IN THE SUPREME COURT OF NEW ZEALAND SC 57/2016

**BETWEEN** **DAVID BROWNE CONTRACTORS LIMITED**
**DAVID BROWNE MECHANICAL LIMITED**
Appellants

**AND** **DAVID ROSS PETTERSON AS LIQUIDATOR OF POLYETHYLENE PIPE SYSTEMS LIMITED (IN LIQUIDATION)**
Respondent

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| Hearing: | 10 November 2016 |
| Coram: | William Young J<br>Glazebrook J<br>Arnold J<br>O'Regan J<br>Ellen France J |
| Appearances: | C R Carruthers QC and D J C Russ for the Appellants<br>B D Gustafson and D R Duffield for the Respondent |

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**CIVIL APPEAL**

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**MR CARRUTHERS QC:**

May it please Your Honours, I appear with Mr Russ for the appellants.

**WILLIAM YOUNG J:**

Thank you, Mr Carruthers, Mr Russ.

**MR GUSTAFSON:**

May it please Your Honours, Gustafson and Duffield for the respondent.

**WILLIAM YOUNG J:**

Thank you, Mr Gustafson. Mr Carruthers.

**MR CARRUTHERS QC:**

May it please Your Honours, I have handed up an outline of the oral argument that I propose to present and I have handed up also the case of *Green v Green* [2016] NZCA 486 to which the oral argument will refer.

So my submission to begin is that the essence of the argument for the appellants is whether there is a general discretion under section 295 of the Companies Act 1993 as the appellants argue or a discretion as to the nature and extent of relief under that section as the Court of Appeal held.

The submission continues that in either event, whether it's a general discretion or whether it's a narrow discretion of the kind identified by the Court of Appeal, the starting point for the inquiry is the factors which go to the exercise of the discretion and my submission is that there are four factors which are relevant to that exercise. The first in this case is whether the transaction is in fact an insolvent transaction in terms of section 292, and then there are three propositions that the Court of Appeal identified that we recognise we have to deal with as factors in the exercise of discretion. The first of those at paragraph 3.2 is payments were made – the payments made were part of a wider restructure which is relevant because the submission is that that restructure is the antithesis of an intention to defeat creditors.

**WILLIAM YOUNG J:**

Haven't we, I know the questions on which leave was granted were general, but didn't the leave judgment make it reasonably clear that we weren't very interested in a challenge to the Court of Appeal's factual findings?

**MR CARRUTHERS QC:**

Well –

**WILLIAM YOUNG J:**

You say, well, we didn't spell that out in the question so we may have to suck it up, but –

**MR CARRUTHERS QC:**

Well, it's just, it's this, because the question is the scope of the discretion under section 295 and the Court of Appeal dealt with the factual findings really in relation to that section and also in relation to section 296(3) in the general defence, so the approach I have taken is certainly to challenge and, in fact, in my submission, to illustrate that those factual findings overturning the High Court really cannot be sustained on the evidence, but if Your Honour wants the argument more narrowly focused then I can come quite squarely to deal with the issue of the nature of the discretion and how it should be exercised under section 295.

**WILLIAM YOUNG J:**

Well, perhaps deal with the more narrow arguments and we can discuss that over perhaps morning tea and perhaps hear from Mr Gustafson about that.

**MR CARRUTHERS QC:**

Right. Well –

**WILLIAM YOUNG J:**

I certainly did anticipate for myself argument as to whether, as a matter of fact, the claim by McConnell Dowell should be treated as a due debt for the purposes of section 292 so that's undoubtedly on the table.

**MR CARRUTHERS QC:**

Yes, yes. I've dealt with that. That probably does put in issue that factor under 3.3, Your Honour, about whether the claim was defensible.

**WILLIAM YOUNG J:**
Yes.

**MR CARRUTHERS QC:**
Now, and I expect, Your Honour, it does put in issue 3.4 about whether there was insurance, so I may be driven to deal with those factors.

So the submission at paragraph 4 of the outline is this, that the Court of Appeal erred in substituting its own view for that of the High Court on the crucial question of whether the transactions under review were entered into pursuant to a longstanding plan for restructuring Mr Browne's finances as the High Court found or were designed to defeat the claim by McConnell Dowell as the Court of Appeal concluded. And then, and this goes to the nature of the process, in the High Court Associate Judge Matthews had the benefit of seeing the witnesses, including Mr Browne, cross-examined and having many documents drawn to his attention in the course of the three-day hearing, and then I've drawn the contrast with the Court of Appeal hearing which occupied little more than half a day and, of course, that Court did not see Mr Browne or the other witnesses cross-examined.

And then I've focused on the advantages of the trial Court. I appreciate this will be familiar ground but I've handed up *Green* where the permanent Court of the Court of Appeal considered that issue in some detail and I think I can leave the passage that I've relied on to Your Honours to read and consider. It is the principle that where the trial Judge has had the advantage of seeing and hearing the witnesses and has made a credibility finding then that should be respected on appeal.

**GLAZEBROOK J:**
Well, that just isn't the law any more, is it?

**MR CARRUTHERS QC:**
Well –

**GLAZEBROOK J:**
Its [*inaudible*] has long gone.

**MR CARRUTHERS QC:**
But it doesn't depend entirely on [*inaudible*], Your Honour, and –

**GLAZEBROOK J:**
And also just mere credibility findings are notoriously difficult for any Court and so relying on credibility findings without the surrounding documentation but it might be you're only saying that in accordance with the surrounding documentation and the combination of those.

**MR CARRUTHERS QC:**
I am submitting exactly that. I don't need – I don't rely purely on the credibility finding. I rely on the associated documents.

**GLAZEBROOK J:**
Which the Court of Appeal was just as – in just as good a position as the trial Judge to assess, wasn't he, whether –

**MR CARRUTHERS QC:**
Well, if the Court of Appeal in fact had attention to the documents which the trial Judge had attention to and my argument is that the Court of Appeal simply didn't do that in relation to the three areas on which I've relied.

**GLAZEBROOK J:**
Well, maybe the best thing is to take us to the documents then, which I presume you're going to, rather than relying more generally on credibility findings in the High Court.

**MR CARRUTHERS QC:**
All right, yes.

I've dealt first with the issue of the restructure, and the starting point for that is 4.4 with the evidence of Mr Wolt who was a financial advisor to Mr Browne,

and his evidence was that transactions under challenge form part of a wider restructure of Mr Browne's affairs and that wider restructure had been underway for some time and was based on his advice and I just, that reference is to the case on appeal, and in the references I've given you the particular section, the case is divided into sections, I've given you the particular part, the tab and the page references, the start of Wolt's affidavit. I've then submitted that Wolt was not cross-examined, there was no justification for the Court of Appeal dismissing his evidence, and really by doing so the Court disregarded the effect of s 92 of the Evidence Act 2006 where the propositions were not put to Wolt because he was not cross-examined.

Then I've gone on to look at what was the other key evidence on this issue, and the restructure was in progress and there were a number of reasons for it, and if I can take you to Mr Browne's evidence in section B part 2 under tab 20, and the reference there is to the page numbers and to the paragraph numbers. I start at paragraph 54 where Mr Browne deposes that there were a number of reasons for undertaking the restructuring of PPS –

**GLAZEBROOK J:**
I'm sorry, I think I've got the wrong –

**WILLIAM YOUNG J:**
Page 267.

**GLAZEBROOK J:**
267, thank you.

**MR CARRUTHERS QC:**
And I'm reading from paragraphs 54 to 60. Paragraph 55, "PPS had been having issue with one of its former employees by the name of George Begg. Mr Begg had been involved with PPS for many years as an employee. He had assumed a high profile for the company and within the industry in which PPS operated. Mr Begg was identified closely with PPS by those in the

industry. He was heavily involved in the Christchurch City Council sewer outfall project and had a close working relationship with MacDow as a result of that project. In early 2008 Mr Begg left PPS to set up his own polyethylene pipe company in direct competition with PPS. PPS discovered that Mr Begg had been working on his plan to leave PPS and set up in opposition while working at PPS and discovered that he had even incorporated a company with a similar name, Pipeline Products Specialists, while working for PPS. PPS took legal advice about Mr Begg's actions and considered Court action to restrain Mr Begg as PPS believed Mr Begg was in breach of his employment duties and had used his position while at PPS to set himself up in his new business. While PPS did not take Court proceedings against Mr Begg, the relationship between PPS and Mr Begg was acrimonious and resulted in other litigation over company names when I formed a new company which Mr Begg complained had a name the was too similar to that of his company. As the relationship with Mr Begg deteriorated PPS became aware that Mr Begg was conducting himself in a way that was affecting the reputation of PPS. PPS and its related companies have a close and commercial relationship with Frank GmbH. Frank is a large company which has a range of interests in polyethylene pipe manufacture and licenses the pipe manufacturing processes to PPS-Frank New Zealand Limited. The directors of Frank made it clear to me that it was not comfortable with the situation involving Mr Begg and there was a clear statement from Frank that they would like to see the Frank products distanced from PPS's activities. Since PPS-Frank New Zealand Limited was the supplier of pipe to PPS, it was necessary to look to develop a new supply company to take over from PPS if the German support and ongoing investment was to be maintained. The message that I was receiving from Frank was important at another level which involved a personal decision by me to withdraw from my ongoing investment and interest in PPS and its related companies. I have two adult sons, both of whom are involved in the businesses associated with pipe manufacturing and supply. I had reached a stage in my life where I wanted to give them the opportunity to step up and take a more active role in both the management of the businesses and investment. In discussing with our German partners, Frank expressed the clear view that they were reluctant to maintain or expand their

financial investment in the New Zealand pipe business, including any in which my sons were involved, unless those businesses were free of any negative associations with PPS both in terms of Mr Begg and the MacDow claim. As part of my intention to withdraw from various business interests, my wife and I had taken legal and accounting advice about estate planning matters. That advice required a restructuring of various aspects of our financial affairs, including withdrawing investments in the form of loans to PPS and dealing with other matters such as shares in PPS-Frank New Zealand Limited. The MacDow claim was part of the consideration when looking at the proposed restructure of PPS. Without trying to minimise the significance of the MacDow claim, I can unequivocally say that the MacDow claim did not drive the decision nor was it a significant consideration when making the decision to repay the inter company loans and my current account. The claims by MacDow involved an allegation that PPS had failed to properly weld three sections (at the time restructuring transactions were undertaken there were only two claims) of the polyethylene pipe which formed the Christchurch City Council sewer outfall project. Having personally observed the treatment of the pipes on site and having written to MacDow and expressed concerns about the pipe handling procedures, PPS was adamant that the weld failures were not as a result of faulty workmanship but related to the handling of the welded sections after the work had been completed. In response to the notified claims by MacDow, PPS had taken legal advice and engaged Duncan Cotterill to represent it to defend its position. The position taken by PPS was completely justifiable and involved PPS engaging a number of highly qualified experts who provided reports on complex engineering issues, materials analysis, welding practices and the alleged weld failures. PPS even went to the extent of instructing an expert from the United Kingdom. When MacDow referred the dispute to adjudication, firstly in January 2009 and then later in May 2009 when settlement negotiations failed, PPS had its solicitors prepare for a full adjudication hearing including briefing witnesses and addressing expert reports from the various experts I have referred to. PPS and its solicitors attended a full-day adjudication hearing in Auckland in July 2009. PPS was fully committed to its defence of the MacDow claim and was surprised by the findings against it."

So that's the background to the restructuring and, of course, that evidence was cross-examined on and the Judge in the first instance found in favour of Mr Browne's credibility on that issue, and so I've submitted then that the underlying reason for the restructure was to free up equity for Mr Browne. I should say that part of that restructure was to free up the equity.

There was a criticism in the Court of Appeal that there was no documentation to support Mr Wolt's evidence. Well in fact that's not correct, there was documentation that supported the restructuring. Exhibited to Mr Wolt's evidence are two diagrams of company structures that are snapshots in time showing what had been done with the various companies. They're probably not the most compelling documents in support of the restructure but as a matter of fact they were before the Court.

And then I've submitted that Mr Wolt's evidence is corroborated by Mr Carey's evidence, which was not challenged, and I should just take you to this reference. So I'm still in section B part 2, and I'm at tab 30, and I'm at paragraph 57 which is on page 407. This in a sense goes to the question of alteration of position, but it illustrates the nature of the restructuring as well, so it's under the heading, "Tracing of funds," and he is asked to deal with that, and then at paragraph 57, "I note the following: the payment of Mr Browne's current account, Browne, was paid to the Browne Family Trust on 2 September 2008. The payment to DBC was made to that company on 2 September 2008. The payment to David Browne Mechanical Limited was made to DBC on that same date. Payment to Mr Browne by the Receiver were made between September 2009 and May 2013," he says, "I have been unable to trace the recipient of those payments. Given Mr Browne's evidence that he does not have a bank account, the payments have presumably been made to third parties."

And then at paragraph –

**GLAZEBROOK J:**
What's the backup – sorry, what are you taking from that?

**MR CARRUTHERS QC:**
All I'm saying is that there was a restructure and this was designed to free up the money, the investment that Mr Browne had and the companies had in PPS.

**ARNOLD J:**
Well, why then did he immediately make a loan of 450,000 to him, put 450,000 back?

**MR CARRUTHERS QC:**
Well, he made that because there was another project that was on foot that needed funding for the company to take funds. But bear in mind, Your Honour, that the effect of the transactions was that he's been paid out 1.5 million and because this project required funding, the company required funding for it, he lent that 450,000. You'll see in the next bullet point, Your Honour, I've given the reference in the High Court judgment to that issue.

**ELLEN FRANCE J:**
Mr Carruthers, that project didn't go ahead did it, once there emerged the problem with McConnell Dowell?

**MR CARRUTHERS QC:**
I think that's correct, Your Honour, yes.

**ELLEN FRANCE J:**
Do you know the date at which – I know Mr Browne talks about that project, McConnell Dowell saying, "No, we don't want to do that." Do you recall that timing of that?

**MR CARRUTHERS QC:**
I don't, Your Honour, but I will certainly have a look at the material and see if we can identify it.

And just having referred to that paragraph you'll see that I've given the cross-references in the margin. At paragraph 60 I've just drawn attention to that analysis of DBC 2009 financial statement shows a change in a current asset "advance Browne Family Trust" from 460,000 round figures as at January 2008 to 871 as at January 2009, this movement of 410,000 of funds paid to the Browne Family Trust.

And then Mr Browne deals with that issue as well under tab 21 in the same volume, paragraphs 46 and 47 which are on page 287, 288, where he – well, Your Honours, it's a lengthy description of the application of the funds which I leave with you rather than read through that. He concludes at 47, "I am able to say with absolute certainty that the funds used by me through the family trust and those used by DBC, received for itself and DBM, were used in the belief that they were payments validly made and received in good faith. Decisions made about the management and operation of the group of companies and our own personal spending and investment decisions were all based on that belief. As I have set out above, key decisions were made which utilised intercompany funds to commit companies within the group to long-term obligations. The availability of PPS funds for operational purposes further meant that either the PPS funds or other funds available to DBC/DBM were able to utilised elsewhere in the group/family trust as I have set out above," and that's the reference back to the paragraph 46 analysis.

And then just moving back through the affidavit to paragraphs 13 and 14, which are on page 280, he refers to a bundle of documents which set out the numerous companies in which he had been a director, 79 in total. These transactions pre- and post-date the PPS restructure. "I have resigned from a number of these directorships, and companies have been struck off as part of the restructuring. These transactions pre- and post-date the PPS restructure and in some cases were undertaken around the same time. In addition to

these matters, there were other transactions where myself, my wife and our trust have disposed of shareholdings in various companies," and then he lists those in paragraph 14.

And then the next reference I have made is to paragraph 15 on the next page. "There were other transactions where myself, my wife and I have purchased new interests in other companies or set up companies as part of the restructuring of our affairs," and he sets out the four illustrations.

In my outline I have referred to the document 1138 to which he refers in paragraph 13. That's simply a schedule of the companies in which he resigned as a director and I don't need to take you there.

The next bullet point I've dealt with in response to His Honour, Justice Arnold, and then what I've done as a final part of this section on restructuring is referred to the passages in the Courts below and that's simply for convenience together, that together my, my submission is that when one analyses the way in which the Associate Judge has discussed and dealt with the restructure, it is a more thoroughgoing and preferable analysis to that adopted by the Court of Appeal in the passage I have referred to because the Associate Judge picks up the factual references in my submission accurately.

So the second area that I identified in relation to the factual issues is the defence of the McConnell Dowell claim and I've submitted that the Court of Appeal misconstrued the evidence as to whether or not Mr Browne had a reasonable belief that the claim by McConnell Dowell was defensible, and I've drawn attention to the claim which was predicated on the proposition that three welds failed of the hundreds of welds made, and at one point in the narrative in the documents that I'll take you to there's reference to some 350 welds having been made at that time, and I've just given you the reference to the High Court judgment that supports that proposition. The fail joints were not made available for testing, that's again a reference to the Associate Judge's decision, but it's also dealt within the correspondence where the German company, Frank, which was assisting Mr Browne, asked for the

facility to test and a request was made, but the fail joints were simply not made available by McConnell Dowell.

Now the next submission is this, that prior to and at the time of the transaction Mr Browne had the following information as to the defensibility of the claim, and I want to take you through these documents. I'm now in section C of the case, part 4, and I'm starting at tab 49, and the first reference is at 1148, page 1148, and this is from Frank, Dr Habedank, who was the managing director of Frank.

**GLAZEBROOK J:**
A belief as to the defensibility in insurance could go both ways couldn't it? Because if you had a belief in the defensibility then why didn't you leave the money where it was, unless there was some particularly urgent need for it to go then?

**MR CARRUTHERS QC:**
Well –

**GLAZEBROOK J:**
Just because you were thinking about restructuring and you might take some money out when you didn't need it. I mean, this could go to, "Well, we took it out because we didn't think the company needed it and we desperately did elsewhere," or it could go to, "Well, why, if you did think it was defensible, did you put it out of the reach of a claim in case you were wrong?"

**MR CARRUTHERS QC:**
Well, Your Honour, you've got a backdrop where the decision had been made and advice had been taken to make this restricting and to take –

**GLAZEBROOK J:**
Well, no, my understanding of that evidence is not that that occurs now, it's that as far as Mr, and what if Wolt –

**MR CARRUTHERS QC:**

Wolt.

**GLAZEBROOK J:**

– was concerned it was sort of a more general thing that when it's available try and restructure, it wasn't, "This is the time we're doing it now," was it, or have I misconstrued the evidence?

**MR CARRUTHERS QC:**

There was an imperative –

**GLAZEBROOK J:**

Because there's a lot of vagary about it, I don't actually know what happened to the funds, but we did do a whole pile of things. Because there doesn't seem to be any ability to say, "We absolutely needed them now and this is where they were going," because if that was the case I would have thought that he would have know where they went rather than the very vague stuff we can't even trace them. Just in fairness I –

**MR CARRUTHERS QC:**

Yes, well, Your Honour, the way in which I put the case is that whether there was a decisive and firm plan on the restructuring or not, there was as a matter of fact a restructuring going on throughout this time on advice from Wolt and Carey, and the fact that the claim was defensible and that there was advice that insurance was available mean that there was really no reason for the restructuring stopping and the funds staying in the company, that that was –

**GLAZEBROOK J:**

All right. So you can't put it any higher in terms of a general plan for restructure, no particular reason for the restructure at that particular time in terms of specific projects that needed funds, but a general feeling that the funds weren't needed because the claim was defensible, is that the highest it can be put, or am I being slightly unfair?

**MR CARRUTHERS QC:**

I think that's – no, I don't think you're being altogether unfair, Your Honour, but I think it is important to go back to the passage that I read from Mr Browne's affidavit about the whole of the background with the Begg incident with Frank saying, "Well, we need to change this." The son's coming into the business, Frank's saying, "Well, we're not really very keen on that," and then Mr Browne moving out of these various positions, the whole rationalisation of the 79 companies that were involved. So that's the backdrop, and whether one describes that as being sufficiently certain or a firm plan or not, that is the factual background, and these transactions were being implemented and the evidence is from Carey as to how he could best discern where the money had gone to.

**ARNOLD J:**

The Court of Appeal at paragraph 30 of its judgment refers to the evidence of Mr Lay, who was present at the meeting on 30 June, and his evidence the Court say was that one of the objectives of this, the decisions made at that meeting, was to ensure that, "The payments to related parties were made in the ordinary course of business and not vulnerable to attack as insolvent transactions." Now that concern about the possibility of attack as insolvent transactions can only have arisen, can't it, from the notification of the McConnell Dowell claim?

**MR CARRUTHERS QC:**

Can Your Honour give me that reference again please?

**ARNOLD J:**

Paragraph 30 of the Court of Appeal, so it's in section D of the case on appeal at – well, there's no page number, it's paragraph 30.

**MR CARRUTHERS QC:**

Your Honour, I'm just going to pause and go to the Lay evidence that is being relied on, because the submission that I will make is that that is inconsistent with the documentary evidence about the defensibility of the claim, which was

being rejected because of the concrete issue, and it is inconsistent with the insurance issue which had been pursued as a pre-contractual issue and which was pursued right through to the point that there was an acknowledgement that McConnell Dowell had made a claim and had then withdrawn it because of the impact of the excess, which was $600,000, and the impact of the loss of the no claim bonus. So you're getting to the point where that statement by the Court of Appeal relying on Lay's evidence is actually inconsistent with the documentary background –

**WILLIAM YOUNG J:**

Sorry, but if McConnell Dowell had made an insurance claim wouldn't the insurer have just stepped into its shoes, unless the arrangements were such that PPS had the benefit of the insurance policy?

**MR CARRUTHERS QC:**

Well, I think that that, the insurance policy was – the contractual arrangements were that PPS, Mr Browne, discussed the question of insurance with McConnell Dowell and was told that that was unnecessary because the insurance was covered by the McConnell Dowell policy.

**WILLIAM YOUNG J:**

Yes, that's dealt with in an email by Mr Dorrance to Mr Browne of the 18th of January. It's an email that doesn't really suggest that there's insurance cover in favour of –

**MR CARRUTHERS QC:**

Well, Your Honour, there's more to that insurance issue than just the Dorrance –

**WILLIAM YOUNG J:**

Yes, Mr Allott I think gives some advice at some stage.

**MR CARRUTHERS QC:**

There is advice from the broker, from the loss adjuster and from NZI, who were PPS's own insurers.

**WILLIAM YOUNG J:**

Well, that's your next point anyway, isn't it?

**MR CARRUTHERS QC:**

Yes, it is. But if I can just –

**ELLEN FRANCE J:**

Who hadn't seen the contract, am I right? Who hadn't actually seen the insurance policy, am I right about that?

**MR CARRUTHERS QC:**

I think you're right in that, Your Honour, but with respect that's unremarkable if it is an insurance policy that McConnell Dowell has and it's in a standard contractor's form, which would be familiar to at least the broker and NZI's own insurer, and certainly the correspondence and discussions go off on the basis that there was insurance available.

**O'REGAN J:**

Did the High Court Judge reject the Lay evidence, the Associate Judge?

**MR CARRUTHERS QC:**

No, I don't think it was dealt with –

**O'REGAN J:**

Would it be better for us to come back to it later if it's –

**MR CARRUTHERS QC:**

I'm just reluctant to leave it just in there.

**WILLIAM YOUNG J:**

Well, what are you looking for, Mr –

**MR CARRUTHERS QC:**

Where in Mr Lay's evidence there is in fact that reference.

**ARNOLD J:**

That seems to be, I think, at B, Part 1, page 239.

**GLAZEBROOK J:**

B and – B?

**ARNOLD J:**

B Part 1, page 239, and it starts early in the page. There's cross-examination on, must have been a letter or something, that Mr Dorrance had written and towards the bottom of the page.

**ELLEN FRANCE J:**

And at 234 in the middle of the page there is discussion about the meeting on the 30th of June and in fact there was some discussion about the MacDow debt, et cetera, and there's follow up to that on 241 and 243.

**MR CARRUTHERS QC:**

Just in the terms that the Court of Appeal has put it and the way in which Your Honour has put it, as the Court of Appeal said, this concern can have arisen from the risk of insolvency as a result of the liability of McConnell Dowell, and I expect that the way in which I answered Your Honour it's a matter of what that risk was, and you'll see in the cross-examination of Mr Lay at page 234 that Her Honour Justice France referred to, between lines 15 and 20, the answer that Mr Lay gave, "At that time the McConnell Dowell claim was under dispute and had not been crystallised, so there was no idea of how much the claim would be and whether it was going to be payable or not." And then it's put that there was concern about the claim succeeding, but the answer was, "There was discussion about its existence, yes, and the potential for it being a very large claim," and it was going to be a large claim if it was successful. But in Lay's affidavit you'll see that there's an extensive reference to funds and the financial position of the company at that time.

Now Your Honour Justice O'Regan asked me about whether this was referred to by the Associate Judge, and if I can just take you to page 48, I'm in section A under tab 6, and at 83, paragraph 83 to 89 I expect, the evidence of Mr Lay is dealt with, and it might just pay me to read that that, "Mr Lay, a chartered accountant who acted for PPS, also gave evidence in relation to the restructuring. He said his purpose was to wind down the company's operation. The company had cash reserves and few, if any, creditors, so restricting was straightforward. The long-term plan was to wind down the operation of PPS. The agreement reached was that the advances from Mr Browne, DBC, DBM, would be repaid, which PPS was able to do from its cash reserves. It would also be necessary for the company to have access to further monies to continue operations where needed and Mr Browne had cash which he was prepared to advance. This option was taken rather than continuing with the bank facility. The bank security over the company was therefore discharged. Mr Lay envisaged that PPS would eventually be wound up. It calculated that 450,000 should be a sufficient sum to fund its ongoing operations until that occurred, so that was the sum which Mr Browne advanced to the company. Mr Lay accepted that when the transactions in issue were under discussion there was also discussion about the McDowell claim and, if it succeeded, it would be for a substantial sum. From this evidence I make the following findings. First, prior to and throughout the period in question there was ongoing activity involving not just PPS but other companies in the group by way of restructuring. The reasons for this are those which are set out in the unchallenged evidence of Mr Wolt. The evidence of Mr Browne and Mr Lay is consistent with that. I am satisfied that the transactions involving PPS were not one-off transactions and they were undertaken for several reasons, including the difficulties being experienced with Mr Begg, the concerns Frank had and its wish to be distanced from the problem with MacDow, Mr Browne's wish to bring his sons into the business, coupled with their wish to do so, but in a separate entity, which tied in with the position of Frank, because of the stigma attached to PPS as a result of the MacDow claim. The evidence of Mr Browne and Mr Lay differs in relation to PPS in one material respect, but I have concluded that the difference is readily reconciled. Mr Browne said in his affidavit that for the reasons I have

referred to, PPS was to be wound down. In cross-examination he maintained that PPS was not being wound down; Mr Lay maintains it was. After considering the evidence given by each of them, both in their affidavits and under cross-examination, I have concluded that these differences are more apparent than real. When Mr Browne spoke of PPS" –

**WILLIAM YOUNG J:**
I don't know if this is very material now, this section.

**MR CARRUTHERS QC:**
Right.

**ARNOLD J:**
Is there any explanation as to why – the advances that were repaid were unsecured, is that right?

**MR CARRUTHERS QC:**
Yes, that's right.

**ARNOLD J:**
Is there any explanation then of why the further advance that was given was secured?

**MR CARRUTHERS QC:**
No, but the logic of it is that in circumstances where $1.5 million had been taken out and you were looking at restructuring by selling down, by, by taking out your investments, and that you were then being asked to support the company, you're agreeing to support the company by providing working capital for a specific project. It has a logic to it that you would be asking for security for that because it's really in a different category from the previous history of the company where you had been heavily involved and where you were promoting the company, developing the company, so one could understand why the primary shareholder would be simply advancing money on the basis that essentially he had control of the company at that point. So I

think that's – there is a distinction between the investments that were made historically and that payment that was made as working capital for a particular project. I was starting to go through this issue of defensibility and I'm at page 11 –

**GLAZEBROOK J:**
Can I just check, are you saying it's the subjective view on defensibility in insurance because clearly, at least from the arbitration, any view of the defensibility was ridiculous?

**MR CARRUTHERS QC:**
No, I don't agree for a moment that you can conclude that it was ridiculous at all. The –

**GLAZEBROOK J:**
Well, they were fairly strong terms in the arbitrator's finding, wasn't it?

**MR CARRUTHERS QC:**
Well –

**GLAZEBROOK J:**
"Ridiculous" is perhaps too high to put it.

**MR CARRUTHERS QC:**
Yes, I think that's –

**GLAZEBROOK J:**
But slight, in the slightest of slightest terms.

**MR CARRUTHERS QC:**
Well, Your Honour, my submission is you need to be a little bit careful with hindsight in –

**GLAZEBROOK J:**
No, no, I understand that. That's why I'm just asking you the question.

**MR CARRUTHERS QC:**

Yes, yes.

**GLAZEBROOK J:**

So is it objective and obviously hindsight bias comes into that or is it a subjective view? I'm asking what the submission is.

**MR CARRUTHERS QC:**

I beg your pardon. Well, the submission is that this issue in terms of the exercise of discretion is the subjective belief of Mr Browne because it's a question of whether he's acting in good faith, if one wants to look at the defence, and 2963, and one would look at good faith as a feature of discretion in any event. So my submission is that it is a subjective test but I'm equally comfortable with the submission that the evidence objectively leading up to the adjudication points to a reasonable belief in the defensibility of the claim.

I'm at page 1148, where the initial reaction of the Germans to the information that they had, is it looks too much concrete, and this was the issue that continued throughout the narrative. And then the next page, 1149, this is the analysis by –

**GLAZEBROOK J:**

Now I think I've lost you again.

**WILLIAM YOUNG J:**

Page 4, third bullet point.

**GLAZEBROOK J:**

Sorry, of your – you're on your –

**O'REGAN J:**

No, he's in the evidence at 1149.

**GLAZEBROOK J:**

Yes, that's what I wanted to go to. So whereabouts are we again?

**MR CARRUTHERS QC:**

Yes. I'm in section C part 4, and I'm under tab 49, and I've dealt with page 1148, looks –

**GLAZEBROOK J:**

Okay, I've got it. It was buried.

**MR CARRUTHERS QC:**

And Your Honour, just picking up your initial reaction, I am in my outline, I'm on page 4 of the third bullet point about the documents on defensibility.

So at 1149 – this is an analysis by McConnell Dowell – three, "The cause of the tear is not know, as all appropriate construction execution procedures appear to have been followed and the section of pipeline had passed all quality assurance check." And then four, "A tear of this type was an identified risk and is always a possibility during a controlled sinking of the pipe as the pipe is at its maximum stress during this operation." And then at 1150, this again is from Dr Habedank at Frank, and halfway down the page, now some remarks to the pictures of the failure and first said, "A crack in the welding zone would be an indication for bad welding or maybe a void." Next, "This is not the fact!" exclamation mark, "The outside beam," now just let me pause there, I think that's seems to be a translation issue, it will be an outside "bead", "of the welding looks good and the crack starts from the seam. This is an indication that the problem might be the resin. We do not think so, because you have used high-quality resin." Next, "Too high temperatures during production of the spiral pipe. This would have damnified the material. This would be a problem for us." And then he goes on at the bottom of the page, "I also talked about this with Thomas and he thinks that they use too much concrete anchors and also the width was not ideal of these concrete anchors. A solution might be to reduce concrete weights." And then at 1153 there is then an expert report from Mr Dennis Hills running through to 1155,

and in the course of that report, at the bottom of 1154, his opinion is, “Whilst it is almost certain that the bottom part of the weld was the weakest, it cannot be stated that this was faulty or the root cause of the failure. However it is the writer’s opinion that the nature of the weld at that point was a contributing factor to the failure. The other contributing factor was the stress in the weld induced in the laying process, and there is no way of knowing whether this was any higher than would normally be expected. It’s the writer’s opinion that this was a unique combination of circumstances and highly unlikely to occur again. As a suggestion, not a criticism, an inspection of weld beads might well include the use of a mirror if the bottom of the weld is not readily visible. Uneven weld beads might require a closer inspection inside the pipe at that point.” And then on the last page, “As noted above, it’s not possible to state that the weld in question was faulty, but it was clearly suspect in terms of its strength and the forces that would normally be expected to be imposed on it during the laying process. Clearly it did not withstand the forces imposed in this particular case.” And then through to –

**WILLIAM YOUNG J:**
But, I mean, we’re generally familiar with these, Mr Carruthers. I mean, there’s nothing absolutely definitive about it, prior to the transactions taking place.

**MR CARRUTHERS QC:**
No.

**WILLIAM YOUNG J:**
And there are broadly, you know, there’s no, a range of possibilities, but they tend to involve either faulty welding or faulty laying and too much concrete.

**MR CARRUTHERS QC:**
Too much concrete, yes. But I think the point of this analysis, Your Honour, is that it was clear that there was a contestable claim and that PPS was gearing up to have that defence by all of the various steps taken. So, Your Honour, I’m content to invite you to follow through those references that I have noted,

and I've noted the pre-transaction references and then the post-transaction references.

**ELLEN FRANCE J:**
Mr Carruthers, do you take issue then with the Court of Appeal's assessment at paragraph 81 that, in the second part of that paragraph, that Mr Browne was also aware that there was a growing body of evidence, including Dr Habedank's email of 14 July 2008, to support McConnell Dowell's position, and then there's refer to Mr Browne's acknowledgement that he was concerned at the time that the welds may have been faulty?

**MR CARRUTHERS QC:**
Well, I do take issue with that, I do take issue, which is why I was tracking through these documents because –

**WILLIAM YOUNG J:**
Perhaps it's best to go directly to the points you take issue with.

**MR CARRUTHERS QC:**
Then I have set out the passages that deal with the question of defensibility, and again I support the High Court judgment because it deals relevantly with the analysis in the documents I've identified.

So the third area that I identified at the start of the submission is this: that moreover the Court of Appeal then misconstrued the evidence as to whether in the event that his company was held liable they would be insured against such liability, and I've drawn attention to the contractual background as being important to the insurance issue, and the evidence of Mr Browne on the contractual background that I'll take you to at the moment, his evidence was not contradicted, and my submission is that that evidence is not only highly relevant but is decisive on Mr Browne's belief. And then I'll take you to the evidence, I'm in section B at part 2, I'm under tab 20, and I'm reading from paragraphs 18 to 24, beginning at page 259 – I beg your pardon, I'm at the

bottom of page 258 at paragraph 18. "As with any construction project, one of the considerations for –

**GLAZEBROOK J:**
Sorry, I think I'm totally – still haven't found where you are.

**MR CARRUTHERS QC:**
I'm in section B, part 2.

**GLAZEBROOK J:**
Yes –

**MR CARRUTHERS QC:**
And I'm under tab 20, Your Honour, at page 258, paragraph 18, the bottom of the page. "As with any construction project, one of the considerations for PPS was placement of the insurance risk for the project. Insurance is a critical part of any tender process as depending on where the insurance risk lies," as where the insurance risk lies, "there is a cost implication which may or may not need to be taken into account when pricing the tender for a contract. In my discussions with MacDow I was advised by Ian Campbell, project director for MacDow, that as head contractor MacDow would be covering the risk for the project and would be insuring accordingly. PPS's tender was prepared on the basis of insurance being covered by MacDow. The price for PPS's welding services would have been significantly higher had PPS been required to insure itself on a contractor's risk basis. After being successful on its tender, PPS was provided with a copy of the contract from MacDow. I have not been able to locate a signed copy of the contract but I have located a draft provided by MacDow prior to signing. To the best of my recollection there were no material changes made to the draft contract and definitely no changes to the insurance provisions. The contract provided by MacDow addresses the issue of insurance and the fact that insurance is the responsibility of MacDow. Contract works and professional indemnity cover were specifically noted as 'not required'. This is because, as far as PPS was aware, it had cover under MacDow's policy of insurance. Prior to signing the

contract, PPS also sought advice from its insurance broker, Mr William Coughlin. Mr Coughlin acted as PPS's broker and for other companies within the PPS group on all of its projects. He was an experienced broker and familiar with both the business of PPS and the industry requirements for insurance in the area of construction. Mr Coughlin, who unfortunately died recently, reviewed the draft MacDow contract and confirmed that the contract document meant that insurance risk was MacDow's responsibility. Based on my discussions with Mr Coughlin at the time, I believe that as part of Mr Coughlin's due diligence he reviewed the MacDow policy of insurance which would have been provided as part of the insurance discussions. There is a copy of the MacDow policy. This particular copy appears to have been obtained in late 2008. I do not know who the signature belongs to above the words 'Received 17/10/08' but it would seem that this copy of the policy was obtained around the time that PPS was engaged in the ongoing dispute with MacDow. Pages," there's a reference to pages of the policy, "which are relevant to the position taken by PPS. The combination of the provisions on those pages was, according to the advice received by PPS, sufficient to provide cover to PPS as a subcontractor under the policy. I have a distinct recollection of raising the insurance issue one final time when signing off the documentation with MacDow and again receiving confirmation from Mr Campbell at MacDow that the insurance risk for the project was their responsibility and was addressed by the contract. It was against that background that I signed the contract document on behalf of PPS," and I've just drawn attention to the documents that he refers to that are noted in the margin.

And then I've gone to the issue after notification of the claim by McConnell Dowell the following steps were taken and I've referred to the affidavit that I'm in at the moment and at page 30 – paragraph 30 on page 261. "The position from PPS was communicated to MacDow from the outset. I note that on 26 August 2008, when MacDow wrote advising of the third weld failure Mr Buckland of MacDow specifically raised the question of how PPS intended to deal with the allegations and requested details of PPS's insurers as MacDow were happy to deal with PPS's insurers in settling matters. PPS's

response was to advise MacDow that it had insured the risk and to make a claim on its insurance." And then at 32, "Throughout this period PPS was in constant communication with MacDow and continued work on the pipeline, although at times work was suspended due to the dispute and MacDow's failure to meet progress payment due under the contract and commissioned expert reports in respect of the pipe failure. PPS had also taken advice on insurance issues and was of the firm view that the losses being sought by MacDow were covered by the insurance policy which PPS believed MacDow was required to have in place under the terms of the subcontract with PPS."

**WILLIAM YOUNG J:**

Just pause there. The only written advice is the letter from, prior to the transactions there's a letter from Mr Dorrance in January, and the letter from the brokers of the 18th of April, I think that's right isn't it?

**MR CARRUTHERS QC:**

That's prior to the notification, yes.

**WILLIAM YOUNG J:**

Yes, prior to the transactions and issues, yes.

**MR CARRUTHERS QC:**

Yes.

**WILLIAM YOUNG J:**

Well, aren't we just going to have to read those and make of them what we can?

**MR CARRUTHERS QC:**

Just let me pause there just for a moment, Your Honour. Your Honour was putting to me that the only advice prior to the notification – prior to the transaction –

**WILLIAM YOUNG J:**

Yes. There's an email from Mr Dorrance of the 18th of January, which is 1159, and then there's a letter from the brokers of the 18th of April, which is at 1226.

**GLAZEBROOK J:**

And then presumably the review from Mr Coughlan, which must have been of the documentation.

**MR CARRUTHERS QC:**

Yes, yes, it –

**WILLIAM YOUNG J:**

But that's not produced though, is it?

**GLAZEBROOK J:**

Well, no, but presumably one could argue that if you looked at the documentation and came to the same view as Mr Coughlan or quite how – although to me I'm not sure how you could come to the view, given the clauses on the contract.

**WILLIAM YOUNG J:**

Well, it's fairly well analysed in a report Duncan Cotterill provided later in the year, after which I didn't understand there to be an issue about insurance.

**GLAZEBROOK J:**

Well, that was my point really, it's difficult to see from the documentation that Mr Coughlan could have reasonably come to the view that he apparently did.

**MR CARRUTHERS QC:**

Is the Duncan Cotterill that you're referring to at 1235?

**WILLIAM YOUNG J:**

Well, 1235, yes. That's after the event.

**MR CARRUTHERS QC:**
After the transaction?

**WILLIAM YOUNG J:**
Yes.

**MR CARRUTHERS QC:**
Although, Your Honour, the way in which the insurance issue developed after the transaction supports Mr Browne's view arising from those contractual negotiations that there was cover, because that's in fact where the insurance negotiations got to.

**WILLIAM YOUNG J:**
Well, I don't understand it to be an issue that McConnell Dowell had cover. What is addressed in the November Duncan Cotterill opinion is whether that cover was for the benefit of PPS.

**MR CARRUTHERS QC:**
Well, I understand that, but the opinion was demonstrated to be wrong by subsequent events when there was in fact a claim made and withdrawn for reasons –

**WILLIAM YOUNG J:**
No, but I don't think that Duncan Cotterill were saying that McConnell Dowell couldn't make a claim.

**MR CARRUTHERS QC:**
Yes.

**WILLIAM YOUNG J:**
What they were saying is that the benefit of the insurance didn't extend to PPS. In other words, if a claim was made and McConnell Dowell was insured, then PPS would still face a claim for the $600,000 excess plus whatever the insurers had to pay out exercising their rights to subrogation, because the

subrogation rights hadn't been cancelled, contrary to what the broker had thought.

**MR CARRUTHERS QC:**

Well, I thought it was ultimately acknowledged that McConnell Dowell would be paying the excess and not PPS, I thought that's was the sequence showed. But, Your Honour –

**WILLIAM YOUNG J:**

Be no claim, PPS never made a claim against anyone saying, “We’re entitled to be indemnified against this liability,” and it didn’t –

**MR CARRUTHERS QC:**

No – well, it said that to McConnell Dowell, yes.

**WILLIAM YOUNG J:**

Yes, but it never put that in issue in litigation or the adjudication process.

**MR CARRUTHERS QC:**

By suing under the Contracts (Privity) Act 1982, for example?

**WILLIAM YOUNG J:**

Yes.

**MR CARRUTHERS QC:**

No, that was not done. But, Your Honour, we’re really focusing on what Mr Browne’s reasonable belief was –

**WILLIAM YOUNG J:**

Yes, well, I’m looking at the externalities as to what his state of mind may have been, leaving aside what he said it was, but what the externalities were prior to the transactions. And the only two externalities I can put my finger on are the email from Mr Dorrance and letter from the broker.

**MR CARRUTHERS QC:**
Yes.

**WILLIAM YOUNG J:**
And I think I'm right on that aren't I?

**MR CARRUTHERS QC:**
And the letter from the broker, that's at 1226, is that – yes.

What I've gone on to analyse at the top of page 5 in those documents is really the events after the transaction that, my submission is, actually support the belief that Mr Browne had as a result of the discussions around the contract.

**WILLIAM YOUNG J:**
So what's the best document there?

**MR CARRUTHERS QC:**
I suppose the –

**WILLIAM YOUNG J:**
There's a claim made on 1276.

**MR CARRUTHERS QC:**
Your Honour, I maintain that all of those documents are important. If you want me to go to the best document it's actually not one that's in that sequence, I think I refer to it in a different context. But if you go to section C part 3 at page –

**WILLIAM YOUNG J:**
C, part 3?

**MR CARRUTHERS QC:**
Yes, part 3, under tab 45 at page 959, you'll have a letter from NZI, who were PPS's insurers to PPS, and if you look at the bottom of page 959 it reads, "The way the contracts have been drafted, McConnell Dowell are responsible

for the excess and cannot pass this cost on to you. Because your subcontract agreement has no reference to liability for the contract works deductible, then by implication the waiver of subrogation applies to losses falling under the $600,000 value as well," and then continues at the end of 960, "I believe there is a valid claim under the contract works policy affected by McConnell Dowell that you are an insured party to that policy and therefore should be able to lodge a claim irrespective of McConnell Dowell's willingness to avoid making a claim," and that willingness I expect the other document that I'd take you to is 129(4), which is the Duncan Cotterill note about the withdrawal of the claim because of no claim bonus et cetera and hefty excess. But my submission is, without taking you to those documents, Your Honour, that I've listed, is that they support the belief because of the way in which the insurance issues was pursued. Now I think I've dealt with that issue about the availability of insurance in that document, 1294. So they're the three areas that I was taking you to on the facts and to the documents that are relied on.

I'm going now onto a separate topic that deals with the issue of whether this was an insolvent transaction, Sir.

**WILLIAM YOUNG J:**
We'll take the adjournment now.

**COURT ADJOURNS: 11.29 AM**
**COURT RESUMES: 11.47 am**

**MR CARRUTHERS QC:**
Your Honour Justice France asked me about the timing of the Rosebank transaction, and Your Honour Justice Arnold asked me about the reason for $450,000. The reference I can give you is in section B part 2, and it's in the cross-examination under tab 23 at page 331, and just before line 20 you'll see the questions put, "I actually thought your evidence, well, Mr Lay's evidence, certainly was that there was on contracts on the horizon?" and then he deals with the Rosebank contract, and that passage shows how that $450,000 or why that $450,000 was made up. And then on the next page, 332, just under

line 5, the question, “But when did you have this conversation with McConnell Dowell about Rosedale?” “During the time this was going on, but of course then everything turned to custard and we just got wiped, and now we don’t do any work for McConnell.” So that's the best I can do in terms of timing, Your Honour.

Now can I just go back to an issue which Your Honour Justice Glazebrook raised with me concerning the reason for the payments or the timing of the payments and why steps were taken at certain times? It’s just simply to draw Your Honours’ attention to some of the evidence that's on that point. In the Wolt affidavit, which is in section B part 2 under tab 31, and the particular paragraphs are on page 413, and there are two paragraphs, paragraphs 10 and 13. In 10 he says, “The key part of my advice has been to ensure that Mr and Mrs Browne improve their own personal liquidity by withdrawing investments from the group structure. It’s been acknowledged that this is not an overnight solution and that the withdrawal must be over a period of time and when opportunities present,” so that's just the context for the timing of payments. And then 13, “The repayment of Mr Browne’s current account and the repayments of the intercompany advances from David Browne Mechanical and David Browne Contractors Limited were discussed with me as part of the restricting process that I have referred to and form part of my advice.” Now from that point Your Honour asked whether there were specific aspects or specific reasons or specific need for that money to be paid, and I think that goes to a passage that I referred to but didn’t read. I’m under tab 21 in Mr Browne’s affidavit and I’m dealing with 287 through to 289, and Your Honour will recall I read paragraph 47 on 289, but paragraph 46 and its subparagraphs refers to what the funds were applied to. So you have a background that the reason the money was being taken out was that that was on the advice of Wolt to take the money out as the opportunities arose, and that was part of the restructuring, and then in terms of what the money was used for or any imperative to use money is dealt with in that paragraph 46.

One final matter before I go on. Your Honour –

**GLAZEBROOK J:**
I suppose I just can't understand why it's an impossible task to trace the funds if in fact they were needed for specific purposes.

**MR CARRUTHERS QC:**
Yes. Well, Your Honour, I can't obviously, I can't answer that. The best I can do is Mr Carey's evidence that did the best he could with what he had.

Can I just deal with an issue that Your Honour Justice –

**GLAZEBROOK J:**
They just seem to have very good memories of discussions and reasons as to why he was acting, but very little recollection of what one might have thought would be more important points from –

**MR CARRUTHERS QC:**
Yes.

In answer to Your Honour Justice Young, there was one issue you raised with me about on an insurance claim, if PPS made a claim there would be a question of payment and subrogation –

**WILLIAM YOUNG J:**
If McConnell Dowell had made a claim.

**MR CARRUTHERS QC:**
– or if McConnell Dowell made a claim. But, Your Honour, that's not the way in which the insurance policy's structured.

**WILLIAM YOUNG J:**
Well, unless the policy excluded it. And this was the point where I thought that the April letter from the brokers, which assumed there wouldn't be rights of subrogation, was a bit overtaken by the Duncan Cotterill opinion in

November which explained why the rights of subrogation existed, and in particular that PPS wasn't an insured.

**MR CARRUTHERS QC:**
Well, no, I think that's the very point, PPS was an insured, and that's what I want to take you to. In section C part 3 under tab 45 at page 933 there is the definition of "insured", and you'll see under clause 5.5.3 the insured includes, "(c) any contractor or subcontractor." So in that respect the Duncan Cotterill advice in relation to subrogation just simply can't be right.

Now I'd got to the point where I was in paragraph 5 of my outline on page 5 and coming to the question of –

**ARNOLD J:**
Can I just interrupt? I'm sorry, I may not be quick on the uptake on this point, but I had though the issue in the insurance area was if it was a matter of faulty design then there might be an argument about PPS's position, but if it was a matter faulty workmanship for which PPS was responsible they wouldn't fall within the policy. Am I wrong about that?

**MR CARRUTHERS QC:**
They wouldn't fall within the policy?

**ARNOLD J:**
No, they wouldn't fall within the cover, I thought that was the effect of some of the advice. I may be wrong about it, just –

**MR CARRUTHERS QC:**
Well, I mean, I suppose I go really to the NZI which analysing the policy made it clear that there would be a claim and –

**GLAZEBROOK J:**
They might be there, but isn't that only if the insured's required to take out insurance on their behalf?

**WILLIAM YOUNG J:**

And that's the text of 5.5.3, which is what Duncan Cotterill relied on. They're only insured if McConnell Dowell parties have agreed to arrange insurance for them.

**GLAZEBROOK J:**

And in actual fact in the contract they said, "You have to indemnify us in respect of faulty workmanship." So that's far and away from saying, "We have to arrange insurance from you, but not only don't we have to do that but you have to indemnify us if there is a problem."

**MR CARRUTHERS QC:**

But the issue here is what Mr Browne believed the position to be.

**GLAZEBROOK J:**

Well, he has to have read the documents; he can't say, "I believed the position to be that I was an insured because I read a document and saw my name in it and assumed that I was an insured.

**MR CARRUTHERS QC:**

No. No, Your Honour, that's why I emphasised the importance of the pre-contractual discussions with Mr Campbell, because what was at issue there was whether –

**GLAZEBROOK J:**

Where's the, what were you –

**MR CARRUTHERS QC:**

I took you to tab 20. I'm in section B part 2 tab 20, and I read from pages 258 to 259 from paragraphs 18 through to 24, which are the discussions that Mr Browne had with Mr Campbell, who was the project manager, as to the position concerning insurance, because the issue of insurance was relevant to the pricing of the contract. If McConnell Dowell was insuring the subcontractors, that insurance cost was not part of the tender price. As

Mr Browne himself said, if they had to arrange their own insurance then there would be an issue for the tender price. So it is his belief –

**GLAZEBROOK J:**
Well, so his belief is based on what was obviously an faulty reading by his insurance broker, Mr Coughlan, if we believe that he had discussion, and supposedly in respect of misrepresentations, because they can only if they have misrepresentations from Mr Campbell.

**MR CARRUTHERS QC:**
Well, I mean, Mr Campbell was the project manager for McConnell Dowell and that issue was squarely raised and it's an issue on which Mr Browne was believed and there was no contrary evidence, so it really is important –

**GLAZEBROOK J:**
Well, the only contrary evidence is the terms of the contract and the insurance, which would suggest that either Mr Coughlan didn't say that or he was totally incompetent.

**MR CARRUTHERS QC:**
Well, what you have is what was said to Mr Browne by Mr Campbell and Mr Coughlan and that formed the basis for his belief which was accepted.

**WILLIAM YOUNG J:**
Right, okay.

**GLAZEBROOK J:**
Okay.

**MR CARRUTHERS QC:**
So I'm at paragraph 5 and I've submitted that this was not an insolvent transaction was conceded by the respondent and the passage in the Court of Appeal judgment is in section D at paragraph 63 where the Court records that, "During the course of the hearing, Mr Petterson conceded that the payment of

$340,600 made to Mr Browne on the 2nd of September 2008 was not an insolvent transaction because the company was able to pay its due debts at the time the payment was made. He therefore abandoned his claim for repayment of this sum." Now – and the concession goes on but that's the important part. So my solution is that the consequence of the concession was that the claim against Mr Browne was not pursued as an insolvent transaction in terms of section 292, and the passages, the sequence of events was that the cross-examination of Mr Petterson took place one afternoon and the claim was abandoned the next morning, and the relevant cross-examination and the references are set out in paragraphs 41 and 42 of the written argument for the appellants.

So I've then said that the corollary of that concession is that the transactions involving the appellants were similarly not insolvent transactions in terms of section 292 and the consequence is, as the Associate Judge found, that there should be no remedy in favour of the respondent in terms of section 295. And then I've said in any event on the evidence the claims by McConnell Dowell were not a due debt for the purposes of section 292, and I've submitted that it's really crucially important to distinguish between the differing uses, meanings and interpretation of insolvency in the Act. The definition in section 4 of the Act is of the solvency test and incorporates the dual components of liquidity and balance sheet solvency. Contingent liabilities only form part of the business, of the balance sheet assessment. So the – and section 4, the section 4 definition, is limited to specific sections in the Act and has no application to section 292, and I can just – the sections to which the Act, to which section 4 applies, are identified in the specific sections themselves, and I can just quickly tabulate those sections for you. The making of distributions under Part 6 is one part where the solvency test applies. A discount scheme approved under section 55. The powers under section 107(1). Buy-out rights under sections 110 to 115. Amalgamations under Part 13 and the transfer of registration under Part 19. So the point is that section 4 is a solvency test definition and it has nothing to do with insolvent transactions under section 292. The test there is simply whether the company is able to pay its due debts as they fall due and does not embrace

contingent liabilities. So I said at 6.3, "In contrast to section 4 section 292 requires on a liquidity assessment, with the consequence that contingent liabilities are irrelevant as they are not debts due, and any avoidance of the transactions now in issue can only occur under section 292." I've referred to the evidence of Mr Ruscoe, I don't need to go to it. He concluded that the McConnell Dowell claim was not a debt due, and I think that's self-evident that that is so. it was accepted by the High Court and the Court of Appeal didn't refer to Mr Ruscoe's evidence in that context.

**GLAZEBROOK J:**
We have asked for submissions specifically on that rather than just an assertion it's self-evident?

**MR CARRUTHERS QC:**
Well, the definition of a due debt – I'll give Your Honour the case reference if you just give me a moment.

There are two cases that are in the bundle that we rely on. Under tab 5 is *Re Northridge Properties Ltd (in liquidation)* HC Auckland M46/75, 13 December 1977–

**GLAZEBROOK J:**
Your bundle is that, your bundle of authorities?

**MR CARRUTHERS QC:**
My bundle of authorities, under tab 5, and it really looks at the test, and the test is satisfied if a company can realise its assets into cash within a reasonable time sufficient to pay its debts as they become legally due, that's the approach in *Northridge*, and the emphasis is on the debts being legally due, and the submission is that a contingent liability arising out of litigation or threatened litigation, for which there has been no judgment, cannot be said to be legally due. And the same point in made in *Blanchett v Joinery Direct Ltd* HC Hamilton CIV-2007-419-1690, 23 December 2008, which is tab 3 in the

bundle. *Northridge* is a decision at first instance of Justice Richardson, and *Blanchett* is a decision of Associate Judge now Justice Faire.

**ELLEN FRANCE J:**

In *Northridge* the Court does say at page 28 that "as they become due," involves consideration of the debtor's position over a period, not an instance, so this, as Justice Richardson said, it's not a snapshot it's a moving picture. Does that not enable some consideration to be given to something like the McConnell Dowell debt?

**MR CARRUTHERS QC:**

Well, not in terms of the nature of, or not in terms of the state of the McConnell Dowell claim at September 2008. If one's looking at a reasonable position one has to take into account all of the factors that are associated with the contingent liability. This is the reason that I really spent so much time on looking at defensible because plainly it could not, my submission is it could not be said that the contingent liability for McConnell Dowell was within a reasonable time in the way in which Justice Richardson refers to it, and I accept that proposition that that's the – that it's not a snapshot that just ignores everything that's going on but the reasonable time certainly can't embrace the nature of the McConnell Dowell claim at the time the payment was made.

**ARNOLD J:**

This question of reasonable time, do you look at that objectively, subjectively? The reason I ask, of course, is there – is the email from Germany in July 2008 which basically says, "The welds were faulty. We're liable." So that's the internal email.

**MR CARRUTHERS QC:**

It says what, Your Honour?

**ARNOLD J:**

Basically says, "The welds were faulty and we're liable."

**MR CARRUTHERS QC:**

No, no. It says that if that's the case, this is where – if this is so, this would involve us but then it goes on to, on the next page, to deal with the question of the concrete.

**ARNOLD J:**

Really?

**MR CARRUTHERS QC:**

Well, we may be at cross-purposes, Your Honour.

**ARNOLD J:**

Maybe I'm thinking about a different one. I'd thought – I'm not sure where it is now.

**ELLEN FRANCE J:**

At page 1434.

**ARNOLD J:**

1434.

**ELLEN FRANCE J:**

Section C, part 5.

**WILLIAM YOUNG J:**

Sorry?

**ELLEN FRANCE J:**

1434, section C, part 5.

**ARNOLD J:**

Can I just make a comment to whoever initially prepared this case on appeal, it is extremely irritating that the documents are not in chronological sequence. I think that's in the Court of Appeal rules, isn't it, that they be in chronological

sequence rather than by reference to the order that they're produced at hearing, because it really does mean we're chasing around.

**MR CARRUTHERS QC:**
So, yes, I'm grateful to Justice –

**GLAZEBROOK J:**
I still haven't it. So it's part 4, is it?

**O'REGAN J:**
C5, C5.

**GLAZEBROOK J:**
C5, okay.

**MR CARRUTHERS QC:**
This is the email I was thinking of and –

**GLAZEBROOK J:**
I'm not quite – sorry.

**WILLIAM YOUNG J:**
Sorry, what page?

**ARNOLD J:**
It's page 1434 in –

**ELLEN FRANCE J:**
Tab 59.

**ARNOLD J:**
C part 5, and it says, as I read it, pretty clearly, the problems were caused by faulty weldings, we've tested the samples with very bad results.

**MR CARRUTHERS QC:**

Sorry, would Your Honour just give me the page reference again?

**ARNOLD J:**

1434. So my question is when you're looking at the sort of reasonable timeframe, of course, how quickly a debt or a claim gets pursued depends on number of things including the energy with which the plaintiff pursues it, and so it does seem to me that when you're looking at the reasonable timeframe you can't look just at what happened, if the plaintiff took a long time, but you do have to look at the way in which the company concerned was thinking about the claim, and this seems to be a pretty acknowledgement that the welds are the problem, and it comes from within the group, as it were. So the fact that McConnell Dowell didn't actually quantify the claim until August and didn't pursue it for quite some time after that, does that really matter?

**MR CARRUTHERS QC:**

Well, yes, it does because it really can't be said that it was a debt that was legally due.

**GLAZEBROOK J:**

Well, isn't it legally due as soon as your – in fact legally due as soon as you were, the negligence was discovered and you should have paid up? Does it depend on a claim?

**MR CARRUTHERS QC:**

Well, it depends on quantification of a claim.

**GLAZEBROOK J:**

Well, I don't know that just because it's –

**MR CARRUTHERS QC:**

I mean, how could –

**GLAZEBROOK J:**

If it's a debt –

**MR CARRUTHERS QC:**

How could this be paid? How could this be paid at the time –

**GLAZEBROOK J:**

Well, no, just thinking about it in terms of if you say, "We accept we're liable and we know we have to pay," then it would be a debt due at that stage. I didn't understand the contingency related to it's not even due until you quantify it. Because that's not a contingency, that's just a matter of numbers.

**MR CARRUTHERS QC:**

Well, if you look at it from an accounting point of view as to how it has to be treated as a contingent liability in the –

**GLAZEBROOK J:**

Well, no, if I say, "I know I'm liable," it's not a contingent liability, it's an absolute liability.

**MR CARRUTHERS QC:**

But you –

**GLAZEBROOK J:**

And I would have to quantify it the best I could in my accounts. I couldn't say, "Ah, it's not a debt due until it can be quantified," I would have to do the best I could, I'm sure, under accounting policies. So it's not a contingency because I've accepted liability. It's a contingency if I contest liability, and then I would have to assess the chances, in proper accounting terms, the chances of that debt becoming – and it would be a balance sheet matter, as you say.

**MR CARRUTHERS QC:**

Yes. Now that's really – I want to move just from that proposition –

**GLAZEBROOK J:**
It's about that –

**MR CARRUTHERS QC:**
Sorry.

**GLAZEBROOK J:**
But what I'm asking is, it still is a debt that's due, and depending upon – because if you really don't have a defence then can it really be treated properly as a contingency in accounting terms? I would suggest not.

**MR CARRUTHERS QC:**
Well, I'm going to answer Your Honour by –

**GLAZEBROOK J:**
And certainly not just because quantification's going to be difficult.

**MR CARRUTHERS QC:**
No, but for it to be recognised as a contingent liability there does have to be a quantification. In practical terms you can't deal with it as a balance sheet item –

**GLAZEBROOK J:**
And you are obliged to quantify it on the basis of whatever information you have at present.

**MR CARRUTHERS QC:**
Yes.

**GLAZEBROOK J:**
And you have to make as good a fist of that as you can.

**MR CARRUTHERS QC:**
Yes, I accept all of that. And I want to come back to the email that Your Honour Justice Arnold referred to, because that actually has to be put in

in context with the way in which the claim proceeded, and those documents that I referred you to and I started to take you through on defensibility make it very clear that right throughout this process up to the adjudication the claim was being resisted on the basis of other expert evidence, on the basis of expert evidence, it was being put in place with substantial costs being incurred in getting the case ready, so even taking the proposition that Her Honour Justice Glazebrook is putting to me, you still have to look at what the evidence actually was about the nature of the claim that was being made and stage it had reached, the ability to quantify it, and my submission is that if one goes carefully through those documents on that issue of defensible, one can't reach the conclusion that this was a contingent liability for the purposes of the first leg of the test.

**ARNOLD J:**
Trouble is it does rather open the regime up to what turn out to be spurious disputes about liability, as this one did, because whatever you say about the nature of the evidence presented and the arguments made, the adjudicator reached a view that was clear and essentially critical of your client's position and consistent with this email.

**MR CARRUTHERS QC:**
Let's turn the coin over on the policy issue, and I've raised this later in the outline.

**ARNOLD J:**
Yes.

**MR CARRUTHERS QC:**
What about spurious claims and the way in which they have to be dealt with? Do we have to apply the same approach?

**ARNOLD J:**

Yes, I think that is a very fair question and I've wondered about it, and I wonder if the answer to it is to use some concept of real likelihood or something like that. In other words –

**GLAZEBROOK J:**

And accounting standards would provide, they do provide, quite detailed analysis of when you recognise contingent debts and how you do so, and some can be recognised merely by a note and an indication that nothing's expected to come of it, so it's not a particularly difficult concept.

**MR CARRUTHERS QC:**

Well, it would normally be a note, but does it –

**GLAZEBROOK J:**

Well, this probably wouldn't have been a note if it had been done properly.

**WILLIAM YOUNG J:**

Wouldn't it be provisioned for? Wouldn't you make provision for it?

**GLAZEBROOK J:**

You'd have to have made provision for this.

**MR CARRUTHERS QC:**

But this is where you get into difficulty with the solvency test as opposed to the section 292 test because – and that's the reason for the distinction is that if it is a contingent liability it falls within the second leg of the section 4 solvency test. it does not fit in the first leg which is effectively the section 292 test. So when one's –

**GLAZEBROOK J:**

What's the policy reason for that, because that's what puzzles me in respect of a debt that in this case was clearly due?

**MR CARRUTHERS QC:**

Well, Your Honour, with respect, I disagree –

**GLAZEBROOK J:**

I know you say it wasn't.

**MR CARRUTHERS QC:**

I disagree with you, yes.

**GLAZEBROOK J:**

I know you say that wasn't the case.

**MR CARRUTHERS QC:**

Yes.

**GLAZEBROOK J:**

But let's just pretend it is for the moment and what's the policy reason?

**MR CARRUTHERS QC:**

Well, I mean, if that's the case then it comes within the reasonable period or it comes squarely within a debt being due which really means that you've telescoped the section 4 test because you're providing for a contingent liability in both the debt due and in the balance sheet test, which is not the way in which the legislation –

**GLAZEBROOK J:**

Is there any discussion as to why the legislation wouldn't look at it that way?

**MR CARRUTHERS QC:**

Well, yes, the rationale in my submission is that the section 292 test really allows companies to continue their day-to-day business and do their transactions in the ordinary course of business whereas if you look at the solvency test and you look at the specific sections that I identified for you, there is a much more critical financial risk in those transactions as opposed to a transaction in the ordinary course of business where there is a significant

amount of money in the bank account and more than sufficient to pay out these creditors. So the policy in my submission is that section 292 actually recognises that it is important for a company to be able to continue its business, to conduct its business in a –

**GLAZEBROOK J:**
But this isn't a nickel and dime conducting business, though, is it? This is actually pulling out all of the funds and doing a total restructure.

**MR CARRUTHERS QC:**
Well, it's not pulling –

**WILLIAM YOUNG J:**
Except it casts a rather unfortunate hue over the case as a whole because if PPS had just continued trading, paying their creditors as and when they fell due in the ordinary way, carrying on business and so on, I can't imagine that there would have been any likely challenge to what happened. It's where the assets are stripped out ahead of or in the aftermath of a claim being notified, and that may itself imply that the claim notified was regarded in such a way by the company that it can fairly be treated as a due debt for the purposes of section 292.

**MR CARRUTHERS QC:**
Your Honour, my submission is that the evidence doesn't support that analysis.

**WILLIAM YOUNG J:**
Yes, yes. Okay, no, I understand. That's really why I didn't stop you on the evidence analysis because it does bear on this issue.

**MR CARRUTHERS QC:**
Yes.

**WILLIAM YOUNG J:**
Okay.

**MR CARRUTHERS QC:**
So I'm at 6.5, so that's where I've dealt with the acknowledgement, and that's the cross-examination and the withdrawal of the claim. Then I've submitted that it would be manifestly unjust if an otherwise solvent company were forced to cease trading by receipt of a substantial claim which it did not have the resources to pay but which it believed was unmeritorious or was insured against.

Then I've gone on to look at section 295, and in a sense this may not be an issue that requires decision because, I say that because at the outset I submitted that the appellant's case is that the proper interpretation of the section is that it is a general discretion reflected by the use of the word "may". The Court of Appeal said, "Well, it's really on the nature and extent of the relief," but as we've noted that introduces a concept where the Court wants to grant relief, where, as some of the case show, there should not be an order in relation to an insolvent transaction. It really opens the way for the Court to say, "Well, we've got to make some order because of our interpretation of section 295 but we'll just make a nominal amount so that we meet the jurisdiction. Now my submission is that that makes something of a nonsense of the section and the better view is that "may" means "may", which gives a general discretion. And the Australian cases, or some of them, go off on the basis that, well, the only use of "may" is that it gives a jurisdictional basis for the Court to make an order, but on analysis that really can't stand because if one put "shell" in there it gives a jurisdictional basis. What "may" does is that it gives – it has two legs, of course, because the provision's there, there is a jurisdictional basis, but more than that "may" in its proper interpretation gives a general discretion, which is what the Associate Judge exercised in recognising that this was not an insolvent transaction and there should be no relief. So that's really the analysis that I've made, and I've just pointed to the various previous decisions of the Court of Appeal and I've tabulated them by reference to the tabs in our material. So then I've submitted that the

interpretation that there's no discretion is likely to result in what I've submitted's a nonsensical position of the Court making an order for a nominal sum.

So those are my submissions in support of the –

**ELLEN FRANCE J:**
Sorry, could I just check one thing, Mr Carruthers? If there is a general discretion, what are the principles applicable to it? Is it a sort of a general unfairness, or what is it?

**MR CARRUTHERS QC:**
No. I think there are probably two ways of looking at it, Your Honour. The way in which we have approached it in this case is to say, well, if the accountants had passed on the notices to the company the opposition would have been put in and it would be decided that it was not an insolvent transaction so there should not be an order, so that's one basis of looking at it. The other basis, which in part the Court of Appeal, it seemed to involve part of the Court of Appeal's analysis, is under section 296(3) where there is a defence, and there are three propositions there: good faith –

**O'REGAN J:**
Giving value is one, I think.

**MR CARRUTHERS QC:**
Giving value – I beg your pardon, thank you, Your Honour, giving value, and change of position, yes. So if one as looking at a principle basis for exercising the discretion where it was an insolvent transaction but there had been some other dealing that warranted a different order than complete repayment. One might look at those principles, and I think the cases – the other point, Your Honour, is that the cases do say that this isn't a code so you have an overlay of whatever common law principles would apply.

**WILLIAM YOUNG J:**

All right, thank you, Mr Carruthers. Right, Mr Gustafson.

**MR GUSTAFSON:**

May it please the Court, Your Honours, I haven't prepared a separate outline of oral statement. If there is one, it's probably in my introduction to my synopsis. The way – and having listened to my learned friend this morning, if I was to summarise what has been put this morning is that there is another defence besides a section 296(3) defence which essentially will apply when considering an order under section 295, and the way my learned friend has approached it is to say, well, he's concentrated very, very much on one leg of the defence. What he hasn't concentrated on is the second leg which is really would a reasonable person in the shoes of Mr Browne as the directing mind of these companies, would he have reason to suspect that the company was insolvent or would become insolvent, and as Your Honours notice, but recorded in the *Trans Otway Ltd v Shephard* [2005] NZSC 76, [2006] 2 NZLR 289 decision which unfortunately I don't have a copy with me but Your Honours actually recorded and quoted with approval from *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, a decision of His Honour, Justice Kitto, and reason to suspect was held to be the circumstances – sorry – would be something along the lines of an actual apprehension or something more than idle wondering. So the question is, what my learned friends are asking you to accept, is that that gets put aside and there is this other residual defence under section 295 where that is not considered and you just look solely at the mind of Mr Browne.

Obviously, it's the contention of the appellants in this case that there was no apprehension with Mr Browne. That was not accepted in the Court of Appeal and it's certainly not something which is accepted by me, and I'll take Your Honour in a moment to, just quickly to the evidence of Mr Lay and also the letter from Mr Dorrance which was written in May of 2009 where he sets out what was agreed at the 30 June meeting and what was intended to be put in place, and I'll take Your Honours to that document, but just to summarise, what Mr Lay accepted was put in place was to pay out the related parties,

strip the assets out of the company and leave it clean apart from the McConnell Dowell debt. Now that letter was written by Mr Dorrance in the mistaken assumption that it was going to be privileged. Unfortunately, the privilege actually lay with the company so it was able to be produced and Mr Lay cross-examined on it.

So, Your Honours, having received your minute, sorry, your decision granting leave, obviously leave has been granted in relation to the action against the companies under section 295 and the orders made under that section by the Court of Appeal but, as Your Honours will be aware, these proceedings will run in tandem with the section 299 application and leave has not been granted in relation to that application for leave to appeal. So we have a situation at the moment where the Court of Appeal's decision records that there was, and this is not challenged now, there was actually a scheme, a deliberate scheme put in place to actually pay out the related parties and leave McConnell Dowell high and dry, and that's indeed what occurred. And on the flip side you have the appellants here today saying, well, they can't, Mr Browne can't challenge in relation to his GSA that was granted as part of the scheme but he's coming to Court and saying to Your Honours, "Look, there's a residual discretion under section 295 and this is a proper case where it should be exercised," and as I've said in my synopsis, and I'm at paragraph 2 here of my synopsis, it's probably easier if you were just going to dispose of this summarily, and I'm not suggesting for a moment that Your Honours are going to do that or should do it, but the easiest way to answer this proposition and dispose of this appeal is to say, well, given that this was part of a scheme to actually effectively hive this company down and refer related party creditors, this is definitely, if there is a discretion, not a case where it should be exercised.

And also Your Honours will have seen from my synopsis that the Australian position is very much that there is no discretion under the equivalent section in the corporations law, and I'll take Your Honour to those cases in a moment. Also I don't and still don't really appreciate what the test for the exercise of the discretion would be, having heard from my learned friends. It seems to be a

sort of, an ability to re-argue any point that should have been argued when the notice was served and –

**WILLIAM YOUNG J:**

Well, just pause there. If it were as simple as the transactions were set aside by mistake and it has become apparent because of related proceedings that the transactions would not have been set aside had an opposition been given and therefore the money isn't really owed, then that might be a defence under section 295 if there is a discretionary defence.

**MR GUSTAFSON:**

That's certainly possible, Your Honour. The problem, with respect, that I see for that is that you have section 294 which, like the statutory demand procedure, sets out a procedure to do things expeditiously and that's certainly what has been noted as the procedure that is provided for liquidators because they usually are coming into an insolvent company that has no money so there is a method provided and –

**WILLIAM YOUNG J:**

They could alternatively have used the company and sued for money hadn't received.

**MR GUSTAFSON:**

Yes, and they could've, if they could've established a defence under section 296 regardless –

**WILLIAM YOUNG J:**

That would have been an answer to a claim for money you hadn't received.

**MR GUSTAFSON:**

Absolutely.

**WILLIAM YOUNG J:**

Yes.

**MR GUSTAFSON:**

And the problem that, in my submission, that the applicants had, the appellants have today coming to the Court, is they are saying to you expressly, "We could not establish a defence under section 296(3) because we could not get past what a reasonable person in the position of Mr Browne should have suspected about the company's financial position."

**GLAZEBROOK J:**

Well, I suppose in the case that Justice Young was postulating they would be able to establish that because the money wasn't due in the first place and the company wasn't insolvent, so it might be you slightly oddly come under that provision.

**MR GUSTAFSON:**

I would agree with Your Honour, except for the wording of section 296(3), and that is "insolvent or is going to become insolvent". And so therefore with section 296(3) you're –

**GLAZEBROOK J:**

So you're not going to get there if the company was solvent.

**MR GUSTAFSON:**

But is about to become insolvent.

**GLAZEBROOK J:**

Well, no, this will be a case where there has been a mistake and it wasn't an insolvent transaction I think was being postulated.

**WILLIAM YOUNG J:**

Yes.

**GLAZEBROOK J:**

So there's been a mistake if you like.

**MR GUSTAFSON:**

Yes.

**GLAZEBROOK J:**

Although presumably there's been a liquidation later so, but through events that don't have anything to do with this.

**MR GUSTAFSON:**

Yes. Certainly Your Honour, with the regime, the weights standard, set up now basically, and those of objections sent, and then it's incumbent upon the liquidator to actually bring the applications, and that's what happened in the other set of proceedings here, which I'll deal with in a moment.

But the section 296(3) defence is not, the onus is on the creditor, it's no doubt about that. But we have a situation now where after Your Honour's decision in *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141, it's not antecedent changing position, it's giving value. So most creditors will meet that first leg. If a creditor doesn't receive the money in good faith they shouldn't get a defence, I think that's axiomatic. You then have the question of a reasonable person, and it's a reasonable person with the business acumen of the person in question, and you heard from my learned friend this morning that Mr Browne had a number of companies, he was legally advised, he was advised by accountants, you know, he was in a very sophisticated position. And so had someone not had Mr Browne's breadth of experience and professional advice there would be a much lower standard for that reasonable person in the creditor's position, but that's not the case here, it's a high standard, and that's why the Court of Appeal when reviewing what had occurred and reviewing the evidence of Mr Lay where he said, "Yes," that, "you know, we were worried about the McConnell Dowell transaction, it was going to be a large claim, and we were concerned about whether or not these transactions could be set aside, if these payments could be set aside." They then go ahead and structure it in a way that they think will achieve that, and subsequently the payments are attacked and set aside. Now that is not a situation, in my submission, where section 296 is ever going to give a

defence, and it's not a situation, in my humble submission, where the Court should say, "There is a residual defence," sorry, "a residual discretion under section 296 where we can countenance that sort of behaviour."

Just to cover off the point that Your Honour Justice Young started with this morning, certainly when I read the application for leave and looked at those cases, I understood that Your Honours –

**WILLIAM YOUNG J:**
Well, I don't think we're really looking for an elaborate argument on the facts. You may have to deal the question that I've put to Mr Carruthers that whether the debt should be regarded as a due debt for the purposes of section 292 may be affected by the way it was perceived, relevant to whether how it should be categorised is how it was perceived, and if the reaction was in part to, as it were, strip the company, then that may imply that the debt was sufficiently real to be regarded as a due debt as opposed to simply a section 4 contingent debt.

**MR GUSTAFSON:**
Yes, Your Honour.

**WILLIAM YOUNG J:**
But I think we'd be interested in seeing the key documents you rely on and the key evidence.

**MR GUSTAFSON:**
Certainly, Your Honour. Well, if I can take Your Honours to the synopsis and if we move through, I've recorded really at paragraphs 4 through to paragraph 7 what I've just described to Your Honours, and also then I've recorded at paragraph 57 and paragraph 7 of my synopsis what this Court of Appeal found and I'll take you to the documents that support this in a moment. But this is not a case where there was just a scheme put in place, liquidator was appointed and that was it. There was then afterwards discovery of documents that showed there was attempts to actually cover it up, and again

that's a factor that I say if there is a discretion it should not be exercised in this case. It just sends the wrong commercial signal to people involved in insolvencies or corporate more generally.

Your Honours, at paragraph 10 of the synopsis, I've just covered off there, Your Honours will have seen the joint memorandum that was filed by myself and my learned friend, Mr Russ. There was no admission made in the High Court by myself and what I've said at paragraph 10, and what I'll take Your Honours to, is –

**GLAZEBROOK J:**
Paragraph 10 of your – of yours, yes.

**MR GUSTAFSON:**
Of my synopsis. What Mr – what the liquidator was asked under cross-examination were hypothetical questions. Could the company pay its due debts, effectively, if the McConnell Dowell claim was not a due debt, and he answered in the affirmative to that, not unequivocally, but certainly he said yes, that was a possibility. And if I can take Your Honours to that information now, the footnote to paragraph 10 sets out the references. So it's tab 13 in part 1 of section B, Your Honours.

**WILLIAM YOUNG J:**
Tab 13?

**MR GUSTAFSON:**
Yes, Your Honour, and if Your Honours come to page 123, this is the cross-examination commencing of the liquidator, Mr Petterson, and if you come over to page 125 at line 19 you have the commencement of this. It actually goes back further to line 15 really. The difference, "The only point of difference between you and him," and that's Mr Russ, the expert called by –

**WILLIAM YOUNG J:**
Ruscoe, isn't it?

**MR GUSTAFSON:**

Ruscoe, sorry. It's terrible, I actually know him quite well. But the difference is the inclusion of the McConnell Dowell debt, and then he goes through this process of saying, "Because if you put the McConnell, MacDow debt to one side, the company's balance sheet solvent and trading solvent?" "Yes." And, "If you're wrong and the MacDow debt is not a valid consideration, you accept the company was solvent on both balance sheet and trading basis at the time of these transactions?" "Yes. At the time that the first transaction was entered into," and then if we come across to – if you come across to page 128 you have at line 31 it's dealing with again Mr Ruscoe's analysis, "I think it was solvent on a net basis, as I say with the qualification of excluding MacDow for now," and then if you come across to 129, "So the point is if MacDow is left out of the equation and the company was solvent for a considerable period of time," there's then quite a long answer and then he concludes at line 25 with the statement dealing with what they were worth, then – and that's what they were worth was the MacDow claim, "Then there might be a significant difference in the solvency of the company on a net asset basis." And just finally, Your Honours, just for completeness, we have at page 135 line 15 the one critical issue, that where the MacDow debt is in or out. So all of the cross-examination is structured on that basis, and to say that this is a concession that it could pay its due debts at the time of the transactions, with respect, is not correct, and it's not correct on the facts. But it's also not correct from a legal perspective. Mr Petterson as liquidator is giving evidence about a question which is, as I submit later, a mixed question of fact in law. He's giving an opinion about a hypothetical case.

**WILLIAM YOUNG J:**

Yes, I think the point that Mr Carruthers relies on comes a little later in the transcript, 138.

**MR GUSTAFSON:**

Sorry, Your Honour, which line?

**WILLIAM YOUNG J:**

Line 10. "Because, I mean, I've been putting to you a hypothetical, but let me put to you now what we actually know. We know that MacDow in January 2008 has said the pipe had failed and you're responsible. But no numbers at that stage?" So I think that's when it starts doesn't it?

**MR GUSTAFSON:**

Yes, Your Honour. Well again it comes back to my, the point I've just made. The question of whether or not a debt is due – and this is the cases that I deal with in the final part of the synopsis and the one that the Court's directed us to. The question is a mixed question of fact and law –

**WILLIAM YOUNG J:**

Well, I agree with that.

**MR GUSTAFSON:**

Yes.

**WILLIAM YOUNG J:**

But I think there was more by way of concession than you took us to.

**MR GUSTAFSON:**

Having seen that, Your Honour, I'd have to accept it.

**WILLIAM YOUNG J:**

Yes.

**GLAZEBROOK J:**

That all still predicated on whether they, McConnell Dowell, was in or out.

**MR GUSTAFSON:**

Yes, Your Honour.

**GLAZEBROOK J:**

I would have thought.

**WILLIAM YOUNG J:**

Yes, I think – yes, well –

**GLAZEBROOK J:**

So it's –

**MR GUSTAFSON:**

Well, Your Honour –

**GLAZEBROOK J:**

And he does say at 128 that the liability should have been recorded, and it was a debt that became due in February 2008. I don't know what he takes from that.

**MR GUSTAFSON:**

Well, Your Honour, I'll take you to that, because it's a point you raised with my learned friend about accounting standards, because they were the subject of evidence. And if Your Honours just get section C part 5, and if Your Honours go to tab 54. Now this was an accounting standard produced by Mr Petterson, and it deals with concepts of financial reporting and, 7.10, it deals with recording liabilities, and that's at page 1408. And so you have there that expenses should be recognised, in 7.24, "Expenses should be recognised in the determination of the result for the reporting period when and only when it's probably that the consumption or loss or service, potential or future economic benefits resulting in a reduction in assets has occurred," and so that's one accounting standard. The other one is the next tab over at 55, and at page 1422.

**GLAZEBROOK J:**

And that means a profit and loss statement presumably –

**MR GUSTAFSON:**

Yes, Your Honour.

**GLAZEBROOK J:**

– rather than merely a balance sheet?

**MR GUSTAFSON:**

Asset, yes.

**WILLIAM YOUNG J:**

But it would have to be matched by a balance sheet item, yes.

**GLAZEBROOK J:**

Oh, it would have to be.

**MR GUSTAFSON:**

Yes, and this particular accounting standard deals with accounting for construction contracts and that's at page 1414, and at page 1422 it says that a loss on a construction contract shall be recognised in the financial report as soon as the loss is foreseen; the loss recognised shall include both the loss for the stage of completion on the contract and the loss for future work on the contract, and if you come over to the commentary on page 1423 there is the statement at 518, "When current estimates of total costs and revenues of a contract indicate a loss, provision is to be made immediately for the entire loss on the contract irrespective of the work done. In some circumstances, the foreseeable loss may exceed the costs of work performed to date. Provision is nevertheless to be made for the entire loss on the contract."

Now in the exchange between Your Honour, Justice Glazebrook, and my learned friend there was discourse about what would be a contingent debt. Did it have to be quantified? And this was in relation to –

**GLAZEBROOK J:**

Well, also this doesn't quite deal with levels of contingency, does it? I think there's another standard that deals with that, isn't there?

**MR GUSTAFSON:**

I'll check at lunchtime, Your Honour, and –

**GLAZEBROOK J:**

Well, it's really just because obviously if – that what I was postulating initially is it's slam dunk, it's clearly due, you even accept it's due, then it seems to me quite clearly you have recognised that there'll be a consumptional loss of service potential, but if, where it's in between and you're not sure, what, what do the standards say? Or do they?

**MR GUSTAFSON:**

Well, the standard – I will check but the standard 5.1.17 does say as soon as the loss is foreseen.

**GLAZEBROOK J:**

Yes, I saw that but –

**MR GUSTAFSON:**

Yes, so –

**GLAZEBROOK J:**

So that begs the question of how clearly do you have to foresee it.

**MR GUSTAFSON:**

Well, this is my next point, Your Honour. It's the one I'll finish on if that suits before lunch but in the exchange between my learned friend and yourself the position, and this is relating to Mr Habedank's, Dr Habedank's letter saying the welds have failed, they're of very poor quality, my learned friend said, well, the loss wasn't quantified at that point in time, and he's right about that but it was quantified before the transactions actually took place, before the money was actually paid out, and if I can take Your Honours to –

**GLAZEBROOK J:**

Yes, I –

**ARNOLD J:**

I think it's the August 2008 letter.

**MR GUSTAFSON:**

26 August, yes.

**GLAZEBROOK J:**

I'd still say that was likely to be neither here nor there. Quantification doesn't seem to me be an issue. If you know it's going to happen then you're obliged to quantify it. If it takes you 10 days or so, well, too bad, but –

**MR GUSTAFSON:**

Well, the –

**GLAZEBROOK J:**

But that's not the quantification. It's the contingent nature so – because –

**WILLIAM YOUNG J:**

Yes, what level? Should we say we've got a 50% chance of losing so we'll provision it at 1.27 million or something, or 1.7 million?

**MR GUSTAFSON:**

Well, Your Honour, at that stage the losses before were particularised at couple of mil so even if you provided a, you know, a 50% contingency, which would be generous –

**WILLIAM YOUNG J:**

Yes, well, that's what I mean.

**MR GUSTAFSON:**

– would be generous, this company is still insolvent.

**GLAZEBROOK J:**

I suppose we're just asking you, because your friend's submission is if it's contingent in any manner it doesn't come into the profit and loss statement.

I'm sorry, I'm still using old-fashioned terms. The revenue statement, isn't it, now? Doesn't come into the revenue statement. It may come into the balance sheet but possibly only as a note, and it's not actually due in legal terms, no matter what the accounting standards say, until not only have you quantified but you've had a Court case saying or arbitration saying your defences have gone. Only at that stage does it come into the solvency.

**MR GUSTAFSON:**

And Your Honours, that's what I'll address you on after lunch because that's certainly not what the Australian cases that Your Honours referred us to say. *New Cap Reinsurance Corporation Ltd v Grant* [2009] NSWSC 662, (2009) 257 ALR 740 was the reinsurance case where the – I don't even think there'd been notification. Certainly they knew there was the formal notification. They knew that the insurer had paid out and they were going to have liability but at that stage it was contingent liability.

The question that the Australian Courts seem to have gone down, the same as the England and Wales Courts, is to say you look at the reasonable chance that it's going to eventuate, which I think is what Your Honour was saying before about do you put a 50% weight on it or a 60% weight. If it's going to – if there's a reasonable prospect that you're going to be paying it then you take it into account in the cash flow test.

**GLAZEBROOK J:**

Yes, my feeling is that there were accounting standards at some stage that did deal with that, whether it was balance sheet or in terms of expenses, I'm not – I can't remember. Whether they still do, I don't know, because it's a long time since I've looked at some of these accounting standards.

**MR GUSTAFSON:**

Luckily I've got an accountant sitting in the back of the Court, Your Honour, so I'll ask.

**WILLIAM YOUNG J:**

Mr Gustafson, how long do you think you'll be? Shall we –

**MR GUSTAFSON:**

I would have thought no more than an hour, Your Honour, is that –

**WILLIAM YOUNG J:**

So if we – would it be worth starting at two, do you think, to make sure we finish by four?

**MR GUSTAFSON:**

Yes, Your Honour. Thank you, Your Honour.

**WILLIAM YOUNG J:**

Okay, thank you.

**COURT ADJOURNS: 1.01 PM**
**COURT RESUMES: 2.00 PM**

**MR GUSTAFSON:**

Your Honour Justice Glazebrook, I've spoken with the liquidator, Mr Petterson, just in the lunch adjournment, about what we were discussing about how you account for contingent debts. I haven't been able to get a copy of the international accounting standard but I do have the reference if Your Honour wants it. It's IAS37 and it's the accounting standard that deals with accounting for contingent liabilities, and the relevant sections of it seem to be 31.10 to 37.36, and basically to summarise what they say is that you account for it if it's more likely than not that it's going to eventuate and you use the best estimate of the amount required to settle the liability in the circumstances.

**GLAZEBROOK J:**

So you account for the whole lot rather than a proportion? It doesn't say.

**MR GUSTAFSON:**

It seems to be an estimate of what you think it's going to take to actually dispose of it. And we know that by 26 April – sorry, 26 August 2008 – MacDow had advised that for the first weld failure they were looking at 2.55 million, and they'd particularised out what that was.

Your Honours, just to really make the best use of the hour, what I'd like to do is just quickly take you to a couple more of the factual matters which I say are relevant, then deal quickly with the cases, the Australian cases which I've set out in the synopsis that say there is a discretion as to what to order, not if to order, and then deal with the cases that Your Honours directed us to probably for the bulk of it, dealing with the cash flow test for solvency.

So if I can first of all ask Your Honours to look at part, sorry, section C part 1 at page 601? Now his is the letter from Duncan Cotterill dated 27 May 2009, and it's written to David Browne, and he in this letter begins by saying, "Kindly note that my advice and communication to you is privileged and it cannot be used in evidence. We need to be careful that other correspondence is not necessarily privileged." And then he says down at 6 on the bottom of the same page, "As at 31 March 2009 there is now very little cash on hand. Most assets are tied up in accounts receivable which, I suspect, are largely MacDow." And so what my learned friend submitted to you this morning was, well, there was a $450,000 advance, that was for the Rosedale outlet. That, as we know from Mr Browne's evidence which the first time we heard of it, this Rosedale outlet, was during cross-examination, but that never took place. So wherever the 450 went, it wasn't cash on hand as at 27 May. He then goes on to say, "I note that you have effectively taken all your current account as drawings for this financial year. This is an upon demand facility and you are able to call up this amount. It's important, David, that you have in your records a demand in writing that was delivered to the directors, which would have been, I'm sure, around April 2008."

**WILLIAM YOUNG J:**

Was there such a demand?

**MR GUSTAFSON:**

I think there was a demand, I don't know when it was actually drafted.

**WILLIAM YOUNG J:**

It is dated April?

**MR GUSTAFSON:**

I'm unsure, Your Honour, I'll ask my learned junior to check.

**WILLIAM YOUNG J:**

It does read rather as an invitation to create and backdate it.

**MR GUSTAFSON:**

It does, it does. And then, if we come over to paragraph 9, "From an overall position I think we have effectively now achieved what we set out to do some nine to 10 months ago, look to wind down in an orderly manner PPS, extract out the wealth and cash in an orderly and legal manner, ensure that the stakeholders in the company are paid in the ordinary course of business, and particularly ensure that you either via your current account or your secured advance are paid out in the normal course of business." And then was then subject to cross-examination of Mr Lay, and if I can take Your Honours to section B part 1 at page 239, and this is tab 17.

**O'REGAN J:**

B1, tab 17, is that right?

**MR GUSTAFSON:**

Yes, Your Honour, page 239.

**GLAZEBROOK J:**

I've got B2, C1 –

**MR GUSTAFSON:**

B1, Your Honour, sorry.

**GLAZEBROOK J:**

I know – I've got it thank you. So tab 17.

**MR GUSTAFSON:**

Tab 17, page 239.

**GLAZEBROOK J:**

It was of course the first one that I had there.

**MR GUSTAFSON:**

Sorry, Your Honour.

**GLAZEBROOK J:**

Unless you prepared the case on appeal I'm not blaming you.

**MR GUSTAFSON:**

I used to do cases on appeal, not for a while, Your Honour.

Page 239 is cross-examine of Mr Lay about this letter, and so at page, it's line 7 I put to him, line 8, "Now isn't it fair to say that what effectively Mr Dorrance is saying here is that what was discussed on 1 July 2008 at the directors' meeting has actually been put in place?" "Yes." And then if you come down to line 22, and this is after I've asked him about the ordinary course of business test that was the pre-2007 amendment to the Companies Act, "So what Mr Dorrance is saying, isn't he, is that we've been able to get the payment made and ensure the they've been made in the ordinary course of business, that's what he's saying?" "That's what they're saying." "And so one of their aims, one of the things you wanted to decide," and this is at line 31, "at the meeting of 1 July was to get related parties paid so that Mr Browne, DBC and DBM try to get them paid so that they are not insolvent transactions, that's right isn't it?" and he says, over the page, "That's correct." So there was clearly on Mr Lay's evidence this perception that they wanted to get the money repaid but they didn't want those transactions if possible impinged as insolvent transactions.

And if I can just, just moving through the, going back to my synopsis, and I'll just quickly take Your Honours through the other key facts that I say are important to this. If Your Honours come over to 12.18, 20 July 2009, this is what I think Your Honour Justice France referred to this morning, which was the defence, and this is in the quote in paragraph 50, was without substantial merit. So it's recorded in the Court of Appeal and if Your Honours want the page reference for the statement and the adjudication, it's C, part 1, page 544.

**GLAZEBROOK J:**
Sorry, what was the paragraph reference in the Court of Appeal?

**MR GUSTAFSON:**
50, Your Honour, and then probably the final – I've alluded to it this morning and in fairness I should just refer Your Honours to it. I did say that there was attempts to frustrate the provision of information to the liquidator and that's recorded in the Court of Appeal judgment in the section 299 proceedings. The actual document which probably sums it up the best is the 26th of July 2010 letter. So this is a year after there's been liquidation 10 months afterwards and nine to 10 months after the section 266 notices, sorry, section 261 notices were served by the liquidator, and you'll see from the letter that there was a statement, and this is –

**GLAZEBROOK J:**
Sorry, where are you? Whereabouts is the letter?

**MR GUSTAFSON:**
The letter is at section C, part 1, page 660. So the same volume Your Honour just had open. It's actually an email, Your Honour. And the bit that the Court of Appeal relied on and that we submitted showed that there was this attempt to not hand over information in a timely manner to the liquidator is the dark and highlighted piece and the bit that starts, "However, we will not be able to resist requirements for bank statements indefinitely. Can we perhaps review these bank statements and understand where the problems may lie?" So you

have a situation, given that the bankruptcy, sorry, the section 261 demands have been issued some eight or nine months before, you have again this delay in providing information. And again this is information, as my friend said this morning, that what he was saying to you and putting to you was that there's background facts that indicate a discretion, if it exists, should be exercised not to make an order under section 295 requiring repayment. I say for these reasons that this is not a situation, if such a discretion exists, where it should be.

If I can just come across to deal with whether or not there's a discretion in the synopsis, and I'm at page, sorry, paragraph 13 here, Your Honour, if I was going to summarise the position, the position in Australia is that there is effectively no discretion and that the word "may" is an empowering word. It gives the Court the ability, the Court may make one of the following orders, and it's not giving an overriding discretion as has been indicated in some of the cases in lower Courts in New Zealand. The question is really in section 295(a) there is the proviso that the Court may order a lesser amount than the original transaction be paid and, Your Honours, the sections are set out in tab 1, volume 1, of our synopsis. But the question is why would you have that and, to me, having thought about it, it seems to be a case where you have a situation where you may want to order a recovery but it may not be the full amount of the original transaction, and the *Madsen-Ries v Rapid Construction Ltd* [2013] NZCA 489, [2015] NZAR 1385 case was an example of that. Now in that case there was two construction companies, both of whom would subcontract to the other, and at the end of a year-long period there was a cheque-swap, and the creditor received more than the debtor company, so there was a swap of $113,000 coming to the creditor and the creditor in turn gave back a cheque for $90,000. Now the liquidator in that case wanted the whole 113, and in both the High Court and the Court of Appeal said, "Well, no, the transaction is set aside but the creditor has altered its position in good faith, not totally, but it has given $90,000 and received $113," and so what both the High Court and the Court of Appeal did was to say, "We are going to order that net amount under section 295(a)," and that produced, and I was counsel for the creditor, it produced, in my

submission, a just result. There had been a preference, there had been a benefit from the insolvent transaction to the creditor. But if you'd done what the liquidator had urged, which was repay the full $113,000, there would have been a massive disadvantage, a fairness disadvantage to the creditor. So in my submission this ability in section 295(a) to order a less amount is designed for that sort of situation. And I know also from reading the – and I know it's before Your Honours, the case, the *McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 783 case – but when you start talking about comparable value, if that decision, well, currently it stands, it is the law dealing with the value given under section 296(3) defence, if that comparable value test stays then section 295(a) would again allow that to play. If that's not the interpretation then it doesn't. So that's why I say there is a very limited discretion in section 295, but it's not, if the Court is convinced that David Browne Construction and Mechanical paid or advanced $300,000 or $400,000 and received back $300,000 and $400,000, then I say that's not the time to exercise that discretion, there's no disparity in value, and effectively the full amount is ordered to be repaid under section 295(a).

**ARNOLD J:**

So in those cases where the demand was not properly made but nevertheless the objection wasn't filed in time and so on, you say what –

**MR GUSTAFSON:**

I say if you are blameless, you took this payment in good faith, you had no reason to suspect insolvency and you'd given value or altered your position, you have a absolute blanket defence. If you cannot prove one of those three things you should not be entitled to any discretion. Because a reasonable person in your circumstances, the Court has found that you should have known that the company was about to become insolvent. Alternatively, you didn't receive the money in good faith or you never gave value. So it's very difficult to see why a person would, if you can't meet those –

**WILLIAM YOUNG J:**

You say there's not a discretion there to pick up 296(3) near misses?

**MR GUSTAFSON:**

Correct, Your Honour, correct. And it's akin to the statutory demand procedure in that if through your negligence or the negligence of one of your advisors you don't meet the objection period and you don't get an objection in, and then you still can't get a defence under section 296(3), why, why would you be entitled to a defence? I mean, you can take one thing for certain: if it's an insolvent transaction the company has gone into liquidation, the company went into liquidation. The only that then is important is effectively, for section 296(3), value, did you know or should you have known? Now those three things, if you can't establish those three things, you should not be entitled to a discretionary relief to excuse your own negligence.

**ELLEN FRANCE J:**

Well, what about Mr Carruthers point that the Act is not a code so you may have, there may be other forms of action being taken?

**MR GUSTAFSON:**

Well, I'm sure there are other forms of action being taken because the proceedings were served on the company's office which was a chartered accountant's firm, the notices that were then ignored. So it's not a situation where, I think, those two companies can come to Court and say, "We are," you know, "We have nothing. We have no recourse to this." They do have recourse and –

**WILLIAM YOUNG J:**

Well, they can sue the accountants.

**MR GUSTAFSON:**

What's –

**WILLIAM YOUNG J:**

They can sue the accountants is what you mean.

**MR GUSTAFSON:**

Yes, well – and again it's if we were talking about whether it's a code, maybe it's a question of coming with clean hands. If you accept for a moment, Your Honour, that the Court of Appeal's decision in section 299 has not been disturbed and there was this apparatus put in place to leave MacDow out in the cold and pay related parties, then how is that party coming here and saying to you, "We need to invoke an equitable relief," or some other unspecified form of defence or relief, to be – avoid a hardship? Because if they actually had bad faith, and these are the companies, if they had bad faith and they should have known and didn't take steps to, as *Trans Otway* says, to actually inquire and find out, why should they be entitled to relief? So that's essentially what I would say to that point.

I mean, also in relation to it not being a code, the liquidators, the powers governing the liquidator are the liquidator, yes, they're appointed by the Court, they're an officer of the Court, but their powers and their duties are solely contained, they are a creature of statute really and they are contained in the Companies Act. I'm not aware of them being able to invoke in their own name any other rights at common law. Sure, they can –

**WILLIAM YOUNG J:**

But they could sue in the name of the company.

**MR GUSTAFSON:**

They can sue in the name of the company, Your Honour. That's the company suing, not them, and these are obviously, it's trite, but these are company causes, these are, sorry, liquidators causes of action, all of them.

**WILLIAM YOUNG J:**

Yes, I think we understand that.

**MR GUSTAFSON:**

So Your Honours, I've set out just briefly the cases dealing with no discretion. Just –

**WILLIAM YOUNG J:**

Well, it's just the Australian cases say, well, this is how we construe the section, may is jurisdictional, we don't construe the legislation as having the purpose of conferring on the Courts a discretionary jurisdiction which isn't provided for in the text of the statute.

**MR GUSTAFSON:**

They go a little bit – that's right, Your Honour, but they do go a little bit further. What they also say is why and that's probably in paragraph 17 in the *New Cap* case and the flavour is what you're doing and the quote at 21 really sets it out. What you're doing is not, it's not, this is not an action for damages against DBC and DBM. What this is trying to do is to put all the creditors into the same place and so that if a transaction has been set aside and someone has received a payment when another creditor hasn't, all you're doing is levelling out the playing field. You're putting everybody back where they were when the company was insolvent. So that's the rationale which is set out in *New Cap* and that *New Cap* decision and, sorry, the other one got missed out and it's certainly not my learned junior's fault, that was done somewhere else, but that *New Cap* decision of Barrett I think really encapsulates the position. There's the other cases as well that I've referred to and they probably are a bit more, as Your Honour says, along the lines of, well, look, this is the way it reads, *Cussen v Sultan* [2009] NSWSC 1114, (2009) 74 ACSR 496 being an example, you know, it's there, in 569, it's not the granting of a discretion, and then down below the other bit that's emboldened, the word "may" is merely used to confer authority. And I understand what my learned friend said, there are other ways that it could be expressed so that it conferred authority, and he's right, there are definitely ways that it could be construed differently. But I think we probably all agree that quite often when statutes reach this Court and are examined, almost everybody agrees they could be worded differently if there's still a dispute.

Your Honour, paragraph 21, I've just, this is an extract taken from your decision 18 months ago from *Allied v Meltzer,* really this is about the 2007 amendments, and it's not a flood gates argument but it does deal with

something that Your Honour Justice Arnold raised today, which is the effect of this. If Your Honours were to find that there was a discretion and that it was perhaps related to equitable principles, in my submission it's actually, with respect, it's actually taking away certainty from section 292 through to 296. The only defence after a transaction is set aside will not now be 296. Is there really something pressing on a party to file a notice of objection in time or do they just ignore it, put the liquidator to expense, wait for the 295 application and then argue everything then? Those are the sort of possible consequences that may come from, in my submission, recognising a discretion.

Now, Your Honour, I'll just skip over this bit because it just deals very briefly with – this is paragraph 24 following – when should the discretion be exercised. I've just set out from *Levin v Timberworld Ltd* [2013] NZHC 3180, it's basically recording there that it's not certain that there is a general discretion, and then really the extract from Westlaw. And it seems to be that if there is a discretion that the Court would seem to set that high, because there has been a procedure put in place under section 294, 296, and then you get to 295. So if the creditor has failed on those two legs and Your Honours are minded to say there is a discretion, it should be one where there is a compelling reason for the Court to grant it.

Now, Your Honour, if I can take Your Honours to paragraph 35, I've dealt here with the cash flow solvency test which you directed us to, and at paragraph 35 I've really set out what I think the position is, and this is looking at the Australian cases, the England and Wales cases and the New Zealand cases, to try and determine just some commonality from those jurisdictions about this cash flow test. And my friend said this morning that it's not a solvency test per se, it's a liquidity test. Well, in my submission, that's not right. What it is, with respect to him, what it is, it is definitely a solvency test, it's one of the two insolvency tests or solvency tests in section 4, but it is not totally devoid, and in the cases, the Australian and English cases, say, it is not totally devoid from the balance sheet test, and there's some cases we'll come to in a moment which have said, "Look, there may be a situation where on a very strict

interpretation of whether a company pay its due debts from its own moneys," that in a snapshot that company will meet that test, but you know, you know from the surrounding facts, you look at the surrounding facts and say, "On a balance sheet test this company is totally insolvent," and what those cases have said is that sometimes you can use the balance sheet test to fact check, if you like, whether the company is solvent, and if it, on a balance sheet test, if it's clearly insolvent then those cases would indicate that the company can't meet its due debts, and that's due debts current and as they become due in the future.

My learned friend has taken you to *Blanchett*. I don't agree with his analysis, and I then come across to paragraph 37 and I say there, "Look, this is a – the cash flow test is a test that goes beyond the simple question of whether there is sufficient cash immediately to meet company obligations," and I've referred to the *Southern Cross Interiors PTY Ltd and Anor v Deputy Commissioner of Taxation and Ors* [2001] NSWSC 621, (2001) 53 NSWLR 213 case and, in particular, that in assessing the – the solvency Courts act upon the basis that a contract debt is payable at the time stipulated for payment in the contract unless there is evidence proving to the Court's satisfaction that's – there's an implied agreement that it be delayed, that there's a course of conduct giving rise to an estoppel or a course of conduct in the industry.

And I wanted to take Your Honours just to the contract which my learned friend also referred Your Honours to, and – so Your Honours, it's section C part 3 and it's tab 45, and my learned friend took you to the definition of "insureds" and said, "Well, that includes subcontractors," and I think it was Your Honour, Justice Glazebrook, that pointed out, well, but that's not what the operative section said, and if Your Honours go to page 901, paragraph 11.1, clause 11.1, you'll see there that the subcontractor, PPS, has agreed to protect and indemnify the employer and the contractor, the contractor's MacDow, against all losses, claims, costs, charges, expenses and damage arising out of or in connection with or in consequence with the subcontract work unless those losses, et cetera, were caused by the fault or

neglect of the contractor, its servants or its agents. So it is a very, very wide indemnity.

**WILLIAM YOUNG J:**
Just looking at the next clause, this was weighed, was it?

**MR GUSTAFSON:**
Sorry, Your Honour, I just –

**WILLIAM YOUNG J:**
11.2.

**MR GUSTAFSON:**
Yes.

**WILLIAM YOUNG J:**
I take it that in fact PPS wasn't required to take out insurance under that clause?

**MR GUSTAFSON:**
It was, I believe it was for its plant and vehicles but that was it.

**WILLIAM YOUNG J:**
Okay. It wasn't required to take out public liability insurance?

**MR GUSTAFSON:**
No, no. So you have this contractual, very, very wide and strong contractual obligation upon PPS and that's obviously what founded the adjudication of Mr Firth in July of 2009. And –

**WILLIAM YOUNG J:**
But it is required to take out public liability cover.

**GLAZEBROOK J:**

Well, that actually, when I think about it, that might have been what Mr Compton was talking about when he said you don't have to do that.

**WILLIAM YOUNG J:**

Well, looking at the schedule –

**GLAZEBROOK J:**

Because there was a discussion, wasn't there, supposedly?

**WILLIAM YOUNG J:**

At 909 is the schedule.

**MR GUSTAFSON:**

Yes, Your Honour, it is.

**GLAZEBROOK J:**

Contract works isn't required.

**MR GUSTAFSON:**

Yep. So public liability. So if they –

**GLAZEBROOK J:**

And no further –

**WILLIAM YOUNG J:**

Well, that's probably not liability to the –

**MR GUSTAFSON:**

No, it's not.

**WILLIAM YOUNG J:**

– to the head contractor.

**GLAZEBROOK J:**

No.

**MR GUSTAFSON:**

Your Honour, just returning to the synopsis, the case that I've cited at paragraph 39 is the massive decision of *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239, (2008) 39 WAR 1 and this is dealing with the cash flow test and Justice Owen, who sat for 404 days on this case, said there's no unanimity among the common law jurisdictions and then he goes on to cite from *Bank of Australasia v Hall* (1907) 4 CLR 1514, the position depends on whether he, or she, it should be, can satisfy debts, not on whether a balance sheet will show a surplus of assets over liabilities, and then His Honour goes on and says, "That being said, it would be wrong to dismiss the balance sheet test as irrelevant. It can be useful, for example, in providing contextual evidence for the proper application of the cash flow test," and then he goes on to cite from the *Insolvent Trading* text, and he goes on at paragraph 1074, "The proposition that a balance sheet assessment continues to have some relevance is supported by other authorities," and he sets out those authorities.

**WILLIAM YOUNG J:**

Can I just say a lot of this is sort of in the air but not quite on point, that the real point I guess is whether a claim that is disputed can be said to give rise to a due debt which is current.

**MR GUSTAFSON:**

Yes, Your Honour, the –

**WILLIAM YOUNG J:**

And the only reason for not treating the McConnell Dowell debt as a debt presently due is because it was disputed. Now I imagine that sometimes it would be that it's legitimate to treat a disputed, a claim that's disputed, as not giving rise to a present debt and then, of course, we've got the argument, discussion you had before lunch with Justice Glazebrook about provisioning

and the like, but the only case I think I'm actually aware of that is on point is the Australian, the old Australian High Court case, *Hall.*

**MR GUSTAFSON:**

*Hall* yes, and that's the one that His Honour, Justice Owen, has just referred to and that's been held to be good law in the *New Cap* case as well, which we'll come to.

**GLAZEBROOK J:**

So where did you say he had referred to it as?

**MR GUSTAFSON:**

In paragraph 39, Justice Owen says –

**WILLIAM YOUNG J:**

Yes, he does, yes.

**MR GUSTAFSON:**

– "The debtor's position depends on whether he can pay his debts."

**GLAZEBROOK J:**

Yes, yes.

**MR GUSTAFSON:**

And there's – if you were looking at a conflict of cases in Australia, you would say there's the *New Cap* case, the decision of Justice White which we'll come to in a moment, and there's a case called *Box Valley Pty Ltd v Kidd* [2006] NSWCA 26, (2006) 24 ACLC 471. Now in *New Cap*, and this is set out in the synopsis, in *New Cap* the *Bank of Australasia v Hall* case wasn't cited and the Court in *New Cap* said, well, in that case the reinsurer position after the insurer had paid out was technically, was technically contingent, and because demand had not been paid for repayment, they knew it would almost certainly be coming but it wasn't a dead cert, and so the courts in this case and other cases have looked to say well, what you should look at is whether or not the

debt is likely to arise, and if it is reasonably likely to arise then you count it in the cash flow test. If it is not, then you discount it. And again also you've got this –

**GLAZEBROOK J:**
And is that on a reasonable person basis?

**MR GUSTAFSON:**
That would be – you've got to remember –

**GLAZEBROOK J:**
So is reasonably likely, I guess that's –

**MR GUSTAFSON:**
Yes, Your Honour, reasonably likely, and you've got to remember that it's not, you're not saying to Mr Browne, "Did you think it was reasonably likely that it was?" It's an objective test. You look at it and you say, "Right, someone in Mr Browne's position, these are the facts he has, was it reasonably likely that this was going to be a debt that was going to arise in the near future?" And the cases say that the period you take is all dependent upon the facts. So we have a case here where, and as Your Honour noted this morning, the – McConnell Dowell didn't bring a cause of action under the Construction Contracts Act 2002 to claim under that straight away. The project was continuing. There was negotiations. Year and a half went past before they actually went to adjudication. But under the Construction Contracts Act the adjudication could have taken place within 35 working days. So it could have been – if it had been forced along, it could have been forced along at a quite significant pace. So that's seven weeks, and it's a point Your Honour made which is, well, if you're looking at the period and when debts are due, do you consider a dilatory plaintiff or someone who's taking their time, and in my submission you don't because you're looking at a period and you say, well, if this debt is likely to arise within the next seven weeks or two months is it a debt that should be taken into account? If the opposite was true then what you're doing is saying to creditors, "You need to drag this process out as long

as you can." You know, get it going for a couple of years and then whatever happens in the interim, and if you've done something like this and stripped assets out of the company, then you're less likely to be tripped up under section 292.

Your Honour, the English case which is – certainly reviews the Australian position and makes, in my submissions, some – it's good reading for me because it summarised everything quite neatly in Australia – was the *Cheyne* case, *In re Cheyne Finance plc (No 2)* [2007] EWHC 2402, [2008] Bus LR 1562, and that was the interpretation of a security deed that actually incorporated section 123 of the Insolvency Act 1986 (UK), and the Court held, and this is at paragraph 42, that the cash flow test is concerned with debts due at a specified time and falling due in a reasonably near future of that time, and the Court held that it would depend on the circumstances of the case to set what that period was.

And dealing with the *Hymix Concrete Pty Ltd v Garritty* (1977) 13 ALR 321 (HCA) case, Justice Briggs said, "Look, this is not a liquidity test. It is looking to see whether there is an endemic lack of working capital," and we know from the email of Mr Dorrance sent on the 27th of May 2009 that at that point in time there was an endemic lack of working capital. Now I accept that that was nine months after these payments were made but the position of the company had not dramatically altered from the time of the transactions. The transactions take place, 450 comes in, it's not there by the 27th of May, the assets that are there are effectively accounts receivable claims against McConnell Dowell which are never going to get paid, and then you have the very large claims that have been made for the three weld failures. So if you're looking at an endemic lack of working capital, in my submission that was there, if, if these debts were properly accounted for, these claims by McConnell Dowell, by 2 September when these transactions took place. I've referred, Justice Briggs refers to the *Taylor v Australia and New Zealand Banking Group Ltd* (1988) 6 ACLC 808 (VSC). Basically there, there was just, there was plant sold and then the company effectively paid out on portfolios of mortgages, but it was clear that at that point in time that there was going to be

a shortfall between what it had to pay in the future, and the assets that it had, and even though it had cash surplus at the time of the impinged transactions took place, the Court in that case said, well, no, you're unable to pay your due debts and those are insolvent transactions.

Your Honours, I'm over at page 49, this is the section I think that really deals with the question of contingent debts, and there's only two cases, there's three listed, but there's only two that I can really rely on, and that's *Fryer v Powell* [2001] SASC 59, (2001) 159 FLR 433 and *New Cap*. The reason *McBain v Palffy* [2009] FCA 260 is not relevant is because it relates actually to a bankruptcy under the Bankruptcy Act 1966 (Cth) in Australia, and that used an identical wording to section, the insolvent transaction section in the corporations law, the problem with it is that in the definition of "debt" in the interpretation section in the Bankruptcy Act, it includes, it says, "Debt includes liabilities," and I think that just distinguishes it away from what we're talking about because obviously a contingent liability is a liability, not necessarily a due debt.

So in the first case, in the *Fryer v Powell* case, that was the Full Court of the Supreme Court, and in that case was noted that an ordinary meaning of debt is a liability or obligation to pay or render something. That one person is bound to pay or perform to another and His Honour also accepted in that case a definition offered by counsel that a debt is simply an obligation of one party to pay a sum of money to another, and that perhaps comes back to the point that was made this morning about the fact that there is by 26 August a $2.55 million claim and the advice from Mr Habedank that the welds were of very poor quality and probably caused or contributed to the failure.

The final case in relation to the section which I say supports our position, Your Honours, is the *New Cap* case. Again this is different from the, a different Judge and different judgment from the one referred to previously. The Court considered whether a debt arises under a reinsurance and in particular if the reinsurer has paid out but is yet to claim under the reinsurance policy, and the Courts reviewed the position in relation to existing debts and at

paragraph 54 I've said what the Court held that a prospective debt is one not immediately payable but will, which will certainly become due in the future, and then a contingent debt exists if there was an existing obligation out of which liability on the part of the debtor to pay a sum will arise in a future event, whether it be an event that must happen or only an event that may happen. And then the Court went on to say that a due debt could, in fact, be an unliquidated damages sum and then set out at paragraphs 57 and 58 of the judgment, relying on the *Bank of Australia*, that the majority of the High Court held that liability of a debtor includes any liability provable on the bankruptcy. Now that's obviously McConnell Dowell has filed in the liquidation in this matter and His Honour Justice White goes on to record, "The majority of the High Court took into account the debtor's liability to pay unliquidated damages for breach of a warranty and fraudulent misrepresentation which liability was established by judgment shortly after the impugned conveyance was made." And then, I won't take you through paragraph 58. Paragraph 59, "A further basis for the conclusion that a wide construction of the word 'debts' should be adopted," and this is in relation to the corporations law, "was that such a construction gave effect to the object of the provision for the avoidance of preferences, which requires regard to be had to the position of all persons who would be entitled to claim on the bankrupt estate." And this is the point that I was making to Your Honours before, in relation to whether or not there's a discretion. It's related but it goes to the underlying nature of what sections 292 to 295 are trying to do. It is not a damages claim. It is a mechanism to put all the unsecured creditors on an equal footing. That's all it is.

I've also cited there the *Box Valley* decision at paragraph 57 and what the Court said in relation to *Box Valley*. *Box Valley*, as I said before, went the other way. It said that contingent debts are not to be taken into account and, as due debts, but in that case it was odd because the Court found itself bound to rely on another New South Wales case where *Bank of Australasia v Hall* case had not been cited, and so it was with a certain level of regret that the *Box Valley* Court basically decided that it would not follow the High Court of Australia decision.

And at paragraph 58 I've set out there why I think *Bank of Australasia v Hall* and the *New Cap* decision of Justice White is correct and *Box Valley* isn't. *Box Valley* just didn't give effect to the, either the Australian or the New Zealand legislation. I mean the purpose of *Bank of Australasia v Hall* and what the Court actually recognised there was these things, these considerations about what are due debts are very fact specific. Now *Bank of Australasia v Hall* you have fraud, you have misrepresentation, you have judgment being granted shortly after the time of the impugned transactions. Here you have a situation where accepting section 229 the judgment stands. We have a scheme to basically pay out related parties at the expense of McConnell Dowell. Now the purpose of the legislation, in my submission, and looking at it as a fact specific case, this is a case where Your Honours can take into account the McConnell Dowell claims as contingent debts, but take them as due debts, because they'd been notified –

**WILLIAM YOUNG J:**
They're contingent only in a particular sense. They've contingent in that they haven't been adjudicated on.

**MR GUSTAFSON:**
Correct, Your Honour.

**WILLIAM YOUNG J:**
But on the basis of the adjudication they were due and owing at the time of this transaction.

**MR GUSTAFSON:**
Correct, Your Honour.

**WILLIAM YOUNG J:**
Not contingent on something else happening like a, as an insurance case, I'll indemnify you if you're held to be liable. Well until that person is held to be liable my debt is contingent.

**MR GUSTAFSON:**
Correct, Your Honour.

**WILLIAM YOUNG J:**
In a different sense.

**MR GUSTAFSON:**
That's exactly right, and that was the position in *New Cap* because the Court was saying well okay it's an insurance claim, but the insurance claim that has triggered everything in this very corporate reinsurance market, has actually occurred. So yes it's contingent but you know that no financial insurer is not going to activate their reinsurance for a very large claim.

**WILLIAM YOUNG J:**
Well it's like money being owed, maybe like, money being owed but on demand. I'm not sure that you'd be entitled to strip yourself of assets on the basis the debt's not due because formal demand hasn't been made.

**MR GUSTAFSON:**
Unless you want to make a lot of business for me Your Honour but, yes, that wouldn't be the position. It's – Your Honour is dead right though, that it comes down to the facts of each case, so if you looked at the one you've just used you'd say well it's on demand, demand hasn't been made, but come on, give effect to the legislation.

So paragraph 59 to 60, Your Honours, and 61, I've just set out why I say, because of the factual matrix, that the McConnell Dowell amounts claimed could be taken into account. At paragraph 61 I've set out, which Your Honours will be far more aware of than me, but these are the steps taken for adjudication, and they total 35 working days, as I said previously.

Paragraph 63 I just note that those payments were, well the costs were notified by 2 September for Weld 151 at 2.55 million.

Your Honours I think probably there's a bit of repetition here because I'm repeating some of the salient facts which I've already made. In paragraph 64, Your Honours, I've just referred to the 5 September notice for the second weld, which was $450,000. That was three days after the cheques were drawn. So you have a situation, if you're looking at factual context where within 10 days, or 11 days, you have PPS notified of pretty much $3 million worth of claims pending for breach. In that interim period you have the money being paid out to all the related parties including Mr Browne. So just to summarise, Your Honours, I say that if this is a contingent debt it is one where it's so likely that it is about to accrue, as at 2 September that it is a debt that you would take into account for the cashflow test. So unless I can help you further?

**WILLIAM YOUNG J:**
Well timed. Thank you Mr Gustafson. Mr Carruthers?

**MR CARRUTHERS QC:**
Can I begin with the welding email that Your Honour Justice Arnold drew my attention to at page 1434 and –

**GLAZEBROOK J:**
Sorry, can we drag that up again.

**MR CARRUTHERS QC:**
It's in section C part 5 and it's under, it's 1434, Your Honour, it's under tab 59.

**GLAZEBROOK J:**
Yes.

**MR CARRUTHERS QC:**
Your Honour, this is the subject of discussion in the Associate Judge's judgment from paragraph 97 through to 111 and he discusses the background to that and at 103 says, "I also accept that the welding samples which were found to have very bad results were not samples of the welding undertaken

during the course of manufacture of the pipeline and that in fact the failed pipeline joints have never been made available to PPCS or, for that matter, to Frank GmbH to test." And so that's the starting point, and then – so there are two points on this, that this was something that Frank in Germany put together to test without the information as to the resin quality and the specifications for the what was in fact used by PPS and PPS-Frank in New Zealand. Now there's another dimension to that email and the discussion by the Associate Judge and that is that if it were a pipeline matter Frank in Germany had an exposure through PPS-Frank in New Zealand. If it were a welding issue, that was a PPS liability, and that's a point that's made by the Associate Judge that you've got to be careful about the way in which one looks at this information. Now, Your Honour, that brings me to a wider point and I did make the submission to you earlier that the reason that I have gone through all of those documents on the defensibility of the claim is to have a proper context because the risk is that one takes a document, and I'm not – and please don't take this as a criticism – is that one takes a document that seems to be an answer to the issue but doesn't have it in context or with its background and that, in fact, is one of the underlying criticisms I make of the Court of Appeal judgment which has taken bits and pieces without the overall picture of the kind that I have been at pains to deal with in the three features of the claim, and that's why I do commend the analysis that the Associate Judge has made because he has carefully gone through the documentary evidence. So that's the first submission I make in reply.

The second submission concerns insurance and I just want to synthesise the discussion that you had with my learned friend and the submissions that he made. The document that he took you to is in section C, part 3, and it's under tab 45, and the page that he took you to was 901 under clause 11. So he took you to clause 11 which is the indemnity and the next step is 11.2.3 concerning contract works and that takes you to 909, as Your Honour, Justice Young, picked up and the exchange you had with Her Honour, Justice Glazebrook. At 909 you have in relation to contract works not required. So one has the spectacle of insurance of subcontract works not being required but –

**GLAZEBROOK J:**

Well, no, it's very, very narrow, 11.2.3. It's just related to – well, I suppose it says "including cover for off site storage" but –

**MR CARRUTHERS QC:**

Well, it's –

**GLAZEBROOK J:**

Well, is contract works insurance defined?

**MR CARRUTHERS QC:**

Well insurance is defined, that's the next step. As I took you to earlier on, insurance is defined in the contract at page 933 where, or insured is defined, and that's where I drew attention to the fact that the insured includes the subcontractor, and this is why the issue of subrogation doesn't arise because what you have is an indemnity that is provided by clause 11. No insurance is required in respect of contract works for that, in respect for that indemnity, so on the face of it the, McConnell Dowell would be able to claim on the indemnity against PPS but in fact PPS is insured in terms of the insurance arrangement so that eliminates the subrogation provision, which makes that letter from the New Zealand, from NZI, accurate as to its analysis of the contract position and also makes Mr Coughlan's advice correct.

**ARNOLD J:**

How does the exclusion in 4.4 work, of the insurance policy, 930?

**GLAZEBROOK J:**

Where's the insurance policy?

**ARNOLD J:**

It's C, part 3, and there are exclusions from cover. Page 930 and 4.4 is the relevant one, which is mentioned in the correspondence.

**MR CARRUTHERS QC:**

Well is it found to be a defect of material workmanship. I mean that must be an issue as to whether that's referring to the materials, or whether it's referring to the act of welding the beads.

**ARNOLD J:**

Well one of the bits of correspondence you referred us to from one of the brokers certainly treated it as not covering faulty welding.

**MR CARRUTHERS QC:**

Yes, that's one of the –

**ARNOLD J:**

Sorry, the policy not covering it, falling within the exclusion.

**MR CARRUTHERS QC:**

Yes, yes, and then the rather more comprehensive analysis that came from NZI made it clear that there was a claim for it. So this is really why I've taken care with that insurance issue, because in the end, as I submitted earlier, one comes back to what Mr Browne believed and was entitled to believe on the information that he had. Now the third submission I make is really to –

**GLAZEBROOK J:**

Are you saying that PPS was actually insured under this policy, or just Mr Browne thought –

**MR CARRUTHERS QC:**

No, I'm saying that they were insured under the policy. There is an issue, I think there is an issue as to the scope of the exclusions as Justice Arnold has identified. But what I'm submitting to you is that by a combination of clause 11 –

**GLAZEBROOK J:**

Well why haven't they claimed on it?

**MR CARRUTHERS QC:**
Well, I'm not sure why the liquidator hasn't claimed on that.

**WILLIAM YOUNG J:**
Well why Mr Browne didn't pursue it, but instead put the company into receivership.

**MR CARRUTHERS QC:**
Well it would still be open to the receiver to pursue it and certainly the liquidator to pursue it. But –

**WILLIAM YOUNG J:**
I mean it wasn't one of the claims the receiver did pursue? And the receiver did pursue the claim against Bosch.

**MR CARRUTHERS QC:**
Bosch, and that was a claim that was funded –

**WILLIAM YOUNG J:**
By Mr Browne.

**MR CARRUTHERS QC:**
By Mr Browne, who then faces, years later, the application by the liquidator to set aside the security and the payment.

The third submission I make concerns what I've called the fate of the money and this is really in response to Your Honour, Justice Glazebrook, or explanation to you. You put to me, well, how is it that Mr Browne can identify in that paragraph 46 I took you to the various transactions that the money was applied to but now the money can't be traced and that – which was Mr Carey's evidence. And bear in mind that there is actually a gap of four years between those transactions and the time that the liquidator acted so the question of being able to identify what happened to the money in the meantime is really

beset with that difficulty. I just simply make that as an explanation, Your Honour. I understand the force of what you put to me.

**GLAZEBROOK J:**
I thought if you're a business you ought to have business records that tell you where money goes but –

**MR CARRUTHERS QC:**
Your Honour, look, I accept that but I'm just putting the situation to you as so an explanation as to what the difficulties were for Mr Carey tracing the money.

My learned friend then relied, and this is my fourth submission, on the Duncan Cotterill letter of 27 May 2009 and as, as supporting the course of conduct that he criticised. That's in – I don't need to take you to it but it's in section C1, tab 32, page 601, and the only submission I make in relation to that is to draw attention to the fact that Duncan Cotterill's narrative of what was proposed and what was achieved lines up precisely with the advice that Mr Walt gave.

The next submission I make concerns Your Honour, Justice Arnold's question of me, the reason for the security for the $450,000. And just bear with me for a moment. If I can take you to the case at section B, part 2, under tab 23, and this is Mr Browne being cross-examined and I'm going to page 307 to 308, and I'll just quickly read the passage because it goes to the origin of the security and the reason for it. I'm just above line 20. "Well my question can go a bit broader Mr Browne. Do you recall having a meeting with Mr Dorrance around the beginning of June where he suggested that the best thing to do or you discussed whether the best thing to do was to take the cash out of Pay Payout yourself, David Browne Contractors, David Browne Mechanical and take a security over PPS, do you recall that?" And the answer is, "We had some financial advice. You've got to look at the context of where we were going with the whole financials and what the advice was and the whole financial thing was spread over a few years. We were looking at it with

Mr Walt's advice who was also acting so it could have possibly been around that time. I can't actually say it was then."

The question, "You heard Mr Petterson yesterday say that he had done searches of PPSRs and the only company around this time that he could find you taking a GSA over to secure advances was PPS. He said there was another company where you and Frank from Germany subsequently had both taken GSAs but PPS out of the 40 companies at the time was the only one where you did. Now why did you do that at this particular point in time?" "It was replacing the ANZ one which was in place for funding and because of the cost of financials from the bank and the rate they were charging we decided that we would replace that and so we decided that we would put in place around just to take the place of that and do internal funding as we had cash available, so it was really just to replace that and, to be honest, that was really one of the first times I'd sort of come across it. So I must admit, you know, it was something that was advised to be done and I took the advice." So that's the background to the security which looks to be a substitute for the security that ANZ had taken and it was something that he was advised to do.

Just one short submission next. My friend, I think, suggested that the defence is under section 296(3) were not being pursued, but in fact they are. As I submitted that really, it really falls into a similar argument to the discretion point that I canvassed the facts on but as you'll see from our written submissions we do formally pursue that, but there's no need for me to add orally to that.

Now the final submission I want to make concerns this question of due debts. My submission is this, that if, as a matter of policy, and as a matter of principle, if the legislature wanted contingent liabilities of any kind taken into account, the legislature would have provided in relation to section 292 that it was subject to the solvency test in section 4, and that would have dealt with the question, any question of contingency, and to analyse it in the way in which the Court has been suggesting in some of the questioning, really creates an uncertainty and is actually against the principle of section 292, and

I want to go back to *Northridge* for that purpose. It's in our authorities under tab 5, that's the decision of Justice Richardson, and at page 25 of the judgment he deals with it in the context of the application of section 56 of the Insolvency Act 1967, which he sets out, and the ingredients are apposite for this case. Then, and the elements 1, an act of the kind specified by a person unable to pay –

**WILLIAM YOUNG J:**
I'm sorry, can you just give me the page reference, it took me a while to find it.

**MR CARRUTHERS QC:**
25 Your Honour, sorry. So he's dealing with the concept of unable to pay his debts as they become due from his own money and then the third element, with a view to giving creditors preference over other creditors. So he then says, "There was considerable argument before me as to the first and third elements. As to the first several points are clear. First the expression is concerned with the position of the debtor at the time the charge or payment is made or other specified act takes place. It is not relevant that in the past he has been unable to pay his debts as they fall due, or that it is likely that in the future he will be unable to pay his debts as they become due. The concern is with the present, but in considering the present position regard may properly be had to the recent past, whether he has, in recent weeks, been able to meet his debts as they become due. And in determining ability to meet debts as they become due, account must be taken of outstanding debts. They have to be paid or allowed for in answering the question. Second, 'as they become due' means as they become legally due. Mr Agar submitted, without being able to cite authority for the proposition, that cognisance must be taken of trade practice and that debts become due when a creditor is pressing for payment and the debtor is unable to make payment. There is no justification in authority for this gloss on the section. As a matter of principle it would not be proper to read it in this way. Moreover, to do so would introduce further uncertainty and confusion I the application of an already uncertain provision." And then he goes on to consider the third proposition.

So, in my submission, that supports the analysis that we have made but underlying it is that introducing any concept of contingency in relation to legally –

**WILLIAM YOUNG J:**
Can I just stop you there? Is it really a contingent debt?

**MR CARRUTHERS QC:**
Well –

**WILLIAM YOUNG J:**
I mean, contingent can be a debt that only arises if an external event occurs. You're using it in the sense that a claim that is disputed gives rise to a debt that is contingent upon you losing the case.

**MR CARRUTHERS QC:**
Yes.

**WILLIAM YOUNG J:**
Now I'm not so sure that that's necessarily right.

**MR CARRUTHERS QC:**
Well, focus then on the words "legally due" and then –

**WILLIAM YOUNG J:**
It was legally due and in terms of what the adjudicator said the money was due as at the time it was demanded. Presumably interest flowed from that time.

**MR CARRUTHERS QC:**
Well, no.

**GLAZEBROOK J:**

Well, not even necessarily demanded. It probably became due as soon as the indemnity was triggered which was as soon as there was damage and loss.

**MR CARRUTHERS QC:**

But that cannot be so because that would mean that every incident or event in the ordinary course of business of a company where there may be a claim, there may be a spurious claim, one's –

**WILLIAM YOUNG J:**

Well, I'm not so worried about it since – because – I mean, what gives this case its flavour is that at a time when there are a series of claims on the assets of the company Mr Browne ensures that his claims are met in a way that means that other claims, if they crystallise in a judgment, won't be able to be met.

**MR CARRUTHERS QC:**

If they crystallise into a judgment in –

**WILLIAM YOUNG J:**

Yes, yes, I've tried to use the – to avoid the contingency –

**MR CARRUTHERS QC:**

Well, I'm content with the way Your Honour puts it but because – I mean, really it's drawing very much on hindsight which is why it's important to go through that documentary material on the defensibility of the claim.

**WILLIAM YOUNG J:**

I understand that argument.

**MR CARRUTHERS QC:**

Yes. So if one looks at it and said, well, that plainly Mr Browne thought with the benefit of the advice that he was getting that it was a defensible claim, what is it in principle that means that he has to stop –

**WILLIAM YOUNG J:**

His is – he's deciding the matter in his own interests in a way that protects his interests and puts at risk the interests of a third party. So that's the uneasy, that's the part about your analysis that makes me a little uneasy. I mean, this is, you know, like so many of the cases where people say, "Oh, well, I acted innocently and I made this ghastly misjudgement but it just so happens that the result is really good for me and bad for the other chap." So that's –

**MR CARRUTHERS QC:**

Well, I mean, that is to take it to its extreme, but in this case or in any case where a party considers that it has a justifiable defence to a claim, that party should be entitled to continue with a procedure that was in place prior to any question of a claim arising and be able to continue that on the basis that, and there are two bases, on the basis that, "Look, we think this was a concrete problem. The way in which you were suspending these pipes was outside the parameters that should be applied," and the other feature is, "And if we're wrong in that, we're insured under the policy." Now in that context there is no justification to blur what is, as Justice Richardson analysed, a debt that is legally due.

**WILLIAM YOUNG J:**

Well, you see, he follows and applies *Hall's* case where the debt was an issue, was contingent in the sense that you would use the word.

**MR CARRUTHERS QC:**

Yes.

**WILLIAM YOUNG J:**

At the time of the transaction there was an unliquidated claim for damages.

**MR CARRUTHERS QC:**

Yes, and, I mean, I'm simply using the analysis for the principles that –

**WILLIAM YOUNG J:**

But I'm not so sure that Justice Richardson regarded, would have seen a debt of that kind as contingent.

**MR CARRUTHERS QC:**

A debt of the kind in this –

**WILLIAM YOUNG J:**

Yes, that is a – a debt that is disputed, that –

**MR CARRUTHERS QC:**

Well, that's, isn't that the point that he's making on the argument that counsel submitted that cognisance must be taken of trade practice and that debts become due when a creditor is pressing for payment?

**GLAZEBROOK J:**

No, I think he was saying just because in practice although the due is – debt – due on the 20th of the month according to the invoice, the practice is that you don't bother paying it until three months later, therefore the debt isn't due three months later, and quite rightly he said, "Well, no, you look at when the debt actually is due. You don't put a gloss on it by saying a debt's not due until the creditor's asking for payment." If anything, that's against you.

**MR CARRUTHERS QC:**

Well, no, with respect –

**GLAZEBROOK J:**

That's my understanding of the submission. You know, we never pay our debts until the creditor tells us to; that's practice. Even though we get an invoice saying the debt's due immediately, trade practice is that you ignore that and only pay the debts when the creditor asks you to.

**MR CARRUTHERS QC:**

Well, Your Honour, I certainly didn't read the passage that way.

**GLAZEBROOK J:**

Well, I think that's what it's saying. He submitted that cognisance must be taken of trade practice that debts become due when a creditor is pressing for payment, ie, not when they say they're due but when the creditor says, "Pay," because the creditor couldn't press for payment before the due date. Well, they could but you could very easily say –

**MR CARRUTHERS QC:**

No, no, no, I accept what Your Honour says about that but I certainly didn't read the passage in that way, but my submission still stands because the fact that payment is sought, for example, in this case, does not make it legally due. The payment becomes legally due in this case when the adjudicator makes the adjudication. That has to be the point in time at which it is legally due.

**GLAZEBROOK J:**

Well, it's not damages, is it? So in fact what the adjudicator says is it was always due at the due date, isn't the adjudicator – because of the indemnity. It's not damages for a breach of contract where there is an argument that the liability arises once the damages have been claimed and quantified, although I think we –

**WILLIAM YOUNG J:**

*Hall* would be against that.

**GLAZEBROOK J:**

Although I think also that case that we did which is interest on debts goes against it as well, because it says debts can include damages. I've forgotten the name of the case but –

**WILLIAM YOUNG J:**

Yes.

**MR CARRUTHERS QC:**
But we'll examine it from McConnell Dowell's point of view.

**WILLIAM YOUNG J:**
Worldwide.

**GLAZEBROOK J:**
Mmm?

**WILLIAM YOUNG J:**
Worldwide.

**GLAZEBROOK J:**
Worldwide, yes, worldwide goes against that, although it was interpreting debt in a particular context in a particular statute but –

**MR CARRUTHERS QC:**
Yes in – and examine it from McConnell Dowell's point of view. I mean, what steps could McConnell Dowell take to recover as a matter of law the money before the adjudication was made, and the answer is they couldn't. So the analysis –

**WILLIAM YOUNG J:**
But that's true of any sort of – you can say that of any debt though.

**MR CARRUTHERS QC:**
But –

**WILLIAM YOUNG J:**
I mean, it's an absolute clear debt. I borrow $100,000 from a finance company, I can't say, "Well, what – I'm not going to treat it as a debt for these purposes because I'm going to spin them off and they won't be able to enforce it till they get summary judgment and therefore it's only due in four months' time."

**MR CARRUTHERS QC:**

Yes, but there's no basis for dispute in that case of the kind that there was here.

**WILLIAM YOUNG J:**

But there's always, you know, the wily debtor is always able to come up with some sort of explanation like, "Oh, it's a breach of the, you know, the creditor contract regime or something." I mean, it –

**MR CARRUTHERS QC:**

Well, as I say, Your Honour, that case is not this case.

**WILLIAM YOUNG J:**

No. What I'm really suggesting is it's not, you can't simply say because the debt was, the claim was disputed it's therefore irrelevant to whether the company could pay its due debts – another way, that merely because it's disputed doesn't mean it's not a due debt.

**MR CARRUTHERS QC:**

Well it's not merely because it's disputed, I think I would accept that but I'm –

**WILLIAM YOUNG J:**

Would that be disputed on substantial grounds?

**MR CARRUTHERS QC:**

Well that, and that's really why I've done that analysis, to say that it was a justifiably disputed debt, which takes it out of the category of being legally due for the section 292 test.

**GLAZEBROOK J:**

But you say a subjective not objective test is my understanding? Or is that to do with the discretion or – because your friend says objective, so it would entail us going through to see whether there was an objective, and I guess he

would also so not only an objectively good defence, but one that goes up above the 50%, that was his submission.

**MR CARRUTHERS QC:**
Well I think Your Honour –

**GLAZEBROOK J:**
Objectively.

**MR CARRUTHERS QC:**
I think Your Honour, we have a similar exchange when I addressed –

**GLAZEBROOK J:**
Yes, I'm just saying that's what your friend, that's the answer your friend gave, that it has to be likely and therefore if you can't say with a greater than 50% likelihood on an objective basis that the company doesn't have to pay it, then it has to be accounted for. I'm just checking what you say.

**MR CARRUTHERS QC:**
Well I think I answered you when I addressed earlier that I've put it as a subjective test, but I said if it's objective I'm prepared to meet that standard, which is why I did the analysis of the documents. Because if you look at what PPS was doing and the analysis through from the expert advice that they were getting through to the instruction to the solicitor through to the preparation for the adjudication and the presentation there, that – one looks at it before the adjudication and not with the benefit of the adjudication decision, it must be that it was a justifiable stand for PPS to take.

**GLAZEBROOK J:**
Well it's slightly difficult, isn't it, to look at it, if you're looking at it objectively it's slightly difficult to ignore the adjudication. You could take a different view from the adjudication but it's hard to say you ignore it, isn't it? If it's subjective. Because objectively it turns out whatever they were doing it was an

exceedingly weak defence, and certainly nothing like the 50% that your friend would suggest.

**MR CARRUTHERS QC:**
Well let's just examine that, because if one's running a case, and you have a complete conflict of evidence on, in the case, and you are analysing your side on an objective basis, and your analysis is that your witness or witnesses are much more likely to be believed because of certain facts that point the differences, and then the Court decides against you, in my submission it's not appropriate to take into account the adverse decision as being reflective of a weak case, or a case that should not have been brought, in the circumstances that I've outlined to you.

The final matter I want to deal with, just to put to rest this question of accounting standards, and I think there needs to be some explanation for the way in which the accounting standards came about, and they were, in fact, produced in re-examination of Mr Petterson and at a time before the concession was made and the application withdrawn, and my junior instructs me that he had prepared on the basis of Mr Petterson's re-examination the prospect of asking to cross-examine him on that, and he had also put in place rebuttal evidence that he would be the subject of an application. So you're in a position where you've got simply part of the accounting standards, and as my friend fairly conceded, the accounting standards in relation to contingencies are somewhat different.

Now in *Northridge* I just want to draw attention to a passage at page 33. It's under tab 5 in my authorities. It's the same case that I was referring to earlier, and I'm at page 33. And you'll see in the substantive paragraph beginning on that page that Justice Richardson is dealing with accounting practice and he says, in the middle, and this may be obvious, "What is appropriate for accounting and audit purposes is not necessarily the proper approach in determining the solvency of a company at a particular date," and then goes on to look at the non-cash assets basis and historical cost, and discussion there. I simply just cite it because there has to be an issue as to

what the relevance is of the accounting standards when one is looking at a debt due.

Those are my submissions in reply Your Honours.

**WILLIAM YOUNG J:**
Thank you Mr Carruthers. We'll take time to consider our judgment and give it in writing in due course.

**COURT ADJOURNS: 3.37 PM**