

<p>1 Wednesday, 25 March 2015 2 (10.30 am) 3 Submissions by MR TROWER ( continued) 4 LORD JUSTICE MOORE-BICK: Yes, Mr Trower. 5 MR TROWER: My Lords, where we got to yesterday, I think, at 6 the close of play was that what the draftsman was 7 seeking to exclude from the concept of liabilities was 8 only those obligations in respect of which a creditor 9 would have no remedy in insolvency proceedings, such 10 that the obligation owed by the borrower would be of no 11 financial value to the creditor. That's the sort of 12 submission that -- 13 LORD JUSTICE BRIGGS: They are still liabilities, aren't 14 they, but they're excluded from the solvency test? 15 MR TROWER: That's correct. That's correct. 16 The way of course it is done is by excluding those 17 liabilities from the solvency test and reinforcing it 18 with the provisions of clause 7, which I'll come on to. 19 Now, what I was -- 20 LORD JUSTICE LEWISON: What falls within the exclusion, what 21 comes within the exclusion? 22 MR TROWER: Exclusion of liabilities? 23 LORD JUSTICE LEWISON: No, not the defined term "excluded 24 liabilities" but the remainder of clause 5.2(a). 25 MR TROWER: The two that immediately occurred to us, and</p> <p style="text-align: center;">Page 1</p>	<p>1 MR TROWER: Yes. 2 LORD JUSTICE MOORE-BICK: So we don't regard them as 3 enforceability liabilities at all? 4 MR TROWER: No. 5 LORD JUSTICE MOORE-BICK: You wouldn't expect them to be 6 enforceable in the liquidation? 7 MR TROWER: Indeed. Although, as we'll see, the way their 8 Lordships approached it was slightly different, because 9 I will take your Lordship back to Taylor. 10 LORD JUSTICE MOORE-BICK: Sorry, that's true as well for 11 statute-barred debts, isn't it? 12 MR TROWER: Yes, it is. 13 LORD JUSTICE MOORE-BICK: Because they technically exist but 14 aren't enforceable. 15 MR TROWER: Yes. But of course what one has to bear in mind 16 in relation to those, if you're thinking about 17 enforcement in other jurisdictions where there may be 18 other insolvency process, the approach (a) may be 19 different and (b) it will depend on where the process is 20 and as to the revenue authority concerned; because of 21 course there wouldn't be a problem if the revenue 22 authority was the local revenue authority in respect of 23 the local insolvency process. 24 LORD JUSTICE LEWISON: So is your analysis that -- take 25 a foreign revenue debt, it is a liability as defined but</p> <p style="text-align: center;">Page 3</p>
<p>1 I was going to come on to those in a relatively short 2 moment, were the foreign revenue claims, which are 3 referred to in Government of India v Taylor, and 4 Limitation Act statute-barred claims. I will explain 5 why in relation to both of them there's actually 6 a difference in analysis in the House of Lords as to why 7 it is that in relation to the Government of 8 India v Taylor-type claims they're not admitted to proof 9 in an administration -- in a liquidation, as it was in 10 those days. 11 LORD JUSTICE LEWISON: So a foreign government just has to 12 whistle for its money, does it, and the members take 13 priority? 14 MR TROWER: That's correct. They simply are unenforceable 15 in the context of English process. There are two 16 reasons for that, two alternative reasons, and we'll 17 look at that in a moment, but one of their Lordships 18 says they are simply not liabilities at all for the 19 purposes of the legislation and the second is that 20 they're not liabilities which the liquidator has to pay. 21 So those are the two different analyses that are used. 22 LORD JUSTICE MOORE-BICK: Would they be enforceable in 23 England anyway? 24 MR TROWER: No. 25 LORD JUSTICE MOORE-BICK: Well, that was my recollection</p> <p style="text-align: center;">Page 2</p>	<p>1 it is excluded by 5.2(a) or it's not a liability at all? 2 Because 5.2(a) must be trying to exclude something which 3 is otherwise a liability. 4 MR TROWER: I think it is probably a liability that is 5 excluded, and the reason I say that is because there are 6 contexts, albeit not in English proceedings, in which it 7 may be enforceable. 8 LORD JUSTICE MOORE-BICK: It may be the word "obligation" is 9 being used in a slightly odd way, it could mean things 10 which could be asserted as obligations but cannot be 11 established in the insolvency. That would cover both 12 the foreign revenue liability, which isn't a liability 13 recognised in English law -- 14 MR TROWER: Yes. 15 LORD JUSTICE MOORE-BICK: -- and the statute-barred debt 16 that is recognised as an obligation but not one that can 17 be enforced. 18 MR TROWER: Yes. 19 LORD JUSTICE MOORE-BICK: So it may be intended to cover 20 a range of slightly different animals. 21 MR TROWER: Of course, what one has to bear in mind when 22 looking at a contract is that the draftsman may, insofar 23 as he was thinking about this sort of thing at all, have 24 been concerned to try and cover the two different 25 juridical analyses that might have applied in relation</p> <p style="text-align: center;">Page 4</p>

<p>1 to whether or not this was a liability or whether it was 2 a liability that wasn't -- wasn't a liability at all, or 3 whether it was a liability that the liquidator simply 4 didn't have to take into account. 5 LORD JUSTICE LEWISON: But why should the definition of 6 "liabilities" be interpreted by reference to an English 7 concept of what is or isn't a liability, an enforceable 8 liability, but 5.2(a) should be interpreted according to 9 some worldwide concept or pan-European concept? 10 MR TROWER: I don't suggest that that's what is happening. 11 What I suggest is happening is that the concept of 12 liability, as defined, is something where an obligation 13 is capable of arising in a particular set of 14 circumstances, and then you look at 5.2(a) and you ask 15 yourself whether, in the circumstances with which 5.2(a) 16 is concerned, that is something that, although capable 17 of being an obligation and liability for the purposes of 18 the substantive definition, is actually taken out of it 19 in the context of the insolvency of a borrower in 20 certain circumstances. 21 LORD JUSTICE LEWISON: In the insolvency of a borrower in 22 England and Wales? 23 MR TROWER: Absolutely. Now there may be -- 24 LORD JUSTICE LEWISON: Wait a minute. So you're accepting 25 are you, that it is the domestic insolvency code, or</p> <p style="text-align: center;">Page 5</p>	<p>1 England? 2 MR TROWER: Correct. Because the insolvency of the borrower 3 is defined to extend -- 4 LORD JUSTICE LEWISON: Yes. 5 MR TROWER: -- in the way that it does. 6 LORD JUSTICE LEWISON: So how would you ever tell whether 7 the borrower was solvent or not? 8 MR TROWER: Well, there is an issue in relation to this 9 clause that I accept is quite difficult. This clause 10 applies whether or not the borrower is subject to 11 insolvency proceedings, although the first draft which 12 one saw, 5.1(b) only applied in circumstances in which 13 the borrower was subject to insolvency proceedings. But 14 those qualificatory words now seem to have been removed 15 from the draft. 16 But it is plainly primarily contemplating the 17 circumstances in which the borrower is subject to 18 insolvency proceedings. One of the reasons I say that 19 is that the concept of excluded liability requires 20 an opinion by the insolvency office holder, which is 21 difficult to see how that can work in circumstances in 22 which the insolvency office holder has not been 23 appointed. 24 If you look at 5.2(b), there's a reference to taking 25 out of account the excluded liabilities, and that</p> <p style="text-align: center;">Page 7</p>
<p>1 insolvency regime, which governs whether something does 2 or doesn't fall within -- 3 MR TROWER: No. 4 LORD JUSTICE LEWISON: That's what I don't quite understand. 5 Unless you're saying a foreign currency debt is not 6 recoverable anywhere in the world in a different 7 jurisdiction, and I don't know whether you are saying 8 that -- 9 MR TROWER: No, my Lord, I am using the foreign revenue debt 10 as an illustration of what the draftsman might have in 11 mind. It is a good illustration, in the sense that 12 there will be some jurisdictions in which -- and in 13 a sense remove this debate from the pure English 14 domestic context. Let's look at it in the context of 15 an insolvency of the borrower outside England. It may 16 still be the case that the same principle is applicable 17 in relation to that insolvency abroad. 18 LORD JUSTICE LEWISON: Yes. 19 MR TROWER: It may be, and this is an interesting 20 possibility, that in that insolvency an English revenue 21 authority seeks to prove. Now in that context it may be 22 the case that, if they had the same rule as we have, you 23 would exclude the English revenue authority under this 24 provision. 25 LORD JUSTICE LEWISON: Even though it would be provable in</p> <p style="text-align: center;">Page 6</p>	<p>1 requires an opinion. We touched on this, I think, 2 yesterday. 3 LORD JUSTICE BRIGGS: 5.2(b). 4 MR TROWER: 5.2(b): 5 "For the purposes of ... the borrower shall be 6 solvent if it is able to pay its liabilities other than 7 the subordinated liabilities in full disregarding ..." 8 And there are two categories of obligation. 9 LORD JUSTICE BRIGGS: It is 5.4, isn't it? 10 MR TROWER: It is 5.2(b). Yes, there are two ways of doing 11 it. 5.4 is not a complete problem because all that does 12 is provide a mechanism -- 13 LORD JUSTICE LEWISON: It's the definition of "excluded 14 liabilities". 15 MR TROWER: -- for proving. It is the definition of 16 excluded liabilities that gives rise to the issue. 17 LORD JUSTICE LEWISON: So suppose you have two lots of 18 subordinated debt. 19 MR TROWER: Yes. 20 LORD JUSTICE LEWISON: One of which ranks senior to the 21 other. 22 MR TROWER: Yes. 23 LORD JUSTICE LEWISON: And the senior lender wants to be 24 repaid. 25 MR TROWER: Yes.</p> <p style="text-align: center;">Page 8</p>

<p>1 LORD JUSTICE LEWISON: Do you take into account the junior 2 subordinated debt or not -- 3 MR TROWER: No, you -- 4 LORD JUSTICE LEWISON: -- if there's no office holder? 5 MR TROWER: My Lord, there isn't a very satisfactory answer 6 to that question because one can see an argument going 7 both ways as to whether or not you simply -- and we 8 would respectfully submit that it would be quite 9 a strong thing to do to take this out of the context in 10 which it appears to apply in any event, merely by reason 11 of the fact that excluded liabilities requires, on its 12 face, the opinion of an insolvency office holder. The 13 better construction is that it requires the opinion of 14 the insolvency office holder where there is one for that 15 purpose. 16 But it is difficult to apply, I quite accept, in 17 this particular context, although this is not a point 18 which my Lords have to grapple with explicitly. Of 19 course it goes to construction but you don't have to 20 deal with it explicitly in the present case. 21 LORD JUSTICE MOORE-BICK: How does 5.2(a) work in a case 22 where you have an English company going into 23 administration in this country but holding assets abroad 24 in a country where there is a revenue debt? So, in 25 other words, the revenue debt would be enforceable by</p> <p style="text-align: center;">Page 9</p>	<p>1 yourself, because in some jurisdictions you may find 2 that the assets concerned are treated as being subject 3 to the English insolvency, whatever. There may be other 4 jurisdictions in which recognition has to be obtained in 5 order to get to that result. There may be yet further 6 jurisdictions where they adopt an approach which permits 7 local creditors to -- 8 LORD JUSTICE BRIGGS: You could have a local insolvency. 9 MR TROWER: You could have a local insolvency. There are 10 a number of different possibilities, my Lord. 11 LORD JUSTICE MOORE-BICK: The notion that the foreign 12 revenue debt is always to be regarded as an enforceable 13 for the purposes of 5.2(a) I think may be questionable, 14 given the fact that the assets in those circumstances 15 would stand to be affected by the enforceability of the 16 foreign revenue claim -- 17 MR TROWER: Yes. 18 LORD JUSTICE MOORE-BICK: -- which would be enforceable in 19 the jurisdiction where the assets stood. 20 MR TROWER: My Lord, for the purposes of my argument 21 I don't, with respect, have to show or say that there 22 will in every case be claims which are not payable or 23 capable of being established or determined. For the 24 purposes of my argument, we submit, what I have to show 25 is what the draftsman might have had in mind as being</p> <p style="text-align: center;">Page 11</p>
<p>1 presumably insolvency proceedings in that country, the 2 diminution of the assets, if that debt were enforced, 3 would affect the overall solvency position of the 4 company. Insolvency is defined as including the 5 equivalent to the various proceedings in any other 6 jurisdiction to which the borrower may be subject. 7 MR TROWER: Yes. 8 LORD JUSTICE MOORE-BICK: How is going to work under those 9 circumstances? 10 MR TROWER: In circumstances where we don't yet have 11 an insolvency or we do have -- 12 LORD JUSTICE MOORE-BICK: You have an insolvency in this 13 country. 14 MR TROWER: In this country, yes. 15 LORD JUSTICE MOORE-BICK: With assets held abroad in 16 a jurisdiction where there is a revenue claim. 17 MR TROWER: Yes. Well -- 18 LORD JUSTICE MOORE-BICK: Because that would affect the 19 overall solvency, would it not, of the -- 20 MR TROWER: It may do. There are number of questions that 21 rise out of that. The first is what would happen in 22 that foreign jurisdiction in relation to the English 23 insolvency and whether it was recognised there. 24 LORD JUSTICE MOORE-BICK: Yes. 25 MR TROWER: So that's the first question that you would ask</p> <p style="text-align: center;">Page 10</p>	<p>1 something that ought to be excluded, all other things 2 being equal. That's what this goes to. 3 I quite accept that when one is trying to identify 4 what the draftsman was thinking about, for the purposes 5 of dealing with my learned friend Mr Snowden's argument 6 about whether it is simply limited to provability, one 7 of the questions your Lordships are going to be asking 8 is, well, what was he thinking about? What was he 9 thinking about? What we are doing with the 10 statute-barred debts and the foreign revenue claims is 11 giving your Lordships a couple of examples from 12 an English perspective, I have to do it from that, as to 13 what he might have had in mind. 14 Now it may be that in other jurisdictions there are 15 other examples. 16 LORD JUSTICE BRIGGS: We don't have to proceed on the 17 assumption that the draftsman had any particular 18 liabilities in mind, do we? He simply comes up with 19 a test that says if this supposed liability -- 20 an extremely broad definition of liability -- is simply 21 not capable of being established or determined in any 22 relevant insolvency process that is affecting or could 23 be affecting this borrower -- 24 MR TROWER: Yes. 25 LORD JUSTICE BRIGGS: -- then you exclude it.</p> <p style="text-align: center;">Page 12</p>

<p>1 MR TROWER: Yes.</p> <p>2 LORD JUSTICE BRIGGS: And you don't have to assume that he</p> <p>3 had a list in mind. Indeed if he had a list in mind,</p> <p>4 you might have thought he would put it in a schedule.</p> <p>5 MR TROWER: Yes. No, my Lord, that's certainly a way of</p> <p>6 looking at it. In a sense, it was that kind of thought</p> <p>7 that was behind the way I put it yesterday about whether</p> <p>8 these claims were enforceable. Your Lordship tested me</p> <p>9 on, well, that phrase hasn't been used in the way that</p> <p>10 provable hasn't been used. But that was the sort of</p> <p>11 thing that we were thinking about, it was a shorthand</p> <p>12 for the kind of thought that your Lordship has had.</p> <p>13 LORD JUSTICE MOORE-BICK: The statute-barred debt is in</p> <p>14 a sense an easier concept by which to test this because</p> <p>15 it can be treated by an obligation, albeit one that</p> <p>16 could not be established or determined in the</p> <p>17 insolvency, in the sense that it would not be payable.</p> <p>18 MR TROWER: Yes. Yes. No, that's right, because of course</p> <p>19 the liability is there, it is just the remedy is barred,</p> <p>20 and the remedy --</p> <p>21 LORD JUSTICE MOORE-BICK: Even that could start to come</p> <p>22 under stress in a cross-border insolvency.</p> <p>23 MR TROWER: Yes, that's undoubtedly the case because of</p> <p>24 issues in relation to different limitation periods.</p> <p>25 So I certainly accept, but submit that it doesn't do</p> <p style="text-align: center;">Page 13</p>	<p>1 MR TROWER: Yes.</p> <p>2 LORD JUSTICE BRIGGS: You then have your insolvency officer</p> <p>3 who can give an opinion about excluded liabilities and</p> <p>4 you know what insolvency you're dealing with to see what</p> <p>5 in fact would be incapable of being established or</p> <p>6 determined in it.</p> <p>7 MR TROWER: That I think is probably the practical answer to</p> <p>8 the problem and I agree with that. I'm afraid I was</p> <p>9 looking at it simply as a matter of textual form.</p> <p>10 LORD JUSTICE BRIGGS: I know.</p> <p>11 MR TROWER: Which requires -- there's a conjunctive word</p> <p>12 "and" between the two clauses, between -- where are</p> <p>13 we? -- 5.1(a) and 5.1(b).</p> <p>14 LORD JUSTICE BRIGGS: Looking at it non-technically, 5.1(a)</p> <p>15 is an insolvency plus test.</p> <p>16 MR TROWER: Yes, that's undoubtedly right.</p> <p>17 My Lords, what I was going to do next in my</p> <p>18 submissions on this was look at statutory interest and</p> <p>19 non-provable claims separately and analyse with your</p> <p>20 Lordships how it is that it works in relation to those</p> <p>21 two categories, because obviously the arguments in</p> <p>22 relation to them are quite different and the reason that</p> <p>23 my learned friend says they come out of the clause are</p> <p>24 quite different.</p> <p>25 Statutory interest, we say, is plainly payable in</p> <p style="text-align: center;">Page 15</p>
<p>1 damage to the underlying argument, that there may be</p> <p>2 really quite difficult questions in some cross-border</p> <p>3 contexts as to how this clause works.</p> <p>4 LORD JUSTICE BRIGGS: Can I just ask this, you said that</p> <p>5 because they've removed some previous wording in</p> <p>6 a draft --</p> <p>7 MR TROWER: Yes.</p> <p>8 LORD JUSTICE BRIGGS: -- you might have to apply the</p> <p>9 solvency test in 5.1(b) in advance of any relevant</p> <p>10 insolvency process.</p> <p>11 MR TROWER: Yes.</p> <p>12 LORD JUSTICE BRIGGS: Could you ever have a situation in</p> <p>13 which the company passed the 5.1(a) test and yet fell at</p> <p>14 the 5.1(b) test?</p> <p>15 MR TROWER: That may be the answer, my Lord.</p> <p>16 LORD JUSTICE BRIGGS: Because --</p> <p>17 MR TROWER: That may be the answer.</p> <p>18 LORD JUSTICE BRIGGS: My instinct is if it has to pass</p> <p>19 120 per cent of its financial resources requirement, the</p> <p>20 idea it would pass that and then fail the solvency test</p> <p>21 is rather remote.</p> <p>22 MR TROWER: I think that must be right.</p> <p>23 LORD JUSTICE BRIGGS: If that's right, then we really only</p> <p>24 have to worry about 5.1(b) in a context where there</p> <p>25 actually is an insolvency --</p> <p style="text-align: center;">Page 14</p>	<p>1 the insolvency of the borrower so long as there is</p> <p>2 a surplus. That's the first point.</p> <p>3 Even if as a matter of construction, which I think</p> <p>4 was a submission my learned friend made, payable is not</p> <p>5 qualified by "in the insolvency of the borrower", which</p> <p>6 I think was one of the ways he put it, and "in the</p> <p>7 insolvency of the borrower" simply qualifies the capable</p> <p>8 bit of the clause, statutory interest is plainly capable</p> <p>9 of being established or determined in the insolvency of</p> <p>10 the borrower. So we tick, we respectfully suggest, both</p> <p>11 of those two boxes. For so long as the company remains</p> <p>12 in administration the person with functional</p> <p>13 responsibility for dealing with that is the</p> <p>14 administrator.</p> <p>15 I think the bottom line of my learned friend's</p> <p>16 submission, as we understand it, is that statutory</p> <p>17 interest is not a sum liability or obligation of the</p> <p>18 borrower. That's the way they put the argument in</p> <p>19 relation to statutory interest. We submit that that's</p> <p>20 wrong. What we say the position is is that 2.88(7)</p> <p>21 simply imposes an obligation that interest is to be paid</p> <p>22 on the proved debts at the higher of the Judgments Act</p> <p>23 rate or the rate applicable to the debt apart from the</p> <p>24 administration before applying any surplus remaining</p> <p>25 after the payment of the debts proved for any purpose.</p> <p style="text-align: center;">Page 16</p>

<p>1 Although 2.88 (7) imposes an obligation without 2 specifically identifying the person on whom it is 3 imposed -- and I accept, just as a matter of drafting, 4 that's the case -- the obligation, we submit, is imposed 5 on LBIE, the borrower, the statutory interest being paid 6 out of a surplus in its estate. It is therefore 7 a liability of the borrower for the purposes of the sub 8 debt agreement and it's not more complicated than that. 9 LORD JUSTICE MOORE-BICK: The possibilities are, what, 10 an obligation on the company or on the liquidator 11 personally? Are there any other possibilities? 12 MR TROWER: We couldn't think of any. To have an obligation 13 which isn't imposed on anybody, it is sort of sitting 14 there in limine in some way, just doesn't make any 15 sense. 16 LORD JUSTICE LEWISON: If you have a trust fund, which is 17 subject to restrictions on how you deal with it, you 18 could say it was an obligation on the trustee but you 19 could also say the fund was impressed with an obligation 20 on the fund. 21 MR TROWER: But you have to work out how to enforce the 22 obligation and you have to have somebody against whom it 23 can be enforced, we suggest. 24 LORD JUSTICE LEWISON: Well, it would be enforced against 25 the office holder who is in control of the fund.</p> <p style="text-align: center;">Page 17</p>	<p>1 the surplus is one that bears on the liquidator rather 2 than the company. 3 MR TROWER: My Lord, I do not dissent from the proposition 4 that within 2.88(7) there are -- 2.88 has within it 5 things that can be enforced against the liquidator, but 6 that does not detract in any way from the existence of 7 the liability of being that of the company's. 8 LORD JUSTICE LEWISON: On the other hand section 74 9 liability is expressly said to be a debt, and 2.88 is 10 not. 11 MR TROWER: Oh, yes. No, I quite accept that, my Lord. 12 I quite accept that and we'll come on and I will make 13 some submissions in relation to all of this in due 14 course on that aspect of it, obviously. 15 LORD JUSTICE LEWISON: Yes. 16 MR TROWER: There is another aspect to this that your 17 Lordships also need to be aware of. One of the 18 functions of the -- let's analyse it from a functional 19 perspective from the position of the administrator. 20 Whenever an administrator acts under the statute he acts 21 as agent of the company. Your Lordships get that from 22 Schedule B1, paragraph 69. It's on page 280 of the 23 Red Book. It is completely unqualified. 24 LORD JUSTICE BRIGGS: In that respect he is different from 25 what we would ordinarily think of as a trustee.</p> <p style="text-align: center;">Page 19</p>
<p>1 MR TROWER: Is your Lordship positing 2.88(7) or the trust? 2 LORD JUSTICE LEWISON: Either. 3 MR TROWER: Either. Well, I don't dissent from the fact 4 that there will be process available to ensure that 5 an office holder who does not comply -- if he misapplies 6 the surplus, one can conceive of types of process in the 7 administration, including, for example, proceedings 8 under Schedule B1, paragraph 77, on unfair prejudice 9 grounds, to make sure that the surplus is dealt with in 10 a way that -- let's assume he threatened to do something 11 that was unfairly prejudicial. You could conceive that 12 a paragraph 77 application might be brought in order to 13 stop him doing it, I accept that. 14 But that doesn't detract at all from the primary 15 obligation, which is an obligation we suggest is imposed 16 on the company in respect of the distribution of its 17 asset. 18 LORD JUSTICE MOORE-BICK: Does this fit in at all with the 19 argument on the nature of the claim under section 74? 20 MR TROWER: Your Lordship is correct. 21 LORD JUSTICE MOORE-BICK: It seems to me that if it's right 22 as it has been suggested, that the right to claim under 23 section 74 is the right of the court which is delegated 24 to the liquidator, it would make some sort of sense to 25 say that the obligation to pay statutory interest out of</p> <p style="text-align: center;">Page 18</p>	<p>1 MR TROWER: It is, very much so. 2 LORD JUSTICE BRIGGS: Or even a trustee in bankruptcy. 3 MR TROWER: That's right, because he is acting as agent, 4 that's the way he is dealt with, and so the trustee -- 5 the big difference of course with trustees is they have 6 the assets vested in them. So the trustees in 7 bankruptcy have a vesting. It's an issue I'll come back 8 to in a couple of other contexts in due course, but 9 that's the critical distinction. 10 LORD JUSTICE LEWISON: A liquidator isn't an agent of the 11 company, is he? 12 MR TROWER: Not explicitly in the same way that 13 an administrator is. 14 LORD JUSTICE LEWISON: But the rule about paying interest, 15 I would have thought, should be the same in its 16 character as between an administration and 17 a liquidation, shouldn't it? 18 MR TROWER: That may help my argument, with respect. 19 LORD JUSTICE LEWISON: Right. 20 MR TROWER: If from an administrator's point of view what he 21 is doing can only be capable of being characterised as 22 an agency function, which it can -- that's the only way 23 you can do it under the statute, that may have knock-on 24 consequences so the way the draftsman of the code 25 generally are thinking about what the liquidator should</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 be doing.</p> <p>2 LORD JUSTICE LEWISON: You have Ayerst to worry about,</p> <p>3 haven't you?</p> <p>4 MR TROWER: Of course one does, yes. But so far as Ayerst</p> <p>5 is concerned, my Lord, don't forget in relation to</p> <p>6 Ayerst there's no -- the assets are impressed with the</p> <p>7 statutory scheme. The creditors don't have a beneficial</p> <p>8 interest. There's a scheme that --</p> <p>9 LORD JUSTICE LEWISON: And nor does the company, so it's</p> <p>10 difficult to see why there's an agency going on there.</p> <p>11 MR TROWER: No, but the company is still entitled -- if</p> <p>12 there's an asset to be got in, for example, it's very</p> <p>13 often the company that gets in the asset.</p> <p>14 I quite accept that in a liquidation concepts of</p> <p>15 agency aren't so prevalent as they are in</p> <p>16 an administration. That much I do accept. But in the</p> <p>17 context of an administration, the concept of agency is</p> <p>18 important.</p> <p>19 Just for your Lordships' note, it's the learned</p> <p>20 judge's judgment at paragraphs 71 and following which</p> <p>21 deal with his analysis of this bit of the case.</p> <p>22 (Pause).</p> <p>23 My Lords, just the final point on this part of the</p> <p>24 argument, legal title on any view remains in the</p> <p>25 company. It is very difficult to see why in those</p> <p style="text-align: center;">Page 21</p>	<p>1 all know pre-insolvency interest is provable, so it</p> <p>2 plainly doesn't, even on my learned friend's argument,</p> <p>3 fall to be disregarded and is therefore -- because it is</p> <p>4 payable and capable of being established and it's</p> <p>5 an obligation of the borrower's.</p> <p>6 So both pre- and post-insolvency interest are</p> <p>7 payable to compensate the creditor for being kept out of</p> <p>8 his money, and they are both an important entitlement</p> <p>9 for creditors whose potential losses are meant to be</p> <p>10 protected by the capital adequacy rules, we suggest.</p> <p>11 But more importantly on this point, there isn't</p> <p>12 actually any good reason why the intervention of the</p> <p>13 insolvency should make all the difference as to whether</p> <p>14 the subordinated debt should rank ahead of or behind the</p> <p>15 undischarged obligation to pay interest. There's no</p> <p>16 commercial reason that arises. It's simply a language</p> <p>17 point. There's nothing that conceptually, so far as the</p> <p>18 creditor is concerned, should make that -- or debtor is</p> <p>19 concerned should make that difference.</p> <p>20 Put another way, why should the interest loss be</p> <p>21 absorbed only if and to the extent that it's sustained</p> <p>22 in respect of the pre-insolvency period? Being kept out</p> <p>23 of your money post-insolvency is a just as much a cause</p> <p>24 for concern.</p> <p>25 Now, I think there's one point that LBHI2 make, as</p> <p style="text-align: center;">Page 23</p>
<p>1 circumstances the person with legal title -- this is not</p> <p>2 a vesting in a trustee in bankruptcy. It is very</p> <p>3 difficult to see why the person with legal title isn't</p> <p>4 under some form of obligation. It may not be the</p> <p>5 complete suite of obligations, but it is very difficult</p> <p>6 to see why it isn't under some form of obligation.</p> <p>7 LORD JUSTICE BRIGGS: That's true in liquidation as much as</p> <p>8 administration.</p> <p>9 MR TROWER: It is indeed, my Lord.</p> <p>10 Just moving on to the next stage, and I will have to</p> <p>11 come back to this for slightly different reasons in the</p> <p>12 context of section 74, as my Lord</p> <p>13 Lord Justice Moore-Bick indicated was likely, and I will</p> <p>14 and there are one or two extra tweaks that have to be</p> <p>15 considered in that context.</p> <p>16 But the concept of statutory interest as a liability</p> <p>17 of the company in the context of this subordinated debt</p> <p>18 agreement has an extra point. We suggest it would be</p> <p>19 a rather strange result to find that for capital</p> <p>20 adequacy purposes there was a major difference between</p> <p>21 a creditor's entitlement to interest accruing</p> <p>22 pre-liquidation, which is plainly a liability of the</p> <p>23 borrower's, and a creditor's entitlement to interest</p> <p>24 accruing post-liquidation on exactly the same debt.</p> <p>25 Just to elaborate that point a little more, as we</p> <p style="text-align: center;">Page 22</p>	<p>1 I understand it, which may be directed at the last</p> <p>2 submission I've made, which is simply this. They say</p> <p>3 that there's no reason why the sub debt shouldn't rank</p> <p>4 behind statutory interest because paying statutory</p> <p>5 interest isn't required to satisfy what they say are the</p> <p>6 core aims of the capital adequacy regime, which is to</p> <p>7 permit the institution's solvency to be estimated and to</p> <p>8 permit the absorption of losses in the context of the</p> <p>9 continued survival of the regulated institution.</p> <p>10 We say that's just not right. I'm not sure how much</p> <p>11 that point is still taken, it was taken certainly at</p> <p>12 an earlier stage. But we say it's simply not right and</p> <p>13 it's the reason I took your Lordships to the capital</p> <p>14 adequacy rules in relation to absorption of losses in</p> <p>15 the insolvency. So one is talking about losses in the</p> <p>16 insolvency as much as the absorption of losses for the</p> <p>17 purposes of ensuring and facilitating the continued</p> <p>18 going concern of the entity.</p> <p>19 Before going to non-provable liabilities, the only</p> <p>20 other point, subject to your Lordships, I had in</p> <p>21 relation to statutory interest is I think a submission</p> <p>22 was made by my learned friend Mr Snowden that the</p> <p>23 assessment of insolvency would be highly speculative if</p> <p>24 it had to include statutory interest pre-insolvency</p> <p>25 proceedings.</p> <p style="text-align: center;">Page 24</p>

<p>1 We had a bit of a debate on this just now as to the 2 extent to which the draftsman contemplated 5.1(b) being 3 applicable in relation to a solvency test prior to the 4 actual initiation of insolvency proceedings. 5 But, with respect, the point doesn't actually go 6 anywhere anyway because the assessment of a company's 7 solvency, on any view, for the purposes of this clause 8 occurs at a relevant moment in time. So you have to ask 9 yourself: what is the position at the relevant moment in 10 time? That relevant moment in time being the time at 11 which the condition is to be satisfied for the repayment 12 of the obligation under the sub debt agreement. In 13 other words, what you're looking at "solvent" for is to 14 see whether the precondition to payment has arisen. 15 So if the borrower is not yet subject to insolvency 16 proceedings, there can't be any warrant for including 17 any guesstimate in relation to prospective future 18 interest obligations, which I think was the underlying 19 point that my learned friend was making. 20 I may have misunderstood the point, but that's what 21 I had understood it to be. 22 My Lords, I was going to go on to non-provable 23 liabilities next and as my Lords know the most obvious 24 non-provable liability that we've all long known about 25 and there's been quite a lot of litigation about over Page 25</p>	<p>1 actionable damage, it is provable. 2 MR TROWER: Oh, yes, I see. Sorry, I was looking at it the 3 wrong round. Yes, those claims are plainly -- they are 4 now provable. 5 LORD JUSTICE LEWISON: Yes. 6 MR TROWER: But if there is a claim in tort where the cause 7 of action is not complete or there's more to prove apart 8 from actionable damage as at the commencement date, it 9 will be non-provable even though the damage then 10 occurs -- or the relevant event occurs fairly short 11 after the commencement date. 12 LORD JUSTICE MOORE-BICK: Can you give an example of that? 13 MR TROWER: It is raised in T&amp;N in relation to mesothelioma 14 claims -- I couldn't that out quite right. 15 Now there, there wouldn't be an event still 16 necessary to occur, apart from actionable damage, where 17 all the exposure had taken place prior to the 18 commencement date. But in an administration -- 19 LORD JUSTICE MOORE-BICK: That's an example, as you say, of 20 the cause of action being complete apart from actionable 21 damage. 22 MR TROWER: Yes, absolutely. 23 LORD JUSTICE MOORE-BICK: Can you give me an example of 24 a tort claim where you can foresee it might come to 25 fruition but hasn't yet got to the -- Page 27</p>
<p>1 the years is the unliquidated claim for damages in tort. 2 I am sure your Lordships have the way it worked, but 3 these were the liabilities that were under consideration 4 in the T&amp;N case that my Lords saw. We don't need to go 5 back to it for present purposes but just in summary 6 pre-1986 all such claims would have been non-provable. 7 Even now, they are only provable to the extent that the 8 cause of action was complete at the insolvency date or 9 the only missing element which is necessary to complete 10 the cause of action is actionable damage. 11 It is very difficult, we suggest, to see why claims 12 of that traditional sort of non-provable claim should 13 not be paid before subordinated debt, which my learned 14 friend's submission requires him to maintain. 15 LORD JUSTICE LEWISON: Sorry, what do you mean by 16 "traditional claims"? 17 MR TROWER: The concept -- sorry, that was probably 18 an inaccurate shorthand which I should not have used. 19 LORD JUSTICE LEWISON: Because claims which you have just 20 described are now provable claims. 21 MR TROWER: No. 22 LORD JUSTICE LEWISON: No? 23 LORD JUSTICE BRIGGS: Only if. 24 LORD JUSTICE LEWISON: I thought you said if the cause of 25 action is complete or if it's complete but for Page 26</p>	<p>1 LORD JUSTICE LEWISON: If the administrator is trading the 2 company and some employee is involved in an accident, or 3 damages a third party, or the delivery van crashes into 4 something -- 5 MR TROWER: Yes, there's that possibility. There's also 6 negligent advice where the reliance takes place 7 subsequently. 8 LORD JUSTICE MOORE-BICK: Yes. 9 MR TROWER: That's another example. 10 So they are out there and, obviously, they have been 11 narrowed and that's another issue that's relevant. But 12 they are out there. Sorry, I shouldn't have used that 13 sort of shorthand "traditional". It serves to confuse 14 rather than elucidate. 15 The judge is actually criticised, I think, by LBH12 16 for not explaining why non-provable liabilities would 17 not be disregarded when calculating whether the borrower 18 was solvent. That isn't quite a fair reading of his 19 judgment. Although he dealt with point in two different 20 contexts, he plainly dealt with at paragraph 87 of his 21 judgment. 22 I don't think that we need to go to it. That is 23 where it is. 24 LORD JUSTICE BRIGGS: Yes. 25 MR TROWER: The judge dealt with it in a manner which we Page 28</p>

7 (Pages 25 to 28)

<p>1 respectfully suggest is perfectly satisfactory.</p> <p>2 Now what LBHI2's argument here is that they seek to</p> <p>3 construe the words "in the insolvency of the borrower"</p> <p>4 as meaning that the non-subordinated liability has to be</p> <p>5 payable or capable of being established or determined as</p> <p>6 part of the proving process -- that's what their</p> <p>7 submission boils down to -- or else is excluded.</p> <p>8 Our submission obviously is that the words can't</p> <p>9 sensibly bear that highly restricted meaning. There are</p> <p>10 a number of reasons for that.</p> <p>11 Let me illustrate why it is that what goes on in</p> <p>12 relation to non-provable liabilities is, on any view,</p> <p>13 something that is going on in the insolvency of the</p> <p>14 borrower. That's what my submissions on this part of</p> <p>15 the case boil down to.</p> <p>16 The first part of the analysis relates to the effect</p> <p>17 of the statutory moratorium. It is of course the case</p> <p>18 that the effect of the moratorium which comes into</p> <p>19 effect on a company going into administration or</p> <p>20 liquidation bars proceedings in relation to compulsory</p> <p>21 windings up and administrations. But the first point is</p> <p>22 it doesn't extinguish the liability, all it does is bar</p> <p>23 the process.</p> <p>24 What it does is it prevents the non-provable</p> <p>25 liability from being determined or enforced until such</p> <p style="text-align: center;">Page 29</p>	<p>1 dispute determined, legal process rather than proof is</p> <p>2 the process by which it's appropriate to obtain a final</p> <p>3 determination of the issue between the parties.</p> <p>4 It will always be -- I can't think of any case in</p> <p>5 which it wouldn't be -- against the background of not</p> <p>6 then being able to go on and execute. You get a lifting</p> <p>7 of the stay simply for the purposes of determining the</p> <p>8 dispute. So that's the context in which it arises.</p> <p>9 But what is going on there, we respectfully suggest,</p> <p>10 is a straightforward question, within the insolvency</p> <p>11 proceedings, of balancing this exercise as to how you</p> <p>12 determine the proceedings against the company.</p> <p>13 There's no reason at all why in the context of</p> <p>14 a disputed non-provable liability that determination</p> <p>15 wouldn't be going on within the context of the</p> <p>16 insolvency proceedings in exactly the same way.</p> <p>17 LORD JUSTICE LEWISON: The counterargument, I suppose, is</p> <p>18 that somebody with a non-provable claim goes along to</p> <p>19 the Companies Court --</p> <p>20 MR TROWER: Yes.</p> <p>21 LORD JUSTICE LEWISON: -- and says, "I wish to issue a claim</p> <p>22 form in the Queen's Bench Division for my personal</p> <p>23 injury [or whatever it is], please let me do it." The</p> <p>24 Companies Court says, "All right, go ahead", and the</p> <p>25 liability is then established or determined in the</p> <p style="text-align: center;">Page 31</p>
<p>1 time as the court considers it appropriate to allow the</p> <p>2 claimant, if necessary, to take steps to issue</p> <p>3 proceedings or take enforcement steps. That's what is</p> <p>4 going on when the court is being asked to give</p> <p>5 permission under section 130 to lift the stay or the</p> <p>6 equivalent under Schedule B, paragraph 43, in relation</p> <p>7 to an administration.</p> <p>8 In a creditors' voluntary liquidation the position</p> <p>9 is slightly different because, unless the liquidator</p> <p>10 obtains a stay under section 126, there is no</p> <p>11 restriction on the claimant taking steps to establish</p> <p>12 his claim notwithstanding the insolvency.</p> <p>13 But in both contexts a non-provable claim is capable</p> <p>14 of being established or determined in the insolvency, we</p> <p>15 submit, because it is only if and to the extent that the</p> <p>16 moratorium is not lifted or a stay is obtained that the</p> <p>17 obligation becomes incapable of being established or</p> <p>18 determined in that insolvency. So the whole thing is</p> <p>19 predicated on the process which the court, with its</p> <p>20 insolvency hat on, is prepared to permit to be taken in</p> <p>21 order to establish the liability.</p> <p>22 There are plenty of cases in which the court permits</p> <p>23 the moratorium to be lifted because legal process --</p> <p>24 when balancing the impact on the creditors as a whole</p> <p>25 against the most convenient mechanism for getting the</p> <p style="text-align: center;">Page 30</p>	<p>1 Queen's Bench Division --</p> <p>2 MR TROWER: Yes.</p> <p>3 LORD JUSTICE LEWISON: -- not in the insolvency.</p> <p>4 MR TROWER: Yes. It will depend on the context as to --</p> <p>5 I mean, there are a number of points that feed off each</p> <p>6 other here. One has to look at the totality of what is</p> <p>7 going to happen. It will depend on the context as to</p> <p>8 what then happens once the Queen's Bench Division have</p> <p>9 reached a determination. You may have a proof which</p> <p>10 then has to be determined on the back of a partial --</p> <p>11 LORD JUSTICE LEWISON: Well, it can't be because</p> <p>12 ex hypothesi it is non-provable.</p> <p>13 MR TROWER: I understand.</p> <p>14 LORD JUSTICE BRIGGS: You are speaking generally.</p> <p>15 MR TROWER: I am speaking generally, my Lord. I am not</p> <p>16 speaking in relation to a non-provable debt.</p> <p>17 LORD JUSTICE LEWISON: I am sorry, I should have made my</p> <p>18 question clear. I am postulating a non-provable claim.</p> <p>19 MR TROWER: Yes.</p> <p>20 LORD JUSTICE LEWISON: The administrator carries on trading,</p> <p>21 somebody gets injured, they wish to bring a claim, it's</p> <p>22 not provable, and they say to the Companies Court,</p> <p>23 "Please can we issue a claim form in the Queen's Bench</p> <p>24 Division?" The Companies Court says yes, and then there</p> <p>25 is a trial in the Queen's Bench Division and</p> <p style="text-align: center;">Page 32</p>



<p>1 quantification of damage.  2 MR TROWER: You then have to go through the analysis of what  3 happens next, which is why one can't look at all these  4 points in entire isolation. One can see that there may  5 be an argument that in that case it feels less like an  6 "in the insolvency" than in the case where that's been  7 done in relation to a proved debt. But --  8 LORD JUSTICE MOORE-BICK: If you succeed and get judgment on  9 your claim --  10 MR TROWER: Yes.  11 LORD JUSTICE MOORE-BICK: -- then presumably you have to  12 prove for the amount of the judgment in the insolvency,  13 do you?  14 MR TROWER: What you would do -- it depends on whether or  15 not it is a proved debt as to what happens.  16 LORD JUSTICE MOORE-BICK: It may become --  17 MR TROWER: I'm sorry?  18 LORD JUSTICE MOORE-BICK: Well, I hear mutterings from  19 either side it is not provable debt. The judgment debt  20 may have a different character from the claim for  21 damages.  22 MR TROWER: It depends what you want to do with it once  23 you've got it.  24 LORD JUSTICE MOORE-BICK: Get paid, obviously.  25 MR TROWER: Obviously you want to get paid, yes.</p> <p style="text-align: center;">Page 33</p>	<p>1 established, it would have been an expense but for the  2 fact it has been recognised as a provable debt.  3 MR TROWER: Yes.  4 LORD JUSTICE LEWISON: That's because expenses are not tied  5 off to the cut off date, they are incurred during the  6 course of the insolvency proceedings.  7 MR TROWER: Yes, that's right.  8 LORD JUSTICE LEWISON: So there's a different rule for  9 expenses.  10 LORD JUSTICE MOORE-BICK: So, just to complete the story,  11 there you are with your judgment debt. What do you do  12 with it?  13 MR TROWER: If you've done it -- are we're talking about  14 a non-provable or a provable?  15 LORD JUSTICE MOORE-BICK: We've got the van that knocked  16 over the pedestrian after the insolvency has started.  17 MR TROWER: Yes.  18 LORD JUSTICE MOORE-BICK: It is a non-provable claim. You  19 get permission, you get the stay lifted.  20 MR TROWER: Yes.  21 LORD JUSTICE MOORE-BICK: You get judgment on your claim for  22 personal injuries.  23 MR TROWER: Yes.  24 LORD JUSTICE MOORE-BICK: There you are holding a judgment  25 debt. It's not a provable debt.</p> <p style="text-align: center;">Page 35</p>
<p>1 LORD JUSTICE BRIGGS: Is a post cut-off date judgment debt  2 in proceedings which have been permitted then provable?  3 MR TROWER: Well --  4 LORD JUSTICE BRIGGS: No, I think not.  5 MR TROWER: -- not as a judgment debt.  6 LORD JUSTICE LEWISON: No.  7 MR TROWER: No.  8 LORD JUSTICE LEWISON: It remains a non-provable claim, does  9 it?  10 LORD JUSTICE BRIGGS: It doesn't gain some extra status in  11 the insolvency.  12 MR TROWER: Yes, that's right.  13 LORD JUSTICE BRIGGS: Of course some of the claims and  14 liabilities may be in fact recoverable as an expense  15 ahead of proof.  16 MR TROWER: Yes.  17 LORD JUSTICE BRIGGS: It may have to be established in  18 court --  19 MR TROWER: Yes.  20 LORD JUSTICE BRIGGS: Established or determined in court  21 proceedings between the person making the claim and the  22 company or the officer, but once established -- I mean,  23 take -- before it got to the Supreme Court an FSD claim  24 had to be established in lengthy proceedings outside the  25 Companies Court, the bankruptcy court. Once</p> <p style="text-align: center;">Page 34</p>	<p>1 MR TROWER: Yes.  2 LORD JUSTICE MOORE-BICK: So what do you do with it?  3 MR TROWER: There are two things you are going to do with  4 it. The first thing is you are going to use it against  5 the insurers, presumably, having established it. That's  6 the first practical thing you're going to do with it in  7 that particular example. But you will then use it to go  8 off and -- to the extent that you're using it within the  9 insolvency, you would want to try and execute to the  10 extent that there was a surplus. Because you won't get  11 anywhere with it as a non-provable debt trying to get  12 a payment by way of dividend on a proof, and you will --  13 and this is the sort of T&amp;N analysis and I will come  14 back on to that in a moment, but there are a number of  15 ways you might do it. But you would seek to enforce, if  16 you were able to, against whatever was available.  17 In practice what would happen is that, to the extent  18 that there was a surplus and the other statutory  19 rankings had been discharged, the liquidator would be  20 under a duty to pay it. I will come on to that in  21 a moment because it is one of the other reasons --  22 there's a bit in Lines Bros actually, in Brightman LJ's  23 judgment, about liquidators' duties in this context.  24 I will show your Lordships that in moment, we've seen  25 the passage already, but just to tie it into the</p> <p style="text-align: center;">Page 36</p>

<p>1 submission.</p> <p>2 LORD JUSTICE MOORE-BICK: Can you just help me on something</p> <p>3 else? Looking at 5.2(b), which uses the language:</p> <p>4 "Payable or capable of being established or</p> <p>5 determined in the insolvency."</p> <p>6 MR TROWER: Yes.</p> <p>7 LORD JUSTICE MOORE-BICK: Given that insolvency is defined</p> <p>8 in terms of procedures or proceedings, liquidation,</p> <p>9 winding up, et cetera, or the equivalent --</p> <p>10 MR TROWER: Yes.</p> <p>11 LORD JUSTICE MOORE-BICK: -- it is quite difficult, isn't</p> <p>12 it, to say that the sort of process which we've just</p> <p>13 been discussing, in which you get leave to pursue</p> <p>14 a claim outside the insolvency, comes within that</p> <p>15 expression?</p> <p>16 In the end all you do is you get your claim</p> <p>17 established outside the insolvency and then you make the</p> <p>18 best of it as you can as tail-end Charlie in the</p> <p>19 insolvency. It is only after you get a judgment.</p> <p>20 MR TROWER: Well, yes, although you have the sort of</p> <p>21 beginning -- what in fact is going on is that the court</p> <p>22 is permitting legal process, notwithstanding the</p> <p>23 operation of the statutory scheme. It is permitting the</p> <p>24 legal process as the most convenient mechanism for</p> <p>25 determining the dispute.</p> <p style="text-align: center;">Page 37</p>	<p>1 payability yet, because I was going to show your</p> <p>2 Lordships how -- there is a bit of the scheme that we</p> <p>3 need just to look at in relation to that. In fact, it</p> <p>4 may be sensible to go there straightaway. It is 107,</p> <p>5 which your Lordships will find on page 67 of the</p> <p>6 Red Book.</p> <p>7 LORD JUSTICE MOORE-BICK: Yes. (Pause).</p> <p>8 MR TROWER: Under this:</p> <p>9 "The company's property is to be applied in</p> <p>10 satisfaction of its liabilities [i.e. all of its</p> <p>11 liabilities] and subject to that application is to be</p> <p>12 distributed amongst its members."</p> <p>13 I am going to come back to this point in the context</p> <p>14 of section 74 --</p> <p>15 LORD JUSTICE MOORE-BICK: When you emphasise "all</p> <p>16 liabilities" what --</p> <p>17 MR TROWER: What that includes, as a matter of construction</p> <p>18 of 107, we submit, is both statutory interest and</p> <p>19 non-provable liabilities as well.</p> <p>20 LORD JUSTICE MOORE-BICK: Does that work in the context of</p> <p>21 the expression "pari passu"?</p> <p>22 MR TROWER: Yes, because what we submit in relation to that</p> <p>23 is that pari passu has to be construed in this context</p> <p>24 pari passu within the ranking which is otherwise to be</p> <p>25 found within the code.</p> <p style="text-align: center;">Page 39</p>
<p>1 We respectfully suggest that merely because the</p> <p>2 proof process is not the process being used for</p> <p>3 determining the dispute shouldn't -- doesn't -- it is</p> <p>4 giving a very narrow meaning to "in the insolvency" if</p> <p>5 the beginning and the end, i.e. the permission to do it</p> <p>6 and the getting at the asset at the end of it, are part</p> <p>7 of the insolvency process.</p> <p>8 LORD JUSTICE BRIGGS: Quite apart from anything else it</p> <p>9 would cut out some provable debts, because if you have</p> <p>10 a disputed provable debt the court may lift the</p> <p>11 moratorium to the extent necessary to enable the debt to</p> <p>12 be determined or established in ordinary proceedings and</p> <p>13 then proved for.</p> <p>14 MR TROWER: Yes.</p> <p>15 LORD JUSTICE BRIGGS: It would be extraordinary if that fell</p> <p>16 out of 5.2.</p> <p>17 MR TROWER: Yes.</p> <p>18 LORD JUSTICE LEWISON: But it wouldn't because it would be</p> <p>19 payable in the insolvency to the extent of the</p> <p>20 dividend --</p> <p>21 MR TROWER: Well, that's a payability --</p> <p>22 LORD JUSTICE LEWISON: -- because you can prove for it.</p> <p>23 MR TROWER: No, that's a payability point, my Lord, with</p> <p>24 respect, and we're talking about established and</p> <p>25 determined. On payability -- I haven't got to</p> <p style="text-align: center;">Page 38</p>	<p>1 So it is pari passu within the preferential debts,</p> <p>2 which come first under 175, and which then provides for</p> <p>3 the other debts which are provable debts to come next.</p> <p>4 It is pari passu within them and then it extends to</p> <p>5 pari passu within all the other rankings of liability.</p> <p>6 We say that's a perfectly available way of construing</p> <p>7 it. You have to construe it that way, we submit,</p> <p>8 because there is a mandatory direction to apply for</p> <p>9 distribution amongst the members according to their</p> <p>10 rights and interests in the company immediately</p> <p>11 afterwards.</p> <p>12 LORD JUSTICE MOORE-BICK: To some extent it has to be</p> <p>13 according to ranking because you have plenty of rankings</p> <p>14 before you get anywhere near statutory interest.</p> <p>15 MR TROWER: Indeed. So that's what it contemplates. Yes,</p> <p>16 the prefs, unsecureds, is a very good example of that.</p> <p>17 But the important point for present purposes as well is</p> <p>18 that the word "liabilities" there, we submit, plainly</p> <p>19 contemplates statutory interest and non-provable</p> <p>20 liabilities. I will come back -- it's of significance</p> <p>21 this submission in relation to a number of other aspects</p> <p>22 of the case. But it is of relevance on this point as</p> <p>23 well because it shows that within the code there are</p> <p>24 distribution provisions contemplated in relation to all</p> <p>25 liabilities, not just those that are proved as unsecured</p> <p style="text-align: center;">Page 40</p>

<p>1 debts.</p> <p>2 Now, just so your Lordships have the complete</p> <p>3 picture --</p> <p>4 LORD JUSTICE LEWISON: Is the word "liabilities" defined by</p> <p>5 the Act --</p> <p>6 MR TROWER: No, it is in the Rules.</p> <p>7 LORD JUSTICE LEWISON: -- as opposed to the Rules? I know</p> <p>8 it's in the Rules.</p> <p>9 MR TROWER: It is not found in the Act, no. The</p> <p>10 introduction to the definition says something along the</p> <p>11 lines, and I may have this a little bit wrong, for all</p> <p>12 purposes in the Act and the Rules. So it is brought in</p> <p>13 that way. We'll look at it in a moment.</p> <p>14 The position in relation to a compulsory</p> <p>15 liquidation -- that's a voluntary liquidation. The</p> <p>16 position in relation to compulsory is slightly</p> <p>17 different, just so your Lordships have it. The way the</p> <p>18 legislation deals with it is 1431, page 82 of the</p> <p>19 Red Book.</p> <p>20 That deals with it on a rather different conceptual</p> <p>21 basis. It deals with it by reference to the functions</p> <p>22 of the liquidator:</p> <p>23 "To secure that the assets the company has got and</p> <p>24 realise them, distribute them to the company's creditors</p> <p>25 and if there is a surplus to the persons entitled to</p> <p style="text-align: center;">Page 41</p>	<p>1 can of it. It is not clear drafting this, in the way</p> <p>2 that 107 is. But we respectfully suggest it doesn't</p> <p>3 matter for the purposes of the point I am presently</p> <p>4 making, which is that there is a liquidation function</p> <p>5 here which has to be fulfilled.</p> <p>6 LORD JUSTICE LEWISON: So what you're saying, then, is that</p> <p>7 in both a voluntary liquidation and a compulsory</p> <p>8 liquidation part of the liquidator's function is to</p> <p>9 distribute the surplus and it may well be that either</p> <p>10 under 107 or, indeed, under 143(1) the surplus is</p> <p>11 distributed to the members, but in either case the</p> <p>12 process of insolvency extends right down to the moment</p> <p>13 when distribution is made to members?</p> <p>14 MR TROWER: Indeed. That's absolutely right, my Lord. It's</p> <p>15 all part of the -- if one likes to think of it in this</p> <p>16 way, insolvency is realising and distributing assets.</p> <p>17 That's what the collective execution scheme, statutory</p> <p>18 scheme, is all about. This is part of the process, as</p> <p>19 much as anything else.</p> <p>20 LORD JUSTICE BRIGGS: It would be inconceivable, would it</p> <p>21 not, to think that whether it was a voluntary or</p> <p>22 compulsory liquidation made a difference to the</p> <p>23 application at each stage of the pari passu principle,</p> <p>24 as is clearly set out in section 107, but not as it</p> <p>25 happens in 143?</p> <p style="text-align: center;">Page 43</p>
<p>1 it."</p> <p>2 That is the way it works. It is a very general form</p> <p>3 of words on lots of levels, that. But what we do</p> <p>4 respectfully suggest is that on any view on this point,</p> <p>5 whether "creditors" extends to everybody, and it</p> <p>6 probably does --</p> <p>7 LORD JUSTICE LEWISON: Is "creditors" a defined expression?</p> <p>8 MR TROWER: No. The reason why I say it probably does is</p> <p>9 David Richards J considered this point in T&amp;N. In fact</p> <p>10 it is one of the most bits of the T&amp;N judgment. He was</p> <p>11 looking at creditors for the purpose of the company's</p> <p>12 legislation, for the scheme's jurisdiction. He said it</p> <p>13 had a very wide meaning in that context. Of course the</p> <p>14 meaning takes its meaning from its context or the word</p> <p>15 takes its meaning from its context.</p> <p>16 There's no reference here to "debts", which is the</p> <p>17 way you get into provable debts. Even if it is limited</p> <p>18 to provable debts as a word, and it may be because of</p> <p>19 "if there is a surplus" -- if surplus here means the</p> <p>20 same as surplus in the Rules and in section 189, it may</p> <p>21 mean that the interest claimants and the non-provable</p> <p>22 creditors come into the persons entitled to it, rather</p> <p>23 than at the creditor stage.</p> <p>24 But I am not going pretend that I can submit this</p> <p>25 fits terribly easily. One has to make what sense one</p> <p style="text-align: center;">Page 42</p>	<p>1 MR TROWER: Yes. One of the reasons for that, my Lord, is</p> <p>2 actually there is some old law on this --</p> <p>3 LORD JUSTICE BRIGGS: Which the court didn't need to be told</p> <p>4 whereas the voluntary liquidator does.</p> <p>5 MR TROWER: Absolutely. It's one of the reasons why one</p> <p>6 sometimes finds in this area that the scheme in relation</p> <p>7 to compulsories is not as explicit as the scheme in</p> <p>8 relation to voluntaries on this point. It goes back to</p> <p>9 the days by origin when liquidators weren't -- were just</p> <p>10 anybody. There was very little regulation in relation</p> <p>11 to liquidators. So they couldn't necessarily be</p> <p>12 expected, without the benefit of being told, and the</p> <p>13 rule in Ex parte James, to behave properly. That's the</p> <p>14 sort of conceptual thing, rather than in a compulsory</p> <p>15 way its the courts doing the exercise.</p> <p>16 The next way of just thinking about this -- of this</p> <p>17 problem -- is think about the position of a liquidator</p> <p>18 who actually has a surplus. When I say "surplus" I mean</p> <p>19 proved debts have been paid in full, what he has left.</p> <p>20 He will doubtless pay the claim if he considers it valid</p> <p>21 and the quantum is agreed without requiring the claimant</p> <p>22 to take proceedings. I mean, that's what one would</p> <p>23 normally expect a liquidator to do. He has power to do</p> <p>24 what is necessary to distribute the assets and on any</p> <p>25 view that's a payable in the insolvency.</p> <p style="text-align: center;">Page 44</p>

<p>1 But one can conceive of circumstances in which there 2 may be doubt in the liquidator's mind about some aspect 3 of what he has to pay. We do respectfully suggest that 4 it would be giving a very narrow meaning indeed to the 5 words in this clause if merely because of that you took 6 that liability out of the concept of what is capable of 7 being established or determined in the insolvency. 8 If the liquidator doesn't pay -- another way of 9 putting the point, slightly differently -- one of the 10 things that can always be done -- and I think my learned 11 friend may have alluded to this or not, I can't now 12 recall -- is that an application can always be made in 13 the insolvency for the purposes of requiring him to do 14 it. 15 LORD JUSTICE LEWISON: An application can be made by 16 somebody with a non-provable claim? 17 MR TROWER: Yes. 18 LORD JUSTICE LEWISON: In the liquidation? 19 MR TROWER: Yes. 20 LORD JUSTICE LEWISON: Right. 21 MR TROWER: Yes. In the context of administration, the 22 section 74 jurisdiction on unfair prejudice is available 23 to creditors and members. So the fact that it's 24 available to members of itself gives you an indication 25 that creditors must, we would respectfully suggest,</p> <p style="text-align: center;">Page 45</p>	<p>1 payable. 2 MR TROWER: Yes. 3 LORD JUSTICE BRIGGS: Those are all alternative ways in 4 which almost anything payable in the liquidation or 5 insolvency could be established. 6 MR TROWER: Yes. 7 LORD JUSTICE BRIGGS: Whether it is a provable debt or 8 non-provable debt or some member's entitlement. 9 MR TROWER: Yes. 10 LORD JUSTICE BRIGGS: Or even for that matter a secured 11 debt. 12 MR TROWER: Yes. 13 LORD JUSTICE BRIGGS: Or an expense. 14 MR TROWER: Or an expense, because they all have knock-on 15 consequences so far as the administration of the estate 16 is concerned. Perhaps there is a point I should have 17 made, which I don't think I have made yet, the words are 18 "capable of being established", which is important 19 because certainly the English insolvency court takes 20 a broad approach to procuring the determination of 21 issues that are required to be determined for the 22 purposes of administering the insolvent estate. 23 My Lords, can I go to Government of India v Taylor, 24 45. I just wanted to show your Lordships the difference 25 of approach between Viscount Simonds and Lord Keith on</p> <p style="text-align: center;">Page 47</p>
<p>1 include any person with a claim who has sufficient locus 2 standi to establish it, a complaint. 3 LORD JUSTICE LEWISON: Yes. 4 MR TROWER: My Lords, I was just going to go on and look 5 quickly next at Government of India v Taylor. I know we 6 sort of debated that, but I promised I would show your 7 Lordships it again in the context of my submissions. It 8 is 1A, tab 45. 9 LORD JUSTICE BRIGGS: Just before we do, can we complete 10 that picture? Where the liquidator is in doubt, there 11 are a number of routes, aren't there? One is that any 12 person interested can apply to have it dealt with in the 13 insolvency proceedings. 14 MR TROWER: Yes. 15 LORD JUSTICE BRIGGS: The liquidator himself can apply. In 16 a sense that's why we're all here. 17 MR TROWER: Yes. 18 LORD JUSTICE BRIGGS: That's what was going on, as 19 I understand, in Waterfall II. 20 MR TROWER: Yes. 21 LORD JUSTICE BRIGGS: Or the creditor, or the person who 22 says he has a payable, can ask for the moratorium to be 23 lifted so he can go to court and have it established. 24 MR TROWER: Yes. 25 LORD JUSTICE BRIGGS: And then once established it will be</p> <p style="text-align: center;">Page 46</p>	<p>1 liability. We've looked at this I think already. 2 I think Mr Wolfson took your Lordships to it. I can't 3 remember, one of my learned friends did. 4 The two passages are page 508 in Viscount Simonds' 5 speech and it is really the paragraph beginning, "We 6 proceed upon the assumption". The bit that is important 7 is towards the bottom. He says: 8 "All turns on the meaning of the word 'liabilities' 9 in this section." 10 If your Lordships would read probably to the end of 11 his speech from, "On the one hand it is said by the 12 respondents that it means". It's just a page. (Pause). 13 Then Lord Keith at page 513 -- 14 LORD JUSTICE LEWISON: It looks as though Viscount Simonds 15 commands the majority. 16 MR TROWER: He does, he does. Three with him, then 17 Lord Keith and Lord Somervell I think go together and 18 that starts at page 513. It's the paragraph beginning 19 "While then" to the end of his speech. (Pause). 20 LORD JUSTICE LEWISON: You see at 512 he is considering the 21 point that my Lord Lord Justice Moore-Bick made, foreign 22 assets. 23 MR TROWER: Yes, your Lordship is quite right. I had 24 forgotten that. 25 LORD JUSTICE LEWISON: On Lord Simonds' approach it wouldn't</p> <p style="text-align: center;">Page 48</p>

<p>1 matter.</p> <p>2 MR TROWER: No. (Pause).</p> <p>3 The sort of difference of approach that's adopted is</p> <p>4 summarised in very clear terms in the headnote,</p> <p>5 actually, on holding 2, where the reporter has</p> <p>6 encapsulated the distinction between the two approaches.</p> <p>7 My Lords, the next sort of topic on this was to look</p> <p>8 at the restrictions on proving bit of this agreement.</p> <p>9 LBHI2 say that, contrary to the judge's view, the</p> <p>10 subordination provisions don't seek to prevent and</p> <p>11 contain no restriction on LBHI2 proving its claims in</p> <p>12 an insolvency of LBI and with the knock-on consequence</p> <p>13 that that has on their argument in relation to the</p> <p>14 interest issue.</p> <p>15 Before we look at the clauses -- and the clauses</p> <p>16 which matter are clauses 4 and 7 -- there are just</p> <p>17 a couple of preliminary points to be made in response.</p> <p>18 The first point is that it's not quite what the</p> <p>19 judge said. I think the way it was characterised by</p> <p>20 LBHI2 -- what they said was that the judge's view was</p> <p>21 that the subordination provisions do in all</p> <p>22 circumstances seek to prevent. I don't think it was</p> <p>23 quite put like that, but what the judge said is</p> <p>24 important. He deals with it at 69 in his judgment.</p> <p>25 What he holds is that what LBHI2 is prevented from doing</p> <p style="text-align: center;">Page 49</p>	<p>1 interest and the non-provable claims have been</p> <p>2 satisfied", that's another thing. It all goes into the</p> <p>3 valuation of the proved debt. It's all part of the</p> <p>4 contingency. So why does it matter whether you can</p> <p>5 lodge a proof or not?</p> <p>6 MR TROWER: It matters because my learned friend's argument</p> <p>7 is that once he has proved, which he says he's entitled</p> <p>8 to do, the surplus out of which statutory interest is</p> <p>9 payable can't arise.</p> <p>10 LORD JUSTICE LEWISON: That depends on what the contingency</p> <p>11 is, doesn't?</p> <p>12 MR TROWER: Maybe not on his argument because, as</p> <p>13 I understand the argument, the way it is put is that</p> <p>14 there is no obligation or there is -- once he has his</p> <p>15 proof in --</p> <p>16 LORD JUSTICE LEWISON: He says Rule 288 --</p> <p>17 MR TROWER: It doesn't matter what's it for.</p> <p>18 LORD JUSTICE LEWISON: -- takes over. I understand that.</p> <p>19 But that's because he says the extent of the</p> <p>20 subordination under clause 5 is only to provable debts.</p> <p>21 But if he's wrong about that and the extent of the</p> <p>22 subordination is to provable debts, statutory interest</p> <p>23 and non-provable claims, why does the administrative act</p> <p>24 of lodging a proof and the admission of the proof, as</p> <p>25 a contingent debt, make any difference?</p> <p style="text-align: center;">Page 51</p>
<p>1 is lodging a proof in respect of the subordinated debt,</p> <p>2 coupled with attempting to require the administrator to</p> <p>3 admit the proof.</p> <p>4 He didn't rely on the mere proving of the debt.</p> <p>5 That's the first point, although in our respectful</p> <p>6 submission, and I will come on to this as part of my</p> <p>7 submissions, we do suggest that he could have done so.</p> <p>8 That's the first preliminary point.</p> <p>9 The second preliminary point is that it is possible</p> <p>10 to contract out of your right to prove your debt or to</p> <p>11 receive payment in priority to claims -- contract out of</p> <p>12 your right to receive payment in priority to claims to</p> <p>13 statutory interest. The judge also dealt with that</p> <p>14 point in paragraph 84 of his judgment.</p> <p>15 But in particular it is possible to contract out of</p> <p>16 your right to prove until something else has happened,</p> <p>17 in this case payment of other people.</p> <p>18 LORD JUSTICE LEWISON: I am struggling with the significance</p> <p>19 of this issue. Mr Snowden says, "I am entitled to</p> <p>20 prove, my debt is a contingent debt". So one then asks:</p> <p>21 what is the contingency? If the contingency is, "I am</p> <p>22 entitled to be paid after other provable debts and</p> <p>23 before statutory interest", that's one thing. But if</p> <p>24 the contingency is, "I am entitled to be paid after</p> <p>25 everybody else has been paid their debts, statutory</p> <p style="text-align: center;">Page 50</p>	<p>1 MR TROWER: I am just being pulled behind. (Pause).</p> <p>2 If he does that, he's entitled to rank for whatever</p> <p>3 his claim is worth, I think -- if he proves as</p> <p>4 a contingent --</p> <p>5 LORD JUSTICE LEWISON: It just seems to me we're going round</p> <p>6 in circles. It all depends on the extent of the</p> <p>7 subordination. If the extent of the subordination is</p> <p>8 what he says it is, then of course he's entitled to</p> <p>9 prove. But if it's greater, then he may still be</p> <p>10 entitled to prove but for a debt which is dependent on</p> <p>11 more contingencies than he is willing to accept.</p> <p>12 MR TROWER: Of course, if the extent of the subordination is</p> <p>13 what --</p> <p>14 LORD JUSTICE BRIGGS: Is subordination a true contingency?</p> <p>15 MR TROWER: No.</p> <p>16 LORD JUSTICE BRIGGS: That's where I am having a bit of</p> <p>17 a problem.</p> <p>18 MR TROWER: Yes.</p> <p>19 LORD JUSTICE BRIGGS: I can see that in a sense it's</p> <p>20 a contingency, but so is an unsecured claim which is</p> <p>21 subordinated to secured creditors' claims if there may</p> <p>22 be deficiency as to secured creditors. It doesn't make</p> <p>23 it a contingent debt.</p> <p>24 MR TROWER: No.</p> <p>25 LORD JUSTICE MOORE-BICK: Well, Mr Trower, we could take</p> <p style="text-align: center;">Page 52</p>

<p>1 a five-minute break?</p> <p>2 MR TROWER: Your Lordship comes to the rescue.</p> <p>3 LORD JUSTICE MOORE-BICK: Shall we do that and then you</p> <p>4 can --</p> <p>5 MR TROWER: I will see how I can respond in a way --</p> <p>6 LORD JUSTICE MOORE-BICK: You may get some help or not</p> <p>7 MR TROWER: Yes.</p> <p>8 LORD JUSTICE MOORE-BICK: We'll rise for five minutes.</p> <p>9 (11.45 am)</p> <p>10 (A short break)</p> <p>11 (11.53 am)</p> <p>12 LORD JUSTICE MOORE-BICK: Yes, Mr Trower.</p> <p>13 MR TROWER: My Lord, let me just try it this way.</p> <p>14 We would certainly agree that the subordination</p> <p>15 position cannot be improved by the mere fact of proof.</p> <p>16 The subordination is what it is.</p> <p>17 If there is an argument -- if there is</p> <p>18 an argument -- that that's what they can do, they can't</p> <p>19 do it. So if their argument is that they can improve</p> <p>20 their position by proof, we say they are restricted from</p> <p>21 doing it under the terms of the agreement.</p> <p>22 LORD JUSTICE BRIGGS: That's 7(e).</p> <p>23 MR TROWER: That's 7(d) and (e) and also 4, which your</p> <p>24 Lordships haven't really looked at. I just wanted to</p> <p>25 show your Lordships 4.</p> <p style="text-align: center;">Page 53</p>	<p>1 than that because what 7 does is it actually stops any</p> <p>2 remedy, other than as specifically provided for earlier</p> <p>3 in the clause. There was just one thing I wanted to</p> <p>4 show your Lordships in relation to this, which relates</p> <p>5 to GENPRU.</p> <p>6 LORD JUSTICE LEWISON: Sorry, other than provided in</p> <p>7 accordance with the agreement; not the clause, isn't it?</p> <p>8 MR TROWER: It says:</p> <p>9 "No remedy against the borrower other than as</p> <p>10 specifically provided by this paragraph 4."</p> <p>11 LORD JUSTICE LEWISON: Yes, but you're talking about 7 now.</p> <p>12 MR TROWER: No, I said 4.7, sorry.</p> <p>13 LORD JUSTICE LEWISON: I beg your pardon.</p> <p>14 MR TROWER: I probably misspoke, I'm so sorry.</p> <p>15 LORD JUSTICE LEWISON: But 4.7 expressly empowers the lender</p> <p>16 to institute proceedings for the insolvency of the</p> <p>17 borrower.</p> <p>18 MR TROWER: 4.4 does that, yes.</p> <p>19 LORD JUSTICE LEWISON: And 5.</p> <p>20 LORD JUSTICE BRIGGS: And 5.</p> <p>21 MR TROWER: And 5 in relation to other obligations.</p> <p>22 LORD JUSTICE LEWISON: And 4.7 says you can't do anything</p> <p>23 else.</p> <p>24 MR TROWER: Yes.</p> <p>25 LORD JUSTICE LEWISON: What you can do is institute</p> <p style="text-align: center;">Page 55</p>
<p>1 LORD JUSTICE BRIGGS: Yes.</p> <p>2 MR TROWER: Page 204. It opens with, "Being subject in all</p> <p>3 respects to the provisions of paragraph 5", in 4.1.</p> <p>4 Then if your Lordships would go to 4.4, it starts at the</p> <p>5 bottom of page 204, where the lender, after doing</p> <p>6 certain things:</p> <p>7 "May at its discretion after taking such preliminary</p> <p>8 steps or actions as may be necessary enforce payment by</p> <p>9 instituting proceedings for the insolvency of the</p> <p>10 borrower after giving seven business days' prior written</p> <p>11 notice to the FSA of its intention to do so."</p> <p>12 There's a similar ability to institute proceedings</p> <p>13 for the insolvency of the borrower in 5, where there is</p> <p>14 a desire to enforce any other obligation under the</p> <p>15 agreement.</p> <p>16 Then 7:</p> <p>17 "No remedy against the borrower other than as</p> <p>18 specifically provided for by this paragraph 4 shall be</p> <p>19 available to the lender, whether for the recovery of</p> <p>20 amounts owing under this agreement or in respect of any</p> <p>21 breach of the borrower of any of its obligations under</p> <p>22 this agreement."</p> <p>23 Now if it is the case that proving is going to</p> <p>24 affect in some way the subordination, if that were to be</p> <p>25 the case, 7 would stop you. But 7 has a wider impact</p> <p style="text-align: center;">Page 54</p>	<p>1 proceedings for insolvency.</p> <p>2 MR TROWER: Yes, you can.</p> <p>3 LORD JUSTICE LEWISON: Which would normally lead to putting</p> <p>4 in a proof.</p> <p>5 MR TROWER: There are two things -- no, is the short answer</p> <p>6 to that, for this reason.</p> <p>7 It is slightly odd, this, it is an odd provision.</p> <p>8 Firstly -- and I just wanted to show your Lordships in</p> <p>9 GENPRU how it was characterised because you do get a bit</p> <p>10 help from GENPRU on this point.</p> <p>11 Secondly, what this appears to contemplate, we would</p> <p>12 suggest, is that enforcement proceedings by instituting</p> <p>13 proceedings for an insolvency of the borrower at the</p> <p>14 suit of this lender are only contemplated in</p> <p>15 circumstances where it is going to be in the money in</p> <p>16 the light of the enforcement -- in the light of the</p> <p>17 subordination. So, in other words --</p> <p>18 LORD JUSTICE BRIGGS: It might be an abuse of process.</p> <p>19 MR TROWER: I'm sorry?</p> <p>20 LORD JUSTICE BRIGGS: It might be an abuse of process.</p> <p>21 MR TROWER: It may be, prior to doing that. But this clause</p> <p>22 is all about permitting the lender to commence</p> <p>23 a collective process in circumstances where it has</p> <p>24 an interest by reason of the way in which the</p> <p>25 subordination provision works.</p> <p style="text-align: center;">Page 56</p>

<p>1 LORD JUSTICE LEWISON: So insolvency means solvency?  2 MR TROWER: Well, there's nothing here about insolvency.  3 LORD JUSTICE LEWISON: Well, institute proceedings for the  4 insolvency of the borrower.  5 MR TROWER: Yes, but you then have to go back to see what  6 insolvency means.  7 LORD JUSTICE LEWISON: I follow. But it is odd, isn't it --  8 MR TROWER: It is a collective enforcement --  9 LORD JUSTICE LEWISON: -- if insolvency means solvency in  10 this clause.  11 MR TROWER: No, in this context it means the collective  12 process, which includes proceedings where it would be --  13 it may be insolvent as against the subordinated debt  14 holder but it may not be insolvent as against the other  15 creditors, if I can put it that way.  16 LORD JUSTICE BRIGGS: It may be insolvent because it can't  17 pay its debts when they fall due --  18 MR TROWER: Yes.  19 LORD JUSTICE BRIGGS: -- even though after an orderly  20 process of realisation everybody gets paid.  21 MR TROWER: Yes. So that's one possibility. The other  22 possibility is that there's a shortfall as regards the  23 entirety of its sub debt but there's no shortfall as  24 regards liabilities to other people.  25 So that's the sort of situation one is thinking</p> <p style="text-align: center;">Page 57</p>	<p>1 particular any damages permitted, et cetera.  2 So the structure that's been adopted in relation to  3 this sort of restriction in GENPRU is that you can  4 petition for the winding up of the firm, you can prove  5 but you can't do anything which interferes with the  6 subordination. (Pause).  7 My Lords have already seen clause 7 and I don't  8 think I have any specific further submissions to make in  9 relation to clause 7 that haven't already been tracked  10 during the course of the debate.  11 The judge's judgment on clause 7 is at paragraph 69.  12 The point in 7(e) is obvious, it's they can't do  13 anything whereby the subordination of the subordinated  14 liabilities or any part of them to the Senior  15 Liabilities might be terminated, impaired or adversely  16 affected. So if they try to do that, they are barred.  17 So to that extent any proof or attempt to maintain  18 a proof in the insolvency which might be argued to  19 interfere with the subordination can't be proceeded with  20 or pursued.  21 The final point I wanted to make in relation to the  22 subordinated debt agreements, unless my Lords have  23 anything else for me, is a point that was alluded to by  24 my Lord Lord Justice Briggs just now in relation to what  25 regime we are in a moment. I took you to GENPRU just</p> <p style="text-align: center;">Page 59</p>
<p>1 about.  2 Can I just show your Lordships very briefly GENPRU.  3 It's not a big point but just to tie it down. It is  4 4/tab 4.  5 LORD JUSTICE BRIGGS: I thought we were in the predecessor  6 of GENPRU for the purposes of construction?  7 MR TROWER: We were. I was going to come back to it. There  8 was a point I was just going to make on that, actually,  9 in any event and we'll do it at the same time as doing  10 it for the purposes of the exercise I want do at the  11 moment. But if you go to 2.2.159, where your Lordships  12 see some of the concepts that we're dealing with under  13 this agreement reflected in the way GENPRU is drafted,  14 what 2.2.159(3) contemplates is two forms of remedy  15 being available to the sub debt holder. One is  16 petitioning for the winding up of the firm and other is  17 proofing for the debt in the liquidation or  18 administration.  19 This is for a slightly different reason but while  20 we're in GENPRU, if your Lordships would go there, any  21 remedy permitted by 3, i.e. petitioning for the winding  22 up of the firm or proving for the debt in the  23 liquidation or administration -- because I don't think  24 your Lordships saw this when we looked at it before --  25 must not prejudice the matters in 1 and 2 and in</p> <p style="text-align: center;">Page 58</p>	<p>1 now so am guilty of it as well, but we do invite your  2 Lordships to bear in mind that we are on the  3 construction of this agreement in the IPRU(INV) regime.  4 It is clear from the face of the agreement itself that  5 that's the regime that we're in.  6 The way in which the two regimes work are slightly  7 different, in this sense -- which is relevant to  8 construction, in this sense. Under the IPRU(INV) regime  9 there was specific provision made for a standard form of  10 agreement to be produced for sub debt and in a sense  11 everything flows from the construction of the standard  12 form agreement.  13 In the GENPRU regime what had to be satisfied in  14 order for the subordinated debt agreement to fulfil the  15 capital adequacy requirements was set out in the terms  16 of the relevant paragraphs, 2.2.159 and following. It  17 explicitly says in 2.2.164 that the regulator is  18 disavowing the use of standard forms.  19 So you find what is required in a different way in  20 the two regimes. One has to be terribly careful about  21 too much intermingling of the regimes, because they  22 approach the way in which they impose the regulatory  23 requirement differently.  24 LORD JUSTICE LEWISON: Had the overarching regulatory  25 requirements of either the Basel agreements or the</p> <p style="text-align: center;">Page 60</p>

<p>1 directives changed between IPRU(INV) and GENPRU?</p> <p>2 MR TROWER: I don't think so.</p> <p>3 LORD JUSTICE LEWISON: So both sets of rules were trying to</p> <p>4 give effect to the same overarching --</p> <p>5 MR TROWER: Overarching, overall I think that's right. The</p> <p>6 change between IPRU(INV) and GENPRU came in some time</p> <p>7 between -- I think GENPRU first was introduced in</p> <p>8 December 2006, although it's not clear, that we've been</p> <p>9 able to work out, exactly when it started to apply to</p> <p>10 LBIE. It plainly did apply to LBIE by the autumn of</p> <p>11 2007 and certainly by the time LBIE went into</p> <p>12 administration, as the judge said.</p> <p>13 LORD JUSTICE LEWISON: If both domestic documents are trying</p> <p>14 to give effect to the same international regime, one</p> <p>15 might think that it would be difficult to find any</p> <p>16 significant difference between them.</p> <p>17 MR TROWER: That's certainly right.</p> <p>18 LORD JUSTICE LEWISON: Substantive difference.</p> <p>19 MR TROWER: Substantive, but one has to be careful about the</p> <p>20 textual approach.</p> <p>21 LORD JUSTICE LEWISON: Yes.</p> <p>22 (Pause).</p> <p>23 MR TROWER: Yes, a suggestion has just been made that GENPRU</p> <p>24 may on the dates be a response to Basel II.</p> <p>25 LORD JUSTICE LEWISON: And IPRU was not?</p> <p style="text-align: center;">Page 61</p>	<p>1 MR TROWER: My Lords, unless there was anything else I can</p> <p>2 assist on in relation to the sub debt agreement, that</p> <p>3 was all I was going to say.</p> <p>4 LORD JUSTICE LEWISON: Just one question which I have only</p> <p>5 just noticed, I'm afraid, Mr Trower. In paragraph 37</p> <p>6 the judge quotes from the directive, which contemplates</p> <p>7 the event of a bankruptcy or litigation of a credit</p> <p>8 institution and the debts must:</p> <p>9 "Rank after the claims of all other creditors and</p> <p>10 are not to be repaid until all other debts outstanding</p> <p>11 at the time have been settled."</p> <p>12 What is "the time" being referred to?</p> <p>13 MR TROWER: I can't be sure, without looking at the</p> <p>14 directive.</p> <p>15 LORD JUSTICE LEWISON: You don't need to answer</p> <p>16 straightaway.</p> <p>17 MR TROWER: Can I come back to that after the short</p> <p>18 adjournment?</p> <p>19 My Lords, the next topic is the first of our two</p> <p>20 appeals which relates to the lacuna. I am dealing with</p> <p>21 the submissions, although I am going to reverse them at</p> <p>22 the end when I deal with provability and the</p> <p>23 contributory rule and set-off, and so on, which I will</p> <p>24 deal with one chunk. But I am going to deal with the</p> <p>25 submissions in the order in which the declarations were</p> <p style="text-align: center;">Page 63</p>
<p>1 MR TROWER: No, because IPRU was already in.</p> <p>2 LORD JUSTICE LEWISON: Right.</p> <p>3 MR TROWER: Yes, it's the directive that gave effect -- the</p> <p>4 judge has actually given the dates in paragraph 40 and</p> <p>5 42 of his judgment.</p> <p>6 LORD JUSTICE LEWISON: 40 and 42?</p> <p>7 MR TROWER: 42. But I'm afraid we haven't chased it down in</p> <p>8 enormous detail. We can do some more work if your</p> <p>9 Lordships would like some detail on it, because it is</p> <p>10 possible to get the FCA handbook at any date. (Pause).</p> <p>11 LORD JUSTICE BRIGGS: The apparent difference, just looking</p> <p>12 in the judgment, between Basel I and II for our purposes</p> <p>13 is that only in Basel II do you get the concept of</p> <p>14 absorption of losses in the event of insolvency; is that</p> <p>15 right? Paragraph 39 of the judgment recites that aspect</p> <p>16 of absorption as a Basel II citation.</p> <p>17 MR TROWER: Yes, I think that's right. (Pause).</p> <p>18 One was already on to it in the 1989 directive,</p> <p>19 which is referred to in paragraph 37, although not in</p> <p>20 quite those terms.</p> <p>21 LORD JUSTICE BRIGGS: The bit cited at paragraph 37?</p> <p>22 MR TROWER: Yes, indeed.</p> <p>23 LORD JUSTICE BRIGGS: Yes.</p> <p>24 MR TROWER: It's a different way of approaching the point.</p> <p>25 LORD JUSTICE BRIGGS: Yes.</p> <p style="text-align: center;">Page 62</p>	<p>1 made, although we've leapt over two of the declarations</p> <p>2 because my learned friend Mr Dicker is dealing with</p> <p>3 currency conversion claims. So the next one is the</p> <p>4 lacuna and I am going to take it together with, if it is</p> <p>5 convenient for your Lordships, the consequence of the</p> <p>6 lacuna being held to continue to exist, which is the</p> <p>7 judge's conclusion that there was a non-provable claim,</p> <p>8 although of course it is my appeal on the declaration 4.</p> <p>9 I am appealing against the judge's decision on the</p> <p>10 lacuna and I am responding to the appeal in relation to</p> <p>11 the consequence of the lacuna, namely being the</p> <p>12 non-provable claim but it is convenient to take them</p> <p>13 together.</p> <p>14 As your Lordships know, of course, to set the scene,</p> <p>15 LBIE is not being wound up but is in administration, but</p> <p>16 liquidation is an exit route available to LBIE's</p> <p>17 administrators. Whether this course will be adopted or</p> <p>18 not will depend on what is in the creditors' best</p> <p>19 interests as a whole, having regard amongst other things</p> <p>20 to the outcome of some of the questions which are in</p> <p>21 issue in this appeal.</p> <p>22 The amount of statutory interest payable on the</p> <p>23 debts proved in LBIE's administration is very</p> <p>24 substantial, because the company has been in</p> <p>25 administration for quite a long time. Just to give your</p> <p style="text-align: center;">Page 64</p>



<p>1 Lordships a flavour, it has been in administration since 2 September 2008 and statutory interest has then been 3 accruing at a minimum of 8 per cent since then. So your 4 Lordships can imagine how much statutory interest there 5 may be. 6 It may be it is more than 8 per cent because people 7 who have contractual entitlements above 8 per cent are 8 entitled to that contractual entitlement. 9 So any uncertainty or any risk of loss to some 10 creditors of an entitlement to statutory interest in 11 respect of the period of LBIE's administration is likely 12 to be highly relevant to the administrators' decision on 13 whether or not to move LBIE into a liquidation. It's 14 not the only factor but it is highly relevant. 15 By the declaration, the judge held, and we say 16 wrongly, that if the administration of LBIE is 17 immediately followed by a liquidation then any interest 18 in respect of the period of the administration which has 19 not been paid before the commencement of the liquidation 20 will not be provable as a debt in the liquidation, nor 21 will it be payable as statutory interest under either 22 Rule 2.88 or section 189. The consequences don't need 23 to be spelt out so far as those creditors who have 24 proved in LBIE's administration are concerned, where 25 their entitlement to statutory interest in respect of</p> <p style="text-align: center;">Page 65</p>	<p>1 non-provable. 2 LORD JUSTICE BRIGGS: Just before we get into the detail of 3 this, can I understand why this is a problem. 4 If one just stands back and thinks for a moment, in 5 an ordinary world you would think the administrators if 6 there was a surplus after distributing the principal to 7 unsecured creditors would just pay that surplus as 8 statutory interest before passing anything left over 9 into a compulsory liquidation. 10 So the answer is you just don't go into compulsory 11 liquidation until you pay the statutory interest. 12 MR TROWER: Yes. 13 LORD JUSTICE BRIGGS: Am I right in thinking the reason why 14 you might otherwise want to go sooner is all to do with 15 triggering the ability to make calls? 16 MR TROWER: Yes, that's one of the reasons. That's the 17 principal -- 18 LORD JUSTICE BRIGGS: And that you're currently held up 19 because you can't be sure that statutory interest is 20 payable until you know whether the subordinated 21 creditors (a) get in first with their debts and (b) 22 share it? 23 MR TROWER: Yes. 24 LORD JUSTICE BRIGGS: Is that the whole problem? 25 MR TROWER: That is the shape of the problem. It is</p> <p style="text-align: center;">Page 67</p>
<p>1 the period has not been satisfied. 2 Our case in relation to this, just to be clear, is 3 that we contend that statutory interest which has 4 accrued during the administration but not paid during 5 the administration is payable in the subsequent winding 6 up as statutory interest. We don't contend that such 7 unpaid statutory interest is provable in a subsequent 8 winding up. 9 Then if we're wrong, and I'll come on to this, we 10 simply say that a creditor's right to unpaid statutory 11 interest, to the extent that they had a pre-existing 12 contractual right, is capable of being vindicated by the 13 operation of the non-provable liability principles. 14 LORD JUSTICE LEWISON: Non-provables? 15 MR TROWER: Non-provable. But for obvious reasons that 16 alternative position is not a complete solution for what 17 we say is the injustice which arises if declaration 4 is 18 upheld in at least the following two respects. 19 A non-provable claim will not exist for those creditors 20 whose debts would not have borne interest part from the 21 administration and in any event will only rank 22 pari passu with other non-provable claims. 23 LORD JUSTICE BRIGGS: So it is not the statutory interest 24 which is on the table, it is the contractual interest? 25 MR TROWER: In relation to declaration 5, yes, for</p> <p style="text-align: center;">Page 66</p>	<p>1 slightly more complicated than that, but the interface 2 between those two competing situations is a very 3 important factor in deciding where to go next. 4 LORD JUSTICE BRIGGS: It's not a problem which the draftsman 5 would ever have conceived of in his most ambitious 6 dreams. 7 MR TROWER: I think that's certainly a fair point. Where 8 that takes my submission -- 9 LORD JUSTICE BRIGGS: Goodness only knows. 10 MR TROWER: Yes. One has to accept that so much of what is 11 going on in this application and in this administration 12 generally is almost certainly beyond the imagination of 13 the most imaginative Parliament draftsman. 14 LORD JUSTICE MOORE-BICK: Just for my benefit, because I am 15 sure everybody else understands this, why is the claim 16 for statutory interest in the administration not 17 provable in the liquidation? 18 MR TROWER: Because for purposes of proof in the liquidation 19 you go back to the beginning of the administration in 20 order to assess whether -- 21 LORD JUSTICE BRIGGS: It is post-cut-off date. 22 LORD JUSTICE MOORE-BICK: It saves me asking the question 23 which I might otherwise have asked. 24 MR TROWER: If I may say so, it's the sort of question that 25 immediately strikes one, obviously. To that extent</p> <p style="text-align: center;">Page 68</p>

<p>1 there's a bit of lack of explicit symmetry. We say you 2 get there another way. 3 LORD JUSTICE MOORE-BICK: Just pursuing that, so that when 4 the company goes into liquidation, the relevant date for 5 assessing all these things is the date it went into 6 administration? 7 MR TROWER: Yes. Not actually for all purposes, but yes. 8 So certainly for the question of whether or not 9 something is provable. 10 LORD JUSTICE MOORE-BICK: It is good enough for a beginner. 11 MR TROWER: My Lord, I wouldn't dream of putting it like 12 that, but certainly for the purpose of whether it is 13 provable. 14 LORD JUSTICE BRIGGS: We are all tempted to say if only they 15 had only followed the logic of that through to its 16 conclusion, some of the problems we have to wrestle with 17 wouldn't be here. 18 MR TROWER: Indeed. 19 So, my Lord, the rules and the bits of the statute 20 we need to look at are 2.88(7), which is in the 21 Red Book -- I think it is easiest to flick through this 22 while we're doing this -- starting at page 731. 23 This is the version F2.88 that was in force at the 24 relevant time and that's applicable. The context is set 25 in sub-rule 1 and the rule with which we're primary</p> <p style="text-align: center;">Page 69</p>	<p>1 That's the equivalent of 2.88(1) and like 2.88(1) 2 deals with the situation by the relevant time with which 3 we're concerned, where one insolvency process precedes 4 another. So that provides the symmetry with 2.88(1) 5 when you're looking, for the purposes of the code, at 6 when it is that provability stops and payability out of 7 the surplus starts. (Pause). 8 The only other legislative point that I think it is 9 worth just telling your Lordships at the outset -- and 10 it's not in the Red Book because it has come into effect 11 subsequent to the date of the Red Book. There has been 12 a legislative amendment to Rule 2.88(7), so that it 13 deals with the lack of symmetry with Rule 2.88(1) and 14 clarifies the creditors' entitlement to post-insolvency 15 interest out of the surplus is preserved in the very 16 unusual circumstance where a liquidation is immediately 17 followed by an administration. 18 LORD JUSTICE BRIGGS: Yes. 19 MR TROWER: Which is a very unusual situation, but that's 20 the symmetry -- so there's a symmetry now by way of 21 legislative amendment between 2.88(1) and 2.88(7). That 22 amendment to the rules is in the bundles. We don't 23 I think need to turn it up now, but it is bundle 3, 24 tab 21. 25 LORD JUSTICE LEWISON: Does that amendment cure the lacuna</p> <p style="text-align: center;">Page 71</p>
<p>1 concerned is sub-rule 7. 2 Then the other bits of the statute that we need to 3 look at, or the statutory scheme, is section 189, which 4 we find at page 100. (Pause). 5 Your Lordships see that it's subsection (2) which is 6 the equivalent of Rule 2.88(7). 7 LORD JUSTICE BRIGGS: This draft antedates the 8 Enterprise Act which enabled you to distribute during 9 your administration, as I understand it, this version? 10 MR TROWER: No. 11 LORD JUSTICE BRIGGS: Oh dear. Okay. Forget it. 12 MR TROWER: This is the legislation that was in force at the 13 time LBIE went into administration. 14 LORD JUSTICE BRIGGS: Oh, yes. 15 MR TROWER: Oh, I see what your Lordship means. 16 LORD JUSTICE BRIGGS: 1892 reached the form we here see 17 before the Enterprise Act. 18 MR TROWER: Yes, I see what your Lordships means. 19 LORD JUSTICE BRIGGS: At a time when nobody was thinking 20 about distributing administrations. 21 MR TROWER: That's absolutely right, yes. I'm sorry, 22 I misunderstood what your Lordship was asking. 23 The other winding-up provision we just need to have 24 in mind for context is 4.93, which your Lordships find 25 on page 789. (Pause).</p> <p style="text-align: center;">Page 70</p>	<p>1 held by the judge or does the lacuna still remain? 2 MR TROWER: No, the lacuna still remains because there has 3 been no amendment to section 189 which is what gives 4 rise to the lacuna. 5 LORD JUSTICE LEWISON: Yes. 6 MR TROWER: The judge accurately expressed the position, we 7 suggest, in relation to the policy problem that arises 8 in his judgment at paragraphs 119 and 121. He sets it 9 out very clearly, page 63 of his judgment, 10 paragraphs 119 to 121. 11 He concludes that there's no purpose served in 12 a denial of interest during the period of an immediately 13 preceding administration or liquidation, there could be 14 no policy justifying such denial. 15 He explains in paragraph 120 of his judgment how 16 Mr Trace manfully rose to the challenge of trying to 17 develop a policy. He formulated it on the basis of 18 an achievement of simplicity and the inherent 19 unlikelihood of a distributing administration being 20 followed by a liquidation. 21 The judge rejected those public policy arguments and 22 none of the respondents, as far as we can discern, on 23 this appeal now seeks to advance a policy justification 24 for the situation in which we all find ourselves. 25 LORD JUSTICE BRIGGS: The odd thing it is precisely where</p> <p style="text-align: center;">Page 72</p>

<p>1 there is a surplus after paying unsecured creditors,                  2 leaving aside interest for the moment, that there may                  3 have to be a liquidation after the administration if the                  4 administrator is restricted in what he does in relation                  5 to members.                  6 MR TROWER: Yes, that's right.                  7 Against that background, we advance two suggested                  8 ways of construing the rules to get to what we submit is                  9 undoubtedly the correct policy answer. We do so                  10 together with the submission that it is possible to                  11 construe them without unduly straining the language.                  12 One of the approaches to construction is more expansive                  13 than the other and they do lead to slightly different                  14 results, but they are both eminently justified as                  15 a matter of language.                  16 In short summary, on the first approach the way we                  17 approach 2.88(7) -- and while I am giving your Lordships                  18 these points you might like have it open in front of                  19 you. We say that 2.88(7) applies once the                  20 administration has become distributive, i.e. once notice                  21 is given under Rule 2.95. That's the first stage in it.                  22 What it does is addresses interest on debts proved                  23 thereafter, whether or not the administration has been                  24 succeeded by a winding up, and whether or not the debts                  25 have been proved in the administration or a later                  Page 73</p>	<p>1 apply -- can I deal with that point first? -- merely                  2 because the distributing administration is succeeded by                  3 a winding-up. There isn't anything in the wording of                  4 2.88(7) which requires it to cease to impose a liability                  5 on the company once the distributing administration is                  6 succeeded.                  7 LBHI I think contend that that can't be right                  8 because the instruction embodied in 2.88(7) is                  9 an instruction that is directed at and only at the                  10 administrator, but we say that's not right. There isn't                  11 anything on the face of 2.88(7) itself which says that.                  12 It simply says, if one goes back to 2.88(7), that                  13 something "shall happen" before something else "shall                  14 happen". It's not directed at anyone. You have to                  15 infer from the context who it is directed at.                  16 It is also said that, well, you can't have Rule 2.88                  17 continuing to operate subsequent to the cessation of the                  18 administration because it's in a bit of the rules which                  19 is dealing with what's happening in the administration,                  20 and they point in particular to Rule 2.1 and 2.68(1).                  21 So far as 2.1 is concerned, that simply provides                  22 that in this part, and this is Part 2 of the rules --                  23 and I should tell your Lordships that this bit we're                  24 concerned with is chapter 10. It simply says:                  25 "In this part, the following chapters apply in all                  Page 75</p>
<p>1 liquidation.                  2 The third stage is that it provides for the payment                  3 of interest accruing since the commencement of the                  4 administration.                  5 The fourth stage is that it does not cease to apply                  6 merely because the distributing administration is                  7 succeeded by a winding up.                  8 On this construction section 189 is simply                  9 inapplicable to the question of the company's liability                  10 to pay statutory interest during the period in which the                  11 company is in administration or for that period. It is                  12 in that sense that we say in our skeleton that the 189                  13 is inapplicable in a subsequent winding up. That's what                  14 we mean by that.                  15 Of course, 189 applies to the question of                  16 a creditor's entitlement to statutory interest in                  17 respect of the period after the commencement of the                  18 winding-up but it doesn't deal at all with interest                  19 accruing during the period of the preceding                  20 administration, which continues to be dealt with by                  21 Rule 2.88, notwithstanding the intervention of the                  22 winding up.                  23 Just dealing with the hurdles or the aspects of the                  24 argument that I have to overcome one by one, why we say                  25 that as a matter of language Rule 2.88 does not cease to                  Page 74</p>	<p>1 the case mentioned in sub-paragraphs (a) to (c) above                  2 and Chapter 10 distributions to creditors."                  3 So what are the cases? The cases are:                  4 "... applies in relation to ..."                  5 That's all it says. So there has been                  6 an appointment of an administrator in relation to LBIE,                  7 it's not a misuse of language to say that once that's                  8 happened the relevant bit continues to apply in relation                  9 to the administration that was commenced by the order                  10 that was made by Henderson J back in September 2008.                  11 LORD JUSTICE BRIGGS: About breakfast time.                  12 MR TROWER: Indeed, my Lord, just before opening hours.                  13 LORD JUSTICE MOORE-BICK: Can I just ask you, I notice that                  14 there's a clear similarity of language between 2.88(7)                  15 and 1892 in the sense that they each refer to debts                  16 proved.                  17 MR TROWER: Yes.                  18 LORD JUSTICE MOORE-BICK: If you prove in the administration                  19 and then the company goes into liquidation, does all the                  20 proving have to be done again or do the proofs made in                  21 the administration automatically stand in the winding                  22 up?                  23 MR TROWER: There's a deeming provision, which I'll show                  24 your Lordships in a moment in relation --                  25 LORD JUSTICE MOORE-BICK: That would --                  Page 76</p>

<p>1 MR TROWER: So if you prove in the administration, you're 2 deemed to have proved in the liquidation. 3 LORD JUSTICE MOORE-BICK: So the date at which you're deemed 4 to have proved in the winding up is the date when you 5 actually proved in the administration? 6 MR TROWER: On the date point, I'll -- 7 LORD JUSTICE MOORE-BICK: All right. That's not a great way 8 of putting it. But the cut-off date, the relevant date 9 for assessing rights and liabilities, so to speak, is 10 set back to the beginning of the administration. 11 MR TROWER: Indeed. 12 LORD JUSTICE MOORE-BICK: And the proof that you have 13 submitted then ranks as the proof in the liquidation, 14 which subsequently overtakes the administration. 15 MR TROWER: Yes. 16 LORD JUSTICE MOORE-BICK: So why doesn't the statutory 17 interest problem simply transfer into the liquidation as 18 from that date? 19 MR TROWER: Well, that's one of the -- yes, that's one of 20 the ways we put it. 21 LORD JUSTICE LEWISON: I think Mr Bayfield wants to tell you 22 something, Mr Trower. 23 MR TROWER: Sorry? 24 LORD JUSTICE LEWISON: I think Mr Bayfield wants to tell you 25 something.</p> <p style="text-align: center;">Page 77</p>	<p>1 It's just it may affect the way I want to put this, but 2 I haven't been able quite to think it through. 3 LORD JUSTICE MOORE-BICK: Shall we come back to this later 4 on, then? 5 MR TROWER: Yes, if that's all right. I will then go on to 6 the non-provable claims bit. 7 LORD JUSTICE BRIGGS: All right. I am just trying to think 8 that through as well. 9 MR TROWER: It is one of those points which may or may not 10 have real significance and I just can't, standing here 11 on my feet, work it through. 12 LORD JUSTICE BRIGGS: Sitting doesn't make it any easier, 13 Mr Trower. 14 LORD JUSTICE MOORE-BICK: Not having to look at us does. 15 MR TROWER: So what I am here doing is explaining why if the 16 judge was right in making declaration 4 -- so I'm not 17 necessarily doing it in the order in which one ought to 18 be doing it, but I think it works fine -- he was also 19 right to make declaration 5. 20 LORD JUSTICE LEWISON: This is not a non-provable claim for 21 contractual interest if you're not entitled to statutory 22 interest, is that right? 23 MR TROWER: Correct, that's exactly it. It's particularly 24 in the context of not being entitled to statutory 25 interest in the context in which the lacuna operates,</p> <p style="text-align: center;">Page 79</p>
<p>1 MR TROWER: I think he does, my Lord, yes. I heard some 2 very loud whispering behind me. (Pause). 3 I have just been told something which I have to say 4 I had not appreciated. My Lord Lord Justice Briggs 5 sitting at first instance did decide that because of the 6 way in which the transitional provisions worked, the 7 deemed cut-off date in relation to LBIE would be the 8 commencement of the liquidation, which does make 9 a rather dramatic -- 10 LORD JUSTICE BRIGGS: That must have been Nortel at first 11 instance? 12 MR TROWER: Yes. My Lord, on this particular argument I'm 13 afraid that had completely slipped my mind because I was 14 simply -- and it does have certain consequences to the 15 way in which I would like to put this, I think. 16 LORD JUSTICE MOORE-BICK: You can't have another five-minute 17 break now. 18 MR TROWER: No, what I am suggesting is, if we parked this 19 just for a moment, I could either deal with the point in 20 relation to non-provable claims, i.e. that bit of it, or 21 we could move on to the next subject altogether. 22 LORD JUSTICE MOORE-BICK: What would be convenient from your 23 point of view? 24 MR TROWER: I think from my point of view it is probably 25 more sensible to deal with the non-provable claims next.</p> <p style="text-align: center;">Page 78</p>	<p>1 because I have to establish that too. 2 LORD JUSTICE LEWISON: Yes. 3 LORD JUSTICE BRIGGS: This is affected by the same point 4 though, isn't it? Because if the cut-off date for the 5 yet to arrive liquidation of LBIE is postponed, why 6 isn't the contractual interest provable? (Pause). 7 I just can't remember what it is was I'm said to 8 have decided. What I understood you to be passing 9 forward from your erudite juniors was that I said that 10 the transitional provisions mean that you don't backdate 11 the cut-off date for the purposes of LBIE's 12 liquidation -- 13 MR TROWER: Yes. 14 LORD JUSTICE BRIGGS: -- then why isn't the contractual 15 interest in the administration period simply provable? 16 MR TROWER: Provable. No, I can see that. 17 LORD JUSTICE LEWISON: It sounds like a case of double 18 parking, Mr Trower. 19 MR TROWER: Shall I move on and do section 74 liability? 20 There is nothing like having one's submissions taken 21 entirely out of one's hands, but it may be the more 22 sensible way of doing it. Are your Lordships content 23 with that? 24 LORD JUSTICE MOORE-BICK: Where are we going? 25 MR TROWER: If we go on to the next subject, which is</p> <p style="text-align: center;">Page 80</p>

<p>1 declaration 6.  2 LORD JUSTICE MOORE-BICK: Gosh we are getting through this  3 quickly.  4 MR TROWER: Yes.  5 Which is next in order, and it's the scope of the  6 section 74 liability. I don't think that is affected by  7 my Lord Lord Justice Briggs' decision at first instance.  8 Now, if I can just collect my thoughts for  9 ten seconds. The issue that we're concerned with here  10 is the issue that is dealt with in paragraph 6 of the  11 learned judge's order, where he decided that the  12 obligation of members to contribute under section 74  13 extends to provide for proved debts, such statutory  14 interest on those debts as is payable under 189, i.e.  15 statutory interest, and non-provable liabilities.  16 That declaration has been appealed insofar as it  17 relates to interest and non-provable liabilities by all  18 the other estates, and the issue that we are concerned  19 with here is a construction point of section 74 of the  20 1986 Act.  21 The question for your Lordships is whether the  22 liability to contribute that's referred to in  23 section 74(1) -- if your Lordships would turn up  24 section 74(1), we have it in the Red Book at page 55 --  25 whether the reference to its "debts and liabilities"</p> <p style="text-align: center;">Page 81</p>	<p>1 shares, one knows that, or of a company limited by  2 guarantee. Their liability is unlimited and capped only  3 by reference to the aggregate amount of the debts and  4 liabilities, whatever they may be as a matter of  5 construction, and the expenses of the winding up.  6 So the question is both the extent of the members'  7 liability to contribute to the assets, absent any  8 limitation on that liability conferred by the statute,  9 and in what sense is the members' liability to  10 contribute to the company's assets co-extensive with the  11 company's own liabilities? So how do those two concepts  12 interrelate with each other?  13 We respectfully suggest that there is some help that  14 your Lordships can get from some of the very early cases  15 back in the late 1860s and 1870s, which were decided  16 just after the time at which the 1862 Act came in, which  17 was the first time we had company law in its present  18 form.  19 The judge has given a very clear description of the  20 development of the law in paragraphs 129 and following  21 of his judgment.  22 LORD JUSTICE LEWISON: 159, did you say?  23 MR TROWER: 129. 129.  24 I don't think that so far as the way he describes it  25 is concerned there are any issues between the parties.</p> <p style="text-align: center;">Page 83</p>
<p>1 that appears in the second line refers to and covers the  2 statutory interest and the non-provable liabilities.  3 So putting it into its Nortel waterfall context,  4 it's whether the obligation to contribute extends, as my  5 learned friends would have it, only to items 1 to 5, or  6 whether, as we would have it, it also extends to items 6  7 and 7 as well. That's the waterfall at paragraph 39.  8 As the learned judge correctly observed, the issue  9 underpinning this declaration turns on the proper  10 construction, but the issue also does require, we  11 suggest, an outline understanding -- and I am not going  12 to go into a great archaeological dig on this -- but of  13 how the relationship between a company and its members  14 has developed over time, with particular regard to  15 insolvency proceedings in relation to unlimited  16 liability companies.  17 Now --  18 LORD JUSTICE BRIGGS: For which archaeology is almost  19 inevitable.  20 MR TROWER: You have to do a little bit. You have to do  21 a little bit, because it's not something which was --  22 well, it's not a form of animal which one sees very much  23 nowadays.  24 LBIE's members don't have the advantage of the sort  25 of cap provided in the context of a company limited by</p> <p style="text-align: center;">Page 82</p>	<p>1 He deals with the concept of LBIE as an unlimited  2 liability company between 129 and 137, and he then goes  3 on and looks in a little bit more detail at the  4 liabilities of members in a liquidation.  5 But what I wanted to start with your Lordships on  6 was the first of the old cases, which is a case called  7 Oakes v Turquand, which was decided in 1867, a decision  8 of the House of Lords. We have it in bundle 1A, tab 7.  9 This case was decided quite soon after the 1862 Act  10 was enacted, as your Lordships can see. The submission  11 that we make on the back of it is that what is clear  12 from this case is that what the 1862 Act was all about,  13 so far as the House of Lords was concerned, was the mode  14 in which creditors were entitled to seek their  15 remedies -- when I say "what the 1862 Act was all  16 about", what this bit of the 1862 Act was all about was  17 affecting the mode in which the creditors were entitled  18 to seek their remedies. It wasn't intended to affect  19 the extent or nature of the liabilities in respect of  20 which creditors were entitled to obtain a remedy.  21 So I would invite your Lordships to think in terms  22 of the means, if you like, which is essentially a move  23 from individual enforcement against the members who were  24 members of previous types of company into the collective  25 scheme that we now see as a mode, but it wasn't intended</p> <p style="text-align: center;">Page 84</p>

<p>1 or designed to interfere with or affect the nature and                  2 extent of the liabilities for which the members were                  3 liable.                  4 The relevant question --                  5 LORD JUSTICE BRIGGS: What, the mode being suing the company                  6 and the company making a call or (inaudible) a call --                  7 MR TROWER: Yes. Putting it into its collective                  8 enforcement --                  9 LORD JUSTICE BRIGGS: -- whereas previously you just sued                  10 the members?                  11 MR TROWER: Yes. Well, you may go against the company                  12 first --                  13 LORD JUSTICE BRIGGS: Yes, but you could sue the members.                  14 MR TROWER: -- but you could sue the members too, yes.                  15 The issue in Oakes v Turquand was whether,                  16 notwithstanding the 1862 Act, where someone -- whether                  17 the rule in a case called Henderson v Royal British Bank                  18 still applied. That was a rule decided under the former                  19 legislation, which was to the effect that where someone                  20 had become a partner and shareholder in a joint-stock                  21 company, the former form of entity, and had held himself                  22 out to the world as such and continued to do so until                  23 the concern stopped payment, whether he could or could                  24 not free himself of liability to the concern's creditors                  25 by repudiating his shares on the ground that he had been                  Page 85</p>	<p>1 in execution would exist ..."                  2 Then if you go on to the next marked passage:                  3 "The first question, then, is whether the change in                  4 the mode in which the creditor is obliged under the Act                  5 of 1862 to seek relief makes any difference as to who                  6 are liable to him as shareholders. I think not."                  7 He is just then reinforcing the fact that this is                  8 a mode of enforcement, which is what you get in the                  9 passage that goes down to the bottom of page 363.                  10 Then if we turn over the page to a passage beginning                  11 on page 364, "But if this change":                  12 "But if this change in the mode in which the                  13 creditor is to seek his remedy makes no difference as to                  14 the persons liable to him, how is he affected by the                  15 introduction of the principle of limited liability?"                  16 Perhaps I should have introduced this by saying the                  17 way limited liability works under the 1862 Act is in                  18 large part tracked right through to the 1986                  19 legislation. So you see a section in the 1862 Act which                  20 is very similar and familiar in form to the form of                  21 section 74, which imposes the liability on the members                  22 but which restricts the extent to which members are                  23 liable by reference to the question of whether it's                  24 a limited liability company or not, by the reference to                  25 whether or not you're seeking to make a past member                  Page 87</p>
<p>1 defrauded. So that was the Henderson issue. That was                  2 the underlying question that was being considered in                  3 Oakes v Turquand.                  4 What it was held was that the rule in Henderson v                  5 Royal British Bank did apply in the winding up of                  6 a company limited by shares.                  7 What I wanted to do, though, was take your Lordships                  8 to passages in the speech of Lord Cranworth. The first                  9 one is at page 362 -- we'll come back to this case for                  10 another reason -- beginning just by the first hole                  11 punch:                  12 "There are important differences between the                  13 provisions of the Act ...(Reading to the words)... and                  14 distributed amongst all the creditors rateably as in                  15 a bankruptcy."                  16 Then he deals with the point about limitation of                  17 liability, which is not a point that I am on at the                  18 moment.                  19 If we then go on to 363:                  20 "It is obvious that when the legislature had                  21 sanctioned the principle of limited liability, the                  22 powers given by the former Acts of taking out execution                  23 against individual shareholders necessarily fell to the                  24 ground. It would be impossible for a creditor to know                  25 to what extent his right to take the shareholder's goods                  Page 86</p>	<p>1 liable, and whether or not the company is a company                  2 limited by guarantee and so on. But the structure is                  3 exactly the same as what we presently have under                  4 section 74.                  5 LORD JUSTICE LEWISON: Corporate law is not a no liability                  6 structure; it's a limited liability structure? It's not                  7 that the members have no liability; they have limited                  8 liability.                  9 MR TROWER: Well, they may not. Of course, in this case                  10 they have unlimited liability.                  11 LORD JUSTICE LEWISON: Yes, I follow.                  12 LORD JUSTICE BRIGGS: It is a liability structure with                  13 limits.                  14 MR TROWER: Yes.                  15 LORD JUSTICE BRIGGS: There are limits in time and there are                  16 limits in amount.                  17 MR TROWER: Yes, there are. One sees in some of the cases                  18 the consequences of past members being sought to be                  19 liable have to be discussed, because the past membership                  20 member liability is limited in a different way from                  21 limiting members by shares.                  22 LORD JUSTICE BRIGGS: It helps to remember that it all                  23 originates out of partnership.                  24 MR TROWER: Yes, it does. That's one of the points that we                  25 make in relation to this whole area. It's a helpful way                  Page 88</p>

<p>1 of thinking about liability in the context of 2 section 74. What you're doing is making people liable 3 in extent and nature as members of a corporation, the 4 concept derived, as it is, from the law of partnership. 5 Just finishing off on this passage, maybe my Lords 6 have read it through, but the way Lord Cranworth puts it 7 is: 8 "If this change in the mode in which the creditor is 9 to seek his remedy makes no difference ...(Reading to 10 the words)... remedy by execution against individual 11 shareholders but it did no more. It plainly left every 12 shareholder subject to all previous liabilities, except 13 only that a line or boundary is fixed beyond which his 14 obligations could not be extended." 15 LORD JUSTICE BRIGGS: Yes. 16 MR TROWER: So that's what we mean by concept of the nature 17 and extent of the liability staying as it was before, 18 but the difference in mode is what has been imposed. 19 Then there's one more passage at page 365. Again, 20 it's marked on the right-hand column. A sentence 21 beginning: 22 "The omission of the clauses declaring shareholders 23 to be liable as if not incorporated was, as I have 24 pointed out, necessary. But the Act seems to me to 25 contain, on the face of it, ample proof that the rights</p> <p style="text-align: center;">Page 89</p>	<p>1 is Humber Ironworks. It is bundle 1A. It is tab 12. 2 LORD JUSTICE BRIGGS: Did the concept of proof come in in 3 the same Act? 4 MR TROWER: I think it did. What I am hesitating about is 5 whether proof came in for the first time then. It's 6 a bankruptcy concept by origin. 7 LORD JUSTICE BRIGGS: Yes. 8 MR TROWER: Of course at this stage the provisions in 9 relation to proof and priority and the like were 10 introduced into corporate winding-up by the imposition 11 of the Bankruptcy Rules. What I am hesitating about, 12 though, as to whether there was any -- I don't think 13 there was anything independently of what was in the 14 bankruptcy legislation. But can I take that away and 15 I'll come back to my Lord on that point. 16 Of course the present question before your Lordships 17 turns on the correct construction of 74. Of course we 18 accept that. Just so your Lordships have where it is, 19 section 38 of the 1862 Act is in the bundles. It's 20 actually in the supplementary bundle of authorities, 21 which is I think bundle 5 -- 22 LORD JUSTICE BRIGGS: This is the granddaddy of section 74. 23 is it? 24 MR TROWER: It is. I am just going to give you the 25 reference to it. It's bundle 5, tab 15, and your</p> <p style="text-align: center;">Page 91</p>
<p>1 of creditors were not intended to be affected except 2 only by the introduction of the principle of limited 3 liability." 4 We submit that Oakes v Turquand is the highest 5 authority for the proposition that, whilst the 1862 Act 6 introduced the principle of limited liability in altered 7 mode, in which creditors could seek their remedy, 8 substituting a winding-up for individual execution, 9 shareholders were otherwise liable to the full extent of 10 previous liabilities. That's the concept that underpins 11 it. 12 LORD JUSTICE BRIGGS: One might say it wasn't what that case 13 was absolutely about, but it was a starting point from 14 which the conclusion in that case was reached, you would 15 say. 16 MR TROWER: Yes, it was. My Lord, that's absolutely right. 17 One has to bear in mind that these liabilities 18 included, at this stage, and we know they included at 19 this stage, the non-provable liabilities of the company 20 to pay, amongst other things, contractual interest on 21 proved debts in respect of the period since the company 22 went into liquidation, on the basis, as we've seen from 23 Humber Ironworks, that the creditor whose debt carries 24 interest is remitted to his rights under the contract. 25 I know your Lordships have seen it already, but it</p> <p style="text-align: center;">Page 90</p>	<p>1 Lordships find it on pages 2 and 3 of the tab. It is 2 page 803 and 804 on the print. 3 Could -- 4 LORD JUSTICE BRIGGS: Debts and liabilities -- so the phrase 5 is ... 6 MR TROWER: If you read it, there have been changes in the 7 language, obviously, but the structure and the substance 8 of the language is the same. (Pause). 9 LORD JUSTICE BRIGGS: And, indeed, right down to the 10 adjustment of the rights of the contributories. 11 MR TROWER: Yes. (Pause). 12 Yes. That subsection, which has been described in 13 some of the authorities as in a slightly odd place in 14 the structure of the way the sections work. 15 The other early case that we wanted to show your 16 Lordships was Webb v Whiffin which is also, while we 17 have it, in bundle 5. It's behind tab 2. That's 18 another decision of the House of Lords. This was the 19 case which I alluded to a short while ago, or one of 20 them, in the line of authorities which is dealing with 21 the position of past members. 22 So the limitation of the members in issue or the 23 limitation of their liabilities related to them being 24 past members. The substantive issue with which the 25 House of Lords was concerned was whether the past</p> <p style="text-align: center;">Page 92</p>

<p>1 members who had been placed on the B list as part of the 2 process of dealing with contributories could be required 3 to contribute to the assets for payment of the debts 4 contracted after the time that they ceased to be 5 members. That was the issue. 6 LORD JUSTICE BRIGGS: Can you just tell me, under the 7 structure is it the current members got clobbered first 8 and the past members were brought in to the extent 9 necessary; is that right? 10 MR TROWER: That's right. If we just go back and look at 11 section 38, which is the section that they were dealing 12 with -- 13 LORD JUSTICE LEWISON: Section 38(3)? 14 MR TROWER: That's right. 15 LORD JUSTICE BRIGGS: Yes. 16 MR TROWER: Yes. (Pause). 17 This case is actually relevant on a number of 18 points. If your Lordships would just read the headnote, 19 which is on page 711, tab 2. (Pause). 20 The point that's alluded to in the headnote about 21 "the word 'assets' in the 38th section of the statute 22 means the same as the word 'property' in the 133rd 23 section", the 133rd section being the pari passu 24 distribution section, comes in at a later stage in the 25 argument because there are questions around what is the Page 93</p>	<p>1 Oakes v Turquand case by Lord Cranworth. 2 My Lords, those were the two House of Lords cases 3 I thought your Lordships ought to see before we delve 4 into the pure textual question on section 74, which is 5 where I was going next. Would that be a convenient 6 moment? 7 LORD JUSTICE MOORE-BICK: Yes, it would. Thank you very 8 much. 2 o'clock, please. 9 (1.03 pm) 10 (The short adjournment) 11 (2.00 pm) 12 LORD JUSTICE MOORE-BICK: Mr Trower, before we get stuck 13 into the afternoon, it would be very convenient to at 14 least one member of the court if we could rise slightly 15 earlier than usual this afternoon. I don't sense that 16 we're getting behind time, are we? 17 MR TROWER: No, I don't think we are, my Lord. I think in 18 some ways that might be convenient from my point of view 19 because I think where we might get to deal with is -- 20 slightly depending upon when your Lordships were 21 proposing to rise, but we might finish everything part 22 from the point that arose that I had to move on from, if 23 I can put it that way, where we have made some progress 24 in understanding the ramifications of it but I'm not 25 sure we're fully there yet. It would be better, Page 95</p>
<p>1 nature of the proceeds of the call? Are they assets of 2 the company? That sort of issue. 3 So on that issue Webb v Whiffin is also relevant. 4 But for present purposes I wanted to go for a slightly 5 different reason ... 6 If your Lordships would go, first of all, to 7 Lord Hatherley's speech at page 717. These are two 8 quite short passages. It starts at the bottom of the 9 page, the very last line, and then over the page, the 10 marked passage. (Pause). 11 There's a slightly more illuminating passage in 12 Lord Chelmsford speech, but it shows that they look at 13 this terminology in the largest and possible general 14 terms. 15 We then go on to page 723, which is in 16 Lord Chelmsford's speech. It's, again, the passage 17 that's marked that's begins at the fourth line from the 18 bottom on page 723. If my Lords would just read over to 19 the end of that paragraph. (Pause). 20 We don't need to read it now, but my Lords might 21 like to note that the next paragraph will be relevant in 22 relation to the assets issue, which we'll come on to. 23 So, my Lords, we place reliance on the way in which 24 Lord Chelmsford in particular expressed himself, 25 particularly supporting what it was that was said in the Page 94</p>	<p>1 I think, for all concerned if we left that over until 2 tomorrow morning. 3 LORD JUSTICE MOORE-BICK: I had in mind that we would rise 4 at 4 o'clock or very shortly thereafter. 5 MR TROWER: Yes. Yes, I think that would fit. 6 LORD JUSTICE BRIGGS: If the parked points are still parked 7 at that stage, for my part I would quite like to know 8 what homework to do in Nortel at first instance. 9 MR TROWER: I can give your Lordships -- 10 LORD JUSTICE BRIGGS: Whatever suits because I know you're 11 right in the middle of your argument at the moment. 12 MR TROWER: I was going to do one small piece of 13 housekeeping before I forget, which is my Lord 14 Lord Justice Lewison's question about the time in 15 relation to the -- 16 LORD JUSTICE LEWISON: Directive. 17 MR TROWER: Article 4, the directive. We have it in 18 bundle 5, tab 19. It is Article 4, four pages into the 19 print. 20 LORD JUSTICE MOORE-BICK: Yes. 21 MR TROWER: It is Article 4(3) and it's actually quite 22 difficult to work it out just by reading the clause, the 23 Article. We suggest there are two possibilities. One 24 is the time of repayment and other is the time of 25 bankruptcy or liquidation. It is where "whether at the Page 96</p>



<p>1 time" appears at the end of that subclause.  2 LORD JUSTICE LEWISON: The recitals, I take it don't help?  3 MR TROWER: We couldn't make them work in a way that gave  4 any assistance.  5 LORD JUSTICE BRIGGS: There is an argument for saying it  6 relates to the time of payment, isn't there?  7 MR TROWER: Yes, there is. There's clearly an argument both  8 ways on this.  9 LORD JUSTICE BRIGGS: It depends whether our cut-off date  10 concept is as deeply rooted in other European systems of  11 insolvency law, doesn't it?  12 MR TROWER: Yes.  13 LORD JUSTICE BRIGGS: Because it is really the cut-off date  14 concept that inspires the alternative argument.  15 MR TROWER: Yes.  16 LORD JUSTICE BRIGGS: It is there in the text, but it  17 certainly would lend weight to it.  18 MR TROWER: Yes, yes.  19 LORD JUSTICE BRIGGS: I simply don't know.  20 MR TROWER: I'm afraid I can't do more than that at the  21 moment. We'll have a bit more of a think of it as to  22 whether there's anything else we can give your Lordships  23 by way of guidance.  24 LORD JUSTICE MOORE-BICK: There's probably a French text,  25 but that may not shed any more light on it.</p> <p style="text-align: center;">Page 97</p>	<p>1 proof by some other provision; for example,  2 post-administration interest or post-liquidation  3 interest.  4 The Supreme Court in Nortel -- and I'll give your  5 Lordships the reference because we don't need I think to  6 turn it up now because I am going to come to it and look  7 it at again a bit later -- did give some guidance at the  8 scope of Rule 13.12(1)(a) at paragraph 68 to 71, and  9 then 13.12(1)(b), of course the expansive guidance,  10 which we'll come back to later in a different context,  11 at paragraph 72 to 86.  12 So that's where you get at appellate level the best  13 description of what 13.12 is doing and we'll look at it,  14 as I say, in the context of provability a little bit  15 later, which is not what we are now on.  16 That's debts. The second concept that one finds in  17 section 74 is liabilities and liabilities is defined in  18 13.12(4). So we have the same rule --  19 LORD JUSTICE LEWISON: You have a bit of a sandwich, haven't  20 you? You have debt in 13.12.(1), you have debt or  21 liability in (3) and then liability in (4)?  22 MR TROWER: Yes, that's right. A sandwich, indeed, my Lord.  23 The important point, though, for present purposes is  24 that the definition of liabilities in Rule 13.12(4) is  25 broader than that of debts in the sense it has no</p> <p style="text-align: center;">Page 99</p>
<p>1 MR TROWER: That may be right, but we'll see what we can do.  2 My Lords, where I was going to go next was on the  3 textual construction submissions in relation to  4 section 64(1). So we're back to that.  5 The meanings, as my Lords, know or the words with  6 concerned with is what is the meaning of the words  7 "debts and liabilities"? Now for the purpose of winding  8 up and administration the terms debts and liabilities  9 which appear in section 74 are defined in Rule 13.12,  10 which my Lords find on page 998 and 999 of the Red Book.  11 The way this works, of course, and I think your  12 Lordships have already heard some submissions on this is  13 that 13.12(1) contains the definition of "debt" and the  14 definition the consequence of the way that works is that  15 the definition of what is a debt is limited by reference  16 to its status and characteristics at the time when the  17 company went into liquidation, which is largely for the  18 purposes for proof because all claims are provable as  19 debts. You get that from Rule 12.3, which is on  20 page 990 of the Red Book.  21 However, there's one point to be clear about, it  22 goes wider than provable debts in this sense, to be  23 a provable a claim must be a debt but if a debt or  24 liability falls within 13.12(1) it may still be a debt  25 within the meaning of the rule but then be excluded from</p> <p style="text-align: center;">Page 98</p>	<p>1 temporal limitation, such as is contained in  2 Rule 13.12(1). What I mean by that is there isn't  3 a temporal limitation which serves to restrict what is  4 capable of being a debt and therefore what is capable of  5 being a provable debt. In particular, it doesn't  6 restrict what is capable of being a liability to  7 liabilities to which the company was subject at  8 a particular time.  9 LORD JUSTICE BRIGGS: There isn't a cut-off date.  10 MR TROWER: There is no cut-off date in relation to it. But  11 the slightly more broader way of looking at the point is  12 that the word "liability" is unconnected to what is  13 provable. There is no linkage that takes you back into  14 provability.  15 When you're looking at Rule 13.12(4) you need to  16 take into account the expansive words that are contained  17 not only in the sub-rule itself, sub (4), which are  18 dealing with the source of the liability, but also the  19 words that one finds in sub-rule (3), which expands it  20 beyond present to certain or contingent, fixed or  21 liquidated, capable of being ascertained, et cetera.  22 So you have two places within the rule where the  23 concept of what is a liability is given quite  24 an expanded meaning.  25 LORD JUSTICE BRIGGS: How can these rules purport to define</p> <p style="text-align: center;">Page 100</p>

<p>1 terms in the Act? Assume for the moment that before  2 this rule was passed --  3 MR TROWER: Yes.  4 LORD JUSTICE BRIGGS: -- if there was a relevant time, the  5 phrase in the Act meant something else.  6 MR TROWER: What I need to just check, my Lord, is whether  7 the rule-making power --  8 LORD JUSTICE BRIGGS: Exactly.  9 MR TROWER: Which I think it did, but I need to find it.  10 LORD JUSTICE BRIGGS: They obviously thought it could.  11 MR TROWER: It says in terms of the face it --  12 LORD JUSTICE BRIGGS: Yes, it does.  13 MR TROWER: But of course what your Lordship is really  14 asking is: is there an ultra vires issue arising here?  15 LORD JUSTICE BRIGGS: Yes.  16 MR TROWER: I will check, if I may, the form of the rule  17 making power. It may be somebody can do it behind me.  18 So we suggest that the broad construction of  19 section 74 says to include the company's liability for  20 post-liquidation interest, which is what we obviously  21 argue for, and non-provable liabilities is consistent  22 with the broad construction placed on section 38 by the  23 19th century authorities that I took your Lordships to.  24 (Pause).  25 The case that is put against us is that when you're</p> <p style="text-align: center;">Page 101</p>	<p>1 statutory interest, because on any view it must be paid  2 before members, and by reading the obligation to pay  3 pari passu across the various rankings, rather than by  4 application to the entirety of the liabilities.  5 One point I mentioned, I think, when we first looked  6 at this but which I didn't take your Lordships to, but  7 I ought to now, is just show your Lordships 175, which  8 is the preferential creditor provision. (Pause).  9 It is 175(1) which is the provision that provides  10 substantively for the ranking of preferential debts  11 being paid in priority to all other debts. So there you  12 see the concept of debts being used, i.e. provable  13 debts, and what section 175 does is that it actually  14 provides for the prefs, the preferential provable debts,  15 to be paid in relation to any other debt which is  16 provable.  17 Then you have the interest that ranks under  18 section 189, and you then have any other liabilities to  19 which the company is subject, which are not provable but  20 which are not somehow discharged as part of the process,  21 i.e. the non-provable liabilities which appear at the  22 end of the Nortel waterfall, and then one has the  23 numbers at the end.  24 So that's the first point. We say 107 is actually  25 consistent with our case, not with the other side's.</p> <p style="text-align: center;">Page 103</p>
<p>1 construing section 74 you have to read the words "debts  2 and liabilities" simply to refer only to provable debts.  3 A number of arguments were advanced as to why that might  4 be the case.  5 We respectfully suggest, of course, as our first  6 point, that there are considerable difficulties based on  7 the way in which the Rules work.  8 The first point that I wanted to address in  9 addition, apart from 13.12, was a point that was put  10 against us -- and which I've already alluded to, but  11 which we say is actually on our favour -- on  12 section 107. In support of the construction of  13 section 74 that it is limited to provable debts, it is  14 said that the word "liabilities" where it is used in  15 section 107 simply does mean provable debts, because  16 those are the liabilities that are paid pari passu. Now  17 that's a point that we've already touched on this  18 morning and I've given my Lords the answer to it.  19 In summary, the construction of section 107 that is  20 suggested against us is not consistent with section 189,  21 which provides for non-provable statutory interest to be  22 paid before any distribution to members. The only way  23 of reading 107 in a manner which is consistent with 189  24 is by construing the words "liabilities" as meaning all  25 liabilities whether or not provable, by including</p> <p style="text-align: center;">Page 102</p>	<p>1 The second issue relates to the significance of the  2 adjustment of the rights of contributories, which is  3 contained in section 74. As my Lord Lord Justice Briggs  4 pointed out this morning, this is something which one  5 can trace right back to the 1862 Act.  6 The judge dealt with the significance of this at  7 paragraphs 158 and 159 of his judgment. That's  8 a helpful place to find the answer. If the member's  9 obligation extends to enabling the company to make  10 payments to shareholders qua shareholders it would be  11 strange if the obligation didn't extend to any and all  12 liabilities which ranked for payment ahead of such  13 payments to shareholders, including therefore statutory  14 interest and any non-provable liabilities.  15 Your Lordships were taken to a decision of  16 Roxburgh J in a case called Phoenix yesterday. Can  17 I just make sure our submission is put in context  18 because, to be frank, we weren't sure where Roxburgh J's  19 decision took anyone or where it went.  20 What we say is simply that a call under section 74  21 to make such an adjustment could be part of a general  22 call to produce funds which flow all the way down  23 through the waterfall. An entitlement to effect  24 a recovery from contributories in respect of adjustments  25 or indeed non-provable liabilities goes into a single</p> <p style="text-align: center;">Page 104</p>

<p>1 pot from which statutory interest would, if necessary, 2 be paid, were that to be the case.</p> <p>3 That's the point about the ring-fenced fund which 4 the judge is looking at in his judgment. The right to 5 call on the proceeds of calls once received by the 6 company form part of the general assets of the company. 7 Now Roxburgh J was dealing with a rather different point 8 as far as one can tell. To be frank, we find it 9 difficult quite working out what the submission was 10 based on it. But the case was about a distribution of 11 surplus assets amongst fully paid shareholders, where 12 an adjustment of the rights of contributories also 13 occurred at that stage. He said that this did not 14 involve two separate processes, an adjustment and 15 a distribution.</p> <p>16 We're not quite sure where that goes on the point 17 that the judge was making in paragraphs 158 and 159 of 18 his judgment. Perhaps your Lordships would just read 19 that. (Pause).</p> <p>20 LORD JUSTICE LEWISON: If I have understood correctly, you 21 say that Webb v Whiffin deals with the point.</p> <p>22 MR TROWER: It does too.</p> <p>23 LORD JUSTICE LEWISON: Once you've made a call the money 24 goes into the general pot.</p> <p>25 MR TROWER: The pot, that's it. My Lord, that may be the</p> <p style="text-align: center;">Page 105</p>	<p>1 taken to it, so that's where it is. (Pause).</p> <p>2 We don't shrink from the submission that 3 Mervyn Davies J was wrong in the way he expressed it. 4 We do, though, point out in addition to the fact that we 5 make that submission that the learned judge there was 6 looking at the true construction of section 33(8) of the 7 Bankruptcy Act, because at that stage this was one of 8 those points where bankruptcy was being introduced into 9 a company winding up through the back door because there 10 was no provision in the winding-up regime.</p> <p>11 There is, of course, one crucial difference between 12 bankruptcy and winding up, which is that in bankruptcy 13 the assets, and therefore any assets out of which the 14 surplus is to be applied, will have vested in the 15 trustee, whereas the assets with which we're concerned 16 and the surplus remain an asset of the company's. 17 Albeit subject to the Ayerst v CK (Construction) 18 statutory scheme, they remain assets of the company's.</p> <p>19 Now, this doesn't mean that the learned judge was 20 right but it may explain why he approached it from 21 a slightly different perspective if he was thinking in 22 terms of the surplus being something that started 23 conceptually under section 33 as being vested in the 24 trustee.</p> <p>25 LORD JUSTICE LEWISON: If the administrator decides to pay</p> <p style="text-align: center;">Page 107</p>
<p>1 simplest way of dealing with it.</p> <p>2 LORD JUSTICE LEWISON: That's the House of Lords and there 3 we are.</p> <p>4 MR TROWER: My Lord, I can leave it at that for these 5 purposes.</p> <p>6 The next topic is the submission that Rule 2.88 and 7 section 189 are mere directions and don't give rise to 8 a liability, so there isn't a liability of the company 9 to interest.</p> <p>10 I have already touched this on the context of the 11 subordinated debt agreement, but the point that 12 I haven't, I don't think, developed at all but I just do 13 a little bit more on relates to Lines Bros and the 14 decision of Mervyn Davies J in Lines Bros which is 15 relied on on the other side.</p> <p>16 Just so your Lordships know where this is, your 17 Lordships need two places to look at. One is the 18 judge's judgment on the point which is sections 163 -- 19 it really starts at 162 to 164, and then the decision of 20 Mervyn Davies J himself which is in bundle 1B, at 21 tab 59.</p> <p>22 LORD JUSTICE LEWISON: 59, did you say?</p> <p>23 MR TROWER: 59. (Pause).</p> <p>24 The bit of Mervyn Davies J's judgment that's 25 relevant for these purposes is page 223. You've been</p> <p style="text-align: center;">Page 106</p>	<p>1 statutory interest --</p> <p>2 MR TROWER: Yes.</p> <p>3 LORD JUSTICE LEWISON: -- on whose bank account does he draw 4 the cheque?</p> <p>5 MR TROWER: There will be a bank account in the name of the 6 company, which will probably have underneath "in 7 liquidation". There are regulations which provide for 8 what companies in liquidation have to say on public 9 paper and I think that's what it is likely to have.</p> <p>10 This point, of course -- and I hope you'll forgive 11 me for making what is an obvious and slightly trite 12 point. Although it's very similar to the sub debt issue 13 in relation to liabilities, your Lordships here are 14 dealing with construing section 74 and on the previous 15 time we looked at the point you were concerned with 16 construing the agreement.</p> <p>17 We respectfully submit that in this particular 18 context and on the issue of whether or not it is 19 a liability of the company for the purposes of 20 section 74 or a liability of the borrower, which was the 21 question under the subordinated debt agreement, there is 22 no substantive difference. There is no policy reason in 23 the section 74 context for saying that members are 24 liable to contribute assets for the payment of the 25 principal amount of provable debts but aren't liable for</p> <p style="text-align: center;">Page 108</p>

<p>1 the interest on those debts, which is payable to 2 compensate the creditors for being kept out of their 3 money until a distribution is made in the liquidation. 4 Given that there's no policy reason for thinking that 5 might be the case, it is difficult to see why one 6 shouldn't regard the question of what is a liability of 7 the company's for section 74 purposes as extending to 8 the obligation which arises to distribute or make 9 an application out of the surplus under section 189 10 or -- yes, it will always be under section 189 for the 11 purposes of this analysis. 12 LORD JUSTICE LEWISON: But surely it will be said against 13 you that the company's obligation, if there is one, is 14 not an obligation to pay statutory interest; it is 15 an obligation to devote a surplus to a particular 16 purpose. 17 MR TROWER: Yes. 18 LORD JUSTICE LEWISON: And a surplus is a surplus, it's 19 a thing that exists. 20 MR TROWER: Yes. There are a number of answers to that. 21 The first answer is that it is something that has -- 22 clearly the juridical basis of the obligation is 23 different, in the sense that it is now derived from the 24 statute. What it is doing, though, is to compensate 25 people for the loss which they have suffered as a result</p> <p style="text-align: center;">Page 109</p>	<p>1 liquidator's hands at the time were just sufficient to 2 meet all the liabilities but not statutory interest, but 3 members were still liable for calls. The question would 4 then be: could you make calls simply to provide 5 a surplus to pay statutory interest? 6 MR TROWER: That's a slightly different point, that one, 7 because -- that point I was going to come on to. 8 LORD JUSTICE MOORE-BICK: That's my Lord's point. 9 MR TROWER: In a sense it's a point that my Lord 10 Lord Justice Lewison I think described as the bootstraps 11 point. 12 LORD JUSTICE MOORE-BICK: I think it was the point my Lord 13 was making a moment ago. 14 MR TROWER: Perhaps I will deal with it in that way then, if 15 I may, because we say that the surplus includes within 16 it the right to make calls. 17 LORD JUSTICE MOORE-BICK: The right to make calls? 18 MR TROWER: Yes, the right as well as the proceeds of the 19 calls. 20 LORD JUSTICE MOORE-BICK: That's just another way of saying 21 an asset of the company is the right to make calls. 22 MR TROWER: Yes. 23 LORD JUSTICE LEWISON: So you say the right to make calls is 24 an asset of the company? 25 MR TROWER: Yes, I do.</p> <p style="text-align: center;">Page 111</p>
<p>1 of being kept out of their money during the operation of 2 the statutory scheme over the company's assets for the 3 purposes of their distribution. It contemplates within 4 the section, the legislation, that there is a nexus 5 between the statutory entitlement and we would say 6 liability under 189 and the original contractual or 7 other right, which on any view is going to have been 8 a liability of the company's. 9 The reason I say that is that although there's 10 a different juridical basis for it, the amount which 11 you're entitled to is either the Judgments Act rate or 12 the rate that would have been applicable apart from the 13 liquidation or the administration. So there's 14 a straight link in the form and wording of the relevant 15 legislation to what on any view was a prior liability of 16 the company's. 17 So that supports the concept, we say, given that you 18 start with an obligation of that sort and you're talking 19 about the obligation being satisfied out of the same -- 20 ultimately the same thing, which is assets that belong 21 to the company, whether it be the surplus, which it now 22 is, or originally however the company would have 23 satisfied its own obligations. 24 LORD JUSTICE MOORE-BICK: Can you test this argument by 25 asking what would be the position if the assets in the</p> <p style="text-align: center;">Page 110</p>	<p>1 LORD JUSTICE LEWISON: Despite the fact that the power is 2 given to the court -- 3 MR TROWER: The power is in the court, yes. 4 LORD JUSTICE LEWISON: -- and dedicated -- 5 MR TROWER: That's just simply a mechanism for getting where 6 one needs to get to. 7 LORD JUSTICE BRIGGS: You would say the right to the 8 proceeds, of course. 9 MR TROWER: And certainly we would say the right to proceeds 10 too. 11 LORD JUSTICE BRIGGS: The company doesn't have the right to 12 make this kind of call. 13 MR TROWER: No, it doesn't have the right -- no. The call 14 itself has to be made by the liquidator by exercising 15 the power of the court under section 150. But this 16 point is dealt with -- the way the judge puts it, he 17 deals with it in 165 and it's also a point that was 18 dealt with in Webb v Whiffin as well. So it is worth 19 looking at in that context. 20 The judge's judgment deals with it at paragraph 165. 21 (Pause). 22 LORD JUSTICE BRIGGS: Yes. 23 MR TROWER: If we go to -- if your Lordships will give me 24 a moment. (Pause). 25 LORD JUSTICE MOORE-BICK: The judge's analysis seems to</p> <p style="text-align: center;">Page 112</p>

<p>1 contemplate that there is an obligation to pay statutory 2 interest and the calls are made in order to meet it; but 3 that is the bootstraps argument, isn't it? 4 MR TROWER: Well, not necessarily, my Lord, no, because it's 5 still -- the obligation -- it does require one to say 6 that the surplus includes -- I accept this much. It 7 does require one to say that the surplus includes the 8 calls or the right to make calls, I accept that, within 9 the concept. But it's the surplus. The surplus is 10 defined as being the surplus after payment of the proved 11 debts. 12 LORD JUSTICE MOORE-BICK: The most natural meaning is the 13 surplus of assets over liabilities or over proved debts 14 in this case. 15 MR TROWER: Well, the way it is described in section 189 is: 16 "Any surplus remaining after the payment of the 17 debts proved in a winding up." 18 That's the way it is described. So the question is: 19 what is the surplus? 20 LORD JUSTICE MOORE-BICK: And over what? 21 MR TROWER: Over what? 22 LORD JUSTICE MOORE-BICK: The surplus -- 23 MR TROWER: Of what? 24 LORD JUSTICE MOORE-BICK: The surplus of what? 25 MR TROWER: Yes, it's what --</p> <p style="text-align: center;">Page 113</p>	<p>1 MR TROWER: This one is, yes, that's right. 2 LORD JUSTICE LEWISON: Of course, you have a statutory 3 contract between the company and the members. 4 MR TROWER: That's right. But that's the first bit. 5 We then go on to Lord Cairns at page 735, because 6 what one is dealing with here is rights under the 7 statute to make a recovery from past members. 8 LORD JUSTICE LEWISON: Sorry, give me the page number again. 9 Mr Trower. 10 MR TROWER: 735. 11 LORD JUSTICE LEWISON: 735. Thank you. 12 MR TROWER: The bit that is worth looking at on page 734 -- 13 before we go to 735, actually, there's a bit saying 14 "A capital is created" about two-thirds of the way down 15 on 734. If your Lordships read there to the end of the 16 paragraph and then move on to "Now I ask the question" 17 on page 735. (Pause). 18 LORD JUSTICE MOORE-BICK: The question was being asked in 19 this case for the purpose -- remind me. 20 MR TROWER: This was past members and the context was 21 whether or not past members were under an obligation to 22 contribute in respect of subsequent debts. 23 LORD JUSTICE MOORE-BICK: The problem was -- 24 MR TROWER: It arose -- 25 LORD JUSTICE MOORE-BICK: -- to which debts should the</p> <p style="text-align: center;">Page 115</p>
<p>1 LORD JUSTICE BRIGGS: It must mean assets. 2 MR TROWER: Yes, it is what is remaining as an asset or 3 a bundle of assets -- 4 LORD JUSTICE BRIGGS: It can't just be cash. 5 MR TROWER: No, it can't, that's absolutely right. It can't 6 possibly just mean that. It is what is left once you've 7 paid the proved debts. What's left once you've paid the 8 proved debts includes, we say, the calls and the right 9 to make calls. (Pause). 10 In a sense it's -- 11 LORD JUSTICE MOORE-BICK: This is just going round in 12 circles. 13 MR TROWER: In a sense one is going round and round. But 14 I did want to show you what is said in <i>Webb v Whiffin</i> on 15 this point, though, because it does help elucidate it. 16 It is actually in bundle 5, tab 2. The first bit is 720 17 in the speech of Lord Hatherley. 18 It is the bit that starts at the very bottom of the 19 page. 20 LORD JUSTICE MOORE-BICK: Yes. 21 MR TROWER: "The assets of the company of course include all 22 contributions which you are entitled to raise from the 23 members." 24 LORD JUSTICE LEWISON: That's under the articles, though 25 isn't it?</p> <p style="text-align: center;">Page 114</p>	<p>1 contributions of past members be appropriated. 2 MR TROWER: Yes, but it arose in the context of the 3 statutory claim under section 38. 4 LORD JUSTICE BRIGGS: Was it an unlimited company? 5 MR TROWER: No. 6 LORD JUSTICE BRIGGS: Or was it simply a statutory claim for 7 monies unpaid on the shares? 8 MR TROWER: This was a statutory claim but for unpaid 9 shares. So to that extent there's a difference, 10 I accept that. But the claim was a statutory claim by 11 the liquidators. 12 LORD JUSTICE MOORE-BICK: The court was really directing 13 itself to what you have a result as a result of making 14 these calls -- 15 MR TROWER: Oh, yes. 16 LORD JUSTICE MOORE-BICK: -- and how it stood in the context 17 of the company's other assets. 18 MR TROWER: Yes, I accept that. I accept that. 19 LORD JUSTICE MOORE-BICK: You have understand the context 20 MR TROWER: No, I understand that. 21 So the bit that matters is the passage on page 735 22 in the speech of Lord Cairns starting at "Now I ask the 23 question". (Pause). 24 One of the cases that your Lordships were taken to 25 by my learned friend, I think, Mr Isaacs was <i>Pyle Works</i>,</p> <p style="text-align: center;">Page 116</p>

<p>1 which we find at tab 24 of bundle 1A. (Pause).</p> <p>2 I think in particular he took you to a passage on</p> <p>3 this point, he took you to a passage at page 574.</p> <p>4 (Pause).</p> <p>5 Starting between the two hole punches in the</p> <p>6 judgment of Cotton LJ "But it was said that calls".</p> <p>7 I think my learned friend took your Lordships to that</p> <p>8 passage. (Pause).</p> <p>9 LORD JUSTICE BRIGGS: Not part of the capital of the</p> <p>10 company.</p> <p>11 MR TROWER: Yes.</p> <p>12 LORD JUSTICE MOORE-BICK: What do we get from that?</p> <p>13 MR TROWER: My Lords, the reason I took it to your Lordships</p> <p>14 because it fits in with a point that I think my Lord</p> <p>15 Lord Justice Briggs made a moment or two ago which</p> <p>16 relates to the question as between liability companies</p> <p>17 and unlimited liability companies. What Cotton LJ is</p> <p>18 saying there is that in the context of a limited</p> <p>19 liability company you have something that is capable of</p> <p>20 constituting the capital but that's not necessarily the</p> <p>21 case in relation to an unlimited liability company where</p> <p>22 the statutory obligation under the section is to -- or</p> <p>23 the statutory entitlement under the section is to get in</p> <p>24 assets for the company in order to discharge the debts</p> <p>25 and liabilities in their entirety, whatever those debts</p> <p style="text-align: center;">Page 117</p>	<p>1 None of that is inconsistent with the concept that</p> <p>2 part of the company's asset base for the purpose of</p> <p>3 generating the surplus under the section -- for the</p> <p>4 purposes of section 89 is itself an asset in the form of</p> <p>5 the ability to make a call on unlimited liability</p> <p>6 members. The reason I say that is because what the</p> <p>7 members have actually undertaken to do in any event is</p> <p>8 discharge the debts and liabilities of the company.</p> <p>9 So we're not here concerned with the issue of</p> <p>10 whether there has been a disposal of an asset in the</p> <p>11 form of unpaid capital, which takes that asset out of</p> <p>12 the control or purview of the company for the purposes</p> <p>13 of discharging the unpaid debts and liabilities.</p> <p>14 So part of the reason for taking you to Pyle Works</p> <p>15 was to make a submission in relation to be cautious, in</p> <p>16 our submission, about how far these cases actually go.</p> <p>17 I think my learned friend's submission was that they</p> <p>18 show you that in certain circumstances a call cannot</p> <p>19 constitute an asset of the company's. That's not</p> <p>20 actually what they do show.</p> <p>21 So we do submit that it's not a bootstraps argument</p> <p>22 in any meaningful sense that the surplus, as a surplus</p> <p>23 when generated under section 189 -- when looked at under</p> <p>24 section 89, itself includes within it the asset in the</p> <p>25 form of the right to make a call and the proceeds of the</p> <p style="text-align: center;">Page 119</p>
<p>1 and liabilities may be.</p> <p>2 The submission I simply wanted to make in relation</p> <p>3 to this case and this line of authorities is that what</p> <p>4 these cases are looking at is questions of whether or</p> <p>5 not capital is available for the purposes of mortgaging,</p> <p>6 charging and the like prior to the period of the winding</p> <p>7 up. That's the context in which one's considering it.</p> <p>8 Of course there will be questions about whether the</p> <p>9 ability to generate assets through the making of a call</p> <p>10 is something that can be or cannot be disposed of by way</p> <p>11 of mortgage or charge by the directors or the company</p> <p>12 prior to the commencement of the insolvency proceedings</p> <p>13 That's a different question from whether or not what is</p> <p>14 being generated as part of the call constitutes an asset</p> <p>15 of the company's. It is a different question which has</p> <p>16 relevance in this sense, that the generation of the</p> <p>17 asset of the company's through the making of the call is</p> <p>18 generating an asset for the purpose of discharging the</p> <p>19 debts or liabilities. Of course that's not something</p> <p>20 that one would expect, save and insofar as it's unpaid</p> <p>21 capital of the company on unpaid shares, would be</p> <p>22 available to the company for the purposes of raising</p> <p>23 money on mortgage, because it is being got in by way of</p> <p>24 unlimited liability for the purpose of discharging the</p> <p>25 debts and liabilities.</p> <p style="text-align: center;">Page 118</p>	<p>1 call.</p> <p>2 LORD JUSTICE LEWISON: It still begs the question of what</p> <p>3 the liability is.</p> <p>4 MR TROWER: That's a different --</p> <p>5 LORD JUSTICE LEWISON: You're approaching it, it seems to</p> <p>6 me, as if the company had a liability to pay statutory</p> <p>7 interest.</p> <p>8 MR TROWER: Yes.</p> <p>9 LORD JUSTICE LEWISON: As opposed to a liability, if there</p> <p>10 is a surplus, to devote it to a particular purpose.</p> <p>11 MR TROWER: And we do say it. We say the company has</p> <p>12 a liability. We do say that and we say that is what the</p> <p>13 section actually means. It is a limited liability --</p> <p>14 sorry.</p> <p>15 LORD JUSTICE MOORE-BICK: Sorry, but you say that when</p> <p>16 you're assessing whether there's a surplus or not you</p> <p>17 have to put into the equation the value to the company</p> <p>18 of the right to make the calls.</p> <p>19 MR TROWER: Yes.</p> <p>20 LORD JUSTICE MOORE-BICK: Whatever the calls would generate</p> <p>21 is to be regarded as an asset, which itself is</p> <p>22 sufficient to create a surplus.</p> <p>23 MR TROWER: Indeed.</p> <p>24 LORD JUSTICE MOORE-BICK: That's your argument.</p> <p>25 MR TROWER: That's the bottom line.</p> <p style="text-align: center;">Page 120</p>

<p>1 LORD JUSTICE BRIGGS: Surpluses needn't mean any more than 2 the wherewithal, once you have paid what it is you had 3 to pay higher up the waterfall. 4 MR TROWER: Yes. 5 LORD JUSTICE BRIGGS: If the wherewithal includes making 6 a call, then you've got it. 7 MR TROWER: Yes. 8 LORD JUSTICE LEWISON: Suppose you're wrong about that -- 9 MR TROWER: Yes. 10 LORD JUSTICE LEWISON: -- but that one of the liabilities of 11 the company is a liability to pay somebody lower down 12 the waterfall. 13 MR TROWER: I was actually going to come on to that point. 14 But, my Lord, indeed. The way we pray that in aid is 15 as -- it is something, but in a rather clearer context, 16 like the adjustment of the rights of contributories. It 17 shows that if you can make a call in order to generate 18 an asset to discharge a liability which falls below the 19 interest obligation, there is nothing in the legislation 20 and, indeed, it's inconsistent with what was said in 21 Webb v Whiffin which makes provision for the separation 22 of the proceeds of that call to discharge that 23 liability. 24 LORD JUSTICE MOORE-BICK: It seems to follow from the 25 argument that if you make a call with a view to meeting</p> <p style="text-align: center;">Page 121</p>	<p>1 principle, in our submission. If there are capable of 2 being liabilities in respect of which a call is capable 3 of being made, that points very strongly in favour of 4 there being an independent liability for these purposes 5 to call in respect of the obligation -- sorry, 6 an independent entitlement in these circumstances to 7 make a call in respect of the independent liability to 8 interest. 9 LORD JUSTICE BRIGGS: Yes. Really there are two potentially 10 comfortable resting points, either nothing below 11 provable debts is to be addressed by making calls -- 12 MR TROWER: Yes. 13 LORD JUSTICE BRIGGS: -- and since the statute says in terms 14 you have to adjust contributory rights, that has to be 15 done by some separate fund -- 16 MR TROWER: Yes. 17 LORD JUSTICE BRIGGS: -- or everything in the waterfall is 18 callable for -- sorry, it is a dreadful expression -- 19 and it is one fund, and ultimately at the very bottom of 20 the pile it adjusts between contributories. 21 MR TROWER: Yes. Yes. 22 LORD JUSTICE BRIGGS: It's a sort of all or nothing position 23 in terms of feeling at all comfortable about it. 24 MR TROWER: Yes. Your Lordships know where we sit on the 25 comfort stakes. But I certainly agree, in the sense</p> <p style="text-align: center;">Page 123</p>
<p>1 the unprovable debt liability, as soon as the funds are 2 received they actually go into the general assets and 3 the statutory interest gets them. 4 MR TROWER: Yes. But that actually helps explain why it is 5 that the argument in relation to statutory interest, 6 which is made against us, is not a good one. Actually 7 it fortifies the fact that there's an independent 8 liability. 9 LORD JUSTICE LEWISON: If there are liabilities lower down 10 the waterfall because, as my Lord says, if you make 11 a call saying, "I want to pay off the non-provables", 12 and the money reaches the administrator or the 13 liquidator, he is required either by the statute or the 14 rules to pay the statutory interest before he can deal 15 with non-provables. 16 MR TROWER: Yes. 17 LORD JUSTICE LEWISON: So the members have to keep on 18 shelling out until they have paid off the statutory 19 interest before they can deal with whatever it is lower 20 down the waterfall. 21 MR TROWER: But it doesn't depend -- 22 LORD JUSTICE LEWISON: I fully see the logic of that 23 argument. 24 MR TROWER: Of course it doesn't depend whether on the facts 25 there are. One has to approach this as a question of</p> <p style="text-align: center;">Page 122</p>	<p>1 that it is very difficult to find a halfway house. 2 LORD JUSTICE BRIGGS: You put it much more precisely. 3 MR TROWER: That I would accept. 4 We do respectfully suggest that the approach adopted 5 by my learned friend does far more violence to the 6 language and the concepts which originally underpinned 7 contributory liabilities than the approach that we 8 adopted. 9 Can I just make the submission, while on this 10 subject, I think my learned friend made a number of 11 submissions around the idea that section 74 was part of 12 the statutory scheme and it was an essential part of the 13 statutory scheme that you had a pari passu distribution. 14 He sort of tied in section 74 to the pari passu 15 distribution amongst proved debts concepts. But in our 16 submission that is actually much too narrow a way of 17 looking at what the statutory scheme has done. I have 18 touched on why in a number of different contexts. There 19 are lots of elements of the statutory scheme. Of course 20 we all know that the pari passu distribution amongst 21 proved debts is one of the core parts of it, but that's 22 an over-simplistic way of looking at it. The statutory 23 scheme of which section 74 forms an integral part 24 includes a number of other things, including most 25 critically and explicitly interest obligations and the</p> <p style="text-align: center;">Page 124</p>

<p>1 distribution to members, even though non-provable 2 liabilities aren't specifically spelt out. 3 LORD JUSTICE LEWISON: Does it follow, from the way you put 4 the case, that if you have a company which is able to 5 pay a dividend to its unsecured creditors of 50p in the 6 pound, you can call on the members, if it's an unlimited 7 company, not only to pay a dividend of 100 but also to 8 pay statutory interest? 9 MR TROWER: Yes. 10 LORD JUSTICE LEWISON: If that is the case, is a company 11 insolvent for the purposes of this subordinated debt 12 agreement? 13 MR TROWER: (Pause). Is it insolvent? Well, the question 14 is whether or not the obligation has actually been 15 discharged in respect of the call is the first -- 16 because the company has to be -- the payment obligation 17 under the subordinated debt agreement is only satisfied 18 when the company is solvent as defined. 19 LORD JUSTICE LEWISON: Is it solvent? If it has an asset, 20 which is the right to call on its members to make good 21 all its provable debts, all the statutory interest, all 22 the non-provable debts, is it solvent? 23 LORD JUSTICE MOORE-BICK: I think you probably have to 24 assume for the argument that its the members -- 25 MR TROWER: I think that is the short answer, it depends how</p> <p style="text-align: center;">Page 125</p>	<p>1 MR TROWER: Yes. This question is going arise in any event 2 in relation to the question of proof in the 3 administrations of LBL and LBHI2 and how you go about 4 valuing that proof. 5 Would you just give me a moment, because we have 6 actually traversed a number of the points during the 7 course of that discussion that I think I was about to 8 deal with and I may have got through quite a lot of 9 them. (Pause). 10 Yes, there were two sections, just to complete the 11 textual argument in relation to section 74, that the 12 learned judge referred to in his judgment and I just 13 wanted to draw your attention to one of them. They were 14 section 89 and section 149(3). (Pause). 15 Would your Lordships turn up section 149(3), which 16 is on page 83 of the Red Book. (Pause). 17 This is a section that we will see some of the 18 antecedents of in the context of the next bit of the 19 argument. Subsection (3) is the one that I would invite 20 your Lordships' attention to just at the moment. 21 (Pause). 22 LORD JUSTICE LEWISON: The official rate I take it is 23 defined somewhere? 24 MR TROWER: Yes, it is. It's the rate referred to in 189, 25 which is either the Judgments Act rate or the rate</p> <p style="text-align: center;">Page 127</p>
<p>1 you value the asset. If you look at the way solvent is 2 defined, it is, "If it is able to pay its 3 liabilities." So the concept of "ability" is there. 4 LORD JUSTICE LEWISON: Right. 5 LORD JUSTICE MOORE-BICK: So the answer is, what, it is 6 solvent so long as the members are solvent? 7 MR TROWER: It may be more than that. Yes, you will have to 8 be quite satisfied the members are solvent and of 9 course -- 10 LORD JUSTICE MOORE-BICK: They just have to be solvent. 11 MR TROWER: Yes, as a matter of proof. It will be 12 an evidential question as to whether they were solvent 13 or not. 14 My Lords, we have -- 15 LORD JUSTICE BRIGGS: The relevant members here are all in 16 some sort of insolvent litigation process. 17 MR TROWER: Yes, on the facts of this case it would be 18 impossible to do -- there may be a very complicated 19 question as to the value which you attribute to -- 20 LORD JUSTICE BRIGGS: To the call. 21 MR TROWER: -- the call. 22 LORD JUSTICE BRIGGS: If the member is insolvent. 23 MR TROWER: Yes. 24 LORD JUSTICE BRIGGS: It might only be insolvent as to 1p in 25 the pound.</p> <p style="text-align: center;">Page 126</p>	<p>1 applicable to the debt apart from the liquidation. 2 All we simply say about that is it's only after 3 creditors have been paid in full, including non-provable 4 claims, and all interest has been discharged that the 5 statutory scheme contemplates that it's appropriate for 6 the contributory to be permitted to exercise a right of 7 set-off against a section 74 liability. 8 LORD JUSTICE BRIGGS: That dis-applies the contributory rule 9 at that stage in the process? 10 MR TROWER: Yes, we'll come back to this because it fits in 11 with the next stage of the discussion. 12 LORD JUSTICE MOORE-BICK: Does it follow, from the 13 proposition you're putting a moment ago, that any 14 creditor who would be entitled to statutory interest if 15 there were a sufficiently large fund and surplus can 16 require the liquidator to make calls in order to 17 constitute the surplus to which he would then become 18 partly entitled? 19 MR TROWER: Your Lordship is putting that question to me 20 independently of 149? 21 LORD JUSTICE MOORE-BICK: Yes. 22 MR TROWER: Yes. Sorry -- 23 LORD JUSTICE MOORE-BICK: I'm still working along previous 24 lines, I'm sorry about that. 25 MR TROWER: No, that's fine, I just wanted to make sure</p> <p style="text-align: center;">Page 128</p>



<p>1 I wasn't missing a point.</p> <p>2 LORD JUSTICE MOORE-BICK: It is my fault entirely.</p> <p>3 MR TROWER: Could you require a liquidator --</p> <p>4 LORD JUSTICE MOORE-BICK: Because in effect you're saying</p> <p>5 well it's an asset of the company --</p> <p>6 MR TROWER: Yes, I think he could. I think he could. There</p> <p>7 will be all sorts of reasons within the liquidation that</p> <p>8 a liquidator may have as to how he is going to collect</p> <p>9 in any asset, including a call. The way it works is</p> <p>10 that quite a lot of liquidator decisions are subject to</p> <p>11 a broad degree of discretion; but in principle, setting</p> <p>12 aside those questions, yes, there is no reason why, in</p> <p>13 our submission, a creditor couldn't do that.</p> <p>14 LORD JUSTICE MOORE-BICK: One just questions whether the</p> <p>15 liquidator ought to have a discretion not to make such</p> <p>16 calls if there's a creditor who is prima facie entitled</p> <p>17 to statutory interest which can only be satisfied if the</p> <p>18 call is made.</p> <p>19 MR TROWER: Yes. In a sense, though, it's no different from</p> <p>20 any other part of the scheme where creditors obviously</p> <p>21 have an interest in ensuring the liquidator does the</p> <p>22 most he can and best he can to get in the assets in the</p> <p>23 most efficient way he can. But in principle recovering</p> <p>24 under a call is like any other asset. The liquidator</p> <p>25 will have to make a judgment as to when the right time</p> <p style="text-align: center;">Page 129</p>	<p>1 rule. Now I am doing it that way for a reason that will</p> <p>2 become apparent in a moment.</p> <p>3 So what this is all about is provability in LBL and</p> <p>4 LBHI2's administrations in respect of the call liability</p> <p>5 under section 74. Set-off in the two competing sets of</p> <p>6 estates -- so set-off in the LBL and LBHI estates and</p> <p>7 set-off in the LBIE estate, and the contributory rule.</p> <p>8 Now for a reason that will become apparent in a moment</p> <p>9 there isn't going to be a great deal to say about</p> <p>10 set-off because of the position the parties have adopted</p> <p>11 in relation to set-off. But I'll explain how that all</p> <p>12 fits in a moment.</p> <p>13 Can I set the scene and hopefully in the course of</p> <p>14 setting the scene explain why it is that I think this is</p> <p>15 a sensible way of doing it.</p> <p>16 As you know, LBL and LBHI2 have two relevant</p> <p>17 capacities so far as LBIE is concerned. They are</p> <p>18 creditors with substantial claims and they are members</p> <p>19 of LBIE, contingently liable to LBIE as contributories.</p> <p>20 So just so your Lordships have the shape of the</p> <p>21 significance of their respective interests, LBL has</p> <p>22 lodged a proof for some 363 million in LBIE's</p> <p>23 administration.</p> <p>24 There may be issues in relation to quantum, but they</p> <p>25 don't arise and that's where it is.</p> <p style="text-align: center;">Page 131</p>
<p>1 is to make a call and all that sort of thing, and there</p> <p>2 may be all sorts of considerations, but in principle it</p> <p>3 is no different, we say.</p> <p>4 That was 149(3). I think that's --</p> <p>5 LORD JUSTICE BRIGGS: Did you say the judge relied on that?</p> <p>6 MR TROWER: Yes, he did.</p> <p>7 LORD JUSTICE BRIGGS: Can you just give me the</p> <p>8 cross-reference? Don't worry now if you don't have it</p> <p>9 on the tip of your tongue. I'm sure one of your team</p> <p>10 can do that.</p> <p>11 MR TROWER: Can I get someone to find it for me and hand it</p> <p>12 up? For some reason I haven't noted it down, but he</p> <p>13 did.</p> <p>14 LORD JUSTICE LEWISON: You also referred to section 89 in</p> <p>15 the declaration of insolvency. Did you want us to look</p> <p>16 at that?</p> <p>17 MR TROWER: I'm not sure it really adds very much, my Lord,</p> <p>18 to be honest with you, no.</p> <p>19 So, my Lords, unless you have any further questions</p> <p>20 for me, I think that was all I had on scope of the</p> <p>21 section 74 liability.</p> <p>22 The next topic is -- I'm lumping them altogether</p> <p>23 because it works better that way, we suggest, and I hope</p> <p>24 your Lordships will find it more helpful -- what I have</p> <p>25 just called provability, set-off and the contributory</p> <p style="text-align: center;">Page 130</p>	<p>1 LBHI2 has lodged a proof for 38 million in respect</p> <p>2 of unsubordinated claims and 1.2 billion in respect of</p> <p>3 the subordinated claims.</p> <p>4 So that's on, if you like, the creditor side.</p> <p>5 On the member side, because LBIE is an unlimited</p> <p>6 many, the liability of LBL and LBHI2 in respect of the</p> <p>7 debts and liabilities are unlimited in amount, it's</p> <p>8 contingent in the sense it depends upon LBIE going into</p> <p>9 liquidation on the future as matters presently stand.</p> <p>10 Another way of putting it is because section the 74</p> <p>11 liability crystallises only in a winding up, there's</p> <p>12 simply the prospect of calls in the future once LBIE</p> <p>13 goes into liquidation. So we have to put that it way as</p> <p>14 matters presently stand in the administration.</p> <p>15 Now if LBL and LBHI2 were both solvent, the dual</p> <p>16 capacities of LBL and LBHI2, the contributories, as both</p> <p>17 creditors and contributories, wouldn't cause any</p> <p>18 ultimately insuperable problems because the</p> <p>19 administrators of LBIE would be able to make substantial</p> <p>20 distributions to them in their capacity as creditors,</p> <p>21 knowing that if they were called later to contribute</p> <p>22 they would be able to discharge their obligations in</p> <p>23 that regard.</p> <p>24 But because they're not solvent, they won't be able</p> <p>25 to discharge it in full, their future obligations as</p> <p style="text-align: center;">Page 132</p>

<p>1 contributories. So if the administrators of LBIE make 2 substantial distributions to LBL and LBHI2 now, it's 3 a bit of a one-way street. Any calls that are made by 4 a future liquidator of LBIE will go, any way in part, 5 unsatisfied.</p> <p>6 That's the issue which underpins declarations 7, 8, 7 9 and 10. That's the sort of factual context.</p> <p>8 LBL and LBHI2's position is: first of all, that the 9 contributory rule doesn't apply; secondly, that LBIE's 10 contingent claims against them are not provable in their 11 administrations; thirdly, that there is therefore no 12 set-off in LBIE's administration; and, fourth, that 13 there's also no set-off in their administrations.</p> <p>14 So the effect of that is they say we should pay the 15 363 million now to LBL and the sums to LBHI2, and that's 16 what the problem is.</p> <p>17 There are two solutions, we suggest, to this, both 18 of which avoid what we would characterise as 19 an injustice were it to actually be enforced. The first 20 is provability and set-off, that's declarations 8, 9 and 21 10. The second involves the application of the 22 contributory rule in LBIE's administration which is the 23 point addressed by declaration 7.</p> <p>24 So far as set-off is concerned, the way we put it is 25 this. LBIE's contingent claims against LBL and LBHI2</p> <p style="text-align: center;">Page 133</p>	<p>1 and, given the unlimited liability and depending of 2 course on the shortfall, as we see it there's likely to 3 be a substantial net creditor -- LBIE is likely to be 4 a substantial net creditor in the administrations of LBL 5 and LBHI2, that's the likely result.</p> <p>6 Now, how does the contributory fit into this?</p> <p>7 LORD JUSTICE LEWISON: Sorry, have you finished on --</p> <p>8 MR TROWER: Well, no, I am going to come on in a moment as 9 to where the arguments are.</p> <p>10 LORD JUSTICE LEWISON: I see.</p> <p>11 MR TROWER: Can I just explain --</p> <p>12 LORD JUSTICE LEWISON: If your claim is provable, then 13 set-off must follow. The real question is: is it 14 provable?</p> <p>15 MR TROWER: My Lord, indeed, that's right. If set-off 16 follows the contributory rule doesn't probably have 17 a place because set-off fills -- and we accept this.</p> <p>18 The contributory rule fills the gap that is left in 19 circumstances where set-off is not available.</p> <p>20 LORD JUSTICE LEWISON: Yes, so the real question is: is it 21 provable?</p> <p>22 MR TROWER: Yes, on the assumption that that's going to give 23 rise to a guaranteed set-off in both administrations, 24 which is likely to be the case.</p> <p>25 LORD JUSTICE LEWISON: The problems all disappear if LBIE</p> <p style="text-align: center;">Page 135</p>
<p>1 for contributions are provable in their administrations, 2 applying Rules 13.12 and the Nortel test.</p> <p>3 In the administration of LBIE, as a result of 4 mandatory insolvency set-off, the claims by LBL and 5 LBHI2 as creditors are set off against LBIE's contingent 6 claims against LBL and LBHI2 in respect of future calls. 7 That's the second stage in the argument.</p> <p>8 In any event, even if that weren't right, there 9 would be such a set-off in the distributing 10 administrations of LBL and LBHI2.</p> <p>11 LBL has already gone into distributing 12 administration, so there's already a double set-off 13 scenario available in that context.</p> <p>14 LBHI2's administration, as I understand it, has not 15 yet converted into a distributing administration. So in 16 the case of LBHI2 the only set-off currently available 17 is the one that's happened under Rule 2.85 in LBIE's 18 administration. But there is the prospect of LBHI2 19 going into some form of process in due course which will 20 bring 2.85 into play in LBHI2's administration and 21 you'll then be into the scenario of a double set-off 22 there.</p> <p>23 So that's the first answer, provability and set-off. 24 What would simply happen is that the administrators 25 would calculate the net balance following the set-off</p> <p style="text-align: center;">Page 134</p>	<p>1 goes into liquidation.</p> <p>2 MR TROWER: Well, the problems disappear --</p> <p>3 LORD JUSTICE LEWISON: These problems, different problems 4 will no doubt arise.</p> <p>5 MR TROWER: You then have a rather different problem when 6 LBIE goes into liquidation, particularly if a call has 7 been made, because the consequence of that, if LBIE goes 8 into liquidation and a call is made, is that one is then 9 straight back into the contributory rule for a different 10 reason.</p> <p>11 LORD JUSTICE BRIGGS: You're back into 1493 --</p> <p>12 MR TROWER: Yes.</p> <p>13 LORD JUSTICE BRIGGS: -- that stage not having been reached.</p> <p>14 MR TROWER: Not having been reached, yes. In a sense, one 15 accepts that the factual situation in relation to 16 a number of these issues is a bit of a moving feast.</p> <p>17 One of the reasons a number actually of these questions 18 were asked of the judge below was so that the estates 19 could work out what was in their best interests to do. 20 That is actually still the issue in relation to the 21 matters which are before your Lordships.</p> <p>22 What we do accept, although the argument was put 23 slightly different below as to how the two interrelated, 24 is that the contributory rule is only capable of 25 applying in circumstances where there is no mandatory</p> <p style="text-align: center;">Page 136</p>

<p>1 set-off, because if you have mandatory set-off, for  2 whatever reason, the set-off mandates what people are  3 entitled to do with the claim and the cross-claim. The  4 analysis of the contributory rule has always been on the  5 basis that it plugs the gap to ensure the pari passu  6 distribution is satisfied in circumstances in which the  7 mandatory set-off is not available.  8 Where you have an automatic self-executing set-off  9 which has happened, it must be the case, we accept, that  10 that is what has happened. But that begs the question  11 as to whether or not there is a mandatory self-executing  12 set-off.  13 As my Lord Lord Justice Lewison identified, so far  14 as the present arguments are concerned that in large  15 part depends on whether or not we have a claim to  16 prove -- the set-off question largely depends on whether  17 or not we have a claim to prove in the contributories'  18 administrations. That's what this is primarily about.  19 There is, though, one issue that makes it  20 slightly -- the mere fact, though, that an insolvent  21 estate does or does not have a right to prove outward in  22 respect of the estate of an entity that also owes it  23 money may not determine conclusively, anyway at Supreme  24 Court level, the question of whether or not there is  25 a set-off. The reason I say that is that there was --</p> <p style="text-align: center;">Page 137</p>	<p>1 falls with declaration 8. In other words, the question  2 of set-off in our administration stands or falls on the  3 answer to provability in the contributories'  4 administrations.  5 But I just need to lay down a marker that, in case  6 the matter goes any further, we --  7 LORD JUSTICE LEWISON: I think you mean when.  8 MR TROWER: -- do reserve the right to argue in the Supreme  9 Court that what was said in BCCI (No 8) at the Court of  10 Appeal level was wrong on this point.  11 So, my Lord, I wonder, it is a few moments early but  12 given we're stopping at 4 --  13 LORD JUSTICE MOORE-BICK: Is that a convenient point?  14 MR TROWER: I think it might be a convenient point for me.  15 LORD JUSTICE MOORE-BICK: We'll rise.  16 (3.12 pm)  17 (A short break)  18 (3.19 pm)  19 LORD JUSTICE MOORE-BICK: Yes, Mr Trower.  20 MR TROWER: So, my Lords, starting first then with  21 provability and the declaration here is LBIE is entitled  22 to lodge a proof in a distributing administration in  23 respect of the contingent liabilities.  24 We say that the judge of course is correct to decide  25 the issue in the way that he did and it turns</p> <p style="text-align: center;">Page 139</p>
<p>1 we just need to be conscious of this.  2 In BCCI (No 8) this court held -- and my Lords don't  3 for the purposes of the debate today need to resolve any  4 of this, but I am just explaining the context in which  5 these issues interrelate -- that insolvency set-off will  6 not apply unless the claim and the cross-claim are both  7 provable debts. So the claim and the cross-claim both  8 have to be provable.  9 The way it was put in the Court of Appeal was:  10 "A claim isn't capable of set-off unless it's  11 admissible to proof. This is true of both sides of the  12 account. The right to set off a particular claim  13 depends on the nature and character of the claim itself  14 and not upon the side of the account on which it is to  15 be placed."  16 Now, put that way was doubted in the House of Lords  17 in BCCI (No 8), put that way. But it remains the case,  18 because of what was said in BCCI (No 8) in the Court of  19 Appeal on the basis of a much earlier Court of Appeal  20 authority, that there's authority binding on this court  21 that LBIE's claim against LBL and LBHI2 must be provable  22 in the administrations of LBL and LBHI2 in order to  23 qualify for set-off in LBIE's administration. So that's  24 the position, which is why we accept for the purposes of  25 this appeal at this level that declaration 9 stands or</p> <p style="text-align: center;">Page 138</p>	<p>1 principally on the construction of Rule 13.12 as  2 interpreted by the Supreme Court in Nortel.  3 13.12, as we've just seen, defines "debt" to mean  4 a debt or liability to which the company is subject at  5 the date on which it goes into liquidation or may become  6 subject after that date by reason of an obligation  7 incurred before that date. So that's the sort of  8 parameters of the concepts we're looking at.  9 13.12(4) expressly includes any liability under  10 an enactment. There's no distinction here to be drawn  11 for these purposes between liability under a contract  12 and liability under enactment, although one has two  13 sources. There's an antecedent source and there's  14 a statutory liability, the antecedent source being the  15 contractual relationship of the company and its members  16 which converts into the liability under the statute  17 which gives rise to the obligation to approve or the  18 obligation to pay.  19 Before we look at Nortel, which we'll obviously have  20 to look at in a little bit of detail in a moment, can  21 I just give your Lordships three scenarios to have in  22 mind when thinking about how this works in circumstances  23 in which there are two estates, one seeking to prove  24 against another estate.  25 The first scenario -- and we concentrate of course</p> <p style="text-align: center;">Page 140</p>

<p>1 on the estate into which the proof is being made, 2 i.e. the estate of the insolvent contributory. That's 3 what we're concerned about here. The first scenario is 4 assume that the company, i.e. LBIE, goes into 5 liquidation, the liquidator makes a call and then the 6 contributory goes into administration. It's common 7 ground in those circumstances that the contributory's 8 liability to pay a call will be a provable debt within 9 13.12(1)(a). There can't be any question of that. 10 That's the first scenario.</p> <p>11 Change the facts slightly and assume that the 12 contributory goes into administration first and then the 13 company goes into liquidation and the liquidator makes 14 a call. So that's the order of events.</p> <p>15 The call which has been made has to be either 16 a provable or a non-provable in the contributory's 17 administration. None of the arguments that have been 18 made so far indicate that anyone is contending for 19 a call that has been made in such a case to be 20 non-provable.</p> <p>21 Where a liquidator has made a call after the 22 commencement of the contributory's administration, it 23 will and should be provable in the contributory's 24 administration. One can't think why that wouldn't be 25 the case.</p> <p style="text-align: center;">Page 141</p>	<p>1 required for them to be provable is for the obligation 2 from which they might eventually spring to have been 3 incurred before the commencement of the insolvency 4 process. That's all you need.</p> <p>5 The second and third scenarios are important when 6 thinking about the Nortel test and the way it works 7 because the only difference is that in the second case 8 the contingency has occurred after the commencement of 9 the contributory's insolvency proceedings, whereas in 10 the third the contingency has not yet occurred at that 11 stage.</p> <p>12 Whether the contingency has or has not occurred at 13 the date of proof in the contributory's insolvency 14 proceedings shouldn't make any difference to the 15 analysis, because there's a provable debt provided that 16 the obligation exists at the commencement date, the 17 commencement of the contributory's insolvency 18 proceedings. That in essence is what the judge held in 19 this case. He concluded, rightly, that where a call has 20 not yet been made it falls within 13.12(1)(b) as 21 a liability to which LBL and LBH12 may become subject by 22 reasons of obligations incurred by them prior to the 23 commencement of their administrations.</p> <p>24 So against that background, looking -- and we have 25 to concentrate for present purposes on 13.12(1)(b) by</p> <p style="text-align: center;">Page 143</p>
<p>1 But it isn't provable under 13.12(1)(a) because 2 there was no presently payable debt in existence at the 3 commencement of the contributory's administration.</p> <p>4 LORD JUSTICE BRIGGS: No.</p> <p>5 MR TROWER: In this second scenario --</p> <p>6 LORD JUSTICE BRIGGS: It is (b) or bust, isn't it?</p> <p>7 MR TROWER: (b) or bust. In this scenario the contributory 8 went into administration before the company went into 9 liquidation. So you're in (b).</p> <p>10 The reason for that is that it has arisen from 11 an obligation incurred prior to the commencement of the 12 contributory's administration. At the moment the 13 contributory went in, the liability to pay calls was 14 a contingent debt and a contingency occurred on the 15 making of the call. That's the analysis we adopt in 16 relation to the second scenario.</p> <p>17 The third scenario is one step removed from that. 18 Assume that the contributory has gone into 19 administration and the company is in administration, 20 which is where we are now, but the company is not yet in 21 liquidation and there's been no call by a liquidator.</p> <p>22 We say that that shouldn't make any difference to 23 the analysis because contingent debts are provable 24 before the contingency occurs, obviously, they are 25 provable on the bases of an estimation. All that is</p> <p style="text-align: center;">Page 142</p>	<p>1 reason of any obligation incurred before that date. 2 That's what we're concerned with.</p> <p>3 Just for your Lordships' note, this concept of 4 contingent provability, one can trace it back to the 5 1869 Bankruptcy Act when the test for provability was 6 first introduced, which I think may be an answer to 7 a point my Lord Lord Justice Briggs asked me a little 8 earlier. My note here is that's when provability first 9 came in in its present form anyway, but that may not, 10 thinking about it, be a complete answer to the point on 11 the 1862 Act. So I'll come back on that.</p> <p>12 LORD JUSTICE BRIGGS: That's why I wanted to fix it.</p> <p>13 MR TROWER: But in practice, we say, and in substance we 14 say, one doesn't really get very much assistance from 15 much of the old law. You don't really get very much 16 assistance from anything, apart from Nortel when it 17 really comes to it. The reason I say that is that in 18 Nortel the Supreme Court swept away a long line of 19 cases. There are about half a dozen that were 20 overruled --</p> <p>21 LORD JUSTICE BRIGGS: Yes.</p> <p>22 MR TROWER: -- in which a restrictive meaning had been given 23 to the obligation incurred. My Lord Lord Justice Briggs 24 knows that only too well, given that he was bound in 25 Nortel at first instance by a number of Court of Appeal</p> <p style="text-align: center;">Page 144</p>

<p>1 authorities which have now gone. 2 So one does have to be very careful about looking at 3 the old law in this area. 4 LORD JUSTICE LEWISON: The old trend, both legislative and 5 judicial, has been to expand the concept of provable 6 debts as far as it can possibly go. 7 MR TROWER: It certainly has. 8 LORD JUSTICE BRIGGS: I said those authorities had 9 wrongly -- I thought, but I couldn't say so -- 10 prioritised certainty over the principle to which 11 my Lord has just referred. 12 MR TROWER: Yes, and my Lord went as far as -- 13 LORD JUSTICE BRIGGS: Mercifully the Supreme Court so 14 concluded. 15 MR TROWER: I don't think the Supreme Court was in any doubt 16 that your Lordship was a little bit sceptical about the 17 authorities by which your Lordship was bound. 18 If we just go to Nortel in the light of that, your 19 Lordships have it behind tab 96 in bundle 1C. On the 20 second page of the headnote on page 210 your Lordships 21 have a list of all the many cases that were overruled 22 about halfway down. 23 I think when your Lordships were shown this by 24 Mr Isaacs yesterday we went straight to paragraph 76. 25 The structure of the judgment of Lord Neuberger, after Page 145</p>	<p>1 necessarily so straightforward. There can be no doubt 2 ...(Reading to the words)... how those debts arose, 3 whether by contract, statute or tort, voluntarily or by 4 compulsion is not material." 5 Then the critical paragraph is 77: 6 "However, the mere fact that a company could become 7 under a liability pursuant to a provision in a statute 8 which was in force before the insolvency event cannot 9 mean that where the liability arises after the 10 insolvency event it falls within 13.12(1)(b). It would 11 be dangerous to try and suggest a universally applicable 12 formula, given the many different statutory and other 13 liabilities and obligations which could exist. However, 14 I would suggest that at least normally in order for 15 a company to have incurred a relevant obligation under 16 Rule 13.12(1)(b) it must have taken or been subjected to 17 some step or combination of steps which (a) had some 18 legal effect, such as putting it under some legal duty 19 or into some legal relationship, and which (b) resulted 20 in it being vulnerable to the specific liability in 21 question, such that there would be a real prospect of 22 the liability being incurred. If these two requirements 23 are satisfied, it is also I think relevant to consider 24 (c) whether it would be consistent with the regime under 25 which the liability is imposed to conclude that the step Page 147</p>
<p>1 he begins an overview at 54 he then starts to look in 2 relation to the FSDs that were in issue in the Nortel 3 proceedings. He asks himself a question just before 65: 4 "Is a liability under an FSD issued after 5 administration a provable debt?" 6 He then, from paragraph 68 onwards, deals with 7 13.12(1)(a). Then at the bottom of the page, 72, he 8 starts on 13.12(1)(b). The main bit that matters, 9 really, starts at paragraph 74: 10 "That issue thus centres on the meaning of the word 11 'obligation' in Rule 13.12(1)(b). The meaning of the 12 word 'obligation' will of course depend on its context. 13 However perhaps more than many words ...(Reading to the 14 words)... whereas the obligation is the anterior source 15 of that liability. 16 "Where a liability arises after the insolvency event 17 as a result of a contract entered into by a company, 18 there's no real problem. The contract in so far as it 19 imposes any actual or contingent liabilities on the 20 company can fairly be said to impose the incurred 21 obligation. Accordingly in such a case the question 22 whether the liability falls within paragraph (b) will 23 depend on whether the contract was entered into before 24 or after the insolvency event. Where the liability 25 arises other than under a contract the position is not Page 146</p>	<p>1 or combination of steps gave rise to an obligation under 2 Rule 13.12(1)(b)." 3 I will come on to my submissions in relation to the 4 application of that test in a moment. Just two points 5 to bear in mind when thinking about the test. The first 6 is one obviously, like all these tests, has to be 7 a little bit careful about construing it as if it was 8 a statute although -- and the second is it talks about 9 "normally". So there's obviously wiggle room, if I can 10 put it that way, possibly on both sides of the equation. 11 So that's the first point about it. But it must be 12 the case that any court, when considering whether or not 13 the test is satisfied, uses this as a fairly clean, 14 clear-cut testing ground for deciding whether or not the 15 requirements of 13.12(1)(b) are satisfied. 16 We say that there are four key factual points for 17 applying the test in the present case. The first is 18 that LBL and LBHI2 became shareholders in LBIE, 19 an unlimited liability company. That's the first fact. 20 The second relevant fact is that the company of 21 which they were shareholders went into administration on 22 15 September 2008. 23 The third relevant fact is that LBIE's 24 administration has become a distributing administration, 25 which it became on 4 December 2009. Page 148</p>

<p>1 The fourth relevant fact is that LBIE's 2 administration is an administration in which liquidation 3 has been selected by the creditors in the proposals as 4 an exit route. (Pause). 5 Can I just give this to your Lordships because 6 I don't think you've been told the statutory way in 7 which that works. My Lord Lord Justice Briggs I think 8 might have been involved in doing it. Just so you know, 9 Schedule B1, paragraph 68(1) -- this is to do with the 10 fourth fact -- requires the administrator of a company 11 to manage its affairs, business and property in 12 accordance with any proposals approved under 13 paragraph 53, any revision of those proposals which are 14 made by him and any revision of those proposals which 15 are approved. 16 Then there are certain provisions elsewhere in the 17 legislation which deal with the approval of proposals, 18 which I don't think your Lordships need to see. But in 19 the present case the proposals which were approved by 20 the creditors in November 2008 did include liquidation 21 as an exit route. 22 LORD JUSTICE LEWISON: An exit route or the exit route? 23 MR TROWER: No, an exit route. An exit route. It's not the 24 only one. 25 It is of course the case that in any administration</p> <p style="text-align: center;">Page 149</p>	<p>1 MR TROWER: Applying the Nortel test, so looking at 2 paragraph 77, LBL and LBHI2 have taken steps and have 3 been subjected to steps which have a legal effect by 4 giving rise to a legal relationship, in the sense that 5 they are shareholders in an unlimited liability company 6 and that is the stage at which a legal relationship 7 arose between them and LBIE. 8 Paragraph 77(b): 9 "LBL and LBHI2 then become vulnerable to the 10 specific liability in question, such that there would be 11 a real prospect of the liability being incurred. All 12 that was required was for LBI to go into liquidation. 13 Now there are obviously two stages at which that 14 might occur. One might say that there was 15 a vulnerability for the purposes of this test at the 16 moment in time at which the company -- at the moment in 17 time at which they became members. That's the first 18 possibility. The second possibility is that the 19 vulnerability arose later on. 20 LORD JUSTICE BRIGGS: The test makes it sounds as if the 21 vulnerability must be coincident with the entry into the 22 relationship because Lord Neuberger says, "and which (b) 23 resulted it in being vulnerable". 24 MR TROWER: Yes, although if there's a continuing 25 relationship --</p> <p style="text-align: center;">Page 151</p>
<p>1 there are essentially three ways you finish. You either 2 rescue the company and return it to the directors or you 3 go into liquidation or you dissolve. 4 But we are in a situation where liquidation is a way 5 out. 6 LORD JUSTICE BRIGGS: If there is a surplus over and above 7 provable debts and statutory interest, can you in fact 8 avoid going into liquidation? I think I asked that 9 question to Mr Isaacs. 10 MR TROWER: You could, if there were reasons to do so. It 11 would depend on what the court thought was appropriate 12 actually. The company could, and I think there has been 13 the odd company that, even though it wasn't clear it was 14 solvent, was handed back to the directors for particular 15 purposes. One could conceive that might happen. 16 Where all the debts are paid, that remains an option 17 in any case. 18 LORD JUSTICE BRIGGS: Okay. 19 MR TROWER: It is pretty rare. The normal situation is the 20 company either goes into liquidation and is dissolved 21 that way or is dissolved independently of going into 22 liquidation at all. 23 But this is on every possible level not a normal 24 case, obviously. 25 LORD JUSTICE BRIGGS: Yes.</p> <p style="text-align: center;">Page 150</p>	<p>1 LORD JUSTICE BRIGGS: The vulnerability may increase or 2 decrease. 3 MR TROWER: It is a bit difficult to see why, when there is 4 a continuing relationship, it can only arise in 5 circumstances where -- so long as the continuation leads 6 to a vulnerability prior to the moment in time which is 7 relevant, which is the commencement date, it is very 8 difficult to see why it should make any difference that 9 there wasn't a vulnerability at the very commencement, 10 as opposed to some later stage. There can be no logical 11 distinction between the two. 12 LORD JUSTICE BRIGGS: Can you remember when the commencement 13 dates were for LBHI2 and LBL? 14 MR TROWER: Their insolvencies? 15 LORD JUSTICE BRIGGS: Yes, do you have dates for both of 16 their insolvencies? 17 MR TROWER: Their insolvencies, I don't think I know that. 18 I will -- 19 LORD JUSTICE LEWISON: Can I put an example to you -- 20 MR TROWER: Yes. 21 LORD JUSTICE LEWISON: -- which I am rather puzzling how it 22 fits into the Nortel test. A company goes into 23 administration. It occupies a building, it therefore 24 has legal duties under the Occupiers' Liability Act. 25 The building has some dangerous feature, a rickety</p> <p style="text-align: center;">Page 152</p>

<p>1 staircase or whatever it is. The legal duty, because it 2 is "or some legal relationship", renders it vulnerable 3 if there is a real prospect of somebody injuring 4 themselves on the rickety staircase. Is that 5 a contingent liability? 6 MR TROWER: Yes. 7 LORD JUSTICE LEWISON: You would have thought when it 8 happens it's just a non-provable tort claim, wouldn't 9 you? 10 MR TROWER: If I may say, there are two separate questions 11 there. You have to ask yourself the question first of 12 all as to whether or not conceptually it fits in the 13 relevant box of liability arising out of an obligation 14 incurred. Then you ask yourself the question, well, 15 what is the nature of the cause of action? Because that 16 may take it back out again -- 17 LORD JUSTICE LEWISON: That would be an example of (c) in 18 the Nortel test, saying "Well, all right, it may fit (a) 19 and (b) but it's not the kind of thing that is 20 provable". Is that how that works? 21 MR TROWER: No, because the reason the tort claim comes out 22 is simply because of a provision in the statutory rule. 23 LORD JUSTICE LEWISON: Right. 24 MR TROWER: Because the statutory rule does not allow you to 25 prove in respect of unliquidated damages in tort,</p> <p style="text-align: center;">Page 153</p>	<p>1 action taken after that point? 2 MR TROWER: So long as you still have the relationship at 3 the time -- 4 LORD JUSTICE MOORE-BICK: I'm not sure. You're not really 5 vulnerable, are you, in any meaningful sense at that 6 point? 7 MR TROWER: At which point? 8 LORD JUSTICE MOORE-BICK: The point you enter into the 9 relationship. 10 MR TROWER: So long as you're continuing with the 11 relationship, my answer -- 12 LORD JUSTICE MOORE-BICK: That's what I'm questioning. 13 MR TROWER: That's my answer to the point, is that the test 14 doesn't make sense unless you -- 15 LORD JUSTICE MOORE-BICK: I'm not sure. If you take over 16 a building that is perfectly sound, you've entered into 17 a relationship in that sense, which doesn't cause you to 18 be vulnerable to the liability which eventually 19 eventuates. But if subsequently someone does something 20 in relation to the building, you get the electrician in 21 to do some rewiring and he does a very bad job and the 22 whole place becomes dangerous, and someone is injured or 23 killed, why different? 24 MR TROWER: Why should it be? 25 LORD JUSTICE MOORE-BICK: Because your vulnerability to that</p> <p style="text-align: center;">Page 155</p>
<p>1 save -- 2 LORD JUSTICE LEWISON: Where everything is there apart from 3 the damage. 4 MR TROWER: Yes, so that's dealt with by the statute. But, 5 yes, we do say that in the circumstances which 6 your Lordship has just posited that would give rise to 7 a contingent liability. We say it is not particularly 8 surprising when you think about what this is actually 9 doing. What it is doing is giving somebody an ability 10 to participate in the distribution of an insolvent's 11 assets in circumstances in which the obligation has been 12 incurred arising out of a pre-existing -- 13 LORD JUSTICE BRIGGS: A pre-cut off date vulnerability. 14 MR TROWER: Yes. 15 LORD JUSTICE MOORE-BICK: I have to say that the way one 16 reads (a) and (b) together suggests that the 17 vulnerability arises from the relationship or the steps 18 taken. 19 MR TROWER: Yes. 20 LORD JUSTICE MOORE-BICK: So in the example of the rickety 21 staircase, if the staircase were rickety when the 22 building was taken over, you're looking at a problem, so 23 to speak, an accident about to happen. But what if the 24 staircase is fine when you take the building over and it 25 only becomes rickety or unsafe as a result of some</p> <p style="text-align: center;">Page 154</p>	<p>1 arose as a result of events which occurred later than 2 entering into the relationship and entirely unconnected 3 with it. 4 MR TROWER: But that's placing, with respect, too much 5 emphasis on the idea of causation linked to the 6 commencement of the relationship. 7 LORD JUSTICE MOORE-BICK: Why not? 8 MR TROWER: Because so long as the relationship subsists at 9 the time of the vulnerability, that's all that should 10 matter in principle. 11 LORD JUSTICE MOORE-BICK: All right. 12 LORD JUSTICE LEWISON: I suppose you would say as happened 13 on the facts of Nortel? 14 MR TROWER: Yes. Yes. 15 LORD JUSTICE BRIGGS: Yes. 16 LORD JUSTICE LEWISON: Because whatever the test is, the 17 facts of Nortel have to be accommodated within it. 18 LORD JUSTICE BRIGGS: The vulnerability of the targets in 19 Nortel was merely because they had the relevant 20 corporate relationship with the employer company. 21 MR TROWER: Yes. 22 LORD JUSTICE BRIGGS: At a time when the sun was blazing 23 down and nobody thought of insolvency as a cloud bigger 24 than a man's hand. 25 MR TROWER: Yes. Another way of thinking about it is it</p> <p style="text-align: center;">Page 156</p>

<p>1 shows -- you either think about the vulnerability being 2 something that comes in so long as the relationship is 3 extant, if you're thinking about what has to be quite 4 a significant vulnerability, or the vulnerability is 5 something that simply flows from the possibility -- or 6 the concept of vulnerability is something that simply 7 flows from the fact that a relationship may lead to 8 an obligation in due course. But the former way of 9 looking at it is more consistent, we suggest, with the 10 way in which Lord Neuberger puts it. 11 I have just been handed a note, just before 12 I forget, about the time the estates became insolvent. 13 LBIE and LBL entered administration in 14 September 2008. LBH2 entered administration in 15 January 2009. 16 LORD JUSTICE BRIGGS: Right. But who was first to the draw 17 as between LBIE and LBL? 18 MR TROWER: The same moment, I think, the same order. 19 Orders made at the same time at the breakfast table of 20 Henderson J. 21 LORD JUSTICE BRIGGS: Right. 22 MR TROWER: Right. 23 LORD JUSTICE BRIGGS: I suppose he was signing two differen 24 orders and you're meant to put the precise date and time 25 at which the administration starts, aren't you, down to</p> <p style="text-align: center;">Page 157</p>	<p>1 we say "No". 2 The first point I think he made was by going back to 3 a couple of passages in paragraphs 58 and 60 of 4 Lord Neuberger's judgment. If my Lords would simply 5 just look at those. (Pause). 6 LORD JUSTICE BRIGGS: It's what Mr Gabriel Moss QC at first 7 instance called "the gut feel, fair solution". 8 MR TROWER: Yes. We do say that there is an issue here 9 which has, in a juridical sense, to do with the fact 10 that both section 74 and the concept of provability all 11 come within the same statutory scheme, where one of the 12 principal parts of the statutory scheme involves the 13 collection of assets for the distribution to the 14 creditors and the insolvent estate generally, the 15 collection and distribution all arising out of the same 16 scheme. 17 We also say, based on what said in paragraphs 59 and 18 60, that it would be somewhat arbitrary if the 19 characterisation and treatment of the liability under 20 the call regime should turn on when the call happens to 21 have been issued, if it's based on the membership of 22 an unlimited liability which existed before the 23 insolvency event. 24 The second point on this is that -- and Mr Isaacs 25 went to many of the provisions in respect of calls for</p> <p style="text-align: center;">Page 159</p>
<p>1 a minute? 2 MR TROWER: They all had 7.56 on them. 3 LORD JUSTICE BRIGGS: Okay. 4 MR TROWER: Four minutes before the appropriate moment. It 5 had to be made before 8 o'clock in the morning, I seem 6 to recall. 7 LORD JUSTICE BRIGGS: I was the applications judge and my 8 clerk spent the whole of the rest of the morning telling 9 LBIE hadn't been put into administration because we 10 weren't told. 11 MR TROWER: Was that because Henderson J stopped being 12 applications judge at 8 o'clock, four minutes after he 13 made the order? 14 LORD JUSTICE BRIGGS: He was the weekend judge, yes. 15 MR TROWER: So, my Lord, the next thing I was going to move 16 on to was how 77(c) works, which is probably the core 17 for present purposes. I have explained 77(a). I've 18 explained 77(b). 19 77(c), is it consistent with the statutory regime in 20 respect of calls to conclude that there's an obligation 21 for the purposes of 13.12(1)(b)? That's the issue. 22 As I understood it, the real focus of Mr Isaacs' 23 submissions were based on this. He said it would be 24 inconsistent with the statutory regime in respect of 25 calls for the prospective liability to be provable. And</p> <p style="text-align: center;">Page 158</p>	<p>1 the purpose of pointing out they don't apply until the 2 company goes into liquidation. Of course that's right. 3 He said that the provisions in respect of settling of 4 lists of contributories and so on don't apply. We 5 accept all of that, but it doesn't actually take us very 6 far because all it means is that the contingency has not 7 yet occurred. That is as far as you get on that point. 8 It doesn't mean that there's currently no obligation 9 within 13.12(1)(b) as interpreted by the Supreme Court. 10 It is also the same answer to Mr Isaacs' reliance on 11 74(2)(a), for example, which provides that: 12 "A past member is not liable to contribute if he 13 ceases to be a member for one year or more before the 14 commencement of the winding up." 15 That doesn't take you very much further. The fact 16 that there may be a whole load of possible factual 17 scenarios in which the contributory will cease to be 18 contingently liable is irrelevant to the question that 19 we're really considering here. That's the whole point 20 of a contingency: it may occur; it may not. 21 Now, the third point is that Mr Isaacs sought to 22 suggest that there will be something wholly unexpected 23 or contrary to the legislature's intention for the 24 liability of a contributory in respect of future calls 25 to be provable in the contributory's insolvency. But</p> <p style="text-align: center;">Page 160</p>



<p>1 where --</p> <p>2 LORD JUSTICE LEWISON: I don't think he said that. I think</p> <p>3 he said it would be contrary for the liability to be</p> <p>4 proved by the administrator who has no power to make the</p> <p>5 call.</p> <p>6 MR TROWER: Well --</p> <p>7 LORD JUSTICE LEWISON: I don't think he's objecting to the</p> <p>8 mere fact of proof in the contributory's insolvency.</p> <p>9 That would be a very difficult objection to sustain.</p> <p>10 MR TROWER: No. I wasn't putting it -- sorry --</p> <p>11 LORD JUSTICE LEWISON: It's a question of who can prove it.</p> <p>12 MR TROWER: I think I must have misspoken. Yes. No.</p> <p>13 The only point here is this -- and I think your</p> <p>14 Lordships may have seen this already -- that where the</p> <p>15 contributories -- there isn't particularly surprising</p> <p>16 about this, because where the contributory is</p> <p>17 an individual there's never been any objection to the</p> <p>18 prospective liability of the contributory being provable</p> <p>19 in the contributory's bankruptcy. That's actually</p> <p>20 something which is made specific provision for. It goes</p> <p>21 right back to the 1862 Act, section 75. They still</p> <p>22 exist as provisions in the existing legislation, which</p> <p>23 my Lords have seen, I think, section 82(4).</p> <p>24 Even though this provision applies only to</p> <p>25 contributories who become bankrupt and not also to</p> <p style="text-align: center;">Page 161</p>	<p>1 MR TROWER: Yes.</p> <p>2 LORD JUSTICE LEWISON: He could prove for a contingent</p> <p>3 claim. He hasn't decided whether to do it or not.</p> <p>4 MR TROWER: Yes.</p> <p>5 LORD JUSTICE LEWISON: I think the whole objection is not</p> <p>6 either to the contingency or proof, it is who can do it.</p> <p>7 MR TROWER: Yes, which leads on in fact to the question</p> <p>8 of -- the issue arises perhaps most sharply in relation</p> <p>9 to what happens where a company has gone into</p> <p>10 administration and what happens where a company has not</p> <p>11 even gone into administration. So it's that case.</p> <p>12 Of course, it's not the facts of this case that</p> <p>13 a company has not yet gone into administration. The</p> <p>14 facts of this case are that a proof is in respect being</p> <p>15 made by administrators of -- or sought to be made by</p> <p>16 a company which is now in administration. It's</p> <p>17 a company in administration with liquidation selected as</p> <p>18 an exit route.</p> <p>19 The solution in that context, we say, is relatively</p> <p>20 straightforward and not particularly surprising as to</p> <p>21 how it would work. The administrators overall -- and</p> <p>22 we're looking at this complete statutory scheme -- are</p> <p>23 required to act in the interests of the company's</p> <p>24 creditors as a whole for the achievement of the</p> <p>25 statutory purpose. That's their overriding duty.</p> <p style="text-align: center;">Page 163</p>
<p>1 contributories who go into administration. That doesn't</p> <p>2 really take matters very much further. There was</p> <p>3 a specific reason why it was necessary to deal</p> <p>4 specifically with contributories who become bankrupt.</p> <p>5 The reason why it was specifically dealt with from</p> <p>6 a legislative point of view is that in bankruptcy, the</p> <p>7 bankrupt's property, including any shares owned by him,</p> <p>8 vests in the trustee. The trustee is made the</p> <p>9 contributory, and it was necessary to provide that</p> <p>10 claims in respect of future calls aren't to be made</p> <p>11 against the trustee personally but are to be admitted to</p> <p>12 proof in the bankrupt's estate.</p> <p>13 But what it shows is that the concept of the ability</p> <p>14 to prove in respect of a future call is not something</p> <p>15 that's in any way antipathetical to the underlying</p> <p>16 principle of: what is this liability? What are the</p> <p>17 characteristics of the liability? There is a specific</p> <p>18 piece of legislation, designed admittedly for</p> <p>19 a different purpose, but which actually contemplates</p> <p>20 provability in respect of future calls in the bankruptcy</p> <p>21 of --</p> <p>22 LORD JUSTICE LEWISON: Put like that, I don't think it is</p> <p>23 very difficult, is it? Suppose LBIE went into</p> <p>24 liquidation and the liquidator hadn't quite decided</p> <p>25 whether or not to make a call.</p> <p style="text-align: center;">Page 162</p>	<p>1 That's Schedule B1, paragraph 3.</p> <p>2 The statutory purpose in the present case is the</p> <p>3 achieving of a better result for the company's creditors</p> <p>4 as a whole than would be likely if the company were</p> <p>5 first wound up.</p> <p>6 In principle it's perfectly consistent with the</p> <p>7 administrators' function and purpose for them to</p> <p>8 exercise their powers to that end if that's the most</p> <p>9 expeditious way of getting in value from the company's</p> <p>10 contributories. That's a concept which is part of the</p> <p>11 same scheme as the scheme in which the liability arises,</p> <p>12 in the sense that it arises under the same legislation,</p> <p>13 in circumstances where, although the company is not yet</p> <p>14 in liquidation, liquidation is something into which</p> <p>15 a company can move in due course.</p> <p>16 So we respectfully suggest that if the question</p> <p>17 is -- and the question plainly is for the purposes of</p> <p>18 paragraph 77(c), "Is it consistent for an obligation to</p> <p>19 have arisen in these circumstances?" we respectfully</p> <p>20 suggest it is. There isn't an objection which arises</p> <p>21 out of the fact that the company is now in</p> <p>22 administration.</p> <p>23 I think my Lord Lord Justice Briggs posited the</p> <p>24 possibility that if a company were in administration or,</p> <p>25 indeed, still subject to the control of the directors</p> <p style="text-align: center;">Page 164</p>

<p>1 a proof could be made and the money could perhaps be</p> <p>2 held on some form of Quistclose trust if recovered,</p> <p>3 pending the possibility of the company going into</p> <p>4 liquidation in due course. That is certainly a possible</p> <p>5 way of solving the problem.</p> <p>6 In the context of administration, it's not an issue</p> <p>7 which we respectfully suggest arises at all. The money</p> <p>8 can be got in --</p> <p>9 LORD JUSTICE BRIGGS: Providing that the proceeds of the</p> <p>10 call just go into the waterfall, as you say they do?</p> <p>11 MR TROWER: Yes.</p> <p>12 LORD JUSTICE BRIGGS: Yes.</p> <p>13 MR TROWER: So we don't actually, with respect, see that</p> <p>14 certainly once a company has gone into administration</p> <p>15 that there should be any question which arises by reason</p> <p>16 of the context in which the liability is being</p> <p>17 considered. It may be that that is why it is relevant</p> <p>18 to think about administration as giving rise to the</p> <p>19 vulnerability, which itself arises as part of the</p> <p>20 continuing relationship between the company and its</p> <p>21 members. Another way of thinking about it, though, is</p> <p>22 to consider whether, in the context of a company having</p> <p>23 reached administration as part of its insolvency, the</p> <p>24 test under paragraph 77(c) is actually satisfied.</p> <p>25 LORD JUSTICE BRIGGS: Because there would be pretty serious</p> <p style="text-align: center;">Page 165</p>	<p>1 LORD JUSTICE BRIGGS: Okay.</p> <p>2 LORD JUSTICE MOORE-BICK: Thank you very much. The</p> <p>3 inevitable question, how are you doing?</p> <p>4 MR TROWER: I think we're doing fine, because --</p> <p>5 LORD JUSTICE MOORE-BICK: Right.</p> <p>6 MR TROWER: -- I think I'm slightly -- no, I think about</p> <p>7 where I thought I would be at the end of today.</p> <p>8 LORD JUSTICE LEWISON: Even including the parked items?</p> <p>9 MR TROWER: Yes.</p> <p>10 LORD JUSTICE MOORE-BICK: Or the double park items.</p> <p>11 MR TROWER: The double park. I think that's right. I mean,</p> <p>12 if, for whatever reason, the parked items end up being</p> <p>13 much shorter than we had intended, we will be ahead of</p> <p>14 time.</p> <p>15 LORD JUSTICE MOORE-BICK: Neither you nor Mr Dicker think we</p> <p>16 are in difficulty completing both submissions tomorrow?</p> <p>17 MR TROWER: No.</p> <p>18 LORD JUSTICE MOORE-BICK: Good. Thank you very much.</p> <p>19 10.30 am tomorrow, please.</p> <p>20 (4.02 pm)</p> <p>21 (The court adjourned until 10.30 am</p> <p>22 on Thursday, 26 March 2015)</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 167</p>
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<p>1 problems if directors could do it.</p> <p>2 MR TROWER: One can see that there are -- I can see that</p> <p>3 there are greater difficulties there. (Pause).</p> <p>4 LORD JUSTICE MOORE-BICK: Do I sense that that is</p> <p>5 a convenient point?</p> <p>6 MR TROWER: I think your Lordship does. I have one or two</p> <p>7 more points, but I think they will take me more -- on</p> <p>8 this before I move on to the final submissions, which</p> <p>9 relate to the contributory rule.</p> <p>10 LORD JUSTICE BRIGGS: Do you have the homework as to which</p> <p>11 bits of Nortel at first instance need to be studied with</p> <p>12 a cold towel round head?</p> <p>13 MR TROWER: Yes, I have a note somewhere. (Pause).</p> <p>14 I think it is paragraph 105.</p> <p>15 LORD JUSTICE BRIGGS: Paragraph 105?</p> <p>16 MR TROWER: 105, and 111 to 123.</p> <p>17 LORD JUSTICE BRIGGS: That's in bundle 1C?</p> <p>18 MR TROWER: 1C.</p> <p>19 LORD JUSTICE BRIGGS: 1B?</p> <p>20 MR TROWER: No, it is 1C, I think, at tab 88.</p> <p>21 LORD JUSTICE BRIGGS: Thank you.</p> <p>22 MR TROWER: One piece of housekeeping. I said I will tell</p> <p>23 your Lordships where in the judge's judgment</p> <p>24 section 149(3) was mentioned, and it is dealt with in</p> <p>25 his judgment at paragraph 160.</p> <p style="text-align: center;">Page 166</p>	<p>1 INDEX</p> <p>2 PAGE</p> <p>3 Submissions by MR TROWER ( .....1</p> <p>4 continued)</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 168</p>
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