



[2019] EWHC 2932 (Ch)

CR-2017-007215

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
IN THE MATTER OF LONDON BRIDGE ENTERTAINMENT PARTNERS LLP (IN
ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
AND THE LIMITED LIABILITY PARTNERSHIP REGULATIONS 2001

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 12/11/2019

Before :

ICC JUDGE BARBER

Between :

HENRY ANTHONY SHINNERS AND NICHOLAS MYERS
(JOINT ADMINISTRATORS OF LONDON BRIDGE
ENTERTAINMENT PARTNERS LLP)

Applicants

- and -

LONDON TROCADERO (2015) LLP

Respondent

Stephen Robins (instructed by **Howard Kennedy LLP**) for the Applicants
Zia Bhaloo QC (instructed by **Hogan Lovells LLP**) for the Respondent

Hearing dates: 4 April and 16 July 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

ICC Judge Barber
.....
12/11/19

ICC Judge Barber

1. This is the application of Henry Shinners and Nicholas Myers, as joint administrators of London Bridge Entertainment Partners LLP ('the Company'), for directions under paragraph 63 of Schedule B1 to the Insolvency Act 1986 as to:
 - (1) Whether the obligation of the Company to provide further security to the Respondent, London Trocadero (2015) LLP ('the Landlord') under clause 5 of a rent deposit deed dated 2 November 2007 ('the Rent Deposit Deed') is a debt owed by the Company to the Landlord which is capable of falling within the principle in *Re Lundy Granite Co Ltd* (1871) LR 6 Ch App 462 in the administration of the Company, as opposed to a contractual obligation of the Company of the type (outside the Company's administration) that would ordinarily fall to be enforced by an action by the Landlord for specific performance;
 - (2) Whether the provision of further security to the Landlord under clause 5 of the Rent Deposit Deed would be contrary to the *pari passu* rule in the Company's administration, or otherwise contravene the statutory scheme for administration under Schedule B1; and, if so, whether the Applicants, as the joint administrators of the Company, should decline on that basis to provide any further security to the Landlord;
 - (3) Depending on the Court's answers to the questions in paragraphs (1) and (2) above, whether the Landlord's application by Amended Application Notice dated 26 January 2018 ('the First Application') and/or the Landlord's application by Application Notice dated 5 November 2018 ('the Second Application') should be struck out or dismissed;
 - (4) Costs, including, if appropriate, the costs of the First Application and/or the Second Application;
 - (5) Such further or other relief as the Court thinks fit.

The Parties

2. The Respondent is the registered proprietor of The London Pavillion, 1 Piccadilly, London W1 ('the Building'), a large five-storey building situated in a prominent location occupying a corner site on Piccadilly Circus. The Company was the lessee of parts of the Building under various leases. The premises demised to the Company were used as a museum trading under the name 'Ripley's Believe it or Not!' The Applicants ('the Administrators') are the joint administrators of the Company, having been appointed on 29 September 2017.

Agreement for Lease

3. By an agreement for lease dated 4 July 2007 made between (1) London Trocadero Limited and (2) the Company ('the Agreement for Lease'), it was agreed (a) that London Trocadero Limited would grant and the Company would accept a lease in the terms summarised in Paragraph 4 below and (b) that the parties would enter into a rent deposit deed in the terms summarised at Paragraphs 6 to 8 below.

The Lease

4. By a lease dated 2 November 2007 made between (1) London Trocadero Limited and (2) the Company ('the Lease'), Units G3, G4, G7, C9 and C10 and parts of the first, second, third, fourth, and fifth floors of the Building ('the Property') were demised to the Company for a term of 25 years commencing on 2 November 2007 at an initial basic rent of £1,750,000 per annum, payable quarterly in advance on the modern quarter days (1 January, 1 April, 1 July and 1 October). The passing rent at the date of forfeiture was £2,051,924.35. The Lease included, at Clauses 4.3, 4.4 and 4.5, covenants to repair, decorate and maintain the Property and fixtures and fittings therein. Clause 4.8 of the Lease contained a covenant against alterations.
5. By a further lease dated 10 July 2008 and made between London Trocadero Limited and the Company ('the Plant Room Lease'), a plant room on the fourth floor of the Building was demised to the Company for a term commensurate with the term of the Lease. The rent under the Plant Room Lease was a peppercorn rent.

The Rent Deposit Deed

6. The parties to the Lease entered into a rent deposit deed on the same date as the Lease ('the Rent Deposit Deed', or 'Deed'), under which the Company paid the Landlord the sum of £2,056,250 ('the Rent Deposit'). This was placed in a specifically designated treasury deposit account with a UK clearing bank ('the Account') in the name of the Landlord together with any other sums paid into the Account by the Company pursuant to the terms of the Rent Deposit Deed and any interest credited to the Account.
7. The Rent Deposit Deed contained, inter alia, the following provisions:

'1.1 Definitions

...'the Tenant's Obligations' means the obligations of the Tenant to pay the rents reserved by the Lease and to perform and observe the covenants and conditions on the part of the Tenant contained in the Lease

...'the Deposited Sum' means the sum of Two Million and Fifty Six Thousand Two Hundred and Fifty Pounds (£2,056,250.00) paid by the Tenant to the Landlord on or before the date hereof and placed in a specifically designated treasury deposit account with a UK Clearing Bank ('the Account') in the name of the Landlord together with any other sums paid into the Account by the tenant pursuant to the terms of this Deed and any interest credited to the Account and which has not been released to the Tenant

2. Charge

The Tenant hereby charges with full title guarantee by way of fixed charge the Deposited Sum to the Landlord as a continuing security for the payment and discharge of any of the Tenant's

Obligations from time to time existing and also for any proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease

3. Withdrawals

3.1 The Tenant hereby agrees that in addition to any other right or remedy which the Landlord may have under the Lease or otherwise if and whenever any rent or other payment due to the Landlord under the Lease is not paid on the due date or if and whenever the Landlord becomes liable for any payments which should be payable by the Tenant and the Tenant shall not pay the same within fourteen days of written demand then in any such case the Landlord may at any time and without notice to the Tenant withdraw for its own use and benefit all or any part of the Deposited Sum as may be required to satisfy the same

3.2 The Landlord shall promptly upon any such withdrawal having been made give written notice thereof to the Tenant

4. The Tenant hereby agrees that in addition to any other right or remedy which the Landlord may have under the Lease or otherwise the Landlord may at any time and without notice to the Tenant withdraw for its own use and benefit all or any part of the Deposited Sum as may be required to satisfy all or any proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease including without limiting the generality of the foregoing legal costs and expenses on a Solicitor and own client basis Counsel's fees and Bailiff's costs and Value Added Tax thereon in obtaining and enforcing judgement for forfeiture and an order for possession

5. Replenishment of Account

The Tenant hereby agrees and covenants with the Landlord that if the Landlord shall on any occasion find it necessary to resort to the Deposited Sum then the Tenant will within fourteen days of written demand pay into the Account a sum equal to the amount in respect of which the Landlord has resorted to the Deposited Sum to the intent that the Deposited Sum exclusive of Interest shall remain at not less than the sum specified in Clause 1 hereof [ie the sum of £2,056,250.00]

6. The Tenant hereby agrees that the Landlord need not have recourse to the Deposited Sum until it has exhausted all other remedies available to it against the Tenant but that the Landlord shall equally be entitled to have recourse to the Deposited Sum upon any breach of the Tenant's Obligations in accordance with the terms of this Deed....

.....

9. Repayment

The Deposited Sum shall be repaid to the Tenant as soon as reasonably practicable after the earlier of the following dates namely:

9.1 the date of expiration or sooner determination of the term of years granted by the Lease;

9.2 the date on which the Tenant can demonstrate to the Landlord's reasonable satisfaction that the Tenant's net profits after deduction of tax for the three previous consecutive years have been equal to at least three times the basic annual rent then payable under the Lease

9.3 the date of the assignment of the Lease with the Landlord's prior written consent

PROVIDED that if on such date (but excluding the date specified in clause 9.3 hereof) there shall be a subsisting material breach of any of the Tenant's Obligations the Landlord shall not be obliged to release the Deposited Sum until fourteen days after all such breaches have been remedied to the Landlord's reasonable satisfaction

10. Forfeiture

10.1 If the Lease shall be forfeited the Deposited Sum shall continue to be available to the Landlord in the manner hereinbefore provided until it shall be exhausted or until there shall be no further liability of the Tenant to the Landlord whereupon as soon as reasonably practicable any remaining balance of the Deposited Sum shall be repaid to the Tenant.'

8. Clause 10.2 of the Rent Deposit Deed further provided that any breach of the obligations of the Tenant contained in the Deed would be deemed to be an event giving rise to the right of re-entry by the Landlord under the Lease.

Subsequent Events

9. On 20 August 2015, the freehold interest in the Building was acquired by the Respondent. The benefit of the Lease and the Plant Room Lease (which collectively will be referred to as 'the Leases'), together with the Rent Deposit Deed, were assigned to the Respondent (hereafter, for ease of reference, 'the Landlord') when it acquired the freehold.
10. On 29 September 2017, the Company went into administration and the Applicants were appointed as joint administrators of the Company.
11. The rent which fell due under the Lease on 1 October 2017, (£512,981.09 plus VAT, payable quarterly in advance for the quarter commencing 1 October 2017), was not paid. On or by 9 October 2017, the Landlord made a withdrawal from the Rent

Deposit in order to settle the unpaid rent. This apparently had the effect of reducing the balance of the Rent Deposit to £1,292,161. On 9 October 2017, the Landlord, by its (then) solicitors, PCB Lawyers LLP ('PCB'), served notice on the Company pursuant to clauses 3.2 and 5 of the Rent Deposit Deed confirming that the rent for the quarter commencing 1 October 2017 had been withdrawn from the Rent Deposit and requiring the Company to replenish the Rent Deposit within 14 days.

12. The Company failed to replenish the Rent Deposit within 14 days. A notice pursuant to Section 146 of the Law of Property Act 1925, requiring the Company to remedy the breach, was served by the Landlord on the Company on 26 October 2017.
13. The Company did not respond to either notice and did not replenish the Rent Deposit.
14. On 1 November 2017, the Landlord's current solicitors, Hogan Lovells International LLP, asked the Administrators to consent to a forfeiture of the Leases. The Administrators initially refused, as they were attempting to assign the Leases to a third party, Exhibitions Holdings Limited ('EHL').
15. On 30 November 2017, the Landlord issued an application for permission to forfeit the Leases ('the Original Application').
16. The Administrators were unable to assign the Leases to EHL and on 21 December 2017 consented to forfeiture. Forfeiture of the Leases then took place on 22 December 2017. Subsequently, the Property and Plant Room (as part of a slightly larger demise) were leased by the Landlord to EHL, which opened its 'Body Worlds' exhibition to the public on 6 October 2018. The new lease was granted on 18 July 2018 for a term of 10 years with an option to take a further 10 years at a rent of £3 million per annum (compared with £2,051,924.35 payable under the Lease) and with a rent-free period until 1 December 2018.
17. It is common ground that for the period 29 September 2017 until the forfeiture of the Leases on 22 December 2017, the Property and the Plant Room were retained for the benefit of the administration.
18. It is also common ground that, if the rent for the period of the Administrators' beneficial retention had remained unpaid, it would have been payable as an expense of the administration pursuant to the Lundy principle.
19. The difference between this case and a number of the cases which have come before the court in the past is that, in this case, the rent for the period of the Administrators' beneficial occupation *has been paid*; it was satisfied by the withdrawal from the Rent Deposit on or by 9 October 2017.
20. The Landlord maintains, however, that there are other sums due under the Lease, in respect of matters such as dilapidations, and also losses arising as a result of the forfeiture, (collectively referred to by Mr Robins as the 'non-expense claims', to differentiate them from the Clause 5 'top up' obligation itself), which remain unpaid and which the Landlord maintains will exceed what is left of the Rent Deposit. The quantum of the 'non-expense claims' is in dispute between the parties but serves to explain why the Landlord would wish to see the Company's top-up obligation under Clause 5 of the Deed treated as an expense of the administration.

21. On 5 January 2018, the Landlord's Original Application (for permission to forfeit) was amended by consent ('the Amended Application') to seek inter alia the following relief pursuant to the Court's inherent jurisdiction and/or under paragraph 63 of Schedule B1 to the Insolvency Act 1986, namely:
- 'For a direction ... that the Joint Administrators should treat as an expense of the administration the whole or part of the accrued obligation of the [Company], under clause 5 of the [Rent Deposit Deed] to pay a sum equal to the amount of rent which the [Landlord] had to resort to, out of the deposited sum, following the [Company's] failure to pay the rent which fell due under the [Leases] for the quarter commencing 1 October 2017, such rent being in the sum of £512,981.09 excluding VAT or £615,577.31 inclusive of VAT.'
22. As confirmed by Counsel for the Landlord at a hearing on 11 March 2019, when invited to clarify the scope of relief sought under the Amended Application, 'top-up is the only issue.... In short, the issue is: is the top-up ... obligation payable as an expense of the administration?'
23. As a corollary of the Amended Application, the Landlord issued a further application ('the Unfair Harm Application'), by which the Landlord sought an order that, as a condition of continuing to defend the Landlord's Amended Application, the Administrators should '(a) undertake to meet in their personal capacity any liability payable as an expense of the administration that cannot be met out of the Company's assets; or (b) confirm that this litigation, including any adverse costs order, is being funded by a third party sufficient to meet the [Landlord's] claims and costs; or (c) confirm that they have obtained insurance to cover the amount claimed by [the Landlord] and its costs; or (d) confirm that they have some other arrangement in place to meet these liabilities.'
24. The Administrators in turn have, by their own application, sought directions under paragraph 63 of Schedule B1 in the terms set out at paragraph 1 above, together with orders for the striking out or dismissal of the Amended Application and the Unfair Harm Application. At an earlier hearing, it was directed that the Administrators' application should be dealt with first.

The Law

The Priority Waterfall

25. In *Re Nortel GmbH* (in administration) [2013] UKSC 5 ('Nortel'), Lord Neuberger explained (at [39]) that the order of priority for payment out of the company's assets in a liquidation or an administration is, in summary terms, as follows:
- (1) Fixed charged 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.

Provable debts

- 26. Debts arising under pre-administration contracts (that is to say, contracts entered into by the company prior to the commencement of its administration) are provable debts.
- 27. Under Rule 14.1(3)(b) of the Insolvency Rules 2016, the claims which are provable in any administration include 'any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date.' 'Liability' in this context includes 'a liability to pay money or money's worth': r.14.1(6) IR 2016.
- 28. The 'relevant date' for such purposes is the date on which the company entered administration: r.14(1)(3) IR 2016.
- 29. The relevant 'liability', for the purposes of r.14.1(3)(b) IR 2016, will include contractual obligations. As explained by Lord Neuberger in *Nortel* at [75]:

'Where a liability arises after the insolvency event as a result of a contract entered into by a company, there is no real problem. The contract, in so far as it imposes any actual or contingent liabilities on the company, can fairly be said to impose the incurred obligation. Accordingly, in such a case the question ... will depend on whether the contract was entered into before or after the insolvency event.'
- 30. Thus, as Lord Hoffmann explained in *In re Toshoku Finance UK plc* [2002] UKHL 6 at [25], 'debts arising out of pre-liquidation contracts such as leases, whether they accrue before or after the liquidation, can and prima facie should be proved in the liquidation.'
- 31. The reference in r.14.1(3)(b) to 'any debt or liability to which the company may become subject' makes clear that contingent liabilities are provable. This is confirmed by r.14.1(5) and also by r.14.2(1), which provides that 'All claims by creditors... are provable as debts against the company... whether they are present or future, certain or contingent, ascertained or sounding only in damages.'
- 32. It follows that a liability arising upon the occurrence of a contingency after the commencement of an administration, by reason of an obligation incurred before the commencement of the administration, will ordinarily be a provable debt in the administration.

Administration expenses

33. Debts and other liabilities arising under post-administration contracts (that is to say, contracts entered into by the administrator after the commencement of the administration) are not provable debts. Instead they are administration expenses, which are payable in priority to provable debts.
34. Under r.3.50(1) IR 2016, the claims which are made payable as administration expenses are all 'fees, costs, charges and other expenses incurred in the course of the administration.'
35. Administration expenses include 'expenses properly incurred by the administrator in performing the administrator's functions' (r.3.51(2)(a) IR 2016). The word 'expenses' in this context relates to expenses incurred in relation to obligations entered into by the office holder after the onset of the liquidation or administration: *Exeter City Council v Bairstow* [2007] EWHC 400 (Ch) at [52], per David Richards J (as he then was); *Re Sixty UK Ltd (in administration)* [2009] EWHC 3866 at [25], per HHJ McCahill QC.
36. Administration expenses also include 'any necessary disbursements by the administrator in the course of the administration': r.3.51(2)(g) IR 2016. A 'disbursement' falls within r.3.51(2)(g) 'if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf), or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration – either because of the nature of the liability or because of the terms of the statute': *Nortel* at [100] per Lord Neuberger. At [101] Lord Neuberger went on to explain: 'If an administrator, on behalf of the company, enters into a transaction which gives rise to tax, or starts (or adopts) proceedings which give rise to a liability for costs, that tax or those costs would fall within the rule, as they arise from his actions as administrator during the administration.'
37. As a result of the rules identified above, the insolvency legislation draws a clear distinction between:
 - (1) Provable debts (which include claims arising from pre-administration contracts); and
 - (2) Administration expenses (which prima facie exclude claims arising from pre-administration contracts).

The Lundy principle

38. In circumstances where the Lundy principle applies, however, certain claims arising under pre-administration contracts become payable as administration expenses.
39. In *re Lundy Granite Co (1870-71)* LR 6 Ch App 462 at 466, James LJ explained the principle as follows:

'... if the company for its own purposes, and with a view to the realisation of the property to better advantage, remains in

possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice therefore require the court to see that the landlord receives the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estate for their own purposes, they ought to pay the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it.'

40. In *re Toshoku Finance UK Plc* [2002] 1 WLR 671 the House of Lords considered an application by liquidators of a subsidiary of Toshoku Ltd for directions as to whether corporation tax payable on interest on a debt owed by a fellow subsidiary which had not been received should be paid as an expense of the winding up in priority to other claims. The House of Lords decided that rule 4.218(1) IR 1986 required the tax to be discharged as a necessary disbursement. In the course of his judgment, Lord Hoffmann examined the origins and scope of the Lundy principle, highlighting (*inter alia*) the following:
- (1) The original insolvency legislation prohibited distraint, subject to the permission of the Court: see sections 87 and 163 of the Companies Act 1862 and *Re Exhall Coal Mining Co Ltd* (1864) de G.J. & S. 377, 46 ER 964.
 - (2) In cases where a liquidator retained possession of rented premises for the purpose of achieving a more advantageous winding-up of the insolvent estate, the Court would ordinarily grant permission to the landlord to distrain for the post-liquidation rent: see *Re Progress Assurance Co*; *Ex p Liverpool Exchange Co* (1870) LR 9 Eq 370 and *Re Lundy Granite Co, ex p Heaven* (1871) LR 6 Ch App 462.
 - (3) Therefore, although rents payable under pre-liquidation leases were *prima facie* provable, even in respect of rents falling due in the post-liquidation period, the principle which emerged from those authorities was 'one which permits, on equitable grounds, the concept of a liability incurred as an expense of the liquidation to be expanded to include liabilities incurred before the liquidation in respect of property afterwards retained by the liquidator for the benefit of the insolvent estate': *Toshoku* at [29].
 - (4) Although the Lundy principle 'evolved in relation to a statutory discretion to allow a process of execution to proceed, it was obvious to everyone that there could be no practical difference between allowing a landlord to levy a distress for rent falling due after the winding up and directing the liquidator that he should be paid in full': *Toshoku* at [24]. A principle relating to the circumstances in which distraint would be permitted was therefore extended to govern the payment of expenses. (See, for example, *Re ABC Coupler & Engineering Co Ltd* (No 3) [1970] 1 WLR 702 at 707, per Plowman J: 'it is well settled that the principles applying to distress for rent apply equally to a claim for payment of rent in full').

- (5) A 'reason, or at any rate a rationalisation' (Toshoku per Lord Hoffmann at [26]) had been put forward by Lindley LJ in *In re Oak Pits Colliery Co* (1882) 21 Ch D 322 at 330, as follows:

'When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of the winding-up of the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose.'

- (6) Commenting on that quote, Lord Hoffmann (Toshoku at [27]) continued:

'My Lords, it is important to notice Lindley LJ was not saying that the liability to pay rent had been incurred as an expense of the winding up. It plainly had not. The liability had been incurred by the company before the winding up for the whole term of the lease. Lindley LJ was saying that it would be just and equitable, in the circumstances to which he refers, to treat the rent liability **as if** it were an expense of the winding up and to accord it the same priority. The conditions under which a pre-liquidation creditor would be allowed to be paid in full were cautiously stated. Lindley LJ said, at p.329, that the landlord 'must show why he should have such an advantage over the other creditors.' It was not sufficient that the liquidator retained possession for the benefit of the estate if it was also for the benefit of the landlord. Not offering to surrender or simply doing nothing was not regarded as retaining possession for the benefit of the estate.' (Lord Hoffmann, Toshoku, at [27])

- (7) Lord Hoffmann (Toshoku, at [29]) continued:

'The principle evolved from *Exhall Coal Mining Ltd* 4 De GJ & S 377 and *Lundy Granite Co* LR 6 Ch App 462 is thus one which permits, on equitable grounds, the concept of a liability incurred as an expense of the liquidation to be expanded to include liabilities incurred before the liquidation in respect of property afterwards retained by the liquidator for the benefit of the insolvent estate. Although it was originally based upon a statutory discretion to allow a distress or execution against the company's assets, the courts quickly recognised that its effect could be to promote a creditor from merely having a claim in the liquidation to having a prior right to payment in full. As in the case of other equitable doctrines, the discretion hardened into principle. By the end of the 19th century, the scope of the *Lundy Granite Co* principle was well settled.'

(8) In Toshoku [38] Lord Hoffmann added:

‘...The court will of course interpret rule 4.218 to include debts which, under the Lundy Granite principle, are deemed to be expenses of the liquidation. Ordinarily this means that debts such as rents under a lease will be treated as coming within paragraph (a), but the principle may possibly enlarge the scope of other paragraphs as well. But the application of that principle does not involve an exercise of discretion any more than the application of any other legal principle to the facts of the case.’

41. Whilst the Lundy principle evolved in the context of liquidations, the rules relating to liquidation expenses were later adopted in the context of administration expenses as well: see *Exeter City Council v Bairstow* [2007] Bus LR 813 at [79] per David Richards J.
42. In rent cases, the rent which is payable as an expense under the Lundy principle is the rent for the period of the administrator’s ‘beneficial occupation’ (*Re New Oriental Bank Corpn* (No 2) [1895] 1 Ch 753 at 757 per Vaughan Williams J), or ‘beneficial retention’ (*Jervis and others v Pillar Denton Ltd* [2014] EWCA Civ 180 at [40] and [82] per Lewison LJ) of the premises in question.
43. Since the case of *Jervis*, it has been established that, for such purposes, rent is treated as accruing from day to day, rather than by reference to whether given rent days fall before, during or after the period of beneficial retention. In reaching this conclusion, Lewison LJ (at [81]-[82]) noted that the salvage principle as formulated by James LJ in the *Lundy Granite* case was not expressed in terms of when rent falls due or when rent accrues. Rather, it was framed:

‘...by reference to the period during which the company uses the landlord’s property to its own advantage. It is in those circumstances that common sense and ordinary justice require the court to see that the landlord is paid. What he is to be paid is again not described by reference to the days on which the rent falls due for payment. What he is to receive is the ‘full value’ of the property. Where the property is held under the terms of a lease the full value will be taken to be the rate of rent reserved by the lease. I cannot see why common sense or ordinary justice should be defeated by the happenstance that a rent day occurs immediately before the date of entry into administration if the rent falling due on that day covers a period during which the administrator retains possession of the property for the benefit of the administration. As Ferris J said in *In re Atlantic Computer Systems plc* (no 2) [1990] BCC 454 “all that is necessary is to treat the rent as accruing from day to day”.’

44. On this basis, Lewison LJ concluded:

‘the office holder must make payments at the rate of the rent for the duration of any period during which he retains possession of the demised property for the benefit of the winding up or administration (as the case may be). The rent will be treated as accruing from day to day. These payments are payable as expenses of the winding up or administration. The duration of the period is a question of fact and is not determined merely by reference to which rent days occur before, during or after that period’: Jervis at [101].

45. In reaching this conclusion, Lewison LJ overruled the decision of HHJ Judge Purle QC in *Goldacre (Offices) Ltd v Nortel Networks UK Ltd* [2010] Ch 455 and the decision of HHJ Judge Pelling QC in *In re Luminar Lava Ignite Ltd* [2014] Ch 165, a point to which I shall return.

The pari passu rule

46. The pari passu rule is a fundamental principle of both corporate and personal insolvency proceedings.
47. In each case, however, there may be circumstances in which an administrator may need to make a payment to an unsecured creditor in contravention of the pari passu rule.
48. The Insolvency Act 1986 provides that an administrator may make such a payment:
- (1) If it is ‘necessary or incidental to the performance of his functions’: paragraph 13 of Schedule 1 and para 60 of Sched B1 to the IA 1986; or
 - (2) If ‘he thinks it likely to assist achievement of the purpose of administration’: para 65 of Schedule B1.
49. As Lord Neuberger observed in *Nortel* at [120]:

‘It was no doubt intended to apply where the payment in question is necessary or desirable to achieve one of the administrator’s statutory functions under paragraph 3 of Schedule B1 to the 1986 Act (eg the company’s survival or a more advantageous realisation of the company’s assets)’.

50. The Court, however, has no power to re-order liabilities in the waterfall simply on the basis that it would be ‘fair’ to do so. As confirmed by Lord Neuberger in *Nortel* at [116]:

‘Such a course would appear to be wrong in principle, because it would involve a judge effectively overruling the lawful provisions of a statute or statutory instrument. It would also be highly problematic in practice because it would throw many liquidations and administrations into confusion: the law would be uncertain, and many creditors who felt that the statutory

ranking caused them unfair prejudice would make applications to the Court.’

51. In Nortel, Lord Neuberger cited Ex p. James; In re Condon (1874) LR 9 Ch App 609 at [122] before holding at [123]:

‘However, none of these cases begins to justify the contention that an administrator can be ordered to change the ranking of a particular debt simply because the statutory ranking appears unattractive Indeed, observations in the Lune Metal case, at paras 35-38, tend to support the notion that the court cannot sanction a course which would be outside an administrator’s statutory powers.’

52. Having considered the legislative framework and the principles developed in the caselaw, I turn next to the present case.

The Present Case

53. In the present case, the question to be determined is whether the obligation of the Company under Clause 5 of the Rent Deposit Deed, to top up the Deposited Sum within 14 days of the Applicant’s demand dated 9 October 2017, following the Applicant’s withdrawal from the Deposited Sum of £615,577.31 in respect of rent payable in advance for the quarter commencing 1 October 2017, should be treated as an expense of the administration, whether by operation of the Lundy principle or otherwise.

54. This involved examination of the following issues, namely:

- (1) Whether the Lundy principle is limited to provable debts;
- (2) Whether the Clause 5 ‘top up’ obligation is in principle capable of proof;
- (3) As a corollary of (2), whether the Clause 5 top up obligation offends the rule against double proof; and
- (4) Whether the Clause 5 top up obligation falls within the Lundy principle or should otherwise be treated as an expense.

55. I shall deal with each in turn.

Is the Lundy principle limited to provable debts?

56. The first issue raised was whether the Lundy principle was limited to provable debts and, if so, whether the top-up obligation was capable of proof.
57. On behalf of the Administrators, Mr Robins maintained that the Lundy principle was limited to provable debts. The ‘gateway’, as he put it, was level 5 of the Nortel waterfall. Ms Bhaloo did not agree with the ‘gateway’ analysis. She maintained that the Lundy principle was, as she put it, a ‘free-standing principle established by the caselaw and that whilst many of the cases refer to provable debts, that was simply because it was ‘the most common situation’, there being ‘very few unprovable

claims'. The Nortel waterfall, she added, included non-provable liabilities at level seven. She maintained that there was 'no authority or basis' for the proposition that a debt or liability had to be capable of proof in order to be elevated to an expense.

58. In reply, Mr Robins referred me to the judgment of Lord Hoffmann in *In re Toshoku* at [19] and [20], where, having traced the 'obscure origins' of the Lundy principle back to *In re Exhall Coal Mining Co Ltd* (1864) 4 De GJ & S 377, Lord Hoffmann concluded (with emphasis added):

'Thus was created a discretion to allow a creditor to use a process of execution to recover in full a debt *for which he would otherwise have had to prove in the liquidation.*'

59. Mr Robins identified four further examples in the caselaw in support of his contention.

(1) In *Toshoku* [25], Lord Hoffmann said that the effect of the Lundy principle, where it applies, is 'that, contrary to the normal *pari passu* rule, a creditor who had a debt which was capable of proof... should be paid in priority to other creditors'; (I note too Lord Hoffmann's comment at [24] (with emphasis added) that '*It is important to bear in mind that the rent was a future debt for which the landlord could have proved in the liquidation..*')

(2) In *Nortel*, Lord Neuberger, referring to the Lundy principle, said at [57] that 'a liability which would otherwise be a provable debt can be, on special facts, an expense of the ... liquidation';

(3) In *Jervis v Pillar Denton Ltd* [2014] EWCA Civ 180, Lewison LJ said at [18]: 'It is also common ground that the salvage principle and the right to prove for a debt are not mutually exclusive. Thus, the mere fact that a right is a provable debt does not mean that the salvage principle cannot apply';

(4) In *Laverty v British Gas Trading Ltd* [2014] EWHC 2443 (Ch), Sales J referred at [8] to 'provable debts which are to be elevated so as to be payable as if they were expenses of the administration on the basis of the principle in the *Lundy Granite* case (sometimes referred to as the 'salvage principle')'.

60. At first glance, these are powerful examples. In none of these examples, however, was the court actively comparing the position of non-provable (level seven) and provable (level five) debts. I also remind myself that the 'foundation of the [Lundy] principle is the application of equity' (*Jervis*, per Lewison LJ); it is a principle which has evolved over time. Given that, it would in my judgment be wrong in principle to impose an absolute bar on non-provable liabilities being elevated to expense status, however unlikely such an elevation may be in practice, particularly given the expansive interpretation of the concept of 'obligation' adopted by the Supreme Court in recent years.

61. I therefore reject Mr Robins' submission that the Lundy principle is limited to provable debts. It does not follow, however, that the question whether a given debt or liability is provable or non-provable is entirely irrelevant. As confirmed by Lindley LJ in *Re Oak Pits Colliery Co* (1882) 21 Ch D 322 at 329, anyone seeking expense status

by operation of the Lundy principle ‘must show why he should have such an advantage over the other creditors’. In my judgment this task will be all the more challenging in the case of a debt or liability which is not admissible to proof.

Is the top-up obligation provable?

62. The next question is whether the top up obligation is capable of proof. On behalf of the Administrators, Mr Robins submitted that the top up obligation was not a debt or liability within the meaning of rule 14.1 IR 2016. Instead, it was an obligation *to provide security for* a debt or obligation. As summarised at paragraphs 92 of his skeleton argument, Mr Robins’ position was as follows:

- (1) The obligation to pay rent at a daily rate for the period of the Administrators’ beneficial occupation or retention of the Property and the Garden Room (‘the Administration Rent’) was a debt. That debt has been paid.
- (2) The top up obligation imposed by Clause 5 of the Rent Deposit Deed is not a debt. It is an obligation to top up a security. That is clear from Clauses 1.1, 2, 3.1, 6, 9 and 10 of the Rent Deposit Deed.
- (3) The UK Clearing Bank owes the balance of the Rent Deposit to the Landlord, which is the owner of the legal title to the credit balance.
- (4) However, the Landlord holds legal title on trust for the Company; this is why it is required to hold the Rent Deposit in a designated deposit account.
- (5) The fact that the Company was able to charge the Rent Deposit with full title guarantee by way of first fixed charge (Clause 2 of the Rent Deposit Deed) reflects the fact that the Company continues to be the beneficial owner of the Rent Deposit; if it had been owned absolutely by the Landlord, the Company could not have charged it at all.
- (6) Since the Rent Deposit has been charged by way of security to secure the performance of the Tenant’s Obligations (as defined by Clause 1.1 of the Rent Deposit Deed) and any proper losses suffered by the Landlord in consequence of the forfeiture, the Company retains an equity of redemption, as recognised by clauses 9 and 10 of the Rent Deposit Deed.
- (7) The obligation to pay a top-up into the Account under clause 5 of the Rent Deposit Deed is not an obligation to make a payment to the Landlord absolutely. The Landlord does not have any unconditional right to the Rent Deposit and cannot simply withdraw it unconditionally. Instead, the Landlord may only hold the Rent Deposit in accordance with the terms of the Rent Deposit Deed and may withdraw monies from the Account only as permitted by the Rent Deposit Deed.
- (8) The obligation of the Company under Clause 5 of the Rent Deposit Deed is therefore an obligation to make a payment in which both the Company and the Landlord will maintain their respective interests; the Company’s beneficial interest has been charged to the Landlord as security for the performance of the

Tenant's Obligations and any proper loss suffered by the Landlord in consequence of forfeiture, and the Company retains its equity of redemption in the usual way, as recognised by Clauses 9 and 10 of the Deed.

- (9) An obligation to top up a security is not a debt; and a person to whom such an obligation is owed is not a creditor in respect of that obligation.
63. In support of these submissions, Mr Robins referred me to *New Hampshire Insurance Company v Magellan Reinsurance Company* [2009] UKPC 33 and in particular, a quote from the Court of Appeal's decision in the case, namely, that 'an obligation to provide security for a debt which may become payable was not itself a debt': para [8]. I was not greatly assisted by this decision. As rightly noted by Ms Bhaloo, the case involved the statutory criteria for presenting a winding up petition under the laws of the Turks and Caicos Islands, a jurisdiction which did not extend the right to petition to contingent creditors or creditors with unliquidated claims. In reply, Mr Robins confirmed that he relied simply upon quoted passage to illustrate a conceptual point. In the absence of detailed submissions on the issue of what qualifies as a 'debt' under Turks and Caicos law, however, this took us no further forward.
64. Mr Robins further referred me to rule 14.1(3), which provides, inter alia: 'Debt', in relation to winding up and administration, means (subject to the next paragraph) any of the following – (a) any debt or liability to which the company is subject at the relevant date; (b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date;'
65. Mr Robins submitted that, for the purposes of rule 14.1(3)(b), it is not every 'obligation' that is capable of giving rise to a provable debt; it has to be an obligation which is capable of giving rise to a 'debt or liability'. I accept that submission. Mr Robins further submitted that the term 'debt', as employed in rule 14.1(3)(b), must, in context, be construed 'in an ordinary, commonly understood sense of the term.... In other words, a liquidated sum that is payable to a creditor absolutely in discharge of a right to receive payment'. Whilst, at first glance, such a construction has its attractions, it is incompatible with rules 14.1(4) and 14.1(5) and I reject it.
66. Ultimately, however, the scope of the term 'debt', as employed in rule 14.1(3)(b), is largely academic. I say this because, in my judgment, the top up obligation contained in Clause 5 of the Rent Deposit Deed clearly qualifies as a 'liability to pay money or money's worth' (r.14.1(6)) in any event. I reject the narrow construction of the term 'pay' which Mr Robins invited me to adopt in this context. For the purpose of rule 14.1(3)(b), therefore, the top up obligation under Clause 5 qualifies as a 'liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date'.

Does the top up obligation offend the rule against double proof?

67. The next question is whether the top up obligation offends the rule against double proof.
68. The rule against double proof is helpfully summarised by Lord Walker in *In re Kaupthing Singer & Friedlander Ltd (No 2)* 2012 1 AC 804 at p813 as follows:

‘10. One of the earliest judicial expositions of that rule was by Mellish LJ in *In re Oriental Commercial bank* (1871) LR 7 Ch App 99, 103-104:

‘But the principle itself – that an insolvent estate, whether wound up in Chancery or in Bankruptcy, ought not to pay two dividends in respect of the same debt – appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than with other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts.’

11. The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call ‘double dip’). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend.’

69. Mr Robins submitted that, even if otherwise satisfying the requirements of rr.14.1 and 14.2 IR 2016, the top-up obligation contained in Clause 5 of the Rent Deposit Deed was not a debt or liability that could be proved because it would be contrary to the rule against double-proof.
70. To illustrate his point, Mr Robins gave the example of a landlord who, at the time of his tenant’s entry into liquidation, is owed £500,000 under the terms of a lease (for say, unpaid rent and dilapidations) and £500,000 pursuant to a top-up obligation in a rent deposit deed. If he sought to lodge a proof for both claims, argued Mr Robins, the liquidator would undoubtedly view both proofs as in respect of the same debt. He would admit the underlying debt to proof but would not ‘double up’. The fact that the landlord had the benefit of two separate contracts, each of which supported a claim of £500,000, would not lead to the conclusion that he could prove for both.
71. That, Mr Robins maintained, was precisely the position in the present case. The Landlord’s claims under the Lease, to the extent that they were valid claims, were already provable. The Landlord could not also prove for an additional liability under Clause 5 of the Rent Deposit Deed that was, as he put it, ‘reflective’ of those provable debts, as that would be contrary to the rule against double proof.
72. On behalf of the Landlord, Ms Bhaloo contended that the rule against double proof was in reality a rule against double dividend and did not, of itself, impact on the ability to prove in the first place. In this regard she referred me to the passage from the judgment of Mellish LJ in *In re Oriental Commercial Bank* at pp103-4 and in particular his conclusion that ‘the true principle is, that there is only to be one dividend in respect of what is in substance the same debt...’

73. Ms Bhaloo also referred me to the judgment of Oliver LJ in *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626. Whilst the House of Lords reached a different conclusion on the facts on the issue whether the rule against double proof had been engaged in TOSG, Oliver LJ's exposition of the rule against double proof (at p.636-644) was later approved by Lord Walker in *Kaupthing* at [12]. At page 636, Oliver LJ had said:

‘.. I am unable to accept that the proper time for determining whether or not the rule against double proofs is to apply is the date of liquidation. I accept Mr Stubb's submission that the rule ought properly to be styled the rule against double dividends, for its object is to absolve the liquidator from paying out two dividends on what is essentially the same debt. That is a matter which very frequently – for instance, in the case of principal and surety – cannot be determined until a payment to the creditor is made. No doubt it can be predicted at the commencement of the liquidation that a case for the application of the rule may arise or that it can never arise, but it may well be impossible to determine at that stage whether it will in fact..

Secondly, it is, I think, a fallacy to argue ... that because overlapping liabilities result from separate and independent contracts with the debtor, that, by itself, is determinative of whether the rule can apply. The test is in my judgment a much broader one which transcends a close jurisprudential analysis of the persons by and to whom the duties are owed. It is simply whether the two competing claims are, in substance, claims for payment of the same debt twice over...’

74. Ms Bhaloo went on to refer me to the judgments of Kerr LJ at p650 and Slade LJ at 659. These passages, she maintained, showed a clear distinction between whether a dividend is payable on a given debt and whether the debt is provable in the first place.
75. A similar submission was made by Mr Fisher of Counsel in the recent case of *Bundeszentralamt Fur Steuern v Heis and others* 2019 EWHC 705 (‘the MF Global case’). This was an application for a stay of appeals brought by the German Federal Tax Office and by Deutsche Bank AG against the rejection by the Joint Special Administrators of MF Global UK Limited of their respective proofs of debt. In the context of this application, ‘the rule against double proof’ was ‘the subject of considerable debate’ [4] before Hildyard J. During the course of the application, Mr Fisher submitted (at [148]) that:

‘the so-called ‘rule against double proof’ in English law is a misnomer. The true rule is not against double proof but against double dividend. It operates to bar the payment of two dividends in respect of what is in substance the same debt, rather than the presentation of two proofs for the same or substantially the same debt.’

In support of his submissions, Mr Fisher relied (at [150] to [154] on the decision of the Court of Appeal in *Barclays Bank v TOSG* and the Supreme Court decision in *In re Kaupthing*, depicting the issue as ‘a relatively discrete matter of timing’ [155]).

76. On behalf of the Joint Special Administrators in the MF Global case, Mr Moss widened the debate, depicting *Barclays v TOSG* as a variation and extension of the basic ‘rule against double proof’ to cater for cases where there was remaining doubt as to whether both proofs related to the same or substantially the same debt. Starting with the case of *Kaupthing*, Mr Moss pointed out that Lord Walker (at [12]) had also quoted Lord Hoffmann’s examination of further case law and summary of the position in *Secretary of State and Industry v Frid* as follows:

‘In *re Fenton*; *Ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 was another case of a surety under a pre-insolvency guarantee, but this time he had not actually paid. Nor could he pay, because he was bankrupt and his assets had vested in his trustee. The creditor was still owed the money and entitled to prove in the liquidation. The Court of Appeal held, first, that one could not have more than one proof in respect of the same debt (‘the rule against double proof’); otherwise, if there had been, say, four guarantors, there could have been five people receiving dividends on the same debt. Secondly, the Court of Appeal said that until the creditor had been paid, he had the superior right of proof and a right of proof by a surety was excluded.’

77. Reference was made in particular to the judgment of Lawrence LJ in *In re Fenton* (at page 114), where he said that:

‘so long as the estate of the principal debtor remains liable to the principal creditor the surety will not be permitted to prove against the estate of the principal debtor, as such a proof would be a double proof for the same debt, and would therefore be inadmissible as being contrary to the established rule of bankruptcy.’

78. In *Fenton*, Lord Harnworth MR agreed, subject to the caveat (at page 110) that he did not wish to exclude the possibility that the claimant might in the future establish a provable debt ‘in some events’. Romer LJ in turn considered *In re Oriental Commercial bank* to be ‘direct authority against such a proof being allowed’ (page 119) and stated (at pages 118-119):

‘Should the surety subsequently pay off the principal creditor before the latter has lodged a proof, he would undoubtedly be able to prove in the bankruptcy, and if he paid the principal creditor off after the latter has lodged a proof, the dividends in respect of such proof would be made available for the surety. But I cannot agree that a surety who has not paid off the principal creditor can prove in the bankruptcy of the principal debtor so as to share in the distribution of his assets unless the principal creditor has renounced in some way his right to lodge

a proof himself while preserving, of course, his rights against the surety. To allow such a sharing in the assets would be to subject the assets to two claims in respect of the same debt, and this is contrary to the well-established rule in bankruptcy against double proof.'

See too *Deering & Ors v the Governor and Company of the Bank of Ireland* (1886) 12 App Cas 20, per Lord Halsbury LC at 28 and *In re Sass, ex p National Provincial Bank of England* (1896) 2 QB 12 per Vaughan Williams J.

79. As noted by Hildyard J in *MF Global UK Limited*:

'These citations may appear to suggest a tension between the approach of the Court of Appeal in *Re Fenton* and that of the Court of Appeal in *Barclays v TOSG* and the House of Lords in *Kaupthing*. Yet *Re Fenton* was cited in each without express or apparent disapproval; and as appears above, it was cited with apparent approval by Lord Hoffmann, who, incidentally, had represented the unsuccessful appellant in *Barclays v TOSG*, in *Secretary of State v Frid*. That begs the question whether there is any real dichotomy between the cases.'

80. In *MF Global*, Mr Moss initially suggested that there was and that to the extent that any dicta in *Barclays v TSOG* were inconsistent, such dicta were incorrect. Ultimately, however, he accepted, with some encouragement from Hildyard J, it would seem [at 164]:

'that the authorities may be seen as two streams, one concerned with the admissibility of proof where there is no doubt as to the secondary nature of the liability owed to one of two claimants (as in the classic principal and surety case instanced by Lord Walker in *Kaupthing*) and the other concerned with the admissibility of two proofs when it remains unclear at the date that the proof is lodged until later (and at latest, the distribution point) whether (a) the rival claims relate to substantially the same debt and/or (b) what the priority is as between the rival claims as against the insolvent estate (as in the *Barclays* case and, perhaps, in *Kaupthing*)'.

81. In *MF Global UK Limited*, Hildyard J (at [172-3]) concluded that some of the apparent differences in the formulation of the rule stemmed from confusing 'the ultimate objective or principle of the rule with the means by which it was achieved'. The objective or principle of the rule, as stated by Mellish LJ in *Re Oriental and Commercial Bank* was 'perfectly clear: that 'an insolvent estate ought not to pay two dividends in respect of the same debt', and (broadened a little to capture what is in substance the same debt, even if not in form) that:

'there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts'.

82. The means by which the objective of the rule may be achieved, however, will depend on whether or not it is clear from the outset that one proof is in substance the same debt as another. In a clear case (such as the paradigm situation of principal creditor and surety, 'S'):

‘the obvious and immediate way of safely securing the purpose or principle of the rule is to preclude any proof by S. That, as I read the cases (such as *Re Fenton*) is what the court has always done. The policy of the rule and the practice of the Court has been to determine the matter at the point when S lodges its proof’

(per Hildyard J at [175]).

In less clear cases, the court

‘may have to wait and see, although even then the game is over once a distribution is made, since on no account can two distributions be made in respect of what is in substance the same debt’.

This, according to Hildyard J, serves to explain cases such as *Barclays Bank v TOSG*.

83. At paragraph [178] of his judgment, Hildyard J concludes:

‘My provisional view is, therefore, that the authorities are not inconsistent: they address two different situations, one being or being analogous to the paradigm, the other being less obvious but potentially productive of the same substantive unfairness. In the first, paradigm type of case, the authorities all stipulate rejection of the proof; in the other, they resort to the underlying rationale of the rule to permit deferral to the point when the risk of double dividend actually eventuates.’

84. I respectfully agree with Hildyard J’s analysis.
85. On present facts, however, the question whether the rule against double proof should more appropriately be termed the rule against double dividend is ultimately academic. As rightly noted by Mr Robins, in the classic rule against double proof situation, *both* proofs meet the statutory test for proof of debts in the Insolvency Rules. They are both debts or liabilities that arise out of an obligation incurred before the commencement of the insolvency proceedings. What matters is whether the proofs are in respect of what is in substance the same debt. Mr Robins submitted that ‘it does not matter whether you say that a proof for the clause 5 top-up obligation would not be admitted at all or that if admitted it would not carry any right to payment because, either way, you get to the same end result, which is that nothing can be payable in respect of it.’

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86. As put by Oliver LJ in TOSG, in considering whether the rule against double proof (or dividend) is offended, the test is ‘whether the two competing claims are in substance claims for payment of the same debt twice over’.
87. Ms Bhaloo submitted that the court should test whether the top up obligations were independent of those of the tenant under the Lease by asking itself: ‘Were this company solvent, would the tenant have to both comply with its obligations under the lease and top up the rent deposit deed...’?
88. In this regard Ms Bhaloo referred me to a passage from Mellish LJ’s judgment in *In re Oriental* at p.102:

‘It is quite obvious that if this proof is allowed the Oriental Commercial Bank will pay a double dividend on the same debt. It appears to me clearly that it is substantially the same debt; because if all parties had been solvent, whatever sums the Oriental Commercial Bank might have paid to the Agra Bank, although they would have paid it, no doubt, for the purpose of performing the contract they had entered into by their endorsement, yet, substantially, whatever sums they might have paid to the Agra Bank would have gone in reduction of the sum which the Oriental Commercial Bank had promised to pay to the European Bank. In that case the Oriental Commercial Bank could never have been called upon to pay these bills twice over. It would have made no difference that they had entered into two contracts with two separate parties that they would pay the bills – namely, with the European bank as acceptors, and with the Agra Bank as holders. It is clear that they would have performed both contracts by paying the bills once, because they had guaranteed the acceptors...’

In a similar vein, I was also referred to TOSG per Oliver LJ at p636H.

89. Ms Bhaloo effectively invited me to interpret the passage quoted from the judgment of Mellish LJ as requiring the court to consider what the position would have been if the company had continued trading and had not gone into liquidation. I reject that invitation. In my judgment, when Oliver LJ postulated the counterfactual ‘if all parties had been solvent’, the meaning which he intended to convey was ‘if all parties were able to pay all debts in full’.
90. Ms Bhaloo maintained that the Rent Deposit Deed entitled the Landlord to a top-up that was not ‘in any way dependent on or interlinked with the obligations of the tenant under the Lease’. It followed, she submitted, that ‘they are not in substance the same debt... The Landlord is entitled to both the top-up and compliance with obligations [under the Lease]...’ The fact that the Lease had been forfeit, she argued, was immaterial.
91. There was an air of unreality to these submissions. At the point of forfeiture, Clauses 9 and 10 of the Rent Deposit Deed were engaged and the basis upon which the Rent Deposit was held changed; post forfeiture, there arose an obligation – a conditional obligation but an obligation nonetheless – on the part of the Landlord to *pay the*

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deposit back, save to the extent that it could establish an entitlement, under the terms of the Lease or the Deed, to keep any of it. Clause 10 of the Rent Deposit Deed clearly envisages a ‘run-off’ period post forfeiture, as far as the Rent Deposit is concerned. It was accepted by Ms Bhaloo that under the terms of the Rent Deposit Deed, the tenant could not be required to top up pursuant to a demand made after forfeiture.

92. By Clause 2 of the Rent Deposit Deed, the Rent Deposit stands charged ‘as a continuing security for the payment and discharge of any of the Tenant’s Obligations [as defined] from time to time existing and also for any proper loss which the Landlord may incur in or incidental to and consequent upon forfeiture of the Lease’. Upon forfeiture and delivery up, the Tenant’s Obligations cease prospectively; accrued rights remain but there are no ongoing or prospective obligations to secure. Whatever the position might be prior to forfeiture of the Leases, upon forfeiture the Rent Deposit is held as security for (1) *past* breaches of the Tenant’s Obligations under the Leases and (2) proper losses suffered by the Landlord in consequence of the forfeiture.
93. In submission, Ms Bhaloo conceded that category (2) (proper losses suffered by the Landlord in consequence of the forfeiture) is not a provable debt in its own right. Whilst clauses 2 and 4 of the Rent Deposit Deed entitled the Landlord to withdraw from the Deposited Sum losses suffered by the Landlord in consequence of forfeiture, the Landlord enjoyed no separate cause of action at common law against the Company for such losses. As put in opening, ‘if a lease is forfeit, absent .. specific provisions such as these provisions in the Rent Deposit Deed, it is incontrovertible that the Landlord doesn’t have a general claim for losses consequent upon forfeiture’; ‘it doesn’t create a separate cause of action either in debt or damages... So, because there is no separate cause of action.... that amount is not provable. There is no claim for it apart from to withdraw it from the Rent Deposit.’.
94. Category (1), however, is different. The Landlord has a free standing provable claim in relation to (1) (the ‘Tenants Obligations’, as defined); a claim which, when asked, Ms Bhaloo was unable to confirm the Landlord would abandon. The Landlord clearly cannot prove both for (1) and for *security* for (1). In the words of Oliver LJ in TOSG, post-forfeiture, these two competing claims would, in substance, be claims for payment of the same debt twice over. Of the two competing claims, by way of loose analogy with the principal creditor/surety cases, primacy would have to be given to (1) rather than *security* for (1). To that extent at least, the top-up claim, in substance, does in my judgment offend the rule against double proof.
95. Even if I am wrong in that conclusion, however, for the reasons summarised below, I am satisfied that the obligation of the Company to provide further security to the Landlord pursuant to Clause 5 of the Rent Deposit Deed should not be treated as an expense of the administration, whether by operation of the Lundy principle or otherwise.

Should the top up obligation be treated as an administration expense?

96. It was common ground that the Lundy principle is not limited to rent. Mr Robins accepted that, in principle, it could extend to ‘any debt or liability to which the company may become subject after the relevant date by reason of any obligation

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incurred before that date.’ He further accepted that, by virtue of rule 14.2(1), potentially, even a claim for damages could be elevated under the Lundy principle. He maintained, however, that there was no basis for saying that the Lundy principle applied to an obligation to provide security for what he referred to as the ‘non-expense claims’ under the Lease and the Deed in this case, which claims, *of themselves*, he submitted, would *not* fall within the Lundy principle and would not be payable as expenses.

97. Ms Bhaloo submitted that if an officeholder retains leased premises for the benefit of the estate, the court must ensure that the landlord obtains ‘the full value of the property’: *In re Lundy Granite Co* per James LJ at 466. She submitted that the term, ‘full value’, ‘means what it says; it is not confined to debts but refers to the full bundle of rights and obligations that make up a lease. When a landlord leases land to a tenant’, she explained, ‘he does not do so merely in exchange for rent, or even for rent, service charge and insurance. The lease encompasses a wide range of rights and obligations, all of which are important and all of which form part of the ‘value’ which the landlord receives in return for demising the property’ (Landlord’s skeleton argument, para 50). In this case, the Agreement for Lease entered into by the parties makes clear, she continued, that the obligations undertaken by the tenant under the Rent Deposit Deed formed part of the consideration for the Lease as well. There was no basis in the authorities, she argued, for limiting the ‘value’ to rent.
98. In short, Ms Bhaloo submitted that, in cases other than those involving periodical payments such as rent, the ‘adoption principle’ was alive and well, notwithstanding the decision of Lewison LJ in *Jervis v Pillar Denton* [2014] EWCA Civ 180.
99. In support of that contention, Ms Bhaloo took me to a number of authorities, which are addressed below.
100. *In re Silkstone and Dodworth Coal and Iron Co* (1881) 17 Ch D 158 at 160, on a summons for leave to distrain, Fry J set out the principle upon which the landlords could distrain, a notice having been served demanding either payment of arrears or the stoppage of works, and the liquidators having neither stopped nor paid, as follows:

‘That is in my view an election by the liquidator to continue in possession of the property, and if he continued in the possession of the property he could only do so upon the terms of the lease, and it is only equitable, if he keeps the lease as an asset of the company and for the purposes of the liquidation, that he should satisfy those conditions upon which the assets remain his; in other words he should pay the rent in full.’
101. In my judgment *Silkstone* is not an authority which supports the adoption principle. The decision was made on a summons for leave to distrain. In that context, any broader comments were obiter at best. Moreover, it is clear from the concluding words of the quoted passage – ‘in other words he should pay the rent in full’ – that the ‘conditions’ to which Fry J intended to refer were those relating to payment of rent.
102. Ms Bhaloo next took me to the case of *Brown, Bayley & Dixon* (1881) 18 Ch D 649. At 652, Fry J said:

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‘In respect of any rights arising after the winding up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument’

103. It was the second half of that extract – ‘if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument’ - on which Ms Bhaloo sought to rely. Once again, however, on closer examination Brown, Bayley & Dixon was not an authority which unequivocally supported the adoption principle. In context, the remarks were ultimately obiter.
104. The case of Brown, Bayley & Dixon involved an application by mortgagees for leave to distrain in respect of arrears of interest. The mortgage deed contained a power for the mortgagees to distrain in respect of any interest which had been in arrear for forty days or more, as a landlord might distrain in respect of rent. Liquidation had commenced on 7 January 1881 and the liquidators had beneficially retained the premises which were subject to the mortgage. They had *paid* interest on the mortgage referable to the period of their beneficial retention as and when it fell due, but pre-liquidation arrears of interest, in a sum of £1845, remained unpaid. It was in respect of those pre-liquidation arrears of £1845 that the mortgagees sought leave to distrain. Leave was refused. Liability for pre-liquidation interest arrears remained with the company. In reality therefore, the ratio of the case was that the mortgagees could not distrain in respect of interest accruing due prior to the period of beneficial occupation by the liquidators.
105. Ms Bhaloo also referred me to *In Re Oak Pits Colliery Co* (1882) 21 Ch D 322, a case in which, at 330, Lindley LJ made the following remarks regarding the salvage principle:

‘When the liquidator retains property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purposes of the winding up of the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose...’

106. This of itself does not support the adoption principle for which Ms Bhaloo contends. It is limited to rent referable to the period of beneficial retention.
107. Ms Bhaloo also took me to the case of *In Hand v Blow* [1901] 2 Ch 721, a case in which, at 736, Romer LJ said:

‘In all of [the authorities] you will find that they are based on the principle I am about to state. If you have a company or person whose estate is being dealt with or administered by the Court, and a liquidator or receiver appointed by the Court has occupied or used premises that are part of the estate, then, as to

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rent and other outgoings payable to the landlord or other parties in respect of the premises for that occupation or user and for which the company or person whose estate is being dealt with or administered is liable, the Court will see that such rent and other outgoings are paid out of the assets got in by the liquidator or receiver.'

108. These were obiter comments, made in the context of an application by a head lessor for an order requiring receivers, appointed on the instigation of mortgagees by sub-demise, to pay rent out of the proceeds of the company's goods sold by the receiver whilst in occupation of the premises. It was conceded that there was no privity of estate or contract as between the head lessor and the mortgagees by sub-demise and a fortiori none between the head lessor and the receiver appointed at their behest. The head lessor, however, sought to argue that the position was 'analogous' to that of a liquidator in possession of a company's property. The court rejected the analogy on the basis that there was no privity of contract or estate between the head lessor and the mortgagees by sub-demise; the mortgagees by sub-demise were not liable to the head lessor in rent. As put by Romer LJ: 'It must be remembered that in .. a case as between mortgagee and mortgagor, the latter remains liable to rent, even if the mortgagee is in possession; and that the mortgagee on going into possession, even though remaining in possession and paying no rent, does not become liable, in respect of such occupation, to the [head] landlord for rent.'
109. The application was dismissed at first instance and the subsequent appeal was also dismissed. It was simply in the context of addressing the attempted analogy that Romer LJ, on an obiter basis, summarised what came to be known as the Lundy principle. Little can be drawn from the quoted passage in context. A reading of Romer LJ's judgment in full reveals that his focus was on privity and not on what other 'outgoings' might or might not fall within the Lundy principle where it did apply.
110. Ms Bhaloo next took me to the case of *In re Levi & Company Limited* [1919] 1 Ch 416. In this case, the company was an assignee of a lease subject to usual repairing covenants, including a covenant to deliver up the premises in good repair at the end of the term. The company went into voluntary liquidation in 1910 and the liquidators remained in possession until the lease expired in 1917, paying the rent reserved, and receiving a profit rental totalling £6000 from their underleases. On the termination of the lease, it was estimated that an expenditure of £400 to £500 was required to comply with the lessee's covenants in the lease. It was held that the reversioners were entitled to be paid that sum in full.
111. At page 419 of the report, Astbury J stated:

'It is suggested that some portion of the dilapidations may have been caused before the commencement of the liquidation, but that consideration is of no importance in the present case, having regard to the covenant by the lessees to deliver up the premises in good repair at the expiration of the term.'

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112. Pausing there, it will be seen that Astbury J was treating the liability to deliver up in good repair at the end of the term as what Lewison LJ would later describe in Jervis as a ‘happenstance’ of timing; that is to say, if, having entered into beneficial possession of premises, a liquidator happens to remain in possession of those premises at the time of accrual of a given liability, that liability in its entirety is treated as an expense, regardless of whether it, or any part of it, is referable to the period of the liquidator’s beneficial retention of the premises or not. On the facts of Levi, the liquidators were in possession for seven years, but in principle, on Astbury J’s reasoning, the liquidators would have faced the same result had they commenced beneficial retention one month, or even one week, prior to expiration of the term: on the back of a covenant to deliver up in good repair at the expiration of the term, they would have been liable, on expiry of that term, to pay for all dilapidations caused at any stage during the term of the lease as an expense, regardless of the fact that those dilapidations did not relate to their period of beneficial retention.
113. At page 420 of the report, Astbury J continued:
- ‘I am told that there is no direct authority on the exact point, a fact which has caused me some surprise because it must have been a matter of common occurrence that a liquidator has retained possession of leasehold premises for the benefit of the liquidation under circumstances similar to those of the present case.’
114. Undaunted, Astbury J considered the caselaw on the treatment of rent accruing after the date of the winding up, referring to a passage in the judgment of Lindley LJ in *In re Oak Pits Colliery Co* and the well known passage from James LJ’s judgment in *In re Lundy Granite*.
115. Astbury J continued (with emphasis added):
- ‘That being the general rule *as to rent* the question is whether the same rule ought not to apply to the sum now in dispute. In *In re Silkstone and Dodworth Coal and Iron Co*, Fry J after referring to the facts of that case said, ‘That is, in my view, an election by the liquidator to continue in possession of the property, and if he continued in the possession of the property he could only do so upon the terms of the lease, and it is only equitable, if he keeps the lease as an asset of the company and for the purposes of the liquidation, that he should satisfy those conditions upon which the asset remains his...’
116. Pausing there, it should be noted that, when quoting this passage from Fry J’s judgment in the Silkstone case, Astbury J in *Re Levi* *stopped short* of the concluding words of the passage in question, which read ‘*in other words, he should pay the rent in full.*’
117. Astbury J continued (in *Re Levi*, at 421):
- ‘.. and the same learned judge in *In re Brown, Bayley & Dixon* says ‘In respect of any rights arising after the winding up by

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reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must do so upon the terms and conditions of the instrument; just as any other person must observe those terms'.

118. For the reasons already given, however, properly analysed, *In re Brown Bayley & Dixon* is not, in my judgment, an authority in support of the adoption principle. The comments quoted were obiter: see paragraphs 102-104 above.
119. Astbury J in *Re Levi* next maintained (at 422) that 'a similar principle as to rates was applied in *In re National Arms and Ammunition* 28 Ch D 474...'.
120. In *re National Arms and Ammunition*, however, Bowen LJ had based his judgment on the simple proposition that since the company was in *rateable occupation*, it was liable to pay the rates, and that the liability for rates was incurred after the date of the winding up. It was a *post-liquidation liability*. As confirmed by Lewison LJ in *Jervis* (at [72]), 'it is now tolerably clear that the reasoning of Bowen LJ is the correct analysis': see *In re Toshoku* at [31-32] and *In re Nortel* at [103]. As explained by Lord Hoffmann in *Re Toshoku* at paragraphs 31-32:

'31 The difference between the treatment of pre-liquidation debts under the *Lundy Granite* principle and the treatment of post-liquidation liabilities emerges clearly from the 19th century cases on rates. In *In re Watson Kipling & Co* (1883) 23 ChD 500, which concerned an assessment of rates made after the liquidation upon property occupied by the company, Kay J rejected the submission of counsel for the rating authority, at p506, that 'where a liability is incurred during the winding up, that liability ought to be paid in full, and therefore these rates ought to be paid in full because they were made during the winding up.'

32 He applied instead the *Lundy Granite Co* principle and said that it was not enough that the company was in rateable occupation. It must have retained occupation for the benefit of the estate. But in *In re National Arms and Ammunition Co* (1885) 28 ChD 474 Bowen and Fry LJ said that this was wrong. Bowen LJ said, at pp480, 482:

'If the company retains the possession of property which would be rateable in the hands of anyone else, it is only reasonable that it should be rateable in the hands of the company... the true test is whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating...'

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121. In short, In re National Arms and Ammunition was not a case governed by the Lundy principle. The rates in issue were a post-liquidation liability. See too Exeter City Council v Bairstow 2007 Bus LR 813, paras 34-39, 84 and 87.
122. Finally, Astbury J in Re Levi referred to the case of Hand v Blow. Again, for the reasons already given, Hand v Blow is not, in my judgment, an authority which supports the adoption principle: see paragraphs 107-109 above.
123. Based on these somewhat shaky foundations, Astbury J concluded in Re Levi (at 423) (with emphasis added):

‘Now that being the rule in a compulsory liquidation, the same principle applies equally to a voluntary liquidation. The liquidators in the present case knew the contents of this lease at the time when they elected to continue in possession of this beneficial term and it would in my opinion be highly inequitable to allow them to enjoy the benefit and disregard the covenants in the lease. It is suggested that the reversioners should from time to time have sought to re-enter for breach of the repairing covenants or have imposed terms on the liquidators in lieu of exercising their right of re-entry, but *as to the covenant by the lessees to deliver up the premises in good repair at the end of the term the reversioners had obviously to wait till the end of the term before they could found any proceedings on that covenant*. In my opinion the principle stated in the authorities to which I have referred is entirely applicable to the present case, and the liquidators having elected to hold the premises for the sake of the profit rental they obtained ought to be allowed to hold them only on the terms and conditions contained in the lease. I hold therefore that the reversioners are entitled to be paid in full the amount of their claim and not merely to prove for dividends in respect of it’

124. In my judgment, the decision in Re Levi was a ‘results-led’ decision which should not be followed.
125. Ms Bhaloo was at pains to stress that Re Levi had been cited with apparent approval by Lord Browne-Wilkinson in the case of Powdrill v Watson [1995] 2 AC 394 at 450. The case of Powdrill, however, concerned the interpretation of specific statutory provisions governing the circumstances in which an office-holder may be said to have adopted a contract of employment and the effect of such adoption. One of the statutory provisions considered was section 19 of the Insolvency Act 1986 (as it then was). Under section 19(5) IA 1986, an administrator was deemed to have adopted a contract of employment if, after a 14-day period mentioned in section 19(5), he caused the company to continue to carry out the contract. The Lundy principle was raised by analogy, in submissions on the effect, or scope, of such adoption. It was accepted before me that Lord Browne-Wilkinson’s comments on the scope of the Lundy principle in that context were obiter, the actual decision being based on

construction of the statutory provisions. At p450D-H, Lord Browne-Wilkinson stated as follows:

‘So far as administration is concerned, section 19 only applies to liabilities incurred during the administration. On the literal meaning of those words, such liabilities include liability for wages accruing during the contractual period of notice or the damages payable for the failure to give notice. Mr Sumption submitted that the words should be read as being limited to those liabilities incurred in return for services actually rendered for the benefit of the administration. He relied by analogy on the salvage cases which render assets in liquidation liable for expenses incurred by the liquidator for the purpose of the more beneficial realisation of the company’s assets: see *In re Oak Pits Colliery* (1882) 21 Ch D 322. However, I do not think these principles assist Mr Sumption. Although the authorities show that debts incurred before the liquidation do not obtain priority, they indicate that even on the salvage principle all liabilities under a contract incurred after the time of adoption of the contract by a liquidator are entitled to priority. Thus in *In re S. Davis and Co Ltd* [1945] Ch 402 damages for failure to deliver up goods bailed to a company under a bailment contract ‘adopted’ by a liquidator were held entitled to priority even though the obligation to deliver up only arose after the liquidator had ceased to manage the company’s business. Again in *In re Levi & Co Ltd* [1919] 1 Ch 416 sums due under a covenant to deliver up in good repair at the termination of a lease which had been used by a liquidator were held entitled to priority on the salvage principle even though some of the disrepair occurred before the liquidator took possession. The salvage principle in liquidation indicates that if a liquidator adopts a contract for the purpose of the more beneficial conduct of a liquidation all such liabilities under such contract after the date of adoption are entitled to priority. This principle is therefore of no assistance in seeking to limit the administrator’s liability in this case.

I therefore reach the view that in the *Paramount* case the employees are entitled under section 19 to payment in lieu of notice, including pension contributions in respect of the notice period.’

126. As rightly submitted by Mr Robins, Lord Browne-Wilkinson’s obiter summary of the *Lundy* principle is not consistent with Lewison LJ’s later analysis of the same in *Jervis*: see para 136 below.
127. In *Re Jervis*, the company leased a number of commercial premises on leases which provided that the rent was payable in advance on the usual quarter days. The company went into administration one day after the March rent became due under

those leases. The rent was not paid but trading continued in some of the leased premises. The company's administrators applied for directions as to the treatment of rent still due under five leases chosen as test leases for the purposes of the application. At first instance the judge followed two first instance decisions, Goldacre [2010] Ch 455 and Luminar [2014] Ch 165. The effect of following these decisions was that, since rent was payable in advance and had fallen due prior to the company's entry into administration, it was not to be treated as an expense of the administration under rule 2.67 IR 1986, but merely as a debt provable in the administration, with the result that the administrators were able to occupy the relevant premises for the remainder of the quarter without paying the rent due for that quarter. The judge then granted permission to the landlords to appeal. It was common ground that if the rent fell within the salvage principle, it was to be treated as an expense of the administration.

128. As noted by Lewison LJ in *Re Jervis* at [100], the results of the Goldacre and Luminar cases had left the law in a very unsatisfactory state. If rent was payable in arrear, the office holder had to pay rent as an expense of the liquidation or administration for any period during which he retained possession of the property for the benefit of the insolvency process, apportioned if necessary to reflect the true extent of the benefit. If, by contrast, the rent was payable in advance, no such apportionment could be made. In some cases, this would result in the office holder paying more than the true benefit (as in Goldacre). In other cases it would result in his paying less (as in Luminar). A consequence of the decisions in Goldacre and Luminar had been that it had become common for companies to enter administration on the day immediately following a quarter day, thus avoiding liability to pay the rent in full even if possession of the leasehold property was retained. It was against this background that the appeal in *Jervis* came before the Court.
129. In Goldacre, the company was a tenant of property held under two leases, each providing for rent quarterly in advance. Following the company's entry into administration, the administrators retained possession of 'a relatively small part' (Judge Purle, Goldacre, at [2]) of the property for the benefit of the administration. The remaining parts of the property were sublet to others. The landlords served notices under the Law of Distress Amendment Act 1908. This transferred to the landlord the company's right to receive rent from the subtenants. In effect, therefore, the landlords were receiving part of the rent in full direct from the subtenants. The case concerned instalments of rent that fell due from the company under the leases in the period during which the administrators retained possession of part of the property for the purpose of the administration.
130. It is important to note that, when the case of Goldacre came to court, the administrators had *already undertaken* to pay the landlord, as an expense of the administration, the *pro rata* proportion of the total rent payable under the lease which reflected *those parts of the premises which were occupied by the company for the purposes of the administration* (Goldacre, argument, at p.457). The administrators argued, not that they shouldn't pay any rent at all, but rather, that the rent payable by them under the salvage principle 'should be tailored to the use [of the premises] that they [were] making' (Goldacre at [18]).
131. In response, Mr Jourdan, on behalf of the landlords (Goldacre at [18]), referred to the passage from Lord Browne-Wilkinson's judgment in *Powdrill v Watson* at p450 quoted above, where he had stated (with emphasis added) that 'even on the salvage

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principle *all* liabilities under a contract incurred after the time of adoption of the contract by a liquidator are entitled to priority’.

132. Mr Jourdan went on (at Goldacre [19]) to cite *In re S Davis & Co Ltd* [1945] Ch 402, a case on bailment, and *In re Levi & Co Ltd* [1919] 1 Ch 416, considered above, before submitting:

‘The salvage principle in liquidation indicates that if a liquidator adopts a contract for the purpose of the more beneficial conduct of a liquidation, all such liabilities under such contract after the date of adoption are entitled to priority. The principle is therefore of no assistance in seeking to limit the administrators’ liability in this case.’

133. Accepting the landlords’ argument, Judge Purle stated (in Goldacre at [20]):

‘In my judgment, that principle applies here so that, as the rent falling due on the next quarter day is a payment in advance, it is not subject to the Apportionment Act 1870... from which it follows, as Mr Jourdan submits and I accept, that the quarter’s rent becomes payable in full from that date as one of the costs and expenses of the administration and would not fall to be apportioned should the administrators vacate the premises during that quarter. It follows also from this that the earlier decision of *Shackell & Co v Chorlton & Sons* [1895] 1 Ch 378 in the other direction is no longer good law, notwithstanding its application in *In re ABC Coupler & Engineering Co Ltd (No 3)* [1970] 1 WLR 702, where the point was conceded. The fuller citation of authority in *In re Levi & Co Ltd* [1919] 1 Ch 416, and its approval in *Powdrill v Watson* [1995] 2 AC 394, establishes that a liquidator electing to hold leasehold premises can do so only on the terms and conditions contained in the lease, and that any liability incurred while the lease is being enjoyed or retained for the benefit of the liquidation is payable in full as a liquidation expense. The same principle in my judgment applies in an administration. As Lord Hoffmann recognised in *In re Toshoku* ... the liability to pay rent is not treated as an expense having priority until (and lasts only so long as) the office holder makes use of or decides to retain the property. Subject to that, any such liability accruing during that period is in my judgment to be treated as an expense having the requisite priority.’

134. At para [29], Judge Purle concluded (with emphasis added) that ‘rent will continue to be payable as an administration expense quarterly in advance under the terms of the two leases so long as the administrators retain or use *any part* of the premises demised under each such lease for the benefit of the administration.’
135. Goldacre was overruled in *Jervis*. Having undertaken a thorough review of the origins and scope of the Lundy principle, Lewison LJ (Sharp and Patten LJJ concurring), concluded that Judge Purle was ‘*wrong to apply the adoption principle*’

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[102]. Lewison LJ also concluded that Judge Purle had been wrong to declare *Shackell & Co v Chorlton & Sons* no longer good law and wrong to doubt *In re ABC Coupler and Engineering Co*.

136. In so concluding, Lewison LJ reasoned, *inter alia*, (with emphasis added), as follows:

‘88. The judge [HHJ Purle] in part justified his conclusion by reference to the ‘adoption’ of contracts as explained by the House of Lords in *Powdrill v Watson* [1995] 2 AC 394. However, that case concerned a very different point. In so far as the House of Lords considered the salvage principle it did so only by analogy (which it rejected). But what Lord Browne-Wilkinson said, at p450, was that:

‘Although the authorities show that debts incurred before the liquidation do not obtain priority, they indicate that even on the salvage principle all liabilities under a contract incurred after the time of adoption of the contract by a liquidator are entitled to priority.... The salvage principle in liquidation indicates that if a liquidator adopts a contract for the purpose of the more beneficial conduct of a liquidation all such liabilities under such contract after the date of adoption are entitled to priority.’

89. That was the principle that Judge Purle QC applied in holding that the full quarter’s rent was payable as an expense of the administration. However, *the formulation of the principle in this way is inconsistent with the decision in In re HH Realisations Ltd 31 P & CR 249*. In that case the liquidators retained possession of the property for the purposes of the winding up. But Templeman J held that the rent was only payable in full until such time as the liquidators gave notice to the landlords of their intention to disclaim even though they retained possession for nearly two months longer. *If the principle applied by Judge Purle QC was correct then the rent ought to have been payable in full for those additional two months. But it was not; and as we have seen, that decision was expressly approved in In re Toshoku UK plc [2002] 1 WLR 671, para 28*. It is also inconsistent with the cases in which rent was payable in arrear in which the landlord was allowed to recover only part of the rent that fell due on a rent day that fell within the period of beneficial occupation. Moreover, *contrary to the way in which Lord Browne-Wilkinson expressed the principle*, liability to pay rent under a lease is not a liability incurred after the onset of insolvency. It is, as we have seen from *In re Toshoku Finance UK plc*, at para 27, a liability incurred when the lease was actually granted. In my judgment, therefore, the ‘adoption principle’ (however it might apply in other factual situations) does not apply to periodical payments such as rent.’

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137. The Court of Appeal in *Jervis* also overruled *Luminar*, a case described as ‘the corollary’ of the decision in the *Goldacre* case [*Jervis* at [90]]. In that case the relevant companies held leases under which rent was payable quarterly in advance. Rent fell due in June and September 2011 and the companies entered administration in October 2011. The administrators continued in beneficial possession until shortly after the March 2012 quarter day. Due to a series of concessions on each side, the issue before the court concerned the rent that fell due on the September 2012 quarter day. Having considered the reasoning of Lord Hoffmann in *Re Toshoku*, Judge Pelling QC concluded that the Lundy principle did not extend to ‘debts that have already become due at the date of the commencement of the liquidation or administration concerned.’ He went on to conclude that where rent is payable in advance and falls due for payment prior to the commencement of the liquidation or administration, then it is provable but not payable as a liquidation or administration expense even though the liquidator or administrator retains the property for the purposes of the liquidation or administration for the whole or part of the period for which the payment in advance was payable.
138. Lewison LJ concluded [at 96-7] that HHJ Pelling was wrong to interpret Lord Hoffmann’s analysis in *Toshoku* as distinguishing between debts accruing before liquidation and debts accruing afterwards. In principle, both were capable of falling within the salvage principle.
139. In the present case, Ms Bhaloo submitted that Lewison LJ’s rejection in *Jervis* of ‘the adoption principle’ was limited simply to what she referred to as ‘rent’ or ‘periodical payment’ cases and relied upon Lewison LJ’s concluding words in para [89]. She maintained that *Jervis* simply introduced an ‘equitable overlay’, applicable only in rent or periodical payment cases. In all other cases, she maintained, the adoption principle was alive and well; indeed, actively preserved by Lewison LJ in his concluding words at para [89].
140. I reject that analysis. It is correct to state that the issue arising on the appeal in *Jervis* (and therefore, the issue that the Court of Appeal had to decide) concerned the treatment of rent payable under a lease held by a corporate tenant which had entered into administration. In the course of his judgment, however, Lewison LJ undertook a thorough interrogation of the underlying caselaw and explained fully the conceptual basis and rationale of the Lundy Granite principle. In *Jervis*, Lewison LJ was not, as submitted by Ms Bhaloo, ‘introducing an equitable overlay’ to temper the rigours of the adoption principle in cases involving rent and periodical payments, leaving the adoption principle otherwise intact; he was, as put by Mr Robins, ‘uncovering the very foundations of the Lundy Granite principle and stressing time and time again the equitable origins of the rule.’ I do not read Lewison LJ’s concluding words at [89] as an attempt to preserve, still less to preserve with approval, the adoption principle in all but rent and periodical payment cases; that would run entirely counter to the reasoning of his judgment. At most he was confining his decision to the case before him. The underlying reasoning of his judgment, however, is clearly of broader significance.
141. At paragraph 77 of his judgment, in a section headed ‘What is the salvage principle?’, Lewison LJ confirmed that the salvage principle:

‘... is a principle that informs the interpretation of the rules which contain the complete list of what could rank as expenses of the relevant insolvency process... Thus in order to rank as an expense a liability must fall within the rules as interpreted in the light of the salvage principle. But it does not follow from that that the principle, once understood, is incapable of being applied to factual situations that did not confront our Victorian forbears. Although the salvage principle owes its origins to applications relating to distress for rent, it has long outgrown those origins. I agree with Mr Zacaroli that the rationale is a judge-made deeming provision under which the office holder is deemed to have incurred the liability in the course of the winding up or administration. The foundation of the principle is the application of equity. Lord Hoffmann [in re Toshoku] makes this clear not only in the passage just cited (‘it would be just and equitable, in the circumstances to which he refers, to treat the rent liability as if it were an expense of the winding up and to accord it the same priority’) but in other passages as well. This he said, at para 29:

‘The principle evolved from the ... cases is thus one which permits, on equitable grounds, the concept of a liability incurred as an expense of the liquidation to be expanded to include liabilities incurred before the liquidation in respect of property afterwards retained by the liquidator for the benefit of the insolvent estate.’

142. At paragraph 79 Lewison LJ continues:

‘Mr McGhee accepted that some form of deeming was necessary, but said that what was deemed to have happened was an assignment to the insolvent company (or possibly the office holder) at the beginning of the period of beneficial retention and a re-assignment back to the company at its termination. There was no trace of such a concept in any of the cases. It presupposes a highly artificial series of transactions ...’

143. Lewison LJ adds at paragraph 80 (with emphasis added):

‘in cases to which the salvage principle applies, *there has been no termination of the lease and no change of tenant*. The whole of the instalment of rent that falls due is a provable debt, so the tenant remains liable to pay it. Whether that liability is satisfied by a dividend or by a payment in full is not a question of apportionment. *The application of the salvage principle neither creates nor transfers any liability. What it does is to treat part of a single liability as an insolvency expense, by requiring that it be paid in full.*’

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144. Whilst, as tacitly acknowledged by Lewison LJ in the concluding words of paragraph 89 of his judgment, the case of *Jervis* itself concerned the treatment of rent payable under a lease held by a corporate tenant that entered administration, read as a whole, the explanation given in his judgment of the conceptual basis and rationale of the Lundy principle is entirely inconsistent with the preservation of the ‘adoption’ or ‘accruals’ approach in relation to pre-insolvency liabilities other than rent or periodical payments.
145. As rightly noted by Mr Robins, Lewison LJ ‘did not go as far as his own logic... because adoption is all or nothing... It is as far removed as can be imagined from the equitable basis of the Lundy principle... That equitable basis must apply across the board irrespective of the sort of liability that you are talking about... It would not be consistent with that to say, Lewison LJ expressly confined it to periodical payments and therefore you still have some sort of happenstance of timing approach for anything that does not fit neatly into that pigeonhole. It is not about categorising liability... it is about identifying the extent to which the liability under the pre-administration contract is correlative to the benefit to the estate after commencement of insolvency proceedings and the whole point of Lewison LJ’s decision is to say that it is not a strict accruals basis.’ I accept these submissions.
146. Ms Bhaloo was at pains to stress that *Re Levi* was cited to Lewison LJ and was not overruled. That does not mean, however, as Ms Bhaloo submitted, that it ‘remains good law’. *Goldacre*, which expressly based itself on *Re Levi* and concerned a proposed apportionment by reference to space not time (see argument at p.457 and judgment at paras [18] and [29]), was overruled. Little can be read, in my judgment, into the fact that Lewison LJ did not overrule *Re Levi* as well.
147. Moreover, for the reasons already explored in this judgment, *Re Levi* was a highly questionable decision from the outset. In my judgment, the authorities upon which Astbury J based his decision did not support his conclusion. In addition, numerous authorities, which did not sit well with the ‘adoption’ approach applied in *Re Levi*, were not cited to Astbury J. These included *Shackell & Co v Chorlton & Sons Ltd* [1895] 1 Ch 378, a decision which Judge Purle felt compelled to declare ‘no longer good law’ in order to reach his decision in *Goldacre*, but which was subsequently approved by Lewison LJ in *Jervis* [at 102] when overruling *Goldacre*.
148. Whilst *Re Levi* was cited with apparent approval by Lord-Browne Wilkinson in *Powdrill*, his comments on the salvage principle were obiter, were not based on detailed submissions on the principle and, for the reasons given by Lewison LJ, were inconsistent with the decision in *re HH Realisations Ltd* expressly approved by the Supreme Court in *In re Toshoku* at [28] and with the body of caselaw addressing cases in which rent was payable in arrear.
149. Moreover whilst *Re Levi* was not a rent case, Astbury J (at p.419) clearly treated the liability to deliver up in good repair at the end of the term as what Lewison LJ would later describe in *Jervis* as a ‘happenstance’ of timing; that is to say, if, having entered into beneficial possession of premises, a liquidator happens to remain in possession of those premises at the time of accrual of a given liability (in this case at the end of the term), that liability in its entirety is treated as an expense, regardless of whether it, or any part of it, is referable to the period of the liquidator’s beneficial retention of the premises. Such an approach in my judgment does not accord with the equitable basis

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of the Lundy principle and cannot survive the reasoning of Jervis. Ms Bhaloo's submission that the approach adopted in Jervis should be limited simply to rent or periodical payment cases was entirely unpersuasive and I reject it. In my judgment, *Re Levi* is no longer good law and I decline to follow it.

150. The obligations arising on the part of the tenant under the Leases and under the Rent Deposit Deed remain with the Company. The issue before me is whether, by operation of the Lundy principle or otherwise, the obligation under Clause 5 of the Rent Deposit Deed to top up the Deposited Sum should be elevated to expense status.
151. In my judgment the Lundy principle does not apply to the 'top-up' obligation arising under Clause 5 of the Rent Deposit Deed and there is no other basis upon which the top-up obligation could properly be treated as an expense of the administration.
152. It is common ground that the rent for the period of the Administrators' beneficial retention of the premises, if and to the extent that it had remained unpaid, would have been elevated so as to be payable as an administration expense, on the basis of the Lundy principle. That rent, however, has already been paid. As Mr Robins put it, the Administrators 'cannot pay it twice'. It was paid in full on or about 9 October 2017, when the Landlord elected to withdraw the rent for 1 October 2017 to 31 December 2017 in the sum of £615,577.31 (inclusive of VAT) from the Rent Deposit.
153. The Landlord has no outstanding claims for rent under the Leases, whether referable to the period of the Administrators' beneficial retention or otherwise. To the extent that the Landlord does not already hold security for any *other* claims arising under the Leases, they will be provable claims in the Company's administration and will rank *pari passu* with the ordinary unsecured claims of the Company's other creditors.
154. Ms Bhaloo has conceded that the Landlord has no separate claims under common law against the Company for losses arising in consequence of forfeiture and to that extent is confined to its entitlement under clause 4 of the Rent Deposit Deed to draw permitted sums from the Deposited Sum in respect of such losses.
155. Anyone seeking to elevate a pre-insolvency claim to expense status within the insolvency must demonstrate why he should enjoy such priority over other creditors. In a leasehold case such as this, for reasons already explored, it is not enough to state simply that the liability *accrued* during the office-holders' beneficial retention of the leased premises. That 'happenstance of timing' approach does not accord with the equitable basis of the Lundy principle and cannot survive the reasoning of Jervis.
156. In my judgment, the Landlord has failed to demonstrate why equity, or, in the words of James LJ in *Re Lundy Granite*, 'common sense and ordinary justice', dictate that the top-up liability should enjoy expense status. In reality, given that the Administration Rent has been paid and that the Leases have been forfeit, the top up is sought simply to secure what Mr Robins described as the 'non-expense claims', such as dilapidations, none of which, in the case as presented to me, were said to be referable to the period of the Administrators' beneficial occupation, together with losses in consequence of forfeiture, which Ms Bhaloo accepted were not even provable. In my judgment, on the facts of this case, there is no equitable justification for extending the Lundy principle to cover such claims and losses.

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157. As Mr Robins put it in his skeleton argument ‘In short, the Landlord is seeking to use Clause 5 of the Rent Deposit Deed as a mechanism to obtain payment in full of unsecured ... debts which do not fall within the Lundy principle and which should not be paid in full.’
158. Ms Bhaloo contended that until the recent making of the paragraph 63 application, the Administrators had not challenged the application of the Lundy Granite principle. In my judgment little turns on this. The Administrators did not encourage the Landlord to withdraw a sum in respect of Administration Rent from the Rent Deposit; they were only told *after the event* that the sum had been withdrawn.
159. Ms Bhaloo also referred me to a letter from Howard Kennedy dated 8 November 2017. The third paragraph of the letter (with emphasis added) read as follows:
- ‘In regards [sic] to the rent, your clients have taken from the rent deposit account the current quarter rental (29th September-25th December) [sic]. Please note that the administrators’ acknowledgement of the liability to pay rent whilst in possession of the Premises is in respect of a liability accruing on a day to day basis (see re Game Station (2014) EWCA Civ 180). As is entirely usual the costs and expenses of the administration will be therefore accounted for (*if not already paid*) once possession ceases and ultimately any remaining balance will be paid at the conclusion of the administration.’
160. The letter dated 8 November 2017 went on to state that the administrators were ‘not currently in a position to replenish the rent deposit account’ but were intending to procure an assignment of the lease and that on such assignment it would be anticipated that the incoming tenant would be required to provide a rent deposit in place of that previously provided by the Company. In the event, an assignment did not prove possible.
161. Read as a whole, the letter of 8 November 2017 was in my judgment far from a concession on the issue whether the top up obligation contained in Clause 5 of the Rent Deposit Deed should be treated as an expense. Moreover, even if any such concession had been made, I was taken to nothing in the evidence to suggest any grounds upon which the Administrators might be prevented from retracting the same.
162. Ms Bhaloo also sought to rely upon the fact that the Administrators eventually conceded forfeiture triggered by a s.146 notice based on the failure to top up the Rent Deposit Deed. Little turns on this however; the question whether the top up obligation should be treated as an expense is entirely distinct from the question whether the Company was in breach of its obligations under clause 5 of the Rent Deposit Deed.
163. Absent Lundy elevation, there is no other basis in the statutory insolvency scheme on which the Administrators could be required to discharge the Company’s obligation under clause 5 of the Rent Deposit Deed to top up the Account. In circumstances where the Leases have been forfeited by the Landlord, the Administrators have rightly confirmed that they do not think that the making of the top up payment would be ‘likely to assist achievement of the purpose of administration’. Accordingly, it is not permitted within paragraph 65 of Schedule B1. Further, the making of the top up

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payment is plainly not 'necessary or incidental to the performance of [the Administrators'] functions'. It is therefore not permitted under paragraph 13 of Schedule B1.

164. In my judgment, the payment sought by the Landlord would be contrary to the statutory insolvency scheme, as an unjustified exception to the pari passu rule.
165. The suggestion that the estate would obtain a windfall if top up security were not provided to the Landlord is irrelevant. As Lord Neuberger held in *Nortel* at [116]-[123], the Court has no power to re-order liabilities in the waterfall on the basis that it would be 'fair' to do so. Even the *Ex p James* line of cases cannot begin to justify the contention that an administrator can be ordered to change the ranking of a particular debt simply because the statutory ranking appears unattractive: *Nortel* at [123].
166. The claimed 'unfairness' only arises because the landlord elected to use the Rent Deposit to discharge the Administration Rent. That was a conscious decision by the Landlord; it was under no obligation to do so. If that election was the result of bad advice from PCB, the Landlord's remedy is to bring a claim against PCB for damages for professional negligence.
167. For all of these reasons, I conclude as follows:
- (1) that the obligation of the Company to provide further security to the Landlord under Clause 5 of the Rent Deposit Deed does not fall within the principle in *Re Lundy Granite Co Ltd* (1871) LR 6 Ch App 462 in the administration of the Company;
 - (2) that the provision of further security to the Landlord under Clause 5 of the Rent Deposit Deed would be contrary to the pari passu rule in the Company's administration and would contravene the statutory scheme for administration under Schedule B1; and
 - (3) that for these reasons the Administrators should decline to provide any further security to the Landlord.
168. In the light of my conclusions, I shall dismiss the Landlord's Amended Application and its Unfair Harm Application.
169. I shall hear submissions on costs and any consequential relief required on the handing down of this judgment.

ICC Judge Barber

29 October 2019