Wednesday, 13 November 2013

(10.30 am)

Submissions by MR TROWER QC

MR JUSTICE DAVID RICHARDS: Mr Trower.

MR TROWER: May it please your Lordship. Just a couple of points from yesterday, if I may.

MR JUSTICE DAVID RICHARDS: Certainly.

MR TROWER: The first was that your Lordship asked about Commonwealth authorities in relation to the currency conversion claim.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: The position is that we haven't done a comprehensive trawl, but we think that our normal research would have picked up the cases on -- MacPherson and that kind of thing(?).

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: We understand though that Allen Overy may have done such an exercise. So there may have been a trawl done, but I can't say more than that.

MR JUSTICE DAVID RICHARDS: Very well.

MR TROWER: The second point is your Lordship asked about the rule-making power in relation to the definitions in 13.12.

MR JUSTICE DAVID RICHARDS: Yes. Yes, thank you.

MR TROWER: The section is Section 4(11)(1) and (2) and

schedule 8, paragraph 12.

MR JUSTICE DAVID RICHARDS: Right, and they create that link?

MR TROWER: What they do is schedule 8 -- well, perhaps I can take your Lordship to the bits that matter. Does your Lordship have the red book there?

MR JUSTICE DAVID RICHARDS: Yes, I do, yes.

MR TROWER: If we start with 4(11).

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: "Rules may be made for the purpose of giving effect to parts 1 to 7 of this Act."

So that includes the bits that we are concerned with. Then 2:

"Without prejudice to the generality of 1 or to any provision of ... (reading to the words) ... necessary or expedient."

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: Then if you go to schedule 8.

MR JUSTICE DAVID RICHARDS: Yes, I see, paragraph 12.

MR TROWER: Paragraph 12.

MR JUSTICE DAVID RICHARDS: "Provision as to the debts that may be proved in the winding up."

MR TROWER: "It is the manner and conditions of proving ... "

Et cetera.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: So may be proved includes what may and what may not and so on and so forth.

MR JUSTICE DAVID RICHARDS: Yes, thank you very much. Thank you. Yes.

MR TROWER: My Lord that, I think, was all I had arising out of yesterday. I am going to now turn, with his Lordship's leave, to the application of the contributory rule. If I can just say some words of introduction first, and then what I was going to do was take your Lordship to the cases and work through them. I am afraid there is not really a short cut to that.

MR JUSTICE DAVID RICHARDS: Okay.

MR TROWER: It is a firmly established rule which we say applies to protect the position of those entitled to a distribution out of the company's assets, and operates to prevent a contributory from claiming or proving in competition with them, until such time as he has discharged his obligations to the contributor to the extent of his liability. One of the cases we will look at briefly describes the rule as being by one which a person liable as a contributory must first discharge himself in that capacity before he is entitled to receive anything in his capacity as a creditor. That is the West Coast Gold Fields case, Mr Justice Buckley.

Now the rule is derived from the seminal case of Grissell, where it was founded on the pari passu principle, and that is important and will be theme that runs through what we are saying, and protection for the rights of that principle was -- and the protection of those people's rights is the reason the principle has actually been developed in the way that it has. It has the clear approval, as a principle, of the Supreme Court in Kaupthing. Now in the present case, we say that this means that neither LBL nor LBHI 2 are entitled to receive a dividend on any of their claims, until such time as the amounts for which they are liable under Section 74 have been discharged. Now it is clear that in a liquidation of LBIE, once a call has been made, a contributory may not prove until he has satisfied the court. That is clear. As we understand it, none of the other parties challenge that principle. What they say is that the principle has no application pre-call, which can only occur in the case of calls on the fully paid members of an unlimited liability once it has gone into liquidation. Now the cases, of course, are mostly dealing with calls made on contributories, where the contribution is payable on unpaid shares, as opposed to payment by contributories with unlimited liability, and where the company is in liquidation. The position of

LBIE, of course, is different on both points. But stepping back, we say, it would very surprising and would not cast very much credit on the law in this area if a radically result were to be reached as a result of these two differences. As to the fact that at present LBIE is in a distributing administration, and not liquidation, both involve a pari passu distribution regime, and both involve the protection of the interests of persons whose claims may not be proveable, but whose rights will be payable before a distribution to members. Both can lead to the dissolution of the company without more. It is entirely adventitious from the perspective of the members that LBIE happens to be in administration. If it were to be in liquidation, not a distributing administration, many of the arguments they make would not be available to them. The fact is that LBIE is in administration because the joint administrators, and the court for that matter, for the matter, continue to consider that it is in the best interests of the estate as a whole that that should continue to be the case, the estate being the collective constitution of those persons for whom the contributory rule is intended to protect. In these circumstances, it is very difficult to see any sensible policy reason why the contributory should be able to prove in

an administration, if they could not take that course in a liquidation. That is the first point.

As to the fact that the members have unlimited liability, and so unlike members with unpaid shares can't be subject to calls on their shares pre-liquidation, because that is the consequence, it would be very odd if the rule worked in a way which operated to put those members in a better position than they would have been in if they had amounts unpaid on their shares, or otherwise in the position of members of the liability. Now we do, of course, accept that there is no precedent for the application of the rule where the company concerned is an unlimited liability in administration and the call hasn't been made. But we do say that once the principles which underpin the rule are appreciated, it can easily be seen that the rule of equity ought to be applied in the present case. More importantly because it is a rule of equity or an equitable rule which flows from both basic equitable principles, and the construction of the statute. We will see that in the cases as we work through them, because its non-application would be said to constitute an interference with the pari passu distribution rule(?). So that is the most important underlying principle, the rule, and your Lordship knows the rule

obviously very well. The statutory provisions which contain it are Section 107, and we don't need to turn it up, but just for your note, Section 107 for voluntaries, 4.181 for compulsories and 2.69 for administrations. So the first one are sections, the second two rules. Now the rules applies in an administration from the moment in time at which the administrators give notice of distribution under rule 2.95. Your Lordship has found to that effect in the Football League case which we put in the bundle at tab 98. I don't think it is necessary to turn it up, but it is there for your Lordship. When I talk about the pari passu distribution rule, it is important that one should not look at this too narrowly as a rule, we say. Because it is part of the statutory scheme which also makes provision for interest to be paid out of the assets, and for payments of that interest to rank weekly amongst the creditors. We have already looked at that in 2.88. That is part of the total scheme which is an essential part of the scheme and the protection of those rights are equally important.

Now Grisell's Case, as we will see, is based on the importance of the rule, to which one needs to add the cogent principle that in this context, members come after creditors, which is the way it is put by

Lord Walker in Kaupthing. I quite appreciate in other contexts it is put slightly differently, particularly in Soden(?), and one understand that submission. But that is not the point. The point here is in this context, the context of the application of the contributory rule. It actually is the case that members come after creditors.

Can I just add this on the general principles? Your Lordship gets some help, we suggest, from the way the statutory scheme was looked at in Dynamics. Now Dynamics preceded Lines Bros, as your Lordship will recall. It establishes, and I don't think we need to turn it up, that the commencement of the winding up is the date on which the scheme provides that all debts and liabilities are notionally to be ascertained. There is a sort of notional ascertainment of that.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: It is from that time as well that the shortfall which the contributories of an unlimited company are liable to discharge is notionally to be treated as having arisen, because it is in relation to that date that the quantification of the liabilities must relate. Exactly the same situation must apply in an administration. The law notionally treats the liabilities which arise for the purposes of distribution

in an administration at the stage -- well, there are two actual possibilities. It is either at the stage at which notice has been given, or at the commencement of the administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: It doesn't matter for present purposes. But the law notionally treats the liabilities, and therefore we would say the ultimate shortfall already having been identified. So it is another way of thinking about the way in which the statutory scheme has been imposed. Now it is, of course, said by the other side, and it is the core of their case, that the fact that the liability is not immediately payable, ie the liability of the contributory, is a bar to the operation of the contributory rule, and there is authority consistent with that position, albeit in very different circumstances, as we will see. But as a matter of principle, there is no such bar in all circumstances, because none of the cases, for perfectly obvious reasons, contemplate that it may be necessary to consider the contributory rule in the context of a pari passu distribution scheme, other than a liquidation, where a dividend might be being paid before it is possible for the company to make a call. So where there is a distributing administration, the

rule should apply, we submit, if the effect of not applying it is to remove from the creditors generally all or part of the fund which should be available to pay their debts.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Now one further point, just before we turn to the cases some of the cases discuss the differences between a company seeking a contribution which is limited and the company where the contributories have unlimited liability. It is sometimes said that this means that the rule doesn't apply, although one needs to look carefully as to why it is that is said in those cases, and we will have to look at some of the sections. We submit that there is no principled reason why the rule should not apply in the context of unlimited liability. There remains a pari passu scheme in place, and also although the company is unlimited, there is no reason why it is that the appropriate administration -- there is no basic reason why it is that the appropriate administration of the estate should not enable the court to require those required to contribute to do so before receiving anything back. Now in the case of a solvent unlimited company, it may not make any difference as to whether the contributory rule applies or not. That doesn't affect the underlying principle.

Now my Lord can I start with Kaupthing? What I thought I would do is start with Kaupthing and then go back to the beginning.
MR JUSTICE DAVID RICHARDS: Yes, okay.
MR TROWER: Kaupthing is at tab 94. Now Kaupthing was not on the contributory rule per se when the interface (inaudible) rule against Doubleproof and the rule in Cherry v Boultbee --
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: -- and which your Lordship gets from the headnote. But just to take you to the passages that are relevant to what we actually need to discuss, pausing -- a pithy summary of what actually happened in Kaupthing, although I don't think we need to read it now, is paragraphs 4 and 5 of Lord Walker's judgment, which is just the facts as to what was going on.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: But I don't think we need it for the purposes of understanding the bit that matters.
MR JUSTICE DAVID RICHARDS: No.
MR TROWER: The bit that matters starts at paragraph 18. It is paragraphs 18 to 20, then 51 to 53.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Would your Lordship like to read that to yourself?

MR JUSTICE DAVID RICHARDS: Yes, I will certainly. So 18 when he says "The rule was applied", which rule is he talking about?
MR TROWER: He is there talking about the rule in Cherry v Boultbee.
MR JUSTICE DAVID RICHARDS: Very well. Thank you. Yes.
MR TROWER: I think it is probably worth looking at 48 next and then 51 to 53.
MR JUSTICE DAVID RICHARDS: Yes, I read 51 to 53. 48?
MR TROWER: 48, it is a sort of helpful summary of the equitable rule.
MR JUSTICE DAVID RICHARDS: Which equitable rule is he referring to --
MR TROWER: Now he is there referring to the rule in Cherry v Boultbee.
MR JUSTICE DAVID RICHARDS: Yes, certainly, I understand that.
MR TROWER: The only reason I wanted just to mention that is one of the points is that in paragraph 51, the way Lord Walker puts it, it is clear that he is regarding the contributory rule as a special instance --
MR JUSTICE DAVID RICHARDS: That is how I read it, yes.
MR TROWER: -- of the overall equitable rule derived from Cherry v Boultbee, as he puts it. Now there will be characteristics the same, but it has obviously developed

in a different way. One of the characteristics which is different in relation to the contributory rule, is that it is based, as we will see, from Overend and Gurney on a construction of the statute, which obviously doesn't apply in relation to the rule in Cherry v Boultbee, so you have to weave into the operation of the rule in Cherry v Boultbee, the impact of the pari passu distribution rule that is provided for by the statute.

MR JUSTICE DAVID RICHARDS: So far as I could see, the rule in Cherry v Boultbee creates a sort of set off. I wasn't clear how much further than that it went, whereas the contributory rule, as you call it, clearly is quite (inaudible), it is quite different.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: Because it is saying "You must pay before you are paid".

MR TROWER: Yes, the way it is put in 13 -- perhaps we should look, on that point, the description of the rule in Cherry v Boultbee at paragraph 13 in Lord Walker's judgment, because he approves what Mr Justice Kepovitch(?) said in Akinah.

MR JUSTICE DAVID RICHARDS: Right.

MR TROWER: So it is not dissimilar.

MR JUSTICE DAVID RICHARDS: Oh yes, it's not. I see. Well, I mean the first sentence I find quite easy to follow.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: But I don't find the next sentence very easy to follow. Because the first sentence looks like the contributory rule.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: But the next sentence. I mean when I read this before, I just wasn't sure I understood what he was saying. The contributory is paid by holding in his own hand a part of the mass, which if the mass were completed, he would receive back. What does that mean?

MR TROWER: Well, the way I have always understood that is that you ask yourself the question; what is the totality of the mass? The totality of the mass is what the fund-holder has, plus what is in the hands of the contributor.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: You add those two together and you say to yourself to the extent that the contributor is retaining within his hands that part of the mass --

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: -- he is himself paid.

MR JUSTICE DAVID RICHARDS: Well, it all depends on the size of the fund and the surplus.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: But if you have a case of an insolvent company -- I think the question I am not clear about with Cherry v Boultbee is whether the fund-holder, the executors or whoever they are, can enforce the liability the beneficiary. Presumably the beneficiary owes money as a creditor.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: Presumably the executor can enforce that liability --

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: -- against the beneficiary in his capacity as a debtor.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: That's right.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: But I just don't quite understand how the rule in Cherry v Boultbee really -- I am not quite sure exactly how it works. Anyway, yes.

MR TROWER: It is more about a retention right than it is about a recovery by the fund.

MR JUSTICE DAVID RICHARDS: The fund can retain?

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: That to which the contributory claims.

MR JUSTICE DAVID RICHARDS: Yes, yes.

MR TROWER: That is the way --

MR JUSTICE DAVID RICHARDS: That is the way you see it. Yes.

MR TROWER: That is way I would see it.

MR JUSTICE DAVID RICHARDS: Okay, okay.

MR TROWER: But I might be wrong. Mr Zacaroli is looking as if I might be right.

MR JUSTICE DAVID RICHARDS: Well, yes, I think that is consistent with the way it is expressed in a number of places, although not -- yes.

MR TROWER: Yes. Which is why although there is sometimes language which is used by some of the judges in actually explaining how they see it, which can be a little bit impenetrable.

MR JUSTICE DAVID RICHARDS: Cherry v Boultbee?

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: Yes, but I mean your point is, isn't it, we are not, at this stage of the debate at any rate, terribly concerned with the rule in Cherry v Boultbee, we are concerned with a different rule --

MR TROWER: Correct.

MR JUSTICE DAVID RICHARDS: -- which derives from the statutory scheme for companies.

MR TROWER: Yes, but which draws on Cherry v Boultbee and

you get that from Grissell's Case.
MR JUSTICE DAVID RICHARDS: Right, okay.
MR TROWER: Shall we go there next?
MR JUSTICE DAVID RICHARDS: Certainly.
MR TROWER: And it is back to 1A.
MR JUSTICE DAVID RICHARDS: This is at tab --
MR TROWER: This is tab 10.
MR JUSTICE DAVID RICHARDS: 10, thank you.
MR TROWER: Like a number of these cases, I just want to say this before we look at it, this case was all about whether or not the person liable to contribute was entitled to a set off, because he would be in a better position if there was a set off. One very often finds that with these cases that that is what is going on.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Because the way the contributory rule operates is more beneficial to the estate than the operation of the set off.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: So just working through the central parts of the opening, the headnote itself describes that, and your Lordship gets the essential facts in the second paragraph, the facts of the case. If your Lordship reads the second, third and fourth paragraphs on the facts.

MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Then if your Lordship would turn on to Lord Chelmsford's judgment that starts page 533 and read the first two paragraphs. He sets out what is going on.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: I don't know how far your Lordship has got?
MR JUSTICE DAVID RICHARDS: Well, I read those two paragraphs.
MR TROWER: The two paragraphs.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: There your Lordship sees he then goes on in the next two paragraphs to bring out the construction of the Companies Act point.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Then you get the three options that he describes as to what might happen:
"Wanting to pay the full amount remaining unpaid on the shares before receiving any dividends in respect of the debt due to him, or before receiving payment of any dividend to pay out any calls that may have been made upon these shares, or is he entitled to deduct the amount of calls which have been made, but not paid by him from the debt which is due to him and receive a dividend upon the balance."
Then the conclusion in the paragraph starting in the

middle of the next page "In the first place".
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Which is of relevance in the sense that it is dealing with the equivalent of what is now Section 80. The bits matter on the formulation of contributory rules start in the next paragraph --
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: -- and really go onto the end of the judgment. It is one of those cases where --
MR JUSTICE DAVID RICHARDS: You've really got to read it. Okay, well I will read that, yes.
MR TROWER: I will come to a point on Section 101.
MR JUSTICE DAVID RICHARDS: Right. Yes.
MR TROWER: On the 101 point, I think we just need to look at 101, because it is a slightly odd way of putting at it in the light of the way 101 is drafted. It is in bundle 2 of the authorities bundles at tab 3. This is the then equivalent of what is now in Section 149, which is that section your Lordship just looked at yesterday.
MR JUSTICE DAVID RICHARDS: Yes, which itself has been amended.
MR TROWER: Itself has been recently amended, yes. So tab 3, three or four pages in.
MR JUSTICE DAVID RICHARDS: Section 10.
MR TROWER: "The court may, at any time ... (reading to the

words) ... in pursuance of this part of this Act."
So pausing there, the order available under 101 is:
" ... exclusive of calls made or to be made by the court in pursuance of this part of the act."
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: And then you go and see:
" ... and it may, in making such order, when the company is not limited, ie unlimited, allow to such contributory by way of set off any monies due to him and the estate which he represents."
Et cetera.
MR JUSTICE DAVID RICHARDS: Just let me -- one moment. Yes.
DEFENCE: Now in the light of that, what is actually said by the Lord Chancellor in the middle of page 536 is a little difficult to understand expressed in precisely exactly the way in which it is expressed, because it is tolerably plain from the wording at 101, the order that can be made does not extend to orders made by virtue of any call made or to be made by the court in pursuance of this part of this Act.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: So it may be that on its true construction of what -- maybe what the Lord Chancellor was thinking about here was where you have unlimited liability and pre-liquidation calls, but that is a slightly odd

concept.
MR JUSTICE DAVID RICHARDS: I don't know whether that was possible under the 1862 Act.
MR TROWER: No, so one can quite see why he might have thought that in the context of unlimited liability, and no issues in relation to the solvency of contributory, it didn't make any difference whether you had a contributory rule or not, because there was always going to be full unlimited liability in respect of everything.
MR JUSTICE DAVID RICHARDS: Yes, I understand that.
MR TROWER: But we are puzzled, and one comes back to this a little bit later, but it doesn't appear to work terribly well as a statement of principle in relation to unlimited liability companies.
MR JUSTICE DAVID RICHARDS: No, was this ever commented on by --
MR TROWER: Yes, well there have been one or two cases subsequently where we get some sort of help on it, but it is not really dealt with expressly anywhere on this point.
MR JUSTICE DAVID RICHARDS: Did any of the great 19th century textbook writers pick up what Lord Chelmsford said? There was Mr Lindley, of course.
MR TROWER: Of course.

MR JUSTICE DAVID RICHARDS: Mr Palmer and Mr Buckley.
MR TROWER: Well, we can certainly look into that.
MR JUSTICE DAVID RICHARDS: Well, they may or may not.
MR TROWER: My Lord, I have not done that, and that is certainly an exercise we can carry out.
MR JUSTICE DAVID RICHARDS: No, well don't worry. I mean on the face of it, it does look as if he has mis-read Section 101.
MR TROWER: It does, doesn't it.
MR JUSTICE DAVID RICHARDS: Anyway, there we are, yes.
MR TROWER: The next case on the list is Calisher's Case, tab 12. This is another relatively short judgment:
"A contributory of a limited company had been wound out, but the court under the Companies Act is not entitled in the absence of a special agreement to set off monies due to him from the company against a call made before the winding up."
One of the questions that arose in this case was whether a special contract in relation to this issue affected the operation of the principle. It is Lord Romily, it starts at page 217. Again, it is a relatively short judgment, I think, which touches on the 101 point at the end, but not in a particularly clear way. It is really just the main first paragraph that your Lordship should read.

MR JUSTICE DAVID RICHARDS: Right. So the first paragraph of his judgment?
MR TROWER: Yes, it is quite a long one.
MR JUSTICE DAVID RICHARDS: Yes. Lord Romily, his reading of the section seems correct.
MR TROWER: Yes. Now the next case which does bear more directly on the unlimited liability point is Gibbs and West's Case, which is tab 19. There were two judgments in Gibbs and West's Case, and the one that matters is the second of the judgments which starts at page 327.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: Your Lordship can there see that the claimants, West and Gibbs -- general creditors of the company:
"The only question I have now to decide is whether in the event ... (reading to the words) ... to be made."
Would your Lordship then read to almost the end of 328?
MR JUSTICE DAVID RICHARDS: Yes, certainly. So he then goes on to discuss whether it is a limited or an unlimited company.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: What does he conclude there?
MR TROWER: He then says it is unlimited.
MR JUSTICE DAVID RICHARDS: He says it's unlimited, yes.
MR TROWER: Then at the very end, the last paragraph.

MR JUSTICE DAVID RICHARDS: Yes. Yes, I see.
MR TROWER: So that an approach that is adopted in relation to unlimited liability company in the light of his construction of 101, which again is a slightly surprising construction of 101, but that is the way he has approached it. Now it may well be if you go back to page 328, your Lordship will see the reference to the passage in Lord Chelmsford's judgment which Mr Higgins said was erroneous, though I confess I was unable to follow him when said so, is in these terms.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: The passage where that argument was made starts at page 325 of the argument.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Your Lordship sees in particular Lord Chelmsford dictums(?) he made under the erroneous supposition in the first part apply to cause. Now that may be what it was that the Vice Chancellor didn't understand.
MR JUSTICE DAVID RICHARDS: I think it clearly is, yes.
MR TROWER: My Lord, the next point is the Black & Co which is tab 23.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Your Lordship again can get I think what you need from the headnote on the facts.
MR JUSTICE DAVID RICHARDS: Where do you suppose Paragrasu

is or was?
MR TROWER: I would guess South America, I might be wrong.
MR JUSTICE DAVID RICHARDS: Yes (inaudible), it has a Joseph Conrad ring to it.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Yes, sorry, page?
MR TROWER: Yes, if you just read the headnote, just because that will give what the case is about.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Then there are two passages in the judgment for your Lordship to read. One starts on page 260 and goes over the page to halfway down 261, and the other starts at the top of the first half of the page 262.
MR JUSTICE DAVID RICHARDS: So 260 starts --
MR TROWER: 260 starts "I pass therefore."
MR JUSTICE DAVID RICHARDS: Okay.
MR TROWER: Then halfway down 261, and then if you read the first half of 262.
MR JUSTICE DAVID RICHARDS: Right. Then on 262 read from --
MR TROWER: From the top to the end of the paragraph.
MR JUSTICE DAVID RICHARDS: What, the moment the winding up takes place?
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: And then there is a passage in the judgment of

Lord Justice Mellish at page 265 dealing with the unlimited liability point, about halfway down.
MR JUSTICE DAVID RICHARDS: Right, Lord Selbourne doesn't comment on that at all?
MR TROWER: No, he doesn't.
MR JUSTICE DAVID RICHARDS: No. So page 265:
"In the case of unlimited liability ... "
Is that right?
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Hold on, sorry, where should I start?
MR TROWER: 265.
MR JUSTICE DAVID RICHARDS: Perhaps I shall start at the top.
MR TROWER: Start at the top, that is probably easiest, yes.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: So what your Lordship sees going on here is the articulation of a couple of points. The first is that the right of set off is excluded, essentially by implication, because of the way 101 is actually drafted. So when one comes back in, they tend to be looking -- with the exception of the Malinn(?) decision -- at the question of the operation of 101 for that purpose, rather than necessarily for the purpose of deciding whether or not there is to be a set off in respect of

a particular unlimited liability company. Your Lordship sees in relation to what Lord Justice Mellish has said here, that the reason that you distinguish between the two, or the reasonable distinction between the two is that other creditors' rights are not prejudiced in any way in the context of unlimited liability. Now, of course, that does actually pre-suppose that the unlimited contributory is itself going to be solvent(?). Would your Lordship just give me one moment?
MR JUSTICE DAVID RICHARDS: Yes, certainly.
MR TROWER: My Lord, the next case is Whitehouse that we need to look at. I am looking at it for a couple of reasons, including the fact that it is then subsequently distinguished and said to be wrong on one point. But Whitehouse was a case in which the rule was applied. The contributory was not permitted to set off a debt due to him from the company against calls made against him. I think we looked at this briefly yesterday.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Where one needs to start is on page 596.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: The application is described starting on the second paragraph. What the Master of the Rolls was concerned with was the question of whether or not a set off was available, and if it wasn't, why it wasn't.

MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: If you go to page 599 at, the paragraph starting "if therefore" and read down to the end of the paragraph at the top of page 600 your Lordship will there see his reasoning.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: But part of this reasoning was subsequently disapproved by the Court of Appeal.
MR JUSTICE DAVID RICHARDS: Right. Yes.
MR TROWER: The only other paragraph I think your Lordship -- well, no, if you could read the first paragraph at the top of page 601.
MR JUSTICE DAVID RICHARDS: Yes. Yes.
MR TROWER: That point about the lack of similarity in the identity of the debtor and creditor is a point which is picked up in Pyle in the Court of Appeal, which I will show you in a moment and is said to be wrong. But then he deals on page 601 further down with Section 101. There is a passage about 10 lines up where it appears that he at least understood the point on the true construction of 101.
MR JUSTICE DAVID RICHARDS: Right, sorry, so that is on the same page?
MR TROWER: The same page, down to the bottom. So that sentence, that excludes calls and the winding up, but

would include a call made before the winding up, is where he seems to (inaudible) up.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: I think that was all I wanted to get out of Whitehouse. The next case is behind tab 27 is Gill's Case. Now there is a very short sentence really, no more than that, that I wanted to draw your Lordship's attention to in that. This was another case on contributory rule, and was a case where it was held that the Judicita Act set off right had not interfered with the operation of the contributory rule. The way Vice Chancellor Bacon puts it on page 757, and it is not directly in the context of the operation of the contributory rule, but it is the way in which he describes the statutory obligation of the contributor. He describes it as the statutory obligation springing from the contract to take shares, which you see about 10 lines down context.
MR JUSTICE DAVID RICHARDS: Yes, yes.
MR TROWER: Your Lordship may find it helpful in that context. Then can we go to Re Pyle Works which is tab 34. Now Pyle was a case about mortgaging calls on shares, so the extent to which the company could mortgage calls. Before we get to the judgment, there is just one comment made in the argument by

Lord Justice Lindley at 560 which your Lordship might find of assistance.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Where he characterises:
"The capital of an unlimited company is the capital which has been called up and so much more as the company wants."
Is the way he puts it. He puts it that way. Lord Justice Cotton had a slightly different sort of approach which I will show you as well.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: We then go to the judgments of Lord Justices Cotton and Lindley, and Lord Justice Cotton starts at 573. Now the passage I was going to show you, perhaps just for completeness, Lord Justice Cotton takes a slightly different approach to what is the capital of an unlimited company, which your Lordship see at 5674 at the bottom of the page, "But it was said that", perhaps stop at the end of the first sentence. Well, possibly, yes. The bit I really wanted your Lordship to see was what he says about Whitehouse.
MR JUSTICE DAVID RICHARDS: Oh right.
MR TROWER: Halfway down:
"It is very true ... (reading to the words) ... before the late Master of the Rolls."

Down to the end of that paragraph.
MR JUSTICE DAVID RICHARDS: I see, yes.
MR TROWER: So he said that the Master of the Rolls was right on one way of looking at it, based on Black's Case, but when he talked about a call being something which accrues to the liquidator and not really due to the company, he was wrong.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Then on page 576 he comes back to the capital point again in the context of simply citing what Lord Cairns said in Webb v Wiffin. It is really the passage starting:
"He therefore in distinct terms ... "
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: This, of course, is all being said in a context of an assessment as to what was available to the company as a mortgage. That is what one has to bear in mind.
MR JUSTICE DAVID RICHARDS: Yes, right.
MR TROWER: Then Lord Justice Lindley also deals with questions of capital and questions of what Whitehouse decided. 582, starting in the middle of the page.
MR JUSTICE DAVID RICHARDS: Yes. Yes.
MR TROWER: So there he is talking about the nature of the capital. He then talks about how it has got in under the various provisions and the materiality of the form

of procedure.
(11.45 am)
He then summarises over the page, at page 583, in the paragraph beginning, "A careful study", the first three points.
MR JUSTICE DAVID RICHARDS: Yes, I have that.
MR TROWER: Then finally in this judgment at page 585, the bottom paragraph, is where Lord Justice -- well, it's the bottom two paragraphs where he deals with the Master of the Rolls in Whitehouse.
MR JUSTICE DAVID RICHARDS: Right. Yes.
MR TROWER: So further confirmation, if it be needed, that the significance of the contributory rule arises in the context of the statutory prohibition on set-off or the fact there is no right to set-off in the light of the statutory code taken as a whole.
My Lord, a convenient moment?
MR JUSTICE DAVID RICHARDS: Certainly. I will rise for five minutes.
(11.47 am)
(Short break)
(11.55 am)
MR TROWER: My Lord, I think we can move to the next authorities bundle which is 1(b). The next case in the list is the first of the Auriferous cases. This is a

case about two companies in liquidation.
MR JUSTICE DAVID RICHARDS: So this is tab?
MR TROWER: Tab number 38.
MR JUSTICE DAVID RICHARDS: Thank you.
MR TROWER: The G company is the member. The A company is the company, for the purposes of looking at this.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: The first case deals with set-off.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: They are both judgments of Mr Justice Wright. Once your Lordship has read the headnote, again it's a relatively short judgment, I think there probably isn't very much of a shortcut to just reading the judgment.
MR JUSTICE DAVID RICHARDS: Very well.
MR TROWER: Then Auriferous 2, which is behind the next tab, is what happens where the company declared a dividend and the contributory sought to prove. So that is more the application of the contributory rule. Again, it is a short judgment. It starts at page 430.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: There is a point at the top of page 431 which is worth perhaps just noting.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: "The call has been made in a liquidation but

when it was made there was only a contingent liability which might never become enforceable and could not be set off unless perhaps after some process of evaluation."

Now, of course at that stage they were not thinking about valuing particular claims in quite the way that we do now.

The next case behind tab 45 is West Coast Gold Fields. Now, this is a case which bears on the question of future liability, although in a rather different context than the one we are concerned with. Again, the headnote is a reasonably clear exposition of the issue.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: So the claim against the company in this case was in its capacity as a shareholder rather than a claim for a debt. So that was the difference. Mr Justice Buckley's judgment starts at 600. The first paragraphs recite matters in a fairly conventional form. Then your Lordship can pick up the reasoning at page 601 where he describes what the trustee says that he ought to receive. This is the trustee in bankruptcy.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Actually if your Lordship would read to the end of the case again. I am sorry, but it is very short.
MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: That passage at the end of Mr Justice Buckley's judgment I think was picked up and used by Lord Walker in Kaupthing.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Then tab 48, and we are nearly there.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: Tab 48 is Rhodesia Goldfields. Again, we are looking at it, as much as anything else, because it was one of Lord Walker's cases. It's actually a slightly different context in which the principle arises. If your Lordship would just read the headnote you will see what it is.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: So what this is about is in a retention context the question is, where a debt is not immediately payable, what the consequences are so far as the ability of the debtor to share in the distribution of funds concerned. If we go to the judgment of Mr Justice Swinfen Eady and your Lordship sees the first paragraph on page 245, the nature of the claim against the debtor seeking to contribute.
MR JUSTICE DAVID RICHARDS: Sorry, where are you? "One of the claims against Partridge."
MR TROWER: "One of the claims against Partridge", and then down to the bottom there.

There is no doubt it is a debt but at the moment it's not ascertained. This is really a case on Cherry v Boultbee rather than ...
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: Then you have a description of the rule in Cherry v Boultbee effectively at the top of page 246.
MR JUSTICE DAVID RICHARDS: Yes, this is Mr Justice Kekewich.
MR TROWER: Yes, that's right. Then there is a paragraph if your Lordship would read starting at the bottom of 246, "Various cases".
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Your Lordship may recall from the written submissions there was then a point that was made about how this didn't apply in relation to future calls, this kind of concept, and there was a reference to something Mr Justice Swinfen Eady had said. He actually said it in the context of the argument. Your Lordship, if you go back to 242:

"The company could not set off a future debt, e.g. a future call. The present claim is for an existing debt."

Now, that's a comment that was made in the context of the argument in relation to the set-off point.
MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: Not, as far as one can tell, in relation to the Cherry v Boultbee issue.
MR JUSTICE DAVID RICHARDS: Well, yes, because that's what he says at the top of 247, isn't it?
MR TROWER: Yes. The reason for drawing that to your Lordship's attention is I think LBL make some point on this and your Lordship has to be careful as to exactly -- it's in the argument anyway and not in the judgment -- but it seems to be in the context of a debate about set-off in circumstances where set-off rights were much tighter in the concept of future maturity and contingency.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: The only other case on this line I wanted to take your Lordship to was White Star, behind tab 54, now this case was all about how the introduction of a set-off rule did not affect the contributory rule per se. So, although this line obviously started on the basis that you had to have the contributory rule in order not to interfere or, sorry, in circumstances where the set-off right had actually been excluded and the pari passu rule was dominant, what this case makes clear is that the mere introduction of a set-off rule across the board does not of itself affect the operation of the contributory rule. But in a sense that's obvious from

the fact that Kaupthing has actually confirmed that it still exists.
This is the judgment of the Court of Appeal. If your Lordship just reads the headnote because there are two companies here. One of the companies is called the Royal Mail company and the other is the White Star company, a shipping company presumably.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: The Royal Mail company is the holder of the shares and the White Star company is the company.
MR JUSTICE DAVID RICHARDS: I think the White Star company owned the Titanic.
MR TROWER: Yes, I think it did.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: One of the basic points in the case was whether or not there were unpaid shares, that was the factual question, or whether or not there would be payment on those shares. So the issue arose in that context. But the statement of principle that your Lordship may find helpful is on page 479, starting at, "If the view above expressed be correct", that view being that there are still unpaid shares.
MR JUSTICE DAVID RICHARDS: Sorry, page?
MR TROWER: 479.
MR JUSTICE DAVID RICHARDS: Sorry, my eye caught the fact

Sir William McLintock was appointed liquidator of the Royal Mail company.
479, yes. Reading where, Mr Trower?
MR TROWER: Starting 479, "If the view above expressed", just that one paragraph.
MR JUSTICE DAVID RICHARDS: Right. Yes.
MR TROWER: My Lord, those are the authorities which help on the way in which the rule developed, how it's been applied and quite a lot of which were referred to in the judgment of Lord Walker, not all of them but quite a few of them. We respectfully submit that one can see very clearly from that line of authority that there are two strands moving together. The first draws on the right of retainer arising from the rule in Cherry v Boultbee. There is a clear link between the two concepts. The second is to the operation of the statutory code in its entirety, the focus of which is on the pari passu distribution rule but a number of those cases, as your Lordship will have seen, look at the code more generally.
Now, we accept that there are a number of cases which indicate that, in the normal course, the right of retainer arising from the rule in Cherry v Boultbee wouldn't apply to entitle the fund owing a present debt to retain an amount equal to a future liability of that

person to the fund. But that doesn't really help on whether the contributory rule can ever apply in those circumstances, because we submit that the contributory rule can apply once an administrator of the company has been appointed and the potential contributory then seeks to prove in the distributing administration.
The contributory rule is stricter than the right of retainer on this point. It's described by Lord Walker in Kaupthing as "a special case" and it's stricter for very good reason. The fund from which the contributory seeks to recover the assets of the company is the very fund which the contributory has undertaken to complete, albeit at some stage in the future. It's the very fund that is to be distributed amongst the creditors in accordance with the statutory scheme. It follows that if the contributory rule is not exercised, that statutory scheme for distribution will be undermined in exactly the same way in administration as it would be or was in the context of a liquidation as formulated in the Grissell's case.
Even though the statutory scheme, taken as a whole, hasn't yet reached the stage at which the contributory's liability to the company is payable under the statute, because a call has not been made, the remaining elements of the scheme are in place, the remaining relevant

elements. We submit that the contributory already has a clear contingent liability to contribute. Now, one of the points that is taken against us, which I touched on I think at the very beginning but I will mention again in this context, is that it's argued against us that the effect of our approach is that it drives a coach and horses through section 75.2(f), which restricts a member from proving in his capacity as such. I am sorry, I said 75. I meant --

MR JUSTICE DAVID RICHARDS: 74.

MR TROWER: -- 74, I am so sorry, which restricts a member from proving in his capacity as such. I say by way of supplement that it fails to give adequate emphasis to the fact that in Soden (?) the House of Lords made clear the rule was not that a shareholder should (inaudible) member. The reason they obviously say that is because that is the effect of what will happen if the contributory rule operates. They won't be entitled to come in to prove under the insolvency. But there is a very short answer to this submission.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: Actually, as it happens, a fairly similar submission was made in Grissell's case, as your Lordship may recall, which was rejected. The short answer is that 74.2(f) is doing a very different job from the

contributory rule. It simply applied so as to exclude a particular category of claim from competing against the claims of other outside creditors, full stop.

MR JUSTICE DAVID RICHARDS: Yes. I mean, it's equally applicable in the case of a company where the capital is fully paid up.

MR TROWER: Yes. So it has nothing to do with a situation in which a member of the company is under a liability to contribute and seeks to prove, notwithstanding that. So it really doesn't help at all on this point. Although it's put at the forefront of some of the submissions and that's why I felt it only right to deal with it.

MR JUSTICE DAVID RICHARDS: I will see how it's put. Mr Trower, let us assume that LBIE was in liquidation but no call has yet been made.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: Now, just the various cases you have shown me -- I appreciate there is obviously this distinction between limited and unlimited companies, but putting that on one side for the moment.

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: What do the cases demonstrate about that circumstance? So there is unpaid capital but no call yet made.

MR TROWER: Yes. As far as I am aware, my Lord, none of the

cases address the point as to where the company has gone into liquidation but a call has not yet been made.

MR JUSTICE DAVID RICHARDS: They are all cases where a call has been made.

MR TROWER: Where a call has been made, yes.

If we are correct as to the application of the contributory rule, the members cannot prove in the LBIE liquidation until they have paid the amount for which they are liable. They are liable for the full amount of the deficiency. In practice, that probably does follow that, because they have unlimited liability, they may not be in a position to discharge that in order to prove, but that's not a particularly surprising consequence given that they are companies with unlimited liability.

Looking at it the other way round, our claims against the members, the fact that the member is itself subject to an insolvency process -- I mean, we have been looking up till now in the context of the contributory rule, i.e. the claim coming into us.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: What is the effect of the fact the member is itself subject to an insolvency process? Well, it's important in the sense of proof because it enables us to prove in respect of the contingent liability.

Auriferous number 1 confirmed that the ruling in Grissell's case continues to apply in that kind of circumstance. The contributory cannot meet in that circumstance the company's inbound claim with a plea of set-off.

MR JUSTICE DAVID RICHARDS: Yes. But presumably set-off is available in the claim made --

MR TROWER: The other way round, into our --

MR JUSTICE DAVID RICHARDS: -- into the member, yes. Hold on. That's Auriferous number 2, is it?

MR TROWER: Yes. Now, my Lord, just for your Lordship's note, in paragraphs 51 to 60 of our supplemental submissions we deal with the position in relation to the application of insolvency set-off in circumstances in which the court might conclude the contributory rule doesn't apply, if your Lordship were to be of that view.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: The analysis is relatively clean I think in that part of the supplemental submissions. What it seeks to deal with is the argument that LBL appears to be making, which is that insolvency set-off doesn't operate as regards the members' contingent liability to contribute in a manner which enables LBL to prove in full in LBIE's administration without taking account of its contingent liability to contribute.

MR JUSTICE DAVID RICHARDS: Sorry, can you just run that past me again. Are we focusing for the moment on proofs in LBIE's, in LBIE's --
MR TROWER: This is what their submission appears to be going to, yes.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: What LBL appears to be submitting is that it is entitled to prove against LBIE and receive 100p in the pound.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: But LBIE is prevented from proving against it until it has gone into liquidation and made a call.
MR JUSTICE DAVID RICHARDS: This is because LBIE has no claim.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: It's the liquidator of LBIE which would have the claim.
MR TROWER: Yes, and the other arguments based on that proposition.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: Which we simply say cannot be right. The reason it cannot be right is because the creditors of LBIE, for whatever reason, are not able to take the benefit of the contributory rule but it must be the case that in those circumstances a set-off at least is available.

MR JUSTICE DAVID RICHARDS: Sorry, in the cases we were looking at a moment ago.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Where Sir George Jessel was wrong in Whitehouse, wasn't it?
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Is this a related point?
MR TROWER: Well, it is related in the sense, yes, it sort of goes to that aspect of mutuality in the sense that --
MR JUSTICE DAVID RICHARDS: Who was the claimant? I may have just misremembered this, sorry.
MR TROWER: Sorry, this is Whitehouse.
MR JUSTICE DAVID RICHARDS: Whitehouse was the Jessel case.
MR TROWER: Whitehouse was the Jessel case.
MR JUSTICE DAVID RICHARDS: Then in Pyle he said he was wrong on this point.
MR TROWER: Yes, 34.
MR JUSTICE DAVID RICHARDS: I think we have, for example, at the end ...
You see, at page 585 Lord Justice Lindley says that a call made by a liquidator in a voluntary winding-up is a debt due to the company.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Not a debt due to the liquidator.

MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: It is in that respect that Sir George Jessel was wrong in Re Whitehouse.
MR TROWER: That's correct, yes.
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: My Lord, I think I should make clear that, in relation to the set-off point, it's very much our secondary position.
MR JUSTICE DAVID RICHARDS: I follow that. You say that the contributory rule applies not only in a liquidation but also in an administration, and it's only if you are wrong about that you say there could be a set-off at that point.
MR TROWER: Yes. The same in the members' distributive administration as well. The set-off would work in both.
MR JUSTICE DAVID RICHARDS: Yes. I don't think there is any doubt -- well, the same would work there. Yes, sorry, of course, it would. It's the same point, isn't it?
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: No, I follow that. I am just trying to think through how the contributory rule applies in an administration which never proceeds to a liquidation.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: I am just trying to think how --

you say, well, now the members cannot recover anything qua creditor without sort of making good the capital of the company. They are never under an actual liability to do so because the company never goes into liquidation. You say, well, if it's at all times clear that if the company went into liquidation they would be required to contribute, then they are in the position that the contributory rule applies.
MR TROWER: Yes. There may be a difference. Where the contributory is in an insolvency procedure itself, the company could prove in respect of the obligation to contribute on which it may get 100p in the pound.
MR JUSTICE DAVID RICHARDS: If it got 100p in the pound, then it would be paid.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: But unless it receives its full debt --
MR TROWER: At that stage --
MR JUSTICE DAVID RICHARDS: The contributory rule still applies.
MR TROWER: The contributory rule -- the contributor there would be able to prove for a dividend.
MR JUSTICE DAVID RICHARDS: Yes, that I follow. Yes, okay.
MR TROWER: My Lord, I think I have probably almost come to the end.

MR JUSTICE DAVID RICHARDS: Of your submissions.
MR TROWER: Of my submissions, yes. Can I just check there isn't anything I need to go back on?
MR JUSTICE DAVID RICHARDS: Yes, of course.
MR TROWER: My Lord, I don't think there is anything else that I was proposing to draw to your Lordship's attention or make submissions to your Lordship on at this stage. If there are any further questions I can help you with?
MR JUSTICE DAVID RICHARDS: If you just give me one moment. Could I take you back to the beginning and go back to the subordinated loan agreement.
MR TROWER: Yes, of course.
MR JUSTICE DAVID RICHARDS: So in volume 4.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Clause 5, the subordination clause. I just wanted to look again at clause 5.1(b), the solvency condition, as it were. Now, this condition applies whether or not the borrower is in an insolvency proceeding.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: I just wanted to hear what you had to say about how it applies if the borrower is not in insolvency.
MR TROWER: I can see what is very difficult is how you

bring in excluded liabilities is one question, but that may not be the point your Lordship is on.
MR JUSTICE DAVID RICHARDS: I am slightly more general really. You cannot have a payment unless the borrower is solvent immediately after the payment.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: In order to be solvent after the payment, the borrower must be able to pay its liabilities in full.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Disregarding (a) and (b) -- well, I am not sure that it's necessarily that difficult to apply (a) and (b) outside an insolvency. But I am more concerned about what is meant by the liabilities in circumstances where the company is not in an insolvency and how the borrower goes about satisfying that requirement.
MR TROWER: As a matter of practicality?
MR JUSTICE DAVID RICHARDS: Yes, really.
MR TROWER: It may well be one of those issues where it is simply -- I mean, borrowers are as likely to be concerned with evidencing their state of affairs pre-insolvency as they are post-insolvency. But maybe I have not quite grasped your Lordship's question.
MR JUSTICE DAVID RICHARDS: I was thinking, for example, you

have -- I suppose, first off you would look at the company's accounts.
MR TROWER: I think you would.
MR JUSTICE DAVID RICHARDS: Clearly it would have present liabilities spelt out, it would have future liabilities.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Now, of course the future liability might not arise for payment for some time. So maybe the exercise that's there undertaken is the exercise resulting from whichever Supreme Court case it was.
MR TROWER: Eurocell.
MR JUSTICE DAVID RICHARDS: Eurocell, thank you. There may be contingent liabilities to the extent that a provision is made. You would need to be satisfied that that could be met. I am just trying to get a feel for -- I mean, if there was an outstanding contribution notice under the pensions legislation, that would be a present liability so would have to be met.
MR TROWER: Yes. I think there is a practical answer to this question which is, although it does apply in practice, if the company satisfies the financial resources requirement under (a), it's most unlikely to be insolvent.
MR JUSTICE DAVID RICHARDS: That I don't -- because you were

not very keen to go into that, and I am not encouraging you to go into the detail of it, but I feel perhaps I ought to know just a little bit about the financial resources requirement.
MR TROWER: We can find it. Actually I am not sure it's going to -- I have looked at it.
MR JUSTICE DAVID RICHARDS: By all means, give me the bottom line as to what it means.
MR TROWER: It's basically a solvency question again but at a different level and taking into account particular categories of asset and liability for regulatory purposes.
MR JUSTICE DAVID RICHARDS: I see.
MR TROWER: So while conceptually a company may be both ways round. Conceptually a company may not be insolvent in circumstances in which it doesn't satisfy the financial resources requirement and it may also be the case that having the solvency test graphs an extra relevant requirement on to having to satisfy the financial resources requirement. It's I think most unlikely that a company would not be solvent but would still satisfy the financial resources requirement.
MR JUSTICE DAVID RICHARDS: Yes, I see.
MR TROWER: Now, it may be that others are able to -- we can certainly look and see if there is an easy way of giving

your Lordship a bit more of a feel about the financial resources requirement. I don't have that at my fingertips at the moment.

MR JUSTICE DAVID RICHARDS: If there is some reasonably easy way of achieving that, I think that might be helpful.

MR TROWER: I can understand that, my Lord, and we will do something on that, although not here and now I am afraid.

MR JUSTICE DAVID RICHARDS: The other point is, although you do not yourself seek to make anything of the FSA materials, as we might call them, there cannot be any doubt, can there, that, to the extent they assist one way or another, these subordinated loan agreements are to be construed having regard to the regulatory regime against which they are made?

MR TROWER: I think that must be right. There are a number of textual indications in the agreement itself in relation to that.

MR JUSTICE DAVID RICHARDS: Yes, and it's a template we happen to know. We know that the whole point of the subordinated agreements is to provide tier two or three capital.

MR TROWER: Yes. So, as a matter of principle, that must be right, although how far it is going to be legitimate to go with the materials will depend on what --

MR JUSTICE DAVID RICHARDS: Depends on the materials. It may be that they don't, in the end, shed a great deal of light.

MR TROWER: No. That was our conclusion but we may be wrong.

MR JUSTICE DAVID RICHARDS: Yes. Mr Trower, can I just check back. I don't think there is anything else I wanted to ask you. No, thank you very much indeed.

MR TROWER: I am grateful.

MR JUSTICE DAVID RICHARDS: Mr Zacaroli.

Submissions by MR ZACAROLI

MR ZACAROLI: My Lord, as my Lord knows, we are playing a very much supporting role in this application. As my Lord will have discovered by now, there has been no division, as it were, of issues between myself and Mr Trower. Mr Trower has covered everything, for reasons which I don't need to go into now. We have sought to liaise with them as much as possible to assist in that process. Therefore, I can be pretty short in my own submissions.

What I propose to deal with, subject to your Lordship, is deal with everything I am going to deal with from the perspective of the foreign currency claim. That will mean touching a little, but only a little, on issues which go more broadly than that, but I intend to

focus principally on the foreign currency claim. Now, Mr Trower has covered it and I won't be repeating things he's done. I may be repeating a sentence but I won't be going into it in any detail.

With that introduction, the sub-topics within the foreign currency claim are really, first of all, the fact that there is such a claim, i.e. different to your claim that is proved, there is a claim which survives the fact you have proved for part of it in a liquidation.

Secondly, the fact that that claim, which was envisaged possibly to occur at least by Lord Justice Brightman in 1982 has survived the Insolvency Act. So it's survived the passing of the Insolvency Act and the Insolvency Rules.

The third point is whether the Law Commission working papers and reports my Lord was shown have in some way impacted on this claim. In a sense, it's linked to the last point. Has the insolvency, in light of those reports and working papers, rejected this claim as a matter of statute.

Then two matters I will deal with very, very briefly -- well, one not at all in fact -- which is whether the liability is subordinated under the agreement. Mr Trower has dealt fully with that. I add

nothing to that. Then whether the liability is one within section 74, i.e. the foreign currency claim, is that a liability that falls within the definition of liability in section 74 for the purposes of the obligation on the members to contribute. Again, that's been dealt with and I can deal with that very shortly.

Then, finally, the impact or the relationship between the contributory rule and this claim. I have one or two points to add there.

MR JUSTICE DAVID RICHARDS: Right.

MR ZACAROLI: Taking the first of those points, which is the survival of this contractual right to be paid in a foreign currency, notwithstanding that a creditor has proved and is required to prove in insolvency.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: I start by developing a little of what this claim actually is because one starts with a debt, a debt that's payable in a foreign currency. We are talking here about a debt that's payable in a foreign currency because that's the contractual entitlement. This is a contractual right we are talking about.

There is a neat explanation of the content of that right in Lord Justice Oliver's decision in Lines Bros itself. It's volume 1C, tab 66. It's page 22 at letters E to F. He is citing a submission from

Mr Stubbs, which obviously was ultimately rejected in whole but the submission here he says is unanswerable. Just above letter E, he says:

"[Mr Stubbs] he contends first, which is unanswerable, that the Milianglos decision" --

MR JUSTICE DAVID RICHARDS: I am terribly sorry, I am just trying to get there. Yes, I have it.

MR ZACAROLI: "He contends first, which is unanswerable, that the decision of the House of Lords in Milianglos establishes beyond doubt that, apart from liquidation or bankruptcy, the foreign currency creditor is, as a matter of contract, owed foreign currency and not sterling and is entitled if he elects to be paid in sterling ...(Reading to the words)... exchange rate then prevailing."

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: It follows from that that if -- well, just to draw back a moment, that means the claim is the claim to have your sterling equivalent paid, to the extent that's not satisfied through the proof and distribution process in the liquidation. That's what the nature of the claim we are talking about is. You start off with the right to be paid in foreign currency; that means entitlement to have sterling equivalent at the date of payment. You prove in an insolvency. It gets converted at the date

of insolvency into X amount of sterling. If it turns out that when you get paid that it's Y pounds or Y dollars less than your dollar entitlement, for example, that's your claim.

There is one other authority which sheds a bit of light on this point. It's another Lines Bros, Lines Bros at first instance in fact, Mr Justice Slade at tab 65 in the same bundle.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: It's page 14 of the report as copied. The first major paragraph at the top, "The Milianglos decision precisely rejected", that's the paragraph. It's the last six or so lines of that paragraph.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: You will see the words, "Accordingly, the court has to decide what payment in sterling should be made." If my Lord reads to the end of that paragraph.

MR JUSTICE DAVID RICHARDS: I will. Yes.

MR ZACAROLI: The second point in these sort of short steps, as it were, as to how we achieve the result that Lord Justice Brightman would like us to get to, the second point is the contractual rights of creditors subsist throughout a liquidation and survive. That's the Wight v Eckhardt decision. Mr Trower took my Lord to it. I don't need to take my Lord to it again. The

phrases such as "the debts are not affected, are not touched by the winding-up process". The contractual right, whatever it is, survives.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The third point then is this contractual right to be paid your sterling equivalent at the date of payment insofar as there is a shortfall is itself not provable. We are talking about a claim which is inherently not provable. The reason for that is that it's the result of the rule that, for the purposes of proving and participating in the collective enforcement of the claims (that's a winding-up), it has to be converted at a single date.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: That's the decision in Lines Bros in the Court of Appeal. Perhaps put most pithily by Lord Justice Brightman himself at page 14, letter H, tab 66.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: It's for the purposes of satisfying, applying the company's proper satisfaction of its liabilities pari passu. You need to convert it to a single date.

Now, one asks oneself why it's not provable. What's the reasoning behind that rule the Court of Appeal adopted? Of course it became statutory later on. The

reasoning is very clearly set out in Lord Justice Brightman's decision at page 16, letters C through to E. Now, you have been shown this before so my Lord will recognise it.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: There are two points. First of all, the policy of the Milianglos decision was that the debtor company should not be entitled to impose on the foreign currency creditor the risk of a fall in value in sterling. Lord Justice Brightman says at letter D:

"Justice demands that the risk shall be borne by the debtor who is the party in default."

So that's the policy of Milianglos. But, said the Court of Appeal in Lines Bros, that policy has no application in the collective enforcement process which is for the benefit of all creditors.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The sterling creditors are not in default vis-a-vis foreign currency creditors.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So that's the principle underlying the result in Lines Bros meaning this claim is not provable.

Now, the fourth point is that, as a matter of principle, debts which subsist but are excluded from the proof process, for whatever reason, are enforceable

against the company's property once all other creditors have been paid in full. As a general principle, that is clearly established by, for example, Humber Ironworks. That's the case about interest. Again, perhaps we don't need to turn it up, but Lord Justice Gifford made the point that, once everyone else has been paid, the creditor whose debt carries interest is remitted to his rights under the contract.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Now, of course that principle has been overtaken by statute. So, in a sense, one doesn't look to Lord Justice Gifford now for that proposition, one looks at statute. But that's irrelevant. He is addressing there the more general principle that if you have a contractual right which survives, which exists but is not provable, it can be paid after all of the other creditors have been paid.

The next step in the argument is that the rationale which we have just seen for excluding the foreign currency claim from proof provides the very reason why it should be possible to assert that claim against the company once all proved debts are paid. Because once the risk of burden falling on other creditors has gone, because they have all been fully satisfied, then the policy in the Milianglos decision returns: justice

demands that the risk is borne by the debtor, the company, as the party in default.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Pausing there, the reason we say the claim survives and is provable after all the other debts have been paid, that reason is supported by the substantive reasoning in the Court of Appeal in Lines Bros. It follows logically that it is claimable and therefore that is why Lord Justice Brightman thought it probably was and Lord Justice Oliver thought it probably was. They didn't have to decide that point. But we are not relying purely on the dicta in the case. We are actually relying on the substantive reasoning in the Court of Appeal to reach the conclusion we say the court should get to.

Just to remind my Lord, the way it's put by Lord Justice Brightman is at page 21, letter F.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So, as a matter of principle, putting ourselves back into 1983 --

MR JUSTICE DAVID RICHARDS: Has Professor Goode speculated on this issue in any of his books? Sorry for throwing that out there.

MR ZACAROLI: No, not that I am aware of. I will look. We may have looked at it. I can't remember.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So if we were sitting here in 1983 I would be submitting to my Lord it follows inexorably from the reasoning in the Court of Appeal in Lines Bros this claim does exist.

But the next topic, as it were, is has that right survived the Insolvency Act? My Lord, I notice the time. Would that be a convenient moment?

MR JUSTICE DAVID RICHARDS: Yes, certainly. We will carry on at 2 o'clock.

(1.00 pm)

(The short adjournment)

(2.03 pm)

MR ZACAROLI: My Lord, unfortunately we don't get any benefit from Professor Goode's thinking on this.

MR JUSTICE DAVID RICHARDS: We don't? Right.

MR ZACAROLI: I was turning then to the question of whether this right which we say existed certainly in 1983, survived the passing of the Insolvency Act.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: What is said against us that because the insolvency rules, rule 2.86, contains a rule providing for conversion at the date of winding up, then in some way this argument is now precluded. We say that is wrong. All that has happened is that the rule that was

laid down in the Lines Bros appeal case itself has been put on statutory footing, but no more. So the enactment of that rule doesn't preclude the argument which existed, notwithstanding the rule existed in judgment form prior to that.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: My learned friend Mr Trower made a number of submissions about the rule itself, in particular that it starts with the words "For the purposes of proving". I don't repeat those submissions, but I rely upon them. Whilst the sterling equivalent of the debt is proveable, for the reasons I gave this morning, the claim for the difference is not proveable, any difference which may arise, that is not proveable.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So the conversion of the debt for the purposes of proving, a fortiori, does not take away the right to claim that which isn't proveable. The contrary argument, my Lord, really rests on the proposition that rule 2.86 was intended to discharge the contractual entitlement to be paid in a foreign currency, which would be flatly inconsistent, or at least would contradict, the general principle with the highest authority of Lord Hoffman behind it, that the winding up process as a whole leaves debts untouched. So we say it

was very surprising if Parliament had by this rule intended to have that effect.

So I then turn next to the question of the reports, the working paper, the report of the Law Commission and the court report, where they at least got close to this point.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: First of all, we echo Mr Trower's point where he said that what those papers collectively were addressing was the possibility of a further conversion date within a winding up process. So they first of all deal with that there should be one date, that is the winding up itself, for conversion of foreign debts. They then go on to consider in the passage my Lord was shown another question; should there be a further conversion date to deal with this problem of changes in fluctuation in currency thereafter, and they reject that proposition. So they don't address this further question which is notwithstanding all of that, once the proof process has been completed, should a creditor who is still suffering a loss, a shortfall on this currency claim, be entitled to claim against the assets of the company before they go back to those members? That simply wasn't addressed, certainly not expressly, in those working papers or the report. The first working

paper my Lord was shown was 1980 or 1981, but it is before the Court of Appeal in Lines Bros. The court report, it is unclear precisely what date it was, but it would be the same year as Lines Bros, but it doesn't appear to refer to the Court of Appeal as such in Lines Bros. The report of the law submission did, however. That was post Lines Bros in the Court of Appeal, and it did refer to Lines Bros. It is in a passage that is cited in LBIE's supplemental reply submissions, but it was missed out of the bundle. We put it on my Lord's desk, I hope.

MR JUSTICE DAVID RICHARDS: Oh yes, thank you.

MR ZACAROLI: That should be put into bundle 3B at tab 13.

MR JUSTICE DAVID RICHARDS: So what is in 13 at the moment?

MR ZACAROLI: It is the same report. This is the Law Commission report, number 124.

MR JUSTICE DAVID RICHARDS: Right, right.

MR ZACAROLI: This extract is paragraphs 2.22 --

MR JUSTICE DAVID RICHARDS: I see, it is the same page.

MR ZACAROLI: Yes, it is the same.

MR JUSTICE DAVID RICHARDS: Okay, thank you. Yes, thank you. Right, yes.

MR ZACAROLI: There is a cross-reference to these two paragraphs I am about to show my Lord, paragraph 3.34, it is the passage that is already in the bundle.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The first line of 3.34:

"As we explained in part 2, the decision ... (reading to the words) ... clear why."

Then the footnote there is paragraphs 2.22 and 2.23, footnote 2 and 4.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So I am now showing my Lord paragraphs 2.22 to 2.25. In fact the important paragraph is 2.22, where the report cites the Lines Bros, first of all, for the main proposition about the single date for conversion. If my Lord could read in detail, in full, paragraph 2.23 and footnote 73 at the end of it.

MR JUSTICE DAVID RICHARDS: Yes. Yes.

MR ZACAROLI: So there is a reference to it, without approving it, without rejecting it, it is just noted.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Paragraph 3.37 in the passage that was already in the bundle, the conclusion of the Law Commission on this point:

"Present law relating to the conversion of sterling foreign currency payment in relation to solvent and insolvent companies and to bankruptcy is satisfactory."

Now I don't suggest that means they are in anyway approving the dicta of Lord Justice Brightman, but it is

very difficult to glean from all of this that they are somehow rejecting that proposition. It was raised as a possibility by Lord Justice Brightman. It is simply not (inaudible).

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: It is very difficult to say that because this report is in the form it is, Parliament somehow responding to it must be taken to have adopted a conclusion which says that the Lord Justice Brightman picture is wrong.

Now the second oddity about these passages in all of the working paper and the court report is the conclusion reached that there should not be a second conversion date because of the risks still for discrimination. Mr Trower made this point that it is odd that that phrase is used, because one is talking about a case where the credits have already been paid, and therefore there is no longer any risk of discrimination.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: My Lord it is important to put those passages in the context of 1981 through 1983, when first of all solvency, as we saw from the Lines Bros decision of Mr Justice Mervyn Davies, was based on the company paying all provable debts in full, but not paying post-liquidation interest. So a company could be

solvent, but still have obligations by way of interest as liquidation.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Secondly, that the concept of solvency in Section 283, which again my Lord saw yesterday, about statement of solvency for the purpose of a solvent winding up, that solvency there also excludes any reference to interest, which is there now. So at that time, the solvent company was one which could pay its proved debts in full, but could not necessarily pay any interest, post-liquidation interest. That point actually comes out of the passage I have just shown my Lord, paragraph 2.23 and the footnote, because the Lines Bros itself was, of course, a case where the question of a surplus was being considered in the context of you can pay all the provable debts, but you can't pay the interest, and there was a contractual right to interest which remained outstanding. So it was indeed the very case of there being a solvent company in the meaning of the words used there.
MR JUSTICE DAVID RICHARDS: Lines Bros, yes.
MR ZACAROLI: Lines Bros.
MR JUSTICE DAVID RICHARDS: That's right.
MR ZACAROLI: In the Law Commission report, where we are looking at the moment, paragraph 2.23, the second half

that paragraph refers to the case of a solvent company. The footnote refers to the fact that even though there is a surplus, nevertheless you have the creditors whose debts carried interest are remitted to their writing of the contract, and therefore get the surplus. So you will be competing with the creditors in relation to interest.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Therefore those passages must be read in that context. That makes sense of the conclusion or the reasoning that you should not have a further date because it would involve discrimination. That falls away if one is talking simply about claims once all other creditors, plus interest, have been paid. So we say that those reports are working papers in fact don't make the recommendation which my learned friend suggests they do, but if they did, in any event Parliament hasn't taken it up, because of the limited of the conversion, ie for the purpose of proving.
I will just identify two points made against us by my learned friends in their written submissions. There are a number of points taken, most of which I would say get subsumed within what I have said. But two specific points, first of all, it is said we can't be right, because it is a one way argument only. In other words,

where the currency goes against a creditor, he has a shortfall claim. Where it goes in their favour, he hasn't got to pay it back what is benefited -- that the increase in payment is benefited by. My Lord, yes, of course that is right. We are talking about claims by creditors against the company. We are not here concerned with the question of whether the company could have a claim against any of its creditors, foreign currency creditors who have been "overpaid" on the basis of this theory. It will be very difficult to see on what basis the company could possibly reclaim, given those creditors have been in an amount based on a statutory scheme. There could be no -- a restitution claim in those circumstances.
MR JUSTICE DAVID RICHARDS: Quite.
MR ZACAROLI: It is right this is a one way bet, as it were. But it has always been a case that a person who is innocent, who is owed money, whether the counterparty had defaulted, if as a result of that default the innocent party has done better than they would have done if there had been no default, there is no principle in English law which requires the innocent party to re-pay that to the defaulting party. So it is not surprising that it has this result.
Then another point taken against us is the

difficulties with the interplay between this proposition and set off. Now I don't fully understand this, because set off only operates in relation to proveable debts. Obviously a foreign currency creditor couldn't rely upon the non-provable aspect of this claim by bringing it into account for the purpose of set off. If the whole of its proveable claim is set off against the debt they were (inaudible), that is no different from it having been paid in full through a distribution process. So set off is merely one form of payment, in substance, in the insolvency process. But one has to remember that this claim only cuts in once all the proveable claims have been paid in full. So we don't understand there to be, or cannot see there to be any conflict between this claim existing and the way in which set off operates under the Act.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: That leaves just two further points. I said I was going to say nothing about the construction of this (inaudible) notion and I will stick by that. The question of whether this claim for liability in relation to a foreign currency shortfall claim is within Section 74 of the Act, and it is encompassed within the obligation of members.
MR JUSTICE DAVID RICHARDS: Yes, yes.

MR ZACAROLI: Now most of the argument before my Lord from Mr Trower focused on interests here. But whatever one says about interests and whether it is a liability of the company, whatever one might say about that, this clearly is a liability of the company. There is nobody else whose liability it could possibly be. The fact that the creditor is limited to proving for its sterling equivalent as at the date of winding up, does not mean the shortfall is not the liability. So on the simple words of Section 74, it is clearly within it, it is a liability. As a matter of principle, since the policy behind the decision in Milliangos, which is really what we are relying upon here, was that the company should bear the currency risk where it has defaulted in payment. We ask rhetorically why should the member's obligation to contribute to the assets of the company not extend to this? They have agreed to stand behind the company, so that it can pay its liabilities in full. Put another way, why should the member benefit from a rule which restricts foreign currency creditors proving a rule which is there are to prevent discrimination between creditors. We can see no reason why that should be the case. I echo here a point that Mr Trower made, but I just want to add an illustration of it. This is a more general point about both interest

and the non-proveable foreign currency claim falling within Section 74. He made the point that it would be bizarre if the company's obligation or the member's obligation to contribute for the purposes of adjusting rights between contributories were covered, but matters above that in the waterfall were not covered. A simple illustration shows how that must be right. Imagine the liquidator makes a call on contributory A, because he will need a to make a contribution to contributory A or a payment to contributory B. So he gets £1,000 in from the contributory. That is a contribution to the assets of the company, it is not a payment to be held on trust for any specific purpose. It is a contribution of the assets.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: In the hands of the liquidator it is therefore an asset which represents, assuming other debts have all been paid in full, a surplus. Rule 22.87 provides in strict terms that any surplus must be used first before anything else for paying interest. So the sum will be paid, in effect, for interest, leaving the call still to be made on the member, because there is still a requirement to make a call on the member for the purpose satisfying the adjustment between credits, between members, because the money that was brought in

for that purpose has not been used for that purpose.

MR JUSTICE DAVID RICHARDS: So I suppose if the right construction of Section 74 is that it is restricted to expenses, proveable debts and adjustments between contributories, that doesn't include statutory interest in non-provable claims, then perhaps the liquidator would not be able to make a call, if the purpose to which the call monies were put, were statutory interest or non-proveable liabilities, because the call would be made on a false basis.

MR ZACAROLI: But that would mean he could never make a call against members, so I could only(?) make a call for the purposes of adjusted rights.

MR JUSTICE DAVID RICHARDS: Of adjusting the rights between the contributors, yes.

MR ZACAROLI: If any debts or liabilities prior to that were outstanding.

MR JUSTICE DAVID RICHARDS: Yes, yes. Well, I suppose you would not be getting to the point of adjusting rights between contributories, would you, while you still had unpaid liabilities, albeit ones not covered on this basis by Section 74?

MR ZACAROLI: Well, then that is very odd, because then the liquidation has a full stop, as it were, a force on it, because you could not call in the money to pay

outstanding debts, not withstanding the fact that you could call in that money for the purpose of adjusting rights between contributories. My Lord, the same point obviously arises in relation to the non-proveable liability, because on the Neuberger waterfall, as I think it was been called, non-proveable liabilities come before members again.

MR JUSTICE DAVID RICHARDS: I mean just to understand about adjustments amongst contributories, what does really -- how does it arise? It is presumably where you have got members who have paid different amounts, and that some equal out -- is that (inaudible).

MR ZACAROLI: Yes it is.

MR JUSTICE DAVID RICHARDS: That member A has paid more than member B, although --

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: -- they each sort of paid the same, so the liquidator can make a call on member B to, as it were, reimburse member A.

MR ZACAROLI: That is right, it doesn't apply -- I don't think it applies on the facts in this case.

MR JUSTICE DAVID RICHARDS: Now, but obviously I just want to understand how it works.

MR ZACAROLI: Yes, it does. I am trying to remember which one it was. It was one of the cases we looked at this

morning, which involved a call for that very purpose, it explained exactly that. We have got some creditors, some members who have paid up in full on the shares.
MR JUSTICE DAVID RICHARDS: Yes, yes.
MR ZACAROLI: And others who have not.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Therefore to adjust rights between them, you need some money --
MR JUSTICE DAVID RICHARDS: Yes. I follow, yes.
MR ZACAROLI: -- if you want to go back --
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: If we can find the reference for my Lord's notes. There is a case where that is actually (inaudible).
So the last point I wanted to deal with was the contributory rule in this context.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Recognising that the rationale for getting behind this claim existing at all in the liquidation context is that it is not competing with other creditors, ie once you have got beyond the stage of other creditors existing, then there can be no competition. It is merely the company left, therefore the claim comes back to into play.
MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Recognising that, and recognising also that we argue that this claim should come before the contributories debt claim.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: So we recognise that there is a glitch to this, because there is a debt outstanding, namely a debt to contributory, or the subordinated debt in a sense falls away. That either goes as a matter of construction or not.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: But there is a debt owed to the members. We say that the justice here, one has two principles, you have got the contributory rule as matter of principle, and you have got the principle that the claim of a foreign currency creditor should not compete with other creditors. They are competing principles in this small area. We say that the right answer here is justice requires the claim for the creditor to be recognised above those of the member. It goes back really to the very rationale that Lord Justice Brightman mentioned in Lines Bros:
"Justice demands that the risk shall be born by the debtor who is the party in default, and although the members themselves are not in default, they have agreed to stand behind the company, to contribute to its assets

sufficiently to pay all of its debts."
That, we say, is a principle which overrides any glitch that our claim only operates once all the other creditors have been paid, ie we are not allowed to compete without outside creditors. It is really part of the pari passu rule. You can't compete with those who genuinely form part of a pari passu distribution, but a member who has not contributed isn't entitled to share in that.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Now if that is wrong, then in the case of an unlimited company, it doesn't matter in fact, because of the unlimited liability of the member. This is just to again illustrate a point Mr Trower made, because he made the point that the primary case for both of us is the contributory rule prevents a member from claiming any amount of its debt, whilst it has not contributed. But our fall back position, even if a member can claim, there will always be set off, which ensures the member cannot claim in competition with outside creditors for assets of the company. So one is assuming here that there are some assets of the company in existence, LBIE has some remaining assets.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The simple question is can the members assert

a claim to those, in competition with outside creditors. This builds on the comments that were read this morning from Grissell's Case and from I think it is Black & Co's Case, where in the first case Lord Chelmsford and in the second, I forget the judge, both of them commented that in the case of an unlimited company, there is no need to prevent set off, because you make a call on the member, it pays, even if it claims for its debt, and there is still money outstanding to outside creditors, you have got a further call to make. So there is sort of circularity of calls. Now the way that this is expressed in our skeleton is at paragraph 31 of skeleton, we have got a short example. Because the idea of making repeat calls is the first way of looking at this. My Lord can remind himself at paragraph 31. It just gives a short worked example.
MR JUSTICE DAVID RICHARDS: Yes, I've got that.
MR ZACAROLI: But it has been said that this doesn't work with a member who is insolvent. But in fact we say it works perfectly well whether the member is insolvent or not. There is a neater way of analysing what is happening here, and that is in our paragraph 32. Just to explain it first, a member has an obligation to contribute to all of the assets -- to the company to pay all of its liabilities. Let's assume for a moment there

are simply two liabilities, one to an outside creditor, but one to the member well. The member's obligation extends to providing enough money to the assets of the company to pay all those liabilities. They will always, therefore, when you take into set off, the member's own claim and the member's own obligation to contribute -- there will always be a set off between the member's call obligation and the member's claim, because they are obviously the same amount. So whatever the size of the member's claim, it will always be set off against this obligation to contribute where there are still outstanding creditors.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So allowing set off, whether the member be solvent or insolvent, will always result in a member not being a net creditor of the estate.

MR JUSTICE DAVID RICHARDS: Yes, I follow. I mean like your example here plays out.

MR ZACAROLI: Yes, exactly.

MR JUSTICE DAVID RICHARDS: Exactly, yes.

MR ZACAROLI: So it doesn't work only with a solvent member, it works in the same way if a member is insolvent.

MR JUSTICE DAVID RICHARDS: Yes, I see, okay.

MR ZACAROLI: My Lord, that is all I wish to say, unless my Lord has any further questions for me?

MR JUSTICE DAVID RICHARDS: No Mr Zacaroli, thank you very much indeed. Yes, Mr Wolfson, you are going first.

Submissions by MR WOLFSON QC

MR WOLFSON: Yes. My Lord, we are significantly ahead of schedule on the timetable. I hope that remains the case when I have finished my submissions as well, because what I am conscious of is that we have said rather a lot in writing, and I am not going to repeat for you everything that we said.

MR JUSTICE DAVID RICHARDS: You have said a great deal in writing.

MR WOLFSON: Yes.

MR JUSTICE DAVID RICHARDS: Which in turn makes even more important the oral submissions.

MR WOLFSON: Well, that was the point I was coming to, which is that your Lordship has been taken to a number of authorities. Normally, I would not want to be taking your Lordship back to authorities you have looked at fairly recently, but I hope your Lordship will forgive me if I do two things during the course of these oral submissions. First, from time to time take your Lordship to passages in my written opening and my supplemental submissions, and secondly take your Lordship back to authorities which your Lordship has actually looked at fairly recently.

MR JUSTICE DAVID RICHARDS: That is fine, that is fine. I have no problem with that at all.

MR WOLFSON: My Lord, the structure of these submissions will, I am afraid, be slightly different to that adopted by my learned friend Mr Trower. I will give your Lordship a road map. What we propose to do is this, deal essentially with six points. First, the liability under Section 74(1) and the liquidator's ability to make calls. The second area in insolvency set off in the context of the liability of contributories, including in that issues of valuation and discounting contingent debts. The third area is the contributory rule, and what we say is its inapplicability while LBIE is in administration. The fourth area is the scope of this Section 74 liability, and in particular whether it extends to statutory interest. The fifth, is what we have called the currency conversion claims. The sixth, which is something which I don't think your Lordship has really been addressed on orally to date, is the manner in which the liability of the two members who are caught (inaudible) Section 74 effects, which will be debated as between themselves. That is the issue essentially between me and my learned friend, Mr Trace.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: That means therefore there are a number of matters which I don't propose to address your Lordship on orally, unless, of course, your Lordship wishes. The first is LBHI 2 subject, other than in the context of the liability of the members under Section 74, so I will say something about it in that context. But I am not go over the submissions on the construction points which my learned friend Mr Trower dealt with. As your Lordship will appreciate, on different issues, the line in this court shifts.

MR JUSTICE DAVID RICHARDS: Of course.

MR WOLFSON: On this point, of course, we agree with my learned friend, Mr Trower, and LBIE on two points. First, that LBHI2 cannot prove in LBIE's estate, in respect of the LBHI2 sub-debt before it ranks the dividends.

MR JUSTICE DAVID RICHARDS: So LBHI 2 cannot -- sorry.

MR WOLFSON: Cannot prove in LBIE's estate in respect of the LBHI 2 sub-debt before it ranks the dividend.

MR JUSTICE DAVID RICHARDS: Yes, I see. Sorry. Yes, I am with you.

MR WOLFSON: The second point on which there is agreement with my learned friend, Mr Trower, is that the LBHI 2 subject can only rank the dividends, once senior liabilities, capital S, capital L, is defined, including

statutory interest, have been paid in full. Both of those issues are essentially questions of construction of the sub-debt agreements, and there is nothing that I wish to add to what my learned friend Mr Trower has said. Now there is an important point here, which is where my affinity with Mr Trower stops and that is this; while we agree with LBIE that as a matter of construction of the sub-debt agreements, LBHI 2 cannot prove in LBIE's estate until post-insolvency interest has been paid in full, and that goes to interpretation points about standard term 5 and the definitions in the agreements. We do not agree with LBIE that post-insolvency interest is a liability under Section 74. I apprehend your Lordship has that point already. But that is where the line comes. Nor do we agree with LBIE that there exists alongside the statutory interest code a concurrent contractual liability for interest. So it is at that stage, so to speak, the physical gap that we have in this court, so to speak, reappears because that is where we disagree with LBIE. I will return to both those points, the Section 74 point and the current contractual right point, later in the submissions, if I may.

The second set of issues which I don't propose to address your Lordship on orally, because we have said

quite a bit of them in writing, and they don't appear to be really in dispute, are these -- there are really two points. First, issues around the applicability of Section 149. That is question seven. The reference in our written opening is paragraphs 84 to 90. It doesn't seem to us that it is really must in issue across the court on that, so I don't propose to say anything about it. The second issue the valuation of the potential liability as contributory. That is question eight, the reference is paragraphs 92 to 103 of our written opening. The only submissions I will make in that regard, I will say a few words, if I may, in relation to the discounting of contingent debts.

MR JUSTICE DAVID RICHARDS: Right.

MR WOLFSON: And your Lordship has heard a little bit about that, that is 2(105) point and what is N, et cetera.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Now if it turns out that my apprehension that some of these issues are common ground is wrong, then maybe I will need to say something in reply, but at the moment it doesn't seem to be that is where the dispute really is. Now before I get to the meat of this, perhaps it might be helpful if I set out in summary what we say the result ought to be. I hesitate to give away the denouement first, but that is the way detective

stories at least used to written, so let's do it that way. First of all, on our primary case, our primary case is that the contributory rule does not apply in circumstances where the obligation to contribute to the fund is only a contingent obligation. Our primary case is if your obligation to contributing is only contingent, the contributory rule simply does not apply, full stop. Now there is a bit of common ground there. LBIE accepts there is no present obligation to contribute. On its case there is only a contingent obligation, so that is a start.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: The second point on our primary case is that there is no insolvency set off in LBIE's administration, because the insolvency legislation does not contemplate a set off in respect of the liability of a contributory for cause. We submit there is a long line of authority establishing that. That is where we will need to go back to the case as we look at it.

Now so far I think this has been a fairly fact free hearing. I do not propose to take your Lordship through the witness statements, but there is an important fact which has not yet been mentioned about LBIE's administration, but of which I remind the court, because of course your Lordship is aware of it. The central and

indisputable fact is that no doubt for good reasons, LBIE's administrators decided to start making distributions, but they have declined either to reject or to admit the members' claims against LBIE. They have simply left them in limbo, and limbo is not a good place to be, either theologically or commercially. The problem with that approach is this, it is common ground across the courts that the members' claims in LBIE are not claims qua member. So they are not claims which are subordinated under Section 74(2)F. Despite the fact, however, that other creditors have been receiving substantial sums, to date no distributions have been made to the members. We, of course, submit that we should be receiving distributions in LBIE's administration. I think it is right to say that the other unsecured creditors have received to date 68 and a half pence in £1, so we are 68 and a half pence in £1 behind. So what we submit is that we should effectively get a catch up dividend, and then we should continue to receive dividends as and when declared by LBIE's administrators, together with all the other unsecured creditors.

Turning now to our administration, our submission on our administration is that LBIE can't prove in our administration, or a subsequent liquidation of LBL, in

respect of the Section 47 liability, unless and until LBIE itself goes into liquidation, and so a call can be made on LBL by LBIE's liquidators. If that happens -- and as your Lordship will appreciate that if is rather big if -- if and when that happens, and LBIE does so prove in LBL's liquidation, we submit that there would be an insolvency set off in LBL's administration or liquidation, to the extent that LBL's claim against LBIE had not already been satisfied by dividends paid. Importantly, this is a point I will obviously come back to, the fact that there is no set off, as we submit, in LBIE's administration, does not mean that there is no set off in our administration, because our primary case is that there is no set off in LBIE's administration for the reasons I have explained, but there is a set off in our administration. I will seek to explain why as I proceed. Essentially, you have to consider separately for each estate whether insolvency set off operates. Now, of course, just to pause there for one second, just to make the obvious point, if there is, of course, a set off for one administration, the effect of that will obviously be taken into account elsewhere. But the question is if there is not been a set off in LBIE's administration, would there be or would not be a set off in LBL's administration. So that is essentially the

prime case, starting from the proposition that the contributory rule does not apply.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Alternatively, if the contributory rule does apply in LBIE's administration, it doesn't have the effect which my learned friend Mr Trower submits that it does. In particular, if the contributory rule does apply, it does not have the effect that LBIE's administrators can, without carrying out any valuation exercise, simply sit back and refuse to pay us any dividend whatsoever. At the very least, what LBIE's administrators have to do is to conduct a valuation exercise and what are they valuing. They would have to compare a fair and genuine estimate of LBL's liability under Section 74, on the one hand, with a value of LBL's claim on the other hand. Once that valuation exercise is done, we are talking here obviously in LBIE's administration, you would see whether a balance is payable to LBL, and if a balance is payable, it should be paid. Now the critical point on this, that what is brought into account when you are doing that valuation on the LBL side of the equation, is the dividend in its insolvency on LBIE's claim. In other words, what you bring into account is the dividend that LBIE would attain in LBL's insolvency on LBIE's claim, and not the

full value of LBIE's claim. The reason for that is because that dividend is all that LBIE, through its office holders, will ever be able to claim against LBL. So that is what you bring into account when the LBIE administrators are conducting that valuation exercise. We will look at a couple of authorities which deal with that. Without wishing to give away all my surprises at once, of course that is an answer, and we will come back to this, to Mr Zacaroli's worked example, because if you assume the insolvency of the contributory, and you recognise that what you are bringing into account is a dividend loan, the numbers don't play out the way he says. Maybe what is helpful is if I, so to speak, re-work the example. We will probably get to that tomorrow, I am afraid.

MR JUSTICE DAVID RICHARDS: Okay, right.

MR WOLFSON: So if therefore there is no contributory rule, there is a valuation exercise in LBIE's administration, you bring into account the dividend that LBIE would get in LBL's administration. The further consequence of that would be this that LBIE could not do two things. It could not both withhold distributions from LBL, and at the same time prove in LBL's insolvency for the Section 74 liability, because we submit that that would amount to a double proof effectively. But let me put it

more simply. If LBIE is withholding distributions, you can't also prove in LBL's insolvency. I make that last point for a commercial reason. That may have a very important effect for LBL's other creditors. If LBL can't receive dividends from LBIE because of the contributory role, contrary to our primary case, LBL would though be able to distribute the funds it currently has to its other unsecured creditors, without regard essentially to LBIE's claim, because LBIE wouldn't be able to withhold the LBIE administration and make the claim in LBL's administration. Again, I will come back to that point.

So with that overview, let me deal with the first point, which is the point under Section 74(1), and starting from the top, so to speak, the proposition that only liquidators can make a call under Section 74. Now the court's power to make calls is delegated to liquidators. Your Lordship has been referred to the relevant sections. I don't think we need to go back to them. But just for your Lordship's note, the duty to settle a list of contributories is placed on the court. That is Section 148. That duty is delegated to the liquidator under rule 4.195, and a compulsory liquidation and Section 165(4)A in a voluntary liquidation. Similarly, in a winding up, the power of

making calls is vested in the court under Section 15. It is worth reminding ourselves at the outset that Section 150(1) applies in terms "at any time after making a winding up order". So that is the starting point. That is essentially the origin of the power. That power, which is given by statute to the court, is then delegated. But who is it delegated to. But who is it delegated to? It is delegated to the liquidator. That is Section 160 and rule 4.202 for a compulsory liquidation and section 165(4)B for a voluntary liquidation. So the starting point is that the liquidator's power to make calls itself derives from the court's power, which is provided by statute and applies in terms "at any time after making the winding up order".

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: So the scheme is you have a power provided by statute to the court, delegable by the court to the liquidator. The statute clearly provides that only liquidators and not administrators have that delegated power to make calls. This reflects the fact that looking at it, so to speak, from the other side of the telescope, the source of the liability of contributories, which is Section 74(1), expressly states that the liability arises "when a company is wound up",

so to speak, the other end of that telescope. So without shirking from making what we submit is an absolutely obvious point, it is a key and we say unique feature of a liquidation that calls can be made on contributories. It is simply not a feature of an administration. That explains the illegal contortions that my learned friend, Mr Trower, has to go through to try and make good his argument in this application. Because where he gets to is this -- it is important your Lordship appreciates just where he gets to. I think this may have been developed by my learned friend, Mr Isaacs, I think, that LBIE's case amounts to saying this; despite a carefully circumscribed statutory scheme, the members, we can't prove against LBIE's estate full stop. That is my learned friend's case. It makes no difference, he says, for the purposes of whether we can prove in LBIE's estate whether LBIE is in liquidation or administration, or it would seem whether LBIE is solvent or insolvent. That is because LBIE says if suffices, even if there is a possibility -- not a likelihood or certainty or anything like it, not even a probability, it suffices if there is a possibility of a shortfall. That itself is enough to prevent us making any claim. So they can be in administration, they can be solvent, and on my learned friend's case we don't get

a penny(?) (inaudible) the operation of what he says is the rule. I rely, for that submission, on paragraph 165 of LBIE's written opening. As I say, that possibility, it is said against us, is enough to mean that we can get nothing out of LBIE's state alone.

MR JUSTICE DAVID RICHARDS: Well, when you say if it is solvent, if there were sufficient in the estate to make returns to members, then it would not be said you could not then claim, make a claim.

MR WOLFSON: Yes. No, but that is right. If there was no possibility whatsoever of a call, my learned friend would, it seems, agree.

MR JUSTICE DAVID RICHARDS: Yes, I see, I see.

MR WOLFSON: But, of course, you can have possibility, when in fact the position is that there is enough money. Sometimes you just don't know.

MR JUSTICE DAVID RICHARDS: Correct.

MR WOLFSON: Now at this stage, I can content myself with saying that this would be a rather drastic effect arising out of a scheme that doesn't appear anywhere in the legislation itself. We submit it is contrary to the statutory scheme. We submit it is contrary to authority. In those circumstances, we say it is not surprising that it appears to be contrary to commercial common sense too.

My learned friend Mr Zacaroli goes even further. My learned friend Mr Zacaroli says at paragraph 38 of his written opening, that the absence of an equivalent provision to Section 74 for a company in administration "appears to be the result of an oversight, rather than a deliberate policy decision". I hope I have quoted my learned friend correctly.

MR JUSTICE DAVID RICHARDS: Which paragraph?

MR WOLFSON: 38, I hope, my learned friend Mr Zacaroli's -- he has distinguished himself by only needing one set of written submissions to say everything he needed to say. Yes, there it is, the top of the page, it is the last sentence. He accepts the point, as he has to, in the penultimate sentence and then explains it in the last sentence. Now with respect to my learned friend, it is, of course, always tempting to say that the absence of a statutory power is the result of an oversight. There is no evidence of any such oversight. It is far from clear -- and this is a point I will come back to later -- that even if it was an oversight it would actually LBIE -- I will come back to my point. Just to make good my submission that it doesn't appear to be an oversight, first, there is no authority, or anything else frankly, cited in support of this suggestion that it was an oversight. If there was an oversight in

omitting to empower administrators to make calls, it was a pretty significant one and nobody seems to have spotted it until now. To make the point which is a corollary with the point in which I started this set of submissions, in fact if such a power has been given to administrators, in my submission, that would actually have been a dramatic new power which would never have previously been available to administrators. In other words, the legislature would have been giving a power formally, given expressly to the court, and also expressly delegable to one set of people in one circumstance vis liquidators in the liquidation, and giving it to the new group of people in a different circumstance vis to administrators in the administration.

MR JUSTICE DAVID RICHARDS: So in a creditor's voluntary winding up, I think you gave me this reference earlier, it still, is it, expressed to be the function of the court to make calls, but that is delegated to the voluntary liquidator?

MR WOLFSON: It is all delegated from the court to the liquidator.

MR JUSTICE DAVID RICHARDS: You say there is no authority that it is an oversight, is there any authority that it is not an oversight?

MR WOLFSON: There is no authority that it is not an oversight.

MR JUSTICE DAVID RICHARDS: No.

MR WOLFSON: My Lord, we are left with essentially the statutory scheme.

MR JUSTICE DAVID RICHARDS: Yes, I mean administration came into our law in 1986.

MR WOLFSON: Yes.

MR JUSTICE DAVID RICHARDS: Distributing administrations came into our law in 2003.

MR WOLFSON: Yes.

MR JUSTICE DAVID RICHARDS: No one can remember the case of an insolvent unlimited company or an insolvent company with amounts unpaid on shares. The authorities which have been cited to me today, apart from Kaupthing where the point is used, as it were, as a parallel argument. The last time this was a live issue was in 1937, and I think it was a pretty dead letter by then. It is a 19th century concept. It doesn't surprise me that nobody gave any thought at all as to whether or not there should be a power in administrators to require calls. I mean that doesn't alter your argument at all.

MR WOLFSON: Absolutely.

MR JUSTICE DAVID RICHARDS: Equally, if in fact it was commonplace to have unpaid amounts on shares in

companies, or it was commonplace to have unlimited companies, frankly I would have thought something would have been included.

MR WOLFSON: Yes.

MR JUSTICE DAVID RICHARDS: But I mean there it is. I mean we are all agreed, it is not there.

MR WOLFSON: With respect, I take your Lordship's points. Of course, your Lordship is plainly right, if I may say, with respect. We have here a case where you get halfway through bundle 2 of the authorities bundles, and I think you are still in 1904 or something.

MR JUSTICE DAVID RICHARDS: Well, exactly, exactly. I mean unlimited companies have been used in very limited -- sorry, no pun intended -- circumstances really. I think in recent times largely -- someone may be able to suggest other reasons -- for tax planning, which was clearly the reason here. There was a time when they were used quite extensively oddly for state companies, you know Downton Abbey might have been held by an unlimited company. But they have had very limited uses over the years.

MR WOLFSON: Yes.

MR JUSTICE DAVID RICHARDS: One can see that even in the 19th century cases, because they are virtually all cases involving companies limited by shares, on which there

are unpaid amounts.

MR WOLFSON: Yes, well, the screenwriters of Downton Abbey have educated the public on the applicability of the Settled Land Act.

MR JUSTICE DAVID RICHARDS: They have indeed, yes, yes.

MR WOLFSON: They may have been made (overspeaking) limited companies as well.

MR JUSTICE DAVID RICHARDS: Yes, indeed (inaudible) and so on, yes.

MR WOLFSON: My Lord, where we get to, and taking, with respect, your Lordship's points, he included that is right. There are a number of areas here where, so to speak, the statute is what the statute is. My learned friend is inviting you, so to speak, to try to fill gaps I make a submission to say if there is a gap it ought to be filled by Parliament, and we will come later to situations of Lacuna, and your Lordship has seen a reference to the decision Mr Justice Briggs in Blueman Pensions Regulator. We will come to that. But there is a headline point there which is this. I put it at a very high level. There are pros and cons for both liquidation and administration, for the creditors, for the office holders, frankly, for everybody with an interest in the act. There are a number of factors which the relevant decision makers must weigh in the

balance in deciding what to do, often under the court's supervision and direction. However, once a particular insolvency procedure has been settled and has been put into effect, there must be an acceptance of the consequences that flow from that process. What we do object to is the idea that, so to speak, the insolvency process is some form of pick and mix, when LBIE's office holders can decide to act as administrators at one time, but then adopt powers expressly reserved and delegated by the court only to liquidators at another time. That may be to repeat the submission I made earlier in different words, but your Lordship sees the point I make.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: In this case, the decision was taken to put LBIE into administration, and importantly, as I said earlier, LBIE's administrators decided to start making distributions to unsecured creditors, in the knowledge first that members have their own unsecured claims against LBIE, not qua member, and we submit that administrators would not be able to make calls on the members. Now there may well have been a number of advantages to that route. No doubt there were good reasons to start making distributions to unsecured creditors, but we submit an inevitable consequence is

you can't make calls at this stage on the members. This is not a case -- to use the phrase adopted by Lord Justice Selwin in Humber Iron Works, this is a case, so to speak, of accidental delay. Your Lordship recalls he was dealing there with the point that between the date of the winding up and the date of actual distribution, things may have moved on.

MR JUSTICE DAVID RICHARDS: Yes, yes.

MR WOLFSON: The situation which LBIE's administrators find themselves is a result of a deliberate decisions or a number of deliberate decisions on the part of the relevant office holders, and essentially what they are seeking to do is to secure in economic terms a key benefit of the liquidation procedure, ie the ability to make calls on the members, by contending that the contributory rule applies in LBIE's administration, without any of the downsides for them, and I assume there are several, of a liquidation procedure. They are trying to have their cake and eat it, and worse, they are trying to make us pay for it. Now I say that with respect to my learned friend, for good forensic reasons. What my learned friend seeks to do is to adopt the old maxim; the best form of defence is attack. What my learned friend does to make this submission, at paragraph 56 of my learned friend Mr Trower's

supplemental submissions, he makes a submission that we are trying to engineer a situation where we can prove against LBIE, and get 100 pence in £1 on our claim, but they can't prove against us, until they have gone into liquidation and made the call, by which time we will have distributed assets, or would be paying out considerable less than 100 pence in £1. I think he reinforced that point orally this morning. The point made against us is that this is unfair. Two points with response to that. First, it is a feature of the fact that LBIE's administrators took the two decisions I have mentioned. They decided not to put LBIE into liquidation, but to keep it in administration. Secondly, they decided to start making distributions to creditors. Second, the consequences may be exacerbated in this case because of the likely dividend rates in the different estates. It looks like LBIE is going to pay a high dividend, possibly 100 pence in £1 if the market is right, and LBL might well pay a lower dividend from its estate. But if I can put it demotically, that is how the cookie crumbles. It doesn't make any difference. It can't affect whether my submissions or my learned friend Mr Trower's submissions are legally right or legally wrong. The relevant dividend rates are what they are. As I mentioned a moment ago that LBIE

may be paying a dividend as high as 100 pence in £1, your Lordship will have seen in the evidence that in fact the market for LBIE debt is actually trading above half.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Your Lordship will appreciate why that is, depending on how the interest -- the way it works at 8 per cent, we will come back to that.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: It is worth making the point --

MR JUSTICE DAVID RICHARDS: Is it 8 per cent?

MR WOLFSON: It is the higher(?) of the Judgments Act rate or the contractual right.

MR JUSTICE DAVID RICHARDS: Yes. The Judgments Act rate is still 8 per cent, is it?

MR WOLFSON: I think it is, I think it is.

MR JUSTICE DAVID RICHARDS: Is it? I thought it had come down to six at some point, but I may be wrong about that. I don't want to say something that is market sensitive, so people should check for themselves.

MR WOLFSON: There was at one time some sort of scheme where people used to pay money into court on the basis it actually accrued better interest. So the Lord Chancellor was operating the best interest rates in town. The munificence of the Lord Chancellor has since

declined dramatically, I am afraid. But my Lord that point that LBIE may be paying 100 pence in £1 is extremely important in this context as well. We should remind ourselves that LBIE going into liquidation is neither certain or even probable. It is worth noting that LBIE's evidence, and let me just give your Lordship the reference, we need not go to it again, it is at bundle 3 --

MR JUSTICE DAVID RICHARDS: But I mean the only issue that this would go to would be valuing a claim in your estate.

MR WOLFSON: Yes, absolutely.

MR JUSTICE DAVID RICHARDS: But I am not sure I can really approach the issues that I have got on this sort of estimation of the chances of LBIE going into liquidation. All the more so, the chances might change depending on the answers I give to the questions posed.

MR WOLFSON: Absolutely, and I am not inviting your Lordship to do it. The submission I was going to make is this, there is a submission in Lidl's(?) position paper, a skeleton. It is paragraph 40 of my learned friend Mr Zacaroli's skeleton, where he submits that your Lordship sees towards the end of that paragraph, three lines up:

"There could be no realistic doubt as to whether

LBIE would go into liquidation."

So there would no reason to discount the value contingent against the members. My Lord, if I may say, I entirely with your Lordship, that we are not going to get into the precise valuation issues of the contingent claims in this hearing. But, my Lord, I do make the point that that goes well beyond LBIE's own evidence.

MR JUSTICE DAVID RICHARDS: No, I see. Yes.

MR WOLFSON: Of course, as your Lordship just said, it depends how your Lordship rules on the various issues.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: If post-administration interests under rule 2887 does not survive into a liquidation, that might be a good reason for LBIE not to go into liquidation.

MR JUSTICE DAVID RICHARDS: Yes. Is that an issue I am invited to decide incidentally on this application, that particular point? Mr Trower took me carefully through the argument on it.

MR WOLFSON: Yes, the oddity is that it is not formally in the joint application.

MR JUSTICE DAVID RICHARDS: No.

MR WOLFSON: But it did find its way onto the list of issues.

MR JUSTICE DAVID RICHARDS: Oh, did it?

MR WOLFSON: Yes.

MR TROWERS: I think that is right, my Lord. It is on the list of issues. It is not actually one of the questions, but I think your Lordship is invited to decide it.

MR JUSTICE DAVID RICHARDS: Right, okay, thank you. Of course, one can always decline an invitation.

MR WOLFSON: I am pleased that my learned friend invited to your Lordship to (inaudible). So my Lord the effect of this, as your Lordship appreciates our case, is that if we give notice of our intentions to declare a dividend, or if we go into liquidation, no proof could be made in our estate from LBIE, unless and until LBIE goes into liquidation and makes a call. That is our point.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Now we say there are two problems for LBIE in that regard. I will develop both of them. The first is that there is no basis for proving an estimated liability for future calls against a corporate contributory. There is no equivalent in the Act or rules in respect of a corporate contributory to what we find in Section 82(4) for a bankrupt individual contributory. I will come back to this point.

Section 82(4), perhaps it is worth turning it up just to remind ourselves what it says.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: It will be in volume 2, behind tab 12. 82.4 provides:

"There may be proved against the bankrupt estate the estimated value of his liability to future calls, as well as the calls already made."

MR JUSTICE DAVID RICHARDS: Right.

MR WOLFSON: The case of Re McMarr(?) on which my learned friend relies or refers to in this regard is a case of a bankrupt contributory. There was no authority to support the contention that a proof can be made in respect of future calls against a corporate contributory. Now my learned friend fairly recognises he has a problem here, and he deals with it in writing. I will give your Lordship the reference, paragraph 11 of his supplemental submissions. The point he makes in paragraph 11 is essentially this, he says presumably it was felt necessary to provide that notwithstanding the terms of the other sub-sections in Section 82, which transfer the status of contributory to the trustee and bankruptcy, that both an existing liability and also a liability in respect of future calls, were proveable against a bankrupt estate. I paraphrase, but I hope fairly that is the point he seeks to make.

MR JUSTICE DAVID RICHARDS: Just let me read myself the

whole of Section 82.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Yes, okay. Yes.
MR WOLFSON: My Lord, I am conscious of the time, but can I finish just this short point.
MR JUSTICE DAVID RICHARDS: Absolutely, yes, certainly and then we will take a break. Yes.
MR WOLFSON: My Lord, with respect to my learned friend, that explanation which he seeks to give, to explain why we have Section 82(4) for individuals, but we have nothing for call ups --
MR JUSTICE DAVID RICHARDS: So the explanation is -- just remind me where it is? Paragraph 11.
MR WOLFSON: Paragraph 11. You can probably better look at in his own words, rather than foist him with my spin on it. It is 11 of the supplemental submissions. Your Lordship sees it is the last sentence.

(3.13 pm)
MR WOLFSON: Now, with respect to my learned friend, we submit that the explanation he gives in fact fails to explain why, given the existence of 82.2 and 82.3, 82.4 is in fact necessary. In other words, if it's right that a proof can be made in respect of the liability to future calls for both individual and also corporate

insolvent contributories, it's very difficult to see why you need 82.4 at all.
MR JUSTICE DAVID RICHARDS: I think what is being suggested in paragraph 11 is that it's the trustee who becomes the contributory.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: So that it's the trustee who becomes liable.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: If the trustee is liable the bankrupt is not.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: So you need something to enable proof for future calls to be made against the bankrupt's estate. I think that's the argument. Whereas with a company of course there is no transfer of assets or liabilities at all.
MR WOLFSON: My Lord, yes. But in our submission if the starting point is that both an individual and a corporate insolvent contributory -- I am sorry.
MR JUSTICE DAVID RICHARDS: I think there is a danger in this because the regime for bankrupt individuals is different from the regime for insolvent companies.
MR WOLFSON: Yes, because you have a trustee.
MR JUSTICE DAVID RICHARDS: I think the other way of looking

at it I think is to say you are seeking to argue that, by reason of 82.4, there is an express exclusion of any right to prove in the insolvency of a company. But I imagine you would accept, certainly in the light of Re Nortel, that the ownership of unpaid shares gives rise to a provable debt in respect of the contingent liability.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: So it is a contingent liability which is provable, and I would have thought it is provable whether or not the company is itself in liquidation, that's one of the contingencies, but you say what would otherwise be the position under the sections dealing with the provability of debts in a liquidation and so on is displaced by 82.4; is that right?
MR WOLFSON: My Lord, if I may, I put it slightly differently. I think I get to the same submission perhaps by a slightly different use of words. We submit that the implication of the express statutory inclusion of liability for future calls in respect only of individual contributories indicates that the power is so limited and there is no power for a future call against a corporate contributory.
MR JUSTICE DAVID RICHARDS: Yes. I think you have put more

elegantly the point I was making. Because were it not for 82.4 it seems to me you would be in difficulty in arguing that there was no provable contingent liability in respect of partly paid shares, for example.
MR WOLFSON: If it was not for 82.4, I couldn't make the submission at all.
MR JUSTICE DAVID RICHARDS: So the basic position is, isn't it, that there is a liability, there is a contingent liability which can be proved. You rely on 82.4 and by implication removing it in the case of an insolvent company.
MR WOLFSON: Exactly. Your Lordship saw the Latin tag in one of the cases we looked at earlier this morning with section 101, exclusio -- I am afraid I am going to get it --
MR JUSTICE DAVID RICHARDS: Exclusio -- no, inclusio, expressio exclusio alterius, yes.
Very well. On that happy Latin note, let us pause for five minutes.
(3.17 pm)
(Short break)
(3.25 pm)
MR WOLFSON: My Lord, I was just making the submission on the section 82.4 point and saying that was the first problem the LBIE administrators have. The second of

course is my general point that they have no basis to make a call at all.

There is also, in this context, the absence of any equivalent to paragraph 8 of schedule 4 for administrators; that's the express power for a liquidator to prove in the bankruptcy or insolvency of a contributory. Your Lordship finds that at the end of tab 12 in bundle 2, paragraph 8 of schedule 4. If your Lordship just turns back from that tab about six pages, there is a page which has page 673 in the top right-hand corner.

MR JUSTICE DAVID RICHARDS: Sorry, just give me a moment. Yes.

MR WOLFSON: It does not seem to say it on the page, but that is paragraph 8 of schedule 4. This is the power given to liquidators to prove in the bankruptcy, insolvency or sequestration of any contributory. My Lord, of course that ties in with my submission that this is a power reserved only to liquidators and not given to administrators.

While we are on this, can I just invite your Lordship to note, because we are coming back to this at some point --

MR JUSTICE DAVID RICHARDS: Sorry, just let me get it. So this is another aspect of the submission that they

cannot prove, is it?

MR WOLFSON: Yes, they cannot prove in our administration unless and until there is a call, and a call can be made --

MR JUSTICE DAVID RICHARDS: Unless and until there is a call, which necessarily means a liquidation.

MR WOLFSON: Exactly.

MR JUSTICE DAVID RICHARDS: So there is no basis for proving an estimated liability for calls. I see. Just let me get this right. So basically you are saying that the LBIE administrators or LBIE while in administration --

MR WOLFSON: Yes.

MR JUSTICE DAVID RICHARDS: -- cannot prove, cannot lodge, is this right, cannot lodge a proof?

MR WOLFSON: In LBL's administration, because that also is a power given only to liquidators.

MR JUSTICE DAVID RICHARDS: The first reason for that is the section 82.4 point and the second is the absence of any power in an administrator to do so.

MR WOLFSON: Yes, c.f. liquidator, which has the power of schedule 4, paragraph 8.

MR JUSTICE DAVID RICHARDS: Let me think about this.

MR WOLFSON: Now, as your Lordship sees, there is another point which we will come back to arising out of this paragraph, which is the use in the second and third

lines of the concept of the balance against the estate.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Does your Lordship see that in the second and third lines? I will come back to that point, if I may, when I am dealing with questions of set-off.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Your Lordship will see that will essentially tie in with my submission that there is a set-off in LBL's administration and that is one of the reasons why this paragraph is talking about balance, but we will come back to that.

That also, as Ms Shah reminds me, ties into the last point, and rateably with the other separate creditors, but we will come back to those points when we are dealing with set-off.

Now, given that the administrator does not have the schedule 4, paragraph 8 power, LBIE relies -- and the reference to their submissions in this regard is paragraphs 13 and 14 of their supplemental submissions -- on other powers contained in schedule 1. We say even if we haven't got paragraph 8 of schedule 4, we do have others powers which we can use. The first one is paragraph 20 of schedule 1 which --

MR JUSTICE DAVID RICHARDS: So this is in their supplemental submissions.

MR WOLFSON: In paragraphs 13 and 14.

Your Lordship finds paragraph 20 of schedule 1 on the previous page, if your Lordship turns back a page in the Act, the previous photocopied page, because only the relevant bits have been photocopied.

MR JUSTICE DAVID RICHARDS: Yes, okay.

MR WOLFSON: That's paragraph 20 of schedule 1:

"Power to rank a claim in bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company", et cetera.

Our submission on this is a short one, which is that while LBIE is in administration the members are not indebted to the company.

MR JUSTICE DAVID RICHARDS: This is in, sorry?

MR WOLFSON: Schedule 1. I think in your Lordship's copy it's 277. Schedule 1, powers of administrator or administrative receiver. The one LBIE seeks to rely on is 20:

"The power to rank and claim in bankruptcy, insolvency ... of any person indebted to the company."

The short point we make in that regard is that the members are not, while LBIE is in administration, indebted to the company. They are only liable to contribute to the company's assets under section 74 when LBIE is wound up.

The second power they seek to rely on --
MR JUSTICE DAVID RICHARDS: Can I just understand this.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: I am not quite sure how you are putting it. Are you saying that the liability to contribute to assets of the company is not something which can fall within the concept of indebtedness there used? Or are you saying and/or are you saying that although it may do so it's not an indebtedness to the company?
MR WOLFSON: I mean, it's always tempting to say both, but really it is both, if I can have both, because they are independent arguments.
MR JUSTICE DAVID RICHARDS: So be it, yes.
MR WOLFSON: Unless and until there is a liquidation and a call, we have no liability to do anything at all.
MR JUSTICE DAVID RICHARDS: No present liability.
MR WOLFSON: No present liability to do anything at all, and it cannot be fairly said that we are indebted to the company.
MR JUSTICE DAVID RICHARDS: But the trouble about indebtedness in an insolvency context is it goes far further than, you know, debitum in praesenti, if we are to continue with Latin. I mean, it includes contingent liabilities.

MR WOLFSON: Quite. Exactly. Your Lordship will appreciate that I have dealt with and I will deal with more with the question of whether there is such a thing as whether you can have a contingent liability in this context within section 74.
MR JUSTICE DAVID RICHARDS: Yes, but for these purposes what you are saying is, no, you cannot.
MR WOLFSON: Exactly.
MR JUSTICE DAVID RICHARDS: I mean, I don't know at what point you are going to make your submissions as to why that is so, whether to do it here or in the context of section 74, I am not sure. Wherever is convenient to you.
MR WOLFSON: I am going to do it in the context of section 74.
MR JUSTICE DAVID RICHARDS: That's fine. Okay. So you say a contingent liability in respect of calls is not a debt or indebtedness.
MR WOLFSON: Is not indebtedness.
MR JUSTICE DAVID RICHARDS: Is not indebtedness in this context.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Okay. That was that. But you also say, do you, that it's not actually --
MR WOLFSON: If necessary, it's not indebtedness to the

company.
MR JUSTICE DAVID RICHARDS: Sorry, it's not a liability to the company. So, in any event, not a liability to the company.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Therefore, a company in administration cannot lodge a proof. Yes.
MR WOLFSON: Of course the obvious point is it would have been the easiest thing in the world to give schedule 4, paragraph 8 power to the administrators. So what I am doing here is, so to speak, dealing with LBIE's submissions as to how they get round that. We should not lose sight of the starting point of the argument. The reason we are looking at these sections is because LBIE is saying, "Even though as administrator I don't have schedule 4, paragraph 8, or the equivalent thereof, I can use these other powers which I am given to get to the same end."
MR JUSTICE DAVID RICHARDS: Yes.
MR WOLFSON: The second way LBIE seeks to fill this gap, because that's in my submission what is happening, is to rely on section 59.1 of schedule B1 of the Act.
MR JUSTICE DAVID RICHARDS: 59.1.
MR WOLFSON: Of schedule B1.
MR JUSTICE DAVID RICHARDS: Right.

MR WOLFSON: In the authorities bundle, so to speak, that is at page 595 in the top right-hand corner.
MR JUSTICE DAVID RICHARDS: Yes.
MR WOLFSON: So that's to do anything necessary or expedient for the management of the affairs, business and property of the company. Our submission in this regard is that contributions made pursuant to calls or to be made pursuant to calls are not "property of the company. "Property", as your Lordship knows, is defined in section 436 of the Act. There is a well-trodden distinction in this regard between assets vested in the company as at the time of winding-up and assets which are only recoverable by the liquidator subsequently in pursuance or the exercise of his statutory winding-up powers. The latter does not fall within the phrase, we submit, "the company's property".
I am not sure that this last point I am making is actually controversial. It's established in an authority which I was not going to go to in detail, but for your Lordship's note it's Re Oasis Merchandising Limited. It's in authorities bundle 1C, tab 74. That was in the context of a liquidator's power of sale and an agreement with a litigation funding company. The short point was that the fruits of a claim for wrongful trading carried on by the liquidator wasn't within the

definition of "a company's property". My Lord, we submit that proving in a contributory's insolvency does not concern management of the property of the company.

Now, no it was doubt because of those provisions that my learned friend Mr Trower yesterday suggested, which was a point he had not taken in writing, that it could be the company rather than the liquidator which could prove in the members' insolvency. Your Lordship will recall that. The reference to the transcript is pages 92 and 94 of yesterday's transcript.

The problem with that submission is that the cases to which he took your Lordship on this point in fact make clear that it would have to be the liquidator's claim in any event, even if the proceeding was for the underlying liability other than by way of balance order. If I recollect correctly in fact I think your Lordship noted this point on the first case he took your Lordship to which was Harrison. Perhaps we can just remind ourselves of that. That's in supplemental authorities tab 5. This was the decision of Mr Justice Vaughan Williams. It's a short judgment. My learned friend took your Lordship to about eight lines up:

"In the present case, however, on the receiver undertaking to leave ...(Reading to the words)... in the possession of the liquidator and indemnifying him

against costs, an order will be made that the receiver should take the proceedings necessary for getting in calls and should for that purpose use the liquidator's name and, if necessary, the name of the company."

Attention was obviously focused on the name of the company because your Lordship picked up it's the preceding line which is the important one and that "and" is a conjunctive and not a disjunctive "and".

So Harrison doesn't assist my learned friend at all. The other case he took your Lordship to was Westmoreland, which is in the prior tab, tab 4, a decision of Mr Justice Kekowich in 1891 which then went on appeal.

In the judgment of Lord Justice Lindley at page 25, the judgment having started on the previous page, the learned judge says:

"In former times, the court often refused to make a balance order and directed the liquidator to bring the action."

MR JUSTICE DAVID RICHARDS: Sorry, where is that?

MR WOLFSON: It's about --

MR JUSTICE DAVID RICHARDS: "In former times", yes, I have it.

MR WOLFSON: There again, it's the liquidator. It's the liquidator who actually has the action.

Now, this point also arose this morning when my learned friend was addressing your Lordship on the decision of Sir George Jessel, Master of the Rolls, in Re Whitehouse in relation to the nature of the liability of the contributory. We started dealing with this yesterday when my learned friend made the point that what was said by the Master of the Rolls in that case should be "treated with caution". I am tempted to say that one should treat with caution any submission that anything said by Sir Georg Jessel should be treated with caution, but of course my learned friend is saved by the point that in fact it was one of the rare cases when the learned judge did err.

But the critical point is this. The passages on which we rely in that case -- and it's in authorities 1A, tab 24, and it's perhaps worth looking at it again -- the passages are at 599, just by the first hole punch, where the learned judge says:

"The debt due to the liquidator is distributable among the creditors and the debt due to the individual from the company ...(Reading to the words)... for the creditor for the amount due. The two debts are not applicable for the same purposes and could not possibly be the subject of set-off."

The second passage at 601, over the page, at roughly

the same point on the page, the first hole punch:

"It is a contribution to the assets enforceable by the liquidator and not at all a debt. When you look at the Act, there is really no question of set-off as between calls, that is the amount unpaid on the shares, and the debt due by the company to the contributory."

We submit that in those passages the learned judge was, with respect, characteristically right. In order for there to be a set-off, there must be a creditor "proving or claiming to prove for a debt in the administration", to use the language of rule 2.85(2). In other words, you need to know if there is a provable debt in order to know whether insolvency set-off applies.

Just to make it clear --

MR JUSTICE DAVID RICHARDS: Sorry, yes.

MR WOLFSON: We are not relying on the point which the Court of Appeal in the Pyle case obviously said the learned judge was wrong on, which is the point at the bottom of 599, which is the mutuality point.

MR JUSTICE DAVID RICHARDS: That's what he's referring to at 601.

MR WOLFSON: He is saying there is no set-off without reason, but the point I do get out of 601, which I submit is a different point, is he's talking there

about the assets enforceable by the liquidator.
MR JUSTICE DAVID RICHARDS: What he is saying is that it's not a debt to the company.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: It's a contribution enforceable by the liquidator.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Therefore, there cannot be a set-off.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: With a debt due by the company to the contributory. Isn't that what he is saying there?
MR WOLFSON: My Lord, I read that as making that point but also reinforcing my point that these are rights enforceable by the liquidator.
MR JUSTICE DAVID RICHARDS: Yes, but I thought this was the point that you said he was to be wrong about.
MR WOLFSON: I read the point he was said to be wrong about was the point at the bottom of 599.
MR JUSTICE DAVID RICHARDS: We had better just have a look at Pyle, which I think is in 34. I think it's Lord Justice --
MR WOLFSON: Lord Justice Lindley. I think it's at 585 and 586.

MR JUSTICE DAVID RICHARDS: Yes. It is clear there, isn't it, that what Lord Justice Lindley was saying was that Sir Georg Jessel was wrong to say or to disagree with the view in Brighton Arcade that a call made by the liquidator was a debt due to the company. So I think what's being said is that if a call is made it is a debt due to the company.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Therefore, the basis on which Sir Georg Jessel said there could be no set-off was incorrect.
MR WOLFSON: If I am trying to get too much out of sir George Jessel's judgment, so be it. But to make it clear, we are not taking the point that there is no set-off in LBIE's estate because of a mutuality issue. The reason why there is no set-off in LBIE's estate is because of essentially the pari passu point, which is a point we will come to, which we see from Grissell's case and thereafter, which is that a set-off, LBIE say, offends the pari passu principle because it effectively gives us a pound for pound return. I am certainly not taking the mutuality point. If your Lordship reads the passage at 601 as being part of the mutuality reasoning, then I am not relying on it. I can't rely on it.
MR JUSTICE DAVID RICHARDS: I am sorry, this all began with

you saying that it must be the liquidator's claim.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Now we have Lord Justice Lindley here saying that the call is a debt due to the company. That's what he says at the foot of page 585.
MR WOLFSON: He says it's enforceable. The issue is that the only person who can enforce this right is the liquidator.
MR JUSTICE DAVID RICHARDS: That may be so.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: But he does say in terms, in the penultimate line, that the call was a debt due to the company.
MR WOLFSON: Yes, and the question is who can enforce that right. We saw earlier in the previous two cases we looked at that it was the --
MR JUSTICE DAVID RICHARDS: You must be right that it's only the liquidator who gets enforcement because that's what the statute says.
MR WOLFSON: Yes. It may be that I am --
MR JUSTICE DAVID RICHARDS: The issue is though whether there is a contingent liability to the company.
MR WOLFSON: Yes, and whether the liability under section 74 extends to the contingent liability is perhaps the issue.

MR JUSTICE DAVID RICHARDS: We will see about that. Yes, okay. I am trying to see where we are going. Right. If you could remind me from time to time of the sort of scheme of the submissions, because obviously it's important all these references but I just want to be quite clear which submission they are going to.
MR WOLFSON: Yes. One of the problems is that there is an interrelationship.
MR JUSTICE DAVID RICHARDS: Of course there is.
MR WOLFSON: The other point in Re Whitehouse, which I am not sure your Lordship really was taken to in any detail.
MR JUSTICE DAVID RICHARDS: Right. Okay.
MR WOLFSON: Which starts at 602 and goes through to the end, is a discussion on the Grissell's case.
MR JUSTICE DAVID RICHARDS: Right. Sorry, just so I know exactly -- I am just looking back at my notes. The overall point here, the headline submission, is that the LBI administrators cannot lodge a proof in LBL's administration.
MR WOLFSON: Exactly. Once I have made that point by reference to the statute, it may be that actually you don't get very much help by looking at any of the other cases, because that point at that level, so to speak, is either right or wrong and not much else is going to

change that.
MR JUSTICE DAVID RICHARDS: Correct.
MR WOLFSON: Let us see. The other separate point in re Whitehouse was a point I was making a moment ago, which is that because of the rule in Grissell's case there cannot be set off in the company's administration between the liability for calls, on the one hand, and an independent debt owing by the company to the contributory, on the other hand, because that gives a contributory 100p in the pound when the other creditors are getting less. That's the point where you offend the pari passu.
MR JUSTICE DAVID RICHARDS: You say it cannot be set-off in LBIE's administration.
MR WOLFSON: Between our claim in that estate and LBIE's call against us, assuming for these purposes that there is a valid call.
MR JUSTICE DAVID RICHARDS: You wouldn't get to set-off in that case, would you, because if LBIE was in liquidation and a call was made, then you accept that the contributory rule would prevent you from proving or receiving and certainly prevent a set-off.
MR WOLFSON: Yes, and the reason, if it arises, would be because it would crash through the pari passu --
MR JUSTICE DAVID RICHARDS: Clearly the contributory rule

would then apply, but then that is not going to be in LBIE's administration.
MR WOLFSON: No, exactly. On my case, yes, exactly.
MR JUSTICE DAVID RICHARDS: Okay. So this submission is that there cannot be a set-off in LBIE's administration.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Between LBL's claim for its debt.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Which it puts forward and LBIE's contingent claim.
MR WOLFSON: On the call.
MR JUSTICE DAVID RICHARDS: Contingent claim.
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: Now, this assumes that Mr Trower is wrong in his argument that the contributory rule applies in LBIE's administration, doesn't it?
MR WOLFSON: Yes.
MR JUSTICE DAVID RICHARDS: So you are saying, well, the contributory rule doesn't apply and therefore LBL can prove for its claim but there cannot be a set-off.
MR WOLFSON: Yes, exactly.
MR JUSTICE DAVID RICHARDS: So your reason for that?
MR WOLFSON: That is the next section of submissions I was coming to. The next page is headed "Insolvency

set-off". So that's what we are going to come to. As your Lordship sees, our primary position is that there is no set-off in LBIE's estate but there is set-off in LBL's estate. That's a point which my learned friend Mr Trower attacks as being, so to speak, me trying to have my cake and eat it, because he's saying I am getting 100p in the pound over here and only paying out 10p in the pound or whatever it is on this side.
Now, let me first deal with LBIE's administration.
MR JUSTICE DAVID RICHARDS: Yes.
MR WOLFSON: Insolvency set-off does not operate in LBIE's administration or a subsequent liquidation in respect of the members' claims against LBIE and their contingent liability under section 74. There are a number of points in this regard. First, the absence of insolvency set-off is the premise of LBIE's case in respect of the contributory rule because the rule in Cherry v Boultbee cannot apply when there is a set-off. The contributory rule cannot apply if there is a set-off.
MR JUSTICE DAVID RICHARDS: Well, that's true.
MR WOLFSON: I mean it's --
MR JUSTICE DAVID RICHARDS: I was trying to think which is the chicken and which is the egg here.
MR WOLFSON: Yes. The way Lord Walker put it in Kaupthing -- just for your Lordship's notes, this is

authorities 1D, tab 94, and the relevant paragraph is 53 -- was that the equitable rule fills the gap left by the dis-application of set-off.
Would it help us to turn up --
MR JUSTICE DAVID RICHARDS: No, I remember that I think. Yes. That's paragraph?
MR WOLFSON: Paragraph 53, my Lord. The point is dealt with a little more fully --
MR JUSTICE DAVID RICHARDS: Maybe we should just look at it.
MR WOLFSON: It's in D. The first sentence of --
MR JUSTICE DAVID RICHARDS: Tab?
MR WOLFSON: It's tab 94, my Lord, the first sentence of paragraph 53:
"The equitable rule may be said to fill the gap left by dis-application of set-off but it does not work in opposition to set-off."
It might be said that Lord Walker's chicken is the dis-application of set-off and his egg is the equitable rule, but the point is dealt with in a bit more detail and it may assist your Lordship to turn three tabs along and to look at a recent decision, a slightly more recent decision of Nicolas Strauss QC, sitting as -- sorry.
MR JUSTICE DAVID RICHARDS: I slightly see it the other way round: that the contributory rule says that a contributory, let us say against whom there is a call

which has not been paid so a clear case, cannot claim against the estate qua creditor because the requirement that he contributes qua contributory comes ahead of that. Therefore, there cannot be set-off because otherwise set-off would actually defeat that. That's actually what Lord Walker says I think, isn't it?

"It produces a similar netting off effect, except where some cogent principle of law requires one claim to be given strict priority to another ...(Reading to the words)... in the queue behind its creditors is one such principle."

MR WOLFSON: Yes. With respect, I see the way your Lordship reads that second sentence. The way he puts it in the first sentence though is, in my submission, actually the other way round. What he's saying is there are two stages. The first is do you have set-off? If you don't, then the equitable rule comes in and fills that gap because otherwise -- and this is a point we need to come back to -- the contributory is in a better position than the other creditors. Certainly, with respect, the way I read that first line was to read it as saying that the first stage is there is no set-off and then the contributory rule comes in.

MR JUSTICE DAVID RICHARDS: Some of those 19th Century cases were effectively saying you cannot have set-off because

that will upset the basic position.

MR WOLFSON: Pari passu.

MR JUSTICE DAVID RICHARDS: Contributories to contribute so that the creditors can then share pari passu.

MR WOLFSON: Yes.

MR JUSTICE DAVID RICHARDS: If you allow the set-off, I mean it does two things actually. It, first of all, defeats the pari passu rule. Secondly, and perhaps even more fundamentally, it defeats the principle that it's for the contributories to provide the funds out of which the creditors are to be paid.

MR WOLFSON: Yes. The contributory's right is his (inaudible) share of the fund as notionally increased by his contribution, which is a point we will come to. That's a point developed by Lord Justice (inaudible).

Perhaps I can show your Lordship tab 97, which is the decision of Mr Nicolas Strauss QC in MK Airlines v Katz. The way the deputy judge put it at paragraph 69 -- well, perhaps I can invite your Lordship to read -- your Lordship sees the heading above paragraph 69.

MR JUSTICE DAVID RICHARDS: Yes. I will just quickly read the headnote, if I may. Yes, sorry, and then page?

MR WOLFSON: It is page 261, paragraph 69.

MR JUSTICE DAVID RICHARDS: Which paragraph, sorry?

MR WOLFSON: 69.

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR WOLFSON: Perhaps I should show your Lordship in 68 the learned justice concluded there is no insolvency set-off but there is a straightforward legal set-off. Then I would invite your Lordship to read 69.

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR WOLFSON: The way it's put there appears to be that it's where you have no set-off that the rule in Cherry v Boultbee applies. This may become a debate with -- I am not sure too much whether it matters actually which is the chicken and which is the egg, provided one ultimately decides (a) whether there is set-off or not and (b) whether the contributory rule applies and, if so, what is its effect. In my submission, the way it's generally approached is that for the rule to apply there is no set-off. So you first ask whether there is set-off or not. If there is no set-off, the question is whether the rule applies.

I mean, it may also be, my Lord, that because the insolvency set-off is mandatory, so to speak, you have to ask that question first because that is -- and I am grateful to Ms Shah -- a question of a high order. It's an automatic question which applies. If the answer to that question is no, then, to use Lord Walker's

formulation, you have to ask, well, I should be "filling the gap" by the application of the rule?

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Now, my Lord, as your Lordship mentioned a moment ago, it's the absence of insolvency set-off in the context of the liability of contributories that is such an important part in the Grissell case line of authority. That is the point I am now going to deal with. Perhaps this evening I won't be able to go much beyond what we have said in writing, but perhaps I can remind your Lordship of that, because it's paragraph 44 of our written opening. We set out in some detail what we say is the effect of this line of authority. It's paragraph 44, pages 28 to 30.

What we did here is to go through the decisions which Lord Walker referred to in Kaupthing. If I can just do it by reference to our written argument. Your Lordship sees first we dealt with Grissell's case, which your Lordship looked at very recently. The bit we have put in italics is I think the passage which my learned friend Mr Trower showed your Lordship earlier today.

MR JUSTICE DAVID RICHARDS: Yes.

MR WOLFSON: Then you see we have tried to set out -- actually we have two As there -- (aa) and then (b), (c), the approach taken by Lord Chelmsford, the Lord

Chancellor, in Grissell's case. Your Lordship sees at (b) on page 29:

"There could not be a set-off of the call because if a debt due from the company to honour its members should happen to be exactly the call made upon him, he would in this way be paid 20 shillings in the pound upon his debts while the other creditors might perhaps receive a small dividend or even nothing at all; and because the amount of an unpaid call could not be satisfied by a set-off of an equivalent portion of the debt, it followed that the amount of such call must be paid before there can be any right to receive a dividend with the other creditors. The amount of the call being paid to the member of the company stands exactly on the footing of the other creditors with respect to the dividend upon the debt due to him from the company. The dividend would be of course upon the whole debt and the member of the company will from time to time, when dividends are declared, receive them in like manner when either no call has been made or, having been made, when he has paid the amount of it."

The point of course we make, and that's why of course the emphasis involved is ours and not the learned judge's, is that the member can receive dividends from the company when no call has been made.

MR JUSTICE DAVID RICHARDS: This is obviously a significant part of your submissions on the application or non-application of the contributory.

MR WOLFSON: It's critical. Exactly. My Lord, what I was then going to go to, your Lordship sees the next paragraph, sub section 2, deals with the Auriferous Properties cases.

Now, actually time is going rather faster than I ever thought possible, looking at that clock.

MR JUSTICE DAVID RICHARDS: Good heavens. It's 4.10. It happens from time to time. I am not quite sure why.

MR WOLFSON: I hope your Lordship isn't in charge of the clock and giving me a hint.

My Lord, what we do in the next paragraph is deal with Auriferous Properties. I do want to take my time over these cases because your Lordship appreciates there were two Auriferous Properties cases. Auriferous Properties number 1 deals with the question whether there can be a set-off in the estate of the contributory; so in these terms LBL. Auriferous Properties number 2 is whether there can be a set-off in the estate of the company, LBIE. Now, we submit that Re Auriferous Properties number 1 is wrongly decided. Your Lordship will, I am sure, have seen that in our written submissions. But certainly when my learned friend dealt

with Auriferous Properties number 1 this morning, he did nothing more than invite your Lordship to read it and certainly didn't deal with any of our submissions that it is wrongly decided, a submission supported by Dr Derham in his book on set-off. I will take your Lordship to those passages.

My learned friend also made the point in writing that Auriferous Properties number 1 was approved by the Court of Appeal in Re White Star Line, which was a case we did look at this morning, but no submission was made in that context that the decision there approved Auriferous Properties number 1 and it doesn't. It says nothing in the judgment about Auriferous Properties number 1 at all. It's all about Auriferous Properties number 2.

The reason why I say that is because that submission is going to take a little bit of time. I am happy to start it but I certainly won't be able to finish it. It might well be easier -- albeit that it's now 1.35! -- for the sake of two minutes, if your Lordship was to rise now. Then what I would plan to do tomorrow would be to deal with the Grissell's line of cases and, in that context, make our submissions as to the inapplicability of set-off in the LBIE administration and the applicability of set-off in the LBL

administration.

MR JUSTICE DAVID RICHARDS: Yes. Very good. We will resume at 10.30 tomorrow.

(4.14 pm)

(The court adjourned until Thursday, 14 November 2013 at 10.30 am)

INDEX

PAGE