Easter Term
[2017] UKSC 38
On appeal from: [2015] EWCA Civ 485

JUDGMENT

The Joint Administrators of LB Holdings Intermediate 2 Limited (Appellant) *v* The Joint Administrators of Lehman Brothers International (Europe) and others (Respondents)
The Joint Administrators of Lehman Brothers Limited (Appellant) *v* Lehman Brothers International (Europe) (In Administration) and others (Respondents)
Lehman Brothers Holdings Inc (Appellant) *v* The Joint Administrators of Lehman Brothers International (Europe) and others (Respondents)

before

Lord Neuberger, President
Lord Kerr
Lord Clarke
Lord Sumption
Lord Reed

JUDGMENT GIVEN ON

17 May 2017

Heard on 17, 18, 19 and 20 October 2016

Appellant (LBHI2 Joint Administrators)
Robert Miles QC
Louise Hutton
Rosanna Foskett
(Instructed by Dentons UKMEA LLP)

Respondents (Anthony Victor Lomas and ors)
William Trower QC
Daniel Bayfield QC
Stephen Robins
(Instructed by Linklaters LLP)

Appellant (LBL Joint Administrators)
David Wolfson QC
Nehali Shah
Ruth den Besten
(Instructed by DLA Piper UK LLP)

Respondent (CVI GVI (LUX) Master Sarl)
Robin Dicker QC
Richard Fisher
Charlotte Cooke
(Instructed by Freshfields Bruckhaus Deringer LLP)

Appellant (LBHI)
Barry Isaacs QC
(Instructed by Weil, Gotshal and Manges (London) LLP)

LORD NEUBERGER: (with whom Lord Kerr and Lord Reed agree)

1. This appeal and cross-appeal raise a number of points of insolvency law, which arise out of the collapse of the Lehman Brothers group of companies ("the Group") in 2008.

Introductory

The basic facts

2. The Group's main trading company in Europe was Lehman Brothers International (Europe) ("LBIE"), which is an unlimited company. Its share capital consists of a number of ordinary shares as well as a number of redeemable shares. All these shares, except for one ordinary share, are held by LB Holdings Intermediate 2 Ltd ("LBHI2"), whose sole function was to act as LBIE's immediate holding company. The remaining ordinary share is held by Lehman Brothers Ltd ("LBL"), which was the service company for the Group's operations in the UK, Europe and Middle East.

3. LBIE and LBL have been in administration since September 2008, and LBHI2 has been in administration since January 2009. The purpose of the administrations of these companies has been the realisation of their respective assets to best advantage, rather than the preservation of the companies as going concerns. Contrary to many people's expectations when LBIE went into administration, it now appears that it is able to repay all its external creditors in full.

4. Under the provisions of the Insolvency Act 1986 as amended ("the 1986 Act"), an administrator of a company is permitted to make distributions to creditors of the company. Once an administrator gives notice of an intention to make a distribution, the administration is commonly referred to as a distributing administration. Since 2 December 2009, LBIE has been in distributing administration, but LBHI2 and LBL have not been. In November 2012, the joint administrators of LBIE declared and paid a first interim dividend to LBIE's unsecured creditors of 25.2 pence in the pound, totalling some £1.611bn.

5. Lehman Brothers Holdings, Inc ("LBHI") is the ultimate parent of the Group. In September 2008, it began Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court, and it emerged from those proceedings in March 2012. LBHI is

an indirect creditor of many companies in the Group, and its primary interest relates to LBHI2's assets, including its right to recover subordinated loans made to LBIE and other issues relating to those subordinated loans.

6. The LBIE administrators received proofs of debt from various unsecured creditors including LBL and LBHI2. LBL's initial proof was for £363m, and LBHI2 submitted a proof for an unsecured claim of around £1.254bn in respect of sums advanced to LBIE under three subordinated debt agreements made in November 2006 (together with a separate unsecured claim of around £38m). The LBL administrators received proofs from LBHI2 in the sum of £257m, and from LBIE for £10.4bn. The proof from LBIE included £10bn, which was the LBIE administrators' estimate of LBL's contingent liability to LBIE as a contributory under section 74 of the 1986 Act. This claim led to LBL seeking leave to amend its proof in LBIE's administration from £363m to £10.934bn. It is also relevant to mention that some of the proofs submitted to LBIE's administrators were in respect of debts denominated in foreign currencies.

7. In February 2013, the administrators of LBIE, of LBL and of LBHI2 issued proceedings seeking the determination of the court on a number of questions arising out of the administrations. On 14 March 2014, David Richards J delivered a judgment (reported at [2015] Ch 1) dealing with those questions, and he subsequently made consequential declarations, which were set out in paras (i) to (x) of an order. The declarations in paras (i) to (ix) were challenged on appeal or cross-appeal, and the Court of Appeal (Moore-Bick, Lewison and Briggs LJJ) upheld most, but varied some, of them in a decision which is reported at [2016] Ch 50.

8. The order made by David Richards J is set out in an appendix to the judgment of the Court of Appeal, and the contents of paras (i) to (ix) have now been the subject of argument in this Court. It is sensible to address them in the same order as they were discussed in the judgments in the Court of Appeal. Before turning to the issues, however, it is right to set out the principally relevant legislative provisions. It is also right to pay tribute to the well expressed and illuminating judgments below, which helped to ensure that the arguments were developed in this Court in a disciplined and clear way.

9. Hereafter, unless the contrary is stated, all references to sections and Schedules are to sections of and Schedules to the 1986 Act, and all references to rules are to those in the Insolvency Rules 1986 (SI 1986/1925) as amended ("the 1986 Rules"). (It is right to add that the 1986 Act was preceded by the Insolvency Act 1985 and the Companies Act 1985 which between them contained the great majority of the provisions now to be found in the 1986 Act. It was decided to repeal those 1985 statutes and consolidate all insolvency law in the 1986 legislation. For present purposes, the changes effected in 1985 can be elided with those in 1986, and

accordingly I shall disregard the 1985 Act when describing the changes to insolvency law effected in the 1980s.)

The 1986 Act and the 1986 Rules: introductory

10. The 1986 Act and the 1986 Rules ("the 1986 legislation") were introduced following the publication of the 1982 *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558) (the Cork Report), and a 1984 Government White Paper, *A Revised Framework for Insolvency Law* (Cmnd 9175). Para 1 of the White Paper acknowledged the "thorough analysis" contained in "the Cork Report", which is accurately characterised by Sealy and Milman in their *Annotated Guide to the Insolvency Legislation*, 19th ed (2016), vol 1, p 1, as "[t]he main inspiration for the reforms" contained in the 1986 legislation. Para 2 of the White Paper described the objectives of the proposed new legislation, which included "establish[ing] effective and straightforward procedures for dealing with and settling the affairs of corporate and personal insolvents in the interests of their creditors". In para 3 of the White Paper it was stated that the law of corporate insolvency had "altered very little over the past century", and that there was "an urgent need to reform, update and strengthen the insolvency legislation so that the objectives … set out in para 2 can be met". Para 4 set out six objectives for the proposed changes which became the 1986 Act and the 1986 Rules. The third of those objectives was "To simplify wherever possible corporate and personal insolvency procedures". And the fifth included "the introduction of a new insolvency mechanism, known as the administrator procedure, designed to facilitate the rehabilitation and re-organisation of companies faced by insolvency but where there are reasonable prospects for a return to profitability".

11. The 1986 legislation consolidated in a single statute and set of rules the legislative provisions regarding both personal insolvency and corporate insolvency. Until then, they had been dealt with in separate legislation - most recently the Bankruptcy Act 1914 ("the 1914 Act") and the Bankruptcy Rules 1952 (SI 1952/2113), which covered personal insolvency, and the Companies Act 1948 ("the 1948 Act") and the Companies (Winding-Up) Rules 1949 (SI 1949/330) ("the 1949 Rules"), which applied to corporate insolvency. Nonetheless, the 1986 legislation contains almost entirely separate regimes for personal insolvency and corporate insolvency. Thus, in the 1986 Act, sections 1 to 251 deal with "company insolvency", sections 251A to 385 with "insolvency of individuals", and the remaining sections, 386 to 444, while applicable to both types of insolvency, are concerned with matters such as insolvency practitioners and subordinate legislation. And this is reflected in the 1986 Rules: Parts 1 to 4 are concerned with "company insolvency", Parts 5 and 6 deal with "insolvency of individuals", and Parts 7 to 13 are of general application, being concerned with court procedures, notices, meetings and a few common definitions. In many ways, there was greater overlap between personal and corporate insolvency in the preceding legislative regimes, because

section 317 of the 1948 Act provided that the principles applicable in bankruptcy "with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities" applied "[i]n the winding up of an insolvent company".

12. As anticipated in the White Paper, the 1986 legislation represents a comprehensive overhaul of the insolvency legislation, adding new procedures and new rules and rewriting many of the established procedures and rules. Most, indeed probably all, fundamental principles apply just as they always have done - the *pari passu* principle is an obvious example. However, when it comes to less fundamental procedures and rules, it cannot be assumed that judicial decisions, even at the highest level, relating to previous insolvency legislation necessarily hold good in relation to the 1986 legislation. Where the wording of a provision in the 1986 legislation has not changed from that of a provision in previous legislation, then, at least prima facie, it may normally be assumed that the effect of the provision was intended to be unaltered, but where the language has been significantly changed, such an assumption may easily lead to error.

13. Further, despite its lengthy and detailed provisions, the 1986 legislation does not constitute a complete insolvency code. Certain long-established Judge-made rules, albeit developed at a time when the insolvency legislation was far less detailed, indeed by modern standards sometimes positively exiguous, nonetheless survive. Recently invoked examples include the anti-deprivation principle (see *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383), the rule against double-proof (discussed in *In re Kaupthing Singer & Friedlander Ltd (in administration) (No 2)* [2012] 1 AC 804, paras 8 to 12), the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442 (also discussed in *Kaupthing (No 2)* [2012] 1 AC 804, paras 13 to 20), and certain rules of fairness (alluded to in *In re Nortel GmbH* [2014] AC 209, para 122). Provided that a Judge-made rule is well-established, consistent with the terms and underlying principles of current legislative provisions, and reasonably necessary to achieve justice, it continues to apply. And, as Judge-made rules are ultimately part of the common law, there is no reason in principle why they cannot be developed, or indeed why new rules cannot be formulated. However, particularly in the light of the full and detailed nature of the current insolvency legislation and the need for certainty, any judge should think long and hard before extending or adapting an existing rule, and, even more, before formulating a new rule.

14. One of the reforms introduced by the 1986 legislation and foreshadowed by the White Paper is the administration procedure. It was introduced as part of the so-called "rescue culture" which has been described as "a philosophy of reorganising companies so as to restore them to profitable trading and enable them to avoid liquidation" - Goode, *Principles of Corporate Insolvency Law,* 4th ed (2011), para 11-03. The procedure was less successful than had been hoped. Accordingly, the

provisions of the 1986 legislation relating to administration were substantially amended as a result of the Enterprise Act 2002 ("the 2002 Act"). Among the changes introduced by the 2002 Act were the conferring of a power on an administrator to make distributions to unsecured creditors and a greater flexibility of exit routes from administration.

15. Schedule B1 to the 1986 Act contains provisions dealing with administration. Para 53 of that Schedule provides for a creditors' meeting to approve the proposals of an administrator following his appointment. Paras 65 and 66 empower an administrator to make distributions to creditors, normally only with the prior consent of the court. Para 67 requires an administrator to take custody of the company's assets, and para 68 enables him to carry on the company's business in accordance with proposals approved under para 53. Para 69 states that "[i]n exercising his functions under this Schedule the administrator of a company acts as its agent." Paras 76 to 86 of Schedule B1 provide for various routes by which the company can exit from administration. Paras 76 to 81 set out a number of different ways in which the company can, in effect, be restored to its pre-administration status. Para 82 provides for a public interest winding-up. Para 83 entitles an administrator to move the company from administration to creditors' voluntary liquidation where, in summary terms, there are sufficient assets to pay the company's liabilities in full. And para 84 enables the company to pass straight from administration to dissolution, but only where it "has no property which might permit a distribution to its creditors" (a potentially narrower restriction, which should probably be construed widely).

16. The provisions of the 1986 Rules governing distributing administrations were introduced by the Insolvency (Amendment) Rules 2003 (SI 2003/1730) ("the 2003 Amendment Rules"). In a distributing administration, as in a liquidation, the duty of the office-holder, whether administrator or liquidator, is to gather in and realise the assets of the company and to use them to pay off the company's liabilities (see sections 107 and 143 in relation to liquidators and paragraphs 65 to 67 of Schedule B1 in relation to administrators).

17. I summarised the priorities in relation to such payments by a liquidator or a distributing administrator in the following terms in *In re Nortel GmbH* [2014] AC 209, para 39:

> "In a liquidation of a company and in an administration (where there is no question of trying to save the company or its business), the effect of insolvency legislation …, as interpreted and extended by the courts, is that the order of priority for payment out of the company's assets is, in summary terms, as follows:

(1) Fixed charge creditors;

(2) Expenses of the insolvency proceedings;

(3) Preferential creditors;

(4) Floating charge creditors;

(5) Unsecured provable debts;

(6) Statutory interest;

(7) Non-provable liabilities; and

(8) Shareholders."

This description of what is known as the waterfall is a generalised summary of the distribution priorities in an insolvency. It was not intended to be treated as some sort of quasi-statutory statement of immutable legal principle, and it would have been better if I had said so at the time.

The centrally relevant provisions of the 1986 Rules

18. I turn then to describe provisions of the 1986 Rules which apply to administrations, and which play a part in relation to the issues which have to be resolved on this appeal.

19. Part 2 of the 1986 Rules is concerned with "Administration Procedure", and Chapter 10 of that Part ("Chapter 10 of Part 2"), which includes rules 2.68 to 2.105, deals with "Distributions to Creditors". The rules in Chapter 10 of Part 2 are very similar indeed to, and were no doubt based on, the rules concerned with "proof of debts in a liquidation", which are to be found in Chapter 9 of Part 4 of the 1986 Rules.

20. Rule 2.68(1) provides that Chapter 10 applies "where the administrator makes, or proposes to make, a distribution to any class of creditors ...". Rule 2.69 provides that provable debts rank equally between themselves and are paid in full

unless the assets are insufficient to meet them, in which case they abate in equal proportions between themselves. This embodies the fundamental principle of equality, which applies similarly to liquidations - see rule 4.181. Rules 2.72 to 2.80 set out the machinery for proving debts, including the submission of a proof, its admission or rejection by the administrator and appeals against the administrator's decision.

21. Rule 2.72 (which is in very similar terms to rule 4.73, which applies in a liquidation) is headed "Proving a debt", and it provides:

> "(1) A person claiming to be a creditor of the company and wishing to recover his debt in whole or in part must (subject to any order of the court to the contrary) submit his claim in writing to the administrator.
>
> (2) A creditor who claims is referred to as '*proving*' for his debt and a document by which he seeks to establish his claim is his '*proof'*."

The remaining paragraphs of this rule set out the machinery by which a debt should be proved. Rule 2.77 provides that a proof may be admitted for payment of a dividend in whole or in part, and rule 2.78 contains appeal procedures where a proof is refused or not admitted in its full amount. Rule 2.79 permits a proof to be withdrawn or varied by agreement with the administrator, and rule 2.80 enables the court to "expunge a proof or reduce the amount claimed" on the application of the administrator "where he thinks the proof has been improperly admitted, or ought to be reduced" or "on the application of the creditor, if the administrator declines to interfere in the matter". The equivalent provisions applicable in a liquidation are rules 4.82 to 4.85.

22. Rules 2.81 to 2.94, 2.102, 2.103 and 2.105 are concerned with quantifying claims made in paying administrations. With one exception, namely rule 2.88 (whose equivalent is to be found in the 1986 Act rather than the 1986 Rules, as explained in para 28 below), these rules are very similar indeed in their language to (and were no doubt based on) rules 4.86 to 4.99, which relate to claims in liquidations.

23. Rule 2.81 requires the administrator to "estimate the value of any debt which, by reason of its being subject to a contingency or for any other reason, does not bear a certain value", and the rule goes on to provide that "he may revise any estimate previously made … by reference to any change of circumstances or to any

information becoming available to him". He is also required to "inform the creditor as to his estimate and any revision to it". (Rule 4.86 is the equivalent provision in liquidations.)

24. Rule 2.83 entitles a secured creditor, who has realised his security, to prove for such part of his debt which remains unsatisfied. And rule 2.90 entitles a secured creditor who has proved for his debt on the basis of putting a value on his security to amend that value with the agreement of the administrator or the court. (Rules 4.88 and 4.95 have similar effect in liquidations.)

25. Rule 2.85 provides for mutual credits and set-off of debts as at the date that the administrator gives notice that he proposes to make a distribution, and such a notice is provided for in rule 2.95. Rule 2.85(3) read together with rule 2.85(2) provides that, as at the date on which an administrator gives notice of his intention to make a distribution, there should be a set-off in respect of what is owing "between the company and any [proving] creditor of the company" in respect of "mutual dealings" between them. "Mutual dealings" are defined in rule 2.85(2) as "mutual credits, mutual debts or other mutual dealings", subject to exceptions all of which relate to events which arise after the administration date. Rule 2.85(4) states that rule 2.85 applies, inter alia, to future, contingent or other quantifiable liabilities, and rules 2.81, 2.86, 2.88 and rule 2.105 apply for the purposes of rule 2.85. (Rule 4.90, which applies in liquidations, is in very similar terms to rule 2.85, save that the date by reference to which set-off is to be effected is the liquidation date.)

26. Rule 2.86 provides:

> "(1) For the purpose of proving a debt incurred or payable in a currency other than sterling, the amount of the debt shall be converted into sterling at the official exchange rate prevailing on the date when the company entered administration or, if the administration was immediately preceded by a winding up, on the date that the company went into liquidation."

Rule 2.86 is virtually identical in its terms to rule 4.91, which applies to proving a debt incurred or payable in a foreign currency in a liquidation.

27. Rule 2.88 deals with interest. Rule 2.88(1) provides that "Where a debt proved in the administration bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the company entered administration". Para (1) was amended by the Insolvency (Amendment) Rules, 2005 (SI 2005/527) ("the 2005 Amendment Rules") by adding the words "or,

if the administration was immediately preceded by a winding up, any period after the date that the company went into liquidation". Rule 2.88(7) states that:

> "Any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company entered administration."

Para (8) states that all interest so payable "ranks equally", and para (9) provides that the rate of such interest is to be the higher of the judgment debt rate or the rate applicable to the debt apart from the administration.

28. Virtually identical provisions to rule 2.88(7) to (9) are contained in section 189(2) to (4) which applies to post-liquidation interest on debts proved in a liquidation. Section 189(2) plays a significant part in some of the arguments on this appeal, and it should be set out in full:

> "Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation."

29. Rule 2.89 permits a creditor whose debt is not yet due for payment to prove "subject to rule 2.105". Rule 2.105 provides that, in the case of such a debt, "[f]or the purpose of dividend (and no other purpose) the amount of the creditor's admitted proof … shall be reduced by applying [a specified] formula", which basically represents a discount for early payment, calculated by reference to the date of administration (or, if relevant, the date of any preceding liquidation). In practice this means that the debt is reduced by 5% for each year between the administration and the contractual due date. Similar provisions for future debts in liquidations are to be found in rules 4.94 and 11.13.

30. Rule 2.95 provides that an administrator who is proposing to make a distribution should give "28 days' notice of that fact". Rule 2.97 permits, indeed it enjoins, an administrator thereafter "to declare the dividend to one or more classes of creditor". Rule 2.98 deals with notification, and rule 2.99 with payment. Rule 2.101 applies where "the amount claimed by a creditor is increased" after a dividend has been paid, and rule 2.102 applies where "a creditor re-values his security" after

a dividend has been declared. There are fairly similar rules for liquidations in Part 11 of the 1986 Rules.

31. Reference should also be made to two rules which contain definitions applicable generally to the 1986 Rules. Rule 13.12(1) states that "in relation to the winding up of a company", the word "debt" means:

> "(a) any debt or liability to which the company is subject at the date on which it goes into liquidation;
>
> (b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; and
>
> (c) any interest provable as mentioned in rule 4.93(1)."

Rule 13.12(4) defines "liability" as meaning "[in] any provision of the [1986] Act or the Rules about winding up":

> "… a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution."

Rule 13.12(3) explains that a debt or liability for this purpose can be "present or future, … certain or contingent, … fixed or liquidated, … capable of being ascertained by fixed rules or as a matter of opinion". Rule 13.12(5) applies these definitions to a case "where a company is in administration", so the references in these definitions to winding up and rule 4.93(1) must respectively be taken to be to administration and rule 2.88(1).

32. Rule 12.3(1) provides:

> "Subject as follows, in administration, winding up and bankruptcy, all claims by creditors are provable as debts against the company or, as the case may be, the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages."

33. There are certain specified exceptions to this definition, but rule 12.3(3) makes it clear that they are not exhaustive. However, as is clear from the strikingly wide words of rules 13.12(1) and (3) and 12.3(1), the statutory policy, which Briggs J rightly identified at first instance in *In re Nortel GmbH* [2011] Bus LR 766, paras 102-103, and which is supported by the Supreme Court in the same case at [2014] AC 209, paras 92-93, is that claims should, if at all possible, be admitted to proof rather than being excluded from proof. Nonetheless, some non-provable liabilities, not specified in rule 12.3, still survive. The most obvious examples are claims which only arise after the date a company goes into administration or liquidation (see *In re Nortel GmbH* at [2014] AC 209, para 35), such as damages for personal injury in an accident which occurred after that date.

The issues on this appeal

34. The first issue on this appeal concerns the ranking in the waterfall summarised in para 17 above which can be claimed by LBHI2 in its capacity as holder of the three subordinated loans made to LBIE. The second issue arises from the fact that LBIE's creditors who have debts denominated in foreign currency, will be paid out on their proofs at the rate of exchange prevailing at the date LBIE went into administration ("the administration date"), and, in some cases, sterling depreciated on the foreign exchange markets between that date and the date of payment. Those foreign currency creditors contend that they are entitled to claim the shortfall. The third issue raises the question whether, if interest which should have been paid during an administration under rule 2.88(7) was not in fact so paid, it can nonetheless be claimed in a subsequent liquidation.

35. The remaining four issues arise because LBIE is an unlimited company and therefore its members can be called upon to make contributions pursuant to section 74 of the 1986 Act to meet liabilities if LBIE is in liquidation. The fourth issue is whether such contributions can be sought in respect of liability for interest under rule 2.88(7) and for liabilities of LBIE which are not provable. The other three issues arise because LBHI2 and LBL are not only creditors of LBIE, but are also members of LBIE and liable to contribute as such. The fifth issue is whether LBIE can prove in the administrations of LBHI2 and of LBL in respect of those respective companies' contingent liabilities to make contributions in LBIE's prospective liquidation. If they can, it is conceded that LBIE can set off its provable claims for contributions against the proofs lodged by LBHI2 and LBL in LBIE's administration. If LBIE cannot so prove, the sixth issue is whether LBIE can nonetheless exercise such a right of set-off. The seventh issue, which only arises if LBIE loses on the fifth and sixth issues, is whether LBIE can nonetheless invoke the so-called contributory rule which applies in a liquidation, namely that a person cannot recover as a creditor of a company in liquidation until he has discharged his liability as a contributory.

36. I turn now to address these issues.

The ranking of the subordinated debt

Introductory

37. As mentioned above, there were three subordinated loan agreements ("the Loan Agreements") made by LBHI2 to LBIE, under which a substantial sum of money remains outstanding. As recorded in para (i) of the order which he made, David Richards J decided that the aggregate debt due under the Loan Agreements ("the subordinated debt") was provable, but that it was "subordinated to provable debts, statutory interest and non-provable liabilities, all of which … must be paid in full before … LBHI2 is entitled to prove and require the LBIE administrators to admit such proof in respect of its claims under [the Loan]". The Court of Appeal upheld this order in so far as it decided that the subordinated debt was provable and subordinated to provable debts, statutory interest and non-provable liabilities. However, they disagreed with the Judge's view that LBHI2 was not entitled to prove until all other proving creditors had been paid in full.

38. On this appeal, while accepting that the subordinated debt ranks behind other provable debts, the LBHI2 administrators argue that the courts below were wrong to hold that the subordinated debt ranked behind statutory interest or non-provable liabilities. By contrast, the LBIE administrators contend that the Court of Appeal ought to have concluded that the Judge was right to hold that LBHI2 was not entitled to prove for the subordinated debt until all liabilities, including statutory interest and non-provable liabilities, had been paid in full.

39. The Loan Agreements were revolving credit facilities made under agreements which contained certain "Variable Terms" and certain "Standard Terms". Clause 9 of the Variable Terms provided for repayment "subject always to [clause] ... 5 ... of the Standard Terms".

40. Clause 1 of the Standard Terms ("clause 1") contained some definitions. "Insolvency Officer" meant "any person duly appointed to administer and distribute [LBIE's] assets in the course of [its] Insolvency", and the term "Insolvency" extended to administration as well as liquidation. "Liabilities" were defined as "all present and future sums, liabilities and obligations payable or owing by [LBIE] (whether actual or contingent, jointly or severally or otherwise howsoever)", a wide definition. "Excluded Liabilities" were "Liabilities which are expressed to be, and in the opinion of the Insolvency Officer of [LBIE], do, rank junior to the Subordinated Liabilities [defined in turn as liabilities under the Loan] in any

Insolvency of [LBIE]". "Senior Liabilities" were "all Liabilities except the Subordinated Liabilities and Excluded Liabilities".

41. Clause 4 of the Standard Terms ("clause 4") dealt with repayment, and it was expressed to be "subject in all respects" to clause 5. Clause 4(4) provided that in the event of certain defaults in repayment LBHI2 could, subject to giving prior notice, "enforce payment by instituting proceedings for the Insolvency of [LBIE]". Clause 4(7) stated that:

> "No remedy against [LBIE] other than as specifically provided by this [clause] 4 shall be available to [LBHI2] whether for the recovery of amounts owing under this Agreement or in respect of any breach by [LBIE] of any of its obligations under this Agreement."

42. Clause 5 of the Standard Terms ("clause 5") contained two sub-clauses of relevance which provided as follows:

> "(1) Notwithstanding the provisions of [clause] 4, the rights of [LBHI2] in respect of the Subordinated Liabilities are subordinated to the Senior Liabilities and accordingly payment of any amount (whether principal, interest or otherwise) of the Subordinated Liabilities is conditional upon -
>
> > (a) (if an order has not been made or an effective resolution passed for the Insolvency of [LBIE] …) [LBIE] being in compliance with not less than 120% of its Financial Resources Requirement immediately after payment by [LBIE] …; and
> >
> > (b) [LBIE] being 'solvent' at the time of, and immediately after, the payment by [LBIE] and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that [LBIE] could make such payment and still be 'solvent'.
>
> (2) For the purposes of sub-[clause] (1)(b) above, [LBIE] shall be 'solvent' if it is able to pay its Liabilities (other than the Subordinated Liabilities) in full disregarding -

> (a) obligations which are not payable or capable of being established or determined in the Insolvency of [LBIE], and
>
> (b) the Excluded Liabilities."

43. Clause 7 of the Standard Terms ("clause 7") included undertakings by LBHI2 not without the consent of the Financial Services Authority (now the Prudential Regulatory Authority) to:

> "(d) attempt to obtain repayment of any of the Subordinated Liabilities otherwise than in accordance with the terms of this Agreement;
>
> (e) take or omit to take any action whereby the subordination of the Subordinated Liabilities or any part of them to the Senior Liabilities might be terminated, impaired or adversely affected."

44. As explained above, the LBHI2 administrators contend that the subordinated debt ranks ahead of statutory interest and non-provable liabilities (ie categories (6) and (7) in the waterfall set out in para 17 above). Their case in relation to non-provable liabilities is that, although they are "Liabilities" within clause 1, they are "not payable or capable of being established or determined in the Insolvency of [LBIE]" within the meaning of clause 5(2)(a), and therefore their existence does not prevent repayment of the subordinated debt. So far as statutory interest is concerned, the LBHI2 administrators' primary case is that it is not one of the "Liabilities" within clause 5(2)(a), because, although very widely defined, the term "Liabilities" in clause 1 is limited to obligations "payable or owing by [LBIE]", and statutory interest is payable and owing by LBIE pursuant to rule 2.88(7), which does not render its payment the responsibility of the company in administration. The LBHI2 administrators alternatively contend that, if statutory interest is nonetheless within "Liabilities", it is excluded from clause 5(2)(a) for the same reason as non-provable liabilities.

45. I turn first to deal with statutory interest, and will then deal with non-provable liabilities. Finally, I will discuss the question of proving for the subordinated debt.

Subordination to statutory interest

46. It is convenient to discuss this issue in relation to liquidations, although the analysis that follows in paras 47 to 55 below is equally applicable to administrations - unsurprisingly, given that, as explained in para 28 above, rule 2.88(7), (8) and (9) are in effectively the same terms as section 189(2), (3) and (4) respectively.

47. The effect of section 189 is that a company in liquidation ceases to be liable for contractual interest which falls due after it goes into liquidation, and instead, in the event of a surplus, there is a liability for statutory interest.

48. LBHI2's first contention is that statutory interest is not payable "in the Insolvency" of LBIE within the meaning of clause 5(2)(a) - ie in an insolvency process of LBIE, as the LBHI2 administrators put it in argument. As a matter of ordinary language, it is hard to see any satisfactory basis for this contention. It is clear, indeed it is common ground, that statutory interest is payable by a liquidator pursuant to the provisions of section 189, and it is in respect of interest on debts which have been indubitably proved and paid "in the Insolvency". Briggs LJ rightly said in the Court of Appeal, at [2015] Ch 50, para 190, that "payment of statutory interest" is "plainly" a "part of the winding-up scheme", and that it is therefore not easy to see why statutory interest is not payable "in the Insolvency".

49. The LBHI2 administrators, however, argue that the expression "obligations which are not payable … in the Insolvency" in clause 5(2)(a) effectively means obligations which are not capable of being the subject matter of a proof. That does not seem to me to accord with the natural meaning of the expression "in the Insolvency". Further, I can see no good commercial reason to exclude statutory interest from the "obligations" which fall within clause 5(2)(a). Contractual interest on provable claims falling due before the administration date or liquidation date (ie the date on which the company concerned goes into administration or liquidation as the case may be) would undoubtedly be such an obligation, and it is hard to see any business sense in excluding interest which falls due after that date from the expression, bearing in mind the overall commercial purpose of the Loan. The fact that interest falling due after the liquidation date is treated somewhat differently in the insolvency legislation, and therefore in the waterfall, does not seem to me to be a good reason for treating it differently for the purposes of clause 5. Of course, clause 5 could have been expressed in a way which had such an effect, but my point is that given that, as drafted, it does not naturally read as having that effect, there is no commercial reason for rejecting its natural meaning.

50. The LBHI2 administrators also argue that the need for consistency in the application of clause 5(2) supports its contended interpretation, because statutory

interest would, as it were, be excluded from any solvency test if LBIE was not subject to insolvency proceedings. I accept that factual premise, but I do not accept that it assists the LBHI2 administrators' argument. The fact that an expression has a single meaning self-evidently does not prevent it from producing different outcomes in different circumstances. There are inevitable and often substantial differences between a company which is in insolvency proceedings and a company which is not. The conclusion reached by the courts below did not involve giving a different meaning to clause 5(2) when applied to a company in insolvency proceedings from that which it would have when applied to a company not in such proceedings. If LBIE, not being in such proceedings, had failed to pay interest on a debt due, its liability for interest would be an "obligation"; and it seems consistent with this that, if LBIE is in insolvency proceedings, any interest payable on a sum due until payment is also an "obligation". Nor do I consider that the LBHI2 administrators derive any assistance from the fact that "Insolvency" includes a foreign insolvency.

51. The second contention raised by the LBHI2 administrators is that any statutory interest is not "payable or owing by [LBIE]" within the definition of "Liabilities" in clause 1. Statutory interest cannot give rise to a provable debt, as it is only payable out of a surplus after payment of proven claims in full, but that would not prevent it being within the expression "Liabilities". More powerfully, the LBHI2 administrators argue that section 189(2) (which is set out in para 28 above) is worded in such a way as to make it clear that the liability to pay statutory interest is not an obligation on the part of the company concerned, and that any such obligation is imposed on the liquidator. The LBHI2 administrators point to the fact that, when a company is in liquidation, its assets are under the custody, control and management of the liquidator, who has statutory duties, including the duty to comply with section 189(2).

52. It is true that the company in liquidation cannot be sued for the purpose of enforcing section 189, and indeed that no claim can be made against the company if section 189 is infringed, because the relevant claim should be made against the liquidator: see the discussion in *In re HIH Casualty & General Insurance Ltd* [2006] 2 All ER 671, paras 115-121. However, in my judgment, that does not mean that statutory interest is not "payable or owing by" the company concerned, at least so far as the meaning of the contractual definition of "Liabilities" in clause 1 is concerned.

53. Section 189(2) effectively confirms that interest, which would, in the absence of the liquidation, normally be expected to be contractually payable by the company from the liquidation date until repayment of the principal, is payable in the liquidation, but only if there is a surplus. Possibly because the effect of a liquidation is thought to be like that of a judgment in that it stops contractual interest running, or possibly as compensation for such interest ranking below unsecured provable debts, section 189(4) gives a creditor the option of claiming such interest at the

judgment debt rate rather than the contractual rate. Given that the creditor is owed the debt until the date of repayment, and given that the company would normally expect to pay interest on the debt to the creditor until that date, it would, as mentioned in paras 49 and 50 above, be surprising if the liability for this interest was not treated as that of the company.

54. Further, the LBHI2 administrators' case proves too much. If payment of interest pursuant to section 189(2) is not treated as "payable and owing" by the company, because it is payable and owing by the liquidator, then it would appear to follow that even provable debts are not "payable and owing" by a company in a winding-up. As Millett LJ explained in *Mitchell v Carter, In re Buckingham International Ltd* [1997] 1 BCLC 673, 684, the making of a winding-up order "divests the company of the beneficial ownership of its assets", and those assets become "subject to a statutory scheme for distribution among the creditors and members", who have the right to have them administered by the liquidator "in accordance with the statutory scheme". When a company goes into liquidation and a creditor proves in respect of a debt, it seems to me that the logic of the case advanced by the LBHI2 administrators would be that the debt is no longer "payable and owing" by the company: there is a proof which is payable and owing out of the assets got in by the liquidator. If, as it must be, that argument is rejected, it would be on the basis that a payment out of the assets of the company by the liquidator of a proof which statutorily replaces a debt of the company should be treated as satisfying a liability "payable and owing" by the company. If that is so, it seems to me very hard to justify a different conclusion in relation to payment of statutory interest by a liquidator under section 189.

55. If payment of interest under section 189(2) involves paying a "sum" or meeting a "liabilit[y]" which is "payable or owing by" the company concerned within the meaning of clause 1, payment of interest by an administrator under rule 2.88(7) seems to me to be *a fortiori*. As Lewison LJ pointed out at [2016] Ch 50, para 45, when paying the interest, the administrator acts as agent of the company pursuant to paragraph 69 of Schedule B1, and, as in the case of a company in liquidation, legal title to the assets from which the interest is paid remains vested in the company.

56. Accordingly, I consider that under the terms of the Loan Agreements statutory interest enjoys priority over the repayment of the subordinated debt. In any event, in the light of my conclusion in para 63 below as to the priorities as between the non-provable liabilities and the subordinated debt, it seems to me that statutory interest must take priority over the subordinated debt as explained in paras 65 and 66 below.

Subordination to non-provable liabilities

57. In the Court of Appeal at [2016] Ch 50, para 60, Lewison LJ accepted that a non-provable liability was "neither determined nor established in the Insolvency of [LBIE]". However, he said that, as a "liquidator's duties continue until the moment comes to make a distribution to members [and] non-provable liabilities rank higher than members", "the liquidator must pay those claims before making a distribution to members", and accordingly those claims are "payable in the Insolvency". Moore-Bick and Briggs LJJ not only agreed that non-provable liabilities were "payable", but also considered that they were "established or determined", "in the Insolvency" of LBIE.

58. In my judgment, a liquidator who meets a non-provable liability of the company is making a payment "in the Insolvency", in the sense in which those words are used in clause 5(2)(a). It is true that there is no express reference to non-provable liabilities, and therefore inevitably no mention of any duty to meet such liabilities, in the 1986 legislation. However, section 107 states that, in a voluntary liquidation, the liquidator must apply the company's assets "in satisfaction of the company's liabilities" prior to distributing them to members; and section 143 requires a liquidator in a winding-up by the court to distribute "the assets of the company … to the company's creditors, and, if there is a surplus, to the persons entitled to it." As Briggs LJ pointed out at [2016] Ch 50, paras 185 to 189, these stipulations, properly interpreted, require a liquidator to meet the company's non-provable liabilities out of any assets remaining after paying proven debts and statutory interest in full, before paying over any outstanding sum to the members of the company.

59. In *In re T & N Ltd* [2006] 1 WLR 1728, paras 106 and 107, David Richards J explained that, although there was no express reference in the 1986 legislation to non-provable liabilities, once all liabilities for which statutory provision has been made have been met by a liquidator, anyone with a non-provable claim would no longer be precluded from enforcing it by proceedings. Accordingly, a liquidator will in practice have to pay off non-statutory liabilities out of the company's remaining assets before distributing to shareholders any surplus remaining after payment of provable debts and statutory interest.

60. Thus, while it is true that there is no provision in the 1986 legislation which specifically requires a liquidator to pay non-provable liabilities, he is in practice obliged to pay off any such claims. Otherwise, if there would still be a surplus after paying off non-provable liabilities in full, he could not distribute that remaining surplus to members, and, even if there would be no such remaining surplus, he would be in an impossible position, able neither to pay the money he held to satisfy the non-provable liabilities nor to pay it over to members. Support for that conclusion may be found in a number of first instance cases, including *Gooch v London Banking*

Association (1886) 32 Ch D 41, 48, per Pearson J, *In re Fine Industrial Commodities Ltd* [1956] Ch 256, 262, per Vaisey J, and *In re Islington Metal & Plating Works Ltd* [1984] 1 WLR 14, 23-24, per Harman J, and also in the Court of Appeal in *In re Lines Bros Ltd (In Liquidation)* [1983] Ch 1, 21, per Brightman LJ.

61. At [2016] Ch 50, para 185, Briggs LJ said that, although "the statutory scheme provides no detailed machinery for dealing with" non-provable liabilities, "they have always been dealt with in accordance with Judge-made principles". Given that the company concerned remains in liquidation, that the duties of the liquidator have not been completed (as payment to members of any final surplus is part of his express duty), and that, before they can be completed, he must in practice satisfy any non-provable liability by making a payment, it appears to me that such a payment would be effected "in the Insolvency" even if sections 107 and 143 did not have the effect described in para 58 above. The proposition that a liquidator is liable to pay off non-provable liabilities if there is a surplus after paying statutory interest is an example of a principle of Judge-made law which survives despite the increasingly full codification of insolvency law. Not merely is there nothing inconsistent with the principle in the 1986 legislation: the principle is effectively necessarily implied by the provisions of the legislation, and those responsible for drafting the legislation must have been well aware of the long-standing and consistent judicial approval of the principle.

62. The same conclusion must apply to a distributing administration, although it is fair to say that an administrator would not necessarily face the quandary identified in para 60 above. Whether a person to whom a company in administration has a non-provable liability would be a "creditor" for the purposes of paragraph 65 of Schedule B1 was not argued, and I prefer to leave the point open. It is unnecessary to decide the point because it seems to have been accepted in argument that, if non-provable liabilities are "payable in a liquidation", they are "payable in the Insolvency of [LBIE]" within the meaning of clause 5(2)(a). In my view, that is plainly right. "Insolvency" in clause 5(2)(a) would appear to be a generic expression. In any event, if an administrator cannot pay off non-provable liabilities, then, where there is a surplus once he has paid off all proofs and all statutory interest, he would have to put the company into liquidation, whereupon the liquidator would have to pay off any non-provable liabilities.

63. Accordingly, in agreement with the Court of Appeal and the Judge, I consider that the non-provable liabilities are payable "in the Insolvency". It is unnecessary to resolve the small difference between Moore-Bick and Briggs LJJ and Lewison LJ as to whether they are also "established or determined" in the insolvency.

Conclusion as to priorities

64. Looking at the issue from a broader, purposive, perspective, the conclusion that both statutory interest and non-provable liabilities have priority over the subordinated debt seems to me to accord both with the eponymous nature of the subordinated debt, and with what a reasonable reader would expect from the general thrust of the terms of the Loan Agreements. The purpose of the parties to those agreements was to ensure that all those with claims on LBIE would have priority over the holders of the subordinated debt. In summary terms, the perception of the reasonable reader would be that the holders of the subordinated debt were to be at the end of the queue - and, in the event of an Insolvency, at the bottom of the waterfall. As to the two categories over which LBHI2 claims priority, the only difference between non-provable liabilities and statutory interest in the present connection is that statutory interest is specifically provided for in the 1986 legislation, whereas non-provable liabilities are not. However, they are both categories of liabilities which have to be met after paying out proofs in full and before any balance can properly be used for another purpose (ie paid over to the members, or rendered subject to a liquidation). It would therefore be surprising if they were treated differently for the purposes of a provision such as clause 5(2)(a).

65. Even if (contrary to my conclusion in para 56 above) statutory interest were not "payable or owing by [LBIE]", then, because non-provable liabilities rank ahead of the subordinated debt, I would nonetheless have concluded that statutory interest should rank ahead of the subordinated debt. It would not, in my view, be legally possible for the subordinated debt to rank ahead of statutory interest but behind non-provable liabilities. The legislative provisions (as interpreted and, arguably, as extended, by judges) make it clear that statutory interest must be paid off before non-provable liabilities; and the terms of the Loan Agreements, as contractual documents, cannot vary the order in which statutory interest and non-provable liabilities are payable in accordance with the waterfall (unless all those who would thereby be prejudiced have agreed, and there is no public policy reason against giving effect to the variation).

66. Although it may at first sight appear to be equally arguable in terms of narrower logic that the subordinated debt should, in these circumstances, rank ahead of statutory interest and non-provable liabilities, I do not consider that that could possibly be right. Once it is accepted that the terms of the Loan Agreements mean that the subordinated debt ranks behind non-provable liabilities, it must necessarily follow that it ranks behind statutory interest. In agreement with all the parties on this appeal, I can see no objection to giving effect to a contractual agreement that, in the event of an insolvency, a contracting creditor's claim will rank lower than it would otherwise do in the "waterfall". James LJ's dictum in *Ex p McKay, Ex p Brown; In re Jeavons* (1873) LR 8 Ch App 643, 647 that a person "is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of

bankruptcy from that which the law provides" is correct, albeit that it should be treated as subject to two qualifications. First, that it does not apply where the "different distribution" involves the creditor in question ranking lower in the waterfall than the law otherwise provides. Secondly, even if the "different distribution" involves him ranking higher than he otherwise would, the dictum would not apply if all those who are detrimentally affected by his promotion have agreed to it (unless there was some public policy reason not to accede to the "different distribution").

67. Finally, it is right to acknowledge that this conclusion involves giving little, if any, meaning to the expression "in the Insolvency" in clause 5(2)(a); the argument that it was intended to exclude claims which were unenforceable as a matter of general law (eg statute-barred claims or foreign tax demands) is not very attractive. However, the fact that an expression in a sentence, especially in a very full document, does not, on analysis, have much, if any, effect if it is given its natural meaning is not, at least on its own, a very attractive or a very convincing reason for giving it an unnatural meaning. As Lord Hoffmann put it in *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd* [1999] AC 266, 274, "the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words". And, if one has to choose between giving a phrase little meaning or an unnatural meaning, then, in the absence of a good reason to the contrary, the former option appears to me to be preferable.

When can LBHI2 lodge a proof?

68. The LBIE administrators contend that it would not be open to LBHI2 to lodge a proof in LBIE's administration for the subordinated debt until all "Senior Liabilities" have been paid in full. David Richards J accepted that contention, on the ground that clause 7(d) and/or (e) had the effect of precluding the lodging of a proof. The Court of Appeal disagreed, and considered that LBHI2 could prove for the subordinated debt at any time. However, they said that, until the Senior Liabilities had been paid in full, the subordinated debt would be a contingent debt, and because of the terms of the Loan, the correct value to ascribe to such a proof before the Senior Liabilities have all been paid would be nil, as nothing could be paid on the proof. If and when the Senior Liabilities were met in full, the Court of Appeal said that the proof in respect of the subordinated debt would be revalued pursuant to rule 2.79 - see at [2016] Ch 50, para 41.

69. In my judgment, David Richards J's view on this point is to be preferred. The Court of Appeal's view appears to me to raise a logical problem. If, at the time such a proof was lodged, there was a chance that the Senior Liabilities would be paid in full, then, as with any other debt which rests on a contingency that may occur, a

valuation of that proof would not be nil: it would have to be a figure which discounted the sum due, in order to allow for the contingency not occurring. However, if the proof is ascribed a valuation greater than nil, it would have to be paid out on any distribution made prior to the satisfaction in full of other proved claims (unless there was one payment of 100%). As David Richards J said, that would appear to fall foul of clause 7. Further, any dividend would be paid out before any statutory interest or any non-provable liabilities had been paid off, which would be inconsistent with the conclusions I have just expressed.

70. It therefore follows that, in my view, it would not be open to LBHI2 to lodge a proof in respect of the subordinated debt until the non-provable liabilities have been paid in full, or at least until it is clear that, after meeting that proof in full and paying any statutory interest due on it, the non-provable liabilities could be met in full. As soon as that has happened, there would, subject to what I say in the next paragraph, be nothing to stop LBHI2 lodging a late proof.

71. On the face of it at any rate, it seems a little strange that a proof can be, or has to be, lodged for a debt which ranks after statutory interest (which can only be paid out of a "surplus") and non-provable liabilities. It may be that the proper analysis is that the subordinated debt is a non-provable debt which ranks after all other non-provable liabilities. It is unnecessary to decide that point, and, as it was not argued, I say no more about it.

72. Accordingly, I would restore para (i) of the order made by David Richards J, because, although I agree with the Court of Appeal that he was right as to the ranking of the subordinated debt, I disagree with the Court of Appeal, and agree with the Judge, as to when the subordinated creditors can prove for the subordinated debt (assuming that they can prove).

The currency conversion claims

Introductory

73. Many of LBIE's creditors were owed unsecured debts payable in foreign currencies. Rule 2.86 applies to such debts and it is set out in para 26 above. In effect, it provides that such debts are to be converted into sterling at the official rate on the administration date. As also explained in para 26 above, rule 4.91 is in effectively identical terms in relation to proving foreign currency debts in liquidations.

74. Given that LBIE is able to pay all external creditors in full, it is rightly common ground that its foreign currency creditors must be paid in full on proved claims, which have to be converted into sterling by reference to the exchange rates prevailing at the date LBIE went into administration. However, in a case where sterling has depreciated against the relevant foreign currency between the administration date and the date (or dates) on which the proved debt is paid, CVI GVF (Lux) Master SARL ("CVI"), effectively representing the foreign currency creditors of LBIE, contends that there would be a contractual shortfall, which they should be able to recover as a non-provable debt. The LBHI2 administrators, on the other hand, contend that there is no room for any such claim, on the ground that the foreign currency debts should be treated as satisfied when the proved claims based on those debts have been paid in full.

75. CVI argues that there is a distinction between the rights of creditors *inter se* and the rights of creditors as against the company. The purpose of the regime contained in Chapter 10 of Part 2, runs the argument, is to ensure that the creditors of a company (or, to be more precise, those creditors falling in category (5) in the waterfall described in para 17 above) in a distributing administration are treated equally, and that distributions to them are effected in an orderly and equitable manner. In particular, it is said that, as between the creditors it is important to have a date by reference to which all debts and claims are valued, and that is the reason for rule 2.86. According to CVI's argument, at least in the absence of express words or necessary implication, the provisions of Chapter 10 of Part 2, and in particular of rule 2.86, do not impinge on the underlying contractual debt between the company and a creditor. If this is right, then so long as an administrator is unable to meet the creditors' proofs in full, no question of an effective claim for the currency shortfall could arise as there would be no money to meet it, but, if there is money left over after all the creditors and all statutory interest have been paid in full, the foreign currency creditors should be entitled to claim for any shortfall.

76. By contrast, the LBHI2 administrators contend that payment in full of a proof based on a foreign currency debt in accordance with rule 2.86 (as with rule 4.91) satisfies the underlying debt. That contention may be advanced on two bases. The primary, narrower, basis simply relies on the effect of rule 2.86, or rule 4.91, read in its context in the 1986 Rules. Thus, the primary contention is that rule 2.86 mandatorily converts the foreign currency debt into sterling, and renders the sterling equivalent of the debt provable in the administration, so that payment in full of the proved, sterling, sum, together with statutory interest, satisfies the claim of the creditor, who has no further claim against any surplus.

77. The alternative, wider, basis for the LBHI2 administrator's case is that payment in full of a proved debt, as assessed in accordance with any of the provisions of Part 10 of Chapter 2, or Chapter 9 of Part 4, of the 1986 Rules, satisfies the underlying contractual debt. The resolution of this alternative contention raises

the rather fundamental question whether the payment in full of a proved debt, as assessed in accordance with the 1986 Rules, satisfies the underlying contractual debt or whether the underlying contractual debt survives the payment in full of the proved claim based upon it (except where the Rules expressly provide otherwise).

78. David Richards J agreed with CVI on this point essentially on the wider of these two contentions, and that is reflected in paras (ii) and (iii) of the order which he made. The majority of the Court of Appeal (Moore-Bick and Briggs LJJ) agreed with this conclusion and held that the foreign currency creditors could claim any contractual shortfall as a non-provable liability. Lewison LJ dissented on this point and would have found for the LBHI2 administrators.

79. I propose to address this issue by considering first the narrower basis for the LBHI2 administrators' case, and then the wider basis.

The narrower issue: foreign currency claims and rules 2.86 and 4.91

80. Where sterling has depreciated relative to the relevant currency since the company went into administration or liquidation, a foreign currency creditor who is paid out on his proof will have received less at the time of payment than he would have been contractually entitled to receive. Accordingly, at any rate at first sight, it is hard to quarrel with the argument that, if it turns out that there is a surplus, it would be commercially unjust to distribute it to the members without first making good the shortfall suffered by the foreign currency creditor. CVI relies on *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, where it was decided that a court could award damages in foreign currency. In that case, Lord Wilberforce said at p 465 that "justice demands that the creditor should not suffer from fluctuations in the value of sterling", as "[h]is contract has nothing to do with sterling: he has bargained for his own currency and only his own currency".

81. Nonetheless, CVI's case seems to me to be at odds with the provisions of rule 2.86 read in the context of the 1986 Rules. Before turning to those Rules, it is appropriate to consider some judicial dicta and policy statements which preceded the 1986 legislation.

82. As the courts below recognised, there are relevant judicial observations in two cases relating to foreign currency claims in liquidations under the insolvency code prevailing immediately before the 1986 legislation (namely the 1948 Act and the 1949 Rules). In *In re Dynamics Corporation of America* [1976] 1 WLR 757, Oliver J in passages at 764H-765A, 767E-G and 786D-F, quoted by Lewison LJ at [2016] Ch 50, para 66-68, said that he considered that the correct analysis was that

the contractual debt was converted into the right to prove, and that "the obligation of the company … is to pay whatever is the sterling equivalent [of the foreign currency debt] at [the date of liquidation]". Although the issue in that case was not the same as that in this case, it appears to me that the observation just quoted was part of the ratio of the decision, and it accords with the LBHI2 administrators' case. On the other hand, in *In re Lines Bros Ltd (In Liquidation)* [1983] Ch 1, 21F-G, Brightman LJ said that he had "not heard any convincing objection" to the notion that, in a solvent liquidation, the liquidator should "make good the shortfall before he pays anything to the shareholders". That was a tentative obiter observation, but it indicates at least a leaning in favour of what is CVI's case. The other members of the Court, Lawton and Oliver LJJ, do not seem to have directly addressed the point, although Lewison LJ may well be right in suggesting that Lawton LJ tended towards the contrary view, ie that adopted by Oliver J in *Dynamics Corporation* [1976] 1 WLR 757.

83. It is in my opinion dangerous to rely on judicial dicta as to the effect of an earlier insolvency code, given that the 1986 legislation amounts to what Sealy and Milman *op cit* describe as including "extensive and radical changes in the law and practice of bankruptcy and corporate insolvency, amounting virtually to the introduction of a completely new code". Accordingly, while the dicta in *Dynamics Corporation* [1976] 1 WLR 757 and *Lines Brothers* [1983] Ch 1 are in point, they are of limited value in themselves both because they are not mutually consistent and because they are based on different legislative provisions under a different code. However, they can be said to suggest that there are principled grounds for supporting either conclusion contended for in this case, and that there is no judicially established practice or understanding on the issue raised by the foreign currency claims.

84. Turning to reports produced shortly before the 1986 legislation, in its 1981 Working Paper No 80 on *Private International Law Foreign Money Matters*, the Law Commission discussed in some detail the question of the date of conversion of foreign currency debts in insolvencies. The purpose of the Working Paper was to indicate the Law Commission's "provisional conclusions" on a number of legal issues involving foreign currencies (see para 1.4 of its *Final Report* mentioned in para 87 below). Paras 3.39 to 3.47 of the Working Paper discussed the specific issue of foreign currency claims in insolvencies. Paras 3.39 to 3.45, which included reference to *Miliangos* [1976] AC 443, *Dynamics Corporation* [1976] 1 WLR 757, and *Lines Brothers* [1983] Ch 1, contained a fairly full analysis of the arguments. In particular, para 3.43 expressed agreement with Oliver J's explanation in *Dynamics Corporation* [1976] 1 WLR 757 as to why the reasoning in *Miliangos* [1976] AC 443 should not apply to foreign currency creditors' claims in liquidations, namely (i) "the form of judgment approved in *Miliangos* did not relate to a creditor's substantive right", and (ii) the company's "obligation … in relation to a foreign money debt … was an obligation to pay the sterling equivalent of that sum in

question at [the date of the winding-up order]". Para 3.43 also explained that adjustment of claims by foreign currency creditors as argued for by CVI in this case "would extend to the field of liquidation and bankruptcy the difficult problems connected with set-off" which had been discussed earlier in the Working Paper.

85. In para 3.46 of the Working Paper, the Law Commission went on to consider and reject the suggestion that, where "the company is found to be solvent", "foreign currency creditors should be compensated from the assets of the company or the bankrupt for adverse exchange rate fluctuations between the date of the relevant order and the date of actual payment". In rejecting that suggestion, the Law Commission made the point that this would produce an "unacceptable … discrimination between foreign currency debts depending on whether the exchange rates have moved to the advantage or disadvantage of the creditors". The provisional conclusion expressed in para 3.47 was that "we support the view of Oliver J. in the *Dynamics Corporation* case that the date of the winding up order is the appropriate, once-for-all, date for the conversion of every foreign currency debt on the winding-up of both solvent and insolvent companies".

86. In para 1308 of the 1982 Cork Report (referred to in para 10 above), the Committee explained that "a primary purpose of the winding up of an insolvent company [is] to ascertain the company's liabilities at a particular date", and accordingly the reasoning in *Miliangos* [1976] AC 443 had no part to play on the issue of the date as at which foreign currency debts should be converted into sterling in a liquidation. In para 1309, the Cork Report "strongly recommend[ed] that any future Insolvency Act should expressly provide that the conversion of debts in foreign currencies should be effected as at the date of the commencement of the relevant insolvency proceedings". Importantly for present purposes, the Report then stated that "we take the same view as the Law Commission (Working Paper No 80) that conversion as at that date should continue to apply, even if the debtor is subsequently found to be solvent", and adding that "[t]o apply a later conversion date only in the case where the exchange rate has moved to the advantage of the creditor, but (necessarily) not where it had moved against him, would, in our view, be discriminatory and unacceptable".

87. The Law Commission adhered to the provisional view expressed in the Working Paper when it published its *Final Report on Private International Law Foreign Money Liabilities*, Law Com No 124, in 1983 (Cmnd 9064). At para 3.34 of its 1983 Report, the Law Commission identified the conclusion reached in para 1309 of the Cork Report, and emphasised that that conclusion applied "whether [the company] is or is not solvent". At para 3.35, the Law Commission referred to the alternative suggestion that "conversion of a foreign currency obligation into sterling … be effected at the latest practicable date - which would seem to be each occasion on which it is decided to declare and pay a dividend". And at para 3.36, the Law Commission, while accepting that there were arguments both ways, rejected that

alternative suggestion and stated that it "remain[ed] of the view which [was] expressed in the working paper".

88. Accordingly, it is quite clear that the "Cork Committee" and the Law Commission each carefully addressed this very issue during the five years leading up to the 1986 insolvency legislation, and reached the clearly expressed and firmly held conclusion that foreign currency claims should be dealt with in solvent, as well as insolvent liquidations, in the manner contended for by the LBHI2 administrators in these proceedings. It is fair to say that the White Paper referred to in para 10 above did not specifically refer to this issue, and that it stated that it did not agree with a number of expressly identified recommendations in the Cork Report, but there is nothing in it to suggest disagreement with the carefully considered and very recently expressed views on the instant topic by the Law Commission and the Cork Committee. Indeed, the very fact that rule 4.91 (which was in the 1986 Rules from their inception, and applies to liquidations) is and was expressed as it is (ie effectively the same as rule 2.86) strongly suggests that the 1986 legislation was intended, on this aspect, to follow the views expressed in the Cork Committee and the Law Commission.

89. In addition, the notion of foreign currency creditors having a possible second bite also appears to be inconsistent with one of the purposes of the 1986 legislation described in the White Paper, namely to "simplify" the insolvency process. Given the general understanding as expressed in the reports referred to in paras 84 to 87 above was that the view expressed by Oliver J in *Dynamics Corporation* [1976] 1 WLR 757 represented the law before the changes embodied in the 1986 legislation, it is scarcely consistent with the drive for simplicity that this simple one-stage approach to conversion should be replaced by a potential two-stage process, particularly when there is no provision in the 1986 legislation which can possibly be said even to hint at such a process.

90. The 1949 Rules were silent so far as the treatment of foreign currency creditors were concerned, and, at least until the decision in *Dynamics Corporation* [1976] 1 WLR 757, the authorities seemed to suggest that a foreign currency debt should be converted into sterling at the date it fell due. Given that the treatment of foreign currency creditors in corporate insolvencies was expressly dealt with for the first time in the 1986 Rules, it appears to me that there must be a presumption that the new rule 2.86 was intended to spell out the full extent of a foreign currency creditor's rights, particularly, when one bears in mind the fact just mentioned that the purpose of the 1986 legislation was to simplify and clarify the law.

91. The LBHI2 administrators' argument is also supported by the fact that it is common ground that, if sterling appreciates against the foreign currency in which the debt is denominated after the date of administration, rule 2.86 would work to the

benefit of the foreign currency creditor. I consider that it tells quite strongly against CVI's case that, if it is right, rule 2.86 would in effect operate as a one-way option on the currency markets in a foreign currency creditor's favour: a classic case of "heads I win, tails I don't lose". This is a point which weighed heavily with the Law Commission and the "Cork Committee" as explained in paras 84 to 87 above. Further, it demonstrates that CVI's argument would mean that foreign currency creditors are treated more favourably than partly secured creditors or contingent creditors, in respect of whom the 1986 Rules provide for post-proof adjustments either way. The point is, I think, another reason which substantially undermines CVI's reliance on Lord Wilberforce's observations in *Miliangos* [1976] AC 443, 465 cited in para 80 above, whose applicability to foreign currency claims in liquidations was in any event, as explained above, rejected by Oliver J, the Cork Report and the Law Commission.

92. Turning to rules which apply to other types of debts, the revaluation provisions in rule 2.81 (and rule 4.86) appear to me to point against CVI's case. First, they are inconsistent with CVI's argument that the rules in Chapter 10 of Part 2 (like the distribution rules in liquidations under Chapter 9 of Part 4 of the 1986 Rules) proceed on the basis that, as between the creditors, there is a date by reference to which all debts and claims are valued (as explained in para 75 above). On the contrary: I consider that that the clear implication of the second part of rule 2.81 is that a contingent creditor should be able to be paid out on a distributing administration by reference to the contractual value of his claim as at the date of payment.

93. Quite apart from that, and perhaps more centrally for present purposes, given that the 1986 Rules expressly provide that adjustments can be made to a proof for a contingent debt if the contingency varies, it can be said with force that the natural implication of there being no equivalent provision for a foreign currency debt is that it was not intended to be adjustable. CVI's argument thus appears to me to be questionable because it effectively infers a non-provable back-door for a foreign currency debt when there is no express provable front door to accommodate external changes, in circumstances where there is an express provable front door to accommodate external changes in relation to another type of debt.

94. There are other provisions of the 1986 Rules which are inconsistent with CVI's contention that the scheme of the 1986 legislation is to have a single date by reference to which all debts and claims are valued, and which demonstrate that, where the legislature wishes to revalue a claim by reference to the date of payment, it so provides. Thus, rules 2.83 and 2.90 enable a creditor with security who proves for the unsecured balance of his debt to vary the amount for which he proves in the event of the creditor realising the security, or in the event of a change in the value of the security, on a date subsequent to that on which he proved for his debt. And

the set-off provisions of rule 2.85(3) which mandate setting off as at the date of the declaration of a dividend are also inconsistent with CVI's argument.

95. While the point has some limited force, I am not much impressed by CVI's argument that, on the LBHI2 administrators' case, a company with foreign currency debts could be put into voluntary liquidation for the sole purpose of benefitting from rule 4.91. In the first place, although I accept that it is not a fanciful notion, it would require very unusual facts before a voluntary liquidation, with its inconveniences and costs, would be a sensible course for a company to take simply to crystallise its foreign currency debts. Secondly, such a course would be very much of a gamble. Foreign currency movements, especially in the short and medium term are notoriously very unpredictable. Thirdly, any creditor could protect himself by covering his position, albeit at a cost and with a degree of uncertainty.

96. For these reasons, as well as those expressed by Lord Sumption in para 194 below, I would allow the LBHI2 administrators' appeal in relation to the foreign currency claims issue on the basis of the primary, narrower, way in which they put their case, namely the effect of rule 2.86 in its context. I should perhaps add that I am not wholly convinced that there is a good reason for not having a provision (similar to that in the second part of rule 2.81) which enables a proof in respect of a foreign currency debt to be adjusted to take account of currency fluctuations either way between date of proof and date of payment. While my conclusion means that is not necessary to consider the wider, alternative way in which the LBHI2 administrators' case is put, it may be helpful to express a preliminary view on the issue, not least because it was the basis on which the Court of Appeal and David Richards J reached a different conclusion from that which I have reached on the foreign currency claims issue.

The wider basis: the effect of payment in full of a proof on a debt

97. The wider basis for the LBHI2 administrators' case involves challenging the correctness of a proposition which was well expressed by David Richards J at [2015] Ch 1, para 110, namely that creditors' contractual rights generally are "compromised by the insolvency regime only for the purpose of achieving justice among creditors through a *pari passu* distribution", and are not affected by payment in full of a proof in respect of the contract under which those rights arise (unless of course the 1986 Rules expressly so provide, as we are agreed that they do in relation to foreign currency debts).

98. While I accept that there is much to be said for the view which the majority of the Court of Appeal and David Richards J reached on this issue (and with which Lord Sumption is inclined to agree), my current inclination is to the opposite effect.

99. It is true that there are statements of high judicial authority which can be cited to support the notion that a contractual claim can survive the payment in full of a proof based on that claim. Thus, in *In re Humber Ironworks and Shipbuilding Co* (1869) LR 4 Ch App 643, 647, having said that "when the estate is insolvent [the Rule then in force] distributes the assets in the fairest way", Giffard LJ explained that "where the estate is solvent …, as soon as it is ascertained that there is a surplus, the creditor … is remitted to his rights under his contract". More recently, Lord Hoffmann discussed the effect of proving for a contractual debt on the underlying debt in the Privy Council case *Wight v Eckhardt Marine GmbH* [2004] 1 AC 47, paras 26 and 27, as quoted by Lord Sumption in para 198 below. In particular, Lord Hoffmann said that "[t]he winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced" and that "[t]he winding up does not either create new substantive rights in the creditors or destroy the old ones". In the later Privy Council case *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liquidation)* [2008] BCC 371, para 8, Lord Hoffmann said that "a winding up order does not affect the legal rights of the creditors or the company".

100. Even ignoring the fact they were based on different insolvency codes, I do not consider that the observations of Giffard LJ in *Humber Ironworks* LR 4 Ch App 643, 647 or of Lord Hoffmann in *Wight* [2004] 1 AC 147, paras 23 to 29 and *Parmalat Holdings* [2008] BCC 371, para 8 can safely be treated as applying to the wider issue raised on the LBHI2 administrators' case. *Humber Ironworks* LR 4 Ch App 643 was concerned with a creditor's claim for interest between the date of winding-up and payment of the principal, for which the Companies Act 1862 made no provision. Accordingly, the court had to decide what Judge-made rule to adopt in relation to such a claim, and it was decided that, in the case of a solvent company, after payment of all principal debts, the liquidator should pay interest at the contractual rate for the period in question. The court was concerned with the effect of the absence of any rule for payment, not with the effect of a rule which stipulated for payment.

101. The dicta in *Wight* [2004] 1 AC 147 must, as Lewison LJ said at [2016] Ch 1, para 94, on any view be no more than a broad generalisation, as they are self-evidently subject to important exceptions, including statutory set-off, disclaimer of onerous property, and the treatment of future and contingent debts. Over and above that, the case was concerned with a very different issue from that in this case. Lord Hoffmann was making the point that the fact that a creditor proved for his debt did not mean that the legal incidences of his underlying debt were affected. Thus, as the proof was based on a contract whose benefit was subsequently lawfully transferred by legislation from the proving creditor to a third party, the liquidators were held entitled to reject the creditor's proof. The case was therefore concerned with the effect on the right to prove of a subsequent event which affected the creditor's rights under the underlying contract, not with the effect on the underlying contract of the payment of a dividend in respect of a proof. In *Parmalat Capital* [2008] BCC 371,

Lord Hoffmann was describing the effect of a winding-up order, not the effect of proving for a debt, let alone the effect of payment of a dividend on a proof.

102. It is right to mention *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd (in liquidation)* [2006] QB 808, where the Court of Appeal was concerned with the current legislation, and the reasoning in *Wight* [2004] 1 AC 147 was followed. However, no consideration appears to have been given as to the possibility of the law having changed, and in any event, the case was not concerned with the effect on the underlying debt of payment of a proof. (While it is strictly unnecessary to express a view on the point, it is right to add that, at any rate as at present advised, I consider that the actual outcome of those three cases was correct, and, through the medium of rules 2.79 and 2.80 and rules 4.84 and 4.85, the outcome would respectively have been the same in an administration and a liquidation under the 1986 legislation.)

103. I accept that the dicta in *Humber Ironworks* LR 4 Ch App 643, *Wight* [2004] 1 AC 147 and, arguably, *Parmalat Capital* [2008] BCC 371, at least if read out of their context, suggest that paying a 100% dividend in respect of a proof does not necessarily discharge the underlying contractual debt. However, as explained above, in none of those cases was that question being addressed or even considered, and I do not think it is safe to proceed on the basis that the dicta were intended to apply to it. It cannot be doubted that the dividend must at least in part satisfy the underlying contractual debt, and therefore it does affect the creditor's rights. In any event, it seems to me that the issue arising from the LBHI2 administrators' wider contention must be resolved by considering the relevant provisions of the applicable insolvency code, namely the 1986 legislation, in their context.

104. It appears to me that there is a strong case for saying that it would be inconsistent with the general thrust of Chapter 10 of Part 2 (or indeed Chapter 9 of Part 4) of the 1986 Rules that a debt, which has been the subject of a proof that has been met in full, nonetheless includes a component which is somehow capable of resurrection. There are provable debts and non-provable debts, but I consider that it is inherently rather unlikely that the legislature intended that there could be a class of debts which, while wholly provable, may nonetheless transpire to have a non-provable element. In other words, the notion of a category of hybrid debt with a presently provable element and a contingently unprovable element seems improbable, particularly bearing in mind that the 1986 legislation was intended to simplify and that its policy was to render as many debts as possible provable (see paras 10 and 33 above).

105. Many of the rules contained in Chapter 10 of Part 2 (and the equivalent rules relating to liquidations in Chapter 9 of Part 4 of the 1986 Rules) appear to me to support the notion that a proving creditor should be treated as having had his

contractual rights fully satisfied once he is paid out in full on his proof. I have in mind the provisions for revaluation of underlying contingent claims up to the date of payment of the proof in rule 2.81, the allowance for adjusting partly secured claims up to the date of payment in rules 2.83 and 2.94, the rules regarding set-off in rule 2.85 the provisions relating to interest in rule 2.88(9), as well as the 5% discount rate on future debts in rule 2.105 - and of course rule 2.86 as discussed above (and the equivalent rules in Chapter 9 of Part 4).

106. There is a powerful case for saying that the fundamental rule 2.72(1) appears to me to be expressed in terms which support the notion that, where a creditor proves for a debt, his contractual rights as a creditor are satisfied if his proof is paid in full. By submitting a proof, a creditor is seeking "to recover his debt in whole or in part". The words "or in part" plainly refer to a case where part of the debt is protected by security, a possibility which is specifically catered for in rules 2.83, 2.93 and 2.94.

107. The suggestion that an unsecured foreign currency creditor who proves for the totality of the sum which he is owed at the time of his proof is seeking to recover only "part" of his debt appears to me to be self-evidently wrong. Accordingly, I would have thought that the natural import of rule 2.72 (and the similarly worded rule 4.73 in the case of liquidations) is that, save where the debt is partially secured, a creditor is treated as seeking to recover his debt "in whole" when he proves. If that is right, it would seem to me to follow that, if and when a foreign currency debt, which has been converted into a sterling-denominated proof in accordance with rule 2.86, is paid in full, the debt has been recovered "in whole". On that basis, I consider that it may be said to follow that there is no basis upon which the foreign currency creditors can base their claims for a contractual shortfall.

108. The notion that a creditor who proves in a liquidation is "wishing to recover his debt in whole or in part" was first introduced in the 1986 legislation. The equivalent provision to rule 4.73 of the 1986 Rules in the 1949 Rules was rule 91, which provided that, subject to certain exceptions, "every creditor shall … prove his debt". This change in wording makes it unsafe to cite judicial decisions or observations as to the effect of proving under the previous insolvency legislation, or indeed under insolvency legislation in other jurisdictions, as a reliable guide as to the effect of proving under the 1986 Rules. Indeed, the change in wording is consistent with the notion that a change in substantive law was contemplated. I doubt that this analysis can be answered by characterising rule 2.72(1) as a purely administrative provision: it is a provision which should be given its natural meaning, at least in the absence of good reason to the contrary.

109. The way in which rule 2.72 is expressed is significant not just in itself, but also because weight is put by CVI on the opening words of rule 2.86, namely "[f]or the purpose of proving …" (see eg per Briggs LJ in the Court of Appeal at [2016]

Ch 50, para 148). Yet, if, as appears to me to be the position, the effect of rule 2.72 is that proving for a debt involves the creditor seeking to recover the debt in whole, and this means that payment in full of the proof satisfies the debt, then the opening words of rule 2.86 take the instant debate no further. In any event, I do not agree with the suggestion that, on the view I incline to favour, the opening words of rule 2.86 are "otiose" (as Briggs LJ put it at [2016] Ch 50, para 150). The rule would have been oddly expressed if the opening words had been omitted.

110. In support of the contrary view, some reliance has been placed on the contrasting legislative provisions relating to bankruptcy. Bankruptcy is different from liquidation not least because (i) the bankrupt normally survives the bankruptcy through discharge, whereas the liquidation of a company is usually followed by its dissolution, and (ii) the statutory history of the two codes is different, and many of the differences have survived into the 1986 legislation. It is true that rule 6.96, which applies in bankruptcy, is expressed in the same way as rules 2.72 and 4.73, but I do not consider that takes matters any further. If a creditor who proves in a bankruptcy is paid 100p in the pound, I know of no reason why his debt should not be treated as having been satisfied in the same way as a creditor in a liquidation or administration. Sections 279 to 281 do not appear to me to be in point because, as I read them, they are concerned with releasing a bankrupt from liabilities which have not been satisfied.

111. The absence of any provision dealing with joint obligors or sureties where a creditor of a company is paid 100p in the pound seems to me to take matters little further. On any view, the rights of such parties would have to be assessed by the court in a case where a creditor is paid less than 100p in the pound, as has been the position in relation to disclaimers by liquidators under section 181, where the courts have had to work out the consequences for sureties - see *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70. It is true that section 281(7) deals with joint obligors and sureties of a bankrupt, but that section, which re-enacts a statutory provision in the 1914 Act, appears to be intended to apply to cases where the creditor of a bankrupt has not been paid 100p in the pound. Quite apart from this, section 281(7) only applies where the bankrupt is discharged, a situation which has no equivalent in corporate insolvency. Just as in the case of joint obligors or sureties of an insolvent company, there is no provision dealing with joint obligors and sureties of a bankrupt where the bankrupt has not been discharged. The same points apply to section 251I, which in any event cannot be of any assistance as it was only added by the Tribunals, Courts and Enforcement Act in 2007.

Conclusion

112. In these circumstances, based on what I have referred to as the narrower or primary contention raised by the LBHI2 administrators, I conclude that it is not open

to the foreign currency creditors to seek to claim as a non-provable debt, the difference between the sterling value of the debt at the administration date and the sterling value of that debt when paid, where the latter exceeds the former. It therefore follows that I would discharge paras (ii) and (iii) of the order made by David Richards J.

The claim for post-administration interest in a subsequent liquidation

Can rule 2.88(7) interest be claimed from a subsequent liquidator?

113. As explained in para 27 above, rule 2.88(1) provides that, when a company is in administration, creditors can only prove for contractual interest on their debts up to the date of administration, but para (7) provides for payment of interest at the rate specified in para (9) out of any surplus in the hands of the administrator, ie once all proving creditors have been paid in full. The question to be addressed is this: if, after LBIE has been in administration, it is then put into liquidation before such statutory interest has been paid to a creditor (whose principal debt will have been paid in full), can the creditor claim such interest from the LBIE liquidator, or prove for it in the LBIE liquidation? David Richards J held that it could not and so directed in para (iv) of the order which he made. The Court of Appeal disagreed.

114. There are, of course, legislative provisions which deal with interest on debts owed by a company in the winding-up context. As explained above, section 189 of the 1986 Act is concerned with "interest on debts" in a winding-up of a company, and section 189(2) (which is set out in para 28 above) is in very similar terms to Rule 2.88(7), which was no doubt based upon it.

115. Rule 4.93 is concerned with the payment of interest on a debt proved for in a liquidation, and para (1), as originally drafted, provided that "[w]here a debt proved in a liquidation bears interest", such interest is "provable as part of the debt except in so far as it is payable in respect of any period after the company went into liquidation". Following the introduction of distributing administrations, rule 4.93(1) was amended by the 2005 Amendment Rules, by the addition of new final words "or, if the liquidation was immediately preceded by an administration, any period after the date that the company entered administration".

116. The LBL administrators contend that, if interest payable under rule 2.88(7) was not paid by the LBIE administrators while LBIE was in administration and LBIE then goes into liquidation, such interest cannot be claimed from the LBIE liquidator or proved for in LBIE's liquidation. They rest this contention on two propositions. First, rule 2.88(7) is a direction to an administrator of a company, and

applies so long as the company is in administration and not thereafter. Secondly, section 189(2), which gives a right to claim interest on debts from a company in liquidation, only applies to interest which has accrued since the date of liquidation, and therefore there is no room for a creditor to claim interest which accrued before that date, and in particular during a pre-liquidation administration. In addition, even disregarding the amendment made to it in 2005, rule 4.93 only applies to debts which are proved for in the liquidation - and a creditor who was entitled to interest under rule 2.88(7) cannot prove for his debt in a subsequent liquidation, because his debt will have been paid out in full by the administrator. With no enthusiasm, David Richards J accepted the LBL administrators' contention, but the Court of Appeal disagreed.

117. I agree with David Richards J's conclusion that the interest provided for in rule 2.88(7) cannot be claimed from a subsequent liquidator, and I share his lack of enthusiasm in reaching that conclusion. As to the conclusion, rule 2.88(7) plainly only applies so long as there is an administration in existence. It is, in my view, an accurate characterisation to describe it as a direction to the administrator of a company while he is in office: thus, it seems to me that he would be susceptible to a claim by the proving creditors if he distributed a surplus to members without first paying statutory interest (see the discussion in *HIH Casualty* [2006] 2 All ER 671 referred to in para 52 above). On no view, can it be read as a direction to a potential or actual subsequent liquidator, acting in a liquidation taking place after an administration has ended. Rule 2.88(7) is in Chapter 10, and, as mentioned above, rule 2.68(1) provides that that Chapter applies to a distributing administration. So, when the administration ends, rule 2.88(7) can no longer apply. And the effect of section 189(2), supported by rule 4.93, is clear: there is no room for rule 2.88(7) interest to be proved for, or to be paid, once a company, which was formerly in administration, is then put into liquidation.

118. As to the lack of enthusiasm, there seems to be no reason why a creditor of a company in administration should lose what would otherwise be his right to statutory interest provided for by rule 2.88, simply because the company goes into liquidation before that interest has been paid. All the more so given that, as mentioned in para 27 above, rule 2.88 itself was amended in 2005 so that, in an administration following a liquidation, the interest which can be claimed under the rule dates back to the liquidation date, rather than the date of administration, but this underscores the force of the point that no similar amendment has been made to section 189(2). And the 2005 amendment to rule 4.93, which dealt with interest which would otherwise accrue after the administration date in the case of a company which subsequently goes into liquidation, further underscores the point.

119. It seems likely that there was an oversight on the part of those responsible for revising the 1986 Act and the 1986 Rules when they were amended to provide for a distributing administration by the 2002 Act and the 2003 Amendment Rules. Two

amendments were subsequently made to the 1986 Rules, explained respectively in paras 115 and 27 above: rule 4.93 was amended appropriately by the 2005 Amendment Rules and, even more in point, rule 2.88 was appropriately amended by the same 2005 Amendment Rules. However, section 189(2) was not amended, quite possibly because it is more difficult to amend primary, than secondary, legislation.

120. Under the United Kingdom's constitutional arrangements, it is not normally appropriate for a judge to rewrite or amend a statutory provision in order to correct what may appear to have been an oversight on the part of Parliament. That would involve a court impermissibly usurping the legislative function of Parliament. As Lord Nicholls of Birkenhead said in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 when discussing the judicial approach to statutes, "[t]he courts are ever mindful that their constitutional role in this field is interpretative" and "[t]hey must abstain from any course which might have the appearance of judicial legislation". For this reason, it would be impermissible to have recourse to an entirely new Judge-made rule to fill the gap in the present case. There has been no such rule nor any similar rule in the past (unsurprisingly, as administration is a new concept and a distributing administration is even newer), and the invention of such a rule would be inappropriate for the reasons discussed in paras 117 to 120 above.

121. The Court of Appeal appreciated this problem, but they considered that they could arrive at a commercially sensible conclusion on various grounds. While I sympathise with their wish to avoid the unattractive conclusion arrived at by the Judge, none of those grounds is supportable. The notion that a liquidator in a subsequent liquidation would be obliged to pay the interest which had accrued during the previous administration under rule 2.88(7) would be inconsistent with the fact that rule 2.88 only applies during the administration. Further, it would be inconsistent with the liquidator's duties as set out in the 1986 Act and the 1986 Rules if the liquidator was required to pay out money for which there was no warrant in the relevant legislative provisions. He does not stand in the shoes of the former administrator: he is the holder of a different statutory office with its own, different, statutorily imposed duties. And the notion that payment of statutory interest could be said to be a liability of the company concerned (as discussed in paras 49 and 53 above) takes matters no further. It would only be such a liability to the extent that the 1986 Act and the 1986 Rules provide, and that brings one back to the fact that rule 2.88 only applies while the company is in administration, and there is no "carry over" provision.

122. Further, the principle laid down in *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567, on which Briggs LJ relied, is not in point. It applies where money is transferred by one party to another party for a specific purpose. In this case, there would be no transfer, and there would be no purpose. No transfer because the administrator would simply relinquish office and the liquidator would assume a

different office, albeit in relation to the same company and the same assets. No purpose, because, in relation to the company's assets, the administrator would have been responsible for them for his statutorily imposed purposes, and the liquidator for his.

123. Quite apart from this, while the solution adopted by the Court of Appeal deals with the lacuna as it applies on the facts of the present case, it would not provide a complete answer. Thus, the solution would only apply to any surplus which had been in the hands of the administrator, and it could only be invoked by creditors who had lodged proofs in the administration. Accordingly, the Court of Appeal's solution would not help in a case where the administration preceding a liquidation had not been a distributing administration, a situation in which the unfairness of a lacuna would be even more marked. Lewison LJ thought, at paras 108 and 109 of his judgment, that "a limited solution is better than no solution at all". I would agree with that approach if the court had been simply seeking to arrive at as reasonable and commercial a result as possible: a partially unreasonable and uncommercial outcome would be preferable to a generally unreasonable and uncommercial outcome. However, when it comes to deciding the meaning of a legislative provision, judges are primarily concerned with arriving at a coherent interpretation, which, while taking into account commerciality and reasonableness, pays proper regard to the language of the provision interpreted in its context. David Richards J's conclusion produced a coherent, if unattractive and quite possibly unintended, outcome, which paid proper, if reluctant, regard to the applicable provisions of the 1986 Act and the 1986 Rules.

Does the right to contractual interest revive?

124. As just explained, David Richards J rightly concluded that a creditor of LBIE who had been entitled to, but had not been paid, interest under rule 2.88(7), could not claim such interest from a subsequent liquidator or prove for such interest in the subsequent liquidation. However, he went on to hold that such a creditor could nonetheless recover interest at the contractual rate for the period of the administration as a non-provable debt from any surplus, and so directed in para (v) of the order which he made. The Court of Appeal allowed the LBHI2 administrators' and LBHI's appeal on this point, on the very limited ground that the holding must be wrong in the light of their conclusion that such a creditor could claim the rule 2.88(7) interest from the liquidator. However, given my view that the Court of Appeal was wrong on that issue, it is necessary to consider whether the Judge was right in holding that a creditor's contractual right to interest revived.

125. In my judgment, contrary to the conclusion reached by David Richards J, the contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for his debt and been paid out on his

proof in a distributing administration. As already mentioned in *In re Humber Ironworks* LR 4 Ch App 643, 647, Giffard LJ, having held that a creditor could only prove for contractual interest up to the liquidation date, explained that "[t]hat rule … works with … fairness", because "where the estate is solvent …, as soon as it is ascertained that there is a surplus, the creditor … is remitted to his rights under his contract". However, as I have also explained, that observation was made in the context of a decision which was wholly based on what Giffard LJ expressly described as "Judge-made law", because the contemporary statutory provisions gave no guidance as to how contractual interest was to be dealt with in a winding-up. The position is, of course, very different now, especially in relation to interest on proved debts in liquidations and administrations. In that connection, I consider that the legislative provisions discussed above, namely rules 2.88 and 4.93 and section 189 provide a complete statutory code for the recovery of interest on proved debts in administrations and liquidations, and there is now no room for the Judge-made law which was invoked by Giffard LJ. It seems to me that this view is consistent with what David Richards J said in *In re Lehman Brothers International (Europe) (in administration)* [2016] Bus LR 17, para 164, although the point which was there being considered was more limited.

126. This issue has some echoes of the currency conversion claim issue. In each case, I consider that the contractual right (in this case to recover interest and in the case of currency conversion claims, to be paid at a particular rate of exchange) has been replaced by legislative rules. On that basis, there is no room for the contractual right to revive just because those rules contain a *casus omissus* or because they result in a worse outcome for a creditor than he would have enjoyed under the contract.

127. To put what may ultimately be the same point in somewhat different terms, it strikes me as rather bold to suggest that interest which accrues due between the date of administration and the date of liquidation can be claimed as a non-provable debt, when section 189(2) specifically gives the right to make such a claim for interest only when it accrues after the liquidation, and rule 4.93 as amended specifically deals with interest accruing during an administration in the case of a company which subsequently goes into liquidation.

Conclusion

128. In these circumstances, without enthusiasm, I would reverse the Court of Appeal's decision and restore the direction given by the Judge in para (iv) of his Order, and, albeit for very different reasons, I would uphold the Court of Appeal's allowance of the appeal against para (v) of the order made by David Richards J.

The issues concerning contributories: general

129. As explained in para 35 above, the remaining issues arise from the provisions of the 1986 Act and the 1986 Rules which are concerned with the liability of contributories. In recent years, these provisions and their legislative predecessors have been relatively rarely invoked. This is because the great majority of modern companies are limited by shares, and the provisions dealing with contributories can only come into play in relation to such companies where there are shares which are not paid up, and that is a relatively infrequent state of affairs. However, in the present case, LBIE is an unlimited company, and so the provisions have a potentially substantial part to play.

130. Section 74(1) provides:

> "When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves."

131. As Briggs LJ explained in [2016] Ch 50, para 172, subsequent subsections of section 74 contain limitations, and they include a provision that no contribution is required from any member exceeding the amount unpaid on shares, where the company is limited by shares. In this case, because LBIE is an unlimited company, section 74 has, at least potentially, an unusually substantial effect.

132. Section 148 provides that, "[a]s soon as may be after making a winding-up order, the court shall settle a list of contributories". By section 150(1):

> "The Court may, at any time after making a winding-up order … make calls on all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the court considers necessary to satisfy the company's debts and liabilities, and the expenses of winding up, and for the adjustment of the rights of the contributories among themselves, and make an order for payment of any calls so made."

Section 154 provides that the Court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled to it.

Pursuant to section 160(1), rules 4.195 to 4.205 delegate the powers and duties of the Court in relation to contributories to the liquidator subject to the court's control. Hence it is the liquidator who settles the list of contributories and makes calls from contributories, but he does so on behalf of the court.

133. Unlike the contents of the 1986 Rules, which, as explained above, are almost all either new provisions or rewritten versions of their legislative predecessors, the provisions of the 1986 Act relating to contributories are largely unchanged from their predecessors. Thus, section 74, section 148, and sections 150 and 154 are respectively expressed in virtually identical terms to section 38, section 98, section 102 and section 109 of the Companies Act 1862 (25 & 26 Vic c 89); and similar provisions are to be found in successive Companies Acts up to the Companies Act 1985.

134. Four issues arise out of LBIE's administration in relation to contributories. The first is self-contained, and it is whether contributories can be liable to contribute towards liability for statutory interest and/or non-provable liabilities. The other three issues arise from the facts that (i) as explained in para 2 above, LBHI2 and LBL, as shareholders of LBIE, are both potentially liable as contributories, and (ii) as explained in para 6 above, LBHI2 and LBL are also both unsecured creditors of LBIE, and they have each lodged proofs in the administration of LBIE in respect of substantial sums.

Liability of contributories for statutory interest and non-provable liabilities

Introductory

135. The issue to be addressed is whether the phrase "debts and liabilities" in section 74(1) extends to statutory interest and non-provable liabilities, as the LBIE administrators contend. David Richards J held that the phrase does extend to statutory interest and non-provable liabilities, and this was recorded in para (vi) of the order which he made. The Court of Appeal agreed. In this connection, it was common ground below, and accepted by the Court of Appeal, that statutory interest and non-provable liabilities were not "debts" because that expression is limited to provable debts (in the light of the terms of rules 12.3 and 13.12). However, the LBIE administrators argued, and the courts below accepted, that statutory interest and non-provable liabilities constituted "liabilities" within section 74(1). That proposition is challenged by the LBHI2 administrators on this appeal.

Non-provable liabilities

136. It is convenient to take non-provable liabilities first. I find it difficult to see why they are not within the expression "liabilities" in section 74(1). A non-provable liability of a company is *ex hypothesi*, as a matter of ordinary language, a liability of the company, albeit that it would appear to be a contingent liability, at least until it is clear that there is a surplus after all provable debts (and, at least normally, any statutory interest) have been paid in full. Despite the argument of the LBHI2 administrators to that effect, there do not appear to be any convincing grounds to support the argument that the expression "liabilities" in section 74(1) is limited to liabilities which can be the subject-matter of a proof. Neither section 74 nor rules 12.3 or 13.12 appear to contain anything in them to support such a reading. Indeed, in rule 13.12(4), "liability" is widely defined and in particular in such a way as not to limit it to provable liabilities.

137. The LBHI2 administrators nonetheless argue that, because section 74 only applies after a winding-up and the liquidator has no liability to pay non-provable liabilities, such claims cannot be liabilities under section 74(1). I cannot accept that argument. In my view, section 74(1) refers to the "debts and liabilities" of the company, and therefore it can be invoked to ensure that non-provable liabilities are paid by the contributories. Further, the liability of contributories under section 74(1) and 150(1) is to the court, and, as explained in para 132 above, the liquidator is acting effectively on behalf of the Court when seeking payments under that section: it is an additional function to his more familiar role, which is concerned with provable debts and liabilities.

138. More importantly in the present context, as discussed in paras 58 to 61 above, although there is no legislative provision requiring a liquidator to pay non-provable liabilities, he is, and has always been regarded by the courts as being obliged to pay off any such claims. I cannot in these circumstances see any basis for acceding to the contention that non-provable liabilities against a company are not within the scope of section 74 so far as its members are concerned.

Statutory interest

139. The position with regard to statutory interest is in my view very different. Statutory interest is due under rule 2.88(7), and that provision states that the liability to pay such interest is only out of any "surplus remaining after payment of the debts proved". The contrary view was taken in the courts below, and I accept that their conclusion is more consonant with what one would expect. Nonetheless, it seems to me that there is no answer to the simple proposition advanced by the LBHI2 administrators that, as section 74 only requires payment from contributories of an

"amount sufficient for payment of [a company's] … liabilities", the section cannot be invoked to create a "surplus" from which statutory interest can then be paid. If there is a deficit, there is no liability for statutory interest, and, if there is a surplus, there is only a liability for statutory interest to the extent of the surplus. Accordingly, in the absence of a sufficient surplus to pay all the statutory interest, there is no obligation to pay all the statutory interest, and therefore there can be no "liabilit[y]" which a contributory could be called on to meet under section 74(1). In effect, the LBIE administrators' argument to the contrary involves them pulling themselves up by their own bootstraps.

140. Moore-Bick and Briggs LJJ concluded, in agreement with David Richards J, that they could defeat this analysis by relying on the proposition that the right under section 74 to make calls on contributories is itself an asset of the company. Accordingly, they reasoned, "where the aggregation of that right with the other assets of the company disclosed a surplus, then the making of the call, together with payment by contributories in response to it, merely enabled statutory interest to be distributed, rather than created the surplus in the first place" (to quote Briggs LJ at [2016] Ch 50, para 197).

141. In my view, that attractively expressed analysis does not answer the simple logic of the argument set out in para 139 above. Section 74(1) can only be invoked in order to pay off "liabilities", and, while I accept that that expression extends to contingent liabilities, it involves circuity of reasoning to say that the section can be invoked in relation to a liability which is contingent on the section being invoked. We were referred to observations of Lord Hatherley LC and Lord Chelmsford in *Webb v Whiffen* (1872) LR 5 HL 711, 718 and 724, which emphasised the broad scope of the power conferred by section 38 of the 1862 Act, but they cannot justify interpreting section 74(1) in a way which is inconsistent with the wording of the rule which is said to found the basis of the particular exercise of the power.

142. The majority of the Court of Appeal also thought that LBHI2 and LBL administrator's argument relied too much on the way in which rule 2.88(7) is expressed. To quote Briggs LJ at [2016] Ch 50, para 198, "the use in section 189, rule 2.88 and elsewhere in the statutory code of the concept of payment out of a surplus is merely a convenient way of identifying liabilities which fall lower than other liabilities in the priorities encapsulated in the waterfall". It seems to me that this analysis involves re-writing the legislative provision to enable it to achieve a more instinctively likely result than if the actual words used in the provision are construed according to the normal principles of interpretation. Briggs LJ could well be right if one was concerned with identifying what the drafters of rule 2.88(7) thought that they were doing, although, because I believe that his re-writing of the rule would only make a difference in the rare case where section 74 applies, it may be more a matter of oversight than wrongly expressed intention. However, Briggs LJ's analysis does not, with respect, fairly reflect what the drafters of rule 2.88

actually wrote. The result of interpreting the words used in rule 2.88(7), unless one departs in a significant way from their natural meaning, may be counter-intuitive, even surprising, in a case where section 74 applies, but it is not absurd or unworkable, and therefore it should be adopted.

143. Unlike Moore-Bick and Briggs LJJ, Lewison LJ was not persuaded by the arguments so far discussed. However, he agreed in the outcome, as he considered that, if (as I have concluded) non-provable liabilities can be the subject-matter of a section 74 claim from contributories, it must follow that statutory interest is in the same position because it ranks above non-provable liabilities in the waterfall summarised in para 17 above. Apart from the fact that one could equally well argue for the converse, it seems to me that that argument wrongly treats the statement quoted in para 17 above as some sort of fundamental principle of law. It is not. If money can be sought from contributories to pay non-provable liabilities, it does not follow that money can also be sought, or that the money obtained can be used, to pay otherwise irrecoverable statutory interest. It merely means that any statutory interest is, as it were, by-passed in favour of non-provable liabilities. Statutory interest is payable out of "any surplus" which arises after payment of provable debts; if there is no surplus, but the liquidator can invoke section 74 to obtain money to pay other non-provable liabilities, it seems to me that, given that the money so obtained has been extracted for a specific purpose, it cannot be treated as a "surplus" which can be used for another purpose.

144. It is true that the cases mentioned at the end of para 60 above underline the importance of a liquidator paying off the company's indebtedness before distributing any surplus to members. However, I do not think that they help the LBIE Administrators' case that statutory interest can found a section 74 claim (although they provide support for their case on non-provable liabilities). So long as there are assets to distribute to members, there is a surplus, and section 74 does not come into play, and once there is no surplus, there is nothing to distribute to shareholders. For the same reasons, I cannot see how the argument of the LBIE Administrators on this issue is assisted by the fact that section 74(1) can be invoked "for the adjustment of the rights of the contributories among themselves".

145. It may be that the LBHI2 administrators are right for another reason, namely that statutory interest is not a liability of the company in question, but of its administrator or its liquidator. That was an argument which concerned Lewison LJ in the light of *In re Pyle Works* (1890) 44 Ch D 534, where it was held that the power to call on contributories is not part of the capital of the company - see at pp 575, 584 and 588, per Cotton, Lindley and Lopes LJJ respectively. The point has some echoes of the argument considered in relation to the subordinated debt in paras 51 and 52 above, but we do not need to decide it and I do not think we should do so.

146. Having said that, I accept that my conclusion does produce the anomalous result that, where section 74 applies, there will be circumstances when one type of creditor who normally has priority over another type will receive nothing when the other type of creditor will be paid in full. It is therefore readily understandable why the courts below tried hard to find a way round this conclusion. However, the conclusion does not lead to any practical or even any conceptual difficulty (see paras 143 and 144 above). Further, if one rejects my conclusion, one is left with the unpalatable choice of holding that a payment for statutory interest is recoverable under section 74 despite the wording of the section and the provisions for statutory interest as discussed in paras 139 to 142 above, or of holding that a payment for other non-provable liabilities is irrecoverable under section 74 despite the argument discussed in paras 136 to 138 above.

147. It is perhaps right to add that the conclusion that section 74 can be relied on to meet non-provable liabilities but not statutory interest may appear, at any rate at first sight, to conflict with what is said in paras 65 and 66 above in relation to the priority of the subordinated debt. In those paragraphs, I was concerned to explain that, while a party could validly contract to be in a worse position in the waterfall than he would normally be, he could not validly contract to improve his position in the waterfall (unless all those who are thereby disadvantaged have agreed). That is because, unless he agrees otherwise, a person is entitled to insist on his legal rights, which includes priorities in the waterfall. However, it is a different matter where the effect of a statutory provision purports to have the effect of changing or by-passing such priorities: the priorities are statutory (with some Judge-made additions), and therefore there is no reason why any statutory variation or modification cannot be effective.

Conclusion

148. Accordingly, albeit without enthusiasm, I would allow the LBHI2 administrators' appeal on the issue whether section 74 can be invoked in order to pay statutory interest, but I would dismiss their appeal on the issue whether that section can be invoked in order to meet other non-provable liabilities. I would therefore allow the appeal in part against para (vi) of David Richards J's order.

Contributories who are also creditors of LBIE

Introductory

149. As explained above, LBHI2 and LBL are each both creditors of, and potential contributories to, LBIE. Three questions arise from this. The first is whether the

LBIE administrators are, as they argue, entitled to prove in the potential distributing administrations (or liquidations) of LBHI2 and LBL in respect of each company's respective potential liability to contribute in a future liquidation of LBIE. The second and third questions arise from the argument pursued by LBHI, effectively on behalf of LBHI2 and LBL, that those two companies are entitled to be paid in LBIE's distributing administration in their capacity as creditors of LBIE, even though in due course they may very well be liable as contributories under section 74. The LBIE administrators meet this argument with two contentions. Their first contention is that the potential liability of LBHI2 and LBL as contributories can be set off as a contingent debt in the administration of LBIE pursuant to rule 2.85, which gives rise to the second question. Alternatively, and this gives rise to the third question, the LBIE administrators contend that they are entitled to rely on the so-called contributory rule, and so can resist paying LBHI2 and LBL on their proofs until they have met their liabilities as contributories (or it is clear that they will have no such liability).

150. I shall take these three questions in turn.

Can the LBIE administrators prove for contributories' potential liability?

151. Both the Judge and the Court of Appeal held that the LBIE administrators were entitled to prove in the administrations of LBHI2 and LBL in respect of the potential prospective liabilities of those companies as contributories of LBIE (which I will refer to as a "prospective section 150 liability"). This is recorded in para (viii) of the order made by the Judge.

152. In order for a prospective section 150 liability to be provable in the administrations of LBHI2 and LBL, it is accepted by the LBIE administrators that it would have to be a contingent obligation under rule 2.85. At any rate on the face of it, such a liability would appear to be contingent, as it could arise in the event of LBIE going into liquidation, and its liquidator being unable to meet all claims and making one or more calls under section 150. The more difficult question would seem to be whether the prospective section 150 liability constitutes an "obligation" within rule 13.12. In that connection, it was accepted in the courts below and by the parties that the guidance given in *In re Nortel GmbH* [2014] AC 209, para 77 applies. That guidance is as follows:

> "… [T]he mere fact that a company could become under a liability pursuant to a provision in a statute which was in force before the insolvency event, cannot mean that, where the liability arises after the insolvency event, it falls within rule 13.12(1)(b). It would be dangerous to try and suggest a

> universally applicable formula, given the many different statutory and other liabilities and obligations which could exist. However, I would suggest that, at least normally, in order for a company to have incurred a relevant 'obligation' under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b)."

153. In my view, that approach is apt in connection with a prospective section 150 liability. It is true that any claim against a contributory can be said to arise from contract, in that the basis of such a claim is contractual in origin. Thus, Lord Cranworth LC said in *Williams v Harding* (1866) LR 1 HL 9, 22 that a not dissimilar obligation under section 90 of the Bankruptcy Act 1861 (24 & 25 Vict c 134) "be referred back to the year … when he became a shareholder" - and see at pp 27-28 per Lord Kingsdown to the same effect. However, as each of them went on to say, the obligation in question was nonetheless "cast on [the contributory] by law" or "made under the statute". In relation to section 150, such an approach is supported by section 80, which describes the liability of a contributory as a debt "accruing due from him at the time when his liability commenced, but payable at the times when calls are made". Accordingly, it is ultimately a statutory obligation, albeit that exposure to such an obligation arises as a result of contract. I can therefore see no reason not to follow the approach suggested in *Nortel GmbH* [2014] AC 209, para 77.

154. In my opinion, application of that approach to a prospective section 150 liability justifies a different conclusion from that reached by the courts below. This view is based on a combination of two propositions. First, the effect of section 150 and rule 4.195 is that the liquidator is the person entitled to make a call, and he possesses that entitlement for the purpose of performing his statutory duties. Secondly, the nature of the liability to contribute is such that it should not be capable of being the subject matter of a proof unless the company concerned is in liquidation, even bearing in mind the wide provisions of rules 2.85 and 13.12.

155. It is clear from section 150 that the right to make calls on contributories only arises when a company is being wound up by the court. There are many judicial dicta which emphasise that a contributory has no liability until the company concerned is wound up (eg per Sir George Jessel MR in *In re Whitehouse & Co*

(1878) 9 Ch D 595, 599 and per Cotton, Fry and Bowen LJJ in *Whittaker v Kershaw* (1890) 45 Ch D 320, 326 and 328-329), and it is consistent with section 80. However, those dicta, like section 80 itself, appear to me to take matters no further for present purposes, at least on their own, as they are consistent with the notion that a contributory has a liability for calls under section 150 which is contingent at least until the company concerned goes into liquidation, and probably until the liquidator makes a call.

156. More to the point, however, it appears to me that any money paid pursuant to a call made under section 150 is not paid to or for the company, but to the liquidator, in order to enable him, as subsection (1) provides, to "satisfy the company's debts and liabilities, and the expenses of winding up". The point is underscored by comparing this wording with that of section 149(1) which empowers the court, after it has made a winding-up order, to require "any contributory … to pay … any money due from him … to the company". As was explained in *In re Pyle Works* 44 Ch D 534, per Cotton LJ at pp 574-575 and Lindley LJ at pp 582-583 (quoted at [2016] Ch 50, paras 113-119), any money paid under section 74 cannot be treated as part of the property of the company concerned: it forms a statutory fund which can only come into existence once the company in question has gone into liquidation. A similar point was more recently made in *In re Oasis Merchandising Services Ltd* [1998] Ch 170, 182, where Peter Gibson LJ giving the judgment of the Court of Appeal, drew a "distinction … between the property of the company … (and property representing the same) and property which is subsequently acquired by the liquidator through the exercise of rights conferred on him alone by statute and which is to be held on the statutory trust for distribution by the liquidator". The importance of distinguishing some statutory rights of a liquidator from the rights of the company in liquidation is also apparent from the judgments of Millett J in *In re MC Bacon Ltd* [1991] Ch 127, 136-137, and of Knox J in *In re Ayala Holdings Ltd (No 2)* [1996] 1 BCLC 467, 470-484.

157. As Lewison LJ said at [2016] Ch 50, para 126, the effect of the reasoning in *Pyle Works* is:

> "(i) that capital capable of being raised only in a winding up is not part of the capital of the company in the ordinary sense;
>
> (ii) that the liquidator is the only person empowered to make the call;
>
> (iii) that the statutory fund created by the call comes into existence only when the company is in liquidation;

(iv) that when paid the call is payable to the liquidator as an officer of the court, and not to the company;

(v) that there can be no anticipation of future calls."

158. Thus, where the company seeking to prove possible future calls is not in liquidation, there is not merely no extant debt: there would appear to be no existing person who could be identified as a potential creditor, merely a person who may (or may not) in due course exist, namely a possible future liquidator. There are therefore obvious problems with the notion that the company or its administrator could prove. In this connection, I do not accept the argument that, because section 80 states that a contributory is a debtor from the time he acquires his shares, there must be a creditor at that time, and therefore the company is the creditor. Section 80 identifies the contractual source of a liability on a call (which is described as a debt, even though it is not actually payable until there is a call) and the person entitled to make the call, namely a liquidator - see in this connection the observations in *Williams v Harding* LR 1 HL 9 cited in para 153 above.

159. If this were the only problem with the LBIE administrators' case, it may conceivably have been appropriate to conclude that LBIE or its administrators, as some sort of agent for a future liquidator of LBIE, could prove for the potential section 150 liability of LBHI2 and LBL in their respective administrations. It is unnecessary to consider whether that would have been possible because of the other problems faced by the LBIE administrators' case on this issue.

160. Thus, quite apart from the fact that he is not a creditor in respect of the potential section 150 liability, it appears to me that there would be serious difficulties if an administrator of a company could prove for such a liability. If the LBIE administrators could prove for such a liability in the administrations of LBHI2 and LBL, it would seem to follow that LBIE could prove in respect of such a liability even if it was in good financial health. I find it difficult to accept that a company which is not insolvent and is trading should be able to prove for and recover sums representing payments in respect of calls, which are only capable of being made by a liquidator on behalf of the court in order to meet statutory liabilities which arise in the event of that company's winding-up.

161. Perhaps on the assumption that a proof based on a contributory's potential liability would only be likely to lead to a substantial sum if the proving creditor was in poor financial health, Briggs LJ said at [2016] Ch 50, para 231, that the directors of the proving creditor "may reasonably be expected to use the fruits of that proof to keep the wolf from the door". In the first place, there is no reason, at least as a matter of law, which justifies that assumption. Secondly, even where it did apply, it

would mean that the contributory's money was being used for a very different purpose from that for which it is statutorily intended. I am unconvinced by the argument that this point could be met by limiting the right to prove for a prospective section 150 liability to a case where the creditor company is in administration: some administrations result in the company being revived, and carrying on business. Further, the suggestion by Briggs LJ at para 233 that the sum paid by the insolvent contributory pursuant to such a proof could be used by the company "to put it back on its feet" is, again, inconsistent with the purpose of section 150.

162. In addition, the notion that a company could prove for a prospective section 150 liability leads to this quandary. If a contributory pays out on a proof in respect of such a liability, it is unclear whether that would put an end to his liability as a contributory. If it would do so, then the whole point of section 150 would be thwarted: the contributory would be contributing towards putting the company on its feet (or keeping the wolf from the door) and could not then be called on again if the company became insolvent, which is the reason for being a contributory. Alternatively, if (as has been assumed in argument by all parties, and may be supported by the fact that there is no limit on the number of calls which a liquidator may make) paying on a proof in respect of a prospective section 150 liability would not put an end to the contributory's liability, he could sometimes find himself paying out twice - once for the costs of putting a company back on its feet (or keeping the wolf from the door), and if the company then falls over (or the wolf then gets in) for the more normal liabilities of a contributory.

163. Other difficulties would arise if a company, which is solvent and viable, was entitled to prove in respect of a prospective section 150 liability in the insolvency of a contributory. Thus, sections 74(1) and 154 envisage that contributories should be entitled to "adjust" their rights "amongst themselves". It is difficult to see how that could be done, in the absence of any applicable statutory provision, in a case where a contributory is liable to pay out for a potential section 150 liability. Further, in most cases, it would also be very difficult to estimate the value of the right to invoke a call under section 150 if the company in question was a going concern. Apart from the inherently wholly speculative nature of the exercise of assessing the extent of the possible future insolvency, there would be the problem of allowing for settling the notional future list of contributories. Additionally, as Briggs LJ accepted at [2016] Ch 50, para 226, if a contributory could be held liable to a company in administration, he could find himself contributing towards the costs and expenses of the administration (as well as those of any subsequent liquidation), which is plainly not intended by section 74.

164. Taking all these problems together, I conclude that it would not be open to LBIE to prove in the distributing administrations or liquidations of LBHI2 or LBL in respect of their potential respective liabilities to contribute under section 150 in the event of LBIE being wound up. I would accordingly allow the appeal of LBHI2

and LBL on this point and set aside para (viii) of the order made by David Richards J.

165. As both Briggs and Lewison LJJ said, this is not an easy point, not least because of the wide words of rule 13.12, the general principle that all potential liabilities should if possible be provable, and the practical consequences of my conclusion. In relation to this last point, I acknowledge that, at least where the company to which it is liable to contribute is not itself in liquidation, this conclusion would enable a potential contributory to escape liability to contribute, at least in some cases, by going into administration or liquidation. I also acknowledge that, in some cases, this conclusion would operate to induce a company to be wound up rather than to go into administration, or to induce an administrator to move a company into winding up. It may be that this raises a particularly acute problem for an administrator in the light of my conclusion in para 128 above in relation to statutory interest. However, I am unable to accept that these points can undermine the conclusion I have reached. They are ultimately attributable to the fact that distributing administrators have, either for good reason or through oversight, not been given all the powers of liquidators, and in particular have not been given the power to call on contributories.

Can the LBIE administrators set off the contributories' potential liability?

166. The Judge and the Court of Appeal considered that the LBIE administrators were right to contend that they could set off against the proofs lodged by LBHI2 and LBL in respect of their claims as subordinated creditors, their respective prospective section 150 liabilities. This was declared to be the position in para (ix) of the order made by David Richards J. As Briggs LJ said, this followed from their conclusion that the prospective section 150 liabilities were provable. However, in the preceding section of this judgment, I have concluded that they are not provable, and it is therefore necessary to address the question of set-off.

167. I do not accept the first line of argument advanced by LBHI, namely, that, simply because the prospective section 150 liabilities are not provable, that of itself means that they cannot be invoked by way of set-off by the LBIE administrators against the proofs lodged by LBHI2 and LBL. I can see no good reason why a debt owing by the creditor to the company which is or would be non-provable in the creditor's insolvency should thereby be disqualified from being set off under rule 2.85 against a proof lodged by the creditor in the company's administration.

168. It is true that there is direct support for the notion that only a provable debt can be invoked to support a set-off, in the judgment of Rose LJ in *In re Bank of Credit and Commerce International SA (No 8)* [1996] Ch 245, 256, where he said

"a claim is not capable of set-off unless it is admissible to proof … To qualify for set-off, therefore, the creditor's claim must be capable of proof … This is true of both sides of the account". In his speech in the appeal to the House of Lords, [1998] AC 214, 228, Lord Hoffmann said that he was "not sure that this is right", and mentioned the decision of the High Court of Australia, *Gye v McIntyre* (1991) 171 CLR 609 as reaching the opposite conclusion.

169. In my view, Lord Hoffmann's doubts were justified, the decision on this point in *Gye* was correct, and Rose LJ's observation should be disapproved. There is nothing in rule 2.85 which, at least expressly, stipulates that the set-off liability has to be provable, and it is inappropriate to imply limitations into a legislative provision unless it is strictly necessary. In any event, the general purpose of insolvency set-off appears to me to point against implying any such restriction. As Parke B explained in *Forster v Wilson* (1843) 12 M & W 191, 204, the purpose of insolvency set-off is "to do substantial justice between the parties", which is reflected in the more recent analysis of Lord Hoffmann in *Stein v Blake* [1996] AC 243, 252-255. *Gye* was a clearly reasoned judgment of a powerful court, which included the observations at (1991) 178 CLR 609, 628-629 that there was "nothing at all" in the relevant legislation which required the set-off claim to be provable, that there was no "reason in fairness or common sense why such an additional test should be imposed", and "considerations of justice and fair dealing which underlie" the set-off provisions "require that a set-off be allowed in such circumstances". Further, the only case cited by Rose LJ to support his view, *Graham v Russell* (1816) 5 M & S 498 does not, with respect, appear to be in point.

170. Accordingly, the mere fact that the prospective section 150 liabilities of LBHI2 and LBL are non-provable does not mean that, for that reason alone, they cannot be relied on by the LBIE administrators to set off against the respective proofs of LBHI2 and LBL in their capacities as creditors of LBIE. Nonetheless, I consider that LBHI is right to contend that such a set off would be impermissible.

171. The various reasons set out in paras 152 to 165 above explaining why I consider that the prospective section 150 liabilities are not provable also serve to explain why they cannot be set off. Once one analyses who is entitled to make calls under section 150, what those calls are for, and the problems which would arise if the right to call could be raised as a contingent claim by the company concerned or its administrator, it seems to me that they are outwith the scope of rule 2.85 as well as rule 2.72. Thus, while it may appear somewhat casuistic, although the fact that the LBIE administrators cannot prove for the prospective section 150 liabilities does not of itself mean that they cannot invoke those liabilities by way of set-off, the reasons why the LBIE administrators cannot prove for those liabilities also justify the conclusion that they cannot invoke them by way of set-off.

Does the contributory rule apply in distributing administrations?

172. In view of my conclusion that the LBIE administrators cannot set off the prospective section 150 liabilities of LBHI2 and LBL against their proofs, LBHI contends that those companies are entitled to be paid out on their proofs like any other unsecured creditor. Given that LBHI2 and LBL are probably insolvent, the potential injustice of such an outcome is plain: although LBHI2 and LBL may each turn out to be liable under section 150 for a substantial sum (indeed, a sum which may be greater than their proved claims), they would have to be paid those claims in full, leaving a future liquidator of LBIE to receive nothing or a mere dividend in respect of any calls under section 150. Such an outcome would seem to me to be plainly inconsistent with one of the fundamental principles underlying the statutory corporate insolvency regime, namely the *pari passu* principle. It would also frustrate the statutory aim of enabling effective calls to be made in a liquidation.

173. It is common ground that this problem would not arise if it was a liquidator, rather than administrators, of LBIE who was effecting a distribution because of the contributory rule, which is an aspect of a wider equitable principle known as the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442. The contributory rule ("the Rule") was first applied in a corporate insolvency case 150 years ago in *In re Overend Gurney & Co; Grissel's Case* (1866) LR 1 Ch App 528, and it was more recently discussed by Lord Walker in *Kaupthing (No 2)* [2012] 1 AC 804. As he pithily expressed it at para 20, a "claimant could recover nothing as a creditor until all his liability as a contributory had been discharged". As he later explained, at para 53, when discussing the wider principle, the Rule "may be said to fill the gap left by disapplication of set-off, but it does not work in opposition to set-off. It produces a similar netting-off effect except where some cogent principle of law requires one claim to be given strict priority to another".

174. The Rule applies in liquidations, although it is not provided for in the 1986 Act or the 1986 Rules, and is one of the surviving Judge-made rules of the insolvency code, as alluded to in para 17 above. The question is whether it can and should be applied in administrations, and, if so, how it should be so applied. In para (vii) of his Order, David Richards J held that the Rule did not have "any application in an administration (including the administration of LBIE)". The Court of Appeal agreed.

175. A liquidator is statutorily authorised to make calls on a contributory, whereas an administrator is not, and the Rule has only ever been applied in liquidations. However, it does not necessarily follow from this that the Rule cannot be extended to administrations. Neither David Richards J nor the Court of Appeal thought it right so to extend it, but that was, in each case, after having concluded that the prospective

section 150 liability of a contributory could be set off against its proved claim in the administration, a conclusion with which, as explained above, I disagree.

176. As I have already indicated, given the detailed and coherent nature of the 1986 legislation, a judge must think long and hard before laying down a new Judge-made rule to liquidations. However, in this case, the course being contemplated does not involve inventing an entirely new rule. It involves extending an existing rule so that it can apply to what is an analogous, albeit not identical, situation to that to which it previously applied, and doing so in order to achieve precisely the same end for which it was conceived.

177. A more difficult question is whether taking such a course would involve extending the contributory rule in a way which is inconsistent with the provisions or principles of the current legislation. There is, at least at first sight, a strong argument that such an extension would be inconsistent with rule 2.69 (which requires debts to be paid in full unless the assets are insufficient to meet them), and rule 2.88(7) (which requires any surplus remaining after payment of the debts proved to be applied in paying statutory interest "before being applied for any purpose") - see paras 20 and 27 above. The answer to this argument is to be found in the fact that the contributory rule undoubtedly applies in a liquidation - see per Lord Walker in *Kaupthing (No 2)* [2012] 1 AC 804, para 20 and per Briggs LJ in this case, [2016] Ch 50, para 243. Yet if the argument is correct, the contributory rule could not apply in a liquidation, as rule 4.181 and section 189(2) are expressed in effectively identical terms to rules 2.69 and 2.88(7) respectively. The true analysis is that the contributory rule is an aspect of a "general equitable principle" which operates as a qualification to the 1986 Rules regarding distributions in liquidations, and is needed to ensure compliance with the overall purpose of those rules (as discussed in *McPherson's Law of Company Liquidation*, 3rd ed (2013), paras 10.036, 13.097 and 13.099). Precisely those reasons justify the extension of a slightly modified version of the contributory rule to administrations.

178. In these circumstances, I have come to the conclusion that it is permissible and appropriate for the LBIE administrators to apply the Rule to the proved claims of LBHI2 and LBL, provided it can be effected in a way which is practical, principled and in harmony with the applicable legislative provisions and principles.

179. David Richards J rejected this conclusion, on the ground that:

> "The fundamental difficulty in applying the contributory rule in an administration is precisely because there is no statutory mechanism for making calls on contributories in an administration. While LBIE remains in administration, there

> can be no calls and therefore nothing that LBHI2 and LBL as members could do to put themselves in a position where they could prove as creditors in respect of their subordinated and unsubordinated claims. Yet this would be the result of applying the contributory rule to a company in administration" - [2015] 1 Ch 1, para 188.

Briggs LJ expressed much the same view in the Court of Appeal:

> "It would … be a serious injustice to a solvent contributory to be disabled from ever proving in a distributing administration because, in the absence of a call, there was nothing which he could pay to free himself from the shackles of the rule. The company might (and usually would) distribute all its assets to its creditors without ever going into liquidation, leaving the contributory high and dry, even though its liability as a contributory might be very small, and its claim as a creditor very large - [2016] Ch 50, para 239."

180. I readily accept that, if the Rule was simply applied to a distributing administration in its existing terms, it could easily lead to injustice in the way described in those passages. However, in my view, a potential contributory can be protected if the Rule is applied with minor procedural modifications to distributing administrations. When making a distribution, the administrators should retain any sum which, if the Rule had not applied, would otherwise have been distributed to a contributory, in his capacity of a proving creditor. Thus, assuming a 100% dividend, if the administrator considers that a creditor's reasonable maximum potential liability as a contributory, A, is greater than his proved claim, B, then B must be retained. If A is less than B, then he can be paid (B-A), and A is retained. If the dividend is not 100% (as presumably almost by definition will be the case), then the position is a little more complex. The administrator would have to assess the likely level of dividend, C, and the same exercise would have to be carried out with (C x B) rather than B. Any such exercise would inevitably be speculative, and the administrator should be cautious but realistic. Any such retention would be kept safe and ready to be paid out appropriately when the final accounts were drawn up, and (save perhaps in these unusual days) the retained money would earn interest.

181. What subsequently happens to that retained sum would depend on the outcome of the distributing administration. If it transpired that there were sufficient funds to meet all claims (other than statutory interest) payable under Chapter 10 of Part 2 (or if the contributories provided security for any potential liability they could have as contributories), then the retained sum could simply be paid to the contributories to meet their proved claims. If there were insufficient funds to meet

all Chapter 10 claims (other than statutory interest), then, unless none of the potential contributories was good for any contributions, the administrators would, I think, be bound to have the company wound up, for the very purpose of enabling a liquidator to make calls on the contributories, in which case the retained sum would be paid over to the liquidator. The liquidator would then proceed in accordance with the Rule, and would make calls on the contributories to enable any outstanding liabilities not met by the administrators to be met in so far as that was legally and practically possible, and the liquidator would apply the Rule in the normal way.

182. If all sums payable (other than statutory interest) in the liquidation were duly paid without recourse to the retained sum, then the retained sum could be paid to the contributories. Otherwise, the retained sum would be dealt with in accordance with the duties of the liquidator. Referring back to paras 121 and 122 above, the liquidator would be obliged to deal with the retained sum in that way as it will have been held by, and been passed to him by, the administrator for that purpose.

183. LBHI's objections to this course have force, but I do not consider that any of them represents a fatal objection either in law or in practice. It is perfectly fair to say that there is no legislative mechanism which provides for a reserved fund in an administration, let alone one which is liable to be handed over to a subsequent liquidator. However, it is scarcely surprising that there is no such mechanism, given that there is no legislative mechanism for the application of the Rule in the first place, even in liquidations. If, as I consider, justice requires extension of the Rule to administrations, I see no good reason why it should not be permissible to add a relatively simple procedural step which is needed to give effect to that extension, provided, as I say, that it is not inconsistent with any legislative provision.

184. It is also true that, where it turns out that section 150 does not need to be invoked, a contributory may be kept out of the money which would have been distributed to him. However, in many such cases, the administrator will be able to be certain that section 150 need not be invoked when, or shortly after, the distribution is made; anyway, the reserved sum will attract interest. It is also true that it has been held that the Rule is not, at least normally, applicable to a contingent liability - see eg *In re Abrahams* [1908] 2 Ch 69. However, that was a decision on a will, and I do not consider that the same limitation is appropriate to a liquidation, not least in the light of the treatment of contingent liabilities in the 1986 Rules. Even assuming (which I doubt) that the same limitation would normally apply to section 150 claims, I do not see it as being so fundamental that it stands in the way of my conclusion.

185. I was at one time attracted by Briggs LJ's point at [2016] Ch 50, para 243, that the courts did not need to devise an extension to the Rule as there would be nothing to prevent an administrator from moving the company into liquidation

simply in order to enable the Rule to be invoked against a contributory. However, if it would otherwise be right to continue the administration, it strikes me as involving a waste of time and money, as well as representing a potential inconvenience, to force an administrator to end the administration prematurely in such a way. Furthermore, given my (reluctant) conclusion in relation to statutory interest in para 128 above, effectively forcing an administrator to move the company into liquidation would potentially wreak real unfairness on all the other creditors of the company.

186. Accordingly, I would allow the appeal of the LBIE administrators on this point, and set aside para (vii) of the Order made by the Judge. I draw support for this conclusion from Lord Walker's description of the Rule quoted in para 173 above. He said that it is intended to "fill the gap left by disapplication of set-off"; it seems to me that if the Rule is not extended to administrations, there would be a gap. Similarly, for the reasons just given, I do not consider that "some cogent principle of law requires" the Rule not to be extended to administrations.

Conclusion

187. For these reasons, I would restore para (i), discharge paras (ii) and (iii), restore para (iv), uphold the discharge of para (v), vary para (vi), and discharge paras (vii), (viii) and (ix), of the order made by David Richards J. No doubt, counsel can agree a form of order which reflects the contents of this judgment.

LORD SUMPTION:

188. I agree with the disposition of this appeal proposed by Lord Neuberger. I add a judgment of my own only in order to address some of the particular difficulties raised by the so-called currency conversion claims.

189. The obligation of a foreign currency debtor is to pay the debt in the designated foreign currency. As a matter of contract, the only sterling sum which will satisfy that obligation is the sterling equivalent of the debt at the time of payment. This was the essential reason why, in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, the House of Lords discarded the old rule of procedure that an English court could not give judgment in a foreign currency, but only in sterling at the rate of exchange prevailing when the debt fell due. Instead, it was held that unless previously paid in the contractual currency or its equivalent, the debt would be converted to sterling at the date of enforcement. Lord Wilberforce observed that circumstances had changed. In the world, then relatively new, of fluctuating currency values, the old rule had given rise to problems whose resolution was

"urgent in the interests of justice": see p 463G (Lord Wilberforce). This, he said at p 465G-H, was because

> "… justice demands that the creditor should not suffer from fluctuations in the value of sterling. His contract has nothing to do with sterling: he has bargained for his own currency and only his own currency. The substance of the debtor's obligations depends upon the proper law of the contract (here Swiss law): and though English law (*lex fori*) prevails as regards procedural matters, it must surely be wrong in principle to allow procedure to affect, detrimentally, the substance of the creditor's rights. Courts are bound by their own procedural law and must obey it, if imperative, though to do so may seem unjust. But if means exist for giving effect to the substance of a foreign obligation, conformably with the rules of private international law, procedure should not unnecessarily stand in the way."

190. The application of the *Miliangos* principle to a liquidation was considered by Oliver J in *In re Dynamics Corporation of America* [1976] 1 WLR 757, a judgment subsequently approved by the Court of Appeal in *In re Lines Brothers Ltd* [1983] Ch 1. He held that foreign currency debts should be converted to sterling at the rate prevailing at the commencement of the winding up. The result was to shelter the creditor from the risk of a decline in sterling between the date when the debt fell due and the commencement of the liquidation. But the creditor remained exposed to the risk of a decline of sterling between the commencement of the liquidation and the payment of a dividend. This difference between the position of a judgment creditor and a creditor seeking to prove in a liquidation was, however, a necessary incident of any scheme for the distribution of an insolvent estate, because debts had to be expressed in a common unit of account valued as at a common date if creditors were to rank *pari passu* in their claims to the deficient pool of assets: see the judgment of Oliver J at pp 761-765.

191. In both *In re Dynamics Corporation of America* and *In re Lines Brothers Ltd*, it was argued by analogy with the result in *Miliangos*, that the correct date of conversion should be the date of payment, the sterling value of the debt being restated at that date. The difficulty about this argument, as Brightman LJ pointed out in *In re Lines Brothers* (p 16) was that where there was a deficiency it was not consistent with *pari passu* distribution, because any upward restatement of the value of the foreign currency creditors' debts would have been at the expense of the sterling creditors:

> "The policy behind the decision, as … was recognised by counsel in argument before us, was that the foreign currency debtor should not be entitled to impose on the foreign currency creditor the risk of a fall in the value of sterling. Justice demands that the risk shall be borne by the debtor, who is the party in default. Hence the justice of the re-interpretation of the law, that the debtor in default is not to be excused from his contractual obligation by payment of anything less than the sterling equivalent of the money contractually due at the date of payment."

192. At the time when in *In re Dynamics Corporation of America* and *In re Lines Brothers Ltd* were decided, there was no specific provision in the Companies Acts or the Winding-up Rules for the conversion of foreign currency debts. The mode of valuing them was determined by Judge-made law. Since 1986, it has been statutory. Rule 2.72 of the Insolvency Rules 1986 provides that a person claiming to be a creditor of a company must submit a proof to the administrator. Rule 4.73, which deals with liquidation, is in substantially the same terms. In both cases, a proof must state the value of the debt at the commencement of the administration or liquidation. I shall refer to this as the "cut-off" date. Rules 2.86 and 4.91 provide that "for the purpose of proving a debt incurred or payable in a currency other than sterling", the debt must be valued in sterling at the exchange rate prevailing on the cut-off date. The combined effect of these provisions is that a creditor with a foreign currency debt can prove only for its sterling equivalent at the cut-off date. The currency conversion claims made by the LBIE creditors arise from a fall in the value of sterling between the cut-off date and the date of payment of the dividend. The result is that at the date when the dividend comes to be paid, its amount will be based on a sterling valuation of the debt which is less than its actual sterling value on that date. The dividend will not therefore represent his pro rata share of the full amount which he was entitled by contract to be paid. Even if the company proves to be solvent and a dividend of 100 pence in the pound is paid on his proved debt, this will represent less than his contractual entitlement. Although described as currency conversion claims, the claims of the LBIE creditors are in reality simply claims for the unsatisfied balance of the original foreign currency liability. David Richards J and the majority of the Court of Appeal held that although a foreign currency creditor's proof was limited to the sterling equivalent of the debt at the cut-off date, the unsatisfied balance claimed by the LBIE creditors was recoverable as a non-provable debt in a case where there was a surplus available for that purpose after the satisfaction in full of provable debts.

193. Non-provable debts are a necessary anomaly in the law of insolvency. Although successive statutory schemes have broadened the range of provable debts, some liabilities are still not provable. These are generally liabilities arising after the commencement of the liquidation or administration, but which are not expenses of

the office-holder because they arise from matters occurring while the company was a going concern. At the relevant time for the purposes of these proceedings (ie before the Rules were amended in 2006), they included liabilities in tort arising from breaches of duty before the cut-off date but giving rise to loss thereafter: *In re T & N Ltd* [2006] 1 WLR 1728, at paras 106-107. They still include statutory liabilities arising after the cut-off date by virtue of events occurring before: *In re Nortel GmbH* [2014] AC 209. As these examples demonstrate, non-provable debts are in principle payable out of any surplus remaining after the satisfaction of provable debts, notwithstanding the absence of express provision for them in the Act or the Rules. This is because the alternative would be to pay the surplus over to shareholders, something which is contrary to the fundamental principle that the assets of a company may not be returned to shareholders while there remains an outstanding unsatisfied liability. As Pearson J observed in *Gooch v London Banking Association* (1886) 32 Ch D 41, 48, the liquidators would be "guilty of a dereliction of duty if they were to distribute the assets without providing for this liability."

194. I have no difficulty with the concept that non-provable debts may be recoverable from a surplus, but I do not accept the conclusion of David Richards J and the majority of the Court of Appeal that the unsatisfied balance of a foreign currency debt can be recovered on that basis. The reason can be shortly stated. It is axiomatic that where the Insolvency Rules deal expressly with some matter in one way, it is not open to the courts to deal with it in a different and inconsistent way. The recoverability of non-provable debts out of a surplus means that that the statutory rules for recovering a dividend on provable debts cannot be regarded as a complete code of the creditor's rights of recovery. But rules 2.86 and 4.91 must be regarded as a complete code for the specific case of foreign currency debts. Non-provable debts are normally debts for which no provision is made in the statutory mechanism of proof and distribution. But the Insolvency Rules do provide for foreign currency debts. Rules 2.86 and 4.91 provide that they are to be valued at the cut-off date and that distributions are to be made in accordance with that valuation. The limitations of these provisions are as much part of the statutory scheme as their positive enactments. It follows that if a debt is provable but the limited character of these provisions nonetheless leaves part of it unsatisfied, the creditor cannot recover more in respect of the same debt by reference to the Judge-made rules governing non-provable debts. A foreign currency debt is a provable debt. It is both inherently implausible and inconsistent with the language of the Rules to suppose that the legislator envisaged that the same debt could at one and the same time be recoverable as to part as a provable debt and as to the rest as a non-provable, conditionally on there being a surplus. That this limit on the recoverability of such debts was deliberate is strongly suggested by the fact that both the Law Commission and the Cork Committee, whose reports were the basis of the 1986 legislation, concluded that the unsatisfied balance of a foreign currency debt should not be recoverable, even if there was a surplus from which to pay it. For my part, I have some misgivings about their reason for this conclusion, which was that since a creditor could not be required to account for a foreign currency gain arising from an

appreciation of sterling, he should not be entitled to recover a loss arising from its fall. But that is beside the point. What matters is that, whether or not their reasons were good, their recommendation was on the face of it adopted by the legislator.

195. This makes it unnecessary to determine the nature of insolvency proceedings as applied to debts in general. There are two possibilities. The first is that the statutory scheme for corporate insolvency works by discharging the creditor's legal right and replacing it by a right to receive a distribution from the insolvent estate in accordance with the Rules. In that case, there is no continuing contractual obligation which can be said to remain partially unsatisfied once the creditor has received all that the Insolvency Rules entitle him to. The second possibility is that insolvency proceedings merely operate as an administrative procedure for distributing the debtor's assets *pari passu* among its creditors when there is a deficiency, without abrogating or altering the creditor's pre-existing legal rights save in so far as the legislative scheme so provides. As David Richards J put it (para 110), the creditor's contractual rights are "compromised by the insolvency regime only for the purpose of achieving justice among creditors through a *pari passu* distribution." In that case, the creditor's claims survive and remain enforceable against any surplus assets, unless the legislation otherwise provides. On the view which I take, even if this latter analysis is correct, it will not avail the LBIE creditors, since in the case of foreign currency debts the legislation does otherwise provide.

196. These fundamental questions about the nature of insolvency proceedings have arisen in the case law in a wide variety of legal contexts. It may well be necessary to answer them at some point in the future. In the meantime, I merely express the provisional view that there is much to be said for the way in which David Richards J and the majority of the Court of Appeal answered them.

197. In the first place, the view that insolvency proceedings are in principle purely administrative, is consistent with the way that the law has developed historically. The origins of English insolvency law lie in statutory provisions governing personal insolvency which date back to the 16th century. The Companies Act 1862, which provided for the creation of the first modern limited liability companies, also provided for winding them up in accordance with a distinct regime for corporate insolvency. But the principles applied to personal and corporate insolvency were always closely related. Throughout their history, a cardinal feature of both has been that the effect of bankruptcy, winding up or administration on the company's existing liabilities is procedural, not substantive. Subject to any contrary order of the court, the commencement of insolvency proceedings suspends the creditor's right to proceed against the debtor or his property for the recovery of his debt, and stays litigation already in progress. In other words, it suspends the creditor's remedies, but not his rights. The current statutory provisions are section 130 of the Insolvency Act 1986 (for a winding up by the court), section 285 (for personal bankruptcy), and Schedule B1, paras 43-44 (for administration). They are no different in their general

approach from those which applied before 1986. The purpose of the procedural moratorium was to allow the insolvent's assets to be realised and distributed to his creditors in proportion to their justified claims. That process was also procedural. In the law of personal insolvency, a bankrupt remained personally liable for his pre-bankruptcy debts, for which he could be sued (and under the old law even imprisoned) for an indefinite period after his assets had been distributed to his creditors. The concept of discharge, which was first introduced into English insolvency law by the Bankruptcy Act 1705 (4 & 5 Anne c 17), was designed to mitigate that indefinite liability. By statute, the bankrupt might be discharged by an authority on whom powers were conferred for that purpose, originally the Lord Chancellor but ultimately the Chancery Division. This remains the position. Sections 279-281 of the Insolvency Act 1986 provide for automatic discharge a year after the bankruptcy order, but the time may be extended by the court. It will be apparent that the whole basis of the procedure for discharge was and is that the process of proof of debt and *pari passu* distribution of assets had not itself discharged the bankrupt. Discharge at the conclusion of the insolvency proceedings or at a specified time after their inception was never a feature of corporate insolvency, even on the limited basis on which it applied in personal insolvency. It was unnecessary, because a corporate insolvency ended with the dissolution of the company, as indeed with limited exceptions it still does.

198. Secondly, English corporate insolvency law has from its inception adopted the principle which had always been fundamental to bankruptcy that liquidation was a mode of collective enforcement of debts, which operated procedurally and administratively rather than substantively and did not itself extinguish the creditors' liabilities. The point was first articulated by Lord Cranworth in *Oakes v Turquand* (1867) LR 2 HL 325, 364, in the context of the Companies Act 1862. For the same reason, Sir George Giffard stated, in *In re Humber Ironworks and Shipbuilding Co Ltd* (1869) LR 4 Ch App 643, 647, that upon a surplus being ascertained, so that *pari passu* distribution of a deficient estate is no longer relevant, "the creditor whose debt carries interest is remitted to his rights under his contract." A tentative statement to the same effect was made by Brightman LJ in *In re Lines Brothers Ltd*, at p 20. But the clearest modern statements of the principle are due to Lord Hoffmann. In *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, para 21, he rejected an argument that

> "the right to share in a liquidation is a new right which comes into existence in substitution for the previous debt and is governed by the law of the place where the liquidation is taking place, rather in the way that obtaining a judgment merges the cause of action in the judgment and creates a new form of obligation, namely a judgment debt, governed by its own rules of enforceability."

His reason was as follows:

> "26. … It is first necessary to remember that a winding up order is not the equivalent of a judgment against the company which converts the creditor's claim into something juridically different, like a judgment debt. Winding up is, as Brightman LJ said in *In re Lines Bros Ltd* [1983] Ch 1, 20, 'a process of collective enforcement of debts'. The creditor who petitions for a winding up is 'not engaged in proceedings to establish the company's liability or the quantum of the liability (although liability and quantum may be put in issue) but to enforce the liability'.
>
> 27. The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against the company are stayed (although the stay can be enforced only against creditors subject to the personal jurisdiction of the court). The creditors are confined to a collective enforcement procedure that results in pari passu distribution of the company's assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced. There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts. When the company is dissolved, there is no longer an entity which the creditor can sue. But even then, discovery of an asset can result in the company being restored for the process to continue."

Similar observations were made by Lord Hoffmann with the support of this court or the Judicial Committee of the Privy Council in *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liquidation)* [2008] BCC 371, and *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, at para 15; and by Lloyd LJ with the support of the rest of the Court of Appeal in *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd (in liquidation)* [2006] QB 808.

199. Third, there is no reason to believe that the position, well established before 1986, was altered by the insolvency legislation of that year. The 1986 legislation

achieved some important changes in United Kingdom insolvency law. The provisions governing proof of debt and the distribution of assets became more elaborate and more comprehensive than the corresponding legislation in force before 1986. But these were incremental changes, many of which in effect codified earlier Judge-made law. The purpose and character of the process of proof of debt and distribution did not change. There are, as there always have been, specific circumstances in which the current scheme of corporate insolvency does provide for a discharge. The most significant of them is mutual set-off, which occurs automatically under rules 2.85 and 4.90, in circumstances when set-off would not necessarily be available at common law. Set-off by its very nature brings about a pro tanto discharge of the liability. The disclaimer of onerous obligations under section 178 of the Act is another example. But in neither case is the creditor's right affected, except by its pro rata abatement where there is a deficiency of assets. So far as the creditor's debt is discharged by set-off, he receives full value. So far as it is disclaimed, the debtor's obligation is transmuted into a claim for the full amount of the resultant loss, for which the creditor may prove just as he could have proved for the liability disclaimed. All of this was equally true of the pre 1986 legislation in force when most of the cases which I have cited were decided. The critical point, however, is that where the legislation effects a discharge of a liability, as it does in these special cases, it does so expressly. An implied discharge is of course conceptually possible. But there is a strong presumption against the implied legislative abrogation of existing rights, and nothing in the Act or the Rules from such an implication could be thought necessary.

200. Fourth, in every respect relevant to the present question, the provisions of the Insolvency Act and Rules governing proof of debt and distribution are the same for liquidation or administration on the one hand and bankruptcy on the other. As I have pointed out, it is and always has been the position in personal insolvency that the underlying liabilities of the bankrupt are not discharged by the bankruptcy order or by the subsequent bankruptcy proceedings, save in so far as they are satisfied by the resultant distribution. There is no discharge of the unsatisfied balance until the bankrupt is discharged, either by the court or automatically subject to the discretion of the court. The statutory provisions for the discharge of the bankrupt in personal insolvency are qualified by express provisions preserving the liability of persons jointly or secondarily liable with the bankrupt, who might otherwise be released by the latter's discharge: see section 281(7) of the Insolvency Act, which substantially re-enacts section 28(4) of the Bankruptcy Act 1914. This is an important safeguard for the rights of and liabilities of third parties. By comparison, with limited exceptions (see above), the law of corporate insolvency has never expressly provided and still does not expressly provide for the discharge of underlying liabilities at any stage, short of payment in full or dissolution. Moreover, there are no corresponding provisions relating to joint obligors and sureties in those parts of the Act which relate to corporate insolvency, as there surely would have been if the legislator had intended that a liquidation or distributing administration should discharge the liabilities of the insolvent company.

201. I am not persuaded that such a radical transformation of the basis of our law of insolvency is achieved by Rule 2.72(1) of the Insolvency Rules, which was the only provision relied upon as expressly having that effect. Rule 2.72(1) provides that a person claiming to be a creditor of the company and "wishing to recover his debt in whole or in part" must submit a proof. The argument is that once the amount for which the creditor has proved has been satisfied by the payment of a dividend, the creditor is treated as having recovered the debt "in whole", or at any rate the whole of the part of the debt for which he proved. In my opinion, this reads too much into the words. Rule 2.72(1) is a purely administrative provision. It appears under the rubric "Machinery of Proving a Debt". The accuracy of this description is borne out by the remaining sub-rules. The reason why the rule refers to a person "wishing to recover his debt in whole or in part" is that he may not wish to prove for a debt so far as it is wholly or partly secured. If he did, he would have to surrender his security and allow the property to which it related to be added to the insolvent estate. As a matter of ordinary English, the natural meaning of rule 2.72(1) is simply that a creditor must prove for any claim or part of a claim in respect of which he wishes to receive a dividend. Moreover, rule 2.72(1) is in the same terms as rule 6.96, which is the corresponding provision governing proof of a bankruptcy debt in personal insolvency. Yet it is clear that in personal insolvency the underlying liability is not discharged by proof and survives the payment of a dividend.

LORD CLARKE: (dissenting)

202. On every issue but one I agree with Lord Neuberger. The exception relates to the currency conversion claims.

203. So far as claims made in foreign currencies are concerned, the position at common law was radically changed by the decision of the House of Lords in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443. Since then it has been recognised that a debt contractually payable in a foreign currency must be discharged in that currency or, if discharged in sterling, at the relevant rate of exchange at the date of payment in order to ensure that it is fully repaid in the contractual currency. It follows that, at any rate in the absence of an administration or liquidation, where the debtor is solvent, the debtor must pay the whole amount so calculated. The obligation to pay is a common law obligation.

204. Where a company goes into administration or liquidation, a creditor must submit a proof to the administrator or liquidator under rules 2.72 and 4.73 of the Insolvency Rules respectively. The combined effect of rules 2.86 and 4.91 is that the proof must state the value of the debt at the cut-off date and the debt must be converted into sterling at the exchange rate on that date. If the value of sterling falls between that date and the date on which the debt would be due at common law, and

if the debtor is solvent at that time, the creditor will make a currency conversion loss unless he is entitled to recover the difference from the debtor.

205. The question is whether he can recover that difference in order to ensure that he is repaid in aggregate the whole of the value of the debt inclusive of interest to the date of the repayment. In my opinion, he should in principle be entitled to recover that whole amount in order to ensure that he recovers the full amount to which he is entitled at common law under the contract. I am not persuaded that there is any relevant rule or statutory provision that leads to any contrary conclusion and, absent such an intervention, it is sufficient to resolve the issue by an application of the common law.

206. As I see it, the point was clearly and accurately put by Briggs LJ in the Court of Appeal in this very case. In para 136 he expressed disagreement with Lewison LJ that currency conversion claims do not constitute, or therefore rank as, non-provable liabilities. In his view they do. He added that the conversion into sterling of foreign currency debts as at the cut-off date is, as both rule 2.86 and rule 4.91 make clear, for the purpose of proof and, under rule 4.90(6), for the purpose of set-off. Apart from that, he said, there is nothing in the Insolvency Act or in the Rules which prevents the foreign currency creditor from reverting to his contractual rights, once the process of proof (and payment of statutory interest) has run its course, if there is then a surplus. I agree. In my opinion, this is a critical point.

207. I further agree with Briggs LJ when he accepted (at para 137) counsel's submission that a currency conversion claim is not a separate or new claim arising from the effect of the two conversion rules. He then in effect harked back to *Miliangos* in saying that it is simply the balance of the creditor's original contractual claim which has not been discharged by the process of early conversion, proof and dividend under the relevant part of the insolvency scheme. The creditor bargained for payment in the specified currency. What he received was payment in sterling, by reference to a conversion date years earlier than payment. Briggs LJ identified the injustice as arising entirely from his exposure to currency risk during the potentially long period between conversion and payment, contrary to the contract, which placed that risk squarely on the company in liquidation or administration. He added that it was not a risk against which the creditor can easily hedge, since (even if while unpaid he has the financial resources) he does not know when, or how much, he will eventually be paid.

208. I agree with Briggs LJ at para 138 that the starting point is to focus on insolvency law as it was immediately prior to 1986, some ten years after *Miliangos* and before the Insolvency Act 1986. He considered two particular circumstances: a liquidation might affect a company which was solvent; or, it might begin on the basis of insolvency but turn out to be solvent as the realisations of assets exceeded

provable liabilities, as in the case of LBIE's administration. He noted in para 139 that in either case non-provable liabilities still had to be settled before distributions could be made to members. The basic principle upon which non-provable liabilities were dealt with was by reference to the creditor's full claim, whether under contract by reference to the concept of "reversion to contract" used in that case, or in tort, where the liability was not provable. He added, at para 140, that the rules were almost entirely judge made.

209. In para 142 he explained that *In re Dynamics Corporation of America* [1976] 1 WLR 757 and *In re Lines Bros Ltd* [1983] Ch 1 need to be understood in that context. Both cases sought to fashion a judge-made rule to deal with the establishment in *Miliangos* of the principle that English law both could and should recognise the injustice of converting a foreign currency obligation into sterling at the date of the commencement of proceedings. They did so as an adjunct to the law of bankruptcy, which was applicable to the winding-up of insolvent companies, by requiring that, as an exception to the *Miliangos* principle, proof of the debt constituted by a foreign currency obligation required conversion into sterling at the cut-off date, so that all proving creditors could be treated equally, in a single unit of account. In particular, that adjunct was a Judge-made part of the legal process of proof of debts. It had no wider purpose. I agree with Briggs LJ that neither Brightman LJ nor Oliver LJ was deciding anything about how to deal with foreign currency liabilities in a solvent winding up. In so far as Lewison LJ expressed a different view, I respectfully disagree.

210. As Briggs LJ explained in para 144, the 1986 insolvency legislation made significant changes to the insolvency structure, but it was not comprehensive and important judge made principles continued to be applicable. The new legislation did not purport to deal with non-provable claims. Having set out a number of classes of non-provable claims, Briggs LJ dealt with non-provable claims in this way at the end of para 145:

> "While it may be assumed that Parliament specifically intended them not to be provable liabilities in a liquidation, there can be no basis for inferring a legislative intent that they could not be pursued in a liquidation in the event of a surplus after payment of provable debts and statutory interest. In short, the 1986 legislation simply passed them by, leaving them to be pursued, in the rare event of a surplus, by reference to the pre-existing judge-made law."

I agree.

211. In paras 146 and 147 Briggs LJ expressed these conclusions:

> "146. Thus, although the legislation provided for the first time that, in a solvent liquidation, a *pari passu* process of distribution against proved claims would be the first stage, distribution of any surplus (after statutory interest) would continue to require the liquidator to treat non-provable claimants as having an entitlement ranking prior to that of the members, applying legal principles not to be found set out in detail anywhere in the legislation.
>
> 147. Against that background it is of course a question of construction whether or not the Insolvency Rules provide that claims in foreign currency can only be pursued by the process of conversion and proof set out in rules 2.86 and 4.91, so that proof followed by payment leaves them wholly exhausted, or whether, as the judge concluded, those rules merely provide a means of quantifying the amount of the proof, for the purposes of proof, but leave any residue of the original contractual entitlement intact, and capable of being pursued in the event of a surplus."

Again, I agree.

212. Briggs LJ then considered the language of the rules, which he thought pointed firmly in the direction identified by the judge. In particular rules 2.86 and 4.91 both used the same formula, namely "for the purpose of proving …". I agree with him (in para 148) that the effect of each rule is simply to provide an exchange rate for the necessary conversion of the face value of the foreign currency debt into sterling so that the creditor can prove for a specific sterling amount. This was exactly what the judge-made rule had done, also (and only) for the purpose of proof.

213. Briggs LJ expressed his conclusion on this part of the case thus in para 153:

> "The potential for injustice caused by the permanent conversion of a foreign currency debt into sterling is entirely the result of the inevitable gap in time between the conversion date and the payment of dividends, during which the risk of depreciation in sterling is thrown, contrary to the contract, on the creditor. But absent set-off there is no reason why the conversion for the purpose of proof should be anything more

> than a means of part-payment which is fair as between all proving creditors, leaving the foreign currency creditor with a remedy against a surplus if (but only if) sterling has depreciated in the meantime, and after all proving creditors have been paid in full with statutory interest."

I agree.

214. Briggs LJ then noted in para 154 that Lewison LJ had given ten reasons for his preference for a permanent substantive effect as the true construction of the two conversion rules. He then gave his reasons for reaching a different conclusion. He did so in paras 154 to 161 which I find convincing but which it is not necessary to repeat here, save as follows.

215. In para 161 Briggs LJ recognised that the currency conversion rules apply, like all the other rules about proof of debts, both to solvent and insolvent windings up. He added:

> "This was a major change wrought by the 1986 legislation, as I have described. The statutory part of the insolvency scheme is now applied to all companies in liquidation. It is by no means confined to the currency conversion rules, but applies also to the whole body of rules which focus on the cut-off date, to the exclusion from proof of post cut-off date liabilities, as well as to set-off."

I agree.

216. Briggs LJ expressed his overall conclusions in paras 162, 163 and 166 in this way:

> "162. In the context of an undoubtedly solvent company it is not easy to see why any of those rules should be applied, where the undoubted consequence is that there has then to be a two stage process, first of proof and then of the satisfaction of non-provable liabilities. But there are equally unsatisfactory aspects of the old regime, in which bankruptcy law was applied only to insolvent companies. Parliament had a choice to make between two alternatives, neither of which can be said to have been ideal. Perhaps the main justification (apart from uniformity) of the choice actually made is that companies may move into and out of

> insolvency during a liquidation or distributing administration, so that it is better to deal by a single process first with the claims of all those entitled on insolvency, leaving until later the just distribution of any surplus, if there turns out to be one in fact. A second obvious reason is that insolvent liquidation or administration is overwhelmingly the main target of the legislation, as the name of both the Act and the Rules makes clear.
>
> 163. However that may be, I do not regard that choice as saying much about the construction of the currency conversion rules, all the more so because they are prefaced by the phrase 'for the purpose of proving'. They are merely one provision which, (like the cut off-date itself) is not the end of the story if there is a relevant surplus to be distributed to those entitled to it.
>
> ...
>
> 166. The result is that, in respectful disagreement with Lewison LJ, I consider that the judge was correct to regard currency conversion claims as non-provable liabilities falling to be dealt with as such in the event of a surplus after payment of provable debts and statutory interest. The language of both relevant rules contains a clear direction to treat conversion as being for the limited purpose of proof of debts, and a separate sub-rule applies the conversion rules for the additional purpose of set-off. Great injustice will be caused in ultimately solvent liquidations if those rules are given a wider effect than expressly prescribed, and there is in my view no convincing reason why that should be so. I would therefore dismiss the appeal against paragraphs (ii) and (iii) of the judge's order."

I found that reasoning wholly convincing.

217. Moore-Bick LJ's reasoning was to much the same effect. I was struck in particular by his quotation of paras 26 and 27 of the judgment of Lord Hoffmann in the Privy Council in *Wight v Eckhardt Marine GmbH* [2003] UKPC 37; [2004] 1 AC 147, where he stressed that a winding up order is not the equivalent of a judgment against the company. He pointed to the statement of Brightman LJ in *In re Lines Bros Ltd* [1983] Ch 1, 20 that winding up is "a process of collective enforcement of debts". Lord Hoffmann stressed that a winding up does not either create new substantive rights in the creditors or destroy old ones. He added:

> "Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced."

218. So, on the facts here the obligation upon the debtor to discharge its obligation to pay interest at the contract rate in dollars remained so long as the company was solvent. There is a good deal of support for this principle: see eg the (albeit *obiter*) statements of Brightman and Oliver LJJ in *In re Lines Bros Ltd* [1983] 1 Ch 1, 21 and 26 respectively quoted by Moore-Bick LJ in the Court of Appeal at paras 255 and 256. As I see it, any other view would have the effect of allowing shareholders to recover claims against the company ahead of creditors with valid claims at common law. In my opinion that would be wrong in principle.

219. In short, there is no common law principle which supports the view that a creditor is not entitled to recover sums in a foreign currency owed to it by a solvent company. Such a conclusion would be to prefer the interests of a debtor company (and its shareholders) to those of the creditor.

220. Such a conclusion could only be justified by statute or statutory instrument. To my mind clear words would be required to deprive the creditor of its common law rights. As I see it, there is no provision in the 1986 Act which has that effect. Reliance is placed upon rule 2.72(1) of the Insolvency rules quoted by Lord Sumption in para 201. I agree with him that the words relied upon in rule 2.72(1), "wishing to recover his debt in whole or in part" do not have that effect.

221. I am bound to say that for my part I am not persuaded by the points made by Lord Neuberger in his discussion of the reports leading up to the 1986 legislation. In short, I prefer the reasoning of David Richards J at first instance and of Moore-Bick and Briggs LJJ in the Court of Appeal to that of those who have taken a different view. I would dismiss the appeal on this point on the simple ground that there is no statute, statutory rule or common law principle to deprive creditors of a solvent company of a common law right to recover a debt in a foreign currency. As I see it, to conclude otherwise would be to permit shareholders to be preferred to creditors of a solvent company, which would be wrong in principle.

222. I appreciate that the conclusion which I have reached above as to the true construction of rules 2.86 and 4.91 differs from that reached by the majority. I note that in para 194 Lord Sumption has expressed some misgivings about the reasons for the conclusion that the effect of those Rules is that the unsatisfied balance of a foreign currency debt should not be recoverable, even if there is a surplus from

which to pay it. I share those misgivings, but I would go further. I do not think that the Rules are clear enough to give the shareholders a windfall at the expense of creditors where there is a surplus which could satisfy the whole or part of the company's liability to the creditors. However, I am pleased to note that the majority have left open the broader questions identified by Lord Sumption at paras 195 et seq. As matters stand at present I agree with his approach, which is essentially the same as I have tried to describe above. It is, as I understand it, agreed that these are questions for final determination on another day.