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

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
LORD JUSTICE MOORE-BICK, LORD JUSTICE LEWISON AND LORD JUSTICE BRIGGS
A2/2014/1833, 1822, 1826 & 1839

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

IN THE MATTER OF LEHMAN BROTHERS LIMITED (IN ADMINISTRATION)

IN THE MATTER OF LB HOLDINGS INTERMEDIATE 2 LIMITED (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

(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) ANTHONY VICTOR LOMAS **(2) STEVEN ANTHONY PEARSON** **(3) PAUL DAVID COPLEY** **(4) RUSSELL DOWNS** **(5) JULIAN GUY PARR** **(in their capacity as Joint Administrators of Lehman Brothers International (Europe) (In Administration))**	**Respondents**

WRITTEN CASE

OF THE LBL JOINT ADMINISTRATORS

ON THE STATUTORY INTEREST ISSUE

(para 29.3 of the Statement of Facts and Issues)

Introduction

1. The question that arises, as a result of the peculiar circumstances of LBIE's administration, is whether, if LBIE subsequently moves from its current administration into liquidation, statutory interest which was payable in respect of the period of the preceding administration, and which is not paid by the administrators out of a surplus in the administration after payment of the debts proved in the administration, is payable in the liquidation.

2. The issue arises because, in enacting the relevant provisions of the 1986 insolvency legislation, the legislature intended to create a complete code for post-insolvency interest, to be paid after the debts proved, but, by virtue of the relevant cut-off provisions, the legislation contains a lacuna. It does not provide for statutory interest payable (but not paid) in respect of the period of an administration immediately preceding a liquidation to be payable as statutory interest out of a surplus in the subsequent liquidation.

3. The Court of Appeal erred in re-writing the legislation on statutory interest.

4. LBL appeals para 4 of the Court of Appeal's order **[CoreD/2/4]**, which declared:

> "if the administration of LBIE is immediately followed by a liquidation, any statutory interest in respect of the period of the administration which was payable under rule 2.88(7) of the Insolvency Rules 1986 but was not paid before the commencement of the liquidation will be payable in the liquidation under rule 2.88(7) from any part of the fund which constituted the "surplus" in the administration (as defined in rule 2.88(7)) and which subsequently comes into the hands of the liquidator(s)".

5. The Court of Appeal should not have allowed the appeal of the LBIE Joint Administrators against declaration (iv) of the Order of David Richards J at first instance **[CoreD/4/75]**. Instead, the Court of Appeal should have upheld the declaration of David Richards J on this issue:

> "if the administration of LBIE is immediately followed by a liquidation, any interest in respect of the period of the administration which has not been paid before the commencement of the liquidation will not be provable as a debt in the liquidation, nor will it be payable as statutory interest under either rule 2.88 of the Insolvency Rules 1986…or section 189 of the Insolvency Act 1986…".

6. LBIE has cross-appealed the Court of Appeal's decision regarding statutory interest, contending that statutory interest in an administration under Rule 2.88(7) **[Auths1/4]** is provable in a subsequent liquidation. Until day 3 of the Court of Appeal hearing, LBIE had conceded that statutory interest was not so provable (as reflected in the declaration made by David Richards J **[CoreD/4/75]**). The Court of Appeal did not decide LBIE's new argument on provability, but it is contradicted by the wording of the legislation.

7. LBIE has also cross-appealed against the Court of Appeal's decision allowing the appeal against declaration (v) of the Order of David Richards J **[CoreD/4/75]**, which was to the effect that creditors of LBIE with debts which carry interest by reason of contract, judgment, or other reasons unconnected with the administration or liquidation of LBIE would be entitled to claim in a liquidation of LBIE, which immediately follows the administration, for interest which accrued due during the period of the administration, as a non-provable claim against LBIE, payable after the payment in full of all proved debts and statutory interest on such debts. There can be no such non-provable claim given that the statutory code for the payment of interest in an insolvency was intended to be a complete code and to replace any pre-existing rights to interest.

8. In relation to other matters before the Court on these appeals:

   (1) LBL supports and adopts the written submissions of the LBHI2 Joint Administrators in relation to the currency conversion claims issue (declarations (ii)-(iii) in the order of David Richards J **[Core/D/4/75]**) save in respect of the submissions made by LBHI2 in respect of insolvency set off and insofar as LBHI2 invites this Court to determine how (if they exist) CCCs are to be dealt with for the purposes of set off. The precise workings of insolvency set off are a matter for further consideration in the separate context of Waterfall III.

   (2) In relation to the s.74 issue (declaration (vi) in the order of David Richards J **[CoreD/4/75]**), LBL supports and adopts the written case of LBHI2, subject to sub-para (3) below.

(3) LBL reserves its position as to whether it is in fact properly to be considered a shareholder in LBIE and whether LBIE's share register should be rectified, the extent of any liability arising from LBL's shareholding in LBIE and/or whether in any event LBL is entitled to recharge any such liability to other companies within the Lehman group, including LBIE. These matters fall to be considered as part of or alongside a separate application made by the LBIE Administrators issued on 22 April 2016 (known as "**Waterfall III**").[1]

The statutory lacuna

Statutory interest in a liquidation

9. The provisions applicable to interest in a liquidation are contained in both the Insolvency Act 1986 and the Insolvency Rules 1986.[2] The introduction of these provisions effected a complete change to the law concerning the payment of interest in a winding up.

10. S.189 regulates interest on debts in a winding up **[Auths1/2]**:

> "(1) In a winding up interest is payable in accordance with this section on any debt proved in the winding up, including so much of any such debt as represents interest on the remainder.
>
> (2) 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."

11. Rule 4.93 prescribes the interest that can be proved as part of a debt. As originally enacted, Rule 4.93(1) provided **[Auths3/51]**:

> "(1) Where a debt proved in the liquidation 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 went into liquidation.
>
> ...."

[1] David Richards J did not consider the basis upon which LBL is a registered holder of one ordinary share of $1 and he expressly did not deal with the relationship between LBL and LBHI2 as members of LBIE, and whether LBL has any right of indemnity against LBHI2 (see the judgment of David Richards J. at [13] **[CoreD/5/84]**).
[2] Unless otherwise specified, references to sections are to sections of the Insolvency Act 1986, and references to rules are to rules in the Insolvency Rules 1986.

12. The Enterprise Act 2002 rendered it possible for assets to be distributed to creditors in an administration. As explained in the Explanatory Note to the Insolvency (Amendment) Rules 2005/527 **[Auths3/30/1]**:

> "As a result of changes made to the law on administration by the Enterprise Act 2002 (c. 40) a company can move between liquidation and administration or between administration and liquidation. Both of these procedures enable creditors to prove their debts at the date of the administration or liquidation respectively."

13. The Insolvency (Amendment) Rules 2005 therefore amended some of the Rules to provide that, where a company moves from liquidation to administration (or vice versa), the relevant date was the date the first insolvency procedure commenced. Thus Rule 4.93(1) **[Auths3/53]** was amended to add the words "*or, if the liquidation was immediately preceded by an administration, any period after the date that the company entered administration*". It is this version of Rule 4.93(1) (in force between 1 April 2005 and 5 April 2010) that will be applicable if LBIE goes into liquidation (by virtue of the transitional provisions, and based upon the date when LBIE went into administration).

14. Under Rule 13.12(1) **[Auths1/6]**, a "*Debt*", in relation to the winding up of a company, is defined to include (*inter alia*), at sub-para (c), "*any interest provable as mentioned in Rule 4.93(1)*".

15. Thus, if LBIE goes into liquidation:

    (1) Where a "*debt proved in the liquidation*" bears interest, that interest will only be provable as part of the debt insofar as it is payable in respect of any period **before** the date LBIE entered administration (Rule 4.93(1)). In this context, by virtue of Rule 4.73(8) **[Auths3/45]**, where a winding up is immediately preceded by an administration, "*a creditor proving in the administration shall be deemed to have proved in the winding up*".

    (2) Any surplus remaining after the payment of debts proved in the 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 (s.189(2) **[Auths1/2]**).

16. The lacuna exists because, unlike Rule 4.93(1) **[Auths3/53]**, s.189(2) does not contain the words "*or, if the liquidation was immediately preceded by an administration, any period after the date that the company entered administration*". There has been no amendment to s.189(2).

17. As pointed out in the judgment of David Richards J at [121] **[CoreD/5/113]**, the Rules and their amendments are not made by Parliament and may be made more easily than amendments to the primary legislation contained in the Act. Whilst it may be easier for the Rules to be amended than the Act, s.189 could have been amended (for example, when changes were made to the Act following the Enterprise Act 2002 and/or given the changes to the Rules by the Insolvency (Amendment) Rules 2005 and the Insolvency (Amendment) Rules 2010 to provide that the relevant date is the date of the first insolvency procedure where a company moves between liquidation and administration (or vice versa)). However, s.189 has not been amended, despite the fact that there have been various changes to the administration and liquidation regimes in the Act including recently by the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015. Statutory interest in a liquidation under s.189 is thus not payable in respect of the period of an administration immediately preceding a liquidation.

Statutory interest in an administration

18. The provisions relating to interest as they apply to administration (which were introduced as part of the changes made to enable companies in administration to make distributions amongst creditors) are similar to those that apply to a liquidation:

    (1) The version of Rule 2.88(1) in force between 1 April 2005 and 5 April 2010 (applicable to LBIE's administration) **[Auths1/4]** provides:

> "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 [or, if the administration was immediately preceded by a winding up, any period after the date that the company went into liquidation]"[3].

[3] The words in square brackets were inserted by the Insolvency (Amendment) Rules 2005/527.

(2) The version of Rule 2.88(7) in force between 1 April 2005 and 5 April 2010 (applicable to LBIE's administration) **[Auths1/4]** provides:

> "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."

19. Therefore, between 1 April 2005 and 5 April 2010 there was a similar lacuna where there was a winding up and a subsequent administration, to that which now exists where there is an administration followed by a winding up. That is because Rule 2.88(1) had the effect that interest during the earlier winding up on interest-bearing debts was not provable in the immediately subsequent administration, and Rule 2.88(7) had the effect that the surplus after payment of the debts proved was only to be applied in paying interest on those debts for the period of the administration (and not the earlier liquidation).

20. However, the legislature cured that lacuna through the amendments to Rule 2.88 made by the Insolvency (Amendment) Rules 2010/686, which amended the relevant provisions of Rule 2.88 so that they read **[Auths1/5]**:

> "(A1) In this Rule, "*the relevant date*" means the date on which the company entered administration or, if the administration was immediately preceded by a winding up, the date on which the company went into liquidation.
>
> (1) 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 relevant date.
>
> ....
>
> (7) 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 relevant date.
>
> ..."

21. Unlike this amendment to Rule 2.88(7), however, there has been no equivalent amendment to s.189(2) **[Auths1/2]** to add the words: "*or, if the liquidation was immediately preceded by an administration, the date on which the company went into administration*".

22. Thus it remains the case that, if LBIE goes into liquidation following its administration, if there is a surplus remaining after the payment of debts proved in the winding up, that surplus would **only** be applied under s.189(2) **[Auths1/2]** in paying statutory interest on those debts for the period of the liquidation, and **not** the earlier administration. This is the lacuna which the Court of Appeal sought to fill. The fact that an identical lacuna in the obverse situation, in which a company moves from liquidation to administration, could only be filled by legislative amendment underscores the fact that it was simply not open to the Court of Appeal to do this. For the reasons set out in paras 35-38 below, the lacuna is one for the legislature, not the Court, to resolve.

23. In the event, the lacuna will only pose a practical problem in LBIE's insolvency if both (i) LBIE moves from administration into liquidation and also (ii) despite the fact that there is a surplus in its administration under Rule 2.88(7) **[Auths1/4]**, LBIE's administrators decide not to pay statutory interest on the debts proved in the administration before the cessation of their appointment. If LBIE does not go into liquidation, or if the administrators apply the substantial surplus in LBIE's administration in paying statutory interest on the debts proved in the administration, as they are directed to by Rule 2.88(7), there will be no lacuna.

The approach at first instance and of the Court of Appeal

24. LBIE had, until day 3 of the hearing in the Court of Appeal, conceded that, if LBIE were to go into liquidation, interest for the period of the prior administration which was not paid in the administration would not be provable in the liquidation (and nor would it be payable out of a surplus in the liquidation under s.189).[4] LBIE instead argued that, if an administrator has given notice of an intention to make a distribution to creditors, and the company subsequently goes into liquidation before statutory interest has been paid by the administrator out of the surplus remaining after payment of the debts proved, but there is then a surplus (in the hands of the liquidator) after payment of all the debts proved, then either:[5]

[4] See, e.g., the judgment of David Richards J at [123] **[CoreD/5/113]** and the transcript for the Court of Appeal hearing at **[CoreE/7/66, lines 6-8]**.
[5] See para 12 of LBIE's skeleton argument for the Court of Appeal **[CoreE/18]** and para 107 of LBIE's written submissions at first instance **[CoreE/17]**.

(1) Rule 2.88(7) **[Auths1/4]** applies to all creditors who proved or prove (whether during the administration or after) and s.189 **[Auths1/2]** is *"simply unnecessary"*; or

(2) Rule 2.88(7) applies to creditors who actually proved during the administration, while s.189(2) applies to those creditors who actually proved during the winding up.

25. The conclusions of David Richards J (previously Chairman of the Insolvency Rules committee) in relation to statutory interest were as follows:

(1) In the context of considering the subordinated debt agreements, David Richards J said at [71] (and in rejecting the argument by LBHI2 and LBHI that Rule 2.88(7) and s.189(2) do not create a liability falling within the meaning of *"Liabilities"* in the subordinated loan agreements) **[CoreD/5/98]**:

> "As to whether rule 2.88(7) creates a debt or liability, it is no doubt true to say that it. It does not follow that it does not create a debt or liability of the company for the purposes of the subordination agreement. The assets constituting the surplus to which rule 2.88(7) applies are assets of the company in administration, albeit that their beneficial ownership is or may well be in suspense: Revenue and Customs Comrs v Football League Ltd (Football Association Premier League Ltd intervening) [2012] Bus LR 1539, paras 101–102. The effect of the direction in rule 2.88(7) is to create a right in favour of creditors to have the relevant surplus applied in the payment of statutory interest. It does not create a proprietary or equitable interest in the surplus in favour of those creditors. It is in my judgment in no sense a misuse of language to say that it creates a concomitant liability or obligation."

(2) At [121] **[CoreD/5/113]**:

> "Given that there is no rational justification for providing that interest for the period of an administration which is immediately followed by a liquidation is neither provable nor payable as statutory interest, I can only conclude that either the terms of section 189 were overlooked or, more probably, it was thought that in some way the amendments to the Rules avoided the need to amend the primary legislation".

(3) In a case where an administration is immediately followed by a liquidation, interest for the period of the administration is neither provable nor payable as statutory interest in the liquidation (at [125]-[126]

[CoreD/5/114]). LBIE's arguments were rejected for a number of reasons including that:

a. On a natural reading of Rule 2.88(7) **[Auths1/4]**, it applies to a surplus in the hands of the administrator rather than in the hands of a subsequent liquidator. "*Read in its context, it seems to direct the administrator as to the application of the surplus which he holds.*"

b. LBIE's argument could not apply to a surplus arising for the first time in the liquidation. Rule 2.88(7) was impossible to reconcile with the equivalent provision in s.189(2) **[Auths1/2]** which requires the surplus remaining in the hands of the liquidator to be applied in paying interest on proved debts in respect of the periods during which they have been outstanding since the company went into liquidation "*before being applied for any purpose*".

c. LBIE's construction would only go a limited way to meeting the problem because the effect of Rule 2.88(7) is limited to the amount of the surplus in the hands of the administrator and to creditors who lodged a proof in the administration.

d. LBIE's construction would provide no assistance in the case of an administration which has not become a distributing administration, and it may be thought more likely that it is in such circumstances that a company will go into liquidation following an administration, and the absence of any provision which could deal with interest for the period of an administration in such a case is "*very telling*".

(4) However, creditors whose debts carried interest prior to the administration, whether by way of contract, judgment interest or otherwise, should be entitled to claim interest at such rate for the period of the administration as a non-provable liability (at [127] **[CoreD/5/114]**).

26. The approach of the Court of Appeal, which differed from the way that LBIE advanced its appeal on the statutory interest issue, was as follows:

(1) Lewison LJ considered the issue at [102]-[112] **[CoreD/3/34-36]**, and his reasoning was that:

a. The requirement under Rule 2.88(7) **[Auths1/4]** to pay interest was not limited to a direction to the administrator, but was a statutory instruction that the surplus cannot be applied for any purpose other than paying statutory interest.

b. It was not necessary to "*become bogged down in selecting a suitable private law label by which to describe this statutory instruction*".

c. If the surplus in the hands of the administrator was "*burdened*" in this way, there was no conflict with s.189 **[Auths1/2]**, because "*If a fund comes into the hands of the liquidator already burdened by an obligation to pay interest to creditors who proved in the administration, so much of the fund as must be applied for that purpose will not count in the liquidation as making up part of any future surplus*".

d. Rule 2.88(7) can only entitle those who have proved in the administration to statutory interest, and this interpretation of Rule 2.88(7) will only have practical effect in relation to an administration that has become a distributing administration. However, "*a limited solution is better than no solution at all*". A more complete solution would have to await Parliament's intervention.

e. The invention of a new species of non-provable claim was not the right solution because the prevailing policy (both legislative and judicial) is to discourage and where possible to eliminate non-provable claims. In view of the conclusion regarding the survival of Rule 2.88(7) into a liquidation, the recovery of administration interest as a non-provable claim in an immediately following liquidation did not arise, and the appeal against para (v) of David Richards J's order **[CoreD/4/75]** was allowed.

(2) Briggs LJ added at [135] **[CoreD/3/41]**:

> "In relation to the issue about statutory interest accruing during an administration I would only add that, for my part, I have found the *Quistclose*-type trust analysis [*Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567 **[Auths6/6]**] of the effect of rule 2.88(7) of the Insolvency Rules 1986 to be the best way, in legal terms, of giving effect to the clear legislative intent embodied in that provision. It does not provide a complete answer to the puzzling lacuna thrown up by the combined effect of section 189(2) of the Insolvency Act 1986 and rule 4.93 (as amended by rule 26 of the Insolvency (Amendment) Rules 2005), where administration precedes liquidation. There will be many combinations of administration and liquidation where no surplus is thrown up during the administration to which rule 2.88(7) can attach, but where the statutory scheme gives rise to an inexplicable gap between the ending of the period for which contractual interest can be proved and the beginning of the period for which statutory interest is payable. In particular, this lacuna will continue to affect all non-distributing administrations which are followed by liquidation. I agree with Lewison LJ that the sooner this inexplicable gap between contractual and statutory interest is remedied by amendment to the Act or to the Rules, the better."

(3) Moore-Bick LJ agreed with the conclusions of Lewison and Briggs LJJ: [246] **[CoreD/3/66]**.

27. For the reasons set out below, David Richards J was correct (notwithstanding his reluctance) to reach the result he did in relation to declaration (iv) **[CoreD/4/75]**, and the Court of Appeal's approach to this issue was incorrect.

The inconsistencies between the Court of Appeal's approach and the statutory waterfall

28. The Court of Appeal's approach is inconsistent with the legislative scheme and, in particular, the statutory waterfall in a winding up. In particular, if the Court of Appeal's approach were followed, the company's estate would not be distributed *pari passu*. Instead, the liquidator would have to pay administration statutory interest before he could pay any principal or interest on proofs that were lodged for the first time in the liquidation. This is fundamentally inconsistent with the statutory scheme.

29. **First**, Rule 2.88(7) **[Auths1/4]** constitutes a direction to the administrator as to how to apply a surplus in his hands after the payment of the debts proved in the administration:

(1) Rule 2.88(7) **[Auths1/4]** is not part of the statutory waterfall applicable in a winding up. Rule 2.88(7) is contained in Part 2 of the Rules, entitled "Administration Procedure". Rule 2.1(1)(d) **[Auths3/32]** provides that chapter 10 of the Rules (which contains Rule 2.88) applies in relation to the appointment of an administrator by the court, the appointment of an administrator by the holder of a qualifying floating charge under para 14, and the appointment of an administrator by the company or the directors under para 22. Rule 2.68(1) **[Auths3/34]** provides that chapter 10 *"applies where the administrator makes, or proposes to make, a distribution to any class of creditors ...*". Section B of Chapter 10 provides the machinery for proving a debt in an administration. The surplus referred to in Rule 2.88(7) is a surplus after payment of the debts proved in the administration, and thus a surplus in the assets administered by the administrator.

(2) The structure of the legislation makes clear that Rule 2.88(7) is a provision which only applies in an administration, directing an administrator as to what to do with any surplus in his hands after payment of debts proved in the administration. Rule 2.88(7) ceases to have effect when the administration ends and the administrators (to whom the direction is given) leave office.

30. **Second**, if a company moves from administration straight into liquidation, the administrator vacates office and relinquishes control over the assets he was administering, including any surplus. In doing so, the administrator is not applying that surplus for any purpose so as to contravene Rule 2.88(7).

(1) The administrator manages the company's property. "*Administrator*" is defined in para 1(1) of Schedule B1 of the Act as "*a person appointed under this Schedule to manage the company's affairs, business and property*" **[Auths3/1]**.

(2) On his appointment, the administrator takes custody or control of the property to which he thinks the company is entitled: see para 67 of Schedule B1 to the Act **[Auths3/5]**. The property nevertheless remains

property of the company in administration.[6] In exercising his functions under Schedule B1, the administrator acts as the company's agent (Schedule B1, para 69 **[Auths3/7]**).

(3) Para 68 of Schedule B1 **[Auths3/6]** provides for how the administrator shall manage the affairs, business and property of the company, including proposals and/or directions by the Court.

(4) The administrator is also subject to the provisions of the Rules which direct him to do certain things as part of his statutory management of the company, including Rule 2.88(7) **[Auths1/4]**.

(5) When the company ceases to be in administration, the administrator's appointment ceases to have effect: see e.g. Schedule B1 paras 76(1) **[Auths3/8]**, 79(1) **[Auths3/10]**, 80(3) **[Auths3/12]**, 81(1) **[Auths3/14]**, 82(3) **[Auths3/15]**, 83(6) **[Auths3/17]**, and 84(4) **[Auths3/19]**.

31. **Third**, when a company moves from administration into liquidation, the administration comes to an end such that the only existing insolvency process is the winding up. In the winding up, the liquidators are bound to apply the assets in accordance with the statutory waterfall applicable in a liquidation. It would be inconsistent with that scheme for Rule 2.88(7) to continue to exist in the liquidation because:

(1) There is no transfer of assets from the administrator to the liquidator. The liquidator is not stepping into the shoes of the administrator, or continuing the administrator's task which the administrator has left unfinished. There is one statutory scheme which the administrator must follow in distributing the assets in the administration, and a different statutory scheme which the liquidator must follow in distributing the assets in the liquidation (see s.148(1) **[Auths2/23]** and Rule 4.179(1) **[Auths3/55]**).

[6] A winding-up order does not of itself divest the company of the legal title to any of its assets, but the company no longer holds beneficial ownership in those assets, which are subject to a statutory scheme for distribution among the creditors and members of the company: see **Ayerst (Inspector of Taxes) v C&K (Construction) Ltd** [1976] AC 167 **[Auths4/6]**. As to whether the "statutory trust" explained by the House of Lords in **Ayerst v C&K (Construction) Ltd** [1976] AC 167 applies to the assets of a company in administration, see **Revenue and Customs Commissioners v Football League Ltd** [2012] EWHC 1372; [2012] Bus LR 1539 at [101]-[102] (David Richards J) **[Auths6/7]** and David Richards J's judgment in this case at [71] **[CoreD/5/98]**.

(2) Lewison LJ said at [107] **[CoreD/3/35-36]** that Rule 2.88(7) **[Auths1/4]** is a "*statutory instruction that the surplus cannot be applied for any purpose other than paying statutory interest*". But the instruction in Rule 2.88(7) cannot be a direction to a liquidator in a winding up following an administration, because the liquidator is subject to different express instructions as to how to apply assets in his hands, which are inconsistent with Rule 2.88(7).

(3) The effect of the relevant legislation (as interpreted and extended by the courts) is to provide for a statutory waterfall in a liquidation (and an administration, where there is no question of trying to save the company or its business), conveniently summarised by Lord Neuberger in **In re Nortel** [2013] UKSC 52; [2014] AC 209 at [39] **[Auths1/17/230-231]**, with an order of priority of payment out of the company's assets in the following order:

> "(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."

(4) Not only would the continued application of Rule 2.88(7) in a liquidation immediately following an administration be inconsistent with the scheme for statutory interest expressly set out in s.189 **[Auths1/2]** (which is the sole and governing provision for statutory interest in a liquidation), it would also flout the clear legislative intent that post-insolvency interest is **only** to be payable in a liquidation after the various categories of prior-ranking claims set out in paras (1)-(5) of the **Nortel** waterfall. The Court of Appeal's approach would entail a re-ordering of the waterfall in a

liquidation by inserting post-administration interest at the top of the waterfall and Rule 2.88(7) **[Auths1/4]** taking precedence over ss.107 **[Auths2/18]**, 115 **[Auths2/19]**, 143(1) **[Auths2/22]**, 175(1) **[Auths2/30]** and 176ZA **[Auths2/32]**.

(5) It is inconceivable that, when Rule 2.88(7) was included in the Rules pursuant to the Insolvency (Amendment) Rules 2003/1730 (the "**2003 Rules**") (which are subordinate legislation), it was intended to take precedence over, and indeed contravene, these express provisions of the primary legislation in the Act (enacted in 1986) which constitute the statutory waterfall in a winding up. Nothing in the legislative history supports such an approach. On the contrary:

a. The preamble to the 2003 Rules **[Auths3/28]** provides that the 2003 Rules were made by the Lord Chancellor in exercise of the powers conferred on him by ss.411-412 of the Act **[Auths2/48,52]**.

b. S.411(1) **[Auths2/48]** provides that Rules may be made for the purpose of giving effect to Parts I to VII of the Act. S.411(2) provides that, without prejudice to the generality of subsection (1), rules under s.411 may contain (*inter alia*) any such provision as is specified in Sch. 8 to the Act **[Auths9/27]**. None of the provisions as specified in Sch. 8 to the Act or any of the other provisions referred to in s.411(1) or s.411(2) provide for rules to be made which would contravene the statutory waterfall applicable in a winding up as established by the Act.

c. Indeed, rather than "*giving effect*" to Parts I to VII of the Act, the Court of Appeal's interpretation of Rule 2.88(7) cuts across it.

d. The explanatory note to the 2003 Rules **[Auths3/29]** explains: "*The main amendment is the substitution of Part 2 of the 1986 Rules by the provisions set out in Part 2 of Schedule 1. This Part of the Schedule sets out the detailed rules for the administration procedure that was introduced as Schedule B1 to the Insolvency Act 1986 by section 248 of the Enterprise Act 2002 in substitution for Part II of the Insolvency*

Act 1986. The substituted Part 2 of the 1986 Rules draws substantially on the existing rules but makes new provisions in consequence of the revised and extended administration procedures introduced by the Enterprise Act 2002". There was no suggestion that the introduction of Rule 2.88(7) **[Auths1/4]** was to have the effect of altering the statutory waterfall in a winding up.

32. **Fourth**, where it is intended that there is to be a charge on property of which an administrator had control prior to the cessation of his appointment, the statute expressly provides for that: see e.g. paras 99(3)-(4) of Schedule B1 to the Act **[Auths3/21]**. There is no such wording apt to create a charge (whether in the form of a "statutory burden"/*Quistclose* trust or otherwise) in Rule 2.88(7). The wording in Rule 2.88(7) simply echoes that in s.189 **[Auths1/2]**. David Richards J was correct to say (at [71] **[CoreD/5/98]**) that Rule 2.88(7) "*does not create a proprietary or equitable interest in the surplus in favour of those creditors*". Lewison LJ (at [107] **[CoreD/3/35-36]**) considered that the Court did not need to select a "*private law label"* for the means by which Rule 2.88(7) continues to operate in a liquidation following an administration. However, in the absence of clear statutory language, any solution should be established by reference to an existing legal process, and the Court of Appeal did not establish what that process is or how it works.

33. For his part Briggs LJ considered that although *"a charge has to have somebody who can enforce the charge ... a Quistclose trust ... used to be thought of as a sort of purpose trust and for this purpose it is probably a convenient way to look at it ... The purpose affects the whole fund. No part of the fund can be used until that purpose has been complied with"* **[CoreE/9/43, lines 9-21]** and said in the Judgment at [135] **[CoreD/3/41]** that he found the "*Quistclose-type trust analysis of the effect of rule 2.88(7) of the Insolvency Rules 1986 to be the best way, in legal terms, of giving effect to the clear legislative intent embodied in that provision"*. However, a **Quistclose** trust arises when A pays or transfers money to B to apply the money or property for a stated purpose and this analysis cannot properly be applied to a surplus (arising after payment of proved debts in an administration) coming into the hands of

a liquidator where the administration has ceased and the assets are to be applied by the liquidator in accordance with the statutory scheme applying in liquidation[7].

34. **Fifth**, if the Court of Appeal's approach regarding the continued application of Rule 2.88(7) **[Auths1/4]** in a winding up immediately following an administration were correct, then, given the equivalent language in s.189(2) **[Auths1/2]**, it ought to apply equally to s.189(2), in circumstances where an administration immediately follows a winding up. This would have the effect that when the administrators take custody and control of a surplus which had been previously administered by liquidators, that surplus would be subject to a "statutory burden"/*Quistclose* trust taking precedence over the statutory waterfall applicable in an administration, such that the administrators would be required to apply that surplus in paying statutory interest for the liquidation period on debts proved in the liquidation. However, this would be inconsistent with the statutory waterfall in an administration, including the amended version of Rule 2.88(7), which (as set out above) now provides that any surplus remaining **after** payment of the debts proved[8] shall be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the date on which the company went into liquidation.

The correction of legislative mistakes by a Court

35. The lacuna arises because s.189(2) of the Act does not provide for an administration start date for statutory interest, where an administration immediately precedes a liquidation. The Court of Appeal attempted to fill that lacuna by holding that Rule 2.88(7) continues to survive in a liquidation following an administration, and to circumscribe the liquidator's administration of the assets in his custody and control.

36. The Court of Appeal did not acknowledge that what they were, in effect, doing was seeking to correct (albeit in part, and with limited effect) what they implicitly considered to be a legislative mistake. The Court of Appeal's approach, however, failed to meet the test for the Court to correct drafting errors in statutory language. As

[7] If further analysis is required, the position also differs from that in which a *Quistclose* trust might arise because there is no transfer of legal title to assets (which at all times remains with the company) and thus nothing to be returned in the event of a failure of purpose. In addition, Rule 2.88(7) is simply a direction as to how money is to be paid; it does not create the proprietary or equitable interest that is fundamental to a *Quistclose* trust.

[8] Rule 2.72(6), as in force from 6 April 2010 **[Auths3/38]**, provides that where an administration is immediately preceded by a winding up, a creditor proving in the winding up is deemed to have proved in the administration.

Lord Nicholls explained in **Inco Europe Ltd v First Choice Distribution** [2000] 1 WLR 586, 592 **[Auths5/3/5-6]**:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words....
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in Jones v. Wrotham Park Settled Estates [1980] A.C. 74, 105–106. In the present case these three conditions are fulfilled.
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In Western Bank Ltd. v. Schindler [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation."

37. The Court cannot re-write the statutory provisions on insolvency interest:

(1) The relevant provision which would have to be amended is s.189(2) **[Auths1/2]**, because that is the provision that governs the payment of post-insolvency interest in a liquidation. The intended purpose of s.189(2), which is part of primary legislation, must be ascertained at the time it was enacted. Given that this was before the changes to the law made by (and after) the Enterprise Act 2002 in relation to the administration procedure, and the changes to the Rules made by the Insolvency (Amendment) Rules

2005 and the Insolvency (Amendment) Rules 2010 to provide that the relevant date is the date of the first insolvency procedure where a company moves between liquidation and administration (or vice versa), there was no mistake in s.189(2) **[Auths1/2]** when it was enacted, and it was not intended to provide for the payment of interest during the period of an administration immediately preceding the liquidation.

(2) Even if Rule 2.88(7) **[Auths1/4]** is treated as the relevant provision for ascertaining intended purpose, it was not intended to continue to operate in a liquidation, where a liquidation immediately follows an administration.

(3) The Court cannot be sure or abundantly sure that by inadvertence the draftsman failed to give effect to the relevant intended purpose, particularly given that the legislature has amended some of the statutory provisions to provide for an administration start date for statutory interest where an administration immediately precedes a winding up but there has been no amendment to s.189 **[Auths1/2]**. This is not a case of correcting a drafting mistake but rather the insertion of a new provision or new wording that is currently not there.

(4) The Court cannot be sure of the substance of the provision Parliament would have made, had the lacuna been noted. It may be considered most likely that Parliament would have amended s.189(2) to provide for an administration start date for statutory interest where a liquidation is immediately preceded by an administration. However, that is not the approach the Court of Appeal took. Instead, it held that Rule 2.88(7) interest continues to be payable in a liquidation following a winding up.

(5) In any event, the insolvency legislation is not an appropriate field in which the Court should rewrite the statute, given the need for certainty in the context of a highly technical and sophisticated code that has to be applied on a day-to-day basis by insolvency practitioners (c.f.: the approach of (i) Briggs J in **Bloom v The Pensions Regulator** [2011] Bus LR 766 at [111]-[123] **[Auths4/12/798-801]**, refusing, "*sorely tempted*" though he was, to read the pre-2010 version of Rule 13.12 **[Auths1/6]** as if it had always

provided for an administration cut-off date in the context of debts proved in a liquidation immediately following an administration, in particular at [120]; (ii) Mummery LJ in **Portsmouth City Football Club** [2014] 1 All ER 12, in the context of administration expenses, at [35] **[Auths6/5/20]** ("*If there is in fact a lacuna or an anomaly in the 1986 Rules, then the point should be addressed by express amendment of the legislation or of the Rules. There is no case for judicial legislation dressed up as benevolent statutory interpretation of either the 1986 Rules or s.51 of the 1981 Act....*"); and (iii) Lord Neuberger in **Re Nortel** at [126] **[Auths1/17/249]**: "*the mere fact that the court does not think it fair that a particular statutory liability should not rank as a provable liability under the relevant statutory provisions is not enough to justify a decision to alter the effect of those provisions*").

(6) The Court should be aware that the construction of Rule 2.88 **[Auths1/4]** that is adopted would also apply to the proposed Insolvency Rules 2016, Rule 14.23 **[Auths8/16/295]** which consolidates Rules 2.88, 4.93 and the equivalent for bankruptcy proceedings. There is no indication in the Explanatory Note to the proposed Insolvency Rules 2016 that interest under Rule 14.23(7) is to continue to be payable in a winding up following an administration **[Auths8/14]**.

38. Thus the lacuna is one for the legislature, not the Court, to resolve.

Further difficulties with the Court of Appeal's approach

39. The Court of Appeal's approach also gives rise to unjustifiable discrepancies.

40. **First**, the Court of Appeal's proposed solution would not apply to creditors who did not lodge a proof in the administration. This would give rise to a bifurcated regime in a liquidation immediately following an administration whereby:

(1) Creditors who proved in the administration would be entitled to: (i) interest under Rule 2.88(7) for the period of the administration out of the surplus that existed in the administration which is subject to the Court of Appeal's "statutory burden"/*Quistclose* trust and which is subsequently administered

by the liquidator; and (ii) interest under s.189(2) **[Auths1/2]** for the period of the liquidation, in the event of a surplus after the payment of the debts proved in the liquidation.

(2) Creditors who did not prove in the administration but only proved in the liquidation would only be entitled to interest under s.189(2) for the period of the liquidation, in the event of a surplus after the payment of the debts proved in the liquidation.

41. This bifurcated regime cannot have been what was intended by the legislature, and (in addition to its inconsistency with the statutory waterfall as explained above) it is impossible to reconcile with, for example, s.189(3) (which provides that all interest under s.189 ranks equally, whether or not the debts on which it is payable rank equally) or Rule 4.73(8) **[Auths3/45]** (which provides that where a winding up is immediately preceded by an administration, a creditor proving in the administration is deemed to have proved in the winding up).

42. **Second**, and relatedly, the Court of Appeal's approach would not provide any assistance in the case of an administration which has not become a distributing administration, because it only assists creditors who lodged a proof in the administration. As David Richards J pointed out at [125] **[CoreD/5/114]**, it may be thought more likely in the case of a non-distributing administration that a company would subsequently go into liquidation, and the absence of any provision dealing with interest for the period of an administration in the case of a non-distributing administration is "*very telling*".

43. **Third**, the Court of Appeal's approach applies **only** to a surplus in the administration after the payment of debts proved in the administration. It does not apply so as to allow the payment of interest for the administration period from a surplus arising for the first time in the liquidation.

LBIE's Cross-Appeals

44. In the event that the appeal of LBL, LBHI2 and LBHI against paragraph 4 of the Court of Appeal's order succeeds, LBIE cross-appeals:

(1) By way of "fall back argument",9 to contend that any right to statutory interest arising in LBIE's administration under Rule 2.88(7) **[Auths1/4]** will be provable in a subsequent liquidation of LBIE (to the extent that such a right has not been satisfied in the preceding administration); and

(2) Further or alternatively, to contend that interest on provable debts accruing for the period of LBIE's administration, other than under Rule 2.88(7) and/or s.189 **[Auths1/2]**, is recoverable in a subsequent liquidation as a non-provable claim.

45. Neither cross-appeal should be allowed. As set out in detail below, LBIE's first cross-appeal is contrary to the statutory scheme which, by s.189 and Rules 13.12(1)(c) **[Auths1/6]** and 4.93 **[Auths3/53]**, expressly provides for payment of interest in a liquidation and prohibits post-administration interest from being provable in a subsequent liquidation; its second cross-appeal is contrary to the intention that the statutory scheme provides a complete code, including so as to exclude any reversion to contractual rights in respect of the payment of interest. It is also contrary to the clear legislative and judicial policy intended to eliminate non-provable liabilities.

LBIE's First Cross-Appeal

46. LBIE's first cross-appeal is addressed only briefly, at paras 91 to 96 of LBIE's Case **[CoreC/1]**. It is based upon the contention that an obligation to pay statutory interest under Rule 2.88(7) that was not met during the course of an administration comprises a liability[10] for the purposes of Rule 13.12(1)(a), being a "*debt or liability to which the company is subject at the date on which it goes into liquidation*", so as to give rise to a provable claim.

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[9] Case of the Joint Administrators of Lehman Brothers International (Europe) (In Administration) ("**LBIE's Case**") at para 91 **[CoreC/1]**.

[10] See LBIE's Case at para 95 **[CoreC/1]**, referencing its further submissions that the payment of statutory interest is a *liability* arising in LBIE's liquidation (LBIE's Case at paras 39 and 140ff). LBIE correctly conceded for the purposes of the arguments regarding s.74 that "*debts*" do not include statutory interest (see Briggs LJ's judgment at [175] **[CoreD/3]**: *"it is common ground that the word "debts" does not include statutory interest or non-provable liabilities, but rather refers only to provable debts. Mr Trower made this concession to the judge, on the basis of rules 12.3 and 13.12. The judge accepted that it was rightly made, and no argument to the contrary was advanced in this court"*).

47. This is a surprising stance; post-administration interest is expressly **not** provable in a subsequent liquidation by virtue of Rules 4.93(1) **[Auths3/53]** and Rule 13.12(1)(c) **[Auths1/6]** (which LBIE fails to address in its case).

48. LBIE's current position is also contrary to the stance it took at first instance, in its written argument before the Court of Appeal, and until Day 3 of the hearing before the Court of Appeal, that interest for the period of the administration which was not paid in the administration would **not** be provable in a subsequent liquidation.[11]

LBIE's construction of Rule 13.12 is incorrect: statutory interest is not a debt or liability under Rule 13.12(1)(a)

49. LBIE's contention that an obligation to pay statutory interest unpaid in an administration is provable in a subsequent liquidation by reason of Rule 13.12(1)(a) **[Auths1/6]**, as a "*debt or liability to which the company is subject at the date on which it goes into liquidation*", is inconsistent with the clear words of Rules 13.12(1)(c) and 4.93(1). Rule 13.12(1)(c) expressly and exclusively deals with what interest is provable in a liquidation by applying the test in Rule 4.93(1) **[Auths3/53]**: "*any interest provable as mentioned in Rule 4.93(1)...*". As set out above, the version of Rule 4.93(1) that will apply to a liquidation of LBIE provides: *"Where a debt proved in the liquidation 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 went into liquidation or,* ***if the liquidation was immediately preceded by an administration, any period after the date that the company entered administration***" (emphasis added).

50. Rule 4.93(1) thus expressly and clearly prohibits interest accrued in the period of LBIE's administration from being provable in a subsequent liquidation. Further, by virtue of the deeming provision in Rule 4.73(8) **[Auths3/45]** (which is in mandatory and unqualified terms), the reference in Rule 4.93(1) to "*a debt proved in the liquidation*" includes all debts proved in the administration.

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[11] See the transcript of the hearing before David Richards J **[CoreE/1/122-123, 126-127] [CoreE/2/63-64]**, para 123 of the judgment of David Richards J **[CoreD/5]**, declaration (iv) made by David Richards J (which, as regards the non-provability of interest during the administration period, LBIE did not appeal) **[CoreD/4]**, and the transcript of the Court of Appeal hearing **[CoreE/7/66, 68]**.

51. It would be inconsistent with Rule 4.93(1) for statutory interest accruing during LBIE's administration to be provable in a subsequent liquidation under Rule 13.12(1)(a), as either a debt or a liability. The sub-paragraphs of Rule 13.12(1) must be read together in a coherent and sensible manner.[12] Given the unambiguous terms of Rule 13.12(1)(c), there can be no room to try to shoe-horn any alleged further entitlement to interest into sub-paragraph (a) of Rule 13.12(1) **[Auths1/6]**. Rule 13.12(1)(c) is the exclusive provision in Rule 13.12(1) regarding interest (referring as it does to *"interest provable as mentioned in Rule 4.93(1)"*), and Rule 13.12(1)(a) cannot be construed as providing for provable interest in wider terms than provided for in Rule 13.12(1)(c).

52. LBIE's suggested construction of Rule 13.12(1)(a) is also inconsistent with the plain intention of the entire statutory scheme that once a company enters into an insolvency process, interest following the date the company entered the insolvency process is not provable, but is only payable if there is a surplus after proved debts (in accordance with the summary of the statutory waterfall set out in Lord Neuberger's judgment in **Re Nortel [Auths1/17/231]**). If statutory interest for the administration period were provable in a subsequent liquidation, that would undermine the *"freeze"* effectively put in place when a company goes into administration or liquidation, which is a necessary part of the *pari passu* distribution process.

Statutory interest is not a debt or liability to which LBIE would be subject on the date on which it goes into liquidation

53. Whilst the LBL Administrators accept the finding of Briggs J in **Bloom v The Pensions Regulator** [2011] Bus LR 766; [2010] EWHC 3010 (Ch) **[Auths4/12]** that, on the proper construction of this version of Rule 13.12(1) the cut-off date for the provability of a relevant debt or liability will be the date of the commencement of the liquidation (rather than the date of the commencement of the preceding administration)[13], this is of no import where rule 13.12(1)(c) expressly provides for interest and, if there are two consecutive insolvency processes, the cut-off for

[12] See, by way of analogy, the approach of Lord Neuberger to the interrelationship of Rules 13.12(1)(a) and 13.12(1)(b) in **Re Nortel** at [68]-[71] **[Auths1/17/237]**.
[13] Indeed, LBL relies upon aspects of Briggs J's reasoning in this decision in the context of its appeal on the statutory interest point, as set out above

provable interest is the date of the commencement of the first insolvency process: see Rule 2.88(1) **[Auths1/4]** (set out above at para 18(1)) and Rule 4.93(1) **[Auths3/53]**.

54. Rules 13.12(1)(c), 4.93(1) and 4.73(8) **[Auths3/45]** as set out above are a complete answer to LBIE's cross-appeal contending for statutory interest for the administration period to be provable in a subsequent liquidation.

55. Moreover and in any event, LBL rejects the assertion that the obligation to pay statutory interest arising in an administration is a liability of LBIE which continues into liquidation for the reasons set out above: Rule 2.88(7) **[Auths1/4]** is simply a direction to the administrators of LBIE as to how to apply a surplus which arises after proved debts have been paid in full in LBIE's administration, and it has no application outside the administration process. It does not create a debt or liability to which LBIE would be subject on the date on which it goes into liquidation; see above at paras 28 to 33; and see too LBHI2's Written Case at para 145 **[CoreB/1]**.

56. Further, as explained in LBHI2's Written Case at para 43.2, statutory interest is not a debt or liability of the company: in **Re Lines Bros Ltd** [1984] BCLC 215, at 223 **[Auths1/16/223]**, Mervyn Davies J correctly explained that "*At no stage can statutory interest be regarded as a debt or liability of the company. A liquidator's obligation under s.33(8) to pay interest out of a surplus is pursuant to a statutory direction to [the liquidator], being an obligation which is part of the statutory scheme for dealing with a company's assets which comes into operation at the outset of the winding up.*" This reasoning is entirely correct and LBIE's attempt to circumscribe what Mervyn Davies J meant by "*At no stage*" (para 167 of LBIE's Case **[CoreC/1]**) is an unwarranted gloss on the judgment.

57. Although the context of Mervyn Davies J's decision concerned a different provision (namely, s.33(8) of the Bankruptcy Act 1914, which provided that "*If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy*" **[Auths2/4]**), the provision, which itself is no longer in effect, dealt with the payment of post-insolvency interest in the event of a surplus existing (after payment of all the debts and liabilities of the company that needed to be paid to satisfy the solvency test then set out in s.317 of the Companies

Act 1948 **[Auths2/11]**).[14] Mervyn Davies J was correct to characterise statutory interest under s.33(8) in this way (ie not as a debt or liability of the company), and the same characterisation applies in respect of statutory interest under s.189 **[Auths1/2]** and Rule 2.88(7).

Further reasons to reject LBIE's first cross-appeal

58. In addition, if statutory interest accrued in the administration period were provable in a subsequent liquidation, then claims for interest for the administration period would compete with creditors with provable claims for principal in the liquidation who did not prove in the administration. That too is inconsistent with the statutory scheme, in particular because:

(1) On the clear terms of s.189(2) **[Auths1/2]** and Rule 2.88(7) **[Auths1/4]**, interest following the commencement of the insolvency is to rank behind provable debts and should only be payable if there is a surplus after the payment of such debts. Post-insolvency interest should not compete with, and reduce the assets available for distribution to, claims for principal and LBIE offers no justification or explanation for this issue which is created by their contention.

(2) LBIE does not (and cannot, in light of the amended version of Rule 2.88 referred to in para 20 above **[Auths1/5]**) suggest that in the reverse situation, where a winding up precedes an administration, statutory interest for the period of the winding up which is not paid in the winding up would be provable in the administration. Where a winding up immediately precedes an administration, Rule 2.88(7) (as amended in 2010) provides for statutory interest to be payable in the administration for both the period of the winding up and the period of the administration, and Rule 2.88(1) provides for interest to be provable as part of the debt in the administration only up to the date of the winding up. If LBIE's construction of Rule 13.12(1)(a) **[Auths1/6]** were correct, it would also apply as regards provability in an administration, including an administration preceded by a winding up. However, the fact that LBIE does not contend for this

[14] Now, of course, dealt with instead by the provisions of the 1986 Act and Rules which relate to liquidation, administration and bankruptcy

demonstrates that in the converse situation i.e. where an administration precedes a winding up, statutory interest for the period of the administration cannot be provable in the winding up. LBIE's suggested approach thus gives rise to an unsustainable and unprincipled inconsistency between the treatment of Rules 2.88(1) **[Auths1/4]** and Rule 4.93(1) **[Auths3/53]**.

Conclusion on LBIE's first cross-appeal

59. LBIE's cross-appeal contending that statutory interest accrued during the period of its administration is provable in a subsequent liquidation should therefore be rejected. LBIE was correct in its initial concession that statutory interest under Rule 2.88(7) for the period of LBIE's administration would not be provable in a subsequent liquidation of LBIE. This is an example of first thoughts being best thoughts.

LBIE's alternative second cross-appeal on declaration (v): non-provable post-insolvency interest

60. LBIE cross-appeals in the alternative against the Court of Appeal's allowing of the appeal against declaration (v) of David Richards J, which was in the following terms **[CoreD/4/75]**:

> "Those creditors of LBIE entitled to interest on their provable debts otherwise than under rule 2.88(7) of the Rules or section 189 of the Act will be entitled to claim in a liquidation of LBIE, which immediately follows the administration, for interest which accrued during the period of the administration, as a non-provable claim against LBIE, payable after the payment in full of all proved debts and statutory interest on such debts."

61. The only reasoning in David Richards J's judgment in Waterfall I in support of declaration (v) is at [127] **[CoreD/5/114]**, where the learned Judge said, following his analysis of why post-administration interest is neither provable nor payable as statutory interest in a subsequent liquidation:

> "In those circumstances, consistently with what I have earlier held as regards non-provable liabilities, I see no reason why creditors whose debts carried interest prior to the administration, whether by way of contract, judgment interest or otherwise, should not in the liquidation be entitled to claim interest at such rate for the period of the administration as a non-provable liability. In my judgment, the reasoning in *In re Humber Ironworks and Shipbuilding Co* LR 4 Ch App 643 applies and, as Giffard LJ put it at p 647, "the creditor whose debt carries interest is remitted to his rights under his contract" or, as I would add, any other rights to interest which he may enjoy."

62. The Court of Appeal allowed the appeal against declaration (v) on the basis that, because of their decision regarding the effect of Rule 2.88(7) **[Auths1/4]**, the question of whether post-administration interest could give rise to a non-provable claim did not arise: see Lewison LJ's judgment at [112], with which Briggs LJ and Moore-Bick LJ agreed ([133] and [246]) **[CoreD/3/36, 40, 66 respectively]**. Further, as regards David Richards J's declaration (v), Lewison LJ (with whom Brigs LJ and Moore-Bick LJ agreed) said at [110]: *"The judge's solution was to hold that an entitlement to statutory interest could be pursued in a liquidation as an independent non-provable claim. However, as I have said the prevailing policy, both legislative and judicial, is to discourage and where possible to eliminate non-provable claims. I do not consider that the invention of a new species of non-provable claim is the right solution."*

No non-provable claim for post-administration interest in a liquidation immediately following an administration

The statutory code for interest

63. The statutory regime for the payment of interest in a liquidation introduced by s.189[15] **[Auths1/2]** and Rule 4.93 **[Auths3/53]** (and, in respect of an administration, by Rule 2.88) replaces any pre-existing contractual (or other) rights to interest that would otherwise accrue for the period of the insolvency.

64. S.189 applies to both solvent and insolvent liquidations. S.189(1) provides: *"In a winding up interest is payable* ***in accordance with this section*** *on any debt proved in the winding up, including so much of any debt as represents interest on the remainder"* (emphasis added). S.189(2) goes on to provide for the payment of post-liquidation interest on debts proved in a winding up out of any surplus remaining after the payment of the debts proved in the winding up. Rule 4.93(1) provides that interest on interest-bearing debts proved in the liquidation is provable in the liquidation except insofar as payable in respect of any period after the company went into liquidation (or, if the liquidation was immediately preceded by an administration, any period after the date the company entered administration), ie there is an express prohibition on proving for any post-insolvency interest **[Auths3/53]**.

[15] In fact, the equivalent to s.189 was first introduced by s.93 of the Insolvency Act 1985, but the provisions of the 1985 Act were re-enacted in the consolidating 1986 Act.

65. These provisions were brought into effect following the Cork Committee's consideration of interest in insolvency proceedings in Chapter 31 of its Report (and, in respect of interest in an administration under Rule 2.88 **[Auths1/4]**, following the changes to the administration process made by the Enterprise Act 2002). In relation to post-insolvency interest, the Cork Committee said, at paras 1383-1384 **[Auths8/3/313-314]**:

> "1383. Section 33(8) of the Act of 1914[16] provides that if, after all the proving creditors have been paid in full, the bankrupt's estate still has a surplus, it is to be applied first in paying interest from after the date of the receiving order at the rate of 4% per annum on all debts proved in the bankruptcy. Any balance then belongs to the bankrupt.
>
> 1384. There is no similar provision in the winding up code; moreover, unlike section 66 of the Act of 1914,[17] the provisions of section 33(8) are not imported into the Companies Acts. Section 317 of the Act of 1948 which imports the rules in force for the time being in bankruptcy affecting the respective rights of creditors, refers specifically to 'insolvent companies' and case law has distinguished the treatment of creditors of insolvent companies on the one hand and of solvent companies on the other. Provided that there is a surplus after the proving creditors have been paid in full, therefore, the company is to be treated as no longer insolvent. This means that the creditor who is entitled to interest on the debt for which he has proved may recover the interest accruing after the presentation of the winding up petition as if there had been no winding up at all. On the other hand, the creditor who is not entitled to interest at the commencement of insolvency proceedings has no means of recovering interest at a later stage even though the company may be in a position to pay."

66. The Committee referred (at para 1386 **[Auths8/3/314]**) to the anomaly between the different treatment of interest in different types of insolvency proceedings. The

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[16] A reference to the Bankruptcy Act 1914. The history to the statutory regimes for post-insolvency interest in bankruptcy and winding up is summarised in David Richards J's judgment in the **Waterfall IIA** proceedings at [46]-[57], [68]-[75] and [90]-[95] **[Auths1/14]**.

[17] As for pre-insolvency interest, s.66(1) of the Bankruptcy Act 1914 provided **[Auths9/26]**: "*Where a debt has been proved, and the debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per cent per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full.*" This provision was applicable in a winding up: **Re Theo Garvin Ltd** [1969] 1 Ch 624, at 656A **[Auths6/14/656]**. It is noteworthy that, in the case of pre-insolvency interest, the legislation expressly provided that a creditor reverted to his contractual right to pre-bankruptcy interest at a rate higher than the 5% referred to in s.66(1) after all the debts proved had been paid in full, and that this was expressly considered by the Cork Committee in Chapter 31 of their Report (paras 1363-1381 **[Auths8/3/310-313]**, and see in particular para 1378 explaining that "*There is no doubt that section 66 has proved impracticable to apply in companies winding up, and is a source of delay, expense and embarrassment*", and para 1380 where the Committee recommended the complete repeal of s.66). In contrast, there is no similar wording in the Act or the Rules for post-insolvency interest which provides that a creditor reverts to his contractual right to interest, which is consistent with the view that the contractual right is replaced in an administration or winding up by the statutory regime for interest.

Committee recommended a common set of rules for pre- and post-insolvency interest in all forms of insolvency proceedings and, as regards the latter, they recommended in para 1395(c) that **[Auths8/3/316]**: "*during the insolvency, in the event of there being a surplus after payment of all admitted debts and liabilities (including interest prior to the commencement of the insolvency, where applicable) interest should run on all such debts and liabilities until a final dividend is declared, the rate being that currently applicable to judgment debts at the commencement of the insolvency.*" In the Committee's view, simplicity and certainty were essential (para 1392 **[Auths8/3/315-316]**).

67. The Government in large part accepted the Committee's recommendations, with the principal difference being that post-insolvency interest should be payable at the higher of the judgment rate and the contractual or other rate otherwise applicable to the debt.

68. The legislative intent was, therefore, to create a complete code for post-insolvency interest, to be paid after the debts proved in the insolvency, on all such debts, prior to any return to the members (as set out in the summary of the statutory waterfall provided by Lord Neuberger in **Re Nortel [Auths1/17/230-231]**). As explained in Sealy & Milman's *Annotated Guide to the Insolvency Legislation* 17th edn., Vol.1, p196 (the most recent version published prior to the report of the **Waterfall IIA** proceedings), there is no provision for the payment of interest in the course of winding up except in accordance with the statutory provisions **[Auths8/17]**. See also Palmer's Company Law, Vol. 4, [15.470] **[Auths8/13]**: "*Under the Insolvency Act 1986 a complete change was made to the law concerning the payment of interest on debts proved in a winding up....*".

69. Furthermore, although David Richards J erroneously made declaration (v), a number of passages in his judgment in the **Waterfall IIA** proceedings [2016] BCC 239; [2015] EWHC 2269 (Ch) **[Auths1/14]** (in which he considered statutory interest further in light of a number of additional issues raised regarding the calculation and payment of such interest) acknowledge that the 1986 legislation established a new and complete code for interest, such that it cannot properly be said the position of the LBL

Administrators represents a misunderstanding of that judgment, or indeed paragraph 164 of it[18]:

(1) In the context of considering (and rejecting) an argument by creditors of LBIE that statutory interest should be calculated on the basis of allocating dividends first to the payment of accrued statutory interest at the date of the relevant dividends and only then in reduction of the principal, the learned judge made clear in the following passages that the right to interest under Rule 2.88(7) **[Auths1/4]** (in an administration) is a purely statutory entitlement and does not involve any remission to contractual or other rights to interest:

a. At [132]: *"There is no doubt that the provisions of the 1986 insolvency legislation dealing with post-insolvency interest were new. As a number of distinguished commentators have observed, section 189 represented a complete change to the law concerning the payment of interest on debts proved in a winding up: see, for example, Fletcher: The Law of Insolvency, 4th ed (2009), para 24–045."*

b. At [149]: "*....The entitlement under rule 2.88 does not involve any remission to contractual or other rights existing apart from the administration....*" (See also [136].)

c. At [152]: *"In my judgment, the purpose behind the introduction of the new regime for post-insolvency interest in all insolvency proceedings was to introduce a straightforward regime for the payment of such interest..."* **[Auths1/14].**

(2) David Richards J also made a number of other relevant observations as to the effect of statutory interest, in the context of considering whether a creditor entitled to statutory interest, currency conversion claims or other non-provable claims would be entitled to any form of compensation for the time taken for such a claim to be discharged, and in considering whether creditors with rights to interest apart from the administration and who

[18] LBIE's Case at para 104.2 **[CoreC/1]**.

recovered less interest under Rule 2.88(7) **[Auths1/4]** than they might otherwise have done (for example because of the issue referred to in sub-para (1) above) had a non-provable claim for the balance. In particular **[Auths1/14]**:

a. At [162], he explained that "*Mr Zacaroli correctly submits that the regime introduced by rule 2.88 and the equivalent provisions for liquidation and bankruptcy cut across such contractual or other rights as creditors would otherwise have to the payment of interest...*".

b. At [163]-[164], he rejected the argument that removing the right to recover such part of a creditor's right to contractual or other interest to the extent not discharged by statutory interest under Rule 2.88(7) would contravene the principle that creditors should make a full recovery before any funds are paid to shareholders, and that the concept of remission to rights remained once the statutory scheme had run its course. Thus:

> "... The new approach introduced by the 1986 legislation for post-liquidation interest was intended to replace the previous law, as stated in *In re Humber Ironworks & Shipbuilding Co* LR 4 Ch App 643. Rule 2.88 is not a partial measure for dealing with post-insolvency interest. If it was only a partial measure, why provide that interest is payable at the rate applicable apart from the administration, if higher than judgment rate? ..." at [164].

(3) In the context of considering whether, in calculating Currency Conversion Claims, credit should be given for statutory interest, David Richards J again emphasised at [228] that Rule 2.88 is a complete code for the payment of post-administration interest and replaces all prior rights **[Auths1/14]**.

70. These observations as to the nature and effect of statutory interest are entirely correct, and are fundamentally inconsistent with his declaration (v) in these proceedings. The Act and the Rules now provide exhaustively for the payment of post-insolvency interest. As set out in paras 35-38 above, LBIE is effectively asking the Court to re-write and/or superimpose a new species of post-administration interest on what the

(exhaustive) scheme already provides. Post-administration, there is provision for payment of interest under Rule 2.88 **[Auths1/4]** (in the event of a surplus) and this provision replaces the creditor's contractual or other right to interest post-administration. There is power for administrators to pay post-administration statutory interest. It is important to bear in mind that there is only a 'lacuna' if the administrators decide to put LBIE into liquidation without having paid interest under Rule 2.88(7).

71. Further, the attempt by the LBIE Administrators to distinguish the position, by suggesting that the statutory code provides for post-liquidation and post-administration interest respectively "*but not for all interest*"[19] is misconceived. We are here dealing with a post-administration (and potentially post-liquidation) situation.

<u>The Court cannot partially ameliorate the lacuna by creating non-provable claims for post-administration interest</u>

72. The legislature intended that post-insolvency interest would not be provable in an administration or a liquidation, nor would it give rise to a non-provable claim, but would instead be payable out of a surplus after the payment of debts proved, and would be payable in respect of all debts (whether or not they otherwise bore interest) at the higher of the Judgments Act rate and the rate otherwise applicable to the debt.

73. The Court should not seek to partially ameliorate the issue that may arise in the circumstances of LBIE's administration (if LBIE's administrators decide to put LBIE into liquidation without having paid statutory interest under Rule 2.88(7)) by creating a non-provable claim for post-administration interest which is payable in a liquidation to creditors with pre-existing rights to interest. The references to **Bloom v Pensions Regulator [Auths4/12]** and **Portsmouth City Football Club [Auths6/5]** at para 37(5) above are repeated.

74. As explained in LBHI2's written case, non-provable liabilities (if they continue to exist) are now extremely rare, there is no statutory mechanism for dealing with them, and there is a clear legislative and judicial policy to eliminate non-provable liabilities

[19] LBIE's Case at para 104.1 **[CoreC/1]**.

(see Lewison LJ at [25] **[CoreD/3/12]** and Lord Neuberger in **Re Nortel** at [90] **[Auths1/17/241]**).

75. Further, the judicial creation of a new species of non-provable claim in a liquidation for interest for the period of an administration immediately preceding the liquidation would give rise to a number of anomalies. In particular:

(1) Because such claims would only be available to creditors whose debts carry interest apart from the insolvency, they would give rise to differential treatment between creditors with such rights to interest as compared to creditors without such rights, which is inconsistent with the legislative scheme which provides for equality as regards the payment of post-insolvency interest as between such classes of creditors. LBIE concedes that unlike statutory interest (which is payable in respect of all provable debts, regardless of whether or not they are interest-bearing debts apart from the insolvency), the non-provable claims for interest envisaged in declaration (v) only assist creditors whose debts are interest-bearing.[20]

(2) Moreover, if such non-provable claims exist, it is difficult to see why they would not also exist where the administration preceding the winding up is not a distributing one, or where a creditor did not prove in the administration but only for the first time in the liquidation, or where a claim was not paid in full in the administration. If so, then, in respect of creditors whose debts carried interest apart from the insolvency, the effect of such non-provable claims, where a liquidation immediately follows an administration, would be that:

a. For the period prior to the administration, the creditor could prove in the administration (if distributing) or liquidation for interest up to the date of the administration: Rule 4.93(1) **[Auths3/53]** and Rule 2.88(1) **[Auths1/4]**. Such a claim would be based upon the rate of interest applicable to the debt.

[20] LBIE's Case at paras 100 and 101 **[CoreC/1]**.

b. For the period of the winding up, interest would be payable to such creditors (along with all other creditors proving in the winding up) under s.189(2) **[Auths1/2]** out of any surplus remaining after the payment of all debts proved in the winding up, at the higher of the judgments rate and the rate otherwise applicable to the debt.

c. For the period of the administration preceding the winding up, there would be a non-provable claim in the liquidation for the pre-existing right to interest for the period of the administration, based upon the rate of interest applicable to the debt.

(3) However, this piecemeal regime applied through two different mechanisms for the payment of interest in two post-insolvency periods (the administration and the liquidation) does not make sense.

a. It is plain that, at least for the liquidation period, the creditor cannot assert any right to interest other than that provided for by s.189(2). To that extent, therefore, his contractual (or other pre-existing) rights to interest no longer exist.

b. It is difficult to fathom how a creditor's rights to interest can be extinguished for part of the insolvency period (the period of the liquidation) but remains intact (albeit only enforceable as a non-provable claim) for the period of the immediately preceding administration.

c. For example, interest payable for the post-liquidation period may be substantially more advantageous to the creditor than his pre-existing right to interest (e.g. if he had a contractual right to interest at 1%). Further, statutory interest would be payable for the period of the liquidation under s.189(2) on the debt proved which would include any pre-administration interest, effectively, therefore, giving the creditor compound interest, when the creditor may only have had a contractual right to simple interest. The creditor may, therefore, receive

significantly more interest for the liquidation period than his contractual (or other) rights provide for.

d. It is difficult to see how the piecemeal regime suggested by declaration (v) can operate in a principled way in practice. For example, would credit have to be given in calculating the non-provable claim for interest for the administration period for the increased interest the creditor may have received over and above his contractual (or other pre-existing) entitlement by virtue of statutory interest paid to him for the liquidation period under s.189(2) **[Auths1/2]**? If no such credit need be given, then the non-provable claim envisaged by declaration (v) is even more anomalous, as it enables a creditor to assert that his contractual (or other pre-existing) rights to interest have not been satisfied in full such that he should have a non-provable claim for interest for the administration period, in circumstances where the statutory interest he has received for the later liquidation period may significantly exceed his contractual (or other pre-existing) entitlement and he may, therefore, end up receiving significantly more than his contractual (or other pre-existing) entitlement to interest across the entire period.

No room for the Humber Ironworks reversion to contract theory

76. In light of the statutory code for the payment of post-insolvency interest in an administration or a liquidation, there is no room for the continued existence of the **Humber Ironworks [Auths1/11]** reversion to contract theory in order to permit the non-provable claims envisaged by declaration (v).

77. As explained in LBHI2's Written Case at paras 89-96 **[CoreB/1]**, the interest provisions introduced by the 1986 Act and Rules are inconsistent with a "remission to contract" approach. When **Humber Ironworks** was decided (almost 150 years ago), there was no statutory entitlement to post-insolvency interest, and the Court of Appeal held that only in the event of there being a surplus could creditors whose debts carried interest assert claims for interest accruing after the date of the winding up. However, in enacting s.189 and Rule 2.88 **[Auths1/4]**, and on the recommendation of the Cork Committee, the legislature did not adopt the **Humber Ironworks** reversion to

contract approach, such that it is no longer the case that a creditor of a company in liquidation or administration may recover interest as if there had been no winding-up at all. Instead, they adopted a new regime for the payment of statutory interest on all debts proved (regardless of whether or not, apart from the insolvency, they were interest-bearing debts).

78. Moreover, the Act and the Rules make no mention of any continuing contractual entitlement to interest in respect of the period after the company enters either administration or liquidation (unlike, for example, s.66(1) of the Bankruptcy Act 1914 **[Auths9/26]**, in relation to pre-bankruptcy interest, and on which see FN17 above). The statutory provisions do not permit the co-existence of any such continuing contractual (or other) entitlement.

79. In any event, the statutory scheme for post-insolvency interest introduced by the 1986 legislation produces a different and inconsistent result to that which would be produced by applying the reasoning in **Humber Ironworks**. The fact that the Act and the Rules replace such other rights as creditors may have in respect of interest on their debts for the post-insolvency period is also clear, in particular, from:

(1) The fact that interest is payable in respect of all proved debts, regardless of whether or not such debts were interest-bearing debts apart from the insolvency.

(2) The fact that the rate of interest for the post-insolvency period is not the rate otherwise applicable to the debt, but is the greater of the rate specified in s.17 of the Judgments Act 1838 **[Auths3/73]** and the rate applicable to the debt apart from the winding up: see s.189(4) **[Auths1/2]** and Rule 2.88(9) **[Auths1/4]**, granting a minimum rate to all creditors.

(3) The fact that post-insolvency interest ranks equally whether or not the debts on which it is payable rank equally: see s.189(3) and Rule 2.88(8).

(4) The fact that interest is payable on a sum comprising both the capital amount of the debt and any interest accrued up to the date of the insolvency, whether or not the debt carried any right to compound interest.

(5) The fact that interest is only payable to the extent of any surplus remaining after debts proved.

80. Further, the statutory code is capable of substantively affecting rights and may result in creditors not receiving all the entitlements that would have existed were it not for the insolvency. In accordance with the analysis of the House of Lords in **Ayerst v C&K (Construction) Ltd** [1976] AC 167 **[Auths4/6]**, the making of a winding up order brings into operation a statutory scheme for dealing with the assets of a company which is being wound up. As Oliver LJ explained in **Re Lines Bros** [1983] Ch 1, at 26 **[Auths1/15/26]**: "*That is the scheme of the statute and it does undoubtedly result in certain circumstances in the possibility of creditors getting less than their full contractual entitlement, even in a fully solvent liquidation*". See also Lewison LJ's judgment in these proceedings at [94] (in the context of his dissent on Currency Conversion Claims) as to the substantive effect of provisions of the insolvency legislation **[CoreD/3/31]**, Lawton LJ's judgment in **Re Lines Bros** [1983] Ch 1, at 14B-F **[Auths1/15/14]**, and the judgment of Slade J in **Re Lines Bros Ltd** (15 April 1981, unrep.) at p24 of the transcript **[Auths5/9/24]** :

> "When the winding-up occurs, the creditor obtains new statutory rights to participate under the statutory scheme of distribution in respect of his debt, as it exists at the winding-up date. For reasons already given, however, the nature of this right will not necessarily be the same as his original contractual right; the statute may compel some adjustment of that right, so that practical effect may be given to what I have described as the two central features of the statutory scheme. In some cases the adjustment will in the event be shown to have operated to the advantage of the creditor concerned. In other cases it will be shown to have operated to his disadvantage, as it has unfortunately operated to the disadvantage of the Bank in the present case. The creditor, however, who lodges with the liquidator a claim to be admitted as a creditor must, in my judgment, accept the rights conferred on him by the statutory scheme of distribution in respect of pre-liquidation debts, for better or for worse. Once the liquidation has intervened, it is a fallacy for him to assume that his original contractual rights against the company are necessarily preserved intact under the statutory scheme, even if, in the event, there proves to be a surplus available for a return to the contributories or for the payment of post-liquidation interest".

Conclusion on LBIE's second cross-appeal

81. For the reasons set out above, LBIE's alternative cross-appeal against the Court of Appeal's allowing of the appeal against declaration (v) should also be refused.

Conclusion

82. The Court of Appeal acknowledged that a complete solution would have to await Parliament's intervention. However, the limited "solution" set out by the Court of Appeal is not a solution at all and it is incorrect, because, in summary:

(1) It is inconsistent with the legislative scheme and, in particular, the statutory waterfall in a winding up;

(2) The lacuna is one for the legislature, not the Court, to resolve; and

(3) The Court of Appeal's approach gives rise to unjustifiable discrepancies in practice.

83. For these reasons, the Court of Appeal should not have allowed LBIE's appeal from declaration (iv) of the Order of David Richards J.

84. Further, LBIE's cross-appeals should be refused:

(1) LBIE's first cross-appeal, contending for statutory interest under Rule 2.88(7) during the period of LBIE's administration to give rise to a provable claim in a subsequent liquidation of LBIE, should be refused because:

a. It is inconsistent with Rules 13.12(1) and 4.93(1) which expressly prohibit such interest being provable in the liquidation.

b. The obligation to pay statutory interest in LBIE's administration would not be a debt or liability of LBIE if it goes into liquidation, for the purposes of Rule 13.12(1)(a).

c. Such a claim would contravene the statutory waterfall in a liquidation, pursuant to which post-insolvency interest is only to be payable after proved claims have been paid in full.

(2) LBIE's second cross-appeal, contending for non-provable claims for post-administration interest to be available in a liquidation following its administration, should also be refused:

a. There is no room for the remission to contractual or other rights to interest under the statutory scheme which provides a complete code for the payment of post-insolvency interest.

b. The creation of such non-provable claims would contravene the clear legislative and judicial policy to eliminate non-provable claims.

c. The piecemeal regime for interest to which such claims would give rise would give rise to unjustifiable discrepancies.

David Wolfson QC

pp.

Nehali Shah

One Essex Court
Temple
London EC4Y 9AR
David.Wolfson@oeclaw.co.uk; nshah@oeclaw.co.uk

pp.

Ruth den Besten

Serle Court
Lincoln's Inn
London WC2A 3QS
rdenbesten@serlecourt.co.uk