

<p>1 Thursday 2 February 2017</p> <p>2 (10.30 am)</p> <p>3 Submissions by MR TROWER (continued)</p> <p>4 MR TROWER: My Lord, we are on to issue 9, which is whether</p> <p>5 as a matter of law it is possible for a member of</p> <p>6 a company to enter into, with that company,</p> <p>7 an enforceable agreement which has the effect of</p> <p>8 enabling that member to avoid what would otherwise be</p> <p>9 its obligations to contribute to the assets of the</p> <p>10 company under section 74 in the event of the company's</p> <p>11 winding up or otherwise to reverse the section. And</p> <p>12 this is the preliminary issue, issue 9, and we deal with</p> <p>13 it in paragraph 242 and following of our skeleton</p> <p>14 argument.</p> <p>15 My Lord, the sense of the issue as far as LBIE is</p> <p>16 concerned is whether it is enable to enter into an</p> <p>17 agreement which has the effect of enabling a</p> <p>18 contributory to avoid its liabilities under section 74</p> <p>19 or, as we put it, to defeat the provisions of the</p> <p>20 statutory regime.</p> <p>21 Now, I think it is necessary to just start by</p> <p>22 looking at the way it is that LBL assert their right to</p> <p>23 an indemnity so that my Lord can see the way in which we</p> <p>24 say the regime would be defeated, and that involves just</p> <p>25 looking at a few passages in LBL's position letter,</p> <p>Page 1</p>	<p>1 And then you get it again in 95.2.1 which my Lord could</p> <p>2 just read. It is essentially the same point. What I am</p> <p>3 trying to do is show my Lord all of the places where it</p> <p>4 has been formulated so we can get the context when we</p> <p>5 are looking at this preliminary point. That I think is</p> <p>6 the position as far as the position paper is concerned.</p> <p>7 We then need to look at LBL's cross application</p> <p>8 because it arises in this issue. It is in the same</p> <p>9 bundle behind tab 2 and this was a cross application</p> <p>10 that was issued by LBL on 17 October with a draft order</p> <p>11 at the back of it. And you get, in paragraph 2, there</p> <p>12 is the formulation of what they are seeking.</p> <p>13 "Any liability of LBL to meet a ...(reading to the</p> <p>14 words)... and whether pursuant to section 74 of the</p> <p>15 Insolvency Act or otherwise shall be set-off against any</p> <p>16 entitlement of LBL to be indemnified against any such</p> <p>17 liability and/or to recharge the same."</p> <p>18 So you have a set-off argument there.</p> <p>19 Then in 3 there is a declaration that:</p> <p>20 "LBL is entitled to an indemnity by virtue of its</p> <p>21 contractual right of recharge and/or its right</p> <p>22 ...(reading to the words)... set out in the position</p> <p>23 paper."</p> <p>24 So we get back to the position paper. And then</p> <p>25 there is an argument in relation to limitation in 4.</p> <p>Page 3</p>
<p>1 which my Lord finds in bundle 1 behind tab 14. The</p> <p>2 starting place is page 29-paragraph 78, the first place</p> <p>3 to look.</p> <p>4 "If, contrary to its principal case, LBL does hold</p> <p>5 a share in LBIE so as to potentially be liable in</p> <p>6 respect of any contribution claim raised then the</p> <p>7 position of the LBL administrators is that LBL has</p> <p>8 a right to be indemnified for and to recharge any such</p> <p>9 liability arising pursuant to an agreement between</p> <p>10 itself and other Lehman Group entries discussed further</p> <p>11 below."</p> <p>12 So that is the formulation in paragraph 78. We then</p> <p>13 see it raised again in paragraphs 92, 93 and 95. So 92:</p> <p>14 "LBL's position is that it is now entitled to</p> <p>15 recharge on the basis set out above any costs, expenses</p> <p>16 or liabilities incurred by it as a member of LBIE</p> <p>17 including any contribution claim."</p> <p>18 And it is the contribution claim element that</p> <p>19 matters for present purposes. And you get the point</p> <p>20 again at the end of 93:</p> <p>21 "So that it may now recharge any contribution claim</p> <p>22 raised by LBIE...(reading to the words)...</p> <p>23 administration expenses."</p> <p>24 So the last bit we don't need to be worried about,</p> <p>25 the first bit we do, to recharge the contribution claim.</p> <p>Page 2</p>	<p>1 And then the final document in which one sees this</p> <p>2 asserted is in the reply position paper, which is behind</p> <p>3 tab 20 of the same bundle at paragraph 13. Sorry,</p> <p>4 paragraph 17 on page 13. And they assert half way</p> <p>5 through that paragraph:</p> <p>6 "Circuity of action takes effect ...(reading to the</p> <p>7 words)... whether entirely or in respect of the sub-debt</p> <p>8 contribution claim."</p> <p>9 So there is a further reference there to a circuity</p> <p>10 of action defence. But it is essentially the points</p> <p>11 that are made in the first position paper that matter</p> <p>12 for present purposes. And our case is that no such</p> <p>13 agreement would be effective because it would be</p> <p>14 inconsistent with the mandatory provisions of the</p> <p>15 statute. That is the position that we adopt. And what</p> <p>16 I was going to do was just make a few submissions on the</p> <p>17 statute itself and then go to the authorities and see</p> <p>18 how far they go on the question of the ability to enter</p> <p>19 into a contract which has the effect of rendering</p> <p>20 nugatory the liability under section 74.</p> <p>21 Insofar as the statute itself is concerned, just to</p> <p>22 remind my Lord of the wording of the statute, the</p> <p>23 wording of the statute is mandatory in its terms, "Is</p> <p>24 liable". In other words if a person is a member, there</p> <p>25 is a liability. Mandatory words are included, importing</p> <p>Page 4</p>

<p>1 no discretion. And that is a liability which, as I have 2 explained to my Lord yesterday, is a liability which 3 arises from the time at which the liability commenced. 4 Which means that from the moment in time which you 5 become a member, the liability arises. And 6 Mr Justice David Richards dealt with that at 7 paragraph 143 of his judgment in Waterfall I and the 8 Court of Appeal agreed with him on that point at 9 paragraphs 210 and 216.</p> <p>10 Now, we say that it is self-evident from the wording 11 of the statute that this liability is imposed for the 12 benefit of the company's creditors as a class, because 13 it talks about debts and liabilities; for the benefit of 14 the company's shareholders as a class, because it talks 15 about adjustment of the rights of contributories. And 16 to ensure that the winding up itself is appropriately 17 facilitated because it talks about the expenses of the 18 winding up. So you have three categories of obligation, 19 stakeholder interest, in the outcome of the section 74 20 claim, depending on the circumstances.</p> <p>21 Now, of course there are limitations in the 22 remainder of section 74, sub-sections 2 and 3, but with 23 one exception only, which we will come back to because 24 it is at the core of some of the points that Mr Marshall 25 makes. 74.2 (e), they are concerned with the</p> <p style="text-align: center;">Page 5</p>	<p>1 look at. Which is dealing with, because of the way he 2 analyses section 74 is talking about the inclusionary 3 aspect and then the exclusionary aspect. Which is 4 obviously going from 74.1 through 74.2 as a matter of 5 analysis. And paragraph 10011, the bit that matters for 6 present purposes, there is a useful little introduction 7 on 623. But on 624 there is the paragraph beginning 8 "the liability of a contributory". And in particular 9 "it is extremely doubtful" that sentence, the few 10 sentences beginning that, five, six lines into the 11 paragraph. And the way it is formulated in McPherson 12 is:</p> <p>13 "It is certainly clear that the company cannot 14 contradict, vary or subtract from the liability which 15 the statute imposes."</p> <p>16 That is the core summary of the position. And there 17 is then a citation, and if you go on to 10012, if 18 my Lord would just read the first paragraph of that. So 19 one has a creditor protection concept which is 20 stringently imposed and there is a relaxation in 21 relation to adjustment.</p> <p>22 And then the other passage from McPherson that is 23 useful on this point as an introduction starts at 10015, 24 when dealing with the amount of the contribution as 25 opposed to the concept of the liability in general</p> <p style="text-align: center;">Page 7</p>
<p>1 consequences of a particular status given by the Act to 2 particular classes of member and their existence 3 confirms, we submit, ie those exceptions, that if the 4 circumstances fall outside the words of limitation, the 5 mandatory provisions apply. So you start with the 6 mandatory provisions, and it is only if the 7 circumstances fall within the words of limitation that 8 there is any limitation.</p> <p>9 Now, in the context of limited liability, there are 10 a number of lines of authorities which confirm the 11 mandatory nature of the liability of members in respect 12 of unpaid or partly paid shares. And at the core of our 13 submissions we submit that the position should actually 14 be a fortiori in relation to an unlimited company. It 15 is probably not necessary to say that, but it should be 16 exactly the same; there should be no distinction between 17 the mandatory obligations in respect of unpaid or partly 18 paid shares and the mandatory obligations in respect of 19 unlimited liability.</p> <p>20 Before we look at the authorities, can I just take 21 your Lordship back to McPherson, which we have looked at 22 once, because there is quite a useful summary of the 23 position in McPherson. My Lord has that behind tab 121 24 in bundle 5, the authorities bundle. and it is 25 paragraph 10011, is the first paragraph one needs to</p> <p style="text-align: center;">Page 6</p>	<p>1 terms, the inclusionary aspect. And the passage, we 2 will be looking at some of the cases that are referred 3 to in this passage. And it is really the particular bit 4 that is particularly helpful is on the first page and 5 just over the top three lines of the next page, but the 6 next paragraph is also of interest, although it is not 7 of direct relevance here.</p> <p>8 MR JUSTICE HILDYARD: Yes.</p> <p>9 MR TROWER: So, my Lord, there your Lordship has a summary 10 of the position.</p> <p>11 What I thought I would do, if it is helpful, next, 12 is to go to the series of different circumstances in 13 which the courts have considered the attempts to 14 adversely impair the claim under section 74. And what 15 I mean by that is, the first case we will look at 16 relates to an attempt in a set-off context. The second 17 we will look at is the issuing of shares at a discount. 18 And we will go through a number of different contexts. 19 But the theme is consistent throughout as to what the 20 answer ought to be.</p> <p>21 As far as the set-off context is concerned, the 22 Black's case, Paraguassu, which is behind tab 26 in 23 bundle 1. Paraguassu was dealing with a circumstance in 24 which there was an attempt to set-off a debt against 25 a call and one of the points that was confirmed during</p> <p style="text-align: center;">Page 8</p>

<p>1 the course of the judgment was that Grissell's case 2 which was the starting point of the contributory rule, 3 applied in any event to make that not possible, because 4 you couldn't set-off a debt against a call. But if 5 my Lord would just read the headnote, so you can see the 6 context. 7 (Pause). 8 MR JUSTICE HILDYARD: Mm-hm. 9 MR TROWER: Now, of course the only reason that, as 10 I explained yesterday, the only reason that Grissell's 11 case doesn't arise in this case is because LBIE is not 12 yet in liquidation. But there is some quite helpful 13 things said in Lord Selborne's judgment. And the 14 passage we need to start at I think starts at page 260. 15 And in the main paragraph on page 260 he explains the 16 position in relation to Grissell's case. That case 17 being decided -- and then at the bottom of the page he 18 makes a fairly general statement and over the page to 19 the impossibility of relieving themselves from the 20 operation of the Act of Parliament. And over the page 21 to about ten lines down. It is probably worth reading 22 to the end of that paragraph. 23 (Pause). 24 MR JUSTICE HILDYARD: Yes. 25 MR TROWER: And then if you go over to page 262, the</p> <p style="text-align: center;">Page 9</p>	<p>1 MR TROWER: My Lord, the second area where there is quite 2 a lot of law is the issuing of shares at a discount. 3 MR JUSTICE HILDYARD: Yes. 4 MR TROWER: And the Ooregum case. 5 MR JUSTICE HILDYARD: Yes. 6 MR TROWER: And the point here is that the legislature has 7 fixed the question of liability under what is now 8 section 74.2 (d) "to the amount, if any, unpaid on the 9 shares in respect the member is liable". In those 10 circumstances the issue of shares at a discount would be 11 an agreement by which the company was seeking to agree 12 with the shareholder concerned that they were not liable 13 for the amount unpaid on their shares. That is the 14 context. 15 Now, to that extent any such agreement has been held 16 on a number of occasions as being consistent with the 17 mandatory provisions. And we say this is a very good 18 example, and one can see it from McPherson's statement 19 of principle in one of the paragraphs that I took you, 20 of an agreement amounting to a device that impairs the 21 obligation to contribute which is struck down. 22 Now, the case one always needs to look at it in this 23 area is the Ooregum case, which is in bundle 2 behind 24 tab 47. And Ooregum was a culmination in the House of 25 Lords of a series of decisions where the issue of shares</p> <p style="text-align: center;">Page 11</p>
<p>1 sentence beginning "the moment the winding up". And the 2 reference to the 38th section is a reference to what is 3 now section 74. So there is that first paragraph at the 4 top of 262 and then if we go on to the last paragraph of 5 Lord Selborne's judgment, which is at page 264, "I am 6 fairly of opinion". And then Sir George Mellish at the 7 bottom of page 264 "I am of the same opinion", that 8 paragraph. And then his sort of summary of the position 9 in the last sentence of the main paragraph on page 265 10 "therefore it appears to me". 11 So the important overarching point here was that the 12 Court of Appeal struck down an attempt to avoid or limit 13 the liability under section 74 by operation of a set-off 14 pursuant to an antecedent agreement. My Lord, that is 15 the first context. 16 MR JUSTICE HILDYARD: Lord Justice James, when referring to 17 the case in common pleas, that was for Brighton 18 Arcade v Dowling, was it? 19 MR TROWER: I think that was, my Lord, yes, its referred to 20 a page 261. 21 MR JUSTICE HILDYARD: That is the suggestion that the 22 principle doesn't apply in a voluntary winding up, but 23 all that is gone. 24 MR TROWER: Yes, you get all of that described on page 261. 25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 10</p>	<p>1 at a discount had been struck down as unlawful and 2 indeed hadn't been struck down as unlawful, depending on 3 the circumstances. And so there had been a bit of 4 a building up of concern around this area over time. 5 And I don't think we need look at the headnote. We can 6 probably go straight to the judgment, the speech of Lord 7 Halsbury at page 133. And the paragraph beginning 8 "my Lords, the whole structure of a limited company" is 9 I think where we need to start. So if my Lord could 10 just read from there to the end of that paragraph. And 11 it is the second half of that paragraph which again 12 contain the core statement of principle, and the concept 13 of: 14 "The statute rendering it impossible for the company 15 to depart from that requirement and by any expedient to 16 arrange with their shareholders that they shall not be 17 liable for the amount unpaid on the shares." 18 The concept of "by any expedient" is quite 19 important, and one keeps on coming back to it. 20 MR JUSTICE HILDYARD: Ooregum related to a company, 21 a limited company. 22 MR TROWER: Indeed. 23 MR JUSTICE HILDYARD: And there are two, possibly, different 24 contexts which may have the same answer but which may be 25 different in terms of analysis. One is the Ooregum</p> <p style="text-align: center;">Page 12</p>

<p>1 rule, which is that the deal which you enter in return</p> <p>2 for limited liability is that you must not reduce your</p> <p>3 capital, issue shares at a discount, or in any way</p> <p>4 undermine the value of the shares by which your</p> <p>5 commitment is prescribed and limited.</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE HILDYARD: That is one line.</p> <p>8 MR TROWER: Yes.</p> <p>9 MR JUSTICE HILDYARD: The other line is the British Eagle</p> <p>10 line, as it were, which is the statutory scheme for</p> <p>11 distributions in a winding up. Now, you may be right</p> <p>12 that they result in the same, but they may be slightly</p> <p>13 different in terms of analysis.</p> <p>14 MR TROWER: I would agree with that, my Lord. I think your</p> <p>15 Lordship is absolutely right. And that is one of the</p> <p>16 reasons that we come on, because we will look at</p> <p>17 Belmont, and see how that fits into this analysis</p> <p>18 shortly. But actually, they are all part of the same</p> <p>19 overarching principle. They are all part of, because</p> <p>20 one has to ask oneself why is it that the compact</p> <p>21 between the company and the member doesn't allow you to</p> <p>22 reduce your capital in that way?</p> <p>23 MR JUSTICE HILDYARD: I can't remember whether the rule in</p> <p>24 Trevor v Whitworth, for example, applies in the context</p> <p>25 of an unlimited company.</p> <p style="text-align: center;">Page 13</p>	<p>1 principle between the two, although I quite appreciate</p> <p>2 that the route by which you get there is different. Or</p> <p>3 may be different.</p> <p>4 MR JUSTICE HILDYARD: Presumably, put in very simple terms,</p> <p>5 and you must say whether very inaccurate terms, in the</p> <p>6 context of an unlimited company the fundamental</p> <p>7 objection put in simple terms to any attempt as between</p> <p>8 the members to restrict their liability undermines what</p> <p>9 people dealing with the company assume the company's</p> <p>10 status to be.</p> <p>11 MR TROWER: Yes.</p> <p>12 MR JUSTICE HILDYARD: When you deal with an unlimited</p> <p>13 company, as is still the case in certain banks for</p> <p>14 example, you know that the members are bound unto the</p> <p>15 last farthing of their worth.</p> <p>16 MR TROWER: Yes.</p> <p>17 MR JUSTICE HILDYARD: And you deal with the company</p> <p>18 accordingly.</p> <p>19 MR TROWER: Yes.</p> <p>20 MR JUSTICE HILDYARD: If you suddenly discover that at the</p> <p>21 end of the day there has been some private compact</p> <p>22 between them that that should not be so, the status of</p> <p>23 the company has been diluted.</p> <p>24 MR TROWER: Yes. And it is one of the ways of analysing why</p> <p>25 it is that you can't contract out of the pari passu rule</p> <p style="text-align: center;">Page 15</p>
<p>1 MR TROWER: I don't know the answer to that, no.</p> <p>2 MR JUSTICE HILDYARD: I just had a residual, probably false,</p> <p>3 recollection. It rather demonstrates that limited</p> <p>4 liability introduces very special and immutable rules.</p> <p>5 MR TROWER: Yes.</p> <p>6 MR JUSTICE HILDYARD: I do not know whether the same</p> <p>7 immutable rules apply in an unlimited company context.</p> <p>8 MR TROWER: Yes.</p> <p>9 MR JUSTICE HILDYARD: I don't know.</p> <p>10 MR TROWER: Well, if one thinks about what it is that</p> <p>11 underpins the rules that must be applied whether you are</p> <p>12 talking about limited liability or unlimited liability,</p> <p>13 what underpins them is the circumstances in which you</p> <p>14 are relieved from the underlying obligation to</p> <p>15 contribute. It all starts with that principle. And so</p> <p>16 while one can quite see that the analysis in relation to</p> <p>17 why it is that the court is concerned about any attempt</p> <p>18 to contract out of your obligation to pay on partly paid</p> <p>19 shares takes a slightly different route, the underlying</p> <p>20 answer will always be the same, we respectfully submit,</p> <p>21 because the underlying answer takes one back to the</p> <p>22 original obligation from which you are in part relieved</p> <p>23 by a limitation of liability, subject to compliance with</p> <p>24 the terms of the statute. So we would respectfully</p> <p>25 suggest that there isn't, ultimately, any distinction of</p> <p style="text-align: center;">Page 14</p>	<p>1 as well.</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR TROWER: Because everyone presupposes, when you go into</p> <p>4 dealing with an entity, that you are going to share with</p> <p>5 the other creditors. There is a policy which underpins</p> <p>6 it, and that is why you have charges registered, for</p> <p>7 example. People are able to look and see. So it is all</p> <p>8 part of the same underlying concept.</p> <p>9 My Lord, there is one other passage worth looking at</p> <p>10 in Lord Halsbury's speech, which is on page 134, and</p> <p>11 which is the first full paragraph, I think, with</p> <p>12 Lord Justice Fry. And that very much chimes, I think,</p> <p>13 with what my Lord was saying just now.</p> <p>14 Then I think we can go on to Lord Macnaghten's</p> <p>15 speech, as he also has some useful analysis, not least</p> <p>16 because the liability to the uttermost farthing is</p> <p>17 referred to in the main paragraph that my Lord sees, but</p> <p>18 the main chunk that matters is on page 145, starting</p> <p>19 with the sentence "that must mean". And going down,</p> <p>20 really, to, probably, the end of the last full paragraph</p> <p>21 on the page.</p> <p>22 (Pause).</p> <p>23 MR JUSTICE HILDYARD: And that is the expression of the deal</p> <p>24 ... (reading to the words)... on the terms that there may</p> <p>25 be ... "</p> <p style="text-align: center;">Page 16</p>

<p>1 MR TROWER: Yes. So of course the agreement in relation to</p> <p>2 unlimited liability is different.</p> <p>3 MR JUSTICE HILDYARD: Yes. But you would say that those</p> <p>4 dealing with the company, in the case of an unlimited</p> <p>5 company, know it is the last farthing. In the case of</p> <p>6 a limited company, know it is the amount payable under</p> <p>7 the shares.</p> <p>8 MR TROWER: Yes, that is the core of the point.</p> <p>9 MR JUSTICE HILDYARD: And that is sort of reflected in the</p> <p>10 last two lines.</p> <p>11 MR TROWER: Yes.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR TROWER: My Lord, it is then worth going on and having</p> <p>14 a quick look at Welton v Saffery, which is behind</p> <p>15 tab 50. And this is a case where the issue arose for</p> <p>16 liability of adjustments as between shareholders. And</p> <p>17 the bit that probably matters, I mean it is again</p> <p>18 Lord Halsbury, and we can pick it up at page 304 and</p> <p>19 down to the end of that first paragraph on page 305.</p> <p>20 One of the points that comes out from this is an express</p> <p>21 statement of purpose not being a relevant consideration.</p> <p>22 Which we will pick up later on in the argument.</p> <p>23 MR JUSTICE HILDYARD: Which bit do you want me to read?</p> <p>24 MR TROWER: Just down to half way down page 305.</p> <p>25 MR JUSTICE HILDYARD: Got it. I have done it.</p> <p style="text-align: center;">Page 17</p>	<p>1 I may.</p> <p>2 If we could then move on to another context, which</p> <p>3 is the way it was put in cases like Muir v the City of</p> <p>4 Glasgow Bank, which is that an unlimited company can't</p> <p>5 agree on limited status. If you are unlimited under the</p> <p>6 Act you can't agree to be limited. And we saw a little</p> <p>7 bit of that when we were looking at Muir v the City of</p> <p>8 Glasgow Bank yesterday, because in the context of the</p> <p>9 trusteeship the analysis was but are you actually</p> <p>10 agreeing for limited status in circumstances where you</p> <p>11 are unlimited? So if we can go back to that, and I will</p> <p>12 show you the passages where this point arose. Tab 36.</p> <p>13 It was really, the best statement of principle for these</p> <p>14 purposes is I think in Lord Selborne's speech at</p> <p>15 page 384, starting with the passage by the Joint Stock</p> <p>16 Companies Act down to the end of that paragraph. So</p> <p>17 starting at the very top of page 384, by the Joint Stock</p> <p>18 Companies Act, down to the end of that paragraph.</p> <p>19 MR JUSTICE HILDYARD: Mm-hm.</p> <p>20 MR TROWER: And then Earl Cannes on page 356 makes a very</p> <p>21 similar point, slightly more shortly. The last</p> <p>22 paragraph on page 356, over the page, the first five</p> <p>23 lines. And the point he makes is that:</p> <p>24 "There is no power to affix any limited liability on</p> <p>25 shares except ...(reading to the words)... arrangement</p> <p style="text-align: center;">Page 19</p>
<p>1 MR TROWER: I think we can end there. And then over the</p> <p>2 page at 306. This is just a summary of the position</p> <p>3 again.</p> <p>4 MR JUSTICE HILDYARD: Yes.</p> <p>5 MR TROWER: And then on to Lord Macnaghten again on</p> <p>6 page 321, the way he puts it. And what is interesting</p> <p>7 is the passage on page 321, about authority, "the</p> <p>8 directors therefore have no authority", and what is</p> <p>9 interesting about his analysis here is that:</p> <p>10 "The articles empowered the director to issue</p> <p>11 shares, but of course on such terms as they think fit</p> <p>12 consistently with the provisions of the Act."</p> <p>13 And that is where the unlimited liability aspect of</p> <p>14 it comes in, because what you have is issuing of shares</p> <p>15 consistently with the provisions of the Companies Act in</p> <p>16 relation to unlimited liability.</p> <p>17 So those two cases in the House of Lords we say --</p> <p>18 MR JUSTICE HILDYARD: Is there anything in Lord Herschell's</p> <p>19 dissent which I need to know about?</p> <p>20 MR TROWER: I don't think so. I didn't actually mark</p> <p>21 anything up in Lord Herschell's dissent. My Lord, can</p> <p>22 I come back to that after the short break just in case</p> <p>23 there is anything? I will read it again. There wasn't</p> <p>24 anything I noticed but that doesn't mean to say there</p> <p>25 wasn't. I will look at it over the short break, if</p> <p style="text-align: center;">Page 18</p>	<p>1 which in this case was not resorted to."</p> <p>2 Because of course the City of Glasgow Bank was an</p> <p>3 unlimited liability company. And he makes the same</p> <p>4 point, actually, further on in his speech at page 359 in</p> <p>5 a passage starting "but putting these considerations</p> <p>6 aside" down to the end of that paragraph.</p> <p>7 MR JUSTICE HILDYARD: I don't know whether it is still the</p> <p>8 case, but there used to be different accounting rules or</p> <p>9 public disclosure rules for unlimited companies. So if</p> <p>10 you get the best of both worlds by claiming to be an</p> <p>11 unlimited company and having a side deal between the</p> <p>12 shareholders, that would be pretty peculiar.</p> <p>13 MR TROWER: Well you don't have to publish your accounts.</p> <p>14 MR JUSTICE HILDYARD: Yes. Is that still the case?</p> <p>15 MR TROWER: It is. And that fits with the whole concept</p> <p>16 which we were on a short while ago about publication to</p> <p>17 the outside world of the nature of your status. And of</p> <p>18 course the other thing is that limited companies</p> <p>19 obviously have to have "limited" after their name.</p> <p>20 Unlimited companies don't.</p> <p>21 My Lord, because I don't think it is necessary to go</p> <p>22 to the cases themselves. Well, actually, I will take to</p> <p>23 you a couple more. If we go to paragraph 267 of our</p> <p>24 skeleton, pages 79 and 80. We have looked, in the</p> <p>25 context of the submission we make at paragraph 267, we</p> <p style="text-align: center;">Page 20</p>

<p>1 have looked at <i>Muir v the City of Glasgow Bank</i>, and 2 paragraph 267.1, there are two other contexts in which 3 we say it arises, articles cannot exempt liability 4 for the calls, (inaudible), which is an Australian case. 5 I wasn't going to go to that. I think it may be 6 helpful, though, to go to <i>Cordova</i>, which is the case we 7 refer to in 267.3, which my Lord finds in bundle 2 8 behind tab 46. And the point here, and it is not, 9 I suspect, a very controversial point, it is something 10 which arises from the same underlying principle. And 11 here the point was a contract to pay calls by 12 instalments wasn't enforceable once the winding up 13 intervened, because it interfered with the ability under 14 section 102 to make calls. I don't think we need look 15 at any passage in the judgment itself, but the headnote 16 makes the point sufficiently clearly and it is evident 17 that that is the case. The only reason for drawing it 18 to your Lordship's attention is that it is another 19 example of the underlying principle that we rely upon. 20 I don't think it adds anything to the principle, apart 21 from to show another context in which exactly the same 22 principle is being applied. 23 Now, it is said by LBL that there isn't a problem 24 with the contract of the type contemplated by the 25 recharge agreement, which excludes or limits a member's</p> <p style="text-align: right;">Page 21</p>	<p>1 a member of a company limited by guarantee, whether you 2 are a past or present member, apart from status under 3 the Act the only provision which refers to an extraneous 4 contract is section 74.2 (e). But the effect of 5 section 74.2 (e) is to exclude from the debts or 6 liabilities towards the payment of which every past or 7 present member is liable to contribute, liabilities in 8 respect of contracts which fulfil certain criteria, 9 whereby the funds of the company are alone made liable 10 in respect of the contract. 11 So what this contemplates is a situation in which 12 a company and a creditor has agreed with the company 13 that the funds of the company are alone to be made 14 liable in respect of the obligation. It has nothing to 15 do with the contract between the company and the 16 shareholder, whether in the form of a recharge agreement 17 or otherwise. And it is easy to see why that sort of 18 contract is permitted. If you step back for a moment, 19 what section 74 is all about is for the protection of 20 creditors and the shareholders interest. But if one of 21 the persons for whom the protection is given wishes to 22 waive his rights or alter his rights in some way to have 23 his claim satisfied out of assets that with otherwise be 24 available there is no reason why he shouldn't do so, 25 which respects the ability of creditors to enter into</p> <p style="text-align: right;">Page 23</p>
<p>1 liability to meet a contribution claim. And the way 2 they have put it is that the an ability to contract out 3 of section 74 is inherent in its terms. Which appears 4 to be a reference to section 74.2 (e), on which we have 5 already made submissions in relation to the sub-debt 6 agreement. Can we just go back to 74.2 (e), because we 7 say this way of looking at it simply doesn't really 8 work. 9 MR JUSTICE HILDYARD: That was in bundle 4, was it? 10 MR TROWER: Yes, 74.2 (e). 11 MR JUSTICE HILDYARD: I am sorry, I can't remember which -- 12 MR TROWER: I am so sorry, it is in volume 5. Apologies. 13 It is in volume 5. It is behind tab 132. 14 MR JUSTICE HILDYARD: Yes. 15 MR TROWER: And this was the policy holder sub-section. 16 MR JUSTICE HILDYARD: Yes. 17 MR TROWER: Now, of course we accept that to the extent that 18 there is anything within section 74.2 that limits 19 liability, that limitation of liability is effective. 20 So to the extent that you can fit within one of the 21 relevant provisions of the sub-section, then there is 22 a limitation on the liability. But that is rather 23 different from the situation that we have here. Because 24 apart from status under the Act, whether you are 25 a member of a company limited by shares, whether you are</p> <p style="text-align: right;">Page 22</p>	<p>1 arrangements of this sort where the effect of the 2 contract has no adverse impact on the position of any 3 other stakeholder. In fact, will have the effect of 4 improving their position. So that is the reason, for 5 example, why it is that you can agree, and I mentioned 6 this yesterday, you can agree to subordinated debt. It 7 is inconsistent with the <i>pari passu</i> provisions. But 8 there is no reason why you can't contract out of the 9 <i>pari passu</i> provisions yourself as long as you don't 10 effect anyone else. 11 MR JUSTICE HILDYARD: You say inward claims, in the case of 12 inward claims, the contracting parties can agree such 13 deal as they wish. 14 MR TROWER: Indeed. 15 MR JUSTICE HILDYARD: Confined to the assets of the company. 16 MR TROWER: Indeed. 17 MR JUSTICE HILDYARD: In the case of outward claims, they 18 cannot, because you cannot limit the recourse that the 19 company may have against those who have subscribed for 20 liability in respect of its activities, whether to an 21 unlimited or limited extent. 22 MR TROWER: Indeed, that is exactly the point, my Lord. 23 That is because there is a class of person who is 24 inevitably going to be affected. Now, there were 25 a number of other points which were made in LBL's</p> <p style="text-align: right;">Page 24</p>

<p>1 position paper which we address in paragraph 276 and</p> <p>2 following of our skeleton. Under the heading "the LBL</p> <p>3 administrators' contentions". And --</p> <p>4 MR JUSTICE HILDYARD: Give me those paragraphs again, I am</p> <p>5 so sorry.</p> <p>6 MR TROWER: 276 and following of our skeleton.</p> <p>7 MR JUSTICE HILDYARD: Yes.</p> <p>8 MR TROWER: Now, most of those points are really, I think</p> <p>9 they boil down to a different way of putting the same</p> <p>10 argument. They really boil down to the point that</p> <p>11 section 74 isn't mandatory, which is the core is of</p> <p>12 a lot of the points that are made and in particular</p> <p>13 doesn't spell out in terms that the extent nature of</p> <p>14 a member's liability can't be excluded. Now, for</p> <p>15 reasons we have already given we say that is wrong both</p> <p>16 as a matter of the obvious construction of the section</p> <p>17 and of the authority.</p> <p>18 But can I just address in a little more detail</p> <p>19 a couple of the points which will take me into Belmont,</p> <p>20 because I haven't made submissions on that yet and</p> <p>21 I think it is important that your Lordship should see</p> <p>22 how we say that works. But the first point that I just</p> <p>23 wanted to make is that it seems to be contended by LBL</p> <p>24 that there was no intention to avoid LBL's statutory</p> <p>25 obligations under section 74, and that is somehow</p> <p style="text-align: center;">Page 25</p>	<p>1 first bit of the holding focuses on the distinction</p> <p>2 between these two rules, the anti deprivation rule and</p> <p>3 the rule that it was contrary to public policy to</p> <p>4 contract out of pari passu distribution, which in some</p> <p>5 of the earlier authorities had been conflated, certainly</p> <p>6 some of the academic analysis of this area had not</p> <p>7 distinguished fully between contracting out of the</p> <p>8 pari passu distribution rule and the anti deprivation</p> <p>9 principle. And the important point and part of the</p> <p>10 ratio of Belmont is that they are two different rules</p> <p>11 and different principles apply in relation to them.</p> <p>12 If we go to the beginning of Lord Collins' judgment</p> <p>13 at page 396, paragraph 1. If your Lordship would just</p> <p>14 read paragraph 1, which sort of summarises the context</p> <p>15 in which he is going to address the constituent element</p> <p>16 of the two rules.</p> <p>17 MR JUSTICE HILDYARD: Is anti deprivation flawed assets?</p> <p>18 MR TROWER: No. Anti deprivation is you can't have</p> <p>19 an agreement which takes an asset out of the estate.</p> <p>20 MR JUSTICE HILDYARD: So it could be --</p> <p>21 MR TROWER: As a result of the insolvency.</p> <p>22 MR JUSTICE HILDYARD: It would extent to a flawed asset?</p> <p>23 MR TROWER: It would extend to a flawed asset, but it is not</p> <p>24 a flawed asset, it has a slightly different range.</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 27</p>
<p>1 relevant. We respectfully suggest that even if that is</p> <p>2 correct it would be irrelevant. That there is no case</p> <p>3 in this area in which purpose is regarded as relevant,</p> <p>4 and I showed my Lord that passage from the judgment of</p> <p>5 Lord Macnaghten in <i>Safri</i>, which said in terms that</p> <p>6 purpose is not relevant. Its effect is what matters,</p> <p>7 not purpose. Sorry, I said Lord Macnaghten, didn't I,</p> <p>8 I meant Lord Halsbury. It is Lord Halsbury in <i>Welton</i></p> <p>9 that says that at 305, not Lord Macnaghten.</p> <p>10 MR JUSTICE HILDYARD: Sorry, which page is that?</p> <p>11 MR TROWER: 305.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR TROWER: That approach is wholly contrary to the position</p> <p>14 taken by Lord Halsbury in <i>Belmont</i> in the pari passu</p> <p>15 rule, when explaining the rule that any agreement which</p> <p>16 has the effect of contracting out of the pari passu rule</p> <p>17 is contrary to public policy and void. And that is the</p> <p>18 distinction between contracting out of the pari passu</p> <p>19 rule and the application of the anti deprivation</p> <p>20 principle which was at the heart of the decision in</p> <p>21 <i>Belmont</i>. I thought it would be helpful to look at</p> <p>22 <i>Belmont</i>, because although it is dealing with a different</p> <p>23 statutory provision, your Lordship does get quite a lot</p> <p>24 of help out of the approach that is taken on this issue,</p> <p>25 we say. It is in bundle 3 behind tab 85. And the very</p> <p style="text-align: center;">Page 26</p>	<p>1 MR TROWER: There is a neat little description in 2 to 5, as</p> <p>2 well.</p> <p>3 MR JUSTICE HILDYARD: Yes.</p> <p>4 MR TROWER: So you have it there in 2 to 5, the</p> <p>5 anti deprivation, and the bit that is slightly more core</p> <p>6 for present purposes is 6 to 7, because that is</p> <p>7 describing the pari passu principle and <i>British Eagle</i>.</p> <p>8 (Pause).</p> <p>9 MR JUSTICE HILDYARD: Yes. How far should I read?</p> <p>10 MR TROWER: If you read to the end of 7.</p> <p>11 MR JUSTICE HILDYARD: Yes.</p> <p>12 MR TROWER: So that sets the context. And then there is</p> <p>13 a lot of discussion about how the distinction between</p> <p>14 the two rules isn't always clear cut and there are some</p> <p>15 facts where there is an overlap between the two. But</p> <p>16 the core question in this case was the extent to which</p> <p>17 motive and commercial context were relevant to</p> <p>18 anti deprivation, because the ratio of the decision was</p> <p>19 that the arrangement in this case was not contrary to</p> <p>20 the anti deprivation principle because it was entered</p> <p>21 into for good commercial reasons.</p> <p>22 But the important point is --</p> <p>23 MR JUSTICE HILDYARD: That is in the anti deprivation</p> <p>24 context.</p> <p>25 MR TROWER: Yes.</p> <p style="text-align: center;">Page 28</p>

<p>1 MR JUSTICE HILDYARD: Presumably it is already answered in 2 the context of, because the scheme amongst their lines 3 was entirely commercial. 4 MR TROWER: Indeed, but that didn't matter. 5 MR JUSTICE HILDYARD: Yes. 6 MR TROWER: And you get from paragraphs 74 and 75 the 7 conclusion on the distinction between the two. So good 8 commercial reasons is a good answer to 9 an anti deprivation challenge but it is not a good 10 answer to a breach of the pari passu rule challenge. 11 And then the other paragraph I would invite your 12 Lordship it read is 78. 13 MR JUSTICE HILDYARD: Mm-hm. 14 MR TROWER: If one looks at 75 and 78. 15 MR JUSTICE HILDYARD: Yes. 16 MR TROWER: So I don't think it is necessary for my Lord to 17 look at British Eagle independently of what is said 18 about British Eagle in Belmont, because we have the 19 Supreme Court telling us how far British Eagle went in 20 the context. But it is in the bundles, if my Lord wants 21 to look at it, at bundle 2-tab 62. Lord Collins cites 22 in Belmont those bits of British Eagle which confirm the 23 irrelevance of intent or good business reasons for 24 entering into the arrangement where it breaches one of 25 the provisions of the statutory code.</p> <p style="text-align: center;">Page 29</p>	<p>1 that he had entered into with the company that was not 2 an unlawful agreement, and so enforceable, that may have 3 a different consequence. But to the extent that it 4 competes in any way with the position of the other 5 unsecured creditors, it is difficult to see why it 6 wouldn't by the back door be cutting across the code. 7 MR JUSTICE HILDYARD: There might be sometimes a fine 8 dividing line between a recourse that negates the 9 primary right and a course which simply reduces its 10 value. 11 MR TROWER: Yes, although I think we would not accept that 12 to the extent that he was able to assert this claim in 13 a manner which reduced the amount which was otherwise 14 available for the unsecured creditors. It would suffer 15 from exactly the same mischief as the indemnity or 16 set-off. 17 MR JUSTICE HILDYARD: Of course, under what you argued 18 before Mr Justice David Richards and the 19 Court of Appeal, it wouldn't have made any difference. 20 MR TROWER: Quite. 21 MR JUSTICE HILDYARD: Because the contribution principle 22 would have made you had to pay up before you took. 23 MR TROWER: Indeed. Which is why, of course, it may be that 24 the Supreme Court will decide the contributory rule is 25 the answer to everything. I doubt it.</p> <p style="text-align: center;">Page 31</p>
<p>1 But one of the points that I wanted to stress is the 2 way in which Lord Collins puts the whole issue at the 3 very beginning of his judgment. The concept here is if 4 you have a piece of legislation, or you have a provision 5 within the insolvency code, which makes provision for 6 something to happen, you can't contract out of it unless 7 of course you can see that there is a clear ability to 8 contract out of it. And when one steps back and thinks 9 about it, it is tolerably clear why that should be, 10 because the insolvency code as a whole is dealing with 11 class and stakeholder interest in the context of 12 insolvency. And it is only if you can see that the 13 class or the stakeholder group is not going to be 14 prejudiced by the arrangement that is made that it would 15 be appropriate to infer an intent, a legislative intent, 16 that parties could actually agree to contract out of it. 17 MR JUSTICE HILDYARD: I will have to hear what Mr Marshall 18 says, but it may be that it is the word 19 "indemnity" which causes one to think in terms of your 20 argument, and subject to questions of contribution, and 21 that kind of thing, if it were a counterclaim 22 pre-existing the insolvency process, that would be 23 perfectly permissible. 24 MR TROWER: Well, if he was able to -- if he just had an 25 unsecured claim for damages arising out of an agreement</p> <p style="text-align: center;">Page 30</p>	<p>1 MR JUSTICE HILDYARD: Yes. It was argued there, was it? 2 MR TROWER: It was, it was. Really, it was advanced on the 3 basis that set-off was, it had to be one or the other, 4 set-off or contribution. 5 MR JUSTICE HILDYARD: Right. Do we know is there any -- 6 MR TROWER: No. I am afraid not. 7 So my Lord, the problem, if Mr Marshall is saying 8 that his remedy is limited to a remedy that doesn't 9 interfere with the interests of the unsecured class for 10 whom section 74 is giving the protection, or for whom 11 the protection is given by section 74, that may be 12 different. But at the moment I have a little bit of 13 difficulty in seeing how that would work. I think it is 14 a point, in fact, thinking about it, which arises in 15 relation to issue 10. So we will come back to it in 16 a moment, actually, in fact. 17 So in summary we say that it is wrong as a matter of 18 principle to an entity that takes the benefit of 19 unlimited liability, so that is the benefit point, the 20 holding out to the world point, and represents to the 21 world accordingly, can have an agreement with the 22 members which renders that status wholly ineffective, or 23 limits it in any way. And that is the extent to which 24 the analysis which one goes through is slightly 25 different, where you have unlimited liability, limited</p> <p style="text-align: center;">Page 32</p>

<p>1 liability, for the reasons that my Lord has identified.</p> <p>2 Finally on this area, although I respectfully submit</p> <p>3 that it doesn't actually add a huge amount, but just so</p> <p>4 my Lord has them, we have identified in paragraph 275 of</p> <p>5 our skeleton a number of cases in completely different</p> <p>6 contexts where we explain that it is perfectly</p> <p>7 conventional for the courts to strike down arrangements,</p> <p>8 the effect of which is to circumvent the statutory</p> <p>9 provisions of a statutory code, even if the</p> <p>10 circumvention doesn't amount to a direct breach. Now,</p> <p>11 they are in a completely different context and my Lord</p> <p>12 may or may not get any assistance from them. We say you</p> <p>13 don't really need the underlying principle, it is just</p> <p>14 a question of statutory construction as to whether or</p> <p>15 not what has been done in this case amounts to a breach,</p> <p>16 which we say it is clear that it is.</p> <p>17 So my Lord, the next issue I was going to go on to</p> <p>18 was issue ten.</p> <p>19 MR JUSTICE HILDYARD: And that principle applies</p> <p>20 irrespective of purpose, does it? If the effect is the</p> <p>21 same, it is prohibited even though the effect has worked</p> <p>22 indirectly as opposed to directly?</p> <p>23 MR TROWER: Yes, that sort of principle demonstrates why it</p> <p>24 is that purpose is not relevant, because what you are</p> <p>25 doing is you are looking at the effect of what has been</p> <p style="text-align: center;">Page 33</p>	<p>1 doesn't, in our submission, actually affect the position</p> <p>2 one way or the other as to the analysis, apart from the</p> <p>3 fact that it is a dissenting speech. My Lord, that was</p> <p>4 that.</p> <p>5 I think I probably should just on reflection show</p> <p>6 your Lordship one of the cases in relation to doing</p> <p>7 indirectly what you are prohibited from doing directly.</p> <p>8 Or not being allowed to do indirectly while there is</p> <p>9 a prohibition on doing it directly. Which is behind tab</p> <p>10 5 bundle 1 and it is the Booth v Pollard case.</p> <p>11 Tab 5-bundle 1. And this was a case in which there was</p> <p>12 an issue about -- well, one gets it from the first</p> <p>13 paragraph of the headnote.</p> <p>14 "You couldn't accept in the course of a business</p> <p>15 a bill of exchange payable at less than six months from</p> <p>16 the time of acceptance and what ever is prohibited by</p> <p>17 law to be done directly cannot legally be affected by an</p> <p>18 indirect and circuitous contrivance."</p> <p>19 And the indirect and circuitous contrivance in that</p> <p>20 case was done by the acceptance being effected by</p> <p>21 a manager rather than the entity itself, which was</p> <p>22 prohibited. And the passage from Lord Chief</p> <p>23 Justice Tindal's judgment at page 1175 of the report, it</p> <p>24 is one of the cases where the appeals to the Lords was</p> <p>25 argued before all of the judges, which you get from the</p> <p style="text-align: center;">Page 35</p>
<p>1 done. It underpins the irrelevance of purpose.</p> <p>2 Yes, I am just looking at the time, my Lord.</p> <p>3 I don't know whether before go on to issue 10 I wonder</p> <p>4 whether now would be a good moment just to break.</p> <p>5 MR JUSTICE HILDYARD: Yes, can I, without wishing to</p> <p>6 embarrass anyone or suggest other than they are very</p> <p>7 very helpful, in the transcripts that I had, circuitry of</p> <p>8 action has become security of action. It may be that</p> <p>9 that should be amended throughout, for future</p> <p>10 generations.</p> <p>11 MR TROWER: Indeed.</p> <p>12 (11.43 am)</p> <p>13 (a short break).</p> <p>14 (11.53 am)</p> <p>15 MR TROWER: My Lord, I had a quick look at the speech of</p> <p>16 Lord Herschell in Welton v Saffery that you asked me</p> <p>17 about. The bit that contains the core of his reasoning</p> <p>18 is at page 313 and 314. I don't think it is really</p> <p>19 hugely helpful one way or the other, to be honest with</p> <p>20 you, but it starts in the passage "it is to be observed</p> <p>21 that" and it goes over the page to 314. The core of his</p> <p>22 reasoning was it was possible for an arrangement to be</p> <p>23 entered into that dealt with adjustment. So in a sense</p> <p>24 it is dealing with arrangement for the rights of</p> <p>25 contributories interse. But that is the passage. It</p> <p style="text-align: center;">Page 34</p>	<p>1 bottom of page 1169, but the judgment, it is really the</p> <p>2 first two paragraphs of the judgment.</p> <p>3 MR JUSTICE HILDYARD: And in this case it looks as if there</p> <p>4 is a contrivance.</p> <p>5 MR TROWER: Yes, that is the language that is used.</p> <p>6 MR JUSTICE HILDYARD: Connoting intention. Is they selected</p> <p>7 the manager, knowing and intending that as a way around</p> <p>8 the prohibition.</p> <p>9 MR TROWER: Yes. That, I can see that and it may be that if</p> <p>10 one gives contrivance the intention, perhaps that is</p> <p>11 right.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR TROWER: So my Lord, that was that. But I am not sure it</p> <p>14 is terribly helpful, any of those other cases, because</p> <p>15 we say that the sort of arrangement that seems to be</p> <p>16 asserted by LBL in this case is actually</p> <p>17 a straightforward and direct contravention of section 74</p> <p>18 because it has the effect, if and to the extent that it</p> <p>19 has the effect of limiting the amount which they are</p> <p>20 otherwise obliged to contribute, and anything which is</p> <p>21 asserted by way of agreement of the sort relied on by</p> <p>22 LBL will have that ultimate effect. And it is as simple</p> <p>23 as that.</p> <p>24 MR JUSTICE HILDYARD: Is there any, and it may not matter</p> <p>25 for the reasons you have stated, but is there any case</p> <p style="text-align: center;">Page 36</p>

<p>1 that I should bear in mind where an indirect effect has</p> <p>2 resulted from a commercial transaction, entirely in good</p> <p>3 faith and not for that purpose?</p> <p>4 MR TROWER: Well, the good faith one sort of goes back to</p> <p>5 British Eagle as a starting point. And it depends,</p> <p>6 I suppose, whether one says it is indirect or direct.</p> <p>7 It may be that it is a little confusing to use the</p> <p>8 concept of direct and indirect in this area, because the</p> <p>9 question is what is the effect of the arrangement is as</p> <p>10 far as circumvention of the rule that is provided for in</p> <p>11 the statute. And in a sense whether it is direct or</p> <p>12 indirect is not really the issue. The question is what</p> <p>13 is the effect and is the statutory provision thereby</p> <p>14 circumvented. And so that doesn't answer my Lord's</p> <p>15 question and I can't immediately think of any case</p> <p>16 where -- can I take that away and think about it?</p> <p>17 MR JUSTICE HILDYARD: Yes. I mean, if there isn't really</p> <p>18 a case, to what extent do I get any help from these</p> <p>19 cases or, to put it more politely, to what extent do</p> <p>20 I get any more help than I get from British Eagle?</p> <p>21 MR TROWER: On reflection, I think you don't, is the short</p> <p>22 answer. I am not sure the direct/indirect analysis is</p> <p>23 the right way of thinking about it. The question is</p> <p>24 whether or not the effect of what is done amounts to</p> <p>25 a breach of the statutory provision. Cuts across the</p> <p style="text-align: center;">Page 37</p>	<p>1 the rule against double proof, LBL couldn't in any event</p> <p>2 have answered.</p> <p>3 Now, I think I am prepared to accept that there are</p> <p>4 a sufficiently large number of unlikelihoods built into</p> <p>5 the assumptions that are made as to the circumstances in</p> <p>6 which issue ten arises. There are two reasons why issue</p> <p>7 ten is being put forward before your Lordship at this</p> <p>8 stage. One is it does actually help to illustrate some</p> <p>9 of the questions around issue nine. But it also does</p> <p>10 matter in the sense that one needs to see some of the</p> <p>11 circumstances in which the recharge arrangement might be</p> <p>12 put forward. And we simply say that the simple reason</p> <p>13 why the rule against double proof applies is that</p> <p>14 LBHI2's claim against us is in respect of the sub-debt,</p> <p>15 and this element of the recharge is also in respect of</p> <p>16 the sub-debt. To apply the test that we discussed</p> <p>17 yesterday, and my Lord put forward, it would be</p> <p>18 extinguished if the sub-debt claim itself was</p> <p>19 extinguished. And it is actually not more complicated</p> <p>20 than that.</p> <p>21 MR JUSTICE HILDYARD: I mean, the rule against double proof</p> <p>22 I find in principle terms extremely difficult to get my</p> <p>23 head around. But if you think about it in cash terms --</p> <p>24 MR TROWER: Yes.</p> <p>25 MR JUSTICE HILDYARD: -- the one fights the other.</p> <p style="text-align: center;">Page 39</p>
<p>1 operation of the statutory provision. And in the</p> <p>2 present case the operation of the statutory provision is</p> <p>3 the ability to make a call on members to discharge the</p> <p>4 debts, liabilities and expenses of the winding up. And</p> <p>5 if the effect of the argument is that that call is</p> <p>6 impaired, or that liability is impaired, that cuts</p> <p>7 across the liability and it will be struck down.</p> <p>8 My Lord, issue ten, which we deal with at 285 and</p> <p>9 following. Now, this issue really arises if we are</p> <p>10 wrong on recharge because it presupposes that LBL does</p> <p>11 have a recharge claim in respect of the sub-debt</p> <p>12 contribution element. And it also presupposes that</p> <p>13 LBHI2 has a claim in relation to the sub-debt that is</p> <p>14 extant. So you have LBIE as an estate faced with</p> <p>15 a claim coming in from LBL under the recharge agreement</p> <p>16 and a claim coming up from LBHI2 in respect of the</p> <p>17 sub-debt agreement. And the question then is to what</p> <p>18 extent could LBL in any event recover? And we say the</p> <p>19 answer to that is given by the rule against double</p> <p>20 proof. Because to the extent that there is a claim</p> <p>21 coming up from LBHI2 in respect of the subordinated</p> <p>22 debt, we have sought to include it in the outbound claim</p> <p>23 as an element within the section 74 liability and it is</p> <p>24 then coming back to us under the recharge arrangement.</p> <p>25 And we would say that in those circumstances, based on</p> <p style="text-align: center;">Page 38</p>	<p>1 MR TROWER: Yes. That is a test. It is a very satisfactory</p> <p>2 test and it is a test that is referred to, as we saw</p> <p>3 yesterday, in a number of authorities. So it does help.</p> <p>4 Because it is difficult to see circumstances where, were</p> <p>5 the test to be applied, you would not consider that it</p> <p>6 was substantially the same debt, or the same debt in</p> <p>7 substance. So the two do work very well. The courts</p> <p>8 have been a little bit cautious, I think, to go all of</p> <p>9 the way and say that is it, that is it, and one can see</p> <p>10 why; one uses the concept of substance to give a little</p> <p>11 bit of wiggle room..</p> <p>12 MR JUSTICE HILDYARD: You can see why, but I am not sure</p> <p>13 I can. Why?</p> <p>14 MR TROWER: Because judges sometimes like to ensure --</p> <p>15 MR JUSTICE HILDYARD: Leave wiggle room.</p> <p>16 MR TROWER: Well, leave wiggle room in case there is</p> <p>17 a circumstance in which they can't presently think of.</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 MR TROWER: So to lay down a hard and fast rule that it is</p> <p>20 the extinction of one, it may be dangerous. But better</p> <p>21 or for worse, the way it has been expressed, plainly, in</p> <p>22 a number of Court of Appeal decisions, as we saw, is you</p> <p>23 look at the substance, albeit you are guided to this</p> <p>24 through extinction.</p> <p>25 MR JUSTICE HILDYARD: I see what you mean.</p> <p style="text-align: center;">Page 40</p>

<p>1 MR TROWER: Yes.</p> <p>2 MR JUSTICE HILDYARD: In a very different context it is</p> <p>3 rather like reflective lost, which you can never really</p> <p>4 understand unless you work out if you pay the money is</p> <p>5 there any remaining claim.</p> <p>6 MR TROWER: Yes, that is a very good analogy. My Lord, that</p> <p>7 is all on the unagreed issues. And there are then the</p> <p>8 five other issues which are what have loosely been</p> <p>9 called the agreed issues. And what I thought would be</p> <p>10 appropriate, subject to your Lordship, for me to do is</p> <p>11 take you through the issues and explain where we are on</p> <p>12 the issues, what the issues are and where the parties</p> <p>13 are, and then see where we get to at the end of that</p> <p>14 exercise on the extent to which first of all everybody</p> <p>15 agrees with what I say. And I hope they will because my</p> <p>16 understanding is that the parties are all agreed in</p> <p>17 relation to them. I can then address your Lordship as</p> <p>18 to what relief we would invite your Lordship to grant in</p> <p>19 those circumstances.</p> <p>20 MR JUSTICE HILDYARD: I mean, one of my bothers, again the</p> <p>21 transcript said I was bothered that there would be</p> <p>22 adversarial, but in fact my bother is that there won't</p> <p>23 be adversarial argument.</p> <p>24 MR TROWER: Quite.</p> <p>25 MR JUSTICE HILDYARD: To what extent is it right for the</p> <p style="text-align: center;">Page 41</p>	<p>1 one where the court granted a direction or gave</p> <p>2 a direction that the office holder should continue to</p> <p>3 administer the estate on the basis that X, Y, Z is the</p> <p>4 position. Another example would be a case where the</p> <p>5 court would actually give the office holders liberty to</p> <p>6 enter into a agreement with somebody else which gives</p> <p>7 you protection insofar as you doing your duty properly</p> <p>8 is concerned. Now, up until now the Waterfall</p> <p>9 proceedings have proceeded on the basis that the court</p> <p>10 has given declarations of right in relation to</p> <p>11 everything within the estates.</p> <p>12 MR JUSTICE HILDYARD: Including where the issue has</p> <p>13 ultimately been agreed.</p> <p>14 MR TROWER: Indeed. And what has normally --</p> <p>15 MR JUSTICE HILDYARD: Did I do that in Waterfall II C?</p> <p>16 MR TROWER: I am sorry?</p> <p>17 MR JUSTICE HILDYARD: Did I do that in Waterfall II C?</p> <p>18 I probably did.</p> <p>19 MR TROWER: I think you did, actually, yes. And I think one</p> <p>20 of the reasons the court got comfortable with it is that</p> <p>21 these estates, not just my client's estates but</p> <p>22 everybody's estates, have been administered on a fairly</p> <p>23 transparent basis. Everything has gone on to the</p> <p>24 website, all of the skeleton arguments have gone on to</p> <p>25 the website and so on and so forth, and everybody who</p> <p style="text-align: center;">Page 43</p>
<p>1 court to grant declarations when agreement suffices?</p> <p>2 MR TROWER: Yes. My Lord, one of the issues, of course,</p> <p>3 that we are faced with is that we are all office</p> <p>4 holders. And what we are actually doing is coming</p> <p>5 before your Lordship to ask for directions which take</p> <p>6 the form of declaratory relief, the declaratory relief</p> <p>7 being for the purposes of administering our respective</p> <p>8 insolvent estates. So that is what we are doing. And</p> <p>9 there are a number of contexts in which it is</p> <p>10 appropriate for an office holder to do that. Either</p> <p>11 uncertainty in relation to the actual answer in general</p> <p>12 legal or factual terms, but also there may be contexts</p> <p>13 in which it is appropriate for the office holder to come</p> <p>14 to the court and say we need the court's protection in</p> <p>15 some form or other before we go ahead and finalise the</p> <p>16 administration of this estate because it is complex,</p> <p>17 there are a lot of people involved in it, we are</p> <p>18 administering it on behalf of the class as a whole and</p> <p>19 in all of the circumstances, given where we are, it is</p> <p>20 right for the court to say you should go ahead and do it</p> <p>21 on this basis.</p> <p>22 Now, there is relief short of a declaration of right</p> <p>23 which establishes the legal position as against the</p> <p>24 world as a whole which in some circumstances can protect</p> <p>25 office holders sufficiently. A classic example would be</p> <p style="text-align: center;">Page 42</p>	<p>1 has an interest in the estate knows what is going on.</p> <p>2 MR JUSTICE HILDYARD: I understand. Directions, really, it</p> <p>3 is a very good reason for administrators, other office</p> <p>4 holders, to seek the direction of the court, which is</p> <p>5 ultimately for their own protection.</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE HILDYARD: But does not necessarily establish</p> <p>8 a rule of law, as it were. It doesn't establish</p> <p>9 res judicata in any sense.</p> <p>10 MR TROWER: Yes.</p> <p>11 MR JUSTICE HILDYARD: I do not know whether a declaration</p> <p>12 does do that. If it does do that, and it is, as it</p> <p>13 were, in rem, if you like, mixing metaphors.</p> <p>14 MR TROWER: Yes.</p> <p>15 MR JUSTICE HILDYARD: Should I be doing it. That is what is</p> <p>16 troubling me. I am not at all suggesting that you don't</p> <p>17 require and deserve the direction even if you are all</p> <p>18 agreed; you need to be protected.</p> <p>19 MR TROWER: Yes.</p> <p>20 MR JUSTICE HILDYARD: But going further than that and saying</p> <p>21 that is the law.</p> <p>22 MR TROWER: Yes. My Lord, it may be, I am obviously going</p> <p>23 to take my Lord through these issues anyway so that we</p> <p>24 can see the shape of them.</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 44</p>

<p>1 MR TROWER: It may be that a direction of that sort will 2 cover the ground. And an indication from your Lordship 3 that that is an appropriate thing to do will obviously 4 help when we discuss it amongst ourselves, if that is as 5 far as we are going to ask your Lordship to go. 6 MR JUSTICE HILDYARD: I don't know what added punch in law 7 declarations give. On the other hand I am squeamish. 8 MR TROWER: Yes. 9 MR JUSTICE HILDYARD: On the other hand because these are 10 full representative proceedings I can see why something 11 which binds or binds better is obviously desirable, if 12 it can be properly granted. 13 MR TROWER: Yes. Well, I think one of the things we 14 obviously need to look at is the formulation of the 15 declaration. Because although the declarations are, 16 this whole hearing is about legal questions, the 17 declarations themselves are formulated by reference to 18 these particular estates. 19 MR JUSTICE HILDYARD: Yes. 20 MR TROWER: And so to that extent, yes they will bind 21 everybody with an interest in the estates. I think that 22 must be right. They don't go any wider than that. We 23 are not inviting your Lordship to declare that a section 24 in a statute means something. Nor are we inviting your 25 Lordship to declare that a particular line of authority</p> <p style="text-align: center;">Page 45</p>	<p>1 reference in relation to that, just so my Lord has them, 2 are LBL's position paper, paragraphs 117 to 118. 3 MR JUSTICE HILDYARD: Hold on. 4 MR TROWER: 117 to 118. LBIE, 13 - 18. I am giving you the 5 paragraph numbers of the position numbers. LBH2 2.1, 6 and LBH1 14 to 17. Now the background to this is that 7 declaration nine made by Mr Justice David Richards in 8 the Waterfall I proceedings held that the contribution 9 claim generally should be included in the set-off 10 account. Now, that declaration was initially appealed 11 but it was upheld by the Court of Appeal. The argument 12 in relation to it -- just for my Lord's note the 13 declaration that was actually made is in bundle 1-tab 11 14 and the Court of Appeal's order is in bundle 1-tab 12. 15 The argument in relation to it is dealt with by 16 Mr Justice David Richards in paragraphs 243 to 249 of 17 his judgment and if we can just go there. 18 MR JUSTICE HILDYARD: Which tab? 19 MR TROWER: 243 to 249 of Mr Justice David Richards. 20 MR JUSTICE HILDYARD: Is that -- 21 MR TROWER: Tab 8 it should be, I am sorry, I didn't have it 22 in my file. 23 MR JUSTICE HILDYARD: Yes. 24 MR TROWER: Now, the arguments that 25 Mr Justice David Richards is dealing with in 243 to 249</p> <p style="text-align: center;">Page 47</p>
<p>1 is to be preferred over another line of authority. All 2 we are asking you Lordship to do is to declare, and 3 perhaps one can pick this up, actually, if you go to our 4 skeleton argument where the agreed issues start, which 5 is page 90. If we look at the first of the declarations 6 in relation to issue 2, it is a very fact specific 7 declaration for the purposes of this as the legal 8 position in relation to this estate. So yes I accept, 9 and indeed this is one of the purposes behind it, that 10 it will bind those interested in this estate. But it 11 doesn't bind in any meaningful sense anybody else 12 because it is simply declaring the position in relation 13 to this estate, or these estates. 14 So against that background, and I appreciate that 15 this is the sort of point, the actual form of the relief 16 my Lord is prepared to grant is a point that we may have 17 to come back to when my Lord has perhaps seen the shape 18 of the argument overall. But shall I take you through 19 these issues just so you can see how they fit and where 20 we get to? 21 MR JUSTICE HILDYARD: Yes. 22 MR TROWER: So issue 2, the issue here is whether the 23 sub-debt element of the contribution claim should go 24 into the set-off account in LBIE's administration. 25 Everyone agrees that it should and the position paper</p> <p style="text-align: center;">Page 46</p>	<p>1 were on the question of set-off in the administration of 2 LBIE's estate, which is part of the question that we are 3 concerned with here. And they were advanced by 4 Mr Wolfson who was then acting for LBL. They weren't 5 pursued in this form in the Court of Appeal, though. 6 And everyone agreed in relation to set-off in the 7 Court of Appeal. At that stage it became a question of 8 well, look, is it the contributory rule or is it 9 set-off, and set-off is an answer in relation to it. 10 No, it is difficult to see how there could be any 11 difference between the various elements of liability 12 which go into constituting the contribution claim. 13 I mean, the conclusion that Mr Justice David Richards 14 reaches on 249: 15 "I therefore conclude that in the administration of 16 LBIE insolvency set-off will ...(reading to the 17 words)... and the contingent claim by LBIE in respect of 18 calls in possible future liquidation of LBIE." 19 That was the conclusion that he reached. 20 Now, the thrust of the argument raised before him 21 was that the contribution claim generally should not go 22 into the LBIE set-off account because of its special 23 characteristics, and that was the way it was put before 24 him. And we, to be frank, when thinking about this 25 again, couldn't think of any extra argument that related</p> <p style="text-align: center;">Page 48</p>

<p>1 specifically to the position of the contribution claim</p> <p>2 insofar as it reflect the sub-debt agreement.</p> <p>3 MR JUSTICE HILDYARD: I am so sorry, Mr Trower, I am</p> <p>4 catching up with you, but in 49 where he says:</p> <p>5 "And the contingent claim by LBIE in respect of</p> <p>6 calls in a possible future liquidation".</p> <p>7 He is using "calls" in a restrictive sense, is he?</p> <p>8 Not extended to a contribution claim.</p> <p>9 MR TROWER: Well --</p> <p>10 MR JUSTICE HILDYARD: I mean it is an unlimited company,</p> <p>11 so --</p> <p>12 MR TROWER: Oh, I see what you mean. Calls in a -- yes, he</p> <p>13 is simply referring there to the calls that would be</p> <p>14 made were LBIE to go into liquidation which the</p> <p>15 foundation for the contingent claim that LBIE is able to</p> <p>16 advance in the insolvencies of its members.</p> <p>17 MR JUSTICE HILDYARD: I think I am being silly and trying to</p> <p>18 crystallise why it is that he hasn't already decided it.</p> <p>19 MR TROWER: Well, it may be that this point has already been</p> <p>20 decided. He certainly decided the general claim goes</p> <p>21 in. There wasn't any attempt in his analysis to</p> <p>22 distinguish between the sub-debt element and any other</p> <p>23 element. So whether he has actually decided it or not</p> <p>24 is not crystal clear. I mean one of the reasons we all</p> <p>25 agree it is, is because we all think it inevitably</p> <p style="text-align: center;">Page 49</p>	<p>1 before them, though, an appeal in relation to that</p> <p>2 declaration. But the arguments in relation to it had</p> <p>3 rather moved on and there was no argument advanced on</p> <p>4 this point.</p> <p>5 Would your Lordship just give me a moment?</p> <p>6 MR JUSTICE HILDYARD: Mm-hm.</p> <p>7 (Pause).</p> <p>8 Mr Bayfield, of course, reminds me that of course</p> <p>9 one of the arguments that there was in the Supreme Court</p> <p>10 was that there was argument over whether our</p> <p>11 contribution claim was provable at all.</p> <p>12 MR JUSTICE HILDYARD: I see, yes.</p> <p>13 MR TROWER: With the necessary consequences to what would</p> <p>14 happen in relation to set-off. Not the necessary</p> <p>15 consequence, but a consequence of what would happen in</p> <p>16 relation to set-off.</p> <p>17 MR JUSTICE HILDYARD: So would it be rash to grant any such</p> <p>18 declaration pending the decision in the Supreme Court?</p> <p>19 MR TROWER: Yes I can see why your Lordship asks that</p> <p>20 question. We are faced with a situation where we have</p> <p>21 to accept that what we don't know what the Supreme Court</p> <p>22 is going to say about anything which may have a bearing</p> <p>23 on these issues, and we have been over this before.</p> <p>24 Would it be rash? No I don't think it would be, with</p> <p>25 respect, on the present state of the law. I think we</p> <p style="text-align: center;">Page 51</p>
<p>1 follows as night follows day from his conclusion in</p> <p>2 relation to the contribution claim generally that that</p> <p>3 must be the case. So in a sense one way of thinking</p> <p>4 about the agreement in relation to issue 2 is that it is</p> <p>5 clarificatory. It is clarificatory of what it is that</p> <p>6 follows inevitably from the decision that has already</p> <p>7 been made in relation to the inclusion in the set-off</p> <p>8 account by Mr Justice David Richards.</p> <p>9 MR JUSTICE HILDYARD: Right, and then I catch you up. That</p> <p>10 decision, it was accepted in the Court of Appeal and not</p> <p>11 challenged in the Supreme Court.</p> <p>12 MR TROWER: It certainly wasn't challenged in the Supreme</p> <p>13 Court. It was appealed in the Court of Appeal, but</p> <p>14 there wasn't any argument addressed along the lines that</p> <p>15 were addressed to Mr Justice David Richards and what</p> <p>16 happened in the Court of Appeal, what happened was</p> <p>17 although they appealed it LBL did not then advance any</p> <p>18 arguments in the Court of Appeal, and Mr Marshall will</p> <p>19 correct me if I am wrong, but LBL didn't advance any</p> <p>20 arguments in the Court of Appeal along the lines that</p> <p>21 were advanced by Mr Wolfson. We accepted in the</p> <p>22 Court of Appeal that the set-off would apply. So the</p> <p>23 Court of Appeal didn't have the arguments in relation to</p> <p>24 this ventilated before them, if I can put it that way,</p> <p>25 and they dismissed the appeal. There was technically</p> <p style="text-align: center;">Page 50</p>	<p>1 would all have to accept that if the Supreme Court</p> <p>2 reached a decision that affected this in any way we</p> <p>3 would have to come back.</p> <p>4 MR JUSTICE HILDYARD: What jurisdiction would I have? Once</p> <p>5 I have given a declaration, my job is done. Even if it</p> <p>6 is subsequently thought to be very foolishly done.</p> <p>7 MR TROWER: Yes. We do actually think that maybe having had</p> <p>8 this argument before your Lordship now, Mr Bayfield</p> <p>9 reminds me, I think the way we put it at the PTR was</p> <p>10 that it would not be sensible for your Lordship to</p> <p>11 actually deliver judgment until --</p> <p>12 MR JUSTICE HILDYARD: You are quite right. I think I need</p> <p>13 signposting as to the agreed matters.</p> <p>14 MR TROWER: Yes.</p> <p>15 MR JUSTICE HILDYARD: Where there is some premise of the</p> <p>16 declaration which is actually subject to dispute in the</p> <p>17 Supreme Court, there are many things which may mean that</p> <p>18 what I do is redundant.</p> <p>19 MR TROWER: Yes.</p> <p>20 MR JUSTICE HILDYARD: But that is slightly different.</p> <p>21 MR TROWER: Yes. I think that what is relevant about what</p> <p>22 has gone before the Supreme Court is whether or not</p> <p>23 there is a claim that is capable of being advanced at</p> <p>24 all.</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 52</p>

<p>1 MR TROWER: That is capable of going into the set-off 2 account. So I think issue 2 is one of those issues. 3 I think on reflection, it must be one of the issues 4 where we would invite your Lordship not to say anything 5 final until such time as we have seen what the Supreme 6 Court have to say. I think that must be right. 7 MR JUSTICE HILDYARD: And as you indicated, it is not 8 impossible, or even particularly unlikely once you get 9 the Supreme Court's judgment on these sorts of points, 10 that one will have to reconvene to see whether the 11 particular way in which their Lordships have expressed 12 it means that the argument is any different. 13 MR TROWER: Yes. 14 MR JUSTICE HILDYARD: And does that go for your agreement 15 between you in a way? That your agreement is on 16 a premise which may, may, fall in the Supreme Court. 17 MR TROWER: Well, I think I am not sure whether we have 18 actually got to -- we are agreed that there is no 19 argument as to any of these issues that requires 20 ventilating before the -- 21 MR JUSTICE HILDYARD: On the state of the law -- 22 MR TROWER: On the state of the law as it is understood to 23 be. 24 MR JUSTICE HILDYARD: Yes. 25 MR TROWER: I am not sure we have finally agreed on the</p> <p style="text-align: center;">Page 53</p>	<p>1 falsified by something that happens in the Supreme Court 2 and where essential steps in the arguments on the 3 disputed matters could be nullified in the Supreme 4 Court, or modified in a way which upsets the analysis. 5 MR TROWER: Yes. 6 MR JUSTICE HILDYARD: Because I haven't got much of a grip, 7 or any grip, really, on what was argued in the Supreme 8 Court beyond knowing that there was foreign exchange 9 losses and that sort of thing that were in dispute. 10 I think it will in fact quite help to draw out the steps 11 in the argument in a way to see what ones are central 12 and still disputed. 13 MR TROWER: Can we give a little bit of thought to exactly 14 the best way of doing that? 15 MR JUSTICE HILDYARD: Yes of course, yes. 16 MR TROWER: But yes, I quite understand what your Lordship 17 is saying in relation to that. 18 MR JUSTICE HILDYARD: To get back to issue 2, I can quite 19 see the strength of the argument, assuming that the 20 premises are not destabilised. 21 MR TROWER: Yes. 22 MR JUSTICE HILDYARD: And for the moment, though I would 23 welcome any guidance on this, but for the moment I am 24 not at all sure why this hasn't already been decided by 25 Mr Justice David Richards.</p> <p style="text-align: center;">Page 55</p>
<p>1 precise form of each of the declarations, but I may be 2 wrong on that. So we are not quite there yet any way on 3 this, which is why what I am doing at the moment 4 probably needs to be limited to an explanation to your 5 Lordship as to what the issues are. 6 MR JUSTICE HILDYARD: This one is quite an awkward one 7 because we have had, throughout the last day, we have 8 gone on the footing that the answers to two and four in 9 set-off terms are clear. 10 MR TROWER: Yes. 11 MR JUSTICE HILDYARD: But it is not impossible that they 12 will be altered in a way which affects the analysis of 13 the contested issues. 14 MR TROWER: I am not sure it goes that far, no. 15 MR JUSTICE HILDYARD: No. 16 MR TROWER: There is one context in which it might arise, 17 which is if the contributory rule were to apply then 18 I think that is right, it would affect the position. 19 MR JUSTICE HILDYARD: Yes. 20 MR TROWER: Yes, I think that must be right, if that is 21 where we end up. It was argued in the Supreme Court. 22 MR JUSTICE HILDYARD: Yes. Well, I think I will need from 23 you all, if it can be agreed, or alternatively 24 submissions if it cannot, insofar as you can presently 25 safely identify them, where your agreement might be</p> <p style="text-align: center;">Page 54</p>	<p>1 MR TROWER: Yes. 2 MR JUSTICE HILDYARD: There must be some sort of rule 3 against double judgments. 4 MR TROWER: We had always taken the view in relation to this 5 that there was. 6 MR JUSTICE HILDYARD: Yes. 7 MR TROWER: And there was argument at one stage over whether 8 or not it had been. 9 MR JUSTICE HILDYARD: Yes. 10 MR TROWER: So that is where we have got to on those. 11 Would your Lordship just give me one moment? 12 MR JUSTICE HILDYARD: Of course, yes. Do you want more than 13 a moment, Mr Trower? Do you want five minutes? 14 MR TROWER: Could I have five minutes, just to check one 15 thing? 16 (12.32 pm) 17 (a short break) 18 (12.36 pm) 19 MR TROWER: My Lord, thank you for that. What I just wanted 20 to remind my Lord of is that as far as issue 2 is 21 concerned in its formulation, it is formulated as 22 an issue about the conclusion in the insolvency set-off 23 account of the outbound claims. You can't obviously add 24 into the set-off account anything which isn't as 25 an inbound claim properly provable in LBIE's</p> <p style="text-align: center;">Page 56</p>

<p>1 administration. And so you couldn't for example add 2 anything in which cuts across the payment of the other 3 unsecured creditors if you are talking about the inbound 4 claim in respect of the subordinated debt. So you have 5 to work out whether or not the inbound claim is provable 6 for the purposes of establishing whether or not the 7 set-off is going to work in the first place. What this 8 issue 2 as presently formulated is about, is about the 9 outbound claim. But it is important that one should 10 bear in mind what the position is in relation to the 11 inbound claim as well, when thinking about the set-off. 12 That is the first thing.</p> <p>13 My Lord, the second thing is what we said about the 14 Supreme Court judgment at the PTR; that your Lordship 15 would be invited not to give judgments, actually, in 16 relation to any of the issues until such time as the 17 Supreme Court gives their judgment. It is not just, 18 really, limited to the agreed issues. So that, if 19 anything, reinforces the point your Lordship made about 20 wanting to have an understanding as to exactly how it is 21 that the Supreme Court might affect the argument in 22 relation to any of the issues.</p> <p>23 Can I then go on to issue 4, which is what effect 24 does the set-off in LBIE's administration of the LBHI 25 sub-debt claim against LBIE's contribution claim have on</p> <p style="text-align: right;">Page 57</p>	<p>1 is that there is nothing to go into the set-off account 2 in the second administration, because the set-off 3 account in LBIE's administration would already have 4 taken place and to the extent that there are actually 5 any changes that need to be taken into account in the 6 relationship between the parties, they would be applied 7 in the LBIE set-off by operation of the hindsight 8 principle. So, put another way, it all flows from the 9 operation of the hindsight principle, because you go 10 back and reconstitute or rework the set-off in LBIE's 11 administration, and so it inevitably follows from that 12 that there is no room for a further set-off in the 13 administrations of either of the contributing members. 14 And so that is the background to that.</p> <p>15 My Lord, issues 6 and 12, I don't think 6 adds 16 anything to 5, it is exactly the same as in relation to 17 LBEL's administration and we don't advance anything else 18 and issue 12 is not something on which we have taken 19 a position one way or another, so I think it would be 20 appropriate for someone else to deal with that.</p> <p>21 MR JUSTICE HILDYARD: Mm-hm.</p> <p>22 MR TROWER: So my Lord, subject to anything else I can help 23 with, those are our submissions on the issues.</p> <p>24 MR JUSTICE HILDYARD: Well, there will be matters, almost 25 inevitably, on which I will want to question, you know,</p> <p style="text-align: right;">Page 59</p>
<p>1 LBIE's ability to make a sub-debt contribution claim 2 against LBL? So this is the effect of any set-off as 3 between LBHI2 and LBIE on the contribution claim against 4 LBL. And everyone agrees that it extinguishes LBIE's 5 contribution claim against LBL to the extent of the 6 set-off, but only to the extent of the set-off. And the 7 reason for this is relatively simple. The set-off is 8 mandatory, and takes effect from the notice date in 9 accordance with rule 2.85. It operates to extinguish or 10 reduce the liability under the subordinated debt to the 11 extent of the set-off and the consequence of this is 12 that there is no liability in respect of the sub-debt 13 for which there is a deficiency in assets. So that is 14 the reason why we have reached the conclusion that we 15 have in relation to issue 4, and I think that is 16 consistent with the reason, certainly why LBHI2 has 17 reached the same conclusion. I can't quite remember 18 about everybody else.</p> <p>19 Issue 5 is whether insolvency set-off in 20 a subsequent distributing administration or liquidation 21 of LBHI2 or LBL is of any application in respect of 22 those companies' claims against LBIE. Now, this is 23 against the background of LBL and LBHI2, their set-off, 24 taking place later than the LBIE set-off because of the 25 notice dates. LBIE was first. And the short point here</p> <p style="text-align: right;">Page 58</p>	<p>1 get some help from you.</p> <p>2 MR TROWER: Yes.</p> <p>3 MR JUSTICE HILDYARD: But thank you very much indeed.</p> <p>4 MR TROWER: I am grateful.</p> <p>5 Yes, Ms Toube.</p> <p>6 Submissions by MS TOUBE</p> <p>7 MS TOUBE: My Lord, Mr Trower left me issues 6 and 12 of the 8 agreed issues.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MS TOUBE: And those, as your Lordship knows, are the only 11 issues on which we expect to be making submissions to 12 your Lordship during the course of this hearing, 13 although as I mentioned during the course of yesterday 14 we do have indirect interests in the various other 15 issues.</p> <p>16 MR JUSTICE HILDYARD: Yes.</p> <p>17 MS TOUBE: But our intention is not to say anything unless 18 we really have to in relation to those.</p> <p>19 So issues 6 and 12, as you were in my learned 20 friend's skeleton it may be best to just look at what 21 those issues are from there. Issue 6 is the mirror 22 issue to issue 5. But relates to LBEL's administration, 23 as opposed to LBIE's administration. And the position 24 is that, again, our notice to distribute came earlier 25 than LBL's notice to distribute. So it is exactly the</p> <p style="text-align: right;">Page 60</p>

<p>1 same issue about whether you take the set-off twice or 2 only in the first administration. And for the same 3 reasons as Mr Trower has said, we say yes, you only take 4 it in the first. We dealt with this in paragraphs 26 to 5 36 of our skeleton and the reasoning is exactly that 6 which Mr Trower has just gone through, which is that 7 set-off is automatic and self-executing. It happens 8 once in the first insolvency, which is LBEL's, and as 9 a result the debts which existed at that time are 10 extinguished by the set-off and are then replaced by 11 a net balance. To the extent of the set-off, obviously. 12 And so therefore the second insolvency is irrelevant and 13 insofar as anything later happens which tells you the 14 quantum of the initial set-off, the hindsight principle 15 is employed back in to the first insolvency and that is 16 how the set-off works.</p> <p>17 So this declaration, I think Mr Trower said he 18 wasn't sure if all of the terms of all of the 19 declarations which were agreed, were agreed. We were 20 quite consistent that people agreed the terms of 6 and 21 12, and everybody has. I don't think I need to show 22 your Lordship that correspondence, save to say that the 23 terms in which they have been agreed are the terms which 24 were set out in my learned friend's skeleton, 25 Mr Trower's skeleton, at paragraph 315, which are almost</p> <p style="text-align: right;">Page 61</p>	<p>1 I am still floundering a bit. But issue 6 is really 2 what is the effect of set-off in the first 3 administration in time and does it really -- because 4 there is a sum identified pursuant to that process, does 5 it really conclude the matter as regards the second.</p> <p>6 MS TOUBE: Yes, that is exactly right, my Lord.</p> <p>7 MR JUSTICE HILDYARD: And that doesn't really seem to be 8 a matter which is likely to be affected by anything that 9 is going on in the Supreme Court.</p> <p>10 MS TOUBE: No.</p> <p>11 MR JUSTICE HILDYARD: Although the valuation might.</p> <p>12 MS TOUBE: Yes.</p> <p>13 MR JUSTICE HILDYARD: Yes.</p> <p>14 MS TOUBE: All of this, of course, is based on the 15 assumption for present purposes that there is anything 16 coming in the other direction from LBL in relation to 17 the recharge claim.</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 MS TOUBE: Which obviously we are not addressing at all 20 today but your Lordship knows we say that on the 21 recharge claim there is no claim.</p> <p>22 MR JUSTICE HILDYARD: Yes.</p> <p>23 MS TOUBE: There are other claims between LBL and LBEL. But 24 your Lordship said it, absolutely, the question is, is 25 it all sorted out on the first insolvency or is there</p> <p style="text-align: right;">Page 63</p>
<p>1 exactly the same as the wording in our skeleton at 2 paragraph 4, except that we manage to get the date of 3 our own notice of distribution wrong. So it is 4 11 July 2012. So that is the relevant date. Those 5 terms are agreed. That is really all we have to say 6 about --</p> <p>7 MR JUSTICE HILDYARD: And the Supreme Court has nothing to 8 do with this?</p> <p>9 MS TOUBE: Not as far as we know. We are not involved in 10 the Supreme Court, but as far as we can tell there is 11 nothing that is going to affect this.</p> <p>12 MR JUSTICE HILDYARD: It seems a sort of general --</p> <p>13 MS TOUBE: It is, yes.</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MS TOUBE: Just to reinforce the point that my learned 16 friend Mr Trower made earlier, obviously we have thought 17 quite hard about this issue, and the other issue to see 18 if there is any other argument that can be put at all 19 against these. On 6, we think the answer is obvious; it 20 would have been for LBL to say if there was any adverse 21 argument. They can't think of anything. On issue 12 if 22 we could have thought of anything even faintly 23 respectable, we would have said it. But we can't. So 24 that is issue 6.</p> <p>25 MR JUSTICE HILDYARD: And I will have to read this, because</p> <p style="text-align: right;">Page 62</p>	<p>1 anything left for the second insolvency?</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MS TOUBE: And we are all agreed that no, everything gets 4 sorted in the first one, which in our case is LBEL's 5 that is 6.</p> <p>6 12, which we have dealt with in our skeleton at 7 paragraphs 40 to 44, this says if there is a recharge 8 claim of the sort that LBL is asserting, and if there is 9 some sort of set-off in LBIE's administration, what 10 effect does that have in relation to LBEL? So in effect 11 what it says is does anything that happens in LBIE's 12 administration make a difference to us? And we say that 13 the answer to that is no, because the way that the claim 14 is put by LBL is that it says it has a claim against us 15 and a claim against LBIE. It is not a jointly and 16 severally liable claim, they say you are liable for X 17 per cent and LBIE is liable to Y per cent. So if 18 something happens to Y per cent in LBIE's administration 19 it is irrelevant to us, and the point is really as short 20 as that. If it is discharged in LBIE's administration, 21 well then so be it, but that makes no difference as far 22 as we are concerned. That is issue 12. Now, the 23 wording in relation to issue 12 is the wording that we 24 set out in paragraph 38 of our skeleton. And again that 25 is agreed by all parties.</p> <p style="text-align: right;">Page 64</p>

<p>1 MR JUSTICE HILDYARD: Yes.</p> <p>2 MS TOUBE: That just leaves one point that we wanted</p> <p>3 mention, although it is not really a point for today.</p> <p>4 In LBEL's correspondence agreeing this declaration, they</p> <p>5 mentioned in the context of issue 12 that it wouldn't</p> <p>6 affect any liability which LBEL had to LBL in respect of</p> <p>7 recharge or indemnity. As we had understood it, and</p> <p>8 obviously this is a part B point, but as we had</p> <p>9 understood it, the claim that was made by LBL against</p> <p>10 LBEL related to recharge, and the claim which is called</p> <p>11 indemnity relates to the claim which is made in respect</p> <p>12 of the people for whom LBL says it was nominee. It may</p> <p>13 be that it is either a typo or the word</p> <p>14 "indemnity" doesn't mean anything more than recharge.</p> <p>15 But we just wanted to note it, as it was in the</p> <p>16 correspondence for this, although it is not strictly</p> <p>17 relevant to this and will only be relevant to</p> <p>18 the September hearing.</p> <p>19 MR JUSTICE HILDYARD: So you need clarification of that?</p> <p>20 MS TOUBE: It would be helpful just to understand if it</p> <p>21 means anything more than recharge. But again that is</p> <p>22 not a matter for today.</p> <p>23 So really, unless your Lordship has any other points</p> <p>24 for me, that is all we have to say.</p> <p>25 MR JUSTICE HILDYARD: Thank you very much.</p> <p style="text-align: center;">Page 65</p>	<p>1 particularly in relation to 5, 6 and 12.</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR ARDEN: My Lord, one could say the same about 2 and 4.</p> <p>4 But I say that with a slight reservation, because</p> <p>5 I think what I can see, if one looks at 4 for example,</p> <p>6 one possible outcome in the Supreme Court is that LBH12</p> <p>7 will be held to have no provable debt in respect of the</p> <p>8 subordinated debt in LBIE's estate. Now, if one looks</p> <p>9 at the proposed issue in relation to 4, it may cover it</p> <p>10 in the sense that it only says well, if you have it,</p> <p>11 then this is the consequence. But as I said, there is</p> <p>12 a degree of nervousness, what might the Supreme Court</p> <p>13 justices come out with? What might be their conclusions</p> <p>14 on this pretty important issue? Does 4 as it is</p> <p>15 currently framed, is it going to cater for every</p> <p>16 possibility? Is it properly worded or best worded to</p> <p>17 cater for all of those possibilities? My Lord, I would</p> <p>18 welcome the chance, I think, to have another look at</p> <p>19 this, perhaps overnight, and see whether the sorts of</p> <p>20 reservations that I have just expressed sort of warrant</p> <p>21 taking some other course other than the course that your</p> <p>22 Lordship might want to take or might take in relation</p> <p>23 to, say, 5, 6 and 12. And to some extent, the same</p> <p>24 applies to the 2. Maybe to a lesser extent.</p> <p>25 MR JUSTICE HILDYARD: I mean, I think we will have to deal</p> <p style="text-align: center;">Page 67</p>
<p>1 Who is next?</p> <p>2 MR ARDEN: Me, my Lord.</p> <p>3 MR JUSTICE HILDYARD: Mr Arden, do you want to start or do</p> <p>4 you want to take a break early and come back early?</p> <p>5 What would you like?</p> <p>6 MR ARDEN: I am entirely in your Lordship's hands. There</p> <p>7 are some sort of preliminary matters that I was going to</p> <p>8 deal with, but.</p> <p>9 MR JUSTICE HILDYARD: Let's do the preliminary matters.</p> <p>10 Submissions by MR ARDEN</p> <p>11 MR ARDEN: Shall I just pick up on the debate your Lordship</p> <p>12 has just had with Mr Trower and Ms Toube just in</p> <p>13 relation to the agreed issues first. My Lord, we have</p> <p>14 obviously been looking at them in the light of the</p> <p>15 debate and I think this is something where we are all</p> <p>16 going to have to have another look before we come to</p> <p>17 a view about what the right course it is for your</p> <p>18 Lordship to take.</p> <p>19 Just looking at the issues as they have been gone</p> <p>20 through and the proposed declaration, and trying to work</p> <p>21 out where they may be impacted by the decision of the</p> <p>22 Supreme Court and where they might not, my Lord some of</p> <p>23 them are, on the face of it, worded in terms where it is</p> <p>24 quite hard to see that the Supreme Court's decision will</p> <p>25 make a difference. And I think that is the case,</p> <p style="text-align: center;">Page 66</p>	<p>1 with it in at least three stages. The first is this</p> <p>2 valuable walk through of them, so that I know roughly</p> <p>3 what is in issue and what is agreed and why. The second</p> <p>4 is for you all to identify, I hope on an agreed basis,</p> <p>5 if our premises of any of the issues, agreed or not</p> <p>6 agreed, which could be destabilised or shaken by the</p> <p>7 Supreme Court, according to the arguments that with made</p> <p>8 to it, and the third is once the Supreme Court has given</p> <p>9 its judgment, or judgments, to see where we are and that</p> <p>10 may show that there were other ones which you didn't</p> <p>11 expect.</p> <p>12 MR ARDEN: Yes.</p> <p>13 MR JUSTICE HILDYARD: In which case, well there we are. But</p> <p>14 I think we will have to take those three steps. But</p> <p>15 I think it is nevertheless valuable, partly because</p> <p>16 I think it will also help me with regards to the</p> <p>17 disputed issues, to know what the building blocks really</p> <p>18 are, to have this canter through the agreed issues,</p> <p>19 also.</p> <p>20 MR ARDEN: My Lord, I think that is right. Your Lordship,</p> <p>21 the issues are set out in a way where they sort of link</p> <p>22 the one to the next and so on.</p> <p>23 MR JUSTICE HILDYARD: Exactly, yes.</p> <p>24 MR ARDEN: So one needs to see what is agreed. As your</p> <p>25 Lordship says, it is a necessary building block to what</p> <p style="text-align: center;">Page 68</p>

<p>1 comes afterwards.</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR ARDEN: On your Lordship's sort of three stage approach,</p> <p>4 I entirely agree with that. And I think it is</p> <p>5 consistent with what LBIE suggested at the PTR.</p> <p>6 MR JUSTICE HILDYARD: It is.</p> <p>7 MR ARDEN: Which is we can see in relation to some of these</p> <p>8 issues the world may well change quite considerably</p> <p>9 after the Supreme Court have handed down their</p> <p>10 judgments. And there is no point in your Lordship</p> <p>11 handing down or giving a judgment only to find that the</p> <p>12 world has changed.</p> <p>13 MR JUSTICE HILDYARD: I just think not only no point,</p> <p>14 I think it would be a flawed approach, actually.</p> <p>15 MR ARDEN: Well, I can tell your Lordship that the issue</p> <p>16 with which I will be most concerned in my oral</p> <p>17 submissions is issue 3.</p> <p>18 MR JUSTICE HILDYARD: Mm-hm.</p> <p>19 MR ARDEN: Our analysis of issue 3 is derived entirely from</p> <p>20 the Court of Appeal's reasoning on issue 3, and that</p> <p>21 reasoning is up for grabs. There are a number of</p> <p>22 aspects to it which as I understand it are subject to</p> <p>23 appeals on one side or the other in the Supreme Court</p> <p>24 and so the world may change. Even if the Supreme Court</p> <p>25 uphold the Court of Appeal, their Lordships will no</p> <p style="text-align: center;">Page 69</p>	<p>1 MR ARDEN: And if we think your Lordship would be assisted</p> <p>2 by reading the voluminous cases, then --</p> <p>3 MR JUSTICE HILDYARD: Are they very -- how long did it all</p> <p>4 last in the Supreme Court?</p> <p>5 MR TROWER: On this argument, on this bit of it? The whole</p> <p>6 hearing took four days, I think.</p> <p>7 MR JUSTICE HILDYARD: Four days, gosh.</p> <p>8 MR TROWER: So we were quite -- but it wasn't all about</p> <p>9 this, because the most substantial part of the argument</p> <p>10 was to do with currency conversion claims. I should</p> <p>11 think we spent a little time on this, yes. I can't</p> <p>12 remember exactly.</p> <p>13 MR JUSTICE HILDYARD: It may be auseless activity, or one</p> <p>14 you decide not to impose.</p> <p>15 MR TROWER: We will certainly have a think.</p> <p>16 MR JUSTICE HILDYARD: Just have a think, in case it shines</p> <p>17 light. The thing I am most interested in is if it</p> <p>18 shines light on the building blocks for each of the</p> <p>19 contested issues.</p> <p>20 MR TROWER: Yes.</p> <p>21 MR ARDEN: My Lord, I thought the non-production of the</p> <p>22 statement of case was a sort of result of unspoken</p> <p>23 agreement that we wouldn't all be taxing each other with</p> <p>24 the submissions, contrary submissions, made in the</p> <p>25 Supreme Court.</p> <p style="text-align: center;">Page 71</p>
<p>1 doubt want to ventilate their own views about</p> <p>2 subordinated debt, the nature of subordination and so on</p> <p>3 so forth, which would inform or may inform your</p> <p>4 Lordship's view on issue 3. If, as I say, the Supreme</p> <p>5 Court uphold the Court of Appeal.</p> <p>6 There is, I think, and certainly for us, as I said,</p> <p>7 probably that is the most important issue. It is one of</p> <p>8 those issues which undoubtedly will be impacted, we</p> <p>9 think.</p> <p>10 So my Lord, that is, I think, all I wanted to say</p> <p>11 about that. But obviously it is a matter that we will</p> <p>12 keep under review and if anything changes we will</p> <p>13 obviously tell your Lordship of any change to our</p> <p>14 position on that.</p> <p>15 My Lord, as far as my submissions are concerned --</p> <p>16 MR JUSTICE HILDYARD: Is there any point, do any of you</p> <p>17 think, and I don't know what their length was, in my</p> <p>18 looking at the cases that went before the Supreme Court?</p> <p>19 Obviously not by way of forecasting what they are going</p> <p>20 to say, it will be well beyond me, but to know what was</p> <p>21 said. Shall I leave that with you?</p> <p>22 MR ARDEN: Yes.</p> <p>23 MR JUSTICE HILDYARD: I will leave it to you.</p> <p>24 MR ARDEN: Can we just think about it, I think?</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 70</p>	<p>1 MR JUSTICE HILDYARD: No, no, just if you think it would</p> <p>2 help.</p> <p>3 Well, if you are moving on to your specific point,</p> <p>4 shall we reconvene at 2 o'clock?</p> <p>5 MR ARDEN: Yes.</p> <p>6 (12.59 pm)</p> <p>7 (the luncheon adjournment)</p> <p>8 (2.00 pm)</p> <p>9 MR ARDEN: My Lord, your Lordship will have seen from the</p> <p>10 skeleton arguments and our skeleton argument in</p> <p>11 particular that in a number or in relation to a number</p> <p>12 of the issues our answer and the way in which we get</p> <p>13 there is essentially the same as LBIE's. My Lord, where</p> <p>14 that is the case, I wasn't proposing, subject of course</p> <p>15 to your Lordship, to develop our submissions to any</p> <p>16 extent orally. It seemed to me that that was probably</p> <p>17 a waste of your Lordship's time because you would simply</p> <p>18 be hearing, perhaps in a slightly different way, exactly</p> <p>19 the same points that Mr Trower has made over the course</p> <p>20 of the last day and a half or so. So what I was</p> <p>21 proposing to do was simply, when we get to it, just tell</p> <p>22 your Lordship what we agree, refer your Lordship to the</p> <p>23 various paragraphs in the skeleton and then move o.</p> <p>24 I think your Lordship is probably more interested in</p> <p>25 hearing the contrary argument rather than the same one</p> <p style="text-align: center;">Page 72</p>

<p>1 put again.</p> <p>2 My Lord, in certain instances, we are unaligned and</p> <p>3 decided to make no oral submissions one way or another.</p> <p>4 That arises in particular in relation to issue 1, and</p> <p>5 when I get to it I'll simply indicate that that is the</p> <p>6 case in relation to those issues.</p> <p>7 What that means is that the oral submissions will</p> <p>8 focus on two issues in particular. By far the largest</p> <p>9 is issue 3. I will have something to say on issue 7.5,</p> <p>10 which is the power to direct liquidators not to call.</p> <p>11 I will have something to say on that, but having heard</p> <p>12 my learned friend and compared the skeleton argument, it</p> <p>13 may be that the difference between us in the arguments</p> <p>14 that we make, the difference between us is perhaps more</p> <p>15 apparent than real, and it is interesting or notable</p> <p>16 that both of us use the same example of a case in which</p> <p>17 the liquidator might be directed, for example, to make</p> <p>18 uneven calls, essentially where every purpose can be</p> <p>19 achieved by unequal calls. So I think for that reason</p> <p>20 that will take me less time.</p> <p>21 My Lord, issue 1, first of all, your Lordship will</p> <p>22 have seen that there are a number of issues bundled up</p> <p>23 into issue 1. The first one is one of statutory</p> <p>24 construction; is LBIE's contingent liability to LBHI2 in</p> <p>25 respect of the subordinated debts a liability for the</p> <p style="text-align: center;">Page 73</p>	<p>1 advance submissions one way or the other.</p> <p>2 That's issue 1. So I think with that then I will</p> <p>3 turn to the main issue, issue 3. As your Lordship</p> <p>4 knows, that is whether the value of the contribution</p> <p>5 claim in respect of the subordinated debts is for the</p> <p>6 purposes firstly of proof in the administration of LBHI2</p> <p>7 and secondly set off in LBIE's administration, the full</p> <p>8 amount of the subordinated debts, or the value placed on</p> <p>9 the debts for the purposes of proof in LBIE's</p> <p>10 administration or some other value. We deal with this</p> <p>11 issue in paragraphs 49 to 69 of our skeleton, and also</p> <p>12 relevant to this is our analysis of the statutory scheme</p> <p>13 for contribution and calls, which we deal with</p> <p>14 separately between paragraphs 26 and 43.</p> <p>15 We have plumped for some other value, but the reason</p> <p>16 for that is simply to take account of the further</p> <p>17 contingencies which attach to LBIE's contingent claim</p> <p>18 under section 74 to reflect the fact that LBIE is not</p> <p>19 yet in liquidation, and obviously no liquidator has made</p> <p>20 a call. But, my Lord, as Mr Trower said, and I agree,</p> <p>21 your Lordship's not being asked to value those</p> <p>22 contingencies or to work out what discount might be</p> <p>23 attributable to them.</p> <p>24 So the real contest in the context of issue 3 so far</p> <p>25 as the element of the section 74 claim, which is</p> <p style="text-align: center;">Page 75</p>
<p>1 purposes of section 74.1? My Lord, we, along with</p> <p>2 everybody else, have answered that question in the</p> <p>3 affirmative. We accept that the liability is within the</p> <p>4 scope of section 74.1, or as I think Mr Atherton puts</p> <p>5 it, in principle it is within it. That's as far as we</p> <p>6 went with issue 1. It seemed to us that having got</p> <p>7 there, one moves on to issue 3.</p> <p>8 There are, though, three other issues raised under</p> <p>9 issue 1. There is the expressed-implied terms argument</p> <p>10 that LBL advances. There's the circuity of action</p> <p>11 issue, again LBL's, and then there's the clause 5.2</p> <p>12 argument, which Mr Atherton advances.</p> <p>13 My Lord, two of those, clause 5.2 and circuity,</p> <p>14 postdated our position paper, so we took no position on</p> <p>15 those in the position paper, and those are two in which</p> <p>16 we intend to be and remain unaligned, we simply don't</p> <p>17 intend to address them. We're content that</p> <p>18 your Lordship will hear full argument on both sides and</p> <p>19 we're content to abide by whatever decision</p> <p>20 your Lordship makes in respect of them.</p> <p>21 So far as implied express terms are concerned, in</p> <p>22 our position paper we've rather more aligned ourselves</p> <p>23 with LBIE. Having reflected, we've decided to change to</p> <p>24 neutral on that, and identified that position in the</p> <p>25 skeleton. So we remain neutral and don't propose to</p> <p style="text-align: center;">Page 74</p>	<p>1 attributable to the subordinated debt, the real contest</p> <p>2 is between nil and the full value, and that's what I'm</p> <p>3 proposing to address.</p> <p>4 My Lord, two scenarios are contemplated by the</p> <p>5 wording of issue 3. There's firstly LBIE's proof in</p> <p>6 LBHI2's administration in respect of the section 74</p> <p>7 liability, and then set off in LBIE's administration, so</p> <p>8 set off between LBHI2's incoming claim in respect of its</p> <p>9 provable debts against LBIE's outgoing claim in respect</p> <p>10 of the section 74 liability. And so whichever it is,</p> <p>11 proof in our administration or proof in set off in</p> <p>12 LBIE's administration, what needs to be considered is</p> <p>13 firstly LBHI2's claim in respect of the subordinated</p> <p>14 debt and then the element of LBIE's claim which is</p> <p>15 attributable to the subordinated debt. Those are the</p> <p>16 incoming and outgoing claims.</p> <p>17 My Lord, in both cases, it's common ground that the</p> <p>18 claims, the incoming and outgoing claims, are contingent</p> <p>19 and require to be estimated and valued, and I think</p> <p>20 common ground also that the estimation process is the</p> <p>21 same.</p> <p>22 So far as set off, and it doesn't really matter</p> <p>23 which estimation rules you look at. So far as set off</p> <p>24 is concerned, in an administration the relevant rules</p> <p>25 are 2.81 and 2.85. They're in the bundle. It may just</p> <p style="text-align: center;">Page 76</p>

<p>1 help now to have a very quick look at them. It's 2 authorities bundle 5, tabs 157 and 158. 157 is 2.81, 3 and that's estimating the quantum of a proof in 4 circumstances where the debt, subject to a contingency 5 or for any other reason, doesn't bear a certain value. 6 This is the basic rule, well known: you estimate the 7 value and you have the power to revise, and then it 8 invokes the hindsight principle by reference to any 9 change of circumstances or information becoming 10 available to him. And then 2, the effect of the 11 estimation, where it is estimated, the amount provable 12 in the administration in the case of VAT debt is that of 13 the estimate for the time being.</p> <p>14 At tab 158, rule 2.85, this is the set off 15 provisions applicable to distributing administration, 16 it's provisions with which your Lordship is familiar. 17 But if your Lordship looks at subrule 5 over the page, 18 where on each side of the account you have a debt which 19 doesn't bear a certain value, you apply 2.81. So the 20 same estimation process will apply to incoming and 21 outgoing claims for the purposes of set off.</p> <p>22 My Lord, much of our analysis depends upon and flows 23 from what was decided in Waterfall I, but before I get 24 there, I think it may assist your Lordship if I just 25 outline what our submissions are in relation to issue 3</p> <p style="text-align: right;">Page 77</p>	<p>1 in different levels, 3, 4, 5, whatever, doesn't of 2 itself change the nature of the debt. In other words if 3 you find a presently payable debt, say at level 5 or 6 4 or whatever, the fact that it occupies that level and 5 not a higher level doesn't turn it into a contingent 6 debt. So it isn't contingent simply because its payment 7 is dependent upon trickle down.</p> <p>8 MR JUSTICE HILDYARD: Yes.</p> <p>9 MR ARDEN: In the case of provable contingent debts, and 10 contingent properly so called, the insolvency scheme 11 provides a mechanism for the fixing of the value of the 12 debt by the estimation provisions your Lordship's just 13 turned to, and revaluation where necessary, or where 14 appropriate, not sanctioned by the terms of the rules 15 and a well known, well established process. It's the 16 estimated amount from time to time which is payable in 17 respect of that debt. That applies to all provable 18 contingent debts. One can see the operation of that 19 pretty clearly from Danka, which I'll come to in 20 a moment.</p> <p>21 Therefore, our submission is that for the purposes 22 of section 74 and for a call made under section 74, the 23 amount of the liability in respect of contingent debts 24 is measured by reference to the amount of the estimate 25 existing at the time of the call. So if you ask at the</p> <p style="text-align: right;">Page 79</p>
<p>1 so that you have them now and upfront, as it were. It's 2 this: the amount of the liability under section 74.1, 3 and therefore the maximum amount which can be the 4 subject of a call, is measured we say by reference to 5 the amount that's payable in respect of the company's 6 debts and liabilities. So there is a liability, but the 7 amount is done by reference to amounts payable in 8 respect of debts and liabilities. The calculation of 9 the amount payable falls to be made at the time of the 10 call, and so the point at which the call is made, you 11 ask yourself what is the amount as set out, or as 12 described, in section 74.1.</p> <p>13 At any given time the company's liabilities will or 14 may comprise a bundle of different types of debts and 15 liabilities falling into one or more of the levels of 16 the waterfall. So, my Lord, at each level of the 17 waterfall, it's perfectly possible to have present 18 debts, future debts, contingent debts, and claims in 19 an unliquidated amount. In order to measure the extent 20 of the liability to which section 74.1 refers, we submit 21 that you have to ask what at the time of the call is 22 payable in respect of each category of debt in each 23 level.</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MR ARDEN: My Lord, the fact that debts may find themselves</p> <p style="text-align: right;">Page 78</p>	<p>1 time of a call and in respect of a contingent debt what 2 is payable in respect of that debt, it's the estimated 3 amount, and we submit clearly not the total amount that 4 might become payable if the contingencies occur.</p> <p>5 The same point can be made in respect of provable 6 future debts. As your Lordship knows, for the purposes 7 of proof, a future debt is admitted but then discounted 8 to bring it back, to give a present day value.</p> <p>9 So again, to ask the same question, for the purposes 10 of section 74, if you ask what is payable in respect of 11 that future debt and therefore what is the amount of the 12 liability that can be called in respect of the future 13 debt, we would submit that it's the discounted value and 14 not the full value, because that's what the statutory 15 scheme provides.</p> <p>16 Now, my Lord, in this case the Court of Appeal have 17 held that in respect of the subordinated debts, which 18 are provable, it is a contingent debt, and a contingent 19 debt properly so-called, and it's one to which the 20 estimation process applies, as that process applies to 21 all contingent debts. That is an essential part of the 22 Court of Appeal's decision.</p> <p>23 The Court of Appeal have also decided how estimation 24 works in this case, and in the context of this 25 particular debt. The debts must be estimated at nil</p> <p style="text-align: right;">Page 80</p>

<p>1 until the relevant contingencies are satisfied. The</p> <p>2 relevant contingencies are the payment of senior</p> <p>3 creditors, that is all creditors occupying the levels</p> <p>4 above level 7A, and so including statutory interest and</p> <p>5 including non provable debts. And again, my Lord,</p> <p>6 that's an essential part of the Court of Appeal's</p> <p>7 reasoning.</p> <p>8 And so it follows, we submit, that until the</p> <p>9 contingencies are satisfied, the right value, the</p> <p>10 correct value, the only value that can be attributed to</p> <p>11 those debts for the purposes of the section 74.1</p> <p>12 liability is nil, because that is the estimate and if</p> <p>13 one asks oneself the question at the time of a call,</p> <p>14 well what is payable in respect of the subordinated debt</p> <p>15 at any time until the contingency is satisfied, the</p> <p>16 answer is nil and therefore there is no amount that can</p> <p>17 be attributed to that liability for the purposes of</p> <p>18 section 74.1.</p> <p>19 If it were otherwise, my Lord, then the section 74</p> <p>20 liability would extend to the full amount of the</p> <p>21 contingent debt, here the subordinated debts, even if it</p> <p>22 were clear at the time of the call that the</p> <p>23 contingencies could never be satisfied. If that's</p> <p>24 right in the case of the subordinated debts, then it's</p> <p>25 difficult to see why the same conclusion wouldn't follow</p> <p style="text-align: center;">Page 81</p>	<p>1 of our analysis, or what's critical in our analysis, is</p> <p>2 the focus on the nature of the debt, the contingent</p> <p>3 nature of the debt, and the position of the debt in any</p> <p>4 given level is completely irrelevant to that analysis.</p> <p>5 We'll see it in a moment, but there's a passage in</p> <p>6 Lord Justice Lewison's judgment, paragraph 42, which</p> <p>7 I'll come to in a moment, where he recognises the</p> <p>8 distinction and says that the contingency, or points</p> <p>9 out, correctly in my respectful submission, that the</p> <p>10 contingency in the case of the subordinated debt stems</p> <p>11 not from its level in the waterfall but because the</p> <p>12 parties have by their agreement created a contingent</p> <p>13 liability. That's the critical difference, that's why</p> <p>14 the argument about levels doesn't affect the analysis,</p> <p>15 it's wrong to conflate the two.</p> <p>16 So, my Lord, that in outline are our submissions.</p> <p>17 Can I start then by considering the incoming claim,</p> <p>18 which is LBHI2's claim against LBIE.</p> <p>19 MR JUSTICE HILDYARD: It will probably become clearer when</p> <p>20 you take me to Lord Justice Lewison's judgment, and I'm</p> <p>21 sorry to be slow, but you draw this crucial distinction,</p> <p>22 do you? Dependency is in a sense an economic matter,</p> <p>23 depending on there being at each level enough money to</p> <p>24 get to the next. Contingency is a feature of the</p> <p>25 particular obligation.</p> <p style="text-align: center;">Page 83</p>
<p>1 in relation to, for example, the contingent debts like</p> <p>2 the indemnities that were considered in Danka.</p> <p>3 I understood Mr Trower's submission to be yes, that's</p> <p>4 right, even if you know at the time that the senior</p> <p>5 debts are not going to be paid and that there is no</p> <p>6 prospect of their being paid from any source, a call</p> <p>7 could nevertheless be made. And we submit that that is</p> <p>8 wrong, it must be wrong.</p> <p>9 It doesn't follow from this analysis, as has been</p> <p>10 suggested by LBIE, that the same point applies to any</p> <p>11 debt in any level of the waterfall, until it's clear</p> <p>12 that there will be sufficient funds to trickle down to</p> <p>13 feed that level. Essentially I'm repeating a point that</p> <p>14 I've already made, but that conflates the notion of</p> <p>15 dependency. If I occupied level 5, payment of my debt</p> <p>16 is dependent upon money trickling down or there being</p> <p>17 something left over after satisfaction of all the levels</p> <p>18 above me. That is dependency, payment is dependent upon</p> <p>19 a trickle down. But that is not the same, we would</p> <p>20 submit, as contractual contingency.</p> <p>21 And so the consequence that's said to follow from</p> <p>22 our analysis, which is that that must apply to every</p> <p>23 debt in any level of the waterfall, because of</p> <p>24 dependency on trickle down, that simply doesn't follow,</p> <p>25 we would submit, from the analysis. The critical part</p> <p style="text-align: center;">Page 82</p>	<p>1 MR ARDEN: Exactly, my Lord, that's right. I'm sorry to use</p> <p>2 a homely example. If Mr Trower and I go out to</p> <p>3 a restaurant and have a good meal, payment is dependent</p> <p>4 upon both of us having gone out with the cash, and our</p> <p>5 not doing a runner. That's dependency, that's the sort</p> <p>6 of economic dependency. The restaurant owner might be</p> <p>7 surprised to hear that in that case his right to receive</p> <p>8 payment was in any sense contingent, it's just dependent</p> <p>9 upon the two events that I've suggested. That is</p> <p>10 different from a case, the same case, but where we go to</p> <p>11 the restaurant owner at the outset and say look we've</p> <p>12 just put £20 on a horse running in such and such a race,</p> <p>13 we won't be able to pay you unless the horse wins, is</p> <p>14 that okay? And he says yes, I'm happy with that.</p> <p>15 That's a true contingent liability, the second. The</p> <p>16 first is an economic dependency. Honesty dependency as</p> <p>17 well, but your Lordship gets the point. It's a fairly</p> <p>18 banal example, but it's exactly the same. So</p> <p>19 your Lordship is right, that is the critical</p> <p>20 distinction.</p> <p>21 So, my Lord, the incoming claim, so that's LBHI2's</p> <p>22 claim against LBIE. The current position is that LBHI2</p> <p>23 has a small unsubordinated claim of about 38 million</p> <p>24 which ranks with the other ordinary unsecured creditors.</p> <p>25 There's no dispute that this claim is provable, because</p> <p style="text-align: center;">Page 84</p>

<p>1 the contributory rule doesn't apply, and therefore in 2 terms of set off will fall on the LBHI2 side of the 3 account. What we're considering, as your Lordship 4 knows, is another element to the claim, and I make that 5 point because, as Mr Trower rightly observed, one talks 6 about sub-debt contribution claims. It tends to obscure 7 the fact that it is in fact just simply an element of 8 a larger claim, albeit potentially the largest element. 9 So far as that element is concerned, I think I will 10 now go to Waterfall I. My purpose in taking 11 your Lordship through the Waterfall I judgments is to 12 show how LBHI2's subordinated debt claim came to be 13 characterised as a contingent debt properly so-called, 14 and to take your Lordship through the relevant passages 15 which lead to that conclusion. I think because, as 16 I said, it is a critical part of our analysis, I think 17 it would help your Lordship to be taken through it, even 18 if your Lordship has already had an opportunity of 19 either glancing or reading through the relevant 20 paragraphs. 21 Can I start first with Mr Justice David Richards' 22 judgment. I am I think like everybody using the trial 23 judgment bundle, so that's T1, tab 8. He sets out 24 between paragraphs 27 to 47 the background to the 25 subordinated debt agreements. Can I just -- I don't</p> <p style="text-align: center;">Page 85</p>	<p>1 Can I just draw your Lordship's attention to the 2 undertakings which are identified at paragraph 54 of the 3 judgment. These are undertakings by LBHI2, and 4 essentially they are undertakings not to do things which 5 might, as Mr Justice David Richards described, subvert 6 the subordinated status of the liabilities, and then he 7 refers to two of them. I will take your Lordship to 8 them. Your Lordship will see the relevance of that in 9 a moment, because it was those that were relied upon by 10 Mr Justice David Richards, and he relied upon those. 11 Essentially those were what achieved the subordination, 12 because his decision was to the effect that LBHI2 13 couldn't prove because of the undertakings, and that was 14 the way in which subordination was achieved. 15 The issues and the arguments are identified and 16 dealt with on this part of the case between 17 paragraphs 55 to 87. Can I just pick up at 59 18 an argument that was run on behalf of LBHI2 and LBHI1. 19 The contention, as your Lordship knows, was that the 20 subordinated debt was not subordinated to statutory 21 interest. And in support of that argument reliance was 22 placed on the provisions for statutory interest, which 23 in the case of administration is 2.88. If I could pick 24 it up about six lines down, the sentence starting "the 25 relevant provisions". If your Lordship would just</p> <p style="text-align: center;">Page 87</p>
<p>1 need to go through that, I'm giving it to your Lordship 2 just simply as an introduction of the more important 3 points, but can I just ask your Lordship to note 4 paragraph 27. Your Lordship will see in the last three 5 lines the common ground. We accepted that the claim is 6 subordinated; it ranks behind provable debts. But the 7 dispute was whether it ranked ahead of others, including 8 in particular the claims for statutory interest. 9 My Lord, the relevant terms are then set out. 10 Your Lordship's seen them in the agreement itself, but 11 they're also set out in the judgment. It's the section 12 which runs between paragraphs 48 through to 54. As 13 I said, your Lordship's been taken through this, but 14 just to remind your Lordship, you have an agreement 15 which comprises the standard and variable terms, that's 16 described at paragraph 49 of the judgment. Clause 1, 17 with its definitions, including liabilities, which was 18 obviously significant. Clause 4, he describes at 19 paragraph 51, but then, subject to the subordination 20 clauses in paragraph 5. I should have said these are 21 all standard terms. Then he summarises the effect of 22 clause 44.7 and then the subordination provisions are 23 set out, I think in full, at paragraph 53. Again, 24 your Lordship's seen all these, I don't think I need to 25 take you through them.</p> <p style="text-align: center;">Page 86</p>	<p>1 perhaps read that down to the end of the page. 2 (Pause). 3 MR JUSTICE HILDYARD: Yes. 4 MR ARDEN: Your Lordship will see it is the italicised 5 wording, and the argument obviously is this: well, if 6 statutory interest is only payable after payment of 7 debts proved, and if LBHI2 can prove in respect of the 8 subordinated debt, then it cannot be subordinated 9 beneath statutory interest. 10 The argument is then picked up again, and again 11 identified at paragraph 65. So you have to read the 12 subordination provisions in the context of the English 13 statutory scheme, and then again the focus on the 14 wording of 288.7 and its counterpart provision 15 applicable to a liquidation. That's section 1892. 16 At 66 to 67, Mr Justice David Richards cautions 17 against reliance or overreliance on domestic provisions 18 when construing international debt instruments. But he 19 then deals with the submissions anyway at paragraphs 68 20 and 69, and perhaps if your Lordship will just read 21 those. 22 (Pause). 23 MR JUSTICE HILDYARD: Yes. 24 MR ARDEN: So what your Lordship will see from that, one 25 sees the argument, as I've already identified it, is</p> <p style="text-align: center;">Page 88</p>

<p>1 well, look at the wording of the relevant rules or 2 section. You can't subordinate me below statutory 3 interest because you have to pay me before. That's 4 essentially it. Mr Justice David Richards' response, or 5 his answer and decision in relation to that, is that 6 that just doesn't work. It doesn't work not because the 7 debt is a contingent debt, but because of the 8 undertakings, you simply cannot prove in competition, 9 and that's why that rule doesn't assist, or didn't 10 assist LBHI2, and, by extension, LBHI1. 11 My Lord, that's almost it so far as this part of the 12 submission is concerned on the first instance judgment. 13 I'll take your Lordship then to how it's dealt with 14 differently in the Court of Appeal. 15 But can I just, while I'm in Mr Justice David 16 Richards' judgment, just take your Lordship to 17 paragraph 76. This is a different point, but it's 18 a point taken by Mr Isaacs about the definition of 19 liabilities, and he says that it can't mean everything, 20 because that would mean full amount of future debts, 21 maximum possible amount of contingent debts, and so on. 22 That's in paragraph 76. 23 The response is at 77, and the reason I take 24 your Lordship to it is because in my submission it's 25 an accurate statement of the statutory scheme so far as</p> <p style="text-align: center;">Page 89</p>	<p>1 Then if I can turn to the Court of Appeal decision, 2 which is in the same bundle but tab 9. On the nature of 3 subordination, the only full judgment is given by 4 Lord Justice Lewison. The others agreed with him on 5 this, but with some additional comments which I think 6 are immaterial for present purposes. The agreement is 7 recorded Lord Justice Briggs at 133 and 8 Lord Justice Moore-Bick at 246. 9 As your Lordship knows, the Court of Appeal agreed 10 with Mr Justice David Richards as to the level of 11 subordination. So 7A, below statutory interest and 12 below non-provable debts. 13 But, my Lord, critically, obviously, it differed 14 from Mr Justice David Richards in its analysis as to how 15 subordination has been achieved in this case. This 16 issue is dealt with between paragraphs 9 and 63 of 17 Lord Justice Lewison's judgment. The early paragraphs, 18 9 to 14, just set the scene, and then the next section 19 between 15 and 27 deals with the insolvency code, as he 20 describes it, including also the waterfall, which 21 your Lordship has seen, it's well known. But 22 your Lordship sees the relevant passage or paragraph 23 from Nortel set out at paragraph 18. 24 He then deals with the extent of subordination in 25 the passage of the judgment headed "the extent of</p> <p style="text-align: center;">Page 91</p>
<p>1 it applies to contingent and future debts, and I think 2 if your Lordship would just read through paragraph 77. 3 (Pause). 4 It's just a neat -- sorry. 5 MR JUSTICE HILDYARD: Do you want me to read 78 as well? 6 MR ARDEN: I don't, but -- no, I don't, my Lord. I'm 7 relying on 77 only because it's, as I said, a neat 8 encapsulation of the statutory scheme, and it's a point, 9 when I'm summarising our case, I made the points about 10 the scheme and estimation and so on, and this is I think 11 quite a useful paragraph. 12 So far as this aspect of the case then is concerned, 13 if your Lordship will look at the declaration which 14 reflects this, it's the same bundle but tab 11, the 15 second page of the order, and it's declaration (i). It 16 starts with a description of the extent of the 17 subordination, and then goes on to reflect the part of 18 the judgment I've just taken your Lordship to where it 19 says: 20 "Must be paid in full before ... LBHI2 is entitled 21 to prove and require admission of such proof in respect 22 of the subordinated loan agreements ... available for 23 insolvency set off." 24 So, my Lord, that's the way the nature of 25 subordination was dealt with at first instance.</p> <p style="text-align: center;">Page 90</p>	<p>1 subordination" starting at paragraph 28. Your Lordship 2 will see at 29 a sort of admonishment, I think, that one 3 needs to keep distinct in all of this, or in this 4 analysis, the two different capacities that LBHI2 has. 5 One is as a creditor, albeit as a subordinated one, and 6 the other is as a member, and it's important not to 7 conflate the two. He says, the third line down: 8 "The extent to which the debt owed by LBIE to LBHI2 9 has been subordinated depends upon the interpretation of 10 the loan agreement." 11 So it's a contractual matter. 12 He then sets out in the next few paragraphs both the 13 regulatory background, quite shortly, and then the 14 provisions, again set out, mostly the same provisions 15 set out in the passages up to 37. 16 Then, if I can, can I pick the judgment up at 38, 17 where he discusses the different ways in which 18 subordination can be achieved and the way in which those 19 different ways are reflected in this case. Perhaps 20 I could just ask you to -- 21 MR JUSTICE HILDYARD: We looked at this yesterday, but I had 22 better read it again. (Pause). 23 Yes. 24 MR ARDEN: Your Lordship will see, if I just pause with the 25 judgment for a moment, your Lordship will have seen in</p> <p style="text-align: center;">Page 92</p>

<p>1 38 a reference to Goode. This passage of the judgment, 2 and then the nil estimate, which I'll come to in 3 a moment, is in fact reflected in the passage from Goode 4 to which he refers. We do have that in the authorities 5 bundle 5 at 10A. It may just help your Lordship to go 6 to that now, just so that we have, while it's relevant, 7 a bit of context for the judgment. That's 10A, I have 8 a blue tab, I think. 9 MR JUSTICE HILDYARD: In volume 5? 10 MR ARDEN: Yes, authorities bundle 5. Oh, sorry, it's 110A. 11 MR JUSTICE HILDYARD: Thank you. 12 MR ARDEN: Sorry, my first 1 was hidden. The whole passage 13 is dealing with subordination. At 560 he starts with 14 the debate about whether you can subordinate, or whether 15 it's a contravention of the pari passu principle. Then 16 if I can pick up on page 210, the second page of the 17 extract, "despite these decisions," and it's that 18 passage down to the end of the page and the sentence 19 just over -- perhaps actually it's worth reading it 20 right down to the end of the section. 21 (Pause). 22 MR JUSTICE HILDYARD: Yes. 23 MR ARDEN: So your Lordship will see the three common types 24 of subordination identified: trust, contractual 25 contingency and restriction on proceeding or lodging</p> <p>Page 93</p>	<p>1 debt in this case, or the subordinated debt agreements 2 in this case give rise to a contingent liability, and 3 that, one sees in 38: 4 "If my judgment clause 4.51 means the right to 5 repayment is a contingent right, contingent on the 6 satisfaction of 5.1B and if appropriate 5.1A as well." 7 So it's a properly contingent liability. The reason 8 that it doesn't matter that the undertakings don't 9 apply, sorry for the double negative, is because of the 10 consequence of it being a contingent liability, and that 11 consequence is set out in paragraph 41. As a contingent 12 liability, its value has to be estimated. Its value 13 will always be nil until satisfaction of the 14 contingency, and therefore the fact that it is 15 a provable debt doesn't matter, because it's always 16 going to come in at nil and therefore not compete with 17 senior creditors until the senior creditors are paid 18 off. That in summary is what paragraph 41 says, and 19 that's why he says: 20 "I do not consider that it matters whether or not 21 a proof is lodged." 22 It doesn't matter because of the characterisation of 23 the liability and the consequences that flow from that. 24 So, my Lord, that's why in my opening submissions 25 I described both the characterisation of the right as</p> <p>Page 95</p>
<p>1 proof. Those three are then reflected in the passage in 2 Lord Justice Lewison's judgment that your Lordship's 3 just read, and your Lordship will have seen in the case 4 of subordination by making the contract contingent, 5 Professor Goode describing how the estimation process 6 should work. As I say we'll pick that up in the 7 judgment in a moment. 8 Then paragraph 39 the judgment. This is where 9 Lord Justice Lewison disagrees with 10 Mr Justice David Richards about the prohibition on the 11 lodging of the proof, and so the effect of the 12 undertakings. Perhaps if your Lordship could just read 13 that. 14 (Pause). 15 My Lord, thank you. If I can ask your Lordship to 16 look at paragraph 41, this is the nil estimate paragraph 17 and also the paragraph that I mentioned when I was 18 outlining my submissions. 19 MR JUSTICE HILDYARD: Yes, not because of the position in 20 the rankings. 21 MR ARDEN: Precisely. 22 MR JUSTICE HILDYARD: Yes. 23 MR ARDEN: So if one takes particularly 38 and 41 together. 24 But in the context of 39, your Lordship can see how he 25 deals with the problem. In 38 he says the subordinated</p> <p>Page 94</p>	<p>1 a contingent right by the Court of Appeal and the 2 consequences so far as estimation is concerned, that's 3 why I described them, as indeed they obviously are, as 4 an essential part of the court's reasoning. 5 Mr Trower observed, and I agree, that for 6 a contingent liability it's unusual, because for most 7 contingent liabilities the process of estimation is not, 8 as he described it, binary, it's not 0 or 100 per cent, 9 it's often somewhere between the two, and if it's a sort 10 of contingency that's getting more likely it moves up, 11 and eventually the contingency might occur, in which 12 case it's 100 per cent, but 100 per cent on revaluation. 13 My Lord, I accept that. But nevertheless, if one looks 14 at the judgment of Lord Justice Lewison, this is 15 properly a contingent liability, and he's not created 16 a different statutory scheme to deal with it. He's 17 applied the same statutory scheme that applies to all 18 contingent liabilities, but simply in this case, so far 19 as estimation is concerned, prescribed the form of 20 estimation in binary terms. But it doesn't make it 21 different from any other contingent liability in terms 22 of either the fact that it is or the fact that it's 23 subject to the estimation process. 24 MR JUSTICE HILDYARD: Why would one expect it to be, when 25 lodged, valued at nil?</p> <p>Page 96</p>

<p>1 MR ARDEN: Well, my Lord, if you simply cannot tell when 2 lodged whether it's going to be paid or not, then you 3 simply value it, you give it a nil value because you 4 can't give it a higher one. 5 (Pause). 6 MR JUSTICE HILDYARD: But is there any particular feature of 7 the contingency, or the debt in general, which makes one 8 adopt the nil value? 9 MR ARDEN: Well, my Lord, I've said it's unusual because in 10 the normal case one would attribute a value to 11 a contingent debt. It may be nil, it could be nil if 12 the contingency was so remote as not to warrant a value 13 being placed on it. So, my Lord, I think it can be nil. 14 MR JUSTICE HILDYARD: Maybe it's excessively strictly 15 construing the words, but one would always expect 16 an instrument, subject to contingencies, to have some 17 value and the difficulty of estimating is very, very 18 great and measuring contingencies is very, very 19 uncertain. But what struck me is the Lord Justice says 20 that when the proof is lodged, one would expect the 21 office holders to value it at nil, and I really am 22 asking is that sort of language used in a particular way 23 which I'm trying to overpass, or is it some feature of 24 the instrument or the arrangements which lead to that 25 conclusion?</p> <p style="text-align: right;">Page 97</p>	<p>1 MR ARDEN: But I accept, I understand your Lordship's 2 reaction to it, because one can take -- there are many 3 contingent liabilities which are very difficult to 4 value, and the classic ones are -- 5 MR JUSTICE HILDYARD: They've kept the courts going for 6 years and years. 7 MR ARDEN: Absolutely. 8 MR JUSTICE HILDYARD: But it's the first time I've come 9 across a sort of absolute binary solution. 10 MR ARDEN: Well, one of the classic cases is the separation 11 agreements, where the contingency is the wife remaining 12 chaste, which I think featured in -- 13 MR JUSTICE HILDYARD: I don't think I'm going to say 14 anything. 15 MR ARDEN: But, my Lord, it just shows, that is just 16 an extreme -- it's the example that people trot out in 17 this area. 18 MR JUSTICE HILDYARD: Yes. 19 MR ARDEN: It's an example. You look at that contingency 20 and say well, how on earth do I value that? Insurance 21 policies are fine, you just get an actuary to come and 22 tell you what the actuarial value is. 23 MR JUSTICE HILDYARD: When it's literally in the air, 24 I agree. I just wondered whether I was missing 25 something, but I'm simply missing that this was the</p> <p style="text-align: right;">Page 99</p>
<p>1 MR ARDEN: Well, my Lord -- 2 MR JUSTICE HILDYARD: It may not matter, but ... 3 MR ARDEN: I acknowledge that the application of the 4 estimation process in a binary way is unusual, and one 5 can see why it's been done in this case, because that is 6 the way in which subordination is achieved, because if 7 you give it anything more than a nil value, you allow 8 the subordinated creditor back in, as it were. 9 MR JUSTICE HILDYARD: I quite understand that that's what 10 one would like to do in order to preserve the objectives 11 of the regulatory instruments under which these are 12 common forms, because my understanding is that the 13 objective is to ensure that the subordination is so 14 complete that the capital can be counted, but I'm just 15 wondering how you get there, that's all. It may not 16 matter, but I just ... 17 MR ARDEN: My Lord, the best I could probably describe it, 18 I think, is it's a sort of robust application of the 19 estimation process. 20 MR JUSTICE HILDYARD: Right. 21 MR ARDEN: In order to achieve -- 22 MR JUSTICE HILDYARD: It should be, therefore it is. 23 MR ARDEN: It is, to achieve the result. That is why it 24 doesn't matter that the undertakings didn't apply. 25 MR JUSTICE HILDYARD: Right.</p> <p style="text-align: right;">Page 98</p>	<p>1 result which accomplished the objective. 2 MR ARDEN: Yes, but as I said, it is through the estimation 3 process, it's not by some other means, and that is the 4 means or that is the approach that the Court of Appeal 5 have adopted. One can ask questions about it, but if 6 I may put it in a rather blunt way, at the end of the 7 day it is what the Court of Appeal have decided by the 8 application of the process. 9 MR JUSTICE HILDYARD: Well, that's definitely so. 10 MR ARDEN: My Lord, I'm sorry, that is on my side the 11 coward's way out. 12 MR JUSTICE HILDYARD: Yes. Let me see if I have it. You 13 say that certainly the analysis and the result is not 14 affected by any confusion between the economic and the 15 legal. 16 MR ARDEN: No, it's absolutely clear how one gets to the 17 conclusion, and it is, as I said, it's not because of 18 economic -- a contingency -- 19 MR JUSTICE HILDYARD: It's not dependency. 20 MR ARDEN: Exactly. 21 MR JUSTICE HILDYARD: It isn't an assessment of the rate of 22 flow down the waterfall. It is looking at the terms of 23 the bond, it's written in the bond, and its value is 24 nil, and as you rightly say, the Court of Appeal says 25 so.</p> <p style="text-align: right;">Page 100</p>

<p>1 MR ARDEN: Yes.</p> <p>2 So, my Lord, as I said, the Court of Appeal's</p> <p>3 analysis is obviously critical, and it tells you why,</p> <p>4 when one's looking at the incoming claim, it shows you</p> <p>5 how we get to where we get, how one gets to the nil</p> <p>6 valuation with no prospect of revaluation until the</p> <p>7 contingency is satisfied, which is obviously payment of</p> <p>8 everybody above us.</p> <p>9 MR JUSTICE HILDYARD: And this was argued in the</p> <p>10 Supreme Court, was it?</p> <p>11 MR ARDEN: My Lord, I'm afraid I wasn't there. But I gather</p> <p>12 that, I think there was a debate about estimation and</p> <p>13 nil and 100 per cent. Mr Trower will tell me --</p> <p>14 MR JUSTICE HILDYARD: I'll ask Mr Trower a bit more about</p> <p>15 that, because they answer in that place, that that's</p> <p>16 what the Court of Appeal said so, is a matter of</p> <p>17 indeference to them, I suppose.</p> <p>18 MR TROWER: My Lord, there was a cross-appeal on this issue</p> <p>19 on the question of whether or not the sub-debt was</p> <p>20 provable.</p> <p>21 MR JUSTICE HILDYARD: Right, thank you.</p> <p>22 MR ARDEN: My Lord, there are just a few other parts.</p> <p>23 That's the central part of the Court of Appeal judgment</p> <p>24 for my purposes. There are just a few other passages</p> <p>25 that I wanted to take your Lordship to, if I may.</p> <p style="text-align: center;">Page 101</p>	<p>1 contingency, and there's a recognition of that</p> <p>2 distinction in that paragraph.</p> <p>3 If your Lordship would just give me a moment, I just</p> <p>4 want to pick up the other ... my Lord, I'm hopping</p> <p>5 around a bit, but if your Lordship would go back to 95.</p> <p>6 This is Lord Justice Lewison. This is the part of his</p> <p>7 dissenting judgment on currency conversion claims.</p> <p>8 MR JUSTICE HILDYARD: 95?</p> <p>9 MR ARDEN: 95. I take your Lordship to this not because of</p> <p>10 the issue with which it's dealing, but because it just</p> <p>11 contains -- Mr Dicker, who was arguing in favour of</p> <p>12 currency conversion claims, relied on contingent debts</p> <p>13 as part of his argument by way of analogy. He describes</p> <p>14 what happens. He makes a submission about contingent</p> <p>15 debts and how you can come back for more. But then he</p> <p>16 says -- it's the bit where Lord Justice Lewison explains</p> <p>17 how that operates, this is just a description of the</p> <p>18 revaluation process.</p> <p>19 MR JUSTICE HILDYARD: I'd better read that.</p> <p>20 MR ARDEN: If your Lordship would, thank you. (Pause).</p> <p>21 MR JUSTICE HILDYARD: Right. What do I get from that?</p> <p>22 MR ARDEN: It's again, rather like the passage from</p> <p>23 Mr Justice David Richards' judgment, it's just a useful</p> <p>24 summary of the treatment of contingent debts and the</p> <p>25 estimation process.</p> <p style="text-align: center;">Page 103</p>
<p>1 MR JUSTICE HILDYARD: Yes.</p> <p>2 MR ARDEN: At paragraph 164, this is Lord Justice Briggs'</p> <p>3 judgment, this is dealing with foreign currency</p> <p>4 conversion claims. Lord Justice Lewison dissented on</p> <p>5 the conversion claims. This is a response to</p> <p>6 a suggestion by Lord Justice Lewison in his judgment</p> <p>7 that the judge's construction runs counter to Danka. If</p> <p>8 I can just ask your Lordship to read through that.</p> <p>9 MR JUSTICE HILDYARD: Down to 166?</p> <p>10 MR ARDEN: No, sorry, just 164.</p> <p>11 MR JUSTICE HILDYARD: Okay. (Pause).</p> <p>12 MR ARDEN: My Lord, it's a short point, it's really just the</p> <p>13 bit at the end where he makes plain -- and it's the</p> <p>14 dependency/contingency point -- that this was certainly</p> <p>15 in Lord Justice Briggs' mind, because he characterises</p> <p>16 the currency conversion claims, correctly in our</p> <p>17 submission, as not being contingent.</p> <p>18 MR JUSTICE HILDYARD: Yes. The market is, the market is,</p> <p>19 and it's dependent on that, but it's no feature of the</p> <p>20 bond.</p> <p>21 MR ARDEN: Exactly, and the same can be said for statutory</p> <p>22 interest, and this is why the conflation between the two</p> <p>23 just doesn't work, because as I said at the outset, of</p> <p>24 course in levels you will find truly contingent debts,</p> <p>25 but occupation of a level is not the same as</p> <p style="text-align: center;">Page 102</p>	<p>1 My Lord, that's all I was going to take</p> <p>2 your Lordship to on Waterfall I. I've taken</p> <p>3 your Lordship through the analysis and then random</p> <p>4 passages which summarise the principles applicable to</p> <p>5 other parts of our submissions.</p> <p>6 MR JUSTICE HILDYARD: I'm sorry, I'm going to ask a really</p> <p>7 stupid question. I have got myself in a muddle. Can</p> <p>8 you revisit dependencies?</p> <p>9 MR ARDEN: I'm sorry, I haven't ...</p> <p>10 MR JUSTICE HILDYARD: Contingencies, you assess them, unless</p> <p>11 you're a binary man, and you may under the hindsight</p> <p>12 principle revisit them. Is it the same with</p> <p>13 dependencies or not?</p> <p>14 MR ARDEN: I'm not sure, my Lord, how it could be, because</p> <p>15 you're not revaluing. A dependency doesn't require a --</p> <p>16 dependency just requires you to wait and see. So I'm</p> <p>17 not quite sure you -- I'm sorry, my Lord, I'm not quite</p> <p>18 sure how you would revisit it. You sit in your level</p> <p>19 and wait for the money to flow down. When it comes it</p> <p>20 just debts distributed amongst your level, <i>pari passu</i>.</p> <p>21 You get whatever you get. I'm not quite sure how one</p> <p>22 would revisit --</p> <p>23 MR JUSTICE HILDYARD: No, it's not something pre-estimated,</p> <p>24 it just just something that happens in the ordinary</p> <p>25 course.</p> <p style="text-align: center;">Page 104</p>

<p>1 MR ARDEN: That's right. And by and large, once a dividend 2 is paid, it's paid. And so that's slightly, I think, 3 probably not the point your Lordship is talking about. 4 MR JUSTICE HILDYARD: So dependency involves no 5 pre-estimate? 6 MR ARDEN: No, it happens, it's just -- as I say, you sit in 7 your bit of the waterfall and wait or hope that the 8 water gets to you, and that's it. The only 9 circumstance -- I'm just trying to think of any 10 circumstances in which estimate might come into it. My 11 Lord, not in any -- 12 MR JUSTICE HILDYARD: Maybe I'm getting muddled, and put 13 these aside and then I'll think and perhaps ask another 14 question. But I have in mind the currency claims, which 15 you call dependencies, right, they're not contingencies? 16 Lord Justice Briggs right, Lord Justice Lewison wrong. 17 How do you value those? Just what they are in the 18 market at the given time? 19 MR ARDEN: My Lord, I think that ... I might have to come 20 back to your Lordship on that, because I suspect that's 21 part of Waterfall that I've not been involved in. 22 MR JUSTICE HILDYARD: Okay. It may demonstrate simply 23 a misunderstanding on my part, but I thought I would 24 share with you my misunderstanding in case there's 25 an answer.</p> <p style="text-align: center;">Page 105</p>	<p>1 contingent claims that I wanted to take your Lordship 2 to. That's Wight v Eckhardt and Danka. 3 Wight v Eckhardt is volume 3 of the authorities at 4 tab 75. Perhaps if your Lordship would just -- 5 your Lordship's probably familiar with it, but it 6 your Lordship could just perhaps take the headnote 7 fairly quickly, and then it's just a few paragraphs in 8 Lord Hoffmann's judgment that I need to take you to. 9 (Pause). 10 MR JUSTICE HILDYARD: Yes. 11 MR ARDEN: Your Lordship will see, just very briefly, the 12 question is whether a debt provable in a liquidation was 13 discharged by a subsequent scheme of arrangement in 14 Bangladesh, and the answer was it was, with some 15 consideration of conflicts of laws principles on the 16 way. 17 But if I could just pick up the judgment at 18 paragraph 23. The argument here from Mr Lowe, 19 summarised at 23, is that the claims of creditors are 20 valued as at the date of the winding up order, and he 21 refers to Humber Ironworks. Then at 24 he supports that 22 by reference to the interest provisions. 25 is the 23 critical submission which then the following paragraphs 24 deal with. So what Mr Lowe is relying on, what he's 25 saying, is that you ascertain everything as at the date</p> <p style="text-align: center;">Page 107</p>
<p>1 MR ARDEN: What you can have, moving it away from currency 2 conversion, of course what one can have are unliquidated 3 claims in a certain amount where one has to estimate, 4 and that's also within the estimation provisions, and 5 again you can re-estimate. So it's not a contingent 6 debt, it's a debt for an uncertain amount upon which you 7 then have to put a value. 8 MR JUSTICE HILDYARD: Yes, that's probably the answer. 9 MR ARDEN: Subject to being corrected by people who know 10 better than I do, if currency conversion claims can't be 11 calculated in a mechanical way, if they are uncertain, 12 then that process would apply. But I suspect there may 13 be some better explanation in relation to those. 14 MR JUSTICE HILDYARD: But you're not deducting against 15 contingencies. 16 MR ARDEN: My Lord that's right. 17 My Lord, this is probably a convenient moment for 18 a break for the shorthand writers. 19 MR JUSTICE HILDYARD: Yes. Five to ten minutes. 20 (3.16 pm) 21 (A short break) 22 (3.23 pm) 23 MR ARDEN: My Lord, I had finished then with the Court of 24 Appeal. On LBHI2's claim, there are just two 25 authorities on the scheme for the treatment of</p> <p style="text-align: center;">Page 106</p>	<p>1 of the winding up order and so subsequent dealings or 2 discharge doesn't matter, I still have a provable debt. 3 Then in the paragraphs in which that argument is 4 rejected, which is 26 down to the end, Lord Hoffmann 5 considers the pari passu rule and the rule within that 6 rule of the idea that you value dates as at the date of 7 the winding up. He explains that second part, why you 8 value debts as at the date of the winding up order, at 9 paragraph 28. It's to give effect to the principle of 10 pari passu distribution. And acknowledging the 11 vividness of the image at 29, he then goes on to explain 12 the ways in which the statutory scheme either, as it 13 were, mitigates that or departs from that. He deals at 14 30 to 32 with contingent liabilities in those three 15 paragraphs. (Pause). 16 MR JUSTICE HILDYARD: Yes. 17 MR ARDEN: I take your Lordship to that because at various 18 points in the submissions, and as I went through 19 Waterfall I, your Lordship will have seen references to 20 Wight v Eckhardt and to this particular part of the 21 scheme, and these paragraphs are a useful summary of the 22 principles. 23 The other case that I was going to take 24 your Lordship to was Danka, which is in the same bundle 25 at tab 94. What your Lordship will get from this in our</p> <p style="text-align: center;">Page 108</p>

<p>1 submission is a flavour of the substantive nature of the</p> <p>2 treatment of contingent debts, that it is the estimate,</p> <p>3 you are paid the estimate for the time being, and that's</p> <p>4 subject to revaluation. That is so even where, as in</p> <p>5 this case, you have a member's voluntary and what is</p> <p>6 being contemplated and what is in fact in the end put in</p> <p>7 to effect is a distribution of surplus to members. So</p> <p>8 the contingent creditor cannot say "I want you to</p> <p>9 reserve for the full amount of the contingent</p> <p>10 liability", all that he's entitled to is the estimate as</p> <p>11 revalued from time to time. And that is so even where</p> <p>12 the contest is between the contingent creditor and the</p> <p>13 members with their rights to surplus. So it's a fairly</p> <p>14 graphic illustration, we would suggest, of the way in</p> <p>15 which the estimation process works. If your Lordship</p> <p>16 would just perhaps read the headnote and the holding.</p> <p>17 (Pause).</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 MR ARDEN: If I could pick up the judgment of</p> <p>20 Lord Justice Patten at paragraph 30, I think, which is</p> <p>21 where there's a reference to Mr Justice Roxburgh's</p> <p>22 judgment in House, Property and Investment. I start at</p> <p>23 30. There's then a citation from House,</p> <p>24 Property and Investment, and what this part of the</p> <p>25 judgment is about is whether a contingent creditor can</p> <p style="text-align: center;">Page 109</p>	<p>1 MR ARDEN: It's the statutory scheme. Danka is a striking</p> <p>2 case, because it's a members' voluntary, it's not</p> <p>3 a case --</p> <p>4 MR JUSTICE HILDYARD: Because reality didn't strike in time,</p> <p>5 the creditors suffered.</p> <p>6 MR ARDEN: Exactly. And so it's not a case where you're</p> <p>7 saying -- in an insolvent liquidation it's rather easier</p> <p>8 to say this is fairness between creditors, it's</p> <p>9 important that we get on with this and people get</p> <p>10 whatever money they're going to get back as quickly as</p> <p>11 possible. Whereas here the contest was between members</p> <p>12 for the surplus and creditors, but nevertheless, as</p> <p>13 your Lordship observed, the scheme is what it is, and</p> <p>14 since it applies in a voluntary, it applies, with all</p> <p>15 its faults.</p> <p>16 So that's the incoming claim, these are LBH12's</p> <p>17 incoming claims, and I've indicated the two elements to</p> <p>18 it, the second being the important one, and I've taken</p> <p>19 your Lordship to why and how you get to the nil, and</p> <p>20 that is what will go in on that side of the account, the</p> <p>21 sort of to nil. And I think that's common ground.</p> <p>22 I now want to look at the other side of the account,</p> <p>23 which is LBIE's contingent claim against LBH12 in</p> <p>24 respect of the section 74 liability which, as I've said,</p> <p>25 falls to be estimated by reference to the same</p> <p style="text-align: center;">Page 111</p>
<p>1 insist on a reserve or whether the contingent creditor</p> <p>2 is stuck with the rights that the scheme provides, in</p> <p>3 other words to an estimation and payment of what is</p> <p>4 estimated.</p> <p>5 Your Lordship will pick up what transpires. If you</p> <p>6 look at paragraph 32, Mr Chivers's submission, and then</p> <p>7 it's Lord Justice Patten's "but it is clear from", and</p> <p>8 if your Lordship would read that and also the extract of</p> <p>9 Lord Justice Hoffmann's judgment in Stanhope. (Pause).</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR ARDEN: Then if I could just ask your Lordship to turn on</p> <p>12 to 35 in the judgment, and then just over halfway down</p> <p>13 there's a sentence starting "I accept, as the judge</p> <p>14 did".</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR ARDEN: Just down to the end of 35.</p> <p>17 My Lord, I've taken your Lordship to it again</p> <p>18 because it is a sort of illustration of the way the</p> <p>19 scheme works for contingent debts, that you get the</p> <p>20 estimate, and it's the estimate and not the gross</p> <p>21 amount, or the maximum amount of the liability. You</p> <p>22 can't insist on a reserve. That is so even though, on</p> <p>23 one analysis, that might be considered to be unfair on</p> <p>24 a contingent creditor --</p> <p>25 MR JUSTICE HILDYARD: It's the statutory scheme.</p> <p style="text-align: center;">Page 110</p>	<p>1 principles as cover the estimation of the incoming</p> <p>2 claims. We submit that the answer to the question can</p> <p>3 you put a greater value on the outgoing section 74 claim</p> <p>4 than is put on the relevant incoming liability, can you</p> <p>5 put a value on the outgoing claim in relation to that</p> <p>6 liability which is greater than its value as an incoming</p> <p>7 claim, we submit the answer to that question must be the</p> <p>8 same whatever type of contingent debt you're</p> <p>9 considering. There's no difference. Although the</p> <p>10 contingent subordinated debt may be, I was going to say</p> <p>11 may be unusual; in a sense most contingent debts have</p> <p>12 their own characteristics. But nevertheless the same</p> <p>13 answer should be given, the same principle should be</p> <p>14 applied whether one's looking at a contingent</p> <p>15 subordinated debt or any other contingent debt.</p> <p>16 So if one asks oneself this question, assume that</p> <p>17 LBIE had given indemnities of the type that were given</p> <p>18 in Danka to some third party and those claims were</p> <p>19 proved by the third party as a contingent claim, the</p> <p>20 process had been gone through and an estimate made, and</p> <p>21 therefore a value attributed to those contingent claims</p> <p>22 to which LBIE was subject to, if you take that as</p> <p>23 an example and ask oneself what is the section 74</p> <p>24 liability in relation to a claim of that nature made</p> <p>25 against LBIE, we would say the answer to that, not</p> <p style="text-align: center;">Page 112</p>

<p>1 numerically but the way you get there, ought to be the 2 same answer as the answer to the question which 3 your Lordship is dealing with, which is what value ought 4 to be given to the section 74 claim in relation to the 5 contingent subordinated debts claim.</p> <p>6 The amount of any section 74 liability is limited, 7 we would say, by the terms of section 74 itself, which 8 are then reflected in the call provisions of 9 section 150. Both sections talk in terms of sums and 10 payment. One is sufficient for payment, one is 11 necessary for payment. What the sections are concerned 12 with and the way in which the liability is measured is 13 by reference to the amount that is required to discharge 14 the debts and liabilities as at the date on which the 15 call is made. That's the point that I made earlier.</p> <p>16 Let's take the indemnities case first of all. If 17 one asks oneself in the case of indemnities, assuming 18 that LBIE had given some indemnities, assuming that the 19 maximum liability was 1 million but they had been 20 estimated at 200,000, what would be the section 74 21 liability in that case or what would be the amount that 22 would be attributed to that debt or liability in 23 a section 74 claim? We would submit the answer must be 24 £200,000, because if you ask the question what is the 25 sum payable at that particular point in time in respect</p> <p>Page 113</p>	<p>1 purpose, payment.</p> <p>2 So far as, then, the scope of section 74 is 3 concerned, I just want to take your Lordship to one or 4 two materials and two or three authorities.</p> <p>5 MR JUSTICE HILDYARD: I'm so sorry, I worry that my 6 understanding goes in and out.</p> <p>7 MR ARDEN: My Lord, it's almost certainly me.</p> <p>8 MR JUSTICE HILDYARD: No, it isn't what you said, I'm just 9 wondering. You said that Mr Trower's side are stuck 10 with the nil valuation for their section 74 claim, and 11 so says the Court of Appeal, and you say that 12 Mr Trower's answer, which is to the effect that the 13 section 74 claim knows no priorities, if you like, and 14 is entitled to be calibrated by reference to the gross 15 amount without taking it into account is no part of the 16 reasoning whereby the Court of Appeal, or at least 17 Lord Justice Lewison, came to the answer of zero?</p> <p>18 MR ARDEN: Absolutely.</p> <p>19 MR JUSTICE HILDYARD: Because dependencies are not the thing 20 which trigger the zero answer contingencies and the 21 features of the contractual arrangements alone came up 22 with the answer of zero.</p> <p>23 MR ARDEN: Yes.</p> <p>24 MR JUSTICE HILDYARD: That's basically what you say?</p> <p>25 MR ARDEN: That's absolutely right, my Lord, that is what we</p> <p>Page 115</p>
<p>1 of that liability, our submission is it must be the 2 estimated. It can't be the gross amount, it must be the 3 amount that's estimated in accordance with the statutory 4 scheme. That is what's payable. If that is right, and 5 we submit it is, we would submit that the same must 6 follow for the subordinated debt, which has gone through 7 the same process but given a value of nil. So if one 8 asks oneself the same question, what do you have to pay 9 in respect of the subordinated debts claim at any moment 10 until the senior creditors are paid, the answer is given 11 to you by the Court of Appeal, it is nil, and that is 12 the amount which one uses when one's measuring the 13 liability under section 74. And therefore we would 14 respectfully submit it cannot be, as Mr Trower contends, 15 the gross amount, by which I mean the amount which might 16 be payable at some point if the contingency is 17 satisfied, because it cannot be said of that amount that 18 that is the amount payable at the time of the call.</p> <p>19 In a sense we just say that that just simply follows 20 from the way in which the statute works. There is 21 a liability, there is a liability in respect of debts 22 and liabilities, but the liability is measured by 23 a reference to an amount sufficient to pay them or, in 24 the context of a call, an amount necessary for their 25 payment. So liability and amount is connected to</p> <p>Page 114</p>	<p>1 say. And once you're in, and the submissions now 2 proceed from that. If you have a liability which falls 3 within the statutory scheme for the purposes of 4 section 74, you have to ask yourself what the statutory 5 scheme gives you. So I've used the indemnity because in 6 our submission the answer to this question is of general 7 application, it must apply to all contingent 8 liabilities. The indemnity is a useful way of testing 9 this, not least because that's what Danka's about.</p> <p>10 So if one asks the issue 3 question about 11 a different type of contingent liability like 12 indemnities and you follow through the process that 13 I have done, and then ask oneself what is payable in 14 respect of a contingent liability like an indemnity 15 which has been through the statutory scheme, there can 16 only be one answer to that, which is the product of the 17 statutory scheme. And then one moves to the 18 subordinated debts and says well, go through the same 19 analysis. What's the answer? Well the Court of Appeal 20 have given it to us.</p> <p>21 MR JUSTICE HILDYARD: That's why I continue to be troubled 22 as to this constituent element of the zero answer and 23 why it was to be expected. But as you rightly say, 24 certainly at this level, ours is not to reason why.</p> <p>25 MR ARDEN: Well, I'm probably not doing justice to</p> <p>Page 116</p>

<p>1 Lord Justice Lewison, or indeed the arguments that would 2 have been advanced in his support in the Supreme Court, 3 but -- 4 MR JUSTICE HILDYARD: Did Lord Justice Briggs or 5 Lord Justice Moore-Bick say anything? 6 MR ARDEN: No, I took your Lordship -- 7 MR JUSTICE HILDYARD: To everything. 8 MR ARDEN: Can I just, so that your Lordship has -- 9 MR JUSTICE HILDYARD: Lord Justice Moore-Bick agreed with 10 everybody? 11 MR ARDEN: Yes, well therein lies another problem, which 12 Mr Trower rightly identified. 13 MR JUSTICE HILDYARD: Yes. 14 MR ARDEN: I referred your Lordship to the paragraphs where 15 they agree. There are some comments about having less 16 difficulty with certain aspects. But they don't 17 disagree, or I think qualify, the steps in 18 Lord Justice Lewison's judgment which are crucial for my 19 purposes on issue 3. 20 MR JUSTICE HILDYARD: I'm so sorry to ask this, but were 21 they crucial to Lord Justice Briggs' approach? Did 22 Lord Justice Briggs on his approach have to swallow nil? 23 MR ARDEN: Well, he swallowed -- he simply agreed -- he had 24 to deal with issue 1, but he simply agreed -- sorry, 25 issue 1, he had to deal with subordination, and agreed</p> <p>Page 117</p>	<p>1 estimation exercise works on both sides, but you would 2 arrive at the same answer. 3 The problem here, and the problem with issue 3, is 4 that the assumption is that the issue is premised on 5 a nil value being attributed to LBHI2's incoming claim, 6 because that's what the Court of Appeal have told us. 7 So that's the premise of the issue. Then the issue says 8 well, given that, what value do we put on the outgoing 9 claim? 10 MR JUSTICE HILDYARD: Mr Trower says it doesn't carry the 11 baggage of these subordinated loan terms, it's just 12 a claim against the members who have agreed unlimited 13 liability. 14 MR ARDEN: But you still have to ask yourself in relation to 15 any amount, any debt or liability, what is the amount 16 that you attribute to it? The amount that is required 17 is the amount to pay. So to work out what the amount of 18 the liability is, and then in turn what the amount of 19 the call will be, you have to put a value on the debts 20 and liabilities. And where they're provable and the 21 statutory scheme applies, in our submission, as I said 22 to your Lordship, it has to be the product of the 23 estimate, because that is the amount that is payable, 24 not the gross amount. 25 In my submission the fact that this is about a claim</p> <p>Page 119</p>
<p>1 with Lord Justice Lewison. As did 2 Lord Justice Moore-Bick. 3 MR JUSTICE HILDYARD: So I can take it that all the Court of 4 Appeal either promulgated or accepted the nil answer. 5 MR ARDEN: My Lord, yes. 6 MR JUSTICE HILDYARD: Right. 7 MR ARDEN: Can I just pursue this slightly, because -- 8 MR JUSTICE HILDYARD: I may be getting the wrong in and out, 9 might I? 10 MR ARDEN: Well no, I don't think your Lordship is. But if 11 one didn't value it at nil, just assume that one sort of 12 ignores -- if one ignores the reason why you value it at 13 nil and say well, just treat it like an ordinary 14 contingent debt, what then? Let's say there's a 10 15 per cent prospect of the claims of the senior creditors 16 being paid in full, so we'll attribute a value of 3 17 per cent of the subordinated debt, we'll make that our 18 estimate. What then? Well, then LBHI2 proves in 19 respect of its subordinated debt and it's given a value 20 of let's say 200,000, or 200 million, or whatever. One 21 then asks the same question -- sorry, asks the question 22 on the other side: given that we have that estimate, 23 what's our section 74 claim worth so far as this element 24 is concerned? You will arrive at the same figure. So 25 in a sense carrying out a different, a non-binary</p> <p>Page 118</p>	<p>1 against members, in fact whether it arises in the 2 context of a limited company with unpaid capital or 3 an unlimited company in our submission doesn't matter. 4 You still -- 5 MR JUSTICE HILDYARD: It's easier in a limited company, 6 because although it's of the same nature, it has been 7 explained to me, really their liability is not measured 8 by any deficiency, it's simply enforcing the contractual 9 term. Now, I understand, Mr Trower explained to me, 10 that it is in fact a claim in respect of deficiency. 11 It's simply that their liability in respect of the 12 deficiency is capped at the nominal value of the share. 13 But for some reason I find it easier to see it in the 14 context of a limited company. When it's unlimited, at 15 the one moment you think well, the assertion of 16 liability flies free of any particular element by 17 reference to which it's calibrated. It's just a claim. 18 You forget the waterfall. You make the claim. You may 19 have to devalue it, I suppose, if the target's plainly 20 not good for the money, whatever it is, but otherwise 21 it's a claim. And then you say yes, but it's a claim to 22 meet a liability, and the liability has been assessed 23 under the statutory scheme as nil, therefore it's 24 a claim to meet nil, therefore it's nil. It's a very 25 elusive thing.</p> <p>Page 120</p>

<p>1 MR ARDEN: But if one tested this, your Lordship's raised</p> <p>2 the point about deficiencies. If one asks oneself what</p> <p>3 is the deficiency in this case, where there's</p> <p>4 a liability contingent upon satisfaction of prior</p> <p>5 levels, and you know that you cannot satisfy the</p> <p>6 contingency. In that case the deficiency stops at the</p> <p>7 point at which you -- it stops short of the subordinated</p> <p>8 debt because the contingency, you know, will not be</p> <p>9 fulfilled.</p> <p>10 But, my Lord as I say, if one asks oneself, and in</p> <p>11 a sense I've made the submissions on this, if you ask</p> <p>12 the question in the terms in which the statute is</p> <p>13 framed, then it is, as I said, about payment, and then</p> <p>14 your Lordship has put to me and I've agreed what my case</p> <p>15 is on that; it's payment in the case of contingent debts</p> <p>16 at the estimated amount.</p> <p>17 My Lord, I was then just going to take you to</p> <p>18 McPherson and I think three authorities, and then I'll</p> <p>19 be finished I think on issue 3. McPherson is at A5,</p> <p>20 tab 121. It's paragraph 10.25. I think this is</p> <p>21 possibly a paragraph that Mr Trower's taken you to, but</p> <p>22 it's the first paragraph of 10.25, if your Lordship</p> <p>23 perhaps would read that. (Pause).</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MR ARDEN: It was particularly the part of the first</p> <p style="text-align: center;">Page 121</p>	<p>1 My Lord, the case is principally concerned with, or</p> <p>2 one of the principal issues in the case is whether or</p> <p>3 not the provisions of the articles which provided for</p> <p>4 distribution of surplus in the way in which I've just</p> <p>5 mentioned, so without regard to paid up capital,</p> <p>6 an issue arose as to whether or not that was consistent</p> <p>7 with the statutory scheme for calls and adjustment.</p> <p>8 There is a long section in the judgment of</p> <p>9 Mr Justice Dixon where he deals with that. There's</p> <p>10 an overlap between the Ooregum type issue with which</p> <p>11 your Lordship was concerned this morning. But in the</p> <p>12 course of that he considers the statutory scheme. If</p> <p>13 your Lordship would look at page 741 first of all, at</p> <p>14 the bottom. The first answer made to the claim that the</p> <p>15 holders are partly paid shares is that the article that</p> <p>16 I've just mentioned is invalid in that it conflicts with</p> <p>17 the company's acts.</p> <p>18 Then if your Lordship looks over the page,</p> <p>19 your Lordship will see references to authorities that</p> <p>20 you were taken to, Ooregum and Welton. And then the</p> <p>21 question, I'm skipping slightly to shorten this, but the</p> <p>22 issue is then identified at 744, third line down:</p> <p>23 "Do the Acts contain anything which invalidates such</p> <p>24 an attempt to give the shareholders an interest in the</p> <p>25 net assets according to the number of their shares</p> <p style="text-align: center;">Page 123</p>
<p>1 paragraph which starts:</p> <p>2 "But on the other hand the duty of contributories to</p> <p>3 contribute to the funds of the company. Consequently</p> <p>4 the power of the liquidator to make calls is not</p> <p>5 independent of claims on that fund."</p> <p>6 That encapsulates the point that I've been trying to</p> <p>7 make to your Lordship about the need to work out what</p> <p>8 the claims and the funds are. The footnote is as to</p> <p>9 King v Tait, and I'll take your Lordship to that now,</p> <p>10 I think. It's authorities bundle 2, tab 58. In the</p> <p>11 High Court of Australia. If your Lordship would perhaps</p> <p>12 read the headnote and the holding. (Pause).</p> <p>13 Your Lordship sees it's in many ways a remarkable</p> <p>14 case, in part because of the nature of the original</p> <p>15 company, which had, as your Lordship will have seen,</p> <p>16 a debenture but where the debenture holder's claims were</p> <p>17 postponed to the claims of members for repayment of paid</p> <p>18 up capital. Remarkable also because its articles</p> <p>19 provided that distribution of surplus was to be done in</p> <p>20 proportion to the number of shares irrespective of the</p> <p>21 amount paid up on them. And then a slight disaster when</p> <p>22 a transfer was made during the course of a winding up,</p> <p>23 during the course of which everybody forgot about what</p> <p>24 they had agreed, and then the matter came back to see</p> <p>25 what should happen as a result.</p> <p style="text-align: center;">Page 122</p>	<p>1 without taking into account the discrepancy between the</p> <p>2 amounts subscribed and the amount paid up? In my</p> <p>3 opinion they do not."</p> <p>4 Where he first starts is to go through the relevant</p> <p>5 provisions, and it's really those rather than the</p> <p>6 specific issue that he's dealing with that I want to</p> <p>7 just refer your Lordship to. If I could pick up, again</p> <p>8 just at the bottom of 744:</p> <p>9 "The chief provision referred to is section 38</p> <p>10 Queensland ..."</p> <p>11 And so on, and your Lordship will see there he's</p> <p>12 referring to the equivalent of section 74. If</p> <p>13 your Lordship could perhaps read over the page until the</p> <p>14 eighth line down.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR ARDEN: And then if one skips a few lines:</p> <p>17 "It is this statutory definition of the nature,</p> <p>18 character ..."</p> <p>19 And so on. So there he identifies what the problem</p> <p>20 is about section 74. And then in the passage starting</p> <p>21 "it is important to notice", he's commenting there that</p> <p>22 this article is concerned only with the last stage --</p> <p>23 MR JUSTICE HILDYARD: The adjustment.</p> <p>24 MR ARDEN: The adjustment, and so it doesn't affect</p> <p>25 creditors or indeed expenses.</p> <p style="text-align: center;">Page 124</p>

<p>1 Towards the bottom of the page, then: 2 "As has often been pointed out, these provisions do 3 not ..." 4 And then if you read over the page down to the 5 reference to Lord Macnaghten in <i>Birch v Cropper</i> which 6 Mr Trower took you to this morning, I think. 7 MR JUSTICE HILDYARD: Yes. 8 MR ARDEN: Then I think in fact if your Lordship would then 9 just take it down to the end of the page, and it's the 10 last part of the page, after <i>Webb v Whiffin</i>, which is 11 the one from which the passage in <i>McPherson</i> is derived. 12 (Pause). 13 MR JUSTICE HILDYARD: Yes. 14 MR ARDEN: Now, my Lord, we can leave that there. That we 15 say is essentially what we are saying about the 16 statutory scheme for contributories, liabilities and 17 calls. 18 MR JUSTICE HILDYARD: You identified that the duty to 19 contribute is not independent of claims on the funds. 20 MR ARDEN: Yes, exactly, and that in the context of 21 a passage which acknowledges, a few lines out: 22 "The indestructible nature of the duty to contribute 23 imposed by these provisions, whether ...(Reading to the 24 words)... or be indefinite." 25 So he starts, accepting the weight of the duty, if</p> <p style="text-align: center;">Page 125</p>	<p>1 prescribed. 2 MR ARDEN: The statutory scheme simply tells you that you 3 have to adjust amongst members according to their 4 rights. But, as Mr Justice Dixon described in terms -- 5 MR JUSTICE HILDYARD: It doesn't prescribe the rights. 6 MR ARDEN: -- what they are. And so where do you find 7 those? Classically in the articles, and so there is 8 nothing objectionable about it, unlike for example the 9 sorts of cases that Mr Trower referred to this morning, 10 the shares at a discount type case. 11 MR JUSTICE HILDYARD: That diminishes the common fund. 12 MR ARDEN: Yes, exactly. 13 So, my Lord, that's <i>King v Tait</i>, and there are just 14 two cases now out of authorities bundle 1. 15 <i>Webb v Whiffin</i> briefly and then <i>Blakeley Ordinance</i>. 16 <i>Webb v Whiffin</i> is tab 28. Sorry, if your Lordship would 17 just read the holding and the headnote. (Pause). 18 MR JUSTICE HILDYARD: Yes. 19 MR ARDEN: Your Lordship will see this, and indeed the next 20 case are cases of B-list shareholders, and as 21 your Lordship knows the liability is a default 22 liability. It arises only in respect of outstanding 23 debts contracted at the time they ceased to be members. 24 This was a case where there was a call on the B-list 25 shareholders and the creditors in respect of the</p> <p style="text-align: center;">Page 127</p>
<p>1 I can put it like that, accepting all of that, upon 2 which Mr Trower has of course relied, you still have to 3 accept the amount, and you can't do that, as he puts it, 4 you can't assess the amount of the liability without 5 reference to -- so it's not independent of -- claims on 6 the fund, and that's the point that I've been making to 7 your Lordship this afternoon. 8 My Lord, the only other case I was going to take 9 your Lordship to is <i>Webb v Whiffin</i>, headnote only, but 10 only as a means of introducing your Lordship to 11 <i>Blakeley Ordinance</i>. Perhaps if I could do that now, and 12 that would probably take -- 13 MR JUSTICE HILDYARD: I've just read a little bit further as 14 to how he eventually justifies the article. 15 MR ARDEN: Yes. 16 MR JUSTICE HILDYARD: "It operates only as between the 17 members." 18 MR ARDEN: My Lord, that's right. I'm sorry, I did mean to 19 say that to your Lordship. Having set it all up and got 20 to the bit I wanted, I didn't then tell your Lordship 21 what happened. But your Lordship's absolutely right, 22 and it works, as your Lordship says, in contract between 23 members, and since it takes place at that level -- 24 MR JUSTICE HILDYARD: The statutory scheme does not mandate 25 equality as between them if they've otherwise</p> <p style="text-align: center;">Page 126</p>	<p>1 relevant debts. So the old creditors, by whose debts or 2 by reference to whose debts the call had been made, were 3 seeking to argue that the proceeds of the call, so far 4 as it related to those debts, should be appropriated to 5 the discharge of their liabilities, to which they got 6 a very firm and at times quite curt response from the 7 House of Lords, which was no, it doesn't matter what the 8 call relates to, it simply falls to be dealt with as 9 part of the general assets of the company. 10 In <i>Waterfall I</i> your Lordship will have seen there's 11 a few references to <i>Webb v Whiffin</i>, including in 12 relation to, or in response to a suggestion that if you 13 called on members at the bottom of the waterfall you 14 could in some way reserve or preserve the proceeds of 15 any call to be dealt with at that stage of the 16 waterfall, to which the answer is plainly not, whenever 17 you make a call it simply goes into the general pot and 18 gets distributed. And I think my learned friend 19 Mr Trower made that point yesterday. In relation to 20 a call in respect of the subordinated debts it will 21 simply fall into the general assets and will swell 22 dividends in the levels above. Whether it ever gets 23 down to the creditor in respect of which the call is 24 made is a matter for the waterfall, but has no bearing 25 on calls, and we accept that.</p> <p style="text-align: center;">Page 128</p>

<p>1 I took your Lordship to that because in the course 2 of the judgments two Court of Appeal cases, Brett's case 3 and Morris' case are referred to as being potentially 4 inconsistent with the decision of the House of Lords. 5 There was a further issue which arose in relation to 6 those cases, which was whether dealings with the 7 relevant debts, the old debts, after the date of 8 liquidation, either by discharge or purchase up and 9 discharge, should be taken into account in assessing the 10 amount of the call which was to be made in respect of 11 those debts. 12 My Lord, those cases then came back on a rehearing 13 to the Court of Appeal, and that's A1, tab 24. Both are 14 taken together, Brett's and then Morris. Plainly the 15 Court of Appeal on the rehearing gave effect to 16 Webb v Whiffin, but they also had to deal with the point 17 that I just mentioned, which is what do you do about 18 post liquidation dealings with the debts? On that 19 point, the House of Lords in Webb v Whiffin, two had 20 said it should be taken into account and two had said 21 that it should not. But there was no decision. If 22 your Lordship could just take the headnote again. 23 MR JUSTICE HILDYARD: Of Webb v Whiffin? 24 MR ARDEN: Sorry, no, of Brett and Morris, that's tab 24. 25 (Pause).</p> <p style="text-align: center;">Page 129</p>	<p>1 MR JUSTICE HILDYARD: Yes. 2 MR ARDEN: In the judgment of Lord Selborne, the Lord 3 Chancellor, you will see first the reference to 4 Webb v Whiffin, this is at page 806, and then he sets 5 out between 806 and 807 what the issues remaining for 6 them are. At 807 draws attention to the differences 7 expressed by their Lordships in Webb v Whiffin on this 8 point. 9 My Lord, at 808 to 809, what your Lordship will see 10 there is there's a sort of degree of tenderness offered 11 to B-list contributories. So, for example in the case 12 of a B-list contributory there is certainly doubt 13 expressed in this case that they could be made liable 14 for the whole of the costs of the liquidation. But what 15 I'd like to do is pick up the bit that we referred to in 16 our skeleton, so at page 809, the second paragraph, 17 about halfway down. He's here dealing with the debts 18 and liabilities in respect of which a call can be made, 19 and he says this then after he's dealt with expenses, 20 "Applying the same principles to debts", and then if 21 your Lordship could read down over the page to the 22 sentence ending "second subsection". (Pause). 23 MR JUSTICE HILDYARD: Yes. 24 MR ARDEN: Then if your Lordship is on 810, then if you 25 could pick it up after the reference to Webb v Whiffin,</p> <p style="text-align: center;">Page 131</p>
<p>1 MR JUSTICE HILDYARD: So the past member bought up the 2 outstanding debts? 3 MR ARDEN: Yes, in Brett's case -- well bought up to the two 4 largest of the four outstanding debts, with £14 left 5 over. And with relation to the two small ones offered 6 to buy them from the liquidator. In Morris' case the 7 facts were slightly different. That was a case -- you 8 can see the facts at 804, set out after the arguments in 9 Brett's case. There was no attempt to buy up, but 10 dividends had been paid in respect of those debts in the 11 course of the liquidation, and the question is whether 12 the amount of the debt should be reduced by the 13 dividends that had been bought up. So essentially the 14 issue was whether you should assess liability by 15 reference to the debts as they were at the beginning of 16 the winding up, or whether you should have regard to 17 what had happened. 18 The answer of the Court of Appeal was again in 19 fairly trenchant terms that you had to take into account 20 what had happened. If I can just pick up the argument 21 in Brett's case at 803 of Sir George Jessop, where he 22 puts an argument that's ultimately successful. If 23 I could ask your Lordship to see "a company may, when 24 wound up", and then just read on to the end the 25 argument. (Pause).</p> <p style="text-align: center;">Page 130</p>	<p>1 "in this section and in sections 74 and 75" perhaps down 2 to the end of that paragraph. (Pause). 3 MR JUSTICE HILDYARD: Yes. 4 MR ARDEN: And then over the page, you see there's a passage 5 "the time when the call is made must necessarily be 6 looked at", and then he just simply asks the question, 7 rhetorically, I think, at the end of that: 8 "Why then are not the payment made after the 9 commencement of the winding up equally to be regarded 10 when the question has reference to the amount of the 11 debts and liabilities of the company in respect of which 12 a past member is required to contribute?" 13 MR JUSTICE HILDYARD: Yes. 14 MR ARDEN: So what your Lordship sees from that, it's not 15 our case, obviously, it's different. As your Lordship 16 observed, it's to do with discharge and payment post 17 liquidation. But you have to look at it at the time 18 that the call is made, that's why you take into account 19 what's happened in the intervening period. The nature 20 of the liability is, as I submitted to your Lordship, 21 linked to the debts and liabilities as they are at that 22 particular point, and it doesn't go beyond that. The 23 vice of it going beyond that is then identified in the 24 earlier passage, where he says "swell the amount of 25 indebtedness by a fictitious process ..." That's the</p> <p style="text-align: center;">Page 132</p>

<p>1 sort of vice of not going through the process which I've</p> <p>2 invited your Lordship to, which is that you artificially</p> <p>3 inflate a liability which the statute itself measures by</p> <p>4 reference to payable debts and liabilities.</p> <p>5 My Lord, those are the materials. My Lord has had</p> <p>6 my submissions on the issues, I've set them out at the</p> <p>7 beginning and I've probably repeated them more than I</p> <p>8 should do, since I began on this issue. I have a little</p> <p>9 way to go, but I'm finished I think on this issue.</p> <p>10 I have something on issue 7, but I doubt that it will</p> <p>11 take me more than 30 minutes tomorrow, so I think</p> <p>12 your Lordship is still well on track.</p> <p>13 MR JUSTICE HILDYARD: We're galloping ahead of the</p> <p>14 chronology, aren't we, because I think you were slotted</p> <p>15 in for the whole of tomorrow.</p> <p>16 MR ARDEN: My Lord, the chronology I think to some extent</p> <p>17 fills the time available. I think we all thought that</p> <p>18 we might be rather quicker than the chronology might</p> <p>19 suggest. As I said, I think I will only be about 30</p> <p>20 minutes tomorrow; I've done most of what I needed to do.</p> <p>21 MR JUSTICE HILDYARD: And is it proposed tomorrow that we</p> <p>22 will go to LBH then?</p> <p>23 MR ATHERTON: Yes, my Lord, but I apply Boyle's law, so</p> <p>24 I will fill the time available.</p> <p>25 MR JUSTICE HILDYARD: Right.</p> <p>Page 133</p>	
<p>1 MR ATHERTON: That was a joke, my Lord.</p> <p>2 MR JUSTICE HILDYARD: It's a Thursday. One never knows.</p> <p>3 All right. Well, 10.30 tomorrow. I should say that</p> <p>4 I think I need to read the Morris case, which has its</p> <p>5 ins and outs, and I didn't quite get. I think I need to</p> <p>6 read what happened before the clarification that was</p> <p>7 given in the Whiffin case.</p> <p>8 MR ARDEN: My Lord, I'm conscious that I took that fairly</p> <p>9 quickly.</p> <p>10 MR JUSTICE HILDYARD: I'll have a look at that, so I may ask</p> <p>11 you some questions. But otherwise about half an hour</p> <p>12 tomorrow. 10.30 tomorrow.</p> <p>13 (4.23 pm)</p> <p>14 (the hearing adjourned until 10.30 am the following day)</p> <p>15</p> <p>16</p> <p>17 Submissions by MR TROWER (continued)1</p> <p>18 Submissions by MS TOUBE60</p> <p>19 Submissions by MR ARDEN66</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>Page 134</p>	

A				
A1 129:13	acknowledging 108:10	administrations 59:13	117:9,23,24,25	119:16,17,17,18
A5 121:19	Act 3:15 6:1 9:20	administrators 2:7	119:12 121:14	119:23,24 121:16
abide 74:19	18:12,15 19:6,16	44:3	122:24	122:21 124:2
ability 4:18 21:13	19:18 22:24 23:3	administrators'	agreeing 19:10	126:3,4 129:10
22:2 23:25 30:7	acting 48:4	25:3	65:4	130:12 132:10,24
38:3 58:1	action 4:6,10 34:8,8	admission 90:21	agreement 1:7,17	amounting 11:20
able 16:7 30:24	74:10	admitted 80:7	2:9 4:13 10:14	amounts 33:15
31:12 49:15 84:13	activities 24:20	admonishment	11:11,15,20 17:1	37:24 78:7 124:2
absolute 99:9	activity 71:13	92:2	21:25 22:6 23:16	analogy 41:6
absolutely 13:15	acts 123:17,23	adopt 4:15 97:8	26:15 27:19 30:25	103:13
63:24 99:7 100:16	actual 42:11 46:15	adopted 100:5	31:2 32:21 36:21	analyses 7:2
115:18,25 126:21	actuarial 99:22	advance 49:16	38:15,17 42:1	analysing 15:24
academic 27:6	actuary 99:21	50:17,19 59:17	43:6 49:2 50:4	analysis 7:5 12:25
accept 22:17 31:11	add 33:3 56:23	75:1	53:14,15 54:25	13:13,17 14:16
35:14 39:3 46:8	57:1	advanced 32:2 48:3	71:23 83:12 86:10	16:15 18:9 19:9
51:21 52:1 74:3	added 45:6	50:21 51:3 52:23	86:14 91:6 92:10	27:6 32:24 35:2
96:13 99:1 110:13	additional 91:5	117:2	agreements 85:25	37:22 49:21 54:12
126:3 128:25	address 25:1,18	advances 74:10,12	90:22 95:1 99:11	55:4 69:19 75:12
acceptance 35:16	27:15 41:17 74:17	adversarial 41:22	agrees 41:15 46:25	77:22 82:9,22,25
35:20	76:3	41:23	58:4	83:1,1,4,14 85:16
accepted 50:10,21	addressed 50:14,15	adverse 24:2 62:20	ahead 42:15,20	91:14 92:4 100:13
86:5 118:4	addressing 63:19	adversely 8:14	86:7 133:13	101:3 104:3
accepting 125:25	adds 21:20 59:15	affect 35:1 54:18	air 99:23	110:23 116:19
126:1	adjourned 134:14	57:21 62:11 65:6	albeit 40:23 85:8	and/or 3:17,21
accomplished	adjournment 72:7	83:14 124:24	92:5	answer 8:20 12:24
100:1	adjust 127:3	affirmative 74:3	aligned 74:22	14:1,20,21 29:8
account 46:24	adjustment 5:15	affix 19:24	allow 13:21 98:7	29:10 31:25 37:14
47:10 48:22 50:8	7:21 34:23 123:7	afraid 32:6 101:11	allowed 35:8	37:22 38:19 42:11
53:2 56:23,24	124:23,24	afternoon 126:7	alter 23:22	48:9 62:19 64:13
59:1,3,5 75:16	adjustments 17:16	ago 20:16	altered 54:12	72:12 81:16 89:5
77:18 85:3 111:20	administer 43:3	agree 11:11 13:14	alternatively 54:23	101:15 105:25
111:22 115:15	administered 43:22	19:5,6 24:5,6,12	amended 34:9	106:8 107:14
124:1 129:9,20	administering 42:7	30:16 49:25 69:4	amount 7:24 11:8	112:2,7,13,25
130:19 132:18	42:18	72:22 75:20 96:5	11:13 12:17 17:6	113:2,2,23 114:10
accounting 20:8	administration	99:24 117:15	31:13 33:3,10	115:12,17,20,22
accounts 20:13	2:23 42:16 46:24	agreed 5:8 23:12	36:19 75:8 77:11	116:6,16,19,22
accurate 89:25	48:1,15 57:1,24	41:9,16 43:13	78:2,3,5,7,9,11,19	118:4 119:2
achieve 98:21,23	58:20 59:2,3,11	44:18 46:4 48:6	79:16,23,24 80:3	123:14 128:16
achieved 73:19	59:17 60:22,23	52:13 53:18,25	80:3,11 81:16,20	130:18
87:11,14 91:15	61:2 63:3 64:9,12	54:23 57:18 60:8	89:20,21 106:3,6	answered 29:1 39:2
92:18 98:6	64:18,20 75:6,7	61:19,19,20,23	109:9 110:21,21	74:2
acknowledge 98:3	75:10 76:6,7,11	62:5 64:3,25	113:6,13,21 114:2	answers 54:8
acknowledges	76:12,24 77:12,15	66:13 68:3,4,5,6	114:3,12,15,15,17	antecedent 10:14
125:21	87:23	68:18,24 91:4,9	114:18,23,24,25	anti 26:19 27:2,8
			115:15 119:15,15	27:17,18 28:5,18

28:20,23 29:9 anybody 46:11 anyway 44:23 88:19 apart 21:20 22:24 23:2 35:2 Apologies 22:12 apparent 73:15 appeal 5:8 10:12 31:19 40:22 47:11 48:5,7 50:10,13 50:16,18,20,22,23 50:25 51:1 69:25 70:5 80:16,23 89:14 91:1,9 96:1 100:4,7,24 101:16 101:23 106:24 114:11 115:11,16 116:19 118:4 119:6 129:2,13,15 130:18 Appeal's 47:14 69:20 80:22 81:6 101:2 appealed 47:10 50:13,17 appeals 35:24 69:23 appears 10:10 22:3 applicable 77:15 88:15 104:4 application 3:7,9 26:19 58:21 98:3 98:18 100:8 116:7 applied 9:3 14:11 21:22 40:5 59:6 96:17 112:14 applies 13:24 33:19 39:13 67:24 79:17 80:20,20 82:10 90:1 96:17 111:14 111:14 119:21 apply 6:5 10:22 14:7 27:11 39:16 50:22 54:17 77:19	77:20 82:22 85:1 95:9 98:24 106:12 116:7 133:23 Applying 131:20 appreciate 15:1 46:14 approach 26:13,24 69:3,14 100:4 117:21,22 appropriate 30:15 41:10 42:10,13 45:3 59:20 79:14 95:6 appropriated 128:4 appropriately 5:16 Arcade 10:18 Arden 66:2,3,6,10 66:11 67:3 68:12 68:20,24 69:3,7 69:15,19 70:22,24 71:1,21 72:5,9 78:25 79:9 84:1 88:4,24 90:6 92:24 93:10,12,23 94:21,23 97:1,9 98:1,3,17,21,23 99:1,7,10,15,19 100:2,10,16,20 101:1,11,22 102:2 102:10,12,21 103:9,20,22 104:9 104:14 105:1,6,19 106:1,9,16,23 107:11 108:17 109:19 110:11,16 111:1,6 115:7,18 115:23,25 116:25 117:6,8,11,14,23 118:5,7,10 119:14 121:1,25 124:16 124:24 125:8,14 125:20 126:15,18 127:2,6,12,19 129:24 130:3	131:2,24 132:4,14 133:16 134:8,18 area 11:1,23 12:4 26:3 27:6 33:2 37:8 99:17 argue 128:3 argued 31:17 32:1 35:25 54:21 55:7 101:9 arguing 103:11 argument 1:14 3:18,25 17:22 25:10 30:20 38:5 41:23 46:4,18 47:11,15 48:20,25 50:14 51:3,10 52:8 53:12,19 55:11,19 56:7 57:21 62:18,21 71:5,9 72:10,25 73:12 74:9,12,18 83:14 87:18,21 88:5,10,25 103:13 107:18 108:3 130:20,22,25 arguments 43:24 47:24 50:18,20,23 51:2,9 55:2 68:7 72:10 73:13 87:15 117:1 130:8 arises 3:8 5:3,5 21:3,10 32:14 38:9 39:6 73:4 120:1 127:22 arising 2:9 30:25 arose 17:15 19:12 123:6 129:5 arrange 12:16 arrangement 19:25 28:19 29:24 30:14 34:22,24 36:15 37:9 38:24 39:11 107:13 arrangements 24:1 33:7 97:24 115:21	arrive 118:24 119:2 article 123:15 124:22 126:14 articles 18:10 21:3 122:18 123:3 127:7 artificially 133:2 ascertain 107:25 aside 20:6 105:13 asked 34:16 75:21 asking 46:2 97:22 asks 51:19 81:13 112:16 113:17 114:8 116:10 118:21,21 121:2 121:10 132:6 aspect 7:3,3 8:1 18:13 90:12 aspects 69:22 117:16 assert 1:22 4:4 31:12 asserted 4:2 36:16 36:21 asserting 64:8 assertion 120:15 assess 104:10 126:4 130:14 assessed 120:22 assessing 129:9 assessment 100:21 asset 27:19,22,23 27:24 assets 1:9 23:23 24:15 27:17 58:13 123:25 128:9,21 assist 77:24 89:9,10 assistance 33:12 assisted 71:1 assume 15:9 112:16 118:11 assuming 55:19 113:17,18 assumption 63:15 119:4	assumptions 39:5 Atherton 74:4,12 133:23 134:1 attach 75:17 attempt 8:16,24 10:12 14:17 15:7 49:21 123:24 130:9 attempts 8:13 attention 21:18 87:1 131:6 attributable 75:23 76:1,15 attribute 97:10 118:16 119:16 attributed 81:10,17 112:21 113:22 119:5 auseful 7:6 auseless 71:13 Australia 122:11 Australian 21:4 authorities 4:17 6:10,20,24 27:5 40:3 77:2 93:4,10 106:25 107:3 115:4 121:18 122:10 123:19 127:14 authority 18:7,8 25:17 45:25 46:1 automatic 61:7 available 23:24 31:14 77:10 90:22 133:17,24 avoid 1:8,18 10:12 25:24 awkward 54:6
B				
B 65:8 B-list 127:20,24 131:11,12 back 3:11,24 5:23 6:21 12:19 14:21				

18:22 19:11 22:6 23:18 30:8 31:6 32:15 37:4 38:24 46:17 52:3 55:18 59:10 61:15 66:4 80:8 98:8 103:5 103:15 105:20 111:10 122:24 129:12 background 46:14 47:6 58:23 59:14 85:24 92:13 baggage 119:11 balance 61:11 banal 84:18 Bangladesh 107:14 Bank 19:4,8 20:2 21:1 banks 15:13 based 38:25 63:14 basic 77:6 basically 115:24 basis 2:15 32:3 42:21 43:3,9,23 68:4 Bayfield 51:8 52:8 bear 37:1 57:10 77:5,19 bearing 51:22 128:24 becoming 77:9 began 133:8 beginning 7:7,10 10:1 12:7 27:12 30:3 130:15 133:7 behalf 42:18 87:18 Belmont 13:17 25:19 26:14,21,22 27:10 29:18,22 beneath 88:9 benefit 5:12,13 32:18,19 best 19:13 20:10 55:14 60:20 67:16 98:17	better 40:20 45:11 92:22 103:19 106:10,13 beyond 55:8 70:20 132:22,23 bill 35:15 binary 96:8,20 98:4 99:9 104:11 bind 45:20 46:10 46:11 binds 45:11,11 Birch 125:5 bit 2:24,25 7:5 8:3 12:3 17:17,23 19:7 27:1 28:5 32:12 34:17 40:8 40:11 55:13 63:1 71:5 93:7 101:14 102:13 103:5,16 105:7 126:13,20 131:15 bits 29:22 Black's 8:22 Blakeley 126:11 127:15 block 68:25 blocks 68:17 71:18 blue 93:8 blunt 100:6 boil 25:9,10 bond 100:23,23 102:20 Booth 35:10 bother 41:22 bothered 41:21 bothers 41:20 bottom 9:17 10:7 36:1 123:14 124:8 125:1 128:13 bought 130:1,3,13 bound 15:14 Boyle's 133:23 breach 29:10 33:10 33:15 37:25 breaches 29:24	break 18:22,25 34:4,13 56:17 66:4 106:18,21 Brett 129:24 Brett's 129:2,14 130:3,9,21 briefly 107:11 127:15 Briggs 91:7 105:16 117:4,22 Briggs' 102:2,15 117:21 Brighton 10:17 bring 80:8 British 13:9 28:7 29:17,18,19,22 37:5,20 building 12:4 68:17 68:25 71:18 built 39:4 bundle 2:1 3:9 4:3 6:24,24 8:23 11:23 21:7 22:9 26:25 29:21 35:10 47:13,14 76:25 77:2 78:14 85:23 90:14 91:2 93:5 93:10 108:24 122:10 127:14 bundled 73:22 bundles 29:20 business 29:23 35:14 buy 130:6,9	81:22 82:6 105:15 113:8,15 114:18 114:24 119:19 127:24 128:2,3,8 128:15,17,20,23 129:10 131:18 132:5,18 called 41:9 65:10 79:10 80:12 128:13 calls 21:4,11,14 48:18 49:6,7,12 49:13 73:18,19 75:13 122:4 123:7 125:17 128:25 Cannes 19:20 canter 68:18 capable 52:23 53:1 capacities 92:4 capital 13:3,22 98:14 120:2 122:18 123:5 capped 120:12 carry 119:10 carrying 118:25 case 2:4 4:12 8:15 8:22 9:1,11,11,16 9:16 10:17 11:4 11:22,23 15:13 17:4,5,15 18:22 20:1,8,14 21:4,6 21:17 24:11,17 26:2 28:16,19 33:15 35:10,11,20 36:3,16,25 37:15 37:18 38:2 40:16 43:4 50:3 64:4 66:25 68:13 71:16 71:22 72:14 73:6 73:16 77:12 79:9 80:16,24 81:24 83:10 84:7,10,10 87:16,23 90:9,12 91:15 92:19 94:3 95:1,2 96:12,18	97:10 98:5 105:24 108:23 109:5 111:2,3,6 113:16 113:17,21 121:3,6 121:14,15 122:14 123:1,2 126:8 127:10,20,24 129:2,3 130:3,6,7 130:9,21 131:11 131:13 132:15 134:4,7 cases 8:2 18:17 19:3 20:22 33:5 35:6,24 36:14 37:19 70:18 71:2 76:17 99:10 127:9 127:14,20 129:2,6 129:12 cash 39:23 84:4 catch 50:9 catching 49:4 categories 5:18 category 78:22 cater 67:15,17 causes 30:19 cautions 88:16 cautious 40:8 ceased 127:23 cent 64:17,17,18 96:8,12,12 101:13 118:15,17 central 55:11 101:23 certain 15:13 23:8 73:2 77:5,19 106:3 117:16 certainly 7:13 27:5 49:20 50:12 58:16 70:6 71:15 100:13 102:14 115:7 116:24 131:12 challenge 29:9,10 challenged 50:11 50:12 chance 67:18
--	--	---	---	--

Chancellor 131:3	21:1	classes 6:2	93:23 98:12	69:16 70:15 74:21
change 69:8,24	claim 2:6,17,18,21	classic 42:25 99:4	111:21 127:11	76:24 85:9 89:12
70:13 74:23 77:9	2:25 4:8 5:20	99:10	compact 13:20	90:12 96:2,19
79:2	8:14 22:1 23:23	Classically 127:7	15:21	113:11 115:3
changed 69:12	30:25 31:12 38:11	clause 74:11,13	companies 18:15	118:24 123:1,11
changes 59:5 70:12	38:13,15,16,20,22	86:16,18,22 95:4	19:16,18 20:9,18	124:22
character 124:18	39:14,18 41:5	clauses 86:20	20:20	conclude 48:15
characterisation	46:23 47:9 48:12	clear 7:13 28:14	companies' 58:22	63:5
95:22,25	48:17,21 49:1,5,8	30:7,9 33:16	company 1:6,6,10	conclusion 29:7
characterised	49:15,20 50:2	49:24 54:9 81:22	6:14 7:13 11:11	48:13,19 50:1
85:13	51:11 52:23 56:25	82:11 100:16	12:8,14,20,21	56:22 58:14,17
characterises	57:4,5,9,11,25,25	110:7	13:21,25 14:7	81:25 85:15 97:25
102:15	58:1,3,5 63:17,21	clearer 83:19	15:6,9,13,17,23	100:17
characteristics	63:21 64:8,13,14	clearly 21:16 79:19	17:4,5,6 19:4 20:3	conclusions 67:13
48:23 112:12	64:15,16 65:9,10	80:3	20:11 22:25 23:1	Confined 24:15
charges 16:6	65:11 75:5,17,25	client's 43:21	23:9,12,12,13,15	confirm 6:10 29:22
chaste 99:12	76:8,9,13,14	code 29:25 30:5,10	24:15,19 31:1	confirmed 8:25
check 56:14	83:17,18 84:21,22	31:6 33:9 91:19	49:10 120:2,3,5	confirms 6:3
chief 35:22 124:9	84:23,25 85:4,8	Collins 29:21 30:2	120:14 122:3,15	conflate 83:15 92:7
chimes 16:12	85:12 86:5 101:4	Collins' 27:12	128:9 130:23	conflated 27:5
Chivers's 110:6	106:24 111:16,23	come 5:23 13:16	132:11	conflates 82:14
chronology 133:14	112:3,5,7,19,24	18:22 32:15 42:13	company's 1:10	conflation 102:22
133:16,18	113:4,5,23 114:9	46:17 52:3 66:4	5:12,14 15:9 78:5	conflicts 107:15
chunk 16:18	115:10,13 118:23	66:16 67:13 79:19	78:13 123:17	123:16
circuitous 35:18,19	119:5,9,12,25	83:7 93:2 95:16	compared 73:12	confusing 37:7
circuitry 4:6,9 34:7	120:10,17,18,21	99:8,21 103:15	compete 95:16	confusion 100:14
74:10,13	120:21,24 123:14	105:10,19	competes 31:4	connected 114:25
circumstance 8:23	claiming 20:10	comes 17:20 18:14	competition 89:8	Connoting 36:6
40:17 105:9	claims 24:11,12,17	69:1 104:19	complete 98:14	conscious 134:8
circumstances 5:20	56:23 58:22 63:23	comfortable 43:20	completely 33:5,11	consequence 31:3
6:4,7 8:12 11:10	71:10 76:16,18,18	coming 12:19 38:15	83:4	51:15,15 58:11
12:3 14:13 19:10	77:21 78:18 85:6	38:16,21,24 42:4	complex 42:16	67:11 82:21 95:10
38:25 39:5,11	86:8 102:4,5,16	63:16	compliance 14:23	95:11
40:4 41:19 42:19	103:7,12 105:14	commenced 5:3	complicated 39:19	consequences 6:1
42:24 77:4,9	106:3,10 107:1,19	commencement	comprise 78:14	51:13 95:23 96:2
105:10	111:17 112:2,18	132:9	comprises 86:15	Consequently
circumvent 33:8	112:21 118:15	commenting	concept 7:19,25	122:3
circumvented	122:5,8,16,17	124:21	12:12,18 16:8	consider 40:5 95:20
37:14	125:19 126:5	comments 91:5	20:15 30:3 37:8	considerably 69:8
circumvention	clarification 65:19	117:15	40:10	consideration
33:10 37:10	134:6	commercial 28:17	concern 12:4	17:21 107:15
citation 7:17	clarificatory 50:5,5	28:21 29:3,8 37:2	concerned 1:16 3:6	considerations
109:23	class 5:12,14 24:23	commitment 13:5	4:21 5:25 8:21	20:5
cites 29:21	30:11,13 32:9	common 10:17	11:12 14:17 43:8	considered 8:13
City 19:3,7 20:2	42:18	76:17,20 86:5	48:3 56:21 64:22	76:12 82:2 110:23

considering 83:17 85:3 112:9 considers 108:5 123:12 consistent 8:19 11:16 58:16 61:20 69:5 123:6 consistently 18:12 18:15 constituent 27:15 116:22 constituting 48:12 construction 25:16 33:14 73:24 102:7 construing 88:18 97:15 contain 12:12 123:23 contains 34:17 103:11 contemplated 21:24 76:4 109:6 contemplates 23:11 contended 25:23 contends 114:14 content 74:17,19 contention 87:19 contentions 25:3 contest 75:24 76:1 109:12 111:11 contested 54:13 71:19 context 3:4 6:9 8:16,21 9:6 10:15 11:14 13:24 14:7 15:6 19:2,8 20:25 21:21 27:14 28:12 28:17,24 29:2,20 30:11 33:11 41:2 54:16 65:5 75:24 80:24 88:12 93:7 94:24 114:24 120:2,14 125:20 contexts 8:18 12:24 21:2 33:6 42:9,12	contingencies 75:17,22 80:4 81:1,2,9,23 97:16 97:18 104:10 105:15 106:15 115:20 contingency 77:4 81:15 82:20 83:8 83:10,24 93:25 95:14 96:10,11 97:7,12 99:11,19 100:18 101:7 103:1 114:16 121:6,8 contingent 48:17 49:5,15 73:24 75:17 76:18 78:18 79:5,6,9,10,18,23 80:1,18,18,21 81:21 82:1 83:2 83:12 84:8,15 85:13 89:7,21 90:1 94:4 95:2,5,5 95:7,10,11 96:1,6 96:7,15,18,21 97:11 99:3 102:17 102:24 103:12,14 103:24 106:5 107:1 108:14 109:2,8,9,12,25 110:1,19,24 111:23 112:8,10 112:11,14,15,19 112:21 113:5 116:7,11,14 118:14 121:4,15 continue 43:2 116:21 continued 1:3 134:16 contract 4:19 14:18 15:25 21:11,24 22:2 23:4,10,15 23:18 24:2,8 27:4 30:6,8,16 94:4	126:22 contracted 127:23 contracting 24:12 26:16,18 27:7 contracts 23:8 contractual 3:21 82:20 92:11 93:24 115:21 120:8 contradict 7:14 contrary 2:4 26:13 26:17 27:3 28:19 71:24 72:25 contravention 36:17 93:15 contribute 1:9 11:21 14:15 23:7 36:20 122:3 125:19,22 132:12 contributing 59:13 contribution 2:6,17 2:18,21,25 4:8 7:24 22:1 30:20 31:21 32:4 38:12 46:23 47:8 48:12 48:21 49:1,8 50:2 51:11 57:25 58:1 58:3,5 75:4,13 85:6 contributories 5:15 34:25 122:2 125:16 131:11 contributory 1:18 7:8 9:2 31:24 48:8 54:17 85:1 131:12 contrivance 35:18 35:19 36:4,10 controversial 21:9 convenient 106:17 conventional 33:7 conversion 71:10 102:4,5,16 103:7 103:12 106:2,10 Cordova 21:6 core 5:24 6:12 7:16	12:12 17:8 25:11 28:5,16 34:17,21 correct 26:2 50:19 81:10 corrected 106:9 correctly 83:9 102:16 correspondence 61:22 65:4,16 costs 2:15 131:14 counted 98:14 counter 102:7 counterclaim 30:21 counterpart 88:14 couple 20:23 25:19 course 5:21 9:1,9 17:1 18:11 20:2 20:18 22:17 30:7 31:9,17,23 35:14 42:2 51:8,8 55:15 56:12 60:12,13 63:14 66:17 67:21 67:21 72:14,19 102:24 104:25 106:2 122:22,23 123:12 126:2 129:1 130:11 court 5:8 10:12 14:17 29:19 31:19 31:24 40:22 42:1 42:14,20 43:1,5,9 43:20 44:4 47:11 47:14 48:5,7 50:10,11,13,13,16 50:18,20,22,23 51:9,18,21 52:1 52:17,22 53:6,16 54:21 55:1,4,8 57:14,17,21 62:7 62:10 63:9 66:22 67:6,12 68:7,8 69:9,20,23,24,25 70:5,5,18 71:4,25 80:16,22,23 81:6 89:14 91:1,9 96:1	100:4,7,24 101:2 101:10,16,23 106:23 114:11 115:11,16 116:19 117:2 118:3 119:6 122:11 129:2,13 129:15 130:18 court's 42:14 53:9 66:24 96:4 courts 8:13 33:7 40:7 99:5 cover 45:2 67:9 112:1 coward's 100:11 created 83:12 96:15 creditor 7:19 23:12 92:5 98:8 109:8 109:12,25 110:1 110:24 128:23 creditors 5:12 16:5 23:20,25 31:5,14 57:3 81:3,3 84:24 95:17,17 107:19 111:5,8,12 114:10 118:15 124:25 127:25 128:1 criteria 23:8 critical 82:25 83:1 83:13 84:19 85:16 101:3 107:23 critically 91:13 Cropper 125:5 cross 3:7,9 cross-appeal 101:18 crucial 83:21 117:18,21 crystal 49:24 crystallise 49:18 culmination 11:24 currency 71:10 102:3,16 103:7,12 105:14 106:1,10 current 84:22
--	--	---	--	---

currently 67:15	129:6,18	109:2 110:19	definitely 100:9	90:16 103:17
curt 128:6	deals 88:19 91:19	112:11 113:5,14	definition 89:18	deserve 44:17
cut 28:14	91:24 94:25	114:9,21 116:18	124:17	desirable 45:11
cuts 37:25 38:6	108:13 123:9	119:19 121:15	definitions 86:17	despite 93:17
57:2	dealt 5:6 34:23	127:23 128:1,1,2	degree 67:12	destabilised 55:20
cutting 31:6	47:15 61:4 64:6	128:4,20 129:7,7	131:10	68:6
D	87:16 89:13 90:25	129:11,18 130:2,4	deliver 52:11	detail 25:18
d 11:8	91:16 128:8,15	130:10,15 131:17	demonstrate	devalue 120:19
damages 30:25	131:19	131:20 132:11,21	105:22	develop 72:15
dangerous 40:20	debate 66:11,15	133:4	demonstrates 14:3	device 11:20
Danka 79:19 82:2	93:14 101:12	decide 31:24 71:14	33:23	Dicker 103:11
102:7 107:2	debenture 122:16	decided 9:17 49:18	depart 12:15	differed 91:13
108:24 111:1	122:16	49:20,20,23 55:24	departs 108:13	difference 31:19
112:18	debt 8:24 9:4 24:6	73:3 74:23 77:23	dependencies	48:11 64:12,21
Danka's 116:9	38:22 40:6,6 57:4	80:23 100:7	104:8,13 105:15	66:25 73:13,14
date 58:8 62:2,4	58:10 67:7,8 70:2	decision 26:20	115:19	83:13 112:9
107:20,25 108:6,8	76:1,14,15 77:4	28:18 50:6,10	dependency 82:15	differences 131:6
113:14 129:7	77:12,18 78:22	51:18 52:2 66:21	82:18,24 83:22	different 8:12,18
dates 58:25 108:6	79:2,3,6,12,17	66:24 74:19 80:22	84:5,6,16,16	12:23,25 13:13
David 5:6 31:18	80:1,2,7,11,13,18	87:12 89:5 91:1	100:19 104:15,16	14:19 15:2,3 17:2
47:7,16,19,25	80:19,25 81:14,21	129:4,21	105:4	20:8 22:23 25:9
48:13 50:8,15	82:11,15,23 83:2	decisions 11:25	dependency/cont...	26:22 27:10,11,24
55:25 85:21 87:5	83:3,3,10 85:12	40:22 93:17	102:14	31:3 32:12,25
87:10 88:16 89:4	85:13,25 87:20	declaration 3:19	dependent 79:7	33:5,11 41:2
89:15 91:10,14	88:8,18 89:7,7	42:22 44:11 45:15	82:16,18 84:3,8	52:20 53:12 72:18
94:10 103:23	92:8 95:1,1,15	46:7 47:7,10,13	102:19	78:14 79:1 84:10
day 15:21 50:1 54:7	97:7,11 106:6,6	51:2,18 52:5,16	depending 5:20	89:17 92:4,17,19
72:20 80:8 100:7	107:12 108:2	61:17 65:4 66:20	12:2 83:23	96:16,21 116:11
134:14	112:8,10,15,15	90:13,15	depends 37:5 77:22	118:25 130:7
days 71:6,7	113:22 114:6	declarations 42:1	92:9	132:15
deal 1:12 13:1	118:14,17,19	43:10 45:7,15,17	deprivation 26:19	differently 89:14
15:12,17 16:23	119:15 121:8	46:5 54:1 61:19	27:2,8,17,18 28:5	difficult 31:5 39:22
20:11 24:13 38:8	130:12	declaratory 42:6,6	28:18,20,23 29:9	40:4 48:10 81:25
59:20 66:8 67:25	debts 5:13 23:5	declare 45:23,25	derived 69:19	99:3
75:10,13 96:16	38:4 61:9 73:25	46:2	125:11	difficulty 32:13
107:24 117:24,25	75:5,8,9 76:9 78:6	declaring 46:12	describe 98:17	97:17 117:16
129:16	78:8,14,18,18,18	deducting 106:14	described 10:24	diluted 15:23
dealing 7:1,24 8:23	78:25 79:9,18,23	default 127:21	78:12 86:16 87:5	diminishes 127:11
15:9 16:4 17:4	80:6,17,21,25	defeat 1:19	95:25 96:3,8	direct 8:7 33:10
26:22 30:10 34:24	81:5,11,21,24	defeated 1:24	127:4	36:17 37:6,8,11
47:25 93:13 102:3	82:1,5 86:6 88:7	defence 4:10	describes 86:18	73:10
103:10 113:3	89:20,21 90:1	deficiencies 121:2	91:20 103:13	direct/indirect
124:6 131:17	91:12 102:24	deficiency 58:13	describing 28:7	37:22
dealings 108:1	103:12,15,24	120:8,10,12 121:3	94:5	directed 73:17
	104:20 108:8	121:6	description 28:1	direction 43:1,2

44:4,17 45:1 63:16 directions 42:5 44:2 directly 33:22 35:7 35:9,17 director 18:10 directors 18:8 disagree 117:17 disagrees 94:9 disaster 122:21 discharge 38:3 108:2 113:13 128:5 129:8,9 132:16 discharged 64:20 107:13 disclosure 20:9 discount 8:17 11:2 11:10 12:1 13:3 75:22 127:10 discounted 80:7,13 discover 15:20 discrepancy 124:1 discretion 5:1 discuss 45:4 discussed 2:10 39:16 discusses 92:17 discussion 28:13 dismissed 50:25 dispute 52:16 55:9 84:25 86:7 disputed 55:3,12 68:17 dissent 18:19,21 dissented 102:4 dissenting 35:3 103:7 distinct 92:3 distinction 6:16 14:25 26:18 27:1 28:13 29:7 83:8 83:21 84:20 103:2 distinguish 49:22	distinguished 27:7 distribute 60:24,25 distributed 104:20 128:18 distributing 58:20 77:15 distribution 27:4,8 62:3 108:10 109:7 122:19 123:4 distributions 13:11 dividend 105:1 dividends 128:22 130:10,13 dividing 31:8 Dixon 123:9 127:4 document 4:1 doing 33:25 35:6,7 35:9 42:4,8 43:7 44:15 54:3 55:14 84:5 116:25 domestic 88:17 door 31:6 double 38:19 39:1 39:13,21 56:3 95:9 doubt 31:25 70:1 131:12 133:10 doubtful 7:9 Dowling 10:18 draft 3:10 draw 55:10 83:21 87:1 drawing 21:17 draws 131:6 duty 43:7 122:2 125:18,22,25	62:16 113:15 132:24 early 66:4,4 91:17 earth 99:20 easier 111:7 120:5 120:13 easy 23:17 Eckhardt 107:2,3 108:20 economic 83:22 84:6,16 100:14,18 effect 1:7,17 4:6,19 23:4 24:1,3,10 26:6,16 33:8,20 33:21,25 36:18,19 36:22 37:1,9,13 37:24 38:5 57:23 58:2,8 63:2 64:10 64:10 77:10 86:21 87:12 94:11 108:9 109:7 115:12 129:15 effected 35:20 effective 4:13 22:19 eighth 124:14 either 42:10 59:13 65:13 85:19 96:22 108:12 118:4 129:8 element 2:18 27:15 38:12,23 39:15 46:23 49:22,23 75:25 76:14 85:4 85:7,8,9 116:22 118:23 120:16 elements 48:11 111:17 elusive 120:25 embarrass 34:6 employed 61:15 empowered 18:10 enable 1:16 enabling 1:8,17 encapsulates 122:6 encapsulation 90:8	enforceable 1:7 21:12 31:2 enforcing 120:8 English 88:12 ensure 5:16 40:14 98:13 enter 1:6,16 4:18 13:1 23:25 43:6 entered 28:20 31:1 34:23 entering 29:24 entirely 4:7 29:3 37:2 66:6 69:4,19 entitled 2:14 3:20 90:20 109:10 115:14 entitlement 3:16 entity 16:4 32:18 35:21 entries 2:10 equality 126:25 equally 132:9 equivalent 124:12 essential 55:2 80:21 81:6 96:4 essentially 3:2 4:10 72:13 73:18 82:13 87:4,11 89:4 125:15 130:13 establish 44:7,8 established 79:15 establishes 42:23 establishing 57:6 estate 27:19 38:14 42:16 43:3 44:1 46:8,10,13 48:2 67:8 estates 42:8 43:11 43:21,21,22 45:18 45:21 46:13 estimate 77:6,13 79:24 81:12 93:2 94:16 105:10 106:3 109:2,3,10 110:20,20 112:20	118:18,22 119:23 estimated 76:19 77:11 79:16 80:2 80:25 95:12 110:4 111:25 113:20 114:2,3 121:16 estimating 77:3 97:17 estimation 76:20 76:23 77:11,20 79:12 80:20,23 90:10 94:5 96:2,7 96:19,20,23 98:4 98:19 100:2 101:12 103:25 106:4 109:15 110:3 112:1 119:1 event 1:10 9:3 38:18 39:1 events 84:9 eventually 96:11 126:14 everybody 41:14 43:25 45:21 58:18 61:21 74:2 85:22 101:8 117:10 122:23 everybody's 43:22 evident 21:16 exactly 6:16 21:21 24:22 31:15 55:13 57:20 59:16 60:25 61:5 62:1 63:6 68:23 71:12 72:18 84:1,18 100:20 102:21 111:6 125:20 127:12 example 11:18 13:24 15:14 16:7 21:19 24:5 42:25 43:4 57:1 67:5 73:16,17 82:1 84:2,18 99:16,19 112:23 127:8 131:11
---	--	---	---	---

exception 5:23	27:22 28:16 31:3	falls 78:9 111:25	6:25 7:18 8:4,15	foreign 55:8 102:3
exceptions 6:3	31:12 32:23 36:18	116:2 128:8	10:3,15 16:11	forget 120:18
excessively 97:14	37:18,19 38:18,20	false 14:2	17:19 19:22 25:22	forgot 122:23
exchange 35:15	41:14,25 45:20	falsified 55:1	27:1 35:12 36:2	form 23:16 42:6,15
55:8	58:5,6,11 59:4	familiar 77:16	41:14 46:5 57:7	46:15 48:5 54:1
exclude 23:5	61:11 67:23,24	107:5	57:12 58:25 61:2	96:19
excluded 25:14	72:16 78:19 90:16	far 1:15 3:6 4:18	61:4,8,15 63:2,25	forms 98:12
excludes 21:25	91:24,25 92:8	8:21 28:9 29:19	64:4 66:13 68:1	formulated 3:4
exclusionary 7:3	133:16	37:10 45:5 54:14	73:21,23 84:16	7:11 45:17 56:21
exempt 21:3	extinction 40:20,24	56:20 62:9,10	85:21 89:12 90:25	57:8
exercise 41:14	extinguish 58:9	64:21 70:15 73:8	93:12 99:8 113:16	formulation 2:12
119:1	extinguished 39:18	74:5,21 75:24	121:22,25 123:13	3:12 45:14 56:21
existed 61:9	39:19 61:10	76:22,23 85:9	123:14 124:4	forth 43:25 70:3
existence 6:2	extinguishes 58:4	89:11,25 90:12	131:3	fortiori 6:14
existing 79:25	extra 48:25	96:2,18 115:2	firstly 75:6 76:5,13	forward 39:7,12,17
expect 60:11 68:11	extract 93:17 110:8	118:23 128:3	fit 18:11 22:20	foundation 49:15
96:24 97:15,20	extraneous 23:3	farthing 15:15	46:19	four 54:8 71:6,7
expected 116:23	extreme 99:16	16:16 17:5	fits 13:17 20:15	130:4
expedient 12:15,18	extremely 7:9	fast 40:19	five 7:10 19:22 41:8	framed 67:15
expenses 2:15,23	39:22	faults 111:15	56:13,14 106:19	121:13
5:17 38:4 124:25		favour 103:11	fixed 11:7	frank 48:24
131:19	F	feature 83:24 97:6	fixing 79:11	free 120:16
explain 33:6 41:11	face 66:23	97:23 102:19	flavour 109:1	friend 62:16 73:12
108:11	faced 38:14 42:3	featured 99:12	flawed 27:17,22,23	128:18
explained 5:2 9:10	51:20	features 115:21	27:24 69:14	friend's 60:20
120:7,9	facilitated 5:17	February 1:1	flies 120:16	61:24
explaining 26:15	fact 24:3 32:14,16	feed 82:13	floundering 63:1	Fry 16:12
explains 9:15	35:3 41:22 46:6	fictitious 132:25	flow 95:23 100:22	fulfil 23:8
103:16 108:7	55:10 75:18 78:25	figh 39:25	104:19	fulfilled 121:9
explanation 54:4	79:4 85:7,7 93:3	figure 118:24	flows 59:8 77:22	full 16:11,20 45:10
106:13	95:14 96:22,22	file 47:22	focus 73:8 83:2	74:18 75:7 76:2
express 17:20	109:6 119:25	fill 133:24	88:13	80:14 81:20 86:23
74:21	120:1,10 125:8	fills 133:17	focuses 27:1	89:20 90:20 91:3
expressed 40:21	facts 28:15 130:7,8	final 4:1 53:5	follow 81:25 82:9	109:9 118:16
53:11 67:20 131:7	factual 42:12	finalise 42:15	82:21,24 114:6	fully 27:7
131:13	faintly 62:22	finally 33:2 53:25	116:12	fund 122:5 126:6
expressed-implied	fairly 9:18 10:6	find 39:22 69:11	following 1:13 25:2	127:11
74:9	43:22 84:17 107:7	78:25 79:3 102:24	25:6 38:9 107:23	fundamental 15:6
expression 16:23	109:13 130:19	120:13 127:6	134:14	funds 23:9,13
extant 38:14	134:8	finds 2:1 21:7	follows 50:1,1,6	82:12 122:3,8
extend 27:23 81:20	fairness 111:8	fine 31:7 99:21	59:11 81:8 114:19	125:19
extended 49:8	faith 37:3,4	finished 106:23	foolishly 52:6	further 2:10 4:9
extension 89:10	fall 6:4,7 53:16	121:19 133:9	footing 54:8	20:4 44:20 59:12
extent 11:15 22:17	85:2 128:21	firm 128:6	footnote 122:8	75:16 126:13
22:20 24:21 25:13	falling 78:15	first 2:2,25 4:11	forecasting 70:19	129:5

future 34:9 48:18 49:6 78:18 80:6,7 80:11,12 89:20 90:1	33:17 34:3 40:8 42:15,20 45:5,22 46:3,23 47:17 48:12,21 49:14 53:14 57:23 59:1 59:9 84:2,10 85:10 86:1 93:5 103:5 111:20 116:18 124:4 132:22 133:9,22	119:24 ground 45:2 76:17 76:20 86:5 111:21 group 2:10 30:13 guarantee 23:1 guidance 55:23 guided 40:23	60:12 65:18 71:6 72:18,25 134:14 heart 26:20 held 11:15 47:8 67:7 80:17 help 26:24 37:18,20 39:8 40:3 45:4 55:10 59:22 60:1 68:16 72:2 77:1 85:17 93:5 helpful 8:4,11 9:12 21:6 26:21 34:7 34:19 36:14 65:20 Herschell 34:16 Herschell's 18:18 18:21 hidden 93:12 High 122:11 higher 79:5 97:4 HILDYARD 8:8 9:8,24 10:16,21 10:25 11:3,5 12:20,23 13:7,9 13:23 14:2,6,9 15:4,12,17,20 16:2,23 17:3,9,12 17:23,25 18:4,18 19:19 20:7,14 22:9,11,14,16 24:11,15,17 25:4 25:7 26:10,12 27:17,20,22,25 28:3,9,11,23 29:1 29:5,13,15 30:17 31:7,17,21 32:1,5 33:19 34:5 36:3,6 36:12,24 37:17 39:21,25 40:12,15 40:18,25 41:2,20 41:25 43:12,15,17 44:2,7,11,15,20 44:25 45:6,9,19 46:21 47:3,18,20 47:23 49:3,10,17 50:9 51:6,12,17	52:4,12,15,20,25 53:7,14,21,24 54:6,11,15,19,22 55:6,15,18,22 56:2,6,9,12 59:21 59:24 60:3,9,16 62:7,12,14,25 63:7,11,13,18,22 64:2 65:1,19,25 66:3,9 67:2,25 68:13,23 69:2,6 69:13,18 70:16,23 70:25 71:3,7,13 71:16 72:1 78:24 79:8 83:19 88:3 88:23 90:5 92:21 93:9,11,22 94:19 94:22 96:24 97:6 97:14 98:2,9,20 98:22,25 99:5,8 99:13,18,23 100:9 100:12,19,21 101:9,14,21 102:1 102:9,11,18 103:8 103:19,21 104:6 104:10,23 105:4 105:12,22 106:8 106:14,19 107:10 108:16 109:18 110:10,15,25 111:4 115:5,8,19 115:24 116:21 117:4,7,9,13,20 118:3,6,8 119:10 120:5 121:24 124:15,23 125:7 125:13,18 126:13 126:16,24 127:5 127:11,18 129:23 130:1 131:1,23 132:3,13 133:13 133:21,25 134:2 134:10 hindsight 59:7,9 61:14 77:8 104:11
G	galloping 133:13 gather 101:11 general 7:25 9:18 42:11 49:20 62:12 97:7 116:6 128:9 128:17,21 generally 47:9 48:21 50:2 generations 34:10 George 10:6 130:21 getting 96:10 105:12 118:8 give 25:4 40:10 43:5 45:7 51:5 55:13 56:11 57:15 80:8 95:2 97:3,4 98:7 103:3 108:9 123:24 given 6:1 23:21 25:15 32:11 38:19 42:19 43:10 52:5 68:8 78:13 83:4 91:3 105:18 112:13,17,17 113:4,18 114:7,10 116:20 118:19,22 119:8 134:7 gives 36:10 43:6 57:17 116:5 giving 32:10 47:4 69:11 86:1 glancing 85:19 Glasgow 19:4,8 20:2 21:1 go 4:17,18 7:17 8:12,18 9:25 10:4 12:6 16:3,14 19:11 20:21,23 21:5,6 22:6 27:12	goes 32:24 34:21 37:4 49:20 54:14 90:17 108:11 115:6 128:17 going 4:16 7:4 16:4 16:19 17:13 21:5 24:24 27:15 30:13 33:17 44:1,20,22 45:5 51:22 53:1 57:7 62:11 63:9 66:7,16 67:15 70:19 82:5 95:16 97:2 99:5,13 104:1,6 108:23 111:10 112:10 121:17 126:8 132:23 133:1 good 11:17 28:21 29:7,8,9,23 34:4 37:2,4 41:6 44:3 84:3 120:20 Goode 93:1,3 94:5 gosh 71:7 grabs 69:21 grant 41:18 42:1 46:16 51:17 granted 43:1 45:12 graphic 109:14 grateful 60:4 great 97:18 greater 112:3,6 grip 55:6,7 Grissell's 9:1,10,16 gross 110:20 114:2 114:15 115:14	H half 4:4 12:11 17:24 72:20 134:11 halfway 110:12 131:17 Halsbury 12:7 17:18 26:8,8,14 Halsbury's 16:10 hand 45:7,9 122:2 handed 69:9 hanging 69:11 hands 66:6 happen 30:6 51:14 51:15 122:25 happened 50:16,16 126:21 130:17,20 132:19 134:6 happens 55:1 61:7 61:13 64:11,18 103:14 104:24 105:6 happy 84:14 hard 40:19 62:17 66:24 head 39:23 headed 91:25 heading 25:2 headnote 9:5 12:5 21:15 35:13 107:6 109:16 122:12 126:9 127:17 129:22 hear 30:17 74:18 84:7 heard 73:11 hearing 45:16	heard 26:20 held 11:15 47:8 67:7 80:17 help 26:24 37:18,20 39:8 40:3 45:4 55:10 59:22 60:1 68:16 72:2 77:1 85:17 93:5 helpful 8:4,11 9:12 21:6 26:21 34:7 34:19 36:14 65:20 Herschell 34:16 Herschell's 18:18 18:21 hidden 93:12 High 122:11 higher 79:5 97:4 HILDYARD 8:8 9:8,24 10:16,21 10:25 11:3,5 12:20,23 13:7,9 13:23 14:2,6,9 15:4,12,17,20 16:2,23 17:3,9,12 17:23,25 18:4,18 19:19 20:7,14 22:9,11,14,16 24:11,15,17 25:4 25:7 26:10,12 27:17,20,22,25 28:3,9,11,23 29:1 29:5,13,15 30:17 31:7,17,21 32:1,5 33:19 34:5 36:3,6 36:12,24 37:17 39:21,25 40:12,15 40:18,25 41:2,20 41:25 43:12,15,17 44:2,7,11,15,20 44:25 45:6,9,19 46:21 47:3,18,20 47:23 49:3,10,17 50:9 51:6,12,17

Hoffmann 108:4	immediately 37:15	132:25	58:19 61:8,12,15	109:24
Hoffmann's 107:8	immutable 14:4,7	indeference 101:17	63:25 64:1 79:10	invite 29:11 41:18
110:9	impact 24:2	indefinite 125:24	90:23 91:19	53:4
hold 2:4 47:3	impacted 66:21	indemnified 2:8	insolvent 42:8	invited 57:15 133:2
holder 22:15 42:10	70:8	3:16	111:7	inviting 45:23,24
42:13 43:2	impair 8:14	indemnities 82:2	instalments 21:12	invokes 77:8
holder's 122:16	impaired 38:6,6	112:17 113:16,17	instance 89:12	involved 42:17 62:9
holders 42:4,25	impairs 11:20	113:18 116:12	90:25	105:21
43:5 44:4 97:21	implied 74:21	indemnity 1:23	instances 73:2	involves 1:24 105:4
123:15	important 10:11	3:20 30:19 31:15	instrument 97:16	inward 24:11,12
holding 27:1 32:20	12:19 25:21 27:9	65:7,11,14 116:5	97:24	Ironworks 107:21
109:16 122:12	28:22 57:9 67:14	116:8,14	instruments 88:18	irrelevance 29:23
127:17	70:7 86:2 92:6	independent 122:5	98:11	34:1
homely 84:2	111:9,18 124:21	125:19 126:5	Insurance 99:20	irrelevant 26:2
honest 34:19	importing 4:25	independently	intend 74:16,17	61:12 64:19 83:4
Honesty 84:16	impose 71:14	29:17	intending 36:7	irrespective 33:20
hope 41:15 68:4	imposed 5:11 7:20	indestructible	intent 29:23 30:15	122:20
105:7	125:23	125:22	30:15	Isaacs 89:18
hopping 103:4	imposes 7:15	indicate 73:5	intention 25:24	issue 1:4,12,12,15
horse 84:12,13	impossibility 9:19	indicated 53:7	36:6,10 60:17	3:8 11:10,25 13:3
hour 134:11	impossible 12:14	111:17	interest 5:19 8:6	17:15 18:10 26:24
House 11:24 18:17	53:8 54:11	indication 45:2	30:11 44:1 45:21	30:2 32:15 33:17
109:22,23 128:7	improving 24:4	indirect 35:18,19	81:4 86:8 87:21	33:18 34:3 35:12
129:4,19	inaccurate 15:5	37:1,6,8,12 60:14	87:22 88:6,9 89:3	37:12 38:8,9 39:6
huge 33:3	inaudible 21:4	indirectly 33:22	91:11 102:22	39:6,9 43:12 46:6
hugely 34:19	inbound 56:25 57:3	35:7,8	107:22 123:24	46:22,22 50:4
Humber 107:21	57:5,11	ineffective 32:22	interested 46:10	53:2 55:18 56:20
	include 38:22	inevitably 24:24	71:17 72:24	56:22 57:8,23
I	included 4:25 47:9	49:25 50:6 59:11	interesting 18:6,9	58:15,19 59:18
idea 108:6	including 2:17	59:25	73:15	60:21,22,22 61:1
identified 33:1,4	43:12 81:4,5 86:7	infer 30:15	interests 32:9 60:14	62:17,17,21,24
63:4 74:24 87:2	86:17 91:20	inflate 133:3	interfere 32:9	63:1 64:22,23
87:15 88:11,25	128:11	inform 70:3,3	interfered 21:13	65:5 67:9,14 68:3
93:24 117:12	inclusion 50:7	information 77:9	international 88:18	69:15,17,19,20
123:22 125:18	inclusionary 7:2	inherent 22:3	interpretation 92:9	70:4,7 73:4,9,9,21
132:23	8:1	initial 61:14	interse 23:20 34:25	73:23 74:6,7,9,11
identifies 124:19	incoming 76:8,16	initially 47:10	intervened 21:13	75:2,3,3,11,24
identify 54:25 68:4	76:18 77:20 83:17	ins 134:5	intervening 132:19	76:5 77:25 91:16
ignores 118:12,12	84:21 101:4	insist 110:1,22	introduces 14:4	101:18 103:10
II 43:15,17	111:16,17 112:1,4	insofar 4:21 43:7	introducing 126:10	116:10 117:19,24
illustrate 39:8	112:6 119:5	49:2 54:24 61:13	introduction 7:6,23	117:25 119:3,4,7
illustration 109:14	inconsistent 4:14	insolvencies 49:16	86:2	119:7 121:19
110:18	24:7 129:4	insolvency 3:15	invalid 123:16	123:6,10,22 124:6
image 108:11	incurred 2:16	27:21 30:5,10,12	invalidates 123:23	129:5 130:14
immaterial 91:6	indebtedness	30:22 48:16 56:22	Investment 109:22	133:8,9,10

issued 3:10 issues 41:7,8,9,11 41:12,12 42:2 44:23 46:4,19 51:23 53:2,3,19 54:5,13 57:16,18 57:22 59:15,23 60:7,8,11,15,19 60:21 66:13,19 68:5,17,18,21 69:8 70:8 71:19 72:12 73:6,8,22 74:8 87:15 123:2 131:5 133:6 issuing 8:17 11:2 18:14 italicised 88:4	123:8 131:2 judgments 56:3 57:15 68:9 69:10 85:11 129:2 judicata 44:9 July 62:4 jurisdiction 52:4 justice 5:6 8:8 9:8 9:24 10:16,16,21 10:25 11:3,5 12:20,23 13:7,9 13:23 14:2,6,9 15:4,12,17,20 16:2,12,23 17:3,9 17:12,23,25 18:4 18:18 19:19 20:7 20:14 22:9,11,14 22:16 24:11,15,17 25:4,7 26:10,12 27:17,20,22,25 28:3,9,11,23 29:1 29:5,13,15 30:17 31:7,17,18,21 32:1,5 33:19 34:5 35:23 36:3,6,12 36:24 37:17 39:21 39:25 40:12,15,18 40:25 41:2,20,25 43:12,15,17 44:2 44:7,11,15,20,25 45:6,9,19 46:21 47:3,7,16,18,19 47:20,23,25 48:13 49:3,10,17 50:8,9 50:15 51:6,12,17 52:4,12,15,20,25 53:7,14,21,24 54:6,11,15,19,22 55:6,15,18,22,25 56:2,6,9,12 59:21 59:24 60:3,9,16 62:7,12,14,25 63:7,11,13,18,22 64:2 65:1,19,25 66:3,9 67:2,25	68:13,23 69:2,6 69:13,18 70:16,23 70:25 71:3,7,13 71:16 72:1 78:24 79:8 83:6,19,20 85:21 87:5,10 88:3,16,23 89:4 89:15 90:5 91:4,7 91:8,10,14,17 92:21 93:9,11,22 94:2,9,10,19,22 96:14,24 97:6,14 97:19 98:2,9,20 98:22,25 99:5,8 99:13,18,23 100:9 100:12,19,21 101:9,14,21 102:1 102:2,4,6,9,11,15 102:18 103:6,8,16 103:19,21,23 104:6,10,23 105:4 105:12,16,16,22 106:8,14,19 107:10 108:16 109:18,20,21 110:7,9,10,15,25 111:4 115:5,8,17 115:19,24 116:21 116:25 117:1,4,4 117:5,7,9,9,13,18 117:20,21,22 118:1,2,3,6,8 119:10 120:5 121:24 123:9 124:15,23 125:7 125:13,18 126:13 126:16,24 127:4,5 127:11,18 129:23 130:1 131:1,23 132:3,13 133:13 133:21,25 134:2 134:10 justices 67:13 justifies 126:14	K keep 70:12 92:3 keeps 12:19 kept 99:5 kind 30:21 King 122:9 127:13 know 14:1,6,9 15:14 17:5,6 18:19 20:7 32:5 34:3 44:11 45:6 51:21 59:25 62:9 68:2,17 70:17,20 82:4 106:9 121:5 121:8 knowing 36:7 55:8 known 77:6 79:15 91:21 knows 44:1 60:10 63:20 75:4 80:6 85:4 87:19 91:9 115:13 127:21 134:2	47:5 58:3,16,21 58:23 67:6 73:24 75:6 84:22 85:2 87:3,12,18 88:7 89:10 90:20 92:4 92:8 111:23 118:18 LBHI2's 39:14 76:6,8,13 83:18 84:21 85:12 106:24 111:16 119:5 LBIE 1:15 2:5,16 2:22 9:11 38:14 47:4 48:16,17,18 48:22 49:5,14,15 58:3,22,24,25 59:7 64:15,17 69:5 74:23 75:18 82:10 83:18 84:22 92:8 112:17,22,25 113:18 LBIE's 46:24 48:2 56:25 57:24,25 58:1,4 59:3,10 60:23 64:9,11,18 64:20 67:8 72:13 73:24 75:7,9,17 76:5,7,9,12,14 111:23 LBL 1:22 2:4,7,7 3:10,13,16,20 21:23 25:2,23 36:16,22 38:10,15 38:18 39:1 48:4 50:17,19 58:2,4,5 58:21,23 62:20 63:16,23 64:8,14 65:6,9,12 74:10 LBL's 1:25 2:14 3:7 24:25 25:24 47:2 60:25 74:11 lead 85:15 97:24 learned 60:19 61:24 62:15 73:12
--	---	---	---	---

128:18	liability 2:9 3:13,17	13:2,5 14:3,12	17:14 18:25 21:14	71:21 72:9,13
leave 40:15,16	4:20,25 5:1,2,3,5	17:6 19:5,6,10,24	26:21 29:17,21	73:2,21 74:1,13
70:21,23 125:14	5:11 6:9,11,19 7:8	20:18,19 22:25	34:15 40:23 45:14	75:20 76:4,17
leaves 65:2	7:14,25 10:13	23:1 24:21 32:8	46:5 48:8 60:20	77:22 78:16,25
left 60:7 64:1 82:17	11:7 13:2 14:4,12	32:25 54:4 57:18	66:16 67:18 76:23	80:16 81:5,19
130:4	14:12,23 15:8	113:6 120:2,5,14	77:1 84:11 89:1	83:6,16,20 84:1
legal 42:12,23	16:16 17:2,16	limiting 36:19	90:13 94:16 99:19	84:21 86:9 89:11
45:16 46:7 100:15	18:13,16 19:24	limits 21:25 22:18	110:6 111:22	90:6,24 91:4,7,8
legally 35:17	20:3 21:3 22:1,19	32:23	123:13 132:17	91:13,17 94:2,9
legislation 30:4	22:19,22 24:20	line 13:7,9,10 31:8	134:10	94:15 95:24 96:13
legislative 30:15	25:14 32:19,25	45:25 46:1 92:7	looked 6:21 20:24	96:14 97:1,9,13
legislature 11:6	33:1 38:6,7,23	123:22 124:14	21:1 92:21 132:6	97:19 98:1,17
Lehman 2:10	48:11 58:10,12	lines 6:10 7:10 8:5	looking 1:22,25 3:5	99:15 100:10
length 70:17	65:6 73:24,25	9:21 17:10 19:23	8:2 16:9 19:7	101:2,11,18,22
lesser 67:24	74:3 76:7,10 78:2	29:2 50:14,20	22:7 33:25 34:2	102:2,4,6,12,15
let's 66:9 113:16	78:6,20 79:23	86:5 87:24 124:16	66:14,19 70:18	103:4,6,16 104:1
118:14,20	80:12 81:12,17,20	125:21	100:22 101:4	104:14,17 105:11
letter 1:25	83:13 84:15 95:2	link 68:21	112:14	105:16,16,19
level 78:16,23 79:3	95:7,10,12,23	linked 132:21	looks 29:14 36:3	106:16,17,23
79:4,5 81:4 82:11	96:6,15,21 109:10	liquidation 9:12	67:5,8 77:17	107:8 108:4
82:13,15,23 83:4	110:21 111:24	48:18 49:6,14	96:13 123:18	109:20 110:7,9,17
83:11,23 91:10	112:4,6,24 113:6	58:20 75:19 88:15	loosely 41:8	115:7,17,25 117:1
102:25 104:18,20	113:12,19,21,22	107:12 111:7	Lord 1:4,15,23 2:1	117:4,5,9,18,21
116:24 126:23	114:1,13,21,21,22	129:8,18 130:11	3:1,3 4:22 5:2	117:22 118:1,2,5
levels 78:15 79:1	114:25 116:2,11	131:14 132:17	6:23 7:18 8:9 9:5	121:10,17 123:1
81:3 82:17 83:14	116:14 119:13,15	liquidator 73:17	9:13 10:5,14,16	125:5,14 126:8,18
102:24 121:5	119:18 120:7,11	75:19 122:4 130:6	10:19 11:1 12:6,9	127:13 129:12
128:22	120:16,22,22	liquidators 73:10	13:14 16:9,10,12	131:2,2,9 133:5,5
Lewison 91:4 94:9	121:4 126:4	literally 99:23	16:13,14,17 17:13	133:16,23 134:1,8
96:14 102:4,6	127:21,22 130:14	little 7:6 19:6 25:18	17:18 18:5,18,21	Lord's 37:14 47:12
103:6,16 105:16	132:20 133:3	28:1 32:12 37:7	18:21 19:14 20:21	Lords 11:25 12:8
115:17 117:1	liable 2:5 4:24 11:9	40:8,10 55:13	21:7 24:22 26:4,5	18:17 35:24 128:7
118:1	11:12 12:17 23:7	71:11 126:13	26:7,8,8,9,14	129:4,19
Lewison's 83:6,20	23:9,14 64:16,16	133:8	27:12 29:16,20,21	Lordship 6:21 8:9
91:17 94:2 117:18	64:17 131:13	loan 90:22 92:10	30:2 32:7 33:1,4	13:15 25:21 26:23
liabilities 1:18 2:16	liberty 43:5	119:11	33:11,17 34:2,15	27:13 29:12 35:6
5:13 23:6,7 38:4	lies 117:11	lodged 95:21 96:25	34:16 35:3,22	39:7 41:10,17,18
78:6,8,13,15	light 66:14 71:17	97:2,20	36:13 38:8 39:17	42:5 45:2,5,23,25
86:17 87:6 89:19	71:18	lodging 93:25	41:6 42:2 44:22	46:2 51:5,19 52:8
96:7,18 99:3	limit 10:12 24:18	94:11	44:23 46:16,17	52:10 53:4 54:5
108:14 113:14	limitation 3:25 6:4	long 24:9 71:3	47:1 56:19,20	55:16 56:11 57:14
114:22 116:8	6:7,8 14:23 22:19	123:8	57:13 59:15,22	57:19 60:10,12
119:20 125:16	22:22	look 2:3 3:7 6:20	60:7 63:6 66:2,13	61:22 63:20,24
128:5 131:18	limitations 5:21	7:1 8:15,17 11:22	66:22 67:3,17	65:23 66:11,18
132:11,21 133:4	limited 6:9 12:8,21	12:5 13:16 16:7	68:20 70:10,15	67:22 68:20,25

69:10,15 70:13 71:1 72:9,15,22 72:22,24 73:21 74:18,20 75:3 77:16,17,24 80:6 84:17,19 85:3,11 85:14,17,18 86:1 86:3,4,14 87:7,8 87:19,25 88:4,20 88:24 89:13,16,24 90:2,13,18 91:9 91:21,22 92:1,24 92:25 93:5,23 94:3,12,15,24 101:25 102:8 103:3,5,9,20 104:2,3 105:3,20 107:1,4,6,11 108:17,19,24,25 109:15 110:5,8,11 110:17 111:13,19 113:3 115:3 117:6 117:8,14 118:10 119:22 121:14,22 122:7,9,11,13,15 123:11,13,18,19 124:7,11,13 125:8 126:7,9,10,19,20 126:22 127:16,19 127:21 128:10 129:1,22 130:23 131:9,21,24 132:14,15,20 133:2,12 Lordship's 21:18 66:6 69:3 70:4 72:17 75:21 79:12 86:10,13,24 87:1 94:2 99:1 107:5 121:1 126:21 Lordships 53:11 69:25 131:7 losses 55:9 lost 41:3 lot 11:2 25:12	26:23 28:13 42:17 Lowe 107:18,24 luncheon 72:7 <hr/> M Macnaghten 18:5 26:5,7,9 125:5 Macnaghten's 16:14 main 9:15 10:9 16:17,18 75:3 making 60:11 94:4 126:6 man 104:11 manage 62:2 manager 35:21 36:7 mandate 126:24 mandatory 4:14,23 4:25 6:5,6,11,17 6:18 11:17 25:11 58:8 manner 31:13 mark 18:20 market 102:18,18 105:18 Marshall 5:24 30:17 32:7 50:18 materials 115:4 133:5 matter 1:5 4:11 7:4 25:16 29:4 32:17 36:24 39:10 63:5 63:8 65:22 70:11 76:22 83:22 92:11 95:8,15,22 98:2 98:16,24 101:16 108:2 120:3 122:24 128:7,24 matters 2:19 7:5 16:18 17:17 26:6 52:13 55:3 59:24 66:7,9 95:20 maximum 78:3 89:21 110:21	113:19 McPherson 6:21,23 7:11,22 121:18,19 125:11 McPherson's 11:18 meal 84:3 mean 8:15 16:19 17:17 18:24 37:17 39:21 40:25 41:20 48:13 49:10,12,24 52:17 65:14 67:25 89:19,20 114:15 126:18 meaningful 46:11 means 5:4 45:24 53:12 65:21 73:7 95:4 100:3,4 126:10 meant 26:8 measure 78:19 measured 78:4 79:24 113:12 114:22 120:7 measures 133:3 measuring 97:18 114:12 mechanical 106:11 mechanism 79:11 meet 3:13 22:1 120:22,24 Mellish 10:6 member 1:5,8 2:16 4:24 5:5 6:2 11:9 13:21 22:25 23:1 23:2,7 92:6 130:1 132:12 member's 21:25 25:14 109:5 members 6:11 15:8 15:14 32:22 38:3 49:16 59:13 109:7 109:13 111:11 119:12 120:1 122:17 126:17,23 127:3,23 128:13	members' 111:2 mention 65:3 mentioned 24:5 60:13 65:5 94:17 123:5,16 129:17 metaphors 44:13 million 84:23 113:19 118:20 mind 37:1 57:10 102:15 105:14 minutes 56:13,14 106:19 133:11,20 mirror 60:21 mischief 31:15 missing 99:24,25 misunderstanding 105:23,24 mitigates 108:13 mixing 44:13 Mm-hm 9:8 19:19 29:13 51:6 59:21 69:18 modified 55:4 moment 5:4 10:1 23:18 32:12,16 34:4 51:5 54:3 55:22,23 56:11,13 79:20 83:5,7 87:9 92:25 93:3 94:7 103:3 106:17 114:9 120:15 money 41:4 82:16 83:23 104:19 111:10 120:20 months 35:15 Moore-Bick 91:8 117:5,9 118:2 morning 123:11 125:6 127:9 Morris 129:14,24 134:4 Morris' 129:3 130:6 motive 28:17 move 19:2 72:23	moved 51:3 moves 74:7 96:10 116:17 moving 72:3 106:1 muddle 104:7 muddled 105:12 Muir 19:3,7 21:1 <hr/> N name 20:19 nature 6:11 20:17 25:13 70:2 79:2 83:2,3 90:24 91:2 109:1 112:24 120:6 122:14 124:17 125:22 132:19 neat 28:1 90:4,7 necessarily 44:7 132:5 necessary 1:21 6:15 20:21 29:16 51:13 51:14 68:25 79:13 113:11 114:24 need 2:24 3:7 9:14 12:5,9 18:19 21:14 33:13 42:14 44:18 45:14 52:12 54:22 59:5 61:21 65:19 86:1,24 107:8 122:7 134:4 134:5 needed 133:20 needs 6:25 11:22 39:10 54:4 68:24 76:12 92:3 negates 31:8 negative 95:9 nervousness 67:12 net 61:11 123:25 neutral 74:24,25 never 41:3 81:23 134:2 nevertheless 68:15 82:7 96:13 111:12
--	--	---	--	---

112:12 night 50:1 nil 76:2 80:25 81:12,16 93:2 94:16 95:13,16 96:25 97:3,8,11 97:11,13,21 98:7 100:24 101:5,13 111:19,21 114:7 114:11 115:10 117:22 118:4,11 118:13 119:5 120:23,24,24 nine 39:9 47:7 nominal 120:12 nominee 65:12 non 81:5 non-binary 118:25 non-production 71:21 non-provable 91:12 normal 97:10 normally 43:14 Nortel 91:23 notable 73:15 note 47:12 65:15 86:3 notice 58:8,25 60:24,25 62:3 124:21 noticed 18:24 notion 82:14 nugatory 4:20 nullified 55:3 number 6:10 8:18 11:16 24:25 33:5 39:4 40:3,22 42:9 69:21 72:11,11 73:22 122:20 123:25 numbers 47:5,5 numerically 113:1	o 72:23 o'clock 72:4 objection 15:7 objectionable 127:8 objective 98:13 100:1 objectives 98:10 obligation 5:18 11:21 14:14,18,22 23:14 83:25 obligations 1:9 6:17,18 25:25 obliged 36:20 obscure 85:6 observed 34:20 85:5 96:5 111:13 132:16 obvious 25:16 62:19 obviously 7:4 20:19 44:22 45:3,11,14 56:23 61:11 62:16 63:19 65:8 66:14 70:11,13,19 75:19 86:18 88:5 91:13 96:3 101:3,7 132:15 occasions 11:16 occupation 102:25 occupied 82:15 occupies 79:4 occupying 81:3 occur 80:4 96:11 October 3:10 offered 130:5 131:10 office 42:3,10,13,25 43:2,5 44:3 97:21 Oh 49:12 93:10 okay 84:14 102:11 105:22 old 128:1 129:7 once 6:22 21:12 52:4 53:8 61:8	68:8 105:1 116:1 one's 101:4 112:14 114:12 ones 55:11 68:10 99:4 130:5 oneself 13:20 81:13 112:16,23 113:17 114:8 116:13 121:2,10 Ooregum 11:4,23 11:24 12:20,25 123:10,20 opening 95:24 operates 58:9 103:17 126:16 operation 9:20 10:13 38:1,2 59:7 59:9 79:18 opinion 10:6,7 124:3 opportunity 85:18 opposed 7:25 33:22 60:23 oral 69:16 73:3,7 orally 72:16 order 3:10 47:14 78:19 90:15 98:10 98:21 107:20 108:1,8 Ordinance 126:11 127:15 ordinary 84:24 104:24 118:13 original 14:22 122:14 ought 8:20 113:1,3 outbound 38:22 56:23 57:9 outcome 5:19 67:6 outgoing 76:9,16 76:18 77:21 112:3 112:5 119:8 outline 77:25 83:16 outlining 94:18 outs 134:5	outset 84:11 102:23 outside 6:4 20:17 outstanding 127:22 130:2,4 outward 24:17 overall 46:18 overarching 10:11 13:19 overlap 28:15 123:10 overnight 67:19 overpass 97:23 overreliance 88:17 owed 92:8 owner 84:6,11	2:12 3:11 4:3,4,5 5:7 6:25,25 7:5,7 7:11,18 8:6 9:15 9:22 10:3,4,8,9 12:7,10,11 16:11 16:17,20 17:19 19:16,18,22 20:6 20:23,25 21:2 25:1 27:13,14 29:11 33:4 35:13 47:5 61:25 62:2 64:24 83:6 86:4 86:16,19,20,23 87:2 88:11 89:17 89:22 90:2,11 91:22,23 92:1 94:8,16,16,17 95:11,18 102:2 103:2 107:18 108:9 109:20 110:6 121:20,21 121:22 122:1 131:16 132:2 paragraphs 2:13 5:9 11:19 25:4 29:6 36:2 47:2,16 61:4 64:7 72:23 75:11,14 85:20,24 86:12 87:17 88:19 91:16,17 92:12 107:7,23 108:3,15 108:21 117:14 Paraguassu 8:22 8:23 pari 15:25 24:7,9 26:14,16,18 27:4 27:8 28:7 29:10 93:15 104:20 108:5,10 Parliament 9:20 part 13:18,19 14:22 16:8 27:9 48:2 65:8 71:9 80:21 81:6 82:25 85:16 87:16 89:11 90:17
<hr/> O <hr/>			<hr/> P <hr/>	
			page 2:2 4:4 8:4,5 9:14,15,17,18,20 9:25 10:5,7,9,20 10:24 12:7 16:10 16:18,21 17:18,19 17:24 18:2,6,7 19:15,17,20,22,22 20:4 26:10 27:13 34:18,21 35:23 36:1 46:5 77:17 88:1 90:15 93:16 93:16,18 123:13 123:18 124:13 125:1,4,9,10 131:4,16,21 132:4 pages 20:24 paid 6:12,18 14:18 82:5,6 90:20 95:17 97:2 105:2 105:2 109:3 114:10 118:16 122:17,21 123:5 123:15 124:2 130:10 paper 3:6,23,24 4:2 4:11 25:1 46:25 47:2 74:14,15,22 paragraph 1:13	

96:4 101:23 103:6 103:13 105:21,23 108:7,20 109:24 115:15 121:25 122:14 125:10 128:9 particular 6:1,2 7:8 8:3 25:12 45:18 45:25 53:11 72:11 73:4,8 80:25 83:25 86:8 97:6 97:22 108:20 113:25 120:16 132:22 particularly 8:4 53:8 67:1 94:23 121:25 parties 24:12 30:16 41:12,16 59:6 64:25 83:12 partly 6:12,17 14:18 68:15 123:15 parts 101:22 104:5 party 112:18,19 passage 7:22 8:1,3 9:14 16:9 18:7 19:15 20:5 21:15 26:4 34:20,25 35:22 83:5 91:22 91:25 93:1,3,12 93:18 94:1 103:22 124:20 125:11,21 132:4,24 passages 1:25 19:12 85:14 92:15 101:24 104:4 passu 15:25 24:7,9 26:14,16,18 27:4 27:8 28:7 29:10 93:15 104:20 108:5,10 Patten 109:20 Patten's 110:7 pause 9:7,23 16:22	28:8 51:7 88:2,22 90:3 92:22,24 93:21 94:14 97:5 102:11 103:20 107:9 108:15 109:17 110:9 121:23 122:12 125:12 127:17 129:25 130:25 131:22 132:2 pay 14:18 21:11 31:22 41:4 84:13 89:3 114:8,23 119:17 payable 17:6 35:15 78:5,7,9,22 79:3 79:16 80:2,4,10 81:14 88:6 113:25 114:4,16,18 116:13 119:23 133:4 payment 23:6 57:2 79:6 81:2 82:15 82:18 84:3,8 88:6 101:7 110:3 113:10,10,11 114:25 115:1 121:13,15 132:8 132:16 peculiar 20:12 pending 51:18 people 15:9 16:7 42:17 61:20 65:12 99:16 106:9 111:9 perfectly 30:23 33:6 78:17 period 132:19 permissible 30:23 permitted 23:18 person 4:24 24:23 persons 23:21 pick 17:18,22 46:3 66:11 87:17,23 92:16 93:16 94:6 103:4 107:17	109:19 110:5 124:7 130:20 131:15,25 picked 88:10 piece 30:4 place 2:2,2 57:7 58:24 59:4 101:15 126:23 placed 75:8 87:22 97:13 places 3:3 plain 102:13 plainly 40:21 120:19 128:16 129:14 pleas 10:17 plumped 75:15 pm 56:16,18 72:6,8 106:20,22 134:13 point 2:19 3:2,5 5:8 7:23 9:2 10:11 11:6 17:8 19:12 19:21,23 20:4 21:8,9,11,16 24:22 25:10,22 27:9 28:22 32:14 32:19,20 37:5 46:15,16 49:19 51:4 57:19 58:25 62:15 64:19 65:2 65:3,8 69:10,13 70:16 72:3 78:10 80:5 82:10,13 84:17 85:5 89:17 89:18 90:8 102:12 102:14 105:3 113:15,25 114:16 121:2,7 122:6 126:6 128:19 129:16,19 131:8 132:22 pointed 125:2 points 4:10 5:24 8:25 17:20 24:25 25:8,12,19 30:1	53:9 65:23 72:19 83:8 86:3 90:9 108:18 policies 99:21 policy 16:5 22:15 26:17 27:3 politely 37:19 Pollard 35:10 position 1:25 2:7 2:14 3:6,6,22,24 4:2,11,15 6:13,23 7:16 8:10 9:16 10:8 18:2 24:2,4 25:1 26:13 31:4 35:1 42:23 43:4 46:8,12,25 47:2,5 49:1 54:18 57:10 59:19 60:23 70:14 74:14,14,15,22,24 83:3 84:22 94:19 possibilities 67:17 possibility 67:16 possible 1:5 9:3 34:22 48:18 49:6 67:6 78:17 89:21 111:11 possibly 12:23 121:21 post 129:18 132:16 postdated 74:14 postponed 122:17 pot 128:17 potentially 2:5 85:8 129:3 power 19:24 73:10 77:7 122:4 pre-estimate 105:5 pre-estimated 104:23 pre-existing 30:22 precise 54:1 Precisely 94:21 preferred 46:1 prejudiced 30:14 preliminary 1:12	3:5 66:7,9 premise 52:15 53:16 119:7 premised 119:4 premises 55:20 68:5 prepared 39:3 46:16 prescribe 127:5 prescribed 13:5 96:19 127:1 present 2:19 4:12 7:6 23:2,7 28:6 38:2 51:25 63:15 78:17 80:8 91:6 presently 40:17 54:24 57:8 79:3 preserve 98:10 128:14 Presumably 15:4 29:1 presupposes 16:3 38:10,12 pretty 20:12 67:14 79:19 primary 31:9 principal 2:4 123:2 principally 123:1 principle 10:22 11:19 12:12 13:19 14:15 15:1 19:13 21:10,19,20,22 26:20 27:9 28:7 28:20 31:21 32:18 33:13,19,23 39:22 59:8,9 61:14 74:5 77:8 93:15 104:12 108:9 112:13 principles 27:11 104:4 107:15 108:22 112:1 131:20 prior 121:4 priorities 115:13 private 15:21
--	--	---	---	--

<p>probably 6:15 9:21 12:6 14:2 16:20 17:17 35:5 43:18 54:4 70:7 72:16 72:24 83:19 98:17 105:3 106:8,17 107:5 116:25 126:12 133:7 problem 21:23 32:7 94:25 117:11 119:3,3 124:19 proceed 116:2 proceeded 43:9 proceeding 93:25 proceedings 43:9 45:10 47:8 proceeds 128:3,14 process 30:22 63:4 76:20 77:20 79:15 80:20,20 94:5 96:7,23 98:4,19 100:3,8 103:18,25 106:12 109:15 112:20 114:7 116:12 132:25 133:1 product 116:16 119:22 Professor 94:5 prohibited 33:21 35:7,16,22 prohibition 35:9 36:8 94:10 promulgated 118:4 proof 38:20 39:1,13 39:21 75:6,9 76:5 76:11,11 77:3 80:7 90:21 94:1 94:11 95:21 97:20 properly 43:7 45:12 56:25 67:16 79:10 80:19 85:13 95:7 96:15 Property 109:22,24 proportion 122:20</p>	<p>propose 74:25 proposed 66:20 67:9 133:21 proposing 72:14,21 76:3 prospect 82:6 101:6 118:15 protect 42:24 protected 44:18 protection 7:19 23:19,21 32:10,11 42:14 43:7 44:5 provable 51:11 56:25 57:5 67:7 76:9 77:11 79:9 79:17 80:5,18 81:5 84:25 86:6 95:15 101:20 107:12 108:2 119:20 prove 87:13 88:7 89:8 90:21 proved 88:7 112:19 proves 118:18 provided 37:10 122:19 123:3 provides 79:11 80:15 110:2 provision 23:3 26:23 30:4,5 37:13,25 38:1,2 88:14 124:9 provisions 1:19 4:14 6:5,6 11:17 18:12,15 22:21 24:7,9 29:25 33:9 77:15,16 79:12 86:22 87:22,25 88:12,17 92:14,14 106:4 107:22 113:8 123:3 124:5 125:2,23 PTR 52:9 57:14 69:5 public 20:9 26:17</p>	<p>27:3 publication 20:16 publish 20:13 punch 45:6 purchase 129:8 purpose 17:21 26:3 26:6,7 33:20,24 34:1 37:3 73:18 85:10 115:1 purposes 2:19 4:12 7:6 19:14 28:6 42:7 46:7,9 57:6 63:15 74:1 75:6,9 77:21 79:21 80:6 80:9 81:11,17 91:6 101:24 116:3 117:19 pursuant 2:9 3:14 10:14 63:4 pursue 118:7 pursued 48:5 put 1:19 15:4,7 19:3 22:2 37:19 39:7,12,17 48:23 50:24 52:9 59:8 62:18 64:14 73:1 84:12 100:6 105:12 106:7 109:6 112:3,4,5 119:8,19 121:14 126:1 puts 18:6 30:2 74:4 126:3 130:22 putting 20:5 25:9</p> <hr/> <p>Q</p> <p>qualify 117:17 quantum 61:14 77:3 Queensland 124:10 question 4:18 11:7 28:16 33:14 37:9 37:12,15,23 38:17 48:1,2,7 51:20 59:25 63:24 74:2</p>	<p>80:9 81:13 101:19 104:7 105:14 107:12 112:2,7,16 113:2,24 114:8 116:6,10 118:21 118:21 121:12 123:21 130:11 132:6,10 questions 30:20 39:9 45:16 100:5 134:11 quick 17:14 34:15 77:1 quicker 133:18 quickly 107:7 111:10 134:9 quite 6:22 9:12 11:1 12:18 14:16 15:1 26:23 31:20 41:24 52:12 54:2 54:6 55:10,16,18 58:17 61:20 62:17 66:24 69:8 71:8 90:11 92:13 98:9 104:17,17,21 128:6 134:5</p> <hr/> <p>R</p> <p>race 84:12 raised 2:6,13,22 48:20 74:8 121:1 random 104:3 range 27:24 ranked 86:7 rankings 94:20 ranks 84:24 86:6 rash 51:17,24 rate 100:21 ratio 27:10 28:18 re-estimate 106:5 reached 48:19 52:2 58:14,17 reaches 48:14 reaction 99:2 read 3:2 7:18 9:5</p>	<p>12:10 17:23 18:23 27:14 28:9,10 29:12 62:25 88:1 88:11,20 90:2,5 92:22 94:3,12 102:8 103:19 109:16 110:8 121:23 122:12 124:13 125:4 126:13 127:17 130:24 131:21 134:4,6 reading 2:22 3:13 3:22 4:6 9:21 16:24 19:25 48:16 71:2 85:19 93:19 125:23 real 73:15 75:24 76:1 reality 111:4 really 8:3 16:20 19:13 22:7 25:8 25:10 32:2 33:13 34:18 36:1 37:12 37:17 38:9 41:3 44:2 55:7 57:18 60:18 62:5 63:1,3 63:5,7 64:19 65:3 65:23 68:17 76:22 97:21 102:12 104:6 120:7 124:5 reason 9:9,10 21:17 23:24 24:4,8 39:12 44:3 58:7 58:14,16 73:19 75:15 77:5 89:23 95:7 116:24 118:12 120:13 reasoning 34:17,22 61:5 69:20,21 81:7 96:4 115:16 reasons 13:16 25:15 28:21 29:8 29:23 33:1 36:25 39:6 43:20 49:24</p>
--	---	---	---	---

61:3 receive 84:7 recharge 2:8,15,21 2:25 3:17,21 21:25 23:16 38:10 38:11,15,24 39:11 39:15 63:17,21 64:7 65:7,10,14 65:21 recognises 83:7 recognition 103:1 recollection 14:3 reconstitute 59:10 reconvene 53:10 72:4 recorded 91:7 recourse 24:18 31:8 recover 38:18 reduce 13:2,22 58:10 reduced 31:13 130:12 reduces 31:9 redundant 52:18 refer 21:7 72:22 124:7 reference 4:9 10:2 10:2 22:4 45:17 47:1 77:8 78:4,7 79:24 93:1 107:22 109:21 111:25 113:13 114:23 115:14 120:17 125:5 126:5 128:2 130:15 131:3,25 132:10 133:4 references 108:19 123:19 128:11 referred 8:2 10:19 16:17 40:2 117:14 124:9 127:9 129:3 131:15 referring 10:16 49:13 124:12	refers 23:3 78:20 87:7 93:4 107:21 reflect 49:2 75:18 90:17 reflected 17:9 74:23 92:19 93:3 94:1 113:8 reflection 35:5 37:21 53:3 reflective 41:3 reflects 90:14 regard 123:5 130:16 regarded 26:3 132:9 regards 63:5 68:16 regime 1:20,24 registered 16:6 regulatory 92:13 98:11 rehearing 129:12 129:15 reinforce 62:15 reinforces 57:19 rejected 108:4 related 12:20 48:25 65:10 128:4 relates 8:16 60:22 65:11 128:8 relation 3:25 6:14 7:21 9:16 14:16 17:1 18:16 22:5 27:11 32:15 35:6 38:13 41:17 42:11 43:10 46:6,8,12 47:1,12,15 48:6,9 50:2,4,7,23 51:1,2 51:14,16 55:17 56:4 57:10,16,22 58:15 59:16 60:18 63:16 64:10,23 66:13 67:1,9,22 69:7 72:11 73:4,6 77:25 82:1 89:5 106:13 112:5,24	113:4 119:14 128:12,19 129:5 130:5 relationship 59:6 relatively 58:7 relaxation 7:20 relevance 8:7 87:8 relevant 17:21 22:21 26:1,3,6 28:17 33:24 52:21 62:4 65:17,17 75:12 76:24 81:1 81:2 85:14,19 86:9 87:25 89:1 91:22 93:6 112:4 124:4 128:1 129:7 reliance 87:21 88:17 relied 36:21 87:9 87:10 103:12 126:2 relief 41:18 42:6,6 42:22 46:15 relieved 14:14,22 relieving 9:19 rely 21:19 relying 90:7 107:24 rem 44:13 remain 74:16,25 remainder 5:22 remaining 41:5 99:11 131:5 remarkable 122:13 122:18 remedy 32:8,8 remember 13:23 22:11 58:17 71:12 remind 4:22 56:20 86:14 reminds 51:8 52:9 remote 97:12 rendering 4:19 12:14 renders 32:22 repayment 95:5	122:17 repeated 133:7 repeating 82:13 replaced 61:10 reply 4:2 report 35:23 representative 45:10 represents 32:20 require 44:17 76:19 90:21 104:15 required 113:13 119:16 132:12 requirement 12:15 requires 53:19 104:16 res 44:9 reservation 67:4 reservations 67:20 reserve 109:9 110:1 110:22 128:14 residual 14:2 resorted 20:1 respect 2:6 4:7 6:11 6:17,18 11:9 23:8 23:10,14 24:20 38:11,16,21 39:14 39:15 48:17 49:5 51:25 57:4 58:12 58:21 65:6,11 67:7 73:25 74:20 75:5 76:6,8,9,13 78:5,8,22 79:17 79:23 80:1,2,5,10 80:12,17 81:14 88:7 90:21 111:24 113:25 114:9,21 116:14 118:19 120:10,11 127:22 127:25 128:20,23 129:10 130:10 131:18 132:11 respectable 62:23 respectful 83:9	respectfully 14:20 14:24 26:1 33:2 114:14 respective 42:7 respects 23:25 response 89:4,23 102:5 128:6,12 restaurant 84:3,6 84:11 restrict 15:8 restriction 93:25 restrictive 49:7 result 13:12 27:21 61:9 71:22 98:23 100:1,13 122:25 resulted 37:2 return 13:1 revaluation 79:13 96:12 101:6 103:18 109:4 revalued 109:11 revaluing 104:15 reverse 1:11 review 70:12 revise 77:7 revisit 104:8,12,18 104:22 rework 59:10 rhetorically 132:7 Richards 5:6 31:18 47:7,16,19,25 48:13 50:8,15 55:25 87:5,10 88:16 91:10,14 94:10 Richards' 85:21 89:4,16 103:23 right 1:22 2:8 3:21 3:21 13:11,15 31:9 32:5 36:11 37:23 41:25 42:20 42:22 43:10 45:22 50:9 52:12 53:6 54:18,20 63:6 66:17 68:20 81:9
---	---	---	--	---

81:24 82:4 84:1,7 84:19 93:20 95:4 95:5,25 96:1 98:20,25 101:21 103:21 105:1,15 105:16 106:16 114:4 115:25 118:6 126:18,21 133:25 134:3 rightly 85:5 100:24 116:23 117:12 rights 5:15 23:22 23:22 34:24 109:13 110:2 127:4,5 rise 95:2 robust 98:18 room 40:11,15,16 59:12 roughly 68:2 route 14:19 15:2 Roxburgh's 109:21 rule 9:2 13:1,23 15:25 26:15,15,16 26:19 27:2,3,8 29:10 31:24 37:10 38:19 39:1,13,21 40:19 44:8 48:8 54:17 56:2 58:9 77:6,14 85:1 89:9 108:5,5,6 rules 14:4,7,11 20:8 20:9 27:2,10,16 28:14 76:23,24 79:14 89:1 run 87:18 runner 84:5 running 84:12 runs 86:12 102:7	satisfaction 82:17 95:6,13 121:4 satisfactory 40:1 satisfied 23:23 81:1 81:9,15,23 101:7 114:17 satisfy 121:5 save 61:22 saw 19:6 40:2,22 saying 16:13 32:7 44:20 55:17 107:25 111:7 125:15 says 26:9 30:18 37:6 49:4 64:7,11 64:14 65:12 67:10 68:25 83:8 84:14 89:19 90:19 92:7 94:25 95:18,19 97:19 100:24 103:16 115:11 116:18 119:7,10 126:22 131:19 132:24 scenarios 76:4 scene 91:18 scheme 13:10 29:2 75:12 79:10 80:15 88:13 89:25 90:8 90:10 96:16,17 106:25 107:13 108:12,21 110:2 110:19,25 111:1 111:13 114:4 116:3,5,15,17 119:21 120:23 123:7,12 125:16 126:24 127:2 scope 74:4 115:2 second 8:16 11:1 12:11 57:13 59:2 61:12 63:5 64:1 68:3 84:15 90:15 93:16 108:7 111:18 131:16,22	secondly 75:7 section 1:10,11,18 3:14 4:20 5:19,22 7:2 8:14 10:2,3,13 11:8 21:14 22:3,4 22:18 23:4,5,19 25:11,16,25 32:10 32:11 36:17 38:23 45:23 74:1,4 75:18,25 76:6,10 78:2,12,20 79:22 79:22 80:10 81:11 81:18,19 86:11 88:15 89:2 91:18 93:20 111:24 112:3,23 113:4,6 113:7,9,20,23 114:13 115:2,10 115:13 116:4 118:23 123:8 124:9,12,20 132:1 sections 113:9,11 132:1 security 34:8 see 1:23 2:13 4:17 9:5 11:18 13:17 14:16 16:7 23:17 25:21 30:7,12 31:5 36:9 39:10 40:4,9,12,25 41:13 44:24 45:10 46:19 48:10 49:12 51:12,19 53:10 55:11,19 62:17 66:24 67:5,19 68:9,24 69:7 79:18 81:25 83:5 86:4 87:8 88:4,24 92:2,24 93:23 94:24 98:5 100:12 104:16 107:11 120:13 122:24 123:19 124:11 127:19 130:8,23 131:3,9 132:4	seeing 32:13 seek 44:4 seeking 3:12 11:11 128:3 seen 46:17 53:5 72:9 73:22 86:10 86:24 91:21 92:25 94:3 108:19 122:15 128:10 sees 4:1 16:17 88:25 91:22 95:3 122:13 132:14 Selborne 131:2 Selborne's 9:13 10:5 19:14 selected 36:6 self-evident 5:10 self-executing 61:7 senior 81:2 82:4 95:17,17 114:10 118:15 sense 1:15 34:23 37:11 39:10 44:9 46:11 49:7 50:3 67:10 83:22 84:8 112:11 114:19 118:25 121:11 sensible 52:10 sentence 7:9 10:1,9 16:19 87:24 93:18 110:13 131:22 sentences 7:10 separately 75:14 separation 99:10 September 65:18 series 8:12 11:25 set 2:15 3:22 61:24 64:24 68:21 75:7 76:7,8,11,22,23 77:14,21 78:11 85:2 86:9,11,23 90:23 91:18,23 92:14,15 95:11 126:19 130:8 133:6	set-off 3:15,18 8:16 8:21,24 9:4 10:13 31:16 32:3,4 46:24 47:9 48:1,6 48:9,9,16,22 50:7 50:22 51:14,16 53:1 54:9 56:22 56:24 57:7,11,24 58:2,6,6,7,11,19 58:23,24 59:1,2,7 59:10,12 61:1,7 61:10,11,14,16 63:2 64:9 sets 28:12 85:23 92:12 131:4 severally 64:16 shaken 68:6 shape 44:24 46:17 share 2:5 16:4 105:24 120:12 shareholder 11:12 23:16 shareholders 5:14 12:16 17:16 20:12 23:20 123:24 127:20,25 shares 6:12,18 8:17 11:2,9,10,13,25 12:17 13:3,4 14:19 17:7 18:11 18:14 19:25 22:25 122:20 123:15,25 127:10 shines 71:16,18 short 18:22,25 20:16 34:13 37:21 42:22 56:17 58:25 64:19 102:12 106:21 121:7 shorten 123:21 shorthand 106:18 shortly 13:18 19:21 92:13 show 3:3 19:12 21:21 35:5 61:21
---	---	--	--	--

S

safely 54:25
Saffery 17:14 34:16
Safri 26:5
sanctioned 79:14

68:10 85:12 showed 26:4 shows 99:15 101:4 side 20:11 69:23 77:18 85:2 100:10 111:20,22 115:9 118:22 sides 74:18 119:1 significant 86:18 signposting 52:13 silly 49:17 similar 19:21 simple 15:4,7 36:22 39:12 58:7 simply 22:7 31:9 39:12 46:12 49:13 72:17,21 73:5 74:16 75:16 79:6 82:24 85:7 86:2 89:8 96:18 97:1,3 99:25 105:22 114:19 117:23,24 120:8,11 127:2 128:8,17,21 132:6 Sir 10:6 130:21 sit 104:18 105:6 situation 22:23 23:11 51:20 six 7:10 35:15 87:24 skeleton 1:13 20:24 25:2,6 33:5 43:24 46:4 60:20 61:5 61:24,25 62:1 64:6,24 72:10,10 72:23 73:12 74:25 75:11 131:16 skipping 123:21 skips 124:16 slight 67:4 122:21 slightly 13:12 14:19 19:21 27:24 28:5 32:24 52:20 72:18 105:2 118:7 123:21 130:7	slotted 133:14 slow 83:21 small 84:23 130:5 so-called 80:19 85:13 solution 99:9 somebody 43:6 sorry 4:3 22:11,12 25:5 26:7,10 43:16 47:21 49:3 83:21 84:1 90:4 93:10,12 95:9 100:10 102:10 104:6,9,17 115:5 117:20,24 118:21 126:18 127:16 129:24 sort 10:8 17:9 23:17 24:1 27:14 33:23 36:15,21 37:4 45:1 46:15 55:9 56:2 62:12 64:8,9 66:7 67:20 68:21 69:3 71:22 84:5 92:2 96:9 97:22 98:18 99:9 110:18 111:21 118:11 131:10 133:1 sorted 63:25 64:4 sorts 53:9 67:19 127:9 sought 38:22 source 82:6 special 14:4 48:22 specific 46:6 72:3 124:6 specifically 49:1 speech 12:6 16:10 16:15 19:14 20:4 34:15 35:3 spell 25:13 spent 71:11 squeamish 45:7 stage 39:8 48:7	56:7 69:3 124:22 128:15 stages 68:1 stakeholder 5:19 24:3 30:11,13 standard 86:15,21 Stanhope 110:9 start 1:21 6:5 9:14 12:9 46:4 66:3 83:17 85:21 109:22 starting 2:2 9:2 16:18 19:15,17 20:5 37:5 87:24 92:1 110:13 124:20 starts 7:23 9:14 14:15 34:20 90:16 93:13 122:1 124:4 125:25 state 51:25 53:21 53:22 stated 36:25 statement 9:18 11:18 12:12 17:21 19:13 71:22 89:25 status 6:1 15:10,22 19:5,10 20:17 22:24 23:2 32:22 87:6 statute 4:15,17,21 4:22,23 5:11 7:15 12:14 14:24 37:11 45:24 114:20 121:12 133:3 statutory 1:20 13:10 25:24 26:23 29:25 33:8,9,14 37:13,25 38:1,2 73:23 75:12 80:14 81:4 86:8 87:20 87:22 88:6,9,13 89:2,25 90:8 91:11 96:16,17 102:21 108:12	110:25 111:1 114:3 116:3,4,15 116:17 119:21 120:23 123:7,12 124:17 125:16 126:24 127:2 stems 83:10 step 23:18 steps 30:8 55:2,10 68:14 117:17 Stock 19:15,17 stops 121:6,7 straight 12:6 straightforward 36:17 strength 55:19 stress 30:1 strictly 65:16 97:14 strike 33:7 111:4 striking 111:1 stringently 7:20 struck 10:12 11:21 12:1,2 38:7 97:19 structure 12:8 stuck 110:2 115:9 stupid 104:7 sub-debt 4:7 22:5 38:11,13,17 39:14 39:16,18 46:23 49:2,22 57:25 58:1,12 85:6 101:19 sub-section 22:15 22:21 sub-sections 5:22 subject 14:23 30:20 41:10 52:16 59:22 69:22 72:14 77:4 78:4 86:19 96:23 97:16 106:9 109:4 112:22 submission 20:25 35:1 79:21 82:3 83:9 89:12,24 102:17 103:14	107:23 109:1 110:6 114:1 116:6 119:21,25 120:3 submissions 1:3 4:16 6:13 22:5 25:20 54:24 59:23 60:6,11 66:10 69:17 70:15 71:24 71:24 72:15 73:3 73:7 75:1 77:25 83:16 88:19 94:18 95:24 104:5 108:18 116:1 121:11 133:6 134:16,17,18 submit 6:3,13 14:20 33:2 78:20 80:3,13 81:8 82:7 82:20,25 112:2,7 113:23 114:5,5,14 submitted 132:20 subordinate 89:2 93:14 subordinated 24:6 38:21 57:4 58:10 67:8 70:2 73:25 75:5,8 76:1,13,15 80:17 81:14,21,24 83:10 85:12,25 86:6 87:6,20,20 88:8,8 90:22 92:5 92:9 94:25 95:1 98:8 112:10,15 113:5 114:6,9 116:18 118:17,19 119:11 121:7 128:20 subordination 70:2 86:19,22 87:11,14 88:12 90:17,25 91:3,11,15,24 92:1,18 93:13,24 94:4 98:6,13 117:25 subrule 77:17
---	--	---	--	---

subscribed 24:19 124:2	suppose 37:6 101:17 120:19	67:22,22 68:14 73:20 75:16 83:20	15:4,5,7 16:24 18:11 22:3 25:13	67:25 68:14,15,16 68:20 69:4,13,14
subsection 131:22	Supreme 29:19	85:14 86:25 87:7	26:5 30:19 39:22	70:6,9,10,17,24
subsequent 58:20 107:13 108:1	31:24 50:11,12	89:13,16,23 99:2	39:23 42:12 54:9	70:24 71:1,6,11
subsequently 52:6	51:9,18,21 52:1	101:25 103:9	61:18,20,23,23	71:15,16 72:1,24
substance 40:7,10 40:23	52:17,22 53:5,9	104:1 107:1,6,8	62:5 66:23 74:9	73:19 74:4 75:2
substantial 71:9	53:16 54:21 55:1	108:17,23 112:22	74:21 79:14 85:2	76:19 77:24 85:9
substantially 40:6	55:3,7 57:14,17	113:16 115:3	86:9,15,21 96:20	85:15,16,22 86:23
substantive 109:1	57:21 62:7,10	118:3 121:17	96:21 100:22	86:24 90:1,10
subtract 7:14	63:9 66:22,24	122:9 125:9 126:8	113:7,9 119:11	91:5 92:2 93:8
subvert 87:5	67:6,12 68:7,8	126:12 129:22	121:12 127:4	97:13 98:18 99:12
successful 130:22	69:9,23,24 70:4	130:19 132:18	130:19	99:13 101:12
suddenly 15:20	70:18 71:4,25	133:11	terribly 36:14	105:2,9,13,19
suffer 31:14	101:10 117:2	taken 26:14,24	test 39:16 40:1,2,2 40:5	109:20 111:21
suffered 111:5	sure 36:13 37:22	56:4 59:4,5,18	tested 121:1	117:17 118:10
suffices 42:1	40:12 53:17,25	85:17 86:13 89:18	testing 116:8	120:15 121:18,19
sufficient 82:12 113:10 114:23	54:14 55:24 61:18	90:18 104:2	thank 56:19 60:3	121:20 122:10
sufficiently 21:16 39:4 42:25	104:14,17,18,21	110:17 111:18	65:25 93:11 94:15	125:6,8 128:18
suggest 14:25 26:1 34:6 109:14	surplus 109:7,13	121:21 123:20	101:21 103:20	132:7 133:9,11,14
133:19	111:12 122:19	129:9,14,20	theme 8:19	133:16,17,19
suggested 69:5 82:10 84:9	123:4	takes 4:6 14:19,21	thing 20:18 30:21	134:4,5
suggesting 44:16	surprised 84:7	27:19 32:18 58:8	45:3 55:9 56:15	thinking 32:14
suggestion 10:21 102:6 128:12	suspect 21:9 105:20 106:12	94:23 126:23	57:12,13 71:17	37:23 48:24 50:3
sum 63:4 113:25	swallow 117:22	talk 113:9	115:19 120:25	57:11
summarise 104:4	swallowed 117:23	talking 7:2 14:12	things 9:13 45:13	thinks 14:10 30:8
summarised 107:19	swell 128:21 132:24	57:3 105:3	52:17 87:4	third 68:8 92:7
summarises 27:14 86:21	T	talks 5:13,14,17 85:5	think 1:21 3:5 9:14	112:18,19 123:22
summarising 90:9	T1 85:23	target's 120:19	10:19 12:5,9	thought 8:11 26:21
summary 6:22 7:16 8:9 10:8 18:2	tab 2:1 3:9 4:3 6:23	taxing 71:23	13:14 16:11,12,14	41:9 52:6 55:13
32:17 95:18	8:22 11:24 17:15	technically 50:25	18:1,11,20 19:14	62:16,22 71:21
103:24 108:21	19:12 21:8 22:13	tell 62:10 69:15	20:21 21:5,14,20	105:23 133:17
sums 113:9	26:25 35:9,11	70:13 72:21 97:1	25:8,21 29:16	three 5:18 8:5 68:1
support 87:21 117:2	47:18,21 77:14	99:22 101:13	30:19 31:11 32:13	68:14 69:3 74:8
supports 107:21	85:23 90:14 91:2	126:20	34:18 35:5 37:15	86:4 93:23 94:1
	93:8 107:4 108:25	telling 29:19	37:16,21 39:3,23	108:14 115:4
	121:20 122:10	tells 61:13 101:3	40:8,17 43:19,19	121:18
	127:16 129:13,24	127:2	45:13,21 48:25	thrust 48:20
	tabs 77:2	ten 9:21 33:18 38:8	49:17,25 51:24,25	Thursday 1:1 134:2
	Tait 122:9 127:13	39:6,7 106:19	52:7,9,12,21 53:2	time 5:3,4 12:4
	take 6:20 20:22	tenderness 131:10	53:3,6,17 54:18	34:2 35:16 53:5
	25:19 37:16 41:11	tends 85:6	54:20,22 55:10	57:16 61:9 63:3
	42:5 44:23 46:18	term 120:9	58:15 59:15,19	71:11 72:17 73:20
	61:1,3 66:4,18	terms 4:23 8:1 12:25 13:13 14:24	61:17,21 62:19,21	77:13 78:9,13,21
			66:15,25 67:5,18	79:16,16,25 80:1

81:13,15,22 82:4 99:8 105:18 109:3 109:11,11 111:4 113:25 114:18 127:23 132:5,17 133:17,24 times 128:6 Tindal's 35:23 today 63:20 65:3 65:22 told 119:6 tolerably 30:9 tomorrow 133:11 133:15,20,21 134:3,12,12 top 8:5 10:4 19:17 total 80:3 Toube 60:5,6,7,10 60:17 62:9,13,15 63:6,10,12,14,19 63:23 64:3 65:2 65:20 66:12 134:17 track 133:12 transaction 37:2 transcript 41:21 transcripts 34:7 transfer 122:22 transparent 43:23 transpires 110:5 treat 118:13 treatment 103:24 106:25 109:2 trenchant 130:19 Trevor 13:24 trial 85:22 trickle 79:7 82:12 82:19,24 trickling 82:16 trigger 115:20 trot 99:16 troubled 116:21 troubling 44:16 Trower 1:3,4 8:9 9:9,25 10:19,24	11:1,4,6 12:22 13:6,8,14 14:1,5,8 14:10 15:11,16,19 15:24 16:3 17:1,8 17:11,13,24 18:1 18:5,20 19:20 20:13,15 22:10,12 22:15,17 24:14,16 24:22 25:6,8 26:11,13 27:18,21 27:23 28:1,4,10 28:12,25 29:4,6 29:14,16 30:24 31:11,20,23 32:2 32:6 33:23 34:11 34:15 36:5,9,13 37:4,21 39:24 40:1,14,16,19 41:1,6,24 42:2 43:14,16,19 44:6 44:10,14,19,22 45:1,8,13,20 46:22 47:4,19,21 47:24 49:3,9,12 49:19 50:12 51:13 51:19 52:7,14,19 52:21 53:1,13,17 53:22,25 54:10,14 54:16,20 55:5,13 55:16,21 56:1,4,7 56:10,13,14,19 59:22 60:2,4,7 61:3,6,17 62:16 66:12 71:5,8,15 71:20 72:19 75:20 84:2 85:5 96:5 101:13,14,18 114:14 117:12 119:10 120:9 125:6 126:2 127:9 128:19 134:16 Trower's 61:25 82:3 115:9,12 121:21 true 84:15	truly 102:24 trust 93:24 trusteeship 19:9 trying 3:3 49:17 66:20 97:23 105:9 122:6 turn 75:3 79:5 91:1 110:11 119:18 turned 79:13 twice 61:1 two 12:23 15:1 17:10 18:17 21:2 27:2,10,16 28:14 28:15 29:7 36:2 39:6 40:7 54:8 73:8 74:13,15 76:4 83:15 84:9 87:7 92:4,7 96:9 102:22 106:24 111:17 115:4,4 127:14 129:2,19 129:20 130:3,5 type 21:24 112:8,17 116:11 123:10 127:10 types 78:14 93:23 typo 65:13	understand 41:4 44:2 55:16 65:20 69:22 98:9 99:1 120:9 understanding 41:16 57:20 98:12 115:6 understood 53:22 65:7,9 82:3 undertakings 87:2 87:3,4,13 89:8 94:12 95:8 98:24 undoubtedly 70:8 unequal 73:19 uneven 73:18 unfair 110:23 unlawful 12:1,2 31:2 unlikelihoods 39:4 unlimited 6:14,19 13:25 14:7,12 15:6,12 17:2,4 18:13,16 19:4,5 19:11 20:3,9,11 20:20 24:21 32:19 32:25 49:10 119:12 120:3,14 unliquidated 78:19 106:2 unpaid 6:12,17 11:8,13 12:17 120:2 unsecured 30:25 31:5,14 32:9 57:3 84:24 unspoken 71:22 unsubordinated 84:23 unusual 96:6 97:9 98:4 112:11 upfront 78:1 upheld 47:11 uphold 69:25 70:5 upsets 55:4 use 37:7 73:16 84:1	useful 6:22 7:23 16:15 90:11 103:23 108:21 116:8 uses 40:10 114:12 uttermost 16:16
V				
v 10:18 13:24 17:14 19:3,7 21:1 34:16 35:10 107:2,3 108:20 122:9 125:5,10 126:9 127:13,15,16 128:11 129:16,19 129:23 131:4,7,25 valuable 68:2,15 valuation 63:11 101:6 115:10 value 13:4 31:10 75:4,8,10,15,21 76:2 77:5,7,19 79:11 80:8,13,14 81:9,10,10 95:12 95:12 97:3,3,8,10 97:12,17,21 98:7 99:4,20,22 100:23 105:17 106:7 108:6,8 112:3,5,6 112:21 113:3 114:7 118:11,12 118:16,19 119:5,8 119:19 120:12 valued 76:19 96:25 107:20 variable 86:15 various 48:11 60:14 72:23 108:17 vary 7:14 VAT 77:12 ventilate 70:1 ventilated 50:24 ventilating 53:20 vice 132:23 133:1				
U				
ultimate 36:22 ultimately 14:25 43:13 44:5 130:22 unagreed 41:7 unaligned 73:2 74:16 uncertain 97:19 106:6,11 uncertainty 42:11 underlying 14:14 14:19,21 16:8 21:10,19 33:13 undermine 13:4 undermines 15:8 underpins 14:11,13 16:5 34:1				

view 56:4 66:17 70:4 views 70:1 virtue 3:20 vividness 108:11 void 26:17 volume 22:12,13 93:9 107:3 voluminous 71:2 voluntary 10:22 109:5 111:2,14	128:16,24 way 1:22,23 4:4 7:1 7:11 13:3,22 17:24 18:6 19:3 22:1,7 23:22 25:9 30:2 31:4 32:23 34:19 35:2 36:7 36:21 37:23 40:9 40:21 48:23 50:3 50:24 52:2,9 53:11,15 54:2,12 55:4,11,14 59:8 59:19 64:13 68:21 70:19 72:12,18 73:3 75:1 87:14 90:24 92:18 97:22 98:4,6 100:6,11 103:13 106:11 107:16 109:14 110:18 113:1,12 114:20 116:8 123:4 128:14 133:9 ways 15:24 92:17 92:19 108:12 122:13 we'll 83:5 94:6 118:16,17 we're 74:17,19 85:3 133:13 we've 74:22,23 84:11 Webb 125:10 126:9 127:15,16 128:11 129:16,19,23 131:4,7,25 website 43:24,25 weight 125:25 welcome 55:23 67:18 Welton 17:14 26:8 34:16 123:20 went 29:19 70:18 74:6 108:18 weren't 48:4	whichever 76:10 Whiffin 125:10 126:9 127:15,16 128:11 129:16,19 129:23 131:4,7,25 134:7 Whitworth 13:24 wholly 26:13 32:22 wider 45:22 wife 99:11 wiggle 40:11,15,16 Wight 107:2,3 108:20 winding 1:11 5:16 5:18 10:1,22 13:11 21:12 38:4 107:20 108:1,7,8 122:22 130:16 132:9 wins 84:13 wish 24:13 wishes 23:21 wishing 34:5 Wolfson 48:4 50:21 wonder 34:3 wondered 99:24 wondering 98:15 115:9 word 30:18 65:13 worded 66:23 67:16,16 wording 4:22,23 5:10 62:1 64:23 64:23 76:5 88:5 88:14 89:1 words 2:22 3:14,22 4:7,24,25 6:4,7 16:24 19:25 48:17 79:2 97:15 110:3 125:24 work 22:8 32:13 40:7 41:4 57:5,7 66:20 75:22 89:6 89:6 94:6 102:23 119:17 122:7	worked 33:21 works 25:22 61:16 80:24 109:15 110:19 114:20 119:1 126:22 world 20:17 32:20 32:21 42:24 69:8 69:12,24 worlds 20:10 worried 2:24 worry 115:5 worse 40:21 worth 9:21 15:15 16:9 17:13 93:19 118:23 wouldn't 31:6,19 65:5 71:23 81:25 wound 130:24 writers 106:18 written 100:23 wrong 25:15 32:17 38:10 50:19 54:2 62:3 82:8,8 83:15 105:16 118:8	35:10,11 73:4,21 73:23 74:6,9 75:2 86:16 93:12 113:19 117:24,25 127:14 134:16 1-tab 47:13,14 10 32:15 34:3 118:14 10.25 121:20,22 10.30 1:2 134:3,12 134:14 100 96:8,12,12 101:13 10011 6:25 7:5 10012 7:17 10015 7:23 102 21:14 10A 93:5,7 11 47:13 62:4 90:14 11.43 34:12 11.53 34:14 110A 93:10 1169 36:1 117 47:2,4 1175 35:23 118 47:2,4 12 47:14 59:15,18 60:7,19 61:21 62:21 64:6,22,23 65:5 67:1,23 12.32 56:16 12.36 56:18 12.59 72:6 121 6:23 121:20 13 4:3,4 47:4 132 22:13 133 12:7 91:7 134 16:10 142 :1 47:6 91:18 130:4 143 5:7 145 16:18 15 91:19 150 113:9 157 77:2,2
W				
wait 104:16,19 105:7 waive 23:22 walk 68:2 want 17:23 56:12 56:13 59:25 66:3 66:4 67:22 70:1 90:5 103:4 109:8 111:22 115:3 124:6 wanted 25:23 30:1 56:19 65:2,15 70:10 101:25 107:1 126:20 wanting 57:20 wants 29:20 warrant 67:20 97:12 wasn't 18:23,25 21:5,12 49:21 50:12,14 61:18 71:8 72:14 101:11 waste 72:17 water 105:8 waterfall 5:7 43:8 43:15,17 47:8 77:23 78:16,17 82:11,23 83:11 85:10,11 91:20 100:22 104:2 105:7,21 108:19 120:18 128:10,13				
X				
X 43:3 64:16				
Y				
Y 43:3 64:17,18 years 99:6,6 yesterday 5:2 9:10 19:8 24:6 39:17 40:3 60:13 92:21 128:19				
Z				
Z 43:3 zero 115:17,20,22 116:22				
0				
0 96:8				
1				
1 2:1 8:23 27:13,14				

158 77:2,14 164 102:2,10 166 102:9 17 3:10 4:4 47:6 18 47:4 91:23 1892 88:15 <hr/> 2 <hr/> 2 1:1 3:9,11 5:22 11:23 21:7 28:1,4 46:6,22 50:4 53:2 55:18 56:20 57:8 67:3,24 72:4 77:10 122:10 2-tab 29:21 2.00 72:8 2.1 47:5 2.81 76:25 77:2,19 2.85 58:9 76:25 77:14 2.88 87:23 20 4:3 84:12 200 118:20 200,000 113:20,24 118:20 2012 62:4 2017 1:1 210 5:9 93:16 216 5:9 23 107:18,19 24 107:21 129:13 129:24 242 1:13 243 47:16,19,25 246 91:8 249 47:16,19,25 48:14 25 107:22 26 8:22 61:4 75:14 108:4 260 9:14,15 261 10:20,24 262 9:25 10:4 264 10:5,7 265 10:9	267 20:23,25 267.1 21:2 267.3 21:7 27 85:24 86:4 91:19 275 33:4 276 25:1,6 28 92:1 108:9 127:16 285 38:8 288.7 88:14 29 92:2 108:11 29-paragraph 2:2 <hr/> 3 <hr/> 3 3:19 5:22 26:25 69:17,19,20 70:4 73:9 74:7 75:3,24 76:5 77:25 79:1 107:3 116:10 117:19 118:16 119:3 121:19 3.16 106:20 3.23 106:22 30 108:14 109:20 109:23 133:11,19 304 17:18 305 17:19,24 26:9 26:11 306 18:2 313 34:18 314 34:18,21 315 61:25 32 108:14 110:6 321 18:6,7 35 110:12,16 356 19:20,22 359 20:4 36 19:12 61:5 37 92:15 38 64:24 84:23 92:16 93:1 94:23 94:25 95:3 124:9 384 19:15,17 38th 10:2 39 94:8,24	396 27:13 <hr/> 4 <hr/> 4 3:25 22:9 57:23 58:15 62:2 67:3,5 67:9,14 79:1 86:18 4.23 134:13 4.51 95:4 40 64:7 41 94:16,23 95:11 95:18 42 83:6 43 75:14 44 64:7 44.7 86:22 46 21:8 47 11:24 85:24 48 86:12 49 49:4 75:11 86:16 <hr/> 5 <hr/> 5 6:24 22:12,13 28:1,4 35:10 58:19 59:16 60:22 67:1,23 77:2,17 79:1,3 82:15 86:20 93:5,9,10 5-bundle 35:11 5.1A 95:6 5.1B 95:6 5.2 74:11,13 50 17:15 51 86:19 53 86:23 54 86:12 87:2 55 87:17 560 93:13 58 122:10 59 87:17 <hr/> 6 <hr/> 6 28:6 59:15,15 60:7,19,21 61:20 62:19,24 63:1 64:5 67:1,23 79:3	60 134:17 62 29:21 623 7:7 624 7:7 63 91:16 65 88:11 66 88:16 134:18 67 88:16 68 88:19 69 75:11 88:20 <hr/> 7 <hr/> 7 28:6,10 133:10 7.5 73:9 74 1:10,18 3:14 4:20 5:19,22 7:2 8:14 10:3,13 22:3 23:19 25:11,25 29:6 32:10,11 36:17 38:23 75:18 75:25 76:6,10 79:22,22 80:10 81:19 111:24 112:3,23 113:4,6 113:7,20,23 114:13 115:2,10 115:13 116:4 118:23 124:12,20 132:1 74.1 7:4 74:1,4 78:2 78:12,20 81:11,18 74.2 5:25 7:4 11:8 22:4,6,10,18 23:4 23:5 741 123:13 744 123:22 124:8 75 29:6,14 107:4 132:1 76 89:17,22 77 89:23 90:2,7 78 2:2,12 29:12,14 90:5 79 20:24 7A 81:4 91:11 <hr/> 8 <hr/>	8 47:21 85:23 80 20:24 803 130:21 804 130:8 806 131:4,5 807 131:5,6 808 131:9 809 131:9,16 810 131:24 85 26:25 87 87:17 <hr/> 9 <hr/> 9 1:4,12 91:2,16,18 90 46:5 92 2:13,13 93 2:13,20 94 108:25 95 2:13 103:5,8,9 95.2.1 3:1
--	---	---	--	---