[APPROVED]

THE HIGH COURT

[2024] IEHC 484
[2020 No. 77 COS]

IN THE MATTER OF THE CBL INSURANCE EUROPE DESIGNATED ACTIVITY COMPANY

AND IN THE MATTER OF THE INSURANCE ACT 1936

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 31st July, 2024

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1. Introduction

1. This is my judgment on an application made pursuant to s. 631(1) of the Companies Act 2014 (the "2014 Act") by the Joint Liquidators of CBL Insurance Europe Designated Activity Company (In Liquidation) (the "Company") for directions and for the determination of a number of complex questions which have arisen in the course of the winding up of the Company, many of which have not previously been considered by the Irish courts.

2. The Company was a registered insurance undertaking and, prior to running into financial difficulties, provided a range of non-life insurance products in Ireland and in a number of other countries in the European Union and the wider European Economic Area. The Joint Liquidators have asked the court to provide answers to a series of complex questions concerning the status of insurance contracts or policies (those terms are used interchangeably in this judgment) which were in existence at the time of the commencement of the winding-up proceedings in relation to the Company. Those questions concern the impact of the winding up on those contracts or policies, the admissibility to proof in the winding up of certain types of claims under insurance contracts issued by the Company and the treatment of those claims by the Joint Liquidators, as well as the status of claims for the return of unearned premiums under Directive 2009/138/EC of the European Parliament of the Council of 25th November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (the "Solvency II Directive" or the "Directive") and the implementing regulations in Ireland.

3. In their affidavit evidence, and in written and oral submissions, the Joint Liquidators set out their views, on the basis of advice received by them, on the various questions which they have raised for the court's determination.

4. Financial Services Compensation Scheme Limited (the "FSCS") is the Scheme Manager of the Financial Services Compensation Scheme in the United Kingdom, which is the UK's statutory fund of last resort where customers have claims against failed financial services firms. The FSCS actively participated in the Joint Liquidators' application for directions, provided evidence, and, in written and oral submissions, offered a different view on a number of the questions raised by the Joint Liquidators for the court's determination.

5. The Arbejdsmarkedets Erhvervssikring (the "AES"), an independent statutory body in Denmark with statutory powers for the determination of workers' compensation claims related to occupational injuries, also provided affidavit evidence in respect of the Joint Liquidators' application. The AES did not, however, actively participate in the application and did not raise any distinct issues for determination by the court apart from those raised by the Joint Liquidators.

6. In this judgment I will first provide a detailed factual and procedural background to the Joint Liquidators' application. I will then identify the particular questions raised by the Joint Liquidators for the court's determination. After this I will outline the statutory provisions relevant to the questions raised, before proceeding to consider the submissions made on behalf of the Joint Liquidators and on behalf of the FSCS on those questions. Finally, I will provide my conclusions and answers to those questions. The Conclusion section of this judgment, at pp. 139-143 contains the answers to each of the questions.

2. Factual and Procedural Background

7. The Company was a registered insurance undertaking which was supervised, regulated, and authorised by the Central Bank of Ireland (the "CBI") to conduct non-life insurance business pursuant to the European Union (Insurance and Reinsurance) Regulations

2015 (S.I. No. 485 of 2015) (the "Solvency II Regulations" or the "Regulations"). The Regulations transposed into Irish law the provisions of the Directive.

8. Prior to the Company's financial difficulties which led to the appointment of an administrator to the Company by the CBI in early 2018 and, ultimately, to the appointment of the Joint Liquidators in early 2020, the Company provided a range of non-life insurance products in Ireland and in a number of other countries in the European Union and the wider European Economic Area, including France, Belgium, Denmark, Italy, Luxembourg, Norway, Romania, Spain, Sweden and the United Kingdom (including Northern Ireland).

9. The Company specialised in construction-related credit and financial surety insurance, professional indemnity insurance, property insurance and travel bonding. Those insurance products were distributed through various third parties, including managing general agents and insurance brokers. Among the risks insured by the Company were medical expense insurance, income protection insurance, fire and other damage to property insurance, general liability insurance, credit and suretyship insurance, legal expenses insurance and miscellaneous financial loss insurance. The majority of the Company's insurance business concerned French construction insurance policies, many of which provided for claims notification periods of up to ten years. Those policies are referred to as "long-tail policies". I will provide some further detail in relation to the nature of the Company's business a little later.

10. The CBI, which supervised, regulated, and authorised the Company to carry on its insurance business, developed concerns about the solvency of the Company and, in particular, about its ability to meet its regulatory solvency capital requirements. An insurer is obliged to establish and maintain technical provisions with respect to its insurance obligations towards its policy holders and beneficiaries of insurance contracts. The value and extent of those technical provisions are determined in accordance with the requirements of the Solvency II Directive and, in the case of Irish-registered insurers, the Solvency II Regulations. An insurer is required to keep a register showing the assets representing the technical provisions required to be maintained by it under those Regulations. In addition, an insurer is required to hold its own funds (essentially a capital buffer) covering its solvency capital requirement (which must also be determined in accordance with the requirements of the Solvency II Regulations). These regulatory requirements are designed to ensure that an insurer is adequately funded and capitalised in order to be able to pay out on claims validly made by policy holders and to otherwise comply with its obligations owed to those policy holders. The assets held by an insurer in order to meet its technical provision requirements are afforded special treatment when winding-up proceedings are opened in respect of the insurer.

11. In February 2018, owing to concerns which the CBI had in relation to the solvency of the Company and its ability to meet its regulatory solvency capital requirements, the CBI issued a number of directions to the Company pursuant to s. 45(1) of the Central Bank (Supervision and Enforcement) Act 2013 (as amended) and Regulation 145 of the Solvency II Regulations. In those directions the CBI directed the Company not to dispose of any assets without the approval of the CBI and to cease writing all new contracts of insurance and refrain from renewing existing contracts of insurance.

12. Shortly after those directions were made, the CBI presented a petition for the administration of the Company pursuant to s. 2 of the Insurance (No. 2) Act 1983. The High Court appointed Kieran Wallace as Provisional Administrator of the Company on 26th February 2018. On 12th March 2018, the High Court made an order for the administration of the Company and Mr. Wallace was appointed Administrator (the "Administrator").

13. On 9th November 2018, the Administrator informed the CBI that the Company's minimum capital requirement ("MCR") was no longer being complied with by the Company, contrary to the Solvency II Regulations. On 28th January 2019, the CBI informed the Company that, if compliance with the MCR was not restored by 9th February 2019, it was minded to withdraw the Company's authorisation, In the event it was not possible for the Company to comply with its MCR. Accordingly, by letter dated 14th February 2019, the CBI confirmed that the Company's authorisation was withdrawn, save to the extent necessary for the continued appointment of the Administrator and his ability to carry out the activities of an insurance undertaking to achieve the objectives of the administration.

14. In the period between March 2018 and January 2020, the Administrator provided eleven reports in relation to the Company to the Court. In his ninth report to the court on 6th December 2019 (the "December 2019 Report"), the Administrator confirmed that, even though the Company held substantial cash reserves and could pay its debts as they fell due, it was clear, given the long-tail nature of the risks which the Company had underwritten, that the Company had insufficient reserves to meet all future claims and liabilities in full. The Administrator expressed a concern in that report that, if the Company continued to meet claims as they arose, claimants under long-tail policies (referred to earlier) could ultimately be prejudiced by the payment in full to claimants under shorter tail policies.

15. The CBI issued a further direction to the Company on 9th December 2019, based on the contents of the December 2019 Report. In that direction, the CBI directed the Company not to make any payments, including payments to policy holders, or to transfer any of its assets to any person, including to its direct or indirect shareholders or to any related company of the Company or to any related company's shareholders. That direction was designed to maintain the *status quo* for the Company and its creditors pending the CBI's further consideration of the financial position of the Company. The CBI directed the Company to notify all brokers and distribution partners and to take reasonable steps to notify all policy holders of the making of that direction.

16. A request for further information by the CBI from the Administrator by means of a notice issued on 19th December 2019, pursuant to s. 46 of the Insurance Act 1936 (as amended). and the information on foot of that request was provided by the Administrator. Following that, the CBI presented a petition for the winding up of the Company on 20th February 2020. An order for the winding up of the Company and for the appointment of Mr. Wallace and Cormac O'Connor as Joint Liquidators was made by the High Court on 12th March 2020 ("the winding-up order"). Following further communications with the Joint Liquidators, the CBI revoked <u>all</u> of the directions made in respect of the Company prior to the making of the winding up order by a letter dated 12th March 2020, which was sent to the Joint Liquidators after the winding-up order.

17. By a further letter dated 12th March 2020, which was sent <u>after</u> the winding-up order, which was made on that same day, the CBI notified the Joint Liquidators that the Company's authorisation to carry on the business of an insurance undertaking was withdrawn, pursuant to Regulation 279 of the Solvency II Regulations *"save to the extent necessary for the effective winding up of* [the Company]*."* The letter made clear that the remaining authorisation held by the Company permitted the Joint Liquidators *"to pursue the activities of an insurance undertaking insofar as those activities* [were] *necessary or appropriate to achieve the objectives of the liquidation, other than entering into new contracts of insurance or renewing any existing contracts of* *insurance"*. Therefore, save to the extent expressly noted in the letter, the Company's authorisation to carry on the business of an insurance undertaking was withdrawn by the CBI pursuant to Regulation 279(1) of the Solvency II Regulations (and Article 279(1) of the Solvency II Directive). The Joint Liquidators were, however, permitted, for the purposes of Regulation 279(2) (and Article 279(2)), to pursue some of the insurance activities of the Company in so far as that was *"necessary or appropriate for the purposes of winding-up, provided that such activities are carried on with the consent and under the supervision of the Bank*".

18. Following their appointment, the Joint Liquidators were required by Regulation 281 (and Article 281) to "*individually inform by written notice each known creditor*" of the Company in the Member States other than the State. In the case of particular claims (which are termed *"insurance claims"* and which are specifically defined in the Regulations and the Directive), the notice was required to:

> *"... also indicate the general effects of the winding-up proceedings on the insurance contracts, in particular the date on which the insurance contracts or the operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation."* (Regulation 281(4))

19. The Joint Liquidators sent notices to all known creditors whose addresses were held by the Company in late March/early April 2020. The sample notice provided in evidence by the Joint Liquidators is dated 24th March 2020 (the "Regulation 281 Notice"). As the Joint Liquidators explained in the affidavit sworn on their behalf by Mr. O'Connor, there were a number of very complex issues arising in the winding up of the Company and some very difficult questions arose as to the impact of the winding up on the rights of creditors (and in particular policyholders), including questions as to the treatment of "*insurance claims*".

20. Having considered those issues and having obtained legal advice from their solicitors and counsel, the Joint Liquidators provided certain information to the Company's known creditors in the Regulation 281 notice which can be summarised as follows. They observed that, as a matter of Irish law, the liquidation of the Company was deemed to have commenced on the date of the presentation of the petition (20th February 2020) and that that date was, therefore, the "*relevant date*" for the purposes of the notice. They referred to the terms of the withdrawal of the Company's authorisation by the CBI. With respect to the effect of the winding-up proceedings, the Joint Liquidators noted that they have been advised and were of the view that the proper interpretation of the relevant provisions of the Solvency II Regulations and of other relevant provisions of Irish legislation was that *"only insurance claims that arose from insurable events that occurred before the commencement of the winding up of* [the Company] *on 20th February, 2020 (whether or not notified to* [the Company] *before that date) will be provable as debts in the liquidation of* [the Company]". It should be noted that the reference to "*insurance claims*" in the notice was not intended to be a reference to that term as it is specifically defined in the Solvency II Regulations and in the Solvency II Directive but rather was intended to refer to claims generally made by insured persons or policyholders against the Company. The Joint Liquidators stated that they would be seeking the directions of the High Court to confirm that interpretation and would also seek directions confirming that insurance policies written by the Company ceased to produce effects on 20th February 2020.

21. It was recommended to the addressees of the Regulation 281 notice that they take immediate steps to put in place alternative insurance to cover any claims that might arise from events since 20th February 2020, and that they proceed on the basis that any claims arising from such events would not be provable debts in the liquidation of the

Company. In the event that the addressees had an existing claim (or a claim that arose from an insurable event that occurred before the commencement of the winding up, but which had not by that stage been notified to the Company) they were requested to notify the claim and to provide supporting documentation. They were further informed that, due to the insolvency of the Company, agreed claims (or claims yet to be agreed) were unlikely to be paid in full, but would rather be paid by means of a dividend in the liquidation. With respect to claims for the return of premiums paid, the notice stated that as the Company was no longer on risk in respect of claims arising from insurable events occurring after 20th February 2020 and that policyholders were *"entitled to lodge a claim for damages for any amount which, under the terms of the policy, is owed by* [the Company]" to the policyholders, and that such claim may include the proportion of the value of the insurance premium paid which relates to the period of time from 20th February 2020 until the date on which the relevant policies were due to expire and would have expired were it not for the winding up of the Company. The notice then made reference to potentially applicable compensation schemes in Ireland, the United Kingdom and Denmark and outlined how preferential creditors and secured creditors would be dealt with in the winding up. The Joint Liquidators did ultimately proceed to bring an application for directions pursuant to s. 631(1) of 2014 Act and the issues raised in that application are the subject of this judgment.

22. Following the issuing of the Regulation 281 notice, the Joint Liquidators were contacted by solicitors acting for the FSCS and by solicitors for the AES raising queries in relation to the manner in which the Joint Liquidators proposed dealing with the admissibility and treatment of claims in the liquidation. The significance of the issues raised by the FSCS and by AES is demonstrated by the fact that affidavits were sworn on behalf of both of those entities in response to the Joint Liquidators' application and the FSCS played an active part in the hearing of the application.

23. In outlining the context of the directions sought from the court, the Joint Liquidators explained that, as the Company had ceased writing and renewing all contracts of insurance with effect from 19th February 2018, and had settled a particularly significant matter with its primary reinsurer (as previously explained to the court), the asset position of the Company was relatively clear. Some premium payments were, however, due from a small number of managing agents.

24. At the time the application for directions was brought, the value of assets held by the Company representing technical provisions was €82,500,000, which was comprised of cash reserves of approximately €77,000,000 and recoverable assets of €5,500,000. The identity of the parties entitled to receive dividend payments from the available assets of the Company was, however, far less clear. As the Joint Liquidators noted, it is inherent in the business of an insurance undertaking that its liabilities will be estimated based on statistical and actuarial formulae in accordance with the requirements of the Solvency II Regulations (and Solvency II Directive) and other relevant legislation.

25. The purpose of the application for directions was not to assist the Joint Liquidators in determining the concrete economic outcome for any individual creditor or class of creditors in the liquidation of the Company but rather to determine (i) the types of claims that are admissible in the liquidation and (ii) in some cases, the priority to be afforded to those claims. Among the factors relevant to the application for directions identified by the Joint Liquidators were the following:

(a) The winding-up proceedings involving the Company are governed by Irish law;

(b) Irish law does not expressly provide that insurance contracts automatically terminate on the appointment of a liquidator;

(c) Each underlying insurance contract with the policyholder is governed by the local law of that policyholder;

(d) Claims which fall within the definition of "*insurance claims*" in the Solvency II Regulations (and the Solvency II Directive) have a unique priority under those legislative provisions;

(f) There is a complex interrelationship between several different legislative schemes, including the 2014 Act, the Solvency II Regulation (and the Solvency II Directive) and other legislation, including the Bankruptcy Act 1988 (as amended) (the "1988 Act").

26. The directions sought by the Joint Liquidators include directions as to:

(a) the implications of the commencement of the winding up, the making of the winding up order and the withdrawal by CBI of the Company's authorisation to carry on the business of the Company as an insurance undertaking and, in the event that one or more of those events caused those contracts to cease to have effect or to terminate, the legal basis on which such cessation of effect or termination occurs;

(b) how claims under contract of insurance issued by the Company should be dealt with for the purposes of the 2014 Act and the 1988 Act;

(c) how the Joint Liquidators should deal with claims made under insurance contracts which relate to events which had not occurred by the date of the commencement of the winding up or the date of the winding up order or the date of the withdrawal of the Company's authorisation, but which might occur and be notified to the Company at some point in the future;

(d) the proper interpretation and scope of an "*insurance claim*" under the Solvency II Regulations (and the Solvency II Directive) and, in particular, how the Joint

Liquidators should deal with claims for the return of premiums paid in respect of the balance of insurance contracts which have been terminated or which otherwise ceased to have effect on the commencement of the winding up or the winding up order or the withdrawal of the Company's authorisation.

27. The Joint Liquidators and the FSCS have different views in respect of a number of the underlying issues in this case. In order to better understand the context in which the issues have been raised and the directions sought by the Joint Liquidators, it is necessary to refer to some further relevant evidence provided by the Joint Liquidators.

3. Summary of Relevant Evidence

(a) The Joint Liquidators' Evidence

28. As noted earlier, and as explained in the affidavit sworn by Cormac O'Connor, one of the Joint Liquidators, the Company specialised in construction–related risks, structural guarantee, credit and financial surety insurance, professional indemnity insurance, property insurance, legal and expense insurance, and travel bonding. Those products were distributed through various third parties, particularly managing general agents and insurance brokers. The Joint Liquidators provided a schedule which set out details of the type of insurance contracts entered into by the Company for which it remained on risk at the date of the commencement of the winding up on 20th February 2020. It is clear from that schedule that a very significant part of the Company's insurance business related to French construction products, many of which have terms that have expired but provide for claims notification periods of up to ten years. As of the date of the presentation of the winding-up petition on 20th February 2020, there were 35,045 on-risk policies which were written across eleven jurisdictions by the Company.

29. As of 20th February 2020, the Company's balance sheet reserves in respect of liabilities under insurance contracts were approximately €117 million. €19 million of those reserves related to claims which were incurred and notified prior to that date. €42 million related to claims which were expected to have occurred, but which had not yet been identified or notified. €56 million related to the Company's liability for unearned premiums. Another schedule disclosed that the largest number of policies written by the Company were in France. The reserves for claims which had been incurred but not reported (by the date of the presentation of the petition) were significantly higher in France than in other countries due to issues which had arisen with a particular managing general agent in that country. Many of these policies were long-tail policies (as explained earlier). The consequences of possible claims arising under those contracts or policies in particular led to the Joint Liquidators to seek certain directions in its application. The Joint Liquidators helpfully provided further details in respect of five different types of contracts or policies written in France with such long-tail effects. Those policies are (a) decennial liability insurance; (b) dommages-ouvrage insurance, (c) construction completion bonds, (d) "after the event" ("ATE") insurance and (e) professional indemnity insurance.

30. The Joint Liquidators explained that decennial liability insurance and dommages-ouvrage insurance both provide cover in respect of latent defects. Approximately 62% of the risks insured by the Company related to policies of that nature. The Joint Liquidators believe that, for the most part, the beneficiaries of those policies are private individuals or small contractors, rather than large corporate entities.

31. With respect to the decennial liability policies, it was explained that every contractor who undertakes any form of construction in France is obliged by law to take out this type of insurance. The policy issued by the Company is expressed to cover claims arising during the period of ten years from the date of completion of the construction work. That date is confirmed by receipt of an acceptance of work certification (the "acceptance of work"). The purpose of this type of policy is to provide a building owner with protection in the event of damage arising from construction which only comes to light within ten years of the acceptance of work. While a fault in a building may have been caused by faulty workmanship during the construction of the building, it may only become apparent many years later. In some cases, it may be difficult to determine the specific date on which the event giving rise to the building owner's loss occurred. French law contains a presumption of liability for a contractor in respect of claims under decennial policies for this prescribed period of time (ten years). The policy covers the cost of all works relating to the restoration of the construction or other intervention work which is required as a result of the claims. Decennial liability policies cover material damage in the event of a total or partial collapse of a building or some latent structural defect that comprises the safety or stability of the building, irrespective of the cause or origin, which did not become manifest by the date of acceptance of work, and which appear within a period of ten years from that acceptance. Most of the decennial liability policies sold the behalf of the Company in France were sold in 2016 and 2017. That means that the notification periods under those policies expire in 2026 and 2027 at the earliest.

32. Dommages-ouvrage insurance is a form of insurance taken out respect of a specific building project. It provides cover to a building owner arising from defects relating to faulty workmanship. This cover is similar to the "Home Bond" cover in Ireland. The policy provides for no fault insurance. On receipt of a claim, the insurer is obliged immediately to cover the cost of remedying the defect. Where an insured person notifies the Company of a defect under the policy, such as a leak and a roof, the Company is obliged under the terms of this type of policy to pay the claim within a specified time period of receipt of the claim. The Company may then seek to claim against the contractor under its policy. The policy is intended to provide insurance cover for a period of ten years commencing from the date of the acceptance of work for damage for which the contractor is responsible. The guarantee given under this type of policy covers damage arising over a period of ten years from receipt of the acceptance of work. Similar to the decennial liability policies, the dommages-ouvrage policies were sold mainly in France in 2016 and 2017 with a ten-year policy term.

33. The Company also issued construction completion bonds or performance bonds in certain jurisdictions, including Norway. Those bonds were issued for residential and small commercial properties. Similar bonds were issued by the Company in other jurisdictions, including Spain and Italy. The effect of these bonds is that the Company insures the performance of the obligations of the contractor or developer for the duration of the bond. The bonds cover certain events up to a value and for a particular duration, which was usually five years, including the cost of completion of a project where the developer or contractor becomes insolvent during the construction period, losses arising due to a delay in completing construction within the contracted timeframe and certain other claims.

34. In the case of decennial liability and dommages-ouvrage policies, the event giving right to the claim (the construction itself) will have occurred prior to the date of the commencement of the winding up. However, in the case of these performance bonds, the nature of the risk insured by the bond (the delay or insolvency of the contractor) is such that the event giving rise to the claim may occur after the commencement of the winding-up.

35. As noted above, the Company also provided ATE insurance. ATE insurance protects the insured from the financial risks directly associated with pursuing legal proceedings. Without such insurance, the insured could be liable to pay for expenses such as medical reports, counsels' fees, and the costs of the opposing side in the proceedings. In the case of ATE insurance, the insured will only pay the premium after the case is won. The premium is usually collected from the final award in the case. If, however, the case is lost, the insurer will not collect the premium and will have to discharge the costs of pursuing the case. In the case of ATE policies issued by the Company, the event giving rise to the claim (the determination of the relevant case) may occur after the commencement of the winding-up.

36. Finally, the Company also issued professional indemnity insurance. Such insurance covers legal costs and expenses incurred in the defence by a policyholder of a claim against it for negligence as well as damages and costs that may be awarded against the policyholder in the event that it is found to have provided negligent advice or services which cause financial loss to the client. Such insurance is available on a "claims made" basis. This means that coverage is offered only in respect of claims made during the term of an insurance contract rather than as a result of an event occurring.

37. By way of assistance to the court in relation to the directions sought, the Joint Liquidators set out their view on the matters covered by the directions in Mr. O'Connor's affidavit. With respect to the impact of the commencement of the winding-up or the winding-up order or the withdrawal of the Company's authorisation (and whichever of those is the "relevant event" is a matter to be determined by the court), on the insurance contracts to which the Company was a party at the date, the Joint Liquidators' position is, on the basis of advice received by them, that there is a good basis to contend that the contracts were frustrated (at least with respect to liability for risk events that occur after the relevant date) owing to supervening illegality which arose from the withdrawal of the Company's authorisation by the CBI. Many of the policies issued by the Company do not contain clauses which automatically terminate the contract on the commencement of the winding up or on any of the other possible relevant dates. As we shall see, the FSCS, while ultimately agreeing that the contracts came to an end on the making of the winding-up order, is of the view that this occurred by virtue of the repudiation of the contracts by the Company and not by frustration. Both the Joint Liquidators and the FSCS acknowledged that it might not ultimately be necessary for the court to reach a concluded view on the precise legal basis on which the contracts came to an end although it will be necessary for the court to determine when the contracts ceased to produce effects.

38. In considering those directions which relate to the identification of claims which are provable in the liquidation of the Company, the Joint Liquidators identified (at para. 77 of Mr O'Connor's affidavit) what they saw as two fundamental questions arising in the conduct of the liquidation, namely:

(a) how the Joint Liquidators ought to treat claims made under policies of insurance issued by the Company which relate to events which had occurred, but which had not been notified at the relevant date (being either the date of presentation of the petition or the making of the winding up order) (they acknowledge that the admissibility of claims which had been notified before that date is clear of any doubt); and

(b) how the Joint Liquidators ought to treat claims which may be made under policies of insurance issued by the Company which relate to events which had not occurred before that date.

39. The Joint Liquidators observed that in the case of the decennial liability policies, the Company received an upfront premium payment over a twelve-month period in return for which the Company agreed to cover the relevant risk, such as, the risk of a crack emerging in a wall of a building being constructed, within a period of ten years from completion of construction. The Joint Liquidators' position is that even if the relevant breach of duty or the "wrong" may have risen from poor construction (an insured risk under the relevant policies) which was completed prior to the relevant date, the assessment of such a proof of debt presents a number of challenges.

40. The position in the case of the construction completion or performance bonds referred to earlier also gives rise to issues. The case of those policies, if the insolvency of the contractor has not occurred prior to the relevant date, the position in relation to the admissibility of those types of claims may be straightforward. However, different complexities do arise in relation to such policies. For example, if the insured event (such as the insolvency) occurs after the relevant date, the policyholder or beneficiary under the policy will not have an admissible claim against the Company in respect of that event but the policyholder may, however, be entitled to claim for any unearned premium in respect of the unexpired term of the policy. The Joint Liquidators' advice is that any such claim for unearned premium will rank as an unsecured claim.

41. By reason of these complexities, the Joint Liquidators have sought a number of directions concerning the interpretation and application of various provisions of the 2014 Act and the 1988 Act to the different scenarios arising. The FSCS has put forward a contrary position in relation to a number of directions sought.

42. The final set of directions sought by the Joint Liquidators concerns the scope of an "*insurance claim*" under Regulation 277(1) of the Solvency II Regulations (and Article 268(1)(g) of the Solvency II Directive). The Joint Liquidators have expressed the view, on the basis of advice received, that a claim for unearned premiums does not constitute an "*insurance claim*" within the meaning of that term under those provisions and does not, therefore, have absolute priority in the liquidation with respect to the assets of the Company which represent its technical provisions. That view is based on what they contend is the proper interpretation of the term "*insurance claim*" in Regulation 270(1) and (2) of the Solvency II Regulations (and Article 268(1)(g) and the second subparagraph of that provision of the Solvency II Directive). The FSCS disagrees with this view and contends that, on the basis of what it regards as the proper interpretation of the relevant provisions of the Solvency II Regulations and the Solvency II Directive, such a claim for unearned premium is an "*insurance claim*" and, therefore, benefits from the absolute precedence given to such a claim by those provisions.

43. The Joint Liquidators sought to identify the commercial consequences of the answers given by the court to the directions sought by them. This was against the background where at the time of the commencement of the winding up (when the petition was presented on 26th February 2020), the Company's balance sheet reserves in inspect of liabilities under the insurance contracts to which it was a party was €117 million (€19 million relating to claims which were incurred and notified prior to the commencement of the winding up; €42 million relating to claims which were incurred but not reported by that date; and €56 million relating to Company's liability for claims for unearned premiums). The answers to be given by the court to the directions sought by the Joint Liquidators will determine what element of those reserves will ultimately become claims admissible in the liquidation and whether or not they are afforded priority as "*insurance claims*".

44. As of the date of commencement of the winding up, the Company had assets of €82.5 million before any provision was made for the costs of the liquidation. The clear position is, therefore, that the Company's creditors will not be paid in full. The Joint Liquidators provided some high-level information about the consequences of the winding up depending on the answers given by the court to the directions sought. I have not, however, found it necessary to reproduce the information provided in this judgment. It is sufficient to note that the court's answers to the questions raised in the various directions sought by the Joint Liquidators will determine what claims are treated as "*insurance claims*", what claims are treated as unsecured claims and what claims are treated as being inadmissible to proof in the liquidation.

(b) The FSCS's Evidence

45. The FSCS provided evidence in the form of an affidavit sworn by Casey McGrath, Head of Legal for the FSCS. In that affidavit, Mr. McGrath described the functions of the FSCS and explained the role which it plays in the UK regulatory framework. The FSCS is the Scheme Manager of the Financial Services Compensation Scheme (the "Scheme") which is the UK's statutory fund of last resort for the customers of failed financial services firms. It plays an integral role in the UK's regulatory framework by securing protection for consumers and encouraging confidence in the UK's financial system. The FSCS protection covers a broad range of retail financial products, including insurance. It is also the UK's deposit guarantee fund. Mr. McGrath explained that in 2019–2020, the FSCS paid £527 million in compensation to 258,119 customers of failed financial services firms of which, £125,667,000 was attributable to general insurance claims. The FSCS recovers as much as possible from failed firms and third parties to offset the costs of such compensation. Those costs are funded by levies raised on the financial services industry.

46. The FSCS is obliged to administer the Scheme in accordance with rules made by the Prudential Regulation Authority (the "PRA") pursuant to s. 213 of the Financial

Services and Markets Act 2000. Those rules are contained in the "Policyholder Protection Rules" (the "PPR") in the PRA's Rulebook. The most relevant provision in those rules for present purposes is PPR 3.1. It provides that the FSCS may pay compensation to an "*eligible claimant*" if it is satisfied that the claim is in respect of a "*protected claim*" against a "*relevant person*" who is "*in default*". A "*protected claim*" is defined (in PPR 9.1) as a "*claim under a protected contract of insurance*". Under PPR 9.8, the FSCS must treat the liabilities of a "*relevant person*" in default in respect of "*the unexpired portion of any premium in relation to relevant general insurance contracts which are not reinsurance contracts on*" as giving rise to claims under a protected contract of insurance (this is referred to as a "return of premium claim"). In addition, pursuant to PPR 13.7, the FSCS may determine that, on the payment of compensation by it, the FSCS shall immediately and automatically be subrogated to all or any part (as determined by the FSCS) of the rights and claims of the claimant against the relevant person and/or any third party. In exercising its subrogation rights, the FSCS is frequently the largest creditor in the insolvency estate of an insurer in respect of whose default the FSCS has paid compensation. Under PPR 14.1, where the FSCS is subrogated to the rights of the claimant, "*it must pursue all and only such recoveries as it considers are likely to be both reasonably possible and cost effective to pursue*."

47. Mr. McGrath helpfully set out in his affidavit the position adopted by the FSCS in relation to the directions sought by the Joint Liquidators. I have sought to summarise that position in very general terms earlier in referring to the Joint Liquidators' evidence. It will, of course, be necessary to elaborate on the respective positions of the Joint Liquidators and the FSCS in much greater detail when considering the directions themselves. It is sufficient to state, at this point, that there was very limited agreement between the Joint Liquidators and the FSCS on the answers to the directions sought by the Joint Liquidators.

4. The Directions Sought by the Joint Liquidators

48. The Joint Liquidators have sought directions pursuant to s. 63(1) of the 2014 Act and seek the determination by the court of the following questions which have arisen in the winding up of the Company:

"1. Does a contract of insurance to which the Company was a party at the date of the commencement of the winding-up (the 'Relevant Date') and which has not terminated automatically according to its own terms, cease to have effect and/or otherwise terminate as a result of the commencement of the winding up of the company, and the withdrawal of the Company's authorisation to carry out the business of an insurance undertaking?[1]

2. Having regard to the provisions of s. 75(1) of the Bankruptcy Act 1988:

(a) Are claims under policies of insurance liabilities that arise from an 'obligation incurred' or liabilities based on 'wrong'?

(b) If claims under insurance policies are provable based on an 'obligation incurred', what is the relevant date (i.e. the date of entry into the contract or the date of the occurrence of the insured event)?

(c) If liabilities are provable on condition they relate to a claim that arises from a 'wrong' that occurred before the Relevant Date, is it sufficient

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[1] Although it is noted at para. 12 of the Joint Liquidators' written submissions that the reference to the "relevant date" is a reference to the date in which the petition for the winding up of the Company was presented (20th February 2020) and that that was also the date on which the Company's authorisation was withdrawn by the CBI, that is not correct. The date of the presentation of the petition was 20th February 2020. The date of the winding-up order was 12th March 2020. That was also the date in which the CBI withdrew the Company's authorisation after the winding-up order was made.

that the wrong or insured event occurred before the Relevant Date, without more?

(d) If the wrong/event is not sufficient, what more must be proved for the claim to be provable in the liquidation within the meaning of s. 75(1)?

3. How should the Joint Liquidators treat claims which may be made under policies which relate to events which have not occurred before the Relevant Date, but which may occur and be notified the Company at some point in the future?

4. Having regards to the provisions of the Solvency II Regulations:

(a) What is the scope of an 'insurance claim' for the purposes of Regulation 277(1)?

(b) Does a claim for unearned premia that arises as a result of the Company no longer being 'on risk' under insurance contracts entered into before the relevant date owing to the commencement of the winding up (whether the contract is terminated/frustrated/cancelled/or otherwise ceases to produce effects) rank as an 'insurance claim' for the purposes of Solvency II?

(c) Is every claim that is made under an insurance policy which gives rise to a provable debt in the liquidation, an 'insurance claim' for the purposes of Regulation 277(1) of the Solvency II [Regulations]*?"*

5. Relevant Statutory and Other Provisions

49. The issues raised by the directions sought by the Joint Liquidators require the consideration of several provisions of various Acts of the Oireachtas and of the provisions of the Solvency II Directive and the Solvency II Regulations. I propose, at this point, to identify and set out the relevant provisions before considering them further in the context of the questions raised.

(1) The Companies Act 2014

50. Some of the questions raised by the Joint Liquidators involve a consideration of the "*relevant date*" for assessing the admissibility or provability of a debt. In some of the questions raised, the Joint Liquidators have understandably referred to the "*relevant date*" as being the date of the commencement of the winding up. Section 589(1) of the 2014 Act which concerns the commencement of a court ordered winding up provides that *"save in a case falling within subsection (2), the winding up of a company by the court shall be deemed to commence at the date of the presentation of the winding-up petition in respect of the company"*. Subsection (2) is not relevant for present purposes. The petition in respect of the Company was presented on 26th February 2020. The winding-up of the Company is deemed by s. 589(1) of the 2014 Act to have commenced on that date rather than on the date on which the Joint Liquidators were appointed (12th March 2020). It can be seen, however, from the Solvency II Directive and the Solvency II Regulations that the date on which a company is ordered to be wound up is the date for the commencement or "*opening up*" of winding-up proceedings with respect to insurance undertakings and is the relevant date for certain actions and consequences under the Solvency II regime.

51. The two most relevant sections of the 2014 Act in terms of the admissibility and provability of debts in the liquidation of the Company are ss. 619 and 620. The marginal note for s. 619 is "*Application of bankruptcy rules in winding up of insolvent companies*". Section 619 (1) states:

> *"In the winding up of an insolvent company the same rules shall prevail and be observed relating to –*

(a) the respective rights of secured and unsecured creditors,

(b) debts provable, and

(c) the valuation of annuities and future and contingent liabilities,

as are in force for the time being under the law of bankruptcy relating to the estates of persons adjudicated bankrupt."

52. The marginal note for s. 620 is "*Debts which may be proved*". Section 620(1) states:

"(1) Subject to the provisions of this section, in a winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy) the following shall be admissible to proof against the company:

(a) all debts payable on a contingency; and

(b) all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages;

a just estimate being made, so far as possible, of the value of such debts or claims which may be subject to any contingency or which sound only in damages, or for some other reason do not bear a certain value."

53. Section 620(2) states:

"The value of such debts and claims as are made admissible to proof by subsection (1) shall, as far as possible, be estimated according to the value thereof at the date on which the winding up shall be deemed to have commenced by virtue of section 589 or 590..."

54. As I point out below, it may be necessary, having regard to the provisions of the Solvency II Directive (and the Regulations) and in order to give a conforming interpretation to national law for the valuation exercise to be carried out in the case of an insolvent insurance undertaking regulated in Ireland (such as the Company) by valuing the debts and claims which are admissible to proof as of the date of the winding-up order (which is when the winding-up proceedings are opened or commenced under the Solvency II regime) as opposed to the date on which the winding up is deemed to have commenced by virtue of s. 589 of the 2014 Act (i.e. the date of presentation of the petition).

55. The final relevant provision of the 2014 Act for present purposes is s. 677 which bears the marginal note "*Effect of winding up on business and status of company*". Section 677(1) states:

> *"From the commencement of the winding up, the company shall cease to carry on its business, except so far as may be required for the beneficial winding up of it."*

56. This provision is relevant to the first question raised for determination by the Joint Liquidators as to the effect of the commencement of the winding up or of the making of the winding up order on insurance contracts to which the Company was a party on one or other of those dates.

(2) The Bankruptcy Act 1988

57. As noted above, s. 619 of the 2014 Act refers to the rules in force of the law of bankruptcy relating to various matters, including *"debts provable"* and applies those rules in a winding up of an insolvent company. Section 620(1) incorporates the law of bankruptcy in the case of insolvent companies when considering the admissibility to proof in a winding up of certain debts and claims and provides for a "*just estimate*" to be made in respect of those debts or claims. The provisions of the law of bankruptcy which are said to be relevant to the questions raised by the Joint Liquidators are those contained in ss. 75 and 76 of the 1988 Act and certain paragraphs of the First Schedule to that Act. The FSCS disputes the application and relevance of these provisions to the questions raised and I address that issue later in this judgment. At this point, I am merely setting out the provisions and will return to their relevance and applicability later.

58. Section 75 bears the marginal note "*Debts provable in bankruptcy and arrangements*". The relevant subsection is s. 75(1). It states:

> *"Debts and liabilities, present or future, certain or contingent, by reason of any obligation incurred by the bankrupt or arranging debtor before the date of adjudication or order for protection and claims in the nature of unliquidated damages for which the bankrupt or arranging debtor is liable at that date by reason of a wrong within the meaning of the Civil Liability Act, 1961, shall be provable in the bankruptcy or arrangement."*

59. This provision is particularly relevant to Questions 2 and 3 of the questions raised by the Joint Liquidators and was the subject of extensive consideration by the parties in their written and oral submissions to the court.

60. Section 76 which bears the marginal note "*Proof of debts*" states:

> *"The provisions of the First Schedule shall apply in relation to the proof of debts."*

61. There are two relevant paragraphs in the First Schedule which is headed "*proof of debts*", paragraphs 15 and 18. Paragraph 15 states:

> *"In respect of debts due after the adjudication or order for protection, the liability for which existed at the date of such adjudication or order for protection, a creditor may prove for the value of the debt at that date."*

Paragraph 18 states:

> *"This Schedule is without prejudice to section 61 of the Civil Liability Act, 1961 (which provides for proof of claims for damages or contribution in respect*

of a wrong) and section 62 of the said Act (which provides for the application of moneys payable under certain policies of insurance where the insured becomes a bankrupt)."

62. Section 75(1) refers to a *"wrong"* within the meaning of the Civil Liability Act 1961 (the "1961 Act") and para. 18 of the First Schedule refers s. 61 of the 1961 Act. Section 2(1) of the 1961 Act defines a *"wrong"* as meaning:

> *"a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional".*

63. The marginal note for s. 61 of the 1961 Act is "*Proof of claims for damages or contribution in bankruptcy*". Section 61(1) is the relevant subsection, it states:

> *"(1) Notwithstanding any other enactment or any rule of law, a claim for damages or contribution in respect of a wrong shall be provable in bankruptcy where the wrong out of which the liability to damages or the right to contribution arose was committed before the time of the bankruptcy."*

64. It will be necessary to consider later in this judgment the interaction between s. 75(1) of the 1988 Act and s. 61(1) of the 1961 Act, as those provisions are certainly not easy to reconcile with each other.

(3) The Solvency II Directive and Regulations

65. While the Solvency II Directive deals with a whole range of issues concerning the taking up and pursuit of the business of insurance in the European Union and wider EEA and consolidates all of the previous European legislation dealing with insurance into a single directive, the relevant part of the Directive for present purposes is Title IV on the "*reorganisation and winding-up of insurance undertakings*". The approach taken by the Solvency II Directive to the reorganisation and winding up of insurance undertakings is well summarised in Recital (117). It states:

> *"Since national legislation concerning reorganisation measures and winding-up proceedings is not harmonised, it is appropriate, in the framework of the internal market, to ensure the mutual recognition of reorganisation measures and winding-up legislation of the Member States concerning insurance undertakings, as well as the necessary cooperation, taking into account the need for unity, universality, coordination and publicity for such measures and the equivalent treatment and protection of insurance creditors."*

66. A number of other recitals are also relevant. Recital (123) states:

> *"Only the competent authorities of the home Member State should be empowered to take decisions on winding-up proceedings concerning insurance undertakings. The decisions should produce their effects throughout the Community and should be recognised by all Member States. The decisions should be published in accordance with the procedures of the home Member State and in the Official Journal of the European Union. Information should also be made available to known creditors who are resident in the Community, who should have the right to lodge claims and submit observations."*

The relevant competent authority to take decisions on winding-up proceedings concerning insurance undertakings in Ireland is the High Court.

67. Recital (125) states:

> *"All the conditions for the opening, conduct and closure of winding-up proceedings should be governed by the law of the home Member State."*

68. Recital (127) is relevant to Question 4 of the questions raised by the Joint Liquidators and, in particular, to the proper meaning of the "*insurance claim*" in the Solvency II Directive and the Solvency II Regulations. Recital (127) states:

> *"It is of utmost importance that insured persons, policy holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings, it being understood that such protection does not include claims which arise not from obligations under insurance contracts or insurance operations but from civil liability caused by an agent in negotiations for which, according to the law applicable to the insurance contract or operation, the agent is not responsible under such insurance contract or operation. In order to achieve that objective, Member States should be provided with a choice between equivalent methods to ensure special treatment for insurance creditors, none of those methods impeding a Member State from establishing a ranking between different categories of insurance claim. Furthermore, an appropriate balance should be ensured between the protection of insurance creditors and other privileged creditors protected under the legislation of the Member State concerned."*

69. Recital (128) concerns the withdrawal of the authorisation to conduct business granted to an insurance undertaking. It states:

> *"The opening of winding-up proceedings should involve the withdrawal of the authorisation to conduct business granted to the insurance undertaking unless this has already occurred."*

70. The Solvency II Directive was implemented into Irish law by the Solvency II Regulations. Where possible, I will refer only to the relevant Solvency II Regulations, but it will be necessary in the case of a number of the issues to refer also to the relevant provision of the Solvency II Directive.

71. Regulation 12 of the Solvency II Regulations is relevant to the Joint Liquidators' contention that insurance contracts to which the Company was a party at the date of commencement of the winding up (or at the date of the winding up order) were discharged by the doctrine of frustration by reason of a supervening illegality. Regulation 12 contains a prohibition on carrying on the business of insurance without authorisation from the CBI. Regulation 12 states:

> *"(1) A person shall not—*
>
> > *(a) carry on the business of insurance of any class, or any reinsurance activity, in the State unless the person holds an authorisation covering the class of insurance or the reinsurance activity, or*
> >
> > *(b) claim to be, or represent itself as, an insurance undertaking or reinsurance undertaking in the State unless the person holds an authorisation covering insurance or reinsurance.*
>
> *(2) Paragraph (1) does not apply to persons, activities or operations excluded from the application of these Regulations.*
>
> *(3) A person who contravenes paragraph (1) commits an offence."*

72. Article 76 of the Solvency II Directive imposes an obligation on Member States to ensure that insurance undertakings establish "*technical provisions*" with respect to all of their *"insurance obligations"* towards policy holders and beneficiaries of insurance contracts. Regulation 83 of the Solvency II Regulations imposes that obligation on insurance undertakings registered in Ireland.

73. Part 18 of the Solvency II Regulations is the part relevant to the issues raised in Question 4. It is the equivalent of Title IV of the Solvency II Directive.

74. Chapter 3 of Part 18 concerns winding-up proceedings. The commencement of winding-up proceedings is dealt with in Regulation 275 (the equivalent of Article 273 of the Solvency II Directive). Regulation 275(1) states:

> *"Only the competent authority of an insurance undertaking's home Member State shall be entitled to decide on the opening of winding-up proceedings with respect to the insurance undertaking, including its branches in other Member States."*

75. Regulation 275(2) states:

> *"A decision to commence winding-up proceedings in respect of an insurance undertaking, including its branches in other Member States, shall, once it takes effect in the State, also take effect in those other Member States."*

76. As noted earlier, the competent authority in Ireland is the High Court (Regulation 270(1)). Winding-up proceedings are commenced in Ireland for the purposes of the Solvency II Regulations (and the Solvency II Directive) when the High Court decides to commence winding-up proceedings in respect of an insurance undertaking. The High Court decided to commence such proceedings in the case of the Company when it appointed the Joint Liquidators and made the winding up order on 12th March 2020. Therefore, the commencement date of the winding-up proceedings with respect to the Company for the purposes of the Solvency II Regulations (and the Solvency II Directive) is 12th March 2020 (and not the date of the presentation of the petition on 20th February 2020, the date on which the winding-up is deemed to have commenced under s. 589 of the 2014 Act). As noted above, this may affect the date of valuation of admissible debts and claims under s. 620(2) of the 2014 Act. Adopting a conforming interpretation of s. 620(2) may require those debts and claims to be valued as of the date of the winding-up order (12th March 2020) as opposed to the date of commencement of the winding-up proceedings under s. 589 of the 2014 Act (20th February 2020). Nothing much may turn on this and the significance of this difference was not addressed in any detail in the submissions of the parties.

77. Regulation 275(3) provides that winding-up proceedings in respect of an insurance undertaking, including its branches in other Member States are governed by the 2014 Act and the Insurance Acts unless otherwise provided by Regulations 285 to 293. The term "*Insurance Acts*" is defined in Regulation 3 as meaning the Insurance Acts 1909 – 2009, Regulations made under those Acts and Regulations relating to insurance made under the European Communities Act 1972.

78. Regulation 275(3) implements Article 274 of the Solvency II Directive which is entitled "*Applicable law*". Article 274(1) states:

> *"The decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects shall be governed by the law applicable in the home Member State unless otherwise provided in Articles 285 to 292."*

79. Article 274(2) provides that the law of the home Member State shall determine, at least, a number of matters which are then set out. Those matters include *"the effects of the winding-up proceedings on current contracts to which the insurance undertaking is party;"* (Article 274(2)(d)), *"the claims which are to be lodged against the estate of the insurance undertaking and the treatment of claims arising after the opening of winding-up proceedings;"* (Article 274(2)(f)) and *"the rules governing the lodging, verification and admission of claims;"* (Article 274(2)(g)). In the case of the Company, these are all matters which are governed by the 2014 Act and the Insurance Acts.

80. The concept of an "*insurance claim*" is central to Question 4. That term is defined in Article 268(1)(g) and is further dealt with in the second subparagraph of Article 268(1)(g) of the Solvency II Directive. Article 268(1)(g) defines "*insurance claim*" as meaning:

> *"an amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 2(3)(b) and (c) in direct insurance business, including an amount set aside for those persons, when some elements of the debt are not yet known."*

81. This definition is replicated and transposed into Irish law by Regulation 270(1) of the Solvency II Regulations.

82. The second subparagraph of Article 268(1)(g) of the Directive then states:

> *"The premium owed by an insurance undertaking as a result of the non-conclusion or cancellation of an insurance contract or operation referred to in point (g) of the first subparagraph in accordance with the law applicable to such a contract or operation before the opening of the winding-up proceedings shall also be considered an insurance claim."*

83. This second subparagraph is replicated in Regulation 270(2). The meaning of the term "*insurance claim*" and the proper interpretation of Article 268(1)(g) and the second subparagraph (and the equivalent provisions of Regulation 270) are a major source of contention and dispute between the Joint Liquidators and the FSCS.

84. An "*insurance claim*" (as that term is defined) must be afforded special protection as is clear from Recital (127) referred to earlier. Article 275 of the Solvency II Directive is headed "*Treatment of insurance claims*". Article 275(1) states:

"(1) Member States shall ensure that insurance claims take precedence over other claims against the insurance undertaking in one or both of the following ways:

(a) with regard to assets representing the technical provisions, insurance claims shall take absolute precedence over any other claim on the insurance undertaking; or

(b) with regard to the whole of the assets of the insurance undertaking, insurance claims shall take precedence over any other claim on the insurance undertaking with the only possible exception of the following:

(i) claims by employees arising from employment contracts and employment relationships;

(ii) claims by public bodies on taxes;

(iii) claims by social security systems;

(iv) claims on assets subject to rights in rem."

85. Ireland opted for the option referred to in Article 275(1)(a). It did so in Regulation 277 which is also headed "*Treatment of insurance claims*". Regulation 277(1) states:

"(1) Insurance claims shall, with respect to assets representing the technical provisions of an insurance undertaking, take absolute precedence over any other claims on the insurance undertaking including claims accorded preference under section 621 of the Act of 2014."

86. Article 275(2) of the Directive provides that Member States may provide that *"the whole or part of the expenses arising from the winding-up procedure, as determined by their national law, shall take precedence over insurance claims"*. Provision was made in Regulation 277(3) for such expenses to take precedence over insurance claims *"to* *the extent that the assets of the undertaking, other than the assets representing the technical provisions, are insufficient to meet such expenses…"*.

87. Article 279 of the Solvency II Directive deals with the withdrawal of an insurance undertaking's authorisation. Article 279(1) states:

> *"(1) Where the opening of winding-up proceedings is decided in respect of an insurance undertaking, the authorisation of that undertaking shall be withdrawn in accordance with the procedure laid down in Article 144, except to the extent necessary for the purposes of paragraph 2."*

88. Article 279(2) provides that the withdrawal of the authorisation pursuant to Article 279(1):

> *"shall not prevent the liquidator or any other person appointed by the competent authorities from pursuing some of the activities of the insurance undertaking in so far as that is necessary or appropriate for the purposes of winding-up.*
>
> *The home Member State may provide that such activities shall be pursued with the consent and under the supervision of the supervisory authorities of that Member State."*

89. Those provisions were implemented into Irish law by Regulation 279 of the Solvency II Regulations. Regulation 279(1) states:

> *"Where a liquidator of an insurance undertaking has been appointed, the Bank shall withdraw the authorisation of the undertaking in accordance with the procedure laid down in Regulation 153, except to the extent necessary for the purposes of paragraph (2)."*

90. It can be seen, therefore, that, under Irish law, the time at which the *"opening of winding-up proceedings is decided"* for the purposes of Article 279(1) of the Directive is when a liquidator has been appointed to the insurance undertaking. That is when a decision is taken to open winding-up proceedings in Ireland under the Solvency II Regulations. In the case of the Company, a decision was taken to open the winding-up proceedings when the Joint Liquidators were appointed and the winding up order was made on 12th March 2020 (and not when the petition was presented on 20th February 2020).

91. Regulation 279(2) is equivalent to Article 279(2) and provides that the withdrawal of the authorisation does not prevent the liquidator, or any person appointed by the competent authorities, from pursuing some of the activities of the insurance undertaking *"in so far as that is necessary or appropriate for the purposes of the winding up"* provided that such activities are carried out with the consent and under the supervision of the CBI.

92. The Joint Liquidators have been advised that the activities of handling and processing claims in the liquidation of the Company are activities which are necessary and appropriate for the purposes of the winding up and that such activities are being carried out with the consent and under the supervision of the CBI (evidenced by the CBI's letter of 12th March 2020). The Joint Liquidators do not seek directions from the court as to whether that advice is correct although it pretty clear that it is.

93. I referred earlier to Regulation 281 of the Solvency II Regulations which requires the liquidator of an insurance undertaking to provide certain information in writing to known creditors. That provision implements Article 281 of the Directive. Regulation 281(4) is particularly relevant to Questions 1 and 4. It states:

> *"(4) In the case of insurance claims, the notice under paragraph (1) shall also indicate the general effects of the winding-up proceedings on the insurance contracts, in particular the date on which the insurance contracts or the*

operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation."

94. Regulation 282 provides for the right of creditors based in another Member State to lodge claims arising from the liquidation of an insurance undertaking in this State. Regulation 282 implements Article 282 of the Directive. As part of the information which creditors are required to provide in support of their claim, they must indicate the nature and amount of the claim and the date on which the claim arose (Regulation 282(3) and Article 282(3)).

95. Regulation 285 (and Article 285) sets out the effects of the commencement of winding-up proceedings on certain contracts and rights. It provides that in the case of certain contracts, namely employment contracts and employment relationships, contracts regarding the use or acquisition of immoveable property and other contracts or rights with respect to immovable property, those rights are governed by certain specified laws. None of those types of contracts are relevant to the issues raised in this application for directions. The Solvency II Directive and the Solvency II Regulations do not expressly specify the effects of the opening of winding-up proceedings on contracts to which the insurance undertaking is a party. That is an issue directly raised by Question 1.

6. Consideration of and Answers to Directions Sought by the Joint Liquidators

(1) Question 1: Termination of Company's Insurance Contracts – Date and Basis for Termination

(a) Introductory Remarks

96. This question seeks to ascertain the effect of the winding-up on insurance contracts to which the Company was a party on the date of the commencement of the winding up and, in particular, (a) whether those contracts were terminated, discharged or ceased to have effect, (b) if so, the date on which the contracts were terminated, discharged or ceased to produce effects, and (c) the legal basis for such termination, discharge or cessation of effects.

97. It is important to note at the outset that the question raised by the Joint Liquidators acknowledges that some of the insurance contracts to which the Company was a party when the winding-up proceedings commenced contained terms which provided for the automatic termination of those contracts on the commencement of such proceedings or had that effect under the governing law which applied to those contracts. Question 1 raised by the Joint Liquidators does not concern those contracts. It is clear, however, that a significant number of the insurance contracts to which the Company was a party at the commencement of the winding up (or making of the winding-up order) do not contain such provisions and did not terminate in accordance with governing law of those contracts at that time. Question 1 seeks to address those contracts and to obtain the court's determination on the three issues to which I have just referred.

98. In the event that those contracts do terminate or otherwise cease to produce effects, the question as posed offers two potential dates on which such termination or cessation of effects occurred and to events which may potentially have brought this about. The two potential dates envisaged in the question are 20th February 2020, (when the winding-up proceedings are deemed to have commenced in accordance with s. 589 of the 2014 Act) and 12th March 2020, (when the Company's authorisation was withdrawn by the CBI pursuant to Regulation 279 (1)). However, as will be seen, there is a third possible event which may have had that effect on the Company's contracts, namely, date of the making of the winding-up order and the appointment of the Joint Liquidators. That order was also made on 12th March 2020.

99. As the submissions of the parties developed and their positions somewhat evolved, it was ultimately agreed by the Joint Liquidators and by the FSCS that the effect of the winding-up proceedings was that the contracts did terminate or cease to produce effects. However, the Joint Liquidators' position was that this occurred on 12th March 2020, when the Company's authorisation was withdrawn by the CBI and that, in those circumstances, the contracts were frustrated by reason of a supervening illegality.

100. The original position of the FSCS was that the contracts were repudiated by the Joint Liquidators when the Regulation 281 notices were sent in late March/early April 2020. The FSCS's position evolved such that its ultimate position at the hearing was that the contracts were terminated on the making of the winding-up order on 12th March 2020, and the termination occurred as a result of the repudiation of the Company of those contracts in circumstances where it was unable to meet its obligations under the contracts and had to be wound up. The FSCS strongly disputed the Joint Liquidators' position that the contracts were discharged by frustration, although both parties accepted that it might ultimately not be necessary for the court to resolve that issue.

101. It is important to remember that while the Company's authorisation to carry on insurance business was withdrawn by the CBI on 14th February 2019, the authorisation was withdrawn save to the extent necessary or appropriate for the continued appointment of the Administrator and his ability to carry on the activities of an insurance undertaking in order to achieve the objectives of the administration under the Insurance (No. 2) Act 1983. The Company was, therefore, still authorised to carry out insurance activities for the purpose of the administration. That authorisation was withdrawn by the CBI on 12th March 2020, after the appointment of the Joint Liquidators and the making of the winding-up order save to the extent necessary for the effect of winding-up of the Company.

102. As noted earlier, the CBI is required by Regulation 279(1) to withdraw the undertaking where a liquidator of an insurance undertaking has been appointed. Under the Solvency II Directive and Solvency II Regulations that obligation stems from the appointment of the liquidator and not from the date of commencement of the winding up (being the date of the presentation of the petition, by virtue of s. 589 of the 2014 Act).

103. It can be seen, therefore, that if the insurance contracts are terminated as a consequence of the winding up, there are three possible dates, namely, (a) the date of the commencement of the winding up (26th February 2020), (b) the date of the appointment of the Joint Liquidators and the making of the winding up order (which is the date on which the winding-up proceedings are opened for the purposes of the Solvency II Regulations: Regulation 275(1) and (2)) (12th March 2020), and (c) the date on which the CBI withdrew the Company's authorisation (which was the same date), but which followed after, and was a separate and distinct event to, the appointment of the Joint Liquidators (Regulation 279(1)).

104. Question 1 seeks to ascertain the effect of one or more of these events, on the dates on which they occurred, on the insurance contracts to which the Company was a party at the relevant time and, in the event, that the contracts were terminated or otherwise ceased to produce effects, the legal basis for that conclusion.

(b) Summary of positions of the parties on Question 1

(i) The Joint Liquidators

105. The Joint Liquidators made the point that there is no express provision in the Solvency II Directive or the Solvency II Regulations or in the relevant Irish legislation that the commencement of the winding up of an insurance company terminates the Company's existing insurance contracts. Irish law applies to the winding-up by virtue of Regulation 275(3) and the issue is not expressly addressed in the 2014 Act or in the Insurance Acts.

In terms of the consequences of the winding up for an insurance company, the Joint Liquidators pointed to the fact that when a liquidator is appointed to an insurance company, the CBI is required to withdraw the Company's authorisation (Regulation 279(1)). They referred also to Regulation 279(2) which provides that the withdrawal of the authorisation does not prevent the liquidator from pursuing some of the activities of the insurance undertaking in so far as that is *"necessary or appropriate"* for the purposes of the winding-up. They noted s. 677(1) of the 2014 Act and to the requirement there that the Company is required to cease to carry on its business from the commencement of the winding up, except so far as may be required for its beneficial winding up.

106. In terms of the effect of winding up on contracts, the Joint Liquidators pointed to Article 274(2)(d) of the Solvency II Directive which provides that the law of the home Member State determines the effects of winding-up proceedings on current contracts of the insurance company, and the fact that Regulations 285–289 provide for the effects of the commencement of winding-up proceedings on certain types of contracts such as employment contracts and contracts with respect to immovable property. Neither the Regulations nor the Directive deal, in general terms, with the effect of the commencement of winding-up proceedings or the making of a winding-up order on existing contracts. However, the Joint Liquidators contended that it is implicit in the requirement under Regulation 281(4), in the case of "*insurance claims*", for the liquidator of an insurance company to serve a notice indicating (amongst other things) the date on which the insurance contracts of that company will cease to produce effects, that the general effect of the commencement of winding-up proceedings is that all insurance contracts and policies cease to produce effects, although they did acknowledge that this is not expressly stated. It is also necessary, to consider the terms of the insurance contracts themselves. If the relevant contract, properly interpreted in accordance with its terms and its governing law, terminates on the commencement of the winding-up, then that is the effect of the commencement of the winding up regardless of the Solvency II provisions. If not, then the effect of the winding up on the contracts must be determined in accordance with Irish law. Since there is no express provision in the 2014 Act and the Insurance Acts, the consequence of the winding up must be determined as a matter of common law.

107. While acknowledging that it might not be necessary for the court to resolve the dispute between the parties as to the legal basis on which the Company's insurance contracts terminated or ceased to produce effects, the Joint Liquidators maintained that the contracts were frustrated once the CBI withdrew the Company's authorisation on 12th March 2020. Thereafter, it would be an offence for the Joint Liquidators to carry on the business of insurance unless the particular activity fell within Regulation 279(2) as being necessary or appropriate for the purposes of the winding-up. On that basis, the Joint Liquidators contended that the contracts were, from the date of withdrawal of the authorisation, frustrated due to supervening illegality. The Joint Liquidators relied on number of passages from *McDermott and McDermott "Contract Law"* (2nd edn, Bloomsbury Professional, 2017) ("*McDermott and McDermott*") and on the decision of the High Court of England and Wales in *Islamic Republic of Iran Shipping Lines v. Steamship Mutual Underwriting Association (Bermuda) Limited* [2010] EWHC 2661 (Comm.); [2011] 2 All E.R. (Comm) 609 (the *"Islamic Republic* case") and on *Re Whitely Insurance Consultants (A Firm)* [2008] EWHC 1782 (Ch); [2009] Bus L.R. 418 (*"Whitely"*).

108. The position of the Joint Liquidators is, therefore, that the insurance contracts terminated on 12th March 2020, when the CBI withdrew the Company's authorisation and did so by frustration caused by supervening illegality.

(ii) The FSCS

109. The FSCS submitted that those contracts which were not terminated automatically in accordance with their own provisions were terminated, in accordance with common law principles, on the making of the winding-up order and the appointment of the Joint Liquidators on 12th March 2020. They relied on a passage in *McPherson's Law of Company Liquidation* (3rd edn, Sweet & Maxwell 2017) (para. 7-056) ("*McPherson*") in which the author stated that contracts may be terminated on the winding up of a Company either by frustration or by breach. The FSCS contended that the correct analysis in this case is that the contracts were terminated by a repudiation (or repudiatory breach) of those contracts by the Company and not by frustration. They initially relied on the Regulation 281 notice sent by the Joint Liquidators in late March/early April 2020 as producing that repudiatory effect but ultimately settled on the making of the winding-up order on 12th March 2020, as being the date on which the contracts were repudiated and ceased to produce effect. They contended that the withdrawal of the authorisation on 12th March 2020, (thus making it illegal to carry on the business of insurance) was triggered, and came about as a result of, by the winding-up order and the appointment of the Joint Liquidators which, in turn, came about as a result of the manner in which the business of the Company was run.

110. The FSCS's position is, therefore, that the insurance contracts were discharged by repudiation and not by frustration. The act or event initially alleged by the FSCS to constitute a repudiation of the contracts was the Regulation 281 notice sent by the Joint Liquidators in late March 2020, which, it submitted, amounted to a clear renunciation of the contracts. However, as noted above, the position at the hearing of the FSCS evolved during the course of the hearing such that its ultimate position, at the hearing, was that the contracts were terminated as being discharged by repudiation on the date on which the winding up order was made on the basis that it was clear at that stage that the Company could not comply with its obligations under the contracts. The FSCS relied on a number of authorities in support of its position on the basis for the termination or discharge of the contracts, including *In Re Albert Life Assurance Company* (1870-71) L.R. 9 Eq. 706 (*"Albert Life"*), *In Re Northern Counties of England Fire Insurance Company MacFarlane's Claim* (1880) 17 Ch. D. 337 (*"MacFarlane's Claim"*), *Re Law Car & General Insurance Corporation Ltd* [1913] 2 Ch. 103 (*"Law Car"*) and *Transit Casualty Co. v. the Policy Holders Protection Board* [1992] 2 Lloyd's Rep. 358 (*"Transit"*) and *Chitty on Contracts* (31st Ed., Sweet & Maxwell 2012).

111. The FSCS contested the Joint Liquidators' reliance on the doctrine of frustration due to supervening illegality. It made a number of points in response. First, it is said that the withdrawal of the Company's authorisation giving rise to the supervening illegality in which the Joint Liquidators rely occurred after the winding up order was made in circumstances where the winding-up came about as a result of the manner in which the business was run. Second, it contended that the withdrawal of the Company's authorisation under Regulation 279 did not mean that all insurance business carried out by the Joint Liquidators after that date was illegal since some insurance activities could be carried out in the circumstances provided for in Regulation 279(2) (i.e., where necessary or appropriate for the purpose of the winding-up). Third, it submitted that the requirements for frustration as discussed by the High Court (McWilliam J. in *McGuill v. Aer Lingus and United Airlines* (Unreported, High Court, 3rd October, 1983)

(*"McGuill"*) are not satisfied in that (a) a party in default cannot rely on the doctrine of frustration and the Company was at fault here where the authorisation was withdrawn following the appointment of the Joint Liquidators and the making of the winding-up order which came about solely and directly as a result of the manner in which the business of the Company was run, ultimately leading to its insolvency and consequent winding up; and (b) the possibility that the Company might be wound up and as a consequence lose its authorisation was not an unexpected event but rather was part and parcel of engaging in a regulated business.

112. Ultimately, the FSCS agreed with the Joint Liquidators that it may not make much difference whether the court finds that the contracts were terminated or discharged as a result of frustration when the authorisation was withdrawn by the CBI or as a result of the repudiation of those contracts by the Company on the making up of the winding-up order although both agreed that contracts were terminated or discharged on 12th March 2020. Both accept, however, that the answers to Questions 2 and 3 are critical to how the Joint Liquidators must deal with claims made under the relevant contracts which were terminated or discharged on that date.

(c) Analysis

113. I agree with the submissions of both parties that the answer to this question is governed by Irish law and, in the absence of any statutory provision expressly specifying the effect of the commencement of the winding-up or the winding-up order and the appointment of the Joint Liquidators or the withdrawal of the Company's authorisation by the CBI, the answer is to be found in the common law.

(i) Effect of Winding Up on Contracts

114. As pointed out by the parties, the Solvency II Directive and the Solvency II Regulations do not afford a clear answer to this question. Article 274(2) of the Solvency II Directive makes clear that it is Irish law which determines the effects of the winding-up proceedings on contracts to which the Company was a party and Regulation 275(3) makes express reference to the 2014 Act and to the Insurance Acts. Regulation 285 (and Article 285) does make provision for the effects of winding-up proceedings on certain types of contracts and rights. However, that provision does not extend to insurance contracts to which the insurance undertaking was a party. While Regulation 275(3) states that the 2014 Act and the Insurance Acts govern the winding-up proceedings in respect of the Company, there is no express provision in either the 2014 Act or in the Insurance Acts which prescribes the effect of the winding-up proceedings (or any particular stage in those proceedings) on contracts to which the Company was a party at the relevant time.

115. I agree that it is implicit in Regulation 281(4) that one of the effects of winding-up proceedings on insurance contracts to which the insurance undertaking was a party is that those contracts will *"cease to produce effects"* on a particular date and that the *"rights and duties of insured persons with respect to the contract"* must be addressed in the notice which must be sent to certain creditors. I agree that it is implicit in that provision that the insurance contracts will come to an end, terminate, or be discharged at a particular date as a result of the winding-up proceedings. I also agree with the FSCS that it is implicit in s. 17 of the 1909 Act and in the Sixth Schedule to that Act that, at least, with respect to the particular types of insurance contracts covered by that Act, the effect of the winding up of an insurance company is to bring the contract to an end since that section and the Sixth Schedule provide for the valuation of the relevant policy for the purpose of a claim by in the winding-up. It would not be necessary to value the policy if the policy remained in existence following the winding up of the insurance company.

116. I agree, therefore, that the winding-up proceedings do have the effect of bringing to an end the contracts to which the Company was a party, in the sense of terminating or discharging those contracts. It is now necessary to consider the event which brings about that effect and the legal basis for it.

(ii) Relevant Event

117. In my view, the event which brought the contracts to an end was the making of the winding-up order and the appointment of the Joint Liquidators on 12th March 2020. It was not the date on which the winding-up was deemed to commence under s. 589 of the 2014 Act (being the date of the presentation of the petition on 20th February 2020). The commencement of winding-up proceedings in respect of an insurance company, which is governed by Title IV of the Solvency II Directive and Part 18 of the Solvency II Regulations, occurs when the court, as the relevant competent authority in the State, makes a decision to "*open*" or commence the winding-up proceedings (Article 273(1) and (2) of the Directive and Regulation 275(1) and (2) of the Regulations). The winding-up proceedings in respect of the Company were opened and commenced on the date on which the court made the winding-up order and appointed the Joint Liquidators on 12th March 2020. This was a separate, prior, and distinct event to the subsequent decision by the CBI, under Regulation 279, to withdraw the Company's authorisation later that day. Although it is true that once the winding-up order that day was made, the CBI was required to withdraw the authorisation under the Regulation 279(1), nonetheless, they are two separate and distinct events.

118. The relevant date, therefore, for the purpose of assessing the effects of the winding-up proceedings on the Company's contracts is 12th March 2020, when the winding-up order was made and not the date on which the winding-up proceedings were deemed to have commenced by virtue of s. 589 of the 2014 Act (20th February 2020), and the relevant event was the making of the winding up order that day and not the subsequent withdrawal of the Company's authorisation later that same day.

(iii) Legal Basis

119. Turning then to the legal basis for the termination or discharge of the contracts on the making of the winding-up order, I agree that that consequence arises in one of two ways, either by way of frustration or by a breach of contract (that is to say, a repudiatory or anticipatory breach): see, for example, *McPherson* at para. 7-056. Whether this consequence arises by frustration or by a repudiatory breach of contract will depend on the nature and terms of the contract and the application of the relevant Irish common law principles applicable to frustration of contracts. The Joint Liquidators contended that the withdrawal of the Company's authorisation by the CBI following the making of the winding-up order on 12th March 2020, frustrated the contract by way of supervening illegality since they say that, following that withdrawal, it was an offence for the Company to carry on insurance business (with some limited exceptions where the activity is necessary or appropriate for the purpose of the winding-up). The FSCS strongly disputed that analysis.

120. I do not believe that the contracts were terminated or discharged or otherwise came to an end by way of frustration for a number of reasons. First, there is the question of timing. I have concluded that the relevant event which had the effect of bringing the contracts to an end occurred on the making of the winding-up order. While the CBI had to withdraw the authorisation once the liquidator was appointed, it did so <u>after</u> the making of the winding-up order. The relevant event bringing the contracts to an end had occurred before any question of a supervening illegality arose. Therefore, the contended-for supervening illegality was not what brought the contracts to an end.

121. Second the conditions necessary for the application of the doctrine of frustration to the Company's contracts are not satisfied in relation to the contract at issue. I will explain briefly why that is so.

122. The legal principles applicable to frustration were summarised by McWilliam J. in the High Court in *McGuill* as follows:

"1. A party may bind himself by an absolute contract to perform something which subsequently becomes impossible.

2. Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed.

3. The circumstances alleged to occasion frustration should be strictly scrutinised and the doctrine is not to be lightly applied.

4. Where the circumstances alleged to cause the frustration have arisen from the act or default of one of the parties, that party cannot rely on the doctrine.

5. All the circumstances of the contract should also be strictly scrutinised.

6. The event must be an unexpected event.

7. If one party anticipated or should have anticipated the possibility of the event which is alleged to cause the frustration and did not incorporated [sic] *a clause in the contract to deal with it, he should not be permitted to rely on the happening of the event as causing frustration."*

123. Those principles were recently approved as being the relevant principles by the Court of Appeal in *Footlocker Retail Ireland Limited v. Percy Nominees Limited* [2024] IECA 65 ("*Footlocker*") (at paras. 110 – 111). However, as was noted by the Court of Appeal in that case, those principles did not describe the significance in terms of the seriousness of the event alleged to cause frustration of the relevant contract. The Court of Appeal went on to consider that issue in some detail and cited with approval the decision of the

Supreme Court in *Neville v Guardian Builders Ltd* [1994] IESC 4; [1995] 1 ILRM 1. It is unnecessary to elaborate further on the principles here since the event which is alleged to have frustrated the contracts here is the alleged supervening illegality brought about by the withdrawal of the Company's authorisation. Apart from the time point just referred to, the application of the frustration principles summarised by McWilliam J. in *McGuill* clearly demonstrates, in my view, that the contracts in this case were not frustrated, whether by virtue of an alleged supervening illegality or otherwise.

124. I say this for a number of reasons. First, in order for there to be a frustration, the relevant event must have occurred without the default of either party to the contract. I agree with the FSCS that the withdrawal of the Company's authorisation came about solely and directly as a result of the winding-up order which was brought about by the insolvency of the Company which in turn was caused by the financial difficulties experienced by the Company. It could not be said in those circumstances that either the winding-up order or the withdrawal of the authorisation occurred without default on the part of the Company.

125. Second, the event which is alleged to have frustrated the relevant contract at issue must have been *"unexpected"*. I agree with the FSCS that the possibility that the Company might be wound up and lose its authorisation was not an unexpected event. It was part and parcel of engaging in the regulated insurance business. Indeed, the evidence discloses that a significant number of the insurance contracts to which the Company was a party made express provision for what was to happen in the case of the winding up of the Company. The winding up of the Company could not, therefore, be said to have been an *"unexpected event"*. An inevitable consequence of the winding up of the Company was the withdrawal of its authorisation under Regulation 279.

126. The decision of the Court of Appeal of England and Wales in *Amalgamated Investments v. John Walker* [1977] 1 W.L.R. 164 ("*Amalgamated Investments"*) and the High Court in *Zuphen v. Kelly Technical Services* [2000] IEHC 117; [2000] ELR 277 (*"Zuphen*") support this conclusion; see also *McDermott and McDermott* paras. 21.40 – 21. 42.

127. In *Amalgamated Investments*, the court had to consider the effect of the listing of a building after a contract of sale for the building was entered into. The court rejected the case made by the plaintiff that the contract was frustrated by that event. Buckley L.J. said:

> *"…the risk of property being listed as property of architectural or historical interest is a risk which inheres in all ownership of buildings. In many cases it may be an extremely remote risk. In many cases it may be a marginal risk. In some cases it may be a substantial risk. But it is a risk, I think, which attaches to all buildings and it is a risk that every owner and every purchaser of property must recognise that he is subject to."* (at 173)

128. *McDermott and McDermott* make the point (at para. 21.40) that:

> *"A failure to provide for ordinary commercial risks in the contract will not automatically be rectified by frustration should those commercial risks subsequently occur. It is not the job of the courts to rewrite the contract the parties actually entered into with the benefit of hindsight"* (at p. 1298)

129. The authors cite *Zuphen* as an excellent example of the principle. I agree with the FSCS that the risk that the Company might go into liquidation and, accordingly, lose its authorisation, was a risk inherent in the carrying on of an insurance business. That risk was recognised by the Company itself by the inclusion of express provisions, in a significant number of its policies, dealing with the consequences of the winding up of the company on the contract. It was not, therefore, an unexpected event and the

Company's failure to include such expression in all of its contracts cannot be rectified or catered for by the application of the doctrine of frustration.

130. This is not a case, therefore, where the event (the making of the winding-up order) occurred without any default on the part of the Company or where it was unexpected. The test for frustration is not, therefore, met in relation to the Company's insurance contracts.

131. Third, neither the *Islamic Republic* case nor *Whitely* on which the Joint Liquidators relied, provide any support for their reliance on the doctrine of frustration on the facts of this case. The *Islamic Republic* case concerned a case of partial illegality of a contract as a result of a subsequent order made by the UK Treasury where the court enforced the part of the contract which was not made illegal. I do not see the relevance to this case. *Whitely* was a case which concerned insurance policies which were issued in breach of a general prohibition contained in legislation and which were, therefore, illegal *ab initio*. It was not a case of frustration at all and, in my view, is of no assistance to the Joint Liquidators' case on frustration.

132. I conclude, therefore, that the contracts were not terminated or discharged by frustration. This begs the question, then, on what legal basis were those contracts terminated or discharged on the making of the winding-up order?

133. In my view, the legal basis on which the winding-up order terminated, discharged, or otherwise brought the contracts to an end was by way of a repudiatory breach of contract, in the sense that the making of the winding-up order, on foot of the Company's insolvency, rendered the Company unable to fulfil the terms of its contracts with policyholders. Thus, the winding-up order terminated the contracts by way of the Company's repudiatory breach of contract. It was a repudiatory breach since the Company put itself in a situation where it was no longer in a position to perform its fundamental obligations under the contract, namely, to indemnify the policy holder under the contract which was the very essence of the contract. It may also have been an anticipatory repudiatory breach in circumstances where the particular obligation to indemnify the policyholder under the relevant policy may not have fallen due as the insured event may not have occurred as of the date of the winding-up order, but the making of that order meant that the Company could not comply with its obligations in full under the contract. What occurred could also conceivably be described as a "renunciation" of the relevant contracts by the Company at the time of the making of the winding up order. Whatever terminology is used, in my view, it is clear that the contracts, the subject of Question 1 was terminated by the Company's breach at the time of the making of the winding-up order since it was plain that the Company could not comply with its obligations under the relevant contracts. There is support for that analysis of the position in a number of the cases relied on by the FSCS.

134. In *Albert Life*, the court was considering various claims in the winding up of an insurance company. At the outset of his judgment, Sir W.M. James V.C., explained the contractual consequences of the winding up of an insurance company. He said:

> *"The contract with an assurance office is, that out of the assurance fund contributed by the assured, and out of the capital of the society certain gums shall be paid in certain events. That is to say, if A. pays a certain annual premium during his life, the company will pay the sum assured out of the assurance fund. The bargain is, that a certain fund or capital shall be forthcoming to meet the claim.*
>
> *Now, circumstances have rendered it quite certain that this company cannot go on; that is to say, they are being wound up because it is certain that they will*

have no means of fulfilling their engagements. To that extent, it may be said that there is a breach of contract, because there is not a fund forthcoming." (at 716)

135. The court went on then to consider how to measure the loss and damage the policyholder has sustained and the valuation of the claims being made in the winding up of the insurance company.

136. In *Law Car*, the Court of Appeal of England and Wales was considering the value of claims made in the liquidation of an insurance company arising in respect of certain insurance policies. This case is very relevant to Questions 2 and 3 but for present purposes what is relevant is the brief description provided by Cozens–Hardy M.R. of the impact of a winding-up order on insurance policies issued by the company in that case. He referred to the potential claims which might be made by policyholders (prior to the enactment of special legislation which I consider later) where an insurance company went into liquidation. He stated that one of the claims which could be made was for the loss to the policyholder *"by reason of the repudiation of the contract at the date of the winding-up order"* (at p. 116). He then considered what would happen if, during the currency of the policy but after the winding up order had been made, an accident occurred and the value of the claim that might be made in the circumstances by the policyholder in the winding up, by reference to what would have been the position *"if the contract of indemnity had not been repudiated"* (at p. 117). He referred to special legislation dealing with workmen's compensation and noted that that legislation laid down a rule for ascertaining the value to the insured of the indemnity *"which, by the reputation of the contract, he has lost"* (p. 117).

137. It might be noted that, in such a situation, the court does not appear to have contemplated or envisaged any requirement on the part of the insured to take any steps to accept the repudiation of the insurance company at the time of the winding-up order.

It can hardly be expected that an insured person would have to take any positive step to accept the insurance company's repudiation of the insurance contract on the making of the winding-up order, as the consequence of the order is that the insured will be deprived of the very indemnity or insurance cover for which it contracted under the policy. The insured is not presented with a choice whether to accept or reject the repudiation. While the issue of election by the insured was not raised in argument before me, I cannot see how any act of election could be required by policyholders in order for the repudiation by the Company to take effect, and to terminate or discharge the insurance contracts.

138. Finally, in *Transit*, another case which I will return to later, Hoffman J., when considering the analysis in *Law Car* of the earlier case of *MacFarlane's Claim*, noted that the winding-up order in the latter case *"effected a termination of the policy"* (p. 359) and the company did not continue to be liable on the policy after the winding up.

139. In my view, these cases do provide some support for the proposition that it was the winding-up order in this case which terminated the insurance contracts, the subject of Question 1, and I am satisfied that that is the correct analysis of the position.

(d) Answer to Question 1

140. Accordingly, my answer to Question 1 (as slightly rephrased) is that a contract of insurance to which the Company was party at the date of the winding up order (12th March 2020) (which, having regard to the provisions of the Solvency II Directive and the Solvency II Regulations must be regarded as the "relevant date" for the purpose of the question and not the date of the presentation of the petition which would be the date on which the winding up would be deemed to commence by virtue of s. 589 of the 2014 Act) and which has not terminated automatically according to its terms, ceases to produce effects, or is otherwise terminated or discharged, as a result of the making of the winding-up order which effected a termination or discharge of the contracts. The contracts did not cease to produce effects and were not otherwise terminated or discharged by frustration by the withdrawal by the CBI of the Company's authorisation to carry out the business of an insurance undertaking (which authorisation was withdrawn on 12th March 2020 after the making of the winding-up order). The rights and obligations of the Company and the other parties to those contracts are the subject of further consideration in the answers to Questions 2 and 3 below.

(2) Questions 2 and 3: Admissibility of Proof of Debts/ Liabilities in Liquidation of the Company

(a) Introductory Remarks

141. Question 2 contains a number of sub-questions which, while referring expressly to s. 75(1) of the Bankruptcy Act 1988, require consideration of a number of the statutory provisions identified earlier in determining the appropriate directions to be given to the Joint Liquidators in relation to the admissibility and proof of debts and liabilities in the winding up of the Company. The answer to Question 3 will depend on the answers given to the four sub-questions raised in Question 2.

142. The issues raised by these two questions have given rise to very significant differences between the Joint Liquidators and the FSCS. While both parties referred to many English authorities, both stressed at various points that the legislation applicable to the admissibility and proof of debts, claims, and liabilities in the winding up of insurance companies in England and Wales is different to that applicable in Ireland. Both accept that it is necessary to consider the issues raised in these two questions by reference to the relevant Irish legislative provisions, albeit that they both maintain that some assistance can be derived from the English cases. I agree. There is, however, a real danger in extracting snippets or extracts from the judgments in English cases and seeking to apply them directly to the issues raised by these two questions. It must, at all times, be recognised that those cases have been decided on the basis of legislation, which, while bearing some similarities to the relevant Irish legislation, differs in a number of significant respects. Nonetheless, I have found some of the English cases to be particularly helpful in answering these two questions. That is particularly so where the issues raised by the questions are very complex and have not yet been considered or decided by the Irish courts. It is also worth pointing out that in bringing their application for directions and in seeking answers to these questions, the Joint Liquidators acknowledge that some of the points advanced by the FSCS are arguable although they maintain that they have the better of the argument in relation to them. While deriving assistance from some of the English cases, I have tried to approach my consideration of answers to the questions raised from first principles based on what appears to me to be the correct analysis of the textual and legal issues and the correct interpretation of the relevant legislative provisions, including, of course, the Insolvency II Directive and the Insolvency II Regulations.

143. The fundamental questions which the Joint Liquidators seek answers to, and which have given rise to, Questions 2 and 3 (as stated by Mr. O'Connor, one of the Joint Liquidators, at para. 77 of his grounding affidavit) are:

(a) How should the Joint Liquidators treat claims made under policies of insurance which relate to events which have occurred but which have not been notified at the "relevant date" (while the question postulates the "relevant date" as being the date of the commencement of the winding up which (under s. 589 of the 2014 Act) is the date of the presentation of the petition on 20th February 2020, as appears from my answer to Question 1, I believe that the relevant date should be the date on which the insurance contracts were terminated or discharged or otherwise ceased to produce effects, which was when the winding-up order was made on 12th March 2020)?

(b) How should the Joint Liquidators treat claims which may be made under policies of insurance which relate to events which have not occurred before the "relevant date"?

144. The answers to these questions must be found by reference to the interpretation and application of the various statutory and other provisions referred to in section 5 of this judgment.

145. Question 2 refers only to s. 75(1) of the 1988 Act. Three points must be made in that regard. First, the FSCS disputes the application of s. 75(1) at all. Second, before one can consider s. 75(1) (if at all), it is necessary to consider ss. 619 and 620 of the 2014 Act. Third, if s. 75(1) does apply, it is also necessary to consider the relevance and effect of some of the provisions of the 1961 Act. The interaction between these various statutory provisions is very complicated and it is easy to see why differences have arisen in this area between the Joint Liquidators and the FSCS.

(b) Summary of the Positions of the Parties on Questions 2 and 3

(i) The Joint Liquidators

146. Briefly stated, the position of the Joint Liquidators is that s. 75(1) of the 1988 Act does apply and governs the debts and claims which may be admitted and proved in the liquidation of the Company. It applies, they say, by virtue of ss. 619 and, more importantly, s. 620 of the 2014 Act. Recognising that s. 75(1) contains two limbs, the Joint Liquidators' position is that in order for a debt or liability to be admitted to proof in the liquidation under the first limb, the *"obligation incurred"* by the Company must be the occurrence of the insured or insurable event under the relevant policy and that event is what must have occurred before the relevant date (being the date the winding up order was made).

147. Insofar as the second limb of s. 75(1) applies, the Joint Liquidators' position is that, in order for a claim for unliquidated damages to be admitted to proof in the liquidation, the *"wrong"* referred to in that limb must have been committed before the relevant date although it is not necessary that the cause of action be complete as of that date. Their position is that insured events which occur, or "*wrongs*" committed after the relevant date ought not to be admitted to proof in the liquidation.

(ii) The FSCS

148. Again, very briefly summarised, the position of the FSCS is that s. 75 of the 1988 Act does not apply and that questions concerning the admissibility to proof of claims can be determined by reference to s. 620 of the 2014 Act. If s. 75(1) does apply, the FSCS maintains that it could only be the first limb. Applying the first limb would lead to the same answer as applying s. 620(1) only. The FSCS's position is that on either basis, the Joint Liquidators are required to admit to proof a claim arising from an insured event which occurred after the relevant date either on the basis that it is a contingent claim against the Company under the relevant policy for the purpose of s. 620(1) or on the basis that it is a contingent liability deriving from an *"obligation incurred"* under the policy as of the "relevant date", under the first limb of s. 75(1) of the 1988 Act.

149. The FSCS does not accept that the second limb of s. 75(1) applies at all on the basis that there is no *"wrong"* which would give rise to a liability under that limb or, if there is, it is not a *"wrong"* for which the Company was *"liable"* at the date of the winding up order.

150. On the basis of these respective positions, the Joint Liquidators contend that unless the insured event (such as the laying of a defective floor, in the case of a claim under one of thew construction policies described earlier) occurred before the relevant date, a claim in relation to that event should not be admitted to proof in the liquidation. The FSCS contend that if the event is one which is insured under the policy, it should be admitted to proof even where it occurred after the relevant date on the basis that a *"just estimate"* can be made of that claim, applying the "hindsight" principle in *MacFarlane's Claim*. In respect of claims under the types of policies covered by the Sixth Schedule to the 1909 Act, the FSCS says that those claims should be valued in accordance with s. 17 of that Act and the Sixth Schedule.

(c) Threshold Issue

151. There is a threshold issue to decide before further analysing the issues subtending Questions 2 and 3 and that is whether s. 75 of the 1988 Act applies at all to those issues. The Joint Liquidators maintain that it does and the FSCS maintains that it does not. In my view, the Joint Liquidators are correct in their position, and I now explain why.

152. Section 619 of the 2014 Act makes clear that in the winding up of an insolvent company, the same rules as if under the law of bankruptcy apply and must be observed in relation to three specified issues. Those issues include *"debts provable"* (s. 619(1)(b)) and *"the valuation of annuities and future and contingent liabilities"* (s. 619(1)(c)). We are concerned primarily here with debts which can be proved in a winding up. Section 75(1) of the 1988 Act deals with debts which can be proved in a bankruptcy. When considering debts provable in winding up of an insolvent company, therefore, s. 619(1) directs us to s. 75 of the 1988 Act. That conclusion is, in my view, copper fastened by s. 620.

153. Section 620(1) (reproduced at para. 52 above) makes clear what debts and claims are admissible to proof in the winding up of a company. It provides that: *"all debts payable on a contingency"* and *"all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages"* are admissible. A *"just estimate"* must be made *"so far as possible"* of the value of such debts or claims which may be the subject of a contingency or which may sound only in damages or might otherwise not bear a certain value[2]. Section 620(1) states that all of this is *"subject, in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy"*. The law of bankruptcy applies by virtue of s. 619(1) to the issue as to what debts are provable in the winding up of an insolvent company. That provision is copper fastened by s. 620(1) in relation to the debts and claims referred to in that subsection. That issue is dealt with in s. 75(1) of the 1988 Act.

154. I agree, therefore, with the Joint Liquidators that the effect of s. 619 and s. 620 in the case of an insolvent company, such as the company at issue here, is to require consideration to be given to s. 75 of the 1988 Act. I do not accept the submission advanced by the FSCS that the application of s. 75 of the 1988 Act would inappropriately oust the provisions of s. 620(1) in relation to debts which can be proved in the winding up of an insolvent company in their entirety. Section 619(1) and s. 620(1) mandate the application of the relevant rules under the law of bankruptcy and, on the question of provable debts in bankruptcy, s. 75 is undoubtedly the most relevant

[2] Section 620(2) provides that such a "just estimate" value must "as far as possible" be estimated as of the date the winding up is deemed to have commenced by virtue of s. 589 of the 2014 Act, i.e., the date of the presentation of the petition. It may well be as observed earlier, applying a conforming interpretation, that in the case of the winding up of an insolvent insurance company registered in Ireland which is governed by the Insolvency II Regulations, the valuation should be as of the date of the making of the winding-up order as that is the date on which the winding-up proceedings are opened/commenced under the Directive and the Regulations.

rule under the law of bankruptcy (albeit not necessarily the only rule). It must, therefore, be considered and applied in this case.

155. The FSCS relied on the case of *P & B Security Services Limited (In Liquidation) v. Triglen Holdings Limited* [2019] IEHC 152 (*"P&B"*) as an example of a case where the court when considering a claim by a defendant to set-off a debt claim by a company in liquidation of monies which the defendant held pursuant to an indemnity given by the company in respect of personal injury claims brought against the defendant where it claimed that liability in respect of those claims rested with the company. Simons J. held that the defendant was entitled to claim a set-off. He looked at s. 619 of the 2014 Act and the First Schedule to the 1988 Act. He considered the provisions in relation to the valuation of contingent liabilities in s. 620(2) of the 2014 Act and the decision of the House of Lords in *Stein v. Blake* [1996] A.C. 243 which had looked at equivalent provisions in the then English legislation. He made a *"just estimate"* of the value of the defendant's contingent claims and allowed the defendant to set-off the debt against its claim against the company valued on the basis of that *"just estimate"*. The FSCS made the point that Simons J. did not find it necessary to refer to s. 75 of the 1988 Act. However, I agree with the Joint Liquidators that it is not surprising that Simons J. did not need to look at s. 75 in that case as there was no issue about the proof of claims or debts in that case. The case was a civil claim for debt and a claimed entitlement by the defendant to set-off. There was no issue in relation to the proof of debts and, therefore, no issue arose as to the application of s. 75.

156. In conclusion, therefore, I am satisfied that it is necessary for me, by virtue of the provisions of s. 619 and s. 620 of the 2014 Act, to consider s. 75 of the 1988 Act in determining the issues which have arisen concerning the admissibility of debts and claims in the winding up of the Company. Having said that, I am also satisfied that whether or not the court applies s. 620(1) in conjunction with or without reference to s. 75(1) of the 1988 Act, the same result is reached with respect to the admissibility of claims under policies in respect of insured events which did not occur until after the date of the making of the winding up order.

(d) Contingent Claims and Liabilities

157. Proceeding on the basis that it is necessary, when considering the debts, claims and liabilities which may be proved in the winding up of the Company under ss. 619 and 620 of the 2014 Act, to apply the provisions of s. 75 of the 1988 Act, I must now consider in more detail the arguments advanced by the parties in relation to those provisions in order to answer the issues raised in questions 2 and 3. The nature of the rights and obligations of the parties to the insurance contracts and policies issued by the Company which were in force at the time of the making of the winding up order (and which were terminated, discharged or otherwise ceased producing effects at that date) must be at the centre of the analysis. It is clear, and acknowledged by the Joint Liquidators, that the obligations or liabilities of an insurance company under an insurance contract are contingent (although the Joint Liquidators maintain that a contingent liability arises only where the insured event or *"wrong"* underpinning the contingency (such as the negligent workmanship) has occurred or been committed before the winding up order even if damage or loss only becomes apparent after that date).

158. It is clear from s. 619(1) of the 2014 Act that *"contingent liabilities"* are to be considered and valued in the winding up of an insolvent company. As previously stated, the rules under the law of bankruptcy apply. It is also clear from s. 620 that contingent debts and contingent claims are admissible to proof in the winding up (subject to the application of the relevant rules under the law of bankruptcy which, as I have already found, include those contained in s. 75 of the 1988 Act). A *"just estimate"* must be arrived at in respect of such contingent debts and claims as are admitted to proof by application of s. 620 of the 2014 Act and s. 75 of the 1988 Act. While s. 620(2) requires that the value of such debts and claims *"as far as possible"* be estimated in value as of the date the winding up is deemed to have commenced by virtue of s. 589 of the 2014 Act (namely, when the petition is presented), as I previously suggested, it may well be that that date must be adjusted by reference to the date of the opening or commencement of the winding-up proceedings under the Solvency II regime which is the date on which the insurance contracts to which the Company was a party were terminated, discharged or otherwise ceased to produce effects.

159. The Joint Liquidators and the FSCS both agree on the test to be applied in determining *"contingent claims"* and *"contingent liabilities"*. Both rely on *Re Eylewood Limited* [2010] IEHC 57 (*"Eylewood"*). In that case, Finlay Geoghegan J. in the High Court had to consider whether a person who was a guarantor of a company's debts was a *"contingent creditor"* in the context of an examinership of the company. Finlay Geoghegan J. approved the description given to the term *"contingent creditor"* by Pennycuick J. in *In Re William Hockley Limited* [1962] 1 WLR 555 ("*William Hockley"*), where he said (at p. 558):

> *"The expression 'contingent creditor' is not defined in the Companies Act, 1948, but it must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability upon the happening of a future event or at some future date ...."* (cited by Finlay Geoghegan J. at para. 86, p. 47).

160. Finlay Geoghegan J. also agreed with Neuberger J. when said in *County Bookshops Limited v. Grove* [2002] EWHC 1160 (Ch.); [2003] 1 BCLC 479, that the term *"contingent creditor"* was *""not a term of art"* and that *"its precise meaning will depend on its context"* (per Neuberger J. at para. 49, quoted by Finlay Geoghegan J. at para. 86, p. 47). The court concluded that in the context of proposals for a scheme of arrangement, the term *"contingent creditor"* included a guarantor with the contingent right of indemnity against a company whose debts the guarantor had guaranteed to a creditor.

161. I note that shortly before the judgment in *Eylewood*, McGovern J. in *In Re Linen Supply of Ireland Limited* [2010] IEHC 28 (*"Linen Supply"*) cited with approval the description of the term *"contingent creditor"* in a different case, *Stonegate Securities Limited v. Gregory* [1980] Ch. 576 ("*Stonegate Securities"*) where Buckley L.J. described the term as *"a creditor in respect of a debt which will only become due in an event which may or may not occur…"* (at p. 579, cited by McGovern J. at para. 15, p. 7). I do not discern any difference in substance between the passage approved by Finlay Geoghegan J. from *William Hockley* in *Eylewood* and that from *Stonegate Securities* approved by McGovern J. in *Linen Supply*.

162. In the present context, a contingent creditor is a person who has a claim against the Company which is contingent (s. 620(1)(b)) or for which the Company has a *"contingent liability"*. There is a helpful definition of the term *"contingent liability"* in *Goode, Principles of Corporate Insolvency Law* (edited by Kristin van Zweiten) (5th edn., 2018) There Prof. Goode states:

> *"A contingent event is one which may or may not occur. But to say that a contingent liability is a liability which may or may not be incurred is to spread the net far too wide, for the number of contingencies as thus defined is infinite.*

Is it to be said, for example, that because I may decide at some future date to buy goods and incur a liability for the price I have a contingent liability? Clearly not. No one can tell what transactions I may decide to enter into in the future or on what terms. More plausibly 'contingent liability' can be understood as a liability or other loss which arises out of an existing legal obligation, but which is dependent on the happening of an event that may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation." (*Goode*, para. 4-26, pp.163 – 164).

163. Among the cases cited by Prof. Goode are *William Hockley* and *Stonegate Securities*. Prof. Goode gives as an example of a contingent liability, the liability of an insurer under a policy of indemnity insurance which is created by the issue of the policy, but which depends on the occurrence of the event in respect of which cover is given. I agree with that analysis. The contingent nature of an insurer's liability under a policy of insurance is central to the meaning of the concept of insurance. One of the essential features of a contract or policy of insurance is that of uncertainty and of something or some event that may or may not occur. Without that uncertainty the inherent and essential requirement for insurance is not present. In *Prudential Insurance Company v. Inland Revenue Commissioners* [1904] 2 K.B. 658, Channell J. said, in referring to the essential element of uncertainty for a contract to be a contract of insurance said:

"There must be either uncertainty whether the event will ever happen or not or if the event is one which must happen at some time, there must be uncertainty as to the time at which it will happen." (at p. 663)

164. This passage was approved in *Medical Defence Union Limited v. Department of Trade* [1980] Ch. 82 which was, in turn, approved in this jurisdiction by McCracken J. in the High Court in *Rafter v. Solicitors Mutual Defence Fund Limited* [2002] 3 I.R. 321, at

327. The contingent nature of the obligation of an insurance company under an insurance contract or policy must exist at the time the contract was made, and the event must be one which involves an element of uncertainty as to whether the event will occur or not. I believe that this is highly relevant to the proper interpretation to be given to the term *"obligation incurred"* in the first limb of s. 75(1) of the 1988 Act to which I will shortly turn.

(e) Paras. 15 and 18 of the First Schedule to the 1988 Act

165. Before doing so, I must refer to a point made by the Joint Liquidators in their written submissions about what they say is the effect of two of the paragraphs in the First Schedule to the 1988 Act. They referred to paras. 15 and 18 of that Schedule (reproduced at para. 61 above) and submitted that on the basis of these paragraphs of the Schedule, *"the clear intention of the legislature is that the only debts which may be provable in the liquidation are those for which liability existed at the liquidation date. It is 'without prejudice' to s. 61 of the 1961 Act (which pertains to 'wrongs' only) and this supports the interpretation that it is intended to address only liability for wrongs which had already occurred at the liquidation date."* (para. 60 of Joint Liquidators written submissions).

166. I do not believe that that submission is correct. I believe the Joint Liquidators are reading too much into paras. 15 and 18 of the First Schedule. The First Schedule is stated, in s. 76 (and not s. 75), to apply *"in relation to the proof of debts"*. Section 75(1) governs what debts, liabilities and claims are provable in bankruptcy (and by virtue of its application to insolvent companies in the winding up of those companies also). Debts and liabilities and claims are dealt with separately. Paragraph 15 of the Schedule refers only to certain debts, namely, those which are due after the bankruptcy adjudication where the liability for those debts existed at the date of the adjudication. I do not believe that that paragraph is intended to affect how the provisions of s. 75(1) are to be interpreted and it does not purport to do so. Paragraph 18 provides that the Schedule is *"without prejudice"* to s. 61 of the 1961 Act (and also to s. 62 of that Act which is not relevant for present purposes). Paragraph 18 notes that s. 61 of the 1961 Act provides for proof of claims for damages or contribution in respect of a *"wrong"*. It is, therefore, only relevant, if at all, for present purposes to the second limb of s. 75(1). It does not seem to me to have any relevance at all to the proper interpretation of the first limb. I do not agree, therefore, with the conclusions sought to be drawn by the Joint Liquidators at para. 60 of their written submissions.

(f) Analysis

167. Section 75(1) contains two limbs, the first limb provides that *"debts and liabilities, present or future, certain or contingent, by reason of any obligation incurred by the bankrupt…before the date of adjudication"* is provable in the bankruptcy. Under the second limb, *"claims in the nature of unliquidated damages for which the bankrupt…is liable* [at the date of adjudication] *by reason of a wrong within the meaning of the Civil Liability Act, 1961"* is also provable in the bankruptcy.

(i) First Limb of Section 75(1) of the 1988 Act

168. Questions 2(a), (b) and (d) require a consideration of the first limb. At the hearing, the Joint Liquidators correctly identified that the key issue arising under that limb is (a) whether the relevant obligation which must be incurred is, under the first limb, the obligation which arises under the insurance contract when the insured event giving rise to the debt or liability occurs, or (b) whether the relevant obligation is incurred at the time the insurance contract itself is entered into between the Company and the policyholder. The Joint Liquidators take the view that the obligation is incurred when the insured event occurs or takes place (such as the laying of the defective floor) and that in order to be admitted to proof in the winding up that insured event must have occurred before the relevant date (which, for reasons outlined earlier, in my view, is the date of the making of the winding up order). The FSCS's position is that the relevant obligation from which the Company's liability arises is incurred when the Company enters into the insurance contract with the policyholder at which point it is subject to a contingent liability to the policyholder. It is fair to say that that is the crux of the issue which arises in relation to the first limb of s. 75(1) and which requires to be decided in order to answer Questions 2(a), (b) and (d).

169. In their written submissions, the Joint Liquidators went somewhat further than they did, ultimately, at the hearing. At para. 61(a), they submitted that the term *"obligation incurred"* in the first limb should be interpreted narrowly such that only claims arising from insured events which have been *"reported"* before the relevant date are admissible. Later, at para. 64, they submitted that the better interpretation of the words *"obligation incurred"* is that they capture certain obligations the Company will have incurred to discharge contingent liabilities for certain claims before the relevant date *"including claims that have been reported and processed but not yet paid and claims that have been reported but not yet processed"*. The FSCS disputed that interpretation in its written submissions, and, in my view, it was correct in doing so.

170. I agree with the FSCS that the language used in the first limb of s. 75(1) does not allow for such a narrow interpretation to be given to the words used. There is nothing in the first limb which would require the court to distinguish between claims arising from events which have occurred before the relevant date which were <u>reported</u> to the Company (either before or after that date) and those which were not (provided, of course that whatever notification requirements under the relevant policy were complied with). The position adopted at the hearing by the Joint Liquidators was that the

Company has not incurred the obligation giving rise to a debt or liability under the first limb of s. 75(1) at the relevant date with respect to insured events which have not occurred by that date. The FSCS disagreed with that and contended that there is nothing in the first limb of s. 75(1) which would permit such a distinction between insured events which occur before the relevant date and those which occur after that date as the relevant obligation is incurred when the insurance contract was entered into with the Company.

171. Before determining that issue, I should state that I also disagree with the statement contained at para. 62 of the Joint Liquidators' submissions that the liability (or claim) can be contingent (such as an obligation or claim or liability under an insurance contract) and admissible to proof in a winding up only if the *"wrong"* which underpins the contingency (such as defective workmanship as in the laying of a defective floor) has occurred before the relevant date even if the damage arising from that *"wrong"* only becomes apparent after that date. It seems to me that that statement incorrectly merges the two limbs of s. 75(1). The two limbs must, in my view, be analysed separately and it is possible that proof of debt or claim could be admitted under the first limb but not under the second limb. For the purposes of the first limb, we are not concerned with the concept of liability for a *"wrong"*. That is something which arises under the second limb.

172. In support of their contention that the obligation is only incurred under the first limb to give rise to the relevant debt or liability, present or future, certain or contingent, when the insured event occurs before the relevant date the Joint Liquidators put forward a number of considerations in their written submissions which were then developed in argument by counsel at the hearing. The first consideration advanced by them was that a broad interpretation of the term *"obligation incurred"* so as to permit a claim to be made in respect of events occurring after the relevant date would be inconsistent with and would make redundant the reference to *"wrongs"* in the second limb of s.75(1). That point was, in my view, answered by the FSCS in their submissions. They made the point correctly that it would only be insured claims covered by a pre-existing obligation incurred by the Company (at the time the insurance contract was entered into) which would give rise to a claim which could be proved in the winding up. The reference to *"wrongs"* in the second limb of s. 75(1) would still apply to claims that do not arise from any contractual obligation incurred before the relevant date, such as claims in tort in respect of events that occur after the relevant date, provided of course, that the requirements of the second limb are met. In my view, the FSCS is correct.

173. The second consideration advanced was that the interpretation of the term *"obligation incurred"* to permit claims to be made under an insurance contract in respect of events that occurred after the relevant date would effectively allow the admission of all *"contingent claims"* without qualification and the reference to the law of bankruptcy in s. 620(1) in the 2014 Act would be otiose. The FSCS answered that point by stating that the reference to the law of bankruptcy in s. 620 is not only a reference to s. 75 but to other bankruptcy rules which could apply in an insolvent winding up. I do not accept that that necessarily answers the point made by the Joint Liquidators. Section 620 requires consideration of any relevant rule arising in the law of bankruptcy and s. 75(1) (both limbs) contains relevant rules. A coherent meaning has to be given to the term *"obligation incurred"*. In my view, as I explain below, the most coherent meaning that can be given to that term, is that the relevant obligation is incurred when the insurance contract was entered into. The Company was, at that stage, subject to a contingent liability in respect of the insured events under the contract. That may mean that the same result would arise under the first limb of s. 75(1) in the case of an insolvent company as would arise under s. 620(1) in the case of a solvent company but that is not necessarily the case and, if it is, it does not mean that the first limb of s. 75(1) should be interpreted or applied differently.

174. The third consideration put forward by the Joint Liquidators was that an insurance company does not bear an obligation unless the insured event has occurred, and some element of liability has been established. Again, the FSCS responded correctly to that submission by pointing out that an insurance company does bear an obligation under the contract before an insured event occurs and even if such an event has occurred. The obligation is to provide insurance cover to the insured if and when the insured event occurs, and the source of that obligation arises from the date the insurance contract is entered into. The obligation isa contingent obligation which arises under the insurance contract. In my view, the FSCS is correct in that submission.

175. The fourth consideration advanced by the Joint Liquidators (which was elaborated on at the hearing) was that if they were required to admit a claim under every policy, even where the insured event has not occurred as of the relevant date, and then to make a *"just estimate"* of the value of the claim or debt, the result would be that claims would be admitted which would never have been made if the Company had remained in operation and the event never occurred. The result would be that the insured would be able to recover in the liquidation or a claim that might never arise while no such claim could have been made while the company continued to trade. The FSCS's response was that the risk of being overcompensated or undercompensated (as the case may be) is something which is inherent in the exercise of valuing a contingent claim and is not an exact science. That is why s. 620(1) provides for the making of a *"just estimate"* in respect of contingent claims. I agree with that submission. The possibility of an anomaly such as that identified by the Joint Liquidators is something which is inherent in relation to contingent claims and liabilities and is something for which s. 620(1) makes express provision by requiring a "*just estimate*" be made of such claims and liabilities (including those which are future and contingent) and in respect of which a considerable discretion is afforded to the Joint Liquidators in making a *"just estimate"* of the value of such claims and liabilities.

176. The fifth consideration put forward by the Joint Liquidators was that if the position advanced by the FSCS were correct, it would mean that the Joint Liquidators could be liable to admit all claims for events that occur after the relevant date and that that would hinder the conduct and completion of the winding-up and expose the Company to open ended liability while in liquidation. The FSCS responded to that point by stating that there was no evidence before the court that the admission of such claims would create insuperable obstacles to the winding up of the company and that the application of the "hindsight" principle referred to in *MacFarlane's claim* means that there would not be open ended liability. While noting that in respect of some types of insurance policies (being those referred to in the Sixth Schedule of the 1909 Act), the "hindsight" principle applied in *MacFarlane's claim* does not apply, in my view, the principle in that case could be followed and applied by the Joint Liquidators when making a *"just estimate"* of the value of the claims or liabilities as of that date by reference to events which occur after that date, subject to the caveat adverted to by Jessel M.R. in *MacFarlane's claim* (namely, that prior dividends could not be disturbed and, ultimately, the completion of the winding up would render the distribution final).

177. The sixth consideration put forward by the Joint Liquidators was that if the FSCS position were correct it would result in the admissibility of contingent claims on the same basis as in a solvent liquidation under the 2014 Act (without applying the rules on bankruptcy) which would be contrary to the clear language of s. 620. That is essentially a repeat of the second consideration and can be answered in the same way. The fact that contingent claims and liabilities may, in the case of the liquidation of the Company be treated in the same way as if it were a solvent winding-up, even with the application of the rules of bankruptcy set out in s. 75(1) of the 1988 Act is not, in my view, a reason to interpret the first limb of s. 75(1) in the manner proposed by the Joint Liquidators.

178. The seventh point made by the Joint Liquidators was that any policy justification for admitting as an obligation incurred claims arising from events which had not occurred at the relevant date would be undermined by the fact that the Company's policyholders were advised of what was happening (in the Regulation 281 notice) and had the opportunity of obtaining replacement cover. The FSCS responded to that point by stating that the question raised for the directions of the court do not concern questions of policy but rather proper interpretation of s. 75(1) of the 1988 Act. I agree with that. The Joint Liquidators relied on *Law Car* in support of this point. That case was concerned with the statutory scheme provided under the 1909 Act in relation to the types of insurance policies covered by the legislation, namely, fire polices, accident policies, employer's liability policies and bonds or certificates where the value of the policy for the purposes of the winding up was in respect of some or all of those policies determined by reference to the last premium paid is proportionate to the unexpired portion of the period in respect of which the premium was paid. That solution was provided for on a statutory basis in respect of the policies covered by the 1909 Act and not otherwise. In the case of any of the policies issued the Company which are within the scope of the 1909 Act and the Sith Schedule to that Act, the method of valuing the claims in respect of those policies will be governed by those provisions.

179. The final point made by the Joint Liquidators was that several English decisions support the interpretation advanced by the Joint Liquidators that in order for an obligation to be incurred for the purpose of the first limb of s. 75(1), the insured event must have occurred before the relevant date under the legislation and rules applicable in England and Wales. Reliance was placed, in particular, by the Joint Liquidators on the case of *Re Nortel GmbH (In Administration)* [2014] A.C. 209 (*"Nortel"*). However, the FSCS contested that point and maintained that *Nortel* did not support it. In fact, both parties relied heavily on *Nortel* at the hearing. I have found the judgments in *Nortel* and, in particular, those of Lord Neuberger and Lord Sumption, to be the most helpful of the English authorities to which I was referred in relation to the issues raised under Questions 2 and 3. When correctly analysed, I believe that those judgments, in particular, provide support for the position advanced by the FSCS.

180. At the hearing, the Joint Liquidators somewhat refined their position on the proper interpretation of the first limb of s. 75(1) and did not contend that, in order to be admissible to proof in the winding up, a claim under an insurance contract in respect of an insured event which occurred before the relevant date had to be reported before that date. As I have already indicated, I could not see any basis for the requirement that the claim be reported (subject, of course, to compliance with whatever notification requirements existed under the relevant policy). The position of the Joint Liquidators at the hearing was that in order for the relevant obligation under the first limb of s. 75(1), which is the source of the liability referred to in that limb, to be incurred before the relevant date, the insured event must have occurred before that date thereby giving rise to the obligation from which the liability arises. Their position is that the Company did not incur any obligation at the time it entered into the insurance contract with the policyholder, and that the occurrence of an insured event triggers the liability (leaving aside notification requirements under the contract). The obligation would not be incurred for the purpose of the first limb of s. 75(1) unless the insured event occurred before the relevant date.

181. The FSCS's position at the hearing was also very clear. It maintained that the Company was subject to an obligation from the time it entered into the insurance contract and that its liability to the policyholder under the contract was, from the outset of the contract, a contingent liability.

182. In my view, the position of the FSCS is to be preferred as it correctly reflects the nature of an insurance company's obligation under an insurance contract as the cases discussed above demonstrate. It is also, in my view, supported by dicta in some of the English cases relied on by the parties, including *Nortel* and *In Re T&N Limited* [2006] 1 WLR 1728 (*"T&N")*. However, I have been very conscious, when considering the English cases, of the differences between the legislation there both in relation to insolvent companies generally and, particularly, in relation to insolvent insurance companies. There have been special rules applicable to the winding up of insurance companies since the 1909 Act which also applied to Ireland but which, as previously explained, was confined to certain types of insurance policies. Things have moved on in England and Wales since 1909. The legislative developments in that jurisdiction since 1909 were outlined by Hoffman J. in *Transit* and by Carnwath J. in *Re Continental Assurance Co. of London plc (In liquidation) (No. 3)* [1999] 1 BCLC 751 (*"Continental"*). The legislation there extended the valuation rules in the 1909 Act to other forms of non-life policies and special rules were made for the winding up of insurance companies, including the Insurance Companies (Winding Up) Rules 1985 which were discussed in *Transit* and *Continental* and the Insurers (Winding Up) Rules 2001 which were referred to in the Joint Liquidators' written submissions. Those rules provided for a distinct set of insolvency rules for insurance companies. Caution must, therefore, be exercised when considering the English cases.

183. I now consider some of those cases as they were the subject of some debate between the parties in the context of the proper interpretation and application of the first limb of s. 75(1) of the 1988 Act.

184. I start with *MacFarlane's Claim*. The case concerned s. 158 of the Companies Act 1862 (which was similar to s. 620(1) of the 2014 Act but without the reference to the application of the law of bankruptcy in the case of insolvent companies) and s. 31 of the Bankruptcy Act 1869 which contained a provision similar to the first limb of s. 75(1) but included a phrase which is not in s. 75(1) which I have underlined in the quote below. The relevant portion of s. 31 provided:

> *"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, <u>or to which he may become subject during the continuance of the bankruptcy</u> by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy…"* (emphasis added)

185. Notwithstanding that s. 158 did not itself include reference to the application of the rules of bankruptcy, it is clear from the judgment of Jessel M.R. that those rules did in fact apply to the issues arising in the winding up of the insurance company in that case. Jessel M.R. referred (at p. 339) to s. 10 of the Judicature Act 1875 the purpose of which, he stated, was:

> *"to make one law for proofs in bankruptcy and winding-up, when in either case the estate is insolvent, and that it was intended that all the rules in bankruptcy, whatever they were, should apply to a winding-up."*

186. The rules in bankruptcy did, therefore, apply to the winding up of the insurance undertaking in that case. The facts are quite relevant to the issues arising in the present case. The issue in the *MacFarlane's Claim* was whether an insured under a fire insurance policy issued by the insurance company which was the subject of winding-up order was entitled to prove in the winding-up for the full amount of the loss covered by the policy when the insured premises were burnt down in the course of the winding-

187. up but after the date of the winding-up order. The fire policy was taken out in May 1878. During the currency of the policy (as presumably renewed), a petition was presented for the winding up of the insurance company and a winding-up order was made in December 1879. In January 1880, after the winding up order was made and before the expiration of the time limited for sending in claims, the insured premises burnt down. The insured sustained loss to the full amount of the policy. He sought to submit a proof in the winding-up for the full amount of that loss. Jessel M.R. held that his claim should have been admitted. Referring to the provisions of s. 31 of the Bankruptcy Act 1869, he stated:

> *"... the proper meaning of the section appears to me to be this, that as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, the same law is to prevail in winding-up as in bankruptcy. The only question then is, what is the law in bankruptcy. I should think the law in bankruptcy as to contingent liabilities was pretty plain, and that any liability contingent at the date of the adjudication which ripens into a debt during the bankruptcy is provable, according to the provisions of the 31^{st} section of the Bankruptcy Act, 1869."* (at p. 340)

188. Jessel M.R. continued:

"… the plain words of the enactment, which is not confined to a debt due at the period of adjudication, but extends in express terms to any liability existing at the time of adjudication and which ripens into a debt during the bankruptcy. Now substitute winding-up for bankruptcy, which I suppose you must do, and take the case of a fire occurring after the winding-up order, which is to be considered as equivalent to the adjudication, a claim under the policy made before the close of the winding-up, whether the period for sending in claims has expired or not, would be provable; but of course this would not disturb previous dividends." (at pp. 340 – 341)

189. He held that if the case depended on the law of bankruptcy the insured was entitled to prove for the full amount of the damage caused by the fire. He also held that if the case depended on s. 158 of the Companies Act 1862, he would come to the same conclusion. His conclusion that an insured could claim in respect of any liability existing at the time of the winding-up, which liability ripened into a debt after the making of the winding-up order is significant, but it is not entirely clear whether he was influenced in that decision by the underlined words in s. 31 of the 1869 Act. It does not appear that he was, but some caution must be exercised in reading too much into this case. It is, however, relevant for its application of the "hindsight" principle in determining the value at the date of the winding up of a contingent claim by having regard, in ascertaining the value, to the fact that an insured event (such as the fire in that case) occurred after the winding-up order was made. In other words, the loss as a result of the post winding-up insured event (the fire) could be taken into account in valuing the claim as of the date of the winding-up. The value of the damage caused by the subsequent event (the fire) would be admissible in evidence in making an estimate of the value of the claim as of the date of the winding-up. This principle is more directly relevant to the valuation of the claims rather than their admissibility but, of course, the question of valuing the claim would not arise if the claim were not admissible in the first place. As already noted, this principle was reversed by legislation in respect of certain policies of insurance (which may or may not include policies of the type issued by the Company, such as the fire policies) by the 1909 Act (which continues to apply in Ireland) and by further subsequent legislation in England and Wales (which applies to a much more extensive range of policies).

190. The next case relied on by the FSCS was *Law Car*. That case was principally concerned with the effect of the 1909 Act on the valuation of claims made in the winding up of an insurance company under policies of insurance which were covered by the provisions of s. 17 and the Sixth Schedule of that Act. It is true, therefore, as submitted by the Joint Liquidators, that the case did not directly concern the admissibility of such claims as opposed to their valuation, but the three judgments delivered in the English Court of Appeal do contain some helpful *dicta* which is supportive of the position of the FSCS on the scope of the first limb of s. 75(1) of the 1988 Act. The issue, as stated by Cozens-Hardy M.R., was whether under an employers' liability policy, the policyholder could prove in respect of claims maturing after the date of the winding-up order. The policy was issued in 1908 and was renewed in 1910. It covered the insured up to July 1911. A winding-up order was made in respect of the insurance company was made on 20th December 1910, a number of days after the petition had been presented. A proof was submitted in the winding-up in respect of accidents which occurred in March 1911 (after the winding up order was made). The Master of the Rolls noted that, prior to the 1909 Act, and some earlier legislation specifically addressing the valuation of claims under employers' liability policies in the case of the winding up of an insurance company, the policyholder would have been entitled to submit a proof in the winding-up for the loss to the policyholder by reason of the repudiation of the contract at the date of the winding-up order.

191. In relation to such a claim, he stated:

"This must often be matter of speculation. But if during the currency of the policy an accident occurred which, if the contract of indemnity had not been repudiated, would have entitled the holder to £x, the Court treated that fact as evidence pro tanto of the value of the indemnity, and the holder could have proved for £x less a discount for the period between the winding-up order and the date of the accident. This would not have exhausted the right of proof, for there might be a necessity for speculation as to the value of the indemnity beyond £x. This was the principle of Sir George Jessel's decision in Macfarlane's Claim. (1) The claim could be made at any time during the continuance of the winding-up, but not so as to disturb prior dividends. That was a claim under a fire policy, to which also there was no special legislation applicable" (per Cozens-Hardy M.R. at pp. 116 - 117)

192. He then referred to the 1909 Act which, as already noted, provided for special rules for the valuation of claims in respect of certain policies, including employers' liability policies which he said reversed or negatived the principle in *MacFarlane's Claim* by providing for the repayment of the apportioned part of the premium paid for the period between the date of the winding-up order and the date in which the policy would otherwise have expired. A claim could only be submitted in respect of the apportioned part of the premium for that period.

193. Kennedy L.J. (the other judge in the majority) agreed. He held that, if the 1909 Act had not made this special and explicit provision, the policyholder might have been entitled to value his policy as best he could, estimating what, for the value of the policy during the unexpired period of his policy, was a fair figure to insert in his proof.

He said:

> *"In the case of such an estimate, there would be no inconsistency in allowing, as Sir George Jessel M.R. held to be right in Macfarlane's Claim (1), that, if before the proof was put in, a contingency covered by the terms of the policy occurred, the loss so ascertained might be taken into consideration in estimating the value of the policy. But the Legislature has, in my judgment, in plain terms, in this paragraph of Sched. VI. (D), chosen to prescribe an essentially different method of valuation—a method which certainly has the merit of simplicity."* (at p.133)

194. Kennedy L.J. found nothing unreasonable in the scheme set out in the 1909 Act which provided for a valuation on the basis of a partial return of premium. He said:

> *"The assured is paid the portion of the premiums which is proportionate to the unexpired portion of the policy, and so receives a sum with which, in respect of that unexpired portion, he can effect a policy with other insurers to cover the same contingencies as were covered by the policy of which he has lost the benefit;…"* (at p. 134)

195. I observe here that the FSCS accepts that a "*just estimate*" (under s. 620(1) of the 2014 Act) and applying *MacFarlane's Claim*, to claims made under policies issued by the Company (which are not included in the types of policies referred to in the Sixth Schedule to the 1909 Act) in respect of insured events occurring after the making of the winding-up order might, in fact, at a minimum equate to the premium which is proportionate to the unexpired portion of the policy (for the period between the date of the winding-up order and the date on which that policy would have expired were it not for that order). That may well be the case. I also agree with the submission made by the FSCS that the Joint Liquidators have a very wide discretion in determining the "*just estimate*" to be made in respect of such claims under s. 620(1).

196. At the end of his judgment, in summarising the effect of the 1909 Act, Kennedy L.J. noted that legislation (in the form of the 1909 Act) was needed:

> *"... as to the method of valuing the policy ... as a contract of indemnity in respect of contingencies, that is to say, the risk of fresh liabilities emerging after the date of the winding-up, and during the unexpired period of the policy. For this valuation also the Sixth Schedule has provided in (D). It has directed the valuation to take place, as at the date of the winding-up order, not on the basis of an estimate of such contingencies, but upon the basis of a partial return of premium"* (at p.136)

197. These dicta of Kennedy L.J. do support the position adopted by the FSCS in terms of the entitlement to prove in the winding up of an insurance company under an insurance contract of indemnity in respect of the risk of fresh liabilities emerging after the date of the winding-up and during the period of the policy up to the date in which it would have expired were it not for the winding-up order.

198. Similar support may be found in the judgment of Buckley L.J. (albeit that he was in the minority on the ultimate outcome of the appeal). He considered the position under s. 158 of the Companies Act 1862 (which did not expressly provide for the application of the law of bankruptcy in the case of insolvent companies but said law was applicable to those companies by reason of s. 10 of the Judicature Act 1875 as explained by Jessel M.R. in *MacFarlane's Claim*). Buckley L.J., having referred to the provisions of s. 158 which rendered admissible to proof debts payable on a contingency and claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, observed that *"[a]ny liability falling within the words of the section which was not a debt at the winding-up was by that section admissible to proof, and the proof was to be of 'the value' of the debt or claim, to be estimated if it was subject to a contingency or did not bear a certain value"*. (at p. 121). He referred to *Craig's Executor's Estate Case* L.R. 9 Eq. 706 and *MacFarlane's Claim* (both of which were to the same effect). He then stated the principle as follows:

> *"For the purpose of proof under s. 158…, there is to be ascertained the value at the winding up of the contingent claim. In ascertaining what that value was at the winding-up the subsequent fact that there was a fire may be taken into account. The proof is not for the amount insured by the policy as a debt, but is a proof for the estimated value of the claim at the winding-up, and upon the question of that value a subsequent fire is admissible evidence."* (at pp. 122 – 123)

While Buckley L.J. differed from the majority on the impact of the 1909 Act on the valuation of such claims he did not do so on their admissibility.

199. I agree with the FSCS that *Law Car* is not authority in support of a return of premium approach (although that could be the value of the claim arrived at on the basis of a "*just estimate*") as that case was concerned with one of the policies for which the legislature had intervened in the form of the 1909 Act. The default approach in relation to admission to proof of contingent claims, without such statutory intervention is, in my view, that adopted in *MacFarlane's Claim*, as the FSCS contended.

200. *MacFarlane's Claim* and *Law Car* were considered and explained by Hoffman J. in *Transit*, another case on which both the Joint Liquidators and the FSCS relied. The judgment is useful in tracing the history of how proof in respect of contingent debts and liabilities was dealt with in the case law and in legislation in that jurisdiction. It is, however, important to stress that this case was concerned with the construction of the provisions of rules for which there is no counterpart in this jurisdiction, namely, the Insurance Companies (Winding Up) Rules 1985 (the "1985 Rules") which provided for principles for valuing insurance policies in the case of a winding-up and applied those principles to a much more extensive range of policies ("general business policies") than those provided for in the 1909 Act. The judgment is primarily concerned with valuing the liabilities of a number of insolvent insurance companies which had issued "long-tail" policies where the liability of the insurer depended on a specified event having taken place during the currency of the policy but where the existence and extent of the liability might not be ascertained until long after the policy had expired (such as claims for asbestosis).

201. In his judgment, Hoffman J. explained *MacFarlane's Claim* and *Law Car*. He explained that in *MacFarlane's Claim*, the holder of a fire insurance policy issued by a company before it was wound-up, could prove for the loss suffered in a fire which occurred after the date of the winding-up order. He noted that, as explained in *Law Car*, that did not mean that the company continued to be liable under the policy after the winding-up as the winding-up order terminated the policy. Hoffman J. observed:

> *"…the subsequent loss was treated as evidence of the value of the contingent claim at the date of the winding up. There was no limit to the period during which hindsight could be used to adjust the value of contingent claims except that prior dividends could not be disturbed and ultimately the completion of the winding up would render the distribution final."* (at p. 359)

202. Hoffman J. then referred to the special rules which were introduced for the valuation of claims under insurance policies including those contained in the 1909 Act and explained how those rules impacted on the valuation of the policies in *Law Car*. In commenting on the issues raised in that case, Hoffman J. noted that there was no doubt that, under the general law and in accordance with the principle in *MacFarlane's Claim*, the policyholder would have been entitled to rely on liabilities created by accidents occurring after the winding-up order as evidence of the value of its contingent claim under the policy. He noted that the majority of the Court of Appeal decided that *MacFarlane's Claim* no longer applied because of s. 17 and the Sixth Schedule of the 1909 Act.

203. Much of the judgment in *Transit* is concerned with the valuation of the policies at issue under the 1985 Rules and in particular under paras. 2(2)(a) (which provided for a return of premium in certain circumstances) and 2(2)(b) (which provided for a "*just estimate*" to be made) of the First Schedule to those Rules. Hoffman J. answered the questions arising in the case by reference to those provisions, noting that under the *Law Car* principle, para. 2(2)(a) excluded the valuation of contingent liabilities arising out of events subsequent to the winding up (as that approach had been reversed by the Rules and by earlier legislation). However, *"contingent liabilities arising out of pre-liquidation events, whether in respect of current or expired policies"* fell to be dealt with on the "*just estimate*" basis in para. 2(2)(b) (again, because that is what the Rules provided).

204. The Joint Liquidators accepted at the hearing that the contingency could occur subsequent to the winding-up order and thereby mature into the liability but maintained that the original obligation had to be sourced at a time prior to the winding-up order. As I have previously explained, I prefer the position adopted by the FSCS on this point. In my view, the original obligation is contained in the insurance contract itself. That conclusion is more consistent with the contingent nature of an insurance contract and also with the principle contained in the authorities discussed above (taking due account of the cases which turned on specific legislative provisions which are not applicable in Ireland, such as *Transit*). Some further support is provided for the position adopted by the FSCS in *T&N*. Although this case is more relevant to a consideration of the second limb in s. 75(1) as it concerned claims for damages in tort, David Richards J. does refer, in passing, to how liability in contract is dealt with under rule 13.12 of the Insolvency Rules 1986 (the "1986 Rules") (which are addressed in detail in the next case to which I will refer). Rule 13.12(1)(b) which was concerned with *"any debt or liability to which the company may become subject after that date* [i.e., the date on which the company goes into liquidation] *by reason of any obligation incurred before that date"*. David Richards J. held that there was no difficulty in applying that provision to a liability arising by reason of a contract made before the date of the winding up. He said:

> *"The Company thereby incurs an obligation to perform its terms…"*.

He held that any claim under the contract which does not come within rule 13.12(1)(a) which applies to *"any debt or liability to which the company is subject at the date on which it goes into liquidation"* will fall under rule 13.12(1)(b) with the same being true of a statutory obligation incurred before the liquidation date (see the discussion at para. 119, p. 1769).

205. The case which I have found to be of most assistance is *Nortel*, a decision of the United Kingdom Supreme Court. The Joint Liquidators and the FSCS both relied on portions of the judgments of a number of the judges in that case. *Nortel* concerned the admissibility to proof and the status in the winding up of a company of the liability of that company pursuant to a financial support direction issued by the Pensions Regulator in the UK after the company went into administration. The UK Supreme Court had to consider whether that liability was one which fell under rule 13.12(1)(b) of the 1986

Rules (UK) as being one which arose *"by reason of* any *obligation incurred before"* an insolvency event, such as going into administration.

206. Under the financial support direction regime under the Pensions Act 2004 (the "2004 Act"), the Pensions Regulator had the power to require companies in a group of companies which were insolvent and placed in administration to provide reasonable financial support for an underfunded or insufficiently resourced occupational pension scheme managed by a service company within the group. Those other companies were referred to as the "target companies". The Pensions Regulator issued warning notices to the target companies concerning two groups of companies which had collapsed stating that he intended to issue financial support directions under the 2004 Act requiring them to provide financial support for the pension schemes managed by the service companies which were in deficit. In the event of non-compliance with the directions, the Regulator had the power to issue a contribution notice requiring a target company to pay a specified amount to the trustees of the pension scheme. The target companies which received the warning notices were at the time in administration.

207. The question, therefore, arose as to whether liability under a financial support direction and a contribution notice was a provable debt, an expense of the administration or neither. If it was an expense of the administration, it would, under the 1986 Rules, rank ahead of unsecured creditors. If the liability was merely a provable debt on the basis that it was a *"liability to which the* [target] *company may become subject after* [the] *date* [on which the company went into administration] *by reason of any obligation incurred before that date"* within rule 13.12(1)(b), it would rank *pari passu* with other unsecured creditors.

208. The UK Supreme Court ultimately held that the liability of a target company pursuant to a financial support direction issued before or after it went into administration ranked as a provable debt of the company and not as an expense of the administration because it was a "*liability under an enactment*" under rule 13.12(4) and, therefore, a liability for the purposes of rule 13.12(1)(b) that arose *"by reason of any obligation incurred before"* an insolvency event (going into administration).

209. The detail is perhaps not so relevant but what is relevant is the interpretation and analysis provided by a number of the judges in respect of the provisions of rule 13.12(1)(b) and the subsequent consideration given to the case by Costello J. in *Re. O'Rourke (A Discharged Bankrupt)* [2018] IEHC 176; [2019] 2 I.R. 287 ("*O'Rourke*"), to which I will return shortly. What constituted a provable debt was governed by rule 12.3, the relevant part of which provided that *"in both winding up and bankruptcy, all claims by creditors are provable as debts against the Company…whether they are present or future, certain or contingent, ascertained or sounding only in damages…"* (somewhat similar but not identical to s. 620(1) of the 2014 Act). The meaning of "*debt*" in that context was dealt with in rule 13.12:

> *"(1) 'Debt' in relation to the winding up of a company means… any of the following –*
>
> *(a) any debt or liability to which the company is subject at the date in which the Company went into liquidation;*
>
> *(b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date;…"*

210. Rule 13.12(4) provided that *"liability"* included *"any liability under an enactment"*. The issue, therefore, which arose was whether, where a financial support direction was issued after the target company went into administration or liquidation, any potential liability created thereby was a "*debt*" within rule 13.12(1).

211. The UK Supreme Court held that the potential liability fell within subparagraph (b), not subparagraph (a), of rule 13.12 and that it did not amount to an expense in the administration. Lord Neuberger P. (with whom Lords Mance, Clarke and Toulson agreed) held that there was no doubt that the liability imposed on a target company on the issuing of a financial support direction after the commencement of its administration or liquidation was a liability for the purposes of rule 13.12(1)(b) as it was a *"liability under an enactment"* under rule 13.12(4). The question was whether it could be said to be a liability which arose *"by reason of any obligation incurred before"* the insolvency event (para. 72, p. 238). He stated that in order for the liability in issue to fall within that provision, the fact that the target company was a member of the relevant group of companies had to amount to a sufficient *"obligation incurred"* within the meaning of the rule, before the target went into administration (para. 73, p. 238).

212. Timing did not pose any problem in the *Nortel* case as each of the target companies were members of a group which fell within the scope of the regime well before they went into administration. The issue, therefore, turned on the meaning of "*obligation*" in rule 13.12(1)(b). Lord Neuberger noted that the meaning of that word would depend on its context and could have a number of meanings or nuances but could not, in the context at issue, have the same meaning as "*liability*". The *"obligation"* in the context of rule 13.12 *"must imply a more inchoate, or imprecise, meaning than 'liability', as the liability is what can be proved for, whereas the obligation is the anterior source of that liability"* (para. 74, p. 238).

213. I agree with the Joint Liquidators that that is the appropriate way to treat the terms *"liabilities"* and *"obligation"* in the first limb of s. 75(1) of the 1988 Act. Therefore, the *"obligation"* in the first limb is the anterior source of the liability (including the contingent liability) for which proof can be submitted in the winding up.

214. Crucially, Lord Neuberger went on to consider what the position would be in the case of a contract where liability arises after the insolvency event, whether it be the administration or liquidation. He said:

> *"Where a liability arises after the insolvency event as a result of a contract entered into by a company, there is no real problem. The contract, in so far as it imposes any actual or contingent liabilities on the company, can fairly be said to impose the incurred obligation. Accordingly, in such a case the question whether the liability falls within paragraph (b)* [of rule 13.12(1)] *will depend on whether the contract was entered into before or after the insolvency event."* (para. 75, p. 238)

215. The FSCS placed much reliance on this passage and on a number of passages in the judgment of Lord Sumption. The Joint Liquidators, on the other hand, sought to qualify what Lord Neuberger was saying in that passage. At the hearing, they contended that when Lord Neuberger was referring to liability arising "*after the insolvency event as a result of a contract entered into by a company*", he was talking about a contract which contains some form of direct liability, such as where a person contracted to pay a sum of money to another person at a certain date. They contended that Lord Neuberger was not, in that passage, referring to an insurance contract which, they submitted, did not impose a contingent liability which would only give rise to an actual liability when the insured event occurred (such as the laying of the defective floor). I do not agree. In my view, having regard to the contingent nature of the obligation on an insurer under an insurance contract (as discussed earlier), the observations of Lord Neuberger would apply to insurance contracts to which the Company was a party at the date of the winding up where the insured event occurred after that date. The relevant liability would arise by reason of an *"obligation incurred"* by the Company when it entered into the insurance contract with the insured. To that extent, therefore, I accept that this passage in the judgment of Lord Neuberger does provide strong support for the position adopted by the FSCS on this issue which I believe is correct.

216. Lord Neuberger then went on to consider the position where the liability arises after the insolvency event other than under a contract. He described that as being *"not necessarily so straightforward"* when compared with the case of a contract. He noted that there could be no doubt but that an arrangement other than a contractual one could give rise to an *"obligation"* for the purposes of rule 13.12(1)(b) (para. 76, p. 238). However, he stated that the mere fact that a company could become under a liability under a statutory provision which was in force before the insolvency event could not mean that, where the liability arises after the insolvency event, it falls within that subrule (13.12(1)(b)). While stating that it could be *"dangerous"* to suggest a *"universally applicable formula"* in the case of statutory and other liabilities and obligations, he nonetheless went on to suggest that:

> *"... at least normally, in order for a company to have incurred a relevant 'obligation' under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b).* (para. 77, pp. 238 – 239)

217. The Joint Liquidators contended that an equivalent test should be adopted in this case to determine whether or not claims under insurance contracts in respect of insured events which occur after the winding-up order should be admitted to proof in the winding-up under the first limb of s.75(1). They argued that the criteria set out by Lord Neuberger at paragraph 77 of his judgment are not fulfilled here in respect of such claims, primarily on the basis that, at the relevant date (whether it be the date of the making of the winding-up order or the date on which the winding-up is deemed to have commenced), the Company was not *"vulnerable"* to the specific liability in question and there was not *"a real prospect of that liability being incurred"* as of that date in respect of insured events that occurred after the date. Nor, they argued, would it be consistent with the regime applicable in the case of an insolvent winding-up to conclude that a claim in respect of such subsequent events should be allowed to be made. The FSCS disputed the application of this test on the basis that it was described by Lord Neuberger as applying in a non-contractual situation. I agree with the FSCS. In my view, the test is not relevant or applicable in the case of claims made under an insurance contract which terminates on the date of the winding up order in respect of insured events that occur after that date. The admissibility of such claims should be determined by reference to the test identified by Lord Neuberger as applying in the case of a contract (at para. 75 of his judgment).

218. If anything, Lord Sumption with whom Lords Mance and Clarke also agreed, was even more definitive in the case of claims made under contract. In his view, the term "*obligation incurred*" in rule 13.12(1)(b) meant a *"legal rule applying before the date when the company goes into liquidation which may, contingently on some future event, give rise to a 'debt or liability' arising after that date"* (para. 130, p. 249).

219. He continued:

> *"But it cannot extend to every legal rule which may on any contingency have that effect. Otherwise every debt or liability would be provable irrespective of the date when it accrued, unless the law changed after the company went into liquidation."* (para. 130, p. 249)

220. Lord Sumption went on to consider the position where liability was said to arise under a contract. He said:

> *"The paradigm case of an 'obligation' within the sub-paragraph is a contract which was already in existence before the company went into liquidation. It is implicit in the argument of those who contend on this appeal that there is no provable debt, in this case that contract is not just the paradigm case but the only one. Yet when one asks what it is about a contract that qualifies it as a relevant source of obligation, the answer must be that <u>where a subsisting contract gives rise to a contingent debt or liability, a legal relationship between the company and the creditor exists from the moment that the contract is made and before the contingency occurs</u>."* (para. 131, p. 920) (emphasis added)

221. He referred in that context to the judgment of Lord Reid in *Winter v. IRC* [1963] A.C. 235 at pp. 247 – 248. He observed that a contract was not the only legal basis on which a contingent obligation of the type required could arise and that a statute could also give rise to one. That was the basis on which the contingent obligation giving rise to the liability arose in that case for which proof could be admitted in the administration.

222. The judgment of Lord Sumption is also supportive of the position adopted by the FSCS in relation to the first limb and I agree that it correctly describes the position in relation to the insurance contracts at issue in this case. I have no hesitation, therefore, in applying the reasoning to be found in the judgment of Lord Neuberger and Sumption in answering the question raised by the Joint Liquidators. That reasoning is consistent with the conclusion I had reached on the issues underpinning those questions.

223. The final case I want to refer to in this context is *O'Rourke*. The judgment of Costello J. in the High Court in that case was relied on by the Joint Liquidators and by the FSCS. It was relied on by the Joint Liquidators on the basis that Costello J. approved and applied the test set out by Lord Neuberger in the case of a claim where the anterior source of the liability was an obligation arising under a statutory regime (i.e., the test set out at para. 77 of his judgment). Costello J. also cited with approval passages from the judgment of Lord Sumption.

224. *O'Rourke* was a case in which the court had to consider the first limb of s. 75(1) and whether a debt or liability could be proved in the bankruptcy as arising by reason of an *"obligation incurred"* by a bankrupt before the date of adjudication in the context of tax avoidance measures under the Taxes Consolidation Act 1997 (the "TCA"). The issue turned on whether the bankrupt incurred an obligation before the date of adjudication and the event by which that obligation was incurred. Costello J. referred to *Nortel* and described rule 13.12 of the 1986 Rules considered in that case as being in *"similar terms"* to s. 75 of the 1988 Act (para. 11). There are obviously differences between the two provisions, but those differences were not relevant in *O'Rourke* and are not relevant to my consideration of that case. As I noted, Costello J. approved the test of Lord Neuberger and also the judgment of Lord Sumption. She held that the relevant obligation was incurred by the bankrupt before the date of adjudication even though his liability to pay the relevant surcharge under legislation arose after that date. The bankrupt had been involved in a scheme and had made tax returns on the basis of that scheme. Costello J. observed that it was open to the Revenue Commissioners to carry out an investigation as to whether the relevant transaction was, in their opinion, a tax avoidance transaction under the legislation. The court noted that if they never conducted an investigation under s. 811, there would be no further liability on the taxpayer to pay tax. Costello J. described the critical step as being the commencement of the investigation pursuant to s. 811 of the TCA. She said:

> *"Once such an investigation is commenced, a contingent outcome is that the Revenue Commissioners may form the opinion that the transaction is a tax avoidance transaction and they may determine that certain tax consequences arise in respect of the transaction if their opinion becomes final and conclusive."* (para. 19, p. 295)

225. Costello J. found that once an investigation was commenced, the Revenue Commissioners and the taxpayer were in *"a relationship the outcome of which* [was] *contingent on certain matters occurring"*, one of those being that the relevant opinion might be formed by the nominated officer under the legislation (para. 22, p. 296). She applied Lord Neuberger's test in respect of potential or contingent liability under a statutory scheme and held that sufficient relevant events had occurred before the taxpayer's adjudication as bankrupt. The actions of the taxpayer and those of the Revenue Commissioners left the taxpayer vulnerable to a liability to tax under the legislation and to a surcharge on that tax. There was a "*real prospect*" of such liability being incurred. On that basis, the first two elements of Lord Neuberger's test were satisfied. Importantly, Costello J. stated,

> *"The liability to pay the surcharge pursuant to s. 811A arose after the date of adjudication of the taxpayer but the liability to pay it arose by reason of an obligation incurred before that date. <u>The fact that it is a contingent liability and the contingency in question is remote or might never eventuate does not alter</u>*

the fact that it is a liability that is provable in the bankruptcy." (para. 24, pp. 296-297) (emphasis added)

226. The FSCS relied on this passage in support of its position on the application of the first limb of s. 75(1) of the 1988 Act. I agree that it is consistent with that position. While *O'Rourke* concerned liability arising under a statutory regime, the description as to the nature of the required contingent liability and the fact that the contingency in question could be remote or might never eventuate is, in my view, equally applicable to the case of an insurance contract which is terminated at the date of the winding-up order and where the insured event occurs after that date but before the original expiry date of the policy. Finally, I should note that Costello J. also held that it would be consistent with the regime under the TCA to admit the relevant liabilities to pay tax and surcharge under ss. 811 and 811A of the TCA to proof in the bankruptcy as pre-adjudication liabilities by reason of obligations incurred by the bankrupt before the date of adjudication for the purpose of s. 75 (first limb) (para. 27, p. 297).

227. In conclusion, I am satisfied on the basis (a) the contingent nature of the obligation of insurance company under an insurance contract in respect of the events for which insurance cover is agreed to be provided, and (b) the case law just discussed (and, in particular, *Nortel* and *O'Rourke*) that the position adopted by the FSCS in relation to the admissibility to proof of claims arising under insurance contracts to which the company was a party and which were terminated or otherwise discharged at the date of the winding-up order in respect of insured events that occurred after that date but within the original term of the relevant policy should be admitted to proof in the liquidation.

228. While I am not asked to give directions in relation to the valuation of those claims, the position would appear to be that, insofar as the relevant insurance contracts or policies issued by the Company do not fall within s. 17 and the Sixth Schedule to the 1909 Act, the "hindsight" principle described in *MacFarlane's Claim* and discussed in a number of the subsequent cases including *Law Car* and *Transit* should be applied by the Joint Liquidators in making a *"just estimate"* of those claims under s. 620(1) of the 2014 Act. The FSCS correctly acknowledged that the Joint Liquidators would have a wide discretion in carrying out that exercise in respect of such claims and that it may be that the value of those claims would (at minimum) equate to the partial return of premiums paid in respect of the unexpired portion of the policy.

(ii) Second Limb of Section 75(1) of 1988 Act

229. Questions 2(a), (c) and (d) require consideration of the second limb of s. 75(1). The terms of that provision were set out in full at para. 82 above. The second limb provides an additional basis for admitting to proof in a bankruptcy or winding-up of an insolvent company. While the first limb provides for proof to be admitted in respect of certain "*debts*" and "*liabilities*" (discussed above), the second limb allows for certain "*claims*" to be proved. Those claims are *"claims in the nature of unliquidated damages for which the bankrupt or arranging debtor is liable at that date* [i.e., the date of adjudication] *by reason of a wrong within the meaning of the Civil Liability Act, 1961"*.

230. Much of the dispute between the Joint Liquidators and the FSCS in relation to the interpretation and potential application of the second limb of s. 75(1) to claims made under insurance contracts to which the Company was a party turns on the meaning of the words *"wrong"* and *"is liable"*. Section 75(1) expressly states that the *"wrong"* which must be considered is a *"wrong within the meaning of the Civil Liability Act, 1961"*. As noted earlier, the word *"wrong"* is defined in s. 2(1) of the 1961 Act as meaning *"a tort, breach of contract or breach of trust"*. The definition goes on to state that an act is a *"wrong"* within the meaning of the definition *"whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he* *is responsible…”*. Those further words are, in my view, particularly relevant in determining whether the second limb of s. 75(1) can be applied at all in the case of claims made under insurance contracts issued by the Company. Section 75(1) does not actually refer to s. 61 of the 1961 Act. Section 76 refers to the provisions of the First Schedule to the 1988 Act and states that those provisions apply in relation to the proof of debts. Paragraph 18 of the First Schedule states that *“[t]his Schedule is without prejudice to section 61 of the Civil Liability Act, 1961 (which provides for proof of claims for damages or contribution in respect of a wrong) …”*.

231. In attempting to understand how the provisions of s. 61 of the 1961 Act may interact with s. 75 of the 1988 Act, two points are relevant: The first is that, as already noted, s. 75(1) does not, in fact, refer to s. 61 of the 1961 Act. The reference to that section is found in para. 18 of the First Schedule which applies by virtue of s. 76. The second point of relevance is that para. 18 of the First <u>Schedule</u> provide that the <u>Schedule</u> is *“without prejudice”* to s. 61 of the 1961 Act. Neither s. 75 nor s. 76 nor the Schedule itself provide that <u>s. 75(1)</u> is without prejudice to s. 61 of the 1961 Act. This is particularly relevant when it comes to considering how s. 75(1) of the 1988 Act and s. 61 of the 1961 Act should be interpreted.

232. A further complicating factor is that s. 61(1) of the 1961 Act starts with the words *“[n]otwithstanding any other enactment or rule of law”* and continues by stating that *“a claim for damages or contribution in respect of a wrong shall be provable in bankruptcy where the wrong out of which the liability to damages or the right to contribution arose was committed before the time of the bankruptcy”*. Two points can be made at this stage in relation to that provision: The first is that the words *“notwithstanding any other enactment or any rule of law”* are important and an issue arises as to whether, assuming s. 61 of the 1961 Act is relevant at all when it comes to interpreting the second limb of s. 75(1), those words have the effect of overriding or disapplying the provisions of s. 75(1) of the 1988 Act. The second is that it will be immediately obvious that while s. 61(1) requires the *"wrong"* from which the liability to damages arises to have been committed before the time of the bankruptcy in order to permit a claim for damages in respect of that wrong to be proved in the bankruptcy, the second limb of s. 75(1) requires that the bankrupt must be *"liable"* at the date of adjudication by reason of a "*wrong*" within the meaning of the 1961 Act. An issue, therefore, arises as to whether, assuming s. 61 of the 1961 Act is relevant at all, something more is required under the second limb of s. 75(1) before a claim for unliquidated damages could be admitted to proof in the bankruptcy than the happening or commission of a wrong. In other words, what do the words *"is liable"* in the second limb of s. 75(1) mean? A further issue arises as to who must commit the "*wrong*" in order to fall within the second limb of s. 75(1)? Can a claim for unliquidated damages be admitted to proof under this limb of s. 75 where the claim is made under an insurance contract issued by the Company in respect of a wrong committed not by the Company but by the person whose wrongs are insured under the insurance contract. Those are the issues which I consider in this part of the judgment.

233. The position of the Joint Liquidators on the interpretation and application of the second limb of s. 75(1) may be summarised as follows: They accept that there are two possible interpretations of the second limb. The first is that it requires that all elements of liability be established at the date of the commencement of the winding-up, in the sense there must be at that date be a complete cause of action (such as in the case of the tort of negligence) which would require that a breach of the relevant duty of care as well as loss being sustained by the party to whom the duty was owed, occurred by or at that date. The alternative interpretation is that all that is required by the second limb of s.

75(1) is that it is only the *"wrong"* that gave rise to the liability which must have been committed or happened before the relevant date. While accepting that both interpretations could be advanced, the Joint Liquidators contend that the better interpretation is the latter one. Their view is that s. 75(1) has to be read in light of and subject to s. 61(1) of the 1961 Act. They rely in support of that contention on para. 18 of the First Schedule to the 1988 Act.

234. The Joint Liquidators accepted at the hearing that the use of the words *"is liable"* in the second limb of s. 75(1) constitutes a bit of a *"wrinkle"*, in that it is ambiguous and not easy to construe. However, they contended at the hearing that their interpretation is the preferable one and relied particularly on the terms of s. 61(1) in that respect. They maintained that where a claim is sought to be admitted to proof in the liquidation of an insurance company and where that claim is based on a *"wrong"* for which the insurance company provided an indemnity under the insurance contract, the requirement that the insolvent insurance company must be *"liable"* as of the date of the winding-up by reason of the *"wrong"* means only that it must be susceptible to the claim (in the sense of having a responsibility for the claim) rather than being liable (in the sense of all elements of the cause of action being complete by that date). All that is required, in their submission, is that the *"wrong"* had to have been committed or happened by that date even if other element necessary to establish legal liability (such as loss being sustained) may have occurred after the relevant date. They maintain that the reference in s. 75(1) to the *"wrong"* within the meaning of the 1961 Act requires one to consider s. 61 of that Act (notwithstanding that s. 61 is not itself referred to in s. 75(1) and is only referred to in para. 18 of the First Schedule as outlined earlier). They then rely on s. 61(1) as requiring simply that the wrong *"out of which the liability to damages... arose"* be committed before the time of the bankruptcy or winding-up. They further pointed to the differences between the relevant Irish provisions and those which were at issue in the *T&N* case, to which both parties referred in their submissions.

235. As regards the applicability of the second limb of s. 75(1) to claims made under an insurance contract against an insolvent insurance company in respect of acts which are wrongs for which an indemnity was provided under the insurance contract, the Joint Liquidators' position is that such claims are covered not on the basis that the *"wrong"* is that of the insolvent insurance company in not paying the claim under the contract but on the basis that the insurance company is liable to indemnify the policyholder in respect of the relevant *"wrong"* (such as the negligent laying of the defective floor in the example previously given). They say that the *"wrong"* does not have to be one committed by the bankrupt or insolvent company and that the second limb of s. 75(1) can apply on the basis that the insolvent insurance company contracted to provide an indemnity or cover in respect of the *"wrong"* committed by someone else under the policy.

236. The position of the FSCS can be briefly summarised as follows. It maintains that claims sought to be proved in the winding up of the Company under contracts or policies of insurance fall to be considered under the first limb of s. 75(1) and not under the second limb. They maintain that it is only necessary, therefore, to consider the first limb and see real difficulties in applying the provisions of the second limb in the case of claims made in the course of the winding up of an insurance company. It maintains that in the case of an insolvent insurance company, the company is not liable for the *"wrong"* of policyholders or of those whose acts are covered under the policies issued by the insurance company. The insurance company may be obliged to provide an indemnity under the relevant contract where it is agreed that if certain events arise (and policy conditions are met), the insurance company would pay out. The obligation on the insurance company to do so arises on foot of the insurance contract and not on the basis of any liability on the part of the insurance company for a "*wrong*" committed by someone else which happens to be covered under the policy. For those reasons, the FSCS contends that the second limb of s. 75(1) does not apply.

237. In the event, however, that it is necessary to consider the second limb, the FSCS contends that it is not sufficient merely for the *"wrong"* to have occurred or been committed by or at the date of the winding up since the second limb of s. 75(1) requires that the bankrupt or insolvent company be *"liable"* at that date by reason of a *"wrong"*. The words *"is liable"* are used in the present tense. The FSCS maintains that it is not possible to interpret those words as meaning something inchoate or as involving something less than a liability for the wrong. Therefore, its position is that the essential elements of the cause of action must be complete such that the bankrupt or insolvent company is liable at the relevant date in order for a claim for unliquidated damages to be admitted to proof under the second limb.

238. I share the doubts of the FSCS that the second limb of s. 75(1) is intended to apply to the proof of claims in the winding up of an insolvent insurance company arising out of policies issued by that company. Such claims, in my view, much more comfortably sit within the first limb on the basis that they amount to claims in respect of liabilities (including contingent liabilities) arising by reason of an "*obligation incurred"* by the insolvent insurance company before the relevant date. This, as previously explained, is likely, in the case of the insolvent insurance company, to be the date of the making of the winding-up order as that is the date of the commencement or opening of winding-up proceedings in respect of an insolvent insurance company under the Solvency II Regime. The second limb provides an additional or alternative basis for submitting a claim in the winding up of an insurance company. I must, therefore, consider whether the sort of claims with which we are concerned in this case could fall within the second limb of s. 75(1) and, if so, what must be established in order for those claims to be admitted to proof under that limb.

239. In seeking properly to interpret the second limb of s. 75(1), I must first focus on the words used in that provision before considering whether some other statutory provision may affect that interpretation. The second limb of s. 75(1) expressly requires the relevant claim to be one for damages for which the bankrupt or insolvent company *"is liable"* at the relevant date by reason of a "*wrong"* (the *"wrong"* being a *"wrong"* within the meaning of the 1961 Act). The *"wrong"* is the anterior source of the liability under the second limb. The "*wrong*" and the liability are, however, two separate things. Without the *"wrong"* the bankrupt or insolvent company will not be "*liable"* for a claim for unliquidated damages. However, if there is a "*wrong"* that does not in itself mean that the bankrupt or insolvent company is liable in damages in respect of that *"wrong"*.

240. In interpreting s. 75(1) and, in particular, the second limb of that provision, I adopt the principles of statutory interpretation discussed recently by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43; [2022] 2 ILRM 313 (*"Heather Hill"*), and *A, B and C v. Minister for Foreign Affairs* [2023] IESC 10; [2023] 1 ILRM 335 (*"A, B and C"*). It is unnecessary to set out those principles here, but it is sufficient to state that the starting point in construing a statutory provision is the language used in the provision and that the *"plain and ordinary meaning of the language"* used is the *"predominant factor in identifying the effect of the provision"* (*A. B. and C.* per Murray J. at para. 73, p. 359). It is, of course, also necessary to consider other factors, including other words used in the relevant section and in the statute, as well as the legal context in which the statute was enacted, and the objective of the statute.

241. Applying these principles, I am satisfied that the Oireachtas must have intended that some meaning be given to the word *"liable"* and, in particular, to the requirement that the claim be one for which the bankrupt or insolvent company *"is liable"* at the relevant date *"by reason of a wrong..."*. Some more than the occurrence or commission of a *"wrong"* would appear, therefore, to be required by the relevant date. In order for such liability to arise, the necessary elements of a cause of action in respect of the relevant cause of action (whether it be tort, a breach of contract or a breach of trust) must be complete. I do not see any reason why the word *"liable"* should be ignored or given a diluted or special meaning other than its plain and ordinary meaning.

242. As already noted, s. 75(1) does not expressly refer to s. 61 of the 1961 Act, and while the only reference to s. 61 of that Act is in para. 18 of the First Schedule (which refers only to the Schedule and not to s. 75 being *"without prejudice"* to s. 61 of the 1961 Act). While I am doubtful whether s. 75 requires consideration of s. 61 of the 1961 Act, as part of the application of the principles of construction set out in the cases to which I have mentioned, I will nonetheless consider that provision.

243. The Joint Liquidators' position is that s. 61 effectively takes priority over the second limb of s. 75(1) of the 1988 Act. They rely, in that regard, on the words used at the start of s. 61(1), namely, *"notwithstanding any other enactment or any rule of law"* in support of that contention. As I will explain shortly, I do not believe that they are correct. Section 61(1) does seem to require only that the *"wrong out of which the liability to damages... arose"* be *"committed before the time of the bankruptcy"*. It does not require that the bankrupt be <u>liable</u> in respect of that wrong. That appears to be why, in *T&N*, David Richards J., stated with reference to s. 61(1) of the 1961 Act, that it was not necessary in Ireland for a cause of action to have accrued in order to make a claim in bankruptcy under s. 61(1). He said:

> *"Under the Irish provision, the date of accrual of the cause of action is irrelevant and all that is necessary is that a liability to damages should arise out of a wrong committed before the time of bankruptcy.*" (para. 92, p. 1762)

244. Unfortunately, the judge may not have been referred to and, in any event, made no reference in that case to s. 75(1) of the 1988 Act and to the significantly different terms of that section which, in my view, <u>do</u> require not just the wrong but also liability in respect of the wrong to have arisen at the relevant date.

245. I do not agree that the words *"notwithstanding any other enactment or any rule of law"* at the start of s. 61(1) have the effect of affording that provision precedence or priority over <u>subsequent</u> legislation enacted by the Oireachtas, as the Joint Liquidators submitted at the hearing. The reason why those words were included at the start of s. 61(1) is that prior to the enactment of that provision the rule was that a claim for unliquidated damages in tort could not be proved in a bankruptcy. In *Forde, Kennedy and Simms, The Law of Company Insolvency* (3rd edn, 2015), the authors state (at para. 13-11, p. 385):

> *"A claim that formally could not be proved in a bankruptcy was in tort; in other words, a person who would have a good case in negligence or for some other tort could not prove against an insolvent defendant's estate."*

246. The authors cite *Re Pen-Y-Van Colliery Co.* (1877) 6 Ch. D. 477. They explain that that rule was "*abolished"* by s. 61 of the 1961 Act.

247. A detailed account of the change in the law in England and Wales to allow proof of claims for unliquidated damages in tort in a bankruptcy and in the winding up of an insolvent company was given by David Richards J. in *T&N* (at paras 76-95, pp. 1757-1763). The law was not changed in that jurisdiction until s. 382 of the Insolvency Act

1986 (in the case of bankruptcy) and rule 13.12 of the 1986 Rules (in the case of the winding up of insolvent companies).

248. Section 61(1), therefore, radically changed the law which applied up to the enactment of the 1961 Act in the case of proof of such claims in bankruptcy. That explains why the words of s. 61(1) were prefaced by the *"notwithstanding any other enactment or any rule of law*". Those words had the effect of nullifying or overriding any other enactment or rule of law which applied up to that point but could not, in my view, have the same effect in respect of future legislation.

249. That conclusion is supported by the decision of the Supreme Court in *Sheedy v. Information Commissioner* [2005] IESC 35; [2005] 2 I.R. 272 (*"Sheedy"*). In that case, the Supreme Court was considering the proper interpretation of a number of statutory provisions, including s. 32(1) of the Freedom of Information Act 1997, and s. 53 of the Education Act 1998. The latter provision started out with the words *"[n]otwithstanding any other enactment…"*. The use of those words was held to operate to nullify or override the earlier statutory provision. The latter provision, therefore, prevailed. Delivering the majority judgment for the Supreme Court, Kearns J. stated:

> *"The use of a 'notwithstanding' clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or appeals of such legislation. ...*
>
> *Such a clause can clearly operate to nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in <u>previous legislation.</u>*
>
> *Because of the 'notwithstanding' clause in s. 53* [of the Act of 1998] *it seems impossible to construe the Acts of 1997 and 1998 together, or as forming part*

> *of a continuum. The word 'notwithstanding' is in this instance a prepositional sentence-starter which unequivocally means, and can only mean, 'despite' or 'in spite of' any other enactment."* (pp. 295 – 296) (emphasis added)

250. It is clear that when Kearns J. was referring to *"any other enactment"* he was referring to *"previous"* legislation and not subsequent legislation. Kearns J. then referred to a number of passages from *Bennion, Statutory Interpretation* (3rd edn.) which made clear that a later enactment can amend an earlier one by implication in order to remove an inconsistency between the two provisions.[3]

251. On the basis of *Sheedy*, I am satisfied that the words *"notwithstanding any other enactment or any rule of law"* in s. 61(1) are intended to apply to previous enactments or rules of law and not subsequent ones. That would be consistent with the reason for the inclusion of that phrase at the outset s. 61(1). I am also satisfied that s. 75(1) had the effect of impliedly amending s. 61(1) by introducing the additional element that liability had to be established in respect of the *"wrong"* by the relevant date in order for a claim to be admissible in the bankruptcy or winding-up of an insolvent company.

252. I agree with the Joint Liquidators that limited assistance can be derived from the *T&N* case as David Richards J. was dealing with issues which specifically arose under Rule 13. 12(2) of the 1986 Rules which differed from s. 61(1) of the 1961 Act and s. 75(1) of the 1988 Act. It might be noted, in any event, that rule 13.12(2) was amended following the decision in *T&N* so as to extend the rights of potential tort claimants to prove in a liquidation of an insolvent company (see *Nortel* per Lord Neuberger at para. 93, p. 242).

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[3] The relevant passage in the current (5th edition) are to be found in s. 60 at p. 293 and s. 87 at p. 304.

253. Something more, therefore, is required than the commission or happening of a *"wrong"* before a claimant can prove in the winding up of a company under the second limb of s. 75(1). The liability of the company by reason of the "*wrong*" must also have arisen, and the essential elements of the cause of action must be established at or by that date.

254. I am inclined also to agree with the FSCS that the second limb of s. 75(1) is not an inherently suitable means by which to seek to prove in the liquidation of the Company in respect of claims under insurance contracts to which the Company was a party where (on the Joint Liquidators' case) the *"wrong"* at issue is not the wrong of the Company itself but rather of the person who performed the act which constitutes the "*wrong*" for which the Company provided insurance cover under the contract. I disagree with the Joint Liquidators that the second limb of s. 75(1) can readily accommodate such claims. Their position is that it is sufficient in order to come within the second limb of s. 75(1) for the *"wrong"* to be one for which the Company has a liability to provide an indemnity under the relevant insurance contract. That position is rather strained and is difficult to maintain in light of the additional words contained in the definition of *"wrong"* in s. 2(1) of the 1961 Act. As mentioned earlier, after defining a *"wrong"* as meaning a tort, breach of contract or breach of trust, the definition in s. 2(1) goes onto state *"whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible…"*. It is not easy to reconcile those words with the liability of an insurance company to provide an indemnity in respect of a wrong committed by another who is insured under the relevant policy. The insurance company in such a situation cannot easily be seen as a *"person to whom the wrong is attributed"* where what it is providing is an indemnity in respect of the relevant act under the terms of the policy. Nor can the insurance company easily be regarded as a person who is *"responsible"* for the acts of another where what it is providing is an indemnity under a contract to insurance.

255. I am inclined, therefore, to agree with the FSCS that it is difficult to see how the sorts of claims under insurance contracts which are at issue here can be accommodated under the second limb of s. 75(1). It is difficult to see how the Company (as an insolvent insurer) can be said to be *"liable"* for unliquidated damages by reason of a "*wrong*" committed by someone else under the terms of the contract of indemnity provided by the Company. That is why such claims are probably best dealt with by the Joint Liquidators under the terms of the first limb of s. 75(1). If, however, the claims are considered by the Joint Liquidators under the second limb, I am satisfied that the liability of the Company for unliquidated damages by reason of a wrong committed by someone which is covered by an insurance contract issued by the Company must exist at the date of the making of the winding up order and that it is not sufficient merely for the relevant "*wrong"* to have been committed or to have happened by that date. For reasons which I have already explained, the relevant date in the context of a winding up of an insolvent insurance company should, by reason of the provisions of the Insolvency II Directive and Insolvency II Regulations, be considered to be the date of the making of the winding up order and not the date on which the winding up would be deemed to have commenced under s. 589 of the 2014 Act.

256. Following on from the analysis and conclusions expressed above in relation to the issues raised in respect of Questions 2 and 3, I would answer those questions as follows:

(g) Answers to Question 2

2(a) This question is answered by applying ss. 619 and 620 of the 2014 Act and s. 75(1) of the 1988 Act, as properly interpreted. A claim made under a policy of insurance issued by the Company which was terminated or discharged or otherwise ceased to produce effects on the date of the making of the winding-up order should be admitted to proof in the winding up of the Company as liabilities of the Company which arose by reason of an *"obligation incurred"* by the Company under the first limb of s. 75(1) of the 1988 Act which applies in the case of the winding up of the Company by virtue of ss. 619 and 620 of the 2014 Act. The relevant *"obligation"* was *"incurred"* under the first limb of s. 75(1) when the relevant policy or contract of insurance was entered into by the Company with the insured. The liability of the Company under such a contract is a contingent liability. The insured is entitled to submit, and the Joint Liquidators are obliged to admit to proof against the Company in the winding-up, a claim in respect of an event which is insured under the relevant contract where the event occurs after the relevant date (which, in the case of the insolvent winding-up of an insurance company is, having regard to the provisions of the Solvency II Directive and the Solvency II Regulations, the date of the making of the winding-up order rather than the date on which the winding-up is deemed to have commenced by virtue of s. 589 of the 2014 Act, being the date of the presentation of the petition). While it is perhaps theoretically possible for a claim by an insured under a policy or contract of insurance issued by the Company to be based on a *"wrong"* within the meaning of the 1961 Act, for reasons I have explained in detail above, it is very difficult to see how such a claim could be accommodated within the terms of the second limb of s. 75(1). By far the more natural and appropriate basis for admitting a claim under such a policy or contract of insurance is the first limb of s. 75(1), being the *"obligation incurred"* basis.

2(b) Claims under policies or contracts of insurance issued by the Company are provable in the winding up of the Company based on an "*obligation incurred"* and the date on which the *"obligation"* was *"incurred"* is the date upon which the relevant contract was entered into and not the date on which the insured event occurred.

2(c) This question is unlikely to arise in light of the answer to Question 2(a) above. However, if a claim is sought to be made under the second limb of s. 75(1), being a claim for unliquidated damages arising from a *"wrong"* that occurred before the relevant date (which, as noted above, is the date of the making of the winding-up order), it is not sufficient merely that the *"wrong"* or insured event (assuming that is the same as the *"wrong"*) was committed or occurred before that date, without more.

2(d) Following on from the answer to Question 2(c) above, in the unlikely event that claims are made in reliance on the second limb of s. 75(1), in order for those claims to be admitted to proof in the winding-up, it would be necessary to show that the Company was *"liable"* at the date of the making of the winding-up order by reason of the relevant *"wrong"*. In other words, the cause of action in respect of the *"wrong"* would have to be complete by that date.

257. Arising from the answers to Questions 2 (a) – (d), the answer to Question 3 is as follows:

(h) Answer to Question 3

258. The Joint Liquidators are obliged to admit to proof in the winding up of the Company claims which are made under policies which relate to events which were insured events under the policies, and which had not occurred before the relevant date (the date of the making of the winding-up order) but which may occur and be notified to the Company at some point in the future. Such claims fall within the first limb of s. 75(1) of the 1988 Act. The Company's liability under those policies was a contingent liability which arose by reason of an "*obligation incurred*" by the Company under those policies. While I am not asked to give directions in relation to the valuation of those claims, the position would appear to be that insofar as the policies do not fall within s. 17 and the Sixth Schedule to the 1909 Act, the "hindsight" principle described in *MacFarlane's Claim* and discussed in a number of the subsequent cases should be applied by the Joint Liquidators in making a *"just estimate"* of those claims under s. 620(1) of the 2014 Act. If any of the policies fall within the Sixth Schedule to the 1909 Act, the relevant method of valuation set out in that Schedule must be applied.

(i) Answers to supplemental questions raised by the Joint Liquidators at para. 77 of the affidavit of Cormac O'Connor

259. I set out those additional answers below:

(a) the Joint Liquidators are required to treat claims made under policies of insurance which relate to events which have occurred but which have not been notified at the relevant date (and assuming that any reporting or notification obligations under the relevant policies are complied with) by attempting, as best they can, to make a *"just estimate"* of those claims under s. 620(1) of the 2014 Act;

(b) the Joint Liquidators are required to treat claims which may be made under policies of insurance which relate to events which have not occurred before the relevant date, where those events are insured events under the policies, in the manner outlined in the answer to Question 2(a) above. In making a *"just estimate"* in respect of such claims, for policies which are not covered by the

1909 Act, they are required to apply the *"hindsight"* principle as set out in *MacFarlane's Claim*. If any of the policies fall within the Sixth Schedule to the 1909 Act, the relevant method of valuation set out in that Schedule must be applied.

(3) Question 4: "Insurance Claims" under the Solvency II Regime

(a) Introductory Remarks

260. Although Question 4 in the application issued on behalf of the Joint Liquidators contains a number of sub-questions, it was indicated on their behalf at the hearing that the issue on which they seek directions is, in fact, a *"net single issue"*. The issue is whether, having regard to the provisions of the Solvency II Directive and Solvency II Regulations, a claim by a policyholder for the return to it of a portion of the premium paid by it under the policy proportionate to the unexpired period of the policy (referred to in shorthand as the "unearned premium") which the policyholder is entitled to have returned to it is an *"insurance claim"* as that term is defined in the Directive and the Regulations. If it is then it is afforded *"absolute precedence"* with respect to assets representing the technical provisions of the Company, over all other claims which are not *"insurance claims"* (subject to precedence given to the expenses arising out of the winding-up). Policyholders may be entitled to a return of unearned premiums in one of two ways. First, they could be entitled to it under the relevant insurance contract. Alternatively, they could be entitled to it as a result of the termination or discharge of the insurance contracts on the making of the winding-up order,

261. Question 4 requires a consideration of a number of provisions of the Solvency II Directive and Regulations. The relevant provisions were set out in full earlier in the judgment (see section 5(3), paras. 65-95 above). It also requires consideration of the judgment of the European Free Trade Association Court (the "EFTA Court") in *Gable Insurance A.G. in Konkurs* Case E-3/19 judgment delivered 10th March 2020 (*"Gable"*). The Joint Liquidators rely on that judgment. The FSCS contends that the case was wrongly decided and should not be followed.

262. Particularly relevant to the issue raised in Question 4 (in its short form) are Recital (127) and Articles 268(1), 275 and 281 of the Solvency II Directive, as well as Regulations 270(1), 270(2), 277 and 281(4) of the Solvency II Regulations.

263. By way of very brief overview and summary, the Joint Liquidators' position, on the basis of advice received by them, is that a claim for unearned premium is not a *"insurance claim"* within the meaning of that term in the Directive and in the Regulations and that it does not, therefore, have the "*absolute precedence*" afforded to such claims under those provisions. They have put forward an interpretation of the relevant provisions in support of their position and rely on the judgment of the EFTA Court in *Gable*. The FSCS's position is that such a claim is an *"insurance claim"* and is entitled to the precedence afforded to such claims on the basis of what they contend is the proper interpretation of those provisions. As already noted, they contend that *Gable* was wrongly decided, is not binding on me, and should not be followed.

(b) Summary of position of parties on Questions 4

(i) The Joint Liquidators

264. In their written submissions, the Joint Liquidators acknowledged that there is no certainty as to whether or not a claim for unearned premium which arises as a result of the winding-up (and, again, here the relevant date, in my view, is the date of the making of the winding-up order rather than the date of the commencement of the winding-up for the reasons outlined earlier). They submitted, however, that in light of various factors, the better interpretation of the relevant provisions of the Directive and of the

Regulations is that the term *“insurance claims”* refers to claims against the insurance undertaking which is being wound up that arise from the conduct of the undertaking in its insurance operations and does not refer to claims that arise as a consequence of the winding-up.

265. They advanced a number of reasons for this in their written submissions. They included the following:

(i) They relied on Recital (127) and its reference to a claim *“arising from insurance operations”*, and submitted that, when read with Article 268(1)(g) of the Directive, a claim must arise from *“insurance operations”* or from the insurance contract itself in order to constitute an *“insurance claim”*.

(ii) They relied on the second subparagraph of Article 268(1)(g) and Regulation 270(2) as being effectively a carve-out from Article 268(1)(g) (and Regulation 270(1)) in respect of a premium owed by an insurance company in certain specific circumstances, namely, where the premium is owed as a result of the *“non-conclusion or cancellation of an insurance contract or operation referred to in point in (g) of the first subparagraph in accordance with the law applicable to such a contract or operation before the opening of the winding-up proceedings…”*. They submitted that it is only in such circumstances that a claim for the return of a premium could be considered an *“insurance claim”*. They suggested that the fact that Article 268(1) (and Regulation 270(2)) expressly legislated for this category of a premium claim to be an *“insurance claim”* would weigh against an interpretation of that term as including a claim for unearned premiums in other circumstances, including where the claim arises on the discharge or termination of the contract on the commencement of the winding-up (or on the making of the winding-up order). They pointed to a possible ambiguity in the second subparagraph of Article 268(1) (and Regulation 270(2)), which I will address below.

(iii) They contended that, if the interpretation for the FSCS was advocating were correct, there could be a real disparity in terms of the rights of policyholders across the EU.

(iv) They relied on Article 274(2)(f) in support of their interpretation insofar as it refers to the law of the home Member State determining the claims which can be lodged against *"the estate of the insurance undertaking"* and suggested this supported their interpretation

(v) They relied on Article 282(3) which requires that a creditor when lodging a claim must provide certain information and documents disclosing various matters, including *"(b) the date in which the claim arose on"*. That would be unnecessary, they said if every policyholder had a right to claim a refund of the unearned premium at the relevant date on the basis that it is an *"insurance claim"*. There would be no need to identify the date as it would arise on the relevant date (whether that be the date of the commencement of the winding-up or, as I believe to be the case, the date of the making of the winding-up order).

(xi) They made a similar point in reliance on Article 281(2) (and Regulation 281) which requires the notice referred to in that Article, in the case of insurance claims, to indicate various matters, including *"the date on which the insurance contracts or the operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation"*. They contended that the requirement to send a notice containing that information is more consistent with the interpretation advanced by the Joint Liquidators.

266. At the hearing, the Joint Liquidators further contended that if the Solvency II Directive had intended to afford priority to the claim for the refund of unearned premia advanced by every person who holds a policy of insurance at the date of the commencement of the winding-up, this could have been provided for in clear language in the Directive, but that was not done. They disagreed with the analysis, advanced by the FSCS, of the definition of an *"insurance claim"* in Article 268(1)(g) (and Regulation 270(1)) and as to the meaning and effect of the second subparagraph of Article 268(1) (and Regulation 270(2)). They also urged the court to follow the approach adopted by the EFTA Court in *Gable* and dismiss the criticisms of that judgment put forward by the FSCS.

(ii) The FSCS

267. The FSCS's position is that claims for the return of unearned premiums arising from the termination or discharge of the insurance contracts to which the Company was subject at the time of the making of the winding-up order are *"insurance claims"* within the meaning of that term in Article 268(1)(g) (and Regulation 270(1)) where the relevant insurance contract itself provides for the return of unearned premiums on the opening of winding-up proceedings (i.e. the making of the winding up order) or where that is required under the law governing the winding-up, which, by virtue of the Article 274 (and Regulation 275), is Irish law, being "*the law applicable in the home Member State*".

268. The FSCS advanced that position on the basis of the aims and objectives of the provisions of the Solvency II Directive and the Solvency II Regulations concerning *"insurance claims"* as they can be ascertained from Recital (172) and Article 268(1) (and Regulation 270), as well as on the basis of, what it contended is, the proper interpretation of those (and other) provisions of the Directive (and the Regulations).

269. Noting the choice for Member States provided for in Article 275 (transposed into Irish law by Regulation 277), of giving *"absolute precedence"* to *"insurance claims"* over other claims, the FSCS drew attention to the provisions of Article 76 of the Directive (Regulation 83) requiring insurance undertakings to "*establish technical provisions with respect to all of their insurance obligations"* towards policyholders and beneficiaries of insurance contracts, and sought to link that obligation on insurance undertakings with the requirement in Article 275 (Regulation 277) to give *"absolute precedence"* with respect to assets representing the technical provisions (which are there to cover the insurance obligations to policyholders and beneficiaries) and with Recital (127) and its reference to the objective of ensuring protection for insured persons in a winding up in respect of claims arising from obligations of insurance undertakings under insurance contracts.

270. The principal argument of the FSCS centred on the terms of Article 268(1)(g) (Regulation 270(1)) itself. It contends that a claim for unearned premiums clearly falls within the definition of an *"insurance claim"* in that provision, when properly interpreted, and that such an interpretation would also be consistent with the context and objectives of the Directive (and of the Regulations). Its position is that Article 268(1)(g) (Regulation 270(1)) covers claims for the return of unearned premiums which arise by virtue of the termination or discharge of the relevant insurance contract on the making of the winding-up order. While describing the second subparagraph of Article 268(1)(g) (Regulation 270(2)) as giving rise to a *"slight conundrum"*, it nonetheless maintains that the provision can be readily interpreted. It asserts that this subparagraph is an add-on provision designed to cover claims for unearned premiums which arise not by virtue of the making of the winding up order, but which arise in circumstances where the insurance contract does not exist at the date of the making of the winding up order either because the contract was not concluded at all (in circumstances where a premium was paid) or because the contract was cancelled before that date. While noting a possible ambiguity in the wording of the subparagraph (as did the Joint Liquidators in their written submissions), the FSCS's position is that any such possible ambiguity does not affect the interpretation of the subparagraph for which it argues. It would have the same meaning whichever way the possibly ambiguous provision is interpreted in terms of the return of premium claims covered by the subparagraph.

271. The FSCS's position, is, therefore, that (a) claims for the return of unearned premiums arising on the termination or discharge of the relevant insurance contract on the making of the winding up order are *"insurance claims"* as that term is defined in Article 268(1)(g) (and Regulation 270(1)), and (b) claims for the return of unearned premiums which arise where there is no insurance contract in existence at the date of the making of the winding up order, either because one was never concluded or was cancelled before that date are <u>also</u> *"insured claims"* by reason of the second subparagraph of Article 268(1)(g) (and Regulation 270(2)).

272. With respect to the EFTA Court in *Gable*, the FSCS carefully analysed that judgment, the questions referred by the Liechtenstein Court, the answers given by the EFTA Court to those questions and the reasoning for those answers. On the basis of that analysis, the FSCS' position is that the decision was wrong in concluding that claims for the return of unearned premiums arising on or after the making of the winding-up order (noting that the relevant provision of Liechtenstein law provided for the termination or cessation of effects of the relevant insurance contracts four weeks after the opening of the insolvency proceedings) are not *"insurance claims"*. While accepting that the judgment of the EFTA Court is persuasive authority in this jurisdiction, it nonetheless urges the court not to follow it or to adopt the reasoning found in the judgment.

(c) Analysis and Answer to Question 4

(i) Proper interpretation of Article 268(1)(g) (and Regulation 270(1))

273. Having carefully considered the rival contentions of the parties on the single net issue raised by Question 4, I have concluded that the position adopted by the FSCS on that net issue is correct. I am satisfied that claims for the return of unearned premiums which arise on the termination or discharge of insurance contracts to which the Company was a party on the making of the winding up order (on 12th March 2020) are *"insurance claims"* as that term is defined in Article 268(1)(g) of the Solvency II Directive (and Regulation 270(1) of the Solvency II Regulations).

274. The effect of that conclusion is that such claims are, by virtue of Regulation 277(1) of the Regulations, entitled to *"absolute precedence"* with respect to the assets representing the Company's technical provisions over all other claims which are not *"insurance claims"* (subject to the precedence over *"insurance claims"* afforded by Regulation 277(3) to expenses arising out of the winding-up).

275. I have reached that conclusion for a number of reasons. First, the conclusion is, I believe, supported and driven by the clearly stated aim and objective of the Solvency II Directive which is to protect *"insured persons, policyholders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations in winding up proceedings concerning the undertaking"*. That aim and objective is expressly recognised in Recital (127). The priority given by the European Union legislature (the Parliament and the Council) to the protection of such persons is made clear from the very outset of that Recital where the protection of those persons is described as being of the *"utmost importance"*. The Recital makes clear that what is of such importance is the protection, in the winding-up proceedings of the class of persons named who have a claim *"arising from insurance operations"* of the relevant insurance undertaking.

276. While the Recital does not expressly mention here that such a claim must arise from an insurance contract, unlike Article 268(1)(g) where that requirement is expressly referred to, in my view, in the event that there is any real difference between a claim *"which arises from an insurance contract"* (Article 268(1)(g)) and a claim *"arising from insurance operations"* (Recital (127)) (and I am not convinced that there is), it is evident that the European Union legislature had in mind the conferral of such protection also on that class of persons in respect of claims which arise from insurance contracts. That is very clear from Article 268(1)(g) itself and also from Recital (127) which refers to claims which are <u>not</u> intended to be covered by the protection conferred on such persons. The Recital excludes from that protection *"claims which arise not from obligations under insurance contracts or insurance operations"* but from civil liability caused by an agent in certain circumstances. The Recital clearly implies, therefore, that the protection is intended to apply in respect of claims by the persons referred to, which arise from insurance contracts. That position is, in any event, very clear from Article 268(1)(g) itself.

277. Second, while I note the reliance by the FSCS on Article 76 of the Directive which requires Member States to ensure that insurance undertakings establish technical provisions with respect to all of their insurance obligations towards policyholders and beneficiaries of insurance contracts, as well as Regulation 83 of the Regulations which requires insurance undertakings to do so, I am not certain that this necessarily assists in the main task which I must undertake in answering Question 4 which is to interpret Article 268(1)(g) and the second subparagraph of that paragraph of the Directive. I do not have any evidence about whether technical provisions are intended to secure premium payments which may be the subject of return of unearned premium claims. I would prefer, therefore, not rest my conclusions on the supposed link sought to be relied by the FSCS between the provisions of Article 76 and Article 268(1)(g).

278. Third, what has really persuaded me that the return of unearned premium claims with which we are concerned are *"insurance claims"* is Article 268(1)(g) (Regulation 270(1)) itself when read with the second subparagraph (Regulation 270(2)).

279. Starting with Article 268(1)(g), it can be seen that a number of requirements must be met before a claim can be a *"insurance claim"*. The claim must involve an amount which is owed by an insurance undertaking to certain types of persons, including *"insured persons, policyholders, beneficiaries and any injured party having direct right of action against the insurance undertaking"*. A claim for the return of unearned premiums fulfils that requirement. It is a claim for an amount owed by the Company to one or more of the categories of persons mentioned. It was accepted by the Joint Liquidators that the unearned premiums must be repaid to those who paid them to secure cover under the insurance contracts. The issue then is whether a claim for the unearned premium is one which *"arises from an insurance contract"*. In my view, there is only one answer to that question. Such a claim does *"arise from"* an insurance contract. The premium was paid by the insured person or policyholder in order to secure insurance cover or an indemnity under the insurance contract. The premium was paid under or in relation to the insured contract. A claim for the return of the unearned premium when the contract has been terminated or discharged or otherwise ceased to produce effects must, in my view, be regarded as one which *"arises from"* that contract. That interpretation follows from the ordinary meaning of the words used, which are very broad in scope, but it is also consistent with the aim and objective of the Directive which is to provide protection to insured persons and policyholders in the winding up of the insurance undertaking in respect of this type of claim as is evident from Recital (127). An interpretation of Article 268(1) which leads to a conclusion that such a claim is not an *"insurance claim"* would not be consistent with the aim and objective of the Directive as explicitly stated in Recital (127). Nonetheless, if the express terms of Article 268(1)(g) compelled such an interpretation, the court would have no alternative but to give effect to that interpretation. However, the express terms of that provision do not require such interpretation. On the contrary, I am satisfied that the express terms of Article 268(1)(g), and the ordinary meaning of the express words used there, compel a conclusion that claims for unearned premiums which arise in the circumstances just referred to do constitute *"insurance claims"* for the purposes of the Directive and the Regulations. That conclusion is entirely consistent with the aim and objective of the Directive to provide protection for the claims made by certain persons as outlined in Recital (127).

280. That would be the end of the matter were it not for the second subparagraph of Article 268(1)(g) and the judgment of the EFTA Court in *Gable*. I must, therefore, turn next to consider whether (a), the second subparagraph affects the interpretation which I have just given to Article 268(1)(g) and (b) the judgment of the EFTA Court compels me to reach a contrary conclusion to the one I have reached as to the proper interpretation of Article 268(1)(g). I will deal with each of those issues in turn.

(ii) Proper Interpretation of second subparagraph of Article 268(1)(g) (and Regulation 270(2))

281. I do not believe that the second subparagraph of Article 268(1)(g) affects the interpretation I have given to that provision. On the contrary, in my view, it reinforces that interpretation. I am satisfied that the correct interpretation of the second subparagraph is that it deals with a situation where, at the time of the opening of the winding-up proceedings which, for the purposes of the Directive and the Regulations, is the date on which the winding-up order is made, there is no insurance contract in existence because it has either never been concluded or has been cancelled before that date and where a premium payment has, nonetheless, been made by the person seeking to become the insured person or policyholder or beneficiary which the insurance undertaking is obliged to repay.

282. The second subparagraph says that such a sum (which is the subject of a claim) should *"<u>also</u> be considered an insurance claim"* (emphasis added). That phrase suggests that the second subparagraph is an add-on which is intended to supplement Article 268(1)(g) or to include a claim which would not otherwise be covered by the definition contained in that provision. The real point that the subparagraph would appear to me to be addressing is a situation where there is no insurance contract in existence at the time of the opening of the winding-up proceedings where Article 268(1)(g) requires there to be such an insurance contract at that point in time. The second subparagraph appears to me to be intended to cover the situation where a premium has been paid in connection with an insurance contract which was either never concluded for whatever reason or was cancelled and so is not in existence at the time of the opening of the winding-up proceedings when the winding up order is made. In order to give a person who has paid a premium to an insurance undertaking in one of those two situations, the protection which would otherwise be given to claims made by the protected class of claimants arising from an insurance contract in existence at the time of the opening of the winding-up proceedings, a further provision had to be included in the form of the second subparagraph. That, in my view, is the most likely reason for that subparagraph. I see no basis for concluding that the effect of that subparagraph was to remove from the scope of protection a claim for the return of unearned premium which would otherwise, on an ordinary straightforward interpretation of Article 268(1)(g), clearly be covered by that provision. To conclude that the second subparagraph would have such a radical effect on Article 268(1)(g) itself would, in my view, be a classic case of the "tail wagging the dog". It would be the wrong approach to take to the interpretation of Article 268(1)(g).

283. While I can see why both parties took the view that there may be a possible ambiguity in the second subparagraph, I do not believe that there is, in fact, any real ambiguity there. To my mind, it makes much more sense to read the non-conclusion or cancellation of an insurance contract which is referred to in the second subparagraph as being qualified in time by the words *"before the opening of the winding-up proceedings"* in the sense that the non-conclusion or cancellation must have occurred <u>before</u> the opening of the winding-up proceedings in order to get the benefit of the protection added by the second subparagraph. It makes more sense and allows the second subparagraph to be read coherently with Article 268(1)(g) to read the subparagraph that way and to read the non-conclusion or cancellation of the insurance contract as having arisen in accordance with the law applicable to the contract. That law will, in any event, be the law which applied to the contract before the opening of the winding-up proceedings because when those proceedings are opened, the law of the home Member State will apply to the winding-up. I do not really think, therefore, that there is a real ambiguity in the second subparagraph.

284. However, even if there is an ambiguity, I do not believe that it makes any difference to the ultimate conclusion to be drawn as to the effect of the second subparagraph on the conclusion that a claim for unearned premium payable to the insured as a consequence of the making of the winding-up order is an *"insurance claim"*. The second subparagraph is addressing the situation where the non-conclusion or cancellation of the insurance contract occurred before and not at or because of the winding-up proceedings. Article 268(1)(g) covers the situation where the insurance contract exists up to and at the opening of the winding-up proceedings and where a claim may arise on the termination or discharge of the contract by virtue of the opening of those proceedings and the making of the winding up order. That in my view is the way in which Article 268(1)(g) and the second subparagraph should be coherently interpreted and read together.

285. I have concluded, as a result of this analysis, that:

(a) a claim by an insured or policyholder or other beneficiary referred to in Article 268(1)(g) for the return of unearned premium paid under an insurance contract where the contract has been terminated or discharged by virtue of the opening of the winding-up proceedings on the making of the winding up order is an *"insurance claim"* within the meaning of that term in Article 268(1)(g) (and Regulation 270(1)); and

(b) a claim by a person who has paid a premium to an insurance undertaking for the return of that premium from the insurance undertaking in circumstances where an insurance contract was either not concluded or was cancelled (in accordance with the law applicable to the contract) before the opening of the winding-up proceedings is also considered to be and is an *"insurance claim"* by virtue of the second subparagraph of Article 268(1)(g) (and Regulation 270(2)).

286. Both types of claims are entitled to the protection afforded to *"insurance claims"* under the Solvency II Directive and the Solvency II Regulations.

(iii) Judgment of EFTA Court in Gable

287. I agree with the FSCS that the conclusion reached by the EFTA Court in *Gable* and the reasoning adopted by the court in that case is not convincing. I accept, of course, that a judgment of the EFTA Court is persuasive authority in this jurisdiction and note that the High Court (O'Neill J.) did have regard to, and cited with approval, a judgment of the EFTA Court in *Ditt v. Krohne* [2012] IEHC 312; [2012] 3 I.R. 120. I also accept that it would often be of assistance to an Irish court to see how the EFTA Court interpreted a provision of European Union legislation which applies throughout the European Union and in the other three States of the EEA (Iceland, Liechtenstein, and Norway). Nonetheless, the decision of an EFTA Court is not binding on the High ,Court and it is open to a judge of the High Court (as a Union judge)[4] to interpret a provision of European Union legislation without being bound by a decision of a non-Union court, albeit a court of significant authority and distinction.

288. For reasons which I now address, I am satisfied that I can either distinguish the judgment of the EFTA Court in *Gable* or am entitled to decline to follow it on the basis that it does not correctly decide or address the status of a claim for the return of unearned premium which arises on the discharge or termination of an insurance contract on the opening of winding-up proceedings.

289. The biggest problem which I have with the judgment in *Gable* is that it appears to me that the interpretation which the EFTA Court gave to the term *"insurance claim"* was driven primarily by its interpretation of the second subparagraph and not by an interpretation of Article 268(1)(g) itself. I believe that it approached the task of interpretating the term by giving undue prominence to the second subparagraph and, conversely, giving insufficient prominence and weight to Article 268(1)(g) itself. It

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[4] Brian Walsh, "Reflections on the Effects of Membership of the European Communities in Irish Law" in *Pierre Pescatore, Du Droit International au Droit de l'Intégration: Liber Amicorum* (Nomos 1987) at p. 807 – quoted with approval by President Koen Lenaerts, President of the Court of Justice of the European Union in his paper for the Centenary of the Establishment of Ireland's Independent Courts System entitled "The Impact of Irish Preliminary References on the CJEU and EU Law" (delivered on 28th May 2024 and published on courts.ie).

approached the task of interpreting the term *"insurance claim"* the wrong way round. In other words, the court appeared to conclude (in paras. 44 and 45) that because a claim for unearned premium, following the cancellation of an insurance contract after the opening of winding-up proceedings, did not fall within the second subparagraph, it could not amount to an *"insurance claim"* within Article 268(1)(g). What I believe the EFTA Court should have done, in order to properly interpret the term, was to consider first and primarily whether such a claim fell within Article 268(1)(g) itself. Instead, it appears to have placed undue focus on the second subparagraph. Because of that focus, it concluded that since the claims for the return of premiums in that case did not fall within the second subparagraph because the insurance contracts were cancelled <u>after</u> the opening of the winding-up proceedings (under Liechtenstein law, the contracts "*ceased"* four weeks after the publication of the opening of the winding-up proceedings – para. 15 of the judgment), they did not fall within the second subparagraph which required the cancellation to have occurred <u>before</u> the opening of the winding-up proceedings. The EFTA Court concluded as a consequence that the claims were not *"insurance claims"*. That does seem to me to be addressing the issue the wrong way round and a classic case of the "tail wagging the dog".

290. The EFTA Court did look first at Article 268(1)(g). At para. 38 of its judgment it looked at the various cumulative requirements under that Article in order for claim to constitute an *"insurance claim"*. The first three requirements identified by the Court rise to no controversy. Those requirements are that there must be *"(i) an amount that is owed; (ii) by an insurance undertaking; (iii) to insured persons, policy holders, beneficiaries or an injured party having a direct right of action against the insurance undertaking"*. However, the fourth requirement referred to by the Court, that an insurance claim be *"on the basis of an insurance contract",* does give rise to some controversy. It may be due to linguistic differences between the English and other language versions of Article 268(1)(g) although no other language versions were provided to me by the parties. What the English version of Article 268(1)(g) states is a claim must be one *"which arises from an insurance contract"* and not one *"on the basis of an insurance contract"*. It may be that there is no real difference between these two phrases, but I have proceeded on the basis that the version which appears in the English translation (*"which arises from an insurance contract"*) is the term which I should consider.

291. Having set out the cumulative requirements of Article 268(1)(g), the EFTA Court then stated:

> *"It follows from this wording that an amount must be 'owed' under an insurance contract. The wording implies that the insured event must have occurred while the insurance contract existed in order for an insurance claim to arise"*. (para. 38)

292. I agree with counsel for the FSCS that there is nothing in Article 268(1)(g) which limits the scope of the definition of *"insurance claim"* to claim arising from the occurrence of an *"insured event"*. That is not expressly provided for in Article 268(1)(g) (or elsewhere in the Solvency II Directive). That provision is much wider in that it refers to an *"amount which is owed"* to the specified classes of persons which *"arises from"* an insurance contract. The scope of the definition is much wider than what might be understood from the implication which the EFTA Court suggested (at para. 38) should be drawn from the terms of Article 268(1)(g). It may be that the EFTA Court was focused on the existence of an *"insured event"* because the claims made in the Liechtenstein proceedings which gave rise to the preliminary reference to the EFTA Court related to claims arising from insured events which occurred before and after the opening of the winding-up proceedings. The EFTA Court may also have been influenced by the fact that, under the relevant provisions Liechtenstein law, the insurance contracts were cancelled (or "ceased") four weeks after the publication of the opening of the winding-up proceedings and not on the opening of the proceedings (paras. 15 and 22). In any event, the EFTA Court does not appear to have specifically considered whether a claim for the return of premiums could come within Article 268(1)(g) itself.

293. The EFTA Court's focus on the occurrence of an *"insured event"* is also evident from para. 41 of the judgment. It concludes that paragraph by stating that an *"insurance claim"* within the meaning of Article 268(1)(g) "*must have arisen before the cancellation of an insurance contract, which may be the result of the opening of winding-up proceedings in accordance with the law of the home EEA State"* (emphasis added). In inserting the requirement that the claim must have arisen before the cancellation of the insurance contract, the EFTA Court does not appear to have considered what the position would be where the claim is said to arise where the insurance contract is cancelled at the time of and by virtue of the opening of the winding-up proceedings, which is the situation with which we are concerned here, and not after that date. There does not seem to me to be any basis for the conclusion drawn by the EFTA Court that in order for there to be an *"insurance claim"*, the claim must have arisen before the cancellation of the insurance contract. A similar conclusion was drawn by the EFTA Court at para. 43 of its judgment and similar concerns arise in relation to that conclusion.

294. The most relevant paragraphs of the EFTA Court's judgment in *Gable* for present purposes are, however, paras. 44 and 45 of the EFTA Court's judgment. There the Court was dealing with a question (question 1(d)) which concerned premiums owed by the insurance undertaking *"following cancellations of contracts after the opening of winding-up proceeding"*. It was not concerned with premiums owed following such cancellations at the time and by virtue of the opening of winding-up proceedings. The EFTA Court stated that the second subparagraph *"clarifies"* the definition of *"insurance claim"* in Article 268(1)(g). Having quoted from the second subparagraph, the EFTA Court stated, *"one prerequisite of an 'insurance claim' is the existence of an insurance contract"*. It is certainly the case that Article 268(1)(g) requires that the relevant claim be one which *"arises from"* an insurance contract and if that is what the EFTA Court meant there is no issue. However, the EFTA Court went on then to conclude that, because under the second subparagraph of Article 268(1)(g), a claim for premiums owed under insurance contracts that were cancelled <u>before</u> the opening of winding-up proceedings are *"insurance claims"* and does not say that claims for such premiums which arise from cancellations that occur *"after the opening of winding-up proceedings"* are insurance claims, such claims do not fall within the definition of *"insurance claims"*. That conclusion appears to have been based exclusively or at least primarily on the interpretation given by the EFTA Court to the second subparagraph. It is true that the second subparagraph applies to confer protection on claims which arise where the insurance contract was not concluded or was cancelled before the opening of the winding-up proceedings. It is true also that the second subparagraph does not refer to claims which arise from the cancellations that occur <u>after</u> the opening of winding-up proceedings. However, that does not mean that claims for the return of unearned premiums which arise from the cancellations of the insurance contracts that occur <u>at</u> or <u>on</u> and by virtue of the opening of the opening of winding-up proceedings are not *"insurance claims"*. The answer to that question must be found in Article 268(1)(g) itself. As I have already concluded, as claims for the return of unearned premiums which arise from the termination or discharge of insurance contracts at the time and by virtue of the opening of the winding of proceedings fulfil all the requirements of Article 268(1)(g) and are, therefore, *"insurance claims"*. We are not concerned in this case with the status of return of premium claims which arise from the termination or cancellation of insurance contracts which occur after the opening of the winding-up proceedings, with which the EFTA Court was concerned in *Gable,* since, under Irish law, the termination or discharge occurs when the winding-up proceedings are opened and not after that date.

295. The EFTA Court repeated its conclusion in the first sentence of para. 45. It based its conclusion on the cancellation of the contract being after the opening of the winding-up proceedings and concluded that such a claim was not an *"insurance claim"* because it did not fall within the second subparagraph. The same points of distinction and criticism arise in relation to that conclusion. However, a further point was made by the EFTA Court in support of its conclusion in the second sentence of para. 45 of its judgment. There it said:

> *"Including such claims as insurance claims would run contrary to the Directive's purpose of harmonising protection of claims based on the occurrence of an insured event covered by an insurance contract."*

296. I agree with the FSCS that this conclusion appears to be a complete *non sequitur*. The Directive may well have the purpose of harmonising the protection of claims. However, I do not believe that it is correct to say that such purpose is confined to claims "*based on the occurrence of an insured event covered by an insurance contract*". The scope of claims entitled to such protection is wider than is acknowledged by the EFTA Court in that conclusion, for the reasons already discussed. However, what is more significant, for present purposes, is that it is not at all clear how including claims for the return of premiums in the circumstances which arose in that case would run contrary to the harmonising purpose of the Directive. It would, in my view, be much more consistent with the harmonising objective of the Directive in relation to winding-up proceedings and the protection intended to be given to certain persons in relation to claims arising out of insurance contracts to interpret (a) Article 268(1)(g) as covering claims for the return of unearned premiums where the relevant insurance contract is terminated or discharged on the opening of the winding-up proceedings, and (b) the second subparagraph as extending that protection to claims for the return of premiums where the insurance contract was either never concluded or was cancelled (where a premium had nonetheless been paid) before the opening of the winding-up proceedings.

297. In fairness to the EFTA Court, it did not actually decide that the former claims would not be *"insurance claims"* because it was not dealing with claims arising in such circumstances but rather claims arising from cancellation of contracts after the opening of the winding-up proceedings. However, the logic of the EFTA Court's judgment and its reasoning is that the former claims would not be entitled to protection as *"insured claims"*. I do not believe that the judgment can be correct in that regard.

298. I would, therefore, firstly distinguish *Gable* from the present case in that the judgment of the EFTA Court in that case was not addressing the specific issue which I have to address, and I would prefer to distinguish the case on that basis. However, I recognise that the reasoning adopted by the EFTA Court could equally be applied to the return of premium claims with which we are concerned in this case. For that reason, I must express my conclusion that I do not believe that the decision is correct, and I do not propose to follow it insofar as those claims are concerned.

(iv) Further points

299. Finally, I should make clear that I have considered all of the submissions advanced by the Joint Liquidators in support of the interpretation of the term *"insurance claims"* for which they contend, and the conclusion which they wish the court to draw from that interpretation, which, if correct, would have the effect of ruling out claims for the return of unearned premiums arising on the termination or discharge of insurance contracts on the opening of the winding-up proceedings as being *"insurance claims"*. Insofar as I have not expressly addressed any of those arguments, I can confirm that none of them persuaded me to adopt a different conclusion. For example, I do not understand the point made that there would be a real disparity in terms of the rights of policyholders across the EU if the return of premium claims with which we are concerned were regarded as *"insurance claims"*. I was not given any evidence as to how such claims are dealt with other EU Member States. Nor do I see how Article 274(2)(f) can have any material effect on the interpretation of the term *"insurance claim"*. Similarly, I do not see how Articles 281 and 282 of the Directive assist in the interpretation of that term. Those provisions deal with claims arising in all sorts of circumstances, not all of them being *"insurance claims"* and not all of them being for the return of unearned premium payments in the circumstances arising here. They are intended to apply to a wide range of situations and that explains why they are expressed in a way which can cover a wide range of claims.

300. I am of the view, therefore, that the conclusion which I reached at para. 285 above as to the proper interpretation of Article 268(1)(g) (Regulation 270(1)) and the second subparagraph (and Regulation 270(2)) is not affected by the judgment of the EFTA Court in *Gable*.

6. Conclusion

(a) Answers to Questions 1-4

301. In conclusion, my answer to the questions raised by the Joint Liquidators are for the reasons discussed in detail above, as follows.

Question 1

302. My answer to Question 1 (as slightly rephrased) is that a contract of insurance to which the Company was a party at the date of the winding-up order (12th March 2020) (the "relevant date"), and which has not terminated automatically according to its terms, ceases to have effect or as otherwise terminated or discharged as a result of the making of the winding-up order which effected a termination of the contracts. The contracts did not cease to produce effects and were not otherwise terminated or discharged by way of frustration arising from the withdrawal by the CBI of the Company's authorisation to carry out the business of an insurance undertaking (which authorisation was withdrawn on 12th March 2020 after the making of the winding-up order). The rights and obligations of the Company and the counter parties to those contracts are the subject of further consideration in the answers to Questions 2 and 3 below.

Question 2

(a) This question is answered by applying ss. 619 and 620 of the 2014 Act and s. 75(1) of the 1988 Act, as properly interpreted. A claim made under a policy of insurance issued by the Company which was terminated or discharged or otherwise ceased to produce effects on the date of the making of the winding-up order should be admitted to proof in the winding up of the Company as liabilities of the Company which arose by reason of an *"obligations incurred"* by the Company under the first limb of s. 75(1) of the 1988 Act which applies in the case of the winding up of the Company by virtue of ss. 619 and 620 of the 2014 Act. The relevant *"obligation"* was *"incurred"* under the first limb of s. 75(1) when the relevant policy or contract of insurance was entered into by the Company with the insured. The liability of the Company under such a contract is a contingent liability. The insured is entitled to submit, and the Joint Liquidators are obliged to admit to proof against the Company in the winding up a claim in respect of an event which is insured under the relevant contract where the event occurs after the relevant date (which, in the case of the insolvent winding up of an insurance company is, having regard to the provisions of the Solvency II Directive and the Solvency II Regulations, the date of the making of the winding-up order rather than the date on which the winding-up is deemed to have commenced by virtue of s. 589 of the 2014 Act, being the date of the presentation of the petition). While it is perhaps theoretically possible for a claim by an insured under a policy or contract of insurance issued by the Company based on a *"wrong"* within the meaning of the 1961 Act, under the second limb of s. 75(1), for reasons I have explained in detail above, it is very difficult to see how such a claim could be accommodated within the terms of that limb of s. 75(1). By far the more natural and appropriate basis for admitting a claim under such a policy or contract of insurance issued by the Company is under the first limb of s. 75(1), the *"obligation incurred"* basis.

(b) Claims under policies or contracts of insurance issued by the Company are provable in the winding up of the Company based on an "*obligation incurred"* and the date on which the *"obligation"* was *"incurred"* is the date upon which the relevant contract was entered into, and not the date on which the insured event occurred.

(c) This question is unlikely to arise in light of the answer to Question 2(a) above. However, if a claim is sought to be made under the second limb of s. 75(1), being a claim for unliquidated damages arising from a *"wrong"* that occurred before the relevant date (which, as noted above, is the date of the making of the winding-up order), it is not sufficient merely that the *"wrong"* or insured event (assuming that is the same as the *"wrong"*) was committed or occurred before that date, without more.

(d) Following on from the answer to Question 2(c) above, in the unlikely event that claims are made in reliance on the second limb of s. 75(1), in order for those claims to be admitted to proof in the winding-up, it would be necessary to show that the Company was *"liable"* at the date of the making of the winding-up order by reason of the relevant *"wrong"*. In other words, the cause of action in respect of the *"wrong"* would have to be complete by that date.

Question 3:

303. Arising from the answers to questions 2 (a) – (d), the answer to Question 3 is as follows: the Joint Liquidators are obliged to admit to proof in the winding up of the Company claims which are made under policies which relate to events which were insured events under the policies and which had not occurred before the relevant date (the date of the making of the winding-u order) but which may occur and be notified to the Company at some point in the future. Such claims fall within the first limb of s. 75(1) of the 1988 Act. The Company's liability under the relevant policies was a contingent liability which arose by reason of an "*obligation incurred"* by the Company under those policies. While I am not asked to give directions in relation to the valuation of those claims, the position would appear to be that as insofar as the policies do not fall within s. 17 and the Sixth Schedule to the 1909 Act, the "hindsight" principle described in *MacFarlane's Claim* and discussed in a number of the subsequent cases should be applied by the Joint Liquidators in making a *"just estimate"* of those claims under s. 620(1) of the 2014 Act. If any of the policies well within the Sixth Schedule to the 1909 Act, the relevant method of valuation set out in that Schedule must be applied.

Answers to supplemental questions raised by the Joint Liquidators at para. 77 of the affidavit of Cormac O'Connor

304. I set out those additional answers below:

(a) the Joint Liquidators are required to treat claims made under policies of insurance which relate to events which have occurred but which have not been notified at the relevant date (and assuming that any reporting or notification obligations under the relevant policies are complied with) by attempting, as best they can, to make a *"just estimate"* of those claims under s. 620(1) of the 2014 Act;

(b) the Joint Liquidators are required to treat claims which may be made under policies of insurance which relate to events which have not occurred before the relevant date, where those events are insured events under the policies, in the manner outlined in the answer to Question 2(a) above. In making a *"just estimate"* in respect of such claims, for policies which are not covered by the 1909 Act, they are required to apply the *"*hindsight*"* principle in *MacFarlane's Claim*. If any of the policies fall within the Sixth Schedule to the 1909 Act, the relevant method of valuation set out in that Schedule must be applied.

<u>Question 4</u>

305. In light of the analysis set out above:

(a) a claim by an insured or policyholder or other beneficiary referred to in Article 268(1)(g) for the return of unearned premiums paid under an insurance contract where the contract has been terminated or discharged by virtue of the opening of the winding-up proceedings on the making of the winding-up order is an *"insurance claim"* within the meaning of that term in Article 268(1)(g) (and Regulation 270(1)); and

(b) a claim by a person who has paid a premium to an insurance undertaking for the return of that premium from the insurance undertaking in circumstances where an insurance contract was, either, not concluded or cancelled (in accordance with the law applicable to the contract) before the opening of the winding-up proceedings is <u>also</u> considered to be and is an *"insurance claim"* by virtue of the second subparagraph of Article 268(1)(g) (and Regulation 270(2)).

(b) Miscellaneous Matters: Final Orders

306. This judgment is being delivered electronically. It may well be that there will be queries and questions arising from the judgment and details to be worked out as to the terms of the final orders to be made. I would propose listing the matter at a time convenient to the parties over the long vacation. The parties should liaise with the registrar with a view to fixing a date and time for that listing.

307. Finally, I must sincerely apologise to the parties for my delay in producing this judgment. I appreciate the patience and understanding of the parties.