1	Monday, 12 December 2016	1	the same time as the part A and B appeals. It is
2	(2.00 pm)	2	unclear whether the time estimate is being extended to
3	MR JUSTICE HILDYARD: Yes.	3	accommodate those appeals or not, but as matters stand
4	Housekeeping	4	those appeals will come on in April as well.
5	MR BAYFIELD: My Lord, good afternoon. This hearing has	5	The Court of Appeal has also been told that all of
6	been convened to deal with matters consequential upon my	6	the parties to the Waterfall proceedings consider that
7	Lord's judgment on Waterfall II part C. The	7	if your Lordship grants permission to appeal against
8	representation today mirrors that with a couple of	8	supplemental issue 1A, it will be convenient for that to
9	casualties that appeared before your Lordship at the	9	come on at the same time as the A and B appeals and the
10	trial, save that Mr Rivett is here in place of Mr Smith	10	other supplementary issue appeals in April. In relation
11	and Mr Amey for York. My Lord, the matters for this	11	to that, there is now a timetable directed by
12	afternoon fall into three categories: firstly the	12	Lord Justice Lewison in terms of skeleton arguments for
13	declarations to be made to reflect your Lordship's	13	the supplemental issues, with the appellant's skeletons
14	judgment; secondly applications for permission to	14	due by 21 January and the respondents' by 28 March,
15	appeal; and thirdly costs.	15	which, if my Lord does give permission to appeal on
16	Turning to the declarations, as your Lordship knows,	16	supplemental issue 1A, would seem to work for that issue
17	the parties have agreed the form of the declarations and	17	as well.
18	they are encapsulated in the draft order behind tab 3 of	18	So there is every chance that if my Lord grants
19	the bundle. They are of course subject to my Lord, but	19	permission to appeal on 1A, that that can catch up with
20	they are agreed as between the parties and we hope they	20	the other supplementary issues and the A and B appeals,
21	properly reflect your Lordship's judgment.	21	which of course would be convenient, given that as my
22	The second aspect for today is permission to appeal.	22	Lord reflected in the judgment at paragraph 454,
23	My Lord has three applications for permission. The	23	supplemental issue 1A derives from issue 4 which was
24	Senior Creditor Group seeks permission to appeal against	24	part of part A of the proceedings.
25	your Lordship's decisions on issues 10, 11, 12, 19, 20	25	My Lord, the final matter is costs. As to that, it
	Page 1		Page 3
1	and 21, and the corresponding declarations are listed in	1	is common ground that the Administrators' costs of part
2	the SCG's skeleton argument at paragraph 23. GSI seeks	2	C and supplemental issue 1A should be paid as an expense
3	permission to appeal against your Lordship's decision on	3	of the administration. (Inaudible) of supplemental
4	issue 11 and certain consequential aspects of issue 12,	4	issue 1A should be paid as an expense. The only area of
5	and the corresponding declarations that they appeal	5	dispute in relation to costs is as to the respondents'
6	against are listed in paragraph 4 of their skeleton	6	costs of part C. Wentworth seeks cost orders against
7	argument. Finally, York seeks permission to appeal	7	the SCG and GSI and the SCG and GSI resist those orders
8	against your Lordship's decision on supplemental issue	8	and invite my Lord to make an order that their costs be
9	1A, which results in the declaration at paragraph 27 of	9	paid as an expense of the administration.
10	the draft order.	10	The Administrators have made a number of
11	The Administrators don't intend to make any	11	observations about costs in our skeleton argument, but
12	submissions on those applications, which are primarily	12	subject to that and one qualification, we take a neutral
13	a matter for my Lord, and they make no applications for	13	position. The one qualification is this: if and to the
14	permission to appeal themselves. My Lord, without	14	extent that my Lord orders that the SCG's costs be paid
15	prejudging whether or not permission to appeal should be	15	as an expense of the administration, then we seek that
16	granted on supplemental appeal 1A, I thought it might be	16	they should be restricted to the costs that would have
17	helpful to let my Lord know where we have got to in	17	been incurred had the SCG returned one firm of
18	terms of listing the appeals of the part A and B	18	solicitors only, and that reflects the costs order that
19	judgments.	19	was made in the SCG's favour on parts A and B of
20	MR JUSTICE HILDYARD: April.	20	Waterfall II in circumstances in which they have
21	MR BAYFIELD: My Lord, that's right. It's 3 or 4 April as	21	retained more than one firm of solicitors.
22	the start date with a time estimate of six days. We now	22	My Lord, there is only one further matter I just
23	have directions from the Court of Appeal that the	23	wanted to mention before I sit down, and that is that
24	supplemental issues which were determined by	24	Mr Rivett has asked me to ask my Lord whether if it is
25	Lord Justice David Richards will come on to be heard at	25	convenient to my Lord that he and his team can be
	Page 2		Page 4
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2 once the question of permission to appeal against the 1A and declaration has been determined, in circumstances in the which the most meany issue for this afternoon is the costs issue between on the one hand Worthworth and on the other the SCI and GSI, in relation to which York has no increase. 8 Unless I can assist my Lord further, that is all placed to be a superpostate for permission to appeal and the properties of this application to reague any of those being. 10 Louncide to say for the Admissistators for the time being. 11 MR JUSTICE HILDYARD: Yes. And consistently with that last request, is it hes that I hear from Mr Kreet and see page 13 where we get to on that, and then turn to be direct? 12 MR RAYTEID. My Lord, that would certainly make sense from that? 13 MR FAYTEIT. I may grateful, my Lord. My Lord, as my learned friend Mr Bayfeld has pointed out, there are only two fixed may be seen as my submission to appeal and the second or costs. John! 14 Which I deal with those. 15 MR RUSTICE HILDYARD: Yes. Is anyone wildly opposed to fixed Mr Bayfeld has pointed out, there are only two laws with are consequential and relevants of as a 23 York is concerned. The first is on the question of permission to appeal and be second or costs. John! 15 MR RUSTICE HILDYARD: Yes be sto deal with permission of the state of the supplemental issue. As in my submission, the transport of the second or costs. John! 16 MR RUSTICE HILDYARD: Yes be second or costs. John! 17 Which I deal with those. 18 MR RUSTICE HILDYARD: Yes and the state of the order in the permission to appeal and the second or costs. John! 19 Which I deal with those. 20 MR RUSTICE HILDYARD: Yes best to deal with permission of the state in the matter overall, the considered – I am quoting the state of the permission to appeal and the second or costs. John! 10 Which I deal with those. 11 which I deal with those. 12 MR RUSTICE HILDYARD: You take your course. 13 MR RUSTICE HILDYARD: You take your course. 14 MR RUSTICE HILDYARD: You take your cours				
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18 Mr Rivett. 19 Application for permission to appeal by MR RIVETT 20 MR RIVETT. I am grateful, my Lord. My Lord, as my learned 21 friend Mr Bayfield has pointed out, there are only two 22 issues which are consequential and relevant so far as 23 York is concerned. The first is on the question of 24 permission to appeal and the second on costs. I don't 25 know if your Lordship has a preference of the order in 26 Page 5 1 which I deal with those. 2 MR JUSTICE HILDYARD: You take your course. 3 MR RIVETT: Then perhaps it's best to deal with permission 4 first. As foreshandword in Mr Amey's skeleton argument, 5 York seeks permission to appeal declaration 27 of the 6 draft order, which relates to your Lordship's finding on 7 supplemental issue IA. In my submission, the three is no previous authority, and on which 10 which there is no previous authority, and on which 11 an appellate court might, with respect, reasonably take 12 a different view from your Lordship. 13 Secondly, as your Lordship. 14 your judgment, it is also a point which derives from 15 an issue dealt with by Mr Justice David Richards, as he 16 then was. It was issue 4 on part A. Mr Justice David Richards, as he 16 then was. It was issue 4 on part A. Mr Justice David Richards, as he 16 then was. It was issue 4 on part A. Mr Justice David Richards, as he 17 the proposed for that issue 1 A was 18 my submission it would be entirely artificial for that 19 issue to be the subject of an appeal by 20 determination of issues 6 to 8. Issue 7, which concerns 21 contingent debts, is itself the subject of an appeal by 22 determination of issues 6 to 8. Issue 7, which concerns 23 contingent debts, is itself the subject of an appeal by 24 Wentworth, also due to be heard in April, and so for the 25 same reason as my submission on issue 4, it would be 26 the friend Mr Baytie and putting a the transcript, henconsidered at the matter overall, his considered — Im quoting at the matter overall, the considered — Im quoting at the matter overall, the considered — Im quotin	16	MR JUSTICE HILDYARD: Yes. Is anyone wildly opposed to	16	order made by Lord Justice David Richards on the other
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Page 6 Page 8	23	Same reason as my sucrimission on issue 7, it would be	23	reasons as to wify Tork's costs should be paid as
		Page 6		Page 8

1	an expense of the administration in his skeleton and	1	this, if they participated in supplemental issue 1A?
2	unless it would assist, I don't propose to repeat those	2	No?
3	submissions.	3	Ruling on appeal
4	MR JUSTICE HILDYARD: Can you show me where Mr Justice David	4	MR JUSTICE HILDYARD: Well I propose to give permission to
5	Richards, as he then was, dealt with the question of	5	appeal. It seems to me that as the matter was
6	duplication and the consequent reduction to 30 per cent?	6	developed, its connections with matters previously
7	MR RIVETT: Yes, my Lord, it is in the transcript of the	7	before Mr Justice David Richards became clear.
8	consequential matters at that hearing. I don't actually	8	I consider it appropriate, therefore, on both grounds,
9	have the underlying hearing bundles, but I understand	9	that is to say, that it is an issue upon which different
10	MR JUSTICE HILDYARD: No, it was supplied to me, with many	10	minds could reasonably differ and therefore there must
11	thanks, separately. It is 9 October, is it?	11	be a realistic prospect on appeal. And second, that on
12	MR RIVETT: That's correct, yes, and the discussion begins	12	the alternative ground, it seems to me that there are
13	on page 100.	13	other good reasons for the matter coming on to be
14	MR JUSTICE HILDYARD: Yes.	14	determined with the other matters to which it was, in
15	MR RIVETT: And then Mr Justice David Richards' ruling	15	a sense, appended, and I take into account in that
16	begins on page 109 at line 10, finishing at line 20 on	16	context, the fact that the Court of Appeal appears to
17	page 110. It is a relatively short section, so perhaps	17	have indicated that they would be able to accommodate
18	your Lordship would like to read it to yourself.	18	this matter as part of their dealing with 2A and B, and
19	(Pause)	19	therefore it seems that it would be most efficient to
20	MR JUSTICE HILDYARD: I see, so do I have it right, the	20	enable that course as soon as possible. I assume that,
21	judge thought that there had been a measure of	21	therefore, the directions, which I have not seen but
22	duplication, he wanted to give York its costs out of the	22	which Mr Bayfield alluded to, given prophetically by
23	estate in respect of issues 7 and 8, and as a matter of	23	Lord Justice Lewison, will enable the matter then to be
24	rough and ready justice, he thought 30 per cent of the	24	dealt with; is that right?
25	overall costs would fit the ticket?	25	MR RIVETT: I believe there may be an issue over the
23	overan costs would in the ticket?	23	MR RIVETT. I believe there may be an issue over the
	Page 9		Page 11
1	MR RIVETT: That's my understanding, yes, my Lord, and	1	appellant's notice, I suspect the appellant's notice
2	that's obviously different from the present application,	2	which is currently in issue, does not include this point
3	the present issue, when York dealt with the issues	3	because obviously permission hadn't been granted or
4	itself. That's reflected in your own judgment at	4	sought, and so it may well be that an appellant's notice
5	paragraph 469. My Lord, I should also point out that	5	needs to be filed, but the same directions in respect of
6	Lord Justice David Richards, as he had become by then,	6	skeleton arguments, I assume, could apply.
7	made no such deduction in respect of York's costs in	7	MR JUSTICE HILDYARD: Yes, I'm afraid I haven't looked at
8	respect of the supplemental issues, the other	8	Lord Justice Lewison's
9		9	MR BAYFIELD: My Lord may have slightly overstated what the
10	supplementary issues.	10	Court of Appeal has said. What the Court of Appeal has
	MR JUSTICE HILDYARD: And those who were concerned are also	11	done is made a direction that the other supplemental
11	seeking their costs out of the estate and no-one has put	12	issues catch up with the A and B appeals. As I said,
12	forward any objection to this proposal; is that right?		1 11 /
13	MR RIVETT: That's my understanding, yes, my Lord.	13	the parties, on a common ground basis, have suggested to
14	MR JUSTICE HILDYARD: So you say this may and this is	14	the Court of Appeal that if permission is granted on 1A,
15	a matter for later in the afternoon, whether it does	15	that that should catch up too. Because that's, at the
16	may differ from the other matters in (Inaudible)	16	moment, a hypothetical, the Court of Appeal hasn't
17	proceedings determined or those part of the proceedings	17	uttered in relation to that, but from the parties'
18	determined by Mr Justice David Richards, but also that	18	perspective, an additional time estimate of one day was
19	the matters in issue were matters arising in respect of	19	given, for all of the supplementary issues to be
20	the statutory scheme?	20	determined. We now know that the Court of Appeal is
21	MR RIVETT: That's correct, my Lord.	21	taking the other ones. Nothing has been said by the
22	MR JUSTICE HILDYARD: Yes. Well, in deference to your	22	court in relation to the time estimate in that regard,
23	request to be released and to quell your enthusiasm for	23	but I think the reality is, if no extra time is made
24	the rest of the afternoon, does anyone have any other	24	available, everyone will just have to do their best to
25	points that they feel I should take into account on	25	ensure that everything is dealt with within the time
	Page 10		Page 12
	1 450 10		1 agc 12

allowed, and if supplemental issue IA is appealed against, the appeal notice will have to be filed in time for the Court of Appeal and the intendable of skeleton arguments, which doesn't appear to give rise to any problem. Because the appellant's skeletons on the other supplementary issues are required by the end of January and in fact, that is a date that falls after the skeleton argument on supplemental issue IA would have to be filed in the ordinary course. So what I would cenvisage happening is once the appeal notice has been filed on perhaps in advance of that, Lindkaters writing to the Civil Appeal Office to say that permission to appeal has been granted and to seek confirmation from the Court of Appeal that IA can be deaft with at the same time as the other supplementary issues, and I would assume, suggesting that the firestable for skeleton arguments that has been set down for the other supplemental issues, should apply equally to IA. MR JUSTICE HILDYARD. Well, obviously, it will be a matter for the Court of Appeal make a decision accordingly. So far as the appeal notice is concerned, when ean you get it in? MR RIVETT: Six January, if possible, my Lord. Obviously, it comes at a somewhat inconvenient time of year, and so 6 January would be the preferable date. MR BAYFIELD: We're content with that, my Lord. MR BAYFIELD: We're content with that, my Lord. MR BAYFIELD: We're content with that my Lord. MR BAYFIELD: We're content with that my Lord. MR BAYFIELD: That's right, I think it will be for my learned friend to file a skeleton argument, either to put in? MR BAYFIELD: That's right, I think it will be for my learned friend to file a skeleton argument, either to put in? MR BAYFIELD: No, no, that's the appellant's skeletons for the respondents in February. MR BAYFIELD: No, no, that's the appellant's skeletons for the respondents in February. MR BAYFIELD: No, so, that's the appellant's skeletons for the respondents in February. MR BAYFIELD: No, so, that's the appellant's skeletons for the responde
on, but if all parties are agreed that within the arguments, which doesn't appear to give rise to any problems. Because the appellant's skeletons on the other supplementary issues are required by the end of January and in fact, that is a date that falls after the skeleton argument on supplemental sizes. I A would have to be filed in the ordinary course. So what I would provided the crivisage happening is once the appeal notice has been to the Civil Appeals Office to say that permission to appeal has been granted and to seek confirmation from the Court of Appeal that I A can be deaft with at the same time as the other supplementary issues, and I would sassume, suggesting that the finisheld for sort appeal has been granted and to seek confirmation from a same time as the other supplementary issues, and I would sassume, suggesting that the finisheld for for skeleton arguments that has been set down for the other supplementary issues, and I would sassume, suggesting that the finisheld for for skeleton arguments that has been set down for the other supplementary issues, and I would sassume, suggesting that the finisheld for for sheep and the appeal notice is concerned, when can you get it in? MR JUSTICE HILDYARD. Is that agoing to cause any problems to anybody? MR JUSTICE HILDYARD. Is that agoing to cause any problems to anybody? MR BAYFIELD: We're content with that, my Lord. MR JUSTICE HILDYARD. That will give you time for any respondent's notice or whatever it is you may wish to put in? MR BAYFIELD: That's right, I think it will be for my learned to the control within the same time that has been agreed with the solicitors and the control within the same time the me with the solicitors and the control within the same time that has been agreed with the solicitors and the control within the same time the form of the problems to the other parties to the appeals, all of whom are copied in and including Michelmencs, who are York's solicions, saying: I by Linklaters on 29 November 2016, a letter expressed to have b
arguments, which doesn't appear to give rise to any problem. Because the appellant's skeletons on the other supplementary issues are required by the end of January and in fact, that is a date that falls after the skeleton argument on supplemental issue I A would have to be filed in the ordinary course. So what I would provided in the ordinary course, so what I would end of the child prapeal notice has been filed, or perhaps in advance of that, Linklaters writing to the Civil Appeals Office to say that permission to a papeal has been granted and to seek confirmation from the Court of Appeal that I A can be dealt with at the same intendable. 11 Same time as the other supplementary issues, and I would assume, suggesting that the timetable for skeleton arguments that has been set down for the other misunderstood. I had misunderstood. But is it the view which the Civil Appeals Office has permitted, that this matter could be dealt with so fir as the parties are copied man dincluding Michelmores, who are York's solicitors, saying: 10 Page 13 11 Spage 13 12 Spage 13 13 Page 15 14 Will Mark Michelmores, who are York's solicitors, saying: 15 MR BAYFIELD: Well, the Court of Appeal has been written to that Judgment is listed to take place before that papeals. A consequential hearing in relation to that Judgment is listed to take place before that what Judgment is listed to take place before that what Judgment is listed to take place before that what Mindent papeal has decision, the parties are required by the papeals. A consequential hearing in relation to that Judgment is listed to take place before that what Mindent papeal has decision, the parties are required by the papeals. A consequential hearing in relation to that papeals has decision, the parties are required by the papeals. A consequential hearing in relation to that papeals has decision, the parties are required by the papeals. A consequential hearing in relation to that papeals has decision, the parties are required by the papeals. A consequential hearin
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supplementary issues are required by the end of January and in fact, that is a date that falls after the skeleton argument on supplemental issue 1A would have to be filed in the ordinary course. So what I would envisage happening is once the appeal notice has been filed, or perhaps in advance of that, inklaters writing to the Civil Appeals Office to say that permission to appeal has been grated and to seek confirmation from the Court of Appeal that IA can be dealt with at the assume, suggesting that the time table for skeleton argument but has been set down for the other supplementaly issues, should apply equally to IA. MR JUSTICE HILDYARD: Thank you, I am so sorry to have misunderstood. I had misunderstood. But is if the view which the Civil Appeals Office has permitted, that this matter could be dealt with so far as the parties are concerned, within the same timetable? MR BAYFIELD: Well, the Court of Appeal has been written to Page 13 Page 13 MR BAYFIELD: No, no, that's the appeallant's skeleton argument at the event that Mr Justice Hildyard receipt gave judgment on an issue closely related to the papeal has foen suggested to appeal that decision, the parties agree that it would be appeal that decision, the parties agree that it would be appeal that decision, the parties agree that it would be appeal that decision, the parties agree that it would be appeal that decision, the parties could be achieved Court of Appeal make a decision accordingly. MR MR NIJSTICE HILDYARD: Is that excise ones are sup one unit in Possible, my to get it in? MR RAYFIELD: Well the page and so to be head. With the appeal notice is concerned, which it at the image of the preferable date. MR JUSTICE HILDYARD: That will give you time for any respondents notice or whatever it is you may wish to put in? MR BAYFIELD: That's right, I think it will be for my learned friend to file a skeleton argument, either to defer the skeleton for the other supplementary issues. MR JUSTICE HILDYARD: Is that exchange or is that one round? MR BAYFI
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hearing which the parties envisage could be achieved 14 6 January for your notice, and that then you must abide,
1 50 directed, by the Court of Appeal, Obviously, with
So that is something that was expressed to the Civil 16 the relevant exchange dates for service of your skeleton
17 Appeals Office on behalf of all of the parties. It 17 argument.
would be very disappointing if anyone's position had 18 MR RIVETT: I am grateful, my Lord.
19 changed since then and there is certainly no indication 19 Ruling on costs
that anyone's position has changed. 20 MR JUSTICE HILDYARD: And then on the matter of costs, it
21 MR JUSTICE HILDYARD: And that remains so from your point of 21 seems to me that this may be slightly different in
view, Mr Rivett - 22 aspect to the other matters of costs which I have to
23 MR RIVETT: It does, my Lord, yes. 23 deal with, and that especially as no-one objects and
24 MR JUSTICE HILDYARD: having taken instructions on it? 24 everyone involved was seeking their own costs out of the
25 MR RIVETT: It does yes, my Lord. 25 estate and it refers to a matter as to the statutory
Perc 14
Page 14 Page 16 4 (Pages 13 to 16)

scheme, it is not impropropriate that you should have the costs of the estate or whatever the magic wording is MR DAYFIED. My Lord, thank you MR DAYFIED. My Lord, thank you MR DAYFIET I am grateful, my Lord. MR RICSTICE HILDYARD. So you may leave if you can bear to. MR RICSTICE HILDYARD I you nex? MR DAYFIET That is very kind, my Lord. MR RICSTICE HILDYARD. You nex? Right MP Dicker, it is you nex? Right MP Dicker. It is you nex? MR DICKER. My Lord, it probably is a labo have two appeal, time to the court of Appeal, and we certainly would be good and the death of the way to the count of Appeal, and we certainly would be good and be does not. MR DICKER. My Lord, it probably is a labo have two appeal, time to the court of Appeal, and we certainly would be counted to the court of Appeal, and we certainly would be counted to the court of Appeal, and we certainly would be counted to the court and so the counted to the court and so the counted to the court and so the counted to the court as to any grounds on which is should simply say an. Is that right? MR DICKER of the DAYARD Well I think the position on permission to appeal is that, beady speaking, the darkinstates are neutral and so I think Mr Eacorol's stacketon suggests that he didn't know whether or not you would be sceking to appeal, it have the an appliemented since, and I sense that there's no active opposition to which is should simply say an. Is that right? MR DICKER of the State State you are right. For a counter of the appeal was a state of the count as to any grounds on which is should simply say an. Is that right? MR DICKER of the State State of the count as to any ground on which is should simply say an. Is that right? There is susse are tricky, and different minds could the counter of the sistent stay to make the counter of the counter of the appeal. We counter of the appeal was				
3 MR RAYFETD. My Lord, thank you. 5 MR RIVETT: I am grateful, my Lord. 6 MR RIVETT: I am grateful, my Lord. 7 MR RIVETT: I am grateful, my Lord. 8 MR IUSTICE HII DYARD. So you may leave if you can bear to 8 MR IUSTICE HII DYARD. So you may leave if you can bear to 9 Right M Dicker, is it you next? 9 Right M Dicker, is it you next? 10 MR DICKER. My Lord, it grebably is 1 also have two 11 applications, costs and permission to appeal. It is not with the order your Lordship would profer to hear 12 leave in which order your Lordship would profer to hear 13 them. 14 MR LUSTICE HILDYARD. Well I think the position on 15 permission to appeal is that, breadly speaking, the 16 Admiristrations are neutral and so I think Mr Zacarol's 17 skeleton suggests that le didn't know whether or not you 18 would be seeking to appeal, it hast been supplemented 19 since, and I sense that there's no active opposition to 21 which it should simply say no. Is that right? 22 MR ZACAROLE That's right, my Lord. 23 MR EXCLORE HID TYARD Ves. 24 These issues are tricky, and different minds could 25 raceh different conclusions. They are important, and as 26 Page 17 1 regards the ISDA claims, they prospectively involve 2 a great many people, not only those interested in the 2 covery good reason for giving permission to appeal, in 2 respect of the issues that year to you be two wild the same and instrustration, but more generally in the 2 received of the issues that year to you be two wild the declaration of the German mater greenout 3 Lehmans administration, but more generally in the 4 regards the ISDA claims, they prospectively involve 5 a great many people, not only those interested in the 6 Lehmans administration, but more generally in the 7 regards the ISDA claims, they prospectively involve 8 a great many people, not only those interested in the 9 cappeal from the constraints, and the declaration of giving permission accordingly 9 MR DICKER. By Lord I am grateful or your Lordship, Just 9 so your I cordship knows, I think Mr Froton, on Behalf	1	scheme, it is not inappropriate that you should have the	1	MR JUSTICE HILDYARD: And 11 and 12, you do and he does not.
4 MR BAYHELD. My Lord, thank you. 5 MR RIVETT: I am grankful, my Lord. 6 MR JUSTICE HILDYARD. So you may leave if you can bear to. 7 MR RIVETT: That is very kind, my Lord. 7 MR RIVETT: That is very kind, my Lord. 8 MR JUSTICE HILDYARD. So you may leave if you can bear to. 8 MR JUSTICE HILDYARD by se. 8 Right, Mr Dicker, is it you next? 9 Right, Mr Dicker, is it you next? 10 MR DUCKER. My Lord, it probably is. Labo have two applications, costs and permission to appeal as the before the coded to make. 11 applications, costs and permission to appeal as the horizont of appeal, and we certainly would follow that both declarations in to appeal as the hard by the position on 14 control to a promission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that, broadly speaking the 2 seek permission to appeal is that there's no active opposition to 19 seek permission to appeal is that there's no active opposition to 19 seek permission appeal the active of the 2 seek permission appeal the active of the 2 seek permission appeal the active of the 2 seek permission appeal the 2 seek permission appeal the 2 seek permission appeal the 2 seek permission ap	2	costs out of the estate or whatever the magic wording	2	MR DICKER: Yes, and then in relation to issue 12, I think
5 MR RIVETT. I am gasteful, my Lord. 6 MR JUSTICE HILDYARD: So you may leave if you can bear to. 7 MR RIVETT: That is very kind, my Lord. 8 MR JUSTICE HILDYARD: Yes. 8 Right Dicker, is it you next? 9 Right Micker, is it you next? 10 MR DICKER. My Lord, it probably is. I also have two 11 applications, costs and permission to appeal. I don't 12 know in which order your Lordship would prefer to hear 13 then. 14 MR JUSTICE HILDYARD: Well I think the position on 15 permission to speel as that, broadly speaking, the 16 Administrators are neutral and so I think Mr Zearrol's 17 skeleton suggests that he didn't know whether or not you 18 would be seeking to appeal, it hearth been supplemented 19 since, and I sense that there's no active opposition to 19 which is should simple syn to, is that right? 20 MR JUSTICE HILDYARD: well I think the position on 20 it, nor any assistance so the court as to any grounds on 21 who is abould simple syn to, is that right? 22 MR ZACAROLE. That's right, my Lord. 23 MR JUSTICE HILDYARD ves. 24 These issues are tricky, and different minds could 25 reach different conclusions. They are important, and as 26 Lethams administration, but more generally in the 37 regards the ISDA chairs, they prospectively involve 28 a great many people, no only those interested in the 38 Lethams administration, but more generally in the 39 required mental proposition to include on our it. 40 ground cross for giving permission to a propol, in 41 give you permission accordingly. 42 MR JUSTICE HILDYARD: Oh, I thought you had, right. In 43 are it sight. Jijas vest mit proposing permission to appeal and we tool 44 declaration, I finite in respect of the issues on other 45 ground careed by issues 13, when examining what crost of funding sould be even from the count. It is rectainly not the heart of the appeal we so that it is additional in terms of SCG points where we have a declaration in respect of the instance of the institute to any application on delimitation to the Genarios of SCG points where we have not adopt	3	is.	3	the difference between us is in relation to
6 MR RISTICE HILDYARD. So you may leave if you can bear to. 7 MR RIVETT: That is very kind, my Lord. 8 MR RUSTICE HILDYARD. Yes. 9 Right, Mr Dicker, is it you next? 9 Right, Mr Dicker, is it you next? 9 Right, Mr Dicker, is it you next? 10 MR DICKER. My Lord, in probably is. I also have two applications, costs and permission to appeal. I don't leave my which is designed your Lordship would profer to hear them. 10 MR RIUSTICE HILDYARD. Well I think the position on permission to appeal is that, broadly speaking, the administrators are neutral and so I think Mr Zacaroli's selectors agasests that he didn't know whether or not you would be seeking to appeal, it hasn't been supplemented since, and I sense that there's no active opposition to it, nor any assistance to the court as to any grounds on 21 which it should simply says no. Is that right? 20 MR ZACAROLI. That's right, my Lord. 21 MR ZACAROLI. That's right, my Lord. 22 MR ZACAROLI. That's right, my Lord. 23 MR RUSTICE HILDYARD. Yes. 24 These issues are risky, and different minds could reach different conclusions. They are important, and as Lehmans administration, but more generally in the market. Therefore it seems to me that there would be every good reason for giving permission to appeal, in the appeal in espect of the issues that you have identified, and 1 give you permission accordingly. MR DICKER. My Lord, Lam grateful to your Lordship Just so your Lordship knows, I think Mr Toxten, on behalf of declaration, 4 which is the costs of funding beson to far as issue II and I2 were concerned. We included of declaration 4, which is the costs of funding beson to include or out it. Page 18 Page 18 Page 20 MR RUSTICE HILDYARD. Yes, you are right. Form 5. Five, you don't appeal, and neither does he. Four, you appeal in include costs or financial consequences to the relevance. Page 18 Page 20	4	MR BAYFIELD: My Lord, thank you.	4	declaration 15, Goldman Sachs have included this and we
7 Appeal, then obliviously it would follow that both declarations will be before the Coart of Appeal, and we certainly would follow that both was the first open and the coart of the properties	5	MR RIVETT: I am grateful, my Lord.	5	haven't. My Lord, if your Lordship's content to give
8 MR JUSTICE HILDYARD. Yes. 9 Right, Mr Dicker, is it you next? 10 MR DICKER: My Lord, if probably is. I also have two applications, costs and permission to appeal. I don't learn which order your Lordship howald prefer to hear them. 14 MR JUSTICE HILDYARD. Well I think the position on permission to appeal is that, broadly speaking, the declaration store and the section of the susses that seems and the section of the sussess are neutral and so I think Mr Zacaroli's sleedens suggests that he didn't know whether or ont you would be seeding to appeal, it hasn't been supplemented since, and I sense that therea's no active opposition to 19 since, and I sense that therea's no active opposition to 19 since, and I sense that there's no active opposition to 19 since, and I sense that the control of the I sense that the control	6	MR JUSTICE HILDYARD: So you may leave if you can bear to.	6	permission to each of us in respect of the ones we do
9 Right, Mr Dicker, is it you next? 10 MR DICKER: My Lord, it probably is. I also have two 11 applications, costs and permission to appeal. I don't 12 know in which order your Lordship would prefer to hear 13 them. 14 MR RUSICE HILDYARD. Well think the position on 15 permission to appeal is that, broadly speaking, the 16 Administrators are neutral and so I think Mr Zoaron't) 17 skeleton suggests that he didn't know whether or not you 18 would be seeding to appeal; it han't been supplemented 19 since, and I sense that there's no active opposition to 20 it, nor any assistance to the court as to any grounds on 21 which it should simply say no. Is that right? 22 MR ZACAROLI: That's right, my Lord. 23 MR LUSTICE HILDYARD Yes. 24 These issues are tricky, and different minds could 25 reach different conclusions. They are important, and as Page 17 1 regards the ISDA claims, they prospectively involve 2 a great many people, not only those interested in the 3 Lehmans administration, but more generally in the 4 market. Therefore it second in great plant in the dealth of the provident of the people. We see that 5 every good reason for giving permission to appeal, in 6 respect of the issues that you have identified, and 1 give you permission accordingly. 8 MR RUSCER: My Lord, I am grateful to your Lordship in sol, it has been supportant, and as 1 give you permission accordingly. 8 MR RUSCER: HILDYARD. Yes that the delatations in relation to the Generation of the mire of the appeal. We see that 18 include ocas or financial consequences to the 19 clevant – 20 MR RUSTICE HILDYARD. In think of Foxton, on behalf of declaration of my permission condition, which was defined at least one other 19 declaration of my permission conditions, which we seed permission in respect of issue 12, that we seed permission in respect of issue 12, that we seed permission in respect of issue 12, that we seed permission in respect of if the debt of the permission in read the destination of the permission in read the destination of the permission	7	MR RIVETT: That is very kind, my Lord.	7	appeal, then obviously it would follow that both
MR DICKER: My Lord, it probably is. I also have two applications, costs and permission to appeal. I don't leave them which order your Lordship would perfect to hear them. MR INSTICE HILDYARD. Well I think the position on permission to appeal is that, broadly speaking, the Administrators are neutral and so I think Mr Zacarol's skeleno suggests that he didn't know whether or not you would be seeking to appeal, it hasn't been supplemented since and I sems that there's no active opposition to a pice and is since, and I sems that there's no active opposition to a pice and is since, and I sems that there's no active opposition to a pice and is since, and I sems that there's no active opposition to a pice and is since, and I sems that there's no active opposition to a pice and is since, and I sems that there's no active opposition to a pice and is since, and I sems that here's no active opposition to a pice and is since, and is sems to me that there's no active opposition to a pice and is a proposition to a pice and the proposition to a pice	8	MR JUSTICE HILDYARD: Yes.	8	declarations will be before the Court of Appeal, and we
applications, costs and permission to appeal. I don't throw in which order your Lordship would prefer to hear throw in which order your Lordship would prefer to hear the would have been been that there is no appeal in the permission to appeal as that, broadly speaking, the Administrators are neutral and so I think Mr Zacaroli's skeleton suggests that he didn't know whether or not you would be seeking to appeal, it hasn't been supplemented since, and I sees that there's no active opposition to it, nor any assistance to the court as to any grounds on the permission appeal in the properties of the court as to any grounds on the permission appeal in the properties of the court as to any grounds on the permission accordingly. Page 17 MR FOXTON: My Lord, in terms of the one addition, which was declaration 15, it just seemed to us that if the debt versus equity issue, if I may so term it, was before the court as to appeal, in a permission accordingly. Page 17 Page 19 regards the ISDA claims, they prospectively involve a great many people, not only those interested in the and respect of the issues that you have identified, and I give you permission accordingly. MR DICKER My Lord, I mag nateful to your Lordship. Just so your Lordship knows, I think Mr Foxton, on behalf of Goldman Sachs, identified at least one other and the declaration 4, which is the costs of fiunding does not inclear that the context of fire a sissue I 1 and 12 were concerned. We included declaration 4, which is the costs of fiunding does not inclear that the cost of fiunding extends to cost of equity fiunding, but we took a fire a sissue I 1 and 12 were concerned. We included declaration 4, which is the costs of fiunding does not inclear that the cost of fiunding does not inclear that the concerned we included on our list. MR DICKER I think there were two differences between us so if a first sight. I just were through — the context is a definition. In the part of the appeal, in the part of the part of the appeal in and the does not. MR DICKER	9	Right, Mr Dicker, is it you next?	9	certainly wouldn't oppose that. My Lord, I think that
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them MR JUSTICE HILDYARD: Well I think the position on Administrators are neutral and so I think Mr Zacaroli's skeleno suggests that be didn't know whether or not you would be seeking to appeal, it hasn't been supplemented since, and I sense that there's no active opposition to it, and any assistance to the court as to any grounds on which it should simply say no. Is that right? MR JUSTICE HILDYARD: Yes. MR AZCAROLI: That's right, my Lord. MR JUSTICE HILDYARD: Yes. These issues are tricky, and different minds could reach different conclusions. They are important, and as Page 17 regards the ISDA claims, they prospectively involve a great many people, not only those interested in the market. Therefore it scens to me that there would be market. Therefore it scens to me that there would be market. Therefore it scens to me that there would be respect of the issues that you have identified, and I give you permission accordingly. MR DICKER: My Lord, I am grateful to your Lordship, Just so your Lordship knows, I think Mr Foxton, on behalf of Goldman Sachs, identified at least one other declaration, I think in respect of issue 12, that we haven't included on our list. MR DICKER: In think there were two differences between us so In far as issue II and 12 were concerned. We included declaration, I think there were two differences between us so In far as issue II and 12 were concerned. We included declaration, I think there were two differences between us so In far was the market agreement as well. Page 18 Page 20	11	applications, costs and permission to appeal. I don't	11	Obviously, there are other declarations in respect of
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5 (Pages 17 to 20)	<u> </u>	1 450 10		

	Waterfall II, Tranche C -	Conse	equentials Hearing 12 December 201
1	MR JUSTICE HILDYARD: No. Do you think that this will	1	the points you wish to appeal, leaving it to the Court
2	arise, really, in the course of argument, as a matter of	2	of Appeal to determine whether either or both of you
3	fact before the Court of Appeal? Have you been able to	3	should have a go at it, and I think I had best leave it
4	estimate that?	4	at that, permission to you each.
5	MR FOXTON: My Lord, I think it is fair to say it's in there	5	MR DICKER: My Lord, I am grateful. The second issue,
6	at the moment in the spirit of just in case rather than	6	obviously, was costs.
7	as being a point which we think will definitely be live,	7	MR JUSTICE HILDYARD: Yes. That is a more difficult matter,
8	but one can see, when analysing the consequences of	8	as far as I am concerned, and one on which I do need
9	a debt or equity analysis of cost of funding, the	9	your assistance.
10	question about what the cost of equity involves may be	10	Application for costs by MR DICKER
11	live before the court, not least given some of the	11	MR DICKER: Then I will proceed accordingly. My Lord, as
12	issues the SCG are raising or weighted average cost of	12	your Lordship knows, we seek an order for payment of the
13	capital and so forth.	13	SCG's costs out of the estate
14	MR JUSTICE HILDYARD: Yes. So you think it could be	14	MR JUSTICE HILDYARD: Yes.
15	artificial, as it were, to have made a stand on this	15	MR DICKER: and wouldn't oppose a similar order in
16	particular subparagraph?	16	relation to any of the other respondents
17	MR FOXTON: My Lord, I suspect it will be something that	17	MR JUSTICE HILDYARD: No.
18	will be ground that is covered, whether permission to	18	MR DICKER: should they wish to make it. My Lord, before
19	appeal is given on this particular declaration or not,	19	delving into the detail, your Lordship should know the
20	and that was the spirit in which we sought to include	20	Administrators don't oppose such an order. If they had
21	potentially consequential issues from a more generous	21	thought it inappropriate, no doubt they would have said
22	perspective at this stage.	22	so, and your Lordship has seen what is said in their
23	MR JUSTICE HILDYARD: And does it flow from that that I	23	skeleton argument. My Lord, the arguments before
24	would not be visiting on the Court of Appeal, in	24	your Lordship are essentially the same arguments as were
25	reality, any substantial or material additional time?	25	before Mr Justice David Richards in relation to parts A
	Page 21		Page 23
1	MR FOXTON: My Lord, I think it does, and I suspect that	1	and B, and much of the ground that I am going to travel
2	this is simply an extremely minor addition to the course	2	is ground which he had to travel before reaching his
3	of argument that is going to be before the court on the	3	decision. We say, essentially, there is no material
4	central issue upon which your Lordship very fairly	4	difference between parts A and B on the one hand and
5	recognised in the judgment, was one which caused you to	5	part C on the other.
6	think carefully about both positions.	6	My Lord, can I start just by emphasising six
7	MR JUSTICE HILDYARD: Well, Mr Dicker, I take it,	7	principal points. The first is that the application was
8	Mr Bayfield, the Administrators are, as they have been	8	issued by the Administrators to obtain guidance that
9	in the past, neutral in this regard, and they simply	9	they considered that they needed. The second is it
10	leave it to the court, not least because at the trial,	10	sought answers to various general questions which the
11	they were neutral as well. I think Mr Trower took on	11	Administrators and the respondents had identified as
12	the role of being the various day's compère for the	12	reflecting arguable positions. The initial questions
13	proceedings in front of me. Mr Dicker, as far as you	13	were identified and formulated by the parties together,
14	are concerned	14	and as your Lordship knows, it didn't stop there. The
15	MP DICKED: My Lard we wouldn't appace Goldman Sache heing	1.5	A desiries tractions identified from the among ible accomments in

MR DICKER: My Lord, we wouldn't oppose Goldman Sachs being

given permission to appeal and for our part, we can't

envisage it will involve the Court of Appeal having any

more work than that which will arise on the appeal in

responsibility to try and clear out some matters which

aren't severally worthy or appropriate to be appealed,

nevertheless, I think in the circumstances, the division

I propose to give permission to appeal to each of you on

Page 22

would be more artful than necessary and therefore

MR JUSTICE HILDYARD: Well recognising it is my

at the application was obtain guidance that ed. The second is it eral questions which the dents had identified as The initial questions by the parties together, didn't stop there. The Administrators identified further possible arguments in their position paper, and as your Lordship referred to in the judgment, identified another nine subquestions shortly before the part C hearing started, which they invited the respondents to address and which they did address.

My Lord, thirdly, to some extent, it was arbitrary as to how the application was heard, and which issues were heard with which part. Your Lordship may have noted from an earlier skeleton submitted by Wentworth that at one stage they were submitting that issue 10

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6 (Pages 21 to 24)

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any event.

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should actually be heard together with part A. In the end that wasn't the consensus view and they didn't ultimately oppose it being heard together with the rest of the ISDA issues in part C. But the decision as to how A, B and C were divided up was essentially regarded as a matter of case management rather than anything else. What would be the most efficient way of dealing with the various issues raised in one composite application? The fourth point is that the SCG's role in the

proceedings was akin to that of a representative respondent. That is certainly how they understood it. The SCG's understanding of their role was made plain in the skeleton argument for the part C hearing, and repeated by me during the course of my oral submissions, and at no stage did the Administrators or Wentworth suggest that we misunderstood why we had been joined before, as to what our role was.

My Lord, that is not just a matter of form. In our submission, the SCG acted exactly as you would have expected from a representative party keen to ensure that the Administrators obtained the guidance that they considered they needed and we set out various points in this respect at paragraph 16 of our skeleton argument. I wonder if I might just remind your Lordship of those

Administrators and the various additional contentions made by them.

At no stage did the Administrators suggest that any of the arguments that had been identified, and in respect of which the SCG and others were making submissions, were points on which they did not require guidance. So at no stage were the SCG making submissions in relation to something which, as it were, it was their agenda to press, but not something the Administrators required guidance in relation to.

The sixth point is if the Administrators were going to obtain the guidance they needed, someone had to be appointed, a respondent who would take an active role. If the SCG had refused, someone else would have had to have been appointed, if necessary on the basis of a formal order for representation, and an order for payment of that party's costs. The only alternative is the Administrators would have had to run all of the arguments themselves, not, in our respectful submission, the most satisfactory way of proceeding and plainly not one which the Administrators wanted. But if that course had been adopted, then obviously, the costs of the Administrators, as it were, standing in my place, would have come out of the estate.

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MR JUSTICE HILDYARD: Is that right, though? Where the

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points?

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MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, 16.1, we worked to agree the answer to certain of the issues. The Administrators were

5 (Inaudible) there was ultimately consensus as to the correct approach to be adopted. We made submissions on 6 7 the remaining issues which, in the light of their own

broad position as creditors, were likely to benefit unsecured creditors as a whole. None of the issues

concerned solely the members of the SCG. That's true as much of the German law issues as any of the others. The

SCG sought to limit their submissions to points of law which were in the interests of unsecured creditors

14 generally rather than sought to rely on facts likely to 15 be of relevance solely to one or more of them. They advanced submissions on particular issues whether one or 16

more of them might have had a lesser interest in such issues, and they limited their submissions to those which were likely to be of general application for

19 20 creditors. Your Lordship may recall the point that is 21 made in subparagraph 5 there in relation to serious and

22 definitive refusal. The only point that was taken was, 23 essentially, the general one, the effect of the making

of the administration order, nothing further. They also

responded to the various subissues identified by the

Page 26

Administrators are having to, as it were, interpret the 1 2 meaning or application of parts of the scheme, if you

3 like, then it is quite so that unless they are bold 4

enough to make the decisions themselves, they will have 5 to go to court and if they go to court, they will need

6 contrary argument for it to make any real sense, and 7 everything flows from that. But in the case of the ISDA

8 forms, there is a basic position under the insolvency 9 rules, and then there is a sort of super claim under the

10 ISDA forms, you either choose to assert them or you 11 don't. If you had decided not to go for more than

12 8 per cent, the Administrators could have just said 13 "Well okay, you get your 8 per cent and that's it."

14 There's no difficulty under the statutory scheme, is 15 there?

MR DICKER: Well, my Lord, we would say that's not, with respect, the right way of looking at the proceedings. The question of whether or not 8 per cent was

18 19 a permissible rate, obviously wasn't something that was 20 solely within the control of the SCG. It was also

21 a claim which could have been advanced by other 22 creditors, and the way in which the proceedings

23 developed was the Administrators essentially said there 24 are a number of issues potentially affecting either all

25 creditors or a substantial number of creditors, and

1	there's a variety of ways in which we can seek to	1	I do find this puzzling is this seems to me a little
2	discharge our statutory duties by determining those	2	bit different from A and B and nevertheless different
3	issues and distributing the surplus. And the way they	3	from the RASCALS case. The RASCALS case, as I
4	chose to deal with this was essentially to say to	4	understand it, centred on a proprietary claim by the
5	creditors, including the SCG, "What are the points which	5	claimants which was particular to them and was therefore
6	you think are reasonably arguable?" as well as	6	in the nature of a straightforward adversarial claim.
7	identifying points which they themselves consider might	7	Here, the matters being generated by reference to
8	be raised by a creditor, and then seek to have those	8	issues, (a) because that is the fact, (b) because hidden
9	determined on the basis that that determination would	9	under the issues is the fact that whilst you assert your
10	then hopefully, in practice, if not as a strict matter,	10	claims, you are also in another pocket interested in the
11	determine them for all creditors certainly make it	11	same answer as, for example, Wentworth had, or Wentworth
12	very difficult for anyone else to subsequently challenge	12	are interested in the same answers you propose because
13	it. So one way of looking at this, if it's a more	13	you have multiple interests. That is as I understand
14	helpful analogy, might be akin, essentially, to a test	14	it.
15	case. Yes, the SCG was content to argue these points,	15	MR DICKER: My Lord, one needs to be quite careful when one
16	but they weren't arguing them simply because they were	16	talks about assertion of claims. It is a point made by
17	asserting them and it was in their interests to do so.	17	Wentworth in their skeleton on more than one occasion.
18	Indeed, that's not, in fact, the way matters developed	18	These issues do not all flow out of one or more proofs
19	previously. This hasn't sprung from a series of proof	19	of debt.
20	of debts claiming 8 per cent which the creditors have	20	MR JUSTICE HILDYARD: But that is a timing issue, isn't it?
21	asserted and the Administrators have rejected, it's	21	It seems to me for the moment that that is more form
22	arisen by the parties essentially looking at the ISDA	22	than substance. As a point of substance, there is
23	master agreement and trying to work out what claims	23	an argument not as to the statutory scheme but as to
24	might be made, and seeking to have those determined.	24	what additional rights the ISDA forms confer. The
25	I entirely accept your Lordship's point that where	25	considered view of the Administrators, which seems to me
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	Page 29		Page 31
1	one's construing the statute itself, one may say that's	1	wholly realistic, was that those claims, the super
2	a paradigm case in which costs should be paid out of the	2	claims, as I have called them, would be asserted. The
3	estate, just as it would be if you're construing the	3	fact that they may not yet have been asserted in every
4	terms of a trust or the terms of a will, but that's not	4	or any instance by way of proof of debt is neither here
5	the only situation. It's not the only situation	5	nor there.
6	referred to in Buxton and, indeed, it wasn't the	6	MR DICKER: Although the function of this part was actually
7	situation, if your Lordship will recall, in relation to	7	to determine what such claims would actually be
8	part B. Part B concerned contracts between the	8	asserted.
9	Administrators and creditors. The issue between them	9	MR JUSTICE HILDYARD: Yes.
10	was whether or not, as Wentworth said, that was	10	MR DICKER: So in a sense one starts, perhaps slightly
11	a commercial deal in which creditors had given up	11	unusually but plainly for very sensible reason, to try
12	compromised claims to interest, damages akin to	12	and identify what arguable positions could be taken by
13	interest, foreign currency claims, or not.	13	creditors to then try and work out whether or not those
14	On one view, and this was a point made by Wentworth	14	positions, if taken, would be valid as a matter of law.
15	to Mr Justice David Richards, that was adversarial	15	Then the Administrators invite proofs, et cetera, no
16	litigation, hostile litigation, of a perfectly normal	16	doubt claims, no doubt consistent with your Lordship's
17	course. There had been a compromise agreement and the	17	judgment, on which they can then proceed. But this has
18	creditors were disagreeing with what those with a	18	not, in the main, proceeded the other way around.
19	certain interest in the estate said the effect of that	19	Just on RASCALS, your Lordship is actually right.
20	agreement was. That wasn't a reason why the costs of	20	Just looking at it, if your Lordship has the judgment.
21	dealing with those issues should not be paid out of the	21	MR JUSTICE HILDYARD: In RASCALS?
22	estate. We say there's no real difference in principle	22	MR DICKER: In RASCALS.
23	between that and the issues arising in relation to	23	MR JUSTICE HILDYARD: Yes.
24	part C.	24	MR DICKER: Just looking at paragraph 4 of
25	MR JUSTICE HILDYARD: The reason I asked the question	25	Mr Justice Briggs' judgment, he says at the start of the
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1 second sentence: 2 "In favour of what I would call the commercial 3 litigation analysis of the ...(Reading to the words)... 4 each respondent replied that it did." 5 I have dealt with that point, essentially to say it is not quite how this application arose. This is not 6 7 a case in which the SCG has asserted each of the claims 8 in a question of the parties identifying arguments which 9 creditors could make. 10 But my Lord, it's the second point that's also 11 important: 12 "Secondly, the dispute lies entirely between LBIE 13 and a specific affiliate. In relation to each 14 ...(Reading to the words)... requiring representation." 15 So this was necessarily hostile litigation in the 16 sense that you had an outsider who was seeking to 17 extract securities which would otherwise be distributed 18 to the general body of creditors in the LBIE estate on 19 the one hand and the Administrators of LBIE on the other 20 seeking to retain those securities. So RASCALS did not 21 involve determination of an issue for convenience on the 22 basis of hearing argument from one creditor, which issue 23 might affect a whole series of creditors. 24 My Lord, we do say that's an important distinction. 25 I mention one way of looking at this is in the sense as Page 33 a test case on the basis that there are however many 1 2 creditors who may wish to advance similar claims. One 3 way of dealing with that would be to have litigation 4 against some or all of them. Another way, the way the

for a person to be appointed as a representative is that they do have the interest of the class, ie they would have to be a creditor, and as a creditor, would have to have an interest in the UK.

So the mere fact that the SCG have an interest in the outcome is neither here nor there. All that establishes is that they are an appropriate person to be joined as a representative. What matters is they are not just arguing, as it were, their own claim. They are seeking to assist the Administrators, obtain guidance to enable the Administrators to determine not merely their own claim, if made, but any other claims as well on a similar basis.

My Lord, we also say it would actually be, in our submission, extremely unfair if the SCG were not granted their costs out of the estate. That essentially is simply a consequence of the submissions I have so far made. If the purpose of this application was to obtain guidance for the benefit not merely of the SCG but for the benefit of all creditors, then if the SCG has to bear Wentworth's costs, which is what Wentworth seeks, and cannot recover its own costs out of the estate, then essentially this exercise, which has ostensibly been done for the benefit of creditors generally, has in fact been conducted at the SCG's expense. My Lord, we say

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5 Administrators chose, was to try and identify the arguments which could be made, determine them as 6 7 a matter of law and then deal with the proofs 8 accordingly. 9 Now, one point that is made by Wentworth is well, 10 the SCG are creditors and they are interested. 11 therefore, in the outcome of the proceedings. The short 12 answer to that is that does not prevent an order for 13 payment of the costs out of the estate from being 14 appropriate. If your Lordship wanted authority to that 15 effect, there is a paragraph in the Singapore Airlines 16 17 MR JUSTICE HILDYARD: Yes, you quote this in 17 of your 18 skeleton 19 MR DICKER: Yes. My Lord, actually, in our submission, the 20 point is actually nonsense. Of course the SCG are 21 creditors. Who else were you going to join as 22 a respondent to argue these points if it was not 23 a creditor? In fact, you can make the point more 24 strongly. If you were going to have formal 25 representation orders, one of the normal requirements Page 34

that outcome would be unfair.

I mentioned earlier that the various issues are not issues in relation to which solely the SCG are interested. For example, I am instructed even in relation to the German law issues, the SCG holds only about four out of 15 GMA claims. As your Lordship I think mentioned a moment ago, Wentworth is itself one of those creditors. Indeed, they appear to have ISDA claims which dwarf the total claims which the SCG have against LBIE.

The other point in this context is that your Lordship shouldn't view the SCG as an entirely homogeneous group. Necessarily, different members of the SCG have slightly different interests. The German law master agreement is one example of that. Regarding them as essentially collectively equally interested in all of the issues would also not be right.

My Lord, just to address two specific points made by Wentworth, the first, which I think I have already dealt with, is there are various references in the skeleton to the SCG seeking to establish a right against LBIE or asserting a claim that are hostile to the interests of the LBIE estate. I have essentially dealt with this. This is essentially how the application came into existence, A, B or, indeed, part C. The importance, as

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9 (Pages 33 to 36)

Lord, as I say, that would necessarily be the position 1 I said, of the application, including part C, was to 1 2 2 in relation to any respondent appointed to assist the give the Administrators a framework which they could 3 3 then apply when considering claims made by creditors. Administrators with a task they were keen to achieve. 4 My Lord, the second point is that Wentworth suggest 4 So in short, we submit the answer in this case 5 the SCG should have tried to reach an agreement to share 5 should be the same as it was for part A and B, and as 6 costs with other creditors in the same position. That 6 I say, hardly surprising given the application was 7 7 essentially divided up in the way it was for case is their skeleton at paragraph 12.3. 8 8 My Lord, an identical submission was in fact made by management reasons, not because anyone thought there was 9 9 Wentworth to Mr Justice David Richards. It is in their some fundamental difference in the nature of the various 10 skeleton argument in the bundle at tab 4A, paragraph 95. 10 parts of the application. 11 MR JUSTICE HILDYARD: But there is a substantial difference, 11 We make the same response in relation to it. 12 12 Essentially, the argument is absurd. No doubt a request isn't there? I fully understand that the actual 13 13 division between A, B and C was to some extent to Wentworth for a contribution to the SCG's costs for 14 14 dealing with these issues would have met with happenstance, but actually C simply dealt with the ISDA 15 15 a predictable response on their part. The short point masters and the GMA. It was split off because it wasn't anything to do with the statutory scheme, although it 16 is someone needed to be joined as a respondent to deal 16 17 17 with these issues. The Administrators identified the would, of course, affect the statutory distribution. 18 MR DICKER: Your Lordship is right. Two points: first of 18 SCG. They were happy to do so. They made it plain the 19 basis on which they understood that they were 19 all, in that respect, not so different, we say, from 20 20 part B. Your Lordship won't be aware, but at one stage participating. 21 My Lord, we do finally refer your Lordship to the 21 there was the possibility of oral evidence in part B as 22 22 four points which the Administrators make in their well, cross-examination of one of the Administrators. 23 23 skeleton argument. We are conscious that for obvious MR JUSTICE HILDYARD: Right. 24 reasons with the parties involved, the Administrators 24 MR DICKER: In the end, that didn't prove necessary, but 25 weren't ever going to feel able to go further than this, 25 there was the potential for contested evidence necessary Page 37 Page 39 1 to ascertain the background within which the issues in 1 but your Lordship should note, we say, the points made 2 in paragraph 10 of their skeleton. 2 relation to part B agreements could be decided. 3 3 My Lord, the other point is I again entirely accept This is how they characterised the proceedings. At 4 4 that a case in which one is construing the statutory 10.1 there are two applications made for the purposes of 5 obtaining directions on a range of issues that the 5 scheme, the terms of a trust and the terms of an order 6 is a paradigm case, but the relevant categories are not 6 Administrators required to have determined, so echoing 7 7 limited to those cases. Can I just remind your Lordship one of the points I made to your Lordship. Secondly: 8 8 "On such an application, it will often be the case just of one passage from Buxton, which your Lordship has 9 9 in the bundle at tab 1. that the appropriate costs order is that the costs of 10 all parties should be paid out of the estate." 10 MR JUSTICE HILDYARD: Yes. MR DICKER: My Lord, it's page 414. Mr Justice Kekewich is 11 Just dropping to the bottom of the page: 11 12 12 dealing with category 1 in the first full paragraph. He "There are, of course, cases where although not 13 formally appointed as representative respondents, the 13 14 14 "In a large proportion of the summonses adjourned parties to an application such as this operate as quasi 15 representative. Here the respondents were not appointed 15 into Court for argument the applicants are trustees of a 16 will or settlement who ask the Court to construe the 16 ...(Reading to the words)... in effect on behalf of 17 instrument of trust for their guidance, and in order to 17 those classes and the Administrators are content to act 18 18 ascertain the interests of the beneficiaries, or else on directions given by the court on this basis." 19 19 So again, echoing a point I made, the SCG did act as ask to have some question determined which has arisen in 20 quasi representatives on the part C application. 20 the administration of the trusts. In cases of this 21 21 character I regard the costs of all parties as Thirdly, they consider the roles undertaken by the 22 22 respondents have been of real assistance to the court. necessarily incurred for the benefit of the estate." 23 23 So it doesn't limit it. It has never been limited Fourthly, they note, as I did, that it's obviously 24 true that the respondents have each chosen to take part 24 to cases dealing solely with construction of the 25 25 relevant instrument. It also covers applications to because of their particular economic interests. My Page 38 Page 40

determine questions which have arisen in the administration of the trusts. We say, with some slight change in language, that exactly covers what is going on in relation to part C. MR LUSTICE HILDYARD This is what I am pazzling abead. Why is the? Snelly all Crelated to was a question of construction on certain commiss to which the Administrations were not really interested as Administrations and were unable accordance. We say, when the Story Responsive to the general relief where in the end the issue is decided against fature. It is part to the estate in that seems and no part of the construction of any of the underlying documents which regulated the conduct of the administration? MR DICKER. My Lord, three points, one, that may be right, the page of the state in that season and no part of the construction of any of the underlying documents which regulated the conduct of the administrations MR DICKER. My Lord, three points, one, that may be right, the page of the state in that season and repart of the eatte. Page 41 A possible for the state in that season are part of the disintensetal. In our respectful subministration of the eatte. A possible for the state of the administrations MR DICKER. But was a though of the drainties A possible possible for the state of the administration of the active Page 41 A possible for the state of the administration of the active Page 41 A possible for the state of the administration of the cature. A possible for the active of the cature of the administration of the active of the cature of the cature of the cature				
administration of the trusts. We say, with some slight in relation to part C. MR JUSTICE HILDYARD: This is what I am puzzling about. Why is that "Sarreyl all Credited to was a question of construction on certain contracts to which the Administrations were not raily interested as Administration were neutral accordingly. They set construction of any of the audrely interested as Administration were not raily interested as Administration were neutral accordingly. They set construction of any of the audrelying decuments which to expect the conduct of the administration? MR DICKER, My Load, three pinds complete in the stress and no part of the administration of the conduct of the administration of the state. Two, your Lordship says the Administration are asserted by, one counter party. MR DICKER, My Load, three pinds complete in the state. Two, your Lordship says the Administration are asserted by, and could only have been advanced by the clima asserted by, and could only have been advanced and asserted by, one counter party. MR DICKER, There is an undoubted public interest in the due administration of the sastes of an insolvents. MR DICKER, There is an undoubted public interest in the due administration of the saste of an insolvents. MR DICKER, So LAS-CALS, tab 6, puragraph 11. If is the last five or ask lines, whe	1	determine questions which have arisen in the	1	a statutory duty to distribute the assets in accordance
4 merely the SCG but offer creditors. They make 5 MR JUSTICE HII DYARD. This is what I am puzzling about. Why 6 is that? Surely all C related to was a question of 7 construction on cartain contracts to which the 8 Administrators were not credity interested as 9 Administration was do year day bad and a pladiatorsal 10 up the crevat. You like, and you had a gladiatorsal 11 contract. That was, I am sure, the origin of it and 12 I could see that that was the origin of it and 13 dispute related to a fight, dish't it, for claims 14 aboves to the estate in that sense and no part of the 15 construction of any of the underlying documents which 16 regulated the conduct of the administration? 18 MR DUSTICE MILDYARD. But one has to remember, doesn't one 19 that as I say, category one is not limited to cases 10 ursting in relation to the administration of the estate. 21 Two, your Lordship asys the Administration as 22 ursting in relation to the administration of the estate. 23 asserts an accordance with the statutory scheme. It 24 suppress that they can't do that without resolving these Page 41 1 questions. 4 mg IUSTICE HILDYARD. See. 5 MR DUSKER: Ry J rod, these batterity scheme. It 2 asserts an accordance with the statutory scheme. It 3 mg List (Fe HILDYARD P. Se. 6 MR DUSKER: It prangraph I I. I think it's quoted in my 2 learned friends skeleton. It's worth just picking it 3 up 3 made in the RASCAI S. case, if your I ordship wouldn't mind 4 going back to that at tab 6. 6 MR DUSKER: By Lord dives the statutory scheme. It 4 questions. 6 MR DUSKER: By Lord dives a table of the worth of the statutory scheme. It 5 due administration of the seate. 7 a great of the country and the statutory scheme. It 8 up 9 MR DUSKER: By Lord dives a statutory device of the statutory scheme. It 9 up. 10 country the proper of the statutory scheme. It 11 questions. 12 mg Lord dives the statutory scheme. It 12 seate as a statutory day to distribute the 12 section of the statutory scheme. It 13 mg Lord dives the statutory scheme. It 14 qu	2	administration of the trusts. We say, with some slight	2	with the scheme. They have decided they can't do that
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21 Two, your Lordship says the Administrators are 22 disinterested. In our respectful submission, they are 23 not. They have a statutory duty to distribute the 24 assets in accordance with the statutory scheme. It 25 happens that they can't do that without resolving these Page 41 Page 43 1 questions. Page 43 1 questions. My Lord, just picking up a point Mr Justice Briggs 3 made in the RASCALS case, if your Lordship wouldn't mind 4 going back to that at tab 6. MR DICKER: It's paragraph 11. Ithink it's quoted in my 4 learned friend's skeleton. It's worth just picking it 8 up. MR DICKER: It's paragraph 11. Ithink it's quoted in my 7 learned friend's skeleton. It's worth just picking it 8 up. MR DICKER: So RASCALS, tab 6, paragraph 11. It's the last 11 five or six lines, when Mr Justice Briggs says 12 "secondly". Does your Lordship have that? 13 MR JUSTICE HILDYARD: Yes. 14 MR DICKER: There is an undoubted public interest in the 15 dua administration of the assets of an insolvent's 16 estate(Reading to the words) code [which is the 17 point I have just made] and parties who are joined in 18 proceedings make necessary for that purpose we say that 19 is this case] should not be discouraged by an unthinking 20 recourse to the general rule where in the end the issue 21 is decided—" 22 MR JUSTICE HILDYARD: Costs follow the event. 23 MR JUSTICE HILDYARD: Costs follow the event. 24 MR JUSTICE HILDYARD: Costs follow the event, yes. 25 MR JUSTICE HILDYARD: Costs follow the event, yes. 26 MR JUSTICE HILDYARD: Costs follow the event, yes. 27 MR JUSTICE HILDYARD: Costs follow the event, yes. 28 MR JUSTICE HILDYARD: Costs follow the event, yes. 29 MR JUSTICE HILDYARD: Costs follow the event, yes. 30 MR JUSTICE HILDYARD: Administrators have	19	involving construction. It also covers any questions	19	which was decided was an issue advanced by the claim
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Page 42 Page 44	25	MR DICKER: So this was a case in which Administrators have	25	your strongest point may be that you were in part
1 age 72		Page 42		Page 44
	<u> </u>	1 agc 72		1 age TT

1	litigating this, arguing, on a matter which, in respect	1	MR JUSTICE HILDYARD: Yes, which is what Mr Justice David
2	of some of their interests, Wentworth were breast high	2	Richards provided.
3	with you and wanting you to win, if you like.	3	MR DICKER: That is what Mr Justice David Richards provided
4	MR DICKER: So far as their own interests as creditors are	4	and we would be entirely content with an order on
5	concerned, if one ignores, as it were, their collateral	5	similar terms.
6	interest as holders of subordinated debt	6	My Lord, unless I can help your Lordship at this
7	MR JUSTICE HILDYARD: Yes.	7	stage, those are my submissions in relation to costs.
8	MR DICKER: which obviously motivated their stance and	8	MR JUSTICE HILDYARD: No, I am grateful.
9	their willingness to oppose, absolutely. In that sense,	9	Yes.
10	looked at through the genuine interests of the general	10	Application for costs by MR FOXTON
11	body of creditors, the points we were arguing were as	11	MR FOXTON: Your Lordship will know that we have sought
12	much in their interests as us, even, one might say, more	12	throughout to avoid repetition
13	so given the amount they had at stake.	13	MR JUSTICE HILDYARD: Yes.
14	MR JUSTICE HILDYARD: Exactly, and it's that, really, which	14	MR FOXTON: of anything that Mr Dicker says, and I hope
15	distinguishes this most clearly from RASCALS.	15	I am not going to fall foul of that at this last stage.
16	MR DICKER: Well, my Lord, I entirely accept it's one	16	We adopt all of the submissions that he has made.
17	important distinction.	17	It is, we say, a striking feature here that the
18	MR JUSTICE HILDYARD: Yes.	18	resolution of the issues before the court impact and,
19	MR DICKER: But another perhaps secondary point is simply	19	had they gone the other way, would have benefited a far
20	and obviously it's not just Wentworth who are in that	20	larger group than those on whom Mr Zacaroli is seeking
21	position.	21	to visit the bill, not least, in certain capacities, his
22	MR JUSTICE HILDYARD: No, I understand that, but Wentworth	22	own clients.
23	are the most arresting example of the point.	23	Now, I suppose it would have been possible to sit on
24	MR DICKER: Your Lordship's absolutely right about that.	24	the sidelines and write to the joint Administrators when
25	MR JUSTICE HILDYARD: That, as it seems to me, is what has	25	they were assembling their list of relevant points not
	D 45		D 47
	Page 45		Page 47
		1	
1	caused me the difficulty. It is necessarily this matter	1	vet being argued and said. "Why don't you argue these
1 2	caused me the difficulty. It is necessarily this matter had to be issue based because people had differing	1 2	yet being argued and said, "Why don't you argue these points?" But that would have been, we submit.
	had to be issue based because people had differing	2	points?" But that would have been, we submit,
2	had to be issue based because people had differing interests on the very same issue and rather than them	2 3	points?" But that would have been, we submit, unsatisfactory. If one looks at the joint
2 3	had to be issue based because people had differing interests on the very same issue and rather than them weighing up whether it was slightly better than for them	2 3 4	points?" But that would have been, we submit, unsatisfactory. If one looks at the joint Administrators' position now, although one of
2 3 4	had to be issue based because people had differing interests on the very same issue and rather than them weighing up whether it was slightly better than for them to be on one side than the other, the Administrators	2 3 4 5	points?" But that would have been, we submit, unsatisfactory. If one looks at the joint Administrators' position now, although one of neutrality, I think it's not unfair to describe it as
2 3 4 5	had to be issue based because people had differing interests on the very same issue and rather than them weighing up whether it was slightly better than for them to be on one side than the other, the Administrators arranged matters so that the issue could be fought out	2 3 4 5 6	points?" But that would have been, we submit, unsatisfactory. If one looks at the joint Administrators' position now, although one of neutrality, I think it's not unfair to describe it as one of benevolent neutrality so far as the claims on
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1			
-	Wentworth's capacity as the holder of subordinated debt.	1	SCG's submissions were concerned, they should be
2	My Lord, if it matters, what was argued at that	2	entitled to such costs as they would have incurred had
3	hearing, the joint Administrators' position was to	3	they used one firm of solicitors, thereby eliminating
4	support GSI becoming involved, but because, and I quote,	4	any duplication that may otherwise have taken place.
5	this was not "standard adversarial commercial litigation	5	MR JUSTICE HILDYARD: Thank you very much. While I have you
6	but proceedings as to how to distribute assets being	6	on your feet, both of you can address this, and you may
7	administered by the court or by the court's officers",	7	not feel able or it right to reply categorically, but in
8	terms were placed on GSI's participation that were	8	trust litigation at any rate, the rule on appeal might
9	adhered to in terms of not running any additional points	9	be completely different.
10	that were already being run by the SCG.	10	MR DICKER: My Lord, and for our part, we would accept there
11	My Lord, the final matter I would mention is this:	11	may well be differences.
12	your Lordship knows we only participated on issues 11 to	12	MR JUSTICE HILDYARD: You are then ostensibly striving for
13	14 and not on, for example, the assignment issues or the	13	victory rather than clarification?
14	German master agreement. If one gets into the fate of	14	MR DICKER: Yes, and the point was made by Wentworth, again
15	subissues, there were aspects of the issues in which we	15	I think before Mr Justice David Richards, one of the
16	did participate that Wentworth did not succeed upon. It	16	points relied on at that stage was "Look, you can tell
17	did not succeed upon its lowest achievable rate	17	it's hostile litigation because the SCG seek to appeal
18	submission under issue 11. Certain of the issues under	18	some of the issues," and as I recall the response was
19	issue 12 were common ground. GSI's case on issue 13 was	19	the same. The Administrators have obtained the guidance
20	accepted at paragraph 189 of the judgment as to the date	20	that they want. To that extent, that point can no
21	at which you reached the relevant determination and part	21	longer be made, we accept, in the event of an appeal.
22	of GSI's case on issue 14 was accepted at paragraph 106.	22	MR JUSTICE HILDYARD: Yes.
23	So our primary position is, of course, that put	23	MR FOXTON: My Lord, we would share that analysis, the
24	forward by Mr Dicker for SCG. These were issues which	24	answer has been given. If you're not happy with the
25	interested a much larger group and it was for the	25	answer, I can see that different considerations might
23	interested a filder larger group and it was for the	-	
	Page 49		Page 51
1	benefit of all that particular creditors with relevant	1	arise.
2	perspectives argued them, but if one needs to go beyond	2	MR JUSTICE HILDYARD: And it's no answer to as it were say,
3	that, one has to look at the particular issues we have	3	"Right then, well let's put all the costs in the
4	participated in and success or failure in the subissues	4	appeal"?
5	that were raised under those issues.		ACD POLYTONIA CALL AND A CARLO MAIN
6		5	MR FOXTON: My Lord, one has the fact that not all the
	My Lord, unless I can assist further.	6	issues raised before your Lordship will be raised on
7	MR JUSTICE HILDYARD: No, thank you very much. Do you	6 7	issues raised before your Lordship will be raised on appeal in any event.
7 8	MR JUSTICE HILDYARD: No, thank you very much. Do you contest the application of the one solicitor rule which	6 7 8	issues raised before your Lordship will be raised on appeal in any event. MR JUSTICE HILDYARD: No, but some percentage. Do you see
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1	issues.	1	raise questions of fact or not, but we would have had
2	MR JUSTICE HILDYARD: So although we have taken them in that	2	a very different argument about issue 10 if it had been
3	order, actually the proper order is to determine the	3	stuck with parts A and B, because it is fundamentally
4	costs and then to determine whether there should be	4	different to everything else in part A and B.
5	an appeal from an entire result?	5	To come to that point, part A was fundamentally
6	MR FOXTON: I think in terms of the logical order, that may	6	a question of construction of the statutory scheme.
7	well be right.	7	There were lots of add on issues that one might say
8	MR JUSTICE HILDYARD: Yes. Okay. How are the transcribers?	8	might have stretched that point this way or the other,
9	Do you want a rest?	9	but the fundamental aspect of part A was the
10	THE SHORTHAND WRITER: Yes, please.	10	construction of the statutory scheme.
11	MR JUSTICE HILDYARD: Five minutes.	11	The fundamental point about part B was that it was
12	(3.26 pm)	12	an application by the Administrators for directions in
13	(A short break)	13	relation to their own conduct in the administration.
14	(3.32 pm)	14	That is, agreements they had entered into as
15	Submissions by MR ZACAROLI	15	Administrators with various parties. True, it raised
16	MR ZACAROLI: My Lord, may I begin by making a preliminary	16	questions of construction. It also raised questions of
17	point that insofar as my learned friends paint this as	17	propriety in terms of ex parte James, whether they
18	an extension of Waterfall IIA and IIB and the same order	18	should be enforced, but that fundamentally involves the
19	that should apply in relation to costs because it is in	19	conduct of the administration by the Administrators.
20	essence part of the same overall application, then they	20	The other point to make about part B is our case on
21	are wrong to do for a number of reasons.	21	costs on parts A and B together was there should be no
22	Mr Justice David Richards made it absolutely clear that	22	order for costs because we won in effect part A, lost
23	he was saying nothing about the costs consequences of	23	part B. We were not interested in actually arguing
24	part C when giving judgment on parts A and B.	24	particularly what part B was about, it was part A that
25	Secondly, each application for costs has to be	25	mattered mostly, because that was where we had won. So
	Page 53		Page 55
1	looked at on its merits, and we don't say for example	1	whatever the order on part B, we would have ended up
2	that my Lord should make the same order here was as made	2	picking up the tab, whether we paid costs on it, and
3	in Rascals because it was made in Rascals. One gets	3	therefore no order as to costs overall, or whether costs
4	very little assistance by applying general principles to	4	came out of the estate. Because of the view we take
5	the facts of other cases.	5	about our economic interest, either way, it was coming
6	Finally, the fact that part C is	6	out of our pocket.
7	MR JUSTICE HILDYARD: So I'm on my own?	7	So far as the law is concerned, we set out the
8	MR ZACAROLI: Yes.	8	general principles which were reviewed and restated by
9	MR JUSTICE HILDYARD: But presumably informed by the other	9	Mr Justice Briggs in the Rascals case. I can see my
10	cases?	10	Lord's read that in some detail, I won't take you over
11	MR ZACAROLI: Informed by the guidance from the cases,	11	that again, the relevant parts are in our skeleton as
12	exactly, yes. But we don't say, as I say, that because	12	well.
13	Mr Justice Briggs found in the way did he in Rascals, it	13	One other authority just worth looking at is the
14	must follow.	14	Westdock(?) case in the Court of Appeal. The reason
15	MR JUSTICE HILDYARD: No.	15	I take to you this, my Lord, is for a passage which
16	MR ZACAROLI: Therefore it is not, we say, particularly	16	explains why it is sometimes appropriate to make a costs
17	fruitful to ask what the differences on the facts are	17	order out of the fund in favour of someone who is
18	between us and Rascals, although I will come to that in	18	a representative of others, for that reason alone.
19	a moment if I may, there are answers to that. The fact	19	Westdock actually appears twice, it's the same judgment,
20	that part C is part of a longer list of questions and	20	but in two different reports. I am looking at it in 2.1
21	that it's true that we did argue at one stage that issue	21	of the bundle, which is the BCC report.
22	10 could be decided in some other order with part A,	22	MR JUSTICE HILDYARD: Yes.
23	that's completely irrelevant. Obviously we were not	23	MR ZACAROLI: The passage is on page 197. On the right hand
24	thinking at the time about the costs consequences of any	24	column, just after halfway down, there is a sentence
25	of this, it was simply a question of which issues might	25	that begins "However", does my Lord have that? Just
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below halfway, "However, there are many cases" in the 1 The second point we make is that these are claims 2 2 middle of the line. 197, right hand column. hostile to the interests of the estate, the LBIE estate. 3 MR JUSTICE HILDYARD: Yes. 3 The essence of it is that the SCG and GSI wish to assert 4 MR ZACAROLI: Just below --4 contractual claims to particularly high rates of 5 MR JUSTICE HILDYARD: Yes, I have it. "In my judgment, the 5 interest. My Lord's timing point is exactly right, with 6 proper approach"? 6 respect, the fact that there have been no proofs yet, or 7 MR ZACAROLI: The next "however", sorry. Ten lines below. 7 whatever it is you put in to claim statutory interest, 8 MR JUSTICE HILDYARD: "However, there are many cases"? 8 is irrelevant, we know that they are asserting the right 9 9 MR ZACAROLI: Yes. Could my Lord just read from that to the to make claims for high rates of interest. 10 end of the second paragraph over the page, that's the 10 If you turn that around, why was it necessary for this application to be made at all? The only answer is 11 middle of the left hand column on the next page. 11 12 MR JUSTICE HILDYARD: Yes. (Pause) 12 because claims to high rates of interest were asserted 13 13 Yes by creditors, primarily the SCG. We have identified two 14 MR ZACAROLI: The point being sometimes in a formal 14 paragraphs in Mr Lomas's ninth witness statement that 15 15 representative case you need to pay -- allow that party make good that point. Has my Lord had a chance to look 16 funds out of the estate because no-one else has the 16 at it or should I take you to it? 17 17 funds to argue it. Clearly not the case here, we're MR JUSTICE HILDYARD: Could you take me to it, I am so 18 18 arguing with very substantial parties arguing in their sorry 19 own interests who could clearly afford to pay the costs. 19 MR ZACAROLI: Bundle 2, tab 1A. At paragraph 44 on page 14 20 My Lord, the overall question then is one of 20 of the bundle, there is a heading, "Interest under 21 substance. As a matter of substance, is the dispute 21 master agreements". This was a witness statement 22 22 that my Lord was dealing with commercial hostile relating to the whole of the Waterfall II application, 23 23 litigation, or is it in substance an application for so there are various other aspects dealt with. At 24 24 directions essential to the operation of the statutory paragraph 44 he begins to deal with interest under 25 scheme for the benefit of all the creditors of the 25 master agreements, identifies what the issues are, and Page 57 Page 59 administration? We say it's the former. 1 1 then at paragraph 47 on page 16, if my Lord could read 2 In our skeleton, we had identified seven points. If 2 paragraph 47 and then paragraph 51. (Pause) 3 3 MR JUSTICE HILDYARD: Yes. 47 and 51? I can just develop some of those in the order they there 4 appear. The first point is that these are claims --4 MR ZACAROLI: Yes, indeed. The reason we are here is 5 this is paragraph 10 of our skeleton -- the first point 5 because some creditors, primarily the SCG, who focussed 6 is these are claims made under pre-administration 6 on this in particular, wanted to assert these sorts of 7 contracts that have nothing to do with any part of the 7 claims. 8 statutory scheme for insolvency. Exactly the same 8 I put that deliberately as the issue arises between q 9 claims could have been brought before LBIE's insolvency the creditors asserting these claims, the SCG and GSI, as had been brought after. 10 10 and the LBIE estate. Those are actually the two sides 11 Looking at both of the rationales referred to in the 11 of this coin. The reason Wentworth is here is because 12 12 Rascals case, there is no question of these proceedings Wentworth has recognised the economic reality that, as 13 arising because of any fault on the part of LBIE, which 13 holder of a subdebt and owner of the shares in LBIE, 14 is one of the rationales for costs out of the fund, and 14 it's in our interests to ensure that high claims are 15 there is no question of construction of the statutory 15 rejected where it's proper to do so, because the surplus 16 scheme or the proper operation of the statutory scheme. 16 after payment of such claims vests in us. We don't know 17 Nor can it be said that it is in the interests of 17 the precise numbers yet, it's true, but we have regarded 18 creditors as a whole that the issues be determined, save 18 our economic interests as being aligned with those of 19 in the sense that there is hostile piece of litigation 19 the shareholders, because we believe the surplus will 20 between some creditors asserting a high rate of interest 20 come to us. Turn that around, every pound that is paid 21 and everybody else with an interest in the estate who 21 out to a creditor and interest over 8 per cent we regard 22 would rather minimise those claims, that's always the 22 as potentially coming out of our pocket. That's the 23 23 case when someone asserts a high claim against economic reality as to why Wentworth is here. 24 an estate. But that's the only sense in which everyone 24 But to answer my Lord's concern that Rascals is 25 25 benefits from the answer to be these questions. different because there you didn't have this Page 58 Page 60

cross-holding issue, that's with respect just to misconstrue who this debate is actually between, it is between creditors seeking to assert claims on the one hand and the LBIE estate on the other. Wentworth is one entity, it's a joint venture, but it's one entity for these purpose. The fact that it also has ISDA claims itself, and therefore if the SCG were to succeed, it may be possible, we don't know, it may be possible for Wentworth, some of those claims to be able to assert interest based on the costs of equity or whatever else the test turns out to be which are above 8 per cent, we don't know because that process hasn't been gone through, but that's irrelevant, with respect, because the dispute is between them and the estate, we represent the estate for this purpose in these proceedings, because we have the economic interest to do so. My Lord, that links to the next point, third in our list in the skeleton. It's irrelevant that the SCG

My Lord, that links to the next point, third in our list in the skeleton. It's irrelevant that the SCG holds very substantial claims and irrelevant also that others hold ISDA agreements who might be able to take advantage of a ruling in the SCG's favour. This is where it's important to keep in mind two separate points. The first is, as my learned friend put it, it's unfair that the SCG should bear the costs in this case because there will be other creditors in the same

proceedings, if the SCG lost that that case there is no possible basis upon which it could say, "No, I don't want to pay the costs of having lost." It makes no difference, we say, merely because either its claim is very large or there are a number of creditors in the same position as the SCG who could have made the same point.

One point the SCG make is that the questions the court were being asked were in the way of general guidance, not fact specific. We say that's true, but so what? In essence these were preliminary issues, and that's the way it was put at one of the earlier directions hearings. These were preliminary issues that would arise or may arise in a number of different factual scenarios, but the mere fact something is being argued as a preliminary issue doesn't take away from it its fundamental nature as a piece of hostile litigation.

The fourth and fifth points in our skeleton I will take together. The fourth point is that it is irrelevant the surplus can't be distributed without the issues being resolved, and the fifth one is the Administrators' repeated mantra that they needed the answers to these questions. In each case the fundamental question is why, and the answer to that question is it's not because the answers affected all

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position as it who would have also succeeded, or benefitted, from its success.

The two different things to keep in mind are first of all costs out of the fund, because in relation to that justify it. The second is a particular party who runs a case asserts a claim which, if it were successful, would happen to benefit others with similar claims. That doesn't justify costs out of the fund. It might do in an extreme case where otherwise the point couldn't be argued by anyone, because no-one had the funds to do so, the Westdock point, but that isn't our case. In circumstances where the party running the point can run it because it has the funds to do so, if it thought that it was unfair that it alone was bearing the costs burden, it is always open to it to go to others who have similar claims to say, "Let's share the costs here". The fact that Wentworth wouldn't play ball is irrelevant, because as I explained Wentworth views its economic position as being completely different.

My Lord, testing the point about there being multiple claims in this way: if the SCG was alone in saying, "We want to assert a rate of interest at 15 per cent based upon a particular construction of the ISDA master agreement" and the Administrators had said, "No, we disagree," there's an issue, there are court

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the creditors and the Administrators needed to know the answer to enable them to distribute the estate in accordance with the statutory scheme, the answer is that the claims were so large that until they were answered, the Administrators couldn't safely distribute what was there. That is never a reason to change the general rule for costs which would otherwise apply. The mere fact someone or a group of people assert a claim so enormous that it holds up distribution is absolutely no reason to depart from the usual costs order.

I will pass over our sixth point, it doesn't seem to be being pursued.

The seventh point we make is that there is no doubt that the SCG and GSI are acting in their own commercial interests. Of course we don't say that that is a reason where, if it was otherwise proper to order costs out of the estate because of the nature of the proceedings, that you should then not do so merely because the representative party had the same interests as everyone in the class, that could never be right, because you have to have the same interests as the class to be a representative. That's not our point. Our point is in asking the question of what is the essential nature of these proceedings, it is of great help to the court to appreciate that these are claims being asserted by

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people, entities, in whose commercial interests it is it to maximise those claims.

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Linked to that, the SCG say that someone else would have had to have been here to argue these points if they weren't. We say with respect to that it's simply not so. This isn't an application like Waterfall IIA, where the Administrators, there being an issue over how the statutory scheme works, need an answer before they can do anything. This is very different. It as not for the Administrators to go out and look for or invite or argue about whether claims could be made when no claims are being asserted, it's for people who want to claim a high rate of interest to make that assertion. If they don't, the Administrators, as my Lord put in argument, can perfectly well say, "We'll pay you 8 per cent because that's what you're entitled to, if you want more it's for you to do the running." So had the SCG not been here, then it would have been up to somebody else, if they wanted to do so, to come to court and argue the point, knowing that in so doing they faced a costs risk. If it wasn't the SCG, it was somebody else who would face that costs risk. Everyone who wants to run a case like that needs to consider whether it is worth the costs risk of doing so.

excuse for departing from the usual costs order. 1

2 MR JUSTICE HILDYARD: In the case of the various examples 3

which were posited on behalf of the Administrators,

4 there was, as it were, a diversion into a number of

5 possibilities which might or might not affect the SCG,

6 but which was fought at and discussed, really, for a 7

more amorphous benefit, would you accept that?

MR ZACAROLI: For what, I'm sorry?

9 MR JUSTICE HILDYARD: For a more amorphous benefit, that is

to say for the benefit of the Administrators in dealing

not so much with SCG but some others who might come out 11

12 of the woodwork?

13 MR ZACAROLI: It is true that the Administrators raise at

14 the margins -- and this is getting into the margins

here, and that may justify if anything a small

16 departure -- but at the margins it's true the

Administrators sought to clarify various points that

18 arose out of the way the claims were asserted, but in

19 essence those arose out of the fact these claims were

20 being asserted.

21 MR JUSTICE HILDYARD: It did, but in commercial litigation,

as it were, that simply wouldn't have happened, would

23 it? Each side would have put its case. For someone to

turn up and say, "Look, not in your case, but in some

other case I have in mind, can you just tell me what you

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would argue?" That's a rather sort of different kettle

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Now so far as GSI is concerned, everything we have

said applies with equal force to them, but we say there is greater force in relation to GSI again, because it's clear from the evidence that they adduced at the point of joinder that their interest in these proceedings is not limited to the fact that they have one ISDA master agreement with LBIE of a substantial amount, I think it's 100 million or so, but they also have many master agreements in the market with counterparties, and they relied on that fact to demonstrate they had a wider interest in these proceedings than just their claim in the estate. In other words, part of their purpose in being here is so that for their general benefit in the market they can get an answer which will be helpful to them. As we say in the skeleton, it would be absurd if the costs of failing to establish that right were then levied on the creditors of LBIE.

The SCG say that they have cooperated throughout by advocating a range of positions that were arguable, that they cooperated in narrowing the issues. Again, my Lord, the answer to this is so what? All the arguments that they ran were designed to increase their prospects of getting a high rate of interest. The fact that they cooperated, as we did, in narrowing issues is no different than you would expect in grown up commercial litigation with sensible parties. It doesn't offer any

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2 of fish.

3 MR ZACAROLI: Yes, it's not entirely clear that that was --

4 well, there's certainly no evidence that I can recall

5 that that was being put on the basis that there are

6 other creditors who have in fact raised this or that

7 point. They were points that arose, perhaps my Lord is

right, amorphously, in a sense that these are points

9 that are still uncertain, given the way that you have

asserted your claim.

11 MR JUSTICE HILDYARD: I took them to be raised for two

reasons. One was as a stress test against the result,

13 but the other was after some concerted thought they were

14 what emerged as to the issues which might arise, as

15 I put it, amorphously, that is to say not by reference

16 to the particular position of SCG but by reference to

the potential position of others who are generally

18 interested in the result.

MR ZACAROLI: Well, given that they were amorphous, we don't

20 know that they wouldn't have arisen in a claim asserted

21 by the SCG or one of their constituent members in due

22 course. So one can't draw a clear distinction between

23 those issues which were amorphous in the sense that they

24 may arise when one gets to the fact specific examples

25 raised by the SCG, and those which might be raised by

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15 might shed some light on the true characteristic or 16 nature of the process, do you see what I mean? 17 MR ZACAROIL: I see what my I ord says, but in my submission 18 that would be for the tail to wag the dog here, because 19 the fundamental issue here was the creditors asserting 20 high rates of interest, and one doesn't lose sight of 21 that merely because in the course of that, around the 22 edges of the construction argument, some other questions 23 get raised which either, as my Lord says, need to be 24 tested, or in themselves need to be determined in order 25 to have a clear picture of how you will deal with the 26 Page 69 27 Televant in determining what that substance is. I'm not 28 surgesting there was improper duplication between GSI 29 and others, maybe, but nevertheless by them. 20 Amy Lord, the last three points to make, I am not 21 and others, maybe, but nevertheless by them. 22 and claims of when they are later asserted by SCG and GSI, 23 may Lord, the last three points to make, I am not 24 suggesting there was improper duplication between GSI 25 and SCG, so that needr't concern my Lord. 26 To deal with GSIs point that there were some points 27 that it won on, but in terms of costs and time and effort 28 it won on, but in terms of costs and time and effort 29 spent on them, they are de minims. I'my I ared thinks 10 that we should cut off a small proportion of our costs, 11 so be it, but it is really at the edges then when one is 12 comparing the time, cost and effort that went into the 13 main dispate. 14 Finally, if my Lord is against us, just for the sake 15 of form, if the order is that costs are payable out of 16 the estate, Wentworth would seek the same order as 17 everyone else on that, but obviously we would rather 18 that that wasn't the case. 19 My Lord, unless I can assist further, those are my 29 submissions. 21 MR JUSTICE HILDYARD: And likevise the issue on appeal, you 22 say well at that point a fortion it's then a stand up 23 battle and the winer is likely to - 24 MR ZACAROIL: Y	13	fact that they're asked, and everyone engages in the	13	administration or the Administrators' own conduct, or
16 mature of the process, do you see what I mean? 17 MR ZACAROLI: I see what my Lord says, but in my submission 18 that would be for the tail to wag the dog bere, because 19 the fundamental issue here was the creditors asserting 19 the fundamental issue here was the creditors asserting 20 high rates of interest, and one doesn't loss sight of 21 that merely because in the course of that, around the 22 edges of the construction argument, some other questions 23 get raised which either, as my Lord says, need to be 24 tested, or in themselves need to be determined in order 25 to have a clear picture of how you will deal with the 26 and others, maybe, but nevertheless by them. 27 and others, maybe, but nevertheless by them. 28 My Lord, the last three points to make, I am not 29 suggesting there was improper duplication between GSI 29 and SCG, so that needn't concern my Lord. 20 To deal with GSFs point that there were some points that 21 it won on, it's true, there were some points that 22 it to have a clear picture of how you will deal with the 23 and sCG, so that needn't concern my Lord. 24 to steed, or it themselves need to be determined in order 25 and others, maybe, but nevertheless by them. 26 and others, maybe, but nevertheless by them. 27 and others, maybe, but nevertheless by them. 28 and sCG, so that needn't concern my Lord. 39 true there is a case which goes so far as to allow costs out of the fund in circumstances like this, where what in essence is happening is an assertion of a claim against the estate by a creditor arising out of a gaainst the estate by a creditor arising out of a pre-administration contract, but I wouldn't go so far as to say it could never be appropriate. 39 My Lord, the order is that costs are payable out of the fund in circumstances like this, where what in essence is happening is an assertion of a claim against the estate by a creditor arising out of a pre-administration contract, but I wouldn't go so far as to say it could never be appropriate. 30 My Lord, unless I can assist fur	14	business of thinking them up and then answering them	14	relates to the statutory scheme and its application, and
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Page 70 Page 72	25	analysis of that, which is on appeal it's a different	25	-
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100 110		Page /U		Page /2

1	litigation.	1	MR ZACAROLI: Yes, it's a preliminary issue in each of those
2	MR JUSTICE HILDYARD: And to the cooling point, what I mean	2	cases.
3	is I think it was Lord Justice Henderson, was it, as he	3	MR JUSTICE HILDYARD: Yes.
4	now is, was concerned that one of the factors to take	4	Mr Dicker.
5	into account is less by adopting excessively rigid,	5	Further submissions by MR DICKER
6	follow the event rules, you might discourage people from	6	MR DICKER: My Lord, five points by way of reply. The first
7	assisting in the disposition of matters which are very	7	point is this: my learned friend said this application
8	difficult when they can afford to do so? Was it	8	was not in the interests of the creditors as a whole.
9	Zitek(?)?	9	I have already made the point that your Lordship can
10	MR ZACAROLI: It is Mr Justice Henderson, I recall his point	10	regard the SCG as if it was one out of however many
11	being you should be wary of allowing costs	11	creditors with a similar interest, but there is a wider
12	MR JUSTICE HILDYARD: Of departing from	12	point here. The Administrators issued the application
13	MR ZACAROLI: Yes, for that reason. That's a very good	13	no doubt because they thought this was the efficient way
14	point no doubt. I can't suggest that in this case	14	of enabling them to conduct their statutory duties and
15	people have been incentivised to make arguments they	15	distribute the surplus. An alternative route may have
16	otherwise wouldn't have made had they known they were	16	been to have a litigation essentially with each creditor
17	paying the costs at the outset, they always knew they	17	in respect of their respective proofs based on whatever
18	were on risk of costs anyway because the point hadn't	18	claims they wished to advance. What we understand to be
19	been determined beforehand. So I can't say that is	19	the position is the Administrators did not think that
20	particularly pertinent point on the facts of this case,	20	was likely to provide a quick, efficient or cost
21	but it is a good point more generally, which is why the	21	efficient way of dealing with things. They considered
22	court should be careful about departing from the general	22	the best approach was to identify and to resolve the
23	rule, as Mr Justice Briggs himself said in Rascals.	23	legal framework which they could then apply to the
24	MR JUSTICE HILDYARD: Rascals is much a plainer case, isn't	24	various claims made by creditors. So in that sense,
25	it? This is quite a long way from Rascals.	25	this application was entirely in the interests of
	Page 73		Page 75
1	MR ZACAROLI: The way that this is different, I've dealt	1	growing indeed in the interests of all the
2	with the cross-holding issue which as I say shouldn't	2	everyone, indeed in the interests of all the stakeholders, including subordinated creditors like
3	really concern my Lord. The other way it is different	3	Wentworth and shareholders, to the extent that it
4	is because Rascals was a proprietary claim asserted	4	provided a quicker means, and hopefully a cheaper means,
5	against the estate.	5	ultimately, of resolving the issues.
6	MR JUSTICE HILDYARD: They wished to hoick something out of	6	MR JUSTICE HILDYARD: Cheaper overall, you mean? From the
7	the estate.	7	point of view of all the interested creditors?
8	MR ZACAROLI: Yes. In one sense this is a clearer case for	8	MR DICKER: Yes. I mean plainly this has not been a cheap
9	hostile litigation, because it's parties seeking to	9	process, but one could imagine what sort of process
10	assert claims against the estate based on their	10	might have been involved if issues affecting creditors
11	contracts, and that's what happens at the proof stage	11	had essentially had to be resolved on a purely bilateral
12	all the time, the parties assert in terms of provable	12	basis dealing with issues as and when they happened to
13	debt, they assert a claim, they assert it at a high	13	be raised by particular creditors. For whatever reason,
14	rate, it will be rejected, there will be an appeal, the	14	the Administrators plainly did not think that was the
15	party that loses that appeal would then pay the costs.	15	appropriate course and they no doubt thought this was
16	It would be impossible to suggest the estate should	16	a better, more efficient way of dealing with things, and
17	somehow bear the costs of successfully fighting off	17	in that sense, in the interests of all the stakeholders,
18	inflated claims. If that's so at the proof stage,	18	certainly not just the SCG or indeed those who have
19	there's absolutely no difference in principle between	19	similar positions.
20	the proof stage and the claims for asserting interest.	20	MR JUSTICE HILDYARD: What makes this in a way a strange
21	MR JUSTICE HILDYARD: And you say the same applies if the	21	case compared to some others is that SCG have not taken
22	Administrators have adopted the sensible precaution of	22	on a battle which they were not vitally interested in,
23	not allowing it to go to the proof stage in a variety of	23	they have not incurred costs which they can't afford,
24	occasions, but have identified an issue which should	24	nor have those costs exceeded what they might ordinarily
		1	
25	deal with all proofs of that kind?	25	have expected to pay in fighting their own battle.
25	•	25	
25	deal with all proofs of that kind? Page 74	25	have expected to pay in fighting their own battle. Page 76

1	MR DICKER: My Lord, to some extent yes, but just going	1	questions were originally identified, essentially as
2	through a couple of those points, my learned friend	2	a cooperative process to try and identify what was
3	relied on Westdock. Can I just take your Lordship to	3	reasonably arguable, but as your Lordship knows, various
4	it, because this is relevant to the point of the SCG as	4	additional points were identified by the Administrators
5	one out of a number. It's at tab 2 of the bundle. Can	5	in their position papers. Nine were identified shortly
6	I just start by showing your Lordship paragraph 4 of the	6	before the part C hearing started. Those issues
7	headnote, what was held. Paragraph 4 says:	7	identified by the Administrators we argued because we
8	"This was hostile litigation between two ascertained	8	thought it sensible to do so, as respondents joined in
9	(Reading to the words) classes of claimants, nor	9	a quasi representative capacity, to ensure the
10	any need for representation orders. Liquidators were	10	Administrators would get the guidance they needed.
11	defending the interests of creditors."	11	MR JUSTICE HILDYARD: Can I get into that, Mr Dicker, with
12	Picking that point up, if your Lordship then goes on	12	any precision? You may be right and it may be my
13	to pages 197 and 198. 198, column 1, if my Lord reads	13	unworthy thought, perhaps that was the time to determine
14	the paragraph after the paragraph my learned friend	14	as between you, before the result was known, that the
15	asked your Lordship to stop at. It's the one in the	15	costs of all of you should have come out of the fund.
16	middle column starting:	16	I don't know. But can I with any precision measure what
17	"If that is the right approach, apart from one very	17	you might have said on your own but would not have said
18	special factor in this case which(Reading to the	18	if only on your own? It seems a difficult thing.
19	words) in this case. The reason is I accept	19	MR DICKER: What your Lordship can take into account is, the
20	Mr Moss's submission that this is in effect hostile	20	essential question is, is this hostile litigation or
21	litigation between two ascertained claimants(Reading	21	not? There are two ways in which can you can
22	to the words) nor any need for any representation	22	conceivably look at it. There is the way my learned
23	order. It is in a sense a mere accident that the point	23	friend seeks to characterise it as essentially the SCG
24	arises for decision under(Reading to the words)	24	asserting claims against the Administrators, which the
25	or in inter-pleader proceedings."	25	Administrators then are effectively forced to have
			·
	Page 77		Page 79
1	Not the case here. There was repeated reference to	1	determined. We say that just doesn't reflect the
1 2	Not the case here. There was repeated reference to the respondent being guasi representatives for a reason	1 2	determined. We say that just doesn't reflect the process, and one indication of that is the way the
2	the respondent being quasi representatives for a reason.	2	process, and one indication of that is the way the
2 3	the respondent being quasi representatives for a reason. That was in essence the role that the SCG were	2 3	process, and one indication of that is the way the Administrators identified issues which they then
2 3 4	the respondent being quasi representatives for a reason.	2	process, and one indication of that is the way the Administrators identified issues which they then expected us as respondents to argue.
2 3 4 5	the respondent being quasi representatives for a reason. That was in essence the role that the SCG were fulfilling in part C just as much as in part A and part	2 3 4	process, and one indication of that is the way the Administrators identified issues which they then expected us as respondents to argue. MR JUSTICE HILDYARD: In ballpark terms, how much is
2 3 4 5 6	the respondent being quasi representatives for a reason. That was in essence the role that the SCG were fulfilling in part C just as much as in part A and part B. MR JUSTICE HILDYARD: I confess I have not read, other than	2 3 4 5	process, and one indication of that is the way the Administrators identified issues which they then expected us as respondents to argue. MR JUSTICE HILDYARD: In ballpark terms, how much is a successful appeal worth to you?
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1 MR DICKER: My Lord, I think what I can say is it may well 2 differ actually between the various members of the SCG 3 depending on what issue one is talking about. For 4 example, your Lordship will have noted that permission 5 is sought in relation to an appeal in respect of the German master agreement by only two out of three of the 6 7 funds instructing me. The third one as I understand it 8 has either no or no material exposure in relation to the 9 German master agreement. Nevertheless, for the purposes 10 of the part C application, it had been joined as 11 a respondent and was happy collectively with the SCG to 12 argue that point, and no doubt similar distinctions can 13 be made in relation to other issues. 14 My Lord, it does lead on to my fourth point, which 15

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is this: my learned friend said if the SCG hadn't been here, someone else would have had to have been here and whoever had been here no doubt would have been sufficiently funded, and if they weren't, it could have gone round every other creditor and had a whip round. My Lord, your Lordship ought to bear in mind that's not necessarily so. Even if the SCG had advanced a claim, what the Administrators could conceivably have done, it's true, is rejected that claim if they had thought there was nothing in it, and if they had thought the appropriate course was to put the creditor to the

Obviously one of the difficulties in making such

2 an application is that it's essentially proleptic, it 3

operates regardless of what may subsequently turn out to

4 be the position, and your Lordship shouldn't be

5 surprised if it was thought that the appropriate stage

6 at which to make such an application was after it had

finished, and that it wasn't considered necessary to

make the application in advance.

9 MR JUSTICE HILDYARD: I'm not sure that I follow that point

completely. I can understand the timing and the

11 structural point, it would have been beneficial to the

12 Administrators to find a way of resolving the matter,

13 and beneficial for them to have the matter adjudicated 14 as between two contesting parties and not themselves,

15 which is what happened. But beyond that, is there any

16 point? I mean, there's no realistic way in which you

17 wouldn't have pursued the issue, is there? And if they

18 had adopted the other way of saying, "We'll wait for the

colour of your eyes, put in a proof or not," a proof

20 would have come in?

21 MR DICKER: Yes, but that's not the way the Administrators

wanted to deal with things.

23 MR JUSTICE HILDYARD: It's rude to ask it, but so what?

MR DICKER: Because if this issue had arisen earlier, it

would have been open to creditors to say, "If the terms

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position of deciding, "Do I want to bring proceedings to seek to establish my claim or not, conscious no doubt that if I do bring proceedings and lose, I may have to pay the costs of them." That is not the approach the Administrators took. Their approach was, these issues having been raised, they need guidance to have them determined, so they know how to distribute the assets in accordance with their statutory duties.

If that's right, if the SCG had said, "We're not prepared to participate unless our costs are covered," it may well that be other creditors would have taken the same position. What then? The consequence would not have been that the issues would effectively have evaporated, they would have been there on the table, the Administrators' position was they needed to have them determined, otherwise they didn't know how to distribute the surplus. If they distributed them ignoring such claims, and they subsequently turned out to be good ones, they would be in breach of statutory duty.

So my learned friend is wrong. If this issue had been of sufficient concern, it would have been open to creditors to have said, "We're simply not prepared to participate without some assurance in relation to our costs." My learned friend said no application for a prospective order was made in relation to costs.

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1 of the deal are that we have to turn up and argue

2 whatever points you think you need guidance on, whether

3 they're actually in our commercial interests or not, and

4 we have to potentially pay for the privilege of doing

5 so, then we're not prepared to participate on that

6 basis. You need to make provision as to our costs, or

7 find someone else who's happy to do it." My learned

8 friend said that would have been absolutely fine,

9 because in that situation no claims would have been

10 asserted, the Administrators could effectively have

ignored such claims and distributed the surplus 11

12 accordingly. We say not so, they indicated quite

13 clearly they were not prepared to do so. These were

14 issues which they needed to have determined. Whether or

not they were pursued by litigation or not, it was

16 sufficient that a creditor said "Our view is" --

MR JUSTICE HILDYARD: Is that not always the case in respect

18 of a large and not obviously hopeless case?

19 MR DICKER: Well, my Lord, like my learned friend, I'm not

20 sure I would be prepared to say always the case.

21 MR JUSTICE HILDYARD: No.

22 MR DICKER: And it may depend on the -- in fact if you have

23 a situation in which one's only talking about a claim

capable of being brought by one creditor, then obviously

25 one of the features of this case no longer applies.

1	MR JUSTICE HILDYARD: Yes, no I understand that.	1	further.
2	MR DICKER: If one was talking about a claim which was	2	MR JUSTICE HILDYARD: Thank you. Yes.
3	identified and advanced by the creditor, then again one	3	Further submissions by MR FOXTON
4	may have a slightly different situation. This is not	4	MR FOXTON: My Lord, three very brief points. Mr Zacaroli
5	that. If one goes back to category 1,	5	made the point that GSI are wide users of the ISDA form
6	Mr Justice Kekewich's judgment in Buxton, and reads it,	6	and mentioned that matter when seeking to join in.
7	this actually falls squarely within his description of	7	Undoubtedly we are. I suspect we are not alone in that,
8	category 1.	8	even amongst those who sit before your Lordship in this
9	MR JUSTICE HILDYARD: Does it?	9	court, but it was quite clear from the position papers
10	MR DICKER: Yes. My Lord, 414, the first full paragraph.	10	that there were financial institutions other than GSI
11	"A large proportion of the summons(Reading to	11	who had faced particular costs of funding issues post
12	the words) the applicants are trustees of a will or	12	the credit crunch, and so the perspective that GSI
13	settlement."	13	represented was not purely a personal or individual
14	MR JUSTICE HILDYARD: Isn't that the point? This is nothing	14	perspective but a wider market perspective.
15	to do with the instrument of trust?	15	My Lord, secondly, there was some suggestion that it
16	MR DICKER: No, my Lord, that distinction is then drawn in	16	would be possible to distinguish points raised by the
17	the next few lines.	17	Joint Administrators from those which were the subject
18	"There are two things that the application may seek.	18	of the adversarial litigation. That's simply not how
19	One, they ask the court to construe the instrument of	19	the process worked here. It was the JAs who identified
20	trust for their guidance, or else ask to have some	20	certain issues, they invited comments, the parties put
21	question determined which has arisen in the	21	forward position papers, and then they came in at the
22	administration of the trusts."	22	end to sweep up anything they felt had not been drawn
23	MR JUSTICE HILDYARD: Yes, administration of the trusts, not	23	out sufficiently by the early material. So the
24	the construction of agreements outside the trust.	24	distinction that Mr Zacaroli is asking you to draw is
25	MR DICKER: Again, it depends how you look at it. From the	25	not one that actually arises on the process adopted.
	D 05		D 07
	Page 85		Page 87
1	Administrators' perspective, this is a question which	1	MR JUSTICE HILDYARD: I think Mr Dicker was wary and he
2	has arisen in relation to the administration of a trust.	2	may well have been right of inviting the court to
3	MR JUSTICE HILDYARD: That's an awfully broad category,	3	opine on the amorphous or hypothetical issues, but there
4	because then it would always be within part 1 if it	4	we are, yes. I ventured where experience may say I
5	arose within the course of administration.	5	should not have, I don't know.
6	MR DICKER: Which is why when it comes to later cases, they	6	MR FOXTON: My Lord, I certainly will not be braver than
7	say that it's not always easy to distinguish between	7	Mr Dicker was in that respect.
8	category 1 cases and category 3 or 4 cases.	8	The final point is this: GSI joined the party
9	MR JUSTICE HILDYARD: Yes.	9	relatively late, by which stage a certain process and
10	MR DICKER: But if one simply reads category 1, this is the	10	a certain way of proceeding had been set in stone. When
11	Administrators coming to court, asking for directions in	11	the Joint Administrators indicated they would not oppose
12	relation to a question of how they apply their statutory	12	our joining, it was on particular terms as to how we
13	duty.	13	should participate, and those terms were justified by
14	MR JUSTICE HILDYARD: It may simply illustrate the	14	Mr Trower on the basis that this was not standard
15	difficulties of analogy with the trust, but I take your	15	adversarial commercial litigation, but proceedings as to
16	point, yes.	16	how to distribute assets being administered by the
17	MR DICKER: My Lord, my fifth and final point. If	17	court, and it would, we respectfully say, be a little
18	your Lordship were perchance against me on submissions	18	unfair to turn around now and say the costs orders
19	I have so far made, what we do say is it would be	19	should be made on the basis that this was standard
20	particularly unfair for the SCG to have to pay	20	adversarial commercial litigation.
21	Wentworth's costs. So if there is an intermediate	21	MR JUSTICE HILDYARD: That was Mr Trower who said that?
22	position, in our submission it would be that the order	22	MR FOXTON: It was.
23	should be each side should bear their own.	23	MR JUSTICE HILDYARD: I don't think Mr Bayfield is saying
24	MR JUSTICE HILDYARD: Right.	24	that much different.
25	MR DICKER: My Lord, unless I can help your Lordship	25	MR FOXTON: No. My Lord, as I characterised earlier, we
	D 07		D 00
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			22 (D 05 +- 00)

1 2 3	understand their position to be one of benevolent neutrality, and we are grateful for it.	1	might conceivably be, but for the very reasons that
	neutrality, and we are grateful for it.	١ ،	
3	,, B	2	there was a division between 2A and B and C, it may well
	MR JUSTICE HILDYARD: Yes.	3	be that there would not be much overall saving of time
4	Well, with a heavy heart, because it will mean	4	for the Court of Appeal, I just do not know.
5	delay, I feel I must reserve this. I find it	5	MR DICKER: I suspect little or none, and there may come
6	a difficult matter, and also I am wary of not	6	a stage at which the plethora of issues in front of the
7	distinguishing properly between the particular facts of	7	Court of Appeal might make it more difficult for the
8	this case and any general propositions given the effect	8	members of the Court of Appeal rather than easier.
9	that they may have, including in subsequent applications	9	MR JUSTICE HILDYARD: Yes. Has anyone made any inquiries of
10	in the Lehmans administration. So I want to think,	10	the Civil Appeals Office as to how long you may have to
11	I want to have a chance to review the transcript and to	11	wait before you get on? I think without expedition it
12	go through the authorities, albeit limited, which you	12	is a year or so, is it not?
13	have cited to me. I apologise for that, I should like	13	MR BAYFIELD: My Lord, that would certainly be our
14	to give an ex tempore judgment, but I just feel it would	14	expectation. The one silver lining perhaps to that is
15	be not the wisest course.	15	that if supplemental issue 1A were to be decided in
16	MR DICKER: My Lord, can I with some hesitation just raise	16	York's favour, albeit the Administrators have taken the
17	one matter. Hesitation simply because I am not sure	17	contrary view, then that may depose of part C in its
18	whether it has been discussed, or if it has, where the	18	entirety, so there is some benefit in there being a gap
19	parties have got to, and it simply concerns the timing	19	between the two.
20	for skeleton arguments for the Court of Appeal. In the	20	MR JUSTICE HILDYARD: Right, so I should be thinking what I
21	usual way we will obviously be under quite a tight	21	should pray for.
22	timetable at a time of the year which is properly not	22	I would prefer to complete the order other than
23	ideal, even though again in the usual way we would have	23	costs and simply have it on the stocks that I cannot
24	any appeal in the Court of Appeal probably some way off.	24	see why that is impossible, but you think it might be,
25	My Lord, I think I am right, and I will be corrected if	25	Mr Dicker?
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1	I am wrong, that because your Lordship is reserving	1	MR DICKER: No, I am not suggesting that is necessarily
2	judgment in relation to cost, your Lordship's order will	2	impossible. Your Lordship could formally adjourn the
3	not be drawn up until your Lordship has delivered	3	issue in relation to costs and provide a separate order.
4	judgment in relation to that, and if that is so, then	4	Thereafter my only concern in that situation would then
5	timing for skeleton arguments may run from there. I am	5	be that we would then be under a certain amount of
6	not raising this necessarily	6	pressure if the normal timetable for production of
7	MR JUSTICE HILDYARD: No, it is a good point.	7	skeleton arguments had to be adhered to.
8	MR DICKER: to have the issue decided now, but I just	8	MR JUSTICE HILDYARD: The reason I ask that, and subject to
9	wondered whether or not some thought should be given to	9	how strong the view taken on the other side is, in
10	it by the parties and if necessary permission to	10	a sense I would prefer to get the order done in order
11	approach your Lordship, if necessary.	11	that you should get in the queue and make some provision
12	MR JUSTICE HILDYARD: I take it that there is no question of	12	for extension of time for skeletons if that is available
13	the Court of Appeal finding time this April to extend	13	to me, than simply stop the clock and thereby stop you
14	the hearing to 2C?	14	making anything other than an enquiry as opposed to
15	MR DICKER: I think the answer to that must be right,	15	an application before the Court of Appeal. That is my
16	without wishing to prejudge the views of the Court of	16	thinking, just to put it on the table.
17	Appeal, they have so far as I understand requested	17	MR BAYFIELD: I think from the Administrators' perspective,
18	confirmation that any additional issues can be fitted	18	we would agree entirely with what my Lord has just said.
19	within the existing time frame. If that question is	19	That would be the best course.
20	asked in relation to part C then it seems to me only one	20	MR JUSTICE HILDYARD: So supposing, I cannot promise you
21	possible answer could be given, there is no prospect of	21	when I will get the judgment out, I am in the midst of
22	that whatsoever.	22	a very long judgment at the minute. I may be able to
23	MR JUSTICE HILDYARD: Within the present timetable?	23	get you a decision with reasons to come later, in which
24 25	MR DICKER: Correct. MR JUSTICE HILDYARD: But if they had a bit more time, it	24 25	case I will tell you what it is, but I just want you to have the best chance of getting on early rather than
23	MA VOOTTEE THED TAND. But II they had a bit more time, it	23	have the best chance of getting on early father than

1	late, given that there are lots and lots of things which	1	MR JUSTICE HILDYARD: Yes, I do have that, but am I then
2	may have to move forward eventually right up the tree,	2	not
3	I do not know.	3	MR ZACAROLI: Those with access to this book, which
4	MR DICKER: My Lord, my learned friend Mr Phillips draws my	4	MR JUSTICE HILDYARD: Do you want another one? I have read
5	attention to a book and a passage in the book with which	5	a similar book in the past.
6	I should probably be more familiar. CPR 52, the	6	MR ZACAROLI: No doubt so, my Lord. I do not think my Lord
7	note 52.4.2, time starts to run on the date when the	7	has, but they can correct that if necessary.
8	judge below makes the decision.	8	MR JUSTICE HILDYARD: What I have in mind, I think that
9	MR JUSTICE HILDYARD: Ah, right, so it is running away.	9	running through it, I have read the declarations, I
10	MR DICKER: So it is probably running away already.	10	should say that I assume that they mirror the questions
11	MR JUSTICE HILDYARD: You are quite right, I was being	11	that were asked and you are satisfied that all have been
12	silly. Because when, in fact, I took an application for	12	answered and you are agreed as to what the form of the
13	permission to appeal as before me when I formally handed	13	answer should take, that is point 1.
14	down judgment for that very reason.	14	MR BAYFIELD: My Lord, that is right.
15	MR DICKER: My Lord, the issue that may then arise is simply	15	MR JUSTICE HILDYARD: So far as the order therefore is
16	whether or not the parties, whether or not one party	16	concerned, it should deal with the declarations, the
17	thinks it appropriate to apply for, or the parties are	17	permission to appeal given, and I would have thought
18	happy to agree to an extension of time for any of the	18	with regard to costs it can refer to the fact that the
19	relevant steps. Now that is obviously not a matter	19	issue of costs has been made subject to reserved
20	before your Lordship presently. I mention it only	20	judgment. You will therefore have the starting gun
21	because as I say it seems to me it might be an issue,	21	fired and it will then be a matter between you as to
22	but perhaps if we could come back to your Lordship if	22	what, subject to my ultimate say-so, the timing for the
23	necessary in relation to that, that may be the most	23	appellant's notice should be. I think that it is
24	efficient way of dealing with it.	24	probably I mean you are all highly responsible and
25	MR JUSTICE HILDYARD: Does anyone have any instant views on	25	experienced, try and work out a time which is
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1	this?	1	appropriate and let me know what it is. If I can give
2	MR ZACAROLI: My Lord, time has been running as my Lord	2	you the answer on costs, I shall, even if with judgment
3	says, and it is extended until today because of the	3	later. Alternatively I shall adopt the cautious route
4	order my Lord previously made. The issue I think so far	4	of simply keeping you waiting, but at least you will
5	as my Lord is concerned is first of all to get the thing	5	have the ticket in to the further process, and the Court
6	running, I think we would endorse that as an approach,	6	of Appeal office will be able to see that they need not
7	so whatever order is made today ought to recognise that	7	say that the bundles are incomplete, because the only
8	there now being a permission to appeal, they should get	8	matter that is presently subject to appeal will all have
9	on with it so we can get our slot in the queue. The	9	been crystallised. Does that make sense?
10	second thing is, my Lord, I think has power to extend	10	MR BAYFIELD: My Lord, it does, yes.
11	time for appellant's notice, which is the critical	11	MR JUSTICE HILDYARD: So shall I leave it to you to discuss
12	document.	12	between you at this difficult time of year what
13	MR JUSTICE HILDYARD: Yes.	13	a sensible timing is, and then I think it is fair to
14	MR ZACAROLI: Skeletons will be a matter for the Court of	14	say, as Mr Justice David Richards said, the judgment was
15	Appeal I think as they are in the other matters going on	15	actually handed down some three months ago now, and
16	before the Court of Appeal.	16	therefore I would not expect a very long extension of
17	MR JUSTICE HILDYARD: Is it not normally you have to put in	17	time, but if given the holiday season some extension of
	MIC JOSTICE THED TARD. IS It not normally you have to put in	1 /	
18	your skeleton argument within a certain time of the	18	time is agreeable, well and good, but it will be fairly
	*		
18	your skeleton argument within a certain time of the	18	time is agreeable, well and good, but it will be fairly
18 19	your skeleton argument within a certain time of the appellant's notice now?	18 19	time is agreeable, well and good, but it will be fairly limited, I think.
18 19 20	your skeleton argument within a certain time of the appellant's notice now? MR ZACAROLI: That is correct, but then the Court of Appeal	18 19 20	time is agreeable, well and good, but it will be fairly limited, I think. MR FOXTON: My Lord, this may be overtechnical, but I wonder
18 19 20 21	your skeleton argument within a certain time of the appellant's notice now? MR ZACAROLI: That is correct, but then the Court of Appeal have been asked in relation to the supplemental issues	18 19 20 21	time is agreeable, well and good, but it will be fairly limited, I think. MR FOXTON: My Lord, this may be overtechnical, but I wonder if the answer is that one of us, and I am happy to do
18 19 20 21 22	your skeleton argument within a certain time of the appellant's notice now? MR ZACAROLI: That is correct, but then the Court of Appeal have been asked in relation to the supplemental issues to extend that time and have done so.	18 19 20 21 22	time is agreeable, well and good, but it will be fairly limited, I think. MR FOXTON: My Lord, this may be overtechnical, but I wonder if the answer is that one of us, and I am happy to do it, makes the application for your Lordship to extend
18 19 20 21 22 23	your skeleton argument within a certain time of the appellant's notice now? MR ZACAROLI: That is correct, but then the Court of Appeal have been asked in relation to the supplemental issues to extend that time and have done so. MR JUSTICE HILDYARD: Do I have jurisdiction to extend time?	18 19 20 21 22 23	time is agreeable, well and good, but it will be fairly limited, I think. MR FOXTON: My Lord, this may be overtechnical, but I wonder if the answer is that one of us, and I am happy to do it, makes the application for your Lordship to extend time under 52.4.2A and your Lordship then adjourns the
18 19 20 21 22 23 24	your skeleton argument within a certain time of the appellant's notice now? MR ZACAROLI: That is correct, but then the Court of Appeal have been asked in relation to the supplemental issues to extend that time and have done so. MR JUSTICE HILDYARD: Do I have jurisdiction to extend time? MR ZACAROLI: I know my Lord has the jurisdiction to extend time for the appellant's notice.	18 19 20 21 22 23 24	time is agreeable, well and good, but it will be fairly limited, I think. MR FOXTON: My Lord, this may be overtechnical, but I wonder if the answer is that one of us, and I am happy to do it, makes the application for your Lordship to extend time under 52.4.2A and your Lordship then adjourns the determination of that application until we have all had a chance to speak to each other, and come back to
18 19 20 21 22 23 24	your skeleton argument within a certain time of the appellant's notice now? MR ZACAROLI: That is correct, but then the Court of Appeal have been asked in relation to the supplemental issues to extend that time and have done so. MR JUSTICE HILDYARD: Do I have jurisdiction to extend time? MR ZACAROLI: I know my Lord has the jurisdiction to extend	18 19 20 21 22 23 24	time is agreeable, well and good, but it will be fairly limited, I think. MR FOXTON: My Lord, this may be overtechnical, but I wonder if the answer is that one of us, and I am happy to do it, makes the application for your Lordship to extend time under 52.4.2A and your Lordship then adjourns the determination of that application until we have all had

1	your Lordship.
2	MR JUSTICE HILDYARD: If that is required, whatever may be
3	the best machinery. But I am not looking, I am afraid,
4	for very long for the extension of time, for the reasons
5	I have sought to outline.
6	MR BAYFIELD: My Lord, what I had in mind certainly was that
7	we would produce an amended draft of this order, making
8	provision for the Administrators' costs, making
9	provision for the costs in relation to issue 1A, saying
10	save as aforesaid, the issue of costs be reserved,
11	granting permission to appeal in relation to the
12	declarations against which permission to appeal was
13	sought, and having a paragraph dealing with the
14	extension of time but not completing the date, whilst we
15	all have a chat and then hopefully submitting that to my
16	Lord later this week with the date filled in if it can
17	be agreed, and if it cannot be agreed, with letters
18	being written to my Lord explaining what the respective
19	positions of the parties are.
20	MR JUSTICE HILDYARD: Sounds sensible. Done.
21	MR BAYFIELD: And we are content with the indication that
22	any extension should be relatively brief.
23	MR JUSTICE HILDYARD: Yes. Excellent. Well I am so sorry
24	not to give you the answer now, but I dare say there are
25	quite a lot of costs riding on this.
23	quite a for or costs riding on this.
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1	Thank you very much indeed for your help.
2	(4.37 pm)
3	(The hearing concluded)
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