Jekyll and Hyde Creditors: The Strange Case of Future and Contingent Debts

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I. Introduction

Normally, a company is under no obligation to settle its debts *before* they become due and payable. Two obvious exceptions exist: one, when the company is being wound up; or two, when it wishes to embark on a corporate restructuring scheme or arrangement that includes all of its creditors. In an English winding up, with limited exceptions,[1] "[a]ll 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".[2] Australia has much in common with England in this area of the law.[3] Also subject to certain exceptions, in an Australian winding up, "all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company".[4] Thus, a company in either jurisdiction may find itself paying creditors whose claims have not matured—either when it is going into liquidation, in which case it *must* deal with them, or when it is restructuring, in which case it *may* deal with them. The purpose of this article is to

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1 See Insolvency (England and Wales) Rules 2016, SI 2016/1024, r 14.2(2)–(5).

2 ibid r 14.2(1). See also r 14.1(5).

3 See, for example, Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 3 All ER 869 [2] (Lord Hoffman); Re HIH Casualty and General Insurance Ltd [2005] EWHC 2125 (Ch), [2006] 2 All ER 671 [34] (David Richards J).

4 Corporations Act 2001 (Cth), s 553(1).

explore the role that future creditors, and more importantly, contingent creditors, play in these processes in England and Australia.

Part II of the article begins by briefly defining future claims (held by future creditors), and then dwells at length on the more complicated concept of contingent claims (held by contingent creditors). In delineating the latter, it emerges that the 'contingent claim' is a slightly narrower concept in Australia than in England. Thus, the scope of the problem identified later in the article is not entirely the same in the two jurisdictions. Next, Part III examines the implications of future and contingent creditors participating in liquidations and reorganisation regimes. It is demonstrated that their claims inevitably create a 'Jekyll and Hyde' problem: the value of these claims will either be underestimated or overestimated, though which it will be is unknown. This, in turn, results in unfair distributions and unfair voting, discussed in Part IV.[5] The article concludes with a discussion of how the Jekyll and Hyde problem may be reduced or ameliorated in England and Australia.

II. Future and Contingent Claims

A. Existing legal obligation

If a company owes a debt which is already due and payable, it is a present debt. By contrast, if a company must pay a sum of money in the future, it owes a future debt, though the creditor is not yet entitled to payment. Contingent debts involve a further layer of complexity: these are debts which may or may not become due in the future. In the Australian High Court case of *Community Development Pty Ltd v Engwirda Construction Company*,[6] Kitto J (with whom Barwick CJ and Windeyer J agreed)[7] authoritatively held that, for future and contingent debts, "there must be an *existing obligation* and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that *must* happen or only an event that *may* happen".[8] If the event *must* occur, it is a future claim; if the event *may* occur, it is a contingent claim.[9] For example, the respondent in *Engwirda* was held to be a contingent creditor because "the appellant was… under a contractual obligation to pay to the respondent the amount, if any,

[5] The author has previously written about this problem of valuing debts that are not due and payable, and the unfairness that may result: see Paulina Fishman, 'Statutory Misinterpretation: Rash Holding in Brash Holdings' (2017) 45 Federal Law Review 199, 210–211; Paulina Fishman, 'Voluntary Arrangements and the "Clean Slate" Mess' (2018) 29 Journal of Banking and Finance Law and Practice 109, 112–114.

[6] *Community Development Pty Ltd v Engwirda Construction Company* (1969) 120 CLR 455.

[7] ibid 457 (Barwick CJ), 460 (Windeyer J).

[8] ibid 459 (emphasis added), discussing a quote from *Re William Hockley Ltd* [1962] 2 All ER 111 (Ch) 113 (Pennycuick J). cf *Re SBA Properties Ltd* [1967] 2 All ER 615 (Ch), 618 (Pennycuick J).

[9] See especially *Expile Pty Ltd v Jabb's Excavations Pty Ltd* (2004) 22 ACLC 667 [37] (Palmer J).

which *might* be found by an arbitrator to be due to it under the building contract".[10] Thus, a contingent claim in Australia requires an existing legal obligation to pay in certain circumstances.[11]

The English understanding of future claims seems to be the same as in Australia. In *Re Liberty International plc*, Norris J succinctly described future claims as "claims not presently due but which are certain to accrue due in the future".[12] English courts have also held that "[t]he essence of a contingent liability… [is] that… the event on which it depends may never happen".[13] Some jurists, however, believe that "[i]n England… an existing liability is not an essential element of a contingent debt".[14] It is respectfully submitted that this is a misconception stemming from an overly literalist reading of the seminal case of *Winter v IRC*. It is true that Lord Reid in *Winter* rejected the argument "that there must be an existing obligation"[15] for a contingent liability to exist. Taken as a whole, however, Lord Reid's speech reveals that this rejection was premised on the understanding of an existing obligation as something presently operative (rather than dormant). Lord Reid insisted that a contingent debt requires an extant *commitment* to pay in certain circumstances,[16] and emphasised that the concept "only include[s] liabilities which in law *must arise* if one or more things happen".[17] Lord Birkett stressed that a contingent debtor must be "*under a liability* to pay… in the circumstances provided".[18] Lord Guest likewise held that a contingent debtor must be "*automatically involved by the operation of law* in the payment… in the circumstances defined".[19] Thus, in substance—though not in form—*Winter* is authority for the proposition that a contingent liability in England must be underpinned by an existing legal obligation.

In the minority in *Winter*, Lord Hodson (with whom Lord Tucker agreed)[20] expressly held that "[t]here can be no true contingent liability unless there is an *existing legal obligation* under which a payment will become due on the happening of a future unascertained event or events".[21] As explained above, however, this

[10] *Engwirda* (n 6) 461–462 (Owen J) (emphasis added). See also 459–460 (Kitto J).

[11] See, for example, *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* (2015) 197 FLR 1 [70]– [73] (Buss JA); *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton (2011) 82 NSWLR 336* [105], [107] (Campbell JA, McColl and Young JJA agreeing) (Sutton); *McLellan v Australian Stock Exchange Ltd* (2005) 144 FCR 327 [16].

[12] *Re Liberty International plc* [2010] EWHC 1060 (Ch), [2010] 2 BCLC 665 [15].

[13] *Winter v IRC* [1963] AC 235 (HL) 251 (Lord Reid) (emphasis added). See also 249.

[14] *McLellan* (n 11) [9] (Finkelstein J). See also [16]; *Glenister v Rowe* [2000] Ch 76 (CA) 84.

[15] *Winter v IRC* (n 13) 249. See also 251 (Lord Reid), 253 (Lord Birkett), 263 (Lord Guest).

[16] ibid 248.

[17] ibid 249 (emphasis added). See also 249: "[A] contingent liability is … a liability which, by reason of something done by the person bound, will necessarily arise or come into being if one or more of certain events occur or do not occur." (emphasis added)

[18] ibid 254 (emphasis added). See also 253.

[19] ibid 264 (emphasis added).

[20] ibid 252.

[21] ibid 257 (emphasis added).

was not the real point of departure from the views of the majority. The actual difference of opinion turned on the nature of the triggering event, which in *Winter* was "ships being sold at a price in excess of their written down value".[22] The minority took issue with this event being in the debtor company's control, because the debtor company could have simply chosen not to sell the ships.[23] Lord Hodson held that "a state of affairs which can be terminated of one's own choice without outside intervention… [is] inconsistent with the imposition of a liability".[24] Lord Hodson found that because "the liability could have been avoided at the volition of the company… the appellants… established vulnerability… but not contingent liability."[25] Given that this was only the minority view, *Winter* stands for the proposition that a contingent liability may exist even if the debtor can choose whether to crystallise the claim or not.

B. Discretionary contingencies

Can there be a contingent debt if crystallisation is a matter of someone's discretion? In England, *Winter* demonstrates that contingent liabilities may depend on the discretion of the debtor. *Haine v Day*[26] extended this further by establishing that the discretion may be that of an unrelated party, such as a court. On the facts, what gave the protective award its contingent quality was precisely "[t]he fact that the Employment Tribunal had a discretion whether or not to make the award".[27] In the UK Supreme Court case *Re Nortel GmbH (in administration)*,[28] Lord Neuberger (with whom Lords Mance, Clarke and Toulson agreed) made a point of stating that *Haine* was "rightly decided".[29] Lord Neuberger reiterated that a contingency need not be one whose "occurrence… [is] determined by absolute rather than discretionary factors".[30] A contingent claim may even be "payable in the event that it is called upon by the creditor (in whose power it is to determine whether or not the contingency occurs)".[31] *Engwirda* demonstrates that a contingent claim in Australia may also depend upon the discretion of an unrelated party—in that case, an arbitrator.[32] Another Australian example is *McLellan v Australian*

22 ibid 264.
23 See also *Re T&N Ltd* [2005] EWHC 2870 (Ch), [2006] 3 All ER 697 [50] (David Richards J).
24 *Winter* (n 13) 259.
25 ibid, 259–260. See also *Re T&N Ltd* (n 23) [54] (David Richards J).
26 *Haine v Day* [2008] EWCA Civ 626, [2008] 2 BCLC 517.
27 ibid [29]. But see [55](ii), [64]–[69].
28 *Re Nortel GmbH (in administration)* [2013] UKSC 52, [2014] AC 209.
29 ibid [90].
30 ibid [136].
31 *Donnelly v Royal Bank of Scotland plc* 2016 SLT (Sh Ct) 307 [97].
32 *Engwirda* (n 6) 458–459 (Kitto J), 461–462 (Owen J).

Stock Exchange Ltd,[33] which concerned charges laid on a company prior to it going into administration, and a fine that was imposed by the Adjudicatory Tribunal afterwards. Finkelstein J accepted that "the possibility of the imposition of a fine by a domestic tribunal is a relevant contingency"[34] and therefore held that Australian Stock Exchange Ltd was a contingent creditor.[35]

C. Differences between england and australia

(i) How an Obligation is Assumed

Does it matter how the debtor comes under the legal obligation? The English case of *Glenister v Rowe* was concerned with whether "a person against whom a costs order may be made… [has] before an order is actually made, a 'contingent liability' for such costs".[36] Mummery LJ (with whom Thorpe and Butler-Sloss LJJ agreed)[37] held "that the claim for costs… was not a contingent liability… at the date of… bankruptcy"[38] on the basis that "it is necessary to identify something agreed or some act done by… [the potential debtor] to give rise to a liability on his part".[39] Merely being sued does not satisfy this condition, according to *Glenister*. In *Nortel*, however, Lord Neuberger expressly stated that *Glenister* was "wrongly decided".[40] He held that "[a]n order for costs made against a company in liquidation… in proceedings begun before it went into liquidation, is… provable as a contingent liability… as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings".[41] The judgment of Lord Sumption (with whom Lords Mance and Clarke agreed) contains similar comments.[42] Thus a contingent claim in England need not have its genesis in some independent and voluntary act of the debtor.

In the Australian High Court case of *Foots v Southern Cross Mine Management Pty Ltd*, however, Gleeson CJ, Gummow, Hayne and Crennan JJ held that a costs order made after bankruptcy was not a provable debt because there was "no antecedent

33 *McLellan* (n 11).
34 ibid [12]. See also [16].
35 ibid [18]. See also *ACCC v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2016] FCA 1246 [68]–[71] (Perry J).
36 *Glenister* (n 14) 78–79.
37 ibid 85.
38 ibid 84.
39 ibid.
40 *Nortel* (n 28) [91].
41 ibid [89].
42 ibid [136].

obligation to pay costs until the order was made".[43] Although their Honours noted that, in bankruptcy, "the classes of provable debts are narrower than those… [in] corporate insolvency",[44] *Foots* has been seen to apply in the winding up context as well.[45] Yet arguably being sued brings "a person… within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs"[46]—and therefore *does* create an antecedent obligation. Rather, the fundamental difference between the *Foots* (and *Glenister*) view of a contingent claim, and the *Nortel* view on the other hand, seems to relate to *how* the antecedent obligation is assumed: in England, it may be imposed upon a potential debtor, whereas *Foots* suggests that in Australia its source must be the potential debtor's independent conduct.[47] An illustration of this is *BE Australia WD Pty Ltd (subject to a Deed of Company Arrangement) v Sutton*, where the facts involved proceedings commenced by Mrs Sutton which could have resulted in an order being made against a company, though not based on "any obligation that the company owed to her before".[48] Campbell JA (with whom McColl and Young JJA agreed) held that there was no contingent claim.[49] His Honour relied on *Foots* by drawing an analogy with costs orders, which do not depend on "any legal right that the applicant has (beyond the bare right to seek the order) before the order is actually made".[50] Yet, now that *Glenister* has been overruled by *Nortel*,[51] the claim in *Sutton* would probably qualify as a contingent claim in England. It follows that the contingent claim is a narrower concept in Australia than in England.

(ii) Mere Expectations

Contingent claims must not be confused with mere expectations. In the Australian case of *Lam Soon Australia Pty Ltd (administrator appointed) v Molit (No 55) Pty Ltd*, the Full Federal Court commented in obiter that "[a] right to sue for damages for a particular future breach of… covenant,… looked at *before the breach occurs*, [is] not

43 *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 [65]. See also [35]–[36], quoting and citing *Glenister* (n 14).

44 ibid [9].

45 See, for example, *Central Queensland Development Corp Pty Ltd v Sunstruct Pty Ltd* (2015) 231 FCR 17 [42]–[72] (Gilmour J, Rangiah and Besanko JJ agreeing); Sutton (n 11) [114] (Campbell JA, McColl and Young JJA agreeing); *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1567 [61], [69] (Hammerschlag J). But see *Re Walker* (2007) 215 FLR 428 [18] (Barrett J).

46 *Nortel* (n 28) [89].

47 See also *McCluskey v Pasminco Ltd* (2002) 120 FCR 326, [39]–[41] (Goldberg J).

48 *Sutton* (n 11) [116]. See also [31].

49 ibid [144].

50 ibid [115]. See generally [113]–[117].

51 *BPE Solicitors v Gabriel* [2015] UKSC 39, [2015] AC 166 [13], citing Nortel (n 28) [87]–[93] (Lord Neuberger), [136] (Lord Sumption).

even a contingent claim: it is a mere expectancy and could not be the subject of proof".[52] Although contractual obligations are voluntarily assumed, perhaps this statement was motived by a concern that the potential debtor has control over whether a breach will or will not occur (reminiscent of the minority's concern in *Winter*). Conversely, as Lord Hoffmann noted in *Secretary of State for Trade and Industry v Frid*, an established category of contingent debts in England comprises of "claims for breach of contract where the contract was made before the insolvency date but the breach occurred afterwards".[53] In an Australian case of the same year, *Re National Express Group Australia (Swanston Trams) Pty Ltd*, Finkelstein J staunchly disagreed with *Lam Soon* and relied on English authorities to argue that "a future breach of contract could be proved as a contingent claim".[54] Finkelstein J's remarks were, however, obiter.[55] The Australian position remains unclear.[56] Thus, the comment in *Lam Soon* creates another possible basis on which contingent claims may be a narrower concept in Australia than in England.

D. Examples

The differences between a contingent claim in England and in Australia mean that the scope of the problem identified in Part III may be slightly broader in the former jurisdiction. To the extent that the problem creates unfairness—explored in Part IV below—one would expect more instances of unfairness in England than in Australia, *ceteris paribus*. Yet it is also apparent from the above discussion that the concepts of contingent claims in these jurisdictions largely overlap. Contracts are a common source of contingent claims.[57] Putting potential breaches aside, one typical example is "an uncalled guarantee, [because] the person with the benefit of the guarantee will be a 'creditor' of the guarantor, even though there has not been, and may never be, any default on the principal debt or any call on the guarantee".[58]

52 *Lam Soon Australia Pty Ltd (administrator appointed) v Molit* (No 55) Pty Ltd (1996) 70 FCR 34, 44 (von Doussa, O'Loughlin and Lehane JJ) (emphasis added).

53 *Secretary of State for Trade and Industry v Frid* [2004] UKHL 24, [2004] 2 AC 506 [9], citing *Re Asphaltic Wood Pavement Co* (1885) 30 Ch D 216 (CA).

54 *Re National Express Group Australia (Swanston Trams) Pty Ltd; Thiess Infraco (Swanston) Pty Ltd v Smith* (2004) 209 ALR 694 [10]. See generally [10]–[16].

55 ibid [17].

56 See *Australian Gypsum* (n 11) [75], [79] (Buss JA); *Larkden* (n 45) [58] (Hammerschlag J); *Re Walker* (n 45) [19] (Barrett J); *Spring Hill Apartments Pty Ltd v We Both Pty Ltd* (in liq) [2006] QSC 151 [40] (Moynihan J); *Re Motor Group Australia Pty Ltd* (2005) 54 ACSR 389 [8]–[11], [14] (Hely J); *Wallace-Smith v Thiess Infraco* (Swanston) Pty Ltd (2005) 218 ALR 1 [105]–[106] (French J), [341] (Allsop J).

57 See, for example, *Nortel* (n 28) [75] (Lord Neuberger), [131] (Lord Sumption).

58 *Re T&N Ltd* (n 23) [46] (David Richards J).

Other common examples include possible claims under insurance policies[59] and conditional fee agreements.[60] Importantly, claims—including contingent claims—"need not arise from consensual transactions at all, but can arise from statutory obligations… or torts".[61] In the English case of *Re T&N Ltd*, David Richards J had to decide whether "those persons who have been exposed to asbestos and who will have claims in negligence… *if they develop* asbestos-related diseases, are 'creditors'… for the purposes of [restructuring regimes]".[62] The answer was in the affirmative, at least in circumstances where "the relevant acts or omissions… are complete… [and] the potential claimants have been exposed to asbestos".[63]

III. The Jekyll and Hyde Problem

The easiest way to understand the problem[64] is to consider some simple examples. If a £100 debt is due and payable when a winding up commences in England, the creditor would be entitled to prove for £100 plus any accrued interest.[65] (In Australia, a creditor who is owed $100 could likewise prove for $100 plus any interest.[66]) Next, consider a future debt of £100 that will fall due three years from now. If interest rates are positive, £100 today is worth more than the same amount in the future, so the debt must be discounted because of "the time value of money".[67] Assuming that the anticipated average interest rate over the forthcoming three years is 5% per annum, the present value of the debt is £86.38.[68] But what if the actual average rate of interest turns out to be only 1% per annum over those three years? Then the discount rate was too high—to the detriment of the future creditor, who *ought* to have been permitted to prove for £97.06.[69] Conversely, if future interest rates are underestimated, discount rates are too low, and future claims are overvalued. This unduly benefits our hypothetical future creditor, who can invest the sum paid through the liquidation or restructuring

59 *Winter* (n 13) 258 (Lord Hodson).
60 *Rowbury v Official Receiver* [2015] EWHC 2276 (Ch), [2016] BPIR 477 [26].
61 *Frid* (n 53) [25] (Lord Hoffmann). See also [19]; *Re T&N Ltd* (n 23) [63].
62 *Re T&N Ltd* (n 23) [66] (emphasis added). See also [47].
63 ibid [67]. See also *Secretary of State for Business, Innovation and Skills v Broomfield Developments Ltd* [2014] EWHC 3925 (Ch) [49]–[51], [80]–[81].
64 Part III expands upon the author's previous work concerning this problem: see n 5.
65 Insolvency (England and Wales) Rules 2016, r 14.23(1)–(6).
66 Corporations Act 2001 (Cth), s 554(1).
67 *Lomas v Burlington Loan Management Ltd* [2015] EWHC 2269 (Ch), [2016] Bus LR 17 [215] (David Richards J) (*Lomas*).
68 Present value = (future amount)/(1 + interest rate)years = £100/(1 + 0.05)3 ≈ £86.38.
69 Present value = (future amount)/(1 + interest rate)years = £100/(1 + 0.01)3 ≈ £97.06.

process, and in three years' time can have more than the £100 that was owed to the creditor by the company.

For contingent claims, one must first assess "the chances of the contingency occurring and the likely amount of any claim"[70] and then assign "a present value on possible future events or outcomes."[71] Once again, "if the contingent debt cannot fall due for payment for a period of, say, five years, the estimate of the liability must include an element of *discount for that period*".[72] To take a very simple example, suppose there is a 50% chance of a £100 claim crystallising three years from now, and the average interest rate over that period is expected to be 5% per annum. The present value of this contingent claim is £43.19.[73] Yet consider the possible outcomes in this scenario if the creditor is involved in the debtor company's liquidation or restructuring scheme or arrangement:

Table III.1

Claim will	*Contingent creditor receives up to £43.19 today*
Arise	Yet would have been owed £100 in three years, the present value of which is £86.38
Not arise	Yet would not have been owed anything at all

Thus, a contingent claim which *will* subsequently crystallise is undervalued at present.[74] But if it will *not* subsequently crystallise, the debtor company is paying someone who will never be owed anything at all![75]

Clearly there is a difficulty with assigning a present value to claims that are not due and payable as yet. Specifically, future and contingent claims create a problem in winding up and restructuring processes because their value must be *estimated*. In the case of future claims, the discount rate for the time value of money has been legislatively fixed at 5% per annum in England,[76] and 8% per annum in Australia.[77] Although there is no risk of paying someone whose claim will never crystallise, these rates may in time prove to have been too high or too low, meaning that future claims are undervalued or overvalued today. There is an additional

70 *Re MF Global UK Ltd (in special administration) (No. 2)* [2013] EWHC 92 (Ch), [2013] Bus LR 1030 [76] (David Richards J).

71 ibid [54] (David Richards J).

72 *Lomas* (n 67) [198] (David Richards J) (emphasis added).

73 Present value = (future amount x probability)/(1 + interest rate)years = (£100 x 0.50)/(1 + 0.05)3 ≈ £43.19.

74 See Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (reprint, Beard Books 2001) 47.

75 See *Lomas* (n 67) [203] (David Richards J); *Wight v Eckhardt Marine GmbH* [2003] UKPC 37, [2004] 1 AC 147 [29], [33] (Lord Hoffman)

76 Insolvency (England and Wales) Rules 2016, r 14.44(2).

77 Corporations Regulations 2001 (Cth), reg 5.6.44. See also Corporations Act 2001 (Cth), s 554B.

estimation problem in the case of contingent claims, given that they must also be discounted for the probability of non-crystallisation. Like Dr Jekyll, who concealed his transformations from the world, future and contingent claims may be overestimated; or, like Mr Hyde, who was but one persona adopted by a more complex character, future and contingent claims may be underestimated.[78] Only time can tell which of the two possibilities will become reality. This valuation—or 'Jekyll and Hyde'—problem is the consequence of involving future and contingent creditors in liquidation and restructuring processes.

IV. Unfair Distributions and Votes

This Part of the article investigates two ways in which the Jekyll and Hyde problem may cause unfairness.[79] For one, it may produce unfair distributions, not only to the future or contingent creditors themselves, but also to its shareholders or to the company's creditors *as a whole*. Secondly, it may produce unfair voting if creditors are invited to make a decision about the future of the debtor company. In contending that distributions and voting may be unfair when future and contingent creditors are involved, the article draws on the reasoning that underpins an established principle in English and Australian insolvency law: namely, the 'hindsight principle'.

A. Distributions

(i) Skewed Distributions

How are the assets of a company distributed in a winding up? In the voluntary winding up of an English company, its assets are generally "applied in satisfaction of the company's liabilities *pari passu* and… [then] distributed among the members according to their rights and interests in the company".[80] Similarly, solvent proprietary companies in Australia limited by shares must pay all their debts in full and any surplus must be distributed to shareholders.[81] But if there are not enough assets to meet all the claims of creditors, the *pari passu* principle requires "the free assets of the insolvent… [to] be distributed *rateably* amongst the insolvent's unsecured creditors"[82]—in other words, "*pro rata* according to the

78 Robert Louis Stevenson, The Strange Case of Dr Jekyll and Mr Hyde (Longmans, Green & Co 1886).

79 Part IV expands upon the author's previous work concerning these two forms of unfairness: see n 5.

80 Insolvency Act 1986 (UK), s 107.

81 See, for example, Corporations Act 2001 (Cth), Pt 1.5, para 9.4; *Mills v Sheahan* (2007) 99 SASR 357 [13] (Debelle J); *Commissioner of Taxation v Linter Textiles Australia Ltd* (in liq) (2005) 220 CLR 592 [54] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), [121] (McHugh J).

82 *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 (CA) 819 (Buckley LJ) (emphasis added).

value of… [their] claims”.[83] In both jurisdictions, this “basic concept of [the] law governing the liquidation of insolvent estates”[84] is enshrined in statute. For instance, the rule applies in an English administration or a court winding up in the same way as it does in a voluntary winding up:

> Debts other than preferential debts rank equally between themselves and, after the preferential debts, must be paid in full unless the assets are insufficient for meeting them, in which case they abate in *equal proportions* between themselves.[85]

Similarly in Australia, subject to certain exceptions, “all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid *proportionately*”.[86]

When “the available pot is too small to pay everyone in full, a *pari passu* distribution has an obvious appeal”.[87] It has the virtue of simplicity.[88] More importantly, “*pari passu* distribution… responds to a very basic human feeling that, when faced by a common misfortune, all those affected by it should bear the burden equally”.[89] Indeed, “*[p]ari passu* distribution is derived from the maxim that ‘equality is equity’”.[90] Thus Briggs J in *Re Nortel GmbH (in administration)* called it “a

83 *Re Dynamics Corporation of America* [1976] 2 All ER 669 (Ch) 673 (Oliver J) (emphasis added). See also *Fuglers LLP v Solicitors Regulatory Authority* [2014] EWHC 179 (Admin), [2014] BPIR 610 [18] (Popplewell J); *Revenue and Customs Commissioners v Football League Ltd* [2012] EWHC 1372 (Ch), [2012] Bus LR 1539 [4] (David Richards J).

84 *Re Gray’s Inn Construction Co Ltd* (n 82) 819. See also, for example, *Coshott v Barry* (2015) 91 NSWLR 1 [88] (McColl and Emmett JJA and Brereton J); *Westpac Banking Corporation v Bell Group Ltd* (in liq) (No 3) (2012) 44 WAR 1 [792] (Lee AJA); *Re Opes Prime Stockbroking Ltd* (2008) 171 FCR 473 [7] (Finkelstein J) ; *Edwards v Attorney General* (2004) 60 NSWLR 667 [89] (Young CJ in Eq); Lewis v Hyde [1998] 1 WLR 94 (PC), 98 (Lord Browne-Wilkinson); *Re HIH Casualty and General Insurance Ltd* (n 3) [34], [37] (David Richards J); *Re HIH Casualty and General Insurance Ltd* (HL) (n 3) [2] (Lord Hoffman).

85 Insolvency (England and Wales) Rules 2016, r 14.12(2) (emphasis added). See also Insolvency Act 1986 (UK), ss 107 (voluntary winding up), 175(1A)–(1B) (preferential debts in winding up), 328 (bankruptcy).

86 Corporations Act 2001 (Cth), s 555 (emphasis added). See also Bankruptcy Act 1966 (Cth), ss 108 and 109(11).

87 *Re Sigma Finance Corporation (in Administrative Receivership)* [2008] EWCA Civ 1303 [92] (Rimer LJ).

88 *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22 (CA) 36 (Woolf LJ).

89 *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch), [2015] 1 WLR 16 [61] (Henderson J). See also, for example, *Re Lehman Brothers International (Europe) (in admin)* [2010] EWCA Civ 917, [2011] Bus LR 277 [76] (Arden LJ); *Re Golden Key Ltd (in receivership)* [2009] EWCA Civ 636 [63] (Arden LJ).

90 *Re Golden Key Ltd (in receivership)* (n 89) [3] (Arden LJ). See also, for example, *Barlow Clowes* (n 88) 42 (Woolf LJ).

fundamental principle of justice, equity and fairness".[91] In Australia, the Full Federal Court in *Akers v Deputy Commissioner of Taxation* recognised that "[t]he principle of *pari passu* distribution… is informed by fairness and equality".[92] The *pari passu* rule, however, does not deviate from the requirement that all provable debts be valued at the same point in time. In *Re Dynamics Corporation of America*, Oliver J explained that "the claims of the creditors amongst whom the division is to be effected must all be *crystallised at the same date*, even though the actual ascertainment may not be possible at that date, for otherwise one is not comparing like with like".[93] The Privy Council in *Wight v Eckhardt Marine GmbH* reiterated that "valuation at the date of winding up ensures that distribution among creditors is truly *pari passu*."[94]

Returning to the Jekyll and Hyde problem outlined in Part III, the overvaluation of future and contingent debts will result in overpayment to future and contingent creditors in a winding up. All else being equal, this overpayment will be detrimental to the members of a solvent company because the surplus available to be distributed among them will be reduced. Or if the company is insolvent, it is the other creditors who will be disadvantaged. This is because (*ceteris paribus*) as the demands on an insufficient pool of assets increase, the portion of each creditor's claim that can be satisfied by the company's limited assets is reduced.[95] Conversely, underpayment to future and contingent creditors unduly benefits members (of a solvent company) or the other creditors (of an insolvent company). This was apparent by 1888, when the Earl of Selborne (with whom Lords Fitzgerald and Herschell agreed) astutely commented in *Hardy v Fothergill*:

> For the principle of the old bankrupt laws, which did not admit to proof any claims for liabilities contingent at the time of bankruptcy, much might perhaps be said. It might be a *hardship upon the creditors*, to whom debts were then due, that a merely possible future liability, *which might never have matured into a debt at all*, should be valued and admitted to proof and to *participation in dividends*.… [B]ut there might also be cases in which it would be a *hardship upon him to be compelled to*

91 *Re Nortel GmbH (in administration)* [2010] EWHC 3010 (Ch), [2011] Bus LR 766 [64]. See also, for example, *Re Lehman Brothers International (Europe) (in admin)* [2009] EWHC 3228 (Ch), [2010] 2 BCLC 301 [249] (Briggs J); Wight (n 75) [28]; *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All ER 478 [58] (Lindsay J); *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812 (CA) 826 (Mummery LJ); *Cox v Bankside Members Agency Ltd* [1995] CLC 671, 682 (Peter Gibson LJ).

92 *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 [138] (Allsop CJ, Robertson and Griffiths JJ agreeing). See also, for example, *Re Opes Prime Stockbroking Ltd* (n 84) [7] (Finkelstein J); *Sheahan v Carrier Air Conditioning Pty Ltd & Campbell* (1997) 189 CLR 407, 463–464 (Kirby J).

93 Re Dynamics Corporation of America (n 83) 675–676 (emphasis added).

94 *Wight* (n 75) [29].

95 See, for example, *Re Trident Fashions plc* [2004] EWHC 293 (Ch), [2004] 2 BCLC 35 [30] (Lewison J); *Re FMS Financial Management Services Ltd* (1989) 5 BCC 191, 193 (Hoffmann J).

> *prove such a claim, so valued*, at a time when the estate of the bankrupt might be inadequate to pay any substantial dividend, instead of waiting for the occurrence of the contingency (if it ever should occur) and then taking his legal remedies against such property as the debtor might at that time possess, whether previously bankrupt or not.[96]

(ii) The Hindsight Principle

The Jekyll and Hyde problem plainly produces skewed distributions—not only for future and contingent creditors, but also for members or other creditors—in English and Australian liquidations. This is particularly noticeable when future and contingent claims mature after the commencement of a winding up, but *prior* to any payment being made. Returning to the example of a £100 future debt, even if it becomes due and payable by the time of distribution, the requirement to value all claims as at a single date would mean that our hypothetical creditor could rely only on a proof for £86.38.[97] Yet once a future debt matures, it seems "unjust that this creditor should not receive a dividend on the full amount of his debt".[98] Again, suppose that a contingent claim crystallises prior to any distribution: if £100 is due and payable, why should the creditor's proof be limited to something like £43.19?[99] Or if it becomes certain that the contingent claim will never crystallise, why should the company pay anything at all?[100] The injustice is so glaring that courts have developed an exception to the same-date valuation requirement: the hindsight principle.[101]

The hindsight principle permits claims to be valued at what they *are* or *ought to have been* worth, rather than what they *were in fact* worth at the commencement of proceedings.[102] As David Richards J explained in *Re MF Global UK Ltd (in special administration)*, it "either removes the need to make the estimate or makes the estimate more accurate and produces what may generally be regarded as *fairer*

96 *Hardy v Fothergill* (1888) 13 App Cas 351, 358 (emphasis added).

97 See n 68 and accompanying text.

98 *Lomas* (n 67) [215] (David Richards J).

99 See n 73 and accompanying text.

100 See n 75.

101 See, for example, *Grapecorp Management Pty Ltd (in liq) v Grape Exchange Management Euston Pty Ltd* (2012) 265 FLR 33 [68]–[70] (Sifris J); *New Cap Reinsurance Ltd (in liq) v Grant* (2008) 221 FLR 164 [50]–[52] (White J); *MS Fashions Ltd v Bank of Credit and Commerce International SA* (in liq) (No 2) [1993] Ch 425 (CA) 432, 435 (Hoffmann LJ).

102 See *Lomas* (n 67) [200], [205] (David Richards J); *Gleave v Board of the Pension Protection Fund* [2008] EWHC 1099 (Ch), [2008] Bus LR 1443 [20] (David Richards J); *Stein v Blake* [1996] AC 243, 252 (Lord Hoffmann).

values for the purposes of the distribution or payment".[103] The Privy Council similarly held in *Wight*:

> Hindsight is used because it is *not considered fair* to a creditor to value a contingent debt at what it might have been worth at the date of the winding-up order when one knows that prescience would have shown it to be *worth more*. The same must be true of a contingent debt which prescience would have shown to be *worth less*.[104]

The *raison d'être* of the hindsight principle is the idea that overvaluing and undervaluing uncrystallised claims is unfair because it results in distributions to future and contingent creditors that are either too large, or too small—and this unduly harms or benefits other creditors of the insolvent company, or members of the solvent company.

The hindsight principle is now "expressly recognised in the applicable legislation".[105] In England, a future claim must be discounted only if "payment is not due at the date of the declaration of a dividend".[106] Likewise in Australia, "[t]he discount by which the amount payable on the future date is to be reduced… is… calculated from the declaration of the dividend to the time when the debt would have become payable".[107] Thus future claims are not discounted if they fall due before a dividend is declared.[108] Yet the hindsight principle is temporally limited: the Jekyll and Hyde problem remains in respect of future claims which do not mature before a dividend is declared. Regarding contingent claims, in an English "administration or… winding up, the office-holder must estimate the value of a debt that does not have a certain value".[109] Consistently with the hindsight principle, such an estimate may be revised "by reference to a change of circumstances or to information becoming available to the office-holder."[110] Thus "the amount provable… is that of the estimate *for the time being*".[111] Additionally, a creditor may withdraw a proof at any time, or vary the amount by agreement with the office-holder.[112] Similarly, in an Australian winding up, "[a] proof of debt or claim may be withdrawn, reduced or varied by a creditor with the consent

103 *Re MF Global UK Ltd (in special administration)* [2013] EWHC 92 (Ch), [2013] Bus LR 1030 [48] (emphasis added).

104 *Wight* (n 75) [32] (emphasis added). See also *Stein* (n 103) 252 (Lord Hoffmann).

105 *Re MF Global UK Ltd (in special administration)* (n 104) [52] (David Richards J).

106 Insolvency (England and Wales) Rules 2016, r 14.44(1).

107 Corporations Regulations 2001 (Cth), reg 5.6.44. See also Corporations Act 2001 (Cth), s 554B.

108 See also *Lomas* (n 67) [197], [224], regarding repealed Insolvency Rules 1986 (UK), r 2.105.

109 Insolvency (England and Wales) Rules 2016, r 14.14(1).

110 ibid r 14.14(2).

111 ibid r 14.14(4) (emphasis added).

112 ibid r 14.10.

of the liquidator".[113] Such provisions enable a contingent creditor to "come back for more if the contingency eventuated".[114] There is no possibility, however, of variation or revision after liquidation,[115] given that "previous distributions cannot be set aside".[116] For contingent claims that do not become certain in time, the Jekyll and Hyde problem remains unresolved.

B. Voting on alternatives

Two corporate restructuring mechanisms that exist in England and Australia in similar forms—voluntary arrangements and court-sanctioned schemes—are considered below. These regimes typically involve creditors voting on particular proposals for dealing with the company's debts. After outlining how the proposals may be approved, this section will elucidate the way in which the Jekyll and Hyde problem infects the voting processes for both of these restructuring regimes.

(i) Voluntary Arrangements

In England, "[t]he directors of a company… may make a proposal… to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs".[117] A decision must be sought "from the company's creditors as to whether they approve the proposal".[118] Accordingly, an invitation will be sent to the company's creditors to participate in some kind of a qualifying decision procedure.[119] A decision approving a proposed or modified company voluntary arrangement "is made when three-quarters or more *(in value)* of those responding vote in favour of it".[120] "Votes are calculated according to the amount of each creditor's claim"[121] at the relevant date, with two major exceptions. First, the value of a secured creditor's vote is usually limited to the value of any unsecured part; and if there is no unsecured part, it is nil.[122] Secondly, "[a] creditor may vote in respect of a debt of an *unliquidated* or *unascertained* amount if the

113 Corporations Regulations 2001 (Cth), reg 5.6.56. See also Corporations Act 2001 (Cth), s 554A.

114 Re *Lehman Brothers International (Europe) (in administration) (No 4)* [2015] EWCA Civ 485, [2016] Ch 50 (CA) [95] (Lewison LJ), citing *Re Danka Business Systems plc (in members' voluntary liquidation)* [2013] EWCA Civ 92, [2013] Ch 506 (CA) [37] (Patten LJ).

115 See *Danka* (n 114) [21], [37].

116 *Wight* (n 75) [31] (Lord Hoffman).

117 Insolvency Act 1986 (UK), s 1(1). But see also s 1(3).

118 ibid ss 3(1)(b) and 3(2)(b). See also Sch A1, para 29(1)(b). See further s 4(1A).

119 ibid s 3(3); Sch A1, para 29(2); Insolvency (England and Wales) Rules 2016, r 2.25(2).

120 Insolvency (England and Wales) Rules 2016, r 15.34(3)(a) (emphasis added). See also rr 15.34(4) and 15.34(5)(a).

121 ibid r 15.31(1)(d).

122 ibid r 15.31(4)–(6).

convener or chair decides to put upon it an *estimated minimum value* for the purpose of entitlement to vote and admits the claim for that purpose".[123] In relation to voluntary arrangements, however, "a debt of an unliquidated or unascertained amount is to be *valued at £1* for the purposes of voting unless the convener or chair or an appointed person *decides to put a higher value* on it".[124]

In Australia, the board of directors may resolve that an administrator should be appointed if it also resolves that "the company is insolvent, or is likely to become insolvent at some future time".[125] Meetings must be convened by the administrator,[126] including one at which the company's creditors can decide to end the administration, to wind up the company, or that the company execute a deed of company arrangement.[127] A resolution put to the vote of creditors must be decided on the voices, unless a poll is demanded.[128] If a poll is taken at a creditors' meeting, the resolution will be carried if a numerical majority of the creditors voting are in favour of it, and "the *value* of the debts owed by the corporation to those voting in favour of the resolution is more than half the total debts owed to all the creditors voting".[129] (But only one of these matters will suffice if "the person presiding at the meeting… exercise[s] a casting vote in favour of the resolution".[130]) A secured creditor's vote is not[131] limited to the "balance, if any, due to him or her after deducting the value of his or her security".[132] However, a "creditor must not vote in respect of… an unliquidated… or… a contingent debt… or an unliquidated or a contingent claim… or… a debt the value of which is not established… unless a just estimate of its value has been made".[133] If there is a creditor with such a debt or claim, "there is an obligation on the chairman to make… a just estimate".[134] Once this has been done, "the admission of the proof is necessarily for the amount of that just estimate".[135]

(ii) Schemes of Arrangement

There is another restructuring mechanism in England; one which involves creditors, or members, or both, voting on a proposed compromise or arrangement

[123] ibid r 15.31(2) (emphasis added).
[124] ibid r 15.31(3) (emphasis added).
[125] Corporations Act 2001 (Cth), s 436A(1). But see also ss 436A(2), 436B, 436C(1)–(2).
[126] ibid ss 436E and 439A.
[127] ibid s 439C.
[128] Corporations Regulations 2001 (Cth), reg 5.6.19(1).
[129] ibid reg 5.6.21(2) (emphasis added). See also regs 5.6.21(4)(a) and 5.6.21(4B).
[130] ibid reg 5.6.21(4)(a).
[131] ibid reg 5.6.24(4).
[132] ibid reg 5.6.24(2).
[133] ibid reg 5.6.23(2).
[134] *Kirwan v Cresvale Far East Ltd* (in liq) (2002) 44 ACSR 21 [395] (Young CJ in Eq).
[135] *Re Free Wesleyan Church of Tonga in Australia Inc* (2012) 260 FLR 348 [37] (Black J). See also [16].

in classes.[136] Upon application, an English court may sanction a compromise or arrangement "[i]f a majority in number representing 75% *in value of the creditors or class of creditors*… (as the case may be), present and voting either in person or by proxy… agree".[137] A similar mechanism is available in Australia.[138] For such a scheme between a company and its creditors (or a class of creditors) to be approved there must be a favourable vote from a numerical majority and their "debts or claims against the company [must] amount in the aggregate to at least 75% of the *total amount of the debts and claims of the creditors present and voting* in person or by proxy, or of the creditors included in that class present and voting in person or by proxy, as the case may be".[139]

(iii) Value of Vote

Earlier, this Part demonstrated that the Jekyll and Hyde problem produces skewed distributions when future and contingent creditors are involved in a winding up. Importantly, it also produces distortions whenever these creditors are involved in voting on the debtor company's future: the value of a creditor's vote in respect of a proposed voluntary arrangement or scheme normally corresponds to the value of that creditor's debt or claim.[140] Therefore, future and contingent creditors will not only receive too much or not enough from the debtor company, to the detriment or benefit of others, but antecedent to any distribution, their votes under a restructuring regime will either be too weighty or too light. For future creditors, the voting unfairness is proportionate to the difference between the actual and estimated interest rate. In the case of contingent creditors, if their claims will eventually crystallise, they deserve more voting power; and if their claims will never crystallise, they should not be voting at all. For contingent creditors whose claims *will* crystallise, the unfairness of insufficient voting power will be greatly exacerbated under the English voluntary arrangement regime if their claim is valued at £1 for the purposes of voting on a proposal.[141] Similarly in Australia, a creditor's voting entitlement might legitimately be reduced to as little as $1 if the "debt is subject to an uncertain contingency".[142]

136 Companies Act 2006 (UK), Part 26, especially ss 895(1)(a) and 896(1).

137 ibid s 899(1) (emphasis added).

138 Corporations Act 2001 (Cth), Part 5.1, especially s 411.

139 ibid s 411(4)(a)(i) (emphasis added).

140 See nn 120, 121, 129, 137, 139 and accompanying text.

141 See n 124 and accompanying text. See also *Re Gertner* [2017] EWHC 111 (Ch), [2017] BPIR 336 [73] (Judge Keyser QC); *Revenue and Customs Commissioners v Maxwell* [2010] EWCA Civ 1379, [2011] Bus LR 707 [57] (Lord Neuberger MR, Carnwath and Sullivan LJJ agreeing).

142 *Selim v McGrath* (2003) 177 FLR 85 [269](f) (citations omitted) (Barrett J). See also nn 133–135 and accompanying text.

V. Conclusion

Future and contingent claims are valued differently from claims that are already due and payable because they are discounted. Future claims are discounted to take into account the time-value of money—which gives rise to overestimation or underestimation of their present value, depending on whether the discount rate proves too low or too high. Contingent claims are further discounted for the uncertainty of crystallisation. This results in an undervaluation of contingent claims which will crystallise, or in the treatment of people and entities as 'creditors' though they will never become entitled to payment at all. This difficulty with ascertaining the value of uncrystallised debts and claims was dubbed the Jekyll and Hyde problem in Part III. That it is unfair is already implicitly recognised in insolvency law by the hindsight principle, though it is temporally limited. The problem manifests itself in how much future and contingent creditors (as well as members or other creditors, depending on the debtor company's solvency) receive in a winding up. Additionally, the problem may manifest itself when creditors vote on restructuring proposals. Indeed, the distributions offered to creditors under such proposals are likely to be indirectly distorted by the Jekyll and Hyde problem, to the extent that winding up is the appropriate counterfactual to the restructure.[143] Yet plainly future and contingent creditors must continue to participate in liquidations, given that companies' affairs are being finalised.[144]

Nonetheless, the Jekyll and Hyde problem is not entirely intractable. In relation to future claims, the discount rate is presently fixed by the legislatures in England and Australia (at 5% and 8%, respectively).[145] It is respectfully submitted that the problem can be largely resolved by simply replacing these fixed rates with floating ones that are pegged to some relevant rate in each jurisdiction's marketplace, such as an appropriate fixed-term deposit rate. Variable discount rates may still prove too low or too high by the time that a future claim matures, but are likely to produce more accurate valuations. In turn, better valuations will reduce the unfairness associated with future creditors voting on the future of, and

[143] See, in relation to voluntary arrangements: *Mourant & Co Trustees Ltd v Sixty UK Ltd (in liq)* [2010] EWHC 1890 (Ch), [2011] 1 BCLC 383 [67](c) (Henderson J); *Fleet Broadband Holdings Pty Ltd v Paradox Digital Pty Ltd* (2005) 228 ALR 598 [62] (Master Newnes); *Infa Products Pty Ltd v Infa Products Pty Ltd (Administrator Appointed)*; *Re Britax Childcare Pty Ltd* (2016) 115 ACSR 322 [115] (Burley J). See, in relation to court-sanctioned schemes: *Re T&N Ltd* [2004] EWHC 2361 (Ch), [2005] Pens LR 1 [82] (David Richards J); *Re Pheon Pty Ltd* (1986) 47 SASR 427, 443 (White J).

[144] See, for example, *Unite the Union v Nortel Networks UK Ltd* (in administration) [2010] EWHC 826 (Ch), [2010] 2 BCLC 674 [33] (Norris J); *Mine & Quarry Equipment International Ltd v McIntosh* (2005) 54 ACSR 1 [16] (McPherson JA, Atkinson and Mullins JJ agreeing); *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd (in liq)* [2005] EWCA Civ 1408, [2006] QB 808 (CA) [19] (Lloyd LJ), [58] (Moore-Bick LJ); *Re T & N Ltd* (n 23) [94] (David Richards J).

[145] Insolvency (England and Wales) Rules 2016, r 14.44(2); Corporations Regulations 2001 (Cth), reg 5.6.44; Corporations Act 2001 (Cth), s 554B.

receiving distributions from, the debtor company. Unfortunately, in relation to contingent claims, there is no presently-available objective factor that can reduce the uncertainty of crystallisation. Contingent creditors (such as potential victims of a mass tort)[146] might not, however, want to see "very small amounts being paid to a very large number of people".[147] The Jekyll and Hyde problem's impact on distributions may be ameliorated if the company were "to calculate on a statistical and actuarial basis the sum needed to meet future claims and allow a proof for that total sum, thereby creating a reserve which can be applied in paying a dividend to those [whose claims crystallise]".[148] Undoubtedly, there would be costs associated with maintaining and distributing the reserved funds. Yet this may be a fairer way to proceed in some liquidations or under some voluntary arrangements and schemes.

[146] *Re Centro Properties Ltd* (2011) 86 ACSR 584 [21] (Barrett J). See also, for example, *New Cap* (n 101) [79] (White J); *Chief Commissioner of State Revenue v Reliance Financial Services Pty Ltd* [2006] NSWSC 1017 [36] (White J); *Petrochemical Industries Ltd (in liq) v Dempster Nominees Pty Ltd* (1994) 15 ACSR 468, 475–476 (Murray J); *Re Gasbourne Pty Ltd* [1984] VR 801, 837 (Nicholson J).

[147] *Re T & N Ltd* (n 23) [138] (David Richards J).

[148] ibid.