Wednesday, 19 October 2016

(10.05 am)

LORD NEUBERGER: We will probably take ten minutes at 11.30 again, just so everyone knows.

Submissions by MR TROWER (continued)

MR TROWER: My Lords, two or three points arising out of yesterday.

The first is on pages 131 to 135 of the transcript, there was a series of questions about a second round of proving. Can I just briefly expand on that and explain what would happen in a case like this.

Once the restrictions imposed by the sub-debt agreement fall away, then the sub-debt lender is entitled to prove, it is not a question of a second round of proving per se. What happens is that an administrator sets a last date for proving, that is rule 2.95, in the normal way. He deals with all of the proofs that come in under rule 2.96, pays statutory interest on the proved claims and also pays the non-provable claims.

Rule 2.96, though, contemplates in its terms the submissions of proofs after the last date for proving. The subordinated debt lender is then permitted to prove, as long as everyone else has been paid in full, so it exercises its right to do so in the normal way under

rule 2.72. The late proof does not disturb the dividends already paid under the rule 2.70.

So as all of the other creditors will be paid in full, it will not be completing with anybody else, so there is no question of further pari passu assessment or anything like that by the administrators or a further round for proving in that sense, it is just a late proof in that sense and that is the way its dealt with. The rules I have just mentioned are in the bundle at F3, tab 74.

One other thing is that I said in answer to a question from Lord Neuberger that late provers are not always people who could have proved from the beginning.

LORD NEUBERGER: Yes.

MR TROWER: Can I just clarify that. They must have a provable debt, and as provability is assessed as at the outset of the insolvency, they will, so far as the statutory code is concerned, have been able to prove from the beginning, so long as their debt is then capable of (inaudible).

The circumstances in which they couldn't actually have proved from the beginning is where they are unable to put a sensible estimate on their debt at the beginning, where they have contracted out of the ability to do so, and there is one other bit of law which is

a little bit -- not difficult, but one has to bear it in mind when looking at this area, which is a point made by Lord Millett in Park Air, which my Lord, Lord Sumption may recall. It is not in the authorities bundle, but what Lord Millett said there -- he was dealing with a landlord's proof for future rent.

LORD NEUBERGER: Yes.

MR TROWER: And can I just give my Lords the reference, because it is 2002 appeal cases 172 of 187D to F, and basically, in the context of a landlord, the law appears to be that you have to wait until the rent falls due before you prove, because part of the consideration for the receipt of the rent is the continued occupation.

Now, that point, though, was considered again, or characterised again, in a different context by Lord Hoffmann in Toshoku, which is in the bundle at F6, tab 18, 3376.

LORD NEUBERGER: Thank you.

MR TROWER: He wasn't considering it together with looking at Park Air, but it is paragraph 24.

LORD NEUBERGER: Park Air wasn't cited.

MR TROWER: No.

LORD NEUBERGER: Yes. Park Air wasn't the disclaimer case.

MR TROWER: It was the disclaimer case, my Lord.

LORD NEUBERGER: So it was obiter, then.

MR TROWER: Yes, it would have been obiter, yes.

There is a bit in Mr Dicker's case which deals with disclaimer in this context. At the end of the day, not a great deal turns on this, we would say. What one is into here, or what one is concerned about here, is the question of proving in respect of contingent liabilities.

LORD NEUBERGER: Is it right to say, insofar as it matters, that Lord Hoffmann was saying rent is a future debt and therefore you can prove for it, and Lord Millett was saying, no, you can't proof for it until it falls due because you haven't --

MR TROWER: You haven't produced the consideration for it.

LORD NEUBERGER: And both of those are obiter?

MR TROWER: Yes, I think they are, because in Toshoku he was looking at it in the context of liquidation expenses.

LORD NEUBERGER: Do we have to decide the issue in this case?

MR TROWER: I am not sure you have to decide the issue, no, but you need to be aware of --

LORD NEUBERGER: We will make some further --

MR TROWER: You need to be aware of the question, I think is a better way of putting it.

LORD NEUBERGER: We can make some further confusing observations. Yes, thank you.

MR TROWER: So that is the first point from yesterday. The second point from yesterday arises --
LORD NEUBERGER: Can you tell me again which is -- it is 2.101 that entitles you to alter the proof, is it? Page 2028, proof altered after payment of dividend.
MR TROWER: Yes, yes.
LORD NEUBERGER: Okay. Is that the one that entitles you or does it just say? Where is the right to alter? Or is it just --
MR TROWER: We are not really talking necessarily about an alteration, actually. Someone can find me the right tort. What we are talking about here is a late proof. That is where I started on this, anyway.
LORD NEUBERGER: Yes. Well, it isn't a late proof, it is the amount increasing in the proof.
MR TROWER: Yes.
LORD NEUBERGER: You are proofing for the whole -- it doesn't alter the proof, it alters the amount you are claiming.
MR TROWER: It depends on --
LORD NEUBERGER: Is it the amount you are claiming or is it simply the value of the proof? I understand it is being said you prove for this, you prove for the whole sum of the subordinated debt, and then the administrator values it at nil. Where does the revaluation of the proof --

it is not a new proof, is it?
MR TROWER: If you have proved for the whole debt -- of course, we say you can't even do that, but if you have proved --
LORD NEUBERGER: Quite, but I just want to see how it works. You say you can't do it.
MR TROWER: You can't do it. But there is a revaluation provision which someone from behind will pass through to me in a moment.
LORD NEUBERGER: Okay. I am really asking you not what your case is; your case is you can't do it.
MR TROWER: You can't do it.
LORD NEUBERGER: Okay, fine.
MR TROWER: I just wanted to explain the statutory context.
LORD NEUBERGER: Thank you.
MR TROWER: Second point from yesterday, page 150 of the transcript, my Lord, Lord Neuberger said: is there anything that expresses and imposes an obligation on the company as opposed to the administrator? I said we would look again overnight. We have, we have checked overnight, and the answer is we couldn't find anything in chapter 10 of the rules, part 2, which is the bit that matters for those purposes.
LORD NEUBERGER: Thank you for whoever looked for it.
MR TROWER: My Lord, the third point arising out of

yesterday was the definitions in rule 13.12.
LORD REED: Sorry, before we get to that, one matter I don't have quite clear in my mind which Lord Neuberger asked about earlier in the hearing is what really is the status of all of this. The requirements about subordinated debt have an origin in Basel.
MR TROWER: Yes.
LORD REED: And then Basel is given effect in EU law by directive.
MR TROWER: Yes.
LORD REED: So the directive imposes an obligation on the United Kingdom.
MR TROWER: Yes.
LORD REED: As I understand it, that is given effect by what was the FSA at the relevant time through -- is it some form of soft law, the GENPRU document?
MR TROWER: My understanding -- two things, the best description of what is going on -- my Lord's question may or may not be answered there, I cant say straight away -- is in the judge's judgment, because he deals with this. My understanding is that if you want it to qualify as subordinated debt for capital adequacy purposes, it has to comply with the requirements. It is that --
LORD SUMPTION: (Overspeaking) -- the subordinated debt for

much longer than the capital adequacy rules have qualified it as capital, subject to certain provisos, have they not? It is not a new creation.
MR TROWER: No. But what it enables a bank to do, a financial institution to do, is to treat it for regulatory purposes, if it complies, at a particular level in it is capital, because banks have to have capital of certain qualities in order to --
LORD REED: So we are right, then, in looking at subordinated debt agreement purely as a contractual matter, rather than having any legislative aspect to it.
LORD SUMPTION: Presumably all that happens if you have a subordinated debt instrument that isn't on the prescribed terms or in some other way doesn't comply, it is perfectly valid simply that you have to have some other assets to make up your capital ratios.
MR TROWER: Yes, I think that is absolutely right.
LORD NEUBERGER: Thank you.
MR TROWER: My Lord, the third point arising out of yesterday relates to the definitions in rules 13.12 of the word "debt" and the word "liabilities", which we were on towards the end of my submissions.
Now, we continue to submit that rule 13.12 helps in showing what "debts and liabilities" means as a phrase within the statutory code, and it is completely

unsurprising to conclude that the word "liabilities" has a very wide meaning. However, looking at the rule-making power, we can see it may be a step too far to submit that the words "debts and liabilities", as that phrase is used in section 74, is actually defined by rule 13.12(1) and 13.12(4). We think that is what the draftsman probably thought he was entitled to do, but we don't think he probably was, and so it may be difficult for you to construe it in that way. That is the way I would put it.

LORD NEUBERGER: There is a definition of "debt" in the legislation, is there not?

MR TROWER: Not for the purposes --

LORD KERR: Not for that particular purpose.

LORD SUMPTION: Is the definition doing more than simply providing that for the purpose of a winding up pursuant to the act, debts and liabilities shall have those meanings, which would be intra vires?

MR TROWER: I think that may be right, my Lord. That may be right. And I say ultimately it doesn't terribly matter, because one still does get quite a lot of help from this, but I can't submit that just reading the words "debts and liabilities" in section 74, they are defined by the rule in that way.

LORD SUMPTION: No.

MR TROWER: But what I can go on and submit is, as I say, that the draftsman has chosen words in the rules which reflect the proper meaning of "debts and liabilities" where they appear in section 74, and there are other places in the act in which the word "liabilities" is plainly not limited to proving debts, the most obvious one being in section 107 and section 148 that we have already looked at. I have explained to my Lords in that context why it is that the word "liabilities" must include more than non-provable liabilities -- and must include non-provable liabilities and statutory interest, and it would be odd if it was intended to have a narrower meaning in section 74.

I have already made submissions on the reasons why a liquidator has to deal with non-provable liabilities and I don't think I need to go back on that. We deal, just for my Lords' note, which this area in paragraphs 132 to 139 of our case in the context of section 74.

The simple submission is that there is, once one has concluded that paying the liabilities is something that is required to be done in the insolvency, which is what I made submissions to my Lords on yesterday in relation to the sub-debt agreement, it is plain that payment of those same liabilities comes within the parameters of

the statutory screen for the purposes of section 74. That is the submissions that I have to meet, which is: what are the parameters of the statutory scheme which section 74 is dealing with when it is thinking about debts and liabilities?

Similarly, the same points on why the statutory interest liability is an obligation or payable or owing by the borrower for the purposes of the definition of "liabilities" in the subordinated debt agreement, apply to the question of why statutory interests, liabilities, under section 189 are amongst its, ie the company's, debts and liabilities for the purposes of section 74. That whole area of why it is a liability of the companies is dealt with in paragraph 140 to 171 of our case.

But can I just add these four, I think, points, which are in addition to the submissions that we have already made in relation to that on the sub-debt agreement, and that relate specifically to the inter-relationship between section 189, interest, and section 74.

The first point is that it is not a very big leap to find statutory interest included within the phrase "its liabilities" in section 74, because for the period when there was no provision for statutory interest,

post-liquidation interest was treated as a non-provable liability to the extent there was a contractual right to receive it and was paid ahead of returns to members. My Lords have heard reference to the Humber Ironworks case. It is also a point that is discussed in Lines Bros.

Now, the point was accepted and discussed by Mr Justice David Richards at paragraph 154 of the judgment and again at paragraph 164. The way he summarised this point is that section 189 was intended to widen the categories of creditors entitled to post-liquidation interest in circumstances where, prior to the 1986 Act, only those with a pre-liquidation right to interest were remitted to their rights so as to have a non-provable claim forward.

LORD NEUBERGER: What paragraph is that, sorry?

MR TROWER: 154 and 164.

LORD NEUBERGER: Thank you.

MR TROWER: Secondly, there is nothing in the language of section 189 that compels the unprincipled conclusion that this provision was intended to turn what had previously been a liability of the company into a mere direction to the liquidator.

Thirdly, it would be strange if a member of an unlimited liability company had been relieved of that liability in respect of post-liquidation interest,

simply because a creditors' right to post-liquidation interest has now been put on a statutory footing.

Now, the members of course look at the point the other way round. They say it would be odd to find the liability of members increased, which is what has happened by reason of the extension of the section 89 entitlement to statutory interest to those who did not have a contractual right beforehand.

We say not so. It is wholly unsurprising that the introduction of new interest rights in a liquidation might extend the liability of the members. One only has to think about it this way: if you look at the range of things that are caught by the section 74 liability, it is debts and liabilities, together with the costs of liquidation, together also with the terms to members. So it is not surprising to find the introduction of a new interest right in a liquidation under the code extends their liabilities.

What we suggest would be more surprising is if the effect of introducing statutory interest were to reduce the liability of the members in respect of those creditors whose prior contractual rights to interest had been replaced with statutory rights. So that is the first point.

The second point is another point that is similar to

that but I think it is different and it is an another logic and consistency point, we submit. The reason why statutory interest is a liability is that it is clear that pre-liquidation interest is a debt or liability of the companies for the purposes of section 74. Now, this is because, as we know, pre-liquidation interest is provable as part of the debt, pursuant to rule 4.93, and it is common ground that provable debts fall within section 74. That interest entitlement can of course arise under a contract or a judgment, but as a matter of policy it is a debt or liability towards the payment of which the members are required to contribute, as a pre-liquidation interest entitlement.

For the pre-liquidation period, the source of the interest entitlement could be either the contract or the Judgments Act, and it will be payable out of assets, depending, of course, on whether it is a judgment or not. For the post-liquidation period, the source of the liquidation entitlement, will be, I accept, section 189(4), but it will apply the contract or the Judgment Act rate and will also be payable out of the assets. There is little logic to a scheme, we would suggest, which treats one as a liability for the purposes of section 74, but denies that status to another.

On the same theme, there is little commercial logic to a scheme which treats principal in its entirety and pre-liquidation interest as a liability to which the members are required to contribute, but denies that status to post-liquidation interests alone. What justification, we ask, can there be for limiting the liability of members in this way, when for both periods the creditor has a claim against the company for being kept out of the money to which he is entitled. This is a point which appealed to the judge and he explains it in particular at paragraph 163 of his judgment.

The third point relates to the inter-relationship between statutory interest and non-provable liabilities. If calls can be made to fund the payment of non-provable liabilities, it makes no sense that they can't be made to fund the payment of a higher ranking liability, which is what would happen in relation to statutory interest. The obvious reason for this is that if a call is made because there isn't sufficient to pay the non-provable liabilities, the proceeds of that call will then be received by way of contribution to the company's assets, and those assets will then have to be applied first in respect of any shortfall in statutory interest, because that is what the statute says has to happen.

The fourth point is similar to that, and it relates

to the significance of the adjustments of the right of contributories. It is similar to the point about non-provable liabilities, and we deal with this point as well in around about paragraph 131 of our case.

The way it works is this: a call can be made under section 74, to adjust rights of the contributories amongst themselves. The fruits of that call fall into a common fund and then have to be applied in accordance with the statutory waterfall.

LORD NEUBERGER: Yes.

MR TROWER: And that is Webb v Whiffin. There is no provision for ring fencing. If the members' obligation extends to enabling the company to make payments to shareholders qua shareholders, which will happen when you have made a call for an adjustment, then it would be wholly illogical if that obligation did not extend to any and all liabilities which rank for payment ahead of such payment to shareholders, including, therefore, statutory interest and any non-provable liabilities.

The judge dealt with the significance of this at paragraphs 158 and 159 of his judgment, and Lord Justice Lewison dealt with it at paragraph 121. The way Lord Justice Lewison puts it -- it is at D3, page 563, we don't need to turn it up, but paragraph 121 -- very crisply encapsulates the point.

Can I then, I think, almost finally, not quite, second last on this aspect of the case, go to the security or boot straps argument, if I can put it that way.

LBHI2 suggests that the Court of Appeal conclusion that a contribution could be sought in respect of statutory interest is circular, because unless and until there is a surplus after payment of the debts proved, there is no liability to pay statutory interest.

We submit this is wrong. We deal with it in paragraph 172 and following of our case.

LORD NEUBERGER: 172?

MR TROWER: Yes. The answer depends on the meaning of the word "surplus", as used in section 189(2), and it is used to describe what remains after provable debts have been paid in full. What remains. It should be remembered that if there is a right to make a call in respect of an early liability ranking below statutory interest, including a call to adjust the rights of contributes, receipts will inevitably comprise part of the surplus. So one needs to look at the boot straps argument in that context.

Against that background, the fundamental flaw we submit is the flaw identified by Mr Justice David Richards at paragraph 165, and I think we ought,

probably, to turn that up. Its D5/649.

LORD NEUBERGER: Yes, it is quoted in your --

MR TROWER: Oh, I am sorry.

LORD NEUBERGER: It is okay, if you want to take it -- we are looking at the judgment quite often, but it is an important case, yes.

MR TROWER: And so if my Lords would just like to remind themselves of that insofar as they need to.

The way Mr Justice David Richards put it was agreed with by Lord Justice Briggs at paragraph 197 of the judgment, on the basis that the right to make calls, or the members' liability to contribute under section 74, is in any event an asset of the company's, and we submit that they were correct on this point.

LORD NEUBERGER: The right to make calls is an asset of the company, but does that really answer the boot straps point?

MR TROWER: Yes, because it goes into the surplus when you are assessing what the surplus is. So the bit in Webb v Whiffin, there are three passages from the judgments of Lord Hatherley, Lord Chelmsford and Lord Cairns in Webb v Whiffin which help on this, and they are to be found in F1, tab 22.

LORD NEUBERGER: Yes. Are they the bits quoted in your case?

MR TROWER: My Lord, they may well be. I am sorry, I am not reading from my case. I am terribly sorry.

LORD CLARKE: I think they are.

MR TROWER: It is Lord Hatherley at page 720, a passage beginning --

LORD SUMPTION: Sorry, can you give me the tab number again, I have only just found my bundle.

MR TROWER: 22. The passage beginning, "The assets of the company".

LORD SUMPTION: Page?

MR TROWER: 1592.

LORD SUMPTION: The very bottom of the page.

MR TROWER: Yes, to over the page, under "the common fund so formed". That is the first bit.

Then there is Lord Chelmsford at page 724. It is the paragraph beginning "In the different sections". And then one gets, again, something a little bit out of the -- on the next page, on 725, for the first sort of 12 lines of the paragraph, beginning, "There is no marshalling".

Then one has Lord Cairns at page 734 in a passage -- and there are two passages from this, the one beginning "A capital is created", and what is quite interesting there is when he uses the concept of capital, he talks about sometimes limited, sometimes without limit. He

thinks of the obligations of the members in an unlimited context constituting the capital. Now, it is not used that way in some of the other cases, later cases, for example Pyle Works talks about capital in a different context.

LORD NEUBERGER: Was the wording of the provisions the same?

MR TROWER: Yes. We are here looking at section 38 of the 1662 Act, which I think we have in the bundles. What we say the explanation for this is -- because as my learned friend has shown you, Pyle Works, and it is referred to in a number of cases, the point in Pyle Works was whether or not you could actually charge the capital to somebody else as security for a debt. That was what it was all about. There was a big debate at the end of the 19th century as to whether you could charge uncalled capital and there were commercial issues that arose as to whether it was a sensible thing to be able to do. Pyle Works suggested that you could, but in the course of discussing that they discussed what capital meant in this context.

That is not the same question, we respectfully suggest, as both, I think, Lord Justice Briggs and Mr Justice David Richards concluded, as what is an asset of the companies for the purposes of determining how it is that you look in particular at the boot straps

argument.
LORD SUMPTION: What about cases like Oasis, which appear to assume that it is not an asset, either?
MR TROWER: The Oasis type of case, as William Leach and Niagafon (?) as well, which are in a sort of similar area, what that is all about is there is a statutory cause of action which is available to the liquidators for the purposes of clawing back assets, or readjusting rights in a claw-back context, overtly in support of the pari passu distribution rule, and in that context the courts have held that the receipts are to come in for the purposes of distribution pari passu amongst the unskilled (?) creditors.
LORD SUMPTION: Well, the receipts from the right must form part of the assets because section 74 provides that it is a contribution to the assets.
MR TROWER: Yes.
LORD SUMPTION: But the right to call under section 74, I think the point being made in Oasis is that that right is not itself an asset of the company, because it is exercisable only by the court through the liquidator.
MR TROWER: Yes. But what we say -- at the end of the day what this all boils down to is whether or not you characterise what is there available as part of the surplus, which is for the purposes of rule 2.88(7) or

section 189, actually, is what we are really looking at here. So when you are looking at what you have got that comes in, do you take into account when you are looking at the question of surplus that asset.
LORD SUMPTION: Which asset? The money when it has come in or the right to call for it?
MR TROWER: Both.
LORD SUMPTION: Because the judge's answer to the boot straps argument is dependent, isn't it, upon the proposition that even before the money has come in, the right to call for it has a value which is itself to be taken into account in determining whether there is a surplus or not.
MR TROWER: Yes.
LORD SUMPTION: So it is already there, although the money hasn't yet been called or turned up.
MR TROWER: I accept that. It links to some extent to the provability question, possibly, which we will come on to in a moment, in relation to the set-off and the contributory rule.
But we do suggest that the judge's approach is right. There is an alternative approach which Lord Justice Briggs adopted as well, which he refers to in paragraph 198 of his judgment, which is that the surplus wording is simply a convenient way of

identifying the statutory order of priority, and one has to be careful about giving too much weight to the analysis of what the elements of the surplus are capable of being, which are a necessary part of the boot straps argument. And we say that that is a perfectly acceptable alternative way of approaching the problem, and commend it to your Lordship.
LORD SUMPTION: It's a condition precedent to the right to call for it at all.
MR TROWER: I am sorry, my Lord?
LORD SUMPTION: The existence of the surplus is a condition precedent to the right to call for it at all.
MR TROWER: Yes, although that is the whole point of the way in which Lord Justice Briggs looks at it. He says that is not looking at it as a matter of reality.
But, my Lord, that is our submission in relation to it. I can't really put it any differently from the way in which Lord Justice Briggs put it. In a sense, it is --
LORD NEUBERGER: Do you adopt what Mr Justice David Richards and then Lord Justice Briggs had to say about it?
MR TROWER: We do.
LORD NEUBERGER: And you say it is supported by Webb v Whiffin.
MR TROWER: Yes, and that is the core of our point.

LORD NEUBERGER: That is the core of your point and it is clearly set out in your written case, yes.
MR TROWER: There is then, my Lord, what might be described as the bankruptcy point. I am not going to spend any time on it at all. It is dealt with in paragraph 190 of our case. For the reasons given in paragraph 190 of our case, the bankruptcy point doesn't help.
LORD NEUBERGER: Oh I see, thank you.
MR TROWER: Yes. Can I then move on to that part of this appeal that deals with provability set-off and the contributory rule.
Now, we look at the architecture of this point slightly different from the way in which it has been presented to my Lords by LBHI.
Before I explain that, can I just give my Lords two or three minutes on the practical implications here as to what is actually going on.
LBL, the members, and LBHI2 have two relevant capacities as far as LBIE is concerned.
LORD NEUBERGER: Yes.
MR TROWER: They are creditors with substantial claims. They have lodged proofs of debts in LBIE's administration. They are members of LBIE, contingently liable to LBIE as contributories.
As LBIE is an unlimited company, the liability in

respect of the debts and liabilities is unlimited in amount. It is contingent because it depends on LBIE going into liquidation in the future. Because the section 74 liability crystallises only in a winding up, and it is only in a liquidation that calls can be made under section 150, there is simply the prospect of calls in the future once LBIE goes into liquidation, and we accept that.

If LBL and LBHI2 were both solvent, the dual capacities of them as creditor and members wouldn't matter, or it wouldn't cause the same problems, because the administrators of LBIE would be able to make substantial distributions to them in their capacity as creditors, knowing that, if later called on to contribute, they would be able to discharge their obligations.

Because they are not solvent, they won't be able to discharge in full their future obligations as contributories. So if the administrators make a substantial distribution to them now, it is effectively a one-way street. Any calls made by a future liquidator will go largely unsatisfied. That is the issue primarily with which 7, 8 and 9 are concerned.

The members submit, first of all, that the

contributory rule doesn't reply; secondly, that LBHI's contingent claims against the member are not provable; and, thirdly, that there is therefore no set-off in LBIE's administration. They effectively say we have to pay out on the proofs now in respect of the unsubordinated debt two, of them, and LBHI2 say payments are also to be made in respect of the subordinated debt now. The implications are that they get the money and that that is an end to it, effectively, and the actual value of the claim to contribute is substantially reduced accordingly.

LORD NEUBERGER: That, you say, is the commercial reality.

MR TROWER: That is the commercial reality of what is going on here.

LORD NEUBERGER: I see.

MR TROWER: There are two solutions to this issue, both of which avoid what we would characterise as an unjust result.

The first is set-off, which may or may not require LBIE's claim against the members to be provable. That is basically issues 8 and 9.

The second financial solution involves the application of the contributory rule in LBIE's administration, and that is the point addressed by declaration 7.

We make no bones about the fact that, as far as the contributory rule is concerned, we would be inviting your Lordships to extend the law. The reason we invite your Lordships to extend the law --

LORD NEUBERGER: That is the reason we are here.

MR TROWER: I am pleased to hear your Lordship respond in that way.

LORD NEUBERGER: Not that we always do it when asked.

MR TROWER: I need say no more.

As far as the first bit is concerned, just to set the scene a little bit more, if LBIE's claims against the members are provable, it is accepted by LBHI that set-off will apply and LBIE will be able to assert its rights as a substantial net creditor in the administrations of the members. That is what the result will be.

If the claims against the members are not provable but are nonetheless available for set-off, the set-off will extinguish any inbound claim into LBIE and LBIE will then become a substantial net creditor in the administration of the members once it goes into liquidation, that is if they are not provable.

If LBIE's claims against members are neither provable nor available for set-off, then unless the contributory rules apply, LBIE will either have to go

into liquidation or admit the members to proof without taking any account of its contingent claim against them under section 74.

Can I say this about the contributory rule before we look at set-off: the contributory rule as it applies in a liquidation is probably best explained by the judge in paragraph 179 of his judgment. In summary, it is simply that a person can recover nothing as a creditor of a company until he has discharged all of his liabilities as a contributory. That is the first point, simply, and crisply expressed.

The second point about it, though, is that it doesn't work in opposition to set-off. Now, what that means is that the issue as to whether the contributory rule applies in administration is relevant only if and to the extent that the answer is not supplied by set-off, that is what I mean by that, which itself may or may not require the question of provability to be resolved.

LORD NEUBERGER: So set-off is the first port of call.

MR TROWER: Yes.

LORD NEUBERGER: Yes, I see.

MR TROWER: Can I admit straight away it wasn't always approached in quite that way, but by the time we got to the Court of Appeal it was clear that that was the right

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

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

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

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

the paragraph on the following page?
MR TROWER: Yes.
LORD NEUBERGER: So it is really the passage dealing with the second submission, halfway down the page.
MR TROWER: Yes, I am sorry, it is down to "occurred at the time of the sequestration order".
LORD NEUBERGER: Yes, thank you. And you adopt that reasoning?
MR TROWER: And we adopt that reasoning and we say it is right.
LORD NEUBERGER: Was the Court of Appeal in BCCI 8, was it reasoned or simply a throwaway line?
MR TROWER: I can show my Lords --
LORD NEUBERGER: Don't worry.
MR TROWER: It wasn't reasoned. It didn't appear to be -- it relied upon a case called Graham v Russell, which was a very old case, which didn't seem to have very much to do with it, when one looked at it.
LORD NEUBERGER: Okay, fine. We will have a look at that. Can you give us the reference to BCCI 8 without turning it up?
MR TROWER: Yes, I can. It is in the Court of Appeal. It is at F4, tab 7, page 2166.
LORD NEUBERGER: I see. Thank you very much. 2166?
MR TROWER: 2166.

LORD NEUBERGER: Yes.
MR TROWER: Now, the underlying point of principle, just so I can articulate it as we see it, what we are of course looking at in a case like this is set-off in the insolvency of a debtor, and there is no principled reason why the artificial exercise of working out whether a claim against a proving creditor would be provable in the insolvency of that proving creditor should be taken into account for set-off purposes. That proving creditor may not be insolvent itself at all. It is not a relevant factor.
LORD NEUBERGER: Yes, I see.
MR TROWER: So having swept that out of the way, we suggest where there was a danger of law heading off in the wrong direction, the question of whether an outbound claim is available for set-off is simply a question of construction of rule 2.85, which we have in the bundles at F3, tab 41.
LORD NEUBERGER: Yes.
MR TROWER: And the operative provisions -- it applies because sub-rule (1) is satisfied. There is then a description of what constitutes mutual dealings in sub-rule (2).
LORD NEUBERGER: Yes.
MR TROWER: The obligation to take the account is in (3),

and then there is a deeming provision as to what are sums to be regarded as being due to or from the company for the purposes of the taking of the account as one finds in sub-rule (4), so that is the structure of the rule.
LORD NEUBERGER: Right.
MR TROWER: As is well known, insolvency set-off is self-executing. That is the first point to bear in mind when one is thinking about the way to look at this rule. That is Stein v Blake. So although it talks about creditors proving, you don't have to actually assert a proof for the rule to have application.
When Stein v Blake was decided, though, and this is a point that is important if one is to understand the architecture of the rules, inbound contingent claims of the debtor were taken into account but outward contingent claims by the debtor against the creditor were not, in English law, anyway.
Now, in 2005, the law was changed, so the rule which you now see was introduced in 2005, which was after Stein v Blake, so that contingent outward claims by the debtor were brought into the set-off account. This was affected by a sub-rule (4). And just so you can see, any perceived unfairness that might have arisen in those circumstances accelerating the net amount is dealt with

by sub-rule (8). So although a contingent outward claim against somebody else is taken into account for set-off purposes, if there is a net amount owing to the company as a result of the circumstances, it is not payable until the contingency is satisfied.
LORD NEUBERGER: Yes, I see.
MR TROWER: Now, what we submit is that the members' liability to LBIE as a result of their contracts of membership under which they undertook unlimited liability is payable in the future. The obligation by virtue of which it is payable is contingent and its amount is ascertainable by fixed rules or as a matter of opinion. It is therefore available for set-off in accordance with rule 2.85(4), and that is an end to it.
LORD NEUBERGER: Yes.
MR TROWER: On any view, the claim and the cross-claim are both mutual and commensurable, which are other aspects which one just needs to get out of the way, and we don't understand there to be any issue about that.
In short, we simply contend that the claim is regarded as being a sum due to LBIE because it is a contingent liability due to it within the meaning of the rule at the time that it went into administration, and we don't have to get into questions around my Lord, Lord Neuberger's Nortel test in relation to obligation

incurred, because that language doesn't appear in here. What we are talking about is simply whether a liability is contingent or not. For that, you go to the basic principle in IRC v Sutherland as to what is a contingent liability, which --
LORD NEUBERGER: The case referred to in detail by Lord Sumption.
MR TROWER: Indeed. Lord Sumption referred to it and my Lord, Lord Neuberger referred to it as well in paragraph 78 to 81 in your judgment in Nortel.
LORD NEUBERGER: I see.
MR TROWER: It is the tax case.
LORD NEUBERGER: Yes.
MR TROWER: And if go to F1, page 1420, tab 17 ...
LORD NEUBERGER: Yes.
MR TROWER: I am so sorry, that is Nortel. I meant to say -- my apologies, because we need to go to F6 for IRC v Sutherland.
LORD NEUBERGER: And the passage is not cited in Nortel, is it?
MR TROWER: They are not cited in full. They are referred to.
LORD NEUBERGER: Fair enough.
MR TROWER: I think we probably ought to look at them. F6, tab 3.

LORD NEUBERGER: Thank you. Yes. F6, tab 3 is --
MR TROWER: I am so sorry, that is the wrong reference.
LORD NEUBERGER: It is.
LORD SUMPTION: Do you mean F6, tab 16?
MR TROWER: Tab 16, thank you. Yes, I do.
LORD SUMPTION: Well, now I am not sure you do, in fact.
LORD NEUBERGER: That is Re Sutherland.
MR TROWER: I am sorry, that is Re Sutherland, and it is page -- I can see what I have done. It is page 249 of the report.
LORD NEUBERGER: Never mind what you have done. 249, thank you.
MR TROWER: 249 of the report, 3319.
LORD NEUBERGER: Yes.
MR TROWER: And the two passages that matter are the paragraph beginning, "So far as I am aware" and it is the bit at the end of that, "It is a liability which by reason" --
LORD NEUBERGER: That sentence, yes.
MR TROWER: That has been used a lot, and he picks it up again in the third class as contingent liabilities.
LORD NEUBERGER: Yes.
MR TROWER: Now, LBHI say that the members' membership is not sufficient to give rise to a contingent liability within the meaning of 2.85, on the basis that there is

no contingent liability until the commencement of the winding up, I think is what they say.
We say that is simply not the case. Not only is it completely inconsistent with the origins of membership of companies, which we have looked at any way in Webb v Whiffin, it is also at odds with many statements of how the liability derives. We suggest that quite a crisp formulation of the situation of the members in the present case and why they satisfy the Sutherland criteria is apparent from a little -- it is a case we only found relatively late, I am afraid, so it is in the supplemental bundle, G --
LORD NEUBERGER: Right.
MR TROWER: -- called Newton v Anglo-Australian Investment, which is a decision of the Privy Council, and it is Lord MacNaghten.
LORD NEUBERGER: G/2, yes.
MR TROWER: G/2. Do you have a G bundle?
LORD NEUBERGER: I do, yes. It is a white file like this (Indicated).
MR TROWER: Yes, that is the one. Tab 2, page 17.
LORD NEUBERGER: Yes.
MR TROWER: And it is we suggest a rather elegant way of expressing the point, and it begins about eight lines down, "The liability of a contributory".

LORD NEUBERGER: Yes, they were helped by that sentence, I can see, yes.
MR TROWER: "The concept of not springing into existence for the first time. It is the ripening of the liability that the contributory undertook when he became a member."
And a similar, although slightly different way of putting it is Lord Romilly in China Steamship, which is F4, tab 20, page 2422.
LORD NEUBERGER: Yes.
MR TROWER: The top of 2426.
LORD NEUBERGER: Thank you.
MR TROWER: Now, he is dealing with section 75, which characterises the liability of a person to (inaudible) the assets of a company being deemed to create a debt. It is that point. He describes the debt in Latin language, which I am not sure whether I am allowed to use or not --
LORD NEUBERGER: Yes, you are.
MR TROWER: -- at the top of the page, on page 244, 2426 of the electronic version.
LORD NEUBERGER: Well, if you couldn't use Latin, you couldn't say ex parte Pickering.
MR TROWER: Yes. Now, so expressed, we respectfully submit that the requirements of contingency within the

contemplation of rule 2.85 are plainly satisfied. Of course we accept that the cause of action under section 74 is incomplete until such time as the company has gone into liquidation and the call has been made, but that doesn't mean that the members are not under a contingent liability to the company from the time they undertake their contract of membership.
LORD NEUBERGER: It could be said to be a bit odd, I suppose, to say it can't be a contingent liability because it only arises if the company goes into liquidation, and contingent liability by definition only arises if something happens.
MR TROWER: Well, quite. To be fair to my learned friend, he may say that it becomes contingent then because it only becomes actual once the call has been made.
LORD NEUBERGER: Quite.
MR TROWER: That may be what he says. So to that extent, there is still a contingency, although then it is a very, very immediate contingency, if I can put it that way.
LORD NEUBERGER: The fact that there is a double contingency doesn't stop it being a contingency.
MR TROWER: No, absolutely not.
LORD REED: Can you say it is debitum in praesenti, if that is how it is put -- yes, debitum in praesenti -- if it

remains to be seen whether the putative debtor will be on the settled list of contributories?
MR TROWER: Yes, you can still say that, because that is just one of the contingencies. It still remains a debt, albeit a contingent debt. The word "contingent" is capable of qualifying and characterising the word "debt".
LORD REED: Yes.
MR TROWER: So can I then move on to the question of provability, either if we are wrong on that or in any event, if I can put it that way. If we are wrong on that for set-off purposes but in any event for proving in their administrations. We deal with this in paragraph 226 and following of our case.
Now, the members contend that the judge and the Court of Appeal were wrong to decide that LBIE will be entitled to lodge a proof. We disagree. We disagree for the reasons that both Lord Justice Briggs gave in paragraphs 205 to 234 and the judge gave in paragraphs 195 to 226.
The question here turns on a slightly different question, because it turns principally on the construction of rule 13.12, as my Lords know and as interpreted by the Supreme Court in Nortel. Here, we have the definition of debt that my Lords are by now

well familiar with in rule 13.12(1). It either has to be a debt or liability which the company is subject to on the date on which it goes into liquidation or may be subject to after that date by reason of an obligation incurred before that date.
LORD NEUBERGER: Yes.
MR TROWER: Plainly, the liability itself is capable of falling within the concept of liability as defined in the rule, whether you characterise it as a liability under a contract or a liability under an enactment or a combination of the two.
LORD NEUBERGER: Yes.
MR TROWER: And then if one just looks at rule 13.12(5), just so my Lords have that note, it provides that the rules are to be read as if references to winding up were references to administration, so that is where one gets the pull in to the administration.
LORD NEUBERGER: I see.
MR TROWER: We submit that the liability is of course the contingent liability under the call. The obligation by reason of which it may become subject to that liability is the obligation that LBIE incurred as a result of the contract of membership. It is as simple as that.
Now, the wording, including in particular the words "by reason of any obligation incurred before that date"

in rule 13.12(b) go right back a long way. But we respectfully suggest that my Lords probably don't need to go anywhere apart from going back to look at Nortel, because quite a lot of the old law was swept away when Nortel was decided. My Lords may well recall how many of the old cases in this area which were a little bit confused were actually overruled. So it is probably not very helpful to look at a lot of the old stuff.
Now, our primary submission is that the liability which will arise after the members insolvency event arises as a result of the contract of membership, and so actually it is a case which falls in large part within the situation contemplated in paragraph 75 of Nortel. Perhaps we can just turn that up, F1, 17.
I am not going to submit that this gives the complete answer, but it is the starting point, because we say it can fairly be said that the contract of membership imposes contingent liabilities on the members, thereby imposing the incurred obligation. The reason that is important is because Nortel was actually of course concerned with a rather different context when you were thinking about the three-stage test, because the question in Nortel involved trying to assess when it was that what was a statutory obligation at large became sufficient of an obligation incurred for the purposes of

satisfying the test in the relevant rule.
We say it is a much, much closer nexus that we have in the case of membership of a company. There is a contract between the company and its members from which a liability under section 74 may ultimately spring.
LORD SUMPTION: It is the combination, isn't it, of membership of the company and statutory scheme?
MR TROWER: Yes, I accept that. I accept that you have to have the statute in order to crystallise the liability. I accept that. Which is why I don't say that one gets the whole answer from paragraph 75. I wouldn't submit that. We need to grapple as well with whether there is anything else. But you are still in search of the question of: where is the obligation incurred? And if one steps back and asks one's self, well, do you incur obligations, most people would think you incur obligations when you undertake a relationship of membership to a company in an unlimited form.
We suggest that this is confirmed in some respects by the statutory scheme under which the liability ultimately crystallises, because it deems the contributory to have been subject to a debt since the time when he first became a member, which is the way section 80 works:

"The liability of a contributory creates a debt in England and Wales in the nature of an ordinary contract debt due from him at the time when his liability commenced but payable at the time when calls are made for enforcing the liability."
Now, this identifies the relationship, even though it cannot of course crystallise into an actual accrued cause of action until after liquidation.
In our submission, what the structure of the Act and the authorities show is that there isn't anything surprising about the obligation being incurred for the purposes of sub-rule (b) at the inception of the contract of membership. The insolvency code is perfectly content with the idea that a debt of the type that falls within (1) is deemed have accrued at the inception of the contract of membership. When one sees the way the membership relationship is characterised throughout the authorities, one gets that impression.
So it is a situation in which the original relationship arises under a contract, and the statute then makes provision for the consequences of that relationship, which is the point I think my Lord, Lord Sumption was putting to me a moment ago. That is why we say that there is a rather different flavour and emphasis to what one is looking at in this case.

Now, as I say, we accept that we still need to look at the questions that are raised by Lord Neuberger in paragraph 77, because it is helpful, but the mere fact that a company could come under a liability pursuant to a provision in statute which was in force before the insolvency event can't mean that where the liability arises after the insolvency event it falls within 12(1)(b). That is the first point made by Lord Neuberger.
The second is that normally, in order for a company to have incurred a relevant obligation, it must have taken or been subject to a step or combination of steps which had a legal effect, and so on. My Lords get that from paragraph 77.
The key factual points to bear in mind in this kind of situation, and one can test them as to what the position is here, are that first of all the members became shareholders in LBIE, an unlimited liability company; second, LBIE went into administration in September 2008; thirdly, LBIE's administration has become a distributing administration in which the administrators have paid 100p in the pound to the ordinary unsecured; fourthly, they are faced with proofs from the members at a time when the debts and liabilities falling within section 74 remain unpaid;

and, fifthly, the administration is an administration in which liquidation has been selected by the creditors as an exit route. So one has to look at the application of the Nortel test against the background of those two statutory contexts.
Now, what has happened is that as far as 77(a) is concerned, had some legal effect, we simply say that the members have taken steps and have been subject to steps which have legal effect by giving rise to a legal relationship because they are shareholders in an unlimited liability company at which stage the legal relationship arose. It is as simple as that.
LORD NEUBERGER: Yes.
MR TROWER: As far as (b) is concerned, we say they became vulnerable to the liability in question such that there would be a real prospect of the liability being incurred. All that is required now is for LBIE to go into liquidation.
The members is suggest that vulnerability only arises in a case like this on a liquidation. At least, I think that is the point they make. I picked it up from paragraph 60 of their case, although I don't think it was quite put like that by Mr Isaacs. We suggest that is introducing a much too narrow an approach, particularly against the policy of expanding

provability. The vulnerability and the real prospect of the liability being incurred arose at the time of membership.

It might be said that there was insufficient vulnerability prior to the commencement of LBIE's insolvency administration, but once the administration intervened, there is no doubt that there was a real prospect of liability being incurred. All that was required was a state of affairs in which it was in the creditors' interest to move into liquidation.

LORD NEUBERGER: I understand.

MR TROWER: However one looks at it, from the time of administration, the members were well inside the penumbra of the regime, which I think was one of the phrases used.

As far as (c) is concerned, we submit that it is consistent with the statutory regime in respect of calls to conclude there is an obligation. This, I think, was really probably the main focus of Mr Isaacs's submissions. He said it would be inconsistent with the statutory regime for the prospective liability of the contributory to be provable.

LORD NEUBERGER: Yes.

MR TROWER: Now, there are a number of points as to why we say there is no inconsistency. The first is that if

there had been a call by a liquidator of LBIE before the commencement of the contributory's administrations, it would be provable.

LORD NEUBERGER: Yes.

MR TROWER: One has to remember one is looking at this from the perspective of the company into which the proof is being made. The fact that a call has not yet been made should not makes any difference to the analysis. It would be somewhat arbitrary if the characteristics and treatment of the liability under the call regime should turn on when the call happens to have been made if its based on the membership of an unlimited liability company which existed before the insolvency event.

LORD NEUBERGER: We are reading straight from 2462 of your --

MR TROWER: Am I? I am sorry, one sometimes forgets --

LORD NEUBERGER: No, it is fine. I would echo what I said to Mr Isaacs. But that's fair enough, okay.

MR TROWER: Secondly, there is nothing unexpected or contrary to the legislature's intention for the liability of a contributory in respect of future calls to be provable. We make a point about where the contributory is an individual, there has never been any objection to that, and we refer to section 82(4).

Now, the fact that this provision may only apply to

contributories who become bankrupt and not also to contributories who go into administration, doesn't go anywhere. The judge explained why it didn't go anywhere in paragraph 145 of his judgment and we deal with the point in our case at paragraph 250.

It is then said that there is a difference between a future call where the company has gone into a liquidation but the call has not been made, and a future call where the company has not yet gone into liquidation. In the first situation a proof is possible, but it is said in the second it is not. I will just come back to that in a moment.

The third point is that LBIE relies on a number of cases which are said to demonstrate that the legislation only contemplated a post-liquidation proof for a future call because it was only post-liquidation that the deemed debt, in the form of an ordinary contract debt that arises under section 74, actually arises.

It is important to bear in mind the following about them: they were all exclusively concerned with the simple question of when it was that the actual liability under section 75 of the 1862 Act, which is the equivalent, actually arose. They weren't concerned with the question of whether the members were subject to a contingent liability at the time the member went into

liquidation or distributing administration.

Indeed, bear in mind that insofar as those earlier cases are concerned, the question of provability of contingent liabilities was in a relatively undeveloped state. You could only, for example, prove in relation to future liabilities in respect of a lease from 1888 onwards, in Hardy v Fothergill. It is only really there that contingent liabilities started to be properly grappled with. Since then, the courts have got much more comfortable with the idea that almost any obligation is capable of being valued and proved.

LORD NEUBERGER: Yes.

MR TROWER: Mr Isaacs also went on to many of the provisions in respect of the calls for the purpose of pointing out that they don't apply until the company goes into liquidation, and he looked at a whole series of points about settling lists of contributories, adjusting rights of contributories, and suggesting that they don't apply until you go into liquidation. Of course we accept all of that, but it doesn't take us very far because all it means is that the contingency has not yet occurred.

Now, one point, for example, is that Mr Isaacs relies on section 74(2)(a), which provides that a past member isn't liable to contribute if he ceases to be a member for one year or more before the commencement.

But the fact there are possible factual scenarios in which the contributory will cease to be contingently liable is irrelevant. That is a definition of a contingency, at the end of the day; it might occur, it might not.
LORD NEUBERGER: We have that point.
MR TROWER: So we respectfully suggest that that doesn't take one very far, and Lord Justice Briggs dealt with this point in paragraph 226 of his judgment.
LORD NEUBERGER: Yes.
MR TROWER: Where he effectively says that you simply deal with this by the value you put on the contingency in the administration of the member.
LORD NEUBERGER: Yes.
MR TROWER: Officeholders are required to estimate, and so on.
LORD NEUBERGER: Yes.
MR TROWER: He then had a series of points about the difficulties that would arise when there is a receipt of the (inaudible - proofs?) of proof before the time contemplated before the time contemplated by the statutory scheme. He says that too points against the statutory source of the obligation satisfying the requirements of paragraph 77.
Now, one needs to be careful to remember the context

in which the significance of these points arises, because LBIE itself, as the proving party, is already in distributing administration and subject to its own statutory scheme, with its own payment waterfall, which is very close to that of the liquidation scheme. It is not a going concern.
Now, it is said that there are significant differences in the administration of statutory waterfall, because costs and expenses of the administration, for example, don't fall within it. Now, that is not right, because the costs and expenses of the administration are materially the same, and are likely to be incurred in the same way if the company was in liquidation rather than administration. In any event, to the extent that they have been incurred and not paid in the course of the administration, they would be charged and paid out of the assets in LBIE's liquidator's hands at the time the administrator goes out of office.
So we say that one has to bear that in mind when one is looking at how the proceeds and the fruits are actually to be dealt with.
Mr Isaacs also submitted that difficulties would arise if directors were to be permitted to prove for a call, and it found some resonance with

Lord Justice Briggs, because he said he had some concerns about the fruits of proof in relation to a future call if they were to fall into the hands of somebody other than a liquidator.
But Lord Justice Briggs answered his own concerns in paragraphs 229 to 231 of his judgment and I respectfully can't improve on that.
LORD NEUBERGER: Okay.
MR TROWER: The critical point when thinking about the circumstances in which the proof may have to be made are that it will inevitably be the case either that both member and company will be subject to a collective distribution process, or the company itself will be on the cusp of insolvency, because otherwise it wouldn't be possible to give a material value to the contingent inward claim.
LORD NEUBERGER: Yes.
MR TROWER: So, my Lords, that is the core of our submissions in relation to that bit of the case.
LORD NEUBERGER: Yes. As with Mr Isaacs, you make a number of points in answer to him in various paragraphs around 250, and before and following, which we will obviously take on board.
MR TROWER: My Lords, that then takes me on to the contributory rule about which I need to say a few words.

LORD NEUBERGER: Yes, indeed.
MR TROWER: The classic statement of principle is given by Mr Justice Buckley in West Coast Gold Fields, F6/21/3419. We don't need to turn it up.
LORD NEUBERGER: This is set out in your paragraphs 261 and 262.
MR TROWER: Yes. The critical point here about the contributory rule is that it does three things, and we need to bear this in mind. The first thing is it protects the pari passu rule, that is the first thing it does. The second thing is it fills the gap left by the disapplication of set-off.
LORD NEUBERGER: So if you are wrong on set-off, this is where it has this very point, yes.
MR TROWER: Yes, and the third thing is that it ensures that the statutory mechanism for making calls in a liquidation isn't defeated. That is the other context in which it is looked at.
We just need to look very quickly, just so my Lords see it, although no more than this, is Grissell's Case, which is F1/18, because it is the source of it. I am only going to take my Lord to two or three cases on this.
LORD NEUBERGER: F1/18. That's right, we looked at that, Overend, Gurney.

MR TROWER: Yes.
LORD NEUBERGER: Yes.
MR TROWER: Now, there is one point that I do need to bring out.
LORD NEUBERGER: Yes.
MR TROWER: It is called Overend, Gurney & Co, as well as, Grissell's Case.
LORD NEUBERGER: Yes.
MR TROWER: I do need to bring it out, because at page 534, the paragraph beginning "Both applications" -- sorry, which is page 1440.
LORD NEUBERGER: I am sorry, thank you.
MR TROWER: I beg your pardon.
LORD NEUBERGER: No, that is fine. Yes.
MR TROWER: And would you read from "Both applications" down to the end of the quote, about halfway down the page, "and interests in the company". The point that is important here is he is making clear that this is a question that depends on the construction of the company's legislation. So it is the court actually extrapolating the consequences of an enactment, and it is important for my argument because it demonstrates that this is why we say that it is sensible for my Lords to extend the application of the rule in the context of the new administration, distributing administration

procedure.
LORD NEUBERGER: Taking it to "interests in the company".
MR TROWER: I think that is all we need to go to.
LORD NEUBERGER: And this is really encapsulating the principles you have identified to us?
MR TROWER: Indeed.
LORD NEUBERGER: Yes, I see, thank you.
MR TROWER: And then if we can go to Lord Walker in Kaupthing, which is in the same bundle, tab 13.
LORD NEUBERGER: Thank you. Yes.
MR TROWER: Now, Kaupthing is based primarily on the rule in Cherry v Boultbee.
LORD CLARKE: You have set out paragraph 52.
MR TROWER: Yes. The bit I want for this purpose, actually, is 1283.
LORD NEUBERGER: Right. Paragraph?
MR TROWER: Paragraph 13.
LORD NEUBERGER: Thank you.
MR TROWER: Where he cites with approval the decision of Mr Justice Kekewich in Ackerman. And if we then go on --
LORD NEUBERGER: Yes.
MR TROWER: -- to look at his description of the rule in paragraphs 51 to 53, which I think my Lord, Lord Clarke has just mentioned that I cited.

LORD NEUBERGER: Yes, he did. (Pause)
Yes.
MR TROWER: So the upshot of those two cases is that the contributory rule is necessary to plug the gap left by the inapplicability of set-off.
LORD SUMPTION: Why did he have no right of set-off in this case?
MR TROWER: The reason you get that, actually, is an operation of section 101 and it is actually a point my Lords should probably just quickly look at. If we go back to Grissell's Case.
LORD SUMPTION: Page?
MR TROWER: Tab 18, page 1441, starting at the bottom of page 535 of the report, "The two remaining questions may be considered together". And if one then just reads there and most of the way down the next page, you can see that because of the way section 101 worked, the amount of the call could not be set-off against the debt.
LORD NEUBERGER: That is a scheme of the act point.
MR TROWER: It was a scheme of the act point. It was a construction of section 101.
LORD NEUBERGER: Yes, I see.
MR TROWER: And there was actually a distinction between the position of limited and unlimited members, because in

fact you could have a set-off in respect of unlimited liability. He explains that point in the case of a member of a limited company is different from that of a member of a company of unlimited liability on page 536, that point being something that one gets from the construction of section 101.
So what we suggest is that what this rule is, is an example of the court acting in aid of a statute to ensure that the intention of the legislation is not defeated. There are plenty of other contexts in which this sort of principle is applied. Probably the most obvious example is the anti-deprivation principle which was being considered at some length in the authorities recently in the Belmont case. The rule against double proof, which was the point which was in issue in Kaupthing, as well, is another example of a case where a court has actually invented a rule which isn't to be found anywhere in the legislation, but which is obviously a necessary rule of justice to ensure that the assets are applied pari passu.
My Lords, I will finish in ten minutes. Shall I keep going, rather than stopping at half past?
LORD NEUBERGER: I think so, that is a good idea.
MR TROWER: So why do we say the contributory rule should apply in an administration? There are four key features

on LBIE's administration on which we rely. The first is it is a distributing administration, so we would accept that it wouldn't apply save in a distributing administration for obvious reasons. The assets are being distributed, but the reason we say it is important is that in a distributing administration, the assets are being distributed once and for all with irreversible consequences.

The second point is that the pari passu rule is applicable in LBIE's distributing administration and we have seen that rule already; it is rule 2.69.

The third consideration -- and we say that those two considerations alone are sufficient -- is that liquidation has been selected as an exit route in the proposals according to which the administrators must manage LBIE's affairs.

The fourth, as a consequence of that, if and when LBIE goes into liquidation, the statutory mechanism in respect of calls will come into effect and it will be possible for calls to be made without limit. The point --

LORD REED: Evidently not if the liability of the contributory has already been discharged.

MR TROWER: Well, we are talking of course here about unlimited liability.

LORD REED: Mm-hm.

MR TROWER: So it won't --

LORD REED: But if it has been valued as a contingent liability and has then been dealt with in the administration, does that not bring it to an end?

MR TROWER: No. I don't think I can submit that if you value it and deal with it in the administration, as a contingent liability, it excludes the liquidator from ever making a future call.

LORD SUMPTION: You can in principle make any number of calls; it is not a one-off thing.

MR TROWER: Yes. It is against the background of this being unlimited liability. But my Lord, Lord Sumption is right: members will very often be subjected to more than one call, or the legislation contemplates that members will be subjected to more than one call as the process of determining how much is required is worked through.

LORD SUMPTION: As the company's accounts deteriorate.

MR TROWER: Yes.

LORD REED: So the contributor is treated as having made, as it were, a payment of account.

MR TROWER: In effect, yes, when it is an unlimited liability, that would be right. It would be same, actually, and it wouldn't very often happen, but if there were unpaid shares, it might happen, too, because

the liquidator may take the view that he only needs so much in order to satisfy the sufficiency.

LORD REED: So the liability is no longer unlimited; it is, in theory, to the extent of a company's debts in the liquidation, less the amount he has already paid.

MR TROWER: Yes, which is why, at the end of the day, all this argument boils down to is a complaint by the members that they are being asked to cough up early, in circumstances where the whole point of proving in an insolvency of someone like a member for a contingent liability, is that they will have to cough up early within the estate, because that is what proving is all about. Proving accelerates the participation right of the person seeking to prove.

LORD NEUBERGER: Just as much as you can prove for a contingent debt.

MR TROWER: Yes.

LORD NEUBERGER: It can't be said you are not owed the money yet.

MR TROWER: Yes. Of course it is tough on one level, but it is tough to an insolvent.

LORD NEUBERGER: Yes, but you get a discount.

MR TROWER: Yes, you get that, too.

LORD REED: Also, at the end of the day, it affects creditors if a company goes into liquidation. It has

been trading as a company unlimited liability, but at the end of the day, just say it had two shareholders, both of which had gone into administration and been dealt with in the way that you are suggesting, then the creditors would then discover that its not a company with unlimited liability.

MR TROWER: I am sorry, my Lord, I am not sure I am understanding in what context they would discover it is not --

LORD REED: In the event that the company went into liquidation, the liquidator made calls on the contributories, but the extent to which they would have to meet calls would be restricted by the fact that they had already met the extent to which their contingent liability had been assessed in advance of the liquidation.

MR TROWER: Well, no, because it wouldn't work like that, my Lord, because the only context in which one could have a call is either in respect of unlimited liability or in respect of unpaid shares. So far as unpaid shares are concerned, you can make a call anyway, irrespective of liquidation. As far as the unlimited liability is concerned, which is the only context in which one has a proof arising, it is an unlimited liability, end of story. They are liable for the debt and liabilities of

the company. So the fact that there has been an earlier payment in respect of a proof is neither here nor there.
LORD SUMPTION: You would say per contra that if you are wrong, then the benefits of the unlimited company to the creditors would actually be severely undermined.
MR TROWER: Indeed, my Lord.
LORD NEUBERGER: Because they would be paid only on the basis -- they would have to share with the people who are meant to be liable to contribute, without having the benefit of those who are meant to be liable to contribute having their liability to contribute taken into account when assessing the dividend.
MR TROWER: Yes.
LORD SUMPTION: You are effectively submitting, are you not, in answer to my Lord, Lord Reed, that the acceptance of a proof at a given valuation is not a compromise or settlement of all liability under section 74.
MR TROWER: My Lord, I am.
LORD SUMPTION: It is a settlement only of such liability as is envisaged for the moment, which may turn out not to be the whole of it.
MR TROWER: Yes, it is like any contingent proof, and one gets it from Stein v Blake, apart from anything else.
LORD SUMPTION: Contingency may turn out to be for a greater sum.

MR TROWER: It may, or a lesser sum.
My Lords, just to finish off on the contributory rule, because I think that is really where I have got to, the judge's position in relation to why the contributory rule shouldn't apply is to be found in paragraph 188 of the judgment, where he said that the difficulty in applying it is because there is no statutory mechanism for making calls on contributories, while there can be no calls and therefore nothing that those members could do to put themselves in a position where they could prove as creditors in respect of their subordinated and unsubordinated claims.
Now, that is conceptually correct insofar as it goes.
LORD NEUBERGER: Yes.
MR TROWER: But it is not, we respectfully suggest, an answer to the extension of the contributory rule that we seek, particularly given that we are only seeking it in the context of the existence of unlimited liability. So it is always open to the members to discharge the entirety of their liability.
That, in essence, is the reason why we say that the judge and Lord Justice Briggs weren't right to reject the concept of applying the contributory rule.
LORD NEUBERGER: Did Lord Justice Briggs agree with that?

MR TROWER: He did, yes.
LORD NEUBERGER: So it could be said to be a bit similar to the Grissell's Case in the sense it is a scheme of the act.
MR TROWER: Yes.
LORD NEUBERGER: Here they have a right to call on contributories. If there is nothing there about the right, then one is to presume that there is nothing in it. But of course the right to call on contributories is not a statutory right, is it? Or is it a statutory right?
MR TROWER: A right to call? Yes, it is part of the scheme.
LORD NEUBERGER: It's in the statute itself?
MR TROWER: Yes, it is.
LORD NEUBERGER: And the circumstances in which you can call are in statute?
MR TROWER: Yes, they are in the statute too.
LORD NEUBERGER: That is really the point, then, being made by Mr Justice Richards.
MR TROWER: Yes, I think that is right, yes.
LORD NEUBERGER: Thank you.
MR TROWER: My Lords, we say at the end of the day, one can see how this has developed as a question of statutory construction through Grissell and Kaupthing.
LORD NEUBERGER: Yes.

MR TROWER: If this is the only way of achieving a result which ensures that the underlying policy in relation to the pari passu rule and the future ability to make calls is preserved, well, then, it is a legitimate source for developing the law on the basis of existing judge-made rules.
LORD NEUBERGER: Thank you.
MR TROWER: My Lord, those were my submissions. I am afraid I rather galloped this morning. I hope I didn't gallop too fast.
LORD NEUBERGER: I am grateful, as I say, particularly on the issues which Mr Isaacs addressed us on. I was concerned to have an equal playing field, a level playing field, but also the detail is in your submissions as it is in Mr Isaacs's.
LORD REED: You may have gone a little bit too fast for me, or I may be rather slower than the rest of the class. I am still a little bit puzzled about the contributory.
MR TROWER: Yes.
LORD REED: As I understand it what we are envisaging is that the company is proving a contingent liability owed to it by the member in the administration of a member.
MR TROWER: Yes.
LORD REED: And if it proves the debt, then the company receives an amount from the administrator by way of

a distribution.
Now, first of all, does that amount then form part of the assets of the company?
MR TROWER: Yes.
LORD REED: So it doesn't form a special statutory fund set aside for winding up purposes.
MR TROWER: No.
LORD REED: And having paid that amount, if there is then a subsequent liquidation of the company, do you say that that amount that the member has already paid is ignored when assessing the members' liability to contribute in response to a call by the liquidator?
MR TROWER: Well, I don't say it is entirely ignored, in the sense that I can see circumstances which may arise when, on the adjustment of rights between contributories, for example, it may affect the amount of the call that the court was going to enable the liquidator to make. But I do say that if one simply -- let's assume you have a single member company, or only one member who is ever going to have a call made against them.
LORD REED: Yes.
MR TROWER: It will affect only to the extent the fact that the liability has come in at an earlier stage means that there is more money there so that the deficiency in the assets will be less as a result.

LORD NEUBERGER: There is clearly no problem for you where there is unlimited liability with one contributor, because we have just gone calling on him or her until either they are bankrupt or the liabilities are met.
LORD REED: Well, Lord Lindley might have thought there was a problem, because his theory, as I understood the Pyle Works judgment, was that the whole point of this was to establish a statutory fund available in a winding up and in a winding up only in order to meet any deficiency that might be in the assets.
MR TROWER: Yes, but that, my Lord, is against the background of a situation -- well, there are two things. It is largely against the background of a situation in which the law in relation to the ability to prove in respect of these things was ill developed. But secondly, and in any event -- and the consequence of that is that we are now in a situation where the law recognises the ability to accelerate in many different contexts by way of proof the receipt of something for which there is presently no accrued cause of action, outside of the realm of proof, and one has to look at Pyle Works and that sort of line of authority against that background.
LORD REED: Yes. But the practical effect is that the company can get in the money as part of its assets, use

it to carry on trading, ostensibly as a company of unlimited liability, end up going into liquidation and, in the single member situation that you are envisaging, the liquidator cannot then call in as much as he otherwise would have been able to call in.
MR TROWER: No, he can. I say he can call in the entirety of the deficiency at the time it goes into liquidation, notwithstanding any earlier proofs that may have been made.
LORD NEUBERGER: That is because it is an unlimited liability.
MR TROWER: Yes, that is because it is unlimited liability.
LORD REED: But the member is required to contribute twice over.
MR TROWER: Yes, one has to be practical about it in this sense: first of all, in the present case, as it happens, the proof is being made by a company in administration so there is a statutory scheme, and one can quite see that more difficult issues might arise in relation to a going concern company, some considerable period of time prior to the -- but in that context, it would probably be quite unlikely that you would be able to demonstrate sufficient value to the contingency, because one of the values of a contingency on the inbound proof is the prospect of the company going into liquidation.

If the company is carrying on trading, it is a bit difficult to conceive of the directors saying, "Well, we wish to prove in respect of the contingent liability to us, the contingency being the liquidation", and that may in practice be the answer.
But what this exchange may also illustrate, my Lord, is that this may be one of those points where of course the court has to take a principled approach to it, and I have explained what we say the principled approach is, and one can see that in the context of an administration there is plain sufficient vulnerability and a plain application of a scheme which is consistent with the proof, but before a company goes into administration, it may be that there are other considerations.
LORD SUMPTION: Are you actually right to accept Lord Reed's double payment point?
MR TROWER: I didn't think I had, actually.
LORD SUMPTION: Oh, in that case ...
MR TROWER: Maybe I did.
LORD SUMPTION: Presumably, if a call is made under section 74, in an administration, which of course begs a large question, and the company continues to trade, the amount of the call, however often it is made, is limited to the amount of the debt.
MR TROWER: Yes.

LORD SUMPTION: So if you have paid an amount equal to the totality of the debts, the mere fact that they aren't used to discharge the debts is neither here nor there. You have hit the limit of your liability. You can only have a further liability if further debts arise, which of course if you are continuing to trade they may well do.
MR TROWER: Yes. I mean, I see that. The question is always going to be at the time the call is actually made, what is the state of the company's balance sheet as far as whether or not there is a requirement to get in money that is sufficient for payment. And what the mischief I discern it may be being put is that what is being done when you make a pre-liquidation proof and have a receipt of fruits is that you are getting in money early on, earlier than you should be.
LORD REED: Yes. I mean, effectively what I am putting to you is Lord Lindley's theory of what the purpose of having contributories of this kind is.
MR TROWER: Yes.
LORD REED: Not to supplement companies' assets but to create a statutory fund in the event of a winding up.
MR TROWER: Yes, I understand that, and that is plainly right insofar as it goes. But of course it is only right -- one is ignoring in looking at it that way the

consequences of the insolvency of the member, which is what this is all about, because the proof question only arises where the member is insolvent, which is why we say the point ultimately -- I mean, I understand why my Lord puts it to me -- doesn't go anywhere, because we are looking at a proof in the insolvency of a member.
LORD NEUBERGER: Thank you very much, Mr Trower. We will come back at 11.55 and hear Mr Dicker then. Thank you very much.
The court is now adjourned.
(11.43 am)
(A short break)
(12.02 pm)
LORD NEUBERGER: I am afraid we are rather late, but our excuse is that we were discussing this case, you will be glad to hear, and we do have a bit more for Mr Trower.
It strikes us that possibly there may be an inconsistency between the conclusion that you succeed on this last point on set-off but you fail on contributory on the basis that essentially the whole nature of the call on contributories is that it waits until the company is in liquidation and the liquidator then calls. If that is right, is it really, although it may be otherwise a contingent liability within the meaning of the relevant rule we looked at for

administration, it would be excluded by the scheme of the statutory provisions.
MR TROWER: I am wondering about the impact of the unlimited liability on that question in this sense -- and maybe this isn't quite answer to my Lord as I am thinking on my feet, but in this sense: the unlimited liability of a member to contribute is one of the reasons why set-off was regarded as acceptable under the old law. That was the distinction that was drawn by Lord Chelmsford -- do I mean Lord Chelmsford? Anyway, in Grissell's Case, between the situation of an unlimited liability member and a limited liability member for set-off purposes. But I am not sure --
LORD SUMPTION: But why would the unlimited character of the liability make a difference to this point?
MR TROWER: Well, maybe I haven't quite grasped the point. Maybe that is the answer.
LORD NEUBERGER: The whole point of the liability of the contributor is that he gets called on to meet particular debts in the company.
MR TROWER: Yes.
LORD NEUBERGER: By the liquidator.
MR TROWER: Yes.
LORD NEUBERGER: And that waits for the liquidation.
MR TROWER: Yes.

LORD NEUBERGER: That seems to be the theory behind Mr Justice Richards's approach, in theory. In principle, he says there is nothing in the act that let's you call it in earlier.
MR TROWER: Yes.
LORD NEUBERGER: Why wouldn't that serve, as it were, as a scheme of the act argument, almost? Why wouldn't it serve to carve out -- and you have the points Lord Reed made to you justifying that. Why wouldn't that apply equally to excluding it from liability, as a contingent liability within the relevant rule if you are looking at the scheme of the act?
LORD SUMPTION: It might be said to be a contingent liability but not a liability owed to the company. It is a liability arising under a power of a public law nature vested in the court.
MR TROWER: Yes. I understand. Sorry, I had misunderstood the question.
LORD NEUBERGER: I put it badly.
MR TROWER: I understand the point now. What that point depends on at the end of the day -- yes, I accept -- is whether or not one can properly characterise what is being recovered, ultimately whether one can properly characterise what is being recovered as an asset of the company.

LORD SUMPTION: That is a different point, isn't it?
MR TROWER: Doesn't it have the same consequence?
LORD SUMPTION: The wording of the section 74 itself indicates that it becomes when paid an asset of the company because you are contributing to the assets of the company.
MR TROWER: Yes.
LORD SUMPTION: What we are concerned with is the nature of the liability to meet a call under section 74 before it has been made.
MR TROWER: Yes.
LORD SUMPTION: And that liability might be said not to be owed to the company at all, but simply to be a liability of a public nature.
MR TROWER: Yes. Well, I see the argument. The question then is, or the point I think then that is put against me on that, is that there is nothing there that is capable of being realised, or protected, by way of a proof in the insolvency of a member if there is not even a contingent liability, was what I think my Lord put.
LORD SUMPTION: Well, it is contingent but it is not owed to the company.
MR TROWER: But that is where we say it does and must go hand in hand with the characterisation of the ultimate

receipt being an asset.
LORD SUMPTION: Because there can't be a liability without a creditor.
MR TROWER: Without a creditor.
LORD SUMPTION: I wonder whether that is true. You can have an obligation under a statute to pay a sum of money which is enforceable through the powers of the court without its necessarily being owed as a debt to a private person.
MR TROWER: Well, I understand that, but it doesn't fit conceptually very well with the concept of section 74 being to contribute to the assets of the company, we would suggest.
LORD SUMPTION: Unless there is a difference between the obligation and the fate of the funds when they turn up.
MR TROWER: Well, I see where one would have to draw the dividing line, I understand that point, but we respectfully suggest that that is not the right way of looking at section 74 because of the concept of bringing in the assets into the company. I realise I am repeating myself.
LORD SUMPTION: It may be that you are able to distinguish the position entirely, but there are of course other powers which a liquidator has, for example to require money to be paid by a person who has been unlawfully

preferred.
MR TROWER: Yes.
LORD SUMPTION: Now, the effect under the current law is that the proceeds of the exercise of that power become assets the company.
MR TROWER: Yes.
LORD SUMPTION: But would one say that the company could prove in the insolvency of the preferred creditor for that amount on the basis that the value of the preference was a debt owed to the company? I suspect not.
MR TROWER: No, I think I would have to accept that is right.
LORD SUMPTION: And isn't that actually an analogous situation?
MR TROWER: No, it is not. Because under the relevant preference legislation, the cause of action is characterised by reference to something that the liquidator can do.
Now, I appreciate that under section 74, what you have is a call that is delegated by the court to the liquidator. I understand that. But that doesn't -- what is going on in a preference or a wrongful trading context is that you have a statute that makes provision for the reversal -- and I sort of touched on this in

submissions -- of some form of preference or something of that sort, for the purposes of enforcing the pari passu rule. And these cases all arise in the context of whether or not the proceeds are capable of being charged to a debenture holder. That is the context in which they arise. They don't arise in the context that we are considering.
So that is the way we would suggest you need to be thinking about it. I mean, I quite understand that what happens when you get in a 239 preference claim is it comes into the central pot under the law and is then distributed in accordance with the statutory code, in that way, and I don't think I would submit that you could prove in respect of a prior preference liability. But we do say that once you look at the background to the nature of the obligation to contribute in this case, that that does constitute a liability which can be identified as such. It is a liability of the company that crystallises at the time that the liquidation takes place.
LORD REED: I am just wondering, it may amount to the same point, but a different way of putting it might be to ask: who is it that has a right to enforce the liability? And on one view, one might say the scheme of the statute is the liability is enforceable only by

a liquidator and, if that is right, then the effect would be that the company prior to winding up couldn't prove for the debt, albeit it otherwise met the statutory definition of a provable debt.

MR TROWER: I mean, one of the differences, of course, is that we are looking here at provability and so we are looking at the relationship that existed between the member and the company, and there is a relationship pursuant to the member -- you know, the company and the member have that relationship. If that is the source of the liability which gives rise to the ultimate title, that is very different from the situation that one is concerned with in a section 239 case.

LORD SUMPTION: You accept the source of it is actually the statutory scheme, isn't it, without which the membership would add up to nothing in this context. I mean, if one looks at the logic of Nortel the reason why it is a liability, and therefore capable of being treated as a contingent liability, is that the statutory scheme exists before the winding up.

MR TROWER: Yes. Although, of course -- I mean, of course there is a statute here from which you derive certain things, but one must be careful, we submit, to move too far away from the contractual nexus which you have in any event. There are principles of law that provide for

when A makes an agreement with B, certain legal consequences flow. There are principles of law which are derived from the fact that that A has entered into a relationship with B, as a result of which certain legal consequences flow, those legal consequences being provided for by statute. Now, that doesn't detract in any way from the significance of the underlying contractual relationship as the source of the liability.

LORD NEUBERGER: Thank you, Mr Trower.

Submissions by MR DICKER

LORD NEUBERGER: Mr Dicker, delayed appearance.

MR DICKER: My Lords, my submissions, as your Lordships are aware, will deal with foreign currency claims.

LORD NEUBERGER: Yes.

MR DICKER: The outcome contended for by the appellants is, we submit, a striking one. Although the administrators have sufficient funds, the relevant foreign currency creditors will never receive the full amount that they are owed, LBIE will never be obliged to pay it, and the shareholders will receive a windfall. We submit that that would be unjust, a submission which was accepted both by the judge at first instance and by the majority in the Court of Appeal.

LORD NEUBERGER: Yes.

MR DICKER: And we submit that there is nothing in the

statutory process of winding up or administration that justifies, let alone requires, such an outcome.

Now, I should say right at the start Mr Trower referred to some areas of law in the course of his submissions. I will not duplicate his submissions, but on occasions I am afraid I will need to refer to material to which he took your Lordship in support of another point.

LORD NEUBERGER: Fair enough.

MR DICKER: My Lord, at the risk of starting with the obvious, we say it is essential to bear in mind the statutory scheme is based on two fundamental principles. First, the company must pay its creditors in full before it can make any distributions to shareholders. In other words creditors first, members last. Secondly, creditors are to be treated pari passu between themselves. As your Lordships are aware, that is reflected in the statutory scheme itself. For example, section 143, dealing with compulsory liquidations, which Lord Justice Briggs refers to at paragraph 189 of his judgment.

LORD NEUBERGER: Yes.

MR DICKER: Core bundle D, tab 3, page 577. Section 143 provides, as your Lordships can see functions of a liquidator in a company being wound up by the court

are, I interpolate, (1) to secure the assets of the company are got in, realised and distributed to the company's creditors and, again interpolating, (2) if there is a surplus, to the persons entitled to it.

Your Lordships know there is a similar provision in relation to voluntary liquidations, namely section 107, and administrations operate in the same way if they are distributing administrations.

We say there are essentially two tasks. One needs to have regard to both. The first task is to distribute the assets of the company pari passu amongst its creditors, in case there is a shortfall.

LORD NEUBERGER: Yes.

MR DICKER: And the rules contain various provisions which apply for the purposes of valuing and determining what claims are admissible.

The second task, obviously, is to ensure that before any distributions are made to shareholders, you have in fact paid all of the company's creditors in full. If they haven't been paid as part of the first process, for whatever reason, they need to be paid before the distributions are made to shareholders.

Now, my learned friend, during the course of his submission, repeatedly characterised our case as relying on what he described as a sort of abstract appeal to

what is fair and just. My Lords, that is simply not right. There is nothing abstract about it. We are simply relying on the provisions of statute, provisions which are repeatedly cited in the cases as fundamental principles of company and insolvency law.

LORD SUMPTION: The essential question, surely, is simply whether the admission of a proof extinguishes the whole of the claim or is a procedural mode of enforcement only, with the results that if it is incomplete and there are assets to satisfy the rest of it, the normal consequence follows.

MR DICKER: My Lord, absolutely.

LORD SUMPTION: It is relatively narrow, isn't it?

MR DICKER: Yes, it is, although we say that the question is best answered by ensuring one has the shape of the statutory scheme as a whole before focusing in on what rule 2.86 was intended to achieve.

LORD REED: One also has to bear in mind the other way of looking at it, which is the approach of Lord Oliver in Dynamics and Lines, that one looks at the nature of the obligation imposed by a debt expressed in foreign currency, and, you know, his approach is essentially to say the obligation is to pay the sterling equivalent, which has to be at a particular date and normally would be the date when the demand was made or a writ was

served, but in insolvency it is the date of the commencement of the insolvency procedure.

MR DICKER: My Lord, your Lordship is absolutely right. There are two possible ways of looking at it. We say that the way your Lordship has just outlined is not the right way. We also say it isn't in fact, in fairness to Mr Justice Oliver as he then was, the way he approached it in Re Dynamics.

My Lord, there was a clear illustration of the difference between the two parties in my learned friend's submissions on the Monday. He described rule 2.86 as a general rule which is intended to strike a fair balance between the various stakeholders of the company, including, ultimately, its members. We say that is simply not the purpose of converting foreign currency claims into sterling as at the date of liquidation.

The purpose of doing that is to ensure pari passu distribution of the assets amongst its creditors. Neither the authorities, the pre-legislative material, or rule 2.86 contain any indication that the rule was intended to apply not simply for the purposes of ensuring pari passu distribution, but essentially as a fair allocation as between creditors on the one hand and all of the company's other stakeholders on the

other.

My Lord, we do say that one needs to construe rule 2.86 in the context of the Act as a whole, including what came before, and I was going to say a few words in response to my learned friend's submissions in relation to process of collective execution, concepts of provable and non-provable claims, and also, prior to 1986, the treatment of non-provable claims in tort and post-insolvency interest before turning to rule 2.86.

Starting, if I may, with the process of collective enforcement. Your Lordship knows this is dealt with by Lord Hoffmann in Wight v Eckhardt. It may help if your Lordships have that open. It is bundle F1, tab 23.

Just emphasising the issues and the points made by Lord Hoffmann in this case before coming to my learned friend's submissions, paragraph 20 sets out in summary form the arguments, or the views of both the Court of Appeal and Mr Lowe on behalf of the appellant.

21, Lord Hoffmann says:

"Central to both of these arguments is the proposition that the right to share in a liquidation is a new right which comes into existence in substitution for the previous debt."

He then deals with, in paragraph 22, the approach taken by the Court of Appeal. I don't need to say

anything in relation to that.

23, my Lords, is significant, because the appellant in Wight v Eckhardt essentially said the statutory scheme involves a cut-off date. Essentially, you take a snap shot of the position as at the date of liquidation and everything is effectively frozen as at that date, and expressly relied in support on Humber Ironworks, dealing with post-insolvency interest, and Dynamics and Lines Bros dealing with currency conversion.

Lord Hoffmann says that that is wrong for two reasons. The first reason, as your Lordships have seen in 26 and 27, is the point about winding up being a process of collective execution, which he then describes in paragraph 27.

The second reason is in paragraphs 28 and 29. What he says there is, well, the need for a cut-off date is solely for the purposes of ensuring a pari passu --

LORD NEUBERGER: He doesn't say "solely", it is "to give effect". Yes.

MR TROWER: Solely for the purposes of ensuring pari passu distribution amongst creditors. That is what was going on in Re Humber Ironworks, that is what was going on in Dynamics and in Lines Bros. So you don't freeze the position as at the date of liquidation.

Now, we say that as far as Lord Hoffmann's first reason is concerned, it is plain that the underlying debt remains, unless and until it is discharged through payment, and in context, what he can only have been contemplating was payment of the underlying debt in full, not some other sum.

Secondly, we also say he must have considered Humber Ironworks, Dynamics and Lines Bros as consistent with that view. In other words, the process of converting foreign currency claims into sterling as at the date of liquidation didn't have the effect of substituting sterling equivalent at the date of liquidation for the underlying obligation, such that if you pay the former, you have necessarily paid the latter. So that is Lord Hoffmann in Wight v Eckhardt.

How do the appellants seek to deal with this? Well, they have sought to deal with it in various ways. Essentially, as we understand it, three. Firstly, they initially submitted that Lord Hoffmann was merely explaining the effect of the winding up order and saying nothing about the effect of the process. We say that is simply impossible to square with what Lord Hoffmann says in paragraph 27. He talks about the debts, remaining debts throughout, and they are untouched. Indeed, it is inconsistent with his reference to, his use of the

phrase "the process of collective execution". He is obviously not just concerned with the effect of the winding up order; he is concerned with the effect of the winding up process as a whole.

The second way the appellants sought to deal with Wight v Eckhardt was to say, well, if you want to participate in a statutory scheme, you have to prove. Now, we say, again, that doesn't assist them. It is obviously true that if you want to participate and receive a dividend in respect of a proved debt then you do need to prove. But that is just circular. It doesn't follow that your only right is to prove, and if you cannot prove for all or part of your claim, the consequence is that your claim is ignored. If that were right, then obviously we wouldn't have a concept of non-provable claims at all.

Now, the third approach which was developed, I think, most fully by my learned friend in his oral submissions on Monday, was that under the statutory scheme, payment in full of a proved debt necessarily amounts to payment in full of the underlying debt. We do ask your Lordships to look at the way my learned friend developed that during the course of his submissions. We say it is entirely unclear how this is intended to work or indeed how it could work consistent

with the statutory scheme. If payment of the proved debt necessarily amounts to payment in full of the underlying debt such that there is no shortfall, in substance we say the creditor the must have lost his own old right and had it replaced by a new right.

LORD SUMPTION: Well, on that footing, presumably if you had a guarantee given to you by a solvent third party, the guarantor would be able to say, "The liability has been extinguished, I am not liable".

MR DICKER: Thank is no doubt why my learned friend, during the course of his submissions, said, well, you could of course read the words "for the purposes of proof" in rule 2.86 as intended to convey that this didn't entitle a guarantor, essentially, to avoid its liability. But obviously we are not just concerned with guarantors as third parties; there are other persons who are involved in this process, and shareholders are one example.

My Lord, we do say that my learned friend's submission in seeking to say, well, if you pay a proved debt in full, that is discharge of the underlying debt, to say that is something different from not inconsistent with Lord Hoffmann's description of the process of collective execution can't be right. This is just playing with words.

Now, at various points, my learned friend said it

wasn't his case that the statutory scheme did replace underlying debt with a new debt. He said, page 64, lines 18 to 20:

"We are not saying there has been a transformation of the debt. We also accepted that rule 2.86 is just for the purposes of valuation."

Now, if that is right, how is it that he gets to his conclusion that payment of the proved debt in full is essentially discharge of the underlying debt? Now, as we understand it, there are two strands to the argument. The first is based on, essentially, a lacuna. What he said at page 46, lines 3 to 5 was:

"There is just nothing in the statute which allows it. We say, in other words, that payment in full in accordance with the statutory scheme discharges that claim."

In other words, because the statute provides and provides only for payment of the proved debt, you can't have any other right.

Now, we say that is simply to misunderstand the effect of the statutory scheme. The statutory scheme doesn't need to give you a currency conversion claim, it is just the unpaid balance of the underlying claim which has not been discharged by the process of collective execution, and which is payable as a non-provable claim

before any distributions are made to shareholders, because otherwise you would infringe the principle of creditors first, members last.

My learned friend, we say, is wrong to suggest that there is a lacuna, that the only right under the statutory scheme is to payment of approved debt, and therefore if your proved debt is paid, there can't be anything else to which you are entitled.

The other part of the argument, as I understand it, is based on the effect of the valuation mechanism for the purposes of proof. What my learned friend said at page 65, lines 4 to 9, was that --

LORD NEUBERGER: Page, sorry?

MR DICKER: It is page 65, lines 4 to 9 of the transcript.

LORD NEUBERGER: Thank you, yes.

MR DICKER: He says:

"They [the debts] are affected. They are discharged here to the extent they are paid out of dividends, and since the statute tells you how to value the debt for the purposes of payment, if it tells you the debt is worth £100 and £100 is paid, the debt is discharged."

Again, just taking this in stages, it is true that the debt is valid as at the date of liquidation.

LORD NEUBERGER: Yes.

MR DICKER: Although, as Lord Hoffmann makes plain in

Wight v Eckhardt, that is for the purposes of ensuring pari passu distribution. It is also plain that the debt is worth £100 on that date. Lord Oliver said so in Re Dynamics. And it is also true that if £100 had in fact been paid on that day, then the underlying debt would have been paid in full. But the problem, obviously, is it wasn't paid on that day. It was only paid later when dividends were paid, and by the time it was paid, it was worth less than the foreign currency claim to which the creditor was entitled.

Now, we say that there is a parallel here, and I will come back to this, in relation to post-insolvency interest. One can equally say the effect of the cut-off date and the need to value claims as at the date of liquidation is that where you have a claim accruing interest, as at the date of liquidation, it is only worth, say, £100. Now, the logic of my learned friend's argument, as we understand it, is that because the statutory scheme values that claim as £100, if £100 is paid, even if that £100 is only paid some years later through the process of dividends, nevertheless proved debt has been paid in full and there can't be any other claim.

Now, perfectly plain, and we will come to this in due course, that prior to1986, that wasn't how it worked

in relation to post-insolvency interest. The court's approach was, well, we value it at £100, excluding post-insolvency interest, for the purposes of ensuring pari passu distribution amongst creditors. But we don't ignore the fact that dividends aren't actually paid on the date of liquidation; they are only paid later. We don't ignore the fact that going on in the background, as far as the underlying debt is concerned, interest continues to accrue, and we don't ignore the fact that, going back to the principle of creditors first, members last, creditors should be entitled to have that interest paid before any distributions are made to shareholders.

We say there is a perfect parallel between that and currency conversion claims. Yes, the scheme does involve valuing claims as at the date of liquidation. But that is for the purposes of proof. It doesn't have the effect of extinguishing the underlying right, nor does it prevent creditors from saying, "My claim may have been worth £100 on the date of liquidation, but by the time you got round to paying me, what you paid me wasn't sufficient to discharge my underlying debt and that is something you have to discharge before you can make any distributions to shareholders".

Now, this argument of my learned friend effectively assumes that the conversion is not just for the purposes

of proof. It necessarily assumes that it operates as between creditors and shareholders as well, so that shareholders can have the benefit of it. We say in substance that is plainly inconsistent with Lord Hoffmann's description of the process of winding up. In substance, that is saying to creditors it doesn't matter what your underlying claim is, the effect of the statutory scheme is that we do freeze the position as at the date of liquidation, we work out what it was worth on that date, we pay you what it was worth on that date and it necessarily follows that you can have no further claims. We say that is simply flatly inconsistent with the nature of the winding up process.

Now, we refer in our written case to an earlier decision, Oakes v Turquand. I wasn't going to take your Lordships to it. It is referred to briefly by Lord Justice Briggs at paragraph 182.

LORD NEUBERGER: Thank you.

MR DICKER: And we develop our submissions on it in our written case at paragraphs 38 to 44.

The short point is if one wants an illustration of why Lord Hoffmann's description of winding up is a process of collective execution, one can clearly see that from its historical development as described by Lord Cranworth in Oakes v Turquand.

LORD NEUBERGER: Yes.
MR DICKER: Now, we also make the point in our written case, and again I won't take your Lordships to it, to the fact that Lord Diplock in Ayerst made the point that the essentials of the statutory scheme in this respect have remained exactly the same ever since 1862, and to four other authorities which repeat Lord Hoffmann's description of the process of winding up. Again, I don't think I need to take your Lordships to those; they are referred to in our written case at paragraph 37.
So that is the collective process of execution.
The next thing I wanted to turn to was the statutory waterfall and the concepts of provable and non-provable claims, and to say a little more about those.
Now, we say it is important to appreciate the nature and extent of non-provable claims when coming to assess the 1986 Act. The draftsman plainly had them in mind. One of the things he addressed in the 1986 Act were unliquidated claims for damages in tort which were previously not provable. The rules were changed to make certain such claims provable. He also dealt with post-insolvency interest. Again, prior to 1986, the authorities held not provable. He inserted a rule specifically dealing with that. So he had non-provable

claims well in mind.
The statutory waterfall was referred to by my Lord, Lord Neuberger in Re Nortel, and it may help if your Lordships just had that authority open. It is F1, tab 17.
LORD NEUBERGER: Yes.
MR DICKER: It is set out at paragraph 39. My Lord identifies the relevant sections and provisions of the rules in relation to winding up and administration, including section 143 and then lists the --
LORD NEUBERGER: Yes, that is set out in Lord Justice Lewison's judgment, and Mr Justice David Richards's judgment.
MR DICKER: Yes.
LORD NEUBERGER: Yes.
MR DICKER: Now, just dealing with the distinction between provable and non-provable liabilities, your Lordships will remember the first part of section 143 says the first task is to distribute the assets pari passu amongst -- distribute the assets amongst the creditors of the company. To do that, as your Lordships indicated in Nortel, there has to be a cut-off date to determine the class of creditors who are to participate in the distribution of the company's available net assets -- that is Lord Neuberger at paragraph 35 -- and the scheme

also depends on there being a common date as at which the fund falls to be valued and distributed pari passu, that is my Lord, Lord Sumption at paragraph 130.
Now, as we say, echoing Lord Hoffmann in Wight v Eckhardt, the purpose of that rule is to ensure pari passu distribution between creditors.
LORD NEUBERGER: Yes, we have got that.
MR DICKER: Doesn't apply any further than is strictly necessary (inaudible).
LORD NEUBERGER: Yes.
MR DICKER: That is what Lord Justice Briggs accepted at paragraph 157 and Lord Justice Moore-Bick accepted at 257 of the their judgments.
LORD NEUBERGER: Yes.
MR DICKER: So we have a requirement to distribute the assets pari passu. To do that, you have to have a cut-off date, value them as at that date. That necessarily excludes certain claims which don't fit within the requirements for provability.
LORD NEUBERGER: Yes.
MR DICKER: And we say non-provable liabilities are simply any claims which for one reason or another either are not provable at all or are not discharged in full as a result of the payment of dividends in respect of proved debts. They therefore rank as non-provable

liabilities.
It is interesting, we say, that my Lord, Lord Neuberger at paragraph 54 of his judgment, when he came on to the third possibility, described that as being:
"It is not a provable debt within rule 12.12 and therefore falls within category 7."
We say that is exactly right. If it is not provable, it is therefore a non-provable claim.
Essentially, we say non-provable claims are simply the necessary consequence of the two principles I mentioned earlier: in other words, pari passu distribution amongst creditors and the principle that creditors must come before members. Once you have those two principles, once you appreciate that to distribute the assets pari passu amongst creditors, you need a set of rules which necessarily exclude certain claims, you are, almost by definition, going to end up with a waterfall which involves payment of provable debts first, a category of non-provable liabilities which don't meet the cut-off or the valuation requirements next, before you get to any distributions being made to shareholders.
So we say, contrary, I think, to the impression my learned friend sought to convey, there is absolutely nothing heretical about the concept of non-provable

claims; they are simply the consequence of giving effect to both the pari passu principle and the principle that the creditors come first, members last.

The reason why the liability has not been paid in full is irrelevant. The nature of the collective process of enforcement means that if the underlying debt, for whatever reason, has not been paid in full, the debtor remains liable and the liability has to be satisfied before any distributions can be made to shareholders.

Now, we deal in our written case with the history of non-provable claims at paragraph 58. I don't need to take your Lordships to that. It is also summarised by Mr Justice David Richards in T&N, paragraphs 76 to 85.

The points we do ask your Lordships to bear in mind are as follows: as I submitted earlier, when construing the 1986 Act, one needs to bear in mind that this statute, like all of its predecessors, is intended to deal with non-provable liabilities as well as provable liabilities. There is something, as I said, the draftsman must have had in mind, because he altered the position in relation to unliquidated claims for damages in tort and post-insolvency interest, both of which were previously regarded as non-provable.

Even after 1986, obviously there is still a category

of non-provable claims. Some are identified specifically in rule 12.3(2) and 12.3(3) states:

"Nothing in this rule prejudices any enactment or rule of law under which a particular kind of debt is not provable, whether on grounds of public policy or otherwise."

As your Lordships know, one example of that, of the statutory liabilities --

LORD NEUBERGER: Where do we find 12.3? Where do we find that rule?

MR DICKER: Those rules are --

LORD NEUBERGER: 12.3, I think you said. Don't worry, we will have a look later. Don't let me hold you up.

MR DICKER: If your Lordships go to F3/71 ...

LORD NEUBERGER: Thank you. Yes.

MR DICKER: So sub-rule (2) --

LORD NEUBERGER: Yes thank you.

MR DICKER: -- says they are not provable --

LORD NEUBERGER: Thank you, yes.

MR DICKER: -- and then there are various specific obligations.

LORD NEUBERGER: Yes, thank you.

MR DICKER: And then sub-rule (3), over the page.

LORD NEUBERGER: Yes.

MR DICKER: "Nothing in this rule prejudices any enactment

or rule of law under which a particular kind of debt is not provable, whether on the grounds of public policy or otherwise."

LORD NEUBERGER: Thank you.

LORD CLARKE: What do you say is the kind of debt which is not provable in this case?

MR DICKER: Well, what is not provable is, essentially, such balance, if any, of the creditors' claim which is not captured by valuing it as at the date of liquidation.

LORD SUMPTION: Statutory interest would be another example, wouldn't it?

MR DICKER: Absolutely. You have this -- I use the expression "snapshot". You take a photograph of the position as at the date of liquidation. You value everything then. Now, just as my Lord, Lord Sumption said in relation to post-insolvency interest, that is not captured by the snapshot because it hasn't yet accrued. It will only accrue as and when the underlying debt is not paid and attracts interest. The cases -- and we will come on to Re Humber Ironworks -- say that because of the need to treat the liquidation for the purposes of pari passu distribution as occurring on one day, collecting the assets and you distribute them on one day, that part of the creditors' rights is not provable.

Similarly in relation to currency conversion claims, because you take this snapshot on the date of liquidation and you value everything on that date.

LORD NEUBERGER: Do you say that there is a fairly exact analogy with Lord Hoffmann's example of an insurance policy where the event eventuates after the vital date of proof -- date at which you take the account, as it were?

MR DICKER: There are similarities. The difference between them is in relation to insurance policies, or anything else which is treated as a provable but contingent claim --

LORD NEUBERGER: Yes.

MR DICKER: -- you can revalue the contingency with the benefit of hindsight. What is different, we say, in relation to post-insolvency interest and currency conversion claims is that, as the cases have held, the effect of having a cut-off date, valuing everything as at the cut-off date for the purposes of ensuring pari passu distribution, is those are not provable at all. They are not even provable as contingent claims. I will come back to this point, but they are regarded as excluded from being provable claims simply because, as I say, they don't show up on the snapshot that is taken as at the date of liquidation.

Now, as far as non-provable claims --
LORD CLARKE: Originally, claims for damages for personal injury, let's say, where the damage isn't suffered until later, is somehow added back in, is it, as the law stands now?
MR DICKER: Those were, before 1986, regarded as non-provable, at least in an insolvent liquidation.
LORD CLARKE: And now?
MR DICKER: The position in 1986 changed and it went through a couple of iterations. Initially, the rules provided that it would be provable, provided the cause of action had effectively accrued by the date of liquidation.
Now, following the decision of Mr Justice Richards in T&N, that was regarded as too onerous a condition and it was altered so that all that is necessary all of the ingredients of the cause of action, with the exception of actionable damage, have occurred by the date of liquidation.
So the position now is that if you have a claim for unliquidated damages in tort, all of the elements of the cause of action, with the exception of actionable damage, are complete by the date of liquidation. It is provable. And if they are not, it is still non-provable.
I will come on to T&N in a moment, but the

consequence of that is there is still a category of non-provable claims for damages in tort, although it is slightly narrower now than it was initially when the 1986 Act was introduced, and the 1986 Act, again, was more generous than the position before then.
If such liabilities come into existence prior to the liquidator getting to the stage of making a distribution to shareholders, then they have to be paid before he can distribute the surplus, because they have priority over any distributions to shareholders.
Again, I will show your Lordships this. There is a good example of this in a case called R-R Realisations, which involves, on one view at least, a claim which at the date of liquidation couldn't even be regarded as a contingent claim. I will come back to that.
What we say is important to appreciate, as far as the historical development of non-provable claims is concerned, is it is certainly true that over the last 300 years the legislature has continually widened the scope of provable claims and correspondingly narrowed the scope of non-provable claims. But the reason it has done so is to ensure that creditors can participate in the assets of an insolvent company. Obviously, if it is non-provable and it is an insolvent company, it is

otherwise highly unlikely that they will receive anything at all, and as a matter of policy that was not thought right.
LORD NEUBERGER: What you are saying is that the court hasn't reduced the number of claims; it has simply reapportioned the claims, as far as it can, from non-provable to provable.
MR DICKER: For the purpose of ensuring that creditors can share. It has not removed non-provable claims --
LORD NEUBERGER: That is what I am saying.
MR DICKER: -- because it doesn't think that creditors should ever be entitled to recover such claims in advance of shareholders.
LORD NEUBERGER: I understand.
MR DICKER: Now, the reason why certain claims are non-provable differs from claim to claim. Some, as your Lordships have already seen, are excluded for some specific policy reason. But others are excluded, as I say, simply because they are regarded as not satisfying the requirements for pari passu distribution, namely the cut-off date and the need to value the claims as at that date.
Non-provable claims are part of the statutory waterfall -- your Lordships have seen that -- and a liquidator has never been entitled to distribute to

members without regard to non-provable liabilities. It has always been part of his duty to pay the company's non-provable liabilities before making any distribution to shareholders.
As my learned friend Mr Trower said, if you look at section 143 he has a statutory duty to distribute the surplus to those entitled to it and it can't make a distribution to shareholders without first paying any claims which are in priority to that.
And your Lordships may note that this point, namely the obligation of the liquidator to deal with non-provable claims, was a point on which all three members of the Court of Appeal agreed. Lord Justice Briggs at paragraphs 185 to 189, lord Justice Moore-Bick at paragraph 246 and Lord Justice Lewison at paragraphs 56 to 61.
Now, it is also true to say that the statute doesn't set out in any detail how such claims should be dealt with. Indeed, it is striking if one goes back, for example, to 143, which refers to the need to distribute the assets amongst the creditors and pay the surplus to those entitled to it. There isn't anything, as it were, express in the middle dealing with non-provable claims. That has always been the case going right back to the origins of both the bankruptcy and corporate insolvency

and, as Lord Justice Briggs says, those sections have consistently been interpreted in the way that my Lord, Lord Neuberger did in Re Nortel.

Just finally, noting the time, there is one authority we have included just to illustrate how this judge made process developed. It is a case called Bromley v Goodyear, decided in 1743. Authorities F4-tab 16.

LORD NEUBERGER: Tab 16?

MR DICKER: Tab 16.

LORD NEUBERGER: Page 2401.

MR DICKER: And it deals with -- it is essentially the origin of the approach to dealing with post-insolvency interest prior to 1986.

LORD NEUBERGER: Where do we find the relevant passage?

MR DICKER: Just very quickly, the facts are simply that the commissioners only paid interest up to the date of the commission of bankruptcy. One can see that just from the first half dozen lines of the facts.

LORD NEUBERGER: Yes.

MR DICKER: They then received 20 shillings in the pound and there turned out to be a surplus. Over the page, page 50, two-thirds of the way down, the Lord Chancellor said:

"Having laid these things out of the case, I come

now to the main question: whether the creditors for debts carrying interest by contract are entitled to have subsequent interest, and I think they are."

He then deals with the position before the new Act which introduced the concept of discharge. He says, skipping a paragraph:

"I will consider this case first upon the old acts, previous to the fourth and fifth Queen Anne, and then upon that statute."

The bottom of the page he says:

"The next direction in the Act is what the commission should do in regard to the debts. They are directed to pay to every of the creditors a portion rate like according to the quantity of his/her/their debts and the question is what debts are here meant and I am of the opinion it means debts due at the time of the bankruptcy or when the commission was issued."

In other words the commissioners were right, you allow interest up to the date of bankruptcy but no further. He then says in the next paragraph:

"The Act goes on to take notice of the surplus which it directs to be paid to the bankrupt ... "

And the following paragraph:

"This shows the surplus to be paid over to the bankrupt is only the surplus after the payment of the

whole debts, for it would be vain to pay any other surplus when it might have been recovered from him again by the creditors."

Page 79, just slightly below half way:

"But then it is said that the practice has been for the commissioners to ascertain the debts by computing interest only at the time of issuing the commission and that being the contemporanea exposito is to be relied upon."

And he says:

"There is no direction in the Act for that purpose. It has been used only as the best method of settling the proportion amongst the creditors that they might have a rate like satisfaction and is founded upon the equitable power given them by the Act."

So in other words, all the Act says is pari passu distribution. The judges held that means you shouldn't be entitled to prove for post-insolvency interest. But there is a provision for a surplus to be paid to the bankrupt and the necessary effect of the scheme is that if interest has accrued post-insolvency on the underlying debt, that interest has to be paid before the bankrupt is entitled to the surplus. So that, we say is an illustration of judicial development.

LORD CLARKE: If there is a surplus, what about the period

between the time of the bankruptcy and the payment. That wasn't recoverable, was it?

MR DICKER: Your Lordship is quite right. The phrase "post-insolvency interest" may not be the most accurate way of describing it. It is interest, essentially, for the period after the commission of bankruptcy in 1749, after the bankruptcy order under more recent statutes. So it is essentially you have this snapshot as at the date of liquidation. You are entitled to prove for interest accrued up to that date. Any interest after that date is regarded as non-provable, (inaudible) only in the event of a surplus, has to be paid in the event of a surplus, before anything is returned --

LORD CLARKE: Well, the interest, the later section of interest had to be paid, did it?

MR DICKER: Yes.

LORD CLARKE: Yes.

MR DICKER: Your Lordships will see that, hopefully, when we return, from Humber Ironworks.

LORD NEUBERGER: Very well. We will resume again at 2 o'clock. The court is now adjourned. Thank you, Mr Dicker.

(1.03 pm)

(The luncheon adjournment)

(2.04 pm)

MR DICKER: My Lords, I have dealt with the process of collective execution. I have made some general submissions in relation to provable and non-provable claims.
LORD NEUBERGER: Yes.
MR DICKER: What I now want to do is turn and deal briefly with two other non-provable claims, namely unliquidated claims for damages in tort and claims for post-insolvency interest, look at the position pre-1986, before turning to deal with the cases dealing with foreign currency claims, ie Dynamics and Lines Bros.
So, firstly, unliquidated claims for damages in tort. We discussed this before the short adjournment. As your Lordships know, the rules as to what was provable, what is provable, has changed over the years. Prior to 1986, unliquidated claims for damages in tort were not provable in an insolvent liquidation. The 1986 Act changed the regime. They were, provided the cause of action had accrued by the time the company went into liquidation. Following T&N, the rules were amended again. They are provable provided every element of the cause of action exists, with the exception of actionable damage, by the date of liquidation.
Your Lordships have seen Mr Justice David Richards's analysis of what the position is in relation to claims

in tort, which, as a result of that cut-off date, are not provable. And just reminding your Lordship of his approach, it is in bundle F1, tab 21.
LORD NEUBERGER: Yes.
MR DICKER: It is paragraphs 106 and 107 of the judgment, page 1556 of the bundle.
LORD NEUBERGER: Yes.
MR DICKER: I know your Lordships have seen these paragraphs, so just emphasising firstly at the start of 107, his reaction, like every other judge dealing with non-provable claims, was that it would be extraordinary if a company's assets could be, and were required to be, distributed to shareholders without paying tort claims which had accrued since the liquidation date, or other claims not provable in a liquidation. He gives one example, which at least subsisted prior to the decision of your Lordships in Re Nortel. Then he explains why and how those claims can be paid in advance of any distributions being made to shareholders.
My Lords, another approach would obviously simply be to say, like the three members of the Court of Appeal below, the liquidator has a duty to discharge non-provable claims before making a distribution to shareholders. If it is clear how much the claim is worth, one doesn't need to go through the process of

commencing proceedings, returning judgment or agreement; the liquidator simply pays what is owed. There may be circumstances in which that sort of detailed analysis isn't necessary.
Now, my Lords, before 1986, the position, just so your Lordships are aware, was more complicated. I have said that unliquidated claims for damages in tort were not provable in an insolvent liquidation. They were, or certain such claims were provable in a solvent liquidation, but there was still the possibility of non-provable claims.
Now, just expanding very briefly upon that, the reason for that was because, prior to 1986, there were two sections, sections 316 and 317, and if your Lordships turn to bundle F4 at tab 11, your Lordships will find a decision of Mr Justice Vinelott in a case called Barclays Securities Limited. I turn to this simply as a convenient way of showing your Lordships the relevant provisions.
At page 2317 of the bundle, page 1602 in the report, halfway down Mr Justice Vinelott has a reference to section 316:
"In every winding up, subject in the case of insolvent companies to the application in accordance with the provisions of this Act, the law of bankruptcy,

all debts payable on a contingency, all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admitted to proof against the company."
And he says, just under that, four lines down:
"That section is clearly wide enough to admit to proof an unliquidated claim for damages in tort."
Now, 316 says, "In every winding up, subject in the case of insolvent companies", and that takes (inaudible) 317, which your Lordships will see on the right-hand page, page 2318 --
LORD NEUBERGER: At the bottom.
MR DICKER: -- of the bundle, just above letter G. Section 317 provides:
"In the winding up of an insolvent company registered in England, the same rules shall prevail and be observed ... respective rights of secured and unsecured creditors and to debts provable ... as are in force for the time being under the law of bankruptcy in England."
And then going over to page 2320 of the bundle, 1605 of the report at letter F, he says:
"I turn, therefore, to consider what debts and liabilities are capable of proof in bankruptcy. Section 30 of the Bankruptcy Act 1914 reads as follows:

'(1) demands in the nature of unliquidated damages arising otherwise than by reason of a contract promise or breach of trust shall not be provable in a bankruptcy.'"

So two different regimes. A carve out for unliquidated claims, damages in tort, in an insolvent liquidation, but no such carve out in relation to solvent liquidations.

There was an issue as to precisely when an unliquidated claim for damages could be proved prior to 1986, and there was a divergence of view between Mr Justice Vinelott in Barclays Securities, who held essentially you can prove in an insolvent liquidation provided you get a judgment during the course of the liquidation, and Mr Justice Harman in Islington Metals, who disagreed. I don't think your Lordships are concerned with that.

The example I want to give your Lordships is not, however, an example of a claim which is provable, either in an insolvent or a solvent liquidation, prior to 1986, and it is illustrated by a case called R-R Realisations Limited, which your Lordships will have in F6 at tab 9.

LORD NEUBERGER: Yes.

MR DICKER: Now, your Lordships need to understand a little of the facts, or at least the relevant chronology. So

starting at page 3177 of the bundle, page 805 of the report, three joint liquidators of the company in voluntary liquidation since October 1971, so that is when the company went into liquidation. They were able, after selling its assets, to pay all of the company's known debts and to pay substantial sums to stockholders. And then at the bottom of that first paragraph:

"In 1979 it was announced that a final distribution of some 5.5 million would be made to ordinary stockholders in December 1979. Meanwhile, following the publication on September 22, 1978 of the results of an inquiry into an accident in Bombay Airport in 1976, writs against the company were issued but not served on behalf of victims or their families."

So we have a liquidation in 1971. We have an aircraft accident in 1976, some five years later. The liquidator has paid all of the creditors in full and the question is: can he distribute to shareholders? Sir Robert Megarry, the Vice Chancellor, held that the answer to that was no, and two paragraphs I wanted to refer your Lordships to in that respect are at page 3183 of the bundle, page 181 of the report --

LORD NEUBERGER: Yes.

MR DICKER: -- between B and E. He says:

"Another point which I think must be carefully borne

in mind in considering the cases on administration of estates ..."

And he deals with that, and then at C:

"Correspondingly, in the voluntary liquidation of a company, it may well be right to give the claimant greater latitude if the distribution is to be made to members and to other creditors, just as a man should seek to be just before he affects to be generous. So I think that an especial care is needed to ensure that all creditors are paid before distributions are made to members. It is only subject to the satisfaction of the company's liabilities. The company's property is distributable amongst the members, see section 302."

A precursor of section 143 and 207.

The other passage, 814 of the report at letter D to E, he says in the second line of the paragraph:

"I do not think it would be just to make the order and so shut out the plaintiffs from making any effective claim against the company, particularly as the proposed distribution is to members and not creditors. I can well appreciate it is highly inconvenient. I do not say that inconvenience and expense may not be of such a degree as to amount to an injustice, but when this is weighed against the proposed virtual extension of the plaintiff's claims against the company's assets, I have

no doubt where the balance of justice lies. As between injustice and inconvenience of anything like equal degree, it is injustice that must be rejected."

These are claims that did not exist at the date of liquidation, came into existence when the accident with the aircraft happened in 1976, no judgment was obtained at the relevant date, even now, at the time of the judgment would have to be paid before any distribution to members.

LORD NEUBERGER: Yes.

MR DICKER: There is a disagreement, I think, between the appellants and us as to whether this was a non-provable claim. My Lord, the reason why we say it is a non-provable claim is based on the judgment of Mr Justice David Richards in T&N. If I can ask your Lordships just to go back to that, it is bundle F1, tab 21.

Now, there are two parts to this judgment. The part that your Lordships so far have seen has been concerned with whether or not the relevant claims for tort in that case were provable in a winding up of T&N. You can see that if you go to page 1546 of the bundle, just above paragraph 69.

So there's a heading "Our future asbestos debt claims, provable debts and a winding up of T&N", and

that is the section that contains paragraphs 106 and 107 that your Lordships have seen. But there was an earlier issue, which is whether or not the claims were creditors for the purposes of schemes of arrangement and CVAs. If your Lordships go back to 1536 of the bundle, page 1745 of the report, just above paragraph 32, your Lordships will see that discussion starts.

Now, the relevance of this is that for the purposes of a scheme of arrangement, there is no inherent cut-off date. There isn't an equivalent to 13.12 that says, to be a provable debt, it either has to be a debt or a liability arising out of an obligation incurred by the date of liquidation. There is simply the question of whether other not they are creditors, which, as a matter of authority, includes contingent creditors.

Now, having held that the tort claims that he was concerned with in T&N were contingent claims, he draws a distinction with other circumstances and the paragraph I wanted to show your Lordships is paragraph 67, 1545 of the bundle. He says, paragraph 67:

"In reaching this conclusion, I emphasise I do so on the basis of the facts relevant to asbestos claims, principally the relevant acts or omissions of T&N are complete. Potential claimants have been exposed to asbestos and the existence of a claim in tort depends

solely on whether the relevant asbestos condition develops. I have not considered circumstances where all of the relevant events excluding damage have not occurred, as for example where a company has negligently made a product but the putative claimant has not acquired it or used it. By way of extreme example, if aero engines are negligently manufactured and are in use but have not yet caused an air crash, it could hardly be supposed that there exists a contingent liability to the victims of a possible future crash. For facts of this sort, see in Re R-R Realisations Limited."

So on that analysis, wouldn't be a contingent claim as at the date of liquidation. Nevertheless, the contingency subsequently happens. There is a claim at that date. It has come into existence before final distributions are made to shareholders. Accordingly, applying creditors first, members last, Sir Robert Megarry held that creditors have to be given an opportunity to establish their claims and be paid before the money is distributed to shareholders.

Now, that is all I was going to say in relation to non-provable claims in tort. A closer analogy to currency conversion claims is obviously provided by the cases dealing with post-insolvency interest, and I was going to turn to that now.

It is important not only because it provides what we say is a close analogy, but also because the cases dealing with currency conversion claims expressly adopted and applied the reasoning in the post-insolvency cases, post-insolvency interest cases, when deciding what the appropriate course was for foreign currency claims.

Now, I say that there is a close analogy for this reason: if one imagines a creditor has a claim to principle and interest, it arises out of an obligation incurred prior to the date of liquidation, in the sense that it arises out of a contract which was entered into before liquidation. So the claim is therefore provable. It arises out of an obligation incurred prior to the date of liquidation.

Now, one could say that the claim to future interest is a contingent claim, in the sense that it is perfectly clear that if dividends are not paid for a period after the date of liquidation, interest will accrue on the underlying debt and to that extent is contingent.

Now, that is not how the statutory scheme deals with them. The reason the statutory scheme doesn't deal with them in that way is because, on the authorities, one has to look at the position as at the date of liquidation, value the claims on that date as if the assets had been

collected and distributed on that date, and if one does so, obviously there is no scope for including any post-insolvency interest as a provable claim.

However, according to those authorities, such post-insolvency interest is nevertheless payable out of a surplus, before it is paid to members. And we do say that the analogy with a foreign currency claim is very close. In just the same way as I submitted before the short adjournment, a foreign currency claim has to be valued as at the date of liquidation, and if you imagine that the assets are collected and distributed on that day, obviously there is no scope for taking into account any subsequent exchange rate movements.

However, it doesn't mean it is it a non-provable claim. If one goes back to Wight v Eckhardt. The underlying debt still exists. In due course, the creditor will be paid sterling dividends. The best he can do is to convert those to the foreign currency on the date he receives them. If, because sterling has depreciated, his debt is not paid in full, what is left is a non-provable claim that has to be discharged before any sums are distributed to shareholders.

Now, as my learned friend Mr Miles indicated, the leading authority on this is Humber Ironworks and Shipbuilding Company, and your Lordships have that in

bundle F1, tab 11. The case dealt with two situations; it dealt both with the position in the event that the company was insolvent and it also dealt with the position in the event that there was a surplus that would otherwise be paid to shareholders.

Now, starting with Lord Justice Selwyn's judgment, he deals first with the question of surplus at the bottom of 645, and I will come back to his treatment of surplus, but at the bottom of 645 of the report he says:

"That disposes of the question where there is a surplus as to which there is no doubt or difficulty."

And then he deals with:

"There remains the question when the estate is insolvent."

Picking it up just about a third of the way down, there is a sentence towards the end of the line:

"That would obviously be the case if the court were able to do what it would wish to do ..."

LORD NEUBERGER: Yes.

MR DICKER: "... namely, to realise all the assets immediately and distribute them amongst the creditors. It is very difficult to conceive of a case in which this could occur. Justice I think requires that the course of proceedings should be followed. No person should be prejudiced by the accidental delay. The consequence of

the necessary forms and proceedings of the court actually takes place in realising the assets, but that in the case of an insolvent estate, all of the money being realised speedily as possible should be acquired equally and rateably in payment of the debts as they existed at the date of winding up."

LORD NEUBERGER: Yes.

MR DICKER: So, in other words, to achieve pari passu distribution, you have to ignore post-insolvency interest. That is the only way of treating creditors equally.

Then at the bottom five lines up, he says:

"But, of course, I have already guarded myself from being supposed to say that the court takes upon itself to alter the rights of creditors to any further extent or to deprive them of the right they have to interest at the full rate of 20 per cent if and when there is a surplus to pay it."

And then his classic image of the tree must lie as it falls:

"... must be ascertained what are the debts as they exist at the date of the winding up and all dividends in the case of an insolvent estate must be declared in respect of the debts so ascertained."

And that essentially is the same as the snapshot

image that I have been using.

And then Lord Justice Giffard, to similar extent, he says at the bottom of the first paragraph of his judgment -- he refers, six lines up to the rule in bankruptcy:

"The rule was, as it has been said, judge-made law, made after great consideration, no doubt because it works with equality and fairness between the parties, and if we are to consider convenience, it is quite clear where the estate is insolvent, convenience is in favour of stopping all of the computations at the date of winding up."

So, again, the emphasis on pari passu distribution, but equally, where it is solvent, and this is the last paragraph on the page, the creditor is entitled to interest.

Now, we say this is exactly what one would exact from the two principles I started with and the description of the statutory scheme by Lord Hoffmann in Wight v Eckhardt. The creditors underlying claims are unaffected by the winding up process. They are discharged only to the extent they are paid out of dividends. Claims for post-insolvency interest are not provable because they are regarded as being inconsistent with the requirements for pari passu distribution

between creditors. But that rule is solely for the purposes of ensuring equal treatment of creditors. It isn't regarded as a rule designed to ensure fairness, and what my learned friend suggests, as between creditors and all stakeholders of the company, including shareholders. To the contrary, if there is a surplus, creditors are entitled to be paid the additional post-insolvency interest to which they were entitled, on their underlying debts. Again, consistent with the principle of creditors first, members last.

Now, my learned friend focuses on the phrase and the image of being remitted to his rights under the contract. We say that is just another way of making the point that Lord Hoffmann did in Wight v Eckhardt, namely the winding up process leaves your debts untouched. They are only paid to the extent that you have received dividends if you look at your underlying debt and there is still a sum which has not been paid. If its not provable, it is a non-provable claim to which you are entitled.

Now, I have taken your Lordships to Humber Ironworks. There are a number of other authorities to similar effect. We refer to two in our written case, paragraph 76.

LORD REED: Could I just ask, I just wondered how far you

can push it. I understand you can say that the provable debt is distinguishable from the rights under the contract, and to the extent that you haven't received your rights under the contract, you can recover the balance as a non-provable debt.

If you are going to look at it that way, do you not have to take into account the interest that you have received under statute, which isn't one of your contractual entitlements either, but which is a sum you have received through the insolvency process?

MR DICKER: Your Lordship, when one is dealing with interest, the short answer is before 1986, the only right you had to post-insolvency interest in liquidation was if you had an underlying right to interest, ie a contractual right. So if there was a surplus, all the creditor would be saying is, "I have looked at my underlying debt, I did receive dividends, but if I calculate the interest I was entitled to as a matter of contract, I haven't been paid in full. There is this shortfall, I can have payment of that."

Your Lordship is absolutely right. That changed in 1986 with the introduction of what is now a rule 2.88 and administration. I will come on to that in due course. But the new regime, obviously, is different. Essentially, we say what the new regime did was to

codify the right to contractual interest, which Humber Ironworks essentially said existed in corporate liquidation. But also, and just before we leave Humber Ironworks, it also dealt with one unfairness, which Lord Justice Giffard identified in Humber Ironworks. If your Lordship just looks at 647, right at the bottom of the page.

LORD NEUBERGER: Yes.

MR DICKER: And I am sorry, I probably stopped reading slightly before I should have done. Five lines up, he says:

"Where the estate is solvent, it works with equal fairness, because as soon as it is ascertained that there is a surplus, a creditor whose debt carries interest is remitted to his rights under the contract. On the other hand, a creditor who has not stipulated for interest does not get it. I may add another reason. I do not see with what justice interest can be computed in favour of creditors whose debts carry interest. Creditors debts do not carry interest are stayed from recovering judgment and so obtaining a right to interest."

So he was essentially saying if you have a contractual right to interest, you can have interest out of a surplus. It is unfair creditors not having

a claim of entitlement to interest in the statutory scheme, because the scheme has prevented them from obtaining judgment, and if they got judgment, they would have had interest at the Judgment Act rate.

Now, that wasn't the position in bankruptcy at the time.

LORD NEUBERGER: What, post the judgment?

MR DICKER: Yes. That wasn't the position in bankruptcy at the time. Bankruptcy, since 1824, certainly 1825, had given creditors a right either to contractual interest or to Judgment Act interest.

Lord Giffard no doubt is picking up that distinction, which was ultimately corrected, albeit 100 years later, by the 1986 Act, saying in rule 2.88(9), you are entitled to interest either at the contractual rate or at the Judgment Act rate, the latter essentially being compensation for the statutory moratorium. If it hadn't existed, you could have got judgment, you could have got interest at 8 per cent.

LORD REED: It is a point Lord Oliver made, you would have got judgment at the rate of exchange applying at the relevant time.

MR DICKER: My Lord, there is another separate point which I am going to come back, and it may be that your Lordship was in part concerned with that, which is one

argument my learned friend makes is that if we are right, it is all unfair because, essentially, you are getting your foreign currency and you are also getting 8 per cent Judgment Act rate and there is essentially an apple and pears.

LORD REED: Perhaps you can put it this way: the scheme gives you exactly what you would have got if you had sued and got a judgment debt as at the date of winding up. You get the sterling equivalent at that date plus the 8 per cent interest from then until actual payment.

MR DICKER: And there is an issue which Mr Justice David Richards considered in Waterfall IIA as to whether or not a foreign currency creditor had to give credit for the interest he received under 2.88, in calculating his non-provable claim.

Mr Justice David Richards held the answer to that was no, and put very shortly -- and I will deal with this in due course -- the reason was that, essentially, you were dealing with two different things here: you had your foreign currency claim, which was your underlying debt, which you should be entitled to recover in full. The statute also said you should be compensated for delay, delay in payment of your provable debts, and that is a separate thing. Obviously if the foreign currency creditor has to give credit for the interest he has

received when calculating his non-provable debt, and either he won't receive -- he will receive interest, but not the full amount of his currency conversion, his foreign currency debt; alternatively, he will receive the full amount of his foreign currency debt, but won't be compensated for delay. Mr Justice Richards said therefore no credit should be given.

LORD NEUBERGER: Two points, the first relating to interest. The judgment rate, although nobody might believe it, is meant to reflect the sterling rate. So may it not be said that by applying the judgment rate from the date in question, it makes sense that the conversion to sterling is treated as being on that date generally, because otherwise why give a rate of interest appropriate to a sterling debt?

MR DICKER: My Lord, a couple of answers to that, the first of which is Judgment Act interest at 8 per cent is paid at your sterling proved debt, not on your foreign currency debt.

LORD NEUBERGER: Yes.

MR DICKER: So we are not applying --

LORD CLARKE: Is the Judgment Act rate different if you get a judgment in a foreign currency?

LORD NEUBERGER: What would you get on your foreign currency?

LORD CLARKE: Because you can get a judgment in any currency now, can't you?

MR DICKER: Yes, you could, and if you had a judgment prior to liquidation, then essentially it would be the rate applicable to the debt apart from the administration.

I should take this slightly more slowly. Rule 2.889 says you take the greater of either the Judgment Act rate or the rate applicable apart from administration. So if you had managed to get a Judgment Act rate on your underlying debt, which you could properly treat as a rate applicable to the debt apart from the administration, then that would be the rate you were entitled to. But the only point I am trying to make at the moment is that as far as the 8 per cent Judgment Act rate is concerned, it is awarded on the proved debt, which by definition is in sterling. So this isn't a situation in which a sterling interest rate is essentially being paid on a foreign debt. You are being fairly compensated for the sterling equivalent of your debt at the date of liquidation. That is the first point.

The second point is that, again, one has to see this operating in two stages. There are statutory rules designed to ensure that every creditor receives pari passu. For that purpose, debts are converted into

sterling.

LORD NEUBERGER: Yes.

MR DICKER: And to ensure that every creditor is treated equally as far as compensation for delay is concerned, every creditor is also entitled to interest at the greater of the Judgment Act rate and the rate applicable apart from the administration.

Now, if the consequence of rules designed to ensure equality is that some creditors ultimately receive slightly more or slightly less by reference to their underlying debt, that is just a function of the statutory scheme and the need in the first instance to ensure everyone is treated equally.

LORD NEUBERGER: Right. The other question I have is this: on the one hand, as I understand it, you distinguish between what is done in order to achieve parity between creditors of the company and, on the other hand, the continuance of the underlying contract between the company and the particular creditor. Does that call into question the assumption that everyone has been making that while sterling, unlikely as it may seem at the moment, as appreciated relative to the currency concerned, the company could justify paying less than the proof amount on the basis that the underlying contract still prevails, and as between the company and

the creditor, the company can pay at the rate appropriate at the date of payment.

MR DICKER: And this obviously raises what my learned friend has characterised as the one-way bet.

LORD NEUBERGER: Is the one-way bet the right assumption, that is the question, or does your approach entitle the liquidator to say, "I am not going to pay you more than you are correct contractually entitled to"?

MR DICKER: My Lord, no, our submissions in relation to that in essence are -- the first stage is there are rules designed to ensure pari passu treatment of creditors.

LORD NEUBERGER: As between creditors.

MR DICKER: As between creditors.

LORD NEUBERGER: Mm-hm.

MR DICKER: And certainly the consequence of that is that everyone is entitled to an equal distribution on the sterling equivalent of their claim by way of dividend on their proof. If some creditors essentially have to give back part of that, then they wouldn't have been treated equally.

LORD NEUBERGER: It is not a question of them being given back; it is about how they are treated equally. But here we are talking about a fully solvent liquidation, where the company is being expected to pay more than the creditor is contractually entitled to.

MR DICKER: Again, I will come back to this, but the short point is we say that is simply a price of ensuring in the first instance pari passu distribution.
LORD NEUBERGER: Doesn't that make it look, then, like a one-way bet?
MR DICKER: Well, my Lord, we say on any basis not a one-way bet. One has to bear in mind a number of things. Most of the time, insolvent liquidations are rather more common than solvent liquidations. So one can't look at this simply on the assumption that you are only ever going to be dealing with the possibility of a solvent liquidation.
LORD NEUBERGER: No, no, of course not.
MR DICKER: If you have an insolvent liquidation --
LORD NEUBERGER: Which is much more common, yes.
MR DICKER: -- it is plainly not a one-way bet. If sterling depreciates, the foreign currency creditor will get less. Even if sterling appreciates, because the company is insolvent, it is unlikely that it will make a profit. So looked at in the round, describing it as a one-way bet, even if the phrase "bet" is apposite, ignores the fact that, more often than not, the company will be insolvent and, when it is insolvent, the currency movements aren't going to enable the foreign currency creditor to make a profit. The most it could

conceivably do is reduce the amount of its loss.
LORD NEUBERGER: In an insolvent case, it doesn't make any difference, in most cases, I accept. But we are looking at cases where it does make a difference.
MR DICKER: My Lord, again, take another example quite close to the present case. You have a situation in which -- assume on the date of administration or liquidation, the value of the company's assets and its liabilities are essentially the same. Assume, rather like LBIE, they are all in US dollars. You have a company, it has $100 million of assets and $100 million of liabilities as at the date of liquidation. As a result of rule 2.86, the foreign currency liabilities have to be converted into sterling as at the date of liquidation, but the assets aren't necessarily going to be converted on that date and, indeed, they weren't converted on that date in LBIE's administration. The administrator converted them in the course of the administration, at a later date, when sterling was more favourable.
So one can easily end up with a situation in which, as at the date of liquidation, $100 million of liabilities, $100 million of assets, the creditors should be paid in full. What happens is, converted into sterling as at the date of liquidation, sterling then subsequently depreciates. So assume it depreciates two

to one. By the time the assets are sold, the administrator gets 200 million sterling. He has 100 million of liabilities to pay, 100 million sterling of liability to pay. That is half of the value of the assets. He pays the other half of the assets to shareholders. So we have a situation in which if you take a snapshot on the date of liquidation, you would expect every creditor to be paid in full. But because of the fact that liabilities are converted in sterling at the date of liquidation, but the assets could be converted into sterling at a later date, that is not what happened. Creditors on my example would end up with 50p in the pound, only 50p in the pound --
LORD NEUBERGER: I understand.
MR DICKER: -- and shareholders would end up with a windfall, again on my example, of 100 million sterling which they would not otherwise have got.
LORD NEUBERGER: You have give extreme pictures, but equally, if currency had gone the other way, they would have landed a windfall at the creditors.
LORD REED: Talking about a 50p in a pound dividend, it might be a rather tendentious way of putting it. If they had sought recovery of the debt on the date of winding up and had been tendered the sterling equivalent at that date, they could have had no complaint; that is

exactly what they were entitled to.
MR DICKER: Correct.
LORD REED: And how sterling moved thereafter would be completely irrelevant. They would have got what they were entitled to and the scheme gives them interest on that amount for the period from when they ought to have got it to the date they actually get it. So in a way, what your complaint really comes to is there may be a disparity between the interest that they get to compensate them for the delay and the actual movement of the currency exchange rates over that period.
MR DICKER: And, my Lord, on that, with respect, we would disagree.
LORD REED: Yes.
LORD NEUBERGER: You say the interest is to make up for the fact that they have not been paid, nothing to do with the currency movement.
MR DICKER: Absolutely. The easiest way to approach it is to imagine you have a creditor. This is a collective process of enforcement, so imagine it was just enforcement. You enforce, your underlying debt remains in tact to the extent it is paid. Over time, the debtor manages to make payments by way of dividend. They are made in sterling, you convert them into US dollars and you find you haven't been paid the full amount you were

owed.
One other problem you have already suffered is you have been paid late as well. You haven't been paid on the date of liquidation, the dividends have been dribbled out over time. You should also be compensated for that. We say one doesn't offset the other.
In answer to my Lord, Lord Neuberger's point, even if you do focus on a solvent liquidation, or indeed a administration before it becomes a distributing administration, there are different ways a company could approach this.
One approach a company could take is to say, "We have foreign currency liabilities. We expect the foreign currency to appreciate against sterling. The sensible course is we will pay them before we go into liquidation. Get them off our books." There is nothing the creditor can do about that.
Conversely, if it thought that sterling was likely to depreciate, it might have an interest in going into liquidation, being able to say, "Your debts are converted into sterling as at the date of liquidation, but we don't have to pay you for a year or however long", and take the advantage of that.
So imagine a company -- take a recent example -- shortly before the referendum vote on Brexit who thought

that the vote would be in favour of leave and the consequence would be that sterling depreciated. Directors think to themselves, "We have massive foreign currency liabilities. We haven't got a hedge. We are obliged to pay the creditors those foreign currency liabilities in their foreign currency. One solution would be we will go into liquidation. That will convert their claims into sterling as at the date of liquidation, but we won't have to pay them for some time. But when we do pay them, with depreciated sterling, some time later, we will be able to say they have been paid in full.
LORD NEUBERGER: Yes, I see.
MR DICKER: We say it really is --
LORD NEUBERGER: This obviously applies to companies going into creditors voluntary, as well as -- does it, or not?
MR DICKER: It applies to creditors voluntary, it also applies, interestingly, in administration, with one overlay. As your Lordships know, distributing administrations are triggered by the administrators giving notice of an intention to make a distribution.
LORD NEUBERGER: Yes.
MR DICKER: So in relation to LBIE, and I can't remember the dates but no doubt I can be reminded of them, it goes into administration on 15 September (inaudible). Notice

of intention to distribute was given some time, I think, late in 2009. So it is at that point it turns into a distributing administration. At that point, debts are converted into sterling but not by reference to the date of the notice. But by reference to a historic date, namely the date it went into administration.
LORD NEUBERGER: Yes, I see. It is a retrospective.
MR DICKER: It is retrospective.
LORD NEUBERGER: So your point is this there could be a certain amount of clever arbitrage here if -- in the case of the solvent company, playing the market, almost.
MR DICKER: Yes.
LORD NEUBERGER: At the expense of the creditor.
MR DICKER: I said the administration, subject to one overlay, which of course is administrators are officers of the court.
LORD NEUBERGER: Yes.
MR DICKER: And there may be an issue. Certainly the structure --
LORD NEUBERGER: Your point is that the creditors are at the mercy of what happens, and there is no way they can make up for their currency loss, even assuming that it is merely happenstance rather than anyone playing clever.
MR DICKER: Yes. And we say --
LORD NEUBERGER: So sorry, I ought to know this, but is 286

effectively an identical provision relating to liquidation?
MR DICKER: Yes.
LORD NEUBERGER: Word for word, effectively.
MR DICKER: I don't know word for word --
LORD NEUBERGER: (Overspeaking) -- liquidation rather than -- anyway, someone can check. That will be fine, don't worry. Thank you.
MR DICKER: My Lord, your Lordship has our point exactly.
LORD NEUBERGER: Yes. There is a danger, it may be we are falling into it, of being too over-analytical, but one can possibly look at the consequences, but in a sense one comes back to the point made by Lord Sumption before the short adjournment: in the end, it depends on what the words "for the purpose of proving a debt incurred or payable" mean.
MR DICKER: In the context of the rules, the statutory schemes are --
LORD NEUBERGER: Of course one has to look at it in context.
MR DICKER: My Lord, can I just add this, and it may be a submission I have already made: we do say, going back to Lord Hoffmann, this is regarded as a process of collective enforcement.
LORD NEUBERGER: Yes.
MR DICKER: It is not intended to leave creditors with

a shortfall. Now, within that, obviously you need to have rules to ensure pari passu distribution. And the consequence of that may be some rough and smooth. But that is as between creditors. It is not intended to enable shareholders, essentially, to say, "I know we owe you a foreign currency amount, but actually the overall effect of this process of execution is we don't have to pay you the full amount we owe you".

Now, my Lords, my next task is to deal with the decisions in Re Dynamics and Lines Bros. Can I start with Re Dynamics, which is F1, tab 9.

LORD NEUBERGER: Yes.

MR DICKER: Now, my Lord, we say it is important that your Lordships appreciate that this company was insolvent, unable to pay its proved debts in full. There was no discussion about what would happen if there was a surplus or about the possibility of non-provable claims. So translating it back to the language of section 143, this was concerned with the first part of section 143, distribution of claims pari passu, not the second part, surplus.

Now, there was a summons by the liquidator, sought to determine whether the liquidator should convert the claims into sterling at various dates, and your Lordship will see the possible dates, 759, letter E. Essentially

the date of winding up, the date on which any proof was admitted or the date on which distributions were to be made.

Now, my Lord, the important point we submit is that Mr Justice Oliver held that the appropriate date was the date of liquidation. The reasons he gave were solely concerned with the need to ensure pari passu distribution between creditors. And just to show your Lordships and point out four passages, the first is in the report 761 at letter D.

LORD NEUBERGER: Thank you.

MR DICKER: It is the second sentence beginning:

"It is of course necessary in a liquidation if a proportionate distribution among creditors of the available assets is to be achieved, claims of all creditors be reduced at some stage to a common unit account and the point at time at which that should be done."

Then --

LORD NEUBERGER: He makes the point it may not operate fairly in all cases, but being relatively easy to apply, yes.

MR DICKER: My Lord, yes. Then 764 at letter F. Having referred, just picking it up at D, section 2571, again a precursor of 143, he refers to the first part of that:

"As soon as may be after making a winding up order, the court should ...(reading to the words)... distribution of its liabilities."

So concerned with that. Then between E and F, picking it up just above F:

"It is only in this way the rateable or pari passu distribution of the available property can be achieved, and it is, as I see, axiomatic that claims of the creditors amongst whom the division is to be affected must all be crystallised at the same date, even though the actual ascertainment may not be possible at that date, for otherwise one is not comparing like with like."

LORD NEUBERGER: Yes.

MR DICKER: And then 764, right at the bottom over to 765A, where he says:

"The moment you start introducing into the scheme of things different dates for the ascertainment of the value of claims of individual creditors or classes of creditors, you introduce, it seems to me, potential inequalities, thus the possibility of that which the Act impliedly prohibits, that is to say a distribution of the property of company otherwise than pari passu."

So, again, solely dealing with pari passu.

Then the passage that is often cited at 774.

LORD NEUBERGER: Yes.

MR DICKER: Picking it up between G and H:

"What the court is seeking to do in a winding up is to ascertain the liabilities of the company at a particular date and to distribute the available assets as at that date pro rata according to the amounts of those liabilities. In practice, the process cannot immediate. Notionally, I think it is, as it seems to me to be treated as if it were, although subsequent events can be taken into account in quantifying what the liabilities were at the relevant date."

So all of this is essentially in the context of what I described as the first part of section 143 in the context of pari passu distribution between creditors. Absolutely nothing to do with the position as between company and shareholders.

LORD NEUBERGER: Yes, I see.

MR DICKER: Your Lordships, I am sure, have already noted this, but we say it is also significant that Mr Justice Oliver cited at some length the judgments dealing with post-insolvency interest. You see that at 761, right at the bottom, below H.

LORD NEUBERGER: Yes.

MR DICKER: The last four lines:

"Creditors claiming in respect of

an interest-bearing debt due and payable before the bankruptcy or winding up cannot in general claim interest beyond the date of the bankruptcy or winding up."

Over the page, 762 at C, over onto 763, lengthy citations from Lord Justice Selwyn's and Lord Justice Giffard's judgments in Humber Ironworks.

LORD NEUBERGER: Yes.

MR DICKER: Now, we say there is nothing in this to suggest that the creditors' debts are substantively changed from foreign currency debt into a sterling debt. Indeed --

LORD NEUBERGER: Your point is that this judgment is purely concerned with the first stage, as I would call it; the relationship between creditors inter se, pari passu. It doesn't go on to consider the second stage.

MR DICKER: My Lord, yes.

LORD NEUBERGER: Effectively, is that right?

MR DICKER: But we also go further. We do say that readings of Mr Justice Oliver's judgment to the contrary are simply incorrect. Can I just show your Lordships two passages. 767 at D.

LORD NEUBERGER: I see.

MR DICKER: Just above D, four lines up, Mr Justice Oliver said:

"What he wants is the sum expressed in the foreign

currency. When the winding up order is made, the creditor has this right and there is nothing as I see uncertain about it. It is that right which, so it seems to me, is the right which falls to be valued."

So he starts by saying, as one would expect from Miliangos, the creditors' right is a right to be paid the foreign currency he is owed. What he then does, the rest of 767 and 768, is consider what the company has to pay in respect of his proved debt. And when one gets to 768D, where he says:

"There is, as I see it, no doubt about what the obligation of the company is at the date of the winding up order."

What he is talking about is the obligation of the company in respect of the proved debt. What he is doing is trying to value the proved debt. He is saying that the only value that you can sensibly give it is the value that it had on the date of liquidation, and that is the company's obligation. It is an obligation in respect of the proved debt valued in accordance with the statutory scheme.

There is one other point one can make in this respect. One needs to bear in mind that at the time of Dynamics, there was no equivalent to rule 2.68. Mr Justice Oliver was essentially doing what the

Lord Chancellor did in Bromley v Goodyear, deciding as a matter of judge-made law what should be the appropriate approach to valuing foreign currency claims for the purposes of proof. So there wasn't a provision which he could have construed to say, "I read this provision and the effect of it is to extinguish the underlying claim and to replace it with a sterling claim", for the simple reason that rule 2.68 didn't exist at the time.

My Lords, that is Dynamics. So if your Lordships go on in F1 to tab 15, your Lordships will have --

LORD REED: Am I right in understanding what Lord Oliver or Mr Justice Oliver was saying, towards the foot of 767, top of 768, he is distinguishing the cases to do with the occurrence of contingencies, insurance contracts and the like on the footing that there the occurrence of a contingency after the date of winding up is the best evidence of value as at the date of winding up.

MR DICKER: My Lord, yes. The argument he is dealing with is a little like the argument I think I said in a sense one could make in relation to post-insolvency interest, which was you have a contractual right to principal plus interest and on the date of liquidation you could say it is a contingent claim for interest, absolutely. Mr Justice Oliver was -- that argument was used

essentially to say I can look to what happens to value it on the current date, and he said, "No, again, I am dealing with valuation, but I think the only way I can value it for the purposes of proof is by converting it as at the date of liquidation".

LORD NEUBERGER: Yes.

MR DICKER: My Lord, absolutely right.

My Lords, tab 15, the Court of Appeal in Lines Bros. Again, with the greatest of respect to Lord Justice Lewison, we say he took some language out of Lines Bros and misconstrued it.

In understanding Lines Bros, we say it is vital to appreciate the bank's argument. The bank's argument was essentially that Re Dynamics Corporation had been wrongly decided.

LORD NEUBERGER: Yes.

MR DICKER: What the bank submitted was that everyone had misunderstood -- Mr Justice Oliver had misunderstood -- what pari passu distribution means. So, again, dealing with the first part of section 143, what the bank submitted was that when you talk about pari passu distribution, following Miliangos, what that means is that you have to distribute the same percentage to each creditor by reference to the value of that creditor's claim at the date of distribution.

LORD NEUBERGER: Yes.
MR DICKER: So in relation to any particular distribution, if a creditor owed £100 and gets £10, a creditor owed $100 should get $10.
LORD NEUBERGER: Yes.
MR DICKER: And you then, essentially, inevitably have a different conversion date for each dividend date, and Lord Justice Brightman dealt with this at 15F to H. Just below F, he says:
"Conversion is inevitable. The question is at what date or dates is that conversion to be affected. The argument of the bank is the conversion is to be recalculated from time to time."
And he then illustrated what that would involve.
LORD NEUBERGER: Yes.
MR DICKER: So when he is talking about once and for all, or recalculated from time to time, he is talking about two alternative approaches to conversion into sterling for the purposes of proof. He is not dealing with, at this stage, non-provable claims.
Now, again, just as with Mr Justice Oliver, Lord Justice Brightman, when he is dealing with the position in relation to the conversion date for the purposes of proof, expresses his reasoning solely in terms of: it is for the purposes of proof, for the

purposes of ensuring a pari passu distribution between creditors.
LORD NEUBERGER: Okay, we have that point.
MR DICKER: Your Lordships will see that, and I don't think I need to take your Lordships to --
LORD NEUBERGER: We have been taken to the passage. What you are saying is the passage is to be read as limited to that aspect, to that relationship.
MR DICKER: Yes. So when one converts into sterling, it is all for the purposes of proof. And again, just like Mr Justice Oliver, he too refers to Re Humber Ironworks in support of that analysis.
LORD NEUBERGER: Yes.
MR DICKER: And you see that at page 21, letter E.
LORD NEUBERGER: Yes.
MR DICKER: And going down to between letter E and G.
LORD NEUBERGER: Yes.
MR DICKER: Now, having --
LORD CLARKE: They were arguing that Dynamics was wrongly decided.
MR DICKER: Yes. Mr Stubbs, as Lord Justice Oliver said in Re Lines Bros, submitted an argument -- this is at 23 letter C to D. He said:
"Mr Stubbs's arguments have a logical cogency which has from time to time during the appeal severely shaken

such confidence as I may have obtained."
In the end, they decided the argument was wrong, but the argument was --
LORD CLARKE: Funny that, yes.
MR DICKER: The argument was Dynamics is wrong, they have misunderstood pari passu distribution, and what pari passu distribution required was essentially not a once and for all conversion, but a recalculation of the exchange rate for the purposes of proof. So once and for all did not mean a substantive extinguishment of the underlying right and replacement with a new right. It just meant in the context of the proof, we keep the same date, the date of liquidation.
LORD NEUBERGER: Yes, okay, we have that.
MR DICKER: Yes. My Lords, your Lordships have seen the suggested treatment of the position in the event of a surplus at page 21 in Lord Justice Brightman's judgment.
LORD NEUBERGER: Yes, we have.
MR DICKER: Again, we say obviously if there had been an substantive replacement of the old right with a new right essentially to the sterling equivalent, the discussion about what would happen in a surplus could never have arisen.
LORD NEUBERGER: Anyway, he leans in your favour, but leaves

it open.
MR DICKER: My Lord, yes. We go further than that, obviously. We say that the views expressed are entirely in accordance with the approach taken in relation to post-insolvency interest and the analysis he gives in relation to the position when the company is insolvent.
LORD NEUBERGER: Yes.
MR DICKER: One other reference. I don't think I need to show your Lordships anything specific in Lord Justice Oliver's judgment, but one reference to Lord Justice Lawton's judgment, so your Lordship can see it, page 14 at letter C.
LORD NEUBERGER: Yes.
MR DICKER: Where he says, just above C:
"When the liquidation starts, no further liabilities under contract become payable until such time as it is clear pre-liquidation liabilities have been satisfied in full."
So we say, perfectly clear, none of them were thinking once for all meant the claim converted to sterling and that was the end of it, even if there was a surplus.
My Lord, that deals with the position prior to the introduction of rule 2.86.
LORD NEUBERGER: Thank you.

MR DICKER: And that is what I wanted to turn to next.
LORD NEUBERGER: Right. That is page 1178, is it?
MR DICKER: Yes.
LORD NEUBERGER: Tab 3.
MR DICKER: We say rule 2.86 was intended simply to codify the position in relation to the valuation of foreign currency claims for the purposes of proof as discussed in Re Dynamics and in the first part of Re Lines Bros. There had been two recent authorities which dealt at length with what is the appropriate date for converting foreign currency claims for the purposes of proof, ensuring the pari passu distribution, in an insolvent liquidation. Those authorities held it is the date of liquidation, and that is what the rules introduced in 1986 were intended to do.
LORD NEUBERGER: Yes.
MR DICKER: No more than that. My Lords, we say, given everything I have said so far, what my learned friend needs to show is a clear intention, essentially, to displace the previous position.
LORD NEUBERGER: Yes.
MR DICKER: To make it plain that, contrary to the basic nature of the scheme, collective process of execution, contrary to the discussions in Re Dynamics and Lines Bros, limit the conversion for the purposes of

proof, what Parliament intended at this stage was to take the steps suggested by --
LORD NEUBERGER: A bit optimistic saying that is Dynamics. He doesn't consider the wider issue, does he, on your case? Dynamics just doesn't consider this question.
MR DICKER: Well, my Lord, what we have in Dynamics was --
LORD NEUBERGER: I know, but it doesn't limit it to that.
MR DICKER: No, no, your Lordship is right, and it may be that I didn't express it well.
LORD NEUBERGER: And Lord Justice Brightman does not express a concluded view, and anyway it is obiter.
MR DICKER: No, that is absolutely right, but what they did do was explain in detail why you have a conversion as at the date of liquidation.
LORD NEUBERGER: Yes, I see.
MR DICKER: And the only reason they gave was to ensure pari passu distribution amongst creditors.
So the task for my learned friend, we say, is to say that when enacting a rule which we say simply replicates the part of the decisions in Dynamics and Lines Bros, Parliament wasn't intended simply to do that, but it was intending to go further, essentially to achieve fairness not merely between creditors for the purposes of proof, between all, as my learned friend described it, stakeholders, so essentially shareholders could also now

take the benefit of the statutory conversion into sterling.
LORD SUMPTION: It doesn't have to be the intention of Parliament, it simply has to be the result as a matter of analysis. The argument is surely simply that the admission of a proof has an effect roughly corresponding to the merger of a judgment with the underlying liability. And the whole argument really depends on whether that proposition is correct.
MR DICKER: Yes, and it is a question of construction and your Lordship is absolutely right and I am content to deal with it in that way.
My Lord, as far as linguistic points are concerned, and context points in relation to rule 2.86, rule 2.86, as my learned friend pointed out, forms part of chapter 10 of the rules.
LORD NEUBERGER: Yes.
MR DICKER: That chapter is concerned with the mechanism for proving a debt.
LORD NEUBERGER: Yes.
MR DICKER: And for valuing that debt for the purposes of proof.
LORD NEUBERGER: That is not a difficult line to push in light of the opening words of sub-rule (1).
MR DICKER: No. On our submissions, that is exactly where

you would expect to find it.
As far as the wording of the rule itself is concerned, it has, as the majority in the Court of Appeal emphasised, it states it operates for the purposes of proving a debt incurred or payable in a currency other than sterling, and it also refers simply to the amount of the debt being converted into sterling, not to the underlying debt being discharged.
Now, we say against the background of Lines Bros, which had only recently been decided, it would be extraordinary if the legislature had phrased 2.86 in that way, intending, effectively, to discharge the underlying debt and replace it with a new one or permit the underlying debt to be paid in full with sterling dividends. The reason I say that is because one looks at Lord Justice Brightman's judgment in Lines Bros, essentially drawing a distinction between what you do for the purposes of proof, namely convert at the date of liquidation, and what you do with any surplus. So a clear distinction between proof on the one hand and dealing with the surplus on the other. 2.86 uses language which suggests that it, like that part of Lord Justice Brightman's judgment, was concerned with the question of proof, not with the distribution of the surplus.

I won't belabour the point, but both Lord Justice Briggs and Lord Justice Moore-Bick regarded these linguistic and contextual points as supported by the overriding justice of recognising currency conversion claims.
LORD NEUBERGER: That is the point you developed earlier.
MR DICKER: Your Lordships have seen that in their judgments.
LORD NEUBERGER: Yes, I understand.
MR DICKER: There is one other matter, one other point I need to deal with. I mentioned that before 1986 there were different rules for proof in an insolvent and a solvent liquidation. Your Lordships will recall sections 316 and 317 of the 1948 Act. Now, that changed in 1986.
LORD NEUBERGER: Yes.
MR DICKER: Essentially, it is the same rules for both.
LORD NEUBERGER: Yes.
MR DICKER: And 2.86 applies both in an insolvent liquidation and in a solvent liquidation. My learned friend's submission, as I understand it, is well, given it applies in a solvent liquidation, it must have been intended to have substantive effect, otherwise why bother to make it applicable in a solvent liquidation?
Now, the answer to that is as follows: first of all,

it is important to appreciate it is not just rule 2.86 that applies in the solvent liquidation, it is the other rules as well.
LORD NEUBERGER: Yes.
MR DICKER: Lord Justice Briggs identified the reason for this at paragraph 162. He said:
"Companies may move into and out of insolvency during a liquidation or distributing administration, so it is better to deal by a single process first with the claims of all of those entitled on an insolvency."
And in that respect, one has to bear in mind that there isn't a thing as such called a solvent liquidation. What there is, strictly speaking, is a members' voluntary liquidation, and a members' voluntary liquidation is any liquidation where, in accordance with section 89, the directors have made a statutory declaration that they have made a full inquiry into the company's affairs and have formed the opinion that it will be able to pay its debts in full.
Now, it is obviously perfectly possible that, even acting reasonably and in good faith, such a directors may turn out to have made a mistake, either because the liabilities are bigger than they expected or the assets realise less than they hoped. So there is always a risk that an apparently solvent company may turn out to be

insolvent, and the way the Act deals with this is by ensuring that the assets are distributed, both in a solvent and in an insolvent liquidation, first pari passu amongst the creditors, essentially to ensure that if it subsequently turns out the company is in fact insolvent, no harm has been done in the meantime.
Now, the argument that by amending the law such that the same rules apply to solvent and insolvent liquidation effectively abolished non-provable claims was an argument that was in fact made to Mr Justice David Richards in T&N and rejected by him in the panel your Lordships have already seen. Can I just show your Lordships paragraph 105 of his judgment in T&N. T&N is in bundle 1, tab 21.
LORD NEUBERGER: Yes.
MR DICKER: It is paragraph 106. He says pressed for the fifth consequence, essentially pressed with this, to try to persuade him to construe the rules on debts provable in a liquidation, to make them as wide as possible:
"... the consequence was submitted that if all provable debts and liquidation expenses were paid in full, the balance of the assets would be distributed among shareholders, no provision would be made for non-provable claims ... submitted this resulted from

first the liquidator's statutory duty to distribute the assets in accordance with section 107, and, secondly, the changes made by the Insolvency Act 1986 and rules, which meant that there was no longer any mechanism for proving such claims even in a solvent liquidation."
So the argument was we have now got the same rules for solvent as we have for insolvent. The intention of the legislature must have been to thereby abolish non-provable claims. It must therefore follow that you can ignore them before distributing a surplus to shareholders. Mr Justice David Richards said no in the passage you have already seen at 107.
LORD NEUBERGER: Yes.
MR DICKER: So there is nothing in that change in 1986, either.
My Lord, there are two further matters I need to deal with. Firstly, briefly, the materials leading up to the 1986 Act, which I think I can take fairly shortly, and then, secondly, other aspects of the statutory scheme on which my learned friend relies.
LORD NEUBERGER: Before you do, how are we doing in terms of time, Mr Dicker?
MR DICKER: My Lord, I will certainly finish well within the estimated time.
LORD NEUBERGER: How long do you think you will need?

MR DICKER: My Lord, I may well be able to finish by 4.15.
LORD NEUBERGER: That is very helpful. And in that case, rather perversely, you having said that, we will rise at 3.55, because one of us has another public engagement, and we will resume again at 10 o'clock tomorrow, because we are going to finish well within time. I hope that is not too inconvenient for you.
MR DICKER: My Lord, it is not at all.
LORD NEUBERGER: It may even help you to --
MR DICKER: That was a hope rather than a guarantee.
LORD NEUBERGER: I am not taking it as a guarantee. It partly depends how much we interrupt you as well, I appreciate, but we will go on to 3.55.
MR DICKER: My Lord, the next topic, the pre-1986 materials, obviously the answer depends primarily on the construction of rule 2.86. But in our submission there is in any event nothing in the relevant material which should indicate the introduction of the rule was intended to do any more than codify the effect of the decision of the Court of Appeal in Lines Bros.
My Lord, I think I can deal with this, as I said, very shortly. I think all your Lordship needs to see is the final report of the Law Commission, obviously that being the last of the three reports, and the only one that post-dated Lines Bros, which your Lordship will

have in bundle F8 at tab 10.
LORD NEUBERGER: Thank you. Yes.
MR DICKER: And there are essentially three parts to this I just want to refer your Lordships to. The first, page 3820 of the bundle, paragraph 2.23, deals with the position if the debtor is solvent:
"No direct authority, but suggested obiter in Lines Bros case that in those circumstances it might well be that a foreign currency creditor was entitled to be paid the balance of his full contractual debt before the shareholders receive anything."
And the footnote reference to Lord Justice Brightman in the Court of Appeal:
"However, for the purposes of determining whether a company is or is not solvent for this purpose, the values of the foreign currency claims are not recalculated."
Again, that is picking up Lord Justice Brightman's approach:
"In other words, the sterling dividends received from time to time as the process of winding up proceeds are not reconverted into the relevant foreign currency as at the respective dates of payment."
What that means is you convert all foreign currency debts as at the date of liquidation. You pay those

sterling proved debts in full without recalculating them as at the date of each dividend, in other words agreeing with Lord Justice Brightman and disagreeing with the bank's submission as to what pari passu meant, and noting that Lines Bros considered that if the consequence was to produce a surplus, a foreign currency creditor is entitled to be paid the balance of his full contractual debt before the shareholders receive anything.
LORD NEUBERGER: It might well be that.
MR DICKER: Yes. So that is surplus.
The absence of surplus they deal with in 334 and 335.
LORD NEUBERGER: Yes.
MR DICKER: 334, they refer to Miliangos:
"The decisions since that case make it clear why in a case of a liquidation of a company, whether it is or is not solvent, and in a bankruptcy, foreign currency debt should be converted into sterling the date of the resolution to wind up the company."
And they say, three lines further down:
"In a working paper, we expressed agreement with this approach."
335:
"Working paper referred to but rejected a possible

argument that a more satisfactory approach than the present one would be for the conversion of a foreign currency obligation into sterling to be affected at the latest practical date. It seemed to be on each occasion on which it was decided to declare and pay a dividend."
That is essentially the argument that is made by the bank in Lines Bros.
LORD NEUBERGER: Yes.
MR DICKER: And 336, on consultation, opinion was divided. And they end 336 by saying:
"In both the Dynamics and the Lines Bros cases, the contrary arguments were fully considered by the court but rejected for reasons which appear to us to be convincing. We remain of the view which we expressed in the working paper."
Now, those two paragraphs are concerned solely with the conversion of foreign currency claims for the purposes of proof, whether in a solvent or an insolvent liquidation, and one can see that from the penultimate sentence in 336. They say:
"In both the Dynamics and the Lines Bros cases, the contrary arguments were fully considered by the court but were rejected for reasons which appear to us to be convincing."
Obviously Dynamics didn't deal with the surplus at

all, so they can't be referring to any question of the surplus there, and Lines Bros did consider the position in the event of a surplus, but obviously didn't reject it. Lord Justice Brightman said this is what should happen in the event of a surplus.

So 334 and 335, 336, as I say, are concerned solely with conversion of currency claims for the purposes of proof, not with a surplus.

Then they say, 337:

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

So no criticism here of the suggested approach of Lord Justice Brightman in Lines Bros.

In addition, agreement with the approach taken in Dynamics and Lines Bros to conversion of claims for the purposes of proof, nothing here in our submission to suggest that when rule 2.86 was introduced Parliament was effectively intending to, or it should be construed as departing from the suggested approach of Lord Justice Brightman.

LORD NEUBERGER: Thank you.

MR DICKER: So that is all, I think, in relation to the Law Commission's final report.

We deal with the working report and with the Cork Committee in our written case.

LORD NEUBERGER: Yes.

MR DICKER: But I don't think I need to say anything more than that.

LORD NEUBERGER: That is fine, thank you.

MR DICKER: There are then five other aspects of the statutory scheme on which my learned friend relies. Now, ultimately, we say, the essential exercise is construing 2.86. This is obviously part of the context. And my learned friend gets no assistance from these other matters. All we say are consistent with respecting the basic principle that creditors' claims have to be satisfied in full before any distribution can be made to shareholders, and none suggest that 2.86 operates by converting the claim into a sterling claim.

Now, the first aspect concerns set-off. In respect of this, we say nothing contrary to our analysis is indicated by the treatment of claims and cross-claims by way of insolvency set-off. Where set-off operates, it has always been regarded as a form of payment. So the creditor is being paid. There is nothing unjust or contrary to the principles I mentioned in insolvency set-off operating as at the date of liquidation. What happens is the debtor obtains full value for his debt at

the date of payment, albeit through the mechanism of conversion into sterling. So one has a form of payment, albeit by way of set-off, but by reference to an exchange rate at the date of such payment. So the creditor is getting full value because his debt is discharged by reference to the then exchange rate.

Now, there is an issue raised by my learned friend as to what happens to the balance of any claim after the set-off has occurred. So imagine a situation in which you have a foreign currency claim which is much larger than a sterling cross-claim.

LORD NEUBERGER: Yes.

MR DICKER: What happens to the balance of the foreign currency claim? Now, we say that what happens is that the balance of the foreign currency claim remains an unpaid foreign currency liability, and there is a close analogy, in our submission, between the treatment of foreign currency claims for the purposes of set-off on the one hand and future debts and set-off on the other.

Now, there is an authority of the Court of Appeal in relation to the latter that I wanted to just show your Lordships. It is another decision in relation to Kaupthing Singer & Friedlander. Your Lordships have it at F1, tab 12.

LORD NEUBERGER: Yes.

MR DICKER: Now, it may help, just before showing your Lordships the relevant passages of this, for your Lordships to have open as well the relevant rule. So if your Lordship goes as well to bundle F3, tab 74.

LORD NEUBERGER: The rule at the bottom of the page in Kaupthing?

LORD CLARKE: Tab what, did you say?

MR DICKER: My Lord, tab 74 and we are looking for rule 2.85, mutual credit and set-off.

LORD CLARKE: Sorry, tab what?

MR DICKER: Sorry, it is tab 74 of bundle F3.

LORD NEUBERGER: 275, yes.

LORD SUMPTION: I have 268.

LORD NEUBERGER: 268.

MR DICKER: And it is rule 2.85, mutual creditors and set-off.

LORD NEUBERGER: Page 2008, okay, right.

MR DICKER: 2.85(2) requires, defines mutual dealings.

LORD NEUBERGER: Yes, I see.

MR DICKER: Sub-rule (3) requires an account to be taken, and then there are two rules, sub-rule (6) which provides:

"Rule 2.86 to 2.88 shall apply for the purposes of this rule in relation to any sums due to the company which are payable in a currency other than sterling."

Obviously to set one debt off against another, they need to be in the same currency, so sub-rule (6) applies rule 2.86 and ensures that foreign currency liabilities are converted into sterling.

Then sub-rule (7), which was the rule that was relevant in Kaupthing, says:

"Rule 2.105 shall apply for the purposes of this rule to any sum due to or from the company, which is payable in the future."

And rule 2.105 --

LORD NEUBERGER: 2032, yes.

MR DICKER: Yes. Debts payable at a future time, requires the future debt to be discounted for the purposes of dividend.

LORD NEUBERGER: Yes, we looked at this.

MR DICKER: So a similar approach to ensuring like is set-off against like, both in relation to foreign currency claims and future debts.

Now, what happened in Kaupthing was the future debt was owed by the creditor to Kaupthing. The creditors' argument was the claim needs to be set-off against cross-claim. The future liability which it owed Kaupthing had to be discounted, because that is what rule 2.85(7) says.

LORD NEUBERGER: Yes.

MR DICKER: You then effect a set-off, but any balance remaining which the creditor owed to Kaupthing is the balance after discounting.

Now, one further rule that the creditor then relied on in rule 2.105 -- and I am sorry, I should have taken your Lordships to this when we had it open. I am sorry, 2.85.

LORD NEUBERGER: Yes.

MR DICKER: 2.85(8).

LORD NEUBERGER: We looked at that earlier.

MR DICKER: "Only the balance, if any, of account owed to the creditor proved in the administration. The balance of any amount owed to the company shall be paid to the administrator as part of the assets, except where all or part of the balance results from a contingent or prospective debt owed by the creditor. In such a case, the balance or that part of it which results from the contingent or prospective debt shall be paid if and when that debt becomes due and payable."

So the creditors' argument was, "The debt which I owed Kaupthing has been discounted to give it a present value. It is then used by way of set-off. There is a balance which I still owe but it remains a discounted amount. Despite having been discounted from the present value, I only have to pay that debt in

accordance with sub-rule (8) if and when that debt becomes due and payable."

LORD NEUBERGER: Yes.

MR DICKER: Now, not surprisingly, the argument was rejected by the Court of Appeal.

LORD NEUBERGER: Yes.

MR DICKER: Just from Lord Justice Etherton's judgment at page 1268 of the bundle, paragraph 32 of the judgment --

LORD NEUBERGER: Yes.

MR DICKER: He says at 32:

"Notwithstanding these powerful and well presented arguments, I would allow this appeal. The interpretation of rule 2.85 for which Mr Fisher contends has no sensible policy rationale. It is on the contrary inconsistent with the basic principles and objectives of insolvency administration."

And then 34:

"Contrary to the approach of the judge and to the submissions of Mr Fisher, I consider it is perfectly possible to interpret rule 2.85(7) and (8) without straining their language so as to produce a sensible meaning in accordance with the sound policy objective and general principles of insolvency administration.

"2.105(2) provides for the discount of a future debt to the current value by application of the statutory

formula for the purposes of dividend and no other purpose. That is consistent with the purpose of rule 2.85, which, as appears from the express provisions of 2.85(1), is triggered by and is for the purpose of making a distribution. I see no difficulty in the circumstances in reading the words 'for purposes of this rule' in rule 2.58 as confining the effect of the incorporation of rule 2.105 to what is necessary to calculate what should be paid by way of dividend to the creditor and for that purpose the making of the insolvency set-off as not touching at all upon what remains due to the company after the insolvency set-off has taken place."

One other paragraph, paragraph 36. The creditor had relied on Stein v Blake. Lord Justice Etherton says:

"I do not accept the principle in Stein v Blake that on the taking of the account for the purpose of the insolvency set-off, the original causes of action that are extinguished has any relevance to the present issue."

Essentially holding that it doesn't follow that balance unpaid by way of set-off can't continue, in this case, as a future debt, or we would say, if it was a foreign currency liability, in a foreign currency.

So there is no problem with adopting our analysis

caused by rule 2.85 and the provisions in relation to set-off. To the extent that set-off occurs and a claim is set-off against a cross-claim, the creditor has effectively received payment in full.
LORD NEUBERGER: Paid at that time, because the deemed payment is affected by the automatic set-off.
MR DICKER: Absolutely.
LORD NEUBERGER: Therefore, whichever way the currency then moves and however far is irrelevant in relation to the part which has been set-off. I understand.
MR DICKER: In substance, it is no different than if a cash payment is made in both directions on the same day.
LORD NEUBERGER: Exactly. Because it is a sterling sum at the rate appropriate at the notional payment.
MR DICKER: Absolutely.
LORD NEUBERGER: Yes, I understand.
MR DICKER: And to the extent there is a balance, no difficulty in holding, it just remains a foreign currency liability --
LORD NEUBERGER: Yes.
MR DICKER: -- to be treated in accordance with the rest of the scheme.
LORD NEUBERGER: I understand. Yes.
MR DICKER: Now, one further point in relation to set-off in administration, and it goes back to a point I made

earlier in the context of what I referred to as the one-way bet issue. Set-off operates slightly differently in an administration than in a liquidation. In a liquidation, set-off effectively occurs automatically upon liquidation by reference to the exchange rate on the date of liquidation.
LORD NEUBERGER: Yes.
MR DICKER: So it happens immediately by reference to exchange rates on that day. Administration is different, as I mentioned. It is triggered by a notice to declare a distribution but then operates retrospectively.
LORD NEUBERGER: Yes.
MR DICKER: Now, as I understand my learned friend's argument, it is that if the Court of Appeal's analysis is right, set-off in administration could lead to a currency conversion claim.
LORD NEUBERGER: Yes.
MR DICKER: And the reason would be because --
LORD NEUBERGER: The retrospective.
MR DICKER: Absolutely. Now, that was an issue which, as part of his endeavours to answer all issues arising in relation to the LBIE estate, Mr Justice David Richards dealt with in a supplemental judgment in Waterfall IIA. It is, just so your Lordships have the reference, it is

authorities F5 at tab 7. I should show your Lordships that.
LORD NEUBERGER: Where does he deal with it?
MR DICKER: It is F5, tab 7.
LORD NEUBERGER: Which paragraph?
MR DICKER: And it is paragraphs 37 to 47.
LORD NEUBERGER: Page 2723, right, thank you. Okay, we have the rule set out.
MR DICKER: He identifies in 37 the issue he is addressing.
LORD NEUBERGER: Yes.
MR DICKER: "Whether and if so in what circumstances and in what manner a currency conversion claim can arise from ... (reading to the words)... pursuant to 2.85(3)."
LORD NEUBERGER: And then we have 285 set out.
MR DICKER: Yes. 39, he identifies the effect of or the difference between the notice of intention to distribute and the date of set-off.
LORD NEUBERGER: Yes.
MR DICKER: 40:
"York submits there may be a currency conversion claim as a result."
42, he says:
"In my judgment the administrators and Wentworth are right, no currency ...(reading to the words)... because the account for the purposes of set-off is taken as at

the date on which notice of an intention to make a distribution is given, that is the date on which the creditors' claim is, to the extent of set-off, discharged. If that were the case, there would be something to be said for equating discharge by set-off with the payment of a dividend."
LORD NEUBERGER: Yes.
MR DICKER: But he says in 43:
"The effect of the provisions in the rules is that although the set-off account is taken as at the date of the administrator's notice, the creditors' claim is discharged to the extent of the set-off as at the date of administration."
So in other words the logic underlying the rules is it may be triggered by a notice of intention to distribute, but you are treated by the rules as effectively having had the benefit of the set-off as at the date of administration by reference to an exchange rate on that date. As a result, no currency conversion claim can arise from the difference between set-off and administration on liquidation.
LORD NEUBERGER: Thank you.
MR DICKER: So we say nothing in the treatment of set-off which is contrary to our analysis. Nothing which one might say infringes the principle that surplus can only

be distributed after creditors' claims have been paid in full.

Lord Justice Briggs in his judgment dealt with this essentially by ensuring that every time he referred to payment he added the words "or by way of set-off". We say it is simply a form of payment.

LORD NEUBERGER: Right.

MR DICKER: So that is the first other aspect. The second concerns contingent claims.

LORD NEUBERGER: Yes.

MR DICKER: Again, we say no infringement of the principle. Obviously there are two potential reasons why the rules provide for the estimation of contingent claims. One is plainly to ensure pari passu distribution between creditors. A second is because, as the cases hold, companies are entitled to wind up their affairs within a reasonable period, and if you can't estimate claims then that wouldn't be possible.

LORD NEUBERGER: Yes.

MR DICKER: Just so there is no misunderstanding, that second principle obviously isn't relevant here, because by the time an administrator comes to make a distribution to shareholders, it is clear what sum is required to discharge any unpaid foreign currency claim. There is no delay, there is in hindrance, to the winding

up of the company by doing that.

Now, the reason why there is no infringement of the principle is as a result of the operation of the hindsight principle. Essentially, you can revalue your contingent claim at any stage and if your revalued claim permits you to share in the assets then you are entitled to do so, and prove for the relevant contingent claim.

Now, given the width of or the extent to which the hindsight principle operates, it is difficult to see why one would ever need a non-provable claim in relation to a contingent claim. And I say that because you can have a company which is in liquidation. The claim is estimated. The liquidator pays the full amount of the estimated claim. He distributes to shareholders. The company is dissolved. Despite that, if the contingency subsequently occurs, creditors are still entitled to apply to have the dissolution declared void, at which point the liquidation restarts and they can then submit a revised proof and ensure, if there are any assets, ensure that they are paid. Essentially it covers in effect all of the ground that might otherwise be covered by a non-provable claim.

Now, as my learned friend mentioned this is dealt with in re: Stanhope, and I wondered just before we rise whether I could just show your Lordships that.

LORD NEUBERGER: Yes.

MR DICKER: It is authorities F6 tab 15.

LORD NEUBERGER: Tab 15, you say?

MR DICKER: Yes.

LORD NEUBERGER: Yes.

MR DICKER: And it involved --

LORD NEUBERGER: We have looked at this.

MR DICKER: It involved a company which had made a declaration of solvency. All of the assets have been distributed and it was deemed to have been dissolved. Your Lordships will see that, page 85 of the reports, letter G.

LORD NEUBERGER: Yes.

MR DICKER: Just, the passages I want to show your Lordship in the report, 88, the bottom of the page, H.

LORD NEUBERGER: Yes.

MR DICKER: Mr Etherton said:

"An English company has an inalienable ...(reading to the words)... in accordance with the rules of liquidation, paying contingent creditors the value of their claims at the date of liquidation, no more."

LORD NEUBERGER: Yes.

MR DICKER: And Lord Justice Hoffmann says:

"There are elements of truth in each of Mr Etherton's propositions but ...(reading to the

words)... of their claims at the date of winding up. The company cannot be required to set aside a fund against the possibility that contingency may happen."

Then just between C and D he says:

"On the other hand, also a rule of winding up is that a creditor may submit a proof or amend an existing proof at any time during the liquidation. The rule that prior distributions cannot be distributed means that it will not do him much good, but in principle is entitled to make the claim."

LORD NEUBERGER: Yes.

MR DICKER: My Lord, I wonder if that is a convenient moment.

LORD NEUBERGER: Yes. You are still on time, on course, along the lines you indicated?

MR DICKER: I have a few short comments to make in relation to future debts, disclaimer and bankruptcy, which were the other three aspects. I then need to see how much, if any, of my submissions on the merits, the one way bet, are left and it may be not much. And that is then it. So I would hope probably no more than about 20 minutes.

LORD NEUBERGER: That is very helpful. We will resume again at 10 o'clock tomorrow. And on that basis we will be virtually an hour ahead of schedule when you sit down.

Thank you very much.

The fact that others have been quick doesn't mean that there is extra time for reply, I should say. So we will have time to consider where we stand. 10 o'clock tomorrow. Thank you very much, Mr Dicker.

(3.54 pm)

(the hearing adjourned until 10 o'clock on Thursday 20 October 2016)