UKSC 2015/0138, 2015/0137, 2015/0139

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION) [2015] EWCA 485

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION) and others

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

(1) THE JOINT ADMINISTRATORS OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

(2) LEHMAN BROTHERS HOLDINGS, INC

(3) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

Appellants

and

(1) THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

(2) CVI GVF (LUX) MASTER SARL

Respondents

WRITTEN CASE OF LEHMAN BROTHERS HOLDINGS, INC ("LBHI")

Introduction

1. By declaration (viii), the learned Judge declared that LBIE, acting by its administrators, will be entitled to lodge a proof in a distributing administration or a liquidation of its members (LBL and LBHI2) in respect of those

companies' contingent liabilities under s 74(1)[1] **[1/1]**. The Judge addressed declaration (viii) at [195] - [226] of his judgment.

2. This Case addresses LBHI's appeal against the order of the Court of Appeal, which upheld declaration (viii). This Case also responds to LBIE's cross-appeals in respect of 2 decisions of the Court of Appeal upholding the decision of the Judge, namely:

   (1) The contingent liabilities of LBIE's members under s 74(1) went into the set-off account in LBIE's administration when set-off took effect on 4 December 2009.[2]

   (2) The contributory rule does not apply in LBIE's administration.[3]

   The cross-appeals arise for decision if (as LBHI submits) the LBIE Administrators will not be entitled to prove in a distributing administration or a liquidation of its members in respect of those companies contingent liabilities under s 74(1).

3. In relation to other aspects of the appeal and cross-appeals, LBHI supports the position taken by LBHI2.

4. Briggs LJ addressed declaration (viii) at [205]-[234]. Lewison LJ did so at [122]-[131]. He said (at [122]) that he found this an exceptionally difficult issue on which he changed his mind more than once; however, in the end, he came to the same conclusion as Briggs LJ. Moore-Bick LJ (at [246]) agreed with the conclusions reached by Lewison and Briggs LJJ.

5. Section 74(1) provides as follows:

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[1] In this Written Case, the sections and schedules referred to are those of the Insolvency Act 1986 (the "**Act**"), and the rules referred to are those of the Insolvency Rules 1986 (the "**Rules**"), save where appears to the contrary.

[2] LBIE's Case, paragraphs 201-225 See declaration (ix). On 4 December 2009 the LBIE Administrators gave notice of a proposed distribution under rule 2.95 **[3/42]**.

[3] LBIE's Case, paragraphs 260-296. See declaration (vii).

> *"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."*

6. Rule 12.3 **[3/72]**, in its form which applies to the instant administrations, provides as follows:

> *"(1) ... in administration, winding up and bankruptcy, all claims by creditors are provable as debts against the company ... , whether they are present or future, certain or contingent, ascertained or sounding only in damages."*

7. Rule 13.12 states:

> *"(1) 'Debt' in relation to the winding up of a company, means ... any of the following ... (b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; ...* **[1/7/1]**
>
> *(5) This rule shall apply where a company is in administration and shall be read as ... if references to winding up were references to administration."* **[1/7/2]**

8. The central issue in relation to declaration (viii) is whether the liability under s 74 (the "**s 74 liability**") falls within r 13.12(1)(b), such that it is provable in a distributing administration or a liquidation of a member of the company before the company itself is in liquidation.

Re Nortel

9. The 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 r 13.12(1)(b): see *Re Nortel GmbH* [2014] AC 209 **[1/17]**, where Lord Neuberger MR said:

> *"[74] … The meaning of the word "obligation" will, of course, depend on its context. However, perhaps more than many words, "obligation" can have a number of different meanings or nuances. In many contexts, it has the same meaning as "liability", but it clearly cannot have such a meaning here. Indeed, in the context of rule 13.12, it must imply a more inchoate, or imprecise, meaning than "liability", as the liability is what can be proved for, whereas the obligation is the anterior source of that liability...* **[1/17/238]**
>
> *[77] … the 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)."* **[1/17/238-239]**

10. It is submitted that condition (c) in the above-mentioned test is not satisfied.

The regime under which the s 74 liability is imposed is the insolvency code, as set out in the Act and the Rules and as explained and developed in case law. It is not consistent with this regime to conclude that a contributory of a company incurs an obligation under s 74 before the company is itself wound up, for 2 principal reasons, as follows:

(1) the s 74 liability cannot be dealt with by the company before it is wound up (whether by proof or otherwise); and

(2) the regime under which the s 74 liability is imposed provides protections and qualifications for the benefit of contributories, which would be lost if the company could prove for the s 74 liability before it is wound up.

The s 74 liability cannot be dealt with before the company is itself wound up

11. The effect of the decisions below is that a company may prove for the s 74 liability in the administration or liquidation of a contributory, even if the company itself is not in liquidation. If this were correct, the company acting by its directors (when a going concern) or its administrators (when in administration) could deal with the s 74 liability.

12. It is clear from the words of s 74 that the s 74 liability arises *"[w]hen a company is wound up"*. So too the court's powers which relate to the s 74 liability, which include the powers to settle the list of contributories (s 148(1)) **[2/24]**; adjust the rights of contributories among themselves (s 154) **[2/26]**; and make calls and orders for the payment of calls (s 150(1)) **[2/25]**. These powers may be delegated to the liquidator; but the liquidator shall not make any call without the special leave of the court or the sanction of the liquidation committee (s 160) **[2/27]**. The powers have been delegated to the liquidator under rr 4.195-4.205 *"as an officer of the court subject to the court's control"* **[3/57 – 3/67]**. Neither the administrator nor the directors of the company have

any of these powers. Furthermore, s 74 has no effect (such that the s 74 liability does not exist, whether contingently or at all) until the company is wound up. This point is addressed below (at paragraphs 63-79) in relation to LBIE's cross-appeal.

13. It has been established since the decision in *Re Pyle Works* (1889) 44 Ch D (CA) 524, 574, 582, 584 **[1/19]** that the moneys paid in respect of the s 74 liability:

(1) are payable only on a winding up of the company;

(2) are never under the control of the directors of the company and cannot be charged, disposed of or in any way dealt with by them;

(3) are not part of the capital of the company;

(4) form a statutory fund which only comes into existence when the company is wound up; and

(5) may be called for only by the liquidator to meet the special demands of the fund.[4]

14. The administrator of the company has no greater right to prove for the s 74 liability than the directors, who are not permitted to do so.

15. The s 74 liability in relation to an unlimited company is to be contrasted with the member's (contractual) liability to pay unpaid capital, which liability has none of the features of the s 74 liability described in *Re Pyle Work*s **[1/19]**.[5] The Act gives the administrator the power to call up any unpaid capital (Sch

[4] See also *Re Paraguassu Steam Tramroad Company, Black & Co's Case* (1872) LR 8 Ch 254 (CA), 262 **[6/2/262]**; *Re West of England and South Wales District Bank, ex p Branwhite* (1879) 40 LT 652, 653 **[6/22/653]**; *Re Mayfair Property Company* [1898] 2 Ch 28 (CA), 35-37 **[5/14/35-37]**.

[5] Furthermore, the s 74 liability is (expressly) a liability to contribute to the assets of the company; the contractual liability to pay unpaid capital is (expressly) a debt owed to the company: see s 33 of the Companies Act 2006 **[2/13]** (derived from s 14 of the Companies Act 1862 **[2/5]**).

1, para 19 **[3/24]**); but it does not give the administrator the power to make a call in respect of the s 74 liability (a "**Call**").

Dealing in the course of the member's business

16. The functions of the liquidator are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it (s 143(1)) **[2/22]**. This includes making and getting in any Calls. This is not a function of the directors.

17. The amount of the s 74 liability is that which is sufficient for the payment of:

    (1) the company's debts and liabilities;

    (2) the expenses of the winding up; and

    (3) for the adjustment of the rights of the contributories amongst themselves.

18. If the proceeds of a proof in respect of a Call were payable to the company before it was wound up, the company could dispose of the proceeds without restriction. It could use the proceeds to further its trading activities, in which case it would not use them in payment of its debts and liabilities (*pari passu*); or in payment of the expenses of the winding up; or for the adjustment of the rights of the contributories amongst themselves.

19. So a company of doubtful solvency could remedy its financial position by receiving the proceeds of a proof in respect of a Call, thereby avoiding the only situation in which a Call may be made (ie in winding up) and frustrating the purpose for which the s 74 liability is imposed (ie to contribute to the statutory fund).

20. Briggs LJ said (at [231]) that:

> *"the directors of a company which proves in respect of future calls …. may reasonably be expected to use the fruits of that proof to keep the*

wolf from the door".

21. This demonstrates that the regime under which the s 74 liability is imposed is inconsistent with a proof in respect of a Call. The amount which a contributory is liable to contribute is not intended to be used to keep the wolf from the door.

22. Briggs LJ also said (at [228]) that it is only if the company is in distributing administration that the use of the proceeds of a proof in respect of a Call is bound to reflect the use specified in s 74(1). This is incorrect, for the following reasons:

    (1) As Briggs LJ accepted, the proceeds of a proof in respect of a Call will be used for payment of the expenses of the administration, which falls outside s 74(1). Section 74(1) refers to "the expenses of the winding up". The expenses of the winding up are all fees, costs, charges and other expenses incurred in the course of the liquidation (r 4.218(1)) **[3/68/1]**; these are not the same as the expenses of the administration, which are all fees, costs, charges and other expenses incurred in the course of the administration (r 12.2(1) **[3/70]**; r 2.67 **[3/33]**).

    (2) The proceeds of a proof in respect of a Call cannot be applied to the adjustment of the rights of the contributories amongst themselves, because there is no such adjustment if the company is not in winding up.

    (3) Section 74(1) contemplates that the proceeds of a Call will be applied towards payment of the company's debts and liabilities *"[w]hen a company is wound up",* not before it is wound up. The debts and liabilities of the company to which the proceeds of a proof in respect of a Call would be applied in an administration may not be the debts and liabilities which exist if and when the company is wound up.

23. It could be practically impossible to estimate the value of the company's proof in respect of a Call if it were made before the company was wound up. How is a loss-making going concern with substantial debts and liabilities which is striving to survive to estimate the amount of its debts and liabilities and expenses of its winding up in the event that it is wound up at some indeterminate time in the future?

24. The same difficulty is faced by an insolvent company in *"an administration designed to put it back on its feet"* (per Briggs LJ at [233]). If the company's proof in respect of a Call was rejected, the company would be required to establish the amount of the proof to the satisfaction of the court. It is difficult to conceive that this exercise is contemplated by the regime under which the s 74 liability is imposed.

25. The inconsistency with this regime is also demonstrated by considering the position if a proof in respect of a Call is made by the company before it is wound up and a Call is subsequently made by the company in its winding up. The total amount of the s 74 liability for which the contributory would be liable could be greater than that specified by s 74(1).

26. This may be demonstrated by an example:

(1) Suppose:

i. an unlimited company in administration has debts and liabilities of 50, and administration expenses of 30;

ii. that the company has a single contributory which is in administration;

iii. the company's administrator may prove in the contributory's administration in respect of the s 74 liability; and

iv. the company's administrator estimates that the expenses of

a subsequent winding up will be 15.

(2) The company's administrator proves in the contributory's administration for 65, which is the amount sufficient for payment of the company's debts and liabilities (50) and the expenses of the winding up (15).

(3) Suppose the contributory's administrator values the proof at 60 (having regard to contingencies) and pays the company a dividend of 55. This is applied by the company's administrator in payment of the administration expenses of 30, and the balance of 25 (55-30) is be applied towards payment of the debts and liabilities of 50, leaving debts and liabilities of 25 (50-25).

(4) Suppose the company then enters winding up with debts and liabilities of 25 and expenses of (say) 15. The liquidator makes a call on the contributory for 40 (25+15). Suppose the contributory's administrator pays the company a dividend of 35.

(5) The result is that the contributory has paid a total of 90 (55+35) in respect of its s 74 liability. This is more than the amount sufficient for the payment of its debts and liabilities and the expenses of the winding up (25+15=40), which is the amount specified by s 74. This is inconsistent with the regime under which the s 74 liability is imposed.

27. The liquidator is empowered by the Act to prove, rank and claim in the insolvency of any contributory for any balance against his estate (s 167 **[2/29]**; Sch 4, para 8 [**3/26]**). The powers of the administrator set out in Sch 1 do not include a like power, which is consistent with the fact that the company is unable, before it is wound up, to prove, rank and claim in the insolvency of any contributory.

Compromise

28. The company is unable, before it is wound up, to compromise any future liability of its contributories under s 74. If it were, a full and final settlement between the company and a contributory would render a subsequently appointed liquidator unable to make a Call on that contributory.

29. If, however, the Courts below were correct to hold that the company can prove in respect of a Call before it is in winding up, the company could compromise with the contributory. This is inconsistent with the regime under which the s 74 liability is imposed.

30. The liquidator is given the power to compromise all calls and liabilities to calls, and take any security for the discharge of any such call or liability and give a complete discharge in respect of it (Sch 4, para 3 [**3/25**]). The powers of the administrator set out in Sch 1 do not include a like power, which is consistent with the fact that the company is unable, before it is wound up, to compromise any future liability of its contributories under s 74.

Sale or assignment

31. The distinctions drawn in *Re Pyle Works* **[1/19]** are reflected and reinforced in recent cases. It was held in *Re Ayala Holdings Ltd (No 2)* [1996] 1 BCLC 467 **[4/5]** that a liquidator could not validly assign the right to have dispositions of the company's property after the commencement of the winding up declared void under s 127 and charges on the company's property declared void under s 395 of the Companies Act 1985 and to recover such sums from the party effecting such dispositions. Knox J distinguished between property of the company, which includes rights of action against third parties vested in a company at the commencement of the winding up; and the rights and powers of a liquidator. The former can be sold or assigned, whereas the latter cannot, because they are an incident of the office of liquidator.

32. In *Re Oasis Merchandising Ltd* [1998] 1 Ch 170, 181 **[5/21]** the Court of

Appeal drew a similar distinction *"between the property of the company at the commencement of the litigation (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"* **[5/21/182F]**. The Court held that a liquidator has no power to assign the fruits of an action for wrongful trading and said that it would be very surprising if an administrator was empowered to sell the fruits of a future wrongful trading action by the liquidator.[6]

33. The right to make a Call is acquired by the liquidator through the exercise of rights conferred on him alone by the Act and is held on the statutory trust for distribution by him. It cannot be assigned by the liquidator, nor can the fruits of a Call be sold by the liquidator. The position of an administrator or the directors is *a fortiori.*

34. If the Courts below were correct to hold that the company can prove in respect of a Call before it is in winding up, the company could at that stage sell or assign the fruits of a proof in respect of a future Call. This is inconsistent with the regime under which the s 74 liability is imposed.

Charge

35. Moneys paid in respect of the s 74 liability cannot be charged by the company. If they were charged, they would be payable to the chargee upon enforcement, rather than to the statutory fund administered by the liquidator for unsecured creditors as a whole.

36. The moneys are in the same position as the fruits of a preference or fraudulent trading action, which are received by the liquidator impressed in his hands with a trust for those creditors amongst whom he has to distribute the assets of

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[6] With effect from 1 October, 2015 an officeholder may assign a right of action for wrongful trading, by virtue of s 246ZD(2) [**2/39]**. S 246ZD(2) does not apply to Calls.

the company.[7]

37. Briggs LJ said (at [229]) that these considerations:

> *"may show... that the early turning into money of an asset ordinarily realisable by a liquidator should not be permitted. Alternatively, they may show that, if that asset is turned into money before liquidation, then the proceeds of its realisation must be held on trust... for the persons entitled to the benefit of it, namely those ranking in the winding up waterfall."*

38. Briggs LJ did not decide which of these two possibilities were shown by the considerations mentioned. It is submitted that they show that the early turning into money of an asset ordinarily realisable by the liquidator - namely the proceeds of the s 74 liability - *"should not be permitted"*. Permitting this would be inconsistent with the regime under which the s 74 liability is imposed.

39. These considerations do not show that the proceeds of a proof in respect of a Call must be held on trust. There is no suggestion in the Act or the Rules that the proceeds must be held by the company on trust for its future creditors to be applied only in the event of a future winding up. Nor does an administrator have the power to create such a trust, which would not be incidental to the performance of his functions (Sch 1, para 13 **[3/23]**; Sch B1, para 3 **[3/2]**).

40. It would be bizarre if a going concern company was obliged to hold assets on trust to be applied by a future liquidator, whilst at the same time it was wound up because it was unable to pay its debts. (Moreover, a trust is in this sense inconsistent both with the wolf at the door referred to by Briggs LJ at [231]

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[7] *Re William C Leitch Brothers Ltd (No 2)* [1933] 1 Ch 261 **[6/23]**; *Re Yagerphone Ltd* [1935] Ch 392 **[6/26]**; *Re Oasis Merchandising Ltd* [1998] 1 Ch 170, 181 **[5/21/181G-182A]**.

With effect from 1 October, 2015 the proceeds of a claim or assignment of a right of action for wrongful or fraudulent trading are not to be treated as part of the company's assets covered by a floating charge: s 176ZB(2) **[2/33/1]**.

and with his holding at [202] that all the proceeds of a Call become part of the assets of the company).

Rights, protections and qualifications available to contributories

41. The regime under which the s 74 liability is imposed provides rights, protections and qualifications for the benefit of contributories. If the Courts below are correct, a contributory of a company which is not in winding up will be subject to the burden of the s 74 liability without these benefits.

Adjustment of the rights of contributories amongst themselves

42. The court and the liquidator have the power to adjust the rights of the contributories (ss 154 **[2/26]**; 165(5) **[2/28]**). The directors and administrator do not.

43. The right to an adjustment of the rights of contributories among themselves is an integral part of the regime under which the s 74 liability is imposed. It would not be fair to allow a proof in relation to the s 74 liability before the company is in winding up, because the contributory would thereby lose the right to such an adjustment[8].

44. Briggs LJ said (at [227]) that this could be reflected in the reduced (or even nominal) value attributed to the contingent s 74 liability. As to this:

    (1) Briggs LJ's suggestion could not work in practice. The calculation would depend on establishing how much the company would be able to recover from other contributories if the company entered winding up at some (indeterminate) future date and/or if other contributories entered winding up at some (indeterminate) future date(s); and the

[8] The adjustment of the rights of the contributories amongst themselves takes account of the different amounts which contributories have paid to the company (*Re Shields Marine Insurance Association, Lee and Moor's Case* (1868) LR 5 Eq 368, 372 **[6/11/372]**).

calculation would also depend on whether the company would acquire new members or lose existing ones in the future. It would be surprising, to say the least, if the regime under which the s 74 liability is imposed contemplated this sort of valuation exercise.

(2) Settlement of a list of contributories is an essential precursor to the adjustment of the rights of contributories. The liquidator must settle the list as an officer of the court subject to the court's control, although the court may dispense with the settlement of a list if it appears to the court that it will not be necessary to make calls on or adjust the rights of contributories (s 128 **[2/21]**; rr 4.195-4.196 **[3/57 – 3/58]**). The procedure for settling the list contains protections for those affected thereby (rr 4.198-4.199 **[3/60 – 3/61]**)[9]. If the decision of the Courts below is correct, a contributory of a company which is not in winding up who is obliged to satisfy a proof in respect of the s 74 liability would be deprived of the protection afforded by the procedure for settling the list.

(3) Section 150 provides that the court may make calls on contributories "for the time being settled on the list of contributories" and make an order for payment of any calls so made **[2/25]**. No such order can be

[9] The fact that s 148(1) **[2/24]** does not take the share register, with its evidentiary effect, as the starting point, and that the Act does not merely require the compilation of a list from the register, but provides for dealing with members by means of a special document called the list of contributories, suggests that something more than a mere compilation from the register, or the arrangement of its contents in a list, is contemplated. The word 'settle' involves the considering of the matter and the determination of questions (*Re Murray Engineering Co* [1925] SASR 330 at 333 **[7/5/333]**). This is borne out by the nature of the procedure prescribed by rr 4.198-4.200 **[3/60 – 3/62]** in relation to settlement of the list. The liquidator must first settle the list including specified information. He must then give each person in the list notice of inclusion, again including specified information, and inform each such person that if he objects to any entry in, or omission from, the list, he should inform the liquidator in writing within 21 days. On receiving a notice of objection, the liquidator has 14 days in which to give notice to the objector either that the liquidator has amended the list, and stating the amendment, or that he considers the objection to be not well-founded and declines to amend the list. The notice is to advise the objector of the effect of r.4.199 **[3/61]**. If the liquidator declines to accept the objection the objector may apply to the court within 21 days for an order removing the entry to which he objects or amending the list.

made before the list is settled (*Re Murray Engineering Co Ltd* [1925] SASR 330) **[7/5]**. The position in relation to a proof in respect of a Call is *a priori.*

(4) If (as the Courts held below) the absence of an adjustment of the rights of contributories could be reflected in the reduced value attributed to the company's proof, Calls could in the same way be reduced in place of the adjustment of the rights of contributories in a winding up. This is not what is intended by the regime under which the s 74 liability is imposed.

Qualifications of the s 74 liability in s 74(2)

45. The s 74 liability is subject to the qualifications set out in s 74(2). These qualifications do not apply unless the company is in winding up. They are inconsistent with a proof by a company which is not in winding up in respect of a Call in two respects.

46. The first relates to the qualification of the s 74 liability in section 74(2)(a). This provides that a past member is not liable to contribute if he ceased to be a member for one year or more before the commencement of the winding up.

47. Consider the following example of an unlimited company ("**Company"**) and sometime member ("**Member**") of the company:

2011: Member enters winding up; Company proves in Member's winding up in respect of Member's s 74 liability

2012: Member ceases to be a member of Company

2016: Commencement of the Company's winding up

48. If the Courts below are correct, the Company is entitled to prove in the Member's winding up in respect of the Member's s 74 liability. This is inconsistent with s 74(2)(a), the effect of which is that the Member has no

liability to contribute because it ceased to be a member of the Company one year or more before the commencement of the Company's winding up.

49. Briggs LJ said (at [227]) that this could be reflected in the reduced (or even nominal) value attributed to the liability, so that if the contributory can show that he has a good chance of ceasing to be a member more than a year before any Call could be made, this is likely to yield a nil valuation of the contingent liability. It is submitted that this is most unlikely to have been contemplated by the regime under which the s 74 liability is imposed. Whether a member has a good chance of ceasing to be a member more than a year before any Call could be made will depend (inter alia) on when the company goes into winding up, which will in turn depend on a detailed analysis of the company's trading and financial position at an indeterminate number of times in the future.

50. The second relates to the qualification of the s 74 liability in section 74(2)(c). This provides that a past member is not liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them.

51. Section 74(2)(c) cannot operate unless the court is able to form a view as to whether existing members are unable to satisfy the contributions required to be made by them. It will be able to form a view by considering the position of existing members at the time in a winding up when a Call is made on a member. Yet if the Courts below are correct, this exercise cannot be carried out (if the company is not in winding up), because the liability of existing members will not arise at the same time, ie when a Call is made; rather, the liability of existing members will arise if and only if each such member is in its own distributing administration or winding up.

Policy considerations

52. Briggs LJ accepted (at [225]) that there was a *"real concern"* about whether the regime under which the s 74 liability is imposed is consistent with proof in respect of a Call ahead of the winding up of the company. He also recognised (at [232]) the *"undoubted difficulties in valuing the contingency ahead of winding up, the risks that the contributory will pay more than it would have done if it had waited for a call, and the risk that the company may use the proceeds of proof otherwise than in the winding up waterfall specified in s 74"*.

53. The Court of Appeal nevertheless held that the s 74 liability was provable before the company was wound up. It placed reliance on two policies of the statutory scheme. The first is the policy of enlarging the scope of provable claims and seeking as far as possible to eliminate non-provable claims (per Lewison at [128] and Briggs LJ at [223]). The second is the policy that the members of an unlimited company are required to make their resources available to the fullest extent possible to ensure that the company discharges all its liabilities (per Briggs LJ at [232]).

54. The first principle was referred to by Lord Neuberger MR in *Re Nortel* at [90]-[93] **[1/17/241-242]**. The test of provability was set out with this principle in mind. It is submitted that if the test of provability is not satisfied, a liability should not be held to be provable because of this principle.

55. Reliance on the second policy is circular, because it assumes that the members of an unlimited company are required to make their resources available to the fullest extent to a company which is not in winding up and may never enter winding up. For the reasons given above, the members of an unlimited company are not required to make their resources available to the company before it is wound up.

56. A further answer to these policy considerations is that the company and its

creditors may benefit from the s 74 liability by causing the company to be wound up[10]. As Briggs LJ said at [243]-[244] (in relation to the contributory rule):

> *"all that needs to be done is to put the company into liquidation, and thereby enable the liquidator to make a call on the insolvent contributory... the administrator has it within his power to choose the liquidation route if, at any stage, it appears to be in the interests of creditors..."*

57. If the company is wound up, it can prove or call for the s 74 liability of the contributory; and the contributory will be required to make its resources available to the fullest extent possible to ensure that the company discharges all its liabilities.

Condition (b) in *Re Nortel*

58. It is submitted that condition (b) in the test set out by Lord Neuberger MR in *Re Nortel* at [77] is not satisfied. Conditions (a) and (b) are closely linked:

> *"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..."* **[1/17/238-239]**

59. So the step(s) referred to in condition (a) must have *resulted in [the member]*

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[10] The proposals of the LBIE Administrators which were approved by creditors in November 2008 included liquidation as an exit route. Indeed, if the s 74 liability is provable, the winding up of LBIE will be a contingency which is taken into account in valuing LBIE's proof. If there is no prospect of winding up, the value of LBIE's proof would be zero.

being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred.

60. The only step to which the member has become subject which results in it being vulnerable to the s 74 liability, such that there would be a real prospect of that liability being incurred, is the winding up of the company. This does not result from the administration or winding up of the member (which is unrelated to the prospect of the s 74 liability being incurred). Nor does it result from the contract of membership, since this does not take into consideration: (i) the prospect of winding up; (ii) the fact that an insolvent company may be dissolved without any s 74 liability being incurred by its members; and (iii) the fact that a solvent company may be wound up or dissolved without any s 74 liability being incurred by its members.

Conclusion

61. LBHI respectfully submits that the appeal against declaration (viii) should be allowed for the following reasons:

   (1) It is not consistent with the regime under which the s 74 liability is imposed to conclude that a contributory of a company incurs an obligation under s 74 before the company is itself wound up.

   (2) As a matter of principle and authority, the company cannot deal with the s 74 liability before it is wound up, whether by way of proof in the administration or winding up of its contributories or otherwise.

   (3) The rights, protections and qualifications afforded to contributories in relation to the s 74 liability would be lost if a company could prove in the administration or winding up of its contributories in respect of the s 74 liability before it is wound up.

   (4) There is no sufficient policy reason why a company should be able to

prove in the administration or winding up of its contributories in respect of the s 74 liability before it is wound up.

(5) It is only the winding up of the company results in the member being vulnerable to the s 74 liability, such that there would be a real prospect of the s 74 liability being incurred.

Set-off in LBIE's administration

62. LBIE submits that the s 74 liability of its members was set off against LBIE's liability to those members in LBIE's administration, whether or not the s 74 liability is provable by the LBIE Administrators in the members' administrations or subsequent liquidations.[11] LBHI accepts that, if the s 74 liability is provable by the LBIE Administrators in the members' administrations or liquidations, it was taken into the set-off account in LBIE's administration. If, however (as LBHI submits in its Case), the s 74 liability is not provable in the members' administrations or liquidations, it was not taken into the set-off account in LBIE's administration. This is for the reasons set out below.

(1) Before LBIE is wound up, nothing is due to LBIE in respect of the s 74 liability

63. As a matter of statutory construction and authority, the liability of a contributory to contribute to the assets of the company under the Act does not exist until the company is wound up.

64. All of the provisions in the Act which relate to contributories and their liability to contribute (including, in particular, sections 74-83 **[1/1, 2/16, 2/17, 9/10 – 9/15]**, 148-150 **[2/24 – 2/25, 9/17]** and 154 **[2/26]**) are contained in Part 4 of the Act. Part 4 of the Act is entitled *"Winding up of Companies Registered under the Companies Acts"*. Section 73(1) **[9/9]** provides:

[11] LBIE's Case, paragraph 198.1.

"This Part applies to the winding up of a company registered under the Companies Act 2006 in England and Wales or Scotland."[12]

65. Section 80 **[9/13]** provides:

> "*The liability of a contributory creates a debt … accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.*"

66. Section 80 is derived from section 75 of the Companies Act 1862 **[2/7]**, which provides:

> *"**The liability of any person to contribute to the assets of the company under this Act, in the event of the same being wound up**, shall be deemed to create a debt … accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned, for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made*[13]*."* (Emphasis added.)

67. The natural meaning of the emboldened words is that the liability of any person to contribute to the assets of the company comes into existence in the event of the same being wound up.

68. The opening words of section 80 have the same meaning as the opening words of section 75 of the Companies Act 1862. The change is simply linguistic, as is clear from the fact that the previous section of the Act (ie section 79 **[2/16]**) defines *"contributory"* as *"every person liable to*

[12] This includes companies registered under earlier Companies Acts, by virtue of sections 1(1) and 1171 of the Companies Act 2006 **[9/5 – 9/6]**.

[13] The successor of this part of section 75 of the Companies Act 1862 is section 82 of the Act **[2/17]**.

contribute to the assets of a company in the event of its being wound up….”. This is consistent with section 74 itself, which provides:

> "***When a company is wound up****, every present and past member is liable to contribute to it assets…"* (Emphasis added.)

69. The fact that the s 74 liability exists only if the company is wound up is also apparent from section 77 of the Companies Act 1862 **[9/3]**, which provides:

> *"If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding up, and may be called upon to admit to proof against the estate of such bankrupt or otherwise to allow to be paid out of his assets in due course of law, any moneys due from such bankrupt in respect of his* ***liability to contribute to the assets of the company being wound up****."* (Emphasis added.)

70. Section 77 of the Companies Act 1862 is the predecessor of section 82 of the Act **[2/17]**, which provides:

> *"(1) The following applies if a contributory becomes bankrupt, either before or after he has been placed on the list of contributories.*
>
> *(2) His trustee in bankruptcy represents him for all purposes of the winding up, and is a contributory accordingly.*
>
> *(3) The trustee may be called on to admit to proof against the bankrupt's estate, or otherwise allow to be paid out of the bankrupt's assets in due course of law, any money due from the bankrupt in respect of his* ***liability to contribute to the company's assets****.*
>
> *(4) There may be proved against the bankrupt's estate the estimated value of his liability to future calls as well as calls already made."* (Emphasis added.)

71. Again, there is no reason to suppose that the meaning of *"liability to contribute to the company's assets"* in section 82 of the Act is different from the meaning of *"liability to contribute to the assets of the company being wound up"* in section 77 of the Companies Act 1862.

72. In *Martin's Patent Anchor Co Ltd v Morton* (1868) LR 3 QB 306 **[9/20]**, 311 (Blackburn J) **[9/20/311]**, 312-313 (Lush J) **[9/20/312-313]**, it was held that section 75 of the Companies Act 1862 only applies where the bankruptcy of the contributory is contemporaneous with the winding up of the company.

73. In *Re China Steamship Company, Ex parte Mackenzie* (1869) LR 7 Eq 240 **[4/20]**, it was held that after a company has commenced to be wound up, a shareholder can assign a debt due to him by the company only subject to the right of set-off by the company of calls made subsequently to the assignment. Lord Romilly MR said at 243, 244, 246 **[4/20/243, 244, 246]**:

> "*The enactment [viz section 75 of the Companies Act 1862] is, that* ***in the event of the company being wound up, and in that event only, a debt is created*** *due from the shareholder, but payable at the time when the calls are made.*
> *…* ***the object of the Legislature in enacting this clause was to prevent the very thing that occurs in this case … if the winding-up should take place*** *before the assignment of the chose in action, then, in my view of the case,* ***it is provided that after the winding-up has taken place****, and before any calls are made, the owner of the debenture shall not be at liberty to assign it, and get money which he can dispose of, so that when the call is made he has nothing which can be made available to pay it.*
> *… Does this section of the Act of Parliament …* ***say this, that when a call is made it has reference back****, and that the debt becomes due at the time the* ***winding-up*** *began?* ***I think it does, and this is what I understand to be the effect of this clause****."* (Emphasis added.)

74. In *Financial Corporation Ltd v Lawrence* (1869) LR 4 CP 731 **[9/7]**, the

holder of shares in a company executed an inspectorship deed. A call was made on the shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the company commenced. Montague Smith J said at 737-738 **[9/7/737-738]**:

> *"in this case, which has been likened to that of a bankruptcy preceding the winding up of the company,* ***that clause*** *[viz. section 75 of the Companies Act 1862]* ***had not come into operation at the date of the deed****, and that the date of the deed is the governing time in the decision of this case.* ***The clauses in part 4 of the Companies Act, 1862, speak only from the commencement of the winding up of a company. When they begin to speak, no doubt for some purposes they have a retro-active effect****..."* (Emphasis added.)

75. Section 75 of the Companies Act 1862 (and section 80 of the Act) are not unique in the insolvency legislation in having no application until a company is wound up and then having retroactive or retrospective effect by virtue of words such as *"in a winding up by the court"* (section 127 of the Act **[9/16]**) or *"where a company is being wound up"* (section 322 of the Companies Act 1948 **[9/4]**, the predecessor of section 245 of the Act **[9/18]**).[14]

76. In *Re Muggeridge, Ex parte Bank of London and National Provincial Insurance Association* (1870) LR 10 Eq 443 at 446 **[9/21/446]**, Lord Romilly MR said:

> "*This section [viz, section 75 of the Companies Act 1862] makes the liability of the contributory a debt, and it is the only thing that makes it a debt,* ***so that when*** *a person is a shareholder in a company, and* ***the***

[14] *Mace Builders (Glasgow) Ltd v Lunn* [1987] Ch 191, 199 **[9/19/199C]** per Sir John Donaldson MR:

> "*The opening words [of section 322 of the Companies Act 1948] are 'Where a company is being wound up ...'. The section thus has no application unless and until the company is being wound up."*

See also *Power v Sharp Investments* [1994] 1 BCLC 111, 125 (CA) **[9/22/125]**.

company is ordered to be wound up, the Act immediately declares that this creates a debt, *which accrued due when the shareholder's liability commenced, but is payable when a call is made…*" (Emphasis added.)

77. In *Re Whitehouse and Co* (1878) 9 Ch D 595 **[9/24]**, Jessel MR disallowed a set-off of the statutory liability to pay calls. He said at 599 **[9/24/599]**:

> *"it must be remembered that the 38th section of the Act, which directs what is to be paid in the case of a winding-up by the shareholders of a limited company, creates new rights and right which did not exist before the passing of the Companies Act*, *1862, and* ***rights which do not exist till there is a winding-up*** *…."*[15] (Emphasis added.)

78. In *Re West of England Bank, Ex parte Hatcher* (1879) 12 Ch D 284, 287 **[9/23/287]**, Fry J said that the liability to contribute in the case of winding-up is "*a statutory liability having very peculiar incidents of its own, and the object and nature of it is to be learnt from the Act itself.*" He distinguished between the contractual liabilities under the company's articles and the statutory liabilities under the Companies Act 1862 in *Re West of England and South Wales District Bank, Ex parte Branwhite* (1879) 40 LT 652 **[6/22]**,[16] and said at 654 that the s 74 liability *"did not exist at all until the winding up arose."* **[6/22/654]**.

79. In *Whittaker v Kershaw* (1890) 45 Ch D 320 at 326, Cotton LJ said: *"We were also referred to sect. 75, …. But that section only applies when the company is being wound up, and we have no winding-up here."* **[9/25/326]**. Fry LJ (with whom Bowen LJ agreed) said at 328-329: *"Sect. 75 provides that when a call*

[15] In *Re Pyle Works* (1889) 44 Ch D 534, 575, Cotton LJ at 575 and Lindley LJ at 585-586 said that the decision in *Re Whitehouse & Co* was right, but that the reason given (viz, that the call accrues to the liquidator) was wrong. They did not disagree with the part of the judgment in *Re Whitehouse & Co* which is quoted above. Lindley LJ also said at 584 that the moneys payable on a winding up form a statutory fund which only comes into existence when the company is in liquidation **[1/19/575, 585-586]**.

[16] David Richards J set out a passage from *Ex parte Branwhite* (1879) 40 LT at [214] and said he obviously accepted the distinct characters of the two liabilities.

is made in the winding-up of a company the call shall be a debt from the time when the liability was contracted. Those words would have been idle if, apart from winding-up, the taking the shares created a debt." **[9/25/328-329]**.

The cases relied upon by LBIE

80. LBIE relies on 4 cases in which it was held that, on the proper construction of section 75 of the Companies Act 1862, the obligation to contribute springs from the contract to take shares: *Re General Works Company, Gill's Case* (1879) 12 Ch D 755 **[4/29]**; *Ex parte Canwell* (1864) 4 DeGJ & S 539 **[4/17]**; *Williams v Harding* (1866) LR 1 HL 9 **[1/24]**; and *Re China Steamship Company, Ex parte Mackenzie* (1869) LR 7 Eq 240 **[4/20]**.[17]

81. These cases are consistent with the analysis set out above, because section 75 of the Companies Act 1862 (and section 80 of the Act) apply only in the event of the company being wound up.

82. *Williams v Harding* was a decision on the Bankruptcy Act 1861 in relation to a company which had been wound up under the Companies Acts 1848-49. The only comment in relation to the Companies Act 1862 is the dictum of Lord Kingsdown at 29 **[1/24/29]**, which does not state or imply that section 75 of the Companies Act 1862 applies other than in the winding up of the company. As stated by Giffard LJ in *Re General Estate's, Hastie's Case* (1869) LR 4 Ch App 274 at 278 **[9/8/278]**, *Williams v Harding* and *Ex parte Canwell*:

> *"result in this, and nothing more: viz., that the debt has its inception at the date of, and originates with, the membership."*

83. The reasoning in *Ex parte Canwell* is exiguous, but it supports the submissions above. The case concerned a company in winding up, and the decision was stated in the headnote as follows:

[17] LBIE's Case, paragraphs 206.1, 232-235.

> “*The liability of a contributory under the Companies Act, 1862, s 75, commences at the date when he enters into the contract under which he becomes a member of the company* ***which is being wound up***.” (Emphasis added.) **[4/17/1028]**.

84. *Re China Steamship Company, Ex parte Mackenzie* **[4/20]** does not support LBIE’s Case, because Lord Romilly MR there held that section 75 of the Companies Act 1862 has reference back when a call is made. Nor does *Re General Works Company, Gill’s Case* (1879) 12 Ch D 755 **[4/29]** support LBIE’s case, because Bacon V-C there held that the relation of debtor and creditor did not exist in relation to the call by the liquidator.

The decisions below

85. David Richards J (at [207]-[215]) rejected the analysis set out above. His reasons were twofold. The first (at [212] and [215]) was that *“in all cases”* the s 74 liability stems from the contract of membership. The second (at [213]) was that it would be extraordinary if the s 74 liability could be avoided if the bankruptcy or liquidation of a member could proceed to a conclusion without the possibility of proof in respect of this liability already undertaken by a member. He also said that the fact that the result could be avoided by a company placing itself into liquidation did not strike him as adequate.

86. Briggs LJ (at [209]-[211]) rejected the analysis set out above for essentially the same reasons as David Richards J. He held (at [209]-[211]) that the court’s power to call on contributories to contribute to the assets of the company is an asset of the company; and that it creates a debt in respect of which the company is the creditor. Lewison LJ said he had reservations about this. It is submitted that his reservations are well-founded, for the reasons he gave (at [113]-[120]).

87. Briggs LJ said there must be a creditor where there is an existing debt. He said the only candidate for the status of creditor other than the company would be

the liquidator, but this makes no sense in the context of an unlimited company prior to going into liquidation which has contributories whose liabilities as such are deemed to be debts from the moment they become creditors.

88. It is respectfully submitted that David Richards J and Briggs LJ were wrong, because the s 74 liability only arises in the event of the company being wound up. The second reason given by David Richards J is circular, since the question being considered was whether a company could prove for the s 74 liability in the bankruptcy or liquidation of a member ahead of the winding up of the company, and he assumed the answer to the question. Furthermore, as Briggs LJ said (at [244]), administration and liquidation have pros and cons viewed as against each other. The LBIE Administrators can (and could have) put LBIE into liquidation in order to benefit from the liquidator's power to make calls if this is in the interests of LBIE's creditors.

(2) Proper construction of rule 2.85

89. LBIE submits that the s 74 liability is a contingent payment obligation within rule 2.85(4)(b) **[3/41/2]**; and that it is "*regarded as being a sum due to ... the company (LBIE)*" as contemplated by rule 2.85(4) at the time the set-off account was taken in its administration.[18] If this is correct, it can by virtue of rule 2.85(5) be included in the set-off account only at the value given to it by rule 2.81 **[3/40]**.

90. Rule 2.81 permits an administrator to *"estimate the value of any debt"* and it is not disputed that "*debt*" is limited by rule 13.12 to provable debts.[19] Therefore, contingent claims can only be attributed a value for the purposes of the set-off if they are provable as debts. Since the s 74 liability is not a contingent claim (or a claim at all), it cannot be attributed a value for the purposes of the set-off.

[18] LBIE's Case, paragraphs 205-206.

[19] See the Court of Appeal judgment at [175].

(3) Set-off of non-provable claims does substantial injustice

91. The purpose of insolvency set-off is to do substantial justice between the bankrupt and his creditors (*Stein v Blake* [1996] AC 243, 251 **[1/20]**).

92. The allowance of set-off between a provable claim by a creditor of the company and a non-provable claim by the insolvent company would be unjust to the creditor.

93. This can be illustrated by a simple example. Suppose a company X (in administration) has an estimated £80 contingent claim against company Y (in administration) which is not provable in Y's administration; and that Y has a provable claim for £100 against X.

94. Suppose that Y gives notice of intention to distribute. If, in the set-off in Y's administration, creditors may only include provable claims on their side of the account, there will be no set-off in this example; the outcome is that Y has a provable claim in X's administration for £100, with X's non-provable contingent claim against Y unresolved and not payable in competition with Y's other creditors.

95. Suppose that X then gives notice of intention to distribute. In the set-off in X's administration, X's contingent non-provable claim is included with the result that Y has a net provable claim in X's estate of £20.

96. By giving notice of intention to distribute, X has received payment in full from Y on its £80 non-provable claim, in circumstances where Y has not paid its proved debts in full (or at all). In this way, the set-off for which LBIE contends disrupts the *pari passu* distribution of counterparts' estates.

97. For the reasons given above, LBHI submits that Rose LJ was correct in *Bank of Credit and Commerce International SA (No 8)* [1996] Ch 245, 256 **[4/7]** in holding that claims must be capable of proof on both sides of the account to qualify for set-off.

The contributory rule

98. The contributory rule is a statement of the principle that, in a liquidation, a person can recover nothing as a creditor of a company until he has discharged all his liability as a contributory.[20]

99. LBIE submits that, if there is no set-off of the s 74 liability in LBIE's administration, then the contributory rule should be extended to LBIE's administration so at to permit the LBIE Administrators to retain, on account of the s 74 liability of its members, the distributions that would otherwise be payable to them on their provable debts in LBIE's administration.[21]

100. It is submitted that David Richards J (at [179]-[194]) and the Court of Appeal (at [132], [235]-[245], [246]) were correct to reject this submission, for the reasons they gave.

101. It is an essential element of the contributory rule that the contributory pays all sums due from him in respect of calls before he can take something from the common fund.[22] It is not possible, whilst LBIE is in administration, for members to pay sums due in respect of calls, because calls cannot be made in administration.

102. The contributory rule is derived from and entirely dependent on the true construction of the relevant provisions of the companies legislation (which is now contained in the Act).[23] LBIE's submission that the contributory rule should be adapted to apply to distributing administrations is wrong because

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[20] Judgment of David Richards J at [179].

[21] LBIE's Case, paragraph 260.

[22] See, for example, LBIE's Case at paragraphs 261-264, citing *Re West Coast Gold Fields Ltd; Rowe's Trustees' Claim* [1905] Ch 597, 600, 602 (Buckley J) **[6/21/600, 602]**, cited *in Re Kaupthing Singer & Friedlander Ltd (in administration) (No 2)* [2012] 1 AC 804 at [20] (Lord Walker) **[1/13/816-817]**; and *Re Auriferous Properties Ltd (No 2)* [1898] 2 Ch 428, 431 (Wright J) **[4/4/431]**.

[23] See, eg *Re Overend, Gurney & Co; Grissell's Case* (1866) 1 Ch App 528, 534 (Lord Chelmsford LC) **[1/18/534]**.

the statutory scheme for administrations contains no provision under which a call can be made whilst LBIE is in administration.

103. The expansion of the contributory rule for which LBIE contends would be unjust, because it would prevent contributories from receiving distributions in an administration in circumstances in which no call could be made, so that no call could be paid. Furthermore, LBIE could distribute all its assets to its other creditors without going into liquidation, and its members would receive nothing.

104. The LBIE Administrators submit that it would be necessary for them to maintain a reserve for the potential benefit of its members until it became clear whether or not LBIE would move into liquidation.[24] However, there is no warrant for devising such a procedure; there is no mechanism for such a procedure; and it would not be fair to deprive contributories of dividends to which they are otherwise entitled until it finally became clear that the company would not move into liquidation.

105. LBIE suggests that a contributory could pay its s 74 liability in advance of a call.[25] This would be also unjust, because a contributory would not know whether a call would otherwise be made. Nor would it know the amount of any call which would otherwise be made. Moreover, it would be unjust if a contributory paid its s 74 liability in advance of a call, and the company never went into liquidation.

106. LBIE submits that it will be unjust if LBIE goes into liquidation, because its members will at that stage be unable to meet any calls.[26] However (as Briggs LJ said at [243]-[244]), administration and liquidation are different regimes, with different pros and cons. If it is in the interests of a company's creditors, a distributing administrator can avoid any inroad into the *pari passu* principle

[24] LBIE's Case, paragraph 293.

[25] LBIE's Case, paragraph 291.2.

[26] LBIE's Case, paragraph 281.

by putting the company into liquidation, thereby enabling the liquidator to make a call. The attempt to bolster the pros of administration with those which the legislature has restricted to winding up is unjustified.

107. Case law does not support LBIE's cross-appeal. Rather, it shows that: (i) the contributory rule does not apply, even during a liquidation, to the contingent liability of a contributory to meet calls (as explained by David Richards J at [190]-[191]); and (ii) the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442 **[4/19]** does not apply where the debt due to the estate is not presently payable (*Re Abrahams* [1908] 2 Ch 69 **[9/1]**). The position is the same in relation to the contributory rule.

Conclusion

108. LBHI respectfully submits that the cross-appeals should be dismissed for the following reasons:

(1) If the s 74 liability of LBIE's members is not provable by the LBIE Administrators in their administrations or subsequent liquidations, insolvency set-off did not take place in LBIE's administration.

(2) If insolvency set-off did not take place in LBIE's administration and the s 74 liability of LBIE's members is not provable in their administrations of subsequent liquidations, the contributory rule should not be extended to permit the LBIE Administrators to retain, on account of the s 74 liability of LBIE's members, the distributions that would otherwise be payable to them.

27 September 2016

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