

<p>1 Wednesday, 19 October 2016 2 (10.05 am) 3 LORD NEUBERGER: We will probably take ten minutes at 11.30 4 again, just so everyone knows. 5 Submissions by MR TROWER (continued) 6 MR TROWER: My Lords, two or three points arising out of 7 yesterday. 8 The first is on pages 131 to 135 of the transcript, 9 there was a series of questions about a second round of 10 proving. Can I just briefly expand on that and explain 11 what would happen in a case like this. 12 Once the restrictions imposed by the sub-debt 13 agreement fall away, then the sub-debt lender is 14 entitled to prove, it is not a question of a second 15 round of proving per se. What happens is that 16 an administrator sets a last date for proving, that is 17 rule 2.95, in the normal way. He deals with all of the 18 proofs that come in under rule 2.96, pays statutory 19 interest on the proved claims and also pays the 20 non-provable claims. 21 Rule 2.96, though, contemplates in its terms the 22 submissions of proofs after the last date for proving. 23 The subordinated debt lender is then permitted to prove, 24 as long as everyone else has been paid in full, so it 25 exercises its right to do so in the normal way under</p> <p style="text-align: center;">Page 1</p>	<p>1 a little bit -- not difficult, but one has to bear it in 2 mind when looking at this area, which is a point made by 3 Lord Millett in Park Air, which my Lord, Lord Sumption 4 may recall. It is not in the authorities bundle, but 5 what Lord Millett said there -- he was dealing with 6 a landlord's proof for future rent. 7 LORD NEUBERGER: Yes. 8 MR TROWER: And can I just give my Lords the reference, 9 because it is 2002 appeal cases 172 of 187D to F, and 10 basically, in the context of a landlord, the law appears 11 to be that you have to wait until the rent falls due 12 before you prove, because part of the consideration for 13 the receipt of the rent is the continued occupation. 14 Now, that point, though, was considered again, or 15 characterised again, in a different context by 16 Lord Hoffmann in Toshoku, which is in the bundle at F6, 17 tab 18, 3376. 18 LORD NEUBERGER: Thank you. 19 MR TROWER: He wasn't considering it together with looking 20 at Park Air, but it is paragraph 24. 21 LORD NEUBERGER: Park Air wasn't cited. 22 MR TROWER: No. 23 LORD NEUBERGER: Yes. Park Air wasn't the disclaimer case. 24 MR TROWER: It was the disclaimer case, my Lord. 25 LORD NEUBERGER: So it was obiter, then.</p> <p style="text-align: center;">Page 3</p>
<p>1 rule 2.72. The late proof does not disturb the 2 dividends already paid under the rule 2.70. 3 So as all of the other creditors will be paid in 4 full, it will not be completing with anybody else, so 5 there is no question of further pari passu assessment or 6 anything like that by the administrators or a further 7 round for proving in that sense, it is just a late proof 8 in that sense and that is the way its dealt with. The 9 rules I have just mentioned are in the bundle at F3, 10 tab 74. 11 One other thing is that I said in answer to 12 a question from Lord Neuberger that late provers are not 13 always people who could have proved from the beginning. 14 LORD NEUBERGER: Yes. 15 MR TROWER: Can I just clarify that. They must have a 16 provable debt, and as provability is assessed as at the 17 outset of the insolvency, they will, so far as the 18 statutory code is concerned, have been able to prove 19 from the beginning, so long as their debt is then 20 capable of (inaudible). 21 The circumstances in which they couldn't actually 22 have proved from the beginning is where they are unable 23 to put a sensible estimate on their debt at the 24 beginning, where they have contracted out of the ability 25 to do so, and there is one other bit of law which is</p> <p style="text-align: center;">Page 2</p>	<p>1 MR TROWER: Yes, it would have been obiter, yes. 2 There is a bit in Mr Dicker's case which deals with 3 disclaimer in this context. At the end of the day, not 4 a great deal turns on this, we would say. What one is 5 into here, or what one is concerned about here, is the 6 question of proving in respect of contingent 7 liabilities. 8 LORD NEUBERGER: Is it right to say, insofar as it matters, 9 that Lord Hoffmann was saying rent is a future debt and 10 therefore you can prove for it, and Lord Millett was 11 saying, no, you can't proof for it until it falls due 12 because you haven't -- 13 MR TROWER: You haven't produced the consideration for it. 14 LORD NEUBERGER: And both of those are obiter? 15 MR TROWER: Yes, I think they are, because in Toshoku he was 16 looking at it in the context of liquidation expenses. 17 LORD NEUBERGER: Do we have to decide the issue in this 18 case? 19 MR TROWER: I am not sure you have to decide the issue, no, 20 but you need to be aware of -- 21 LORD NEUBERGER: We will make some further -- 22 MR TROWER: You need to be aware of the question, I think is 23 a better way of putting it. 24 LORD NEUBERGER: We can make some further confusing 25 observations. Yes, thank you.</p> <p style="text-align: center;">Page 4</p>

<p>1 MR TROWER: So that is the first point from yesterday. The 2 second point from yesterday arises -- 3 LORD NEUBERGER: Can you tell me again which is -- it is 4 2.101 that entitles you to alter the proof, is it? 5 Page 2028, proof altered after payment of dividend. 6 MR TROWER: Yes, yes. 7 LORD NEUBERGER: Okay. Is that the one that entitles you or 8 does it just say? Where is the right to alter? Or is 9 it just -- 10 MR TROWER: We are not really talking necessarily about 11 an alteration, actually. Someone can find me the right 12 tort. What we are talking about here is a late proof. 13 That is where I started on this, anyway. 14 LORD NEUBERGER: Yes. Well, it isn't a late proof, it is 15 the amount increasing in the proof. 16 MR TROWER: Yes. 17 LORD NEUBERGER: You are proofing for the whole -- it 18 doesn't alter the proof, it alters the amount you are 19 claiming. 20 MR TROWER: It depends on -- 21 LORD NEUBERGER: Is it the amount you are claiming or is it 22 simply the value of the proof? I understand it is being 23 said you prove for this, you prove for the whole sum of 24 the subordinated debt, and then the administrator values 25 it at nil. Where does the revaluation of the proof --</p> <p style="text-align: center;">Page 5</p>	<p>1 yesterday was the definitions in rule 13.12. 2 LORD REED: Sorry, before we get to that, one matter I don't 3 have quite clear in my mind which Lord Neuberger asked 4 about earlier in the hearing is what really is the 5 status of all of this. The requirements about 6 subordinated debt have an origin in Basel. 7 MR TROWER: Yes. 8 LORD REED: And then Basel is given effect in EU law by 9 directive. 10 MR TROWER: Yes. 11 LORD REED: So the directive imposes an obligation on the 12 United Kingdom. 13 MR TROWER: Yes. 14 LORD REED: As I understand it, that is given effect by what 15 was the FSA at the relevant time through -- is it some 16 form of soft law, the GENPRU document? 17 MR TROWER: My understanding -- two things, the best 18 description of what is going on -- my Lord's question 19 may or may not be answered there, I can't say straight 20 away -- is in the judge's judgment, because he deals 21 with this. My understanding is that if you want it to 22 qualify as subordinated debt for capital adequacy 23 purposes, it has to comply with the requirements. It is 24 that -- 25 LORD SUMPTION: (Overspeaking) -- the subordinated debt for</p> <p style="text-align: center;">Page 7</p>
<p>1 it is not a new proof, is it? 2 MR TROWER: If you have proved for the whole debt -- of 3 course, we say you can't even do that, but if you have 4 proved -- 5 LORD NEUBERGER: Quite, but I just want to see how it works. 6 You say you can't do it. 7 MR TROWER: You can't do it. But there is a revaluation 8 provision which someone from behind will pass through to 9 me in a moment. 10 LORD NEUBERGER: Okay. I am really asking you not what your 11 case is; your case is you can't do it. 12 MR TROWER: You can't do it. 13 LORD NEUBERGER: Okay, fine. 14 MR TROWER: I just wanted to explain the statutory context. 15 LORD NEUBERGER: Thank you. 16 MR TROWER: Second point from yesterday, page 150 of the 17 transcript, my Lord, Lord Neuberger said: is there 18 anything that expresses and imposes an obligation on the 19 company as opposed to the administrator? I said we 20 would look again overnight. We have, we have checked 21 overnight, and the answer is we couldn't find anything 22 in chapter 10 of the rules, part 2, which is the bit 23 that matters for those purposes. 24 LORD NEUBERGER: Thank you for whoever looked for it. 25 MR TROWER: My Lord, the third point arising out of</p> <p style="text-align: center;">Page 6</p>	<p>1 much longer than the capital adequacy rules have 2 qualified it as capital, subject to certain provisos, 3 have they not? It is not a new creation. 4 MR TROWER: No. But what it enables a bank to do, 5 a financial institution to do, is to treat it for 6 regulatory purposes, if it complies, at a particular 7 level in it is capital, because banks have to have 8 capital of certain qualities in order to -- 9 LORD REED: So we are right, then, in looking at 10 subordinated debt agreement purely as a contractual 11 matter, rather than having any legislative aspect to it. 12 LORD SUMPTION: Presumably all that happens if you have 13 a subordinated debt instrument that isn't on the 14 prescribed terms or in some other way doesn't comply, it 15 is perfectly valid simply that you have to have some 16 other assets to make up your capital ratios. 17 MR TROWER: Yes, I think that is absolutely right. 18 LORD NEUBERGER: Thank you. 19 MR TROWER: My Lord, the third point arising out of 20 yesterday relates to the definitions in rules 13.12 of 21 the word "debt" and the word "liabilities", which we 22 were on towards the end of my submissions. 23 Now, we continue to submit that rule 13.12 helps in 24 showing what "debts and liabilities" means as a phrase 25 within the statutory code, and it is completely</p> <p style="text-align: center;">Page 8</p>

<p>1 unsurprising to conclude that the word "liabilities" has 2 a very wide meaning. However, looking at the 3 rule-making power, we can see it may be a step too far 4 to submit that the words "debts and liabilities", as 5 that phrase is used in section 74, is actually defined 6 by rule 13.12(1) and 13.12(4). We think that is what 7 the draftsman probably thought he was entitled to do, 8 but we don't think he probably was, and so it may be 9 difficult for you to construe it in that way. That is 10 the way I would put it. 11 LORD NEUBERGER: There is a definition of "debt" in the 12 legislation, is there not? 13 MR TROWER: Not for the purposes -- 14 LORD KERR: Not for that particular purpose. 15 LORD SUMPTION: Is the definition doing more than simply 16 providing that for the purpose of a winding up pursuant 17 to the act, debts and liabilities shall have those 18 meanings, which would be intra vires? 19 MR TROWER: I think that may be right, my Lord. That may be 20 right. And I say ultimately it doesn't terribly matter, 21 because one still does get quite a lot of help from 22 this, but I can't submit that just reading the words 23 "debts and liabilities" in section 74, they are defined 24 by the rule in that way. 25 LORD SUMPTION: No.</p> <p style="text-align: center;">Page 9</p>	<p>1 the statutory screen for the purposes of section 74. 2 That is the submissions that I have to meet, which 3 is: what are the parameters of the statutory scheme 4 which section 74 is dealing with when it is thinking 5 about debts and liabilities? 6 Similarly, the same points on why the statutory 7 interest liability is an obligation or payable or owing 8 by the borrower for the purposes of the definition of 9 "liabilities" in the subordinated debt agreement, apply 10 to the question of why statutory interests, liabilities, 11 under section 189 are amongst its, ie the company's, 12 debts and liabilities for the purposes of section 74. 13 That whole area of why it is a liability of the 14 companies is dealt with in paragraph 140 to 171 of our 15 case. 16 But can I just add these four, I think, points, 17 which are in addition to the submissions that we have 18 already made in relation to that on the sub-debt 19 agreement, and that relate specifically to the 20 inter-relationship between section 189, interest, and 21 section 74. 22 The first point is that it is not a very big leap to 23 find statutory interest included within the phrase "its 24 liabilities" in section 74, because for the period when 25 there was no provision for statutory interest,</p> <p style="text-align: center;">Page 11</p>
<p>1 MR TROWER: But what I can go on and submit is, as I say, 2 that the draftsman has chosen words in the rules which 3 reflect the proper meaning of "debts and liabilities" 4 where they appear in section 74, and there are other 5 places in the act in which the word "liabilities" is 6 plainly not limited to proving debts, the most obvious 7 one being in section 107 and section 148 that we have 8 already looked at. I have explained to my Lords in that 9 context why it is that the word "liabilities" must 10 include more than non-provable liabilities -- and must 11 include non-provable liabilities and statutory interest, 12 and it would be odd if it was intended to have 13 a narrower meaning in section 74. 14 I have already made submissions on the reasons why 15 a liquidator has to deal with non-provable liabilities 16 and I don't think I need to go back on that. We deal, 17 just for my Lords' note, which this area in 18 paragraphs 132 to 139 of our case in the context of 19 section 74. 20 The simple submission is that there is, once one has 21 concluded that paying the liabilities is something that 22 is required to be done in the insolvency, which is what 23 I made submissions to my Lords on yesterday in relation 24 to the sub-debt agreement, it is plain that payment of 25 those same liabilities comes within the parameters of</p> <p style="text-align: center;">Page 10</p>	<p>1 post-liquidation interest was treated as a non-provable 2 liability to the extent there was a contractual right to 3 receive it and was paid ahead of returns to members. My 4 Lords have heard reference to the Humber Ironworks case. 5 It is also a point that is discussed in Lines Bros. 6 Now, the point was accepted and discussed by 7 Mr Justice David Richards at paragraph 154 of the 8 judgment and again at paragraph 164. The way he 9 summarised this point is that section 189 was intended 10 to widen the categories of creditors entitled to 11 post-liquidation interest in circumstances where, prior 12 to the 1986 Act, only those with a pre-liquidation right 13 to interest were remitted to their rights so as to have 14 a non-provable claim forward. 15 LORD NEUBERGER: What paragraph is that, sorry? 16 MR TROWER: 154 and 164. 17 LORD NEUBERGER: Thank you. 18 MR TROWER: Secondly, there is nothing in the language of 19 section 189 that compels the unprincipled conclusion 20 that this provision was intended to turn what had 21 previously been a liability of the company into a mere 22 direction to the liquidator. 23 Thirdly, it would be strange if a member of an 24 unlimited liability company had been relieved of that 25 liability in respect of post-liquidation interest,</p> <p style="text-align: center;">Page 12</p>

<p>1 simply because a creditors' right to post-liquidation 2 interest has now been put on a statutory footing. 3 Now, the members of course look at the point the 4 other way round. They say it would be odd to find the 5 liability of members increased, which is what has 6 happened by reason of the extension of the section 89 7 entitlement to statutory interest to those who did not 8 have a contractual right beforehand. 9 We say not so. It is wholly unsurprising that the 10 introduction of new interest rights in a liquidation 11 might extend the liability of the members. One only has 12 to think about it this way: if you look at the range of 13 things that are caught by the section 74 liability, it 14 is debts and liabilities, together with the costs of 15 liquidation, together also with the terms to members. 16 So it is not surprising to find the introduction of 17 a new interest right in a liquidation under the code 18 extends their liabilities. 19 What we suggest would be more surprising is if the 20 effect of introducing statutory interest were to reduce 21 the liability of the members in respect of those 22 creditors whose prior contractual rights to interest had 23 been replaced with statutory rights. So that is the 24 first point. 25 The second point is another point that is similar to</p> <p style="text-align: center;">Page 13</p>	<p>1 On the same theme, there is little commercial logic 2 to a scheme which treats principal in its entirety and 3 pre-liquidation interest as a liability to which the 4 members are required to contribute, but denies that 5 status to post-liquidation interests alone. What 6 justification, we ask, can there be for limiting the 7 liability of members in this way, when for both periods 8 the creditor has a claim against the company for being 9 kept out of the money to which he is entitled. This is 10 a point which appealed to the judge and he explains it 11 in particular at paragraph 163 of his judgment. 12 The third point relates to the inter-relationship 13 between statutory interest and non-provable liabilities. 14 If calls can be made to fund the payment of non-provable 15 liabilities, it makes no sense that they can't be made 16 to fund the payment of a higher ranking liability, which 17 is what would happen in relation to statutory interest. 18 The obvious reason for this is that if a call is made 19 because there isn't sufficient to pay the non-provable 20 liabilities, the proceeds of that call will then be 21 received by way of contribution to the company's assets, 22 and those assets will then have to be applied first in 23 respect of any shortfall in statutory interest, because 24 that is what the statute says has to happen. 25 The fourth point is similar to that, and it relates</p> <p style="text-align: center;">Page 15</p>
<p>1 that but I think it is different and it is an another 2 logic and consistency point, we submit. The reason why 3 statutory interest is a liability is that it is clear 4 that pre-liquidation interest is a debt or liability of 5 the companies for the purposes of section 74. Now, this 6 is because, as we know, pre-liquidation interest is 7 provable as part of the debt, pursuant to rule 4.93, and 8 it is common ground that provable debts fall within 9 section 74. That interest entitlement can of course 10 arise under a contract or a judgment, but as a matter of 11 policy it is a debt or liability towards the payment of 12 which the members are required to contribute, as 13 a pre-liquidation interest entitlement. 14 For the pre-liquidation period, the source of the 15 interest entitlement could be either the contract or the 16 Judgments Act, and it will be payable out of assets, 17 depending, of course, on whether it is a judgment or 18 not. For the post-liquidation period, the source of the 19 liquidation entitlement, will be, I accept, 20 section 189(4), but it will apply the contract or the 21 Judgment Act rate and will also be payable out of the 22 assets. There is little logic to a scheme, we would 23 suggest, which treats one as a liability for the 24 purposes of section 74, but denies that status to 25 another.</p> <p style="text-align: center;">Page 14</p>	<p>1 to the significance of the adjustments of the right of 2 contributories. It is similar to the point about 3 non-provable liabilities, and we deal with this point as 4 well in around about paragraph 131 of our case. 5 The way it works is this: a call can be made under 6 section 74, to adjust rights of the contributories 7 amongst themselves. The fruits of that call fall into 8 a common fund and then have to be applied in accordance 9 with the statutory waterfall. 10 LORD NEUBERGER: Yes. 11 MR TROWER: And that is Webb v Whiffin. There is no 12 provision for ring fencing. If the members' obligation 13 extends to enabling the company to make payments to 14 shareholders qua shareholders, which will happen when 15 you have made a call for an adjustment, then it would be 16 wholly illogical if that obligation did not extend to 17 any and all liabilities which rank for payment ahead of 18 such payment to shareholders, including, therefore, 19 statutory interest and any non-provable liabilities. 20 The judge dealt with the significance of this at 21 paragraphs 158 and 159 of his judgment, and 22 Lord Justice Lewison dealt with it at paragraph 121. 23 The way Lord Justice Lewison puts it -- it is at D3, 24 page 563, we don't need to turn it up, but 25 paragraph 121 -- very crisply encapsulates the point.</p> <p style="text-align: center;">Page 16</p>

<p>1 Can I then, I think, almost finally, not quite, 2 second last on this aspect of the case, go to the 3 security or boot straps argument, if I can put it that 4 way. 5 LBH12 suggests that the Court of Appeal conclusion 6 that a contribution could be sought in respect of 7 statutory interest is circular, because unless and until 8 there is a surplus after payment of the debts proved, 9 there is no liability to pay statutory interest. 10 We submit this is wrong. We deal with it in 11 paragraph 172 and following of our case. 12 LORD NEUBERGER: 172? 13 MR TROWER: Yes. The answer depends on the meaning of the 14 word "surplus", as used in section 189(2), and it is 15 used to describe what remains after provable debts have 16 been paid in full. What remains. It should be 17 remembered that if there is a right to make a call in 18 respect of an early liability ranking below statutory 19 interest, including a call to adjust the rights of 20 contributors, receipts will inevitably comprise part of 21 the surplus. So one needs to look at the boot straps 22 argument in that context. 23 Against that background, the fundamental flaw we 24 submit is the flaw identified by Mr Justice David 25 Richards at paragraph 165, and I think we ought,</p> <p style="text-align: center;">Page 17</p>	<p>1 MR TROWER: My Lord, they may well be. I am sorry, I am not 2 reading from my case. I am terribly sorry. 3 LORD CLARKE: I think they are. 4 MR TROWER: It is Lord Hatherley at page 720, a passage 5 beginning -- 6 LORD SUMPTION: Sorry, can you give me the tab number again, 7 I have only just found my bundle. 8 MR TROWER: 22. The passage beginning, "The assets of the 9 company". 10 LORD SUMPTION: Page? 11 MR TROWER: 1592. 12 LORD SUMPTION: The very bottom of the page. 13 MR TROWER: Yes, to over the page, under "the common fund so 14 formed". That is the first bit. 15 Then there is Lord Chelmsford at page 724. It is 16 the paragraph beginning "In the different sections". 17 And then one gets, again, something a little bit out of 18 the -- on the next page, on 725, for the first sort of 19 12 lines of the paragraph, beginning, "There is no 20 marshalling". 21 Then one has Lord Cairns at page 734 in a passage -- 22 and there are two passages from this, the one beginning 23 "A capital is created", and what is quite interesting 24 there is when he uses the concept of capital, he talks 25 about sometimes limited, sometimes without limit. He</p> <p style="text-align: center;">Page 19</p>
<p>1 probably, to turn that up. Its D5/649. 2 LORD NEUBERGER: Yes, it is quoted in your -- 3 MR TROWER: Oh, I am sorry. 4 LORD NEUBERGER: It is okay, if you want to take it -- we 5 are looking at the judgment quite often, but it is 6 an important case, yes. 7 MR TROWER: And so if my Lords would just like to remind 8 themselves of that insofar as they need to. 9 The way Mr Justice David Richards put it was agreed 10 with by Lord Justice Briggs at paragraph 197 of the 11 judgment, on the basis that the right to make calls, or 12 the members' liability to contribute under section 74, 13 is in any event an asset of the company's, and we submit 14 that they were correct on this point. 15 LORD NEUBERGER: The right to make calls is an asset of the 16 company, but does that really answer the boot straps 17 point? 18 MR TROWER: Yes, because it goes into the surplus when you 19 are assessing what the surplus is. So the bit in 20 Webb v Whiffin, there are three passages from the 21 judgments of Lord Hatherley, Lord Chelmsford and 22 Lord Cairns in Webb v Whiffin which help on this, and 23 they are to be found in F1, tab 22. 24 LORD NEUBERGER: Yes. Are they the bits quoted in your 25 case?</p> <p style="text-align: center;">Page 18</p>	<p>1 thinks of the obligations of the members in an unlimited 2 context constituting the capital. Now, it is not used 3 that way in some of the other cases, later cases, for 4 example Pyle Works talks about capital in a different 5 context. 6 LORD NEUBERGER: Was the wording of the provisions the same? 7 MR TROWER: Yes. We are here looking at section 38 of the 8 1662 Act, which I think we have in the bundles. What we 9 say the explanation for this is -- because as my learned 10 friend has shown you, Pyle Works, and it is referred to 11 in a number of cases, the point in Pyle Works was 12 whether or not you could actually charge the capital to 13 somebody else as security for a debt. That was what it 14 was all about. There was a big debate at the end of the 15 19th century as to whether you could charge uncalled 16 capital and there were commercial issues that arose as 17 to whether it was a sensible thing to be able to do. 18 Pyle Works suggested that you could, but in the course 19 of discussing that they discussed what capital meant in 20 this context. 21 That is not the same question, we respectfully 22 suggest, as both, I think, Lord Justice Briggs and 23 Mr Justice David Richards concluded, as what is an asset 24 of the companies for the purposes of determining how it 25 is that you look in particular at the boot straps</p> <p style="text-align: center;">Page 20</p>

<p>1 argument.</p> <p>2 LORD SUMPTION: What about cases like Oasis, which appear to</p> <p>3 assume that it is not an asset, either?</p> <p>4 MR TROWER: The Oasis type of case, as William Leach and</p> <p>5 Niagafon (?) as well, which are in a sort of similar</p> <p>6 area, what that is all about is there is a statutory</p> <p>7 cause of action which is available to the liquidators</p> <p>8 for the purposes of clawing back assets, or readjusting</p> <p>9 rights in a claw-back context, overtly in support of the</p> <p>10 pari passu distribution rule, and in that context the</p> <p>11 courts have held that the receipts are to come in for</p> <p>12 the purposes of distribution pari passu amongst the</p> <p>13 unskilled (?) creditors.</p> <p>14 LORD SUMPTION: Well, the receipts from the right must form</p> <p>15 part of the assets because section 74 provides that it</p> <p>16 is a contribution to the assets.</p> <p>17 MR TROWER: Yes.</p> <p>18 LORD SUMPTION: But the right to call under section 74,</p> <p>19 I think the point being made in Oasis is that that right</p> <p>20 is not itself an asset of the company, because it is</p> <p>21 exercisable only by the court through the liquidator.</p> <p>22 MR TROWER: Yes. But what we say -- at the end of the day</p> <p>23 what this all boils down to is whether or not you</p> <p>24 characterise what is there available as part of the</p> <p>25 surplus, which is for the purposes of rule 2.88(7) or</p> <p style="text-align: center;">Page 21</p>	<p>1 identifying the statutory order of priority, and one has</p> <p>2 to be careful about giving too much weight to the</p> <p>3 analysis of what the elements of the surplus are capable</p> <p>4 of being, which are a necessary part of the boot straps</p> <p>5 argument. And we say that that is a perfectly</p> <p>6 acceptable alternative way of approaching the problem,</p> <p>7 and commend it to your Lordship.</p> <p>8 LORD SUMPTION: It's a condition precedent to the right to</p> <p>9 call for it at all.</p> <p>10 MR TROWER: I am sorry, my Lord?</p> <p>11 LORD SUMPTION: The existence of the surplus is a condition</p> <p>12 precedent to the right to call for it at all.</p> <p>13 MR TROWER: Yes, although that is the whole point of the way</p> <p>14 in which Lord Justice Briggs looks at it. He says that</p> <p>15 is not looking at it as a matter of reality.</p> <p>16 But, my Lord, that is our submission in relation to</p> <p>17 it. I can't really put it any differently from the way</p> <p>18 in which Lord Justice Briggs put it. In a sense, it</p> <p>19 is --</p> <p>20 LORD NEUBERGER: Do you adopt what Mr Justice David Richards</p> <p>21 and then Lord Justice Briggs had to say about it?</p> <p>22 MR TROWER: We do.</p> <p>23 LORD NEUBERGER: And you say it is supported by</p> <p>24 Webb v Whiffin.</p> <p>25 MR TROWER: Yes, and that is the core of our point.</p> <p style="text-align: center;">Page 23</p>
<p>1 section 189, actually, is what we are really looking at</p> <p>2 here. So when you are looking at what you have got that</p> <p>3 comes in, do you take into account when you are looking</p> <p>4 at the question of surplus that asset.</p> <p>5 LORD SUMPTION: Which asset? The money when it has come in</p> <p>6 or the right to call for it?</p> <p>7 MR TROWER: Both.</p> <p>8 LORD SUMPTION: Because the judge's answer to the boot</p> <p>9 straps argument is dependent, isn't it, upon the</p> <p>10 proposition that even before the money has come in, the</p> <p>11 right to call for it has a value which is itself to be</p> <p>12 taken into account in determining whether there is</p> <p>13 a surplus or not.</p> <p>14 MR TROWER: Yes.</p> <p>15 LORD SUMPTION: So it is already there, although the money</p> <p>16 hasn't yet been called or turned up.</p> <p>17 MR TROWER: I accept that. It links to some extent to the</p> <p>18 provability question, possibly, which we will come on to</p> <p>19 in a moment, in relation to the set-off and the</p> <p>20 contributory rule.</p> <p>21 But we do suggest that the judge's approach is</p> <p>22 right. There is an alternative approach which</p> <p>23 Lord Justice Briggs adopted as well, which he refers to</p> <p>24 in paragraph 198 of his judgment, which is that the</p> <p>25 surplus wording is simply a convenient way of</p> <p style="text-align: center;">Page 22</p>	<p>1 LORD NEUBERGER: That is the core of your point and it is</p> <p>2 clearly set out in your written case, yes.</p> <p>3 MR TROWER: There is then, my Lord, what might be described</p> <p>4 as the bankruptcy point. I am not going to spend any</p> <p>5 time on it at all. It is dealt with in paragraph 190 of</p> <p>6 our case. For the reasons given in paragraph 190 of our</p> <p>7 case, the bankruptcy point doesn't help.</p> <p>8 LORD NEUBERGER: Oh I see, thank you.</p> <p>9 MR TROWER: Yes. Can I then move on to that part of this</p> <p>10 appeal that deals with provability set-off and the</p> <p>11 contributory rule.</p> <p>12 Now, we look at the architecture of this point</p> <p>13 slightly different from the way in which it has been</p> <p>14 presented to my Lords by LBHI.</p> <p>15 Before I explain that, can I just give my Lords two</p> <p>16 or three minutes on the practical implications here as</p> <p>17 to what is actually going on.</p> <p>18 LBL, the members, and LBHI2 have two relevant</p> <p>19 capacities as far as LBIE is concerned.</p> <p>20 LORD NEUBERGER: Yes.</p> <p>21 MR TROWER: They are creditors with substantial claims.</p> <p>22 They have lodged proofs of debts in LBIE's</p> <p>23 administration. They are members of LBIE, contingently</p> <p>24 liable to LBIE as contributories.</p> <p>25 As LBIE is an unlimited company, the liability in</p> <p style="text-align: center;">Page 24</p>

<p>1 respect of the debts and liabilities is unlimited in 2 amount. It is contingent because it depends on LBIE 3 going into liquidation in the future. Because the 4 section 74 liability crystallises only in a winding up, 5 and it is only in a liquidation that calls can be made 6 under section 150, there is simply the prospect of calls 7 in the future once LBIE goes into liquidation, and we 8 accept that.</p> <p>9 If LBL and LBHI2 were both solvent, the dual 10 capacities of them as creditor and members wouldn't 11 matter, or it wouldn't cause the same problems, because 12 the administrators of LBIE would be able to make 13 substantial distributions to them in their capacity as 14 creditors, knowing that, if later called on to 15 contribute, they would be able to discharge their 16 obligations.</p> <p>17 Because they are not solvent, they won't be able to 18 discharge in full their future obligations as 19 contributories. So if the administrators make 20 a substantial distribution to them now, it is 21 effectively a one-way street. Any calls made by 22 a future liquidator will go largely unsatisfied. That 23 is the issue primarily with which 7, 8 and 9 are 24 concerned.</p> <p>25 The members submit, first of all, that the</p> <p style="text-align: center;">Page 25</p>	<p>1 We make no bones about the fact that, as far as the 2 contributory rule is concerned, we would be inviting 3 your Lordships to extend the law. The reason we invite 4 your Lordships to extend the law --</p> <p>5 LORD NEUBERGER: That is the reason we are here.</p> <p>6 MR TROWER: I am pleased to hear your Lordship respond in 7 that way.</p> <p>8 LORD NEUBERGER: Not that we always do it when asked.</p> <p>9 MR TROWER: I need say no more.</p> <p>10 As far as the first bit is concerned, just to set 11 the scene a little bit more, if LBIE's claims against 12 the members are provable, it is accepted by LBHI that 13 set-off will apply and LBIE will be able to assert its 14 rights as a substantial net creditor in the 15 administrations of the members. That is what the result 16 will be.</p> <p>17 If the claims against the members are not provable 18 but are nonetheless available for set-off, the set-off 19 will extinguish any inbound claim into LBIE and LBIE 20 will then become a substantial net creditor in the 21 administration of the members once it goes into 22 liquidation, that is if they are not provable.</p> <p>23 If LBIE's claims against members are neither 24 provable nor available for set-off, then unless the 25 contributory rules apply, LBIE will either have to go</p> <p style="text-align: center;">Page 27</p>
<p>1 contributory rule doesn't reply; secondly, that LBHI's 2 contingent claims against the member are not provable; 3 and, thirdly, that there is therefore no set-off in 4 LBIE's administration. They effectively say we have to 5 pay out on the proofs now in respect of the 6 unsubordinated debt two, of them, and LBHI2 say payments 7 are also to be made in respect of the subordinated debt 8 now. The implications are that they get the money and 9 that that is an end to it, effectively, and the actual 10 value of the claim to contribute is substantially 11 reduced accordingly.</p> <p>12 LORD NEUBERGER: That, you say, is the commercial reality.</p> <p>13 MR TROWER: That is the commercial reality of what is going 14 on here.</p> <p>15 LORD NEUBERGER: I see.</p> <p>16 MR TROWER: There are two solutions to this issue, both of 17 which avoid what we would characterise as an unjust 18 result.</p> <p>19 The first is set-off, which may or may not require 20 LBIE's claim against the members to be provable. That 21 is basically issues 8 and 9.</p> <p>22 The second financial solution involves the 23 application of the contributory rule in LBIE's 24 administration, and that is the point addressed by 25 declaration 7.</p> <p style="text-align: center;">Page 26</p>	<p>1 into liquidation or admit the members to proof without 2 taking any account of its contingent claim against them 3 under section 74.</p> <p>4 Can I say this about the contributory rule before 5 we look at set-off: the contributory rule as it applies 6 in a liquidation is probably best explained by the judge 7 in paragraph 179 of his judgment. In summary, it is 8 simply that a person can recover nothing as a creditor 9 of a company until he has discharged all of his 10 liabilities as a contributory. That is the first point, 11 simply, and crisply expressed.</p> <p>12 The second point about it, though, is that it 13 doesn't work in opposition to set-off. Now, what that 14 means is that the issue as to whether the contributory 15 rule applies in administration is relevant only if and 16 to the extent that the answer is not supplied by 17 set-off, that is what I mean by that, which itself may 18 or may not require the question of provability to be 19 resolved.</p> <p>20 LORD NEUBERGER: So set-off is the first port of call.</p> <p>21 MR TROWER: Yes.</p> <p>22 LORD NEUBERGER: Yes, I see.</p> <p>23 MR TROWER: Can I admit straight away it wasn't always 24 approached in quite that way, but by the time we got to 25 the Court of Appeal it was clear that that was the right</p> <p style="text-align: center;">Page 28</p>

1 way of thinking about the point.
 2 LORD NEUBERGER: You first of all consider set-off and if
 3 you, as it were, fail on set-off, you then have to rely
 4 on the contributory rule.
 5 MR TROWER: Yes.
 6 LORD NEUBERGER: Okay.
 7 MR TROWER: One wouldn't --
 8 LORD NEUBERGER: (Overspeaking) -- warning us that if we
 9 read the judgments of Mr Justice David Richards --
 10 MR TROWER: Just bear that in mind. It is probably worth
 11 bearing in mind.
 12 LORD NEUBERGER: Okay, thank you.
 13 MR TROWER: That wouldn't necessarily be the result for
 14 which in a liquidation one would contend in all cases,
 15 because obviously you are in a better position if the
 16 contributory rule applies than if set-off applies.
 17 Now, the judges in the Court of Appeal both adopted
 18 set-off for the reasons that my Lords will have seen in
 19 the judgment, and they both held that in any event the
 20 contributory rule would not apply. So they concluded --
 21 I mean, leaving aside all questions of set-off, they
 22 said it wouldn't apply in any event, even if we were
 23 wrong on set-off, but they solved it with set-off.
 24 LORD NEUBERGER: Right.
 25 MR TROWER: Now, on this appeal, the members say that the

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1 judge and the Court of Appeal were wrong to adopt the
 2 solution that set-off was available.
 3 LORD NEUBERGER: Yes.
 4 MR TROWER: They say that LBIE's contingent claims against
 5 the members for contributions are not provable, and on
 6 this basis, but on this basis alone, they say that there
 7 is no set-off in the administrations of LBIE and no
 8 set-off in the administrations of them, either.
 9 We disagree and say that the judge and the
 10 Court of Appeal were correct to adopt that solution, and
 11 we go on to say that whether or not LBIE's claims
 12 against the members are provable in the administrations,
 13 set-off is available. Our second case is that if the
 14 courts below were wrong to adopt that solution, they
 15 should have adopted the solution of the contributory
 16 rule.
 17 LORD NEUBERGER: Yes.
 18 MR TROWER: Can I just make clear one other point, though,
 19 which is that although the question of provability is
 20 argued primarily in the context of set-off, there is
 21 also a second aspect to the question of provability,
 22 because irrespective of the question of set-off, if
 23 LBIE's section 74 contribution claim isn't provable, the
 24 members may be able to complete their distributing
 25 administration or liquidations without regard to LBIE's

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1 future claims against them. So although the primary
 2 purpose for resolving this issue is a set-off point,
 3 there is a freestanding question in any event about
 4 proving in their administration for any dividend.
 5 Can I just deal with that first question about the
 6 relevance of provability to set-off. Now, in the
 7 Court of Appeal, we accepted that the availability of
 8 set-off depended on LBIE's claims against the members
 9 being provable in their insolvencies, and this was
 10 because of BCCI 8 in the Court of Appeal, which although
 11 what was held in BCCI 8 -- and I don't think we need to
 12 turn it up for these purposes, although we will need to
 13 look at the House of Lords -- what Lord Justice Rose
 14 said, giving the judgment of the court -- some think it
 15 may have been another of their Lordships who actually
 16 wrote the judgment, but that is another thing, but its
 17 described as Lord Justice Rose giving the judgment of
 18 the court at page 256 -- was that a claim is not capable
 19 of set-off unless it is admissible to proof. It is true
 20 on both sides of the account, the right to set-off of
 21 a particular claim depends on the nature and character
 22 of the claim itself and not upon the side of the account
 23 on which it is to be placed.
 24 So what he was saying there is when you are looking
 25 at the question of set-off, you have to ask yourself the

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1 question of whether it is provable on both sides.
 2 LORD NEUBERGER: Yes.
 3 MR TROWER: Now, if we then just go to the House of Lords
 4 where Lord Hoffmann doubted that, which is F4, tab 8,
 5 2195 --
 6 LORD SUMPTION: Where do we find --
 7 MR TROWER: The passage is 2209.
 8 LORD SUMPTION: Yes.
 9 MR TROWER: It is the passage between F and H.
 10 LORD SUMPTION: I am not sure that this is right,
 11 a High Court of Australia decision. That is the
 12 passage, is it?
 13 MR TROWER: Yes, and the High Court of Australia decision is
 14 itself in the bundle and we can turn it up. It is F1,
 15 tab 10, 1245. It is the passage starting, "The second
 16 submission on behalf of the appellants".
 17 LORD NEUBERGER: Section 86 is similarly worded, is it?
 18 MR TROWER: Yes, we get where that is worded on page 1234.
 19 LORD NEUBERGER: Yes I see, thank you.
 20 MR TROWER: Now, just so my Lords understand what the
 21 position was in Gye v McIntyre, Gye was the bankrupt,
 22 McIntyre had a judgment debt and Gye had an unliquidated
 23 claim in tort against him which would not have been
 24 provable. So that is why the issue arose.
 25 LORD NEUBERGER: That is all of the way down to the break in

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<p>1 the paragraph on the following page?</p> <p>2 MR TROWER: Yes.</p> <p>3 LORD NEUBERGER: So it is really the passage dealing with</p> <p>4 the second submission, halfway down the page.</p> <p>5 MR TROWER: Yes, I am sorry, it is down to "occurred at the</p> <p>6 time of the sequestration order".</p> <p>7 LORD NEUBERGER: Yes, thank you. And you adopt that</p> <p>8 reasoning?</p> <p>9 MR TROWER: And we adopt that reasoning and we say it is</p> <p>10 right.</p> <p>11 LORD NEUBERGER: Was the Court of Appeal in BCCI 8, was it</p> <p>12 reasoned or simply a throwaway line?</p> <p>13 MR TROWER: I can show my Lords --</p> <p>14 LORD NEUBERGER: Don't worry.</p> <p>15 MR TROWER: It wasn't reasoned. It didn't appear to be --</p> <p>16 it relied upon a case called Graham v Russell, which was</p> <p>17 a very old case, which didn't seem to have very much to</p> <p>18 do with it, when one looked at it.</p> <p>19 LORD NEUBERGER: Okay, fine. We will have a look at that.</p> <p>20 Can you give us the reference to BCCI 8 without turning</p> <p>21 it up?</p> <p>22 MR TROWER: Yes, I can. It is in the Court of Appeal. It</p> <p>23 is at F4, tab 7, page 2166.</p> <p>24 LORD NEUBERGER: I see. Thank you very much. 2166?</p> <p>25 MR TROWER: 2166.</p> <p style="text-align: center;">Page 33</p>	<p>1 and then there is a deeming provision as to what are</p> <p>2 sums to be regarded as being due to or from the company</p> <p>3 for the purposes of the taking of the account as one</p> <p>4 finds in sub-rule (4), so that is the structure of the</p> <p>5 rule.</p> <p>6 LORD NEUBERGER: Right.</p> <p>7 MR TROWER: As is well known, insolvency set-off is</p> <p>8 self-executing. That is the first point to bear in mind</p> <p>9 when one is thinking about the way to look at this rule.</p> <p>10 That is Stein v Blake. So although it talks about</p> <p>11 creditors proving, you don't have to actually assert a</p> <p>12 proof for the rule to have application.</p> <p>13 When Stein v Blake was decided, though, and this is</p> <p>14 a point that is important if one is to understand the</p> <p>15 architecture of the rules, inbound contingent claims of</p> <p>16 the debtor were taken into account but outward</p> <p>17 contingent claims by the debtor against the creditor</p> <p>18 were not, in English law, anyway.</p> <p>19 Now, in 2005, the law was changed, so the rule which</p> <p>20 you now see was introduced in 2005, which was after</p> <p>21 Stein v Blake, so that contingent outward claims by the</p> <p>22 debtor were brought into the set-off account. This was</p> <p>23 affected by a sub-rule (4). And just so you can see,</p> <p>24 any perceived unfairness that might have arisen in those</p> <p>25 circumstances accelerating the net amount is dealt with</p> <p style="text-align: center;">Page 35</p>
<p>1 LORD NEUBERGER: Yes.</p> <p>2 MR TROWER: Now, the underlying point of principle, just so</p> <p>3 I can articulate it as we see it, what we are of course</p> <p>4 looking at in a case like this is set-off in the</p> <p>5 insolvency of a debtor, and there is no principled</p> <p>6 reason why the artificial exercise of working out</p> <p>7 whether a claim against a proving creditor would be</p> <p>8 provable in the insolvency of that proving creditor</p> <p>9 should be taken into account for set-off purposes. That</p> <p>10 proving creditor may not be insolvent itself at all. It</p> <p>11 is not a relevant factor.</p> <p>12 LORD NEUBERGER: Yes, I see.</p> <p>13 MR TROWER: So having swept that out of the way, we suggest</p> <p>14 where there was a danger of law heading off in the wrong</p> <p>15 direction, the question of whether an outbound claim is</p> <p>16 available for set-off is simply a question of</p> <p>17 construction of rule 2.85, which we have in the bundles</p> <p>18 at F3, tab 41.</p> <p>19 LORD NEUBERGER: Yes.</p> <p>20 MR TROWER: And the operative provisions -- it applies</p> <p>21 because sub-rule (1) is satisfied. There is then</p> <p>22 a description of what constitutes mutual dealings in</p> <p>23 sub-rule (2).</p> <p>24 LORD NEUBERGER: Yes.</p> <p>25 MR TROWER: The obligation to take the account is in (3),</p> <p style="text-align: center;">Page 34</p>	<p>1 by sub-rule (8). So although a contingent outward claim</p> <p>2 against somebody else is taken into account for set-off</p> <p>3 purposes, if there is a net amount owing to the company</p> <p>4 as a result of the circumstances, it is not payable</p> <p>5 until the contingency is satisfied.</p> <p>6 LORD NEUBERGER: Yes, I see.</p> <p>7 MR TROWER: Now, what we submit is that the members'</p> <p>8 liability to LBIE as a result of their contracts of</p> <p>9 membership under which they undertook unlimited</p> <p>10 liability is payable in the future. The obligation by</p> <p>11 virtue of which it is payable is contingent and its</p> <p>12 amount is ascertainable by fixed rules or as a matter of</p> <p>13 opinion. It is therefore available for set-off in</p> <p>14 accordance with rule 2.85(4), and that is an end to it.</p> <p>15 LORD NEUBERGER: Yes.</p> <p>16 MR TROWER: On any view, the claim and the cross-claim are</p> <p>17 both mutual and commensurable, which are other aspects</p> <p>18 which one just needs to get out of the way, and we don't</p> <p>19 understand there to be any issue about that.</p> <p>20 In short, we simply contend that the claim is</p> <p>21 regarded as being a sum due to LBIE because it is</p> <p>22 a contingent liability due to it within the meaning of</p> <p>23 the rule at the time that it went into administration,</p> <p>24 and we don't have to get into questions around my Lord,</p> <p>25 Lord Neuberger's Nortel test in relation to obligation</p> <p style="text-align: center;">Page 36</p>

<p>1 incurred, because that language doesn't appear in here. 2 What we are talking about is simply whether a liability 3 is contingent or not. For that, you go to the basic 4 principle in IRC v Sutherland as to what is a contingent 5 liability, which -- 6 LORD NEUBERGER: The case referred to in detail by 7 Lord Sumption. 8 MR TROWER: Indeed. Lord Sumption referred to it and my 9 Lord, Lord Neuberger referred to it as well in 10 paragraph 78 to 81 in your judgment in Nortel. 11 LORD NEUBERGER: I see. 12 MR TROWER: It is the tax case. 13 LORD NEUBERGER: Yes. 14 MR TROWER: And if go to F1, page 1420, tab 17 ... 15 LORD NEUBERGER: Yes. 16 MR TROWER: I am so sorry, that is Nortel. I meant to 17 say -- my apologies, because we need to go to F6 for 18 IRC v Sutherland. 19 LORD NEUBERGER: And the passage is not cited in Nortel, is 20 it? 21 MR TROWER: They are not cited in full. They are referred 22 to. 23 LORD NEUBERGER: Fair enough. 24 MR TROWER: I think we probably ought to look at them. F6, 25 tab 3.</p> <p style="text-align: center;">Page 37</p>	<p>1 no contingent liability until the commencement of the 2 winding up, I think is what they say. 3 We say that is simply not the case. Not only is it 4 completely inconsistent with the origins of membership 5 of companies, which we have looked at any way in 6 Webb v Whiffin, it is also at odds with many statements 7 of how the liability derives. We suggest that quite 8 a crisp formulation of the situation of the members in 9 the present case and why they satisfy the Sutherland 10 criteria is apparent from a little -- it is a case we 11 only found relatively late, I am afraid, so it is in the 12 supplemental bundle, G -- 13 LORD NEUBERGER: Right. 14 MR TROWER: -- called Newton v Anglo-Australian Investment, 15 which is a decision of the Privy Council, and it is 16 Lord MacNaghten. 17 LORD NEUBERGER: G/2, yes. 18 MR TROWER: G/2. Do you have a G bundle? 19 LORD NEUBERGER: I do, yes. It is a white file like this 20 (Indicated). 21 MR TROWER: Yes, that is the one. Tab 2, page 17. 22 LORD NEUBERGER: Yes. 23 MR TROWER: And it is we suggest a rather elegant way of 24 expressing the point, and it begins about eight lines 25 down, "The liability of a contributory".</p> <p style="text-align: center;">Page 39</p>
<p>1 LORD NEUBERGER: Thank you. Yes. F6, tab 3 is -- 2 MR TROWER: I am so sorry, that is the wrong reference. 3 LORD NEUBERGER: It is. 4 LORD SUMPTION: Do you mean F6, tab 16? 5 MR TROWER: Tab 16, thank you. Yes, I do. 6 LORD SUMPTION: Well, now I am not sure you do, in fact. 7 LORD NEUBERGER: That is Re Sutherland. 8 MR TROWER: I am sorry, that is Re Sutherland, and it is 9 page -- I can see what I have done. It is page 249 of 10 the report. 11 LORD NEUBERGER: Never mind what you have done. 249, thank 12 you. 13 MR TROWER: 249 of the report, 3319. 14 LORD NEUBERGER: Yes. 15 MR TROWER: And the two passages that matter are the 16 paragraph beginning, "So far as I am aware" and it is 17 the bit at the end of that, "It is a liability which by 18 reason" -- 19 LORD NEUBERGER: That sentence, yes. 20 MR TROWER: That has been used a lot, and he picks it up 21 again in the third class as contingent liabilities. 22 LORD NEUBERGER: Yes. 23 MR TROWER: Now, LBHI say that the members' membership is 24 not sufficient to give rise to a contingent liability 25 within the meaning of 2.85, on the basis that there is</p> <p style="text-align: center;">Page 38</p>	<p>1 LORD NEUBERGER: Yes, they were helped by that sentence, 2 I can see, yes. 3 MR TROWER: "The concept of not springing into existence for 4 the first time. It is the ripening of the liability 5 that the contributory undertook when he became 6 a member." 7 And a similar, although slightly different way of 8 putting it is Lord Romilly in China Steamship, which is 9 F4, tab 20, page 2422. 10 LORD NEUBERGER: Yes. 11 MR TROWER: The top of 2426. 12 LORD NEUBERGER: Thank you. 13 MR TROWER: Now, he is dealing with section 75, which 14 characterises the liability of a person to (inaudible) 15 the assets of a company being deemed to create a debt. 16 It is that point. He describes the debt in Latin 17 language, which I am not sure whether I am allowed to 18 use or not -- 19 LORD NEUBERGER: Yes, you are. 20 MR TROWER: -- at the top of the page, on page 244, 2426 of 21 the electronic version. 22 LORD NEUBERGER: Well, if you couldn't use Latin, you 23 couldn't say ex parte Pickering. 24 MR TROWER: Yes. Now, so expressed, we respectfully submit 25 that the requirements of contingency within the</p> <p style="text-align: center;">Page 40</p>

<p>1 contemplation of rule 2.85 are plainly satisfied. Of 2 course we accept that the cause of action under 3 section 74 is incomplete until such time as the company 4 has gone into liquidation and the call has been made, 5 but that doesn't mean that the members are not under 6 a contingent liability to the company from the time they 7 undertake their contract of membership. 8 LORD NEUBERGER: It could be said to be a bit odd, 9 I suppose, to say it can't be a contingent liability 10 because it only arises if the company goes into 11 liquidation, and contingent liability by definition only 12 arises if something happens. 13 MR TROWER: Well, quite. To be fair to my learned friend, 14 he may say that it becomes contingent then because it 15 only becomes actual once the call has been made. 16 LORD NEUBERGER: Quite. 17 MR TROWER: That may be what he says. So to that extent, 18 there is still a contingency, although then it is 19 a very, very immediate contingency, if I can put it that 20 way. 21 LORD NEUBERGER: The fact that there is a double contingency 22 doesn't stop it being a contingency. 23 MR TROWER: No, absolutely not. 24 LORD REED: Can you say it is debitum in praesenti, if that 25 is how it is put -- yes, debitum in praesenti -- if it</p> <p style="text-align: center;">Page 41</p>	<p>1 well familiar with in rule 13.12(1). It either has to 2 be a debt or liability which the company is subject to 3 on the date on which it goes into liquidation or may be 4 subject to after that date by reason of an obligation 5 incurred before that date. 6 LORD NEUBERGER: Yes. 7 MR TROWER: Plainly, the liability itself is capable of 8 falling within the concept of liability as defined in 9 the rule, whether you characterise it as a liability 10 under a contract or a liability under an enactment or 11 a combination of the two. 12 LORD NEUBERGER: Yes. 13 MR TROWER: And then if one just looks at rule 13.12(5), 14 just so my Lords have that note, it provides that the 15 rules are to be read as if references to winding up were 16 references to administration, so that is where one gets 17 the pull in to the administration. 18 LORD NEUBERGER: I see. 19 MR TROWER: We submit that the liability is of course the 20 contingent liability under the call. The obligation by 21 reason of which it may become subject to that liability 22 is the obligation that LBIE incurred as a result of the 23 contract of membership. It is as simple as that. 24 Now, the wording, including in particular the words 25 "by reason of any obligation incurred before that date"</p> <p style="text-align: center;">Page 43</p>
<p>1 remains to be seen whether the putative debtor will be 2 on the settled list of contributories? 3 MR TROWER: Yes, you can still say that, because that is 4 just one of the contingencies. It still remains a debt, 5 albeit a contingent debt. The word "contingent" is 6 capable of qualifying and characterising the word 7 "debt". 8 LORD REED: Yes. 9 MR TROWER: So can I then move on to the question of 10 provability, either if we are wrong on that or in any 11 event, if I can put it that way. If we are wrong on 12 that for set-off purposes but in any event for proving 13 in their administrations. We deal with this in 14 paragraph 226 and following of our case. 15 Now, the members contend that the judge and the 16 Court of Appeal were wrong to decide that LBIE will be 17 entitled to lodge a proof. We disagree. We disagree 18 for the reasons that both Lord Justice Briggs gave in 19 paragraphs 205 to 234 and the judge gave in 20 paragraphs 195 to 226. 21 The question here turns on a slightly different 22 question, because it turns principally on the 23 construction of rule 13.12, as my Lords know and as 24 interpreted by the Supreme Court in Nortel. Here, we 25 have the definition of debt that my Lords are by now</p> <p style="text-align: center;">Page 42</p>	<p>1 in rule 13.12(b) go right back a long way. But we 2 respectfully suggest that my Lords probably don't need 3 to go anywhere apart from going back to look at Nortel, 4 because quite a lot of the old law was swept away when 5 Nortel was decided. My Lords may well recall how many 6 of the old cases in this area which were a little bit 7 confused were actually overruled. So it is probably not 8 very helpful to look at a lot of the old stuff. 9 Now, our primary submission is that the liability 10 which will arise after the members insolvency event 11 arises as a result of the contract of membership, and so 12 actually it is a case which falls in large part within 13 the situation contemplated in paragraph 75 of Nortel. 14 Perhaps we can just turn that up, F1, 17. 15 I am not going to submit that this gives the 16 complete answer, but it is the starting point, because 17 we say it can fairly be said that the contract of 18 membership imposes contingent liabilities on the 19 members, thereby imposing the incurred obligation. The 20 reason that is important is because Nortel was actually 21 of course concerned with a rather different context when 22 you were thinking about the three-stage test, because 23 the question in Nortel involved trying to assess when it 24 was that what was a statutory obligation at large became 25 sufficient of an obligation incurred for the purposes of</p> <p style="text-align: center;">Page 44</p>

<p>1 satisfying the test in the relevant rule. 2 We say it is a much, much closer nexus that we have 3 in the case of membership of a company. There is 4 a contract between the company and its members from 5 which a liability under section 74 may ultimately 6 spring. 7 LORD SUMPTION: It is the combination, isn't it, of 8 membership of the company and statutory scheme? 9 MR TROWER: Yes, I accept that. I accept that you have to 10 have the statute in order to crystallise the liability. 11 I accept that. Which is why I don't say that one gets 12 the whole answer from paragraph 75. I wouldn't submit 13 that. We need to grapple as well with whether there is 14 anything else. But you are still in search of the 15 question of: where is the obligation incurred? And if 16 one steps back and asks one's self, well, do you incur 17 obligations, most people would think you incur 18 obligations when you undertake a relationship of 19 membership to a company in an unlimited form. 20 We suggest that this is confirmed in some respects 21 by the statutory scheme under which the liability 22 ultimately crystallises, because it deems the 23 contributory to have been subject to a debt since the 24 time when he first became a member, which is the way 25 section 80 works:</p> <p style="text-align: center;">Page 45</p>	<p>1 Now, as I say, we accept that we still need to look 2 at the questions that are raised by Lord Neuberger in 3 paragraph 77, because it is helpful, but the mere fact 4 that a company could come under a liability pursuant to 5 a provision in statute which was in force before the 6 insolvency event can't mean that where the liability 7 arises after the insolvency event it falls within 8 12(1)(b). That is the first point made by 9 Lord Neuberger. 10 The second is that normally, in order for a company 11 to have incurred a relevant obligation, it must have 12 taken or been subject to a step or combination of steps 13 which had a legal effect, and so on. My Lords get that 14 from paragraph 77. 15 The key factual points to bear in mind in this kind 16 of situation, and one can test them as to what the 17 position is here, are that first of all the members 18 became shareholders in LBIE, an unlimited liability 19 company; second, LBIE went into administration 20 in September 2008; thirdly, LBIE's administration has 21 become a distributing administration in which the 22 administrators have paid 100p in the pound to the 23 ordinary unsecured; fourthly, they are faced with proofs 24 from the members at a time when the debts and 25 liabilities falling within section 74 remain unpaid;</p> <p style="text-align: center;">Page 47</p>
<p>1 "The liability of a contributory creates a debt in 2 England and Wales in the nature of an ordinary contract 3 debt due from him at the time when his liability 4 commenced but payable at the time when calls are made 5 for enforcing the liability." 6 Now, this identifies the relationship, even though 7 it cannot of course crystallise into an actual accrued 8 cause of action until after liquidation. 9 In our submission, what the structure of the Act and 10 the authorities show is that there isn't anything 11 surprising about the obligation being incurred for the 12 purposes of sub-rule (b) at the inception of the 13 contract of membership. The insolvency code is 14 perfectly content with the idea that a debt of the type 15 that falls within (1) is deemed have accrued at the 16 inception of the contract of membership. When one sees 17 the way the membership relationship is characterised 18 throughout the authorities, one gets that impression. 19 So it is a situation in which the original 20 relationship arises under a contract, and the statute 21 then makes provision for the consequences of that 22 relationship, which is the point I think my Lord, 23 Lord Sumption was putting to me a moment ago. That is 24 why we say that there is a rather different flavour and 25 emphasis to what one is looking at in this case.</p> <p style="text-align: center;">Page 46</p>	<p>1 and, fifthly, the administration is an administration in 2 which liquidation has been selected by the creditors as 3 an exit route. So one has to look at the application of 4 the Nortel test against the background of those two 5 statutory contexts. 6 Now, what has happened is that as far as 77(a) is 7 concerned, had some legal effect, we simply say that the 8 members have taken steps and have been subject to steps 9 which have legal effect by giving rise to a legal 10 relationship because they are shareholders in an 11 unlimited liability company at which stage the legal 12 relationship arose. It is as simple as that. 13 LORD NEUBERGER: Yes. 14 MR TROWER: As far as (b) is concerned, we say they became 15 vulnerable to the liability in question such that there 16 would be a real prospect of the liability being 17 incurred. All that is required now is for LBIE to go 18 into liquidation. 19 The members is suggest that vulnerability only 20 arises in a case like this on a liquidation. At least, 21 I think that is the point they make. I picked it up 22 from paragraph 60 of their case, although I don't think 23 it was quite put like that by Mr Isaacs. We suggest 24 that is introducing a much too narrow an approach, 25 particularly against the policy of expanding</p> <p style="text-align: center;">Page 48</p>

<p>1 provability. The vulnerability and the real prospect of 2 the liability being incurred arose at the time of 3 membership. 4 It might be said that there was insufficient 5 vulnerability prior to the commencement of LBIE's 6 insolvency administration, but once the administration 7 intervened, there is no doubt that there was a real 8 prospect of liability being incurred. All that was 9 required was a state of affairs in which it was in the 10 creditors' interest to move into liquidation. 11 LORD NEUBERGER: I understand. 12 MR TROWER: However one looks at it, from the time of 13 administration, the members were well inside the 14 penumbra of the regime, which I think was one of the 15 phrases used. 16 As far as (c) is concerned, we submit that it is 17 consistent with the statutory regime in respect of calls 18 to conclude there is an obligation. This, I think, was 19 really probably the main focus of Mr Isaacs's 20 submissions. He said it would be inconsistent with the 21 statutory regime for the prospective liability of the 22 contributory to be provable. 23 LORD NEUBERGER: Yes. 24 MR TROWER: Now, there are a number of points as to why we 25 say there is no inconsistency. The first is that if</p> <p style="text-align: center;">Page 49</p>	<p>1 contributories who become bankrupt and not also to 2 contributories who go into administration, doesn't go 3 anywhere. The judge explained why it didn't go anywhere 4 in paragraph 145 of his judgment and we deal with the 5 point in our case at paragraph 250. 6 It is then said that there is a difference between 7 a future call where the company has gone into 8 a liquidation but the call has not been made, and 9 a future call where the company has not yet gone into 10 liquidation. In the first situation a proof is 11 possible, but it is said in the second it is not. 12 I will just come back to that in a moment. 13 The third point is that LBIE relies on a number of 14 cases which are said to demonstrate that the legislation 15 only contemplated a post-liquidation proof for a future 16 call because it was only post-liquidation that the 17 deemed debt, in the form of an ordinary contract debt 18 that arises under section 74, actually arises. 19 It is important to bear in mind the following about 20 them: they were all exclusively concerned with the 21 simple question of when it was that the actual liability 22 under section 75 of the 1862 Act, which is the 23 equivalent, actually arose. They weren't concerned with 24 the question of whether the members were subject to 25 a contingent liability at the time the member went into</p> <p style="text-align: center;">Page 51</p>
<p>1 there had been a call by a liquidator of LBIE before the 2 commencement of the contributory's administrations, it 3 would be provable. 4 LORD NEUBERGER: Yes. 5 MR TROWER: One has to remember one is looking at this from 6 the perspective of the company into which the proof is 7 being made. The fact that a call has not yet been made 8 should not makes any difference to the analysis. It 9 would be somewhat arbitrary if the characteristics and 10 treatment of the liability under the call regime should 11 turn on when the call happens to have been made if its 12 based on the membership of an unlimited liability 13 company which existed before the insolvency event. 14 LORD NEUBERGER: We are reading straight from 2462 of 15 your -- 16 MR TROWER: Am I? I am sorry, one sometimes forgets -- 17 LORD NEUBERGER: No, it is fine. I would echo what I said 18 to Mr Isaacs. But that's fair enough, okay. 19 MR TROWER: Secondly, there is nothing unexpected or 20 contrary to the legislature's intention for the 21 liability of a contributory in respect of future calls 22 to be provable. We make a point about where the 23 contributory is an individual, there has never been any 24 objection to that, and we refer to section 82(4). 25 Now, the fact that this provision may only apply to</p> <p style="text-align: center;">Page 50</p>	<p>1 liquidation or distributing administration. 2 Indeed, bear in mind that insofar as those earlier 3 cases are concerned, the question of provability of 4 contingent liabilities was in a relatively undeveloped 5 state. You could only, for example, prove in relation 6 to future liabilities in respect of a lease from 1888 7 onwards, in <i>Hardy v Fothergill</i>. It is only really there 8 that contingent liabilities started to be properly 9 grappled with. Since then, the courts have got much 10 more comfortable with the idea that almost any 11 obligation is capable of being valued and proved. 12 LORD NEUBERGER: Yes. 13 MR TROWER: Mr Isaacs also went on to many of the provisions 14 in respect of the calls for the purpose of pointing out 15 that they don't apply until the company goes into 16 liquidation, and he looked at a whole series of points 17 about settling lists of contributories, adjusting rights 18 of contributories, and suggesting that they don't apply 19 until you go into liquidation. Of course we accept all 20 of that, but it doesn't take us very far because all it 21 means is that the contingency has not yet occurred. 22 Now, one point, for example, is that Mr Isaacs 23 relies on section 74(2)(a), which provides that a past 24 member isn't liable to contribute if he ceases to be 25 a member for one year or more before the commencement.</p> <p style="text-align: center;">Page 52</p>

<p>1 But the fact there are possible factual scenarios in 2 which the contributory will cease to be contingently 3 liable is irrelevant. That is a definition of 4 a contingency, at the end of the day; it might occur, it 5 might not. 6 LORD NEUBERGER: We have that point. 7 MR TROWER: So we respectfully suggest that that doesn't 8 take one very far, and Lord Justice Briggs dealt with 9 this point in paragraph 226 of his judgment. 10 LORD NEUBERGER: Yes. 11 MR TROWER: Where he effectively says that you simply deal 12 with this by the value you put on the contingency in the 13 administration of the member. 14 LORD NEUBERGER: Yes. 15 MR TROWER: Officeholders are required to estimate, and so 16 on. 17 LORD NEUBERGER: Yes. 18 MR TROWER: He then had a series of points about the 19 difficulties that would arise when there is a receipt of 20 the (inaudible - proofs?) of proof before the time 21 contemplated before the time contemplated by the 22 statutory scheme. He says that too points against the 23 statutory source of the obligation satisfying the 24 requirements of paragraph 77. 25 Now, one needs to be careful to remember the context</p> <p style="text-align: center;">Page 53</p>	<p>1 Lord Justice Briggs, because he said he had some 2 concerns about the fruits of proof in relation to 3 a future call if they were to fall into the hands of 4 somebody other than a liquidator. 5 But Lord Justice Briggs answered his own concerns in 6 paragraphs 229 to 231 of his judgment and I respectfully 7 can't improve on that. 8 LORD NEUBERGER: Okay. 9 MR TROWER: The critical point when thinking about the 10 circumstances in which the proof may have to be made are 11 that it will inevitably be the case either that both 12 member and company will be subject to a collective 13 distribution process, or the company itself will be on 14 the cusp of insolvency, because otherwise it wouldn't be 15 possible to give a material value to the contingent 16 inward claim. 17 LORD NEUBERGER: Yes. 18 MR TROWER: So, my Lords, that is the core of our 19 submissions in relation to that bit of the case. 20 LORD NEUBERGER: Yes. As with Mr Isaacs, you make a number 21 of points in answer to him in various paragraphs around 22 250, and before and following, which we will obviously 23 take on board. 24 MR TROWER: My Lords, that then takes me on to the 25 contributory rule about which I need to say a few words.</p> <p style="text-align: center;">Page 55</p>
<p>1 in which the significance of these points arises, 2 because LBIE itself, as the proving party, is already in 3 distributing administration and subject to its own 4 statutory scheme, with its own payment waterfall, which 5 is very close to that of the liquidation scheme. It is 6 not a going concern. 7 Now, it is said that there are significant 8 differences in the administration of statutory 9 waterfall, because costs and expenses of the 10 administration, for example, don't fall within it. Now, 11 that is not right, because the costs and expenses of the 12 administration are materially the same, and are likely 13 to be incurred in the same way if the company was in 14 liquidation rather than administration. In any event, 15 to the extent that they have been incurred and not paid 16 in the course of the administration, they would be 17 charged and paid out of the assets in LBIE's 18 liquidator's hands at the time the administrator goes 19 out of office. 20 So we say that one has to bear that in mind when one 21 is looking at how the proceeds and the fruits are 22 actually to be dealt with. 23 Mr Isaacs also submitted that difficulties would 24 arise if directors were to be permitted to prove for 25 a call, and it found some resonance with</p> <p style="text-align: center;">Page 54</p>	<p>1 LORD NEUBERGER: Yes, indeed. 2 MR TROWER: The classic statement of principle is given by 3 Mr Justice Buckley in West Coast Gold Fields, 4 F6/21/3419. We don't need to turn it up. 5 LORD NEUBERGER: This is set out in your paragraphs 261 and 6 262. 7 MR TROWER: Yes. The critical point here about the 8 contributory rule is that it does three things, and we 9 need to bear this in mind. The first thing is it 10 protects the pari passu rule, that is the first thing it 11 does. The second thing is it fills the gap left by the 12 disapplication of set-off. 13 LORD NEUBERGER: So if you are wrong on set-off, this is 14 where it has this very point, yes. 15 MR TROWER: Yes, and the third thing is that it ensures that 16 the statutory mechanism for making calls in 17 a liquidation isn't defeated. That is the other context 18 in which it is looked at. 19 We just need to look very quickly, just so my Lords 20 see it, although no more than this, is Grissell's Case, 21 which is F1/18, because it is the source of it. I am 22 only going to take my Lord to two or three cases on 23 this. 24 LORD NEUBERGER: F1/18. That's right, we looked at that, 25 Overend, Gurney.</p> <p style="text-align: center;">Page 56</p>

<p>1 MR TROWER: Yes.</p> <p>2 LORD NEUBERGER: Yes.</p> <p>3 MR TROWER: Now, there is one point that I do need to bring</p> <p>4 out.</p> <p>5 LORD NEUBERGER: Yes.</p> <p>6 MR TROWER: It is called Overend, Gurney & Co, as well as,</p> <p>7 Grissell's Case.</p> <p>8 LORD NEUBERGER: Yes.</p> <p>9 MR TROWER: I do need to bring it out, because at page 534,</p> <p>10 the paragraph beginning "Both applications" -- sorry,</p> <p>11 which is page 1440.</p> <p>12 LORD NEUBERGER: I am sorry, thank you.</p> <p>13 MR TROWER: I beg your pardon.</p> <p>14 LORD NEUBERGER: No, that is fine. Yes.</p> <p>15 MR TROWER: And would you read from "Both applications" down</p> <p>16 to the end of the quote, about halfway down the page,</p> <p>17 "and interests in the company". The point that is</p> <p>18 important here is he is making clear that this is</p> <p>19 a question that depends on the construction of the</p> <p>20 company's legislation. So it is the court actually</p> <p>21 extrapolating the consequences of an enactment, and it</p> <p>22 is important for my argument because it demonstrates</p> <p>23 that this is why we say that it is sensible for my Lords</p> <p>24 to extend the application of the rule in the context of</p> <p>25 the new administration, distributing administration</p> <p style="text-align: center;">Page 57</p>	<p>1 LORD NEUBERGER: Yes, he did. (Pause)</p> <p>2 Yes.</p> <p>3 MR TROWER: So the upshot of those two cases is that the</p> <p>4 contributory rule is necessary to plug the gap left by</p> <p>5 the inapplicability of set-off.</p> <p>6 LORD SUMPTION: Why did he have no right of set-off in this</p> <p>7 case?</p> <p>8 MR TROWER: The reason you get that, actually, is</p> <p>9 an operation of section 101 and it is actually a point</p> <p>10 my Lords should probably just quickly look at. If we go</p> <p>11 back to Grissell's Case.</p> <p>12 LORD SUMPTION: Page?</p> <p>13 MR TROWER: Tab 18, page 1441, starting at the bottom of</p> <p>14 page 535 of the report, "The two remaining questions may</p> <p>15 be considered together". And if one then just reads</p> <p>16 there and most of the way down the next page, you can</p> <p>17 see that because of the way section 101 worked, the</p> <p>18 amount of the call could not be set-off against the</p> <p>19 debt.</p> <p>20 LORD NEUBERGER: That is a scheme of the act point.</p> <p>21 MR TROWER: It was a scheme of the act point. It was</p> <p>22 a construction of section 101.</p> <p>23 LORD NEUBERGER: Yes, I see.</p> <p>24 MR TROWER: And there was actually a distinction between the</p> <p>25 position of limited and unlimited members, because in</p> <p style="text-align: center;">Page 59</p>
<p>1 procedure.</p> <p>2 LORD NEUBERGER: Taking it to "interests in the company".</p> <p>3 MR TROWER: I think that is all we need to go to.</p> <p>4 LORD NEUBERGER: And this is really encapsulating the</p> <p>5 principles you have identified to us?</p> <p>6 MR TROWER: Indeed.</p> <p>7 LORD NEUBERGER: Yes, I see, thank you.</p> <p>8 MR TROWER: And then if we can go to Lord Walker in</p> <p>9 Kaupthing, which is in the same bundle, tab 13.</p> <p>10 LORD NEUBERGER: Thank you. Yes.</p> <p>11 MR TROWER: Now, Kaupthing is based primarily on the rule in</p> <p>12 <i>Cherry v Boulton</i>.</p> <p>13 LORD CLARKE: You have set out paragraph 52.</p> <p>14 MR TROWER: Yes. The bit I want for this purpose, actually,</p> <p>15 is 1283.</p> <p>16 LORD NEUBERGER: Right. Paragraph?</p> <p>17 MR TROWER: Paragraph 13.</p> <p>18 LORD NEUBERGER: Thank you.</p> <p>19 MR TROWER: Where he cites with approval the decision of</p> <p>20 Mr Justice Kekewich in <i>Ackerman</i>. And if we then go</p> <p>21 on --</p> <p>22 LORD NEUBERGER: Yes.</p> <p>23 MR TROWER: -- to look at his description of the rule in</p> <p>24 paragraphs 51 to 53, which I think my Lord, Lord Clarke</p> <p>25 has just mentioned that I cited.</p> <p style="text-align: center;">Page 58</p>	<p>1 fact you could have a set-off in respect of unlimited</p> <p>2 liability. He explains that point in the case of</p> <p>3 a member of a limited company is different from that of</p> <p>4 a member of a company of unlimited liability on</p> <p>5 page 536, that point being something that one gets from</p> <p>6 the construction of section 101.</p> <p>7 So what we suggest is that what this rule is, is</p> <p>8 an example of the court acting in aid of a statute to</p> <p>9 ensure that the intention of the legislation is not</p> <p>10 defeated. There are plenty of other contexts in which</p> <p>11 this sort of principle is applied. Probably the most</p> <p>12 obvious example is the anti-deprivation principle which</p> <p>13 was being considered at some length in the authorities</p> <p>14 recently in the <i>Belmont</i> case. The rule against double</p> <p>15 proof, which was the point which was in issue in</p> <p>16 <i>Kaupthing</i>, as well, is another example of a case where</p> <p>17 a court has actually invented a rule which isn't to be</p> <p>18 found anywhere in the legislation, but which is</p> <p>19 obviously a necessary rule of justice to ensure that the</p> <p>20 assets are applied <i>pari passu</i>.</p> <p>21 My Lords, I will finish in ten minutes. Shall</p> <p>22 I keep going, rather than stopping at half past?</p> <p>23 LORD NEUBERGER: I think so, that is a good idea.</p> <p>24 MR TROWER: So why do we say the contributory rule should</p> <p>25 apply in an administration? There are four key features</p> <p style="text-align: center;">Page 60</p>

<p>1 on LBIE's administration on which we rely. The first is 2 it is a distributing administration, so we would accept 3 that it wouldn't apply save in a distributing 4 administration for obvious reasons. The assets are 5 being distributed, but the reason we say it is important 6 is that in a distributing administration, the assets are 7 being distributed once and for all with irreversible 8 consequences.</p> <p>9 The second point is that the pari passu rule is 10 applicable in LBIE's distributing administration and we 11 have seen that rule already; it is rule 2.69.</p> <p>12 The third consideration -- and we say that those two 13 considerations alone are sufficient -- is that 14 liquidation has been selected as an exit route in the 15 proposals according to which the administrators must 16 manage LBIE's affairs.</p> <p>17 The fourth, as a consequence of that, if and when 18 LBIE goes into liquidation, the statutory mechanism in 19 respect of calls will come into effect and it will be 20 possible for calls to be made without limit. The 21 point --</p> <p>22 LORD REED: Evidently not if the liability of the 23 contributory has already been discharged.</p> <p>24 MR TROWER: Well, we are talking of course here about 25 unlimited liability.</p> <p style="text-align: center;">Page 61</p>	<p>1 the liquidator may take the view that he only needs so 2 much in order to satisfy the sufficiency.</p> <p>3 LORD REED: So the liability is no longer unlimited; it is, 4 in theory, to the extent of a company's debts in the 5 liquidation, less the amount he has already paid.</p> <p>6 MR TROWER: Yes, which is why, at the end of the day, all 7 this argument boils down to is a complaint by the 8 members that they are being asked to cough up early, in 9 circumstances where the whole point of proving in 10 an insolvency of someone like a member for a contingent 11 liability, is that they will have to cough up early 12 within the estate, because that is what proving is all 13 about. Proving accelerates the participation right of 14 the person seeking to prove.</p> <p>15 LORD NEUBERGER: Just as much as you can prove for 16 a contingent debt.</p> <p>17 MR TROWER: Yes.</p> <p>18 LORD NEUBERGER: It can't be said you are not owed the money 19 yet.</p> <p>20 MR TROWER: Yes. Of course it is tough on one level, but it 21 is tough to an insolvent.</p> <p>22 LORD NEUBERGER: Yes, but you get a discount.</p> <p>23 MR TROWER: Yes, you get that, too.</p> <p>24 LORD REED: Also, at the end of the day, it affects 25 creditors if a company goes into liquidation. It has</p> <p style="text-align: center;">Page 63</p>
<p>1 LORD REED: Mm-hm.</p> <p>2 MR TROWER: So it won't --</p> <p>3 LORD REED: But if it has been valued as a contingent 4 liability and has then been dealt with in the 5 administration, does that not bring it to an end?</p> <p>6 MR TROWER: No. I don't think I can submit that if you 7 value it and deal with it in the administration, as 8 a contingent liability, it excludes the liquidator from 9 ever making a future call.</p> <p>10 LORD SUMPTION: You can in principle make any number of 11 calls; it is not a one-off thing.</p> <p>12 MR TROWER: Yes. It is against the background of this being 13 unlimited liability. But my Lord, Lord Sumption is 14 right: members will very often be subjected to more than 15 one call, or the legislation contemplates that members 16 will be subjected to more than one call as the process 17 of determining how much is required is worked through.</p> <p>18 LORD SUMPTION: As the company's accounts deteriorate.</p> <p>19 MR TROWER: Yes.</p> <p>20 LORD REED: So the contributor is treated as having made, as 21 it were, a payment of account.</p> <p>22 MR TROWER: In effect, yes, when it is an unlimited 23 liability, that would be right. It would be same, 24 actually, and it wouldn't very often happen, but if 25 there were unpaid shares, it might happen, too, because</p> <p style="text-align: center;">Page 62</p>	<p>1 been trading as a company unlimited liability, but at 2 the end of the day, just say it had two shareholders, 3 both of which had gone into administration and been 4 dealt with in the way that you are suggesting, then the 5 creditors would then discover that its not a company 6 with unlimited liability.</p> <p>7 MR TROWER: I am sorry, my Lord, I am not sure I am 8 understanding in what context they would discover it is 9 not --</p> <p>10 LORD REED: In the event that the company went into 11 liquidation, the liquidator made calls on the 12 contributories, but the extent to which they would have 13 to meet calls would be restricted by the fact that they 14 had already met the extent to which their contingent 15 liability had been assessed in advance of the 16 liquidation.</p> <p>17 MR TROWER: Well, no, because it wouldn't work like that, 18 my Lord, because the only context in which one could 19 have a call is either in respect of unlimited liability 20 or in respect of unpaid shares. So far as unpaid shares 21 are concerned, you can make a call anyway, irrespective 22 of liquidation. As far as the unlimited liability is 23 concerned, which is the only context in which one has 24 a proof arising, it is an unlimited liability, end of 25 story. They are liable for the debt and liabilities of</p> <p style="text-align: center;">Page 64</p>

<p>1 the company. So the fact that there has been an earlier 2 payment in respect of a proof is neither here nor there. 3 LORD SUMPTION: You would say per contra that if you are 4 wrong, then the benefits of the unlimited company to the 5 creditors would actually be severely undermined. 6 MR TROWER: Indeed, my Lord. 7 LORD NEUBERGER: Because they would be paid only on the 8 basis -- they would have to share with the people who 9 are meant to be liable to contribute, without having the 10 benefit of those who are meant to be liable to 11 contribute having their liability to contribute taken 12 into account when assessing the dividend. 13 MR TROWER: Yes. 14 LORD SUMPTION: You are effectively submitting, are you not, 15 in answer to my Lord, Lord Reed, that the acceptance of 16 a proof at a given valuation is not a compromise or 17 settlement of all liability under section 74. 18 MR TROWER: My Lord, I am. 19 LORD SUMPTION: It is a settlement only of such liability as 20 is envisaged for the moment, which may turn out not to 21 be the whole of it. 22 MR TROWER: Yes, it is like any contingent proof, and one 23 gets it from Stein v Blake, apart from anything else. 24 LORD SUMPTION: Contingency may turn out to be for a greater 25 sum.</p> <p style="text-align: center;">Page 65</p>	<p>1 MR TROWER: He did, yes. 2 LORD NEUBERGER: So it could be said to be a bit similar to 3 the Grissell's Case in the sense it is a scheme of the 4 act. 5 MR TROWER: Yes. 6 LORD NEUBERGER: Here they have a right to call on 7 contributories. If there is nothing there about the 8 right, then one is to presume that there is nothing in 9 it. But of course the right to call on contributories 10 is not a statutory right, is it? Or is it a statutory 11 right? 12 MR TROWER: A right to call? Yes, it is part of the scheme. 13 LORD NEUBERGER: It's in the statute itself? 14 MR TROWER: Yes, it is. 15 LORD NEUBERGER: And the circumstances in which you can call 16 are in statute? 17 MR TROWER: Yes, they are in the statute too. 18 LORD NEUBERGER: That is really the point, then, being made 19 by Mr Justice Richards. 20 MR TROWER: Yes, I think that is right, yes. 21 LORD NEUBERGER: Thank you. 22 MR TROWER: My Lords, we say at the end of the day, one can 23 see how this has developed as a question of statutory 24 construction through Grissell and Kaupthing. 25 LORD NEUBERGER: Yes.</p> <p style="text-align: center;">Page 67</p>
<p>1 MR TROWER: It may, or a lesser sum. 2 My Lords, just to finish off on the contributory 3 rule, because I think that is really where I have got 4 to, the judge's position in relation to why the 5 contributory rule shouldn't apply is to be found in 6 paragraph 188 of the judgment, where he said that the 7 difficulty in applying it is because there is no 8 statutory mechanism for making calls on contributories, 9 while there can be no calls and therefore nothing that 10 those members could do to put themselves in a position 11 where they could prove as creditors in respect of their 12 subordinated and unsubordinated claims. 13 Now, that is conceptually correct insofar as it 14 goes. 15 LORD NEUBERGER: Yes. 16 MR TROWER: But it is not, we respectfully suggest, 17 an answer to the extension of the contributory rule that 18 we seek, particularly given that we are only seeking it 19 in the context of the existence of unlimited liability. 20 So it is always open to the members to discharge the 21 entirety of their liability. 22 That, in essence, is the reason why we say that the 23 judge and Lord Justice Briggs weren't right to reject 24 the concept of applying the contributory rule. 25 LORD NEUBERGER: Did Lord Justice Briggs agree with that?</p> <p style="text-align: center;">Page 66</p>	<p>1 MR TROWER: If this is the only way of achieving a result 2 which ensures that the underlying policy in relation to 3 the pari passu rule and the future ability to make calls 4 is preserved, well, then, it is a legitimate source for 5 developing the law on the basis of existing judge-made 6 rules. 7 LORD NEUBERGER: Thank you. 8 MR TROWER: My Lord, those were my submissions. I am afraid 9 I rather galloped this morning. I hope I didn't gallop 10 too fast. 11 LORD NEUBERGER: I am grateful, as I say, particularly on 12 the issues which Mr Isaacs addressed us on. I was 13 concerned to have an equal playing field, a level 14 playing field, but also the detail is in your 15 submissions as it is in Mr Isaacs's. 16 LORD REED: You may have gone a little bit too fast for me, 17 or I may be rather slower than the rest of the class. 18 I am still a little bit puzzled about the contributory. 19 MR TROWER: Yes. 20 LORD REED: As I understand it what we are envisaging is 21 that the company is proving a contingent liability owed 22 to it by the member in the administration of a member. 23 MR TROWER: Yes. 24 LORD REED: And if it proves the debt, then the company 25 receives an amount from the administrator by way of</p> <p style="text-align: center;">Page 68</p>

<p>1 a distribution. 2 Now, first of all, does that amount then form part 3 of the assets of the company? 4 MR TROWER: Yes. 5 LORD REED: So it doesn't form a special statutory fund set 6 aside for winding up purposes. 7 MR TROWER: No. 8 LORD REED: And having paid that amount, if there is then 9 a subsequent liquidation of the company, do you say that 10 that amount that the member has already paid is ignored 11 when assessing the members' liability to contribute in 12 response to a call by the liquidator? 13 MR TROWER: Well, I don't say it is entirely ignored, in the 14 sense that I can see circumstances which may arise when, 15 on the adjustment of rights between contributories, for 16 example, it may affect the amount of the call that the 17 court was going to enable the liquidator to make. But 18 I do say that if one simply -- let's assume you have 19 a single member company, or only one member who is ever 20 going to have a call made against them. 21 LORD REED: Yes. 22 MR TROWER: It will affect only to the extent the fact that 23 the liability has come in at an earlier stage means that 24 there is more money there so that the deficiency in the 25 assets will be less as a result.</p> <p style="text-align: center;">Page 69</p>	<p>1 it to carry on trading, ostensibly as a company of 2 unlimited liability, end up going into liquidation and, 3 in the single member situation that you are envisaging, 4 the liquidator cannot then call in as much as he 5 otherwise would have been able to call in. 6 MR TROWER: No, he can. I say he can call in the entirety 7 of the deficiency at the time it goes into liquidation, 8 notwithstanding any earlier proofs that may have been 9 made. 10 LORD NEUBERGER: That is because it is an unlimited 11 liability. 12 MR TROWER: Yes, that is because it is unlimited liability. 13 LORD REED: But the member is required to contribute twice 14 over. 15 MR TROWER: Yes, one has to be practical about it in this 16 sense: first of all, in the present case, as it happens, 17 the proof is being made by a company in administration 18 so there is a statutory scheme, and one can quite see 19 that more difficult issues might arise in relation to 20 a going concern company, some considerable period of 21 time prior to the -- but in that context, it would 22 probably be quite unlikely that you would be able to 23 demonstrate sufficient value to the contingency, because 24 one of the values of a contingency on the inbound proof 25 is the prospect of the company going into liquidation.</p> <p style="text-align: center;">Page 71</p>
<p>1 LORD NEUBERGER: There is clearly no problem for you where 2 there is unlimited liability with one contributor, 3 because we have just gone calling on him or her until 4 either they are bankrupt or the liabilities are met. 5 LORD REED: Well, Lord Lindley might have thought there was 6 a problem, because his theory, as I understood the 7 Pyle Works judgment, was that the whole point of this 8 was to establish a statutory fund available in a winding 9 up and in a winding up only in order to meet any 10 deficiency that might be in the assets. 11 MR TROWER: Yes, but that, my Lord, is against the 12 background of a situation -- well, there are two things. 13 It is largely against the background of a situation in 14 which the law in relation to the ability to prove in 15 respect of these things was ill developed. But 16 secondly, and in any event -- and the consequence of 17 that is that we are now in a situation where the law 18 recognises the ability to accelerate in many different 19 contexts by way of proof the receipt of something for 20 which there is presently no accrued cause of action, 21 outside of the realm of proof, and one has to look at 22 Pyle Works and that sort of line of authority against 23 that background. 24 LORD REED: Yes. But the practical effect is that the 25 company can get in the money as part of its assets, use</p> <p style="text-align: center;">Page 70</p>	<p>1 If the company is carrying on trading, it is a bit 2 difficult to conceive of the directors saying, "Well, we 3 wish to prove in respect of the contingency liability to 4 us, the contingency being the liquidation", and that may 5 in practice be the answer. 6 But what this exchange may also illustrate, my Lord, 7 is that this may be one of those points where of course 8 the court has to take a principled approach to it, and 9 I have explained what we say the principled approach is, 10 and one can see that in the context of an administration 11 there is plain sufficient vulnerability and a plain 12 application of a scheme which is consistent with the 13 proof, but before a company goes into administration, it 14 may be that there are other considerations. 15 LORD SUMPTION: Are you actually right to accept Lord Reed's 16 double payment point? 17 MR TROWER: I didn't think I had, actually. 18 LORD SUMPTION: Oh, in that case ... 19 MR TROWER: Maybe I did. 20 LORD SUMPTION: Presumably, if a call is made under 21 section 74, in an administration, which of course begs 22 a large question, and the company continues to trade, 23 the amount of the call, however often it is made, is 24 limited to the amount of the debt. 25 MR TROWER: Yes.</p> <p style="text-align: center;">Page 72</p>

<p>1 LORD SUMPTION: So if you have paid an amount equal to the 2 totality of the debts, the mere fact that they aren't 3 used to discharge the debts is neither here nor there. 4 You have hit the limit of your liability. You can only 5 have a further liability if further debts arise, which 6 of course if you are continuing to trade they may well 7 do. 8 MR TROWER: Yes. I mean, I see that. The question is 9 always going to be at the time the call is actually 10 made, what is the state of the company's balance sheet 11 as far as whether or not there is a requirement to get 12 in money that is sufficient for payment. And what the 13 mischief I discern it may be being put is that what is 14 being done when you make a pre-liquidation proof and 15 have a receipt of fruits is that you are getting in 16 money early on, earlier than you should be. 17 LORD REED: Yes. I mean, effectively what I am putting to 18 you is Lord Lindley's theory of what the purpose of 19 having contributories of this kind is. 20 MR TROWER: Yes. 21 LORD REED: Not to supplement companies' assets but to 22 create a statutory fund in the event of a winding up. 23 MR TROWER: Yes, I understand that, and that is plainly 24 right insofar as it goes. But of course it is only 25 right -- one is ignoring in looking at it that way the</p> <p style="text-align: center;">Page 73</p>	<p>1 administration, it would be excluded by the scheme of 2 the statutory provisions. 3 MR TROWER: I am wondering about the impact of the unlimited 4 liability on that question in this sense -- and maybe 5 this isn't quite answer to my Lord as I am thinking on 6 my feet, but in this sense: the unlimited liability of 7 a member to contribute is one of the reasons why set-off 8 was regarded as acceptable under the old law. That was 9 the distinction that was drawn by Lord Chelmsford -- do 10 I mean Lord Chelmsford? Anyway, in Grissell's Case, 11 between the situation of an unlimited liability member 12 and a limited liability member for set-off purposes. 13 But I am not sure -- 14 LORD SUMPTION: But why would the unlimited character of the 15 liability make a difference to this point? 16 MR TROWER: Well, maybe I haven't quite grasped the point. 17 Maybe that is the answer. 18 LORD NEUBERGER: The whole point of the liability of the 19 contributor is that he gets called on to meet particular 20 debts in the company. 21 MR TROWER: Yes. 22 LORD NEUBERGER: By the liquidator. 23 MR TROWER: Yes. 24 LORD NEUBERGER: And that waits for the liquidation. 25 MR TROWER: Yes.</p> <p style="text-align: center;">Page 75</p>
<p>1 consequences of the insolvency of the member, which is 2 what this is all about, because the proof question only 3 arises where the member is insolvent, which is why we 4 say the point ultimately -- I mean, I understand why 5 my Lord puts it to me -- doesn't go anywhere, because we 6 are looking at a proof in the insolvency of a member. 7 LORD NEUBERGER: Thank you very much, Mr Trower. We will 8 come back at 11.55 and hear Mr Dicker then. Thank you 9 very much. 10 The court is now adjourned. 11 (11.43 am) 12 (A short break) 13 (12.02 pm) 14 LORD NEUBERGER: I am afraid we are rather late, but our 15 excuse is that we were discussing this case, you will be 16 glad to hear, and we do have a bit more for Mr Trower. 17 It strikes us that possibly there may be 18 an inconsistency between the conclusion that you succeed 19 on this last point on set-off but you fail on 20 contributory on the basis that essentially the whole 21 nature of the call on contributories is that it waits 22 until the company is in liquidation and the liquidator 23 then calls. If that is right, is it really, although it 24 may be otherwise a contingent liability within the 25 meaning of the relevant rule we looked at for</p> <p style="text-align: center;">Page 74</p>	<p>1 LORD NEUBERGER: That seems to be the theory behind 2 Mr Justice Richards's approach, in theory. In 3 principle, he says there is nothing in the act that 4 let's you call it in earlier. 5 MR TROWER: Yes. 6 LORD NEUBERGER: Why wouldn't that serve, as it were, as 7 a scheme of the act argument, almost? Why wouldn't it 8 serve to carve out -- and you have the points Lord Reed 9 made to you justifying that. Why wouldn't that apply 10 equally to excluding it from liability, as a contingent 11 liability within the relevant rule if you are looking at 12 the scheme of the act? 13 LORD SUMPTION: It might be said to be a contingent 14 liability but not a liability owed to the company. It 15 is a liability arising under a power of a public law 16 nature vested in the court. 17 MR TROWER: Yes. I understand. Sorry, I had misunderstood 18 the question. 19 LORD NEUBERGER: I put it badly. 20 MR TROWER: I understand the point now. What that point 21 depends on at the end of the day -- yes, I accept -- is 22 whether or not one can properly characterise what is 23 being recovered, ultimately whether one can properly 24 characterise what is being recovered as an asset of the 25 company.</p> <p style="text-align: center;">Page 76</p>

<p>1 LORD SUMPTION: That is a different point, isn't it?</p> <p>2 MR TROWER: Doesn't it have the same consequence?</p> <p>3 LORD SUMPTION: The wording of the section 74 itself</p> <p>4 indicates that it becomes when paid an asset of the</p> <p>5 company because you are contributing to the assets of</p> <p>6 the company.</p> <p>7 MR TROWER: Yes.</p> <p>8 LORD SUMPTION: What we are concerned with is the nature of</p> <p>9 the liability to meet a call under section 74 before it</p> <p>10 has been made.</p> <p>11 MR TROWER: Yes.</p> <p>12 LORD SUMPTION: And that liability might be said not to be</p> <p>13 owed to the company at all, but simply to be a liability</p> <p>14 of a public nature.</p> <p>15 MR TROWER: Yes. Well, I see the argument. The question</p> <p>16 then is, or the point I think then that is put against</p> <p>17 me on that, is that there is nothing there that is</p> <p>18 capable of being realised, or protected, by way of</p> <p>19 a proof in the insolvency of a member if there is not</p> <p>20 even a contingent liability, was what I think my Lord</p> <p>21 put.</p> <p>22 LORD SUMPTION: Well, it is contingent but it is not owed to</p> <p>23 the company.</p> <p>24 MR TROWER: But that is where we say it does and must go</p> <p>25 hand in hand with the characterisation of the ultimate</p> <p style="text-align: center;">Page 77</p>	<p>1 preferred.</p> <p>2 MR TROWER: Yes.</p> <p>3 LORD SUMPTION: Now, the effect under the current law is</p> <p>4 that the proceeds of the exercise of that power become</p> <p>5 assets the company.</p> <p>6 MR TROWER: Yes.</p> <p>7 LORD SUMPTION: But would one say that the company could</p> <p>8 prove in the insolvency of the preferred creditor for</p> <p>9 that amount on the basis that the value of the</p> <p>10 preference was a debt owed to the company? I suspect</p> <p>11 not.</p> <p>12 MR TROWER: No, I think I would have to accept that is</p> <p>13 right.</p> <p>14 LORD SUMPTION: And isn't that actually an analogous</p> <p>15 situation?</p> <p>16 MR TROWER: No, it is not. Because under the relevant</p> <p>17 preference legislation, the cause of action is</p> <p>18 characterised by reference to something that the</p> <p>19 liquidator can do.</p> <p>20 Now, I appreciate that under section 74, what you</p> <p>21 have is a call that is delegated by the court to the</p> <p>22 liquidator. I understand that. But that doesn't --</p> <p>23 what is going on in a preference or a wrongful trading</p> <p>24 context is that you have a statute that makes provision</p> <p>25 for the reversal -- and I sort of touched on this in</p> <p style="text-align: center;">Page 79</p>
<p>1 receipt being an asset.</p> <p>2 LORD SUMPTION: Because there can't be a liability without</p> <p>3 a creditor.</p> <p>4 MR TROWER: Without a creditor.</p> <p>5 LORD SUMPTION: I wonder whether that is true. You can have</p> <p>6 an obligation under a statute to pay a sum of money</p> <p>7 which is enforceable through the powers of the court</p> <p>8 without its necessarily being owed as a debt to</p> <p>9 a private person.</p> <p>10 MR TROWER: Well, I understand that, but it doesn't fit</p> <p>11 conceptually very well with the concept of section 74</p> <p>12 being to contribute to the assets of the company, we</p> <p>13 would suggest.</p> <p>14 LORD SUMPTION: Unless there is a difference between the</p> <p>15 obligation and the fate of the funds when they turn up.</p> <p>16 MR TROWER: Well, I see where one would have to draw the</p> <p>17 dividing line, I understand that point, but we</p> <p>18 respectfully suggest that that is not the right way of</p> <p>19 looking at section 74 because of the concept of bringing</p> <p>20 in the assets into the company. I realise I am</p> <p>21 repeating myself.</p> <p>22 LORD SUMPTION: It may be that you are able to distinguish</p> <p>23 the position entirely, but there are of course other</p> <p>24 powers which a liquidator has, for example to require</p> <p>25 money to be paid by a person who has been unlawfully</p> <p style="text-align: center;">Page 78</p>	<p>1 submissions -- of some form of preference or something</p> <p>2 of that sort, for the purposes of enforcing the</p> <p>3 pari passu rule. And these cases all arise in the</p> <p>4 context of whether or not the proceeds are capable of</p> <p>5 being charged to a debenture holder. That is the</p> <p>6 context in which they arise. They don't arise in the</p> <p>7 context that we are considering.</p> <p>8 So that is the way we would suggest you need to be</p> <p>9 thinking about it. I mean, I quite understand that what</p> <p>10 happens when you get in a 239 preference claim is it</p> <p>11 comes into the central pot under the law and is then</p> <p>12 distributed in accordance with the statutory code, in</p> <p>13 that way, and I don't think I would submit that you</p> <p>14 could prove in respect of a prior preference liability.</p> <p>15 But we do say that once you look at the background to</p> <p>16 the nature of the obligation to contribute in this case,</p> <p>17 that that does constitute a liability which can be</p> <p>18 identified as such. It is a liability of the company</p> <p>19 that crystallises at the time that the liquidation takes</p> <p>20 place.</p> <p>21 LORD REED: I am just wondering, it may amount to the same</p> <p>22 point, but a different way of putting it might be to</p> <p>23 ask: who is it that has a right to enforce the</p> <p>24 liability? And on one view, one might say the scheme of</p> <p>25 the statute is the liability is enforceable only by</p> <p style="text-align: center;">Page 80</p>

<p>1 a liquidator and, if that is right, then the effect 2 would be that the company prior to winding up couldn't 3 prove for the debt, albeit it otherwise met the 4 statutory definition of a provable debt. 5 MR TROWER: I mean, one of the differences, of course, is 6 that we are looking here at provability and so we are 7 looking at the relationship that existed between the 8 member and the company, and there is a relationship 9 pursuant to the member -- you know, the company and the 10 member have that relationship. If that is the source of 11 the liability which gives rise to the ultimate title, 12 that is very different from the situation that one is 13 concerned with in a section 239 case. 14 LORD SUMPTION: You accept the source of it is actually the 15 statutory scheme, isn't it, without which the membership 16 would add up to nothing in this context. I mean, if one 17 looks at the logic of Nortel the reason why it is 18 a liability, and therefore capable of being treated as 19 a contingent liability, is that the statutory scheme 20 exists before the winding up. 21 MR TROWER: Yes. Although, of course -- I mean, of course 22 there is a statute here from which you derive certain 23 things, but one must be careful, we submit, to move too 24 far away from the contractual nexus which you have in 25 any event. There are principles of law that provide for</p> <p style="text-align: center;">Page 81</p>	<p>1 statutory process of winding up or administration that 2 justifies, let alone requires, such an outcome. 3 Now, I should say right at the start Mr Trower 4 referred to some areas of law in the course of his 5 submissions. I will not duplicate his submissions, but 6 on occasions I am afraid I will need to refer to 7 material to which he took your Lordship in support of 8 another point. 9 LORD NEUBERGER: Fair enough. 10 MR DICKER: My Lord, at the risk of starting with the 11 obvious, we say it is essential to bear in mind the 12 statutory scheme is based on two fundamental principles. 13 First, the company must pay its creditors in full before 14 it can make any distributions to shareholders. In other 15 words creditors first, members last. Secondly, 16 creditors are to be treated pari passu between 17 themselves. As your Lordships are aware, that is 18 reflected in the statutory scheme itself. For example, 19 section 143, dealing with compulsory liquidations, which 20 Lord Justice Briggs refers to at paragraph 189 of his 21 judgment. 22 LORD NEUBERGER: Yes. 23 MR DICKER: Core bundle D, tab 3, page 577. Section 143 24 provides, as your Lordships can see functions of 25 a liquidator in a company being wound up by the court</p> <p style="text-align: center;">Page 83</p>
<p>1 when A makes an agreement with B, certain legal 2 consequences flow. There are principles of law which 3 are derived from the fact that that A has entered into 4 a relationship with B, as a result of which certain 5 legal consequences flow, those legal consequences being 6 provided for by statute. Now, that doesn't detract in 7 any way from the significance of the underlying 8 contractual relationship as the source of the liability. 9 LORD NEUBERGER: Thank you, Mr Trower. 10 Submissions by MR DICKER 11 LORD NEUBERGER: Mr Dicker, delayed appearance. 12 MR DICKER: My Lords, my submissions, as your Lordships are 13 aware, will deal with foreign currency claims. 14 LORD NEUBERGER: Yes. 15 MR DICKER: The outcome contended for by the appellants is, 16 we submit, a striking one. Although the administrators 17 have sufficient funds, the relevant foreign currency 18 creditors will never receive the full amount that they 19 are owed, LBIE will never be obliged to pay it, and the 20 shareholders will receive a windfall. We submit that 21 that would be unjust, a submission which was accepted 22 both by the judge at first instance and by the majority 23 in the Court of Appeal. 24 LORD NEUBERGER: Yes. 25 MR DICKER: And we submit that there is nothing in the</p> <p style="text-align: center;">Page 82</p>	<p>1 are, I interpolate, (1) to secure the assets of the 2 company are got in, realised and distributed to the 3 company's creditors and, again interpolating, (2) if 4 there is a surplus, to the persons entitled to it. 5 Your Lordships know there is a similar provision in 6 relation to voluntary liquidations, namely section 107, 7 and administrations operate in the same way if they are 8 distributing administrations. 9 We say there are essentially two tasks. One needs 10 to have regard to both. The first task is to distribute 11 the assets of the company pari passu amongst its 12 creditors, in case there is a shortfall. 13 LORD NEUBERGER: Yes. 14 MR DICKER: And the rules contain various provisions which 15 apply for the purposes of valuing and determining what 16 claims are admissible. 17 The second task, obviously, is to ensure that before 18 any distributions are made to shareholders, you have in 19 fact paid all of the company's creditors in full. If 20 they haven't been paid as part of the first process, for 21 whatever reason, they need to be paid before the 22 distributions are made to shareholders. 23 Now, my learned friend, during the course of his 24 submission, repeatedly characterised our case as relying 25 on what he described as a sort of abstract appeal to</p> <p style="text-align: center;">Page 84</p>

<p>1 what is fair and just. My Lords, that is simply not 2 right. There is nothing abstract about it. We are 3 simply relying on the provisions of statute, provisions 4 which are repeatedly cited in the cases as fundamental 5 principles of company and insolvency law. 6 LORD SUMPTION: The essential question, surely, is simply 7 whether the admission of a proof extinguishes the whole 8 of the claim or is a procedural mode of enforcement 9 only, with the results that if it is incomplete and 10 there are assets to satisfy the rest of it, the normal 11 consequence follows. 12 MR DICKER: My Lord, absolutely. 13 LORD SUMPTION: It is relatively narrow, isn't it? 14 MR DICKER: Yes, it is, although we say that the question is 15 best answered by ensuring one has the shape of the 16 statutory scheme as a whole before focusing in on what 17 rule 2.86 was intended to achieve. 18 LORD REED: One also has to bear in mind the other way of 19 looking at it, which is the approach of Lord Oliver in 20 Dynamics and Lines, that one looks at the nature of the 21 obligation imposed by a debt expressed in foreign 22 currency, and, you know, his approach is essentially to 23 say the obligation is to pay the sterling equivalent, 24 which has to be at a particular date and normally would 25 be the date when the demand was made or a writ was</p> <p style="text-align: center;">Page 85</p>	<p>1 other. 2 My Lord, we do say that one needs to construe 3 rule 2.86 in the context of the Act as a whole, 4 including what came before, and I was going to say a few 5 words in response to my learned friend's submissions in 6 relation to process of collective execution, concepts of 7 provable and non-provable claims, and also, prior to 8 1986, the treatment of non-provable claims in tort and 9 post-insolvency interest before turning to rule 2.86. 10 Starting, if I may, with the process of collective 11 enforcement. Your Lordship knows this is dealt with by 12 Lord Hoffmann in Wight v Eckhardt. It may help if your 13 Lordships have that open. It is bundle F1, tab 23. 14 Just emphasising the issues and the points made by 15 Lord Hoffmann in this case before coming to my learned 16 friend's submissions, paragraph 20 sets out in summary 17 form the arguments, or the views of both the 18 Court of Appeal and Mr Lowe on behalf of the appellant. 19 21, Lord Hoffmann says: 20 "Central to both of these arguments is the 21 proposition that the right to share in a liquidation is 22 a new right which comes into existence in substitution 23 for the previous debt." 24 He then deals with, in paragraph 22, the approach 25 taken by the Court of Appeal. I don't need to say</p> <p style="text-align: center;">Page 87</p>
<p>1 served, but in insolvency it is the date of the 2 commencement of the insolvency procedure. 3 MR DICKER: My Lord, your Lordship is absolutely right. 4 There are two possible ways of looking at it. We say 5 that the way your Lordship has just outlined is not the 6 right way. We also say it isn't in fact, in fairness to 7 Mr Justice Oliver as he then was, the way he approached 8 it in Re Dynamics. 9 My Lord, there was a clear illustration of the 10 difference between the two parties in my learned 11 friend's submissions on the Monday. He described 12 rule 2.86 as a general rule which is intended to strike 13 a fair balance between the various stakeholders of the 14 company, including, ultimately, its members. We say 15 that is simply not the purpose of converting foreign 16 currency claims into sterling as at the date of 17 liquidation. 18 The purpose of doing that is to ensure pari passu 19 distribution of the assets amongst its creditors. 20 Neither the authorities, the pre-legislative material, 21 or rule 2.86 contain any indication that the rule was 22 intended to apply not simply for the purposes of 23 ensuring pari passu distribution, but essentially as 24 a fair allocation as between creditors on the one hand 25 and all of the company's other stakeholders on the</p> <p style="text-align: center;">Page 86</p>	<p>1 anything in relation to that. 2 23, my Lords, is significant, because the appellant 3 in Wight v Eckhardt essentially said the statutory 4 scheme involves a cut-off date. Essentially, you take 5 a snap shot of the position as at the date of 6 liquidation and everything is effectively frozen as at 7 that date, and expressly relied in support on Humber 8 Ironworks, dealing with post-insolvency interest, and 9 Dynamics and Lines Bros dealing with currency 10 conversion. 11 Lord Hoffmann says that that is wrong for two 12 reasons. The first reason, as your Lordships have seen 13 in 26 and 27, is the point about winding up being 14 a process of collective execution, which he then 15 describes in paragraph 27. 16 The second reason is in paragraphs 28 and 29. What 17 he says there is, well, the need for a cut-off date is 18 solely for the purposes of ensuring a pari passu -- 19 LORD NEUBERGER: He doesn't say "solely", it is "to give 20 effect". Yes. 21 MR TROWER: Solely for the purposes of ensuring pari passu 22 distribution amongst creditors. That is what was going 23 on in Re Humber Ironworks, that is what was going on in 24 Dynamics and in Lines Bros. So you don't freeze the 25 position as at the date of liquidation.</p> <p style="text-align: center;">Page 88</p>

<p>1 Now, we say that as far as Lord Hoffmann's first 2 reason is concerned, it is plain that the underlying 3 debt remains, unless and until it is discharged through 4 payment, and in context, what he can only have been 5 contemplating was payment of the underlying debt in 6 full, not some other sum.</p> <p>7 Secondly, we also say he must have considered Humber 8 Ironworks, Dynamics and Lines Bros as consistent with 9 that view. In other words, the process of converting 10 foreign currency claims into sterling as at the date of 11 liquidation didn't have the effect of substituting 12 sterling equivalent at the date of liquidation for the 13 underlying obligation, such that if you pay the former, 14 you have necessarily paid the latter. So that is 15 Lord Hoffmann in <i>Wight v Eckhardt</i>.</p> <p>16 How do the appellants seek to deal with this? Well, 17 they have sought to deal with it in various ways. 18 Essentially, as we understand it, three. Firstly, they 19 initially submitted that Lord Hoffmann was merely 20 explaining the effect of the winding up order and saying 21 nothing about the effect of the process. We say that is 22 simply impossible to square with what Lord Hoffmann says 23 in paragraph 27. He talks about the debts, remaining 24 debts throughout, and they are untouched. Indeed, it is 25 inconsistent with his reference to, his use of the</p> <p style="text-align: center;">Page 89</p>	<p>1 with the statutory scheme. If payment of the proved 2 debt necessarily amounts to payment in full of the 3 underlying debt such that there is no shortfall, in 4 substance we say the creditor the must have lost his own 5 old right and had it replaced by a new right.</p> <p>6 LORD SUMPTION: Well, on that footing, presumably if you had 7 a guarantee given to you by a solvent third party, the 8 guarantor would be able to say, "The liability has been 9 extinguished, I am not liable".</p> <p>10 MR DICKER: Thank is no doubt why my learned friend, during 11 the course of his submissions, said, well, you could of 12 course read the words "for the purposes of proof" in 13 rule 2.86 as intended to convey that this didn't entitle 14 a guarantor, essentially, to avoid its liability. But 15 obviously we are not just concerned with guarantors as 16 third parties; there are other persons who are involved 17 in this process, and shareholders are one example.</p> <p>18 My Lord, we do say that my learned friend's 19 submission in seeking to say, well, if you pay a proved 20 debt in full, that is discharge of the underlying debt, 21 to say that is something different from not inconsistent 22 with Lord Hoffmann's description of the process of 23 collective execution can't be right. This is just 24 playing with words.</p> <p>25 Now, at various points, my learned friend said it</p> <p style="text-align: center;">Page 91</p>
<p>1 phrase "the process of collective execution". He is 2 obviously not just concerned with the effect of the 3 winding up order; he is concerned with the effect of the 4 winding up process as a whole.</p> <p>5 The second way the appellants sought to deal with 6 <i>Wight v Eckhardt</i> was to say, well, if you want to 7 participate in a statutory scheme, you have to prove. 8 Now, we say, again, that doesn't assist them. It is 9 obviously true that if you want to participate and 10 receive a dividend in respect of a proved debt then you 11 do need to prove. But that is just circular. It 12 doesn't follow that your only right is to prove, and if 13 you cannot prove for all or part of your claim, the 14 consequence is that your claim is ignored. If that were 15 right, then obviously we wouldn't have a concept of 16 non-provable claims at all.</p> <p>17 Now, the third approach which was developed, 18 I think, most fully by my learned friend in his oral 19 submissions on Monday, was that under the statutory 20 scheme, payment in full of a proved debt necessarily 21 amounts to payment in full of the underlying debt. We 22 do ask your Lordships to look at the way my learned 23 friend developed that during the course of his 24 submissions. We say it is entirely unclear how this is 25 intended to work or indeed how it could work consistent</p> <p style="text-align: center;">Page 90</p>	<p>1 wasn't his case that the statutory scheme did replace 2 underlying debt with a new debt. He said, page 64, 3 lines 18 to 20:</p> <p>4 "We are not saying there has been a transformation 5 of the debt. We also accepted that rule 2.86 is just 6 for the purposes of valuation."</p> <p>7 Now, if that is right, how is it that he gets to his 8 conclusion that payment of the proved debt in full is 9 essentially discharge of the underlying debt? Now, as 10 we understand it, there are two strands to the argument. 11 The first is based on, essentially, a lacuna. What he 12 said at page 46, lines 3 to 5 was:</p> <p>13 "There is just nothing in the statute which allows 14 it. We say, in other words, that payment in full in 15 accordance with the statutory scheme discharges that 16 claim."</p> <p>17 In other words, because the statute provides and 18 provides only for payment of the proved debt, you can't 19 have any other right.</p> <p>20 Now, we say that is simply to misunderstand the 21 effect of the statutory scheme. The statutory scheme 22 doesn't need to give you a currency conversion claim, it 23 is just the unpaid balance of the underlying claim which 24 has not been discharged by the process of collective 25 execution, and which is payable as a non-provable claim</p> <p style="text-align: center;">Page 92</p>

<p>1 before any distributions are made to shareholders, 2 because otherwise you would infringe the principle of 3 creditors first, members last. 4 My learned friend, we say, is wrong to suggest that 5 there is a lacuna, that the only right under the 6 statutory scheme is to payment of approved debt, and 7 therefore if your proved debt is paid, there can't be 8 anything else to which you are entitled. 9 The other part of the argument, as I understand it, 10 is based on the effect of the valuation mechanism for 11 the purposes of proof. What my learned friend said at 12 page 65, lines 4 to 9, was that -- 13 LORD NEUBERGER: Page, sorry? 14 MR DICKER: It is page 65, lines 4 to 9 of the transcript. 15 LORD NEUBERGER: Thank you, yes. 16 MR DICKER: He says: 17 "They [the debts] are affected. They are discharged 18 here to the extent they are paid out of dividends, and 19 since the statute tells you how to value the debt for 20 the purposes of payment, if it tells you the debt is 21 worth £100 and £100 is paid, the debt is discharged." 22 Again, just taking this in stages, it is true that 23 the debt is valid as at the date of liquidation. 24 LORD NEUBERGER: Yes. 25 MR DICKER: Although, as Lord Hoffmann makes plain in</p> <p style="text-align: center;">Page 93</p>	<p>1 in relation to post-insolvency interest. The court's 2 approach was, well, we value it at £100, excluding 3 post-insolvency interest, for the purposes of ensuring 4 pari passu distribution amongst creditors. But we don't 5 ignore the fact that dividends aren't actually paid on 6 the date of liquidation; they are only paid later. We 7 don't ignore the fact that going on in the background, 8 as far as the underlying debt is concerned, interest 9 continues to accrue, and we don't ignore the fact that, 10 going back to the principle of creditors first, members 11 last, creditors should be entitled to have that interest 12 paid before any distributions are made to shareholders. 13 We say there is a perfect parallel between that and 14 currency conversion claims. Yes, the scheme does 15 involve valuing claims as at the date of liquidation. 16 But that is for the purposes of proof. It doesn't have 17 the effect of extinguishing the underlying right, nor 18 does it prevent creditors from saying, "My claim may 19 have been worth £100 on the date of liquidation, but by 20 the time you got round to paying me, what you paid me 21 wasn't sufficient to discharge my underlying debt and 22 that is something you have to discharge before you can 23 make any distributions to shareholders". 24 Now, this argument of my learned friend effectively 25 assumes that the conversion is not just for the purposes</p> <p style="text-align: center;">Page 95</p>
<p>1 Wight v Eckhardt, that is for the purposes of ensuring 2 pari passu distribution. It is also plain that the debt 3 is worth £100 on that date. Lord Oliver said so in 4 Re Dynamics. And it is also true that if £100 had in 5 fact been paid on that day, then the underlying debt 6 would have been paid in full. But the problem, 7 obviously, is it wasn't paid on that day. It was only 8 paid later when dividends were paid, and by the time it 9 was paid, it was worth less than the foreign currency 10 claim to which the creditor was entitled. 11 Now, we say that there is a parallel here, and 12 I will come back to this, in relation to post-insolvency 13 interest. One can equally say the effect of the cut-off 14 date and the need to value claims as at the date of 15 liquidation is that where you have a claim accruing 16 interest, as at the date of liquidation, it is only 17 worth, say, £100. Now, the logic of my learned friend's 18 argument, as we understand it, is that because the 19 statutory scheme values that claim as £100, if £100 is 20 paid, even if that £100 is only paid some years later 21 through the process of dividends, nevertheless proved 22 debt has been paid in full and there can't be any other 23 claim. 24 Now, perfectly plain, and we will come to this in 25 due course, that prior to 1986, that wasn't how it worked</p> <p style="text-align: center;">Page 94</p>	<p>1 of proof. It necessarily assumes that it operates as 2 between creditors and shareholders as well, so that 3 shareholders can have the benefit of it. We say in 4 substance that is plainly inconsistent with 5 Lord Hoffmann's description of the process of winding 6 up. In substance, that is saying to creditors it 7 doesn't matter what your underlying claim is, the effect 8 of the statutory scheme is that we do freeze the 9 position as at the date of liquidation, we work out what 10 it was worth on that date, we pay you what it was worth 11 on that date and it necessarily follows that you can 12 have no further claims. We say that is simply flatly 13 inconsistent with the nature of the winding up process. 14 Now, we refer in our written case to an earlier 15 decision, Oakes v Turquand. I wasn't going to take your 16 Lordships to it. It is referred to briefly by 17 Lord Justice Briggs at paragraph 182. 18 LORD NEUBERGER: Thank you. 19 MR DICKER: And we develop our submissions on it in our 20 written case at paragraphs 38 to 44. 21 The short point is if one wants an illustration of 22 why Lord Hoffmann's description of winding up is 23 a process of collective execution, one can clearly see 24 that from its historical development as described by 25 Lord Cranworth in Oakes v Turquand.</p> <p style="text-align: center;">Page 96</p>

<p>1 LORD NEUBERGER: Yes.</p> <p>2 MR DICKER: Now, we also make the point in our written case,</p> <p>3 and again I won't take your Lordships to it, to the fact</p> <p>4 that Lord Diplock in Ayerst made the point that the</p> <p>5 essentials of the statutory scheme in this respect have</p> <p>6 remained exactly the same ever since 1862, and to four</p> <p>7 other authorities which repeat Lord Hoffmann's</p> <p>8 description of the process of winding up. Again,</p> <p>9 I don't think I need to take your Lordships to those;</p> <p>10 they are referred to in our written case at</p> <p>11 paragraph 37.</p> <p>12 So that is the collective process of execution.</p> <p>13 The next thing I wanted to turn to was the statutory</p> <p>14 waterfall and the concepts of provable and non-provable</p> <p>15 claims, and to say a little more about those.</p> <p>16 Now, we say it is important to appreciate the nature</p> <p>17 and extent of non-provable claims when coming to assess</p> <p>18 the 1986 Act. The draftsman plainly had them in mind.</p> <p>19 One of the things he addressed in the 1986 Act were</p> <p>20 unliquidated claims for damages in tort which were</p> <p>21 previously not provable. The rules were changed to make</p> <p>22 certain such claims provable. He also dealt with</p> <p>23 post-insolvency interest. Again, prior to 1986, the</p> <p>24 authorities held not provable. He inserted a rule</p> <p>25 specifically dealing with that. So he had non-provable</p> <p style="text-align: center;">Page 97</p>	<p>1 also depends on there being a common date as at which</p> <p>2 the fund falls to be valued and distributed pari passu,</p> <p>3 that is my Lord, Lord Sumption at paragraph 130.</p> <p>4 Now, as we say, echoing Lord Hoffmann in</p> <p>5 Wight v Eckhardt, the purpose of that rule is to ensure</p> <p>6 pari passu distribution between creditors.</p> <p>7 LORD NEUBERGER: Yes, we have got that.</p> <p>8 MR DICKER: Doesn't apply any further than is strictly</p> <p>9 necessary (inaudible).</p> <p>10 LORD NEUBERGER: Yes.</p> <p>11 MR DICKER: That is what Lord Justice Briggs accepted at</p> <p>12 paragraph 157 and Lord Justice Moore-Bick accepted at</p> <p>13 257 of the their judgments.</p> <p>14 LORD NEUBERGER: Yes.</p> <p>15 MR DICKER: So we have a requirement to distribute the</p> <p>16 assets pari passu. To do that, you have to have</p> <p>17 a cut-off date, value them as at that date. That</p> <p>18 necessarily excludes certain claims which don't fit</p> <p>19 within the requirements for provability.</p> <p>20 LORD NEUBERGER: Yes.</p> <p>21 MR DICKER: And we say non-provable liabilities are simply</p> <p>22 any claims which for one reason or another either are</p> <p>23 not provable at all or are not discharged in full as</p> <p>24 a result of the payment of dividends in respect of</p> <p>25 proved debts. They therefore rank as non-provable</p> <p style="text-align: center;">Page 99</p>
<p>1 claims well in mind.</p> <p>2 The statutory waterfall was referred to by my Lord,</p> <p>3 Lord Neuberger in Re Nortel, and it may help if your</p> <p>4 Lordships just had that authority open. It is F1,</p> <p>5 tab 17.</p> <p>6 LORD NEUBERGER: Yes.</p> <p>7 MR DICKER: It is set out at paragraph 39. My Lord</p> <p>8 identifies the relevant sections and provisions of the</p> <p>9 rules in relation to winding up and administration,</p> <p>10 including section 143 and then lists the --</p> <p>11 LORD NEUBERGER: Yes, that is set out in</p> <p>12 Lord Justice Lewison's judgment, and</p> <p>13 Mr Justice David Richards's judgment.</p> <p>14 MR DICKER: Yes.</p> <p>15 LORD NEUBERGER: Yes.</p> <p>16 MR DICKER: Now, just dealing with the distinction between</p> <p>17 provable and non-provable liabilities, your Lordships</p> <p>18 will remember the first part of section 143 says the</p> <p>19 first task is to distribute the assets pari passu</p> <p>20 amongst -- distribute the assets amongst the creditors</p> <p>21 of the company. To do that, as your Lordships indicated</p> <p>22 in Nortel, there has to be a cut-off date to determine</p> <p>23 the class of creditors who are to participate in the</p> <p>24 distribution of the company's available net assets --</p> <p>25 that is Lord Neuberger at paragraph 35 -- and the scheme</p> <p style="text-align: center;">Page 98</p>	<p>1 liabilities.</p> <p>2 It is interesting, we say, that my Lord, Lord</p> <p>3 Neuberger at paragraph 54 of his judgment, when he came</p> <p>4 on to the third possibility, described that as being:</p> <p>5 "It is not a provable debt within rule 12.12 and</p> <p>6 therefore falls within category 7."</p> <p>7 We say that is exactly right. If it is not</p> <p>8 provable, it is therefore a non-provable claim.</p> <p>9 Essentially, we say non-provable claims are simply</p> <p>10 the necessary consequence of the two principles</p> <p>11 I mentioned earlier: in other words, pari passu</p> <p>12 distribution amongst creditors and the principle that</p> <p>13 creditors must come before members. Once you have those</p> <p>14 two principles, once you appreciate that to distribute</p> <p>15 the assets pari passu amongst creditors, you need a set</p> <p>16 of rules which necessarily exclude certain claims, you</p> <p>17 are, almost by definition, going to end up with</p> <p>18 a waterfall which involves payment of provable debts</p> <p>19 first, a category of non-provable liabilities which</p> <p>20 don't meet the cut-off or the valuation requirements</p> <p>21 next, before you get to any distributions being made to</p> <p>22 shareholders.</p> <p>23 So we say, contrary, I think, to the impression my</p> <p>24 learned friend sought to convey, there is absolutely</p> <p>25 nothing heretical about the concept of non-provable</p> <p style="text-align: center;">Page 100</p>

<p>1 claims; they are simply the consequence of giving effect 2 to both the pari passu principle and the principle that 3 the creditors come first, members last.</p> <p>4 The reason why the liability has not been paid in 5 full is irrelevant. The nature of the collective 6 process of enforcement means that if the underlying 7 debt, for whatever reason, has not been paid in full, 8 the debtor remains liable and the liability has to be 9 satisfied before any distributions can be made to 10 shareholders.</p> <p>11 Now, we deal in our written case with the history of 12 non-provable claims at paragraph 58. I don't need to 13 take your Lordships to that. It is also summarised by 14 Mr Justice David Richards in T&N, paragraphs 76 to 85.</p> <p>15 The points we do ask your Lordships to bear in mind 16 are as follows: as I submitted earlier, when construing 17 the 1986 Act, one needs to bear in mind that this 18 statute, like all of its predecessors, is intended to 19 deal with non-provable liabilities as well as provable 20 liabilities. There is something, as I said, the 21 draftsman must have had in mind, because he altered the 22 position in relation to unliquidated claims for damages 23 in tort and post-insolvency interest, both of which were 24 previously regarded as non-provable.</p> <p>25 Even after 1986, obviously there is still a category</p> <p style="text-align: center;">Page 101</p>	<p>1 or rule of law under which a particular kind of debt is 2 not provable, whether on the grounds of public policy or 3 otherwise."</p> <p>4 LORD NEUBERGER: Thank you.</p> <p>5 LORD CLARKE: What do you say is the kind of debt which is 6 not provable in this case?</p> <p>7 MR DICKER: Well, what is not provable is, essentially, such 8 balance, if any, of the creditors' claim which is not 9 captured by valuing it as at the date of liquidation.</p> <p>10 LORD SUMPTION: Statutory interest would be another example, 11 wouldn't it?</p> <p>12 MR DICKER: Absolutely. You have this -- I use the 13 expression "snapshot". You take a photograph of the 14 position as at the date of liquidation. You value 15 everything then. Now, just as my Lord, Lord Sumption 16 said in relation to post-insolvency interest, that is 17 not captured by the snapshot because it hasn't yet 18 accrued. It will only accrue as and when the underlying 19 debt is not paid and attracts interest. The cases -- 20 and we will come on to Re Humber Ironworks -- say that 21 because of the need to treat the liquidation for the 22 purposes of pari passu distribution as occurring on one 23 day, collecting the assets and you distribute them on 24 one day, that part of the creditors' rights is not 25 provable.</p> <p style="text-align: center;">Page 103</p>
<p>1 of non-provable claims. Some are identified 2 specifically in rule 12.3(2) and 12.3(3) states: 3 "Nothing in this rule prejudices any enactment or 4 rule of law under which a particular kind of debt is not 5 provable, whether on grounds of public policy or 6 otherwise."</p> <p>7 As your Lordships know, one example of that, of the 8 statutory liabilities --</p> <p>9 LORD NEUBERGER: Where do we find 12.3? Where do we find 10 that rule?</p> <p>11 MR DICKER: Those rules are --</p> <p>12 LORD NEUBERGER: 12.3, I think you said. Don't worry, we 13 will have a look later. Don't let me hold you up.</p> <p>14 MR DICKER: If your Lordships go to F3/71 ...</p> <p>15 LORD NEUBERGER: Thank you. Yes.</p> <p>16 MR DICKER: So sub-rule (2) --</p> <p>17 LORD NEUBERGER: Yes thank you.</p> <p>18 MR DICKER: -- says they are not provable --</p> <p>19 LORD NEUBERGER: Thank you, yes.</p> <p>20 MR DICKER: -- and then there are various specific 21 obligations.</p> <p>22 LORD NEUBERGER: Yes, thank you.</p> <p>23 MR DICKER: And then sub-rule (3), over the page.</p> <p>24 LORD NEUBERGER: Yes.</p> <p>25 MR DICKER: "Nothing in this rule prejudices any enactment</p> <p style="text-align: center;">Page 102</p>	<p>1 Similarly in relation to currency conversion claims, 2 because you take this snapshot on the date of 3 liquidation and you value everything on that date.</p> <p>4 LORD NEUBERGER: Do you say that there is a fairly exact 5 analogy with Lord Hoffmann's example of an insurance 6 policy where the event eventuates after the vital date 7 of proof -- date at which you take the account, as it 8 were?</p> <p>9 MR DICKER: There are similarities. The difference between 10 them is in relation to insurance policies, or anything 11 else which is treated as a provable but contingent 12 claim --</p> <p>13 LORD NEUBERGER: Yes.</p> <p>14 MR DICKER: -- you can revalue the contingency with the 15 benefit of hindsight. What is different, we say, in 16 relation to post-insolvency interest and currency 17 conversion claims is that, as the cases have held, the 18 effect of having a cut-off date, valuing everything as 19 at the cut-off date for the purposes of ensuring 20 pari passu distribution, is those are not provable at 21 all. They are not even provable as contingent claims. 22 I will come back to this point, but they are regarded as 23 excluded from being provable claims simply because, as 24 I say, they don't show up on the snapshot that is taken 25 as at the date of liquidation.</p> <p style="text-align: center;">Page 104</p>

<p>1 Now, as far as non-provable claims --</p> <p>2 LORD CLARKE: Originally, claims for damages for personal</p> <p>3 injury, let's say, where the damage isn't suffered until</p> <p>4 later, is somehow added back in, is it, as the law</p> <p>5 stands now?</p> <p>6 MR DICKER: Those were, before 1986, regarded as</p> <p>7 non-provable, at least in an insolvent liquidation.</p> <p>8 LORD CLARKE: And now?</p> <p>9 MR DICKER: The position in 1986 changed and it went through</p> <p>10 a couple of iterations. Initially, the rules provided</p> <p>11 that it would be provable, provided the cause of action</p> <p>12 had effectively accrued by the date of liquidation.</p> <p>13 Now, following the decision of Mr Justice Richards</p> <p>14 in T&N, that was regarded as too onerous a condition and</p> <p>15 it was altered so that all that is necessary all of the</p> <p>16 ingredients of the cause of action, with the exception</p> <p>17 of actionable damage, have occurred by the date of</p> <p>18 liquidation.</p> <p>19 So the position now is that if you have a claim for</p> <p>20 unliquidated damages in tort, all of the elements of the</p> <p>21 cause of action, with the exception of actionable</p> <p>22 damage, are complete by the date of liquidation. It is</p> <p>23 provable. And if they are not, it is still</p> <p>24 non-provable.</p> <p>25 I will come on to T&N in a moment, but the</p> <p style="text-align: center;">Page 105</p>	<p>1 otherwise highly unlikely that they will receive</p> <p>2 anything at all, and as a matter of policy that was not</p> <p>3 thought right.</p> <p>4 LORD NEUBERGER: What you are saying is that the court</p> <p>5 hasn't reduced the number of claims; it has simply</p> <p>6 reapportioned the claims, as far as it can, from</p> <p>7 non-provable to provable.</p> <p>8 MR DICKER: For the purpose of ensuring that creditors can</p> <p>9 share. It has not removed non-provable claims --</p> <p>10 LORD NEUBERGER: That is what I am saying.</p> <p>11 MR DICKER: -- because it doesn't think that creditors</p> <p>12 should ever be entitled to recover such claims in</p> <p>13 advance of shareholders.</p> <p>14 LORD NEUBERGER: I understand.</p> <p>15 MR DICKER: Now, the reason why certain claims are</p> <p>16 non-provable differs from claim to claim. Some, as your</p> <p>17 Lordships have already seen, are excluded for some</p> <p>18 specific policy reason. But others are excluded, as</p> <p>19 I say, simply because they are regarded as not</p> <p>20 satisfying the requirements for pari passu distribution,</p> <p>21 namely the cut-off date and the need to value the claims</p> <p>22 as at that date.</p> <p>23 Non-provable claims are part of the statutory</p> <p>24 waterfall -- your Lordships have seen that -- and</p> <p>25 a liquidator has never been entitled to distribute to</p> <p style="text-align: center;">Page 107</p>
<p>1 consequence of that is there is still a category of</p> <p>2 non-provable claims for damages in tort, although it is</p> <p>3 slightly narrower now than it was initially when the</p> <p>4 1986 Act was introduced, and the 1986 Act, again, was</p> <p>5 more generous than the position before then.</p> <p>6 If such liabilities come into existence prior to the</p> <p>7 liquidator getting to the stage of making a distribution</p> <p>8 to shareholders, then they have to be paid before he can</p> <p>9 distribute the surplus, because they have priority over</p> <p>10 any distributions to shareholders.</p> <p>11 Again, I will show your Lordships this. There is</p> <p>12 a good example of this in a case called</p> <p>13 R-R Realisations, which involves, on one view at least,</p> <p>14 a claim which at the date of liquidation couldn't even</p> <p>15 be regarded as a contingent claim. I will come back to</p> <p>16 that.</p> <p>17 What we say is important to appreciate, as far as</p> <p>18 the historical development of non-provable claims is</p> <p>19 concerned, is it is certainly true that over the last</p> <p>20 300 years the legislature has continually widened the</p> <p>21 scope of provable claims and correspondingly narrowed</p> <p>22 the scope of non-provable claims. But the reason it has</p> <p>23 done so is to ensure that creditors can participate in</p> <p>24 the assets of an insolvent company. Obviously, if it is</p> <p>25 non-provable and it is an insolvent company, it is</p> <p style="text-align: center;">Page 106</p>	<p>1 members without regard to non-provable liabilities. It</p> <p>2 has always been part of his duty to pay the company's</p> <p>3 non-provable liabilities before making any distribution</p> <p>4 to shareholders.</p> <p>5 As my learned friend Mr Trower said, if you look at</p> <p>6 section 143 he has a statutory duty to distribute the</p> <p>7 surplus to those entitled to it and it can't make</p> <p>8 a distribution to shareholders without first paying any</p> <p>9 claims which are in priority to that.</p> <p>10 And your Lordships may note that this point, namely</p> <p>11 the obligation of the liquidator to deal with</p> <p>12 non-provable claims, was a point on which all three</p> <p>13 members of the Court of Appeal agreed.</p> <p>14 Lord Justice Briggs at paragraphs 185 to 189,</p> <p>15 lord Justice Moore-Bick at paragraph 246 and</p> <p>16 Lord Justice Lewison at paragraphs 56 to 61.</p> <p>17 Now, it is also true to say that the statute doesn't</p> <p>18 set out in any detail how such claims should be dealt</p> <p>19 with. Indeed, it is striking if one goes back, for</p> <p>20 example, to 143, which refers to the need to distribute</p> <p>21 the assets amongst the creditors and pay the surplus to</p> <p>22 those entitled to it. There isn't anything, as it were,</p> <p>23 express in the middle dealing with non-provable claims.</p> <p>24 That has always been the case going right back to the</p> <p>25 origins of both the bankruptcy and corporate insolvency</p> <p style="text-align: center;">Page 108</p>

<p>1 and, as Lord Justice Briggs says, those sections have 2 consistently been interpreted in the way that my Lord, 3 Lord Neuberger did in <i>Re Nortel</i>. 4 Just finally, noting the time, there is one 5 authority we have included just to illustrate how this 6 judge made process developed. It is a case called 7 <i>Bromley v Goodyear</i>, decided in 1743. Authorities 8 F4-tab 16. 9 LORD NEUBERGER: Tab 16? 10 MR DICKER: Tab 16. 11 LORD NEUBERGER: Page 2401. 12 MR DICKER: And it deals with -- it is essentially the 13 origin of the approach to dealing with post-insolvency 14 interest prior to 1986. 15 LORD NEUBERGER: Where do we find the relevant passage? 16 MR DICKER: Just very quickly, the facts are simply that the 17 commissioners only paid interest up to the date of the 18 commission of bankruptcy. One can see that just from 19 the first half dozen lines of the facts. 20 LORD NEUBERGER: Yes. 21 MR DICKER: They then received 20 shillings in the pound and 22 there turned out to be a surplus. Over the page, 23 page 50, two-thirds of the way down, the Lord Chancellor 24 said: 25 "Having laid these things out of the case, I come</p> <p style="text-align: center;">Page 109</p>	<p>1 whole debts, for it would be vain to pay any other 2 surplus when it might have been recovered from him again 3 by the creditors." 4 Page 79, just slightly below half way: 5 "But then it is said that the practice has been for 6 the commissioners to ascertain the debts by computing 7 interest only at the time of issuing the commission and 8 that being the contemporanea exposito is to be relied 9 upon." 10 And he says: 11 "There is no direction in the Act for that purpose. 12 It has been used only as the best method of settling the 13 proportion amongst the creditors that they might have 14 a rate like satisfaction and is founded upon the 15 equitable power given them by the Act." 16 So in other words, all the Act says is <i>pari passu</i> 17 distribution. The judges held that means you shouldn't 18 be entitled to prove for post-insolvency interest. But 19 there is a provision for a surplus to be paid to the 20 bankrupt and the necessary effect of the scheme is that 21 if interest has accrued post-insolvency on the 22 underlying debt, that interest has to be paid before the 23 bankrupt is entitled to the surplus. So that, we say is 24 an illustration of judicial development. 25 LORD CLARKE: If there is a surplus, what about the period</p> <p style="text-align: center;">Page 111</p>
<p>1 now to the main question: whether the creditors for 2 debts carrying interest by contract are entitled to have 3 subsequent interest, and I think they are." 4 He then deals with the position before the new Act 5 which introduced the concept of discharge. He says, 6 skipping a paragraph: 7 "I will consider this case first upon the old acts, 8 previous to the fourth and fifth Queen Anne, and then 9 upon that statute." 10 The bottom of the page he says: 11 "The next direction in the Act is what the 12 commission should do in regard to the debts. They are 13 directed to pay to every of the creditors a portion rate 14 like according to the quantity of his/her/their debts 15 and the question is what debts are here meant and I am 16 of the opinion it means debts due at the time of the 17 bankruptcy or when the commission was issued." 18 In other words the commissioners were right, you 19 allow interest up to the date of bankruptcy but no 20 further. He then says in the next paragraph: 21 "The Act goes on to take notice of the surplus which 22 it directs to be paid to the bankrupt ... " 23 And the following paragraph: 24 "This shows the surplus to be paid over to the 25 bankrupt is only the surplus after the payment of the</p> <p style="text-align: center;">Page 110</p>	<p>1 between the time of the bankruptcy and the payment. 2 That wasn't recoverable, was it? 3 MR DICKER: Your Lordship is quite right. The phrase 4 "post-insolvency interest" may not be the most accurate 5 way of describing it. It is interest, essentially, for 6 the period after the commission of bankruptcy in 1749, 7 after the bankruptcy order under more recent statutes. 8 So it is essentially you have this snapshot as at the 9 date of liquidation. You are entitled to prove for 10 interest accrued up to that date. Any interest after 11 that date is regarded as non-provable, (inaudible) only 12 in the event of a surplus, has to be paid in the event 13 of a surplus, before anything is returned -- 14 LORD CLARKE: Well, the interest, the later section of 15 interest had to be paid, did it? 16 MR DICKER: Yes. 17 LORD CLARKE: Yes. 18 MR DICKER: Your Lordships will see that, hopefully, when we 19 return, from Humber Ironworks. 20 LORD NEUBERGER: Very well. We will resume again at 21 2 o'clock. The court is now adjourned. Thank you, 22 Mr Dicker. 23 (1.03 pm) 24 (The luncheon adjournment) 25 (2.04 pm)</p> <p style="text-align: center;">Page 112</p>

<p>1 MR DICKER: My Lords, I have dealt with the process of 2 collective execution. I have made some general 3 submissions in relation to provable and non-provable 4 claims. 5 LORD NEUBERGER: Yes. 6 MR DICKER: What I now want to do is turn and deal briefly 7 with two other non-provable claims, namely unliquidated 8 claims for damages in tort and claims for 9 post-insolvency interest, look at the position pre-1986, 10 before turning to deal with the cases dealing with 11 foreign currency claims, ie Dynamics and Lines Bros. 12 So, firstly, unliquidated claims for damages in 13 tort. We discussed this before the short adjournment. 14 As your Lordships know, the rules as to what was 15 provable, what is provable, has changed over the years. 16 Prior to 1986, unliquidated claims for damages in tort 17 were not provable in an insolvent liquidation. The 1986 18 Act changed the regime. They were, provided the cause 19 of action had accrued by the time the company went into 20 liquidation. Following T&N, the rules were amended 21 again. They are provable provided every element of the 22 cause of action exists, with the exception of actionable 23 damage, by the date of liquidation. 24 Your Lordships have seen Mr Justice David Richards's 25 analysis of what the position is in relation to claims</p> <p style="text-align: center;">Page 113</p>	<p>1 commencing proceedings, returning judgment or agreement; 2 the liquidator simply pays what is owed. There may be 3 circumstances in which that sort of detailed analysis 4 isn't necessary. 5 Now, my Lords, before 1986, the position, just so 6 your Lordships are aware, was more complicated. I have 7 said that unliquidated claims for damages in tort were 8 not provable in an insolvent liquidation. They were, or 9 certain such claims were provable in a solvent 10 liquidation, but there was still the possibility of 11 non-provable claims. 12 Now, just expanding very briefly upon that, the 13 reason for that was because, prior to 1986, there were 14 two sections, sections 316 and 317, and if your 15 Lordships turn to bundle F4 at tab 11, your Lordships 16 will find a decision of Mr Justice Vinelott in a case 17 called Barclays Securities Limited. I turn to this 18 simply as a convenient way of showing your Lordships the 19 relevant provisions. 20 At page 2317 of the bundle, page 1602 in the report, 21 halfway down Mr Justice Vinelott has a reference to 22 section 316: 23 "In every winding up, subject in the case of 24 insolvent companies to the application in accordance 25 with the provisions of this Act, the law of bankruptcy,</p> <p style="text-align: center;">Page 115</p>
<p>1 in tort, which, as a result of that cut-off date, are 2 not provable. And just reminding your Lordship of his 3 approach, it is in bundle F1, tab 21. 4 LORD NEUBERGER: Yes. 5 MR DICKER: It is paragraphs 106 and 107 of the judgment, 6 page 1556 of the bundle. 7 LORD NEUBERGER: Yes. 8 MR DICKER: I know your Lordships have seen these 9 paragraphs, so just emphasising firstly at the start of 10 107, his reaction, like every other judge dealing with 11 non-provable claims, was that it would be extraordinary 12 if a company's assets could be, and were required to be, 13 distributed to shareholders without paying tort claims 14 which had accrued since the liquidation date, or other 15 claims not provable in a liquidation. He gives one 16 example, which at least subsisted prior to the decision 17 of your Lordships in Re Nortel. Then he explains why 18 and how those claims can be paid in advance of any 19 distributions being made to shareholders. 20 My Lords, another approach would obviously simply be 21 to say, like the three members of the Court of Appeal 22 below, the liquidator has a duty to discharge 23 non-provable claims before making a distribution to 24 shareholders. If it is clear how much the claim is 25 worth, one doesn't need to go through the process of</p> <p style="text-align: center;">Page 114</p>	<p>1 all debts payable on a contingency, all claims against 2 the company, present or future, certain or contingent, 3 ascertained or sounding only in damages, shall be 4 admitted to proof against the company." 5 And he says, just under that, four lines down: 6 "That section is clearly wide enough to admit to 7 proof an unliquidated claim for damages in tort." 8 Now, 316 says, "In every winding up, subject in the 9 case of insolvent companies", and that takes (inaudible) 10 317, which your Lordships will see on the right-hand 11 page, page 2318 -- 12 LORD NEUBERGER: At the bottom. 13 MR DICKER: -- of the bundle, just above letter G. 14 Section 317 provides: 15 "In the winding up of an insolvent company 16 registered in England, the same rules shall prevail and 17 be observed ... respective rights of secured and 18 unsecured creditors and to debts provable ... as are in 19 force for the time being under the law of bankruptcy in 20 England." 21 And then going over to page 2320 of the bundle, 1605 22 of the report at letter F, he says: 23 "I turn, therefore, to consider what debts and 24 liabilities are capable of proof in bankruptcy. 25 Section 30 of the Bankruptcy Act 1914 reads as follows:</p> <p style="text-align: center;">Page 116</p>

<p>1 '(1) demands in the nature of unliquidated damages 2 arising otherwise than by reason of a contract promise 3 or breach of trust shall not be provable in 4 a bankruptcy." 5 So two different regimes. A carve out for 6 unliquidated claims, damages in tort, in an insolvent 7 liquidation, but no such carve out in relation to 8 solvent liquidations. 9 There was an issue as to precisely when an 10 unliquidated claim for damages could be proved prior to 11 1986, and there was a divergence of view between 12 Mr Justice Vinelott in Barclays Securities, who held 13 essentially you can prove in an insolvent liquidation 14 provided you get a judgment during the course of the 15 liquidation, and Mr Justice Harman in Islington Metals, 16 who disagreed. I don't think your Lordships are 17 concerned with that. 18 The example I want to give your Lordships is not, 19 however, an example of a claim which is provable, either 20 in an insolvent or a solvent liquidation, prior to 1986, 21 and it is illustrated by a case called R-R Realisations 22 Limited, which your Lordships will have in F6 at tab 9. 23 LORD NEUBERGER: Yes. 24 MR DICKER: Now, your Lordships need to understand a little 25 of the facts, or at least the relevant chronology. So</p> <p style="text-align: center;">Page 117</p>	<p>1 in mind in considering the cases on administration of 2 estates ..." 3 And he deals with that, and then at C: 4 "Correspondingly, in the voluntary liquidation of 5 a company, it may well be right to give the claimant 6 greater latitude if the distribution is to be made to 7 members and to other creditors, just as a man should 8 seek to be just before he affects to be generous. So 9 I think that an especial care is needed to ensure that 10 all creditors are paid before distributions are made to 11 members. It is only subject to the satisfaction of the 12 company's liabilities. The company's property is 13 distributable amongst the members, see section 302." 14 A precursor of section 143 and 207. 15 The other passage, 814 of the report at letter D to 16 E, he says in the second line of the paragraph: 17 "I do not think it would be just to make the order 18 and so shut out the plaintiffs from making any effective 19 claim against the company, particularly as the proposed 20 distribution is to members and not creditors. I can 21 well appreciate it is highly inconvenient. I do not say 22 that inconvenience and expense may not be of such 23 a degree as to amount to an injustice, but when this is 24 weighed against the proposed virtual extension of the 25 plaintiff's claims against the company's assets, I have</p> <p style="text-align: center;">Page 119</p>
<p>1 starting at page 3177 of the bundle, page 805 of the 2 report, three joint liquidators of the company in 3 voluntary liquidation since October 1971, so that is 4 when the company went into liquidation. They were able, 5 after selling its assets, to pay all of the company's 6 known debts and to pay substantial sums to stockholders. 7 And then at the bottom of that first paragraph: 8 "In 1979 it was announced that a final distribution 9 of some 5.5 million would be made to ordinary 10 stockholders in December 1979. Meanwhile, following the 11 publication on September 22, 1978 of the results of 12 an inquiry into an accident in Bombay Airport in 1976, 13 writs against the company were issued but not served on 14 behalf of victims or their families." 15 So we have a liquidation in 1971. We have 16 an aircraft accident in 1976, some five years later. 17 The liquidator has paid all of the creditors in full and 18 the question is: can he distribute to shareholders? 19 Sir Robert Megarry, the Vice Chancellor, held that the 20 answer to that was no, and two paragraphs I wanted to 21 refer your Lordships to in that respect are at page 3183 22 of the bundle, page 181 of the report -- 23 LORD NEUBERGER: Yes. 24 MR DICKER: -- between B and E. He says: 25 "Another point which I think must be carefully borne</p> <p style="text-align: center;">Page 118</p>	<p>1 no doubt where the balance of justice lies. As between 2 injustice and inconvenience of anything like equal 3 degree, it is injustice that must be rejected." 4 These are claims that did not exist at the date of 5 liquidation, came into existence when the accident with 6 the aircraft happened in 1976, no judgment was obtained 7 at the relevant date, even now, at the time of the 8 judgment would have to be paid before any distribution 9 to members. 10 LORD NEUBERGER: Yes. 11 MR DICKER: There is a disagreement, I think, between the 12 appellants and us as to whether this was a non-provable 13 claim. My Lord, the reason why we say it is 14 a non-provable claim is based on the judgment of 15 Mr Justice David Richards in T&N. If I can ask your 16 Lordships just to go back to that, it is bundle F1, 17 tab 21. 18 Now, there are two parts to this judgment. The part 19 that your Lordships so far have seen has been concerned 20 with whether or not the relevant claims for tort in that 21 case were provable in a winding up of T&N. You can see 22 that if you go to page 1546 of the bundle, just above 23 paragraph 69. 24 So there's a heading "Our future asbestos debt 25 claims, provable debts and a winding up of T&N", and</p> <p style="text-align: center;">Page 120</p>

<p>1 that is the section that contains paragraphs 106 and 107 2 that your Lordships have seen. But there was an earlier 3 issue, which is whether or not the claims were creditors 4 for the purposes of schemes of arrangement and CVAs. If 5 your Lordships go back to 1536 of the bundle, page 1745 6 of the report, just above paragraph 32, your Lordships 7 will see that discussion starts.</p> <p>8 Now, the relevance of this is that for the purposes 9 of a scheme of arrangement, there is no inherent cut-off 10 date. There isn't an equivalent to 13.12 that says, to 11 be a provable debt, it either has to be a debt or 12 a liability arising out of an obligation incurred by the 13 date of liquidation. There is simply the question of 14 whether other not they are creditors, which, as a matter 15 of authority, includes contingent creditors.</p> <p>16 Now, having held that the tort claims that he was 17 concerned with in T&N were contingent claims, he draws 18 a distinction with other circumstances and the paragraph 19 I wanted to show your Lordships is paragraph 67, 1545 of 20 the bundle. He says, paragraph 67:</p> <p>21 "In reaching this conclusion, I emphasise I do so on 22 the basis of the facts relevant to asbestos claims, 23 principally the relevant acts or omissions of T&N are 24 complete. Potential claimants have been exposed to 25 asbestos and the existence of a claim in tort depends</p> <p style="text-align: center;">Page 121</p>	<p>1 It is important not only because it provides what we 2 say is a close analogy, but also because the cases 3 dealing with currency conversion claims expressly 4 adopted and applied the reasoning in the post-insolvency 5 cases, post-insolvency interest cases, when deciding 6 what the appropriate course was for foreign currency 7 claims.</p> <p>8 Now, I say that there is a close analogy for this 9 reason: if one imagines a creditor has a claim to 10 principle and interest, it arises out of an obligation 11 incurred prior to the date of liquidation, in the sense 12 that it arises out of a contract which was entered into 13 before liquidation. So the claim is therefore provable. 14 It arises out of an obligation incurred prior to the 15 date of liquidation.</p> <p>16 Now, one could say that the claim to future interest 17 is a contingent claim, in the sense that it is perfectly 18 clear that if dividends are not paid for a period after 19 the date of liquidation, interest will accrue on the 20 underlying debt and to that extent is contingent.</p> <p>21 Now, that is not how the statutory scheme deals with 22 them. The reason the statutory scheme doesn't deal with 23 them in that way is because, on the authorities, one has 24 to look at the position as at the date of liquidation, 25 value the claims on that date as if the assets had been</p> <p style="text-align: center;">Page 123</p>
<p>1 solely on whether the relevant asbestos condition 2 develops. I have not considered circumstances where all 3 of the relevant events excluding damage have not 4 occurred, as for example where a company has negligently 5 made a product but the putative claimant has not 6 acquired it or used it. By way of extreme example, if 7 aero engines are negligently manufactured and are in use 8 but have not yet caused an air crash, it could hardly be 9 supposed that there exists a contingent liability to the 10 victims of a possible future crash. For facts of this 11 sort, see in Re R-R Realisations Limited."</p> <p>12 So on that analysis, wouldn't be a contingent claim 13 as at the date of liquidation. Nevertheless, the 14 contingency subsequently happens. There is a claim at 15 that date. It has come into existence before final 16 distributions are made to shareholders. Accordingly, 17 applying creditors first, members last, 18 Sir Robert Megarry held that creditors have to be given 19 an opportunity to establish their claims and be paid 20 before the money is distributed to shareholders.</p> <p>21 Now, that is all I was going to say in relation to 22 non-provable claims in tort. A closer analogy to 23 currency conversion claims is obviously provided by the 24 cases dealing with post-insolvency interest, and I was 25 going to turn to that now.</p> <p style="text-align: center;">Page 122</p>	<p>1 collected and distributed on that date, and if one does 2 so, obviously there is no scope for including any 3 post-insolvency interest as a provable claim.</p> <p>4 However, according to those authorities, such 5 post-insolvency interest is nevertheless payable out of 6 a surplus, before it is paid to members. And we do say 7 that the analogy with a foreign currency claim is very 8 close. In just the same way as I submitted before the 9 short adjournment, a foreign currency claim has to be 10 valued as at the date of liquidation, and if you imagine 11 that the assets are collected and distributed on that 12 day, obviously there is no scope for taking into account 13 any subsequent exchange rate movements.</p> <p>14 However, it doesn't mean it is a non-provable 15 claim. If one goes back to Wight v Eckhardt. The 16 underlying debt still exists. In due course, the 17 creditor will be paid sterling dividends. The best he 18 can do is to convert those to the foreign currency on 19 the date he receives them. If, because sterling has 20 depreciated, his debt is not paid in full, what is left 21 is a non-provable claim that has to be discharged before 22 any sums are distributed to shareholders.</p> <p>23 Now, as my learned friend Mr Miles indicated, the 24 leading authority on this is Humber Ironworks and 25 Shipbuilding Company, and your Lordships have that in</p> <p style="text-align: center;">Page 124</p>

<p>1 bundle F1, tab 11. The case dealt with two situations; 2 it dealt both with the position in the event that the 3 company was insolvent and it also dealt with the 4 position in the event that there was a surplus that 5 would otherwise be paid to shareholders. 6 Now, starting with Lord Justice Selwyn's judgment, 7 he deals first with the question of surplus at the 8 bottom of 645, and I will come back to his treatment of 9 surplus, but at the bottom of 645 of the report he says: 10 "That disposes of the question where there is 11 a surplus as to which there is no doubt or difficulty." 12 And then he deals with: 13 "There remains the question when the estate is 14 insolvent." 15 Picking it up just about a third of the way down, 16 there is a sentence towards the end of the line: 17 "That would obviously be the case if the court were 18 able to do what it would wish to do ..." 19 LORD NEUBERGER: Yes. 20 MR DICKER: "... namely, to realise all the assets 21 immediately and distribute them amongst the creditors. 22 It is very difficult to conceive of a case in which this 23 could occur. Justice I think requires that the course 24 of proceedings should be followed. No person should be 25 prejudiced by the accidental delay. The consequence of</p> <p style="text-align: center;">Page 125</p>	<p>1 image that I have been using. 2 And then Lord Justice Giffard, to similar extent, he 3 says at the bottom of the first paragraph of his 4 judgment -- he refers, six lines up to the rule in 5 bankruptcy: 6 "The rule was, as it has been said, judge-made law, 7 made after great consideration, no doubt because it 8 works with equality and fairness between the parties, 9 and if we are to consider convenience, it is quite clear 10 where the estate is insolvent, convenience is in favour 11 of stopping all of the computations at the date of 12 winding up." 13 So, again, the emphasis on pari passu distribution, 14 but equally, where it is solvent, and this is the last 15 paragraph on the page, the creditor is entitled to 16 interest. 17 Now, we say this is exactly what one would exact 18 from the two principles I started with and the 19 description of the statutory scheme by Lord Hoffmann in 20 Wight v Eckhardt. The creditors underlying claims are 21 unaffected by the winding up process. They are 22 discharged only to the extent they are paid out of 23 dividends. Claims for post-insolvency interest are not 24 provable because they are regarded as being inconsistent 25 with the requirements for pari passu distribution</p> <p style="text-align: center;">Page 127</p>
<p>1 the necessary forms and proceedings of the court 2 actually takes place in realising the assets, but that 3 in the case of an insolvent estate, all of the money 4 being realised speedily as possible should be acquired 5 equally and rateably in payment of the debts as they 6 existed at the date of winding up." 7 LORD NEUBERGER: Yes. 8 MR DICKER: So, in other words, to achieve pari passu 9 distribution, you have to ignore post-insolvency 10 interest. That is the only way of treating creditors 11 equally. 12 Then at the bottom five lines up, he says: 13 "But, of course, I have already guarded myself from 14 being supposed to say that the court takes upon itself 15 to alter the rights of creditors to any further extent 16 or to deprive them of the right they have to interest at 17 the full rate of 20 per cent if and when there is 18 a surplus to pay it." 19 And then his classic image of the tree must lie as 20 it falls: 21 "... must be ascertained what are the debts as they 22 exist at the date of the winding up and all dividends in 23 the case of an insolvent estate must be declared in 24 respect of the debts so ascertained." 25 And that essentially is the same as the snapshot</p> <p style="text-align: center;">Page 126</p>	<p>1 between creditors. But that rule is solely for the 2 purposes of ensuring equal treatment of creditors. It 3 isn't regarded as a rule designed to ensure fairness, 4 and what my learned friend suggests, as between 5 creditors and all stakeholders of the company, including 6 shareholders. To the contrary, if there is a surplus, 7 creditors are entitled to be paid the additional 8 post-insolvency interest to which they were entitled, on 9 their underlying debts. Again, consistent with the 10 principle of creditors first, members last. 11 Now, my learned friend focuses on the phrase and the 12 image of being remitted to his rights under the 13 contract. We say that is just another way of making the 14 point that Lord Hoffmann did in Wight v Eckhardt, namely 15 the winding up process leaves your debts untouched. 16 They are only paid to the extent that you have received 17 dividends if you look at your underlying debt and there 18 is still a sum which has not been paid. If its not 19 provable, it is a non-provable claim to which you are 20 entitled. 21 Now, I have taken your Lordships to Humber 22 Ironworks. There are a number of other authorities to 23 similar effect. We refer to two in our written case, 24 paragraph 76. 25 LORD REED: Could I just ask, I just wondered how far you</p> <p style="text-align: center;">Page 128</p>

<p>1 can push it. I understand you can say that the provable 2 debt is distinguishable from the rights under the 3 contract, and to the extent that you haven't received 4 your rights under the contract, you can recover the 5 balance as a non-provable debt. 6 If you are going to look at it that way, do you not 7 have to take into account the interest that you have 8 received under statute, which isn't one of your 9 contractual entitlements either, but which is a sum you 10 have received through the insolvency process? 11 MR DICKER: Your Lordship, when one is dealing with 12 interest, the short answer is before 1986, the only 13 right you had to post-insolvency interest in liquidation 14 was if you had an underlying right to interest, ie 15 a contractual right. So if there was a surplus, all the 16 creditor would be saying is, "I have looked at my 17 underlying debt, I did receive dividends, but if 18 I calculate the interest I was entitled to as a matter 19 of contract, I haven't been paid in full. There is this 20 shortfall, I can have payment of that." 21 Your Lordship is absolutely right. That changed in 22 1986 with the introduction of what is now a rule 2.88 23 and administration. I will come on to that in due 24 course. But the new regime, obviously, is different. 25 Essentially, we say what the new regime did was to</p> <p style="text-align: center;">Page 129</p>	<p>1 a claim of entitlement to interest in the statutory 2 scheme, because the scheme has prevented them from 3 obtaining judgment, and if they got judgment, they would 4 have had interest at the Judgment Act rate. 5 Now, that wasn't the position in bankruptcy at the 6 time. 7 LORD NEUBERGER: What, post the judgment? 8 MR DICKER: Yes. That wasn't the position in bankruptcy at 9 the time. Bankruptcy, since 1824, certainly 1825, had 10 given creditors a right either to contractual interest 11 or to Judgment Act interest. 12 Lord Giffard no doubt is picking up that 13 distinction, which was ultimately corrected, albeit 14 100 years later, by the 1986 Act, saying in 15 rule 2.88(9), you are entitled to interest either at the 16 contractual rate or at the Judgment Act rate, the latter 17 essentially being compensation for the statutory 18 moratorium. If it hadn't existed, you could have got 19 judgment, you could have got interest at 8 per cent. 20 LORD REED: It is a point Lord Oliver made, you would have 21 got judgment at the rate of exchange applying at the 22 relevant time. 23 MR DICKER: My Lord, there is another separate point which 24 I am going to come back, and it may be that your 25 Lordship was in part concerned with that, which is one</p> <p style="text-align: center;">Page 131</p>
<p>1 codify the right to contractual interest, which Humber 2 Ironworks essentially said existed in corporate 3 liquidation. But also, and just before we leave Humber 4 Ironworks, it also dealt with one unfairness, which 5 Lord Justice Giffard identified in Humber Ironworks. If 6 your Lordship just looks at 647, right at the bottom of 7 the page. 8 LORD NEUBERGER: Yes. 9 MR DICKER: And I am sorry, I probably stopped reading 10 slightly before I should have done. Five lines up, he 11 says: 12 "Where the estate is solvent, it works with equal 13 fairness, because as soon as it is ascertained that 14 there is a surplus, a creditor whose debt carries 15 interest is remitted to his rights under the contract. 16 On the other hand, a creditor who has not stipulated for 17 interest does not get it. I may add another reason. 18 I do not see with what justice interest can be computed 19 in favour of creditors whose debts carry interest. 20 Creditors debts do not carry interest are stayed from 21 recovering judgment and so obtaining a right to 22 interest." 23 So he was essentially saying if you have 24 a contractual right to interest, you can have interest 25 out of a surplus. It is unfair creditors not having</p> <p style="text-align: center;">Page 130</p>	<p>1 argument my learned friend makes is that if we are 2 right, it is all unfair because, essentially, you are 3 getting your foreign currency and you are also getting 4 8 per cent Judgment Act rate and there is essentially 5 an apple and pears. 6 LORD REED: Perhaps you can put it this way: the scheme 7 gives you exactly what you would have got if you had 8 sued and got a judgment debt as at the date of winding 9 up. You get the sterling equivalent at that date plus 10 the 8 per cent interest from then until actual payment. 11 MR DICKER: And there is an issue which 12 Mr Justice David Richards considered in Waterfall IIA as 13 to whether or not a foreign currency creditor had to 14 give credit for the interest he received under 2.88, in 15 calculating his non-provable claim. 16 Mr Justice David Richards held the answer to that was 17 no, and put very shortly -- and I will deal with this in 18 due course -- the reason was that, essentially, you were 19 dealing with two different things here: you had your 20 foreign currency claim, which was your underlying debt, 21 which you should be entitled to recover in full. The 22 statute also said you should be compensated for delay, 23 delay in payment of your provable debts, and that is 24 a separate thing. Obviously if the foreign currency 25 creditor has to give credit for the interest he has</p> <p style="text-align: center;">Page 132</p>

<p>1 received when calculating his non-provable debt, and 2 either he won't receive -- he will receive interest, but 3 not the full amount of his currency conversion, his 4 foreign currency debt; alternatively, he will receive 5 the full amount of his foreign currency debt, but won't 6 be compensated for delay. Mr Justice Richards said 7 therefore no credit should be given. 8 LORD NEUBERGER: Two points, the first relating to interest. 9 The judgment rate, although nobody might believe it, is 10 meant to reflect the sterling rate. So may it not be 11 said that by applying the judgment rate from the date in 12 question, it makes sense that the conversion to sterling 13 is treated as being on that date generally, because 14 otherwise why give a rate of interest appropriate to 15 a sterling debt? 16 MR DICKER: My Lord, a couple of answers to that, the first 17 of which is Judgment Act interest at 8 per cent is paid 18 at your sterling proved debt, not on your foreign 19 currency debt. 20 LORD NEUBERGER: Yes. 21 MR DICKER: So we are not applying -- 22 LORD CLARKE: Is the Judgment Act rate different if you get 23 a judgment in a foreign currency? 24 LORD NEUBERGER: What would you get on your foreign 25 currency?</p> <p style="text-align: center;">Page 133</p>	<p>1 sterling. 2 LORD NEUBERGER: Yes. 3 MR DICKER: And to ensure that every creditor is treated 4 equally as far as compensation for delay is concerned, 5 every creditor is also entitled to interest at the 6 greater of the Judgment Act rate and the rate applicable 7 apart from the administration. 8 Now, if the consequence of rules designed to ensure 9 equality is that some creditors ultimately receive 10 slightly more or slightly less by reference to their 11 underlying debt, that is just a function of the 12 statutory scheme and the need in the first instance to 13 ensure everyone is treated equally. 14 LORD NEUBERGER: Right. The other question I have is this: 15 on the one hand, as I understand it, you distinguish 16 between what is done in order to achieve parity between 17 creditors of the company and, on the other hand, the 18 continuance of the underlying contract between the 19 company and the particular creditor. Does that call 20 into question the assumption that everyone has been 21 making that while sterling, unlikely as it may seem at 22 the moment, as appreciated relative to the currency 23 concerned, the company could justify paying less than 24 the proof amount on the basis that the underlying 25 contract still prevails, and as between the company and</p> <p style="text-align: center;">Page 135</p>
<p>1 LORD CLARKE: Because you can get a judgment in any currency 2 now, can't you? 3 MR DICKER: Yes, you could, and if you had a judgment prior 4 to liquidation, then essentially it would be the rate 5 applicable to the debt apart from the administration. 6 I should take this slightly more slowly. Rule 2.889 7 says you take the greater of either the Judgment Act 8 rate or the rate applicable apart from administration. 9 So if you had managed to get a Judgment Act rate on your 10 underlying debt, which you could properly treat as 11 a rate applicable to the debt apart from the 12 administration, then that would be the rate you were 13 entitled to. But the only point I am trying to make at 14 the moment is that as far as the 8 per cent Judgment Act 15 rate is concerned, it is awarded on the proved debt, 16 which by definition is in sterling. So this isn't 17 a situation in which a sterling interest rate is 18 essentially being paid on a foreign debt. You are being 19 fairly compensated for the sterling equivalent of your 20 debt at the date of liquidation. That is the first 21 point. 22 The second point is that, again, one has to see this 23 operating in two stages. There are statutory rules 24 designed to ensure that every creditor receives 25 pari passu. For that purpose, debts are converted into</p> <p style="text-align: center;">Page 134</p>	<p>1 the creditor, the company can pay at the rate 2 appropriate at the date of payment. 3 MR DICKER: And this obviously raises what my learned friend 4 has characterised as the one-way bet. 5 LORD NEUBERGER: Is the one-way bet the right assumption, 6 that is the question, or does your approach entitle the 7 liquidator to say, "I am not going to pay you more than 8 you are correct contractually entitled to"? 9 MR DICKER: My Lord, no, our submissions in relation to that 10 in essence are -- the first stage is there are rules 11 designed to ensure pari passu treatment of creditors. 12 LORD NEUBERGER: As between creditors. 13 MR DICKER: As between creditors. 14 LORD NEUBERGER: Mm-hm. 15 MR DICKER: And certainly the consequence of that is that 16 everyone is entitled to an equal distribution on the 17 sterling equivalent of their claim by way of dividend on 18 their proof. If some creditors essentially have to give 19 back part of that, then they wouldn't have been treated 20 equally. 21 LORD NEUBERGER: It is not a question of them being given 22 back; it is about how they are treated equally. But 23 here we are talking about a fully solvent liquidation, 24 where the company is being expected to pay more than the 25 creditor is contractually entitled to.</p> <p style="text-align: center;">Page 136</p>

<p>1 MR DICKER: Again, I will come back to this, but the short 2 point is we say that is simply a price of ensuring in 3 the first instance pari passu distribution. 4 LORD NEUBERGER: Doesn't that make it look, then, like 5 a one-way bet? 6 MR DICKER: Well, my Lord, we say on any basis not a one-way 7 bet. One has to bear in mind a number of things. Most 8 of the time, insolvent liquidations are rather more 9 common than solvent liquidations. So one can't look at 10 this simply on the assumption that you are only ever 11 going to be dealing with the possibility of a solvent 12 liquidation. 13 LORD NEUBERGER: No, no, of course not. 14 MR DICKER: If you have an insolvent liquidation -- 15 LORD NEUBERGER: Which is much more common, yes. 16 MR DICKER: -- it is plainly not a one-way bet. If sterling 17 depreciates, the foreign currency creditor will get 18 less. Even if sterling appreciates, because the company 19 is insolvent, it is unlikely that it will make a profit. 20 So looked at in the round, describing it as a one-way 21 bet, even if the phrase "bet" is apposite, ignores the 22 fact that, more often than not, the company will be 23 insolvent and, when it is insolvent, the currency 24 movements aren't going to enable the foreign currency 25 creditor to make a profit. The most it could</p> <p style="text-align: center;">Page 137</p>	<p>1 to one. By the time the assets are sold, the 2 administrator gets 200 million sterling. He has 3 100 million of liabilities to pay, 100 million sterling 4 of liability to pay. That is half of the value of the 5 assets. He pays the other half of the assets to 6 shareholders. So we have a situation in which if you 7 take a snapshot on the date of liquidation, you would 8 expect every creditor to be paid in full. But because 9 of the fact that liabilities are converted in sterling 10 at the date of liquidation, but the assets could be 11 converted into sterling at a later date, that is not 12 what happened. Creditors on my example would end up 13 with 50p in the pound, only 50p in the pound -- 14 LORD NEUBERGER: I understand. 15 MR DICKER: -- and shareholders would end up with 16 a windfall, again on my example, of 100 million sterling 17 which they would not otherwise have got. 18 LORD NEUBERGER: You have give extreme pictures, but 19 equally, if currency had gone the other way, they would 20 have landed a windfall at the creditors. 21 LORD REED: Talking about a 50p in a pound dividend, it 22 might be a rather tendentious way of putting it. If 23 they had sought recovery of the debt on the date of 24 winding up and had been tendered the sterling equivalent 25 at that date, they could have had no complaint; that is</p> <p style="text-align: center;">Page 139</p>
<p>1 conceivably do is reduce the amount of its loss. 2 LORD NEUBERGER: In an insolvent case, it doesn't make any 3 difference, in most cases, I accept. But we are looking 4 at cases where it does make a difference. 5 MR DICKER: My Lord, again, take another example quite close 6 to the present case. You have a situation in which -- 7 assume on the date of administration or liquidation, the 8 value of the company's assets and its liabilities are 9 essentially the same. Assume, rather like LBIE, they 10 are all in US dollars. You have a company, it has 11 \$100 million of assets and \$100 million of liabilities 12 as at the date of liquidation. As a result of 13 rule 2.86, the foreign currency liabilities have to be 14 converted into sterling as at the date of liquidation, 15 but the assets aren't necessarily going to be converted 16 on that date and, indeed, they weren't converted on that 17 date in LBIE's administration. The administrator 18 converted them in the course of the administration, at 19 a later date, when sterling was more favourable. 20 So one can easily end up with a situation in which, 21 as at the date of liquidation, \$100 million of 22 liabilities, \$100 million of assets, the creditors 23 should be paid in full. What happens is, converted into 24 sterling as at the date of liquidation, sterling then 25 subsequently depreciates. So assume it depreciates two</p> <p style="text-align: center;">Page 138</p>	<p>1 exactly what they were entitled to. 2 MR DICKER: Correct. 3 LORD REED: And how sterling moved thereafter would be 4 completely irrelevant. They would have got what they 5 were entitled to and the scheme gives them interest on 6 that amount for the period from when they ought to have 7 got it to the date they actually get it. So in a way, 8 what your complaint really comes to is there may be 9 a disparity between the interest that they get to 10 compensate them for the delay and the actual movement of 11 the currency exchange rates over that period. 12 MR DICKER: And, my Lord, on that, with respect, we would 13 disagree. 14 LORD REED: Yes. 15 LORD NEUBERGER: You say the interest is to make up for the 16 fact that they have not been paid, nothing to do with 17 the currency movement. 18 MR DICKER: Absolutely. The easiest way to approach it is 19 to imagine you have a creditor. This is a collective 20 process of enforcement, so imagine it was just 21 enforcement. You enforce, your underlying debt remains 22 in tact to the extent it is paid. Over time, the debtor 23 manages to make payments by way of dividend. They are 24 made in sterling, you convert them into US dollars and 25 you find you haven't been paid the full amount you were</p> <p style="text-align: center;">Page 140</p>

<p>1 owed.</p> <p>2 One other problem you have already suffered is you</p> <p>3 have been paid late as well. You haven't been paid on</p> <p>4 the date of liquidation, the dividends have been</p> <p>5 dribbled out over time. You should also be compensated</p> <p>6 for that. We say one doesn't offset the other.</p> <p>7 In answer to my Lord, Lord Neuberger's point, even</p> <p>8 if you do focus on a solvent liquidation, or indeed</p> <p>9 a administration before it becomes a distributing</p> <p>10 administration, there are different ways a company could</p> <p>11 approach this.</p> <p>12 One approach a company could take is to say, "We</p> <p>13 have foreign currency liabilities. We expect the</p> <p>14 foreign currency to appreciate against sterling. The</p> <p>15 sensible course is we will pay them before we go into</p> <p>16 liquidation. Get them off our books." There is nothing</p> <p>17 the creditor can do about that.</p> <p>18 Conversely, if it thought that sterling was likely</p> <p>19 to depreciate, it might have an interest in going into</p> <p>20 liquidation, being able to say, "Your debts are</p> <p>21 converted into sterling as at the date of liquidation,</p> <p>22 but we don't have to pay you for a year or however</p> <p>23 long", and take the advantage of that.</p> <p>24 So imagine a company -- take a recent example --</p> <p>25 shortly before the referendum vote on Brexit who thought</p> <p style="text-align: center;">Page 141</p>	<p>1 of intention to distribute was given some time, I think,</p> <p>2 late in 2009. So it is at that point it turns into</p> <p>3 a distributing administration. At that point, debts are</p> <p>4 converted into sterling but not by reference to the date</p> <p>5 of the notice. But by reference to a historic date,</p> <p>6 namely the date it went into administration.</p> <p>7 LORD NEUBERGER: Yes, I see. It is a retrospective.</p> <p>8 MR DICKER: It is retrospective.</p> <p>9 LORD NEUBERGER: So your point is this there could be</p> <p>10 a certain amount of clever arbitrage here if -- in the</p> <p>11 case of the solvent company, playing the market, almost.</p> <p>12 MR DICKER: Yes.</p> <p>13 LORD NEUBERGER: At the expense of the creditor.</p> <p>14 MR DICKER: I said the administration, subject to one</p> <p>15 overlay, which of course is administrators are officers</p> <p>16 of the court.</p> <p>17 LORD NEUBERGER: Yes.</p> <p>18 MR DICKER: And there may be an issue. Certainly the</p> <p>19 structure --</p> <p>20 LORD NEUBERGER: Your point is that the creditors are at the</p> <p>21 mercy of what happens, and there is no way they can make</p> <p>22 up for their currency loss, even assuming that it is</p> <p>23 merely happenstance rather than anyone playing clever.</p> <p>24 MR DICKER: Yes. And we say --</p> <p>25 LORD NEUBERGER: So sorry, I ought to know this, but is 286</p> <p style="text-align: center;">Page 143</p>
<p>1 that the vote would be in favour of leave and the</p> <p>2 consequence would be that sterling depreciated.</p> <p>3 Directors think to themselves, "We have massive foreign</p> <p>4 currency liabilities. We haven't got a hedge. We are</p> <p>5 obliged to pay the creditors those foreign currency</p> <p>6 liabilities in their foreign currency. One solution</p> <p>7 would be we will go into liquidation. That will convert</p> <p>8 their claims into sterling as at the date of</p> <p>9 liquidation, but we won't have to pay them for some</p> <p>10 time. But when we do pay them, with depreciated</p> <p>11 sterling, some time later, we will be able to say they</p> <p>12 have been paid in full.</p> <p>13 LORD NEUBERGER: Yes, I see.</p> <p>14 MR DICKER: We say it really is --</p> <p>15 LORD NEUBERGER: This obviously applies to companies going</p> <p>16 into creditors voluntary, as well as -- does it, or not?</p> <p>17 MR DICKER: It applies to creditors voluntary, it also</p> <p>18 applies, interestingly, in administration, with one</p> <p>19 overlay. As your Lordships know, distributing</p> <p>20 administrations are triggered by the administrators</p> <p>21 giving notice of an intention to make a distribution.</p> <p>22 LORD NEUBERGER: Yes.</p> <p>23 MR DICKER: So in relation to LBIE, and I can't remember the</p> <p>24 dates but no doubt I can be reminded of them, it goes</p> <p>25 into administration on 15 September (inaudible). Notice</p> <p style="text-align: center;">Page 142</p>	<p>1 effectively an identical provision relating to</p> <p>2 liquidation?</p> <p>3 MR DICKER: Yes.</p> <p>4 LORD NEUBERGER: Word for word, effectively.</p> <p>5 MR DICKER: I don't know word for word --</p> <p>6 LORD NEUBERGER: (Overspeaking) -- liquidation rather</p> <p>7 than -- anyway, someone can check. That will be fine,</p> <p>8 don't worry. Thank you.</p> <p>9 MR DICKER: My Lord, your Lordship has our point exactly.</p> <p>10 LORD NEUBERGER: Yes. There is a danger, it may be we are</p> <p>11 falling into it, of being too over-analytical, but one</p> <p>12 can possibly look at the consequences, but in a sense</p> <p>13 one comes back to the point made by Lord Sumption before</p> <p>14 the short adjournment: in the end, it depends on what</p> <p>15 the words "for the purpose of proving a debt incurred or</p> <p>16 payable" mean.</p> <p>17 MR DICKER: In the context of the rules, the statutory</p> <p>18 schemes are --</p> <p>19 LORD NEUBERGER: Of course one has to look at it in context.</p> <p>20 MR DICKER: My Lord, can I just add this, and it may be</p> <p>21 a submission I have already made: we do say, going back</p> <p>22 to Lord Hoffmann, this is regarded as a process of</p> <p>23 collective enforcement.</p> <p>24 LORD NEUBERGER: Yes.</p> <p>25 MR DICKER: It is not intended to leave creditors with</p> <p style="text-align: center;">Page 144</p>

<p>1 a shortfall. Now, within that, obviously you need to 2 have rules to ensure pari passu distribution. And the 3 consequence of that may be some rough and smooth. But 4 that is as between creditors. It is not intended to 5 enable shareholders, essentially, to say, "I know we owe 6 you a foreign currency amount, but actually the overall 7 effect of this process of execution is we don't have to 8 pay you the full amount we owe you".</p> <p>9 Now, my Lords, my next task is to deal with the 10 decisions in Re Dynamics and Lines Bros. Can I start 11 with Re Dynamics, which is F1, tab 9.</p> <p>12 LORD NEUBERGER: Yes.</p> <p>13 MR DICKER: Now, my Lord, we say it is important that your 14 Lordships appreciate that this company was insolvent, 15 unable to pay its proved debts in full. There was no 16 discussion about what would happen if there was 17 a surplus or about the possibility of non-provable 18 claims. So translating it back to the language of 19 section 143, this was concerned with the first part of 20 section 143, distribution of claims pari passu, not the 21 second part, surplus.</p> <p>22 Now, there was a summons by the liquidator, sought 23 to determine whether the liquidator should convert the 24 claims into sterling at various dates, and your Lordship 25 will see the possible dates, 759, letter E. Essentially</p> <p style="text-align: center;">Page 145</p>	<p>1 "As soon as may be after making a winding up order, 2 the court should ...(reading to the words)... 3 distribution of its liabilities." 4 So concerned with that. Then between E and F, 5 picking it up just above F: 6 "It is only in this way the rateable or pari passu 7 distribution of the available property can be achieved, 8 and it is, as I see, axiomatic that claims of the 9 creditors amongst whom the division is to be affected 10 must all be crystallised at the same date, even though 11 the actual ascertainment may not be possible at that 12 date, for otherwise one is not comparing like with 13 like." 14 LORD NEUBERGER: Yes. 15 MR DICKER: And then 764, right at the bottom over to 765A, 16 where he says: 17 "The moment you start introducing into the scheme of 18 things different dates for the ascertainment of the 19 value of claims of individual creditors or classes of 20 creditors, you introduce, it seems to me, potential 21 inequalities, thus the possibility of that which the Act 22 impliedly prohibits, that is to say a distribution of 23 the property of company otherwise than pari passu." 24 So, again, solely dealing with pari passu. 25 Then the passage that is often cited at 774.</p> <p style="text-align: center;">Page 147</p>
<p>1 the date of winding up, the date on which any proof was 2 admitted or the date on which distributions were to be 3 made.</p> <p>4 Now, my Lord, the important point we submit is that 5 Mr Justice Oliver held that the appropriate date was the 6 date of liquidation. The reasons he gave were solely 7 concerned with the need to ensure pari passu 8 distribution between creditors. And just to show your 9 Lordships and point out four passages, the first is in 10 the report 761 at letter D.</p> <p>11 LORD NEUBERGER: Thank you.</p> <p>12 MR DICKER: It is the second sentence beginning: 13 "It is of course necessary in a liquidation if 14 a proportionate distribution among creditors of the 15 available assets is to be achieved, claims of all 16 creditors be reduced at some stage to a common unit 17 account and the point at time at which that should be 18 done." 19 Then -- 20 LORD NEUBERGER: He makes the point it may not operate 21 fairly in all cases, but being relatively easy to apply, 22 yes. 23 MR DICKER: My Lord, yes. Then 764 at letter F. Having 24 referred, just picking it up at D, section 2571, again 25 a precursor of 143, he refers to the first part of that:</p> <p style="text-align: center;">Page 146</p>	<p>1 LORD NEUBERGER: Yes. 2 MR DICKER: Picking it up between G and H: 3 "What the court is seeking to do in a winding up is 4 to ascertain the liabilities of the company at 5 a particular date and to distribute the available assets 6 as at that date pro rata according to the amounts of 7 those liabilities. In practice, the process cannot 8 immediate. Notionally, I think it is, as it seems to me 9 to be treated as if it were, although subsequent events 10 can be taken into account in quantifying what the 11 liabilities were at the relevant date." 12 So all of this is essentially in the context of what 13 I described as the first part of section 143 in the 14 context of pari passu distribution between creditors. 15 Absolutely nothing to do with the position as between 16 company and shareholders. 17 LORD NEUBERGER: Yes, I see. 18 MR DICKER: Your Lordships, I am sure, have already noted 19 this, but we say it is also significant that 20 Mr Justice Oliver cited at some length the judgments 21 dealing with post-insolvency interest. You see that at 22 761, right at the bottom, below H. 23 LORD NEUBERGER: Yes. 24 MR DICKER: The last four lines: 25 "Creditors claiming in respect of</p> <p style="text-align: center;">Page 148</p>

<p>1 an interest-bearing debt due and payable before the 2 bankruptcy or winding up cannot in general claim 3 interest beyond the date of the bankruptcy or winding 4 up." 5 Over the page, 762 at C, over onto 763, lengthy 6 citations from Lord Justice Selwyn's and 7 Lord Justice Giffard's judgments in Humber Ironworks. 8 LORD NEUBERGER: Yes. 9 MR DICKER: Now, we say there is nothing in this to suggest 10 that the creditors' debts are substantively changed from 11 foreign currency debt into a sterling debt. Indeed -- 12 LORD NEUBERGER: Your point is that this judgment is purely 13 concerned with the first stage, as I would call it; the 14 relationship between creditors inter se, pari passu. It 15 doesn't go on to consider the second stage. 16 MR DICKER: My Lord, yes. 17 LORD NEUBERGER: Effectively, is that right? 18 MR DICKER: But we also go further. We do say that readings 19 of Mr Justice Oliver's judgment to the contrary are 20 simply incorrect. Can I just show your Lordships two 21 passages. 767 at D. 22 LORD NEUBERGER: I see. 23 MR DICKER: Just above D, four lines up, Mr Justice Oliver 24 said: 25 "What he wants is the sum expressed in the foreign</p> <p style="text-align: center;">Page 149</p>	<p>1 Lord Chancellor did in Bromley v Goodyear, deciding as 2 a matter of judge-made law what should be the 3 appropriate approach to valuing foreign currency claims 4 for the purposes of proof. So there wasn't a provision 5 which he could have construed to say, "I read this 6 provision and the effect of it is to extinguish the 7 underlying claim and to replace it with a sterling 8 claim", for the simple reason that rule 2.68 didn't 9 exist at the time. 10 My Lords, that is Dynamics. So if your Lordships go 11 on in F1 to tab 15, your Lordships will have -- 12 LORD REED: Am I right in understanding what Lord Oliver or 13 Mr Justice Oliver was saying, towards the foot of 767, 14 top of 768, he is distinguishing the cases to do with 15 the occurrence of contingencies, insurance contracts and 16 the like on the footing that there the occurrence of 17 a contingency after the date of winding up is the best 18 evidence of value as at the date of winding up. 19 MR DICKER: My Lord, yes. The argument he is dealing with 20 is a little like the argument I think I said in a sense 21 one could make in relation to post-insolvency interest, 22 which was you have a contractual right to principal plus 23 interest and on the date of liquidation you could say it 24 is a contingent claim for interest, absolutely. 25 Mr Justice Oliver was -- that argument was used</p> <p style="text-align: center;">Page 151</p>
<p>1 currency. When the winding up order is made, the 2 creditor has this right and there is nothing as I see 3 uncertain about it. It is that right which, so it seems 4 to me, is the right which falls to be valued." 5 So he starts by saying, as one would expect from 6 Miliangos, the creditors' right is a right to be paid 7 the foreign currency he is owed. What he then does, the 8 rest of 767 and 768, is consider what the company has to 9 pay in respect of his proved debt. And when one gets to 10 768D, where he says: 11 "There is, as I see it, no doubt about what the 12 obligation of the company is at the date of the winding 13 up order." 14 What he is talking about is the obligation of the 15 company in respect of the proved debt. What he is doing 16 is trying to value the proved debt. He is saying that 17 the only value that you can sensibly give it is the 18 value that it had on the date of liquidation, and that 19 is the company's obligation. It is an obligation in 20 respect of the proved debt valued in accordance with the 21 statutory scheme. 22 There is one other point one can make in this 23 respect. One needs to bear in mind that at the time of 24 Dynamics, there was no equivalent to rule 2.68. 25 Mr Justice Oliver was essentially doing what the</p> <p style="text-align: center;">Page 150</p>	<p>1 essentially to say I can look to what happens to value 2 it on the current date, and he said, "No, again, I am 3 dealing with valuation, but I think the only way I can 4 value it for the purposes of proof is by converting it 5 as at the date of liquidation". 6 LORD NEUBERGER: Yes. 7 MR DICKER: My Lord, absolutely right. 8 My Lords, tab 15, the Court of Appeal in Lines Bros. 9 Again, with the greatest of respect to 10 Lord Justice Lewison, we say he took some language out 11 of Lines Bros and misconstrued it. 12 In understanding Lines Bros, we say it is vital to 13 appreciate the bank's argument. The bank's argument was 14 essentially that Re Dynamics Corporation had been 15 wrongly decided. 16 LORD NEUBERGER: Yes. 17 MR DICKER: What the bank submitted was that everyone had 18 misunderstood -- Mr Justice Oliver had misunderstood -- 19 what pari passu distribution means. So, again, dealing 20 with the first part of section 143, what the bank 21 submitted was that when you talk about pari passu 22 distribution, following Miliangos, what that means is 23 that you have to distribute the same percentage to each 24 creditor by reference to the value of that creditor's 25 claim at the date of distribution.</p> <p style="text-align: center;">Page 152</p>

<p>1 LORD NEUBERGER: Yes.</p> <p>2 MR DICKER: So in relation to any particular distribution,</p> <p>3 if a creditor owed £100 and gets £10, a creditor owed</p> <p>4 \$100 should get \$10.</p> <p>5 LORD NEUBERGER: Yes.</p> <p>6 MR DICKER: And you then, essentially, inevitably have</p> <p>7 a different conversion date for each dividend date, and</p> <p>8 Lord Justice Brightman dealt with this at 15F to H.</p> <p>9 Just below F, he says:</p> <p>10 "Conversion is inevitable. The question is at what</p> <p>11 date or dates is that conversion to be affected. The</p> <p>12 argument of the bank is the conversion is to be</p> <p>13 recalculated from time to time."</p> <p>14 And he then illustrated what that would involve.</p> <p>15 LORD NEUBERGER: Yes.</p> <p>16 MR DICKER: So when he is talking about once and for all, or</p> <p>17 recalculated from time to time, he is talking about two</p> <p>18 alternative approaches to conversion into sterling for</p> <p>19 the purposes of proof. He is not dealing with, at this</p> <p>20 stage, non-provable claims.</p> <p>21 Now, again, just as with Mr Justice Oliver,</p> <p>22 Lord Justice Brightman, when he is dealing with the</p> <p>23 position in relation to the conversion date for the</p> <p>24 purposes of proof, expresses his reasoning solely in</p> <p>25 terms of: it is for the purposes of proof, for the</p> <p style="text-align: center;">Page 153</p>	<p>1 such confidence as I may have obtained."</p> <p>2 In the end, they decided the argument was wrong, but</p> <p>3 the argument was --</p> <p>4 LORD CLARKE: Funny that, yes.</p> <p>5 MR DICKER: The argument was Dynamics is wrong, they have</p> <p>6 misunderstood pari passu distribution, and what</p> <p>7 pari passu distribution required was essentially not</p> <p>8 a once and for all conversion, but a recalculation of</p> <p>9 the exchange rate for the purposes of proof. So once</p> <p>10 and for all did not mean a substantive extinguishment of</p> <p>11 the underlying right and replacement with a new right.</p> <p>12 It just meant in the context of the proof, we keep the</p> <p>13 same date, the date of liquidation.</p> <p>14 LORD NEUBERGER: Yes, okay, we have that.</p> <p>15 MR DICKER: Yes. My Lords, your Lordships have seen the</p> <p>16 suggested treatment of the position in the event of</p> <p>17 a surplus at page 21 in Lord Justice Brightman's</p> <p>18 judgment.</p> <p>19 LORD NEUBERGER: Yes, we have.</p> <p>20 MR DICKER: Again, we say obviously if there had been</p> <p>21 an substantive replacement of the old right with a new</p> <p>22 right essentially to the sterling equivalent, the</p> <p>23 discussion about what would happen in a surplus could</p> <p>24 never have arisen.</p> <p>25 LORD NEUBERGER: Anyway, he leans in your favour, but leaves</p> <p style="text-align: center;">Page 155</p>
<p>1 purposes of ensuring a pari passu distribution between</p> <p>2 creditors.</p> <p>3 LORD NEUBERGER: Okay, we have that point.</p> <p>4 MR DICKER: Your Lordships will see that, and I don't think</p> <p>5 I need to take your Lordships to --</p> <p>6 LORD NEUBERGER: We have been taken to the passage. What</p> <p>7 you are saying is the passage is to be read as limited</p> <p>8 to that aspect, to that relationship.</p> <p>9 MR DICKER: Yes. So when one converts into sterling, it is</p> <p>10 all for the purposes of proof. And again, just like</p> <p>11 Mr Justice Oliver, he too refers to Re Humber Ironworks</p> <p>12 in support of that analysis.</p> <p>13 LORD NEUBERGER: Yes.</p> <p>14 MR DICKER: And you see that at page 21, letter E.</p> <p>15 LORD NEUBERGER: Yes.</p> <p>16 MR DICKER: And going down to between letter E and G.</p> <p>17 LORD NEUBERGER: Yes.</p> <p>18 MR DICKER: Now, having --</p> <p>19 LORD CLARKE: They were arguing that Dynamics was wrongly</p> <p>20 decided.</p> <p>21 MR DICKER: Yes. Mr Stubbs, as Lord Justice Oliver said in</p> <p>22 Re Lines Bros, submitted an argument -- this is at 23</p> <p>23 letter C to D. He said:</p> <p>24 "Mr Stubbs's arguments have a logical cogency which</p> <p>25 has from time to time during the appeal severely shaken</p> <p style="text-align: center;">Page 154</p>	<p>1 it open.</p> <p>2 MR DICKER: My Lord, yes. We go further than that,</p> <p>3 obviously. We say that the views expressed are entirely</p> <p>4 in accordance with the approach taken in relation to</p> <p>5 post-insolvency interest and the analysis he gives in</p> <p>6 relation to the position when the company is insolvent.</p> <p>7 LORD NEUBERGER: Yes.</p> <p>8 MR DICKER: One other reference. I don't think I need to</p> <p>9 show your Lordships anything specific in</p> <p>10 Lord Justice Oliver's judgment, but one reference to</p> <p>11 Lord Justice Lawton's judgment, so your Lordship can see</p> <p>12 it, page 14 at letter C.</p> <p>13 LORD NEUBERGER: Yes.</p> <p>14 MR DICKER: Where he says, just above C:</p> <p>15 "When the liquidation starts, no further liabilities</p> <p>16 under contract become payable until such time as it is</p> <p>17 clear pre-liquidation liabilities have been satisfied in</p> <p>18 full."</p> <p>19 So we say, perfectly clear, none of them were</p> <p>20 thinking once for all meant the claim converted to</p> <p>21 sterling and that was the end of it, even if there was</p> <p>22 a surplus.</p> <p>23 My Lord, that deals with the position prior to the</p> <p>24 introduction of rule 2.86.</p> <p>25 LORD NEUBERGER: Thank you.</p> <p style="text-align: center;">Page 156</p>

<p>1 MR DICKER: And that is what I wanted to turn to next. 2 LORD NEUBERGER: Right. That is page 1178, is it? 3 MR DICKER: Yes. 4 LORD NEUBERGER: Tab 3. 5 MR DICKER: We say rule 2.86 was intended simply to codify 6 the position in relation to the valuation of foreign 7 currency claims for the purposes of proof as discussed 8 in Re Dynamics and in the first part of Re Lines Bros. 9 There had been two recent authorities which dealt at 10 length with what is the appropriate date for converting 11 foreign currency claims for the purposes of proof, 12 ensuring the pari passu distribution, in an insolvent 13 liquidation. Those authorities held it is the date of 14 liquidation, and that is what the rules introduced in 15 1986 were intended to do. 16 LORD NEUBERGER: Yes. 17 MR DICKER: No more than that. My Lords, we say, given 18 everything I have said so far, what my learned friend 19 needs to show is a clear intention, essentially, to 20 displace the previous position. 21 LORD NEUBERGER: Yes. 22 MR DICKER: To make it plain that, contrary to the basic 23 nature of the scheme, collective process of execution, 24 contrary to the discussions in Re Dynamics and 25 Lines Bros, limit the conversion for the purposes of</p> <p style="text-align: center;">Page 157</p>	<p>1 take the benefit of the statutory conversion into 2 sterling. 3 LORD SUMPTION: It doesn't have to be the intention of 4 Parliament, it simply has to be the result as a matter 5 of analysis. The argument is surely simply that the 6 admission of a proof has an effect roughly corresponding 7 to the merger of a judgment with the underlying 8 liability. And the whole argument really depends on 9 whether that proposition is correct. 10 MR DICKER: Yes, and it is a question of construction and 11 your Lordship is absolutely right and I am content to 12 deal with it in that way. 13 My Lord, as far as linguistic points are concerned, 14 and context points in relation to rule 2.86, rule 2.86, 15 as my learned friend pointed out, forms part of 16 chapter 10 of the rules. 17 LORD NEUBERGER: Yes. 18 MR DICKER: That chapter is concerned with the mechanism for 19 proving a debt. 20 LORD NEUBERGER: Yes. 21 MR DICKER: And for valuing that debt for the purposes of 22 proof. 23 LORD NEUBERGER: That is not a difficult line to push in 24 light of the opening words of sub-rule (1). 25 MR DICKER: No. On our submissions, that is exactly where</p> <p style="text-align: center;">Page 159</p>
<p>1 proof, what Parliament intended at this stage was to 2 take the steps suggested by -- 3 LORD NEUBERGER: A bit optimistic saying that is Dynamics. 4 He doesn't consider the wider issue, does he, on your 5 case? Dynamics just doesn't consider this question. 6 MR DICKER: Well, my Lord, what we have in Dynamics was -- 7 LORD NEUBERGER: I know, but it doesn't limit it to that. 8 MR DICKER: No, no, your Lordship is right, and it may be 9 that I didn't express it well. 10 LORD NEUBERGER: And Lord Justice Brightman does not express 11 a concluded view, and anyway it is obiter. 12 MR DICKER: No, that is absolutely right, but what they did 13 do was explain in detail why you have a conversion as at 14 the date of liquidation. 15 LORD NEUBERGER: Yes, I see. 16 MR DICKER: And the only reason they gave was to ensure 17 pari passu distribution amongst creditors. 18 So the task for my learned friend, we say, is to say 19 that when enacting a rule which we say simply replicates 20 the part of the decisions in Dynamics and Lines Bros, 21 Parliament wasn't intended simply to do that, but it was 22 intending to go further, essentially to achieve fairness 23 not merely between creditors for the purposes of proof, 24 between all, as my learned friend described it, 25 stakeholders, so essentially shareholders could also now</p> <p style="text-align: center;">Page 158</p>	<p>1 you would expect to find it. 2 As far as the wording of the rule itself is 3 concerned, it has, as the majority in the 4 Court of Appeal emphasised, it states it operates for 5 the purposes of proving a debt incurred or payable in 6 a currency other than sterling, and it also refers 7 simply to the amount of the debt being converted into 8 sterling, not to the underlying debt being discharged. 9 Now, we say against the background of Lines Bros, 10 which had only recently been decided, it would be 11 extraordinary if the legislature had phrased 2.86 in 12 that way, intending, effectively, to discharge the 13 underlying debt and replace it with a new one or permit 14 the underlying debt to be paid in full with sterling 15 dividends. The reason I say that is because one looks 16 at Lord Justice Brightman's judgment in Lines Bros, 17 essentially drawing a distinction between what you do 18 for the purposes of proof, namely convert at the date of 19 liquidation, and what you do with any surplus. So 20 a clear distinction between proof on the one hand and 21 dealing with the surplus on the other. 2.86 uses 22 language which suggests that it, like that part of 23 Lord Justice Brightman's judgment, was concerned with 24 the question of proof, not with the distribution of the 25 surplus.</p> <p style="text-align: center;">Page 160</p>

<p>1 I won't belabour the point, but both 2 Lord Justice Briggs and Lord Justice Moore-Bick regarded 3 these linguistic and contextual points as supported by 4 the overriding justice of recognising currency 5 conversion claims. 6 LORD NEUBERGER: That is the point you developed earlier. 7 MR DICKER: Your Lordships have seen that in their 8 judgments. 9 LORD NEUBERGER: Yes, I understand. 10 MR DICKER: There is one other matter, one other point 11 I need to deal with. I mentioned that before 1986 there 12 were different rules for proof in an insolvent and 13 a solvent liquidation. Your Lordships will recall 14 sections 316 and 317 of the 1948 Act. Now, that changed 15 in 1986. 16 LORD NEUBERGER: Yes. 17 MR DICKER: Essentially, it is the same rules for both. 18 LORD NEUBERGER: Yes. 19 MR DICKER: And 2.86 applies both in an insolvent 20 liquidation and in a solvent liquidation. My learned 21 friend's submission, as I understand it, is well, given 22 it applies in a solvent liquidation, it must have been 23 intended to have substantive effect, otherwise why 24 bother to make it applicable in a solvent liquidation? 25 Now, the answer to that is as follows: first of all,</p> <p style="text-align: center;">Page 161</p>	<p>1 insolvent, and the way the Act deals with this is by 2 ensuring that the assets are distributed, both in 3 a solvent and in an insolvent liquidation, first 4 pari passu amongst the creditors, essentially to ensure 5 that if it subsequently turns out the company is in fact 6 insolvent, no harm has been done in the meantime. 7 Now, the argument that by amending the law such that 8 the same rules apply to solvent and insolvent 9 liquidation effectively abolished non-provable claims 10 was an argument that was in fact made to 11 Mr Justice David Richards in T&N and rejected by him in 12 the panel your Lordships have already seen. Can I just 13 show your Lordships paragraph 105 of his judgment in 14 T&N. T&N is in bundle 1, tab 21. 15 LORD NEUBERGER: Yes. 16 MR DICKER: It is paragraph 106. He says pressed for 17 the fifth consequence, essentially pressed with this, to 18 try to persuade him to construe the rules on debts 19 provable in a liquidation, to make them as wide as 20 possible: 21 "... the consequence was submitted that if all 22 provable debts and liquidation expenses were paid in 23 full, the balance of the assets would be distributed 24 among shareholders, no provision would be made for 25 non-provable claims ... submitted this resulted from</p> <p style="text-align: center;">Page 163</p>
<p>1 it is important to appreciate it is not just rule 2.86 2 that applies in the solvent liquidation, it is the other 3 rules as well. 4 LORD NEUBERGER: Yes. 5 MR DICKER: Lord Justice Briggs identified the reason for 6 this at paragraph 162. He said: 7 "Companies may move into and out of insolvency 8 during a liquidation or distributing administration, so 9 it is better to deal by a single process first with the 10 claims of all of those entitled on an insolvency." 11 And in that respect, one has to bear in mind that 12 there isn't a thing as such called a solvent 13 liquidation. What there is, strictly speaking, is 14 a members' voluntary liquidation, and a members' 15 voluntary liquidation is any liquidation where, in 16 accordance with section 89, the directors have made 17 a statutory declaration that they have made a full 18 inquiry into the company's affairs and have formed the 19 opinion that it will be able to pay its debts in full. 20 Now, it is obviously perfectly possible that, even 21 acting reasonably and in good faith, such a directors 22 may turn out to have made a mistake, either because the 23 liabilities are bigger than they expected or the assets 24 realise less than they hoped. So there is always a risk 25 that an apparently solvent company may turn out to be</p> <p style="text-align: center;">Page 162</p>	<p>1 first the liquidator's statutory duty to distribute the 2 assets in accordance with section 107, and, secondly, 3 the changes made by the Insolvency Act 1986 and rules, 4 which meant that there was no longer any mechanism for 5 proving such claims even in a solvent liquidation." 6 So the argument was we have now got the same rules 7 for solvent as we have for insolvent. The intention of 8 the legislature must have been to thereby abolish 9 non-provable claims. It must therefore follow that you 10 can ignore them before distributing a surplus to 11 shareholders. Mr Justice David Richards said no in the 12 passage you have already seen at 107. 13 LORD NEUBERGER: Yes. 14 MR DICKER: So there is nothing in that change in 1986, 15 either. 16 My Lord, there are two further matters I need to 17 deal with. Firstly, briefly, the materials leading up 18 to the 1986 Act, which I think I can take fairly 19 shortly, and then, secondly, other aspects of the 20 statutory scheme on which my learned friend relies. 21 LORD NEUBERGER: Before you do, how are we doing in terms of 22 time, Mr Dicker? 23 MR DICKER: My Lord, I will certainly finish well within the 24 estimated time. 25 LORD NEUBERGER: How long do you think you will need?</p> <p style="text-align: center;">Page 164</p>

<p>1 MR DICKER: My Lord, I may well be able to finish by 4.15. 2 LORD NEUBERGER: That is very helpful. And in that case, 3 rather perversely, you having said that, we will rise at 4 3.55, because one of us has another public engagement, 5 and we will resume again at 10 o'clock tomorrow, because 6 we are going to finish well within time. I hope that is 7 not too inconvenient for you. 8 MR DICKER: My Lord, it is not at all. 9 LORD NEUBERGER: It may even help you to -- 10 MR DICKER: That was a hope rather than a guarantee. 11 LORD NEUBERGER: I am not taking it as a guarantee. It 12 partly depends how much we interrupt you as well, 13 I appreciate, but we will go on to 3.55. 14 MR DICKER: My Lord, the next topic, the pre-1986 materials, 15 obviously the answer depends primarily on the 16 construction of rule 2.86. But in our submission there 17 is in any event nothing in the relevant material which 18 should indicate the introduction of the rule was 19 intended to do any more than codify the effect of the 20 decision of the Court of Appeal in Lines Bros. 21 My Lord, I think I can deal with this, as I said, 22 very shortly. I think all your Lordship needs to see is 23 the final report of the Law Commission, obviously that 24 being the last of the three reports, and the only one 25 that post-dated Lines Bros, which your Lordship will</p> <p style="text-align: center;">Page 165</p>	<p>1 sterling proved debts in full without recalculating them 2 as at the date of each dividend, in other words agreeing 3 with Lord Justice Brightman and disagreeing with the 4 bank's submission as to what pari passu meant, and 5 noting that Lines Bros considered that if the 6 consequence was to produce a surplus, a foreign currency 7 creditor is entitled to be paid the balance of his full 8 contractual debt before the shareholders receive 9 anything. 10 LORD NEUBERGER: It might well be that. 11 MR DICKER: Yes. So that is surplus. 12 The absence of surplus they deal with in 334 and 13 335. 14 LORD NEUBERGER: Yes. 15 MR DICKER: 334, they refer to Miliangos: 16 "The decisions since that case make it clear why in 17 a case of a liquidation of a company, whether it is or 18 is not solvent, and in a bankruptcy, foreign currency 19 debt should be converted into sterling the date of the 20 resolution to wind up the company." 21 And they say, three lines further down: 22 "In a working paper, we expressed agreement with 23 this approach." 24 335: 25 "Working paper referred to but rejected a possible</p> <p style="text-align: center;">Page 167</p>
<p>1 have in bundle F8 at tab 10. 2 LORD NEUBERGER: Thank you. Yes. 3 MR DICKER: And there are essentially three parts to this 4 I just want to refer your Lordships to. The first, 5 page 3820 of the bundle, paragraph 2.23, deals with the 6 position if the debtor is solvent: 7 "No direct authority, but suggested obiter in 8 Lines Bros case that in those circumstances it might 9 well be that a foreign currency creditor was entitled to 10 be paid the balance of his full contractual debt before 11 the shareholders receive anything." 12 And the footnote reference to Lord Justice Brightman 13 in the Court of Appeal: 14 "However, for the purposes of determining whether a 15 company is or is not solvent for this purpose, the 16 values of the foreign currency claims are not 17 recalculated." 18 Again, that is picking up Lord Justice Brightman's 19 approach: 20 "In other words, the sterling dividends received 21 from time to time as the process of winding up proceeds 22 are not reconverted into the relevant foreign currency 23 as at the respective dates of payment." 24 What that means is you convert all foreign currency 25 debts as at the date of liquidation. You pay those</p> <p style="text-align: center;">Page 166</p>	<p>1 argument that a more satisfactory approach than the 2 present one would be for the conversion of a foreign 3 currency obligation into sterling to be affected at the 4 latest practical date. It seemed to be on each occasion 5 on which it was decided to declare and pay a dividend." 6 That is essentially the argument that is made by the 7 bank in Lines Bros. 8 LORD NEUBERGER: Yes. 9 MR DICKER: And 336, on consultation, opinion was divided. 10 And they end 336 by saying: 11 "In both the Dynamics and the Lines Bros cases, the 12 contrary arguments were fully considered by the court 13 but rejected for reasons which appear to us to be 14 convincing. We remain of the view which we expressed in 15 the working paper." 16 Now, those two paragraphs are concerned solely with 17 the conversion of foreign currency claims for the 18 purposes of proof, whether in a solvent or an insolvent 19 liquidation, and one can see that from the penultimate 20 sentence in 336. They say: 21 "In both the Dynamics and the Lines Bros cases, the 22 contrary arguments were fully considered by the court 23 but were rejected for reasons which appear to us to be 24 convincing." 25 Obviously Dynamics didn't deal with the surplus at</p> <p style="text-align: center;">Page 168</p>

<p>1 all, so they can't be referring to any question of the 2 surplus there, and Lines Bros did consider the position 3 in the event of a surplus, but obviously didn't reject 4 it. Lord Justice Brightman said this is what should 5 happen in the event of a surplus. 6 So 334 and 335, 336, as I say, are concerned solely 7 with conversion of currency claims for the purposes 8 of proof, not with a surplus. 9 Then they say, 337: 10 "Present law relating to the conversion into 11 sterling of foreign currency claims in relation to 12 solvent and insolvent companies and to bankruptcy is 13 satisfactory." 14 So no criticism here of the suggested approach of 15 Lord Justice Brightman in Lines Bros. 16 In addition, agreement with the approach taken in 17 Dynamics and Lines Bros to conversion of claims for the 18 purposes of proof, nothing here in our submission to 19 suggest that when rule 2.86 was introduced Parliament 20 was effectively intending to, or it should be construed 21 as departing from the suggested approach of 22 Lord Justice Brightman. 23 LORD NEUBERGER: Thank you. 24 MR DICKER: So that is all, I think, in relation to the Law 25 Commission's final report.</p> <p style="text-align: center;">Page 169</p>	<p>1 the date of payment, albeit through the mechanism of 2 conversion into sterling. So one has a form of payment, 3 albeit by way of set-off, but by reference to 4 an exchange rate at the date of such payment. So the 5 creditor is getting full value because his debt is 6 discharged by reference to the then exchange rate. 7 Now, there is an issue raised by my learned friend 8 as to what happens to the balance of any claim after the 9 set-off has occurred. So imagine a situation in which 10 you have a foreign currency claim which is much larger 11 than a sterling cross-claim. 12 LORD NEUBERGER: Yes. 13 MR DICKER: What happens to the balance of the foreign 14 currency claim? Now, we say that what happens is that 15 the balance of the foreign currency claim remains an 16 unpaid foreign currency liability, and there is a close 17 analogy, in our submission, between the treatment of 18 foreign currency claims for the purposes of set-off on 19 the one hand and future debts and set-off on the other. 20 Now, there is an authority of the Court of Appeal in 21 relation to the latter that I wanted to just show your 22 Lordships. It is another decision in relation to 23 Kaupthing Singer & Friedlander. Your Lordships have it 24 at F1, tab 12. 25 LORD NEUBERGER: Yes.</p> <p style="text-align: center;">Page 171</p>
<p>1 We deal with the working report and with the Cork 2 Committee in our written case. 3 LORD NEUBERGER: Yes. 4 MR DICKER: But I don't think I need to say anything more 5 than that. 6 LORD NEUBERGER: That is fine, thank you. 7 MR DICKER: There are then five other aspects of the 8 statutory scheme on which my learned friend relies. 9 Now, ultimately, we say, the essential exercise is 10 construing 2.86. This is obviously part of the context. 11 And my learned friend gets no assistance from these 12 other matters. All we say are consistent with 13 respecting the basic principle that creditors' claims 14 have to be satisfied in full before any distribution can 15 be made to shareholders, and none suggest that 2.86 16 operates by converting the claim into a sterling claim. 17 Now, the first aspect concerns set-off. In respect 18 of this, we say nothing contrary to our analysis is 19 indicated by the treatment of claims and cross-claims by 20 way of insolvency set-off. Where set-off operates, it 21 has always been regarded as a form of payment. So the 22 creditor is being paid. There is nothing unjust or 23 contrary to the principles I mentioned in insolvency 24 set-off operating as at the date of liquidation. What 25 happens is the debtor obtains full value for his debt at</p> <p style="text-align: center;">Page 170</p>	<p>1 MR DICKER: Now, it may help, just before showing your 2 Lordships the relevant passages of this, for your 3 Lordships to have open as well the relevant rule. So if 4 your Lordship goes as well to bundle F3, tab 74. 5 LORD NEUBERGER: The rule at the bottom of the page in 6 Kaupthing? 7 LORD CLARKE: Tab what, did you say? 8 MR DICKER: My Lord, tab 74 and we are looking for 9 rule 2.85, mutual credit and set-off. 10 LORD CLARKE: Sorry, tab what? 11 MR DICKER: Sorry, it is tab 74 of bundle F3. 12 LORD NEUBERGER: 275, yes. 13 LORD SUMPTION: I have 268. 14 LORD NEUBERGER: 268. 15 MR DICKER: And it is rule 2.85, mutual creditors and 16 set-off. 17 LORD NEUBERGER: Page 2008, okay, right. 18 MR DICKER: 2.85(2) requires, defines mutual dealings. 19 LORD NEUBERGER: Yes, I see. 20 MR DICKER: Sub-rule (3) requires an account to be taken, 21 and then there are two rules, sub-rule (6) which 22 provides: 23 "Rule 2.86 to 2.88 shall apply for the purposes of 24 this rule in relation to any sums due to the company 25 which are payable in a currency other than sterling."</p> <p style="text-align: center;">Page 172</p>

<p>1 Obviously to set one debt off against another, they 2 need to be in the same currency, so sub-rule (6) applies 3 rule 2.86 and ensures that foreign currency liabilities 4 are converted into sterling. 5 Then sub-rule (7), which was the rule that was 6 relevant in Kaupthing, says: 7 "Rule 2.105 shall apply for the purposes of this 8 rule to any sum due to or from the company, which is 9 payable in the future." 10 And rule 2.105 -- 11 LORD NEUBERGER: 2032, yes. 12 MR DICKER: Yes. Debts payable at a future time, requires 13 the future debt to be discounted for the purposes of 14 dividend. 15 LORD NEUBERGER: Yes, we looked at this. 16 MR DICKER: So a similar approach to ensuring like is 17 set-off against like, both in relation to foreign 18 currency claims and future debts. 19 Now, what happened in Kaupthing was the future debt 20 was owed by the creditor to Kaupthing. The creditors' 21 argument was the claim needs to be set-off against 22 cross-claim. The future liability which it owed 23 Kaupthing had to be discounted, because that is what 24 rule 2.85(7) says. 25 LORD NEUBERGER: Yes.</p> <p style="text-align: center;">Page 173</p>	<p>1 accordance with sub-rule (8) if and when that debt 2 becomes due and payable." 3 LORD NEUBERGER: Yes. 4 MR DICKER: Now, not surprisingly, the argument was rejected 5 by the Court of Appeal. 6 LORD NEUBERGER: Yes. 7 MR DICKER: Just from Lord Justice Etherton's judgment at 8 page 1268 of the bundle, paragraph 32 of the judgment -- 9 LORD NEUBERGER: Yes. 10 MR DICKER: He says at 32: 11 "Notwithstanding these powerful and well presented 12 arguments, I would allow this appeal. The 13 interpretation of rule 2.85 for which Mr Fisher contends 14 has no sensible policy rationale. It is on the contrary 15 inconsistent with the basic principles and objectives of 16 insolvency administration." 17 And then 34: 18 "Contrary to the approach of the judge and to the 19 submissions of Mr Fisher, I consider it is perfectly 20 possible to interpret rule 2.85(7) and (8) without 21 straining their language so as to produce a sensible 22 meaning in accordance with the sound policy objective 23 and general principles of insolvency administration. 24 "2.105(2) provides for the discount of a future debt 25 to the current value by application of the statutory</p> <p style="text-align: center;">Page 175</p>
<p>1 MR DICKER: You then effect a set-off, but any balance 2 remaining which the creditor owed to Kaupthing is the 3 balance after discounting. 4 Now, one further rule that the creditor then relied 5 on in rule 2.105 -- and I am sorry, I should have taken 6 your Lordships to this when we had it open. I am sorry, 7 2.85. 8 LORD NEUBERGER: Yes. 9 MR DICKER: 2.85(8). 10 LORD NEUBERGER: We looked at that earlier. 11 MR DICKER: "Only the balance, if any, of account owed to 12 the creditor proved in the administration. The balance 13 of any amount owed to the company shall be paid to the 14 administrator as part of the assets, except where all or 15 part of the balance results from a contingent or 16 prospective debt owed by the creditor. In such a case, 17 the balance or that part of it which results from the 18 contingent or prospective debt shall be paid if and when 19 that debt becomes due and payable." 20 So the creditors' argument was, "The debt which 21 I owed Kaupthing has been discounted to give it 22 a present value. It is then used by way of set-off. 23 There is a balance which I still owe but it remains 24 a discounted amount. Despite having been discounted 25 from the present value, I only have to pay that debt in</p> <p style="text-align: center;">Page 174</p>	<p>1 formula for the purposes of dividend and no other 2 purpose. That is consistent with the purpose of 3 rule 2.85, which, as appears from the express provisions 4 of 2.85(1), is triggered by and is for the purpose of 5 making a distribution. I see no difficulty in the 6 circumstances in reading the words 'for purposes of this 7 rule' in rule 2.58 as confining the effect of the 8 incorporation of rule 2.105 to what is necessary to 9 calculate what should be paid by way of dividend to the 10 creditor and for that purpose the making of the 11 insolvency set-off as not touching at all upon what 12 remains due to the company after the insolvency set-off 13 has taken place." 14 One other paragraph, paragraph 36. The creditor had 15 relied on Stein v Blake. Lord Justice Etherton says: 16 "I do not accept the principle in Stein v Blake that 17 on the taking of the account for the purpose of the 18 insolvency set-off, the original causes of action that 19 are extinguished has any relevance to the present 20 issue." 21 Essentially holding that it doesn't follow that 22 balance unpaid by way of set-off can't continue, in this 23 case, as a future debt, or we would say, if it was 24 a foreign currency liability, in a foreign currency. 25 So there is no problem with adopting our analysis</p> <p style="text-align: center;">Page 176</p>

<p>1 caused by rule 2.85 and the provisions in relation to 2 set-off. To the extent that set-off occurs and a claim 3 is set-off against a cross-claim, the creditor has 4 effectively received payment in full. 5 LORD NEUBERGER: Paid at that time, because the deemed 6 payment is affected by the automatic set-off. 7 MR DICKER: Absolutely. 8 LORD NEUBERGER: Therefore, whichever way the currency then 9 moves and however far is irrelevant in relation to the 10 part which has been set-off. I understand. 11 MR DICKER: In substance, it is no different than if a cash 12 payment is made in both directions on the same day. 13 LORD NEUBERGER: Exactly. Because it is a sterling sum at 14 the rate appropriate at the notional payment. 15 MR DICKER: Absolutely. 16 LORD NEUBERGER: Yes, I understand. 17 MR DICKER: And to the extent there is a balance, no 18 difficulty in holding, it just remains a foreign 19 currency liability -- 20 LORD NEUBERGER: Yes. 21 MR DICKER: -- to be treated in accordance with the rest of 22 the scheme. 23 LORD NEUBERGER: I understand. Yes. 24 MR DICKER: Now, one further point in relation to set-off in 25 administration, and it goes back to a point I made</p> <p style="text-align: center;">Page 177</p>	<p>1 authorities F5 at tab 7. I should show your Lordships 2 that. 3 LORD NEUBERGER: Where does he deal with it? 4 MR DICKER: It is F5, tab 7. 5 LORD NEUBERGER: Which paragraph? 6 MR DICKER: And it is paragraphs 37 to 47. 7 LORD NEUBERGER: Page 2723, right, thank you. Okay, we have 8 the rule set out. 9 MR DICKER: He identifies in 37 the issue he is addressing. 10 LORD NEUBERGER: Yes. 11 MR DICKER: "Whether and if so in what circumstances and in 12 what manner a currency conversion claim can arise from 13 ... (reading to the words)... pursuant to 2.85(3)." 14 LORD NEUBERGER: And then we have 285 set out. 15 MR DICKER: Yes. 39, he identifies the effect of or the 16 difference between the notice of intention to distribute 17 and the date of set-off. 18 LORD NEUBERGER: Yes. 19 MR DICKER: 40: 20 "York submits there may be a currency conversion 21 claim as a result." 22 42, he says: 23 "In my judgment the administrators and Wentworth are 24 right, no currency ...(reading to the words)... because 25 the account for the purposes of set-off is taken as at</p> <p style="text-align: center;">Page 179</p>
<p>1 earlier in the context of what I referred to as the 2 one-way bet issue. Set-off operates slightly 3 differently in an administration than in a liquidation. 4 In a liquidation, set-off effectively occurs 5 automatically upon liquidation by reference to the 6 exchange rate on the date of liquidation. 7 LORD NEUBERGER: Yes. 8 MR DICKER: So it happens immediately by reference to 9 exchange rates on that day. Administration is 10 different, as I mentioned. It is triggered by a notice 11 to declare a distribution but then operates 12 retrospectively. 13 LORD NEUBERGER: Yes. 14 MR DICKER: Now, as I understand my learned friend's 15 argument, it is that if the Court of Appeal's analysis 16 is right, set-off in administration could lead to 17 a currency conversion claim. 18 LORD NEUBERGER: Yes. 19 MR DICKER: And the reason would be because -- 20 LORD NEUBERGER: The retrospective. 21 MR DICKER: Absolutely. Now, that was an issue which, as 22 part of his endeavours to answer all issues arising in 23 relation to the LBIE estate, Mr Justice David Richards 24 dealt with in a supplemental judgment in Waterfall IIA. 25 It is, just so your Lordships have the reference, it is</p> <p style="text-align: center;">Page 178</p>	<p>1 the date on which notice of an intention to make 2 a distribution is given, that is the date on which the 3 creditors' claim is, to the extent of set-off, 4 discharged. If that were the case, there would be 5 something to be said for equating discharge by set-off 6 with the payment of a dividend." 7 LORD NEUBERGER: Yes. 8 MR DICKER: But he says in 43: 9 "The effect of the provisions in the rules is that 10 although the set-off account is taken as at the date of 11 the administrator's notice, the creditors' claim is 12 discharged to the extent of the set-off as at the date 13 of administration." 14 So in other words the logic underlying the rules is 15 it may be triggered by a notice of intention to 16 distribute, but you are treated by the rules as 17 effectively having had the benefit of the set-off as at 18 the date of administration by reference to an exchange 19 rate on that date. As a result, no currency conversion 20 claim can arise from the difference between set-off and 21 administration on liquidation. 22 LORD NEUBERGER: Thank you. 23 MR DICKER: So we say nothing in the treatment of set-off 24 which is contrary to our analysis. Nothing which one 25 might say infringes the principle that surplus can only</p> <p style="text-align: center;">Page 180</p>

<p>1 be distributed after creditors' claims have been paid in 2 full. 3 Lord Justice Briggs in his judgment dealt with this 4 essentially by ensuring that every time he referred to 5 payment he added the words "or by way of set-off". We 6 say it is simply a form of payment. 7 LORD NEUBERGER: Right. 8 MR DICKER: So that is the first other aspect. The second 9 concerns contingent claims. 10 LORD NEUBERGER: Yes. 11 MR DICKER: Again, we say no infringement of the principle. 12 Obviously there are two potential reasons why the rules 13 provide for the estimation of contingent claims. One is 14 plainly to ensure pari passu distribution between 15 creditors. A second is because, as the cases hold, 16 companies are entitled to wind up their affairs within 17 a reasonable period, and if you can't estimate claims 18 then that wouldn't be possible. 19 LORD NEUBERGER: Yes. 20 MR DICKER: Just so there is no misunderstanding, that 21 second principle obviously isn't relevant here, because 22 by the time an administrator comes to make 23 a distribution to shareholders, it is clear what sum is 24 required to discharge any unpaid foreign currency claim. 25 There is no delay, there is in hindrance, to the winding</p> <p style="text-align: center;">Page 181</p>	<p>1 LORD NEUBERGER: Yes. 2 MR DICKER: It is authorities F6 tab 15. 3 LORD NEUBERGER: Tab 15, you say? 4 MR DICKER: Yes. 5 LORD NEUBERGER: Yes. 6 MR DICKER: And it involved -- 7 LORD NEUBERGER: We have looked at this. 8 MR DICKER: It involved a company which had made 9 a declaration of solvency. All of the assets have been 10 distributed and it was deemed to have been dissolved. 11 Your Lordships will see that, page 85 of the reports, 12 letter G. 13 LORD NEUBERGER: Yes. 14 MR DICKER: Just, the passages I want to show your Lordship 15 in the report, 88, the bottom of the page, H. 16 LORD NEUBERGER: Yes. 17 MR DICKER: Mr Etherton said: 18 "An English company has an inalienable ...(reading 19 to the words)... in accordance with the rules of 20 liquidation, paying contingent creditors the value of 21 their claims at the date of liquidation, no more." 22 LORD NEUBERGER: Yes. 23 MR DICKER: And Lord Justice Hoffmann says: 24 "There are elements of truth in each of 25 Mr Etherton's propositions but ...(reading to the</p> <p style="text-align: center;">Page 183</p>
<p>1 up of the company by doing that. 2 Now, the reason why there is no infringement of the 3 principle is as a result of the operation of the 4 hindsight principle. Essentially, you can revalue your 5 contingent claim at any stage and if your revalued claim 6 permits you to share in the assets then you are entitled 7 to do so, and prove for the relevant contingent claim. 8 Now, given the width of or the extent to which the 9 hindsight principle operates, it is difficult to see why 10 one would ever need a non-provable claim in relation to 11 a contingent claim. And I say that because you can have 12 a company which is in liquidation. The claim is 13 estimated. The liquidator pays the full amount of the 14 estimated claim. He distributes to shareholders. The 15 company is dissolved. Despite that, if the contingency 16 subsequently occurs, creditors are still entitled to 17 apply to have the dissolution declared void, at which 18 point the liquidation restarts and they can then submit 19 a revised proof and ensure, if there are any assets, 20 ensure that they are paid. Essentially it covers in 21 effect all of the ground that might otherwise be covered 22 by a non-provable claim. 23 Now, as my learned friend mentioned this is dealt 24 with in re: Stanhope, and I wondered just before we rise 25 whether I could just show your Lordships that.</p> <p style="text-align: center;">Page 182</p>	<p>1 words)... of their claims at the date of winding up. 2 The company cannot be required to set aside a fund 3 against the possibility that contingency may happen." 4 Then just between C and D he says: 5 "On the other hand, also a rule of winding up is 6 that a creditor may submit a proof or amend an existing 7 proof at any time during the liquidation. The rule that 8 prior distributions cannot be distributed means that it 9 will not do him much good, but in principle is entitled 10 to make the claim." 11 LORD NEUBERGER: Yes. 12 MR DICKER: My Lord, I wonder if that is a convenient 13 moment. 14 LORD NEUBERGER: Yes. You are still on time, on course, 15 along the lines you indicated? 16 MR DICKER: I have a few short comments to make in relation 17 to future debts, disclaimer and bankruptcy, which were 18 the other three aspects. I then need to see how much, 19 if any, of my submissions on the merits, the one way 20 bet, are left and it may be not much. And that is then 21 it. So I would hope probably no more than about 20 22 minutes. 23 LORD NEUBERGER: That is very helpful. We will resume again 24 at 10 o'clock tomorrow. And on that basis we will be 25 virtually an hour ahead of schedule when you sit down.</p> <p style="text-align: center;">Page 184</p>

1 Thank you very much.
2 The fact that others have been quick doesn't mean
3 that there is extra time for reply, I should say. So we
4 will have time to consider where we stand. 10 o'clock
5 tomorrow. Thank you very much, Mr Dicker.
6 (3.54 pm)
7 (the hearing adjourned until 10 o'clock on Thursday
8 20 October 2016)
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11 Submissions by MR TROWER (continued)1
12 Submissions by MR DICKER82
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