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The *Eurosail* Judgment in a Post-Crisis World – Part Two

Boris Bonev, UCL, London, UK

Introduction

The first part of this article explored different insolvency theories, the background facts of the *Eurosail* case, as well as the macroeconomic bank and securitisation context in which the decision was reached. It has argued that there were strong policy reasons for the courts to accept a pro-liquidity approach, one supported theoretically and achieved through valuation mechanisms in the context of US restructuring cases. This part will explore the appellate history of the *Eurosail* case, focusing on how the provisions of the Insolvency Act have been diluted to achieve, in my opinion, a desired policy outcome. An alternative solution based on the observations made in Part I will be proposed for future insolvency proceedings in the context of securitisation.

Firstly, this part will move to explore the appellate history of the *Eurosail* case. Secondly, it will move on to explore the case law developments after the *Eurosail* decision and the interpretation issues that have arisen. Thirdly, this part will explain *Eurosail's* impact on director's duties during doubtful solvency. Finally, this part will conclude with recommendations.

Eurosail in the Court of Appeal

The leading judgment was handed by Lord Neuberger.[1] His Lordship observed that the requirement of s. 123(2) to consider prospective and future liabilities will not be automatically triggered each time a company's liabilities exceed its assets. Such a mechanistic interpretation must be contrary to commercial reality and therefore could not stand.

As a starting point, the company's audited accounts should be viewed while 'amended' to consider other factors such as discounts. A reference was made to Professor Goode's interpretation of cash-flow insolvency where it should be observed in conjuncture with the test for balance sheet insolvency. A contrary interpretation would give rise to situations where insolvency is triggered automatically.[2] His Lordship further accepted the inclusion of contingent liabilities, but not assets, in the balance sheet test. On the point of taking account prospective liabilities, a balance needs to be struck between the ability of a company to address temporary financial deficiencies on one hand, and 'putting down the shutters' on the other, when those deficiencies are unsurmountable. His Lordship identified this moment as the 'point of no return' beyond which a company is deemed to be insolvent. In the case of a closed securitisation structure with long term maturity dates, however, the 'point of no return' would be influenced by factors outside the control of the SPV structure, such as the general health of the UK housing market and the movement of currency rates.

Toulson J had several points to add.[3] Firstly, allowing considerations for the securitisation market and the interests of its players to influence the legal interpretation of s. 123(2) would be allowing the 'tail to wag the dog'. A construction of the statute with reference to the agreement, while convenient does not reflect the intention of the draftsmen. I submit that while the infringement of freedom of contract point is obvious, there is a further issue of legal certainty. English contract law, for the most part, does not allow for the subjective intentions of the parties to be considered in discerning clauses.[4] It is difficult to contemplate a situation in which, the event of default agreed and advised upon was referring to a statutory section which cannot be relied on. Lord Hope has suggested extrajudicially, that the reason for this may be that the time of preparing the documentation was a time of 'unbridled optimism' in the securitisation market and a difficulty in interpretation was not contemplated.[5]

His Lordship further agreed with Lord Neuberger MR, in that Professor Sir Roy Goode has correctly discerned the underlying policy as the 'point of no return'. However, this was not to be a paraphrase of the correct

Notes

1 BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc [2011] EWCA Civ 227.
2 Ibid.
3 Cheyne Finance Plc (In Receivership), Re [2007] EWHC 2116 (Ch).
4 *Smith v Hughes*. [1861-73] All ER Rep 632
5 Lord Hope, 'A light at the end of the tunnel? – BNY in the UK Supreme Court', 29 August 2013, Gold Coast, Australia, Speech at the Banking and Financial Services Law Association.

test. Instead, it required the court to make a judgment, when assessing the company's assets and making a 'proper allowance' for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. As his Lordship further noted this was not 'exact science'.

Dr Peter Walton in an article[6] later cited in the Supreme Court, sought out to explore the origins of the test for 'inability to pay debts'. Walton posits that two types of future liabilities exist – liquidated debts due in the future and unliquidated contingent liabilities such as a claim for damages. Walton' central argument is that both *Cheyene* and by extension *Eurosail* were wrongly decided on the issue of future, but not contingent, liabilities being included in the cash flow test. There were good historic reasons to believe that S. 123 explicitly separating the cash-flow and balance sheet test was done so an element of futurity was included only in the later. More interestingly, Walton refers to the historic case of *Re European Life*[7] where the issues before the court were whether an insurance company is to be wound up under what then was s.79(5) of the Companies Act 1862, namely winding-up petition on the 'just and equitable' ground. His Lordship in the case essentially employed a balance sheet test with reference to present and future liabilities discounted for contingencies in deciding that the company is indeed solvent. His Lordship also accepted that despite current balance sheet difficulties, the company was not in an irredeemable position. It is ultimately argued that this is the basis for the 1986 legislation on balance sheet insolvency, which the Parliament did not mean to change despite the Cork Committee recommendations and the dictum in *Eurosail.* Walton however also notes that following *Re Equitable Life Insurance,* Parliament passed legislation[8] specifically intended to allow shareholders or policy holders of assurance companies to voluntarily wind them up. Parliament believed the policies that were held on to the balance sheet can be properly quantified with the reference to their *future* performance. On the valuation side, therefore Walton criticised Toulson J's dictum on 'proper allowance' for future and contingent liabilities relating to the 'balance sheet' test as being 'vague and impressionistic.'[9] Walton instead argues that it is possible to put a present value on future liabilities, albeit at a discount.

I submit that it is again the nature of the facts in the case at hand, along with *Cheyene's* dictum, which persuaded the court in all instances of *Eurosail* to accept this current interpretation. There were good macroeconomic policy reasons to find *Eurosail*'s *SPV* operation solvent. It is perhaps true that it could have found solvent through Court discretion under the balance sheet test. However, the ability of the SPV in *Eurosail* to service its short and near-term liabilities under the cash-flow test made it convenient for the affirmation of the *Cheyene* dictum on cash-flow insolvency requiring a futurity element. The needs for both the operational and policy justice of the present case potentially damaged the long-term policy interests of legal certainty. The mentioning of Parliament's legislative intervention after *Re European*, on the other hand, is an interesting historic precedent on the possibility of specific industry winding-up tests and whether Parliament should intervene once again in relation to SPV or other unorthodox business structures.

Eurosail in the Supreme Court and subsequent commentary

In the Supreme Court,[10] Lord Walker gave the leading judgment. While on the facts, the court again found the company not to be insolvent under s. 123(2), there was a divergence from the 'point of no return' test set out in the Court of Appeal. Lord Walker held that the correct test is more appropriately expressed as the court deciding on the 'balance of probabilities' whether the company, in view of its prospective assets and liabilities, cannot be reasonably expected to meet those liabilities.

In such an event, the company will be considered balance sheet insolvent, despite being able to meet its current liabilities under the cash flow test 'as they fall' due. Furthermore, the court gave authoritative guidance on the interpretation of 123(1)e given the historical changes that have occurred. Lord Walker concluded that because the words 'as they fall due' have appeared in 123(1)(e) after the enactment of the 1986 legislation their purpose is to look at the present, as well as the future. The cash- flow test involved an element of futurity concerned with the reasonably near future. How far into the future one must look depends on the circumstances.

Lord Walker endorsed Briggs J dictum in *Cheyene* in allowing an element of futurity in the cash-flow test. His Lordship also elaborated on the link and interaction between the "cash flow" and the "balance sheet" tests. The "cash flow" test becomes inapplicable once the court moves beyond the reasonably near future. At this point, a more sensible approach involves a comparison of present assets with present and future liabilities,

Notes

6 Peter Walton, '"Inability to pay debts": beyond the point of no return?' [2013] 1(2) *Journal of Business Law* 212-236130(Oct), 648-677.

7 European Life Assurance Society (No.1), Re (1869-70) L.R. 9 Eq. 122 (Ct of Chancery).

8 Life Assurance Companies Act 1870.

9 See n. 6 above at p. 14.

10 *BNY Corporate Trustee Services Ltd v Eurosail-UK* 2007-3BL Plc [2013] UKSC 28.

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which are discounted for contingencies.[11] (the "balance sheet" test) becomes the only sensible test. The burden of proof is on the party which is claiming "balance sheet" insolvency.), Firstly, it is for the court to observe whether the company is paying its debts as they fall due under the cash-flow test with the added futurity element. Then the court looks beyond the reasonably near future to see if the company's present assets are outweighed by its liabilities.

In *Eurosail* it depended on three factors: the movements of the US dollar and the euro against the pound secondly, the LIBOR benchmark interest rates and the performance of the United Kingdom property market in relation to the mortgage portfolio.

Walton in a case comment[12] has exclaimed that it would now take a ''crystal ball" for creditors to be able to satisfy the tests laid down by the Supreme Court. Walton submits that the Supreme Court fundamentally did not accept the Parliament's intention not to change the law after the 1985 Cork Committee. The *Cheyene* dictum effectively changed the test, by introducing futurity. Walton further argues that Lord Walker's stipulation of the "balance sheet" test introduces a sensible approach in having to show that a company has insufficient assets to be able to meet its liabilities including future and contingent ones. The problem in *Eurosail* is that presented a closed system without the use of directorial agency and any real decision making. Especially given the long maturity dates no creditor without a ''fully functioning crystal ball" would ever be able to satisfy the test.

Meng Sue Wee has further criticised[13] the *Eurosail* judgment on several grounds regarding valuation. Wee has argued that the case offers no guidance on how to discount future debts. Moreover, there is no authoritative guidance on how the assets are to be valued –according to Sir Goode's work, unless a company has relatively few assets and liabilities, then the balance sheet test becomes wholly unreliable for creditors. Finally, like Walton, Wee posits that the court cannot ever be satisfied that there would eventually be a deficiency. Two explanations are possible –that it cannot be proven that the company's liabilities exceed its assets or alternatively that a time in the future may come where this is the case. The answer unfortunately is not very clear once the test moves beyond the 'reasonable future'.

Day has also noted[14] that the rejection of the 'no return' test by the Supreme Court was odd given that both Lord Walker and Toulson J correctly recognised is as being the underlying policy of the test. This was particularly so given the pro-corporate rescue context of the Enterprise Act 2002[15] reforms, or in other words it would be difficult to justify winding up a company prior to it reaching the 'point of no return'. Day suggests that instead of encapsulating the entirety of the 123(2) test into the 'point of no return' as Lord Neuberger ruled in the Court of Appeal, what could be done instead is allowing it to influence the burden of proof if the company is cash-flow solvent. An additional use would be to allow the 'no return' wording to influence the aggregate valuation of assets for the purposes of the 'balance sheet' test. I submit that Day's suggestion of preserving the underlying policy and simultaneously the test as laid in *Eurosail* is perhaps the best desirable outcome. I remain unconvinced however that introducing a two-tier test where the 'no return' test effects the evidential burden makes any material difference in calculation and the overall result.

I would argue that notwithstanding the possible misinterpretations of the cash-flow and balance sheet tests interpretation, which the Court arrived at, no other outcome was desirable on the facts. The linguistic retreat that the Supreme Court undertook from the point of 'no return' to the 'balance of probabilities' was presumably to introduce a seemingly lower threshold which the creditors might still be able to satisfy. The introduction of a cash-flow futurity element however, as Walton has rightly observed,[16] makes such a task impossible in any event, especially where long maturity dates and uncontrollable economic factors are involved. It is submitted that the reason for the decision was the sensitive economic background of the *Eurosail* decision and again, as was observed both by Lord Walker and commentators, the closed nature of the SPV system. A finding of insolvency would have led to devaluation of the assets on a 'fire sale' basis which in turn would have exacerbated the domino effect on liquidity problems observed in Part I. In effect, the court closed a hypothetical floodgate by transferring the risk of non-performance onto the more junior noteholders. The policy importance of an ultimate pro-liquidity finding was later admitted by Lord Hope in an extra-judicial speech.[17]

Notes

11 E.g. the DCF test.
12 Prof. Peter Walton, 'BNY Corporate Trustee Service Ltd v Eurosail-UK 2007-3BL Plc: from the point of no return to crystal ball gazing' [2013] Insolv. Int., 26(8), 124-127.
13 Meng Sue Wee, 'Misconceptions about the "unable to pay its debts" ground of winding up', [2014] L.Q.R., 130(Oct), 648-677.
14 William Day, 'Taking balance-sheet insolvency beyond the point of no return', C.L.J., 72(3), 515-518.
15 Enterprise Act 2002.
16 See n. 12 above.
17 See n. 5 above.

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It is further interesting to note that in the same speech his Lordship contemplated the soundness of including an event of default in the underlying documentation referring to the test in 123(2).[18] His Lordship asks rhetorically if the noteholders have considered themselves what the section meant before including it.[19] Given the court's insistence on commercial sensibility, where parties of equal bargaining power are to have their intentions respected by courts, it is surprising to find that they were ultimately precluded from utilising the provision with any legal certainty.

I would argue that, in view of the present value approach of English courts, valuing future and contingent liabilities is an impossible task indeed, requiring a 'crystal ball' the further away into the future one looks. In that sense Day's comments of allowing the 'no return' to influence the burden of proof is of limited assistance when there are distant liabilities to be considered. Perhaps an additional suggestion in terms of making the test functional will be to allow the use of future value models to be adopted, such as those allowed in US restructuring jurisprudence. This will require the Court to explicitly move away from the decision in *IMO Carwash*[20] and allow the 'Monte Carlo' prediction models to be acceptable evidence in valuation.

An important point must be made here. It is appreciated that in insolvency proceedings, it cannot be expected of the parties to wage valuation battles similar to those in restructuring. However, court guidance on valuation in insolvency proceedings could possibly be issued instead.

Furthermore, given the difference between closed SPV systems and orthodox businesses structures which Lord Walker pointed out,[21] perhaps it might be prudent to introduce a separate test for winding up an SPV structure. Parliament in 1870 had no issues[22] with legislating for insolvency tests meant for life insurance companies alone and allowing future' estimations'. Perhaps it is time to introduce a similar approach to complex securitisation vehicles. One such test may consider all the policy and economic factors discussed above and include different valuation approaches, without necessarily compromising the established jurisprudence, in the cases of orthodox companies where directorial decision making is a factor. An alternative way of looking at this point might be to take Dr Walton's suggestion[23] of re-interpreting *Re European*[24] 'just and equitable ground' dictum. If 'policies' relating to assurance companies in the 19th century could be 'estimated' for balance sheet purposes with reference to future contingencies, then the same could be achieved for securitisation structures today.

Significant case law developments following *Eurosail*

There have been several decisions past *Eurosail* which have further attempted to clarify the ambiguities involved in the insolvency test.

In Casa Estates,[25] the facts concerned a petition to render a company balance sheet insolvent. The defendant company entered into liquidation after the 2008 Dubai market crash. The company made a loan to another company some time prior to liquidation. The responded liquidator alleged that the transaction should be voided as a transaction at an undervalue under s.238 Insolvency Act 1986. The issue before both the Court of Chancery and the subsequently the Court of Appeal was whether the company was insolvent and unable to pay its debts under s. 123 at the relevant time as required by s. 238.[26] Such a determination required the court to refer to the meaning of the test laid in *Eurosail*. At the Court of Appeal the company was considered to be cash-flow insolvent even after the Supreme Court rejection of the 'point of no return test', on which the lower court findings were based. The judge held that the loans was not likely to be repaid, in addition to the company also being balance sheet insolvent at the relevant time. More importantly, the judge held that it was relevant exactly how the company was able to avoid cash-flow insolvency, if it was doing so by incurring new debt. At par 30 the judge noted:

''What a commercial approach requires the court to do is not to stop automatically at the answer to the question: is the company for the time being paying its debts as they fall due? In an appropriate case it must go on to inquire: how is it managing to do so?

31 It certainly seems counter-intuitive (to me at least) that a company that manages to stave off cash-flow insolvency by going deeper and deeper into long-term debt is not insolvent. ''[27]

The judge thus concluded, observing *Eurosail* and *Cheyene*, that proving cash-flow solvency does not

Notes

18 See n. 5 above.
19 See n. 5 above p. 20.
20 *Re Bluebrook Ltd* [2010] B.C.C. 209.
21 See n. 1 above.
22 See n. 13 above.
23 See n. 12 above.
24 See n. 7 above.
25 *Re Casa Estates (UK) Ltd (In Liquidation)*, [2014] EWCA Civ 383.
26 S. 238 Insolvency Act 1986 Transaction at an undervalue.
27 See n. 25 above para. 30.

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negate an inquiry into the balance sheet solvency of a company. It is further appropriate to inquire how a company is managing debts as they fall due. There are several points to be made here. Firstly, it is interesting to note, as with *Eurosail*, the court did not reach a different conclusion based on the differing linguistic ground after the Supreme Court substituted the 'point of no return' test with the 'balance of probabilities' one. Secondly, an inquiry on *how* the debts are being paid might indeed be something that needs to be incorporated into the cash-flow test as it stands.

Perhaps, this is an issue that the Supreme Court should revisit at a future date. On the other hand, and somewhat following the second point, I would suggest that it would seems commercially and legally imprudent that the acceptable methods of repayment debts as they fall due would only become clear after extended litigation. This certainly does contribute towards the legal certainty concerns that *Eurosail* left for practitioners. It certainly does not contribute towards reducing party costs either.

Fennel in a case comment[28] has also observed that the judgment did not make clear in what hindsight terms the court can look back on when applying the balance sheet test relating to liabilities. This, Fennel argues, might create problems where mismatches between the timing of a liability arising as a fact and its crystallisation, such as a litigation claim.

Another case that warrants consideration, in light of Fennel's comments, is *Evans v Jones.*[29]

It was held that, following *Eurosail*, contingent assets cannot be considered for the purposes of the balance sheet test. In principle, a litigation claim could be taken into account under common market valuation techniques. However, since the dividend claim had been contingent on being discovered and pursued, it could not be accounted for at the relevant time required by s. 238. Such a claim was further contingent on the company going insolvent. Based on all of this, it would have been contrary to commercial reality to hold this to be an asset.

This decision also seems to somewhat answer the valuation question that Fennel posed earlier as to how a liability is to be valued retrospectively. It again confirms the Court's adamant approach in adopting a stance which is consistent with commercial reality. While this clarification on the kind of assets and liabilities that can be included is indeed desirable, those developments still fail to answer the valuation issues on an elongated timeline.

Impact of *Eurosail* on director's duties and wrongful trading

The other area where the Eurosail dictum may have implications is director's duties in general and the liability for wrongful trading in particular. It is especially necessary to consider this area given that as mentioned several times above, the dictum concerned an SPV system lacking any real decision making. Again, it is necessary to briefly explore the legislative and theoretical background of the area before moving on to consider the latest case law developments. There have been cases relating to director's duties approaching insolvency past the decision which would be considered below.

The first point to be made is that director's duties UK legislation is shareholder centric as it requires the directors to act in good faith in the best financial[30] interest of shareholders.

The point to be made in the context of this article is that directors start owing their duties towards creditors apart from shareholders when approaching insolvency. The seminal authority on the matter is *West Mercia v Dodd,*[31] where it was held that when approaching insolvency, the duties of the director shift from those of shareholders to those of creditors. As Fennel has noted,[32] an insolvency within s. 123 is not required for those duties to arise, however a proof of insolvency within the meaning of the section will be sufficient to establish the duty. A breach of the duty can incur a liability in wrongful trading[33] or in more extreme cases – fraudulent trading.[34]

From a policy perspective it is evident that director's duties jurisprudence is firmly grounded in the property rights of shareholders, which only become subordinated to those of creditors in the events of doubtful solvency. In practice, however, directorial conduct would rarely be found to have breached duties related to creditors and even more rarely give rise to liability for compensation. Given *Eurosail's* permissive dictum in recognising that a company may go through periods of insolvency in between solvencies and the lack of directorial agency context of the decision, it could be argued that it may add to the cumulative effect

Notes

28 Steven Fennell, 'Cash-flow and balance sheet insolvency for claims by office-holders', [2014] *Insolv. Int.*, 27(8), 121-123.
29 *Evans v Jones* [2016] EWCA Civ 660.
30 S. 172 Companies Act 2006.
31 *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4 B.C.C. 30.
32 See n. 28.
33 S. 214 Insolvency Act 1986.
34 S. 213 Insolvency Act 1986.

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of the already existing jurisprudence that seldom holds directors accountable to creditors.

A recent case to be considered in relation to *Eurosail'* and to illustrate this point is the Chancery court's decision in *Re Ralls Builders.*[35] The facts concerned an application made by the liquidators of a wound-up company for the directors to compensate for liabilities incurred, during a period of insolvency, in which wrongful trading occurred. The company suffered several periods of insolvency between periods of solvency before finally becoming obvious with the release of the 2010 accounts that it has been severely balance sheet insolvent for some time. The liquidators argued that up to that period of liquidation directors have traded despite no realistic prospects of repaying newly incurred liabilities.

Snowden J found that the directors were guilty of wrongful trading. However, as they did not further increase the net deficiencies of the company and acted in good faith, no liability to pay compensation to newer creditors was found to exist. Snowden J, following the dictum in *Re Continental Assurance*[36] held that the creditors, who's debts were incurred on a later date than that of the company being declared insolvent, had no stronger claim, than those debts that were being incurred. This was so as both suffered equally due to the depletion of assets. I would submit that this seems to run counter to Professor Goode's observations about the necessity of both insolvency tests in the context of balancing future and present creditor's differing positions.[37]

Gabriel Moss,[38] arguing from a pro-creditor position, submits that the history of the court approaches to s.214 interpretation has been one of compensatory, rather than penal nature. By examining several first instance decisions, Moss concludes that for a director to ever be liable for compensation for wrongful trading, the company's net deficit must have increased because of continued trading.

I observe that this is strange given the stern stance the courts have taken against mechanical evaluation and application of the law. The past cases in which an opposite conclusion was reached and compensation was deemed appropriate – *Re Purpoint*[39] and *Morphitis,*[40] this was due to an evidential impossibility of assessing net company liability. The *Ralls Builder's* dictum was in line with previous authority. This, Moss argues, creates perverse incentives to take on new liabilities at the expense of new creditors during periods of doubtful solvency, regardless of repayment prospects.

Moss argues adopting the Cork' committee's recommendations of extending the liability of compensation for wrongful trading where no reasonable prospect of new creditor repayment exists, when the company is suffering from inability to pay debts e.g. under the standard now established by *Eurosail.*

In my view under the current status quo, a claimant seeking a compensation for wrongful trading faces a double burden. The liquidator seeking to wind up a company firstly has to satisfy the test under the *Eurosail* dictum. Secondly, they will have to prove that there was a net deficiency of assets caused by the actions of the director. If the Cork Committee's suggestions are adopted as argued by Moss, then a finding of wrongful trading which entitled a creditor to compensation would effectively be tied to a finding of insolvency under *Eurosail.* 'No reasonable prospects of repaying new creditors' is a very similar linguistic ground to 'unable to pay debts' on the 'balance of probabilities' so it should not be a difficult change to make. In addition to this, there seems to be an inconsistency with the jurisprudence accepting a mechanical increase of net deficiency required for holding a director liable, despite the insistence on a commercially realistic non-mechanical approach on overall valuation for finding of insolvency purposes. As discussed, Professor Goode, Lord Neuberger in the Court of Appeal and the Supreme Court noted the need for both tests, so an excess of balance sheet liabilities does not automatically trigger insolvency.

A determination of wrongful trading should follow a similar standard in inquiring how the debts are being paid, in line with the recent decision in *Casa Estates*. The current status quo as, Moss further observed, leads to perverse incentives where a director can stave off insolvency by borrowing from new creditors to pay the old ones. Such conduct also as illustrated earlier in *Casa Estates* will entitle the court to find the company being cash flow insolvent. I would submit that it should make a director liable for wrongful trading and compensation as well.

Conclusion

It has been argued that the Court in *Eurosail,* influenced by strong economic policy considerations, had to stretch the limits of the legislative and precedent language on balance sheet and cash-flow insolvency. Subsequent decisions partly clarified the scope of what contingent assets and liabilities would be considered by

Notes

35 *Grant v Ralls* [2016] Bus. L.R. 555.
36 *In re Continental Assurance Co of London plc* [2007] 2 BCLC 287.
37 See n. 4 above, p. 115.
38 Gabriel Moss, 'No compensation for wrongful trading – where did it all go wrong?', [2017] *Insolv. Int.*, 30(4), 49-53.
39 *Re Purpoint Ltd* [1991] B.C.C. 121.
40 *Morphitis v Bernasconi* [2003] Ch. 552.

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the courts, but the valuation issues remain. This article has suggested that a desirable reform might be to accept US restructuring valuation methods in insolvency cases where the business structure is unorthodox.

In terms of director's duties and wrongful trading, if the pro-business dictum of *Eurosail* is accepted, then it would only be reasonable to counter-balance it by putting certain mechanisms in place that protect the interests of creditors. I would submit that the area of director's duties in wrongful trading could constitute such a counterbalance if the aforementioned valuation suggestions are accepted.

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