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## ReSearch Memo

### Negative Net Assets

When is a company in insolvent? When is a company's assets less than its liabilities (taking account of contingent and prospective liabilities)?

Under English law this is a commercial test and requires that a company has reached a "point of no return" and is not based solely on a review of the company's balance sheet:

*It is only when it can be said that the company's use of its cash or other assets for current purposes amounts to what may be vernacularly characterised as a fraud on the future or contingent creditors that it can be said that it "has reached the point of no return" (BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc [2011] EWCA Civ 227c, per Lord Neuberger MR at paragraph 49, the "Eurosail Case").*

Further, in the Eurosail Case, Lord Neuberger MR said that if the test was whether the company's aggregate liabilities exceeded its aggregate assets as shown on the balance sheet, then:

*"many companies that were solvent and successful and many companies early on in their lives would be deemed to be unable to pay their debts... [it would be hard to] discern any conceivable policy reason why a company should be at risk of being wound up simply because the aggregate value (however calculated) of its liabilities exceeds that of its assets." (paragraphs 44 and 47).*

A factual determination that the company is at the point of no return is required - an exercise beyond simply looking at the numbers on the balance sheet.

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