1	Monday, 6 February 2017	1	"It is to decide what a reasonable person would have
2	(10.30 am)	2	understood the parties to have meant by using the
3	Submissions by MR MARSHALL (continued)	3	language which they did."
4	MR MARSHALL: My Lord, I think we finished on Friday on the	4	He then gives some examples from the
5	subject of interpretation of express terms in the	5	Mannai Investment case and also Investors Compensation
6	subordinated loan agreements, and focusing in particular	6	Scheme Limited itself, where rather different language
7	on the provisions for repayment and payment that	7	to that appearing on the contract was ultimately the
8	contained.	8	meaning that the court came to conclude was the
9	My Lord, I gave your Lordship the well established	9	intention of the parties.
10	formulation as to the correct approach to contractual	10	So the amount of red ink that one has to use doesn't
11	interpretation derived from Investors Compensation	11	necessarily matter.
12	Scheme v West Bromwich Building Society. Could I just,	12	The second point from the case is concerning whether
13	before embarking on the materials showing the become	13	or not one needs to find some sort of ambiguity in order
14	ground, the relevant background that we say is	14	to have regard to the relevant context or background.
15	relevant	15	His Lordship deals with that at page 1118, at letter E,
16	MR JUSTICE HILDYARD: The background to what?	16	to 1119, just below letter B. Could I invite your
17	MR MARSHALL: I am sorry, my Lord?	17	Lordship to just read those passages. It is effectively
18	MR JUSTICE HILDYARD: I didn't quite catch that phrase.	18	paragraphs 36 and 37.
19	MR MARSHALL: Before we get into the materials regarding the	19	(Pause)
20	background that we rely upon, could I just show your	20	MR JUSTICE HILDYARD: Yes.
21	Lordship one or two further points that are derived from	21	MR MARSHALL: I am grateful. So ambiguity not needed to go
22	the Supreme Court, or House of Lords, authorities.	22	to the background, we submit, in the light of that.
23	First of all, three points derived from Chartbrook,	23	Then the third point which we draw attention to is
24	if I could ask your Lordship to look at that. That is	24	on page 1120, which concerns the issue of an agreement
25	in authorities bundle volume 3, tab 80. If I could go	25	which is capable of assignment. What is the position
	Page 1		Page 3
1	to the speech of Lord Hoffmann, your Lordship will see	1	then, given that possibly another party may come in as
2	the formulation derived from investors compensation	2	an assignee and they might not know of the relevant
3	scheme at the top of page 1112, paragraph 14. In	3	specific background to the contract's original
4	particular, at letter B.	4	negotiation and formulation. His Lordship addresses
5	MR JUSTICE HILDYARD: Mm-hm.	5	that on page 1120, in paragraph 40. Again, perhaps if
6	MR MARSHALL: After setting that out, just one or two other	6	I can invite your Lordship to read that paragraph.
7	points that one can see from the decision.	7	(Pause)
8	Firstly, on page 113, at letter H, his Lordship drew	8	MR JUSTICE HILDYARD: Yes.
9	attention to the fact that you may have to use	9	MR MARSHALL: So, my Lord, we respectfully submit that may
10	additional language in the course of interpreting the	10	well be important when we come to consider Mr Trower's
11	agreement to get to the outcome. If you like, the	11	case on the permissibility of considering the specific
12	amount of red ink that you have to use isn't something	12	context of this subordinated loan agreement, given the
13	that should affect the approach or deter the court from	13	provisions for assignment with the consent of the FSA.
14	adopting the construction advocated. Your Lordship will	14	We will respectfully submit, in the light of the
15	see, just below letter H, he said that:	15	guidance provided by Lord Hoffmann there, that is not
16	"I do not think that it is necessary to undertake	16	a factor that would prohibit reference to the specific
17	the exercise of comparing this language with that of the	17	background to the origination of the subordinated loan
18	definition in order to see how much use of red ink is	18	agreements as between the LBHI2 and the FSA and LBIE.
19	involved. When the language used in an instrument gives	19	In particular, we will be submitting to your
20	rise to difficulties of construction, the process of	20	Lordship that if there were to be any assignments of the
21	interpretation does not require one to formulate some	21	subordinated loan agreements, realistically it was going
22	alternative form of words, which approximates as closely	22	to be within the Lehman Group and any potential assignee
23	as possible to that of the parties."	23	would be well aware, or had readily available to them,
24	Then your Lordship will see he goes over the page in	24	the particular background that had led to their
25	saying:	25	formulation.
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8th Floor, 165 Fleet Street London EC4A 2DY

1	MR JUSTICE HILDYARD: Is that a fact? That it would be	1	Albeit that the variable terms to some extent one has to
2	within the Lehman Group?	2	apply guidance from the FSA in connection with.
3	MR MARSHALL: We submit when you see the materials which	3	MR JUSTICE HILDYARD: Yes.
4	I will take to you shortly	4	MR MARSHALL: But one of the important aspects of the
5	MR JUSTICE HILDYARD: Yes.	5	variable part is that the type of borrower will vary.
6	MR MARSHALL: your Lordship will see how the whole thing	6	In this case, it is an extremely unusual type of
7	came about through a restructuring.	7	borrower, namely an unlimited company. That is by no
8	MR JUSTICE HILDYARD: Yes.	8	means a standard type of borrower from the regulatory
9	MR MARSHALL: Given that, given the reasons for that	9	perspective. The repayment terms could also vary. They
10	restructuring, how it all happened, we would submit that	10	were part of the variable terms. So that, first of all,
11	it is highly unlikely, when one has seen all of that,	11	that is the first qualification to applying the standard
12	that all of that was going to be undone with the	12	form principle to interpretation.
13	subordinated loan agreements then being assigned out of	13	The second is that even if one does apply the
14	the Lehman Group to some totally independent third	14	approach that one has to find a meaning which is
15	party. We would respectfully submit that this is	15	applicable not only in our particular context, but more
16	a very, very unlikely scenario and we submit it is much	16	widely, when one looks at the guidance that the FSA
17	more likely any assignee would have been within the	17	published in combination with the way in which they
18	group and therefore very much aware of how the	18	approached this matter which your Lordship will see
19	agreements were formulated and organised; bearing in	19	shortly it is very event that they did not have in
20	mind as your Lordship will see when we come to the	20	mind as a source of capital for LBIE, as a source of
21	documents this was all done in a central way. There	21	support for LBIE, calls on members. Indeed, they have
22	was a centralised process here for the whole group, with	22	viewed the matter as being one where the capital will
23	the FSA and Revenue, and it was all done by a department	23	already be within LBIE, in the sense of paid up capital
24	which was representing everyone within the Lehman UK	24	on shares, and then various other things that they will
25	Group at the relevant time.	25	accrue in the form of capital over time, but not
	Page 5		Page 7
		1	
1		1	
1	MR JUSTICE HILDYARD: I am going to be very rude and it is	1	something in the form of a call on shareholders under
2	entirely my frailty, but would you speak up a little bit	2	section 74. That doesn't feature at all.
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2 (Pages 5 to 8)

Day 4

1	necessarily the case that you are confined to what would	1	MR JUSTICE HILDYARD: Lord Neuberger.
2	be the standard meaning for everyone. It may then be	2	MR MARSHALL: It is indeed. Bundle 4, tab 100. Your
3	appropriate to consider the particular circumstances.	3	Lordship will find Lord Neuberger's speech at page 6 of
4	But those are the list of submissions, if you like,	4	the report, and your Lordship will see that, at letter
5	which I will develop shortly, in answer to the	5	J, his Lordship gave some general guidance on the proper
6	suggestion that it is just a standard form and you have	6	interpretation of contractual provisions. He begins, at
7	to apply it without regard to the background in this	7	paragraph 15, by adopting the test of Lord Hoffmann in
8	particular case.	8	Chartbrook, which I took your Lordship to just a short
9	MR JUSTICE HILDYARD: But your approach, is it, is to look	9	time ago. Then he sets out, at page 7, at letter A and
10	at the contract and interpret it rather than focus on	10	B, the types of matter that the court then takes into
11	the broader question, if you like, as to what the assets	11	account.
12	of the company actually are?	12	MR JUSTICE HILDYARD: Yes.
13	I haven't put that very clearly, but you wish as	13	MR MARSHALL: Which are the same as those described, indeed,
14	a matter of contract to say that the contract states	14	by Lord Hoffmann.
15	that it is only the assets apart from, as it were, the	15	He then set out various factors to bear in mind, and
16	call, which are contractually brought into account.	16	they are listed then on page 7, at letter D, all of the
17	MR MARSHALL: Yes.	17	way through to page 8, letter H. There are seven
18	MR JUSTICE HILDYARD: Whereas, I think, Mr Atherton, for	18	factors which he draws attention to. The first point
19	example, might say, "Well, the cause of action made	19	is: don't under value the language. Although one, of
20	available to a liquidator to enforce unlimited liability	20	course, has regard to commercial commonsense and
20	is simply not within that bag", whatever the contract	20	surrounding circumstances. He makes the point, in
21	may say.	22	paragraph 18, that the less clear the words, the more it
23	MR MARSHALL: Yes.	23	will be open to one to depart from their natural
23	MR JUSTICE HILDYARD: But you are a contractual	23	meaning. Then, the third point, in paragraph 19, is
24	MR MARSHALL: We are on a contractual interpretation point,	24	about not adopting commercial commonsense on
25	WR WARSHALL. We are on a contractual interpretation point,	25	about not adopting commercial commonsense on
	Page 9		Page 11
1	here. I, of course, adopt what Mr Atherton suggests,		a retrospective basis. Paragraph 20 is that while
2	that there is an additional argument	2	commercial commonsense is a very important factor, the
3	MR JUSTICE HILDYARD: Yes.	3	court will be very slow to reject the natural meaning of
4	MR MARSHALL: but our argument is based on interpretation	4	a provision simply because it appears to be imprudent
5	of the contract. When it talks about repaying these	5	for one of the parties.
6	loans, it is talking about repaying from the funds of	6	Paragraph 21, the fifth point, is about what facts
7	LBIE itself, rather than funded through calls on	7	were known. It has to be facts known or reasonably
8	shareholders, on a proper interpretation.	8	available to both parties.
9	MR JUSTICE HILDYARD: Yes.		Then, when we get to the next point, paragraph 22,
10	MR MARSHALL: My Lord, can I just add the final point	10	where the Aberdeen City Council point is made. MR JUSTICE HILDYARD: Yes.
11	I wanted to make concerning the correct approach to	11 12	
12	interpretation. This will be relevant, as your Lordship		MR MARSHALL: He then says:
13	will see, shortly.	13	"In some cases an event subsequently occurs which
14	This is what might be described as the	14	was plainly not intended or contemplated by the parties
15 16	Aberdeen City Council approach, where one finds that there is a gap. The parties might not have contemplated	15	judging from the language of their contract. In such
16 17	there is a gap. The parties might not have contemplated	16	a case, it is clear what the parties would have intended the court will give offset to that intention "
17	a particular scenario but the court, as part of its	17	intended, the court will give effect to that intention."
18 19	process of interpreting the express terms, will fill that can by looking at other provisions of the agreement	18 19	He gives, as an example, the Aberdeen City Council
20	that gap by looking at other provisions of the agreement to see what the parties' intention was. One sees that	20	decision, where the court concluded:
	•		"Any approach other than that adopted would defeat
21 22	from the decision in Arnold v Britton, which your	21 22	the parties' clear objectives, but the conclusion was based on what the parties had in mind when they entered
22	Lordship has, I think, in authorities bundle 4. MR JUSTICE HILDYARD: This is another Supreme Court	22	into the contract."
23 24	decision.	23 24	
24 25	MR TROWER: It is indeed.	24 25	The seventh point, that he mentions in paragraph 3, is specific to service charges being construed
23	WINT FRO WEAK. IT IS INCOM.	23	is specific to service charges being construed
	Page 10		Page 12

		1	
1	restrictively, which isn't relevant for our purposes.	1	supplies machinery where the parties have failed do so,
2	My Lord, can I then go to Lord Hodges' speech, where	2	but this principle goes further than that?
3	you will see in a little bit more detail what	3	MR MARSHALL: It does. It is quite close to implication of
4	Aberdeen City Council was about, and how the Supreme	4	a term but it is being done as part of the express term,
5	Court dealt with it. That is on page 17, at	5	interpretation. There is a gap, but you fill it by
6	paragraph 71.	6	reference to the internal context of the document and
7	He makes the point:	7	that's (Inaudible) interpretation of express terms,
8	"In Aberdeen City Council the internal context of	8	rather than implication of a term with the rules that
9	the contract provided the answer. In that case, the	9	one derives in Aberdeen City Council applying, rather
10	sale contract provided for the payment to the vendor of	10	than the implications of term rules, which are now to be
11	a further sum on disposal of land by the purchaser. Two	11	found Marks and Spencer, which I will take your Lordship
12	of the methods of disposal required the parties to	12	to later.
13	ascertain the market value of the property on disposal	13	My Lord, with that legal analysis, can I then take
14	in calculating an additional payment. The other used	14	your Lordship to what we contend is the relevant context
15	the gross sales of proceeds in calculating the payment.	15	to these subordinated loan agreements.
16	The purchaser then sold the site at an undervalue to	16	First and foremost, they were carried out in
17	an associated company; that was a circumstance which, on	17	conjunction with a capital restructuring by the Lehman
18	the face of the contract, the parties had not	18	UK Group in 2006, which was done in order to meet tax
19	contemplated. The courts, at each level, interpreted	19	and regulatory capital requirements. Your Lordship will
20	the provision which used the gross sales proceeds in the	20	find the description, in some detail in all of that, in
20	calculation as requiring a market valuation where there	21	the judgment of Mr Justice David Richards in the
22	was a sale that was not at arm's(reading to the	22	Waterfall I proceedings in trial bundle 1, tab 8. If
23	words) as a whole and in particular from the fact	23	your Lordship would be kind enough to go to page 9,
24	that the other two methods of disposal required such	24	paragraph 28, you Lordship will see the reference to the
25	a valuation."	25	position prior to the capital restructuring, prior to
20		23	position pror to the capital restructuring, prior to
	Page 13		Page 15
		1	
1	His Lordship commented on the fact that there had	1	2006 with various facilities in place. Then in
1 2	His Lordship commented on the fact that there had been some criticism from a Professor. Martin Hogg on	$\begin{vmatrix} 1\\ 2 \end{vmatrix}$	2006, with various facilities in place. Then, in paragraph 29, it is in order to utilise LBIE's foreign
2	been some criticism from a Professor, Martin Hogg, on	2	paragraph 29, it is in order to utilise LBIE's foreign
2 3	been some criticism from a Professor, Martin Hogg, on the ground that it protected the party from its	2 3	paragraph 29, it is in order to utilise LBIE's foreign tax credits for US tax purposes:
2 3 4	been some criticism from a Professor, Martin Hogg, on the ground that it protected the party from its commercial fecklessness. His Lordship thought it was	2 3 4	paragraph 29, it is in order to utilise LBIE's foreign tax credits for US tax purposes: "Deciding to improve its profitability in part by
2 3	been some criticism from a Professor, Martin Hogg, on the ground that it protected the party from its commercial fecklessness. His Lordship thought it was the correct approach as the internal context contract	2 3 4 5	paragraph 29, it is in order to utilise LBIE's foreign tax credits for US tax purposes: "Deciding to improve its profitability in part by restructuring its regulatory capital base so as to
2 3 4 5 6	been some criticism from a Professor, Martin Hogg, on the ground that it protected the party from its commercial fecklessness. His Lordship thought it was the correct approach as the internal context contract pointed towards the commercially sensible	2 3 4 5 6	paragraph 29, it is in order to utilise LBIE's foreign tax credits for US tax purposes: "Deciding to improve its profitability in part by restructuring its regulatory capital base so as to replace some of the subordinated debt with share capital
2 3 4 5 6 7	been some criticism from a Professor, Martin Hogg, on the ground that it protected the party from its commercial fecklessness. His Lordship thought it was the correct approach as the internal context contract pointed towards the commercially sensible interpretation.	2 3 4 5 6 7	paragraph 29, it is in order to utilise LBIE's foreign tax credits for US tax purposes: "Deciding to improve its profitability in part by restructuring its regulatory capital base so as to replace some of the subordinated debt with share capital and reduce its interest payments."
2 3 4 5 6 7 8	been some criticism from a Professor, Martin Hogg, on the ground that it protected the party from its commercial fecklessness. His Lordship thought it was the correct approach as the internal context contract pointed towards the commercially sensible interpretation. My Lord, we will shortly show your Lordship that	2 3 4 5 6 7 8	paragraph 29, it is in order to utilise LBIE's foreign tax credits for US tax purposes: "Deciding to improve its profitability in part by restructuring its regulatory capital base so as to replace some of the subordinated debt with share capital and reduce its interest payments." LBHI2 is interposed as an intermediate company as
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1	settled.	1	manifying what carts of appital will be available
1 2	His Lordship ended up relying partly on that	1 2	specifying what sorts of capital will be available, which may be a slightly different matter than whether
3	language in concluding in argument that it is all about	3	they are sources which are in fact capital, though not
4	trying to protect trade counter-parties of LBIE and	4	counted as available capital.
5	other forms of creditors weren't really of significance	5	MR MARSHALL: Well, as we will see, the main concern of all
6	in this context. That was rejected, in part based on	6	of the regulators including the FSA in the light of
7	this language used in the EC directive.	7	the legislation they had to work under is to protect
8	My Lord, we respectfully submit that directive is	8	external creditors, all the external creditors.
9	important, because that seems then to be the foundation	9	MR JUSTICE HILDYARD: Yes.
10	for our own regulation, which is then based on that. As	10	MR MARSHALL: Our case is that of course if you have
11	your Lordship will see when one comes to it, the types	11	a situation where you are looking at the relevant entity
12	of capital that need to be put in place do not seem to	12	as part of a group, a regulated group which is in
13	envisage capital coming in in the form of calls under	13	fact the case with Lehman as your Lordship will see
14	a provision like section 74.	14	shortly it would be invidious to that objective, of
15	MR JUSTICE HILDYARD: Is that because of the definition in	15	protecting external creditors, if you can, if you like,
16	annex 5 or because of our own domestic definition?	16	shift the burden of meeting the claims of the creditors
17	MR MARSHALL: It is simply because the process, under	17	from one entity within the group to another by virtue of
18	section 74, of making calls like that, in an unlimited	18	a call, leaving other creditors of the group then
19	company, don't fall within one of the categories that	19	exposed. As opposed to using whatever form of capital
20	the FSA have down as a source of capital for the	20	has been provided under these regulations and that loan,
21	purposes of their regulatory requirements, no doubt	21	which is what we submit should happen if you want to
22	based on the EC directive that we can see being referred	22	achieve that objective. So if you have this call
23	to here. That is no doubt because, within the EC, the	23	process available, and you are looking at that on
24	concept of unlimited companies, such as the one that we	24	a group wide basis, it potentially would be something
25	have here, is not a familiar one.	25	that would undermine the objective of the regulations.
	Page 17		Page 19
	1 age 17		1 age 19
1	MR JUSTICE HILDYARD: Do we have annex 5?	1	Particularly if as we submit was in fact the case in
2	MR MARSHALL: Annex 5, I am not sure.	2	the Lehman Brothers you have one company within the
3	MR JUSTICE HILDYARD: I think it is referred to in	3	group which is in fact providing the services which are
4	paragraph 38, and obviously it is tied to investment	4	then coming from external creditors for the benefit of
5	firms and credit institutions.	5	other trading companies within the group. So they gain
6	MR MARSHALL: Yes. I am not sure we have it in the bundle	6	the benefit of the agency, if you like, of that company,
7	at the moment but we can obtain it. We certainly have	7	engaging landlords and other suppliers. Those creditors
8	the FSA's own handbook provisions, which I think	8	might in other circumstances be direct creditors of the
9	Mr Atherton took you to some of	9	trading company but because of the way the group is
10	MR JUSTICE HILDYARD: Yes.	10	structured, it doesn't turn out to be that way because
11	MR MARSHALL: and I will return to shortly. But we can	11	they have a service company in place. If you then have
12	try to obtain annex 5 as well.	12	a subordinated loan from a shareholder which can then be
13	His Lordship then goes on to refer to further	13	called in and then the call made across to the service
14	revisions on the Basel guidelines, and to Basel 2, which	14	company, you then potentially leave those creditors
15	is then given effect to by a further EC directive, as	15	exposed. That would be a very surprising outcome, given
16 17	one sees from paragraph 40. All of this then leads, in	16	the intention of these regulations.
17 18	paragraph 42, to the introduction of the	17	MR JUSTICE HILDYARD: Does that mean that you have to
18	General Prudential sourcebook, which then provides guidance in accordance with the Basel 2 requirements.	18 19	persuade me that own capital has a particular meaning in the context, which would not necessarily apply in
20	His Lordship then goes on to describe the different	20	non-group contexts?
20	tiers of capital which are relevant: tier one through to	20	MR MARSHALL: I will, but I do it by virtue of two routes.
21	tier 3, in paragraphs 44 through to 47.	21	One is based on the way in which capital is described in
22	My Lord, just to	22	the FSA handbook, and what they regard as the capital
23	MR JUSTICE HILDYARD: Those lists, give one the initial	23	available to the company, which doesn't include calls
25	impression, of both the FSA and the European directive,	25	under section 74 or anything like that. The second
	Page 18		Page 20

5 (Pages 17 to 20)

1	route is by virtue of the particular context to these	1	creditors, in terms of the widest possible group.
2	subordinated loan agreements, which show that the FSA	2	MR JUSTICE HILDYARD: Yes.
3	was approaching the regulation of Lehman on a UK group	3	MR MARSHALL: Your Lordship will see in particular, from
4	wide basis, and with a view to protecting creditors of	4	paragraph 61, His Lordship concluded that it was
5	the group rather than just the creditors of LBIE; the	5	intended to provide the widest possible protection.
6	resources provided under the subordinated loan agreement	6	MR JUSTICE HILDYARD: Yes.
7	were intended to be resources for the group and the	7	MR MARSHALL: If I then look at the matter more
8	protection of creditors of the group.	8	specifically, if your Lordship would be kind enough to
9	MR JUSTICE HILDYARD: Well, that second reason may be	9	take up trial bundle 5 and go to tab 1.
10	a reason why you do, but really I am clarifying with you	10	MR JUSTICE HILDYARD: Trial bundle 5?
11	that is what you say?	11	MR MARSHALL: Trial bundle 5, my Lord, yes, tab 1.
12	MR MARSHALL: Yes.	12	Your Lordship will see the first of a sequence of
13	MR JUSTICE HILDYARD: Own funds has a special and particular	13	documents, and the first set are the correspondence
14	meaning having regard to the deployment of these	14	between the Lehman Group and the FSA and Revenue leading
15	agreements in what is intended to be a group context.	15	up to the subordinated loan agreements, which explain
16	MR MARSHALL: Yes, indeed.	16	the regulatory thinking at the relevant time and how it
17	MR JUSTICE HILDYARD: Yes.	17	was approached as far as the regulators were concerned.
18	MR MARSHALL: Yes, indeed.	18	The first document, on flag 1, is an email from
19	MR JUSTICE HILDYARD: Does your interpretation also mean you	19	a Mr Bowen, who is from UK regulatory reporting of the
20	must, as it were, interpolate the words "own funds	20	Lehman Group, to a Ms Edwards at the FSA, copied to
21	counted as capital" for the purposes of the FSA	21	various other people within the Lehman Group with
22	regulations?	22	a subject of "Group restructuring".
23	MR MARSHALL: Yes, it does.	23	The first part explains that there is going to be
24	MR JUSTICE HILDYARD: It does. You have to go that far?	24	a restructuring, under which a limited liability partner
25	MR MARSHALL: I submit we can go that far and I rely on that	25	would have as its partners a UK holding company and
	Page 21		Page 23
1	as one of the points in our favour, in terms of how this	1	a Delaware incorporated company. Your Lordship will see
2	regime operated.	2	that in the third paragraph, beginning with the number
2 3	regime operated. MR JUSTICE HILDYARD: So even if a call is an asset, even	2 3	that in the third paragraph, beginning with the number 2, there was commentary about the permanence, the likely
2 3 4	regime operated. MR JUSTICE HILDYARD: So even if a call is an asset, even though only an asset which is realisable by	2 3 4	that in the third paragraph, beginning with the number 2, there was commentary about the permanence, the likely permanence of the structure. He explains that the
2 3 4 5	regime operated. MR JUSTICE HILDYARD: So even if a call is an asset, even though only an asset which is realisable by a liquidator, contrary to what Mr Atherton submits, you	2 3 4 5	that in the third paragraph, beginning with the number 2, there was commentary about the permanence, the likely permanence of the structure. He explains that the relevant tax, or the tax department, had provided
2 3 4 5 6	regime operated. MR JUSTICE HILDYARD: So even if a call is an asset, even though only an asset which is realisable by a liquidator, contrary to what Mr Atherton submits, you say it still isn't within the phrase, either because the	2 3 4 5 6	that in the third paragraph, beginning with the number 2, there was commentary about the permanence, the likely permanence of the structure. He explains that the relevant tax, or the tax department, had provided a commentary on that. The observations were that
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2 3 4 5 6 7 8 9 10	regime operated. MR JUSTICE HILDYARD: So even if a call is an asset, even though only an asset which is realisable by a liquidator, contrary to what Mr Atherton submits, you say it still isn't within the phrase, either because the phrase has a particularly limited meaning in the context of the group and/or because in all contexts, the phrase is intended to be limited to capital recognised as available under the regulatory regime and the European	2 3 4 5 6 7 8 9 10	that in the third paragraph, beginning with the number 2, there was commentary about the permanence, the likely permanence of the structure. He explains that the relevant tax, or the tax department, had provided a commentary on that. The observations were that although there was a risk that US accounting standards could be changed, in particular a particular standard called APB23 might change, the view was that this was unlikely. Indeed, even if that relevant standard,
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1	some further resource in terms of capital would be in	1	see a letter from Lehman Brothers to the Revenue of
2	the form of the ability to make calls, potentially on	2	18 August 2006. It is quite a long letter, setting out
3	members. In terms of the group structure, unfortunately	3	all sorts of details regarding the proposed transaction,
4	it has been split over two pages, but page 3,	4	how it was going to work, who is going to participate in
5	Your Lordship will see on the right-hand side is the	5	it. But if I could ask Your Lordship first to look at
6	proposed capital structure. At the bottom of page 3, on	6	page 8, there Your Lordship will find a heading:
7	the right-hand side, Your Lordship sees the new holding	7	"Letter C. Details of the purpose of the
8	company being inserted between LBH and, if one turns	8	transactions."
9	over the page, LBIE. There is in fact no reference to	9	MR JUSTICE HILDYARD: Page 8?
10	LBL in this chart at all. We submit that is interesting	10	MR MARSHALL: Just below that heading, Your Lordship will
11	and perhaps of some significance because the only	11	find a paragraph, about half way down, which says:
12	function of having LBL in the chart would be if you were	12	"The primary purposes of the proposed restructuring
13	expecting to have a source of capital from it,	13	are as follows."
14	potentially, in the form of calls under section 74. The	14	Then it says this:
15	fact it is not even listed or mentioned or listed or	15	"LB Spain is currently the head of the LB UK Group
16	referred to is indicative of the absence of any interest	16	from an accounting and regulatory perspective."
17	in that power to make calls.	17	Then this important statement:
18	Your Lordship sees that on the key to the chart, the	18	"The UK group is regulated on a consolidated basis
19	focus is upon equity, subordinated debt and preference	19	by the FSA. With effect from 1 January 2007, new FSA
20	shares, and then there is an accounting consolidation	20	rules will come into force under which the preference
21	arrow as well. The focus is on the three forms of	21	shares issued by LB Holdings and LB Plc to LBDI will
22	capital identified equity, subordinated debt,	22	have an adverse impact on the LB UK Group FSA capital
23	preference shares but nothing more than that.	23	ratios. It has therefore become necessary to redeem the
24	MR JUSTICE HILDYARD: But, of course, all that may show is	24	preference shares and reissue them to a UK body in the
25	that they were focusing on an unlimited company for its	25	corporate chain for FSA purposes."
	Page 25	<u> </u>	Page 27
1	tax benefits rather oblivious as to its other	1	So there Your Lordship sees the regulation is group
2	consequences.	2	wide and is intended to protect the capital position for
3	MR MARSHALL: Well, this is to show, also, the capital	3	the group.
4	position. How is it going to be capitalised?	4	Just dropping down two paragraphs, one then has
5	The forms of capital all referred to there are	5	a paragraph beginning, "The main purpose":
6	actually in line as we will see soon with what the	6	"The main purpose of these transactions is not to
7	FSA looks at for sources of capital. It doesn't include	7	provide a UK tax advantage over and above reductions
8	the ability to include for money from members in an	8	that would be available in the absence of the arbitrage
9	unlimited amount, under section 74.	9	resulting from the transactions. This is evidenced by
10	If one goes back to the email, on page 1, and if	10	the fact that the amount of UK(reading to the
11	I could just ask Your Lordship to focus on the	11	words) new structure and are still subject to the
12	pre-penultimate paragraph where Mr Bowen says:	12	HMRC thin capitalisation agreement, rather the main
13	"However, the final form of the restructuring would	13	purposes of the transaction is to provide financing to
14	not lead to an overall reduction in capital at the group	14	the LB UK Group for business purposes in a manner that
14	or reduction in the quality of the capital available to	15	is efficient from both a regulatory and a US tax
16	the group."	16	perspective."
17	My Lord, important, we respectfully submit because,	17	Then, the penultimate paragraph:
18	with regard to the FSA, they were looking at the matter	18	"As the proposed transaction does not displace or
19		1.0	To the proposed transaction does not displace of
		19	alter the existing amount of debt funding to the UK
20	from the group perspective with a view to maintaining	19 20	alter the existing amount of debt funding to the UK group, it would seem that no comparison needs to be made
20 21	from the group perspective with a view to maintaining capital on a group basis, not by reference to a LBIE	20	group, it would seem that no comparison needs to be made
21	from the group perspective with a view to maintaining capital on a group basis, not by reference to a LBIE exclusive position. This is the start of a consistent	20 21	group, it would seem that no comparison needs to be made here. The same loan amount is in place before and after
21 22	from the group perspective with a view to maintaining capital on a group basis, not by reference to a LBIE exclusive position. This is the start of a consistent theme that Your Lordship will see in the documentation.	20 21 22	group, it would seem that no comparison needs to be made here. The same loan amount is in place before and after the transaction and fulfils the same purpose, that of
21 22 23	from the group perspective with a view to maintaining capital on a group basis, not by reference to a LBIE exclusive position. This is the start of a consistent theme that Your Lordship will see in the documentation. If one goes on from there to the next document,	20 21 22 23	group, it would seem that no comparison needs to be made here. The same loan amount is in place before and after the transaction and fulfils the same purpose, that of providing capital to support the general UK business
21 22 23 24	from the group perspective with a view to maintaining capital on a group basis, not by reference to a LBIE exclusive position. This is the start of a consistent theme that Your Lordship will see in the documentation. If one goes on from there to the next document, which is at tab 2, this is now a correspondence with the	20 21 22 23 24	group, it would seem that no comparison needs to be made here. The same loan amount is in place before and after the transaction and fulfils the same purpose, that of providing capital to support the general UK business activities."
21 22 23	from the group perspective with a view to maintaining capital on a group basis, not by reference to a LBIE exclusive position. This is the start of a consistent theme that Your Lordship will see in the documentation. If one goes on from there to the next document,	20 21 22 23	group, it would seem that no comparison needs to be made here. The same loan amount is in place before and after the transaction and fulfils the same purpose, that of providing capital to support the general UK business
21 22 23 24	from the group perspective with a view to maintaining capital on a group basis, not by reference to a LBIE exclusive position. This is the start of a consistent theme that Your Lordship will see in the documentation. If one goes on from there to the next document, which is at tab 2, this is now a correspondence with the	20 21 22 23 24	group, it would seem that no comparison needs to be made here. The same loan amount is in place before and after the transaction and fulfils the same purpose, that of providing capital to support the general UK business activities."

7 (Pages 25 to 28)

a capital preservation exercise for the UK group as 1 My Lord, I don't know whether this would be 1 2 2 a convenient -- I have several documents go through. a whole, which is unsurprising, if the whole group was 3 3 I wonder whether this would be a convenient moment to being regulated on a consolidated basis by the FSA. 4 My Lord, one can also see, when one goes a little 4 break for the transcriber, or whether you would prefer 5 5 to break at 12? I can do either way, whichever bit back in the document to the details of the 6 Your Lordship would think is convenient. 6 transaction, which are set out in pages 6 through to 7, 7 MR JUSTICE HILDYARD: You think it would be better in terms 7 under section B, towards the foot of page 6, that the 8 of your organisation if we break now, do you? 8 transaction is then set out and there is a reference to 9 9 MR MARSHALL: If I have 30 minutes, I can get through an appendix. Then there is a reference: 10 "Under the new arrangements finance will be provided 10 probably the remaining items in this bundle and then that would be a convenient point to break. 11 to UK New Co as follows." 11 12 This is the new holding company. Then Your Lordship 12 MR JUSTICE HILDYARD: Well, let's try for another half 13 an hour and then look forward to the down hill, from 13 sees the types of capital that are going to be 14 available. We have the subordinated loan equity funds 14 your point of view, shorter bit. 15 and further details regarding those. A reference, at 15 MR MARSHALL: My Lord, then moving from there, the next 16 the end, to UK New Co will equity fund LBIE. No 16 letter we need to look at is in tab 4 of the bundle, indication of the prospect that, in effect, there will 17 which is a letter dated 29 September 2006 from Lehman 17 18 Brothers to the Revenue. Similar points emerge from 18 be members who will be open to unlimited calls, under 19 section 74, as a potential source of capital in 19 that. Your Lordship will see, in paragraph 1 --20 MR JUSTICE HILDYARD: When the heading is, "Lehman 20 addition. 21 If one goes to the appendix, Your Lordship will see, 21 Brothers," that means? 22 MR MARSHALL: That means the group, if effect. It is being 22 on pages 10 and 11, where the current structure is set 23 23 out, in appendix 1, and the proposed structure is set written by a lady called Jackie Dolby, Your Lordship 24 24 out, in appendix 2. There isn't any reference to any will see her being referred to on page 2. 25 25 MR JUSTICE HILDYARD: Yes. potential source of capital in the form of calls and, Page 29 Page 31 1 MR MARSHALL: Director of European taxation. There is a tax 1 indeed, there is no reference to LBL as being 2 a shareholder who would be potentially open to a call, 2 department which is acting for the group, it would 3 3 appear. and providing a source of capital. So this is entirely 4 MR JUSTICE HILDYARD: Is this Lehman Brothers Plc? 4 consistent with the earlier document that Your Lordship 5 MR MARSHALL: I think her office happened to be at 5 saw. It focuses upon a different source. 6 Lehman Brothers Limited. 6 My Lord, the final point that one gets from the 7 MR JUSTICE HILDYARD: Right. 7 letter is that this is clearly a very carefully prepared 8 8 structure, organised not only with the FSA regulatory MR MARSHALL: Our --9 MR JUSTICE HILDYARD: It may not matter. 9 requirements in mind but also with a view to ensuring 10 that certain US tax advantages were obtained. One sees 10 MR MARSHALL: Sometimes the letters get written on behalf of 11 that from the earlier part of the letter and, in 11 LBIE, but sometimes they are on a heading which is particular, on page 3. Paragraph 10 on that page, where 12 Lehman Brothers Limited. Let me just see an example. 12 13 there is a reference to a Luxembourg corporation having 13 Yes, if Your Lordship looks back at the letter 14 I took you to a moment ago, in tab 2, if you look at 14 been set-up, and there is reference to US "check the 15 box" regulations, whereby the Luxembourg company was a 15 page 2 --16 MR JUSTICE HILDYARD: Yes. disregarded entity, treated as a branch of its 100 per 16 17 MR MARSHALL: -- the bottom of the page, Your Lordship will 17 cent parent, LB Spain holdings, which was a wholly owned 18 see it is a Lehman Brothers Limited document. 18 subsidiary of LBDI." 19 19 Yes, and, indeed, on page 1, where you see the memo It then goes on to say: 20 20 "This structure was implemented to allow dividends from the Revenue to Ms Dolby, she is European Taxation 21 and interest to be paid within the LB UK Group without 21 Department, Lehman Brothers Limited. So she seems to be 22 22 immediately triggering US taxes." based in Lehman Brothers Limited, but the department she 23 is part of seems to be dealing with matters on a group 23 As we will see in some of the later documentation, 24 the way in which the new holding company is put in place 24 wide basis. 25 25 Now, in this letter, of 29 September, in paragraph 1 is done very much with the US tax position in mind. Page 30 Page 32

8 (Pages 29 to 32)

1	she deals with the coming change in the FSA rules in	1	efficient management of the repatriation of funds to the
2	relation to capital issues to companies outside the UK	2	US.
3	regulated group. She talks about the new ratio that has	3	"Secondly, it ensures the proposed reorganisation
4	to be complied with. She then describes what the UK	4	will be treated as tax free from the US tax
5	regulated group is, a couple of paragraphs down,	5	perspective."
6	represented by LB Spain Holdings and all entities under	6	So there clearly was careful preparation in terms of
7	LB Spain, and it is said that they don't currently meet	7	trying to ensure the US tax advantage was achieved, but
8	this requirement because preference shares were going to	8	the second point that one gets from the letter is of
9	be treated at non-core tier 1 capital. She then goes on	9	course that the UK Lehman companies are being looked at
10	to say:	10	on a group basis, and capital preservation is being
11	"Therefore, to ensure that Lehman Brothers meets the	11	looked at on a group basis.
12	FSA requirement from 1 January without ejecting	12	When one looks at the restructuring charts, they
13	additional equity LB needs to restructure so that the	13	follow in a familiar style, on page 3, in the sense that
14	preference shares issued by LB Holdings and LB Plc are	14	there is no reference to the ability to call on assets
15	held by a member of the UK regulated group, hence the	15	from members and, indeed, LBL as a member is not even
16	creation of an SLP [I think is a reference to a Scottish	16	actually mentioned.
17	limited partnership] which will be treated as part of	17	MR JUSTICE HILDYARD: Mr Marshall, you accept, do you, that
18	the UK regulated LB group and will hold the preference	18	the question is not whether, under these plans, this
19	shares."	19	capital resource, if it is one, was to be included but
20	She then attaches a diagram, prepared by our	20	whether there is clarity that it was to be excluded?
20	regulatory group, showing the equity of subordinated	21	MR MARSHALL: Yes. But what I am using this for is to show
21	debt position of the group pre and post implementation,	22	Your Lordship that, from the FSA perspective, the
22	and asks them to note that the proposed changes to the	23	objective was to preserve capital for the group, thereby
		23	protecting creditors of the group; it would have been
24 25	structure require no additional injections of equity or	24	
25	debt into the UK group.	23	wholly inimical to that objective if, by virtue of
	Page 33		Page 35
1	She then notes, at the end of page 1, that the	1	a subordinated loan agreement which was meant to provide
2	diagram depicts two UK new companies between LBIE and	2	part of that capital, assets from one member were to be
3	LB Plc, and the previous letter of 18 August only	3	removed, leaving creditors of it exposed and unpaid with
4	referred to one. The additional new company was	4	the money then going off, up chain, to the holding
5	required for US tax purposes but had no impact on the	5	companies further up the chain, potentially perhaps
	overall tax position.	6	outside of the UK group all together, ultimately.
6 7	She then goes on, on page 2, in the second paragraph	7	The idea was to protect the group, as a whole, to
	down from the top of the page, to note:		
8 9		8	ensure capital was preserved within the group, not to
	"As the business of LBIE expands new equity or debt	-	allow it to escape in such a way that creditors of one
10	will need to be injected into the group to meet the FSA	10	of the group members were left exposed, which is what
11	prescribed capital ratios."	11	would happen if the subordinated debt could lead to the
12	She didn't have any projections as to the future	12	section 74 call.
13	capital requirement.	13	We submit it is therefore not at all surprising that
14	Then, in paragraph 3, she refers back to her first	14	the FSA's focus, in terms of what resources were going
15	point:	15	to be available to LBIE to meet the subordinated loan
16	"That in order to meet the FSA requirements, without	16	debt, was going to be its own resources. It wasn't
17	injecting any additional equity, the LB Holdings/LB Plc	17	going to be going round grabbing money from other people
18	preference shares have to be held by an entity/body	18	within the group in order to meet it, which would create
19	within the UK regulated group."	19	that very danger. Your Lordship will see support for
20	Then talks about the possible capital duty costs of	20	that, not only from this material, but actually also
21	doing that.	21	from other provisions of the subordinated loan
22	Then, finally, on point 4, Your Lordship will see	22	agreement, itself, which we will come to. They include
23	that the purpose of inserting two UK new companies was	23	provisions which prevented LBIE obtaining a surety to
24	twofold. Firstly, it enabled earnings streams from	24	support its position as a debtor, and prevented LBHI2
25	subsidiaries to be isolated allowing for a US tax	25	from having any form of indemnity from someone else to
	Page 34		Page 36

1	cover the debt, either. There was meant to be a focus	1	That approval, which is dated 30 October 2006,
2	purely upon the repayment obligations of the borrower,	2	Your Lordship will see, on the second paragraph,
3	LBIE, and we would submit that is entirely consistent	3	a reference to the change of controller application
4	with the focus being upon its assets and resources alone	4	having been approved. Then, in the next paragraph, the
5	without recourse to other people, whether under	5	approval is given to the repayments of the existing
6	section 74 or some other similar obligation.	6	subordinated loans. In the last sentence, Your Lordship
7	My Lord, just to complete the picture, in terms of	7	will see:
8	the pre November 2006 materials, Your Lordship has	8	"This permission is granted on the understanding the
9	another letter, at tab 5, dated 6 October 2006. This is	9	facilities in question will be simultaneously replaced
10	to the FSA. This one is written on LBIE paper from	10	with three identical facilities from LBH Plc to LBHI2,
11	a lady called Sophie Hutcherson of the	11	and from LBHI2 to LBIE, as described in your letter.
12	Prudential Advisory Group. In the third paragraph, on	12	Therefore, the pre-payments will not have an adverse
13	the first page, she refers to various change of	13	effect on the firm's UK capital structure."
14	controller forms for phase 1 of the European holding	14	My Lord, in the context of this correspondence "the
15	company restructure, and then for phase 2, once approval	15	firm" we respectfully submit is Lehman Brothers group,
16	had been put in place for phase 1. She goes on to say,	16	not LBIE. LBIE was a UK company, so it wouldn't make
17	in the course of that paragraph:	17	much sense to refer to a UK capital structure for it.
18	"We have provided an explanation of all the stages	18	In the context, it must be a reference to the
19	in the group reorganisation. This is supported by	19	Lehman Group UK capital structure; that is consistent
20	diagrams of the relevant parts of the group, details of	20	with all the earlier correspondence, where the concern
21	the capitalisation of LBIE, copies of the forms and	21	of the FSA is to protect the group wide position.
22	examples of the banner sheets for New Co 1 and 2, as	22	Now, my Lord, we have also have in the bundle some
23	at November."	23	subsequent correspondence in 2007. We don't have it
24	Your Lordship will then see a detailed explanation	24	there for the purposes of showing or pointing to some
25	of the rationale as provided on the second page, and it	25	statement by one of the parties to the subordinated loan
	Page 37		Page 39
1	is in particular that as they were moving forward	1	agreement regarding what they understood the agreement
1	is in particular that as they were moving forward	1	
2	to January 2007 and the implementation of GENPRU and	2	
2	to January 2007, and the implementation of GENPRU and BIPRU meets	2	to mean. We are not relying on it for that. We are not
3	BIPRU rules:	3	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that
3 4	BIPRU rules: "We have considered what changes we need to make to	3 4	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible.
3 4 5	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same	3 4 5	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show
3 4 5 6	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has	3 4 5 6	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at
3 4 5 6 7	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the	3 4 5 6 7	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It
3 4 5 6	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies."	3 4 5 6 7 8	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what
3 4 5 6 7 8 9	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter	3 4 5 6 7 8 9	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was.
3 4 5 6 7 8 9 10	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that	3 4 5 6 7 8 9 10	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first
3 4 5 6 7 8 9 10 11	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that there is an explanation of some of the US tax advantages	3 4 5 6 7 8 9 10 11	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first of those documents. It is dated 16 March 2007 to
3 4 5 6 7 8 9 10 11 12	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that there is an explanation of some of the US tax advantages that were designed to be achieved by the insertion of	3 4 5 6 7 8 9 10 11 12	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first of those documents. It is dated 16 March 2007 to Mr Franklin at the FSA. It is explaining that there was
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3 4 5 6 7 8 9 10 11 12 13 14	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that there is an explanation of some of the US tax advantages that were designed to be achieved by the insertion of the Lehman Brothers Holdings Intermediate 1 company and LBHI2, as well.	3 4 5 6 7 8 9 10 11 12 13 14	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first of those documents. It is dated 16 March 2007 to Mr Franklin at the FSA. It is explaining that there was a proposed change to the nature of some of the term "subordinated debt" that funded LBIE. The proposal
3 4 5 6 7 8 9 10 11 12 13 14 15	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that there is an explanation of some of the US tax advantages that were designed to be achieved by the insertion of the Lehman Brothers Holdings Intermediate 1 company and LBHI2, as well. In terms of how the transaction then worked, there	3 4 5 6 7 8 9 10 11 12 13 14 15	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first of those documents. It is dated 16 March 2007 to Mr Franklin at the FSA. It is explaining that there was a proposed change to the nature of some of the term "subordinated debt" that funded LBIE. The proposal seems to have been for replacement of some of the
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3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that there is an explanation of some of the US tax advantages that were designed to be achieved by the insertion of the Lehman Brothers Holdings Intermediate 1 company and LBHI2, as well. In terms of how the transaction then worked, there seems to have been an application for a change of controller, which Your Lordship sees at page 4.	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first of those documents. It is dated 16 March 2007 to Mr Franklin at the FSA. It is explaining that there was a proposed change to the nature of some of the term "subordinated debt" that funded LBIE. The proposal seems to have been for replacement of some of the subordinated loan amounts with floating rates, subordinated notes. At the end of the first page of
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3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that there is an explanation of some of the US tax advantages that were designed to be achieved by the insertion of the Lehman Brothers Holdings Intermediate 1 company and LBHI2, as well. In terms of how the transaction then worked, there seems to have been an application for a change of controller, which Your Lordship sees at page 4. The FSA had to then give its approval for two things as part of this process. One was for the change of	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first of those documents. It is dated 16 March 2007 to Mr Franklin at the FSA. It is explaining that there was a proposed change to the nature of some of the term "subordinated debt" that funded LBIE. The proposal seems to have been for replacement of some of the subordinated notes. At the end of the first page of that letter, in the penultimate paragraph, Your Lordship will see there was a reference to diagrams of the
3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	BIPRU rules: "We have considered what changes we need to make to the capital structure to LBSH UK Group. At the same time, as a matter of routine, our tax department has just received the optimal group structure for the purposes of tax efficiencies." Your Lordship will see then there is, in the latter part of page 2, under the heading, "Benefits", that there is an explanation of some of the US tax advantages that were designed to be achieved by the insertion of the Lehman Brothers Holdings Intermediate 1 company and LBHI2, as well. In terms of how the transaction then worked, there seems to have been an application for a change of controller, which Your Lordship sees at page 4. The FSA had to then give its approval for two things as part of this process. One was for the change of control, which they did give, as Your Lordship sees on	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	to mean. We are not relying on it for that. We are not relying on subsequent conduct, or statements in that way, which we accept wouldn't be admissible. What we do rely upon this material for is to show Your Lordship what the FSA or regulatory concern was at the time when the agreements were entered into. It records the thinking prior to November 2006, and what the FSA's general approach was. If I go to tab 8, Your Lordship will find the first of those documents. It is dated 16 March 2007 to Mr Franklin at the FSA. It is explaining that there was a proposed change to the nature of some of the term "subordinated debt" that funded LBIE. The proposal seems to have been for replacement of some of the subordinated notes. At the end of the first page of that letter, in the penultimate paragraph, Your Lordship will see there was a reference to diagrams of the existence and proposed flow of capital in the group.
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Page 42 Page 44	-	, C , C		1
		Page 42		Page 44

11 (Pages 41 to 44)

Day 4

1	pages 4 and 5. We then see various figures being given,	1	submission you would get to the same answer because if
2	I think, on the charts, for equity, subordinated debt	2	one looks at the FSA handbook, which sets out the types
3	and two types of preference shares, and also a	3	of capital that were going to be available to the
4	guarantor or standby letter of credit but no reference	4	borrowing entity, one won't find any reference to the
5	to potential calls under section 74, and no reference to	5	potential for a call upon members under section 74, or
6	LBL, at all.	6	anything of that nature.
7	So, my Lord, all of that, we respectfully submit,	7	One sees that from a document, I think, that
8	effectively shows three things. One is that the	8	Mr Atherton took Your Lordship to in the authorities
9	structure, which led to the subordinated loan agreements	9	bundle, volume 5, at tab 171, which is an extract from
10	provided by LBHI2, was very, very carefully organised,	10	the interim Prudential sourcebook for investment
11	was designed to achieve specific advantages and meet the	11	business. The calculation of financial resources for
12	FSA regulatory requirements. It wasn't going to be	12	a firm is dealt with in paragraph 10-62, and
13	something that would alter very easily.	13	Your Lordship sees the provisions which I think your
14	And, second, when engaging in these transactions, it	14	Lordship has looked at already for the calculation of
15	was the UK regulated group which was considered and	15	financial resources in accordance with certain tables,
16	thereby the creditors of that group. What was sought to	16	A, B and C, which are then on the following pages.
17	be achieved was a preservation of capital at the correct	17	Table A, for example, consists of a combination of
18	level for the group, which we submit is important when	18	ordinary share capital, non-cumulative preference share
19	one considers how one should interpret what sources	19	capital, share premium account, reserves excluding
20	should be used to repay the subordinated debt. It would	20	valuation reserves, audited retained earnings and
21	be extremely surprising if creditors who are providing	21	externally verified interim net profits of current
22	services which were of benefit to the group via LBL were	22	account and partners' capital; similar provisions in
23	to be left out of pocket as a result of a repayment of	23	table B and in table C.
24	subordinated debt funded by calls on members such as	24	The sorts of things Your Lordship sees there are
25	LBL. Wholly inimical to the whole purpose of the	25	entirely consistent with the various tables for the
	Page 45		Page 47
1	structure. My Lord, that might be a convenient moment	1	restructuring of the Lehman Group, and what was thought
2	to break.	2	to be relevant to the FSA for the purposes of that
3	MR JUSTICE HILDYARD: Yes, well, a long 5 minutes.	3	restructuring and the approval of the FSA for it that
4	(11.58 am)	4	Your Lordship has already seen.
5	(A short break)	5	There was no expectation that the borrowing entity
6	(12.10pm)	6	would be relying upon capital from other sources than
7	MR MARSHALL: My Lord, we of course rely on that material	7	those listed on the sourcebook, in particular calls on
8	I have taken Your Lordship to as part of the immediate	8	other entities within the group, under section 74 or
9	context to the subordinated loan agreements and in	9	similar.
10	explaining the objectives behind them. We respectfully	10	MR JUSTICE HILDYARD: It may not matter, but you would
11	submit that Your Lordship is entitled to have regard to	11	accept that if there were unpaid share capital in
12	all of that. Notwithstanding the standard form nature	12	a limited company, that would be
13	of schedule 2 to the subordinated loan agreements, given	13	MR MARSHALL: Yes, indeed, it would be.
14	that there are variable terms in schedule 1, the	14	MR JUSTICE HILDYARD: Why is that; because it falls within
15	agreements as a whole are hybrid. The important matters	15	ordinary share capital?
16	to bear in mind when considering these agreements is	16	MR MARSHALL: Ordinary share capital. But what we are
17	that the variable terms, of course, encompass the	17	talking about is something very different from that, and
18	circumstances of the particular borrower and the	18	that is certainly not within the contemplation of the
19	repayment terms in connection with that borrower. It is	19	FSA.
20	important, therefore, to consider the particular context	20	MR JUSTICE HILDYARD: Well, Mr Trower's point is that the
21	with regard to interpreting the repayment provisions.	21	only difference, really, between a limited share and an
22	But, my Lord, if one had to also look at the matter	22	unlimited share is that the limited share caps what
23	more widely, in terms of how repayments would be	23	would otherwise be an unlimited liability.
24	considered more generally when looking at these FSA	24	MR MARSHALL: Yes.
25	prescribed agreements, or standard forms, in our	25	MR JUSTICE HILDYARD: But they are not different in nature.
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12 (Pages 45 to 48)

8th Floor, 165 Fleet Street London EC4A 2DY

1	That is what he saw amongst athen this sa	1	Madand if for any data and an
1	That is what he says, amongst other things. MR MARSHALL: Well, we respectfully disagree with that.	1 2	My Lord, if for any reason that analysis was
23	Where one is dealing with unlimited liability as		incorrect and the standard form didn't quite work in
	opposed to a limited one if there is an exposure to	3	that way, then if we have to apply the AIB approach,
4	a particular amount in relation to uncalled share	4 5	which is the one that Mr Trower has been advocating, I think that is the case that Your Lordship has in
6	capital for another entity in the group, for example,	6	volume 3 of the authorities, at tab 74. Tab 74, page 96
7	that would no doubt appear as a provision in the	7	of the report. The judgment of Lord Millett. I think
8	accounts of, let's say LBL, for example. LBL may	8	earlier I said Lord Mustill, it is Lord Millett. It is
9	potentially have a provision in its account for a small	9	at paragraph 7. He made the point in that case that
10	amount of uncalled share capital which is still owing	10	they were concerned with a standard form:
11	and has to be dealt with. But an unlimited liability	11	"Designed for use in a wide variety of
12	would be a different matter, and not something that any	12	circumstances, not context specific, value much
13	creditor dealing with LBL would necessarily be aware of	13	diminished if it could not be relied upon as having the
14	or take account of, unless some specific mention was	14	same meaning on all occasions. Relevance of factual
15	made of it. It is, in our submission, a very different	15	background of particular cases, interpretation is
16	type of liability.	16	necessarily limited."
17	In the context of the type of regulation that the	17	But then he made this observation:
18	FSA was undertaking and Your Lordship has seen that	18	"The danger, of course, is that a standard form may
19	they regulated on a group basis it would be very,	19	be employed in circumstances for which it was not
20	very strange to leave other members of the UK group	20	designed. Unless the context in a particular case shows
21	exposed to calls for the benefit of other members of the	21	that this has happened, however, the interpretation of
22	group, and shareholders of those members, leaving third	22	the form ought not to be effected by the fact all
23	party creditors exposed. That can't possibly have been	23	background."
24	what was sought to be achieved.	24	My Lord, if we were wrong in the analysis that
25	If there was a limited amount of ordinary share	25	I have provided Your Lordship with as to how the
	Page 49		Page 51
1	capital that still had to be paid up, that obviously is	1	standard form should be approached, and if when one is
2	still in a different category and no doubt creditors	2	to look at it in a rather different way, well, we would
3	dealing with members of the group would take account of	3	respectfully submit that it is evident that it is now
4	that. But an unlimited liability is in a different	4	being employed in circumstances for which it was not
5	category. Particularly one arising from a very small	5	designed, namely unlimited companies. It is clearly, in
6	shareholding, which was the case here.	6	our submission, designed for a rather different purpose,
7	My Lord, we submit that there is nothing terribly	7	having regard to the list of types of capital that they
8	surprising about the sourcebook provisions, given that	8	had in contemplation. It is not the case that they had
9	the source of them seems to be an EC provision which	9	in mind unlimited companies with the provisions for
10	I referred to earlier in Mr Justice David Richards'	10	calls that they envisage. If necessary, I would submit
11	judgment, he referred to the EC judgments that led to	11	that the exception that Lord Millett recognised there
12	all of this. These provisions in the sourcebook are no	12	would come into play to allow Your Lordship to have
13	doubt reflective of that. We will get appendix 5 for	13	regard to the particular context.
14	Your Lordship, so that Your Lordship has it, but I am	14	My Lord, I have already responded briefly to the
15	reasonably confident that the FSA was simply	15	further suggestion that because the subordinated loan
16	implementing and putting in place what the EC directives	16	agreement had provision allowing assignment with FSA
17	required. Those directives don't seem to have	17	consent, that that should deter Your Lordship from
18 19	anticipated any type of source of capital by section to 74.	18 19	having regard to the particular context that led to its creation. Your Lordship has seen the passage from
20	MR JUSTICE HILDYARD: Is it annex 5 to the directive?	20	Chartbrook of Lord Hoffmann which suggests that the mere
20	MR MARSHALL: I think it was annexe 5 that was referred to	20	existence of an assignment provision doesn't lead to
22	in the passage of Mr Justice David Richards' judgment	22	that result. You still can have regard to the context.
23	Your Lordship referred to earlier.	23	Particularly so when the assignee might well be someone
24	MR JUSTICE HILDYARD: Yes, whichever that is.	24	who would have a full awareness of the particular
25	MR MARSHALL: Indeed.	25	context; having regard to the way in which these
	Page 50		Page 52

13 (Pages 49 to 52)

1		1	
1	subordinated loan agreements were set-up, and the		subordinated loan agreements as being ones that were to
2	purpose for which they were set-up, the advantages which	$\begin{vmatrix} 2 \\ 2 \end{vmatrix}$	be repaid, potentially, from calls made on the lender,
3	they were sought to achieve, we respectfully submit it	3	itself, holds good. Notwithstanding the fact that LBL
4	is unlikely, in the extreme, that one would see these	4 5	have held a tiny proportion of the shares in LBIE. My Lord, the final point which we would make on
5	subordinated loan agreements being assigned to someone		
6	outside of the Lehman Group. If they were going to be	6	interpretation of the express terms is based on the
7	assigned or changed, the likelihood was it would likely	7	Aberdeen City Council approach.
8	be another Lehman Group entity, no doubt fulfilling some new structure to achieve whatever advantage was sought	8	If Your Lordship concluded there was just a gap here
9 10		9 10	in the agreement, that something had occurred that no one had really contemplated, then Your Lordship would be
10	to be preserved in relation to the US tax position. That is what we see from the way this was done.	10	
11	My Lord, other points that we draw upon. We draw	11	entitled to look at the other provisions of the agreement to see what the general objective was of the
12	upon a further point, which is that of course LBHI2, the	12	parties. If one goes to the subordinated loan
13	lender under the subordinated loan agreements, was also,	13	agreement, that is in bundle 4, tab 1, and if you go to
14	by a very large degree indeed, the majority shareholder	14	clause 6F on page 11, your Lordship will see the
15	in LBIE. So if it really was the case that calls under	16	heading, "Representations and undertakings of the
10	section 74 were to be used as a source of funding for	17	borrower":
18	repayment of the subordinated loan, it would be very odd	18	"From and after the date of this agreement, or
18 19	because effectively the call would be going round to the	18	effective date if earlier, the borrower shall not
20	same party as the lender, which is a commercially odd	20	without the prior written consent of the FSA"
20	and we would submit rather absurd thing to be happening.	20	Then letter D is:
21	The answer to that that is put forward is: well, it	21	"Not to repay any of the subordinated liabilities
22	was always possible that LBHI2 might have transferred	22	otherwise than in accordance with the terms of this
23 24	its shares and also you have LBL, albeit a minority	23	agreement."
24	shareholder, it is there as well.	24	Then letter F:
25	shareholder, it is there as well.	23	Then letter F.
	Page 53		Page 55
1	Well, as to the transfer of shares by LBHI2,	1	"Arrange or permit any contract of suretyship or
2	Your Lordship of course needs bear in mind that that is	2	similar agreement relating to its liabilities under this
3	not going to happen very easily. It would only be done	3	agreement to be entered into."
4	if FSA consent was given for a change of control. If	4	There was a further representation that that had not
5	that was going to occur, it would, we would submit, only	5	happened prior to the date of this agreement.
6	be likely to happen in the context of some further	6	My Lord, we would respectfully submit that is
7	restructuring, whereby the subordinated debt that had	7	a pointer, a strong pointer, to the fact that the
8	been provided by LBHI2 was going to be replaced by some	8	borrower's assets alone, its resources alone, were to be
9	new subordinated debt, or some new arrangement under	9	the source of repayment, not other persons.
10	which the relevant regulatory capital was provided.	10	Similarly, clause 7, which has representations and
11	Just in the same way as when LBH, which had previously	11	undertakings from the lender, Your Lordship will see:
12	provided subordinated debt, ceased to be the holding	12	"From and after the date of this agreement the
13	company. Its subordinated debt was repaid and replaced	13	lender shall not, without the prior written consent of
14	with a new subordinated loan from the new holding	14	the FSA "
15	company.	15	Then, if you Lordship looks down to letter F, at the
16	We don't accept that there was any real prospect of	16	bottom of page 12:
17	LBHI2 simply transferring its shares without a lot of	17	"Take or enforce any security, guarantee, or
18	other things happening at the same time, which would	18	indemnity from any person for all or any part of the
19	completely alter the over all position.	19	subordinated liabilities."
20	As far as LBL's shareholding is concerned, of course	20	"The lender shall on obtaining or enforcing any
21	it is our case that there was a nomineeship arrangement	21	security(reading to the words) notwithstanding
22	under which we would be entitled to be indemnified by	22	this undertaking hold the same and any proceeds thereof
23	LBHI2, and so claims against us, we would submit, would	23	on trust for the borrower."
24	have led, ultimately, to LBHI2 as well. So the same	24	Again, we would respectfully submit, a strong
25	point, that it is not commercial for one to read the	25	pointer to the fact that there is not to be another
			D 54
	Page 54		Page 56

14 (Pages 53 to 56)

1	accuracy for more and have and the harmonical accurate	1	Vous Londship will goo that haing serious discinction of
1 2	source for repayment beyond the borrower's own	$\begin{vmatrix} 1\\ 2 \end{vmatrix}$	Your Lordship will see that being reviewed beginning at paragraph 21, on page 754. Your Lordship sees, at 754,
3	resources.	$\begin{vmatrix} 2\\ 3 \end{vmatrix}$	
4	My Lord, we would respectfully submit that if there is a gap in the document in terms of no indication from	4	paragraph 21, just below letter F, he observes: "It could be dangerous to reformulate the
5	it as to what exactly the answer was to be as to the	5	principles, but I would add six comments on the summary
6	source of repayment, those provisions give Your Lordship	6	given by Lord Simon in BP Refinery."
7	a very strong indication of what the objective of the	7	The first of those is to echo observations of
8	parties or the intention of the party was in the same	8	Lord Steyn in Equitable Life v Hyman.
9	way as an Aberdeen City Council. Your Lordship could	9	"The implication of a term was not critically
10	approach the matter on the basis of that, as a matter of	10	dependent on proof of an actual intention of the parties
10	interpretation of the express terms.	11	when negotiating the contract. If one approaches the
12	My Lord, that is what I wanted to say about	12	question by reference to what the parties would have
13	interpretation or construction of the express terms of	13	agreed, one is not strictly concerned with the
14	the subordinated loan agreements.	14	hypothetical answer of the actual parties, but with that
15	If we are wrong about all of that, then in the	15	of the notional reasonable person in the position of the
16	alternative we would respectfully submit that	16	parties at the time at which they were contracting."
17	Your Lordship should conclude that it is correct to	17	So it is an objective test by reference to what the
18	imply a term that repayment was to be made from LBIE's	18	reasonable person in the position of the parties would
19	own funds and without recourse to the funds of its	19	have considered.
20	members. We submit that term would be required to give	20	The second point:
21	commercial or practical coherence to the agreement or,	21	"A term should not be implied into a detailed
22	alternatively, would be so obvious as to go without	22	commercial contract merely because it appears fair or
23	saying to a reasonable reader of the contract knowing	23	merely because one considers that the parties would have
24	all of its provisions and the surrounding circumstances.	24	agreed to it if it had been suggested to them. Those
25	My Lord, I am using there the formulation of	25	are necessary but not sufficient grounds for including
	D 57		D 50
	Page 57		Page 59
1	Lord Neuberger in Marks and Spencer. I wonder if I can	1	the term. However, and thirdly, it is questionable
1 2	take Your Lordship to that case, just so Your Lordship	1 2	the term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness
	take Your Lordship to that case, just so Your Lordship sees how the relevant principles work. It is in		whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything.
2	take Your Lordship to that case, just so Your Lordship sees how the relevant principles work. It is in bundle 4 of the authorities, at tab 103. If we could go	2 3 4	whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything. If a term satisfies the other requirements it is hard to
2 3 4 5	take Your Lordship to that case, just so Your Lordship sees how the relevant principles work. It is in bundle 4 of the authorities, at tab 103. If we could go to, first of all, paragraph 18, on page 753, where	2 3 4 5	whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything. If a term satisfies the other requirements it is hard to think that it would not be reasonable and equitable."
2 3 4 5 6	take Your Lordship to that case, just so Your Lordship sees how the relevant principles work. It is in bundle 4 of the authorities, at tab 103. If we could go to, first of all, paragraph 18, on page 753, where His Lordship referred to a formulation of Lord Simon in	2 3 4 5 6	whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything. If a term satisfies the other requirements it is hard to think that it would not be reasonable and equitable." So the first part of the traditional formulation may
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$ \begin{array}{c} 2\\3\\4\\5\\6\\7\\8\\9\\10\\11\\12\\13\\14\\15\\16\\17\\18\\19\\20\\21\\22\\23\\24\end{array} $	 take Your Lordship to that case, just so Your Lordship sees how the relevant principles work. It is in bundle 4 of the authorities, at tab 103. If we could go to, first of all, paragraph 18, on page 753, where His Lordship referred to a formulation of Lord Simon in the Privy Council in the case of BP Refinery v Shire of Hastings, where he set out under the traditional approach four conditions. As it was put: "For a term to be implied [I am reading from the quoted words] the following conditions which may overlap must be satisfied: "(1) It must be reasonable and equitable. "(2) It must be necessary to give business efficacy to the contract so that no term will be implied of the contract that is effected without it. "(3) It must be capable of clear expression." And then finally: "(5) It must not contradict any express term of the contract." So there is a traditional formulation which is then reviewed by Lord Neuberger in the light of the Attorney 	$ \begin{array}{c} 2\\3\\4\\5\\6\\7\\8\\9\\10\\11\\12\\13\\14\\15\\16\\17\\18\\19\\20\\21\\22\\23\end{array} $	 whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything. If a term satisfies the other requirements it is hard to think that it would not be reasonable and equitable." So the first part of the traditional formulation may well simply be superfluous. "Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize, although Lord Simon's requirements are otherwise (inaudible), I would accept that business necessity and obviousness, his second third requirements, can be alternatives in the sense that one of them needs to be satisfied, although I expect that in practice it would be a rare case in which only one of those requirements would be satisfied." So necessity and for business efficacy, and obviousness, are potentially alternatives. "Fifthly, if one approaches the issue by reference to the efficacious bystander it is vital the formula (?) of the question be posed to him with the utmost care. "And sixthly, necessity for business efficacy involves(reading to the words) the test is not

15 (Pages 57 to 60)

1 It may well be that a more helpful way of putting 1 terms of implication of a term are firstly that the 2 Lord Simon's second requirement is, as suggested by 2 court has some sort of strong presumption against 3 Lord Sumption, that a term can be implied if without 3 implication of a term when one is dealing with 4 the term the contract would lack commercial or practical 4 a detailed standard form contract. That is based on the 5 coherence." 5 judgment of Mrs Justice Gloster as she then was in the 6 And just dropping down to paragraph 23, he is there 6 case of Great Ship India, which I think Your Lordship 7 considering some observations by Lord Hoffmann about the 7 has in bundle 3 of the authorities at tab 92. If I can 8 process of implying terms into a contract being part of 8 just show you that very quickly. This was a case 9 9 the exercise of construction. He makes the observation concerning a standard form charterparty. 10 at paragraph 23 that: 10 (Pause). 11 "The notion that a term will be implied of 11 Your Lordship will see from the report at page 360, 12 a reasonable reader of the contract, knowing all of its 12 in the right-hand column, paragraph 2 it was an appeal 13 provisions and the surrounding circumstances we would 13 from arbitrators and it raised a short point of 14 understand it to be applied, is quite acceptable 14 construction in relation to a clause of the amended 15 provided that the reasonable reader is treated as 15 BIMCO supply time 1989 form of charterparty. And the reading the contract at the time it was made and he 16 16 relevant part that is relied upon, I think, is at 17 would consider the term to be so obvious as to go 17 page 366 of the report on the right-hand column at 18 without saying or to be necessary for business 18 paragraph 41 and it is I think the last sentence of 19 efficacy." 19 paragraph 41, where her Ladyship made this statement: 20 20 And he also goes on, I think, just below letter F to "Moreover, there is a real difficulty in seeking to 21 21 imply a term into a detailed standard form contract such sav: 22 22 "The second proviso is important because otherwise as the supply time 1989 form where the strong 23 Lord Hoffmann's formulation may be interpreted as 23 presumption is likely to be the detailed terms of the 24 suggesting that reasonableness is a sufficient ground 24 contract are complete." 25 for implying a term." 25 And Your Lordship sees that there is then Page 61 1 Now, just applying the relevant test with those 1 a reference to Attorney General of Belize and in 2 qualifications, we respectfully submit that the 2

particular the speech of Lord Hoffmann at paragraphs 17 3 reasonable reader would have taken account of the other 3 to 27, and then to the Mediterranean Salvage case and 4 provisions of the subordinated loan agreement and in 4 the speech of Lord Clarke at paragraphs 10 and 15 to 18. 5 particular clauses 6F and 7F that Your Lordship has seen 5 My Lord, with respect we submit unfortunately the and would take account of all of the surrounding 6 6 analysis here seems to be incorrect, because in fact the 7 circumstances that we have been through, specifically 7 two cases referred to don't support any suggestion that 8 the contents of the FSA handbook in terms of what type 8 there is in fact a strong presumption rule of that kind. 9 of capital was intended to be preserved. And we would 9 But in any event the contract Your Lordship is concerned 10 submit the particular circumstances leading to these 10 with here, certainly on one view, is not a detailed 11 subordinated loan agreements under which a UK group 11 standard form contract. It is actually quite a brief 12 position was intended to be protected, with creditors of 12 document. In terms of loan agreements, one knows from 13 the group as a whole intended to receive that 13 experience they certainly can be a great deal more 14 protection. 14 comprehensive and detailed than the one that we have to 15 With that background we respectfully submit any 15 consider in this particular instance. 16 reasonable reader would have treated it as an obvious 16 If one goes to Attorney General of Belize, which is 17 conclusion that recourse was to be had to the assets of 17 the first authority referred to to support what 18 LBIE itself without recourse to those of its members for 18 Mrs Justice Gloster has there referred to, that is at 19 the repayment of the LBHI2 subordinated loan. And that 19 bundle 3-tab 79 and the passages that were relied on 20 only becomes even more obvious when one sees that LBHI2 20 were 17 to 27. That is in the report at 21 is by far and away the most significant member and that 21 tab 79-page 1993 through to 1995. It is actually quite 22 the other member holding a minority interest has a right 22 a lengthy passage in which His Lordship was dealing with 23 of recourse as against LBHI2 concerning its own 23 the correct principles for implication of a term 24 liability if a call was made under section 74. 24 generally. And among other things, Your Lordship sees 25 My Lord, the points that are made against us in 25 on page 1994 at paragraphs 23 to 25, there is reference Page 62 Page 64

16 (Pages 61 to 64)

Page 63

1	to Lord Steyn's observations in Equitable Life that	1	observations made by Sir Thomas Bingham in the case,
2	Lord Neuberger had referred to and he then refers to	2	I think, of Socimer Bank v Standard Bank Limited. There
3	the Moorecock, and paragraph 25:	3	is a quotation, which Your Lordship will see in
4	"The requirement that the implied term must go	4	paragraph 18, from Sir Thomas Bingham, where he says:
5	without saying is no more than another way of saying	5	"The difficulties increase the further one moves
6	that although the instrument does not expressly say so,	6	away from these paradigm examples."
7	that is what a reasonable person would have understood	7	MR JUSTICE HILDYARD: I think this is in
8	it to mean."	8	Philips Electronique, is it not?
9	Then, just above letter C on page 1995, he then said	9	MR MARSHALL: Yes, I am so sorry. I may have the wrong one.
10	this:	10	Your Lordship is right, yes:
11	"Likewise, it is not necessary that the need for the	11	"It is much more difficult to infer with confidence
12	implied term should be obvious in the sense of being	12	what the parties must have intended when they have
13	immediately apparent, even upon a superficial	13	entered into a lengthy and carefully drafted contract
14	consideration of the terms of the contract and the	14	but have omitted to make provision for the matter in
15	relevant background. The need for an implied term not	15	issue. Given the rules which restrict evidence of the
16	infrequently arises when the draftsman of a complicated	16	parties' intention when negotiating the contract, it may
17	instrument has omitted to make express provision for	17	well be doubtful whether the omission was the result of
18	some event because he has not fully thought through the	18	the parties' oversight or of their deliberate decision
19	contingencies which might arise even though it is	19	if the parties appreciate that they were unlikely to
20	obvious after a careful consideration of the express	20	agree on what is to happen a certain, not impossible,
21	terms and the background that only one answer would be	21	eventuality. They may well choose to leave the matter
22	consistent with the rest of the instrument. In such	22	uncovered in their contract in the hope that the
23	circumstances, the fact that the actual parties might	23	eventuality will not occur."
24	have said to the efficacious bystander could you please	24	The judgment then moves on to other aspects.
25	explain that again does not matter."	25	So, my Lord, that is pretty much the only bit of the
	Page 65		Page 67
1	So my Lord, from what we can see there doesn't seem	1	two judgments referred to that could possibly provide
2	to be any support for this suggestion that there is some	2	any kind of support for the proposition: well, it is
3	sort of strong presumption when one is dealing with	3	more difficult to imply a term in a complex standard
4	complicated agreements, or complicated standard form	4	form agreement.
5	agreements. But rather, an indication that when one is	5	But none of them go as far as to say there is any
6	dealing with a complicated instrument there may well be	6	form of strong presumption. Lord Hoffmann rather
7	a basis for implication of a term, having regard to the	7	suggests that in a complicated instrument it may well
8	factors that Lord Hoffmann refers to at 1995, C to D.	8	still be appropriate to imply a term, and
9	So if anything, the authority is actually contrary to	9	Sir Thomas Bingham is simply indicating that it can be
10	such an approach.	10	more difficult in a lengthy and carefully drafted
11	If one goes to the Mediterranean Salvage case, which	11	contract because it might have been something that had
12	I think has been inserted into Your Lordship's bundle at	12	been left in the air because the parties couldn't agree
13	tab 79A. This is the speech of Lord Clarke.	13	about it and they left it out for that reason. But we
14	Paragraph 10, which was the first of the passages	14	aren't, in our submission, dealing with a lengthy and
15	referred to by Mrs Justice Gloster, is really a passage	15	complex agreement here. It is a relatively short
16	referring back to Lord Hoffmann's speech in Belize. It	16	standard form document that one is concerned with.
17	is also noting that it can be the inference that	17	And
18	something is not provided for that nothing is intended	18	MR JUSTICE HILDYARD: It is a very difficult test for the
19	to happen.	19	(inaudible) though, isn't it? I mean, at what stage of
20	Paragraphs 15 to 18, which is the other passage that	20	a contract? Does it have to be more than ten pages?
21	was referred to by Mrs Justice Gloster, sets out the	21	MR MARSHALL: Well
22	general approach to implication of terms. The relevant	22	MR JUSTICE HILDYARD: It can't be the length. Surely what
23	bit, which then refers to what might be the approach, or	23	they are getting at is along the lines of: where lots of
24	the special issue that arises when one is dealing with	24	people have worked hard to reach a standard form, which
25	a lengthy or complicated contract, is with reference to	25	will be considered appropriate across a wide variety of
	Page 66		Page 68

17 (Pages 65 to 68)

8th Floor, 165 Fleet Street London EC4A 2DY

Day 4

1 transactions and has had a lot of input into it, to 1 background as to what that objective was, at the time, 2 cover all eventualities, it is rather presumptuous of 2 which was to preserve the position of the UK 3 the court to suppose that they have just made a bog in 3 Lehman Group generally and to protect the creditors of 4 a certain area. It is more difficult to suppose that. 4 that group generally. 5 It's more likely that they simply haven't covered that 5 MR JUSTICE HILDYARD: Just going back to Belize. 6 because it is too difficult and not intended. 6 MR MARSHALL: Yes. 7 MR MARSHALL: Tor that 7 MR JUSTICE HILDYARD: Inset that all that is being said? 8 saying, wasn't it, was that it is an unitary exercise. 9 MR MARSHALL: Yes. 9 Search of the court is what the parties intended, and 10 that same search applies in any of the three contexts in 11 more effort that has gone into a contract, and the more 11 which one is looking at the same question. 12 general its application that is intended, the less 12 MR MARSHALL: Yes. 13 likely the court is to wade in and say, "Oh, well, they 13 MR JUSTICE HILDYA	
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21the possible cases. But that is not necessarily always21and I haven't covered it there you look at the22so and, in this context, having regard to the material22inference from the express terms, still at large, and23behind the standard form contract, particularly the23you think: well, how can they, at that third stage, if24handbook that Your Lordship has seen, it is a pretty24it is sequential, have really left this out by accident	,
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24handbook that Your Lordship has seen, it is a pretty24it is sequential, have really left this out by accident	
25 good indicator that they just didn't have in mind calls 25 rather than by design?	
Page 69 Page 71	
1 under section 74 at all, and that maybe because they 1 MR MARSHALL: Your Lordship said, "Absolute necess	
2 wanted to keep them out of the equation, in terms of 2 I respectfully submit to Your Lordship that that is	<i>,</i>
3 what sources could be called upon for repayment; another 3 putting it rather too high, because as Lord Neuberger	
4 option would be to conclude that they just didn't have 4 MR JUSTICE HILDYARD: "Absolute necessity" in the S	amption
5 unlimited companies in mind, at all, for this type of 5 sense, to give coherence to the contract.	r · ·
6 document. That wouldn't be at all surprising, because 6 MR MARSHALL: To give coherence, yes.	
 reaction of the second s) easily
8 thing. 8 falls back into reasonableness.	
9 Not to focus on provisions that are going to cover 9 MR MARSHALL: Yes.	
10 them perhaps wouldn't be that surprising. It wouldn't 10 MR JUSTICE HILDYARD: The constant refrain is you c	un't At
11 be any criticism of the FSA in relation to that. 11 least at the implication, you just can't.	
12 Particularly where what the FSA is doing is very much 12 MR MARSHALL: Yes. But, yes, I entirely accept	
13 based on the European background directives, which 13 Your Lordship's	
14 certainly wouldn't have had English unlimited companies 14 MR JUSTICE HILDYARD: You don't urge me off Belize	
15 as the focus. 15 presumably? It just needs to be understood in the light	
16 So while accepting what Your Lordship has said, we 16 of the subsequent cases.	
17 would respectfully submit this could well properly come 17 MR MARSHALL: Absolutely, my Lord, yes.	
 into the category of case where it is simply an area MR MARSHALL. Absolutly, my Edd, yes. MR JUSTICE HILDYARD: You are a unitary man, aren' 	vou?
19 which wasn't focused upon and for understandable 19 MR MARSHALL: I am a unitary man, certainly. My Lon	you
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	-
	-
22covered, and there needs to be appropriate implication22I believe Lord Neuberger was suggesting.23of a term to cover it, to make the document work23MR JUSTICE HILDYARD: Yes.	-
	-
24coherently, having regard to what its objective was.24MR MARSHALL: My Lord, we have these three routes to25Your Lordship has already heard from me as to the25conclusion, what we say the conclusion is whichever	d,
2.5 Four Lorusing has an easy mean from the as to me 2.5 Conclusion, what we say the conclusion is which ever	d,
Page 70 Page 72	d,

8th Floor, 165 Fleet Street London EC4A 2DY

1 one you take, and this is the law of it— that the 1 (1.09 pm) 2 obvious focu— 2 (The hardson adjournment) 3 MR AUSTICE IILDYARD. The most difficult a- 3 (2.69 pm) 4 MR AUSTICE IILDYARD. The most difficult is the 7 MR AUSTICE HILDYARD. Yes. The most difficult is the 5 and not with recourse to other persons within the group 5 behind me have been vorking inductionly and have found 6 waters to the connel directive from 193, which 1 think is to be connel directive from 193, which 7 MR AUSTICE HILDYARD. Yes. The most difficult is the 8 MF Justice David Richards, which the recourse effect to 10 euring (inaudbib) bargins is another. 10 various definitions of vhat comprises own limits for the 11 cherly enough Your Lordship was (france are certices, 11 11 hand care 11 cherly enough Your Lordship was (france are certices, 11 hand care 11 12 repression that oppoorthe 16 in paragraph, A.to. 13 orbond that was going to be maded annul. Reliance 10 WR AUSTICE HILDYARD. Yes. 14 MR IUSTICE HILDYARD. Yes. 10 proffs, shooth frageraph, A.to. 15 which is being consideneed there sever of the maxing is a contex. <t< th=""><th></th><th></th><th></th><th></th></t<>				
3 MR.USTICE HUDYARD: The most difficult - 4 MR.MARSHALL: A value of the borrowing entity 5 and or with accourts to the presons within the group 6 via section 75, or indeed by other runes, like 7 modermities and surveyships. 8 MR.USTICE HUDYARD: Yes. The most difficult is the 9 MR.MARSHAL: Your Lordship bios for thing, but 10 earing (maddble) bargins is another. 11 MR MARSHAL: Your Lordship bios for that approach to 12 apply. Your Lordship bios for that approach to 13 to see what the objective was. If one can see it 14 MR MARSHAL: Your Lordship bios for that approach to 15 what hey did in that case. 16 My Lord, just a couple of other very short points 16 My Lord, just a couple of other very short points 17 Dany Containers, which is a acts to do with negatibile 18 Dany Containers, which is a acts to do with negatibile 19 Dany Containers, which is and sack offend in the creaves 2029, excluding 20 containers, which is and sack offend in the creaves 2029, excluding 21 profiles, indive approach to intervis absorefiles 22	1	one you take, and this is the last of it that the	1	(1.03pm)
4 MR MASSHALL: My Lord, over the solut adjournment those found 5 and not with recourse to other persons within the group 6 wascian 75, or indeed by other routes, like 7 indemnities and suretyships. 8 MR MSTECHILLY MAP. Vest. The most difficult is the 9 Aberdeen City, sin't it, because age is one thing, but 11 MR MSTECHILLY Map. Vest. The most of the approach to 12 apply, Your Lordship is howing at the other provision 13 sea what the objective was. If one can see it 14 clearly enoughly is looking at the other provision 15 sea what the objective was. If one canse of 16 was a couple of other very short points 17 Point Cordship is nothing. 18 I think, in Mr Trover's sketchon argument to 19 Dairy Contances, which is a case to dwith negotable 20 contimet, with a cagotable contract. It is not some sort 21 observation of Lord Hoffmann that you can have some agreements where certainty in terms of the meaning is 22 was abo placed on the case of Mannai, and the 23 observation of Lord Hoffmann that you can have some agreements when a counting ing in the termsoff 24 <td< td=""><td>2</td><td>obvious focus</td><td>2</td><td>(The luncheon adjournment)</td></td<>	2	obvious focus	2	(The luncheon adjournment)
5 and not with recourse to other persons within the group 5 behind me have been working indectory and have found 6 via section 75, or indeed by other routes, like 6 7 annex 5 to the conneil directive of April 1989, which the 8 MR RUSTICE IIILDYARD. Yes. The most difficult is the 8 MR Paster Early and Relatives of the interports to 9 annex 5 to the conneil directive of April 1989, which thes 9 annex 5 to the conneil directive of April 1989, which thes 9 and up a copy of the relevant EU provision 10 respectively on provise of the rentifications of what comprises of the rentifications fail are regulated. Could 11 MR MARSHALL: You Loadship as not find approach to 12 I bedraw we break, iff may. There was: Ifference, 13 I dink, is the coertex it, is not sort of 14 MR MARSHALL: We Loadship will see, in paragraph 2, sub-paragraph 4, to: 15 before we break, iff may. There was reference, 16 I dink, is the acts of Mannai, and the 20 respectfully submit that is on or elevance. We are or indeed in point set of the relation of not finds of point set on the act of Mannai, and the 21 offsend there is so provide in the act on of Mannai, and the 22 respectfully submit that is on or elevance. We are or in the ing on or in list is on theact of Mannai, and the	3	MR JUSTICE HILDYARD: The most difficult	3	(2.05pm)
6 via section 7, or indeed by other routes, like 6 annex 5 to the council directive from 1993, which 7 indemnities and suretyships. 6 annex 5 to the council directive of April 1989, which has 9 MR LUSTICE HIID YARD Yes. The most difficult is the 7 1 think is the one referred to by 11 MR MARSHALL: Your Lordship is nother. 7 1 directive of April 1989, which has 12 apply, Your Lordship is nother. 11 purposes of the institutions that are prosend to a particle council directive of April 1989, which has 12 and active council directive of April 1989, which has 11 13 is directive annex 5, is, 1 thrink, the purposition. 11 14 clearly enough Your Lordship is nother. 11 15 which dig din that conser. 16 16 16 intrain, in M Trowers sheelson argument to 16 MR MARSHALL: Throw a clearly for annex you. 16 proposition that you dont apply terms vary readily. 17 annex or and it corse refers, as Your Lordship will see, and annex you. 17 proposition that you dont apply terms vary readily. 18 19 "Own finds as defined in directive 80 299, excluding contrast, it is not some sort 10 16	4	MR MARSHALL: was on the assets of the borrowing entity	4	MR MARSHALL: My Lord, over the short adjournment those
7 I think is the one referred to by 8 MR JUSTICE HILDYARD, Yes. The most difficult is the 9 Aberdeen Chy, losh it, because a gap is one thing, but 10 curing (maudble) bargains is another. 11 MR MARSHALL: You Londship to so for that approach to 12 apply, Your Londship to so for that approach 13 to see what the objective was. If one can nee it 14 clearly enough? Your Londship can fill that agp, which is 15 what they dial in that case. 16 MP JUSTICE HILDYARD. The was reference, 11 think, in Mr Tower's skelcton argument to 19 Deary Containers, which is a case to do with negotable 20 containers, which is a case to do with negotable 21 proposition thar you don't bar adoptive two apply times 22 respectfully submit that is of on relevance. We and postable contract. This was reference, 23 dealing with a negotable contract. This not some sort 23 24 respectfully submit that is of on relevance. 24 25 was also placed on the case of Mannai, and the 25 26 matter contraint of the regotable con the case of Mannai, and the 26	5	and not with recourse to other persons within the group	5	behind me have been working industriously and have found
8 MR JUSTICE HILDYARD Yes 9 Abordeen City, sin it, because a gap is one thing, but 9 11 MR MARSHALL: Your Lordship has to, for that approach to 9 12 anghy, Your Lordship to an fill that gap, which is 10 13 rose what the objective was, Irons can see it 13 14 clearly enough Your Lordship can fill that gap, which is 14 15 what they did in that case. 13 16 My Lord, just a couple of other very short points 16 17 before we herak, IT may. Three was reference, 13 18 Ithink, In MT Tower's skoleton argument to 18 19 Dairy Containers, which is a case to do with negotiable 10 20 certain feam.s? Your Lordship at is of no relevance. 21 proposition that you don't apply terms very readify. We 22 22 roped that was oping to be traded around. Reliance 23 23 observation of Lord Hoffmann that you can have some 24 24 observation of Lord Hoffmann that you can have some 24 25 was also placed on the case of Mannia is on thing 3 26	6	via section 75, or indeed by other routes, like	6	annex 5 to the council directive from 1993, which
9 Aberdeen City, sin't it, because a gap is one thing, but 9 an earlier conneal directive of April 1989, which has 10 Curing (maudible) bargains is another. 10 11 MR MARSHALL: You Lordship has to looking at the other provision apply. Your Lordship is looking at the other provision apply. To very was reference, 11 12 apply. Your Lordship is a fill that gap, which is what they did in that case. 11 14 clearly enough Your Lordship or of Other very short points 16 15 which has 17 16 My LOR, dij sat a couple of Other very short points 16 17 before we break, if I may. There was reference, 17 18 Hinik, in Mr Trover's skelction argument to 19 19 Dairy Containers, which is a case to do with negotiable 10 20 contracts. This was relide upon to support the 10 21 proportis, subordinated I can capital and liquid assets, 21 22 respectfully shimit that is of nor relevance. We are not 22 23 dealing with a negotiable contract. It is not some sort 24 24 observation of Lord Hoffmann that you can have some 25 33 artifies 1	7	indemnities and suretyships.	7	I think is the one referred to by
10 curing (mandhb) bargains is another. 10 various definitions of what comprises own funds for the 11 MR MARSHALL: Your Lordship is as (o, for that approach to 10 various definitions of the relevant EU provisions. 13 to see what the objective was. If one can see it 11 MR JARSHALL: Your Lordship van fill that gap, which is 14 clearly cough Your Lordship is an fill that gap, which is 13 MR MARSHALL: Think Your Lordship will find the 1993 16 My Lod, just a couple of other very short points 16 MR MARSHALL: Think Your Lordship will find the 1993 17 before we herak, if Turn, 'Three was reference, 18 Ithink, in Mr Trower's skeletan argument to 19 Dairy Containers, which is a case to do with negatiable 19 "Own finade sa defined in atervice 82.59 excluding 21 respectfully submit that is of on relevance. We are not 10 "Then three is also reference to net traifing book 22 respectfully submit that is on for net another. It is not some sort 10 "Own finade sa defined in direux assets, which is being considered there is where, for example, 24 of baland was going to be traded around. Reliance 20 "Amite 2 25 was also placed on the case of Mannai, and the 20 "Amite 2 <td>8</td> <td>MR JUSTICE HILDYARD: Yes. The most difficult is the</td> <td>8</td> <td>Mr Justice David Richards, which then cross refers to</td>	8	MR JUSTICE HILDYARD: Yes. The most difficult is the	8	Mr Justice David Richards, which then cross refers to
11 MR MARSHALL: Your Lordship has to, for that approach to apply, Your Lordship is looking at the other provision 12 apply, Your Lordship is looking at the other provision is used what the objective was. If one can see it 14 clearly enough Your Lordship on III that gap, which is 15 what the yold in that crease. 16 My Lord, just a couple of other very short points 17 before we break, if I may. There was reference. 18 Inhink, IM. Trovers' Station argument to 19 Dairy Containers, which is a case to do with negotible 20 contracts. This was relied upon to support the 21 proposition that you don't apply terms very reality. We 22 respectfully submit that is of no relevance. We are not 23 dealing with a negotiable contract. It is not some sort 24 of bod that was going to be traded around. Reliance 25 was also placed on the case of Mannai, and the 26 observation of Lord Hoffmann that you can have some 2 agreement, who has to look simply ta the tryp of case 36 presented where certainty in terms of the meanning is 37 othere agreement, who has to look simply ta the trun or sin than tha sin addition, on its list <	9	Aberdeen City, isn't it, because a gap is one thing, but	9	an earlier council directive of April 1989, which has
12 apply, Your Lordship is looking at the other provision to see what the objective way after are etting clearly enough Your Lordship and if that gap, which is what they did in that case. 12 I hand up a copy of the relevant EU provisions. 13 clearly enough Your Lordship and if that gap, which is what they did in that case. 14 MR UNSTICE HILDYARD. Thank you. 14 MR UNSTICE HILDYARD. Thank you. 14 MR UNSTICE HILDYARD. Thank you. 15 which is a cose to do with negotiable contracts. This was relied upon to support the proposition that you don't apply terms very readily. We respectibly soburit that is of on relevance. We are not of hord that was going to be traded around. Reliance which is being considered there is where, for example, you have a documentary credit which is going to be agreements where case of Mannai, and the 20 Then there is also reference to net frading book profits, subordinated lean coupid and liquid assets, which are then defined, I think, on the following page. 1 observation of Lord Hoffmann that you can have some agreements where case of Mannai, and the setting are active setting in terms of the meaning is eritical. Certainty is paramount. But the type of case which is being considered there is where, for example, you have a documentary credit which is going to be agreement, who has to look simply at the terms of the agreement, who doesn't honow about the context of the agreement, who doesn't honow about the context of the agreement, who doesn't honow about the context of the agreement, who has to look simply the apply the Marks and gener principles, which have been set out the the document to work out what they have to do. It is not that c	10	curing (inaudible) bargains is another.	10	various definitions of what comprises own funds for the
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13 to see what the objective was. If one can see it 13 (Handed) 14 clearly enough Your Lordship can fill that gap, which is 13 (Handed) 15 What they did in that case. 15 MR MARSHALL: Think Your Lordship will find the 1993 16 My Lord, just a couple of other very short points 16 MR MARSHALL: Think Your Lordship will find the 1993 17 before we break, if I may. There was reference, 17 annexure and it cross refers, as Your Lordship will see, 18 in paragraph 2, sub-paragraph A, to: 18 in paragraph 2, sub-paragraph A, to: 19 Dairy Containers, which is a case to do with negotiable 10 "Own funds as defined in directive 89.29, excluding 20 certain items." 11 Then there is also reference to net trading book 21 proposition that you do happly erms very readily. We 11 Then there is also reference to net inding book 22 of bond that was going to be traded around. Reliance 23 which are then defined, I think, on the following page. 24 of Apol 1989 has the definition of own funds in 3 article 2 33 critical. Certainty in paramout. But the type of case 4 MR MARSHALL: My Lord, the other council directive </td <td>12</td> <td>apply, Your Lordship is looking at the other provision</td> <td>12</td> <td>I hand up a copy of the relevant EU provisions.</td>	12	apply, Your Lordship is looking at the other provision	12	I hand up a copy of the relevant EU provisions.
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25 MR JUSTICE HILDYARD: 2.05. 25 correct on issue 1 it doesn't, and if we are correct on				
Page 74 Page 76				· ···· · ···· · · · · · · · · · · · ·
		Page 74		Page 76

1 the rectification issue it de		1	down, again, to a single process.
2 concerned. We would sir		2	Now, looking at the authorities, there is no case,
-	on valuation, then any claim	3	we submit, that is inconsistent with that approach. In
4 under the subordinated lo	-	4	the skeleton argument for Mr Trower, at paragraph 210,
	regards LBHI2, and there	5	there is reference to a number of authorities beginning
	t to claim over as against LBL.	6	with re: Barnard's Banking Company, and then also to re:
	sue 7, which is the next one,	7	Cordova Union, and Helbert v Banner. They all, of
-	ng in two parts, with parts of	8	course, emphasise that the process is for the benefit of
	nsidered together. (i) Was	9	creditors and that the court has to get on and see that
Ū.	contribute to the assets of	10	creditors are paid. But, subject to that, if the
5	l or otherwise, and (v) was	11	process of calling in is going to achieve that
	trators directed to assert less	12	objective, one can then take into account further
-	ontribution claim as against	13	factors which will make the process smoother, quicker
	what should the reduction be	14	and easier, which will include, where appropriate, to
15 and what factors should b		15	have regard to the size of shareholdings held and other
• · · ·	at category first of all, our	16	factors, such as the nominee arrangements.
-	hat whilst we accept that the	17	If I could just go to the Helbert v Banner case,
18 jurisdiction exists to call t		18	which I think is in bundle 1 of the authorities, at
<u> </u>	per, irrespective of the size of	19	tab 22, what Your Lordship can see from the decision,
-	nes to actually making the	20	particularly the passage that begins just about half way
21 decision to do that, to ma	ke a call under section 150,	21	down, with reference to that part of the case. The
the court has a discretion	and that discretion is not	22	emphasis is on the fact that the court is exercising
23 limited to just having rega		23	a reasonable discretion and, in that particular case,
24 relevant shareholder can p	pay or not, which is the	24	the question is whether or not the court should make
25 particular factor averted t	o in decision 150.2.	25	the call where there was a question over whether or not
D			D 70
Page			Page 79
1 My Lord, the rationale b	behind the reference to the	1	it was in fact necessary that there might in fact be
2 ability to pay must be a pr	actical consideration. There	2	other sources of payment. The observation is, from
	the process of seeking to	3	Lord Hatherley, the Lord Chancellor:
4 call in money when it is, a		4	"The court would in no case direct calls to be made
5 possible; one is simply go	ing to waste time and effort	5	if it was clear that there were assets actually in the
6 by seeking to do so.		6	possession of the liquidator which were sufficient for
7 If that is the rationale be	ehind it, then one can	7	the payment of the debts."
8 foresee that there will be a	number of other factors	8	Then there was a question, really, of what level of
9 which may come into the	court's consideration, which	9	proof was required for the court to be satisfied that it
10 would have potentially the	same effect. For example,	10	was appropriate for a call to be made given the question
	ntributories are in funds but	11	over whether or not the company would have funds
12 have very different sizes of	f shareholding and go through	12	available, itself, to meet the outstanding indebtedness.
13 the process of making a ca	all for the full amount as	13	If it is a reasonable discretion of that kind, in our
	and then go through a further	14	submission that sort of discretion is entirely
15 process of adjustment? O	ne can simply save time and	15	consistent with the type of approach which I have
	e stage process rather than	16	indicated to Your Lordship can be properly taken. It is
	sing the calls on the size of	17	not surprising that Helbert v Banner and the other cases
18 shareholding.	-	18	that have been referred to, like re: Cordova and
_	older is simply holding that	19	Barnard's, have not referred to factors beyond the lack
	on behalf of another, and that	20	of assets to meet the relevant indebtedness, because
21 other is in funds, again, it		21	most of these cases in fact I think in each one of
	to be resolved in one court	22	these cases, the court was concerned with limited
	han two. Rather than having	23	companies where the calls were tied only to the amount
•	older who is holding as nominee	24	outstanding on the relevant debt, which certainly seems
	be indemnified, one can cut it	25	have been the case in Helbert v Banner, as one sees from
_			
Page 7	78		Page 80

20 (Pages 77 to 80)

1 paid up the position between the contributions where the contributions where the contribution or adjustments is required simply based on the size of shareholdings. So taking account of the size of the secrets of the secret of the secret secr	1			
3 Here, one is of course desling with a unifinited 3 the size of shareholdings. So taking account of 4 company, pointably, are more wide ranging, including 5 between the methors - for scample, a right to indemnity 6 those which law pis indicated could potentially be 6 because one is holding as nomine for analytes in fidemnity 6 those which law pis indicated could potentially be 6 because one is holding as nomine for analytes in the oright 7 My Lord, see respectivity submit, although in theory 8 it may be that is not capable of being dealy with by way 10 amouta, a number of factors would come into play at be 10 the right suddenly disoppears. It still persists and 11 the right suddenly disoppears. It still persists and 11 the right suddenly disoppears. It still persists and 12 section 15. Not simply blinked to the number of shares 13 then it would be asserted, and if the relevant 13 beld, but possibly also nonineer armagements and the 13 then it would be asserted, and gints more three seas discincent 14 is as to whether the office holders had made afficient 15 may be the case. 15 MRURUSTICE HILDY ARD. Ney ond that, what	-	pages 29 to 30, where the shortfall on what had been	1	
4 company, and the sorts of factors that will cone into 4 rateability. But where there is some independent right 5 phy, potentially compared to the sort of factors that will cone into account. 5 because one is holding as noninnee for another, so indemnity because one is holding as noninnee for another, so indemnity because one is holding as noninnee for another, so indemnity of the adjustment process, but that doesn't mean that 10 around, a number of factors would cone into play at the point of the exercise of the discretion under 7 11 around is a number of factors would cone into play at the point of the exercise of the discretion under 11 12 section 150. Not simply link do the number of shares 12 13 bed, but possibly also noninee arrangements and the link. Wy Lord, two authorities, 1 think, are referred to by the right con signified to the other shares 16 14 the right con signified to the number of shares 16 15 MR UNSTICE HILDYARD. Roynd that, what do I get from inquiries to lotser the affidavit which hey had made is a part of an adjustment process and there is a part of the exercision is put: 21 MR MARSHALL: Yes: 2 21 MR MARSHALL: Yes: 2 22 MR MARSHALL: Weil, I think it is expressed as being a ranzamole discretion as to whether worth a cone link to the adistrument process. There is a shoronindity independentity one shoul	2		2	
5 play, peternially, are more wide many, including 5 between the members - for example, and under the second multiple 6 these which have just indecated could potentially be 5 between the members - for example data with by way 7 the second multiple 5 between the members - for example data with by way 7 the second multiple 5 it may be that is not capable of being data with by way 9 the second multiple 5 it may be that is not capable of being data with by way 10 amount, a number of factors would come into play at the 10 the trip standard my diagonearth, and the descritten and the 12 section 150. Not simply linked to the number of shares 12 member, against whom the right exists, is in insolvency, then it would be asserted, and of the same relation of the form and participles - it may be that is as part of the 13 held, but possibly also nominee arrangements and the 13 member, against whom the right exists, is in insolvency, then it would be asserted, and of the carcino of the form and adjustment process. The fore is in a mounter is a special clim at that will be capable of being advanced. 16 ME MARSHALL: Vers. 10 Mether the reverse assect as being a reasonable discretion in a more is on the share form and the second as part of the adjustment process. There is a past of the casist of the share fore share of the share of th	3		3	
6 those which law just indicated could potentially be 6 because one is holding as nomine ry as 7 taken into account. 7 indemification on agency or trusteship principles – 8 My Lord, we respectively submit, although in theory 7 indemification on agency or trusteship principles – 9 there is jurisdiction to make a call for the full 7 indemification on agency or trusteship principles – 10 around, annubre of factors would core simulation the right can similation on agency or trusteship principles – 1 11 may be that is no calle of been in would be asserted, and the relator in the relatore in the relatore in the relator in the re	4		4	
7 idem file data or agency or mateschip principles 8 My Lord, we respectively solving although in theory it may be that is not capable of being dealt with by way 9 there is jurisdiction to make a call for the full it may be that is not capable of being dealt with by way 10 arcum, a number of factors would come into play at the it may be that is not capable of being dealt with by way 11 point of the corrects of the discretion under it may be that is not capable of being dealt with by way 12 section 150. Not simply finked to the number of shares it may fifted can still be asserted, and of the gart of the 13 bid, by possibly also nomine arrangements and the its in solvency, the section of the rarin ones, 1 think, are referred to 14 indermification ones, 1 think, is the indermification ones, 1 think, is the 16 Helbert V Samer, cally. Park was case on wasnit indermification ones, 1 think, is the 17 it, as to whether the vasi of addication. indermification ones, 1 think, is the 18 inquiristication ones, 1 think, we referred to indermification ones, 1 think, is the 18 MR INSTICE HILDYARD. Beyond that, what do Ig efform ifig. indermification ones, 1 think, is the 19 MR MARSHALL: Well, 1 think it is expresseat as being <td< td=""><td>5</td><td>play, potentially, are more wide ranging, including</td><td>5</td><td></td></td<>	5	play, potentially, are more wide ranging, including	5	
8 My Lord, we respectifully submit at langup in theory 8 it may be that is not capable of brong doal with by way 9 there is jurisdiction to make a call for the full 9 10 amount, a number of facors would come into play at the 11 point of the exercise of the discretion under 11 12 section 150. Not simply linked to the number of shares 11 13 held, but possibly also nominee arrangements and the 13 14 like. My Lord, as far as - 13 16 If RIXTICE HILDYARD: Must proposition do 1 get from 1? 14 18 inquiries to bolders had made sufficient 18 19 as to whether the erw was a deficiency. 19 20 MR MARSHALL: York as a case on, wash 16 21 MR MARSHALL: York as a case on, wash 16 22 MR MARSHALL: York as a case on, wash 16 23 it any be cass. 16 24 a reasonable discretion 17 25 MR UNSTICE HILDYARD: A reasonable discretion to accept or 27 24 a reasonable discretion to advect the artification to accept or 28 25 MR NARSHAL	6	those which I have just indicated could potentially be	6	-
9 there is piridication to make a call for the full 9 of the adjustment process, but that doesn't mean that 10 amount, a number of factors would come into play at the 10 that right sandtill be asserted, and if the relevant 11 point of the exercise of the discretion under 11 the right can still be asserted, and of the relevant 12 section 150. Not simply linked to the number of shares 13 them it would be asserted, and of the relevant 13 theid but yoossibly also nomine arrangements and the 14 proofing process and appropriate set-off arrangements as 14 the volume to sasserted, no doubt, as part of the casse. 16 Mb Ux Yue to suggest that it is all really going to 16 Hober V Banner, really. Nat was a seas exis on, wasn't 17 16 17 it, as to whether the office holders had made sufficient 17 18 be dealt with as part of an adjustment process and there 18 maxmasched discretion is pair: 18 ar assonable discretion is pair: 18 20 MR MARSHALL: Vest. Wassersed, no dual respectfully submit that is expressed as being a reasonable discretion under the provision as to whether or not on wake a call. It is page 34: 11 independently of the call and digustment process. There is als no noting inconsistent	7	taken into account.	7	
10 amount, a number of factors would come into play at the 10 that right suddenly disappears. It still persists and 11 point of the exercise of the discretion under 11 12 section 150. Not simply liaked to the number of shares 13 held, but possibly also nominee arrangements and the 14 like. Wy Lord, sa far a - 15 MR JUSTICE HILDYARD: Must proposition do 1 get from 16 Holbert v Banner, really? That was a case on, wasn't 17 tip as to whether the offits on bioders had made sufficient 18 inquiries to bioders had made sufficient 19 as to whether the offits on bioders had made sufficient 10 most whether the offits on the two was a deficiency. 20 MR MARSHALL: VS. 21 MR MARSHALL: VS. 22 MR MARSHALL: VS. 23 that new more than the fact that the court 24 areasonable discretion 25 MR JUSTICE HILDYARD: A reasonable discretion to accept or 26 Page 81 27 MR MARSHALL: VG. 28 that right suddenly of the call and adjustment process. There 29 r acosonable discretion in or	8		8	
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21 (Pages 81 to 84)

Waterfall III - Part A Trial

		1	
1	difference between that point is thus removed. The	1	page 206, is that the Vice Chancellor, although finding
2	subsequent diminution in the value of the shares from	2	it rather difficult to reconcile all of the decisions,
3	a clause which both parties were in perfect ignorance at	3	comes to the conclusion that he is bound by the outcome
4	the time of the contract(reading to the words)	4	in that case and he cannot order rectification of the
5	There was, therefore, I think, a binding contract	5	register in the case before him, notwithstanding having
6	between Messrs Musgrave and Mr Hart which I should have	6	concluded that there was a contract and in normal
7	been bound to decrease specific performance if the case	7	circumstances he would have ordered specific
8	had been brought before me by a bill to enforce the	8	performance. So he concludes, I think, at the top of
9	contract."	9	page 207, four lines down from the top:
10	The court concluded there was a contract and could	10	"Under these circumstances, I must reluctantly leave
11	have been specifically performed had there been	11	Messrs Musgrave to assert what remedies they have
12	appropriate proceedings do it. What then happens is	12	against Mr Hart by bill for a specific performance and
13	that the Vice Chancellor then goes on to consider	13	indemnity or, as they may be advised, the present
14	whether all of this can be dealt with in the proceedings	14	application must therefore be refused but considering
15	before him under one of the provisions of the 1862	15	the conduct of Mr Hart, it certainly must be so without
16	Companies Act.	16	costs."
17	At page 204, he goes on to note that there were	17	So that is the position that is arrived at in
18	previous binding decisions in which there were opposing	18	Overend & Gurney, where the company had gone into
19	opinions. In particular, at the bottom of page 204,	19	liquidation and the question was rectification of
20	opposing opinions in the case of Ward v Henry's case.	20	register to alter the list of contributories. The
21	But then, at page 205, four lines down, he then	21	conclusion is: can't alter the register, can't avoid you
22	says:	22	having a call made upon you, as a contributory, but you
23	"However, there is a later case of the greatest	23	are still going to have your remedy for some form of
24	important which was not reported at the time of	24	contractual relief, whether for specific performance or
25	argument. I refer to Marino's case."	25	damages in lieu, or compensation in lieu, as against the
	Page 85		Page 87
1	And then he notes in that case:	1	other party
1	And then he notes in that case: "Marino was registered shareholder of company and	1	other party. We would respectfully submit that is entirely
2	"Marino was registered shareholder of company and	2	We would respectfully submit that is entirely
2 3	"Marino was registered shareholder of company and another party(reading to the words) accepted the	2 3	We would respectfully submit that is entirely consistent with what you would expect. You still have
2 3 4	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his	2 3 4	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the
2 3 4 5	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf."	2 3 4 5	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the
2 3 4 5 6	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that	2 3 4 5 6	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being
2 3 4 5 6 7	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that case. At about ten lines up from the foot of page 205,	2 3 4 5 6 7	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being dealt with as part of rectification of the register, but
2 3 4 5 6 7 8	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that case. At about ten lines up from the foot of page 205, he then notes:	2 3 4 5 6 7 8	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being dealt with as part of rectification of the register, but you still have a right which is then capable of being
2 3 4 5 6 7 8 9	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that case. At about ten lines up from the foot of page 205, he then notes: "There was therefore this defect, that while the	2 3 4 5 6 7 8 9	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being dealt with as part of rectification of the register, but you still have a right which is then capable of being pressed. In the context of an insolvent respondent to
2 3 4 5 6 7 8 9 10	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that case. At about ten lines up from the foot of page 205, he then notes: "There was therefore this defect, that while the transfer was executed by the seller and sent to the	2 3 4 5 6 7 8 9 10	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being dealt with as part of rectification of the register, but you still have a right which is then capable of being pressed. In the context of an insolvent respondent to the proceedings, would be dealt with, no doubt, by way
2 3 4 5 6 7 8 9 10 11	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that case. At about ten lines up from the foot of page 205, he then notes: "There was therefore this defect, that while the transfer was executed by the seller and sent to the company for registration, it had not been executed by	2 3 4 5 6 7 8 9 10 11	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being dealt with as part of rectification of the register, but you still have a right which is then capable of being pressed. In the context of an insolvent respondent to the proceedings, would be dealt with, no doubt, by way of proof.
2 3 4 5 6 7 8 9 10 11 12	"Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that case. At about ten lines up from the foot of page 205, he then notes: "There was therefore this defect, that while the transfer was executed by the seller and sent to the company for registration, it had not been executed by the purchaser."	2 3 4 5 6 7 8 9 10 11 12	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being dealt with as part of rectification of the register, but you still have a right which is then capable of being pressed. In the context of an insolvent respondent to the proceedings, would be dealt with, no doubt, by way of proof. My Lord, the Alexandra Palace decision, which
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	 "Marino was registered shareholder of company and another party(reading to the words) accepted the shares bought by the company and acted as agents on his behalf." He then goes on to describe further details of that case. At about ten lines up from the foot of page 205, he then notes: "There was therefore this defect, that while the transfer was executed by the seller and sent to the company for registration, it had not been executed by the purchaser." The case then came before the Court of Appeal. The conclusion of Lord Justice Turner was: "The respondent has to make out that the company was guilty of default in not taking his name off the register, although according to their ordinary practice, the name could not be taken off(reading to the words) to deviate from the practice which they had always pursued." 	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	We would respectfully submit that is entirely consistent with what you would expect. You still have your right. It may not be dealt with as part of the call process. It may not be dealt with as part of the adjustment process. It may not be capable of being dealt with as part of rectification of the register, but you still have a right which is then capable of being pressed. In the context of an insolvent respondent to the proceedings, would be dealt with, no doubt, by way of proof. My Lord, the Alexandra Palace decision, which I think is the one referred to in Mr Trower's skeleton argument, is also in bundle 1, at tab 40. The question that arose as one sees from the headnote is whether or not under the particular provision of the Companies Act, section 109, the 1862 Companies Act, there was a possibility of adjusting rights which included equities between tortfeasors. There were some rights between the potentially rights between the contributories for contributions as joint tortfeasors. It is therefore focused simply upon the question of whether or not the adjustment process under
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22 (Pages 85 to 88)

Waterfall III - Part A Trial

6 February 2017

1	The conclusion is that it can't. There is no	1	this: in relation to an unlimited company, it is not
2	jurisdiction under the Act to deal with it as part of	2	clear how this would actually work prejudicially
3	the adjustment process. That is from Mr Justice Fry's	3	certainly as far as LBIE is concerned. Because if LBL
4	judgment, at page 300. Your Lordship sees what was	4	was to make a claim as against LBHI2, and received any
5	trying to be asserted in, I think, the second paragraph	5	funds as a result of that, there could be a further call
6	down:	6	from LBIE, if necessary, as against LBL, assuming we are
7	"I do not find that I have any authority to make	7	wrong in all of our other arguments about our defence to
8	such an order for the purposes of working out such	8	such a call, and any difficulty arising over double
9	inequity between a tortfeasor to the company and	9	proof could be dealt with by the making of that further
10	creditors or contributories of the company."	10	call.
11	Then he addresses the question as to whether	11	It is a similar explanation to the one that applies
12	section 109 gave him the jurisdiction for the adjustment	12	when considering the contributory rule in connection
13	process. He concludes that it doesn't.	13	with an unlimited company. It is a point that is
14	At page 301, Your Lordship sees that he was purely	14	considered in the judgment of one of the members of the
15	focusing on whether he had the statutory jurisdiction	15	Court of Appeal in Black's case, which I think
16	and concluded that the statutory jurisdiction, among	16	Your Lordship was taken to, which is in bundle 1 of the
17	other things, wouldn't be appropriate because equities,	17	authorities, at tab 26.
18	of the sort that were raised, would need to be worked	18	It is the judgment of Lord Justice Mellish, at
19	out by, potentially, other forms of proceedings. They	19	page 265. He was really considering, specifically, the
20	wouldn't be convenient to be dealt with as part of the	20	contributory rule here, but similar considerations, we
21	adjustment process in the winding up.	21	submit, apply in connection with double proof as well.
22	That does not mean, however, that the right to	22	At 265, about eight lines down, there is a sentence
23	contribution that existed then suddenly disappeared. It	23	beginning "although that section", and he is referring
24	could still be asserted. It would just have to be dealt	24	to section 101 of the 1862 Act:
25	with by a more convenient and appropriate process. Of	25	"Although that section does not in terms say that
	Dage 90		Page 91
	Page 89	<u> </u>	rage 91
1	course, if the respondent had been, itself, insolvent,	1	there is to be no set-off, it shows the legislature in
2	-	1	
	by a proof in their bankruptcy, or whatever insolvency	2	framing that section the thought had already been
3	by a proof in their bankruptcy, or whatever insolvency process was being undertaken.	$\begin{vmatrix} 2\\ 3 \end{vmatrix}$	framing that section the thought had already been enacted. There should be no set-off, because in the
3 4	process was being undertaken.	1	enacted. There should be no set-off, because in the
		3	
4	process was being undertaken. So, my Lord, that we submit is also the position here, in the sense that if there is a right of	3 4	enacted. There should be no set-off, because in the 101st section they proceed to say: where there is unlimited liability in the case of any independent
4 5	process was being undertaken. So, my Lord, that we submit is also the position	3 4 5	enacted. There should be no set-off, because in the 101st section they proceed to say: where there is
4 5 6	process was being undertaken. So, my Lord, that we submit is also the position here, in the sense that if there is a right of indemnity, for example, on the part of LBL, against other estates, irrespective of whether that can be dealt	3 4 5 6	enacted. There should be no set-off, because in the 101st section they proceed to say: where there is unlimited liability in the case of any independent contract, there may be a set-off. The reasonable
4 5 6 7	process was being undertaken. So, my Lord, that we submit is also the position here, in the sense that if there is a right of indemnity, for example, on the part of LBL, against	3 4 5 6 7	enacted. There should be no set-off, because in the 101st section they proceed to say: where there is unlimited liability in the case of any independent contract, there may be a set-off. The reasonable distinction between a company with unlimited and limited
4 5 6 7 8	process was being undertaken. So, my Lord, that we submit is also the position here, in the sense that if there is a right of indemnity, for example, on the part of LBL, against other estates, irrespective of whether that can be dealt with as part of the adjustment process, the claim can still be made and it can still be proved for. If there	3 4 5 6 7 8	enacted. There should be no set-off, because in the 101st section they proceed to say: where there is unlimited liability in the case of any independent contract, there may be a set-off. The reasonable distinction between a company with unlimited and limited liability is obvious. In the case of(reading to the
4 5 6 7 8 9	process was being undertaken. So, my Lord, that we submit is also the position here, in the sense that if there is a right of indemnity, for example, on the part of LBL, against other estates, irrespective of whether that can be dealt with as part of the adjustment process, the claim can	3 4 5 6 7 8 9	enacted. There should be no set-off, because in the 101st section they proceed to say: where there is unlimited liability in the case of any independent contract, there may be a set-off. The reasonable distinction between a company with unlimited and limited liability is obvious. In the case of(reading to the words) is that it doesn't at all prejudice the rights
4 5 6 7 8 9 10	process was being undertaken. So, my Lord, that we submit is also the position here, in the sense that if there is a right of indemnity, for example, on the part of LBL, against other estates, irrespective of whether that can be dealt with as part of the adjustment process, the claim can still be made and it can still be proved for. If there is a right of set-off, or an appropriate set-off to be made in connection with it, then it will be dealt with	3 4 5 6 7 8 9 10	enacted. There should be no set-off, because in the 101st section they proceed to say: where there is unlimited liability in the case of any independent contract, there may be a set-off. The reasonable distinction between a company with unlimited and limited liability is obvious. In the case of(reading to the words) is that it doesn't at all prejudice the rights of the other creditors, because all of the shareholders
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23 (Pages 89 to 92)

8th Floor, 165 Fleet Street London EC4A 2DY Day 4

1	is still a shortfall at LBIE, they can make a further	1	which gives one creditor more than its proper share.
2	call as against LBL to recover.	2	My Lord, it is also then noted that, I think at
3	When one looks at the authorities that have been	3	paragraph 9 of Lord Collins' judgment, at page 398, that
4	cited in connection with issue 8, in the LBIE skeleton	4	the distinction between the two sub-rules is by no means
5	argument, they all appear to be cases where the double	5	clear cut. He gives, as an example, the case of ex
6	proof doctrine has been applied in connection with	6	parte McKay.
7	a limited liability company, not an unlimited company.	7	Then notes, at page 400, paragraph 14, that it
8	My Lord, that then leads on to the last, well, one	8	doesn't follow from the fact that it is difficult in
9	of the last, of the contentious issues involving our	9	some cases to draw the line between the two categories,
10	side, which is issue 9A, the preliminary issue to issue	10	that there aren't relevant differences. He goes on to
11	9, which concerns whether you can have an agreement	11	describe:
12	between a member and the company which enables the	12	"The anti-deprivation rule applies only if the
13	member to avoid liability under section 74.	13	deprivation is triggered by bankruptcy and has the
14	In this context, it would seem the only agreement we	14	effect of depriving the debtor of property which would
15	are really concerned with is in fact the recharge	15	otherwise be available to creditors, the pari passu rule
16	agreement, which we are contending existed and which had	16	applies irrespective of whether bankruptcy or
17	been in place for some time prior to LBL's involvement	17	liquidation is the trigger. There is a question of
18	with LBIE, and in particular prior to it having a share.	18	whether the bone fides of the parties are equally
19	That recharge agreement, we contend, had a much wider	19	relevant to the application of the two principles."
20	potential area of coverage. It is covering a number of	20	He then goes on to consider that. Your Lordship
21	different services being provided for the Lehman Group,	21	will see that then dealt with, at page 413, paragraph 75
22	and which was never entered into, of course, for the	22	where he considers the limits of the anti-deprivation
23	purposes of avoiding the effect of section 74.	23	rule. At paragraph 75, just beside letter G, on
24	Now, we contend that such an agreement, if it does	24	page 413, he explains that the anti-deprivation rule had
25	have the effect of negating a call by virtue of the	25	been based on the notion of fraud or a direct fraud on
	Page 93		Page 95
	1 420 75		1 420 75
1	right to then seek indemnification from LBIE and	1	the bankruptcy laws. At letter H, he then says:
2	creating a defence of circuity of action, or set-off,	2	"The overall effect of the authorities is that where
3	doesn't offend public policy and that is essentially for	3	the anti-deprivation rule has applied, it has been an
4	three reasons. Whilst it is correct that there is	4	almost invariably expressed element that the party
5	a general principle that you can't contract out of the	5	seeking to take advantage of the deprivation was
6	insolvency legislation, it is not the case that	6	intending to evade the bankruptcy rules. But where it
7	principle is applied in precisely the same way in all of	7	is not applied, the good faith or the commercial sense
8	the circumstances covered by it, and one can see that	8	of the transaction has been a substantial factor. By
9	from the Belmont Park Investments decision, which	9	contrast, the leading pari passu principle case, British
10	Your Lordship was, I think, taken to last week, which is	10	Eagle, it didn't matter whether there was a sensible
11	in bundle 3 of the authorities, at tab 85. If one takes	11	commercial arrangement not intended to circumvent the
12	it up in the judgment of Lord Collins, which is at	12	pari passu principle."
13	page 396, Your Lordship, I think, was taken to this	13	My Lord, there is then a conclusory section, at
14	passage previously.	14	page 421, where, firstly, in paragraph 102, the
15	Your Lordship will have seen that the	15	anti-deprivation rule is treated as too well established
16	anti-deprivation rule, and the rule that it is contrary	16	to discard. Then, at paragraph 103, he goes on to say
17			
	to public policy to contract out of pari passu	17	this:
18	to public policy to contract out of pari passu distribution are two sub-rules of the general principle:	17 18	this: "As has been seen, commercial sense and absence of
18 19			
	distribution are two sub-rules of the general principle:	18	"As has been seen, commercial sense and absence of
19	distribution are two sub-rules of the general principle: you can't contract out of the insolvency legislation.	18 19	"As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly
19 20	distribution are two sub-rules of the general principle: you can't contract out of the insolvency legislation. It is noted that there is some overlap, but they are	18 19 20	"As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the
19 20 21	distribution are two sub-rules of the general principle: you can't contract out of the insolvency legislation. It is noted that there is some overlap, but they are directed fundamentally at different situations;	18 19 20 21	"As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule, despite statutory inroads party
19 20 21 22	distribution are two sub-rules of the general principle: you can't contract out of the insolvency legislation. It is noted that there is some overlap, but they are directed fundamentally at different situations; anti-deprivation being aimed at attempts to withdraw	18 19 20 21 22	"As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule, despite statutory inroads party autonomy is at the heart of English commercial law.
19 20 21 22 23	distribution are two sub-rules of the general principle: you can't contract out of the insolvency legislation. It is noted that there is some overlap, but they are directed fundamentally at different situations; anti-deprivation being aimed at attempts to withdraw assets from bankruptcy liquidation; the pari passu rule	18 19 20 21 22 23	"As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule, despite statutory inroads party autonomy is at the heart of English commercial law. Plainly, there are limits to party autonomy in the field
19 20 21 22 23 24	distribution are two sub-rules of the general principle: you can't contract out of the insolvency legislation. It is noted that there is some overlap, but they are directed fundamentally at different situations; anti-deprivation being aimed at attempts to withdraw assets from bankruptcy liquidation; the pari passu rule reflecting the principle that statutory principles for	18 19 20 21 22 23 24	"As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule, despite statutory inroads party autonomy is at the heart of English commercial law. Plainly, there are limits to party autonomy in the field with which this field is concerned, not least because

11if one approaches it from Lord Justice Lewison's11comply with the statutory requirements. There wasn't12perspective.12authority in Welton v Saffery for shares to be issued in13Looked at in that way, and if that is the right way13the form in which they were. So it ultimately ended up14to analyse it, what one is looking for is, first of all,14being a sort of ultra vires point, as opposed to16intent in terms of the agreement. Was it designed to16of public policy.17deprive LBIE of that ability? Was that the intention17My Lord, if I can just take Your Lordship to the18behind it when it was set-up?18Welton v Saffery case. It is in volume 2 of the20rule, it has to be a right which is only triggered upon20is relied upon is at pages 304 to 305, and the argument21insolvency and doesn't apply outside of insolvency.21was whether the previous case, the Ooregum case, could22In our submission, one can categorise the recharge22apply where there was a call simply to settle the rights				
3 contractual terms which parties have agreed and there is a particularly strong case for autonomy in cases of complex financeli instruments, such as those involved in this appeal. No doubt that is why, except in the case of any objective other than a partfectly and orgen the insolvency lagislation, the modern tendency has been to uphold commercial argument al objective other than a partfectly of the insolvency lagislation, the order tendency has been to uphold commercial argument al objective other than a partfectly of the insolvency legislation, the recommercial argument is objective other than a partfectly of the insolvency legislation rule. a absence of any objective other than a partfectly any connection with an attempt to undermine the effect of the anti-deprivation rule. 9 the negoes not to cellain the policy behind the anti-deprivation rule being clear, and: 11 insolvency legislation. is particularly the could be said to be arrinforced by the fact that the cell for course is application which means purpose, the insolvency legislation. 14 This possible to give that policy behind the anti-deprivation rule being clear, and: 11 insolvency legislation. insolvency legislation which precomes its application to bore file antity or versits in application which here are also could have been used directly by making appropriate provision. 16 anti-deprivation rule property of one of the parties to the bankruptey." 10 insolvency legislation. 11 20 My Lord, in the present case, we respectfully submit. 12 12 12 21		-		
4 a perticularly strong case for autonomy in cases of complex financial instruments, such as those involved in 6 4 adepts in connection with the respected, given the absence of any objective other than a pertepticat commercial objective which does not have appropriate commercial objective which does not have to uphold commercially justifiable contractual provisions which have been said to offend the 11 7 9 to uphold commercially justifiable contractual provisions which have been said to offend the 13 11 11 14 The then goes on to explain the policy behind the 13 11 11 13 anti-deprivation rule being clear, and: 14 11 11 14 The spossible to give that policy a commonsense application which prevents its application to bore fide commercial transactions which of not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties to the 14 16 15 an asset of the company. 21 Now, my Lard, I think a number of points were made about the fact that there are older authorities suggesting that any attempts to achieved indirecity. 20 My Lord, in the present ease, we respectfully submit we not concerned with the pripassy nulle. Ware concerned with a statutory provision for a call which, 22 23 24 about the fact that there are older authorities suggesting that any attempts to achieved indirecity. 25 On another analysis, that of Lord Justice Engipts it, a contract, such as the reckpurg approxi. 3 it, a contract, such as			1	
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22 In our submission, one can categorise the recharge 22 apply where there was a call simply to settle the rights	20	rule, it has to be a right which is only triggered upon	20	is relied upon is at pages 304 to 305, and the argument
			21	was whether the previous case, the Ooregum case, could
			22	apply where there was a call simply to settle the rights
	23	agreement as falling within either of those two	23	of shareholders interse. That is recorded in the
24 conditions for the application of that rule or anything 24 judgment of Lord Halsbury, at page 304, in the first				
25 analogous to it. 25 paragraph.	25	analogous to it.	25	paragraph.
Page 98 Page 100		Page 98		Page 100

25 (Pages 97 to 100)

1	He then goes on, in the second paragraph, at the		contrary to the statutory objective.
2	foot of page 304, to say that he thinks:	2	In our submission, the cases that are referred to in
3	"The legislator, in permitting the existence of		this section would be consistent with an approach which
4	a company limited by shares and with limited liability,	4	categorised an attempt to evade, a deliberate attempt to
5	created a machinery which makes it impossible by any	5	evade, the effect of the insolvency provisions as being
6	expedient, either by company or shareholder, to act	6	prohibited; that would be consistent with an application
7	otherwise than in pursuance of provision of the statute,	7	of something similar to the anti-deprivation rule, as
8	whether for the purposes of settling the rights interse	8	opposed to a rule similar to the pari passu rule, where no nefarious intent is required.
9	or for the purposes of satisfying creditors."		
10	He then expresses a view as to what the decision in	10 11	So, my Lord, in summary, we respectfully submit that
11 12	Ooregum established: "Unable to see how this artificial feature limited	11	the recharge agreement is not contrary to public policy per se. It would require establishing some form of
12	within its sphere of action by the statute under which	12	intent, on the part of those who entered into it, to act
13	it was created can do anything contrary to the	13	contrary to the insolvency provisions before it could be
14	provisions of the statute is not a question for what	15	said to be unenforceable in any relevant respect. If we
16	purpose it is done, dealing with it, as I think it must	16	are correct, that it is something that has to be looked
10	be dealt with, as an artificial creation, it can only	17	at by reference to the anti-deprivation doctrine, or
18	act as a company or a shareholder in either of those	18	something akin to it, one would need to see, also, that
19	characters within the fetters created by the Act of	19	it was triggered by or intended to be triggered by
20	Parliament."	20	insolvency, which it clearly is not, it is something
20	He then goes on to say:	20	that applied outside of that context. For those
21	"It is said and I think justly said that people have	22	reasons, it is not defeated simply because it may
22	been invited to take shares under the article of	23	incidentally result in a scenario whereby a call is made
23	association which expressly provided that shares might	24	under section 74, there may be a right of recourse back
25	be issued at a discount. It is I think hard for persons	25	again to LBIE because of its provisions.
23	be issued at a discount. It is I timit hard for persons	25	again to EDEE occurse of its provisions.
	Page 101		Page 103
1	who have relied upon that assurance to find out that the	1	My Lord, I think that largely dealt with the issues
1 2	who have relied upon that assurance to find out that the Article which authorised the issue of the shares at the	1 2	My Lord, I think that largely dealt with the issues which were the key ones for me to address. I think
	-		
2	Article which authorised the issue of the shares at the	2	which were the key ones for me to address. I think
2 3	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is	2 3	which were the key ones for me to address. I think there are also potentially issues raised in connection
2 3 4	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is in conflict with the memorandum of association by which	2 3 4	which were the key ones for me to address. I think there are also potentially issues raised in connection with issue 10. But, my Lord, I think our position is
2 3 4 5	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is in conflict with the memorandum of association by which the statute itself that must determine the rights in	2 3 4 5	which were the key ones for me to address. I think there are also potentially issues raised in connection with issue 10. But, my Lord, I think our position is issue 10 was that that would not arise as a practical
2 3 4 5 6	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is in conflict with the memorandum of association by which the statute itself that must determine the rights in that respect." It is evident, from the way that this analysis works, that it is a question of the power of the company	2 3 4 5 6	which were the key ones for me to address. I think there are also potentially issues raised in connection with issue 10. But, my Lord, I think our position is issue 10 was that that would not arise as a practical issue because of either our arguments under issue 1, the
2 3 4 5 6 7	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is in conflict with the memorandum of association by which the statute itself that must determine the rights in that respect." It is evident, from the way that this analysis	2 3 4 5 6 7	which were the key ones for me to address. I think there are also potentially issues raised in connection with issue 10. But, my Lord, I think our position is issue 10 was that that would not arise as a practical issue because of either our arguments under issue 1, the circuity of action defence, or alternatively the correct
2 3 4 5 6 7 8	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is in conflict with the memorandum of association by which the statute itself that must determine the rights in that respect." It is evident, from the way that this analysis works, that it is a question of the power of the company	2 3 4 5 6 7 8	which were the key ones for me to address. I think there are also potentially issues raised in connection with issue 10. But, my Lord, I think our position is issue 10 was that that would not arise as a practical issue because of either our arguments under issue 1, the circuity of action defence, or alternatively the correct contractual interpretation, or as a result of the effect
2 3 4 5 6 7 8 9	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is in conflict with the memorandum of association by which the statute itself that must determine the rights in that respect." It is evident, from the way that this analysis works, that it is a question of the power of the company to issue shares at a discount. His conclusion is because of the way in which the company is set-up, as a statutory creature, the memorandum is subject to the	2 3 4 5 6 7 8 9	which were the key ones for me to address. I think there are also potentially issues raised in connection with issue 10. But, my Lord, I think our position is issue 10 was that that would not arise as a practical issue because of either our arguments under issue 1, the circuity of action defence, or alternatively the correct contractual interpretation, or as a result of the effect of the rules on set-off. But this is in connection with whether the recharge claim against LBIE in respect of the sub-debt contribution claim and LBHI2's claim in
2 3 4 5 6 7 8 9 10	Article which authorised the issue of the shares at the discount was ultra vires of the company, because it is in conflict with the memorandum of association by which the statute itself that must determine the rights in that respect." It is evident, from the way that this analysis works, that it is a question of the power of the company to issue shares at a discount. His conclusion is because of the way in which the company is set-up, as	2 3 4 5 6 7 8 9 10	which were the key ones for me to address. I think there are also potentially issues raised in connection with issue 10. But, my Lord, I think our position is issue 10 was that that would not arise as a practical issue because of either our arguments under issue 1, the circuity of action defence, or alternatively the correct contractual interpretation, or as a result of the effect of the rules on set-off. But this is in connection with whether the recharge claim against LBIE in respect of
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26 (Pages 101 to 104)

1	I think our position was that I will just find my	1	MR MARSHALL: My Lord, I am just going to say that subject
2	note in connection with it issue 1 potentially would	2	to anything Your Lordship wanted to ask me, that does
3	be affected by the Supreme Court's judgment to the	3	conclude our submissions.
4	extent that it concerned the sub-debt and its	4	Mr Trower and I have discussed the question of
5	construction.	5	replies, and I think he is going to address
6	In terms of the agreed issues, we don't consider	6	Your Lordship.
7	that issues 5, 6 and 12 were likely to be affected by	7	MR JUSTICE HILDYARD: Can I ask you something on the
8	the Supreme Court judgment, because the court wasn't	8	circuity of action?
9	considering the position as between multiple	9	MR MARSHALL: Yes, of course.
10	administrations but only the position in LBIE's	10	MR JUSTICE HILDYARD: The facts of the cases are not easy to
11	administration. But it does seem that the judgment	11	always to see clearly
12	would impact on issue 2, because the ranking and	12	MR MARSHALL: Yes.
13	provability of the sub-debt are in issue, together with	13	MR JUSTICE HILDYARD: and I must look at them. But is
14	the question of whether it may be included in the	14	there any case, on which you rely, where the circuity
15	insolvency set-off account. Similarly, those issues	15	did not depend on there being an equal and opposite
16	might impact on issue 4, which concerns the availability	16	contractual indemnity in respect of the same amount?
17	of the sub-debt or a sub-debt contribution claim for the	17	MR MARSHALL: I think the ones that I have taken
18	purposes of set-off.	18	Your Lordship to were ones in which there was
19	My Lord, as far as the remaining issues are	19	a contractual indemnity, but there are more cases which
20	concerned, issue 3 might be impacted if the Supreme	20	we can consider.
21	Court ventured into the issue of the valuation.	21	I am just trying to remember. The Post Office case,
22	MR JUSTICE HILDYARD: If what?	22	my Lord, the one about the telephone line.
23	MR MARSHALL: Issue 7 might be affected as well. Issue 3	23	MR JUSTICE HILDYARD: Yes.
24	might be impacted if the Supreme Court enters into the	24	MR MARSHALL: That was a tortious claim for
25	issue of valuation. Issue 7 might be affected by any	25	misrepresentation by the relevant telephone company to
	Page 105		Page 107
1	determinations as to the scope of the section 74	1	the local authority the Post Office to the local
2	liability and is operation. Issue 8 might be affected	2	authority, which would have given the right to
3	by the Supreme Court's determination as to the	3	compensation for the same amount that the local
4	application of the contributory rule. We don't see any	4	authority was liable to the Post Office for, for
5	likely impact from the Supreme Court on issue 9A or 10.	5	damaging their line. So that would be an example of
6	My Lord, that might be a convenient moment to break.	6	duninging their file. So that would be an example of
7	I can obviously just check whether there is anything		a non-contractual claim going in the other direction
'			a non-contractual claim going in the other direction, but they are generally cases about the same amount
8		7	but they are generally cases about the same amount.
8	else for me to add, but I think we have pretty much come	7 8	but they are generally cases about the same amount. MR JUSTICE HILDYARD: I mean, they are the same claim. I am
9	else for me to add, but I think we have pretty much come to the end of our submissions.	7 8 9	but they are generally cases about the same amount. MR JUSTICE HILDYARD: I mean, they are the same claim. I am grateful to you for pointing out that the Post Office is
9 10	else for me to add, but I think we have pretty much come to the end of our submissions. MR JUSTICE HILDYARD: Have you all been discussing how we	7 8 9 10	but they are generally cases about the same amount. MR JUSTICE HILDYARD: I mean, they are the same claim. I am grateful to you for pointing out that the Post Office is the same claim in a different direction as regards
9 10 11	else for me to add, but I think we have pretty much come to the end of our submissions. MR JUSTICE HILDYARD: Have you all been discussing how we should carry forward matters, both as regards the agreed	7 8 9 10 11	but they are generally cases about the same amount. MR JUSTICE HILDYARD: I mean, they are the same claim. I am grateful to you for pointing out that the Post Office is the same claim in a different direction as regards tortious basis of liability.
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1	comparable in terms of the quantification. That is	1	Court. But they may, we accept that.
2	certainly true.	2	We don't think, for our part, that any of the other
3	MR JUSTICE HILDYARD: Yes.	3	issues will be.
4	MR MARSHALL: But the basis on which the claim may come back	4	I think everyone is of the same mind in relation to
5	need not necessarily be contractual, it would appear.	5	all of the other issues, apart from 7. I think there is
6	MR JUSTICE HILDYARD: No. There is either a contract or	6	a slight divergence of view between counsel as to
7	some equal and opposite fault.	7	whether there is any possibility of 7 being affected.
8	MR MARSHALL: Yes.	8	We don't see it ourselves at the moment, but that is one
9	MR JUSTICE HILDYARD: Whereas one might think that the calls	9	of the things that we will think about before I do my
10	on an unlimited share are simply a contractual matter.	10	reply, now I know which area there is a little bit of
11	They may or may not be confined to the particular	11	divergence of view in relation to the impact. I think
12	exposure. Mr Trower says they are not, you say all but	12	it is only issue 7.
13	a penny or two they are, but they do seem rather	13	My Lord, that is the position as far as the Supreme
14	different in source; do you want to respond to that?	14	Court is concerned.
15	MR MARSHALL: Well, my Lord, fundamentally, if there is	15	My Lord, as far as replies are concerned, we have
16	a call made to meet this sub-debt, then necessarily its	16	discussed it. I think where we are is this: I think we
17	quantification is based on the subordinated debt	17	are all agreed that we should go back down the line, by
18	agreement and, therefore, there is a right to recover	18	which I mean in the reverse order for the way we did
19	for precisely the same amount, but one can't see why, in	19	submissions first time round. With me finishing with
20	principle, that shouldn't come within the doctrine.	20	the last of the replies of right. Of course we accept
21	No one has suggested on any of the authorities,	21	that if anyone raises new points, or new cases in their
22	including the Supreme Court decision advanced, that it	22	replies, Mr Marshall will then have a go at the end,
23	has to be a fault based claim going back for	23	insofar as, in accordance with normal practice. But,
24	MR JUSTICE HILDYARD: That case was a contractual indemnity.	24	otherwise, that is the way we think it will work.
25	MR MARSHALL: That was for contractual indemnity.	25	We would respectfully suggest that we rise for a day
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1	MR JUSTICE HILDYARD: That was a moot, on analysis.	1	and sit again on Wednesday morning to do the replies.
2	MR MARSHALL: Yes.	2	We are all confident we can get the replies dealt with
3	MR JUSTICE HILDYARD: Yes. Well, if anyone knows of a case	3	in a day. The great advantage of that is that it will
4	which is not an equal and opposite claim, that would be	4	give us time to give Your Lordship, I hope, a little bit
5	helpful.	5	more assistance in the way in which the issues actually
6	MR MARSHALL: Of course, we will look for that, check that.	6	all do inter mesh in the light of the way the arguments
7	HOUSEKEEPING	7	have gone. Subject to the court, we think that it will
8	MR TROWER: My Lord, we will also do a bit more work on that	8	make our replies crisper and more effective, if we can
9	as well.	9	do it that way.
10	MR JUSTICE HILDYARD: Yes.	10	So, unless there was anything else, I think that was
11	MR TROWER: My Lord, just so I can tell Your Lordship where	11	where we all were as to how we should take matters
12	we are we all are, first, so far as the Supreme Court is	12	forward, but we should invite Your Lordship to adjourn
13	concerned. First of all, we did make a further inquiry	13	now until 10.30 on Wednesday, when we will do the
14	this morning. We have been regularly inquiring and they	14	replies in that way. It may also assist Your Lordship
15	are probably bored of us asking, and I am afraid the	15	in identifying those areas which you want to
16	answer remains: they simply don't know and won't tell	16	cross-examine us a bit harder on.
17	us. Can't tell us, perhaps, but that is the position.	17	MR JUSTICE HILDYARD: Are you each proposing to have
18	MR JUSTICE HILDYARD: Yes.	18	merely I don't mean that rudely oral replies, or
19	MR TROWER: The second point is: so far as the issues are	19	are you envisaging that there will be any written
20	concerned, we agree with Mr Marshall that it is possible	20	replies?
21	that issues 1, 2, 3 and 4 may be impacted, although it	21	MR TROWER: My Lord, I think there will be one or two aids
22	is very difficult to know to what extent. There are any	22	that Your Lordship will get.
23	number of different ways of analysing the issues leading	23	MR JUSTICE HILDYARD: Yes.
24	to a conclusion that they might be impacted, and they	24	MR TROWER: We weren't envisaging a full speaking note in
25	may well not be, whatever the result in the Supreme	25	writing.
	-		-
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Day 4

1	MR JUSTICE HILDYARD: No.	1	impacted.
2	MR TROWER: But there certainly will be aids to the reply,	2	MR TROWER: Yes. Your Lordship may recall that at the PTR
3	I am sure. I think Mr Atherton mentioned to me that he	3	we did actually say in our skeleton argument, I think
4	is thinking of one. We have, certainly, one in mind,	4	I addressed you on it as well, we would actually invite
5	which will help Your Lordship I hope, on paper. I mean,	5	Your Lordship not to give judgment until the Supreme
6	we are obviously very much in Your Lordship's hands as	6	Court
7	to what else Your Lordship would find helpful. If you	7	MR JUSTICE HILDYARD: Well, yes, that would be a welcome
8	would like more in writing. I can't promise a full	8	excuse. The trouble is that the problem is once it all
9	reply by Wednesday morning, though, in writing.	9	goes away, you tend, such hard disk as you have, it just
10	MR JUSTICE HILDYARD: No, no, I was just wondering about the	10	gets written over by some other matter. So the more
11	timing. It is a matter for you, really. I am not going	11	I can and it is the reason why, by way of
12	to direct	12	explanation, if it is not already obvious, I intervene,
13	MR TROWER: Yes.	13	usually it is to remind myself of the question, as well
14	MR JUSTICE HILDYARD: a written reply, especially as we	14	as to obtain your answer to it. That is the problem,
15	have a transcript at the end of the day.	15	sometimes.
16	MR TROWER: I mean, hopefully the transcript will read like	16	MR TROWER: Yes.
17	a written reply in any event if we get until Wednesday	17	MR JUSTICE HILDYARD: Very well. Well, if Wednesday suits
18	to refine it.	18	you all. I would be prepared to give you longer if you
19	MR JUSTICE HILDYARD: I am sure it will.	19	wished it, but it may not be necessary and you have
20	You are quite right in identifying that I am still	20	other things to do. If Wednesday is the sort of golden
21	uncertain how all of the issues actually click together.	21	space that enables you all to hone your submissions to
22	MR TROWER: Yes.	22	the maximum, well and good. We will do that and we will
23	MR JUSTICE HILDYARD: And in some cases I am not clear where	23	be confident, you say, of getting it over with in a day.
24	the distinguishing lines are. For example, Mr Marshall,	24	MR TROWER: Yes.
25	between the deprivation and the pari passu, I was not	25	MR JUSTICE HILDYARD: I will inform listing accordingly.
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1	absolutely clear where you say the line is drawn and why	1	On 1B there may be one slight glitch. Sorry, part
1 2	absolutely clear where you say the line is drawn and why you fall one side of it, which isn't really a matter for	2	B. There may be some glitch in the timetable since
3	reply but I dare say will be an issue raised by	3	I have made a commitment which is in my interests to
4	Mr Trower.	4	honour, which I had forgotten and so I will let you know
5	MR TROWER: I think Your Lordship can rest assured that	5	that at the end of Wednesday, if you could let me know.
6	I will certainly have something to say about that.	6	I am going to take a Friday towards the end of September
7	MR JUSTICE HILDYARD: Yes.	7	out of the schedule.
8	MR TROWER: I quite appreciate you might not feel you have	8	MR TROWER: Okay.
9	got everything you need.	9	MR JUSTICE HILDYARD: Good, well, thank you. I look forward
10	MR JUSTICE HILDYARD: Well, I think I am going to leave it	10	to the reply.
11	and think if I have any particular questions, then I may	11	(3.40 pm)
12	step out of the orderly sequence of reply, and in order	12	(the hearing adjourned until Wednesday, 8 February 2017)
12	to just arm myself as best I can.	13	
14	MR TROWER: Yes.	14	
15	MR JUSTICE HILDYARD: I think if you can reach agreement,		Submissions by MR MARSHALL1
16	possibly even commit to paper where you think and why	15	(continued)
17	the issues that we are dealing with, especially 1 to 4,	16	HOUSEKEEPING110
18	possibly 7, are impacted or could be impacted by the	17	
19	Supreme Court that would be an useful aide-memoire to	18 19	
20	have.	20	
21	MR TROWER: Yes.	20	
22	MR JUSTICE HILDYARD: If on the other hand time gets away	21	
23	from you and you have to deal with it orally by	23	
24	agreement, that is fine, but I think I ought to have	24	
25	somewhere on the record where it will be or could be	25	
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