
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : THE BELL GROUP LTD (IN LIQ) -v- WESTPAC
BANKING CORPORATION [No 10]
[2009] WASC 107

CORAM : OWEN J

HEARD : 6 & 20 FEBRUARY, 23 - 25, 30 MARCH 2009

DELIVERED : 30 APRIL 2009

FILE NO/S : CIV 1464 of 2000

BETWEEN : THE BELL GROUP LTD ACN 008 666 993 (IN LIQ)
First Plaintiff

THE BELL GROUP LTD ACN 008 666 993 (IN LIQ)
as trustee separately for each of
DOLFINNE PTY LTD ACN 009 134 516 (IN LIQ)
INDUSTRIAL SECURITIES PTY LTD
ACN 008 728 792 (IN LIQ)
MARANOA TRANSPORT PTY LTD
ACN 009 668 393 (IN LIQ)
NEOMA INVESTMENTS PTY LTD
ACN 009 234 842 (IN LIQ)
Second Plaintiff

BELL GROUP FINANCE PTY LTD
ACN 009 165 182 (IN LIQ) (RECEIVER AND
MANAGER APPOINTED)
Third Plaintiff

BELL GROUP (UK) HOLDINGS LTD (IN LIQ) (IN
ADMINISTRATIVE RECEIVERSHIP)
Fourth Plaintiff

BELL PUBLISHING GROUP PTY LTD
ACN 008 704 452 (IN LIQ)
Fifth Plaintiff

BELL GROUP NV (IN LIQ)
Sixth Plaintiff

AMBASSADOR NOMINEES PTY LTD
ACN 009 105 800 (IN LIQ)
BELCAP ENTERPRISES PTY LTD
ACN 009 264 537 (IN LIQ)
BELL BROS PTY LTD ACN 008 672 375 (IN LIQ)
BELL EQUITY MANAGEMENT LTD
ACN 009 210 208 (IN LIQ)
DOLFINNE PTY LTD ACN 009 134 516 (IN LIQ)
GREAT WESTERN TRANSPORT PTY LTD
ACN 009 669 121 (IN LIQ)
HARLESDEN FINANCE PTY LTD
ACN 009 227 561 (IN LIQ)
INDUSTRIAL SECURITIES PTY LTD
ACN 008 728 792 (IN LIQ)
MARADOLF LTD ACN 005 482 806 (IN LIQ)
MARANOA TRANSPORT PTY LTD
ACN 009 668 393 (IN LIQ)
WANSTEAD PTY LTD ACN 008 775 120 (IN LIQ)
WESTERN TRANSPORT PTY LTD
ACN 009 666 308 (IN LIQ)
WIGMORES TRACTORS PTY LTD
ACN 008 679 221 (IN LIQ)
W & J INVESTMENTS LTD ACN 000 068 888 (IN
LIQ)
DOLFINNE SECURITIES PTY LTD
ACN 009 218 142 (IN LIQ)
NEOMA INVESTMENTS PTY LTD
ACN 009 234 842 (IN LIQ)
TBGL ENTERPRISES LTD ACN 008 669 216 (IN
LIQ)
WANSTEAD SECURITIES PTY LTD
ACN 009 218 160 (IN LIQ)
WAON INVESTMENTS PTY LTD ACN 008 937 166
(IN LIQ)
WESTERN INTERSTATE PTY LTD
ACN 000 224 395 (PROVISIONAL LIQUIDATOR
APPOINTED)
Seventh Plaintiffs

GEOFFREY FRANK TOTTERDELL

in his capacity as liquidator (with ALJ Woodings) of
each of First Plaintiff and of the first, second, third,
fifth, ninth, tenth, eleventh, thirteenth, fourteenth,
sixteenth, seventeenth and nineteenth named Seventh
Plaintiffs
Eighth Plaintiff

ANTONY LESLIE JOHN WOODINGS

in his capacity as sole liquidator of the Third Plaintiff
and of the Fifth Plaintiff and of the fourth, sixth,
seventh, eighth, twelfth, fifteenth and eighteenth
named Seventh Plaintiffs
and as liquidator (with GF Totterdell) of the First
Plaintiff and of the first, second, third, fifth, ninth,
tenth, eleventh, thirteenth, fourteenth, sixteenth,
seventeenth and nineteenth named Seventh Plaintiffs
Ninth Plaintiff

GARRY JOHN TREVOR

in his capacity as liquidator of the Sixth Plaintiff
Twelfth Plaintiff

THE LAW DEBENTURE TRUST CORPORATION
plc

as trustee of the BGNV Trusts as defined in the
schedule to the writ of summons
Thirteenth Plaintiff

AND

WESTPAC BANKING CORPORATION
ACN 007 457 141
First Defendant

SG AUSTRALIA LTD ACN 002 093 021 (formerly
SOCIETE GENERALE AUSTRALIA LTD)
NATIONAL AUSTRALIA BANK LTD
ACN 004 044 937

HSBC BANK AUSTRALIA LTD ACN 006 434 162
(formerly HONGKONGBANK OF AUSTRALIA
LTD)

STANDARD CHARTERED BANK
ARBN 097 571 778

COMMONWEALTH BANK OF AUSTRALIA
ACN 123 123 124

Second Defendants

LLOYDS TSB BANK plc (formerly LLOYDS BANK
plc)

BANCO ESPIRITO SANTO SA (formerly BANCO
ESPIRITO SANTO E COMERCIAL DE LISBOA)

SEB AG (formerly BfG BANK AG) (formerly BANK
FUR GEMEINWIRTSCHAFT AG)

BANK OF SCOTLAND plc (formerly THE
GOVERNOR AND COMPANY OF THE BANK OF
SCOTLAND)

CREDIT AGRICOLE SA (formerly CAISSE
NATIONALE DE CREDIT AGRICOLE)

BANK AUSTRIA CREDITANSTALT AG (formerly
BANK AUSTRIA AKTIENGESELLSCHAFT)

CREDIT LYONNAIS

DRESDNER BANK AG

KBC BANK VERZEKERINGS HOLDING NV
(formerly KREDIETBANK NV)

SKOPBANK

DZ BANK AG DEUTSCHE ZENTRAL-
GENOSSENSCHAFTSBANK (formerly DG BANK
DEUTSCHE GENOSSENSCHAFTSBANK AG)

THE GULF BANK KSC

GENTRA LTD (formerly ROYAL TRUST BANK)

CALYON (formerly CREDIT AGRICOLE

INDOSUEZ) (formerly BANQUE INDOSUEZ)

Third Defendants

EQUITY TRUST (CURACAO) NV

Fifth Defendant

Catchwords:

Equity - Equitable relief - Declarations, monetary relief, compensatory interest - Relief relating to transactions of non-parties - Turns on own facts

Legislation:

Nil

Result:

Relief granted

Category: B

Representation:

Counsel:

All Plaintiffs : Mr E M Corboy SC, Mr S M Davies &
Mr J D S Barber
All Defendants : Mr D E J Ryan SC, Mr H K Insall SC &
Mr D F C Thomas

Solicitors:

All Plaintiffs : Blake Dawson
All Defendants : Freehills

Case(s) referred to in judgment(s):

Atlas Tiles Ltd v Briers (1978) 144 CLR 202.
Deeny v Gooda Walker Ltd (No 4) [1995] STC 696.
Hancock Family Memorial Foundation Ltd v Porteous [2000] WASC 29;
(2000) 22 WAR 198.
Ninety Five Pty Ltd (In Liq) v Banque Nationale de Paris [1988] WAR 132.
Re Humber Ironworks and Shipbuilding Co (Warrant Finance Co's Case) (1869)
LR 4 Ch App 643.
Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1986] Ch 246.
The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 9] [2008]
WASC 239.
Westpac Banking Corporation v Gollin & Co Ltd (In Liq) [1988] VR 397.

OWEN J

1 **OWEN J:** On 28 October 2008 I handed down reasons for decision in *The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239. In those reasons I made some findings of fact and enunciated conclusions of law concerning relief. But I left open the precise form of the relief the parties should have. These reasons are directed to those questions.

2 Acronyms and abbreviations listed in the glossaries in *Bell [No 9]* will be used in these reasons.

Background

3 I can see little point in repeating vast tracts of text from *Bell [No 9]*. But there are some points that need to be made by way of background to the fashioning of relief.

1. The plaintiffs established a cause of action on the first limb of *Barnes v Addy*; namely, the banks received trust property knowing that it arose from a breach of the directors' fiduciary duties.
2. The plaintiffs failed to establish a cause of action based on equitable fraud.
3. There is no such thing as a 'group' *Barnes v Addy* claim. This, combined with the failure of the equitable fraud claim, means that relief must attach to individual companies and individual transactions.
4. It follows from the establishment of the first limb *Barnes v Addy* claim that the plaintiffs have identified trust property (more accurately in the circumstances of this case property to which fiduciary obligations attached) received by the banks.
5. The plaintiffs are entitled to equitable relief. The guiding principle is that equity intervenes only to the extent necessary to do practical justice between the parties. The court has a wide discretion to mould equitable relief for this purpose. But, like all discretions of this nature, it must be exercised judicially. One aspect of that principle is that there must be a reasonable evidentiary base for the relief ordered.
6. A prerequisite to equitable relief of the type sought by the plaintiffs is that the other party can be restored to the position it enjoyed prior to the event giving rise to the claim for equitable

relief. But exact restoration is not essential. The party must be restored to its original position so far as is possible.

7. Not all of the Bell group companies that entered into Transactions are plaintiffs in the action. As a general proposition relief cannot be granted to an entity that is not a party to the action. This is especially so where, as in this case, Transactions entered into by non-plaintiff entities have not been set aside.
8. The primary monetary relief to which the plaintiffs are entitled is the disgorgement by the banks of the proceeds from assets realised or obtained by virtue of rights and powers arising from the impugned Transactions. The proceeds fall into five categories, as discussed in Sect 35 of *Bell [No 9]*.
9. The plaintiffs are also entitled to compensatory relief. In *Bell [No 9]* I made it clear that the compensatory relief would be measured by an award of interest, not through an account of profits.
10. The banks established that the on-loans from the three BGNV bond issues were subordinated. The plaintiffs failed to establish that the BGNV Subordination Deed was procured by breach of fiduciary duty by BGNV's director. That Transaction has not been set aside.
11. There are litigation funding arrangements in place between the liquidators of the various Bell group companies and funding creditors. I am not aware of details of the arrangements. At least one application has already been made under s 564 of the *Corporations Act 2001* (C'th) (although it has been deferred pending the outcome of this action) and, no doubt, other similar applications will be made in due course. The litigation funding arrangements are of no relevance to my deliberations on relief as between the parties to these proceedings.

Orders proposed by the parties

- 4 By the end of January 2009 both parties had filed drafts of proposed orders which they would seek. The plaintiffs' document is undated but was sent under cover of a letter of 23 December 2008.¹ The banks' draft orders are dated 23 January 2009.² The documents went through the normal process of amendment and adjustments, culminating in drafts dated 25 March 2009.³ The plaintiffs' final draft is structured as follows.

OWEN J

1. Judgment for the plaintiffs generally and an order dismissing the counterclaim.
2. Declarations that certain of the Transactions are void as against the liquidators under the statutory claims.
3. Declarations of entitlement to monetary relief for bank interest, bank fees, proceeds from the sale of the publishing assets, proceeds from the sale of the BRL shares, miscellaneous receipts, legal fees and stamp duty.
4. Declarations that the banks are not entitled to rely on or enforce nominated non-plaintiff Transactions in certain respects.
5. Declarations concerning the subordination of the on-loans and that the banks are not entitled to rely on or enforce the BGNV Subordination Deed as against BGNV.
6. Declarations concerning the entitlement of the banks to prove in the liquidations of TBGL, BGF and BGUK.
7. Orders rescinding *ab initio* Transactions of plaintiff Bell companies in so far as they bind those plaintiffs.
8. Injunctions to support the declarations in item 4 above.
9. Orders for payment of the amounts the subject of the declarations in item 3 above.
10. Orders for payment of compound interest and costs and for the release of moneys held as security for costs.

5 The plaintiffs' draft orders are supported by a series of schedules concerned, in the main, with amounts paid to individual banks and identifying the respective liabilities of the relevant Bell group companies to the banks immediately before 26 January 1990. I do not believe there is any dispute as to the material recorded in the various schedules, although the use to which that material can be put is a different matter.

6 In their proposed final orders the banks deal with declarations concerning the continued enforceability of the BGNV Subordination Deed and the fate of distributions to BGNV by the liquidators of TBGL and BGF in due course. They also posit orders to be made:

- (a) for the plaintiffs' primary entitlement to monetary relief to be limited to the difference between the amount the banks actually received and that which they would have received in liquidations shortly after 26 January 1990;
- (b) for the payment of moneys should their objections to the orders sought by the plaintiffs (particularly in relation to the sale of the publishing assets) be upheld;
- (c) for the calculation of interest on a different basis from that set out in *Bell [No 9]*; and
- (d) for a different regime concerning their entitlement to lodge proofs of debt, including an order that the moneys payable under judgment be held on trust until the proofs of debt have been finally admitted.

7 I have included as a schedule to these reasons a list of orders I am prepared to make. They are based on the plaintiffs' amended proposed orders of 25 March 2009. However, items 1, 2, 4 and 8 have been omitted. I have rearranged the order in which things appear so that the declarations of rescission precede matters going to monetary relief. The only order that might be said to arise from the counterclaim is one relating to the BGNV Subordination Deed. Otherwise I have not felt the need to draw on the drafting of the banks' proposed orders. For reasons of economy the schedule does not include Schedules A to G of the plaintiffs' proposed orders. The parties have those documents and I think other readers will be able to make sense of what I say without having to go to the plaintiffs' schedules.

8 As is usual for these proceedings, the parties' written submissions in relation to relief cover hundreds of pages and raise myriad issues. I have no intention of dealing with all issues and nor do I propose to canvass every argument (or even most arguments) raised on each (or any) of them. I will limit myself to those that I believe are necessary to explain why I have reached the conclusions that I have. I acknowledge that the exposure of the reasoning process in relation to those matters with which I intend to deal will be spare. But these reasons have to be read in the light of what is said in *Bell [No 9]*.

Some miscellaneous issues

9 I will start with a number of smaller issues that were raised in the written materials or in the hearings on 23, 24 and 25 March 2009.

The plaintiffs' preamble

- 10 The bland statements that the plaintiffs are entitled to judgment and that the counterclaim should be dismissed mask more than they reveal. They are unnecessary.

The declarations on the statutory claims

- 11 Before the hearing commenced on 23 March 2009 the banks pointed out to the plaintiffs that if the Transactions were rescinded *ab initio* as part of the *Barnes v Addy* relief there would be nothing on which the avoiding effect of s 120 of the *Bankruptcy Act 1966* (C'th) could operate. In my view the banks were correct. On 23 March 2009 counsel for the plaintiffs said that the declarations sought in pars A to D of the 20 January 2009 document would not be pressed.

- 12 However, in the 25 March 2009 draft the relevant declarations were reinstated. Counsel for the plaintiffs explained the change of heart in this way:

We have reconsidered that matter overnight [I]f your Honour was to accede to the notional liquidation scenario and windfall arguments that would have consequences for monetary relief and the way in which your Honour dealt with monetary relief in respect of the statutory claims.

Your Honour concluded it wasn't necessary to consider monetary relief in respect of the statutory claims, noting the *Brady v Stapleton* point that had been raised by the defendants that it wasn't necessary to deal with it. In our submission, it would be necessary to revisit that issue if the notional liquidation scenario were to be accepted.

We don't seek monetary relief in the orders proposed in respect of the statutory claims but we will, in the light of having thought about that submission that we have made and the consequences of an acceptance of the notional liquidation scenario, still press for the declarations in A to D on the basis that we're entitled to, as the court found, that statutory relief.

- 13 As I have not acceded to the notional liquidation scenario and (or) the windfall argument (to which I will turn shortly) there is no need for these declarations. But the plaintiffs' position is on record should it need to be reconsidered at some time in the future.

The agency argument

- 14 In some paragraphs of their draft orders (for example, pars M, 49 and 54) the plaintiffs sought payment of the entire sum from Westpac. This was apparently based on the agency argument. I took a limited view of

Westpac's agency; see, for example, *Bell [No 9]* Sect 30.5.2, although it must be said that this was largely concerned with the imputation of knowledge. Looking at the circumstances overall, I do not think Westpac received the funds in a true agency capacity such as to render it liable to repay the full amount to the plaintiffs and then look to the other banks for an indemnity.

The JNTH share mortgage

15 The share mortgage granted by TBGL over shares in JNTH was omitted from the list of Transactions the plaintiffs sought to have set aside: *Bell [No 9]* Sect 38.23. It does not appear in Bell Table P193A.⁴ Nonetheless, for the reasons set out in the document entitled 'Plaintiffs' Submissions in Support of Proposed Orders and in Response to Defendants' Amended Explanation',⁵ I will make the order sought by the plaintiffs.

The BPG receipt

16 On 23 July 1992 Westpac distributed to the banks \$641,000 that it had received as part of the third and final distribution of the proceeds from the sale of the publishing assets. This amount was not included in the plaintiffs' pleaded case but the banks do not dispute that it was received or that it came from the sale of the publishing assets. I cannot see any prejudice (in terms of mounting a defence) that accrued to the banks as a result of its omission from the pleadings. Accordingly, I will order that it be repaid to BPG.⁶

Bank interest

17 The pleaded claim for recovery of interest paid by the companies to the banks before the commencement of the insolvency administrations includes some payments before 26 January 1990.

18 The relevant payments affect Westpac (\$568,700) and HKBA (\$443,956). I will not order repayment of those amounts.

Interest

Calculation of compensatory interest

19 In *Bell [No 9]* [9711] - [9719] I said that compensatory relief ancillary to the primary monetary relief would be in the form of interest, not an account of profits. I made that decision on public interest grounds. I specified the rate and manner of calculation of interest. The banks

submitted they had not been properly heard on the rate and manner of calculation of compensatory interest. After a 3 year trial, towards the end of which the parties filed about 37,000 pages of written closing submissions (including on questions relating to relief) I was (perhaps inexplicably) unsympathetic to that argument.

20 The banks submitted that to compensate the plaintiffs for being held out of moneys in accordance with the principles set out in the judgment the interest payable by the banks should be calculated:

- (a) using the 90-day bank bill swap rate less 0.05 per cent for the period up until August 2007;
- (b) using the 90 day-bank bill swap rate for the period from August 2007; and
- (c) compounding interest every 90 days.

21 The banks sought leave to rely on an affidavit detailing the relevant rates and setting out the calculation of the interest according to the principles outlined. I gave leave for the banks to adduce the additional affidavit evidence but for the limited purpose of illustrating the windfall argument. In that respect I note that if interest were to be calculated in accordance with the banks' submissions the amount would reduce by about \$550 million.

22 I do not resile from anything I said in Sect 36.4 of *Bell [No 9]* and (save as set out below) have no intention of revisiting that matter. I confirm the decisions to:

- (a) deny the plaintiffs an election between an account of profits and some other measure of compensation;
- (b) direct that compensation take the form of interest; and
- (c) direct that interest should be calculated on a compound, rather than simple, basis.

23 There are, however, three issues that I do need to address. First, in *Bell [No 9]* [9718] I said the rate of interest should be the Westpac business indicator rate less 1 per cent and I explained why. For the reasons explained in plaintiffs' document entitled 'Notes on Monetary Receipts and the Liquidators' Compound Interest Calculations'⁷ I note that as from 25 January 2008, the rate will change to the Westpac Reference Lending Rate plus 0.75 per cent less 1 per cent.

OWEN J

24 Secondly, I did not specify the rest periods for the calculation of compound interest. The plaintiffs submit that interest should be compounded at monthly rests.⁸ I accept that submission.

25 Thirdly, the plaintiffs submit that the compound interest calculation should continue through to the date on which the banks repay the moneys. I think a more appropriate order is that the calculation be made as at the date of the judgment. From that date the plaintiffs will have a judgment they can enforce. Thereafter, so far as concerns interest, s 8 of the *Civil Judgments Enforcement Act 2004* (WA) will apply.

Tax on interest

26 The banks made a further submission concerning the calculation of compensatory interest. The banks contended that the plaintiffs should only be entitled to compound such interest as the plaintiffs would have been entitled to retain for their benefit. The plaintiffs would obviously not have retained any amount which was payable as tax in respect of the interest earned. Accordingly, if tax is and would have been payable in respect of moneys placed on deposit by the plaintiffs the amount payable as interest for each year should be excluded from any compounding effect.

27 The banks do not argue that the primary amount they are required to pay should be reduced by the tax that is, or would have been, payable on the interest component of the monetary relief. The banks seek to be relieved of an obligation to pay compound interest on such sums on an incorrect basis; namely that the plaintiffs would have 'had the use' of such funds over the years. The plaintiffs are therefore compensated for tax but the banks are not exposed to the compounding impact on that portion of the moneys the plaintiffs would have been obliged to cede to the revenue authorities.

28 The banks rely on dicta of Stephen J in *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202. His Honour said, at 231:

If the basic factor in assessing economic loss, namely, what would have been the Plaintiff's earnings but for his injury, can be no more than an informed estimate, inherently subject to errors of various kinds, some of which may be cumulative the one upon the other, it is obviously illusory to seek for precise accuracy in an ancillary factor such as tax, itself dependent for its quantum upon an uncertain estimate of earnings. As Barwick CJ said in *Lind v Macleod*, estimation of the amount of tax a Plaintiff would have paid on his continuing pre-accident income is to be made 'not, of course, precisely but broadly in a manner which is sufficient

for such purposes as the present'. This conforms with the views of their Lordships in *Gourley's Case*; as Earl Jowitt said, the tax must be estimated and that estimate 'will be none the worse if it is formed on broad lines, even though it may be described as rough and ready'.

29 The plaintiffs submitted that the banks' position is wrong in principle. I do not think I need to resolve that issue. I am prepared to accept, for the purpose of these supplementary reasons, that the position is as contended for by the banks. The next question concerns the onus of proof. Each party said the other bore the burden of establishing the tax position of the relevant companies. I will resolve it shortly. Put bluntly, the plaintiffs want the money so they have to establish their entitlement to it.

30 It is neither necessary nor possible to make precise findings as to the tax position of the several Bell group companies. I was referred to *Deeny v Gooda Walker Ltd (No 4)* [1995] STC 696, a case in which certain Lloyds names were awarded damages for breach of the obligation to exercise reasonable skill and care in the conduct of insurance underwriting businesses on behalf of the names. The point in issue was whether in determining interest on the damages under the equivalent to s 32 of the *Supreme Court Act 1935* (WA) the calculation should be made on the gross amount or on the net losses after giving credit for tax savings. Phillips J held that it should be the latter but he applied an approach that accords with the 'rough and ready' description adopted in *Atlas Tiles*. Phillips J said, at 702:

The discretion to award interest under statute is a broad discretion designed to enable the court to compensate for the prejudice flowing from loss of the use of money. No court is likely to countenance a detailed inquiry into the tax position of an individual Plaintiff in order to decide how to exercise that discretion. The complexity and cost of that exercise are likely to be out of proportion to the end to which it is directed. But it does not seem to me that this fact should result in the court, in all circumstances, closing its eyes to the implications of taxation when awarding statutory interest.

31 That is the approach I intend to take. I do not have to decide whether or not the amount payable to the plaintiffs will be subject to tax. Nor do I need to enter into the complex task of determining whether losses are available to offset any tax that might be payable and, if so, the extent of the offset. All I am required to do is take a broad brush approach and look at potential outcomes. The purpose is to determine whether an alternative method of calculating interest is necessary or appropriate in order to do practical justice between the parties.

32 The allocation of the primary monetary relief among the plaintiff Bell companies is summarised in the following table. The figures have been rounded.

<u>Company</u>	<u>Amount</u>
BGF	\$256.5 million and £443,800
BPG	\$641,000
BGUK	£14.1 million
Bell Equity Management	\$830,000
Dolfinne	\$28 million
Industrial Securities	\$5.9 million
Maranoa Transport	\$19.5 million
Dolfinne Securities	\$1.2 million
Neoma Investments	\$3.4 million
Wanstead Securities	\$943,000

33 This demonstrates that of the great bulk of the primary monetary relief (something in excess of 90 per cent) is payable to Australian Bell group companies. It can be assumed that the compensatory interest would be shared between the Australian Bell group companies and BGUK in roughly similar proportions.

34 The BGF accounts at 5 October 1990 include, by way of a note, an unrecognised future tax benefit of \$591.2 million.⁹ The June 1989 and 5 October 1990 accounts indicate that the group used group tax relief to alleviate income tax on individual group companies. The note concerning the unrecognised future tax benefit is as follows:

The directors' estimate of the potential future income tax at 5 October 1990 in respect of timing differences not brought to account is [\$591.2 million]. This benefit will only be obtained if:

- (a) the company derives further assessable income of a nature and of an amount sufficient to enable the benefit from the deductions for the timing differences to be realised;
- (b) the company continues to comply with the conditions for deductibility imposed by law; and
- (c) no changes in tax legislation adversely affect the company realising the benefit from deduction for the timing differences.

35 The 5 October 1990 accounts were audited. There is a qualification concerning the 'going concern' assumption but there is no adverse comment on the note about future income tax benefits. This suggests that the auditors were satisfied that, so long as the company earned assessable income in a future period (and the other conditions were fulfilled), the tax benefit could be recognised. So far as I am aware there has been no change in the ownership structure of BGF such as might affect the ability to carry forward losses or to permit the allocation of losses to other group companies. Nor am I aware of any changes to tax legislation that might have an impact of the ability of the BGF to bring to account its tax losses against assessable income that it might earn in the future.

36 I accept that this would not be a sufficient evidentiary base on which to make findings as to the exact tax position of the company. For example, it does not answer the question whether there have been, since 1990, other calls on the available tax losses of BGF. But that is not the exercise I have to perform. The question is whether there are circumstances of sufficient gravity to require a reduction in the level of compensation to which the plaintiffs would otherwise be entitled. I can approach it using the 'rough and ready' approach.

37 In Australia the company tax rates have varied between a high of 39 cents in the dollar (January 1990 to 30 June 1993) to a low of 30 cents in the dollar. Had the 39 cent rate carried through for the entire period, the companies would have been able to earn assessable income up to about \$1.5 billion before the future income tax benefit had been fully utilised. As a matter of mathematics, as the rate declines the level of assessable income the losses can sustain increases.

38 I believe the material in the BGF accounts as at 30 June 1989 and 5 October 1990 is sufficient to enable me to draw a reasonable inference that if the receipt or accrual of compensatory interest attracted (or attracts) a liability to tax, the available tax losses in BGF would have covered (or would cover) its liability. By virtue of the group relief system, BPG and

the seven BRL shareholders would have been able to take advantage of BGF's carry forward losses.

39 My limited knowledge of tax law and practice suggests there would be difficulties in applying group relief across international borders. If this is right, BGF could not cede losses to alleviate any tax levied on BGUK in relation to interest payable to it under the judgment. In relation to BGUK some group relief schedules were tendered in evidence. They were described as adaptations of the schedules maintained by Martin Brown. He was the group Taxation Manager for Bond Corporation (UK) Ltd, with responsibility for tax matters of the BGUK group. The schedule for 30 June 1988 indicates that BGUK had tax losses to carry forward of £14.1 million. In his witness statement Brown said that as at November 1988 there were losses in the BGUK group but that he did not expect the companies, in future accounting periods, to have trading income against which those losses could be carried forward.¹⁰

40 This suggests that there were at least some tax losses that might have been (or might be) available in BGUK but whether or not they could be used to offset tax on the receipt of compensatory interest is problematic. But as I have already said, the primary monetary relief payable to BGUK is a small percentage of the total amount that the banks will be required to pay and the interest calculation will be proportionately similar. I do not believe that the risk of unjustified windfall accruing to BGUK by reason of tax implications requires that a different treatment be afforded to the BGUK entitlement.

The windfall argument

41 In their document dated 23 January 2009 entitled 'Defendants' Explanation and Proposed Orders for Relief' the banks raised an argument (rejected at trial) that the plaintiffs were not entitled to equitable relief because the banks could not be restored to their original position. Perhaps anticipating my likely reaction to that line of attack they raised an alternative argument based on a provisional liquidation scenario. The banks sought to adduce a further expert report opining as to what would have happened in the following hypothetical circumstances:

- (a) the various Bell group companies went into liquidation a reasonable time after 26 January 1990;
- (b) the publishing assets, the BRL shares and miscellaneous assets were realised at the values I attributed to them for the purposes of the insolvency case; and

- (c) the funds were distributed in the liquidations on the basis of the liabilities of the various companies in 1990.

42 The difficulties in establishing all necessary elements of a formal liquidation scenario in the narrow confines of a post-trial hearing to determine relief will be obvious. The banks did not press the tender of the additional expert report. But a notional liquidation remains the basis of what has been termed the windfall argument.

43 The windfall argument has, at its heart, a number of related propositions. First, the plaintiffs cannot recover that which would have been paid to the banks in any event. The banks contend that the assets actually available in a notional liquidation would have been few because:

- (a) the publishing assets were subject to the Harlesden securities, which have not been and cannot be set aside; and
- (b) in early 1990 the BRL shares were worth nothing.

44 Secondly, relief should be moulded to recognise that the banks would have received all or substantially all of the plaintiffs' assets in the notional liquidation so that 'the prejudice that founds the grant of relief is the prejudice to those external creditors who would have, but did not, receive a dividend as a result of the impugned transactions'. Accordingly, the banks should only be required to repay to the plaintiffs amounts representing the likely dividend to those external creditors.

45 Thirdly, in a liquidation occurring within a reasonable time after 26 January 1990 the bondholders would not have received anything because of the subordinated status of the on-loans. If the plaintiffs are permitted to recover all of the moneys involved in the primary relief together with compensatory interest, it is likely that some funds will flow to BNGV and from it to the bondholders. The bondholders are, therefore, big winners from this saga and it would not be appropriate to grant equitable relief that gives them a distribution to which they would not otherwise have been entitled.

46 Fourthly, in a notional liquidation the banks would have recovered virtually all of the moneys then owing to them. Relief should therefore be moulded so that they are only required to disgorge the difference between the amount they actually received and that which they would have recovered in the notional liquidation. If the award of interest is to be truly compensatory, it should be calculated only on that difference.

47 The first of those propositions depends on the view that is taken of the fact that the Harlesden securities have not been set aside. The second and fourth propositions are closely related. The second depends on the extent of the external creditors and is thus problematic if the formal notional liquidation scenario is carried through to permit definite calculations to be made. I will, therefore, concentrate on the fourth scenario.

48 The third proposition says much about why this litigation has been carried through to the lengths that it has. Decisions about litigation funding were taken at an early stage. I have already said that I know nothing about the detail of the arrangements and regard them as essentially irrelevant to the task I have to perform. But the reality is that SGIC, which acquired the domestic bonds from Heytesbury Securities, is one of the litigation funders. It has never been argued that the domestic bonds were other than subordinated but SGIC may eventually be a party to the s 564 applications.

49 One plank of the banks' argument is that rescission is not possible and that, therefore, the banks cannot be restored to their original position and that, accordingly, the plaintiffs are not entitled to any monetary relief. Leaving to one side the Harlesden securities I rejected that argument at trial and will not go into it again. With that exception I do not propose to go into the fascinating arguments about whether the banks need leave to reopen in order to advance the remaining aspects of the windfall argument. I think a more fruitful exercise will be to examine whether:

- (a) the plaintiffs should have their primary monetary relief or whether they should be limited to the differential identified in the fourth proposition above; and
- (b) whether (assuming the plaintiffs are entitled to their primary monetary relief) an award of interest on the full amount will offend the compensatory principle.

50 To put these arguments in perspective it is necessary to look at the broad figures involved in the plaintiffs' claims for monetary relief and in the banks' response. The figures set out in the table are all approximate.

<u>Nature of claim</u>	<u>Amount</u>
Plaintiffs' primary monetary relief	\$350 million
Compound interest on full amount of plaintiffs' primary monetary relief	\$1.2 billion
Banks' 'fourth proposition' differential	\$87 million
Compound interest on banks' 'fourth proposition' differential	\$428 million

51 The Oxford Dictionary defines 'windfall' as 'a thing unexpectedly acquired, a piece of unexpected good fortune'. We could have a neat semantic debate as to whether, strictly speaking, the consequences of this judgment are a 'windfall'. The liquidators took the view that the banks had received an inappropriate benefit at the expense of the general body of creditors and they set out to right the perceived wrong. No doubt they kept the creditors (including the bondholders) informed as to the proposed course of action and progress along the way. They encouraged the trustee for the bondholders to join in the action. I am not sure whether, in those circumstances, a distribution (if one is made) to subordinated creditors out of a fund recovered from the action should be characterised as a 'windfall'.

52 Be that as it may, it is undeniable that had the Transactions not occurred and had the companies gone into liquidation shortly after 26 January 1990 it is unlikely the bondholders would have received a return on their investments. To that extent, anything they now receive might be termed a 'windfall' in a more idiomatic understanding of the word.

53 This brings us back to the vexed question of a 'valid and effective restructure'. The banks' case is that, as at 26 January 1990, the directors had two choices: the Transactions or liquidation. The beauty of the Transactions, the banks say, is that they were an essential first step which gave the directors an opportunity 'to exercise their commercial acumen and business judgment to pursue steps to order the affairs of the Bell group in the interests of each company as a whole in the Bell group'. This would allow them to continue to carry on business so as to restructure the financial position of the group. The plaintiffs say this is not so. They say that unless the Bell Participants were able to enter into a valid and

effective restructuring of their financial position, those companies would have been wound up or their assets liquidated.

54 There are myriad references in *Bell [No 9]* to the concept of the valid and effective restructure and the opposing positions taken by the parties in relation to it. Without intending this to be an exhaustive list I mention [709], [901], [4925] to [4926], [4300] - [4309] and [4334] - [4335]. As a general statement I accepted that the banks' position of 'Transactions or liquidation' was too restricted and that the plaintiffs' case in relation to the valid and effective restructure was to be preferred.

55 The banks' windfall argument relies on the notional liquidation scenario. In other words, the banks posit what would have happened had the Transactions not occurred and had the companies gone into liquidation shortly after 26 January 1990. In that respect the banks take comfort from what I said at [4287] about my 'back of the envelope' calculation as to the position had the companies gone into liquidation on 26 January 1990. The banks submit that on that basis they would, on a notional winding up, have received, save for immaterial amounts, repayment of the entirety of their debts. This is so even if the Transactions had not been entered into. Any relief which is ordered should take those findings into account. To do otherwise will mean that the banks pay interest on monies which they would in any event have received in 1990 to the benefit of creditors the court has found would not have received a payment in a liquidation in January 1990, namely the subordinated bondholders.

56 This submission attaches too great a significance to my back of the envelope calculation. In [4288] and [4289] I explained the purpose of the exercise and its limitations, including that it commits the group insolvency sin. In addition, it was necessarily restricted to evidence led, largely from the books and records of the companies, concerning the position in January 1990. It is not uncommon in large corporate liquidations for creditors to emerge who do not appear in the books and records: see [7244]. This may be the case in the Bell group company liquidations. Evidence was adduced as to proofs of debt lodged and admitted in the liquidations. They were not admitted to establish the truth of their contents but they indicate there are claims by entities purporting to be creditors and which are not reflected in the back of the envelope calculation.

57 The notional liquidation scenario also assumes that there would not be, and could not be, a valid and effective restructure taking into account the position of all creditors. As I pointed out, particularly at [4335], by

reason of the Transactions the companies lost free and unfettered access to all or most of their valuable assets. They were thereafter inhibited in the way they could realistically go about restructure plans involving creditors other than the banks. The banks were placed in a dominant position to direct and control the restructure negotiations. This makes it difficult to supplant 'valid and effective restructure' considerations with those inherent in the notional liquidation scenario. In my view there is an insufficient evidentiary base from which to calculate the differential that is at the heart of the banks' fourth proposition.

58 The banks assert in their written submissions that this court should not make an award of interest in favour of companies in liquidation which would result in distributions being received by creditors or shareholders of such companies who would not otherwise have received or been entitled to such distributions. They rely on two cases in support of this proposition: *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 and *Ninety Five Pty Ltd (In Liq) v Banque Nationale de Paris* [1988] WAR 132. I think that those cases are directed at a different issue and do not stand for the proposition advanced by the banks.

59 In *Rolled Steel Products* the plaintiff company effectively assumed responsibility for part of a debt owed by company B to the defendant. The plaintiff and B had some common directors and were owned or majority owned in common. B defaulted in its obligations to the defendant and the defendant extracted payment from the plaintiff. Both the plaintiff and B went into liquidation. The court held that in causing the plaintiff to assume responsibility for B's debt the directors had breached their fiduciary duties to the plaintiff. The court set aside the transaction and ordered the defendant to repay the interest component of the money extracted from the plaintiff.

60 An issue arose as to whether interest should be awarded on the monetary relief granted to the plaintiff. The defendant argued that any monetary relief awarded (including interest) should be limited so as to provide that the aggregate amount to be paid by the defendant did not exceed a sum sufficient to enable the plaintiff's liquidator to discharge in full the liabilities, costs, charges and expenses of the liquidation. If an amount greater than that sum were awarded, the surplus would benefit the director who had actively participated in the breaches of trust and the minority shareholders who had consented to those breaches. Slade LJ ultimately decided, however, that while he had 'much sympathy' for the

argument he would not cap the defendant's liability on procedural grounds.

61 In *Ninety Five* the issued shares in the plaintiff were acquired by a company called Bicton. On settlement the directors of the plaintiff, in breach of their fiduciary duties, paid cheques to the defendant bank in repayment of a loan by the defendant to Bicton to enable Bicton to acquire the issued capital of the plaintiff. The effect of these transactions was that the plaintiff gave to Bicton financial assistance to the extent of almost \$2 million, in breach of section 67 of the *Companies Act 1961* (WA). That section prohibited a company from giving financial assistance in connection with the purchase of its own shares. The plaintiff later went into liquidation.

62 Smith J found that the defendant was liable as a constructive trustee to account to the plaintiff the sum received in repayment of the Bicton loan under both limbs of *Barnes v Addy*. His Honour then turned to consider whether the plaintiff should be entitled to interest on the sum paid in respect of the Bicton loan. Smith J noted that, as the plaintiff's money had been used by the defendant in its trading activities, the plaintiff would generally be entitled to compound interest. However, an award of interest would result in a substantial surplus in the hands of the liquidator of the plaintiff after all its liabilities and the costs, charges and expenses of the liquidation had been discharged. That surplus would fall to be distributed to the sole contributory of the company which the evidence disclosed to be Bicton.

63 Smith J therefore adopted the approach advanced, but not applied, in *Rolled Steel Products* and placed a limit on the liability of the defendant. He capped the interest award so that the amount to be paid by the defendant to the plaintiff did not exceed a sum sufficient to enable the liquidator of the plaintiff to discharge in full the plaintiff's liabilities and the costs, charges and expenses of the liquidation.

64 In both of these cases an uncapped award of interest would have provided a surplus to the liquidator in excess of the liabilities and costs, charges and expenses of the liquidation, and this surplus would have fallen to be paid to a party which had actively participated in the breach of fiduciary duties. It would therefore sometimes be appropriate to limit the award of interest so as to prevent a wrongdoer from benefiting from its active participation in the breach.

65 In the present case, however, the bondholders are creditors of BGNV and BGNV is, in turn, a creditor of BGF. Further, the bondholders did not participate in any breach of fiduciary duty. They are not wrongdoers for whom the discharge of their (subordinated) claims would be inequitable. It follows that the principles enunciated in *Rolled Steel Products* and *Ninety Five* do not support the capping of an award of interest which, under general principles, would flow from a defendants' conduct in relation to the trust property.

66 I need now to go back to the fundamentals from which the right to relief arises. The plaintiffs established a cause of action on the first limb of *Barnes v Addy*; namely, the banks received trust property knowing that it arose from a breach of the directors' fiduciary duties. The primary monetary relief to which the plaintiffs are entitled is the disgorgement by the banks of the proceeds from assets realised or obtained by virtue of rights and powers arising from the impugned Transactions. Once the Transactions have been set aside the banks' obligation is to restore to the plaintiffs the funds in the five categories identified in the judgment.

67 I do not see how the restoration of these funds to the plaintiffs can be said to constitute a 'windfall'. But the plaintiffs cannot require repayment of the funds without recognising the obligations the several Bell group companies had to the banks prior to the Transactions. The banks can assert claims in respect of those obligations but they do so on an equal footing with other ordinary, unsecured and unsubordinated creditors. This does not, and cannot, constitute a windfall.

68 The problem arises through, and because of, the award of compensatory interest. It appears in stark relief because of the sheer size of the number. But its size is an incident of the passing of time and care needs to be taken not to allow the number to mask the relevant principle. The purpose of the award of interest is to compensate the plaintiffs for being held out of their primary monetary relief. Had these proceedings been finalised within a short (or even reasonable) time after the impugned Transactions it is unlikely that this argument would have arisen.

69 Nonetheless, it seems to me that as a matter of principle the plaintiffs are entitled to have the compensation calculated on the full amount of the primary monetary relief. The next question is whether, due to the sheer size of the figure concerned or because it opens up the possibility that creditors who might not otherwise have received a dividend might do so, the court should adopt a different approach. Put in a slightly different way the question is whether those circumstances will produce a result that

goes so far beyond reasonable compensation that it is offensive to conscience and ought not to be countenanced by a court of equity.

70 One of the questions this raises is what would be an appropriate and fair alternative method of calculation. I can see no reason why I should do anything other than order the payment of the full amount of the primary monetary relief. To this extent I do not accept the approach advocated by the banks in what I have termed the fourth proposition. In particular, I do not accept that restoration to the extent of \$350 million (or thereabouts) should be replaced by orders for payment of an amount of approximately \$87 million.

71 It would, of course, still be possible to recognise the smaller figure but to do so solely as the base for the calculation of compensatory interest. The problem with that approach is that it assumes the banks would have received payment in full had the Transactions not been entered into and had the companies been liquidated shortly after 26 January 1990. As I have already indicated, the 'back of the envelope' calculation I made in *Bell [No 9]* [4287] is an insufficient evidentiary base for such a finding.

72 It may well be that the interest award forms the bulk of the fund from which (after the priority claims recognised in the relevant legislation have been satisfied) distributions or payments might be made to ordinary creditors and (perhaps) to subordinated creditors and (perhaps also) to litigation funders (if successful in applications under s 564). But that is a consequence of the peculiar circumstance of this case and does not, in my view, require either the withholding of part (or all) of the primary monetary relief or a capping or other diminution in the award of compensatory interest to which the plaintiffs would otherwise be entitled.

73 I do not regard the windfall argument as a frivolous flight of fancy on the part of the banks. It deserved, and has been given, close attention. But I think the preferable course is to order the repayment of the primary monetary relief and to permit the calculation of interest to be made on the full amount.

Non-plaintiff transactions

74 I made it clear during the trial that I held a grave concern about the question of relief in relation to non-plaintiff Transactions and (I hope) that concern is obvious from the reasons: see, for example, *Bell [No 9]* Sect 36.2. I reiterated it during the hearings in February and March 2009. I have already identified the problem. Not all of the Bell group companies that entered into Transactions are plaintiffs in the action. As a general

proposition relief cannot be granted to an entity that is not a party to the action. This is especially so where, as in this case, Transactions entered into by non-plaintiff entities have not been set aside. Further, a prerequisite to equitable relief of the type sought by the plaintiffs is that the other party can be restored, so far as is possible, to the position it enjoyed prior to the event giving rise to the claim for equitable relief.

75 In addition, there are strict limits on the availability of monetary relief in relation to transactions that have not been set aside. The discussion of *Hancock Family Memorial Foundation Ltd v Porteous* [2000] WASC 29; (2000) 22 WAR 198 in Sect 21.2.5.2 highlights the problem for the plaintiffs in relying on transactions that have not been set aside .

76 I said (at [9660]) that I was am not prepared to grant relief in the broad all-encompassing form advanced in prayer for relief EE of 8ASC and in PP par 71(d)(iii). But I said the plaintiffs might be entitled to some relief in relation to non-plaintiff Transactions if that were necessary to preserve the integrity of orders to which they were otherwise entitled but that any such relief would have to be precise and limited.

77 The inclusion or exclusion of Bell group companies from the list of plaintiff entities has not happened by accident. It has been the subject of deliberate and considered forensic decisions. When the action was initiated in 1995 TBGL, BGF, BGUK, BPG and BGNV were all parties. So, too, were 14 of the companies that are now the seventh plaintiffs. But over the years another six Bell group companies have been added as seventh plaintiffs; namely, Dolfinne Securities, Neoma, TBGL Enterprises, Wanstead Securities, WAON and Western Interstate. During the opening counsel for the plaintiffs went to some lengths to explain why each of the plaintiff companies had been joined as a party.¹¹ Section 6.2.1 includes a brief summary of the rationale behind the joinder of the various entities.

78 It would have been impossible, or at least very difficult, to join some of the Bell group entities. Companies within the Harlesden sub-group (the group that held the publishing assets and which was sold to WANH by the Harlesden share sale agreement) are examples. But there are some other entities that are not parties and which the plaintiffs now seek to bring in to the overall relief regime. In relation to those entities (save for Bell Bros Holdings, which is in liquidation) the explanation proffered as to why they were not joined is that they have been deregistered. I will return to that question a little later.

79 The plaintiffs are not saying that relief can be granted to entities that are not parties to the action. But they say that where a Transaction of a non-party adversely affects the rights of a plaintiff Bell company the latter can claim relief in relation to the non-party Transactions to prevent infringement of a plaintiff's rights. The problem I perceive is that this may become a triumph of form over substance. In other words, that the relief will, in substance, be relief in favour of the non-party although the form belies such a conclusion. That matter aside, there is nothing I wish to add to what I said in *Bell [No 9]* and in exchanges with counsel in the March 2009 hearings about the principles and difficulties as I have identified them. I need to explain in a little more detail:

- (a) what relief the plaintiffs seek in respect of non-plaintiff Transactions;
- (b) why the plaintiffs say they need that relief; and
- (c) why they say it does not infringe the general principles.

80 The difficulty confronting me is not so much one of a lack of power. The question relates to the proper exercise of the power and discretion to fashion relief so as to do justice between the parties. Such an exercise of power and discretion must be faithful to established principles and must not give vent to idiosyncratic notions of fairness. This starting point relieves me of the obligation to enter into a detailed analysis of the parties' submissions about these questions.¹²

81 In an early version of the plaintiffs' draft minute of proposed judgment and orders¹³ the plaintiffs sought a declaration (identified by the letter O) in these terms:

The [banks] are not entitled:

- (a) to enforce or rely on or assert the validity of the transactions referred to in Column 1 of Schedule H against the companies listed against each such transaction in Column 2 of Schedule H;
- (b) to take any step to require the companies listed in Column 2 of Schedule H to perform or comply with any transaction referred to in Column 1 of Schedule H; or
- (c) to rely on or assert an entitlement to payment or receive any payment from the companies referred to in Column 2 of Schedule H under or by reason of the transactions against which the name of that company is listed in Column 2 of Schedule H.

82 The first transaction listed in Column 1 of Schedule H is the Principal Subordination Deed. Column 2 contains the names of 13 non-plaintiff Bell group companies that are parties to the Principal Subordination Deed. Among them is Group Color. The other transactions (and companies) mentioned in Schedule H are guarantees and indemnities (Group Color and TBGIL), a share mortgage (Group Color) and the BIIL Subordination Deed (BIIL). In other words the declaration and Schedule H purport to affect four transactions and 15 companies. The all-embracing effect of this declaration is obvious from its terms.

83 As a result (I presume) of exchanges that took place during the March 2009 hearings, this regime was altered. Both declaration O and Schedule H were deleted and replaced by a series of declarations (identified as O to DD) dealing separately with indentified transactions and companies and seeking to inhibit the exercise by the banks of rights in nominated clauses in the relevant document. Those paragraphs relate to the Principal Subordination Deed and (in one paragraph only) the BIIL Subordination Deed and seek to restrict the banks from enforcing rights in relation to distributions by the liquidators to the relevant non-plaintiff Bell companies. Details of the fourteen non-plaintiff Bell companies and the source of the distributions to them from the liquidator of a plaintiff Bell company are listed in the following table. I will explain the fourth column (plaintiff said to be affected) later in this section.

<u>Non-plaintiff company</u>	<u>Source of distribution</u>	<u>Paragraph in proposed orders</u>	<u>Plaintiff said to be affected</u>
Armstrong Ledlie Stillman Pty Ltd	BGF	O	TBGL
Belcap Portfolio Pty Ltd	BGF	P	BGF
Bell Bros Holdings	Bell Bros	R	TBGL and BGF
BIIL ¹⁴	BGUK	DD	BGUK
Bell Properties Pty Ltd	Bell Bros	S	Bell Bros
Davsell Pty Ltd	BGF	T	TBGL
Godine Enterprises Pty Ltd	BGF	Q	BGF
Group Color ¹⁵	BGF	V and W	Belcap Enterprises
Harlesden Pty Ltd	BGF	X	Wanstead
Overells Pty Ltd	BGF	Z	TBGL
Savidge & Killer Pty Ltd	BGF	AA	TBGL

W & J Financial Services	BGF	CC	TBGL
Wanstead Finance Pty Ltd	BGF	U	BGF
Wigmores Finance Pty Ltd	BGF	Y	BGF

84 I should add that in par BB the plaintiffs sought orders preventing the banks from enforcing rights under the Principal Subordination Deed in relation to distributions by the liquidator of BGF to Bell International Insurance Co Ltd. But that company was not a party to the Principal Subordination Deed and nor was it otherwise a Bell Participant. On 24 April 2009 the plaintiffs solicitors advised the Court that par BB was no longer pressed.

85 To describe the relief sought by the plaintiffs in this aspect of the proposed orders I will use declaration V as an example:

[The banks] are not entitled to rely on, assert, exercise or enforce any right under clauses 2, 3, 4, 5, 6, 7(b), 8, 9, 10, 12 and 15 of the Principal Subordination Deed in respect of any payment, division or distribution of any kind or character whatsoever, whether in cash, securities or other property or the benefit or proceeds thereof which shall be payable to, or deliverable to or received by [Group Color] from the liquidator of BGF.

86 Apart from the boilerplate provisions it is difficult to identify anything material in the Principal Subordination Deed that is not covered in the nominated clauses. The BIIL Subordination Deed is in similar terms. I should add that in pars 25 to 40 the plaintiffs seek injunctions restraining the banks from engaging in conduct contrary to the declarations. Paragraph 38 relates to Bell International Insurance Co Ltd and is no longer pressed.

87 The explanation as to why the plaintiffs say relief in relation to non-party transactions is necessary emerges from two documents. One is an affidavit sworn by Woodings on 18 February 2009¹⁶ and the other is plaintiffs' Submissions in Support of Proposed Orders.¹⁷ I will try to describe the problem in as brief a fashion as I can.

88 Woodings developed a distribution model which calculates the distribution of amounts to the creditors and shareholders of the Bell group companies. It is not based on the SNAs but rather on available current information as to external creditors and debt and equity relationships

within the Bell group. The distribution model demonstrates, among other things, the financial effect of certain non-plaintiff Transactions and the terms governing the distributions to BGNV in the liquidations of BGF and TBGL on the resulting distributions to creditors. The distribution model identifies the non-plaintiff companies whose Transactions are likely to have a significant adverse impact on the distributions that are received both by plaintiff Bell companies and by external creditors of the Bell group companies, other than the banks. Four variables and a number of differing assumptions have been used to develop a variety of scenarios showing how moneys would flow depending on the circumstances pertaining to receipts and recognition of claims.

89 Woodings opines that if the relief sought in relation to the non-plaintiff Transactions is not granted, the external creditors are likely to receive significantly less than would otherwise be the case. Based on the assumptions and calculations in the distribution model the reduction in the amount that they will receive is in the range of \$119 million to \$678 million. Conversely, the plaintiffs contend, the banks stand to benefit by these amounts if the relief is not granted.

90 As a result of further exchanges between the parties in February and March 2009 the plaintiffs prepared a revised distribution model. I am not sure what, if any, difference the revised model makes to the range mentioned in the preceding paragraph. The plaintiffs' written submissions suggest that there will still be a significant reduction in the funds available to meet the claims of external creditors. I cannot say whether it is more or less than the range specified in the preceding paragraph.

91 The problem arises in this way. The proceeds of this judgment and any other funds available in the liquidations, after satisfying priority claims, will be distributed by the liquidator of a recipient company (A) according to claims that have been recognised by A. This will include distributions to external creditors of A and to other Bell group companies (B). There will, in turn, be distributions by B according to claims it has recognised. This may involve further distributions to external creditors and to other Bell group companies. In relation to the latter, the distribution might be to a creditor company or to its shareholder as a return of capital.

92 The distribution model recognises that if the banks are able to enforce the Principal Subordination Deed and the BIIL Subordination Deed against the 14 non-plaintiff companies identified in the table there will be blockages in the free flow of funds through the group. In his

affidavit Woodings has annexed fifteen charts that provide details of the blockages. Because the proposed orders have changed since the affidavit was sworn the charts do not marry exactly with the proposed orders but that is not an impediment to the use of the charts. I am going to use two of the charts to illustrate the blockage proposition. But before I do so, I need to explain how the plaintiffs say that there is an adverse impact on legitimate rights that they are entitled to protect. What follows is an incomplete description of the problem but it is enough to identify what the plaintiffs say is at stake.

93 The plaintiffs contend that the banks should not be allowed to rely on the Principal Subordination Deed (or the BIIL Subordination Deed) as against the specified non-plaintiff Bell companies. If they are permitted to do so any funds distributed to the non-plaintiff Bell companies as creditors or shareholders of other Bell group companies will pass to the banks instead of the creditors and (or) shareholders of the non-plaintiff Bell companies.

94 Clause 2 of the Principal Subordination Deed provides for contractual subordination of 'subordinated liabilities' to 'senior liabilities'. The subordinated creditor cannot prove in the liquidation of any 'security provider' unless requested by the banks' security agent to do so. Consequently, if there are any senior liabilities extant after various Transactions have been set aside, any non-plaintiff Bell company owed money by a plaintiff Bell company with funds to distribute cannot prove in the liquidation of that plaintiff and is, therefore, unable to secure funds for distribution to its own creditors or shareholders, (which may include plaintiff Bell companies) or will hold any funds received subject to the turnover trust under cl 4. By virtue of that provision liquidation distributions to a non-plaintiff Bell company as a subordinated creditor of a plaintiff Bell company with funds to distribute is postponed to senior liabilities and will be the subject of a turnover trust if the senior liabilities have not been paid or satisfied in full.

95 By reason of the banks' pre-Transactions respective facilities 'senior liabilities' may include:

- (a) principal and interest to the dates of liquidation of BGF and BGUK under the facilities; and
- (b) post-liquidation interest, in circumstances where the banks' entitlement to post-liquidation interest is a contractual entitlement which subsists as a liability of BGF and BGUK that is merely

deferred until all creditors have been paid in full the amounts owing to them plus pre-liquidation interest where applicable.

96 Accordingly, while any entitlement of the banks under their pre-Transactions respective facilities to principal, pre-liquidation or post-liquidation interest remains outstanding, any distribution to a non-plaintiff subordinated creditor in the liquidation of a security provider will be caught by the turnover trust.

97 All fourteen companies mentioned above are 'subordinated creditors' and BGF, BGUK, Bell Bros and Group Color are 'security providers'. The gravamen of the plaintiffs' complaint is that where there is what I have called a blockage the banks will be able to recover a part (in fact a significant part) of the funds they are obliged to pay under the judgment.

98 This brings me back to the charts in the Woodings affidavit. Chart 8 concerns Group Color (a non-plaintiff Bell company that entered into a Transaction, namely, the Principal Subordination Deed) and its relationship with Belcap Enterprises (a plaintiff Bell company). Belcap Enterprises holds all of the issued share capital of Group Color. According to its SNA Group Color had no creditors as at 26 January 1990 but it was a creditor of BGF. The statutory report as to affairs prepared for Group Color shows that BGF was indebted to it for \$111,000. The chart indicates that an amount of \$134,000 would be available for distribution from Group Color to Belcap Enterprises as its sole shareholder. But the Principal Subordination Deed, in so far as it affects Group Color, has not been set aside. If, therefore, the principal, pre-liquidation and post-liquidation interest have not been repaid to the banks Group Color would hold the amount of \$134,000 on trust for the banks.

99 The mischief, according to the plaintiffs, is that the source of the \$134,000 is the judgment in this action, stemming from breaches of fiduciary duty and knowing receipt of trust property. It follows that if the banks can lay claim to the \$134,000 the free flow of funds from one group company to another (whether or not they are plaintiffs) is impeded. Further, the banks are being relieved (to that extent) of the consequences of their wrongdoing.

100 The second illustration comes from Chart 5, which deals with the relationship between Bell Bros and Bell Properties Pty Ltd. While it is not reflected in Chart 5, the SNAs show that BGF was indebted to Bell Bros to the tune of some \$253 million. Bell Bros is the sole shareholder

of Bell Properties and, according to its SNA, it is indebted to Bell Properties in an amount of \$1.5 million. The SNA for Bell Properties does not include any liabilities for Bell Properties. Although it is not reflected in Chart 5 I remind the reader of the finding in Sect 10.6.1 of *Bell [No 9]* that Bell Bros was liable (subject to objection) to the Deputy Commissioner of Taxation in an amount of \$30 million. The chart demonstrates that if the liquidator of Bell Bros were to distribute \$1.5 million to Bell Properties (in fact the chart says the distribution might be \$4 million) that sum would then flow back to Bell Bros as a return of capital. But if the banks had not received their principal, pre-liquidation and post-liquidation interest in full they could lay claim to the moneys in Bell Properties. This would reduce the amount available to Bell Bros to satisfy its liability to the Deputy Commissioner of Taxation (among others).

101 These two examples illustrate why, according to the plaintiffs, relief in respect of non-plaintiff Transactions (Group Color and Bell Properties, respectively) is necessary to prevent an adverse impact on the legitimate rights of the plaintiff Bell companies (Belcap Enterprises and Bell Bros, respectively). The right which will be nullified is, in essence, the ability of the plaintiff Bell companies to enjoy the full fruits of the judgment once the chain of distributions have been worked through.

102 The banks, in their inimitable fashion, spare no hyperbole in characterising the model as unreliable and entirely devoid of merit. I do not think it can be dismissed that easily. I accept its general formulation and I acknowledge the problems that it illustrates. However, it is one thing to say that refusal of relief will have an adverse impact on the way the fruits of the judgment are finally claimed and distributed. It is quite another thing to say that fundamental principles relating to relief in the adversarial system should, in the exercise of the discretion to fashion relief, be overridden.

103 I need to make one other comment about the distribution model. The banks contend that one factor making the model unreliable is that it assumes that distributions to a company in respect of shares (as opposed to debt) are caught by the Principal Subordination Deed. The banks say this assumption is not correct and that the deed does not capture returns to shareholders. The plaintiffs say it does. I have assumed, for the purposes of these reasons, that the position is as set out in the model. But I have not decided that question. It is one of the myriad areas of controversy that remain to be resolved.

104 I made it clear in *Bell [No 9]* that a pre-condition to equitable relief is that the banks be restored, so far as is possible, to the position they were in before 26 January 1990. The orders rescinding transactions cover the Transactions but they do not disturb the pre-existing relationships between the banks. The banks are, therefore, entitled to prove in the liquidations of BGF and BGUK for the principal sums and interest outstanding as at the dates of commencement of the liquidations of those companies. Subject to the rules affecting double distributions (see *Westpac Banking Corporation v Gollin & Co Ltd (In Liq)* [1988] VR 397, 401 - 403) the banks can also prove in the liquidation of TBGL under the negative pledge guarantees.

105 If the banks can claim post-liquidation interest accruing under the pre-January 1990 banking arrangements the amounts are likely to be significant. Whether they have such an entitlement as against non-plaintiff entities could raise some interesting and complex questions. BGF, BGUK and TBGL are insolvent companies. If the rule in *Re Humber Ironworks and Shipbuilding Co (Warrant Finance Co's Case)* (1869) LR 4 Ch App 643 is applicable a right to pursue a contractual claim for post-liquidation interest would only arise if, and only if, there is a surplus. Where there are creditors with different rankings, what claims have to be satisfied before it could be said that there is a 'surplus'? Unless and until there is a 'surplus' no right to post-liquidation interest could be claimed or enforced against BGF, BGUK or TBGL. The Principal Subordination Deed was executed as part of the 1990 refinancing. Could a contractual claim for post-liquidation interest (arising under pre-January 1990 arrangements and which cannot then be enforced against the borrowers) be sheeted home to other parties to the Principal Subordination Deed?

106 If the right to post-liquidation interest is governed by s 563B of the *Corporations Act 2001* (C'th) (which came into effect on 23 June 1993) the amount involved may be less than if it were pursued as a contractual claim because the prescribed rate is likely to be lower than the contractually determined measure. But, again, several issues might arise in the application of s 563B(2). If the claim to post-liquidation interest (as against the borrowers) is 'postponed', could it be pursued against other parties under a contractual arrangement? The postponement is effective until 'all other debts and claims in the winding up' have been satisfied. What obligations does that phrase cover? What effect would the 'carve out' of members' claims have? And if the legislative intent in introducing s 563B was to do away with contractual claims for interest, what does that

have to say about the same contractual claim being pursued against another party?

107 Fortunately, these are questions that I do not have to determine for the purposes of fashioning relief in this action.

108 I acknowledge that each of the 14 non-plaintiff companies is a Bell Participant and the entry by them into their respective Transactions was infected by the directors' breaches of fiduciary duty. But the point remains that those entities are not before the Court to complain about the conduct of their directors or about the conduct of the banks in knowingly receiving trust property or to claim relief in respect of the those matters.

109 In reality, the plaintiffs seek secondary relief in relation to Transactions in respect of which the right to primary relief lies with an entity that is not a party. The large number of variables, assumptions and scenarios emerging from the distribution model suggests that the liquidators have carefully worked through the chain of distributions that are likely to occur once a fund is available. It can therefore be assumed that there are no other material sources of funds available to any Bell Participant that is not either a plaintiff or a non-plaintiff Bell group entity mentioned in pars O to DD. Were it not for the breaches of fiduciary duty each of the non-plaintiff Bell entities would have been liable to the banks to the extent provided for in the Principal Subordination Deed. In the light of the breaches of duty those entities could have come to the court and asked (as the plaintiffs have) to be relieved of their obligations under the Deed by way of rescission. They have not done so and is difficult to characterise what the plaintiffs now seek as other than rescission through the back door. This they cannot do.

110 I think it is unlikely that, in relation to any of the 14 companies (assuming they had been joined), the banks could have raised a defence that was not available (or rejected) as against a plaintiff Bell company. Nonetheless, it is a possibility and it is one of the reasons for the general rule that militates against relief in favour of non-parties. It goes without saying that if a claim for primary relief by one of the 14 entities had failed it would have weakened further the claims of the other plaintiff companies to secondary relief in relation to those Transactions.

111 In *Bell [No 9]* I said the plaintiffs might be entitled to some relief in relation to non-plaintiff Transactions if that were necessary to preserve the integrity of orders to which they were otherwise entitled. It is necessary to examine what has happened (or is likely to happen) in order to see

whether there is a compelling argument that the intent of the Court's orders will be frustrated illegitimately unless the banks are prevented from enforcing non-plaintiff Transactions.

112 Each plaintiff company is entitled to orders that its Transactions have been avoided *ab initio* in so far as they affect it. The declarations sought in pars O to DD have nothing to say on that question. The issue only arises in relation to monetary relief. What is the position in that regard? The banks are obliged to pay the following amount to the following plaintiff companies:

- (a) to BGF, \$256.5 million plus £443,800 plus interest on those amounts;
- (b) to BPG, \$641,000 plus interest;
- (c) to BGUK, £14.1 million plus interest; and
- (d) to the BRL shareholders, \$59.9 million.

113 Again, those orders can take effect without any involvement of non-plaintiff Bell entities. Once those moneys have been paid the liquidators of the various companies are then obliged to deal with the fund according to law. This means satisfying priority claims recognised by statute and by court orders (if any). The balance then falls to be divided (again according to law) to those who have established claims against the insolvent company. This includes claims by related companies. But once the distributions have been made the legitimate rights enjoyed by the company concerned in relation to the fund have been honoured, exercised and satisfied. If other rights arise they do so otherwise than by reason of the judgment. And a recipient of a distribution by the first company holds the funds subject to all the rights and obligations enjoyed or imposed by law.

114 I can illustrate what I mean by reference to the Group Color (Chart 8) example. BGF has a right to receive moneys from the banks under the judgment. The fund so established must be distributed first to priority creditors and then to other entities that have established claims against BGF. One of those entities is Group Color. Once the liquidator of BGF has distributed \$134,000 to Group Color that is an end to the legitimate rights and expectations as between it and Group Color. Group Color, in turn, holds the funds as an owner but subject to all legitimate claims on it. Under the distribution model the plaintiffs say Group Color

should pass the funds over to Belcap Enterprises because it is the sole shareholder and Group Color has no liabilities to third parties.

115 But I do not think this justifies the grant of relief ostensibly at the behest of Belcap Enterprises but initially for the benefit of Group Color. There is a limited number of ways in which the moneys could be passed to Belcap Enterprises. One is by way of loan but as Belcap Enterprises is in liquidation and unlikely to be able to repay, that would be problematic. It would be equally difficult to justify the declaration and payment of a dividend. The only other mechanism would be some form of return of capital, for example in a liquidation or in a manner authorised by Chapter 2J of the *Corporations Act*. But a return of capital (under those provisions or otherwise) can only occur if it does not materially prejudice the company's ability to pay its creditors.

116 The nub of the problem is that, like it or not, the Principal Subordination Deed (insofar as it affects Group Color) is still on foot. It has not been set aside. If, therefore, the banks have a claim under the Principal Subordination Deed they are creditors of Group Color. The effect of the argument is that the banks cannot enforce their rights as a creditor of Group Color (not a party to the action) because Belcap Enterprises (which was a party to the action) says it has a claim (which would, on normal principles rank behind the claim of the banks) against Group Color. I have not overlooked the fact that Group Color is an indirect recipient of the fruits of the judgment. But the claim by Group Color against BGF arose in the ordinary course of the intra-group dealings and not because of the conduct the subject of the action. In other words the fruits of the judgment provide the means by which the claims could be satisfied but they are not directly concerned with conduct complained of by a plaintiff and which entitles a plaintiff to judgment.

117 I can complete this picture by going one step beyond those depicted in Chart 8. According to its SNA, Belcap Enterprises has no liabilities. Any funds it received from Group Color would therefore be available to be passed on to its shareholder, TBGL. They are both plaintiffs. But the capacity for TBGL to benefit from some form of capital distribution from Belcap Enterprises depends on a fund emanating from Group Color. The same problems arise. Similarly, the SNA shows that Belcap Enterprises is a creditor of BGF to the tune of some \$424,000. The legitimate interest of Belcap Enterprises is to have the liquidators of BGF recognise its claim and then distribute whatever funds are available.

118 There is a further practical difficulty. Most of the 14 non-plaintiff entities have been deregistered. Section 601AD of the *Corporations Act* provides that a company ceases to exist on deregistration. It also provides relevantly that on deregistration, all the company's property (other than any property held by the company on trust) vests in ASIC and that ASIC has all the powers of an owner over property vested in it. Further, all property that vests in ASIC does so subject to liabilities attaching to that property under a law. ASIC should satisfy those liabilities and then hold the balance under the provisions of Part 9.7 relating to unclaimed moneys. Under Part 9.7, unclaimed moneys are to be held in the Companies and Unclaimed Moneys Special Account. A person claiming to be entitled to the moneys can apply to ASIC and if ASIC is satisfied as to the entitlement it is to pay the funds to that person.

119 I say this presents a practical difficulty because the choses in action (such as Group Color's claim against BGF and Belcap Enterprises' shareholding in Group Color) have vested in ASIC. This raises at least two issues. First, there is nothing (or no one) to whom the declarations and injunctions could attach because the companies simply do not exist. Once there is a fund available for distribution the liquidator of BGF will have two choices. One is to have the companies reinstated either by ASIC or more probably by the court under s 601AH(2) and then placed in liquidation. The other is to pay the moneys to ASIC and then convince ASIC that they should return the funds in a manner consistent with the distribution model. If, as I suspect might be the case, the banks were to lodge a competing claim, ASIC would have to make a determination. Of course, the banks might themselves move to have the companies reinstated. This leaves open the further (unpalatable) possibility of a war over whether the revived entity should be liquidated and, if so, who should be the liquidator.

120 I found a little curious the plaintiffs' written submission¹⁸ to the effect that it is difficult to see why the banks, or for that matter the court, should have a concern about the interests of parties that do not exist. It is of concern to me because I am being asked to recognise that rights do or may exist against the nonexistent entity (otherwise the orders would be inutile) and that such rights as do exist should be ignored. Further, it is a realistic possibility that at some stage the entities may re-emerge from the darkness. Alternatively, another body in which the property of the nonexistent entity has vested will have to decide what to do with that property. I doubt it would do so without taking into account the range of interests affecting the property.

121 The plaintiffs have previously had recourse to the procedure for the reinstatement of companies. I note, for example, that five of the six companies that were added as seventh plaintiffs (namely, WAON, Neoma, Dolfinne Securities, TBGLE and Wanstead Securities) had previously been deregistered. They were restored to the register late in 1995, placed in liquidation on 21 December 1995 and joined as parties in January 1996.

122 For all of these reasons I do not believe that I should depart from the principle that, generally speaking, relief speaks as between the parties to the action. Nor have I been persuaded that the integrity of the orders I propose to make will be destroyed because non-party Transactions remain on foot. I am not prepared to grant the relief sought in pars O to DD and pars 25 to 40. I have not been able to devise an alternative form of relief that would ensure that the entirety of the judgment sum filters its way unimpeded through the various companies in the Bell group. I acknowledge that a consequence is that the banks may recover more than the debts they are legitimately able to prove in the liquidations of the various companies. This is a decision from which I take no satisfaction. One of my objectives throughout this litigation has been to dispose of as many of the issues dividing the parties as was possible so as to clear the way for a (relatively) orderly and expeditious finalisation of insolvency administrations. That objective has not been achieved.

The Harlesden securities

123 In Sect 4.8.1 and Sect 35.4.2 and Sect 35.4.3 of *Bell [No 9]* I described the process by which the publishing assets were sold. The sale was evidenced by an instrument dated 5 September 1991 between Fear and Maxsted (the receivers and managers of BGF and BPG appointed by the banks) and WANH. The sale was effected by the transfer of the issued share capital of Harlesden Investments, the company directly under BPG at the apex of the sub-group that held the operating assets of the publishing businesses.

124 One of the conditions of the Harlesden sale agreement was that the banks accept the discharge amount in full satisfaction of all liabilities of the Harlesden group companies, discharging all securities issued by Harlesden group companies to the banks and fully releasing those companies. This is what happened.

125 The banks' argument is as follows. The banks say they cannot be restored to the position they would have been in if the impugned Transactions had not been entered into. Had these Transactions not

occurred the banks would have been entitled to exercise their rights against the Harlesden companies, but for the release of those companies from their liabilities pursuant to the Harlesden sale agreement. The release by the Banks of the Harlesden companies' liabilities and securities was a condition of the share sale agreement. Without the releases, the payment would not have been made and no moneys would have flowed to BGF. If the releases had not been given, the banks would have retained their agreements and securities with the Harlesden companies.

126 It is not now possible to rescind their Transactions, it is impossible to undo the Harlesden sale agreement and it is not now possible to restore the position between the banks and the Harlesden companies. By the releases, the banks unalterably changed their position. The releases were part of the *quid pro quo* for the payment of the discharge amount. It would not be substantial restoration simply to permit the banks to prove in the liquidation of the plaintiffs.

127 The banks therefore argue that even if the plaintiffs make out a general entitlement to monetary relief it cannot extend to the proceeds from the sale of the publishing assets.

128 I have considered these arguments closely. I accept that the Harlesden securities cannot now be set aside and nor can the Harlesden sale agreement be undone. However, I adhere to what I said in *Bell [No 9]* pars [9425] to [9428], pars [9570] to [9573] (describing how the loss from the sale of the publishing assets arose and why the loss is attributable to BGF) and in pars [9655] to [9659]. In my view the propositions advanced by the banks now are the same as those put forward at trial. The answer is the same now as it was then. The banks did not have access to the publishing assets prior to 26 January 1990. All they could do was prove in a liquidation and, in the meantime, use the powers in the negative pledge arrangements to insist the assets remain unsecured. It would be defying reality to say that the situation should now be viewed as if the banks had enjoyed the protection of the publishing assets (at the expense of other creditors) all along.

129 This is especially if, as I said at [9659], the form of the realisation (devised and implemented by receivers and managers appointed by the banks) is put forward as the means by which the banks can retain improperly received gains. The receivers and managers appointed by the banks agreed to the sale of the publishing assets by way of the share sale. They agreed to terms that included that the banks accept the discharge amount in full satisfaction of all liabilities owed by the Harlesden

sub-group companies to the banks and release those companies from all obligations as guarantor, surety or indemnifier by the banks. On 31 December 1991 Westpac, 'as agent under the Inter-Creditor Agreement and trustee under the Security Trust Deed for itself and [the other banks]' executed a deed of release and discharge complying with the condition.¹⁹

130 It can be put in a slightly different way. Suppose the banks were now to attempt to enforce the Harlesden securities against, say, WAN or Western Mail (assuming they still exist). In all probability the banks would be met by defences such as those they raised in this action and which are dealt with in Sect 34.1, 34.2 and 34.3. They would certainly be met by a claim under the deed of 31 December 1991. All of those matters are solely within the province of the banks and no responsibility can be sheeted home to the plaintiffs. In this respect, the situation is quite different from that pertaining to the non-plaintiff Transactions discussed earlier. In relation to those Transactions the inability of the plaintiffs to seek effective relief lies in the fact that the relevant entities are not parties to the action. Save for the very existence of the instruments (a different matter), it cannot be said the banks have brought that situation about.

131 In relation to the Harlesden securities the banks, by their own actions, brought into effect the very situation about which they now complain. I do not believe that the inability to restore the banks to a position where they could claim under guarantees and other securities they deliberately discharged is a reason to deny relief to the plaintiffs.

The BGNV Subordination Deed and the on-loans

132 I found that the directors of TBGL and of BGF breached their fiduciary duties in causing those companies to enter into the BGNV Subordination Deed. It follows that the first plaintiff and the third plaintiff are entitled to declarations and orders that, in so far as it affects them, the BGNV Subordination Deed is rescinded *ab initio*. On the other hand I was not persuaded that the director of BGNV breached its fiduciary duty in causing BGNV to enter into the BGNV Subordination Deed. Leaving to one side the equitable fraud and statutory claims (which were not established) I did not understand the plaintiffs to mount a case that there were other bases on which BGNV could avoid the deed. It follows that BGNV is not entitled to an order rescinding the BGNV Subordination Deed.

133 The reader could be forgiven for thinking that this was an end to the matter. What a naïve thought. Tens of pages of the written submissions were devoted to reasons why this was not so.

134 The plaintiffs contend that, in addition to declarations of rescission for the benefit of TBGL and BGF and notwithstanding the findings about Equity Trust's conduct, they should have orders prohibiting the banks from relying on the BGNV Subordination Deed. Paragraph EE of the plaintiffs' proposed orders is in these terms:

The [banks] are not entitled:

- (a) to enforce or rely on or assert the validity of [the BGNV Subordination Deed] against the sixth Plaintiff;
- (b) to take any step to require the sixth Plaintiff to perform or comply with the BGNV Subordination Deed; or
- (c) to rely on or assert an entitlement to payment or receive any payment from the sixth Plaintiff under or by reason of the BGNV Subordination Deed.

135 The banks initially wanted orders that the BGNV Subordination Deed was valid and binding on TBGL, BGF and BGNV and that the liquidators of TBGL and BGF should pay direct to the banks any dividends payable to BGNV in the liquidations of TBGL and BGF. However, the final position adopted by the banks is that they should have these orders²⁰:

1. The BGNV Subordination Deed referred to in paragraph [495] of the judgment was and is valid and binding upon BGNV.
2. Orders that any distribution, dividend or other payment to BGNV in the liquidation of TBGL and BGF be made to Mr Trevor as the Australian liquidator of BGNV to be held on trust by the BGNV pursuant to the terms of the BGNV Subordination Deed and that such sums are only to be dealt with by Mr Trevor and BGNV in accordance with the terms of the said Deed.

Alternative to order 2

3. Orders that BGNV forthwith withdraw any proof of debt lodged in the liquidations of TBGL or BGF.
4. Orders that BGNV be prevented from lodging any proof in the liquidations of TBGL and BGF without the written consent of Westpac Banking Corporation Ltd.

Alternative to orders 2, 3 and 4

5. Orders that any distribution, dividend or other payment made to the BGNV in the liquidations of TBGL or BGF be made to Mr Trevor as the Australian liquidator of BGNV and that any such funds be

held by BGNV pursuant to the terms as to the subordination of the BGNV on-loans found by the Court and that such sums are only to be dealt with by the Twelfth Defendant and BGNV in accordance with the terms of the said on-loans contract as found by the Court.

6. Declares that TBGL and BGF only be entitled to relief against the Banks as otherwise provided for in these orders upon undertaking to the Court that they will not vary or purport to vary or to terminate or purport to terminate or rescind or purport to rescind the on-loans contracts or their terms as found by the Court.

136 The distribution model referred to in Woodings' 18 February 2009 affidavit dealt with the impact of the BGNV Subordination Deed as well as the non-plaintiff Transactions. Woodings opined that if the relief sought by the plaintiffs was not granted and the banks were left with a free run under the BGNV Subordination Deed there would be a significant impact on the funds available for external creditors. He said²¹:

Based on the [assumptions and calculations in the model], if the distributions which BGNV receives in the liquidations of BGF and TBGL are governed by the BGNV Subordination Deed, the External Creditors are likely to receive approximately \$44,213,841 to \$304,871,284 ... less than they would if distributions which BGNV receives in the liquidations of BGF and TBGL were governed by the terms of the BGNV On-loans. Similarly, the Banks are likely to benefit by these amounts.

137 The position, it seems to me, is relatively simple. The on-loans were subordinated on the same terms and conditions as are applicable to the bonds. There is nothing I wish to add to what I said in Sect 13.2.7, Sect 13.2.8 and Sect 13.4. The BGNV Subordination Deed, insofar as it affects TBGL and BGF has been rescinded *ab initio*. As between the liquidators of TBGL and BGF, on the one hand, and the liquidator of BGNV, on the other hand, this is how matters should proceed. What happens as between BGNV (through its liquidators and (or) curatoren), the banks and other creditors of BGNV will be left to be worked out in the liquidation of BGNV.

138 I am not prepared to give the plaintiffs the relief they seek par EE. Even more so than the non-plaintiff Transactions it is rescission (by BGNV) by the back door. And this time the back door was not only shut but deadlocked by the absence of a finding of a breach of fiduciary duty by the director in causing BGNV to enter into the deed. It is tantamount to an attempt by the liquidator to disclaim onerous property. I acknowledge that this may cause difficulties if the banks seek to take steps to cause BGNV to comply with the terms of the BGNV Subordination Deed. But save for one matter (with which I will deal in a

moment) those problems (if they arise) will occur in the liquidation of BGNV.

139 So far as I am concerned the liquidators of TBGL and BGF can conduct the liquidations on the basis that the claims by BGNV under the on-loans are subordinated in the manner set out in Sect 13.2.7, Sect 13.2.8 and Sect 13.4. When it comes time to make a distribution to creditors of TBGL and (or) BGF and if a distribution is to be made to BGNV the liquidators will do so according to the provisions of the relevant statute and in accordance with the proof of debt that has been lodged. The fate of moneys distributed to the liquidator of BGNV and questions about inconsistent trusts affecting those funds (a matter on which I express no opinion) will have to be decided in the liquidation of BGNV and in the light of circumstances existing at that time.

140 Save for a declaration that the BGNV Subordination Deed subsists I am not prepared to grant the relief sought by the banks. The banks say that correspondence passing between their solicitors and the representatives of BGNV suggest that they are at risk of further proceedings in the Netherlands Antilles brought by BGNV's curator in the Netherlands Antilles and (possibly) the twelfth plaintiff. They seek relief to guard against that possibility. I adopt, in part, the plaintiffs' written submissions as to why relief is neither necessary nor appropriate on that count.²²

141 A little earlier I said that, save for one matter, the problems that had been identified will occur in the liquidation of BGNV. The 'one matter' relates to the proof of debt already lodged by BGNV in the liquidations of TBGL and BGF. I am prepared to make a declaration that the BGNV Subordination Deed subsists as between BGNV and the banks and I have indicated I will not make the declarations sought by the plaintiffs in par EE. But it should be noted that I have declined the banks' request for an order that the BGNV withdraw the proof of debt. In my view to make that order would unnecessarily interfere with the orderly and efficient functioning of the liquidations of TBGL and BGF.

142 The orders I am prepared to make in relation to the BGNV Subordination Deed and the on-loans are set out in pars 1.1(h), 1.2(g), 2.1 and 2.2.

The banks' proofs of debt

143 The final matter with which I want to deal is the right of the banks to lodge proofs of debt in the liquidations of BGF, TBGL and BGUK. It

will be clear from what I said at various places in *Bell [No 9]* that I regard the right of the banks to prove as the means by which they can be restored, so far as is possible, to their former position which, in turn, is a precondition to equitable relief of the type sought by the plaintiffs.

144 Apart from drafting matters I think there are three points on which the parties differ. First, should the amounts (in respect of principal and interest accrued to the commencement of the liquidations) for which the banks are entitled to prove be included in the proofs? Secondly, at what point should the banks lodge their proofs? Thirdly, should the funds payable under the judgment be held by the liquidator in a separate fund until the proofs have finally been admitted?

145 In their proposed orders the banks have specified the sums they will claim.²³ In their submissions²⁴ the plaintiffs accept the banks have an entitlement to prove for the principal and interest accrued to the commencement of the liquidation. But they say they 'are in the process of checking [the banks'] calculations' and suggest there may be an issue with some of the interest rates adopted by the banks in their computations. Unless that process has been completed (and I am not aware whether it has) I think the amounts should be excluded from the declarations.

146 The plaintiffs suggest that the right to prove should not arise 'unless and until [the banks] have complied with all orders in these proceedings and all appeals have been finalised'. Strictly speaking, the right to prove will arise immediately on the judgment being pronounced because the Transactions will then have been set aside and the banks will fall back on the facilities as they existed before 26 January 1990. But I can see good reason why the banks' right to prove should be deferred until the judgment sum has been paid. I am not sure whether it should be deferred further until after all appeals have been resolved. This may depend on what arrangements (if any) the parties make for the disposition and preservation of the judgment sum pending the finalisation of any appeal. Those matters might also be the subject of interlocutory applications to the appeal court. I will include a provision that the right to lodge a proof of debt is not to be exercised until the judgment sum has been paid. I will leave the parties to their own devices as to what (if any) other arrangements they see fit to make in this respect.

147 In their draft orders the banks included provisions the object of which was to ensure that there would be no impediment to them proving in the liquidations and that they would receive the amounts to which they

were entitled in the administrations. To bring this situation about the banks proposed that:

- (a) the orders be made on the undertaking of the liquidators to admit the banks' proofs and defend any challenge made by any person; and
- (b) the plaintiffs retain the moneys paid under the judgment in a separate fund and not use the funds until the banks had been admitted to proof and repaid the amounts to which they would be entitled to receive in the liquidations.

148 In view of the passages from the plaintiffs' written submissions acknowledging the banks' right to prove I do not think I need to make the entire judgment conditional on an undertaking. The liquidators are officers of the court and I believe they can be relied on to proceed in accordance with the materials placed before the court in this regard. There is, of course, a possibility that another creditor might appeal against the liquidator's decision to admit the banks' proofs. If that occurs the liquidators will, no doubt, take legal advice and act in good faith in relation to it. I think there will be sufficient protection for the banks if I include in the order a provision that the liquidators are to take reasonable steps to defend any such challenge.

149 I am not attracted to the banks' proposal that the judgment sum be held in a separate account and not be used until the banks have been 'admitted to proof and repaid'. There are two reasons. First, the judgment sum might be the only source from which the banks could be 'repaid'. Secondly, while I am aware that there are litigation funding arrangements in place I have no idea whether there are other sources of funds to cover the administrative aspects of the liquidations. To impose such a condition on the liquidators' access to the fruits of the judgment would, in my view, be an unwarranted interference with the insolvency administrations. There may, for example, be other applications (not connected with the on-going arguments between the liquidators and the banks) that have to be made in the several insolvency administrations. The liquidators ought not to be inhibited from moving forward with the administrations in an orderly and expeditious manner.

150 The orders that I am prepared to make in relation to the banks' right to prove in the liquidations of the companies are set out in par 4 of the Schedule. The right to prove in the liquidation of TBGL under the

guarantees is, of course, subject to the rule against double payment of dividends in respect of the same debt.

Effective date of judgment

151 At the request of the parties I have included an order under s 11 of the *Civil Judgments Enforcement Act 2004* (WA) that the judgment take effect on and from 29 May 2009.

Post script

152 These reasons (including the schedule of proposed orders) were released to the parties on 27 April 2009 and they were invited to suggest changes that would come within 'the slip rule' (Order 21 r 10). I agreed to some of the requested changes and they are reflected in the Schedule. Others were not agreed between the parties and I have resolved them as follows.

Date when compound interest order ceases

153 A dispute has arisen as to whether interest should be calculated to 30 April 2009 or 29 May 2009. In par 25 I said:

.... the calculation be made as at the date of the judgment. From that date the plaintiffs will have a judgment they can enforce. Thereafter, so far as concerns interest, s 8 of the *Civil Judgments Enforcement Act 2004* (WA) will apply.

154 The term 'judgment' is, I accept, imprecise. A party can only 'enforce' orders, not reasons for decision. If the monetary orders are to take effect on 29 May 2009, then that is the end date for the calculation of compound interest.

Liberty to apply

155 The plaintiffs sought an additional order in these terms:

9. The parties have liberty to apply to any judge of the Court for supplementary orders in relation to:
 - (a) the accrual, pending the resolution of any appeal from these orders, of the liability of the defendants to make payment under orders 5, 6 and 7.2;
 - (b) arrangements for payment of the money the subject of orders 5, 6 and 7.2 pending the resolution of any appeal from these orders; and

- (c) the right of the defendants, pending the resolution of any appeal from these orders, to lodge any proofs of debt under order 4.2.

156 I am not prepared to make that order. It would not come within the slip rule, although that is not the reason I have declined to include it. There must be finality to this litigation. If the parties come to the Court with a consent order covering arrangements to preserve the judgment sum or in relation to other matters affecting the judgment it can be dealt with under Order 43 r 16. If a problem arises before an appeal is instituted there may be some options for a judge to exercise powers within the inherent jurisdiction. Otherwise, the subjects covered in pars 9(a) and 9(b) are properly the province of the Court of Appeal if and when appellate proceedings have been commenced.

157 As to par 9(c), in my view, the right to prove probably arises as soon as the orders setting aside the Transactions have been pronounced. This is why (as part of the fashioning of relief) I included par 4.2 in the Schedule. Once again, if a problem arises after the judgment sum has been paid or provided for and during the period in which an appeal is extant it is properly a matter to be raised within the appellate process.

Conclusion

158 At the outset of the hearing on 23 March 2009 I expressed grave misgivings about the impact the 'war' between the banks and the liquidators was likely to have on the future of these insolvency administrations.²⁵ I repeat those concerns. It will be apparent from what I have said in these reasons that I can see other (and no less complex) disputes breaking out in the future. The potential for those disputes to disrupt the orderly and expeditious progress of the administrations and eat into the funds otherwise available to creditors will be apparent.

159 As I said earlier in these reasons I had hoped to minimise the number of contentious issues remaining between the parties. That was probably a forlorn hope given the nature of this dispute and the circumstances in which it arose and in which the litigation was prosecuted. I admit to failure in that respect.

160 There is one ray of light in this otherwise gloomy picture. With the assistance of Registrars of this Court the parties agreed costs. The savings to the public and to the parties by the avoidance of a full taxation of costs are significant. I can only hope that the parties have learned from that experience.

SCHEDULE

1. In relation to the rescission of Transactions the Court declares and orders that:
 - 1.1. Insofar as they purport to bind the first plaintiff:
 - (a) the Australian Banks Facilities Agreement dated 26 January 1990 (ABFA);
 - (b) the Australian Banks Supplemental Agreement dated 26 January 1990 (ABSA);
 - (c) the Lloyds Supplemental Agreement No 2 dated 26 January 1990, including its appendix, the Restated Lloyds Facilities Agreement No 2 (LSA No 2);
 - (d) the deed of guarantee and indemnity dated 1 February 1990;
 - (e) the share mortgage dated 1 February 1990;
 - (f) the share mortgage dated 29 March 1990;
 - (g) the Principal Subordination Deed;
 - (h) the BGNV Subordination Deed;
 - (i) the JNTH share mortgage dated 1 February 1990;
 - (j) the direction and authorisation between the fifth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990;
 - (k) the direction and authorisation between the eighth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990;
 - (l) the direction and authorisation between the tenth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990; and
 - (m) the direction and authorisation between the sixteenth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990,

are rescinded ab initio.

1.2. Insofar as they purport to bind the third plaintiff:

- (a) ABSA;
- (b) ABFA;
- (c) LSA No 2;
- (d) the guarantee and indemnity dated 1 February 1990;
- (e) the mortgage debenture dated 1 February 1990;
- (f) the Principal Subordination Deed; and
- (g) the BGNV Subordination Deed,

are rescinded ab initio.

1.3. Insofar as they purport to bind the fourth plaintiff:

- (a) LSA No 2;
- (b) the deed of guarantee and indemnity dated 15 February 1990;
- (c) the mortgage debenture and share mortgage dated 15 February 1990; and
- (d) the BIIL Subordination Deed dated 14 May 1990,

are rescinded ab initio.

1.4. Insofar as they purport to bind the fifth plaintiff:

- (a) the deed of guarantee and indemnity dated 1 February 1990;
- (b) the mortgage debenture dated 1 February 1990; and
- (c) the Principal Subordination Deed,

are rescinded ab initio.

1.5. Insofar as they purport to bind the first named seventh plaintiff:

- (a) the guarantee and indemnity dated 1 February 1990;

- (b) the BRL share mortgage dated 1 February 1990;
- (c) the JNTH share mortgage dated 1 February 1990;
- (d) the Principal Subordination Deed;
- (e) the direction and authorisation between the eighth named seventh plaintiff, the first named seventh plaintiff and the first defendant dated 1 February 1990; and
- (f) the direction and authorisation between the sixteenth named seventh plaintiff, the first named seventh plaintiff and the first defendant dated 1 February 1990,

are rescinded ab initio.

1.6. Insofar as it purports to bind the second named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.

1.7. Insofar as they purport to bind the third named seventh plaintiff:

- (a) the deed of guarantee and indemnity dated 1 February 1990;
- (b) the Western Interstate share mortgage dated 1 February 1990; and
- (c) the Principal Subordination Deed,

are rescinded ab initio.

1.8. Insofar as they purport to bind the fourth named seventh plaintiff:

- (a) the deed of guarantee and indemnity dated 1 February 1990;
- (b) the BRL share mortgage dated 1 February 1990; and
- (c) the Principal Subordination Deed,

are rescinded ab initio.

1.9. Insofar as they purport to bind the fifth named seventh plaintiff:

- (a) the Principal Subordination Deed; and

- (b) the direction and authorisation between the fifth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990,

are rescinded ab initio.

1.10. Insofar as it purports to bind the sixth named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.

1.11. Insofar as it purports to bind the seventh named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.

1.12. Insofar as they purport to bind the eighth named seventh plaintiff:

- (a) the deed of guarantee and indemnity dated 1 February 1990;
- (b) the BRL share mortgage dated 1 February 1990;
- (c) the JNTH share mortgage dated 1 February 1990;
- (d) the Principal Subordination Deed;
- (e) the direction and authorisation between the eighth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990; and
- (f) the direction and authorisation between the eighth named seventh plaintiff, the first named seventh plaintiff and the first defendant dated 1 February 1990,

are rescinded ab initio.

1.13. Insofar as it purports to bind the ninth named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.

1.14. Insofar as they purport to bind the tenth named seventh plaintiff:

- (a) the Principal Subordination Deed; and
- (b) the direction and authorisation between the tenth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990,

are rescinded ab initio.

- 1.15. Insofar as they purport to bind the eleventh named seventh plaintiff:
 - (a) the deed of guarantee and indemnity dated 1 February 1990;
 - (b) the JNTH share mortgage dated 1 February 1990; and
 - (c) the Principal Subordination Deed,are rescinded ab initio.
- 1.16. Insofar as it purports to bind the twelfth named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.
- 1.17. Insofar as it purports to bind the thirteenth named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.
- 1.18. Insofar as it purports to bind the fourteenth named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.
- 1.19. Insofar as they purport to bind the fifteenth named seventh plaintiff:
 - (a) the deed of guarantee and indemnity dated 1 February 1990;
 - (b) the BRL share mortgage dated 1 February 1990; and
 - (c) the Principal Subordination Deed,are rescinded ab initio.
- 1.20. Insofar as they purport to bind the sixteenth named seventh plaintiff:
 - (a) the deed of guarantee and indemnity dated 1 February 1990;
 - (b) the BRL share mortgage dated 1 February 1990;
 - (c) the Principal Subordination Deed;
 - (d) the direction and authorisation between the sixteenth named seventh plaintiff, the first plaintiff and the first defendant dated 1 February 1990; and

- (e) the direction and authorisation between the sixteenth named seventh plaintiff, the first named seventh plaintiff and the first defendant dated 1 February 1990,

are rescinded ab initio.

1.21. Insofar as it purports to bind the seventeenth named seventh plaintiff the Principal Subordination Deed is rescinded ab initio.

1.22. Insofar as they purport to bind the eighteenth named seventh plaintiff:

- (a) the deed of guarantee and indemnity dated 1 February 1990;
- (b) the BRL share mortgage dated 1 February 1990;
- (c) the JNTH share mortgage dated 1 February 1990; and
- (d) the Principal Subordination Deed,

are rescinded ab initio.

1.23. Insofar as they purport to bind the nineteenth named seventh plaintiff:

- (a) the deed of guarantee and indemnity dated 1 February 1990;
- (b) the JNTH share mortgage dated 1 February 1990; and
- (c) the Principal Subordination Deed,

are rescinded ab initio.

1.24. Insofar as they purport to bind the twentieth named seventh plaintiff:

- (a) the deed of guarantee and indemnity dated 1 February 1990;
- (b) the mortgage debenture dated 1 February 1990; and
- (c) the Principal Subordination Deed,

are rescinded ab initio.

2. In relation to the sixth plaintiff and to the subordination of the on-loans the Court declares that:
 - 2.1. As between the sixth plaintiff and the defendants the BGNV Subordination Deed is valid and effectual.
 - 2.2. The loans made by the sixth plaintiff to:
 - (a) the first plaintiff on or about 20 December 1985;
 - (b) the third plaintiff on or about 7 May 1987; and
 - (c) the third plaintiff on or about 14 July 1987,

were respectively subordinated on the terms and conditions applying per se to the bonds issued by the sixth plaintiff on or about each of those dates.

3. In relation to monetary relief the Court declares that:

Bank Interest

- 3.1. On the dates and in the amounts referred to in Schedule A:
 - (a) the first defendant received the total amount of \$5,319,964 as a constructive trustee on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff;
 - (b) the first named second defendant received the total amount of \$6,646,737 as a constructive trustee on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff;
 - (c) the second named second defendant received the total amount of \$5,602,974 as a constructive trustee on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff;
 - (d) the third named second defendant received the total amount of \$5,347,699 as a constructive trustee on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff;
 - (e) the fourth named second defendant received the total amount of \$3,435,581 as a constructive trustee on behalf of

the third plaintiff and dealt with the same contrary to the interests of the third plaintiff;

- (f) the fifth named second defendant received the total amount of \$2,925,063 as a constructive trustee on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff; and
- (g) listed next to the name of the first named third defendant, or shortly after those dates, the third defendants received the respective proportions set out in Schedule B of the amount of £12,964,319 sterling as constructive trustees on behalf of the fourth plaintiff and dealt with the same contrary to the interests of the fourth plaintiff.

Bank fees

- 3.2. On or shortly after 31 January 1990, the first and second defendants received the respective proportions set out in Schedule C of the amount of \$2,247,500 as constructive trustees on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff.
- 3.3. On or shortly after 6 February 1990, the third defendants received the respective proportions set out in Schedule B of the amount of £1 million sterling as constructive trustees on behalf of the fourth plaintiff and dealt with the same contrary to the interests of the fourth plaintiff.

Sale proceeds of the publishing and communication assets

- 3.4. On the dates listed in Schedule D, the first, second and third defendants received the amounts listed next to their name in Schedule D under the column titled "Principal amount received" in the total amount of \$222,291,022.22 as constructive trustees on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff.
- 3.5. On the date listed in Schedule E, the first, second and third defendants received the amounts listed next to their name in Schedule E under the column titled "Principal amount received" in the total amount of \$641,000 as constructive trustees on behalf of the fifth plaintiff and dealt with the same contrary to the interests of the fifth plaintiff.

BRL shares

3.6. On the dates listed in Schedule F, the first, second and third defendants received the amounts listed next to their name in Schedule F under the column titled "Principal amount received" in the total amount of \$59,876,063.57 as constructive trustees on behalf of the following plaintiffs and dealt with the same contrary to the interests of the following plaintiffs:

- (a) on behalf of the fourth named seventh plaintiff: \$830,042.23;
- (b) on behalf of the fifth named seventh plaintiff: \$28,043,076.14;
- (c) on behalf of the eighth named seventh plaintiff: \$5,906,887.21;
- (d) on behalf of the tenth named seventh plaintiff: \$19,539,625.41;
- (e) on behalf of the fifteenth named seventh plaintiff: \$1,246,281.07;
- (f) on behalf of the sixteenth named seventh plaintiff: \$3,366,939.22; and
- (g) on behalf of the eighteenth named seventh plaintiff: \$943,212.29.

Miscellaneous receipts

3.7. The first, second and third defendants received the respective proportions set out in Schedule G of the following amounts on the following dates as constructive trustees on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff:

- (a) \$146,221.95 on 1 September 1995; and
- (b) \$731,992.88 on 15 October 1996.

Legal fees

3.8. The first and second defendants received the respective proportions set out in Schedule C of the following amounts on the

following dates as constructive trustees on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff:

- (a) \$690,652.62 on 9 March 1990;
- (b) \$4,815 on 18 April 1990;
- (c) \$15,436.46 on 21 June 1990; and
- (d) \$63,893.66 on 7 December 1990.

3.9. The third defendants received the respective proportions set out in Schedule B of the following amounts on the following dates as constructive trustees on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff:

- (a) £414,736.12 sterling on 23 March 1990;
- (b) £26,648.94 sterling on 30 March 1990; and
- (c) £2,488.94 sterling on 20 June 1990.

3.10. The third defendants received the respective proportions set out in Schedule B of the amount of £148,971.66 sterling on 30 March 1990 as constructive trustees on behalf of the fourth plaintiff and dealt with the same contrary to the interests of the fourth plaintiff.

Stamp duty

3.11. The first, second and third defendants received the respective proportions set out in Schedule G of the amount of \$1,079,949.50 on 22 February 1990 as constructive trustees on behalf of the third plaintiff and dealt with the same contrary to the interests of the third plaintiff.

4. In relation to the banks' entitlement to prove in the liquidations the Court declares and orders that:

4.1. Subject to order 4.2 the following defendants are entitled to lodge proofs of debt in the liquidation of the following plaintiffs for the amounts owing under the following instruments:

- (a) the first defendant in the liquidation of the third plaintiff under the Bridging Bills Acceptance Line set out in a letter dated 30 March 1989, as amended from time to time;

- (b) the first named second defendant in the liquidation of the third plaintiff under the revolving cash advance facility set out in a letter dated 12 September 1988, as amended from time to time;
 - (c) the second named second defendant in the liquidation of the third plaintiff under various bill facilities set out in letters dated 10 January 1986, 16 June 1986, 4 November 1986, 24 April 1987, 20 October 1987, 14 December 1987 and 7 July 1988, as amended from time to time;
 - (d) the third named second defendant in the liquidation of the third plaintiff under the bill acceptance and discount facility set out in a letter dated 5 June 1987, as amended from time to time;
 - (e) the fourth named second defendant in the liquidation of the third plaintiff under the bill acceptance and discount facility set out in a letter dated 30 June 1987, as amended from time to time;
 - (f) the fifth named second defendant in the liquidation of the third plaintiff under the commercial bill facility set out in a letter dated 10 February 1986, as amended from time to time;
 - (g) the third defendants in the liquidation of the fourth plaintiff under the Lloyds Supplemental Agreement No 1 dated 27 August 1987;
 - (h) the first and second defendants in the liquidation of the first plaintiff under the first plaintiff's guarantees dated 30 July 1987; and
 - (i) the third defendants in the liquidation of the first plaintiff under the first plaintiff's guarantee dated 27 August 1987.
- 4.2. No proofs of debt may be lodged by a defendant until all moneys due under orders 5, 6 and 7 by that defendant have been paid or provided for.
- 4.3. The eighth and ninth plaintiffs must admit proofs of debt that comply with order 4.1 and must take all reasonable steps to defend

any challenge which may be made by any party to the admission of each such proof of debt.

5. In relation to monetary relief the Court further orders that:

Bank interest

- 5.1. The first defendant pay the amount of \$5,319,964 to the third plaintiff.
- 5.2. The first named second defendant pay the amount of \$6,646,737 to the third plaintiff.
- 5.3. The second named second defendant pay the amount of \$5,602,974 to the third plaintiff.
- 5.4. The third named second defendant pay the amount of \$5,347,699 to the third plaintiff.
- 5.5. The fourth named second defendant pay the amount of \$3,435,581 to the third plaintiff.
- 5.6. The fifth named second defendant pay the amount of \$2,925,063 to the third plaintiff.
- 5.7. The third defendants pay the respective proportions set out in Schedule B of the amount of £12,964,319 sterling to the fourth plaintiff.

Bank fees

- 5.8. The first and second defendants pay the respective proportions set out in Schedule C of the amount of \$2,247,500 to the third plaintiff.
- 5.9. The third defendants pay the respective proportions set out in Schedule B of the amount of £1 million sterling to the fourth plaintiff.

Sale proceeds of the publishing and communication assets

- 5.10. The first, second and third defendants pay the amounts listed next to their name in Schedule D under the column titled "Principal amount received" in the total amount of \$222,291,022.22 to the third plaintiff.

5.11. The first, second and third defendants pay the amounts listed next to their name in Schedule E under the column titled "Principal amount received" in the total amount of \$641,000 to the fifth plaintiff.

BRL shares

5.12. The first, second and third defendants pay the amounts listed next to their name in Schedule F under the column titled "Principal amount received" in the total amount of \$59,876,063.57 to the following plaintiffs:

- (a) to the fourth named seventh plaintiff: the amount of \$830,042.23;
- (b) to the fifth named seventh plaintiff: the amount of \$28,043,076.14;
- (c) to the eighth named seventh plaintiff: the amount of \$5,906,887.21;
- (d) to the tenth named seventh plaintiff: the amount of \$19,539,625.41;
- (e) to the fifteenth named seventh plaintiff: the amount of \$1,246,281.07;
- (f) to the sixteenth named seventh plaintiff: the amount of \$3,366,939.22; and
- (g) to the eighteenth named seventh plaintiff: the amount of \$943,212.29.

Miscellaneous receipts

5.13. The first, second and third defendants pay the respective proportions set out in Schedule G of the following amounts to the third plaintiff:

- (a) \$731,992.88; and
- (b) \$146,221.95.

Legal fees

- 5.14. The first and second defendants pay the respective proportions set out in schedule C of the amount of \$774,797.74 to the third plaintiff.
- 5.15. The third defendants pay the respective proportions set out in schedule B of the amount of £443,874 sterling to the third plaintiff.
- 5.16. The third defendants pay the respective proportions set out in schedule B of the amount of £148,971.66 sterling to the fourth plaintiff.

Stamp duty

- 5.17. The first, second and third defendants pay the respective proportions set out in schedule G of the amount of \$1,079,949.50 to the third plaintiff.
6. In relation to compensatory interest the Court further orders that:
 - 6.1. Each defendant ordered to pay an amount under any of orders 5.1 to 5.17, pay interest on that amount:
 - (a) for the period to 24 January 2008, at the rate from time to time published by the first defendant and referred to as the Westpac business indicator rate, minus 1%; and
 - (b) for the period from 25 January 2008, at the rate from time to time published by the first defendant and referred to as the Westpac Reference Lending Rate plus 0.75%, minus 1%,

being, for the period from 26 January 1990 to 22 December 2008, the rates set out in the document entitled "Notes on Monetary Receipts and the Liquidators' Compound Interest Calculations",²⁶ dated 23 December 2008, compounded at monthly rests, to the relevant plaintiff or plaintiffs referred to in that order, from the following dates to the date this order 6 takes effect:

- (c) in relation to orders 5.1 to 5.7, from the dates in respect of the amounts listed next to that defendant's name, and in the case of the second to fourteenth named third defendants,

from the dates in respect of the amounts listed next to the first named third defendant's name, in Schedule A;

- (d) in relation to order 5.8, from 31 January 1990;
- (e) in relation to order 5.9, from 6 February 1990;
- (f) in relation to order 5.10, from the dates in respect of the amounts listed next to that defendant's name in Schedule D;
- (g) in relation to order 5.11, from 23 July 1992;
- (h) in relation to order 5.12, from the dates in respect of the amounts listed next to that defendant's name in Schedule F;
- (i) in relation to order 5.13(a), from 15 October 1996;
- (j) in relation to order 5.13(b), from 1 September 1995;
- (k) in relation to order 5.14, from the following dates in respect of the following amounts:
 - (i) \$690,652.62 from 9 March 1990;
 - (ii) \$4,815 from 18 April 1990;
 - (iii) \$15,436.46 from 21 June 1990; and
 - (iv) \$63,893.66 from 7 December 1990;
- (l) in relation to order 5.15, from the following dates in respect of the following amounts:
 - (i) £414,736.12 sterling from 23 March 1990;
 - (ii) £26,648.94 sterling from 30 March 1990; and
 - (iii) £2,488.94 sterling from 20 June 1990;
- (m) in relation to order 5.16, from 30 March 1990; and
- (n) in relation to order 5.17, from 22 February 1990.

7. In relation to costs, by consent but without prejudice to the position taken by the parties in their submissions concerning final relief the Court orders that:

- 7.1. For the purposes of order 7.2, all limits on costs prescribed by any applicable scale or fixed in any applicable statutory determination be removed.
- 7.2. The defendants pay the plaintiffs' costs, including reserved costs, fixed in the sum of \$82.5 million.
- 7.3. All previous costs orders made between the parties in the action in this Court or the Federal Court of Australia are vacated, except to the extent that any such orders have been paid.
- 7.4. All security for costs provided by, or on behalf of, the plaintiffs be released forthwith, including:
 - (a) the amount standing to the credit of the BankWest account no 306-089 2991912 be released to the Insurance Commission of Western Australia;
 - (b) the Commonwealth of Australia be released from any undertakings provided to the Court in relation to payment of any of the defendants' costs; and
 - (c) the Bank Bonds provided by, or on behalf of, the sixth plaintiff.
8. The Court further orders that orders 5, 6 and 7.2 be dated 29 May 2009 and take effect from that date.

¹ [MISP.00106.001].

² [MISD.00024.001].

³ [MISP.00116.015] (plaintiffs); [MISD.00024.013] (banks).

⁴ [MISP.00039.038.001].

⁵ [MISP.00106.004] pars 39 to 42.

⁶ See generally [MISP.00106.004] pars 192 to 204.

⁷ [MISP.00116.010] Sect 7.

⁸ [MISP.00106.004] pars 190, 191.

⁹ [TBGL.00565.026] Tiff 8.

¹⁰ [WITP.00001.037] pars 200 and 201.

¹¹ [Tra: 2700] (approximately) to [Tra: 2820] (approximately).

¹² For example [MISP.00106.004] pars 72 to 109; [MISP.00106.007] pars 163 to 182; [MISD.00024.008] pars 159 to 203; [MISD.00024.011] pars 7 to 13.

¹³ [MISP.00106.005].

¹⁴ Par DD is the paragraph dealing with the BIIL Subordination Deed and distributions to BIIL from the liquidator of BGUK.

¹⁵ Par W seeks also to capture distributions by Group Color to Belcap Enterprises (a seventh plaintiff).

¹⁶ [WITP.00001.101].

¹⁷ [MISP.00106.004] particularly pars 110 to 160.

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- ¹⁸ [MISP.00106.004] par 103.
¹⁹ [TBGL.03300.032].
²⁰ [MISD.00024.013].
²¹ [WITP.00001.101] par 15.
²² [MISP.00106.007] pars 120, 121, 122, 124, 125 and 126.
²³ [MISD.00024.013] Schedule E par 2.
²⁴ [MISP.00106.004] pars 170 to 174.
²⁵ [Tra: 37169].
²⁶ [MISP.00116.010].