that's the
13 structure. The way in which it works. The starting
14 point. Then you work out, using 5.2, what that means.
15 It provides that:
16 The borrower would be solvent if it is able to pay
17 its non-subordinated liabilities in full,
18 disregarding ..."
19 First of all, the excluded liabilities, which
20 admittedly come second, and obligations which are not
21 payable or capable of being established or determined in
22 the insolvency of the borrower.
23 It is at the end of the day those words, and
24 possibly as well the point on interest not being
25 a liability of the borrower, which LBHI2's appeal turns

1 on. What it says is that the phrase is designed to
2 cover the two categories of provable debts under English
3 law, those obligations which are payable, accrued
4 liabilities, and those which are only capable of being
5 established or determined in the insolvency of the
6 borrower, which it limits to, for example, future and
7 contingent provable debts.
8 It says that statutory interest and non-provable
9 liabilities are neither payable nor capable of being
10 established or determined in the insolvency of the
11 borrower.
12 It's an obvious point but needs to be made, the one
13 thing that is plain is that the draftsman did not use
14 the term an onology(?) of provability. One asks the
15 question, why didn't he do so?
16 LORD JUSTICE BRIGGS: I think I asked Mr Snowden that.
17 MR TROWER: Indeed, your Lordship did.
18 Our obvious first point is he didn't use the
19 language because his intention was to subordinate the
20 debt behind all enforceable obligations. And I will
21 come back to that concept of enforceable obligations,
22 because it fits with the concept which must underpin the
23 whole idea of capital adequacy.
24 LORD JUSTICE BRIGGS: The temptation to ask you why you
25 didn't use that word either is almost is irresistible,

1 but I will leave it.
2 MR TROWER: Well, my Lord, we can see what is --
3 LORD JUSTICE LEWISON: As a word "provable" has a particular
4 meaning in the English insolvency code.
5 MR TROWER: It does.
6 LORD JUSTICE LEWISON: The concept of debts which are either
7 payable or capable of being established may have a much
8 wider pan-European idea.
9 MR TROWER: Absolutely, it may. Although, of course, what
10 it does do -- although as a concept it may have the same
11 idea, transcending different jurisdictions, the way it
12 actually applies in different jurisdictions may be very
13 different.
14 LORD JUSTICE BRIGGS: Yes.
15 MR TROWER: That's quite a critical point, my Lords, we say
16 because at the end of the day one would expect the
17 absorption of losses to cross and transcend the same
18 categories of losses across every jurisdiction in which
19 this agreement is designed to be used.
20 LORD JUSTICE LEWISON: That's one possibility. The other
21 possibility, as it were, you take your jurisdiction as
22 you find it.
23 MR TROWER: Of course.
24 LORD JUSTICE BRIGGS: Could it mean that you are
25 subordinated to anything which anyone else, other than

1 the excluded liability creditor, can get out of
2 an insolvency process?
3 MR TROWER: It could certainly mean that. And that --
4 LORD JUSTICE BRIGGS: In other words, it has a sort of
5 down-to-earth almost protean effect of subordinating the
6 subordinated creditor where some useful purpose would be
7 served because somebody else could get paid out of
8 an insolvency?
9 MR TROWER: My Lord, that is at root what we say it means.
10 We say that you do indeed get, under English law, out of
11 the insolvency process statutory interest and
12 non-provable claims. That, of course, may --
13 LORD JUSTICE BRIGGS: You do get statutory interest but the
14 other one is the big "if", isn't it?
15 MR TROWER: One understands that, my Lord, but I am going to
16 explain to your Lordship I hope in a manner that gives
17 a little bit of substance to the mere sentence by way of
18 response, how it is that it can properly be regarded as
19 in the insolvency.
20 LORD JUSTICE MOORE-BICK: Would that be something to do
21 tomorrow?
22 MR TROWER: Looking at the time, my Lord, it certainly
23 would.
24 LORD JUSTICE MOORE-BICK: Thank you very much. We'll sit at
25 10.30 am.

1 (4.17 pm)
2 (The court adjourned until 10.30 am
3 on Wednesday, 25 March 2015)
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