

1 Friday, 3 February 2017
 2 (10.30 am)
 3 HOUSEKEEPING
 4 MR TROWER: My Lord, just before Mr Arden carries on, there
 5 is one housekeeping matter from yesterday.
 6 Your Lordship asked us about whether it was a good
 7 idea for your Lordship to have a file of the cases of
 8 the Supreme Court. It sounds worse than it is, in the
 9 sense that there are two relatively slim bound volumes
 10 of cases, and I think we all do think it would be a good
 11 idea if your Lordship had them. We will put a sheet of
 12 paper at the front which identifies those paragraphs in
 13 each of the cases which deals with the contributory
 14 related issues, because there are of course, within the
 15 cases, sections dealing with currency conversion claims
 16 and the lacuna in relation to interest, which your
 17 Lordship doesn't need to be troubled with. We will
 18 prepare that and it will be available during the course
 19 of the day.
 20 MR JUSTICE HILDYARD: Thank you very much. Thank you.
 21 Submissions by MR ARDEN (continued)
 22 MR JUSTICE HILDYARD: Yes, Mr Arden.
 23 MR ARDEN: My Lord, I finished yesterday by taking your
 24 Lordship through at a bit of a gallop through
 25 Webb v Whiffin and the Brett and Morris cases.

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1 MR JUSTICE HILDYARD: Yes.
 2 MR ARDEN: Your Lordship indicated you may wish to come back
 3 on those this morning. My Lord, I am happy to go back
 4 to those cases if your Lordship would find it helpful.
 5 MR JUSTICE HILDYARD: I have neglected to look at them
 6 again. I was puzzling, really, over this business of
 7 subordination and nil value, looking at the recent
 8 Lehman case. I still find it a little confusing.
 9 I am also just puzzling as to whether your
 10 submission, you only look at contractual contingencies
 11 and not economic dependency, and you rely on that
 12 particular phrase in Lord Justice Lewison's judgment.
 13 I fully understand why you do so but, logically, one
 14 might expect it simply to be a matter of sequence. That
 15 is to say you look at the contingencies which emerge
 16 from the contractual terms and, having established, that
 17 you then work out whether there are any other
 18 impediments to recovery of the debt; that will include
 19 economic dependencies, as well.
 20 I know what you are going to say, you are going to
 21 say: well, don't worry your head about that because the
 22 Court of Appeal have explained the result. It doesn't
 23 include that thought.
 24 But I still find it hard to entirely reconcile
 25 myself to the actual process, or logic. I don't mean it

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1 rudely, but I do. There we are.
 2 MR ARDEN: Your Lordship has anticipated I would come back
 3 to your Lordship on that point, much as I did yesterday,
 4 which is to say that the Court of Appeal had to decide
 5 how subordination worked in this case. They have come
 6 out with the result that I repeatedly emphasised to your
 7 Lordship yesterday, which is to construe the agreement
 8 as being properly -- it is a contingent contractual --
 9 or a contractual agreement, where liability is
 10 contingent. Then that carries with it all of the
 11 consequences I outlined yesterday, and makes it
 12 fundamentally different from the economic dependency
 13 that any creditor, contingent or otherwise, in any level
 14 is subject to the trickle down.
 15 MR JUSTICE HILDYARD: Yes. I don't think there is much
 16 dispute between you as to whether ultimately it is
 17 contingent. It is the "one would expect a nil value",
 18 which -- I find it difficult to catch that bus.
 19 MR ARDEN: Well, my Lord, your Lordship raised this
 20 yesterday.
 21 MR JUSTICE HILDYARD: Mm-hm.
 22 MR ARDEN: I certainly didn't disagree, and I may have come
 23 close to agreeing but there is a sort of functional
 24 aspect to this --
 25 MR JUSTICE HILDYARD: Mm-hm.

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1 MR ARDEN: -- which is that you have to do it that way in
 2 order to achieve subordination. That is the way you
 3 achieve subordination, without infringing the pari passu
 4 rule.
 5 MR JUSTICE HILDYARD: Mr Justice David Richards might have
 6 thought that it wasn't so easy and therefore he adopted
 7 a rather different basis for subordination, which
 8 resulted in the same punch line.
 9 MR ARDEN: Yes. It is the same result by a different means,
 10 but obviously the two means are fundamentally different.
 11 MR JUSTICE HILDYARD: They are. One has been overruled by
 12 the Court of Appeal, I accept that.
 13 MR ARDEN: My Lord, that's right.
 14 MR JUSTICE HILDYARD: Yes.
 15 MR ARDEN: My Lord, I should say --
 16 MR JUSTICE HILDYARD: I was really just giving you an excuse
 17 as to why I hadn't read Morris.
 18 MR ARDEN: My Lord, they are fascinating cases. I don't
 19 know how your Lordship managed to keep away from them.
 20 I should say, on estimation, of course the issue 3
 21 is premised on a nil value going in. In other words,
 22 your Lordship is not being asked to determine that is
 23 wrong, that the estimation process shouldn't work in
 24 that way.
 25 My Lord, as I sort of explained to your Lordship

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<p>1 yesterday, just assume that that wasn't the case and so 2 one went through a non-binary estimation: let's say the 3 result of that was to attribute a 10 per cent value, you 4 get to the same result that we are contending for. Of 5 course, the reason you can't do that is because it 6 wrecks subordination. 7 MR JUSTICE HILDYARD: Yes. I can see that ultimately this 8 is sort of flapping about a point which may not actually 9 affect the analysis. I can see that, but I am just 10 explaining to you that I do find that difficult. In 11 a way, it also goes in my own mind -- whether logically 12 or not -- to the essential difference between you and 13 Mr Trower, for example. You are a bucket man, he is 14 a sluice man. You just look at the bucket and you have 15 to be able to reconcile yourself, or persuade yourself, 16 that there is something payable under the relevant 17 bucket in order to justify the claim outwards. If there 18 isn't, and there is a nil value, that is the end of the 19 story. Mr Trower, on the other hand, being a sluice 20 man, said, "No, no, you don't look at that, you look at 21 the overall indebtedness. If there is an overall 22 indebtedness, you have the outward claim and you then 23 determine, at the end of the day, what the result should 24 be". It is simply trying to create a logical universe 25 in my own mind, and that is where sometimes the steps</p> <p style="text-align: center;">Page 5</p>	<p>1 them. My Lord, they don't go to this particular point. 2 MR JUSTICE HILDYARD: No. 3 MR ARDEN: They go to the measurement of the liability -- 4 MR JUSTICE HILDYARD: Yes. 5 MR ARDEN: -- under section 74. 6 MR JUSTICE HILDYARD: Yes. 7 MR ARDEN: To pick up, or to use Mr Justice Dixon's terms, 8 the importance of establishing the claims on the fund, 9 because it is by reference to those that your liability 10 is measured under section 74. 11 Morris is a different case, as your Lordship knows, 12 but you see the importance of going through that 13 process, being emphasised in the judgment of the 14 Lord Chancellor, the need to assess at the date of the 15 call and the importance of not inflating the liability 16 by reference to what he described as nominal amounts. 17 Admittedly in the case of debts which existed at 18 a particular date which have then been dealt with or 19 discharged. 20 As I said, it is a different case but I think the 21 principles and the approach which the Court of Appeal 22 applied are useful for your Lordship and very much, 23 I would submit, consistent with what we say about 24 section 74. 25 MR JUSTICE HILDYARD: Shall we leave it, having made my</p> <p style="text-align: center;">Page 7</p>
<p>1 have confused me, as you can tell. 2 MR ARDEN: My Lord, I think that is right. 3 But, my Lord, as far as overall indebtedness is 4 concerned, this is the deficiency point. One still has 5 to ask: well, what debts go into the debit side of 6 the -- 7 MR JUSTICE HILDYARD: Yes. 8 MR ARDEN: If there is a contingent debt, one has to say: 9 well, what's it -- so you still get back to the -- once 10 one is in the realm of contractual contingency, in 11 a sense the bucket comes -- I am not sure I can pursue 12 your Lordship's analogy properly. 13 MR JUSTICE HILDYARD: Yes. 14 MR ARDEN: But the contingency, the existence of contingent 15 liabilities, and what you do with them, is a process you 16 have to go through in order to determine the total 17 amount of the deficiency. When you are asking what the 18 totality of the debts are, you have to ask yourself 19 where they are contingent, as I said, what amount is 20 payable in respect of it. 21 MR JUSTICE HILDYARD: Yes. So now you have seen the level 22 of my confusion, do you think we should go to Morris or 23 not? I think read them and I will get a chance to 24 interrogate you in reply, if necessary. 25 MR ARDEN: My Lord, I am happy for your Lordship to read</p> <p style="text-align: center;">Page 6</p>	<p>1 confession that I will read those two cases, and maybe 2 the universe will become clear in exactly where they fit 3 in it likewise and then I can plague you again if 4 necessary? 5 MR ARDEN: My Lord, absolutely, I would be quite happy. 6 My Lord, I thought I had finished issue 3. 7 I haven't quite. I have one more point which I can deal 8 with briefly, in part because, subject to your Lordship, 9 Mr Atherton and I have agreed a division of 10 responsibility which hands this point over to him. 11 My Lord, the point is the one which we make, the 12 conundrum we pose in paragraph 63 of our skeleton. This 13 is the analysis that I think Mr Trower characterised as 14 dense. I don't bridle at the use of that term. It is 15 about right. My Lord, perhaps if your Lordship would 16 just glance down 63, and then I will just make a few 17 submissions on it. 18 (Pause) 19 MR JUSTICE HILDYARD: Yes. 20 MR ARDEN: Your Lordship, this is not a result for which we 21 contend and it is not a result that arises on our 22 analysis. This just won't happen. It is something 23 which might happen on LBIE's analysis if you make 24 a call, if you can make a call, in respect of the 25 subordinated debt.</p> <p style="text-align: center;">Page 8</p>

<p>1 What it postulates is a situation where a call is 2 made. There is a proof in LBHI2's estate. Sums are 3 paid on account of that call. Those sums taken together 4 with the other assets in LBIE's estate, mean that there 5 are sufficient funds to pay all of the levels above us 6 with a little bit over. The consequence of that is that 7 the contingency is satisfied. We can then prove for the 8 full amount of our claim and one then gets into the 9 position of set-off, reversing the whole thing, so that 10 the contingency is no longer satisfied and then it is, 11 then it isn't, and so on and so forth.</p> <p>12 Now, Mr Trower's answer to that was to take your 13 Lordship to provisions in the subordinated debt 14 agreement.</p> <p>15 MR JUSTICE HILDYARD: 7(b).</p> <p>16 MR ARDEN: 7(b), which precludes set-off. Now, the 17 difficulty with that is in fact identified in 18 Mr Trower's skeleton in part of his submissions made in 19 relation to issue 9A. It is a contracting out 20 difficulty.</p> <p>21 As he rightly points out, at paragraph 26.9, you 22 can't contract out of insolvency set-off, as 23 NatWest v Halesowen. It is mandatory and self 24 executing.</p> <p>25 As I said, if your Lordship is content with this</p> <p style="text-align: center;">Page 9</p>	<p>1 MR ARDEN: My Lord, I hope your Lordship doesn't mind if 2 I leave that hanging there.</p> <p>3 MR JUSTICE HILDYARD: No.</p> <p>4 MR ARDEN: Sure as I am --</p> <p>5 MR JUSTICE HILDYARD: Boyle's law is going to take --</p> <p>6 MR ARDEN: Yes.</p> <p>7 My Lord, that is then issue 3. Now, the only other 8 issue that I am going to deal with is issue 7.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR ARDEN: We deal with that from paragraph 69 to 80 of our 11 skeleton.</p> <p>12 My Lord, can I just preface that by making one 13 point. If your Lordship would just go back to 14 paragraph 43 of our skeleton.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR ARDEN: My Lord, issue 7 recites the shareholdings and 17 then asks the court to deal with the issues in the light 18 of those shareholdings.</p> <p>19 As your Lordship knows, there are different classes. 20 We have ordinary and preference shares. An issue may 21 arise, but doesn't arise for your Lordship and doesn't 22 make a material difference to the hypothesis on which 23 you have to deal with the issues in 7. An issue arises, 24 or may arise, as to whether or not, when one is looking 25 at ultimate adjustment and responsibility for debts and</p> <p style="text-align: center;">Page 11</p>
<p>1 course, Mr Atherton, who is going next, will expand on 2 this a little bit. If that is right, you are left with 3 the conundrum that we have identified which, as I have 4 said, and I emphasise, is not a result that we contend 5 for, because it just plainly undermines the whole point 6 of the subordination agreement, and is not one which 7 arises on our analysis.</p> <p>8 Is your Lordship looking for 7(b)?</p> <p>9 MR JUSTICE HILDYARD: I was going to wonder what you say 10 7(b) tackles.</p> <p>11 MR ARDEN: Is it in T4/1? Yes, my Lord, T4/1.</p> <p>12 MR JUSTICE HILDYARD: Which file is that; 4?</p> <p>13 MR ARDEN: It is bundle 4. We are using the agreement at --</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR ARDEN: So it is page 6. 6 in the agreement, 12 in the 16 bundle, the page.</p> <p>17 MR JUSTICE HILDYARD: Yes.</p> <p>18 MR ARDEN: My Lord, what it would cover, what it would 19 preclude, is set-off or netting off out side of 20 an insolvency.</p> <p>21 MR JUSTICE HILDYARD: So 7(b), on your analysis, applies 22 only outside insolvency, because otherwise it 23 contradicts the scheme.</p> <p>24 MR ARDEN: Exactly.</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 10</p>	<p>1 liabilities, one should treat the preference 2 shareholders and the ordinary shareholders differently 3 because they have different rights to the surplus.</p> <p>4 As your Lordship probably knows, I think you have 5 looked at this in 3.2(c), the preference shareholders, 6 here, have a right to the return of their capital, but 7 no right to participate in the surplus. Only the 8 ordinary shareholders have a right to participate in 9 surplus. So if one bases responsibility by reference to 10 rights to participate in surplus, then it would be 11 allocated amongst ordinary shareholders but not 12 preference shareholders.</p> <p>13 My Lord, the reason it doesn't make a difference 14 here is because of the numbers. What matters for the 15 issues in issue 7 is the disparity between what LBHI2 16 holds and what LBL holds. LBL holds one share, we hold 17 the rest. If the adjustment is done by reference to the 18 nominal value of all shares, then the proportions are in 19 the region of 13 billion to 1. If one does it by 20 reference to ordinary shares, one gets down to the sort 21 of measly figure of 6.2 billion or so to 1.</p> <p>22 Whichever one it is, in terms of the disparity, the 23 disparity is massive, so one can deal with the issues in 24 issue 7 on either basis without it making a difference. 25 My Lord, nor does it make a difference to what we say</p> <p style="text-align: center;">Page 12</p>

<p>1 about the need for an adjustment, because whichever way 2 you look at it, when one came to the ultimate 3 adjustment, where it is done by reference to share 4 capital, it is what we could expect to come in from LBL 5 is de minimis on either basis. 6 My Lord, I referred your Lordship to it because we 7 raised the point which was raised in argument, I think 8 by Mr Justice David Richards in waterfall 1. As he 9 said, it doesn't really matter. We have picked up on 10 that. I think, again, it doesn't matter, your Lordship 11 can proceed on either basis. 12 So back to the issues in issue 7. We have dealt 13 with them fairly briefly. Largely because we 14 anticipated that in all of them, bar 7.5, on the 15 position papers we would find ourselves aligned with 16 LBIE. Indeed, that has turned out to be the case. 17 So if I can just go through the sub issues briefly: 18 we agree with LBIE in its answer to and analysis of 19 sub-paragraph 1 of issue 7, which is as to the nature of 20 the liability under section 74.1. We agree with LBIE in 21 its answer to issue 7.2 and 7.3, which deal with rights 22 of contribution, indemnity and adjustment. We agree 23 that it is all to be done through the statutory scheme, 24 and by way of adjustment, not by way of contribution and 25 indemnity. Therefore, set-off doesn't apply in the</p> <p style="text-align: center;">Page 13</p>	<p>1 adjustment. 2 So the decision to make a call or not to make a call 3 is one that has to be justified by reference to the 4 achievement of those purposes. It is for that reason 5 that in many cases, other than inability to pay, the 6 personal circumstances of the contributory may well not 7 be a relevant factor to take into account. If they cut 8 across the statutory purposes, then the statutory 9 purposes are likely to be preferred. 10 Now, we have postulated one possible scenario which 11 would justify an inequality of call in our skeleton and 12 it is essentially the same one that Mr Trower advanced 13 as a possible set of circumstances where you might make 14 different calls; that is where all statutory purposes 15 can be achieved by making adequate calls. You might 16 well get a case where an inequality of call will result 17 in -- and so, for example, if you have solvent 18 contributories and an imbalance in nominal value, you 19 may, by making a larger call on the larger shareholder, 20 be able to achieve not merely the satisfaction of the 21 creditor's debts and liabilities and the payment of the 22 expenses, but also by dint of doing that achieve 23 adjustment at the same time; that clearly makes sense, 24 because it prevents you from making two calls. It 25 prevents an essentially simple winding up from becoming</p> <p style="text-align: center;">Page 15</p>
<p>1 context of adjustment. 2 We agree with LBIE on 7.4; whether the adjustment is 3 affected by other claims. So the only sub issue of 7 4 with which we disagree with LBIE is in relation to the 5 ability of a liquidator to call for less. 6 As I indicated, I think at the outset, having seen 7 LBIE's submissions and heard what Mr Trower says about 8 it, I suspect that the difference between us is maybe 9 one of emphasis but certainly more apparent than real. 10 My Lord, what we say about that is in the skeleton. 11 It is this: we submit that there is a discretion as to 12 the way in which you make calls. You can make calls on 13 one or more. You don't have to make calls on all 14 contributories, you can make calls in differing amounts. 15 We submit that is clear from both section 150, the use 16 of the permissive "may" and also the rules themselves, 17 which contemplate that there may be inequality of 18 approach to different contributories. 19 But, my Lord, the reason that I think the difference 20 between us is perhaps not as deep as it might be is that 21 we would accept that the power to make a call, the 22 discretion to make a call, has to be exercised in the 23 light of the statutory purposes, which are set out in 24 section 74 and then repeated in section 150 for the 25 payment of creditors, the payment of expenses and</p> <p style="text-align: center;">Page 14</p>	<p>1 more complicated than it needs to. 2 My Lord, beyond that we say in the skeleton -- and 3 I think this must be right -- that everything will 4 depend upon the particular circumstances. Beyond saying 5 what I said fairly shortly, it is quite difficult for 6 the court to give definitive guidance because it is all 7 completely fact dependent. So, my Lord, that I think is 8 all I wanted to say on 7.5. 9 My Lord, there then remains 8, the rule against 10 double proof. Again, we agree with LBIE, and our 11 analysis, I think, is essentially the same. That we 12 deal with from 81 to 87 of our skeleton. 13 On issue 9, the preliminary issue, again, we agree 14 with LBIE about contracting out. 15 The same applies to issue 10. On recharge, again we 16 agree with LBIE in its answer and the analysis which 17 leads to that answer to the issue posed by 10. 18 MR JUSTICE HILDYARD: Yes. 19 MR ARDEN: My Lord, on 12, the LBL issues, we have nothing 20 to say because it doesn't concern us. 21 So, my Lord, on the disputed issues, that is our 22 position and those are our submissions. Perhaps I can 23 just check behind me, and then I will just come back to 24 deal briefly with the agreed issues. 25 My Lord, those are my submissions on the disputed</p> <p style="text-align: center;">Page 16</p>

<p>1 issues.</p> <p>2 I think on the agreed issues, essentially they are</p> <p>3 being left over and then, I think, with those and these</p> <p>4 issues, your Lordship is going to receive assistance on</p> <p>5 how they are impacted by the Supreme Court. I think</p> <p>6 they will be revisited in due course, but I don't think</p> <p>7 there is anything I need to say about those or about</p> <p>8 Mr Trower's approach at the moment. I think this is</p> <p>9 probably something we come back to.</p> <p>10 So, my Lord, unless I can assist your Lordship,</p> <p>11 those are our submissions.</p> <p>12 MR JUSTICE HILDYARD: Thank you very much.</p> <p>13 Yes.</p> <p>14 Submissions by MR ATHERTON</p> <p>15 MR ATHERTON: My Lord, I am obliged.</p> <p>16 MR JUSTICE HILDYARD: Mr Atherton.</p> <p>17 MR ATHERTON: Could I just start off where Mr Arden left off</p> <p>18 in terms of what our position is in relation to the</p> <p>19 various issues.</p> <p>20 As far as we are concerned, we understand that</p> <p>21 issues 2, 4, 5, 6 and 12 are agreed between the parties</p> <p>22 as a matter of principle.</p> <p>23 I think issues 2 and 4, particularly the terms of</p> <p>24 the declarations, need to be agreed. They may also be</p> <p>25 subject to alteration in the light of any decision from</p> <p style="text-align: center;">Page 17</p>	<p>1 MR JUSTICE HILDYARD: -- is agreed on the basis of the</p> <p>2 wording proposed by LBL.</p> <p>3 MR ATHERTON: Correct.</p> <p>4 MR JUSTICE HILDYARD: Yes.</p> <p>5 MR ATHERTON: As far as regards issue 8, we have effectively</p> <p>6 adopted, as set out in our position paper, the position</p> <p>7 of LBIE. I think the only outlier by way of a change is</p> <p>8 LBL in relation to that issue.</p> <p>9 Issues 7.1 to 7.4, we effectively agree with LBIE.</p> <p>10 Again, as far as LBH is concerned there is no issue</p> <p>11 there, and we would hope, insofar as appropriate, to</p> <p>12 agree declarations in due course, even if in escrow, if</p> <p>13 you like.</p> <p>14 As regards issues 9A and 10, the LBH administrators</p> <p>15 don't take a position.</p> <p>16 On that basis, my Lord, and as you will have seen</p> <p>17 from our outline submissions, the only issues that</p> <p>18 I propose to deal with are issues 1, 3 and 7.5. I was</p> <p>19 proposing to deal with those in this way, with your</p> <p>20 Lordship's permission: I was going to deal with issue 3</p> <p>21 first, essentially because it follows directly on from</p> <p>22 Mr Arden and it is certainly fresh in everyone's mind.</p> <p>23 I was then going to deal with issue 7.5, because</p> <p>24 that relates, or there are issues which are relevant to</p> <p>25 issue 7.5 and issue 3; then I was going to deal with</p> <p style="text-align: center;">Page 19</p>
<p>1 the Supreme Court.</p> <p>2 As regards 5 and 6, and issue 12, which are the LBL</p> <p>3 issues, the administrators of LBH have agreed with LBL</p> <p>4 the terms of declarations that could be made, and for</p> <p>5 our part we don't think that they will be impacted by</p> <p>6 the determinations, pending judgments from the Supreme</p> <p>7 Court.</p> <p>8 As regards those same issues, 5 and 6, I understand</p> <p>9 that the declarations have been agreed as between all of</p> <p>10 the parties, but there is an issue potentially between</p> <p>11 LBL and LBIE as regards the terms of the declaration in</p> <p>12 relation to 12. As far as we are concerned, we have</p> <p>13 accepted the modification to the declaration as proposed</p> <p>14 by LBL.</p> <p>15 MS TOUBE: My Lord, I hesitate to rise but I should just say</p> <p>16 that issue 12 has been agreed by everybody, including</p> <p>17 LBIE. LBIE had different wording, originally, but</p> <p>18 everybody has adopted ours.</p> <p>19 MR TROWER: That's right.</p> <p>20 MR ATHERTON: That is helpful.</p> <p>21 MR JUSTICE HILDYARD: So issue 12, subject to it being</p> <p>22 appropriate to make a declaration in respect of it at</p> <p>23 all and it being your present view that the Supreme</p> <p>24 Court's reference is not really going to be affected --</p> <p>25 MR ATHERTON: That's right.</p> <p style="text-align: center;">Page 18</p>	<p>1 issue 1, which will then hopefully lead in with</p> <p>2 Mr Marshall, who I understand will be starting with</p> <p>3 issue 1. That is why I have adopted this particular</p> <p>4 order.</p> <p>5 My Lord, Mr Trower, in relation to issue 3, started</p> <p>6 his submissions by indicating that the position adopted,</p> <p>7 essentially, on this side of the court, by LBH, LBL and</p> <p>8 LBH12 was a consequence of a misunderstanding of the</p> <p>9 waterfall and a misinterpretation of</p> <p>10 Lord Justice Lewison's reasoning in the Court of Appeal.</p> <p>11 What is sauce for the goose is sauce for the gander,</p> <p>12 in the sense that I would suggest that the position</p> <p>13 adopted by LBIE is consequential upon a misunderstanding</p> <p>14 of the waterfall, a mischaracterisation of what is meant</p> <p>15 by contingent, a misunderstanding/a misinterpretation of</p> <p>16 Lord Justice Lewison, a non-application of the mandatory</p> <p>17 regime for estimating contingent liabilities, which in</p> <p>18 turn results in a misapplication of the call provisions</p> <p>19 in section 74 and section 150.</p> <p>20 Just pausing there, I should have pointed out that,</p> <p>21 I am very grateful to Mr Arden for his submissions,</p> <p>22 which I adopt wholeheartedly and in whole. Hopefully</p> <p>23 I won't repeat what he said, but my submissions are,</p> <p>24 essentially, perhaps a change in emphasis or additions</p> <p>25 to what he says. But, for example, the point about</p> <p style="text-align: center;">Page 20</p>

<p>1 mischaracterisation of the meaning of contingency, or 2 contingent, follows on directly from Mr Arden and your 3 Lordship's discussion about dependency. We will come on 4 to that momentarily. 5 Without wanting to demean the seriousness of the 6 process that we are involved in, we have had some 7 colourful allusions during the course of submissions, 8 which have served their purpose. 9 MR JUSTICE HILDYARD: Do you mean buckets or sluices? 10 MR ATHERTON: I was going to say free flowing streams, 11 buckets. We have also learned that Mr Arden and 12 Mr Trower dine together and contemplate leaving without 13 paying the bill together and in some cases when they 14 can't pay the bill, it appears that they have 15 an inveterate gambling problem. I am going to join in 16 if you don't mind. I hope your Lordship will see where 17 I am going, and the first line of this is not true. 18 I have very hairy legs. Or rather, let me do it the 19 other way around. Chimpanzees have very hairy legs. 20 I have very hairy legs, therefore I am a chimpanzee. 21 I hope your Lordship will bear witness that I am not. 22 But if one applies effectively that type of Socratic 23 syllogism -- is how Mr Trower seeks to justify the 24 position he has embarked upon. If I could give you two 25 syllogisms which I say exposes his analysis for being</p> <p style="text-align: center;">Page 21</p>	<p>1 goes down the waterfall, it may be that one can't pay 2 sufficient for preferential creditors, whatever it might 3 be. But that doesn't render the payments lower down the 4 waterfall in any way contingent. 5 The second syllogism, which I think is the way 6 Mr Trower actually puts his case, is as follows: the 7 payment of liabilities in the waterfall are contingent 8 upon payments being made higher up the waterfall, but 9 you value all of the payments in the waterfall, both 10 prior and successive, in full. The sub-debt is also 11 contingent upon payments being made higher up the 12 waterfall and therefore you must value that in full. 13 Again, we say that reasoning simply can't pertain in 14 this case. The reason being -- and building upon what 15 I have already submitted, my Lord -- all the liabilities 16 in the waterfall are already determined, actual 17 liabilities for the purposes of this analysis. We will 18 come back and elaborate upon it in a moment. Therefore 19 they have to be paid. They are not contingent. They 20 are actual liabilities. The sub-debt is a properly 21 so-called contingent liability. It is conditional upon 22 payment of prior ranking claims, which include all of 23 the liabilities from 1 to 7, but ranking before any 24 obligations in relation to shareholders. 25 I suppose, one might say: so far so good. But,</p> <p style="text-align: center;">Page 23</p>
<p>1 flawed -- and I do mean that with the greatest of 2 respect, and he knows I mean that with the greatest of 3 respect. 4 First of all, we embark on the first analysis. 5 Payment of the sub-debt is contingent upon payment of 6 all liabilities higher up the waterfall. Payment of all 7 liabilities in the waterfall are dependent upon payment 8 of all liabilities higher up the waterfall, therefore 9 all liabilities in the waterfall are contingent. 10 We say one only has to go through that process to 11 expose the fact that the characterisation of contingency 12 by reference to dependency is fundamentally flawed. The 13 mere fact, as I think Mr Arden submitted, that when one 14 is in the waterfall -- and using Mr Trower's illusion -- 15 if the bucket isn't full, the water doesn't spill down 16 in to the next bucket. All that means is it is not 17 contingent on the filling up of the immediately prior 18 bucket, it just means that the assets available in the 19 estate of the company are insufficient to pay the 20 liability. What is important about the waterfall 21 liabilities is they are all there and all determined. 22 They are actual liabilities. So, for example, upon the 23 winding up, statutory interest is payable. That is 24 a crystallised liability. It may be, in the 25 circumstances, unable to make that payment. When one</p> <p style="text-align: center;">Page 22</p>	<p>1 again, it comes back to the fact that one is dealing, in 2 1 to 7, with actual liabilities. The reason why this is 3 important is because -- as Mr Arden said today and 4 yesterday -- when one is concerned in dealing with the 5 call in a liquidation, one is concerned with dealing 6 with actual liabilities. 7 Now, it may be that those liabilities can't be 8 definitively determined, but they can be estimated. On 9 the basis of that estimation, a call can be made. 10 Mr Trower, I think, has made that submission. That is 11 plain on the face of section 74. 12 The issue here, and what has sort of permitted 13 Mr Trower to make the submission in the way that he has 14 made it, is because he has conflated contingency and 15 dependency and he has been allowed -- if I can put it 16 this way -- to exercise that slight of hand because the 17 contingency to which the sub-debt is subject, just so 18 happens to mirror the waterfall; that is why Mr Trower 19 was able to say, "The waterfall payments are contingent 20 on the payments being made higher up the level", because 21 that is the actual contingency by way of contract that 22 applies to the sub-debt obligation. 23 I hope your Lordship sees that the waterfall claims, 24 as you debated with Mr Arden, aren't contingent, they 25 are merely dependent.</p> <p style="text-align: center;">Page 24</p>

<p>1 What are they dependent upon? Simply the ability to 2 pay. 3 The sub-debt is not subject to that in terms of the 4 way the waterfall operates. It is actually 5 a pre-condition, contractually, that those prior ranking 6 claims are in fact paid in full. So although there is 7 a synergy between the two, they are fundamentally very 8 different, in terms of how they are to be dealt with. 9 Now, applying Mr Trower's analysis further, and for 10 which he relies upon the statement in the 11 Court of Appeal of Lord Justice Briggs and 12 Lord Justice Lewison. He says the situation is this: 13 well, because contributories, particularly an unlimited 14 company, are obliged to pay all the waterfall, from 1 to 15 7, then they are automatically obliged to pay anything 16 in between, and that is why I can make a call. But one 17 has to analyse, at each stage, in circumstances about 18 how that obligation does arise. 19 So if I could give your Lordship an example: if we 20 are looking at unsecured provable claims, at level five 21 of the waterfall, within that one would have a series of 22 provable debts. They will be plainly provable debts 23 which are ascertained and determined and definitive in 24 their value. They don't produce a problem. One would 25 have prospective claims. Still dependency, as your</p> <p style="text-align: center;">Page 25</p>	<p>1 a company were, they would have to go through that 2 process in relation to the level 5 waterfall 3 liabilities. Estimating, or determining what those 4 values were. It wouldn't necessarily be a situation 5 where they would be definitive in relation to, certainly 6 contingent liabilities. But in order to make a call on 7 contributories they would have had to estimate those 8 values in order to infer an appropriate exercise of the 9 ability to make a call, and that would bring it within 10 section 74. 11 I have not been able to think of an example, but if 12 for example you had in bucket 5, what has been referred 13 to in the context of this particular contingency, 14 a binary contingency, let's say of 100, the liability 15 would be 100. If it was similar in this context, the 16 binary nature, it may be appropriate to make that value 17 nil. You couldn't put it in as 100, because there is no 18 liability at that stage or at any level in the 19 waterfall. The position must be the same whether the 20 company is solvent or insolvent. In a solvent context 21 if one was subject to a contingent liability, until a 22 contingency falls in nothing is due or payable. That is 23 subject to one point: that must be the position in 24 the context of an insolvency. Until the contingency 25 falls in, nothing is due or payable. Therefore, if you</p> <p style="text-align: center;">Page 27</p>
<p>1 Lordship discussed yesterday, and you raised the 2 question with Mr Arden about whether or not you would 3 have issues of estimation with dependencies and the 4 answer is: in the context of a prospective debt you 5 would, because when you are making a distribution, you 6 value it if that distribution is in advance in time from 7 when the liability would otherwise be paid, you discount 8 it. 9 Similarly, if one has contingent liabilities, at 10 level 5 in the bucket, they have to be valued for the 11 purposes of set-off and distribution if there is to be 12 set-off, in any event, for the purposes of distribution. 13 Mr Arden used the example of the valuation of the 14 indemnities in the Danka case. Another very simple 15 example would be in the context of an insurance company 16 or a reinsurance company, where you have home insurance 17 in relation to fire. One can determine, along the 18 continuum, if it runs for 12 months, there has been no 19 fire after 11 months and actually being able to work out 20 what the chances are of the fire actually happening in 21 the last month, and that would give you the value in 22 respect of that contingent claim. 23 Leaving aside the circumstances we are in at the 24 moment, if the liquidators or the administrator had 25 a situation of assessing what the liabilities of</p> <p style="text-align: center;">Page 26</p>	<p>1 made a call against a contributory, the contributory 2 would be entitled to say, "Well, I am simply not liable 3 for that because that contingency hasn't occurred in the 4 insolvency of the company". On that basis, we say that 5 the analysis breaks down. As your Lordship already has, 6 and if your Lordship goes back to the transcript where 7 Mr Trower is dealing with his analysis, it is largely 8 all predicated on the equiparation between contingent 9 liability as regards the outbound claim and the inbound 10 claim as regards LBHI2; the equiparation of that 11 contingency with the dependency issues in terms of when 12 the waterfall comes into play and the ability of those 13 liabilities, which are actual liabilities, to be paid. 14 That is why it is not sufficient simply to say, 15 "Well, because contributories are liable to pay 16 liabilities from 1 through to 7, therefore they must be 17 liable on that basis to make contributions", one has to, 18 at each level, at least estimate what those liabilities 19 are in order that you can put forward a genuine and 20 proper call. 21 Now, we say that, therefore, deals with the 22 misunderstanding of the waterfall, which Mr Arden also 23 dealt with yesterday, the mischaracterisation of 24 contingency. The third element, then, which we say is 25 the flaw in the analysis is the misinterpretation of</p> <p style="text-align: center;">Page 28</p>

<p>1 Mr Justice Lewison. 2 Now, the first point, and if your Lordship were to 3 ask me the question that you have asked Mr Arden this 4 morning, I would give your Lordship the same answer: it 5 doesn't really matter because Lord Justice Lewison has 6 said the value is nil. 7 But Mr Trower's assertion is: well, when 8 Lord Justice Lewison made that observation, at 9 paragraph 41 of the judgment, he was talking about 10 ranking; where in the waterfall? That is why it was 11 given a nil value. 12 Now, hopefully your Lordship can see now why that 13 can't be right. Lord Justice Lewison wasn't dealing 14 with ranking when he valued it at nil, because you don't 15 value it at nil. Statutory interest will have its full 16 value at the end of the waterfall, whether or not it is 17 capable of being paid from that waterfall. It may 18 remain unpaid, but it has that fixed value. So the 19 value at nil that Lord Justice Lewison is applying can't 20 be by reference to ranking. And -- 21 MR JUSTICE HILDYARD: Lord Justice Lewison, subject to 22 Mr Trower correcting me, appears to say, expressly, it 23 is nothing to do with ranking. 24 MR ATHERTON: No, I agree. I was going to take your 25 Lordship to paragraph 41, but your Lordship has seen it</p> <p style="text-align: center;">Page 29</p>	<p>1 because the mood music in the new regime is to try to 2 cram as much into provable liabilities as opposed to 3 non-provable to ensure that they can properly be dealt 4 with in the process of liquidation and winding up and 5 that is why he is led, I think, to the determination 6 that it must be nil. 7 Now, that is my supposition. But I think that is 8 the only way one can analyse it, in terms of why you get 9 there. The question may be -- with your Lordship's 10 permission I will come back to it. 11 MR JUSTICE HILDYARD: Yes. 12 MR ATHERTON: It may have to be, in certain circumstances, 13 that it can't be nil. I will come back that in 14 a moment, if I might. 15 The other aspect, and it is probably easier if -- 16 rather than me paraphrasing, if your Lordship has the 17 transcript from day 1 to hand. I am not sure we have 18 a designated bundle for it. 19 MR JUSTICE HILDYARD: No. I have, yes. 20 MR ATHERTON: Thank you. 21 MR JUSTICE HILDYARD: I am not sure it has been designated, 22 but I have a bundle. 23 MR ATHERTON: It is page 82. I will just start there 24 because it is the break after lunch. 25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 31</p>
<p>1 time and time again. 2 MR JUSTICE HILDYARD: Yes. 3 MR ATHERTON: We agree. In its terms it is plain that he is 4 talking about contingency when he is dealing with nil 5 value. He comes back to it in paragraphs 62 and 63 of 6 his judgment, where he does say that one of the reasons 7 why it is nil value is because of the aspect of 8 subordination. I think the issue simply is the nature 9 of the contingency is such and its context, it is 10 creating a subordination, is that the value of that 11 contingency has to be nil and there is no real two ways 12 about it. 13 MR JUSTICE HILDYARD: Why do you say that? 14 It is what you would expect. I know you say that 15 the Court of Appeal says it and therefore that is what 16 I now expect. Why does the contingency, stripping out 17 any issue of dependency, why does it lead to nil? 18 MR ATHERTON: Well, the answer to that is given, I think, by 19 Lord Justice Lewison in paragraph 63; because he is 20 tying it to subordination. He has concluded that these 21 debts are provable. Unlike Mr Justice David Richards, 22 who achieved the same result from a different route. 23 MR JUSTICE HILDYARD: Therefore subordination worked, yes. 24 MR ATHERTON: Mr Justice Lewison came to the conclusion that 25 they must be provable, as did Lord Justice Briggs,</p> <p style="text-align: center;">Page 30</p>	<p>1 MR ATHERTON: If your Lordship could just, to yourself, read 2 into it. The important bit comes, really, at the start 3 of Mr Trower's submission at line 23, on page 83. 4 Taking you through to line 22, on page 84. Actually, 5 my Lord, if you could read to page 85 to line 22. 6 MR JUSTICE HILDYARD: 83 to 85? 7 MR ATHERTON: Yes, please. 8 MR JUSTICE HILDYARD: Yes. 9 MR ATHERTON: Down to line 22. 10 (Pause) 11 MR JUSTICE HILDYARD: Yes, I have come to line 5, on 86. 12 MR ATHERTON: That is more than I asked your Lordship to do, 13 but I am very grateful for the extra effort. 14 It took me some time to unpick this, because I am 15 a bit slower than Mr Trower. But what I think it 16 basically comes down to, he says that the payment on the 17 waterfall, when you get to the level of non-provable 18 debts and statutory interest, is quite illuminating as 19 regards his analysis because you are not trammelled by 20 any issues of set-off, and you simply have to pay them. 21 So what he says is -- and we can go back to 84 my Lord, 22 please, at line 6: 23 "You cannot set-off the account in LBIE's 24 administration, that is the very nature of it." 25 That doesn't present a problem. So they have no</p> <p style="text-align: center;">Page 32</p>

<p>1 value in the insolvency, if looked at through 2 Lord Justice Lewison's perspective. 3 Now, pausing there, that is not, with respect, what 4 Lord Justice Lewison was saying because that is 5 Mr Trower saying, "Lord Justice Lewison is talking about 6 ranking". 7 It simply can't be right, because the non-provable 8 liabilities in the administration in this case, subject 9 to the Supreme Court, and in any liquidation, will have 10 a definitive value. You can't value them at nil. They 11 have a value. 12 Similarly, statutory interest is determined as 13 an actual liability upon the winding up of the company 14 under section 189. It will have a definitive value, so 15 you don't value them at nil. You have to give them 16 their actual value because they are crystallised 17 liabilities within the winding up. Lord Justice Lewison 18 wouldn't have valued them at nil, he would have valued 19 them at the full value because Lord Justice Lewison is 20 valuing the nil liability because it is contingent and 21 the circumstances and nature of that contingency. So he 22 is not valuing it by reference to its ranking. 23 So we say, again, that, if you like, is the 24 distillation of Mr Trower's analysis; how he uses, we 25 say, a misinterpretation of Lord Justice Lewison to</p> <p style="text-align: center;">Page 33</p>	<p>1 prospect of set-off, insofar as it hasn't already 2 occurred in relation to the liabilities owed by LBIE to 3 LBHI2 and the sub-debt claim back from LBHI2. 4 Now, that may just be musings on my part, but I was 5 just trying to work out what was the purpose or the 6 motivation to create the situation that we say is being 7 created. 8 The next point in the analysis deals with the 9 non-application of the mandatory requirements of the 10 insolvency regime. This goes to two points. First of 11 all, your Lordship may recall, earlier on in my 12 submissions, I was suggesting that the position in 13 relation to the contingent liability, where the company 14 was solvent, is that there is no liability due or 15 payable because the contingency hasn't fallen in. The 16 same position obtains in the insolvency because it must 17 be the same. 18 Now, the slight difference there is it does in fact, 19 as a matter of insolvency principle, become due, even 20 though the contingency hasn't happened. It becomes due 21 because that is what we are told happens, by rule 2.81 22 and 2.85, dealing with estimation and set-off. So it 23 becomes due at that point in time, but it is still not 24 payable. It becomes due because it has to be estimated 25 and there is, therefore, we say, an obligation on the</p> <p style="text-align: center;">Page 35</p>
<p>1 putatively support that analysis. 2 Now, it is convenient, I think, if you go to 85, as 3 you have read that, just for me to make this point: 4 I was trying to work out, rightly or wrongly, why the 5 administrators of LBIE might be taking this position. 6 Now, on one level it may simply be, as Mr Arden 7 says, and as was alluded to by the Blakeley Ordinance 8 case, to swell the assets in the estate of LBIE for the 9 benefit of its creditor constituency. What it is 10 actually doing is importing the contributory principle 11 into administration, because what is essentially 12 happening is Mr Trower is saying, "No, there is no 13 set-off here". So you value the out going claim in full 14 which means, in theory, LBHI2 have to pay it and only 15 after that payment is it possible for them to take or 16 participate in any distributions from LBIE. We say that 17 that is, at the moment certainly, impermissible, because 18 the courts thus far have found that the contributory 19 principle doesn't apply in administration. 20 Now, whether or not it is the same aspect of the 21 same issue, either that or they are trying to create 22 a situation whereby set-off, for whatever reason or on 23 whatever basis, hasn't taken place in the 24 administration, then move into liquidation where the 25 contributory principle does apply. So there is no</p> <p style="text-align: center;">Page 34</p>	<p>1 administrators to estimate the liability. 2 It may be that the estimate is nil. They have 3 estimated the incoming claim at nil, as per 4 Lord Justice Lewison, they are adopting that. Then they 5 say, "Nevertheless, the out going claim must be given 6 full value". 7 Just dealing with this point, Mr Trower also said in 8 his submissions, and it was an interesting word: it is 9 a distraction to consider the outbound claim and the 10 inbound claim as mirror images of themselves. 11 In my submission he is right, it is a distraction, 12 because it distracts from the flaw in the arguments as 13 presented by LBIE in order to get from where they start 14 to where they want to finish. The reality is that the 15 sub-debt contribution claim from LBIE against LBHI2 is 16 entirely parasitic upon the sub-debt claim from LBHI2 17 into LBIE. It is highly false to draw a distinction 18 between the two. 19 Now, in the context of estimation you heard from 20 Mr Arden, where he said, "Well, in relation to issue 2, 21 the principal position would be another value, because 22 if one was looking at contingencies, the different 23 contingencies as against the contingencies to which the 24 outbound claim is subject, and the contingencies to 25 which the inbound claim was subject, then in theory</p> <p style="text-align: center;">Page 36</p>

<p>1 because the inbound claim was subject to less 2 contingency than the outbound claim, it would be 3 different a different and higher value. Therefore, in 4 theory, you would have a net balance in terms of any 5 set-off". I am not suggesting we need to go through the 6 exercise, but just for the purposes of articulation that 7 means that there would be a net balance in favour of 8 LBH12. 9 The reality is that set-off has already occurred in 10 this administration. It must have done because it is 11 mandatory. It is self executing. 12 The intervention of the human agency, by which 13 I mean the insolvency practitioner, is to give 14 tangibility to that automatic, self-estimating set-off 15 by providing an estimate for the net balance that arises 16 from the two cross claims. 17 Now, prior to that the estimate may be: well, 18 I can't put it in the set-off account because my 19 estimate of the two claims is nil. 20 Well, so be it. Then it is nil. There isn't, 21 therefore, in relation to the sub-debt contribution 22 claim, anything which could form the basis of 23 a legitimate call by a liquidator, or could form the 24 basis of a legitimate contingent proof by 25 an administrator in this case.</p> <p style="text-align: center;">Page 37</p>	<p>1 estimation of the contingency, an element of hindsight 2 by reference to the date of administration or rather the 3 date when the administration became a distributing 4 administration. 5 Now, my Lord, if we could go to 2.85, which deals 6 with the set-off provisions. Rule 1 says it applies 7 when it has become a distributing administration. 8 Sub-rule 2 deals mutuality. Then if we go over the 9 page, sub-rule 3: 10 "An account shall be taken at the date of the notice 11 of what is due from each party to the other in respect 12 of the mutual dealings and the sums due from one party 13 shall be set-off against the sums due from the other." 14 If you read it with sub-rule 4: 15 "A sum shall be regarded as being due to or from the 16 company for the purposes of paragraph 3 whether it is 17 payable at present or in the future ... (b) the 18 obligation by virtue of which it is payable is certain 19 or contingent, or its amount is fixed or liquidated." 20 So that shows what I meant when I said, "It won't be 21 due or payable in a solvent context but it may become 22 due in the context of an insolvency", because the 23 purpose is to deem it due for the purpose of estimation 24 under 2.81, then insofar as the potential for a set-off 25 as a consequence of mutual dealings, then for the</p> <p style="text-align: center;">Page 39</p>
<p>1 Now, we say that follows. Your Lordship is familiar 2 with Stein v Blake. That is what Stein v Blake says. 3 It is self executing, it is mandatory, it occurs 4 automatically. We also say it is apparent from the 5 relevant rules. My Lord, if it is convenient, could 6 I just take you to those. I know they have been 7 referred to, and Mr Arden refers to them, but I think it 8 pays just to look at them. You can find those in 9 bundle 5 of the authorities bundle, at tab 157. Yes, at 10 157 is rule 2.81. So sub-rule 1 makes it: 11 "Mandatory for the administrator to estimate the 12 value of any debt which by reason of it being subject to 13 any contingency [so this case] or any other reason does 14 not bear a certain value." 15 So where you have an unascertained or unliquidated 16 claim at level 5 in the waterfall, one is obliged to 17 estimate it. You may revise it in the context of or by 18 reference to the hindsight principle. And: 19 "Where the value of the debt is estimated in this 20 rule the amount provable in the administration in the 21 case of that debt is that of the estimate for the time 22 being." 23 As Mr Arden said yesterday, correctly, the value 24 which you would take is the value at the date of proof 25 which would incorporate, insofar as relevant to the</p> <p style="text-align: center;">Page 38</p>	<p>1 purposes of that set-off. 2 So, as I say, this process has already happened. 3 What we don't have is the human intervention of the 4 estimate. Either it is not set-offable because they are 5 both nil, that takes care of itself. Or you can set it 6 off. 7 We say it doesn't really matter in a way, because 8 if, as Mr Trower submits, the contingency is, if you 9 like, binary, it is all or nothing, then it doesn't 10 really matter because the two sides of the equation will 11 always balance. Even if you were adopting an analysis 12 of contingency on the basis of a continuum, it becoming 13 less or greater as you go along that horizontal 14 continuum, you get to the situation where it will always 15 be the same value. So one may then ask the 16 question: why is this creating a difficulty? 17 It is only creating a difficulty because we say LBIE 18 are adopting the wrong analysis as regards the 19 waterfall, the nature of the contingency and the failure 20 to apply the set-off provisions or the estimation 21 provisions that they are required to apply in the course 22 of the administration. 23 Again, I come back to the point I made earlier. 24 Let's assume that you were just assessing what your 25 provable, unsecured liabilities were at level 5, for the</p> <p style="text-align: center;">Page 40</p>

<p>1 purposes of knowing that the likelihood was that the 2 assets of the company in winding up would not be 3 sufficient to pay them. Before you make your call, you 4 have to estimate what those liabilities are. You don't 5 have to ascertain them, but they do require estimation 6 in order to give a three-dimensional element and 7 a justifiable element to the call against the 8 contributories.</p> <p>9 Now, Mr Trower and LBIE in their position paper 10 sought to justify their analysis in relation to why they 11 can give full value to the outbound claim by indicating, 12 by reference to the contract company case in the 19th 13 century, that was an example of where there were plainly 14 future liabilities and, therefore, prior to 15 ascertainment of the liabilities, and prior to the 16 ascertainment of the assets that would be available to 17 the liquidator in the winding up, the liquidator was at 18 liberty to put in a call to shareholders in respect of 19 their unpaid share liability. We say that is a very 20 different situation. That is where one is dealing with 21 actual liabilities. They may be prospective in some 22 cases. They may have already crystallised, but you are 23 estimating what the liabilities are and the liquidators 24 have come to the conclusion that it is necessary to make 25 a call, and the call is upheld by the court.</p> <p style="text-align: center;">Page 41</p>	<p>1 parasitic outbound claim. Either that, or if the 2 administrators are given the value to the outbound claim 3 of, say, 1.3 billion, then that, suffice it to say, is 4 the estimate that they are giving to the inbound claim, 5 because the two -- it is binary. They can't have, on 6 this analysis, different values.</p> <p>7 Now, the way out of the conundrum is to apply 8 Lord Justice Lewison's analysis, and it may be no more 9 than analysis of cutting the Gordian knot, and no more 10 sophisticated than that. But in terms of, "I have a 11 contingency", the context of that contingency is it 12 relates to subordination. I don't want to upset the 13 subordination because of the regulatory context that it 14 applies in and, therefore, the nature of the right or 15 the nature of the liability can only be valued at nil, 16 until such time that the contingency has fallen in.</p> <p>17 MR JUSTICE HILDYARD: Going back to the actual section, 18 section 70 --</p> <p>19 MR ATHERTON: 74.</p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR ATHERTON: Yes, my Lord.</p> <p>22 MR JUSTICE HILDYARD: We will have a break soon.</p> <p>23 MR ATHERTON: I beg your pardon, yes.</p> <p>24 MR JUSTICE HILDYARD: Which I have in 132 of the same 25 volume 5.</p> <p style="text-align: center;">Page 43</p>
<p>1 But what one had in that case is -- and I don't 2 think I need to take you back to it, but if your 3 Lordship goes to, we say, that case and -- I have lost 4 my reference, but I will come back to it.</p> <p>5 There are three cases which deal with this issue, 6 but if you look at the rehearsal of the evidence, the 7 liquidators have actually gone to the effort of 8 estimating the liabilities that support, or in support 9 of, the call that they wish to make. The court says it 10 is entirely justifiable.</p> <p>11 What is not justifiable is, as in the 12 Blakeley Ordinance, one cannot put in a call for 13 liabilities which do not exist, or which haven't been 14 estimated. You cannot put a call in -- and this is 15 I think the Barnard's Bank (?) case -- you cannot put 16 a call in where it is obvious that the assets will be 17 sufficient to pay the liabilities. All we have here is 18 a situation where there is no estimate of the incoming 19 claim, or rather the incoming claim is estimated at nil, 20 but there is arguably no corresponding estimate applied 21 on any reasoned basis to the outgoing claim.</p> <p>22 Now, your Lordship might think: well, because these 23 two claims are parasitic, in fact either we say the 24 position is the inbound claim has been valued or 25 estimated at nil, and that must dictate the value of the</p> <p style="text-align: center;">Page 42</p>	<p>1 MR ATHERTON: Yes.</p> <p>2 MR JUSTICE HILDYARD: The thing is, to me it rather depends 3 whether you are using the spectacles of limited 4 companies or unlimited companies. Take the case first 5 of a limited company:</p> <p>6 "When a company is wound up every present, last 7 member liable to contribute ...(Reading to the words)... 8 payments of its debts and liabilities and the expenses."</p> <p>9 Now, in the context of a limited company, we know 10 that liability is actually capped --</p> <p>11 MR ATHERTON: Correct.</p> <p>12 MR JUSTICE HILDYARD: -- by the nominal amount of the 13 share. But if you have a company where some of the 14 share capital is paid in full and some not, it seems 15 odd, doesn't it, that you pre-estimate in order to 16 determine whether you should make a call? You should 17 really make a call, shouldn't you, on their unsatisfied 18 contractual liability to pay up to the nominal amount?</p> <p>19 MR ATHERTON: Well, the anterior question, my Lord, is 20 whether or not one needs to. If there are sufficient 21 assets within the estate of the company, one doesn't 22 need to make the call.</p> <p>23 MR JUSTICE HILDYARD: Well, is that right? Or from the 24 point of view of ensuring that the capital account, as 25 it were, is made good, because you -- I can't remember</p> <p style="text-align: center;">Page 44</p>

1 what the accounting treatment of an unpaid share is.
 2 I would have thought that was just an asset of the
 3 company.
 4 MR ATHERTON: Well, I would say it is part of the capital.
 5 MR JUSTICE HILDYARD: Yes.
 6 MR ATHERTON: We will come to this in relation to issue 1.
 7 But I think --
 8 MR JUSTICE HILDYARD: So it would really be a distribution
 9 to those shareholders if you didn't call it in, surely,
 10 in effect?
 11 MR ATHERTON: Perhaps if we go to tab 143, my Lord. I am
 12 not sure we have looked at section 150 in any detail.
 13 This is where the ascertainment issue comes in:
 14 "The court may at any time after making a winding up
 15 order, and either before or after it has ascertained the
 16 sufficiency of a company's assets, make calls on all or
 17 any of the contributories for the time being to the
 18 extent of their liability for payment of any money which
 19 the court considers necessary to satisfy the company's
 20 debts and liabilities."
 21 Now, I read "ascertainment" as being definitive.
 22 But it is plain that the exercise of the power to make
 23 the call is linked to the necessity to satisfy the
 24 company's debts and liabilities.
 25 MR JUSTICE HILDYARD: And for the adjustment of the right to

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1 the contributories amongst themselves.
 2 MR ATHERTON: Yes, of course. At the initial stage, one has
 3 to estimate what the liabilities are and then see if
 4 a necessary adjustment is made.
 5 If the situation is that the liabilities are
 6 relatively small and the company's assets are relatively
 7 large, then it may be that you don't need a call.
 8 The reality is, of course, if you are in liquidation
 9 then the assets are likely to be insufficient to meet
 10 the liabilities in which case, in all likelihood, you
 11 would need to make a call. This is why I think the old
 12 cases show that the liquidators come to court with
 13 estimates and evidence to indicate why the assets are
 14 insufficient and what the levels of liabilities are, in
 15 order that the court or the jurisdiction can be
 16 exercised.
 17 MR JUSTICE HILDYARD: I really ought to know the answer to
 18 this, but I just don't, I am afraid.
 19 Take the case of the limited company. Some of the
 20 shareholders are paid in full to the nominal amount of
 21 their shares, some have not. Let us take the first
 22 example, where the assets prove sufficient for the
 23 payments of it is liabilities.
 24 MR ATHERTON: Yes.
 25 MR JUSTICE HILDYARD: Normally, as I understand it, any

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1 distribution of surplus will then be according to the
 2 stated nominal amount.
 3 MR ATHERTON: Correct.
 4 MR JUSTICE HILDYARD: But some of them will have paid the
 5 nominal amount and some not.
 6 MR ATHERTON: That's right. I am sorry.
 7 That is when you have the adjustment. You make the
 8 call against those who have not paid, in order that
 9 those who have paid do not take the entirety of the
 10 burden.
 11 MR JUSTICE HILDYARD: If that is so, why didn't you do it
 12 first off? Because you are going to have to do that in any
 13 event, either because there is a deficiency or because
 14 there would be a surplus and there is a need for
 15 an adjustment.
 16 MR ATHERTON: But it may also depend on the amount of the
 17 call.
 18 MR JUSTICE HILDYARD: Well, no. Well, they may, subject to
 19 the conditions of the limitation, but assume it is the
 20 usual limitation, capped at nominal value. Why do you
 21 have to make any pre-estimate? You are going to have to
 22 call that in, one way or the other.
 23 MR ATHERTON: Because I think the situation is this: you do
 24 estimate the assets and liabilities, and that will
 25 dictate what level of call you may need to make against

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1 those who have not paid the entirety of the shares.
 2 Because it may not be necessary to make a call
 3 against --
 4 MR JUSTICE HILDYARD: I think that is my point: why? One
 5 way or the other, if there is a deficiency you are going
 6 to have to get them to pay up, insofar as they have not
 7 paid the nominal capital. If there is a surplus you are
 8 going to have to do it, in order that some shareholders
 9 shouldn't get a benefit denied others. One way or
 10 another, you are going to have to call up to the
 11 nominal. You know that, you don't need any estimate at
 12 all.
 13 MR ATHERTON: In order to come to the conclusion that you
 14 need to call up all the unpaid elements from all the
 15 shareholders, then you will have had to undertake
 16 an estimate of the liabilities and the assets.
 17 MR JUSTICE HILDYARD: Why? That is my point.
 18 MR ATHERTON: Because there may be a situation where you
 19 estimate the liabilities and the assets and it only
 20 requires a certain level of contribution from those who
 21 have not paid, and then they will pay pari passu and
 22 make that contribution.
 23 Now, if it turns out that there is still an element
 24 of unpaid -- and when you are doing that you may take
 25 into account any adjustment that you think is

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<p>1 appropriate to deal with shareholders. If at that point 2 in time they are still insufficient, you can make 3 another call. That was common ground as accepted by 4 Lord Justice Briggs, that a liquidator can make more 5 than one call, and the same would be true in the context 6 of an unlimited company. But you estimate the balance 7 sheet at what you think you will need. It may be 8 an over estimate, it may be an under estimate. But 9 that, I think, in my submission is the process and is 10 indicated as being the appropriate course by reference 11 to section 150.</p> <p>12 MR JUSTICE HILDYARD: So you read 74 -- and this may be 13 common ground for all I know. But when it says: 14 "When is company is wound up every present and past 15 member is liable to contribute to its assets to any 16 amount sufficient for the payment of its debts and 17 liabilities." 18 You say that means its debts and liabilities as 19 estimated from time to time and after the application of 20 mandatory set-off.</p> <p>21 MR ATHERTON: Yes. Yes, I do.</p> <p>22 MR JUSTICE HILDYARD: So --</p> <p>23 MR ATHERTON: I would go as far as to say that I don't think 24 that is novel, in my submission.</p> <p>25 MR JUSTICE HILDYARD: No, I just want to make clear that</p> <p style="text-align: center;">Page 49</p>	<p>1 confused in my mind.</p> <p>2 MR ATHERTON: You have certainly confused me, my Lord.</p> <p>3 MR JUSTICE HILDYARD: Good. All right. Five, ten minutes.</p> <p>4 MR ATHERTON: I am obliged.</p> <p>5 (11.58 am)</p> <p>6 (A short break)</p> <p>7 (12.09pm)</p> <p>8 MR ATHERTON: I am obliged, my Lord.</p> <p>9 I wonder whether it may help just on what the issue 10 we are dealing with if we went to tab 147, in bundle 5. 11 This is section 154, which deals with the adjustment of 12 rights between contributories. That may also indicate 13 that one would, for example, make a call in relation to 14 liabilities and then immediately before, if there were 15 any surplus, one with then consider what the adjustment 16 might be and, insofar as necessary, make a call in 17 respect of adjustment, or indeed a potentially further 18 call.</p> <p>19 Now, the point, the bombshell that your Lordship 20 left court on is the question: what is the limitation? 21 In unpaid capital cases the limitation is the 22 element that is unpaid.</p> <p>23 Now, your Lordship said, in the course of 24 Mr Trower's submissions, if your Lordship has the 25 transcript from day 1 again -- and I am sorry to jump</p> <p style="text-align: center;">Page 51</p>
<p>1 that is what it means?</p> <p>2 MR ATHERTON: Yes, because one is dealing with sufficiency.</p> <p>3 One is not simply saying: you owe all your money on the 4 unpaid element of the capital, I want it all in.</p> <p>5 To use a phrase that Mr Trower is fond of: it is 6 a bit more nuanced than that.</p> <p>7 I think that is borne out when one reads 74 with 8 section 150.</p> <p>9 MR JUSTICE HILDYARD: So I must rid myself of the notion -- 10 which is in fact not a notion supported by any of you, 11 so I ought to rid myself of it -- but there is 12 a distinction between the obligation of any shareholder 13 to pay up any amount uncalled on his share, up to the 14 nominal value, and any other exposure to that 15 contributory, under the provisions of section 74. It is 16 all one unitary obligation.</p> <p>17 MR ATHERTON: Yes. Yes, but it doesn't stop you coming back 18 if there is more to be paid.</p> <p>19 MR JUSTICE HILDYARD: Well, that is a question of 20 estimation --</p> <p>21 MR ATHERTON: Yes, exactly.</p> <p>22 MR JUSTICE HILDYARD: -- and hindsight.</p> <p>23 MR ATHERTON: Exactly.</p> <p>24 MR JUSTICE HILDYARD: Yes, yes. Sorry, it is probably 25 a very (inaudible) point. I think I have become</p> <p style="text-align: center;">Page 50</p>	<p>1 around. I apologise.</p> <p>2 MR JUSTICE HILDYARD: Hold on. Yes.</p> <p>3 MR ATHERTON: If your Lordship could go to page 74, and 4 perhaps in fairness your Lordship should just read -- 5 because I have highlighted the previous passages. If 6 your Lordship starts at page 72, just if it helps the 7 context, from line 23. This is Mr Trower to your 8 Lordship, and then continue reading to page 74, line 6. 9 Or maybe 8.</p> <p>10 (Pause)</p> <p>11 MR JUSTICE HILDYARD: Where down to?</p> <p>12 MR ATHERTON: Page 74, probably line 9, my Lord. I think 13 that draws it to a conclusion.</p> <p>14 MR JUSTICE HILDYARD: Yes, okay.</p> <p>15 (Pause)</p> <p>16 Yes.</p> <p>17 MR ATHERTON: I think that is the point that your Lordship 18 was getting at. You have the obvious cap in the context 19 of a limited company but, potentially, no cap in the 20 context of an unlimited company.</p> <p>21 MR JUSTICE HILDYARD: Mm-hm.</p> <p>22 MR ATHERTON: The answer to that, in my submission, is that 23 it is capped by reference to section 74 and section 150. 24 You make the call against those members in an unlimited 25 company in an amount which is, by reference to</p> <p style="text-align: center;">Page 52</p>

<p>1 section 74, sufficient for the payment of the company's 2 debts or liabilities and then, by reference to 3 section 150, by reference to what the court considers 4 necessary to satisfy the company's debts and 5 liabilities. So there is an inherent statutory cap and 6 that again, in my submission, undermines the analysis 7 that the outbound claim from LBIE to LBHI2 is full 8 value, because you simply cannot say that that is 9 a liability of the company. The value must be nil, we 10 say. 11 The point I was going to make in support of that 12 is -- and this is a point that Mr Arden made 13 yesterday -- the ability to make calls, or the 14 jurisdiction to make calls, it must be limited to the 15 specified purposes of section 74 and section 150. 16 Anything outwith that would be a wrongful exercise of 17 the jurisdiction, or would be beyond the jurisdiction as 18 prescribed by the two sections. Now, that, I think, was 19 supported by Mr Arden's reference to the case of 20 King v Tate. 21 MR JUSTICE HILDYARD: Just one moment. 22 MR ATHERTON: Of course. 23 MR JUSTICE HILDYARD: King v Tate was the one where 24 effectively the contributories had a bit of 25 a windfall --</p> <p style="text-align: center;">Page 53</p>	<p>1 MR JUSTICE HILDYARD: So the guarantee -- taking the 2 question I asked Mr Trower -- is not of the actual 3 liability but the estimated liability in the insolvency 4 accounts? 5 MR ATHERTON: Correct. Correct. 6 MR JUSTICE HILDYARD: As estimated from time to time. 7 MR ATHERTON: Yes, indeed. Indeed, as set out in rule 2.85 8 of the Insolvency Rules. 9 MR JUSTICE HILDYARD: There is no difference in quality 10 between the contractual obligation of shareholders to 11 pay up on their shares in a limited company, and the 12 uncapped, subject to statutory cap, liability of 13 shareholders in unlimited companies. 14 MR ATHERTON: In my submission, yes. So there is that 15 element of symbiosis. But, of course, the potential for 16 liability is obviously at large in principle in the 17 unlimited context, subject to the liabilities expenses 18 of the winding up. 19 My Lord, just for your Lordship's note, if I could 20 just pause there and go back to a particular issue, we 21 spoke about dependencies, you spoke about dependencies 22 with Mr Trower -- 23 MR JUSTICE HILDYARD: I am so sorry. 24 MR ATHERTON: No, of course. 25 MR JUSTICE HILDYARD: It just shows my ignorance. In</p> <p style="text-align: center;">Page 55</p>
<p>1 MR ATHERTON: That's right. 2 MR JUSTICE HILDYARD: -- at the expense of the creditors. 3 MR ATHERTON: That's right. But the point was that you 4 couldn't make a proof for a call for any more than was 5 actually represented to the liabilities. 6 MR JUSTICE HILDYARD: Correct me if I am wrong, but what you 7 are explaining to me is: once the insolvency process has 8 begun, all liabilities are in accordance with 9 an estimate. Their reality is no longer. 10 MR ATHERTON: That's right. Well, either they bear their 11 value, where there is -- 12 MR JUSTICE HILDYARD: Sorry? 13 MR ATHERTON: They bear their value, in terms of liability 14 where there is no issue. 15 MR JUSTICE HILDYARD: Yes. 16 MR ATHERTON: Or contingent -- 17 MR JUSTICE HILDYARD: If there is any reduction because of 18 the exigencies of there being a deficiency -- 19 MR ATHERTON: That's right. 20 MR JUSTICE HILDYARD: -- liability means estimate 21 liability. 22 MR ATHERTON: Correct. Of course, with the benefit of 23 hindsight, you are not precluded from making further 24 calls or further estimations because one can take into 25 account the hindsight principle.</p> <p style="text-align: center;">Page 54</p>	<p>1 a limited company, the reason why I think I rebel 2 against the notion in any context the shareholders may 3 not be as a matter of automaticity, as it were, called 4 up to the nominal value is because otherwise they will 5 in effect have achieved the issue of shares at 6 a discount. So I have always imagined -- wrongly it 7 seems -- that as to the nominal amount, they had to 8 cough up in any event. 9 MR ATHERTON: The reality is, my Lord, they will always be 10 required because otherwise you are probably in a solvent 11 liquidation. So the reality is that the -- 12 MR JUSTICE HILDYARD: That is what I am getting at. 13 Whatever the situation. In a solvent situation, it is 14 going to be unfair if they get a return at nominal 15 having not paid it. 16 MR ATHERTON: No, but then before you distribute the 17 surplus, by reference to section 154, there is 18 an adjustment. 19 MR JUSTICE HILDYARD: Yes. 20 MR ATHERTON: To ensure that those who have paid in full are 21 not bearing the burden. 22 MR JUSTICE HILDYARD: This is a notional adjustment. 23 MR ATHERTON: Well, it may have to be an actual adjustment 24 that comes in to ensure the full surplus, or those who 25 haven't paid -- it may be a bit like the rule in</p> <p style="text-align: center;">Page 56</p>

<p>1 Cherry v Boltby, where you make a contribution and then 2 you share out in the distribution. 3 MR JUSTICE HILDYARD: Yes. That is another facet of my 4 surprise that you have to estimate before you call in 5 a limited company, but there we are. That is the rule, 6 is it? 7 MR ATHERTON: Well, in my submission that is what the 8 principle, or the regime required or set out in the Act, 9 by 74, section 150. As your Lordship is intimating, the 10 reality may be very different. 11 In the old cases, of course, one had very large 12 unpaid capital. That was just what happened. Then, 13 I think the position was in 1865, when there was in the 14 UK and Europe a form of depression or recession, that is 15 when all of these companies started to collapse and all 16 these liabilities for unpaid capital were being called 17 in; that led to a change whereby you had your £1 share 18 and you paid your £1, so there was a difference in -- 19 MR JUSTICE HILDYARD: You are still allowed to issue shares 20 unpaid, aren't you, in a private company? In a 21 public company it has to be 25 per cent paid at the very 22 at least. 23 MR ATHERTON: That's right, yes. 24 MR JUSTICE HILDYARD: And it has to be paid in cash, or cash 25 equivalent. I thought those were sort of maintenance of</p> <p style="text-align: center;">Page 57</p>	<p>1 the nil valuation on the one side, you say it can't be 2 more than that on the other side, and there we are. 3 MR ATHERTON: That's right. That's right. But before 4 I leave this issue, if your Lordship has concluded 5 interrogating me on that. 6 MR JUSTICE HILDYARD: No, I am sorry. 7 MR ATHERTON: All I was going to say to your Lordship is you 8 were discussing dependencies with Mr Arden yesterday, 9 and with me -- excuse me. 10 I am sorry, my Lord, Lord Justice Briggs, at 11 paragraph 164 and 198, makes the point that in relation 12 to currency conversion, they are not contingent 13 liabilities. They are full blown actual liabilities, 14 crystallised liabilities, of the company. At 15 paragraph 198, he essentially makes the same point about 16 statutory interest. So they are the points I was 17 making, they are crystallised, actual liability of the 18 company from the outset, so they are not contingent and 19 they are not, in relation to the currency conversion 20 claims and statutory interest, they are already 21 crystallised. They may have to be subject to 22 calculation, but they are not contingent. 23 MR JUSTICE HILDYARD: So on the findings of the 24 Court of Appeal, the unlimited shareholders are liable 25 for that, are they?</p> <p style="text-align: center;">Page 59</p>
<p>1 capital and the whole thing was cohesive, in the sense 2 that as to that element of the exposure of a 3 contributory they would never, in any circumstance, be 4 allowed ultimately not to pay up. 5 MR ATHERTON: I don't think I am disagreeing with your 6 Lordship. I think the process of call and adjustment, 7 whether in an insolvent liquidation or a solvent 8 liquidation. Which is the purpose of this, of these 9 contributory rules -- if I can use it in a non-technical 10 sense -- as provided for by the Act, are there to ensure 11 that the losses in the company are borne equitably as 12 between the membership. That is the objective, the 13 goal. 14 MR JUSTICE HILDYARD: Anyway, it may not matter because you 15 say we are dealing with an unlimited company in an 16 unlimited context. The guarantee, the exposure of the 17 contributory, the unlimited contributory is in respect 18 of the estimated liabilities of the company from time to 19 time, after the application of mandatory set-off. 20 MR ATHERTON: Yes, my Lord. 21 MR JUSTICE HILDYARD: That is that. 22 MR ATHERTON: Yes. I don't personally, or in my submission 23 that is not heterodox or antithetical. 24 MR JUSTICE HILDYARD: No. In a sense, that is a sort of 25 simple way through from your point of view. You accept</p> <p style="text-align: center;">Page 58</p>	<p>1 MR ATHERTON: Yes. 2 MR JUSTICE HILDYARD: In full? 3 MR ATHERTON: Yes. Correct. 4 What Mr Trower says is that we are seeking to hide 5 behind the trickle down. If it doesn't trickle down, we 6 are not liable. That is plainly not correct, because 7 where the liabilities are in the waterfall, they are 8 liabilities and a call can be made. Absolutely. The 9 reason Mr Trower's articulation of what our position 10 must be is flawed is because it derives from the 11 mischaracterisation of the contingency in the context of 12 the waterfall. 13 I did say to your Lordship that there may be 14 a circumstance where one has to bite the bullet in 15 a case like this. I am just trying to provide a sort of 16 logical conclusion as to where one might go in this 17 case. 18 Now, your Lordship was taken by Mr Arden, yesterday, 19 to Danka case. That provides an illustration, in the 20 sense that if you have a contingency, which may or may 21 not fall in -- and that was the contingency on 22 an indemnity, so it is much more straightforward, 23 I accept that -- it is not appropriate for the office 24 holder to simply sit there and wait to see whether the 25 contingency falls in, because that would really just</p> <p style="text-align: center;">Page 60</p>

<p>1 prolong the process. The whole point about estimation, 2 the point about set-off, within the pari passu 3 principle, is to draw a conclusion to the process and 4 allow the distribution to take place as quickly, 5 efficiently and as fairly as possible.</p> <p>6 Now, your Lordship may recall Lord Justice Patten 7 said, "Well, waiting for the contingency to fall in is 8 not estimation, and you are not obliged to keep a fund 9 open against which proofs can be made in relation to 10 contingency, you have to bite the bullet". That is 11 that. Apply that reasoning -- which must be right, and 12 I don't think anyone would dissent from that -- to this 13 case. In my submission the way in which the 14 administrators could crystallise this issue is by 15 placing an estimate on the inbound and the outbound 16 claims. Either at nil, so there is not actually 17 anything set-off, but that is the issue, that deals with 18 it, because either there doesn't seem to be any prospect 19 of the contingency falling in or if it does fall in, it 20 won't fall in for several years. Remember in the 21 context here, that these issues are sought to be 22 determined in order to allow a release of funds which 23 have been locked into the process for several years now, 24 not least because of the complexity of the competing 25 interests. So it might be that they either say nil, or</p> <p style="text-align: center;">Page 61</p>	<p>1 MR JUSTICE HILDYARD: The contingency is wrapped up in the 2 solvency issue.</p> <p>3 I don't agree with Lord Justice Lewison that it is 4 nil, I am going to say it is ten or whatever it is.</p> <p>5 MR ATHERTON: But your Lordship doesn't actually have to 6 make that.</p> <p>7 MR JUSTICE HILDYARD: I know, but I am trying to work out 8 whether it is all wrapped up in the contingency or as 9 a matter of law, or it is merely a process of 10 estimation.</p> <p>11 MR ATHERTON: I am not a statistician, but it may be that 12 an actuary or a statistician could place a value on the 13 contingency. With all of the relevant information, what 14 are the prospects of all prior ranking claims being 15 paid?</p> <p>16 My Lord, would it be convenient for me to move on to 17 a different topic?</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 MR ATHERTON: I was now going to just deal, briefly, with 20 the paragraph 63 issue of Mr Arden's --</p> <p>21 MR JUSTICE HILDYARD: Yes.</p> <p>22 MR ATHERTON: -- skeleton argument.</p> <p>23 Now, I think the way Mr Arden dealt with it, if 24 I might say so, sort of deals with it. The simple fact 25 of the matter is that set-off, as a matter of English</p> <p style="text-align: center;">Page 63</p>
<p>1 in order to, as I said, cut the Gordian knot, simply 2 place a value on it. It may be a notional value.</p> <p>3 I don't know, but what that points towards is the, if 4 you like, commonsense approach is that adopted by 5 Lord Justice Lewison in taking a nil value rather than 6 putting some value on it, which may or may not 7 compromise the subordination and therefore give LBHI2 8 a benefit which, by reference to its subordinated 9 status, allows it to participate in a way which was 10 never intended.</p> <p>11 MR JUSTICE HILDYARD: At the risk of being a dog with 12 a bone, when Lord Justice Lewison says, "One would 13 expect", is he saying that as a matter of law it is nil 14 or is it a matter of his practical experience or 15 anticipation that it is nil? And are you saying: that 16 may be right, it may be wrong; it would depend on the 17 liquidator?</p> <p>18 MR ATHERTON: I don't think that one is concerned with it as 19 a matter of law. I think one is concerned with it as 20 a matter of estimate, in the circumstances.</p> <p>21 MR JUSTICE HILDYARD: So it would be consistent with what 22 Lord Justice Lewison says to adopt, broadly, the 23 following: I mustn't take into account the economic 24 factors as such.</p> <p>25 MR ATHERTON: Yes.</p> <p style="text-align: center;">Page 62</p>	<p>1 insolvency law, heritage and policy, is considered to 2 be, when dealing with mutual claims, the best way of 3 manifesting the pari passu principle. So set-off is 4 an element of pari passu, not anti-deprivation and 5 therefore, on the basis of the discourse that you had 6 with Mr Trower, it is not capable of being abrogated.</p> <p>7 That is clear from the NatWest Bank v Halesowen case, 8 which I am sure your Lordship is familiar with. Does 9 your Lordship want me to take you to the authority?</p> <p>10 MR JUSTICE HILDYARD: Perhaps you had better, just in case.</p> <p>11 MR ATHERTON: Yes, of course.</p> <p>12 MR JUSTICE HILDYARD: I mean, it was mentioned by Mr Arden.</p> <p>13 MR ATHERTON: Yes. I don't think it is controversial in 14 terms of actually establishing the principle.</p> <p>15 MR JUSTICE HILDYARD: No.</p> <p>16 MR ATHERTON: It is in bundle 2, at tab 61. I don't think 17 one needs to go to the headnote, but what I would ask 18 your Lordship to go to is page 802 and the speech of 19 Lord Dillon. The analysis starts at just below E, the 20 paragraph beginning:</p> <p>21 "In the Court of Appeal ..."</p> <p>22 Just so your Lordship gets the whole process, if 23 your Lordship wouldn't mind reading through to 805, just 24 above E.</p> <p>25 MR JUSTICE HILDYARD: Okay.</p> <p style="text-align: center;">Page 64</p>

<p>1 MR ATHERTON: I think that will deal with that particular 2 issue. 3 (Pause) 4 MR JUSTICE HILDYARD: Yes. 5 MR ATHERTON: I am obliged. For your Lordship's note, Lord 6 Simon of Glaisdale concurred, at page 808F through to 7 809B, as did Lord Kilbrandon, at 823 to 824. There was 8 a dissent from Lord Cross of Chelsea at 818A to B. 9 My Lord, the same principle, by reference to the 10 Halesowen case, was applied in the MS Fashions case in 11 the Court of Appeal. Again, for your Lordship's note, 12 that is bundle 2, tab 68 and it is Lord Justice Dillon 13 at page 446. That establishes the principle. 14 Your Lordship went to clause 7B this morning with 15 Mr Arden, and we therefore say it is put in terms by 16 LBIE in response to the iterative process that Mr Arden 17 is embarking upon in paragraph 63 by saying that is not 18 what we or LBH suggest is the position, but it is 19 testing what would happen if LBIE's postulated position 20 was correct. We, when we read, or when we were 21 considering LBIE's position, came up with essentially 22 the same analysis, albeit that we say the analysis would 23 arise earlier, because of course the contingency, which 24 the payment of the sub-debt is subject to, is not, as 25 suggested by Lord Justice Lewison, the payment of prior</p> <p style="text-align: center;">Page 65</p>	<p>1 divider 12. It is couched in terms, by LBIE, that LBHI2 2 is seeking to set-off. That is not the position. The 3 position is that set-off would arise automatically and 4 on a mandated basis by reference to rule 2.85. So the 5 attempt to preclude that mandatory process by reference 6 to a contractual term, as set out in the sub-debt 7 agreement, as we say four square in opposition to what 8 the House of Lords held in the Halesowen case. 9 My Lord, I have finished, I think, on issue 3. 10 I was then just going to go and deal with issue 7.5, if 11 I might. I am obliged. 12 I think I can take this, hopefully, slightly 13 quicker, but I think it is important to remind oneself 14 of what the issue is because, in my submission, LBH is 15 the only party that has actually answered the question 16 that is posed. 17 The issue is whether the LBHI administrators should 18 be directed to assert less than 100 per cent of the 19 contribution claim against LBL and/or LBHI2 and, if so, 20 by how much the contribution claim should be reduced as 21 against LBL and/or LBHI2 and what factors should the 22 court take into account in reaching its decision. 23 The first point I make is that the question is posed 24 and directed towards the position in administration, not 25 in liquidation. We say that the answer to the question</p> <p style="text-align: center;">Page 67</p>
<p>1 ranking liabilities. It is the ability of LBIE to pay 2 prior ranking liabilities. 3 It is a difference not of substance. Rather than, 4 as Mr Arden says, there would have to be a repayment of 5 dividends, we would say that when you put in your proof 6 and you work out what the dividends are, you will work 7 out if the dividend is such from LBHI2 that you would 8 become able to pay the prior ranking liabilities, the 9 consequence of that would be there would then be 10 a set-off in terms of the two claims. You would be able 11 to work it out, and there wouldn't be any payment anyway 12 because of the set-off that arises by reference to the 13 two cross claims as between LBIE and LBHI2. Therefore 14 rendering LBIE back in to the position that it is not in 15 fact able to satisfy the prior ranking liabilities. But 16 other than that small divergence, we agree with the 17 analysis. 18 Your Lordship may find in the correspondence 19 bundle -- and I am not suggesting we go to it now -- for 20 your Lordship's note: this point was first raised by 21 LBIE by letter to Mr Arden's instructing solicitors, 22 Dentons, on 27 January 2017. That is in the 23 correspondence bundle, at divider 10. Then, the 24 response, which for LBH's part we endorse, is by letter 25 from Dentons of 30 January 2017, in the same bundle, at</p> <p style="text-align: center;">Page 66</p>	<p>1 follows on from the submission that I have made and that 2 Mr Arden has made -- I am jumping ahead slightly, but in 3 direct answer to the question -- should be that the LBIE 4 administrators should be directed that they are not to 5 make a contribution call against either LBL or LBHI2. 6 We say that is the corollary of the position as 7 postulated by LBH, LBHI2 and I think LBL. 8 Now, the logically anterior question is whether or 9 not the court has the jurisdiction to direct the 10 administrators to do anything. We say that is tolerably 11 clear and, again, I don't think it is necessary for me 12 to take your Lordship to any of the authorities on this 13 because I don't think it is controversial. 14 First, it is quite plain that an administrator is 15 an officer of the court and, therefore, subject to the 16 supervisory jurisdiction of the court; that is made 17 clear in the Atlantic Computer case, just for your 18 Lordship, at page 529. That is at bundle 2 of the 19 authorities, divider 67. 20 Now, there is a further aspect to the supervision of 21 the court in respect of an administrator. That is 22 paragraph 74 of schedule B1, which I am not sure is in 23 the bundle. That allows relief to be granted where -- 24 does your Lordship have it? That is great. I am 25 grateful for that.</p> <p style="text-align: center;">Page 68</p>

<p>1 Your Lordship will find it in Sealy & Milman, at 2 page 653, if you are in the same edition. So where the 3 administrator is acting, or has acted so as to unfairly 4 harm the interests. 5 Just for the transcript writer that is F-A-I-R-L-Y, 6 not F-U-R-L-Y. It's just my accent, everyone writes it 7 down, they think I am saying "fur" when I mean "fair". 8 That is a further aspect of the ability of the court 9 to grant relief in relation to an administrator, 10 specifically. 11 The third aspect is as was applied by 12 Mr Justice David Richards in another of the Lehmans 13 related case, which is 14 Lomas v Burlington Loan Management, which your Lordship 15 will find at bundle 4, divider 101. There is 16 an exposition of a principle, at paragraphs 174 to 183. 17 That is quite an interesting case, where, amongst 18 others, certain creditors, including currency conversion 19 creditors, had entered into settlement agreements. On 20 one construction of those agreements, it would appear or 21 it was suggested that the currency conversion creditors 22 had waived their claims. Mr Justice David Richards 23 found that in fact on the proper construction of the 24 agreements that didn't happen, but if that was the 25 proper construction, he would have precluded the</p> <p style="text-align: center;">Page 69</p>	<p>1 one is dealing strictly with the ability of the 2 liquidator to make calls under section 74 and 3 section 150. Your Lordship heard from Mr Trower about 4 the use of the word "may". I think we accept, it is not 5 a discretion which is boundless, but it does give the 6 court the ability to exercise some discretion as to the 7 amount of the call, and the timing of the call. It may 8 even allow you to make unequal calls. I think that 9 Mr Arden accepted that this morning. It may be that in 10 the exercise of any power over the administrators, in 11 any given case, the court would exercise its supervisory 12 jurisdiction by reference to the proscriptions or the 13 ambit inherent within section 74 and section 150. The 14 reason why this has resonance in this case is because of 15 the position which has been adopted by the 16 administrators of LBIE as regards the valuation of the 17 outbound claim into the administration of LBH12. 18 We say either it is wrong, for the reasons that 19 I have sought to develop this morning, in which case the 20 reality is: if your Lordship found that it was wrong, 21 then it wouldn't be pursued by the administrators. 22 I have no doubts about that. But, in theory, your 23 Lordship could direct that they were not to make any 24 contribution claim as against LBH12 or LBL, either 25 because it wasn't within or for the purposes of</p> <p style="text-align: center;">Page 71</p>
<p>1 administrators from relying on their strict legal rights 2 by reference to that construction, such that they 3 wouldn't be entitled to say that the claims had been 4 waived. 5 MR JUSTICE HILDYARD: This was on ex parte James grounds, 6 was it? 7 MR ATHERTON: That's right, yes. 8 MR JUSTICE HILDYARD: Yes. 9 MR ATHERTON: It comes down, in that context, to the office 10 holder having to be more honourable than the most 11 honourable person, if I can put it that way. There is 12 a much higher threshold of conduct. 13 It wasn't suggested in the case -- just as it isn't 14 suggested here -- that the administrators in that case 15 were doing anything wrong. It was simply a question 16 of: if that construction had obtained, then the judge 17 would have precluded the reliance on that construction 18 by the office holder, even though it was strictly in 19 accordance with the legal rights, if that had been the 20 interpretation. 21 It is right therefore, we say, that in this context, 22 where we are in administration, arguably, the ability of 23 the court to control the conduct of the administrator is 24 wider than it might be in relation to a liquidator. 25 The reason I say that is because in a liquidation</p> <p style="text-align: center;">Page 70</p>	<p>1 section 74 or anything like a notional equivalent, or 2 because arguably, notwithstanding that they were 3 correct -- and your Lordship doesn't have to make this 4 determination -- it could be considered to be unfair as 5 regards the contributories. Bringing into either ex 6 parte James and/or the -- 7 MR JUSTICE HILDYARD: Ex parte James isn't a sort of general 8 palm tree, is it? 9 MR ATHERTON: It is often used like that, I accept, but I am 10 trying to -- 11 MR JUSTICE HILDYARD: But, I mean, in 12 Mr Justice David Richards case, there was basically 13 a case of estoppel. 14 MR ATHERTON: Yes. 15 MR JUSTICE HILDYARD: The question was if the court should 16 give effect to estoppel by, in the particular context, 17 invoking the ex parte James rule. 18 MR ATHERTON: Yes. 19 MR JUSTICE HILDYARD: But that is not a sort of general wand 20 of what I think might be fair or practical, or anything 21 else. I mean, it has to have some legal or equitable 22 footing, hasn't it? 23 MR ATHERTON: Well, Mr Justice David Richards puts it on the 24 ground of unfairness and says that is a recognised 25 concept in English law and it is essentially the same,</p> <p style="text-align: center;">Page 72</p>

<p>1 because he said he would have applied paragraph 74. 2 MR JUSTICE HILDYARD: But he had the benefit of the fact 3 that it fitted neatly, didn't it, in to the general 4 concept of estoppel? 5 MR ATHERTON: I think that is probably fair in the 6 circumstances of the case. I don't disagree with your 7 Lordship that it is often a refuge for -- 8 MR JUSTICE HILDYARD: It has to have limits is the point 9 about ex parte James. 10 MR ATHERTON: Yes, of course. 11 MR JUSTICE HILDYARD: Or it does descend into arbitrariness. 12 MR ATHERTON: I quite agree. For these purposes, I am 13 simply seeking to submit that when the court has 14 jurisdiction to direct the administrators as to their 15 conduct, it is either, insofar as they are different, by 16 reference to the court's supervisory jurisdiction, 17 generally over its officers, or it has tangibility by 18 reference to paragraph 74 in the context of 19 an administration under schedule B1, or by reference to 20 ex parte James. So your Lordship has those tools, if 21 you like. 22 MR JUSTICE HILDYARD: But in no way must I depart from the 23 statutory scheme, must I, unless there is some legal or 24 equitable footing for doing so? 25 MR ATHERTON: Correct, I agree. I agree with that.</p> <p style="text-align: center;">Page 73</p>	<p>1 MR JUSTICE HILDYARD: If. 2 MR ATHERTON: Yes, of course. 3 MR JUSTICE HILDYARD: What is the factor in the hypothesis 4 which you have to deal with, which is whatever reason 5 you have not satisfied me on the law that I can say, 6 "Well, hang the law, I think it is fairer that I should 7 do something else"? 8 MR ATHERTON: I am not going to convince you, I don't think, 9 that I have an answer to that question. One suggestion 10 might be the fact that what we say is occurring here is 11 the impermissible intervention or injection of the 12 contributory rule into the administration. Or 13 an attempt -- 14 MR JUSTICE HILDYARD: But if that is the effect of the law, 15 that is the effect of law. 16 But, anyway, I can think about it. You can probably 17 tell that when one feels that ex parte James is being 18 used as an outrider to specifically identified points of 19 law equity, I think I might be very anxious about it. 20 MR ATHERTON: I accept that. Obviously, as I have said to 21 your Lordship, I am not asking your Lordship to exercise 22 the jurisdiction. 23 MR JUSTICE HILDYARD: No. 24 MR ATHERTON: I am simply saying that they are the tools 25 that allow you to control an administrator, and that is</p> <p style="text-align: center;">Page 75</p>
<p>1 It may be that if one were to consider it 2 appropriate to control the conduct of administrators in 3 any given case, in the context of calls being made or 4 contingent proofs being made by reference to what 5 a liquidator could do in a liquidation, then one might 6 apply the ambits of section 74 or section 150, but 7 I would submit that that may not necessarily be the 8 case. 9 In this case, we say the circumstances are such that 10 either the contribution claim made by the administrators 11 does not fall within section -- or if they were 12 a liquidator would fall within section 74 and 13 section 150. Therefore, your Lordship could direct them 14 not to make this call or -- 15 MR JUSTICE HILDYARD: Mustn't you win on the law, or not at 16 all, on this point? 17 MR ATHERTON: I think the answer to that is -- and your 18 Lordship doesn't have to make the determination -- but 19 as a matter of principle if what the administrators were 20 seeking to do was strictly within the conduct which was 21 entirely consistent with the strict legal rights, if 22 there was a basis for challenging under paragraph 74 23 schedule B1, and if the relevant criteria in ex parte 24 James was satisfied, then your Lordship could use those 25 tools to control that conduct.</p> <p style="text-align: center;">Page 74</p>	<p>1 what the question posits. 2 MR JUSTICE HILDYARD: It shows how a court in 3 an administration can give teeth, for example, to 4 an equity or an estoppel. 5 MR ATHERTON: Indeed. Indeed. 6 MR JUSTICE HILDYARD: Without it having to be asserted by 7 a separate action, or anything else. It just takes 8 a view an estoppel exists, I am going to direct the 9 administrators to abide by it. 10 MR ATHERTON: That's right. 11 MR JUSTICE HILDYARD: There is no more than that? 12 MR ATHERTON: I think that is probably right, yes. 13 In direct answer to the question, your Lordship 14 could direct the administrators not to make the 15 contribution claim they are seeking to make, but that 16 would be on the basis that it would be wrong as a matter 17 of law, on the basis that has been put forward by myself 18 and Mr Arden. In which case, the reality is that your 19 Lordship wouldn't have to make the direction -- 20 MR JUSTICE HILDYARD: That's right. 21 MR ATHERTON: -- because the administrators would not 22 operate on that. 23 MR JUSTICE HILDYARD: I think it is law or nought, really, 24 unless you have some particular estoppel or other legal 25 or equitable right.</p> <p style="text-align: center;">Page 76</p>

<p>1 MR ATHERTON: Very well, I am content to accept that. 2 MR JUSTICE HILDYARD: Yes. 3 MR ATHERTON: It is just after 10 to, I was going to move on 4 to issue 1, but it would be convenient to me if we 5 started just before 2 o'clock if that is convenient to 6 everybody else? 7 MR JUSTICE HILDYARD: Does that suit everyone? Five to two? 8 MR ATHERTON: I am obliged. 9 (12.52pm) 10 (The luncheon adjournment) 11 (2.00pm) 12 MR TROWER: My Lord, there is a new file that has 13 an appeared on your desk. That is the cases. 14 MR JUSTICE HILDYARD: Thank you very much. 15 MR ATHERTON: I don't know about you, my Lord, but I am now 16 regretting turning to contractual construction on 17 a Friday afternoon, but there we are. That was my 18 fault. 19 MR JUSTICE HILDYARD: I am sure you will enliven it. 20 MR ATHERTON: What your Lordship will need from the outset 21 is volume 4, divider 1, which is the agreement. It does 22 seem an age ago, although it was only earlier this 23 morning, that Mr Trower was addressing you on this 24 point. My Lord, I think we can go to page 10 of the 25 bundle, which is the subordination provision.</p> <p style="text-align: center;">Page 77</p>	<p>1 repayment of prior ranking liability. 2 In relation to that second point, that is not what 3 was submitted and that is not what we say is the 4 consequence of our interpretation. If the call is made 5 and assets are acquired, and I use that in the loosest 6 sense, funds are required as a consequence, then they 7 may very well be used to pay prior ranking liabilities 8 and they may or may not be sufficient in order to 9 discharge them. If they are not, the sub-debt is not 10 payable. That is how the clause is intended to operate. 11 However, if they are, notwithstanding that those 12 liabilities have been paid, within the meaning of the 13 clause the sub-debt isn't payable. 14 We say that Mr Trower's application or utilisation 15 immediately of business commonsense, commercial 16 commonsense, he was a bit ruder than that in his 17 skeleton, I think he was suggesting we were being 18 absurd, but that is neither here nor there. In doing it 19 that way he has come in too early, if I can put it that 20 way, by the application of business commonsense in the 21 course of the iterative process which is the 22 construction of the agreement, and also gives too high 23 a profile and too much emphasis to business commonsense, 24 or commercial commonsense. To some extent, we say that, 25 in any event, the notion of whether or not my</p> <p style="text-align: center;">Page 79</p>
<p>1 Our basic proposition here is that by reference to 2 the specific wording of the clause, particularly the use 3 of the word "it" and "solvent", which we say has been 4 used to convey a particular notion, the consequence of 5 this clause, on a fair interpretation, is that insofar 6 as LBIE, in order to pay prior ranking claims, those 7 ranking in priority to the subordinated liability, 8 insofar as it has to have regard to or recourse to 9 a call by a liquidator, or the contingent claim of 10 an administrator to the same effect as against its 11 members, it can never be solvent for the purposes of 12 this clause. 13 Now, we say the consequence of that is essentially, 14 therefore, notwithstanding if as a consequence of that 15 call LBIE is capable of being able to discharge its 16 prior ranking liabilities, the subordinated debt never 17 becomes payable. 18 Now, Mr Trower in his skeleton argument, and to 19 an extent in his oral submissions, immediately jumped in 20 and says, "That interpretation creates or is contrary to 21 business commonsense, commercial commonsense", for two 22 reasons: (1) it means, as I have just submitted it 23 means, the sub-debt is never payable, that is contrary 24 to business and commercial commonsense, and (2) because 25 the prior consequence is you cannot apply any call in</p> <p style="text-align: center;">Page 78</p>	<p>1 construction of the agreement is a matter of business 2 commonsense or not is ameliorated. Its relevance is 3 substantially reduced given the regulatory context in 4 which this agreement sits. I don't think there is any 5 dissension that it does sit in a regulatory context, and 6 that I think was accepted by Mr Justice David Richards 7 at first instance, where he said it was appropriate to 8 consider it in its regulatory context. Insofar as there 9 is any absurdity in the context of the way this 10 agreement is said to work on our analysis, it is the 11 progeny of LBIE's treatment of the outbound sub-debt 12 contribution claim in relation to issue 3. That is what 13 creates the difficulty, we submit. It is not 14 a consequence of the construction that we place upon it. 15 We also question in our position paper, and in our 16 skeleton argument, the extent to which this issue 17 actually had any resonance in this particular case. The 18 answer is it does have resonance because of the way LBIE 19 answer the question in relation to issue 3. 20 Now, we say that the starting point for any 21 contractual construction are the words themselves. One 22 criticism that Mr Trower makes is that he says that we 23 are trying to restrict the meaning of the clause. We 24 would counter that by saying what Mr Trower is seeking 25 to do is inject into the clause something that is not</p> <p style="text-align: center;">Page 80</p>

<p>1 there. So if we go to the clause, we say, on its face 2 it is plain what the meaning is intended to convey. The 3 borrower being solvent, pausing there, it is in inverted 4 commas. The use of the word "solvent" we say is 5 deliberate in order to convey a particular notion. 6 Essentially, the company can pay its liabilities. It 7 can pay its liabilities. It is in inverted commas 8 because it is not a pure solvency test as per, for 9 example, section 123 of the Insolvency Act, because you 10 take out of account subordinated liabilities, 11 obligations which are not payable or capable of being 12 established in any insolvency of the borrower and 13 excluding liabilities as defined. That is why its in 14 inverted commas. 15 So: 16 "The borrower being solvent at the time of and 17 immediately after the payment by the borrower and 18 accordingly no such amount which would otherwise fall 19 due for payment should be payable except to the extent 20 the borrow could make such a payment and still be 21 solvent." 22 So the word is used again. Sub-clause 2: 23 "For the purposes of sub-paragraph 1B, the borrower 24 shall be solvent if it is able to pay its liabilities 25 other than subordinated liabilities in full,</p> <p style="text-align: center;">Page 81</p>	<p>1 by which one can contribute to the assets. Then if you 2 go to -- 3 MR JUSTICE HILDYARD: I don't follow that. Why is not the 4 chose in action as much an asset as any other asset? 5 MR ATHERTON: I am sorry, my Lord, could you repeat that 6 please? I am sorry. 7 MR JUSTICE HILDYARD: Why is not the chose in action, 8 conferred by section 74, just as much an asset as any 9 other chose in action? 10 MR ATHERTON: There may be a difference in whether it is 11 unpaid capital or an unlimited company, in our 12 submission. If it is unpaid capital, there is a chose 13 in action. There is a debt already there. Section 80 14 says: 15 "The liability is created upon the accession to 16 membership and can be enforced as a debt." 17 Now, that gets you into another question which is 18 addressed in the Court of Appeal. I will take you to 19 it, the Court of Appeal. The fact that section 80 20 creates, in effect, the notion of a debt. It is 21 a statutory construct, in my submission. Therefore, one 22 doesn't have to hunt around for a creditor. 23 MR JUSTICE HILDYARD: Why do you say its a statutory 24 construct? I mean, the source of it is the fact that 25 the liability has not been limited. The pledge given by</p> <p style="text-align: center;">Page 83</p>
<p>1 disregarding the liabilities set out in A and B." 2 We say that is perfectly plain, on its face, which 3 means LBIE must be able, from essentially its own funds, 4 not by recourse to its membership, be able to discharge 5 the liabilities. So you are not looking at the ability 6 of LBIE, or a liquidator, to make a call on its 7 shareholders. 8 Now, Mr Trower said, "This clause does in the deal 9 with the source from which the liabilities of the 10 company are to be paid". We say that is not correct. 11 The source is LBIE. That is the source of the funding. 12 We say that there is nothing novel or contrary to any 13 notions of commonsense, business or otherwise, in that 14 construction. Indeed, we indicate, or we submit, that 15 it is entirely consistent, for example, with the terms 16 of section 74 and section 150. 17 I am sorry, but perhaps, just to make that point, or 18 illustrate it rather more clearly, if we could go to 19 bundle 5, tab 132. Section 74.1: 20 "When a company is wound up every present and past 21 member is liable to contribute to its assets to any 22 amount sufficient for payment of its debts and 23 liabilities." 24 So what that clause envisages is not the fact, for 25 example, that the call is an asset, but it is a source</p> <p style="text-align: center;">Page 82</p>	<p>1 each shareholder in an unlimited company operates in 2 contract and is enforceable by statute. But the source 3 is a promise, "I will stand by, to the last farthing, 4 the operations of this company. I promise. And in 5 return for that I get a share in your company". Why is 6 that not a chose in action? 7 MR ATHERTON: I am not doubting that it is. 8 MR JUSTICE HILDYARD: But then it includes that, doesn't it? 9 Its assets include that asset. 10 MR ATHERTON: First of all, we say that, in the context of 11 this clause, it can't have been contemplated that what 12 it would include is the ability of a liquidator to make 13 a call and have recourse to its members. That can't be 14 what was intended by this. Therefore it can similarly 15 not have been intended that the funds which are 16 available by reference to the clause to make the company 17 solvent, one could have regard or would ever have 18 contemplated the notion that an administrator would be 19 able to bring a contingent proof or claim in respect of 20 the call. 21 I accept what your Lordship says, but then one gets 22 into the issue and we try and separate it out. In our 23 submission, the construction of the clause, one doesn't 24 have to ascertain whether or not something is an asset 25 or not. But we say when one understands what is or</p> <p style="text-align: center;">Page 84</p>

<p>1 isn't an asset, and whether or not these calls are 2 an asset of the company, that serves to bolster our 3 construction. 4 MR JUSTICE HILDYARD: Just so that I know that I am on the 5 right page, your point is this, isn't it: this 6 particular promise is in effect, "I promise if called 7 upon by a liquidator in an insolvency to pay"? 8 MR ATHERTON: Yes. All we are saying is, here, a call can 9 be made in respect of the prior ranking liabilities. If 10 those prior ranking liabilities are paid through that 11 call, if that results in them all being paid off, it 12 doesn't result, for the purposes of the provision, 13 insolvency such as then brings into play -- 14 MR JUSTICE HILDYARD: Well, that is the consequence. 15 MR ATHERTON: That's right. 16 MR JUSTICE HILDYARD: I am just trying to get into the 17 "it" point. 18 I mean, this resonates with me for this reason: that 19 I have always in my mind drawn a distinction between the 20 contractual promise to pay up shares and the contractual 21 exposure which can only be brought home by a liquidator 22 in certain contexts. But you were, I think, dissuading 23 me from that before the short adjournment. You were 24 wanting to see them as unitary. 25 MR ATHERTON: I don't resile from that position. It</p> <p style="text-align: center;">Page 85</p>	<p>1 Webb v Whiffin, where you had a huge unpaid capital 2 element. I think it was £100 unpaid -- ordinary shares 3 of £100, £10 were paid. 4 MR JUSTICE HILDYARD: Yes. 5 MR ATHERTON: What the court was applying there was the then 6 equivalent of section 74. The call was not for the £90, 7 it was for, I think, £30 because that was the basis of 8 the estimate which the liquidators had put in, in order 9 to justify the call before the court. So the court was 10 applying the section 74 process within the context of 11 the winding up. 12 Now, it may be, for example, if a call has been made 13 on unpaid capital pre-liquidation, that just has to be 14 paid to the liquidator. 15 MR JUSTICE HILDYARD: So liquidation diminishes, does, it or 16 could diminish, the contractual promise to pay the 17 nominal value? 18 MR ATHERTON: Well, I think the way I would answer that 19 question is by again referring to the process that was 20 begun through by Webb v Whiffin. 21 On your Lordship's analysis, with respect, what the 22 liquidator could or should have done is said, "I want 23 the £90". They didn't do that, because it may have been 24 that prior to that the company could have called in 25 under the Articles before that, but by applying the</p> <p style="text-align: center;">Page 87</p>
<p>1 possibly being slightly more equivocal than I was 2 submitting, but I don't think what I was submitting was 3 incorrect. 4 MR JUSTICE HILDYARD: The amount unpaid on an issued share 5 is absolutely, undoubtedly an asset of the company. 6 MR ATHERTON: Agreed. 7 MR JUSTICE HILDYARD: It is simply a deferred payment of 8 that which is already due by all the other shareholders 9 and, if it weren't, it would be a reduction in its 10 capital. 11 MR ATHERTON: I accept that. 12 MR JUSTICE HILDYARD: It is absolutely plain. 13 MR ATHERTON: I don't dissent from that. 14 MR JUSTICE HILDYARD: So it is a slightly different quality 15 to the exposure which a liquidator can enforce. 16 MR ATHERTON: Indeed. Exactly right. Exactly. 17 MR JUSTICE HILDYARD: But you say as to both -- I am sorry 18 to harp back. 19 MR ATHERTON: No, no, of course not. 20 MR JUSTICE HILDYARD: But you say as to both that you cannot 21 enforce either, except after estimation and the 22 application of mandatory set-off. I thought that was 23 an important part of your point before the short 24 adjournment. 25 MR ATHERTON: It is. I think it is brought out in, I think,</p> <p style="text-align: center;">Page 86</p>	<p>1 section 74 process, the statutory process, they were 2 making an estimate, putting on a value, in order to 3 justify the call that was being made. That was less 4 than the full amount -- 5 MR JUSTICE HILDYARD: Was it in the House of Lords? 6 MR ATHERTON: Webb v Whiffin was, yes. It was. There 7 wasn't any query about -- I don't think any of their 8 Lordships -- 9 MR JUSTICE HILDYARD: They are very different. Who am I to 10 say, the House of Lords decided, but they are different, 11 very different. 12 MR ATHERTON: I agree, I will be relying on the difference 13 when I come to look and what Lord Justice Briggs says in 14 Waterfall I in the Court of Appeal. My learned friend, 15 Mr Trower, sought to put it in the course of his 16 submissions, which I now can't find. If your Lordship 17 just bears with me. Yes, if your Lordship has the 18 transcript for day 1. 19 MR JUSTICE HILDYARD: Yes. 20 MR ATHERTON: Please. If your Lordship looks at page 55, 21 line 11, through to 56, line 24, please. 22 (Pause) 23 MR JUSTICE HILDYARD: Well, Mr Trower says they are all 24 assets of the company, both the exposure and the 25 commitment are assets of the company.</p> <p style="text-align: center;">Page 88</p>

<p>1 MR ATHERTON: Well --</p> <p>2 MR JUSTICE HILDYARD: You say the exposure is -- query --</p> <p>3 not, because it only arises and is enforceable in the</p> <p>4 event of a liquidation by a liquidator.</p> <p>5 MR ATHERTON: That's right. I am sorry, my Lord.</p> <p>6 MR JUSTICE HILDYARD: You therefore say it is not part of</p> <p>7 its assets. Of "its", the corporation's, assets.</p> <p>8 MR ATHERTON: That's right. So if I was tracking</p> <p>9 Mr Trower's submission, where he says, in line 8, on</p> <p>10 page 56, "it", what he actually means is: such</p> <p>11 entitlements, including such funds as may be generated</p> <p>12 by a liquidator through the specific means of making</p> <p>13 a call against its members.</p> <p>14 That is what he means. We say that meaning can't</p> <p>15 possibly be incorporated without doing violence to the</p> <p>16 terms of that provision in the contract.</p> <p>17 MR JUSTICE HILDYARD: You are going to show me, are you --</p> <p>18 or do I have this wrong too? -- that Lord Justice Briggs</p> <p>19 draws the same distinction? Because I thought</p> <p>20 Lord Justice Briggs said it was all assets?</p> <p>21 MR ATHERTON: Well --</p> <p>22 MR JUSTICE HILDYARD: Or have I misunderstood that?</p> <p>23 MR ATHERTON: That is what Lord Justice Briggs does say.</p> <p>24 MR JUSTICE HILDYARD: Right.</p> <p>25 MR ATHERTON: We say he is wrong to have said that, and</p> <p style="text-align: center;">Page 89</p>	<p>1 MR JUSTICE HILDYARD: Even an unlimited share has a nominal</p> <p>2 amount, doesn't it?</p> <p>3 MR ATHERTON: Yes. But I don't think that makes any</p> <p>4 difference to our analysis, with respect, my Lord.</p> <p>5 Would it help -- I am sure it won't, but I will try.</p> <p>6 In bundle 1, my Lord, if you could go to tab 44,</p> <p>7 please. That is Birch v Cropper, the Bridgewater Canal</p> <p>8 case. Could your Lordship go to, please, page 543 of</p> <p>9 the speech of Lord MacNaghten, and I think it is about</p> <p>10 two-thirds of the way down, the line beginning:</p> <p>11 "Every person who becomes ..."</p> <p>12 MR JUSTICE HILDYARD: Hold on, sorry.</p> <p>13 MR ATHERTON: I am sorry.</p> <p>14 MR JUSTICE HILDYARD: No, no. Yes, we had a look at this,</p> <p>15 didn't we?</p> <p>16 MR ATHERTON: Yes. Just go over the page, to the first line</p> <p>17 of 544. It is a limited company but the analysis must</p> <p>18 be stronger in the context of an unlimited company.</p> <p>19 MR JUSTICE HILDYARD: So do I have it right? What the House</p> <p>20 of Lords is saying is liquidation works at change in the</p> <p>21 nature of the shareholders' liability. It becomes,</p> <p>22 after liquidation, in both contexts of a limited and</p> <p>23 unlimited company, a unitary obligation to pay up either</p> <p>24 with or without limitation, depending on what sort of</p> <p>25 company it is.</p> <p style="text-align: center;">Page 91</p>
<p>1 Lord Justice Lewison says that in an unlimited company</p> <p>2 calls, the ability to call, the proceeds of a call, are</p> <p>3 not assets of the company.</p> <p>4 MR JUSTICE HILDYARD: They are not assets, unless they</p> <p>5 relate to that part of the call as reflects the</p> <p>6 outstanding amount on the promise to pay the nominal</p> <p>7 amount.</p> <p>8 MR ATHERTON: Lord Justice Lewison's observations were made</p> <p>9 specifically in relation to unlimited companies.</p> <p>10 MR JUSTICE HILDYARD: I see. I am sorry.</p> <p>11 MR ATHERTON: We will come to it, because if I might</p> <p>12 respectfully say so, your Lordship made the same comment</p> <p>13 when Mr Trower was making submissions and, with respect,</p> <p>14 you had it the wrong way round.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR ATHERTON: Lord Justice Lewison says in an unlimited</p> <p>17 company there can't be assets.</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 MR ATHERTON: It may just be a nomenclature issue that we</p> <p>20 don't have to deal with, but it might be more accurate.</p> <p>21 I know all the judges talk about assets. It may be the</p> <p>22 accretion to the funds available, whether it is unpaid</p> <p>23 capital or whether by contribution in an unlimited</p> <p>24 context, are actually capital rather than strictly</p> <p>25 so-called assets, insofar as there is a difference.</p> <p style="text-align: center;">Page 90</p>	<p>1 MR ATHERTON: That is my understanding of what the House of</p> <p>2 Lords say. Yes, my Lord.</p> <p>3 MR JUSTICE HILDYARD: So there is an exchange. Before</p> <p>4 liquidation all you have is the promise to pay out to</p> <p>5 the nominal amount. It is contractually enforceable at</p> <p>6 the say-so of the directors and it is an asset to the</p> <p>7 company accordingly.</p> <p>8 After liquidation, that element is swamped, goes,</p> <p>9 transmogrified into a unitary obligation enforceable</p> <p>10 only by the liquidator.</p> <p>11 MR ATHERTON: That's right, correct. Within the ambit and</p> <p>12 context of section 74 and section 150.</p> <p>13 MR JUSTICE HILDYARD: Yes, subject to --</p> <p>14 MR ATHERTON: Absolutely. That is certainly my</p> <p>15 understanding and that is certainly my submission,</p> <p>16 my Lord.</p> <p>17 Now, if, I think your Lordship can put that</p> <p>18 particular bundle away. I just wanted to go back to</p> <p>19 section 74, please. We are back in bundle 5, tab 132,</p> <p>20 and I just wanted to take your Lordship to, in 74, to E,</p> <p>21 which again we have been to before.</p> <p>22 MR JUSTICE HILDYARD: Yes.</p> <p>23 MR ATHERTON: In the third line:</p> <p>24 "Policy or contract is restricted ... or whereby the</p> <p>25 funds of the company are alone made liable in respect of</p> <p style="text-align: center;">Page 92</p>

<p>1 the policy or contract." 2 So what the section there is drawing a distinction 3 between, the funds of the company and the ability to 4 call and the proceeds of the call. We say that is 5 plainly designating, or having in contemplation that 6 there is something different. We say the same is true, 7 that chimes with the wording of section 150, which your 8 Lordship will find at divider 143. 9 MR JUSTICE HILDYARD: I am not to try and work out whether 10 there is any difference between funds and assets? 11 MR ATHERTON: For these purposes, I don't think it matters. 12 What it's drawing a distinction between is the corpus 13 available to the company, whether one calls them funds 14 and assets, and the adjunct or the potential accretion 15 to that fund or those assets represented by the ability 16 to make an call and the proceeds of the call. In 2E it 17 is drawing that distinction. Then, in my submission, we 18 have the same delineation, in section 150, 19 sub-section 1, where it says: 20 "The court may at the time, after making the winding 21 up order, either before or after it has ascertained the 22 sufficiency of the company's assets ... " 23 MR JUSTICE HILDYARD: I am so sorry, where are you looking 24 now? 25 MR ATHERTON: I am so sorry, my Lord.</p> <p style="text-align: center;">Page 93</p>	<p>1 context, actually does show you what the source is; that 2 context is by reference to the relevant regulatory 3 position that the company is in, and from which this 4 contract derives. So, for example, if your Lordship 5 could go to bundle 5. I had just put bundle 5 away, but 6 it is bundle 5. I think your Lordship has that out 7 already. Can we go to divider 172. These are the two 8 extracts, at 171 and 172, but we will go to 172 first, 9 from the FSA regulatory provisions. So if your Lordship 10 has divider 172, you have INPRU 1063. And 1063.1, 11 a calculation: 12 "A firm may take into account subordinated loan 13 capital in its financial resources in accordance with 14 tables 1062.2(a), (b) and (c), subject to 2 below." 15 I don't think the subject 2 is relevant for these 16 purposes. I don't think it is relevant for my purposes. 17 If we can then go backwards in the bundle, my Lord, to 18 tab 171. This is INPRU 1062.2: 19 "The firm must calculate its financial resources in 20 accordance with table 1062.2(a) below unless ... " 21 The "unless" in (a) and (b) don't really take us 22 anywhere for these purposes. 23 Then, over the page, you will have what the company 24 can take into account as regards its financial 25 resources. We say this is, if you like, the detail of</p> <p style="text-align: center;">Page 95</p>
<p>1 MR JUSTICE HILDYARD: It is my fault. 2 MR ATHERTON: Section 150, divider 143. The same bundle, it 3 is divider 143. 4 MR JUSTICE HILDYARD: Yes. 5 MR ATHERTON: So if your Lordship has regard to 6 section 101 ... 7 MR JUSTICE HILDYARD: So you say the reference in line 2 to 8 "assets", means assets before called. 9 MR ATHERTON: Correct. So there is a delineation again 10 between the sufficiency of the company's assets and the 11 accretion or swelling of the fund by the making and 12 honouring of a call. 13 We say that our construction of clause 5 chimes with 14 that delineation, so there is plainly something 15 different between, as your Lordship put it, the corpus 16 of the company at that point in time, pre-liquidation, 17 and then subsequently. We say this is borne out by how 18 it was phrased by Mr Justice Lewison at first instance. 19 Can I just park that for the moment, because I want to 20 do the analysis of the Court of Appeal and where they 21 came to on this as a separate topic, if that is 22 convenient to your Lordship. 23 MR JUSTICE HILDYARD: Absolutely. 24 MR ATHERTON: I am grateful. 25 We also say that the clause, in the appropriate</p> <p style="text-align: center;">Page 94</p>	<p>1 the sources which are within clause 5. If your Lordship 2 just looks down, you have the ordinary share capital, 3 non-cumulative preference shares, share premium 4 accounts, et cetera. Then, the first is initial 5 capital, that is (a), and then the next box, investments 6 own shares, intangible assets, that is (b). (a) minus 7 (b) equals original owned funds. Then, you have further 8 additions and subtractions. At the bottom of the 9 column, you see, "Financial resources". 10 We say that is what is meant by solvency. That is 11 the source of solvency for the purposes of clause 5. 12 What one does not see there are any items which 13 relate to the ability of a liquidator to make a call. 14 True it is, ordinary share capital, I accept, would 15 include unpaid share capital in a limited company. That 16 then brings us in to the next point. As was loomed 17 large in the Court of Appeal, unlimited companies, 18 nowadays, are a relatively rare occurrence. As 19 Lord Justice Briggs said, quite vividly, and the charts 20 which allow you to navigate the situation and the 21 position in relation to unlimited companies are old. 22 Of course, no one anticipated -- and again this is 23 borne out by what Mr Justice David Richards said at 24 first instance -- or had regard to the status of LBIE as 25 an unlimited company or, indeed, really had any notion</p> <p style="text-align: center;">Page 96</p>

<p>1 that it would ever become insolvent.</p> <p>2 So, again, the context is relevant because what can</p> <p>3 never have been this contemplation in creating</p> <p>4 a relevant accretion to the assets or the funds</p> <p>5 available to the company for the purposes of dealing</p> <p>6 with creating solvency in clause 5, would be the ability</p> <p>7 of a liquidator to make calls against the membership.</p> <p>8 Now, one can foresee that if it had been intended</p> <p>9 that one could look towards the membership in that way,</p> <p>10 but in the context of the agreement one might have, for</p> <p>11 example, representations from the membership as to the</p> <p>12 maintenance of their solvency. One doesn't have that.</p> <p>13 The representations, as regards the lender and the</p> <p>14 borrower -- the lender of course being LBHI2, which is</p> <p>15 the parent company -- there is no reference to that type</p> <p>16 of further support matrix, or further support network as</p> <p>17 regards the solvency of LBIE. One might have thought</p> <p>18 that that would be relevant if the regulator in the</p> <p>19 standard form contract was intending to have regard to</p> <p>20 the ability to make calls in an unlimited context</p> <p>21 against the company's membership. We say, that is all</p> <p>22 on a fair interpretation of clause 5, by reference to</p> <p>23 the improve documents at tab 171 and 172.</p> <p>24 MR JUSTICE HILDYARD: I can see that isn't inconsistent with</p> <p>25 your case, but I am not sure it demonstrates it.</p> <p style="text-align: center;">Page 97</p>	<p>1 suggesting a call can't be made under section 74 and</p> <p>2 section 150, obviously it can. I am not suggesting, as</p> <p>3 I have previously submitted, that if funds are generated</p> <p>4 by such a call they cannot be applied to prior ranking</p> <p>5 liabilities. All I am saying is that by reference to</p> <p>6 this clause and the INPRU documentation, one cannot get</p> <p>7 to a situation where that means if all of the prior</p> <p>8 liabilities are paid, that constitutes solvency for the</p> <p>9 purposes of the provision.</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR ATHERTON: My Lord, your Lordship will be familiar with</p> <p>12 the authorities on contractual construction. So Rainy</p> <p>13 Sky --</p> <p>14 MR JUSTICE HILDYARD: I saw there was another one coming up</p> <p>15 before the Supreme Court next month.</p> <p>16 MR ATHERTON: Is there?</p> <p>17 MR JUSTICE HILDYARD: As to whether one should look at the</p> <p>18 words first.</p> <p>19 MR ATHERTON: We say you do, but it may be pending the</p> <p>20 determination of the Supreme Court, like so much in this</p> <p>21 case, my Lord.</p> <p>22 MR JUSTICE HILDYARD: I may be wrong, but I did look at this</p> <p>23 and wondered whether we had been there before. The rule</p> <p>24 being that you must look at the words first and then</p> <p>25 swiftly move on.</p> <p style="text-align: center;">Page 99</p>
<p>1 I mean, this is a list of admissible assets and</p> <p>2 a prescribed list of deductions to be made.</p> <p>3 MR ATHERTON: Yes.</p> <p>4 MR JUSTICE HILDYARD: Neither is complete.</p> <p>5 MR ATHERTON: Well, it is complete for the purposes of --</p> <p>6 MR JUSTICE HILDYARD: INPRU.</p> <p>7 MR ATHERTON: Yes, and the regulatory context in which this</p> <p>8 company sits. One would have thought that, where one is</p> <p>9 dealing in this context that one is looking for</p> <p>10 a cushion of capital, would be, that that represents,</p> <p>11 the landscape which the company is inhabiting, and</p> <p>12 nothing beyond that.</p> <p>13 MR JUSTICE HILDYARD: Well, I mean that is, with respect,</p> <p>14 sort of stating that INPRU and the statute walk hand in</p> <p>15 hand. What I am suggesting is that whilst this is</p> <p>16 entirely consistent with the statute, it is not</p> <p>17 demonstrative of its extent, nor it is a demonstrative</p> <p>18 of the extent of it. I suppose you would say, in the</p> <p>19 latter context, there is a much more exact correlation</p> <p>20 because the standardised form is prescribed by and is</p> <p>21 intended to implement the INPRU view of world.</p> <p>22 MR ATHERTON: Absolutely. Your Lordship is right because it</p> <p>23 is illustrated by this point. We are looking at it for</p> <p>24 the purposes of the clause. Your Lordship's point about</p> <p>25 it albeit not referring to the statute, I am not</p> <p style="text-align: center;">Page 98</p>	<p>1 MR ATHERTON: Well, I am trying to be as swift as I can,</p> <p>2 my Lord.</p> <p>3 Your Lordship has the authorities, Arnold v Browne,</p> <p>4 Rainy Sky, also Chartbrook, because Chartbrook, at</p> <p>5 paragraph 16, says when a word is used in a specific</p> <p>6 context, and a specific word is used, prima facie it</p> <p>7 should carry with it that label and that meaning, and we</p> <p>8 say that is the importance of the word "solvent" and</p> <p>9 "solvency" here. It has a particular connotation and</p> <p>10 that connotation can't be the ability to create</p> <p>11 a "solvency position" as an accord by reference to the</p> <p>12 conduct or power of a liquidator, to put the company in</p> <p>13 that position. We say that simply doesn't make sense</p> <p>14 within the context of --</p> <p>15 MR JUSTICE HILDYARD: I think there are authorities that say</p> <p>16 there are slightly different approaches, where you have</p> <p>17 actually defined terms.</p> <p>18 I mean, the most honest description, possibly, with</p> <p>19 respect to everybody, is Bingham, where he says it is</p> <p>20 neither unswervingly literal nor unknowingly purposive,</p> <p>21 or whatever it is, ie it is a bit of a blend. The fact</p> <p>22 that you take into account the context gives a bit of a</p> <p>23 steer to having regard to the commercial realities of</p> <p>24 life, including the effects.</p> <p>25 MR ATHERTON: Yes.</p> <p style="text-align: center;">Page 100</p>

<p>1 MR JUSTICE HILDYARD: Subject to what they next say, that 2 seems broadly correct. 3 But if you have a defined term, and they have gone 4 out of their way to say, "In this contract when I say 5 'this', I mean 'that'", you must probably give full and 6 entire four wall context to that. That is broadly what 7 you are saying, is it? 8 MR ATHERTON: Yes, but we say here solvency is defined 9 because it is referred to in 5.1(b). 10 MR JUSTICE HILDYARD: It is definitely. It is in quotes the 11 whole time. 12 MR ATHERTON: That's right. And then defined by reference 13 to 2. 14 MR JUSTICE HILDYARD: Yes. 15 MR ATHERTON: I will take up a short amount of time, when 16 I was debating a very similar question before one of 17 your Lordship's former colleagues in chambers, 18 Mr Jonathan Crow QC, when he was a judge. I was 19 debating whether or not if one put in a definitions 20 clause, Rumpelstiltskin, whether or not it was bad 21 because Rumpelstiltskin didn't actually feature in the 22 contract, but it was something else. Anyway. It was 23 the same sort of issue. 24 MR JUSTICE HILDYARD: I am sure he followed you. 25 MR ATHERTON: He obviously didn't, like your Lordship.</p> <p style="text-align: center;">Page 101</p>	<p>1 down -- insofar as there is any commercial absurdity or 2 situation where it doesn't accord with business 3 commonsense, we say it doesn't matter in this case, or 4 it is of less worth because of the regulatory context. 5 In response to dealing with Mr Marshall's arguments 6 my learned friend also relied on the AIB case, also 7 Mr Justice Andrew Smith's decision in the Swiss Marine 8 case. Particularly in the latter, where what 9 Mr Justice Andrew Smith said was where you are dealing 10 with the standard form contracts, what you take aren't 11 the usual meaning of the words, because they are open to 12 a larger constituency than just the immediate parties, 13 that is what one ought to do; that is consistent with 14 what Lord Justice Millett says. We say that is the 15 proper construction here. Just taking the usual meaning 16 of the words. It can't include an accretion to the 17 funds available by reference to a call by a liquidator 18 against the membership in an unlimited context. 19 My Lord, I think that deals with that particular 20 aspect of the interpretation. I would now like to say, 21 and deal with the question of assets by reference to 22 where we had come to in that context by reference to the 23 first instance decision of Mr Justice David Richards and 24 the Court of Appeal. 25 Now, we say on one level it doesn't really matter</p> <p style="text-align: center;">Page 103</p>
<p>1 We say, just by applying the usual tenets of 2 construction that is where we get to. We say there is 3 no ambiguity when one looks at that clause, in 4 regulatory context there is no ambiguity. 5 The consequence of Arnold v Browne is really you 6 only get into business commonsense, commercial 7 commonsense when there is some sort of ambiguity. We 8 say there isn't one, so one doesn't need to apply. 9 Let's say that there is, let's say that a commercial 10 absurdity is asserted as a consequence of our 11 interpretation, namely that the sub-debt is not payable, 12 we say, "But look at it in the regulatory context, why 13 is that so unusual? This is effectively capital". The 14 reality is, we would say, that no one anticipated this 15 loan, these loans, to ever be repaid. They are 16 essentially sitting as capital. The only contemplation 17 that anybody would have that they might be repaid would 18 be in similar circumstances to a shareholder being 19 entitled to a return of capital or the payment of 20 a dividend. That contemplation or that anticipation is 21 outside the notion of a company becoming insolvent and, 22 therefore, through the insolvency process and the 23 process of a liquidator making a call, being in some way 24 able to repay the subordinated debt. So we say the 25 regulatory context has a role to play and it cuts</p> <p style="text-align: center;">Page 102</p>	<p>1 whether these are assets or not, because on our 2 interpretation, assets don't really matter. But if -- 3 if -- we are right in our assertion that the ability to 4 make a call by a liquidator and the fruits of that call 5 are not an asset, we say even more so that we are 6 correct on our analysis, because they simply don't 7 feature, nor should they feature, in the accretion to 8 create a solvency position for the purposes of the 9 clause. 10 Now, Mr Trower submits that the notion that calls 11 are not assets of the company, which is our submission, 12 is wrong by reference to longstanding authority, and he 13 cites Webb v Whiffin and General Works Company v Gill. 14 We say there is a very simple answer to that: both of 15 those cases did not involve unlimited companies and were 16 concerned with unpaid share capital. We don't dissent 17 from the notion that the ability to call for unpaid 18 capital in respect of shares as a right or as 19 a fructification of that right are properly so-called 20 capital. Whether they are assets or not I don't think 21 matters for these purposes. Maybe technically loose 22 language, but they are certainly capital. Insofar as 23 one is dealing with a limited company, one sees it in 24 the INPRU documentation, that would be incorporated in 25 the funds available for the financial resources. So</p> <p style="text-align: center;">Page 104</p>

<p>1 I don't think I need to take you, and descend into the 2 detail of either Webb v Whiffin or the Gill case, the 3 General Works Company case, we say they are 4 distinguishable on that basis. 5 Where did this issue about assets come from in the 6 Court of Appeal? 7 If your Lordship doesn't mind, if we can go to the 8 Court of Appeal judgment. I think your Lordship has 9 been dealing with it in the authorities bundle. 10 MR JUSTICE HILDYARD: Actually, I have been dealing with it 11 in the core bundle. 12 MR ATHERTON: I am grateful. 13 MR JUSTICE HILDYARD: Tab 9. 14 MR ATHERTON: Thank you, my Lord, I am grateful for that. 15 (Pause) 16 Just for your Lordship's note, paragraphs 28 through 17 to 32, Lord Justice Lewison refers to the improved 18 documentation and the schedules that I took your 19 Lordship to. 20 MR JUSTICE HILDYARD: Yes. 21 MR ATHERTON: Then if we could go to paragraph 113 and if 22 your Lordship wouldn't mind, it is probably quicker if 23 your Lordship reads from 113 to 120, inclusive, please. 24 I can't recall now whether you have been taken to that 25 before.</p> <p style="text-align: center;">Page 105</p>	<p>1 the adjustment as between members, that informs the 2 suggestion, or the notion, that those are not assets of 3 the company where the recovery is made for the purposes 4 of that adjustment as between the membership themselves. 5 MR JUSTICE HILDYARD: I suppose another way you could put it 6 is that this is not a matter, unlike uncalled capital, 7 which is legislated for, capable of being legislated for 8 by the articles of association. 9 MR ATHERTON: Indeed. Indeed. 10 I was going to take your Lordship to paragraphs 196 11 and 197. This is the origin of the whole assets, if 12 I can put it like this, controversy in the judgment of 13 Lord Justice Briggs. 196 gives you the context of the 14 argument he is dealing with, and then 197 is the 15 relevant paragraph. 16 MR JUSTICE HILDYARD: How far should I go? 17 MR ATHERTON: Just to the end of paragraph 197, my Lord. 18 MR JUSTICE HILDYARD: Right, so Lord Justice Briggs and 19 Mr Justice David Richards say that both the uncalled bit 20 and the exposure bit are assets of the company. 21 MR ATHERTON: Well, there in lies the issue, because 22 Lord Justice Briggs says that is what Mr Justice David 23 Richards says as paragraph 165. That is what LBIE say, 24 Mr Justice David Richards said -- 25 MR JUSTICE HILDYARD: I see.</p> <p style="text-align: center;">Page 107</p>
<p>1 MR JUSTICE HILDYARD: This is Lord Justice Lewison? 2 MR ATHERTON: That's right. Yes, my Lord. 3 (Pause) 4 MR JUSTICE HILDYARD: Yes. 5 MR ARDEN: So Lord Justice Lewison, we say, is very clear 6 that although the position may be different in relation 7 to a limited company, he has grave doubts as to whether 8 or not calls of this nature in an unlimited company do 9 in fact represent an asset or an accretion to the assets 10 of the company. He says, I am not citing it because 11 I think the citation and the quotations from Pyle Works 12 by Lord Justice Lewison is sufficient. He says that the 13 Court of Appeal are bound by the interpretation of 14 Webb v Whiffin in that case, in Pyle Works. The 15 consequence of which is they are not assets. Now, that 16 is Mr Justice Lewison. 17 If one goes ahead in the judgment, my Lord, to 18 paragraphs 196 and 197. 19 MR JUSTICE HILDYARD: In the case of Sun v Wright, which is 20 not subject to the control of the directors, it is quite 21 difficult to see that that is an asset. 22 MR ATHERTON: Indeed. Indeed, which is in the context of 23 a call in a liquidation against an unlimited membership. 24 MR JUSTICE HILDYARD: Yes. 25 MR ATHERTON: Yes. He goes on to say that when one is doing</p> <p style="text-align: center;">Page 106</p>	<p>1 MR ATHERTON: -- in paragraph 75.4 of their skeleton 2 argument. If we go to paragraph 165 of 3 Mr Justice David Richards' decision, in divider 8. Does 4 your Lordship have that? 5 MR JUSTICE HILDYARD: Yes. He is looking at it 6 post-liquidation. 7 MR ATHERTON: That's right, but so is Lord Justice Briggs. 8 MR JUSTICE HILDYARD: I suppose you say the magic is in the 9 assets available to a liquidator? 10 MR ATHERTON: Correct, yes. What Mr Justice David Richards 11 does not say is that they are assets of the company. 12 They are assets available to the liquidator. So I am 13 not sure how I can put this. But, in my respectful 14 submission, Lord Justice Briggs misdirects himself or 15 assumes something in the words that 16 Mr Justice David Richards uses which is not correct. 17 An example would be assets available to a liquidator 18 for the purpose of discharging liabilities in the 19 winding up would include things like the proceeds of 20 a preference claim. The proceeds of an under value 21 claim. A contribution to the assets from a misfeasance 22 directive for wrongful trading. So conceptually it is 23 very different. 24 Now, if you don't mind, if we could just go back to 25 Lord Justice Briggs' judgment, where we left it, at 197.</p> <p style="text-align: center;">Page 108</p>

<p>1 If your Lordship just had regard to the beginning of the 2 last sentence: 3 "As will later appear, I agree with the judge that 4 the right to make calls, et cetera, is an asset of the 5 company." 6 So we need to see if there is any additional 7 reasoning which can be brought to bear in 8 Lord Justice Briggs' judgment. 9 Now, as far as I can ascertain, I think what 10 Lord Justice Briggs is referring to is paragraphs 210 to 11 212. 12 MR JUSTICE HILDYARD: Shall I read those? 13 MR ATHERTON: Yes please. I am sorry, my Lord. Yes, 14 please. 15 (Pause) 16 MR JUSTICE HILDYARD: Yes, so you don't agree with 212? 17 MR ATHERTON: No, because what is the source of that 18 assertion by, respectfully, by the Lord -- 19 MR JUSTICE HILDYARD: Well, I can see the force of it. He 20 just says if there is someone who owes, there must be 21 an asset. That is all he is saying, really. That may 22 not be right. 23 MR ATHERTON: Well, my interpretation is he is saying it is 24 undoubtedly an asset, (1) by reference to his reference 25 to Mr Justice David Richards, which in my submission was</p> <p style="text-align: center;">Page 109</p>	<p>1 available beforehand. It is just of a different nature. 2 MR ATHERTON: Correct. The source is different. It is all 3 part of the composition of that liquidation fund. 4 MR JUSTICE HILDYARD: Yes. 5 MR ATHERTON: But the origin is very different, we say. 6 MR JUSTICE HILDYARD: Yes. 7 MR ATHERTON: If your Lordship could just bear with me for 8 one moment. 9 MR JUSTICE HILDYARD: Yes. 10 MR ATHERTON: My Lord, just in way of summary, therefore, we 11 say that, on our construction of clause 5, it doesn't 12 matter whether the accretion to the fund is an asset or 13 not. We say it is just not within the clause. But we 14 say that that construction is buttressed by the fact 15 that these aren't assets and, therefore, they are well 16 out with the contemplation of the regulator and the 17 parties in the context where these are not negotiated 18 contracts. My Lord -- 19 MR JUSTICE HILDYARD: At the second level of your argument, 20 can I just ask you this -- 21 MR ATHERTON: Yes. 22 MR JUSTICE HILDYARD: -- what is the status of 23 Lord Justice Briggs' analysis in terms of precedent? 24 MR ATHERTON: None. 25 MR JUSTICE HILDYARD: It is just an argument? It is just</p> <p style="text-align: center;">Page 111</p>
<p>1 exposed as fallacious, if I can put it that way, 2) he 2 is relying on Webb v Whiffin as saying, "That is the 3 situation", but that is plainly not the situation in 4 Webb v Whiffin, where one is dealing with a limited 5 company. 6 Again, if one is in the situation where one is 7 relying on assets available to a liquidator, we say that 8 palpably is not the same as the assets of the company. 9 True it is, as I said, it will be an accretion to the 10 funds available to discharge the liabilities in the 11 liquidation. That doesn't of itself make those funds 12 assets of the company, in that sense. They are brought 13 into a single composite fund for the purposes of 14 distribution. 15 MR JUSTICE HILDYARD: It is a very particular species of 16 rights. I mean, normally, think is it Ayerst that says 17 there is no change in ownership, and if there is no 18 change in ownership, if you had it after liquidation, 19 presumably you had it before; do you see what I mean? 20 But your answer to that is to say: well, no, this is 21 a very particular right which, as regards the bit which 22 extends beyond the call, the call on the limited -- 23 MR ATHERTON: Yes. 24 MR JUSTICE HILDYARD: -- on the nominal capital, and rather 25 like, as you say, other insolvency processes not</p> <p style="text-align: center;">Page 110</p>	<p>1 a theory, is it? 2 MR ATHERTON: I think it is probably obiter. 3 MR JUSTICE HILDYARD: It isn't obiter to him, because he 4 thought it was an essential dissolver of the boot straps 5 argument. 6 MR ATHERTON: Well, the answer is it doesn't form part of 7 the ratio of the case. 8 MR JUSTICE HILDYARD: It does for him. 9 MR ATHERTON: But in the context of what 10 Lord Justice Lewison said, and the concurrence of 11 Lord Justice Moore-Bick -- 12 MR JUSTICE HILDYARD: He disagreed with everybody, you mean. 13 MR ATHERTON: But it is still two against one as to whether 14 or not these form an asset of the company. 15 MR JUSTICE HILDYARD: Right. 16 MR ATHERTON: But, in any event, what I hope to have shown, 17 in my submission I have shown, is that the analysis 18 applied by Lord Justice Briggs is not appropriate. It 19 is wrong, because he is putting too much weight on 20 Webb v Whiffin, which is a different type of case. 21 MR JUSTICE HILDYARD: Yes. 22 MR ATHERTON: And he is affording a meaning to the words of 23 Mr Justice David Richards, which they simply don't bear. 24 MR JUSTICE HILDYARD: So it is open to me to disagree? 25 MR ATHERTON: Yes, my Lord, very much so.</p> <p style="text-align: center;">Page 112</p>

<p>1 MR JUSTICE HILDYARD: Right.</p> <p>2 MR ATHERTON: I am sorry, can I just ask for your Lordship's</p> <p>3 indulgence once more?</p> <p>4 Just to reinforce that last point, my Lord, could</p> <p>5 your Lordship just go back to Lord Justice Briggs'</p> <p>6 judgment?</p> <p>7 MR JUSTICE HILDYARD: Mm-hm.</p> <p>8 MR ATHERTON: At 212.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR ATHERTON: When one breaks it down, although it uses</p> <p>11 quite strident terms, it is actually not quite as</p> <p>12 conclusive as one might imagine:</p> <p>13 "Furthermore, even though not conclusive on this</p> <p>14 issue, I consider that the undoubted fact that the</p> <p>15 fruits of a call constituted cash to the company point</p> <p>16 strongly to the conclusion of the liability of the</p> <p>17 company prior to making the call itself is an asset to</p> <p>18 the company."</p> <p>19 So he is a little equivocal with respect to his own</p> <p>20 reasoning.</p> <p>21 MR JUSTICE HILDYARD: He is not particularly equivocal in</p> <p>22 the last sentence.</p> <p>23 MR ATHERTON: Well, then that is slightly more strident than</p> <p>24 the opening sentence of the paragraph.</p> <p>25 MR JUSTICE HILDYARD: Yes. He gathers force.</p> <p style="text-align: center;">Page 113</p>	<p>1 (3.10pm)</p> <p>2 Submissions by MR MARSHALL</p> <p>3 MR JUSTICE HILDYARD: Yes, Mr Marshall.</p> <p>4 MR MARSHALL: My Lord, if I may I am going to start with</p> <p>5 issue 1 and follow on from where, to some extent,</p> <p>6 Mr Atherton left off.</p> <p>7 My Lord, we submit that there is no obligation to</p> <p>8 contribute under section 74 of the 1986 Act in respect</p> <p>9 of the subordinated debt for essentially two reasons.</p> <p>10 Even if, contrary to our primary case, LBL is indeed</p> <p>11 a shareholder and all of our contentions for the part B</p> <p>12 trial are unsuccessful. The first of those is that LBIE</p> <p>13 has a complete defence to the subordinate debt claim</p> <p>14 under the doctrine of circuity of action. That is</p> <p>15 applying principles in a recent Supreme Court decision,</p> <p>16 the case of Farstad; since it has no liability for such</p> <p>17 a debt, it can make no quarrel in connection with it.</p> <p>18 The second way we put the matter is that properly</p> <p>19 construed and if that argument is incorrect, properly</p> <p>20 construed the subordinated debt agreements only</p> <p>21 permitted recourse to the assets of LBIE, and not those</p> <p>22 of its members, so that the exception which arises under</p> <p>23 section 74.2(e) applies in this case.</p> <p>24 My Lord, if I can begin, then, which the circuity of</p> <p>25 action point, which in a way it is somewhat odd that</p> <p style="text-align: center;">Page 115</p>
<p>1 MR ATHERTON: Yes.</p> <p>2 MR JUSTICE HILDYARD: The eye of the hurricane.</p> <p>3 MR ATHERTON: Indeed, my Lord. Your Lordship has my</p> <p>4 submissions anyway.</p> <p>5 MR JUSTICE HILDYARD: Yes.</p> <p>6 MR ATHERTON: They are my submissions. I was 15 minutes</p> <p>7 longer than I thought I would be.</p> <p>8 MR JUSTICE HILDYARD: I am very grateful to you.</p> <p>9 Is it your go?</p> <p>10 MR MARSHALL: I believe so, my Lord.</p> <p>11 MR JUSTICE HILDYARD: Do you want to gather yourself and</p> <p>12 have a break now?</p> <p>13 MR MARSHALL: This might be a convenient moment for the</p> <p>14 transcribers. I understand that Ms Toubé would prefer</p> <p>15 if we could rise at 4 o'clock today. I think she needs</p> <p>16 to be home before it is dark. If your Lordship would</p> <p>17 find that convenient, I am very happy to do so. I hope</p> <p>18 that would be the case with other parties.</p> <p>19 MR JUSTICE HILDYARD: Certainly, we are well ahead of</p> <p>20 schedule and I would have to rise at 4.15 pm.</p> <p>21 MR MARSHALL: Yes.</p> <p>22 MR JUSTICE HILDYARD: So everything points towards</p> <p>23 4 o'clock.</p> <p>24 (3.02pm)</p> <p>25 (A short break)</p> <p style="text-align: center;">Page 114</p>	<p>1 I am addressing rather than Mr Trower, because one would</p> <p>2 have naturally thought, since it is a possible line that</p> <p>3 he could have taken as a defence to a claim against his</p> <p>4 client, it would be for him to take. But there we are,</p> <p>5 we nevertheless raise it.</p> <p>6 We submit that it is a very well established</p> <p>7 principle, certainly going back to at least the early</p> <p>8 part of the 19th century, that where there is circuity</p> <p>9 of action, it is not merely a counterclaim, or a right</p> <p>10 giving rise to a potential set-off, but a complete</p> <p>11 defence to the claim such that the claim cannot be</p> <p>12 maintained. Using the old language, used in the days</p> <p>13 when the court dealt with actions of assumpsit and so</p> <p>14 on, there would be a non-suit. We can see that from one</p> <p>15 of the early cases, a decision of Lord Justice Tenterden</p> <p>16 back in 1829. This is the case of Carr v Stephens,</p> <p>17 which I think has been added to your Lordship's bundle.</p> <p>18 I think it is in authorities bundle volume 1 with a new</p> <p>19 tab 4A, which I hope your Lordship will find has already</p> <p>20 been included.</p> <p>21 The facts are a little complex, and take a little</p> <p>22 bit of time, when you read the report, to get to grips</p> <p>23 with. If I can try and summarise it for your Lordship.</p> <p>24 What seems to have happened is that there was</p> <p>25 a receiver appointed in respect of the rental derived</p> <p style="text-align: center;">Page 116</p>

<p>1 from an estate in which a married lady had an interest; 2 she was entitled to the rental that the receiver 3 happened to gather in. 4 What also appears to have happened is that 5 a solicitor, who was in fact the claimant, was owed some 6 money by the husband of the lady concerned. The husband 7 issued a bill of exchange, which was accepted by the 8 receiver and which was drawn in favour of the solicitor 9 who was the plaintiff. The question arose as to payment 10 under that bill of exchange. The receiver had obtained 11 an indemnity, an indemnity in case if he made payment 12 and there was then subsequent complaint, the payment was 13 being made from funds to which the husband was not 14 entitled, that he should be able to be indemnified by 15 the solicitor against any such claim. It seems to have 16 become evident that the lady would not have permitted, 17 did not permit, the money to be paid over. 18 So the matter first came before Lord Tenterden who 19 thought: well, you still have to pay and you will just 20 have to claim back under the indemnity. 21 But then he seems to have revised his view on the 22 matter. Your Lordship will see the revised view at the 23 bottom of page 282 of the English reports, beside the 24 number 760, the last paragraph on the page: 25 "Upon further consideration, I think I was wrong in</p> <p style="text-align: center;">Page 117</p>	<p>1 vessel and questions of contribution in relation to 2 a fire that occurred on the vessel. Under the 3 charterparty for the vessel, there was a provision for 4 an indemnity for the charterer. Your Lordship will see 5 that referred to on the first page of the report, 6 page 87, in the second paragraph. It is clause 33.5 of 7 the charterparty, which provided: 8 "The owner shall defend, indemnify and hold harmless 9 the charterer, its affiliates and customers from and 10 against any and all claims." 11 That included where the loss or damage was caused or 12 contributed to by the negligence of the charterer, its 13 affiliates, or customers. 14 Your Lordship sees, on the third paragraph of that 15 page, there is then a summary of the background events. 16 The oil rig supply vessel was damaged by fire. It was 17 owned by the pursuer Farstad Supply, the owner, and was 18 under charter to Asco, and Asco had engaged Enviroco, 19 who were the defender, to clean out some of the tanks on 20 board the vessel. On Asco's instructions the master 21 started up the engines and, at the same time, 22 an employee of Enviroco inadvertently opened a valve 23 which released oil into the engine room, near hot 24 machinery, and that resulted in the fire. The owner 25 sued Enviroco for damages and negligence, and they</p> <p style="text-align: center;">Page 119</p>
<p>1 deciding that the plaintiff might recover on the bill 2 and that the defendant must resort to the indemnity. 3 That would only lead to a circuitry of action. It 4 appears that before the bill became due Mr and Mrs H 5 ordered the defendant not to pay it with the money in 6 his hands and to which they were entitled. He was bound 7 to comply with that order and if he afterwards was 8 compelled to pay the plaintiff, he would be liable to 9 pay the amount to Mr and Mrs H over again and entitled 10 to sue on the indemnity. In order to avoid that 11 circuitry of action, I am of the opinion that we ought to 12 hold that the present action is not maintainable and the 13 consequence is that the rule for entering a non-suit 14 must be made absolute." 15 So your Lordship there sees the way it is dealt with 16 is, it is a defence, the action cannot be brought. It 17 is non-maintainable, non-suit entered. 18 Now, your Lordship, that is one of the older 19 authorities your Lordship sees with the doctrine being 20 recognised early days. 21 It has had, as I indicated earlier, more recent 22 recognition and application in the case of Farstad in 23 the Supreme Court, which your Lordship will find in 24 bundle of authorities volume 3, at tab 81. 25 It is principally concerned with an oil rig supply</p> <p style="text-align: center;">Page 118</p>	<p>1 averred that if they were liable to the owner, then they 2 were entitled to a contribution from Asco under statute. 3 It was agreed that if Enviroco was entitled to such 4 a contribution, Asco would at the least be entitled to 5 an indemnity from the owner under clause 33.5 of the 6 charterparty. 7 Your Lordship starts to see, therefore, the circuitry 8 issue arising. 9 As your Lordship will see, it was held, in fact, 10 that the question that arose under the statute is 11 whether if Asco had been sued by the owner, it would 12 have been liable to the owner. The answer to that 13 question was the same as it would have been if the owner 14 had sued both Enviroco and Asco and the case had fallen 15 within section 3.1 of the relevant statute; that 16 depended on whether Asco would have had a defence under 17 the charterparty for the owner's claim to damages. 18 They concluded that any liability of Asco to the 19 owner in negligence or based on its negligence was in 20 fact excluded by clause 33.5. So the primary finding 21 was that in fact the clause that contained the indemnity 22 was also in fact an exclusion clause, which excluded 23 liability. 24 They did go on to say that even if it wasn't -- and 25 this is the observation: if clause 33.5 was not</p> <p style="text-align: center;">Page 120</p>

<p>1 an exclusion clause but a narrow indemnity clause, Asco 2 would not have sued, have been liable to the owner 3 because it would have had a defence of circuity of 4 action, or -- and because this was a Scottish case -- 5 the equivalent Scottish doctrine, (Latin). 6 My Lord, the first judgment was that given by 7 Lord Clarke, and begins at page 89, with which Lord 8 Phillips agreed. 9 The issue we are interested in, I think, is dealt 10 with at page 95, beginning at paragraph 29. Where your 11 Lordship will see, at paragraph 29, that the primary 12 finding was that clause 33.5 excluded liability. 13 Then, at paragraph 30, there was the observation 14 that the conclusion that Asco would have had such 15 a defence makes the remaining question, which formed 16 part of the argument, irrelevant. That question was 17 whether, if clause 33.5 was not an exclusion clause but 18 only an indemnity clause, the position would be 19 different. 20 The argument accepted by the majority in the inner 21 house was that in such a case the owner would have been 22 entitled to judgment against Asco because clause 33.5 23 did not afford a defence but would have been liable to 24 indemnify Asco against the liability under the clause. 25 It is said in those circumstances if the action had been</p> <p style="text-align: center;">Page 121</p>	<p>1 view expressed above, clause 33.5 was no more than 2 a narrow indemnity clause, even if Asco was in principle 3 liable to the owner, it would be entitled to be 4 immediately indemnified by the owner. It would be bound 5 to repay the amount of the liability. In these 6 circumstances it would, as Lord Dunedin put it, be 7 useless to give judgment against the owner for Asco." 8 Accordingly, if Asco had been sued no such judgment 9 would have been given for damages against it. It 10 therefore was protected against the possibility of 11 a judgment being given against it. 12 My Lord, just to complete the materials: Lord Hope 13 whose judgment or speech begins at page 98 of the 14 report, he dealt with the matter at paragraph 44, on 15 page 100. 16 He agreed with Lord Clarke, as to it being, in fact, 17 an exclusion clause case, but goes on to conclude that 18 he would have reached the same conclusion if on the 19 proper construction of the charterparty, the clause was 20 to be regarded as providing Asco with an indemnity. He 21 makes the further point that the defence of the circuity 22 of action wasn't in so many words known to Scottish law 23 but the underlying principle certainly is, although it 24 was overlooked by the majority of the inner house. He 25 then goes on to say, at the end, in the last two</p> <p style="text-align: center;">Page 123</p>
<p>1 brought by the owner against both Enviroco and Asco as 2 contemplated by the relevant Act, it would have been 3 entitled to a joint several decree against both. 4 Your Lordship will see in paragraph 31 Lord Clarke 5 agreed with Lord Mance that that argument couldn't be 6 accepted. The charterparty was governed by English law 7 and such a claim by the owner would be met by the 8 defence of circuity of action and judgment would be 9 given not for the owner but for Asco, there would thus 10 be no order of the court that Asco pay compensation to 11 the owner. 12 So it is not a question of counterclaims or anything 13 of that nature. It is a straight defence and if it 14 works you have no claim. That was a question of English 15 law. Although it was a Scottish case, every other 16 aspect of it was Scottish, this particular point was 17 an English law point. 18 He goes on a little further to consider what would 19 be the position under Scottish law and your Lordship 20 sees that being dealt with in paragraph 32. In essence, 21 his Lordship concluded that there is a very similar 22 doctrine with a Latin tag associated with it, which 23 applies under Scottish law. 24 Then, at paragraph 33, he concludes: 25 "That principle would apply here if contrary to the</p> <p style="text-align: center;">Page 122</p>	<p>1 sentences: 2 "Asco's right to an indemnity from the owner for the 3 losses claimed for would be sufficient to defeat the 4 owners' claim upon the application of this principle. 5 The result is that for the purposes of the relevant 6 section, Asco would have been found not liable to in 7 respect of the loss and damages on which the action 8 against Enviroco is founded." 9 So it is a complete defence, no liability. 10 My Lord, Lord Roger, I don't think dealt with that 11 particular topic we are interested in, but Lord Mance 12 did, whose speech begins at page 102. 13 MR JUSTICE HILDYARD: Lord Roger may have done in 48. 14 MR MARSHALL: Well, he was in complete agreement, in fact, 15 which Lord Clarke and Lord Mance, at 45. 16 MR JUSTICE HILDYARD: He seems to indicate, although it 17 doesn't exist this Scottish law, there is nothing in 18 Scottish law against it, therefore it does exist. 19 MR MARSHALL: Yes. Lord Mance deals with it more 20 specifically at page 104, in paragraph 59. He 21 concludes, there: 22 "The language operates as a series of indemnities 23 against third party exposure ... this is both what the 24 heading of clause 33 and what common commercial sense 25 would bring one to expect ... it is unnecessary to</p> <p style="text-align: center;">Page 124</p>

<p>1 consider the position on unreal hypothesis that 2 clause 33.5 operates as a pure indemnity." 3 Then, he goes on to say: 4 "The consequence of this hypothesis would seem to me 5 as a matter of English law, as the law governing 6 charterparty rather than Scots law, but under both 7 English and Scots law the action would clearly fail 8 whether for circuity of action in English terminology or 9 pursuant to the equivalent Scots law doctrine." 10 So that is the more recent and highest authority. 11 MR JUSTICE HILDYARD: The judge was governed by the law of 12 Scotland, was it? 13 MR MARSHALL: Sorry, my Lord, the charterparty? 14 MR JUSTICE HILDYARD: Yes. 15 MR MARSHALL: The charterparty was governed by English law, 16 that is why Lord Mance thought it was probably 17 an English law point rather than a Scottish law point. 18 MR JUSTICE HILDYARD: Right. But the case was fought in 19 Scotland? 20 MR MARSHALL: It was fought in Scotland. 21 MR JUSTICE HILDYARD: Lord Mance thinks it is a matter of 22 substance under the contract, rather than a matter of 23 procedure. 24 MR MARSHALL: We would submit it is a matter of substance 25 because it provides you with a complete defence to the</p> <p style="text-align: center;">Page 125</p>	<p>1 MR MARSHALL: Well, even if there was a mismatch, whatever 2 the claim is that is going to be made, under section 74, 3 is certainly going to defeat that portion of the claim 4 that is being made by LBHI2. It is LBIE's case that the 5 claim, under section 74, is in fact exceeding by a very 6 large margin whatever is coming in the other direction. 7 So as long as that is the case, then they have 8 a complete defence. 9 My Lord, it is submitted, really, in answer to this 10 that there are two points that are raised at the moment. 11 The first point is: oh well, this isn't applicable 12 because it is really a case of set-off, and solvency 13 set-off arrangements come into play. 14 The second point, that was put forward rather more 15 tentatively, is that in some way this interfered with 16 the contributory rule. With respect, we don't accept 17 that either of those can possibly be an answer, because 18 the first set-off requires there to be two maintainable 19 claims, which you are giving rise to debts or some other 20 quantified amount that you can pursue, but here you 21 don't have that. You don't get to that stage. There is 22 no claim that can be maintained. There is a complete 23 defence to it. 24 My learned friend wanted to rely upon a passage in 25 the Post Office v Hampshire County Council case for the</p> <p style="text-align: center;">Page 127</p>
<p>1 claim. 2 My Lord, we would submit one can see from those 3 cases therefore that it is an instance of a defence. 4 What is required is a right of indemnification or 5 recourse in respect of the same claim, or amount, as 6 against the party suing. 7 Here we have a claim for the recovery of the 8 subordinated debt against LBIE by LBHI2, and we submit 9 it precisely falls within the same principle, in the 10 context we are concerned with for issue number 1, which 11 is a claim in respect of the subordinated debt, which 12 may only be pursued through the insolvency process. 13 Indeed, that is what the subordinated debt agreement 14 envisaged that it would only be pursued in the 15 insolvency context. 16 In that context, there would then be the claim over 17 against LBHI2 by LBIE because of the shareholding under 18 section 74, for exactly the same thing. If that is the 19 scenario we are concerned with, we have complete 20 circuity. If that is so, there is no claim under the 21 sub-debt that can be maintained, applying these 22 principles. 23 MR JUSTICE HILDYARD: Does that apply even if there is 24 a mismatch between the value, or estimate of one and the 25 estimate of another?</p> <p style="text-align: center;">Page 126</p>	<p>1 proposition that it is really better considered within 2 the ambit of set-off rather than something else. 3 Unfortunately, the passage that your Lordship was 4 taken to is just the start of the analysis and doesn't 5 complete the analysis, when one looks at that case. 6 Could I take your Lordship to it? It is authorities 2, 7 tab 64. It repays a little bit more study in our 8 submission, than perhaps was given to it by Mr Trower. 9 This was a case all to do with telephone cables, the 10 Post Office underground telephone cables. 11 As your Lordship sees from the headnote, what had 12 happened was the road had become flooded and someone 13 from the local authority had arranged for some work to 14 be carried out draining the water off the road. Before 15 they did the work, they had asked the employees of the 16 Post Office to indicate where the telephone cable was 17 positioned. Unfortunately, they seem to have been 18 informed wrongly, and plunged a crowbar into the wrong 19 part of the relevant area, causing problems. Then the 20 question arose: well, among other things, what happens 21 when there is liability on the part of the council under 22 statute, under the relevant statutory provision, 23 covering this sort of thing? 24 Which I think was a provision of the Telegraph Act. 25 But there is a claim going in the other direction for</p> <p style="text-align: center;">Page 128</p>

<p>1 precisely the same loss, from the council against the 2 Post Office, for the wrong information they were given 3 about where they were meant to be putting the crowbar. 4 Your Lordship will see that this was addressed in 5 Lord Justice Geoffrey Lane's judgment after the passage 6 which my learned friend took your Lordship to, which is 7 on page 134. Your Lordship was taken, I think, to the 8 passage referring to Ginty v Belmont Building Supplies. 9 MR JUSTICE HILDYARD: Yes. 10 MR MARSHALL: Letters D to G. But then your Lordship needs 11 to go on a little bit further, to the foot of the page, 12 letter H, where Lord Justice Geoffrey Lane then says: 13 "What is said here is this ..." 14 There was, first of all, an objection that the 15 matter wasn't pleaded, and as far as that was concerned 16 Mr Denning, who was for the council, his reply was: 17 "The facts we rely on are sufficiently pleaded. All 18 we are saying is that insofar as the Post Office has 19 suffered this damage, this expense, the reason for 20 incurring this expense is their own fault and as the 21 amendment to the particulars of claim made clear." 22 So they consequently submitted that every ground 23 that was necessary for the foundation of the application 24 of this doctrine of circuity of action is present, and 25 his Lordship agreed with him. He then went on to say:</p> <p style="text-align: center;">Page 129</p>	<p>1 of long stop that was there. 2 My Lord, Lord Justice Ormrod, who gave a concurring 3 judgment deals with the matter at page 136. Just beside 4 letter G, where he made this point: 5 "The only remaining question then is whether, 6 strictly speaking, this is a matter of counterclaim or 7 whether it can be relied upon as a defence. I accept 8 without hesitation Mr Denning's submissions that on the 9 authorities this is a classic example of the circuity of 10 action situation and that consequently a defendant to 11 a claim under section 8 can rely by way of defence on 12 facts which indicate that, had he brought 13 a counterclaim, he would have been entitled in law to 14 recover from the Post Office as damages for negligence 15 the sums claimed against him by the Post Office, and 16 consequently I accept the argument of Mr Denning and the 17 short and effective submission that Hampshire County 18 council is not only a valid counterclaim but a valid 19 defence to the claim in this case." 20 Lord Justice Orr then agreed with Lord Justice Lane 21 and Lord Justice Ormrod. 22 So, my Lord, that is how it was dealt with there, 23 and I would submit to your Lordship that that is 24 entirely in line with both the oldest authorities and 25 the most recent from the Supreme Court.</p> <p style="text-align: center;">Page 131</p>
<p>1 "In this case, it seems to me there was a total 2 circuity of action on the basis of the proper findings 3 of the judge. Consequently, the council succeeds on 4 that issue." 5 So that meant defence to claim, end of case. 6 There was then, though, a further alternative point, 7 which is then dealt with in the next part of the 8 judgment: 9 "But once again the matter does not stop there, 10 because yesterday evening ...(reading to the words)... 11 and counterclaim based on the position in Hedley Byrne." 12 That was based on the negligence of the Post Office 13 employee in advising as to where to carry out the 14 repairs on the road. 15 His Lordship observes that they didn't have to get 16 into the morass of Hedley Byrne and succeeding cases 17 because of a concession, but he then goes on to say, as 18 your Lordship sees in the last two sentences: 19 "But that is a long stop as far as the council is 20 concerned. The council should, in my judgment, succeed 21 on the circuity of action point, even though they have 22 failed on the meaning of section 8." 23 So they didn't actually, in the end, have to rely on 24 a counterclaim, at all. They just relied on a defence. 25 The amendment wasn't in fact necessary. It was a sort</p> <p style="text-align: center;">Page 130</p>	<p>1 We aren't dealing with counter claims, cross claims, 2 set-offs, we are simply dealing with a defence to the 3 claim. 4 My Lord, the second area, which was the contributory 5 rule I think, is something that was described by 6 Mr Justice David Richards, as he then was, in the 7 Waterfall I proceedings, which I think your Lordship has 8 in trial bundle 1, at tab 8. I think he describes it at 9 page 47, paragraph 179. 10 MR JUSTICE HILDYARD: Paragraph 79, did you say? 11 MR MARSHALL: Paragraph 179, my Lord. 12 MR JUSTICE HILDYARD: I am so sorry. 13 MR MARSHALL: He describes it by reference to a series of 14 cases in the 19th century, beginning with Overend Gurney 15 Grissel's case, which established the principle that 16 a person could recover nothing as a creditor of 17 a company until he had discharged all of his liabilities 18 as a contributory. He then referred to the classic 19 statement of the principle given by Mr Justice Buckley 20 in West Coast Goldfields, an early 20th century case: 21 "The person liable as contributory must discharge 22 himself in that character before he can set-up that as 23 a creditor he is entitled to receive anything and 24 a fortiori, as it seems to me, before he can set-up as 25 a contributory he is entitled to receive anything."</p> <p style="text-align: center;">Page 132</p>

<p>1 You will notice that that was upheld by the 2 Court of Appeal. Later on, in the course of this quite 3 lengthy section of his judgment, he then ultimately 4 concludes that the contributory rule doesn't apply in 5 the context of administration, which is also the 6 conclusion of the Court of Appeal. Your Lordship will 7 find that judgment in the next tab, tab 9. The relevant 8 passages, I think, are at paragraph 132, on page 37, 9 where Lord Justice Lewison agrees with 10 Lord Justice Briggs on the matter, and 11 Lord Justice Briggs deals with it, at 233 to 245. 12 Your Lordship will see the conclusion at 245 is that 13 he agreed with the judge on that particular point. 14 Now, apart from the fact that it doesn't apply in 15 the context of an administration anyway, it is also 16 quite difficult to understand how this has any relevance 17 to this issue at all, because it, LBH12, has no claim. 18 There is nothing you are preventing by virtue of the 19 contributory rule. There just isn't a claim, so you 20 just don't have to deal with it. There is no question 21 of postponing anything by virtue of the contributory 22 rule doctrine. There is just nothing to postpone. 23 So my Lord, we just don't see that as really having 24 any relevance at all to the topic that your Lordship has 25 to deal with.</p> <p style="text-align: center;">Page 133</p>	<p>1 following from some of the early cases that your 2 Lordship saw under some of the 19th century statutes, 3 where they tend to use that formulation. And my Lord, 4 we submit that that interpretation applies where ever 5 one sees provisions for repayment such as appear in the 6 variable terms, and if your Lordship has the 7 subordinated debt agreement, it is in volume 4 at tab 1 8 and if one goes to clause 9, for example, in the 9 variable terms on page 5 the third line on clause 9, 10 "the terms for repayment are..." where one sees 11 reference to repayment we respectfully submit one then 12 has to interpret what does repayment mean in this 13 context? It means repayment by the borrower, obviously, 14 we would submit, but also repayment by the borrower from 15 their own funds. And similarly when one looks at the 16 standard terms, for example where there is a definition 17 of "advance" on page 7, and your Lordship will see 18 reference to repayment. 19 MR JUSTICE HILDYARD: I am sorry, I was pondering your from 20 their own funds point. 21 MR MARSHALL: Yes. I am using that language because it is 22 the language of section 74.2(e) itself. 23 MR JUSTICE HILDYARD: Doesn't that sort of beg the question, 24 I mean 74.2(e), as you confirmed, was a long utilised 25 clause but we still have to decide whether it applies in</p> <p style="text-align: center;">Page 135</p>
<p>1 So my Lord, it is quite a short point but, in our 2 submission, it is a clear and straightforward answer to 3 the issue that we have to deal with. If there is no 4 proper claim in relation to the sub-debt, there is no 5 possible basis for then claiming against either 6 ourselves or anyone else under section 74. 7 If we are incorrect in the circuitry of action 8 approach, we would nevertheless submit to your Lordship 9 that on the proper construction of the subordinated debt 10 agreement this is a case where recourse was to be had to 11 the funds of LBIE alone, in the sense that those words 12 are used in section 74.2(e) of the Act. Your Lordship 13 will recall the wording. I think the provision is in 14 bundle 5, I think at several different places. I had it 15 at 133. Your Lordship might have been marking it up 16 from 132, but the reference in the provision is as to 17 the funds of the company are alone made liable in 18 respect of the policy, or contract. 19 MR JUSTICE HILDYARD: Where are you looking, I am sorry? 20 MR MARSHALL: I am looking at bundle 5, tab 133 where we 21 have section 74, and sub-section 2(e). There were two 22 alternatives, you can either have the liability of the 23 individual members and the policy and contract 24 restricted or where the funds of the company are made 25 liable to the policy or contract. The wording is</p> <p style="text-align: center;">Page 134</p>	<p>1 the context, or whether it only applied where there was 2 an express clause to that effect in, for example, life 3 assurance contracts. 4 MR MARSHALL: Well, what we say the provisions of 74.2(e) is 5 all about is creating an exception -- 6 MR JUSTICE HILDYARD: Where have we been looking at 7 section 74? For some reason -- 8 MR MARSHALL: It is bundle 5 of the authorities, my Lord, at 9 either tab 132 or 133. 10 MR JUSTICE HILDYARD: Is that the only place we have been 11 looking at it? 12 MR MARSHALL: I think so. There is 132 which has the pre 13 2009 version, and then there is the 133 which is the one 14 from 2009 to present. 15 MR JUSTICE HILDYARD: Yes. 16 MR MARSHALL: But for present purposes I don't think it 17 matters, because the provision is the same. This is 18 an exception to sub-section 1. So it is creating 19 a situation where there will not be liability on the 20 part of members, or past members, to contribute to the 21 assets. And you do it by a policy of insurance. 22 Historically a lot of the cases were to do with life 23 policies. Or other contracts, where the liability of 24 individual member is restricted, or funds of the company 25 alone are made liable in respect of the policy. Or</p> <p style="text-align: center;">Page 136</p>

1 contract.
 2 MR JUSTICE HILDYARD: Yes. That is so, but why does that
 3 help you with clause 9?
 4 MR MARSHALL: What we submit clause 9 means when it refers
 5 to repayment. One has to interpret this agreement as to
 6 what it means by repayment. And we say it should be
 7 interpreted, properly interpreted, having regard to all
 8 of the rules, current rules of interpretation as meaning
 9 repayment from the funds of LBIE alone. And therefore
 10 falls within section 74.2(e).
 11 MR JUSTICE HILDYARD: What are the particular things, and
 12 I am so sorry to be slow, but which you say ensure that
 13 repayment is only to be from the funds alone?
 14 MR MARSHALL: A number of things, we rely upon.
 15 MR JUSTICE HILDYARD: You are going to come to that?
 16 MR MARSHALL: I am going to come through a full list of
 17 things that point that way.
 18 MR JUSTICE HILDYARD: Yes.
 19 MR MARSHALL: We submit it is internally consistent in the
 20 sense that if you look at other provisions of the
 21 contract, to make it work coherently that is how you
 22 should interpret it. I will also be relying upon the
 23 background, or context in which this agreement was made,
 24 and we submit that is relevant, even though one is
 25 dealing with, in part, a standard form agreement but in

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1 part a non-standard form agreement, in the sense that
 2 there are variable terms which are made individually.
 3 But of course an important part of the variable term is
 4 identifying who the borrower is. The nature of the
 5 borrower is part of the variable term. And the context
 6 in this instance is a borrower which is an unlimited
 7 company, which is a fairly special one, and one has to
 8 then consider the particular background to that and the
 9 dealings with the regulator in that connection. But
 10 there are a number of factors which I am going to come
 11 to.
 12 MR JUSTICE HILDYARD: I misunderstood you Mr Marshall, I am
 13 so sorry. I thought you were telling me within the
 14 phrase or word repayment is the self-contained answer,
 15 whereas you are going to show me all sorts of factors
 16 which you rely on as vesting in that single word the
 17 meaning that it is repayment out of the funds of the
 18 company alone?
 19 MR MARSHALL: Yes. No doubt there is more than one way to
 20 interpret it, actually, but there are certainly two
 21 interpretations being advanced. One interpretation is
 22 repayment means repayment from the funds of LBIE and
 23 repayment from any funds it might be able to collect
 24 under section 74.
 25 MR JUSTICE HILDYARD: That is one argument.

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1 MR MARSHALL: That is one argument.
 2 MR JUSTICE HILDYARD: And Mr Atherton has waxed lyrical on
 3 that this afternoon. But I had misunderstood; this was
 4 an opening rather than a closing submission.
 5 MR MARSHALL: Oh, absolutely. I was asked by Mr Trower, or
 6 the gauntlet was thrown down, well, pick the term that
 7 has to be interpreted.
 8 MR JUSTICE HILDYARD: And the term is the word "repayment".
 9 MR MARSHALL: And the term is repayment, yes. In fact it is
 10 "repayment" and there are also instances where one finds
 11 the word "payment" being used as well. And we would
 12 submit that also is to be interpreted in that way.
 13 I think there are examples of that in clause 5, for
 14 example.
 15 MR JUSTICE HILDYARD: And you are alerting me to the fact
 16 that these are variable terms because you are alerting
 17 me to the fact that part of your argument will be that
 18 the specific nature of the borrower is to be taken into
 19 account in this particular context.
 20 MR MARSHALL: Absolutely. That is a variable factor.
 21 MR JUSTICE HILDYARD: Right.
 22 MR MARSHALL: That is not standard form. In fact in this
 23 instance it is a very unusual factor. Perhaps unique,
 24 in fact.
 25 MR JUSTICE HILDYARD: I see. Yes.

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1 MR MARSHALL: Now, the first answer from Mr Trower is well,
 2 if you look at all of the old cases, Re: Athenaeum up
 3 until the latter part of the 19th century, I think the
 4 latest he gets up to is about 1880. You get a much
 5 clearer statement, if you are going to rely on section
 6 74.2(e). You get it all spelt out in bold terms but the
 7 problem with that my Lord is all of those authorities
 8 predate the modern approach to the interpretation of
 9 contracts, which we are informed by Lord Neuberger in
 10 Arnold v Britton has undergone to some extent
 11 a revolution over the last 45 years and we are no longer
 12 in a situation where we have to find things spelt out
 13 literally in that way. Rather, the approach is the one
 14 which was advocated by Lord Hoffmann in
 15 Investors Compensation Scheme and which has remained the
 16 position throughout all of the Supreme Court and Privy
 17 Council cases that have followed it; that when you are
 18 interpreting it is the meaning which the relevant
 19 contract or instrument would convey to a reasonable
 20 person having all of the background knowledge which
 21 would be reasonably available to the audience to whom
 22 the instrument or contract is addressed. And my Lord,
 23 that has been repeated a number of times, including in
 24 the most recent Supreme Court decision in
 25 Arnold v Britton. Adopting that approach, one has

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1 regard to not only the internal context of the document
2 in terms of trying to make sure that the various
3 provisions in it work coherently together, but where
4 appropriate to relevant contextual matters. And in this
5 context we are talking about regulatory background,
6 principally.
7 MR JUSTICE HILDYARD: But two points there. You have to
8 find a provision.
9 MR MARSHALL: Yes.
10 MR JUSTICE HILDYARD: And you say you have found the
11 provision.
12 MR MARSHALL: Yes.
13 MR JUSTICE HILDYARD: And the provision is repayment.
14 MR MARSHALL: Yes.
15 MR JUSTICE HILDYARD: And the other is notwithstanding the
16 sea change in attitude to the approach of English law to
17 contractual interpretation, if it is, you have to take
18 into account in interpretation the fact that in the past
19 for many, many years, as is part of the context, you
20 only got away with this if it was clear.
21 MR MARSHALL: Yes, but my answer to your Lordship is --
22 MR JUSTICE HILDYARD: It is all part of the context, isn't
23 it?
24 MR MARSHALL: Yes. I suppose my answer to that last point,
25 my Lord, is in the old authorities they happen to have

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1 express provisions. It wasn't said in the old
2 authorities because you are seeking to come out of what
3 was the equivalent of section 74.1 you have to do so in
4 very clear terms. That isn't spelt out.
5 MR JUSTICE HILDYARD: No, one of the factors that
6 a draftsman would take into account, being a learned
7 man, is blimey, it has always been made express in the
8 past, or words to like effect depending on the
9 draftsman.
10 MR MARSHALL: Yes. No doubt in the old days they were very
11 conscious of the wider circumstances in which liability
12 would arise. But all I am submitting to your Lordship
13 is no one has ever said if you want to use
14 section 74.2(e) you have to do it in very clear and
15 express terms, no one has ever said that, it just so
16 happens that the older authorities did do it in much
17 more express terms.
18 MR JUSTICE HILDYARD: Yes.
19 MR MARSHALL: But that doesn't mean that that sort of
20 inhibits your Lordship in any way in adopting the
21 correct modern approach to interpretation which is to be
22 applied on this authority to this agreement, and that is
23 where we would submit you start.
24 My Lord, I am very conscious of the fact it is now
25 3.59, so before I start going off into the various

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1 factors, that might be a convenient moment to call
2 a halt.
3 MR JUSTICE HILDYARD: Yes, indeed. Well, thank you. 10.30
4 on Monday, then. Have a very good weekend.
5 (3.59 pm)
6 (the hearing adjourned until 10.30 am on Monday 6 February
7 2017)
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