

<p>1 Monday, 12 December 2016 2 (2.00 pm) 3 MR JUSTICE HILDYARD: Yes. 4 Housekeeping 5 MR BAYFIELD: My Lord, good afternoon. This hearing has 6 been convened to deal with matters consequential upon my 7 Lord's judgment on Waterfall II part C. The 8 representation today mirrors that with a couple of 9 casualties that appeared before your Lordship at the 10 trial, save that Mr Rivett is here in place of Mr Smith 11 and Mr Amey for York. My Lord, the matters for this 12 afternoon fall into three categories: firstly the 13 declarations to be made to reflect your Lordship's 14 judgment; secondly applications for permission to 15 appeal; and thirdly costs. 16 Turning to the declarations, as your Lordship knows, 17 the parties have agreed the form of the declarations and 18 they are encapsulated in the draft order behind tab 3 of 19 the bundle. They are of course subject to my Lord, but 20 they are agreed as between the parties and we hope they 21 properly reflect your Lordship's judgment. 22 The second aspect for today is permission to appeal. 23 My Lord has three applications for permission. The 24 Senior Creditor Group seeks permission to appeal against 25 your Lordship's decisions on issues 10, 11, 12, 19, 20</p> <p style="text-align: center;">Page 1</p>	<p>1 the same time as the part A and B appeals. It is 2 unclear whether the time estimate is being extended to 3 accommodate those appeals or not, but as matters stand 4 those appeals will come on in April as well. 5 The Court of Appeal has also been told that all of 6 the parties to the Waterfall proceedings consider that 7 if your Lordship grants permission to appeal against 8 supplemental issue 1A, it will be convenient for that to 9 come on at the same time as the A and B appeals and the 10 other supplementary issue appeals in April. In relation 11 to that, there is now a timetable directed by 12 Lord Justice Lewison in terms of skeleton arguments for 13 the supplemental issues, with the appellant's skeletons 14 due by 21 January and the respondents' by 28 March, 15 which, if my Lord does give permission to appeal on 16 supplemental issue 1A, would seem to work for that issue 17 as well. 18 So there is every chance that if my Lord grants 19 permission to appeal on 1A, that that can catch up with 20 the other supplementary issues and the A and B appeals, 21 which of course would be convenient, given that as my 22 Lord reflected in the judgment at paragraph 454, 23 supplemental issue 1A derives from issue 4 which was 24 part of part A of the proceedings. 25 My Lord, the final matter is costs. As to that, it</p> <p style="text-align: center;">Page 3</p>
<p>1 and 21, and the corresponding declarations are listed in 2 the SCG's skeleton argument at paragraph 23. GSI seeks 3 permission to appeal against your Lordship's decision on 4 issue 11 and certain consequential aspects of issue 12, 5 and the corresponding declarations that they appeal 6 against are listed in paragraph 4 of their skeleton 7 argument. Finally, York seeks permission to appeal 8 against your Lordship's decision on supplemental issue 9 1A, which results in the declaration at paragraph 27 of 10 the draft order. 11 The Administrators don't intend to make any 12 submissions on those applications, which are primarily 13 a matter for my Lord, and they make no applications for 14 permission to appeal themselves. My Lord, without 15 prejudging whether or not permission to appeal should be 16 granted on supplemental appeal 1A, I thought it might be 17 helpful to let my Lord know where we have got to in 18 terms of listing the appeals of the part A and B 19 judgments. 20 MR JUSTICE HILDYARD: April. 21 MR BAYFIELD: My Lord, that's right. It's 3 or 4 April as 22 the start date with a time estimate of six days. We now 23 have directions from the Court of Appeal that the 24 supplemental issues which were determined by 25 Lord Justice David Richards will come on to be heard at</p> <p style="text-align: center;">Page 2</p>	<p>1 is common ground that the Administrators' costs of part 2 C and supplemental issue 1A should be paid as an expense 3 of the administration. (Inaudible) of supplemental 4 issue 1A should be paid as an expense. The only area of 5 dispute in relation to costs is as to the respondents' 6 costs of part C. Wentworth seeks cost orders against 7 the SCG and GSI and the SCG and GSI resist those orders 8 and invite my Lord to make an order that their costs be 9 paid as an expense of the administration. 10 The Administrators have made a number of 11 observations about costs in our skeleton argument, but 12 subject to that and one qualification, we take a neutral 13 position. The one qualification is this: if and to the 14 extent that my Lord orders that the SCG's costs be paid 15 as an expense of the administration, then we seek that 16 they should be restricted to the costs that would have 17 been incurred had the SCG returned one firm of 18 solicitors only, and that reflects the costs order that 19 was made in the SCG's favour on parts A and B of 20 Waterfall II in circumstances in which they have 21 retained more than one firm of solicitors. 22 My Lord, there is only one further matter I just 23 wanted to mention before I sit down, and that is that 24 Mr Rivett has asked me to ask my Lord whether if it is 25 convenient to my Lord that he and his team can be</p> <p style="text-align: center;">Page 4</p>

<p>1 released once York's costs on supplemental issue 1A and 2 once the question of permission to appeal against the 1A 3 declaration has been determined, in circumstances in 4 which the most meaty issue for this afternoon is the 5 costs issue between on the one hand Wentworth and on the 6 other the SCG and GSI, in relation to which York has no 7 interest.</p> <p>8 Unless I can assist my Lord further, that is all 9 I wanted to say for the Administrators for the time 10 being.</p> <p>11 MR JUSTICE HILDYARD: Yes. And consistently with that last 12 request, is it best that I hear from Mr Rivett and see 13 where we get to on that, and then turn to the others?</p> <p>14 MR BAYFIELD: My Lord, that would certainly make sense from 15 his perspective.</p> <p>16 MR JUSTICE HILDYARD: Yes. Is anyone wildly opposed to 17 that?</p> <p>18 Mr Rivett.</p> <p>19 Application for permission to appeal by MR RIVETT</p> <p>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</p> <p style="text-align: center;">Page 5</p>	<p>1 artificial for that issue to be the subject of an appeal 2 but not this one.</p> <p>3 My Lord, in those circumstances I submit it is 4 appropriate for permission to appeal to be granted on 5 this issue also. Your Lordship has of course heard 6 detailed argument on the underlying issue, and it is not 7 the purpose of this application to reargue any of those 8 points, and so I don't propose to do so. In those 9 circumstances, my Lord, I ask for permission.</p> <p>10 MR JUSTICE HILDYARD: Yes. Do you want to deal with costs? 11 Application for costs by MR RIVETT</p> <p>12 MR RIVETT: Yes, my Lord. As my learned friend Mr Bayfield 13 pointed out, it is common ground, I believe, that our 14 costs should be paid as an expense of the 15 administration. Such an order is consistent with the 16 order made by Lord Justice David Richards on the other 17 supplemental issues. It is also consistent with the 18 costs orders he made on parts A and B. There, looking 19 at the matter overall, he considered -- I am quoting 20 here from the transcript, and unless your Lordship 21 requires me to do so I shan't take you to it -- there 22 Mr Justice David Richards said:</p> <p>23 "Having looked at the matter overall, this case will 24 naturally fit into the category of a case where the 25 Administrators have been required to come to court in</p> <p style="text-align: center;">Page 7</p>
<p>1 which I deal with those.</p> <p>2 MR JUSTICE HILDYARD: You take your course.</p> <p>3 MR RIVETT: Then perhaps it's best to deal with permission 4 first. As foreshadowed 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 1A. In my submission, the threshold 8 test for permission to appeal is easily met on that 9 issue. First, it is an entirely novel point of law on 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.</p> <p>13 Secondly, as your Lordship noted at paragraph 454 of 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 17 Richards gave permission to appeal on that issue, and in 18 my submission it would be entirely artificial for that 19 issue to be the subject of an appeal, but not this one.</p> <p>20 Thirdly, in reaching your conclusion, your Lordship 21 drew support from Mr Justice David Richards's 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</p> <p style="text-align: center;">Page 6</p>	<p>1 order to resolve issues of law which need to be 2 determined before they can proceed further with the 3 administration of the estate."</p> <p>4 Your Lordship is doubtless familiar with the 5 authorities referred to in footnote 1 of Mr Amey's 6 skeleton argument, which established in such 7 circumstances, the costs of all parties are usually paid 8 as expenses of the administration. I expect 9 your Lordship will be taken to those authorities in 10 greater detail later, but certainly adopting those 11 authorities, Mr Justice David Richards did order that 12 the costs be paid as expenses of the administration. 13 Admittedly, the judge there made it clear that his 14 decision on costs did not necessarily carry over into 15 part C. However, of course, supplemental issue 1A was 16 of course, consequential to the judgment on part A and 17 so the judge's approach to costs on part A, in my 18 submission, applies equally here. His Lordship also 19 limited York's recovery to 30 per cent of its costs in 20 that trial, but that was on the basis that its 21 submissions, I understand, were duplicative of those 22 made by another party. As your Lordship is aware, that 23 isn't the position here and no such limitation is, 24 therefore, appropriate. Mr Amey's set out further 25 reasons as to why York's costs should be paid as</p> <p style="text-align: center;">Page 8</p>

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

<p>1 allowed, and if supplemental issue 1A is appealed 2 against, the appeal notice will have to be filed in time 3 for it to fit in with the timetable for skeleton 4 arguments, which doesn't appear to give rise to any 5 problem. Because the appellants' skeletons on the other 6 supplementary issues are required by the end of January 7 and in fact, that is a date that falls after the 8 skeleton argument on supplemental issue 1A would have to 9 be filed in the ordinary course. So what I would 10 envisage happening is once the appeal notice has been 11 filed, or perhaps in advance of that, Linklaters writing 12 to the Civil Appeals Office to say that permission to 13 appeal has been granted and to seek confirmation from 14 the Court of Appeal that 1A can be dealt with at the 15 same time as the other supplementary issues, and I would 16 assume, suggesting that the timetable for skeleton 17 arguments that has been set down for the other 18 supplemental issues, should apply equally to 1A.</p> <p>19 MR JUSTICE HILDYARD: Thank you, I am so sorry to have 20 misunderstood. I had misunderstood. But is it the view 21 of you all, and in particular York, that within the time 22 which the Civil Appeals Office has permitted, that this 23 matter could be dealt with so far as the parties are 24 concerned, within the same timetable?</p> <p>25 MR BAYFIELD: Well, the Court of Appeal has been written to</p> <p style="text-align: center;">Page 13</p>	<p>1 MR JUSTICE HILDYARD: Well, obviously, it will be a matter 2 for the Court of Appeal to direct when it should come 3 on, but if all parties are agreed that within the 4 existing timetable, they will have finished their 5 arguments, then I dare say that will greatly assist the 6 Court of Appeal make a decision accordingly. So far as 7 the appeal notice is concerned, when can you get it in?</p> <p>8 MR RIVETT: Six January, if possible, my Lord. Obviously, 9 it comes at a somewhat inconvenient time of year, and so 10 6 January would be the preferable date.</p> <p>11 MR JUSTICE HILDYARD: Is that going to cause any problems to 12 anybody?</p> <p>13 MR BAYFIELD: We're content with that, my Lord.</p> <p>14 MR JUSTICE HILDYARD: That will give you time for any 15 respondent's notice or whatever it is you may wish to 16 put in?</p> <p>17 MR BAYFIELD: That's right, I think it will be for my 18 learned friend to file a skeleton argument, either 19 together with the appeal notice or within 14 days 20 thereafter which as currently stands, will be before the 21 date for the skeletons for the other supplementary 22 issues.</p> <p>23 MR JUSTICE HILDYARD: Remind me when they're coming in?</p> <p>24 MR BAYFIELD: 31 January.</p> <p>25 MR JUSTICE HILDYARD: Is that exchange or is that one round?</p> <p style="text-align: center;">Page 15</p>
<p>1 by Linklaters on 29 November 2016, a letter expressed to 2 have been one that has been agreed with the solicitors 3 to the other parties to the appeals, all of whom are 4 copied in and including Michelmores, who are York's 5 solicitors, saying:</p> <p>6 "The parties note also that Mr Justice Hildyard 7 recently gave judgment on an issue closely related to 8 the appeals. A consequential hearing in relation to 9 that judgment is listed to take place before 10 Mr Justice Hildyard on 12 December 2016. In the event 11 that Mr Justice Hildyard were to grant permission to 12 appeal that decision, the parties agree that it would be 13 desirable for such appeal also to be heard at the April 14 hearing which the parties envisage could be achieved 15 without any further extension to the April hearing."</p> <p>16 So that is something that was expressed to the Civil 17 Appeals Office on behalf of all of the parties. It 18 would be very disappointing if anyone's position had 19 changed since then and there is certainly no indication 20 that anyone's position has changed.</p> <p>21 MR JUSTICE HILDYARD: And that remains so from your point of 22 view, Mr Rivett --</p> <p>23 MR RIVETT: It does, my Lord, yes.</p> <p>24 MR JUSTICE HILDYARD: -- having taken instructions on it?</p> <p>25 MR RIVETT: It does yes, my Lord.</p> <p style="text-align: center;">Page 14</p>	<p>1 MR BAYFIELD: No, no, that's the appellant's skeletons for 2 the respondents in February.</p> <p>3 MR JUSTICE HILDYARD: Right.</p> <p>4 MR BAYFIELD: So I think it does work.</p> <p>5 MR JUSTICE HILDYARD: Yes. And it works without my 6 requiring them to hand over their skeleton argument at 7 the time, of the grounds?</p> <p>8 MR BAYFIELD: It does.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 Well Mr Rivett, having regard to the time of year 11 and given that there's no reason that has been suggested 12 to me for putting you on an accelerated track compared 13 to the rest, I am content that you should have until 14 6 January for your notice, and that then you must abide, 15 if so directed, by the Court of Appeal, obviously, with 16 the relevant exchange dates for service of your skeleton 17 argument.</p> <p>18 MR RIVETT: I am grateful, my Lord.</p> <p>19 Ruling on costs</p> <p>20 MR JUSTICE HILDYARD: And then on the matter of costs, it 21 seems to me that this may be slightly different in 22 aspect to the other matters of costs which I have to 23 deal with, and that especially as no-one objects and 24 everyone involved was seeking their own costs out of the 25 estate and it refers to a matter as to the statutory</p> <p style="text-align: center;">Page 16</p>

<p>1 scheme, it is not inappropriate that you should have the 2 costs out of the estate or whatever the magic wording 3 is. 4 MR BAYFIELD: My Lord, thank you. 5 MR RIVETT: I am grateful, 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. 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 JUSTICE HILDYARD: Well I think the position on 15 permission to appeal is that, broadly speaking, the 16 Administrators are neutral and so I think Mr Zacaroli's 17 skeleton suggests that he didn't know whether or not you 18 would be seeking to appeal, it hasn'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 JUSTICE HILDYARD: Yes. 24 These issues are tricky, and different minds could 25 reach different conclusions. They are important, and as</p> <p style="text-align: center;">Page 17</p>	<p>1 MR JUSTICE HILDYARD: And 11 and 12, you do and he does not. 2 MR DICKER: Yes, and then in relation to issue 12, I think 3 the difference between us is in relation to 4 declaration 15, Goldman Sachs have included this and we 5 haven't. My Lord, if your Lordship's content to give 6 permission to each of us in respect of the ones we do 7 appeal, then obviously it would follow that both 8 declarations will be before the Court of Appeal, and we 9 certainly wouldn't oppose that. My Lord, I think that 10 was the only additional point I needed to make. 11 Obviously, there are other declarations in respect of 12 which we seek permission which Goldman don't, for 13 example, issue 10, declaration 22, in relation to 14 (Inaudible) and your Lordship has observed the three 15 declarations in relation to the German master agreement 16 as well. 17 MR JUSTICE HILDYARD: Yes. What you're proposing requires 18 me, I think, just to touch base, to see what it is that 19 GSI say are the differences between you. 20 MR FOXTON: My Lord, in terms of the one addition, which was 21 declaration 15, it just seemed to us that if the debt 22 versus equity issue, if I may so term it, was before the 23 Court of Appeal, we would really be traversing the 24 ground covered by issue 15, when examining what cost of 25 funding might mean. In those circumstances, it was</p> <p style="text-align: center;">Page 19</p>
<p>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 seems to me that there would be 5 every good reason for giving permission to appeal, in 6 respect of the issues that you have identified, and 7 I give you permission accordingly. 8 MR DICKER: My Lord, I am grateful to your Lordship. Just 9 so your Lordship knows, I think Mr Foxtton, on behalf of 10 Goldman Sachs, identified at least one other 11 declaration, I think in respect of issue 12, that we 12 haven't included on our list. 13 MR JUSTICE HILDYARD: Oh, I thought you had, right. I'm 14 sure it's right. I just went through -- 15 MR DICKER: I think there were two differences between us so 16 far as issue 11 and 12 were concerned. We included 17 declaration 4, which is the costs of funding does not 18 include costs or financial consequences to the 19 relevant -- 20 MR JUSTICE HILDYARD: Yes, you are right. Form 5. Five, 21 you don't appeal, and neither does he. Four, you appeal 22 and he does not. 23 MR DICKER: In relation to issue 11, your Lordship is right. 24 We seek permission in respect of declaration 4 and as 25 I understand it, he does not.</p> <p style="text-align: center;">Page 18</p>	<p>1 appropriate that it would be live before the court. It 2 is certainly not the heart of the appeal. We see that 3 as being much more the question about whether cost of 4 funding extends to cost of equity funding, but we took 5 a fairly broad view of what might be consequential 6 declarations following on from that primary issue. 7 MR JUSTICE HILDYARD: Right. Any others? 8 MR FOXTON: My Lord, I think that is the only one of ours 9 that is additional. In terms of SCG points where we 10 have not sought permission, we are certainly not 11 resistant to any application on their part, we have 12 simply not yet, ourselves, reached a considered view, 13 beyond those we have identified. 14 MR JUSTICE HILDYARD: Should I not take you at your word as 15 to what parts of the appeal you wish to be engaged in 16 and give you permission, according to your considered 17 view now? 18 MR FOXTON: My Lord, I am happy to be taken at my word, 19 because those are the issues, as it were, we think 20 really matter to us, but we are otherwise neutral in 21 terms of the SCG position. 22 MR JUSTICE HILDYARD: Yes. Does anyone have any submissions 23 to make, especially with regard to 15? Mr Zacaroli in 24 particular, do you? 25 MR ZACAROLI: My Lord, I don't.</p> <p style="text-align: center;">Page 20</p>

<p>1 MR JUSTICE HILDYARD: No. Do you think that this will 2 arise, really, in the course of argument, as a matter of 3 fact before the Court of Appeal? Have you been able to 4 estimate that?</p> <p>5 MR FOXTON: My Lord, I think it is fair to say it's in there 6 at the moment in the spirit of just in case rather than 7 as being a point which we think will definitely be live, 8 but one can see, when analysing the consequences of 9 a debt or equity analysis of cost of funding, the 10 question about what the cost of equity involves may be 11 live before the court, not least given some of the 12 issues the SCG are raising or weighted average cost of 13 capital and so forth.</p> <p>14 MR JUSTICE HILDYARD: Yes. So you think it could be 15 artificial, as it were, to have made a stand on this 16 particular subparagraph?</p> <p>17 MR FOXTON: My Lord, I suspect it will be something that 18 will be ground that is covered, whether permission to 19 appeal is given on this particular declaration or not, 20 and that was the spirit in which we sought to include 21 potentially consequential issues from a more generous 22 perspective at this stage.</p> <p>23 MR JUSTICE HILDYARD: And does it flow from that that I 24 would not be visiting on the Court of Appeal, in 25 reality, any substantial or material additional time?</p> <p style="text-align: center;">Page 21</p>	<p>1 the points you wish to appeal, leaving it to the Court 2 of Appeal to determine whether either or both of you 3 should have a go at it, and I think I had best leave it 4 at that, permission to you each.</p> <p>5 MR DICKER: My Lord, I am grateful. The second issue, 6 obviously, was costs.</p> <p>7 MR JUSTICE HILDYARD: Yes. That is a more difficult matter, 8 as far as I am concerned, and one on which I do need 9 your assistance.</p> <p>10 Application for costs by MR DICKER</p> <p>11 MR DICKER: Then I will proceed accordingly. My Lord, as 12 your Lordship knows, we seek an order for payment of the 13 SCG's costs out of the estate --</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR DICKER: -- and wouldn't oppose a similar order in 16 relation to any of the other respondents --</p> <p>17 MR JUSTICE HILDYARD: No.</p> <p>18 MR DICKER: -- should they wish to make it. My Lord, before 19 delving into the detail, your Lordship should know the 20 Administrators don't oppose such an order. If they had 21 thought it inappropriate, no doubt they would have said 22 so, and your Lordship has seen what is said in their 23 skeleton argument. My Lord, the arguments before 24 your Lordship are essentially the same arguments as were 25 before Mr Justice David Richards in relation to parts A</p> <p style="text-align: center;">Page 23</p>
<p>1 MR FOXTON: My Lord, I think it does, and I suspect that 2 this is simply an extremely minor addition to the course 3 of argument that is going to be before the court on the 4 central issue upon which your Lordship very fairly 5 recognised in the judgment, was one which caused you to 6 think carefully about both positions.</p> <p>7 MR JUSTICE HILDYARD: Well, Mr Dicker, I take it, 8 Mr Bayfield, the Administrators are, as they have been 9 in the past, neutral in this regard, and they simply 10 leave it to the court, not least because at the trial, 11 they were neutral as well. I think Mr Trower took on 12 the role of being the various day's compère for the 13 proceedings in front of me. Mr Dicker, as far as you 14 are concerned --</p> <p>15 MR DICKER: My Lord, we wouldn't oppose Goldman Sachs being 16 given permission to appeal and for our part, we can't 17 envisage it will involve the Court of Appeal having any 18 more work than that which will arise on the appeal in 19 any event.</p> <p>20 MR JUSTICE HILDYARD: Well recognising it is my 21 responsibility to try and clear out some matters which 22 aren't severally worthy or appropriate to be appealed, 23 nevertheless, I think in the circumstances, the division 24 would be more artful than necessary and therefore 25 I propose to give permission to appeal to each of you on</p> <p style="text-align: center;">Page 22</p>	<p>1 and B, and much of the ground that I am going to travel 2 is ground which he had to travel before reaching his 3 decision. We say, essentially, there is no material 4 difference between parts A and B on the one hand and 5 part C on the other.</p> <p>6 My Lord, can I start just by emphasising six 7 principal points. The first is that the application was 8 issued by the Administrators to obtain guidance that 9 they considered that they needed. The second is it 10 sought answers to various general questions which the 11 Administrators and the respondents had identified as 12 reflecting arguable positions. The initial questions 13 were identified and formulated by the parties together, 14 and as your Lordship knows, it didn't stop there. The 15 Administrators identified further possible arguments in 16 their position paper, and as your Lordship referred to 17 in the judgment, identified another nine subquestions 18 shortly before the part C hearing started, which they 19 invited the respondents to address and which they did 20 address.</p> <p>21 My Lord, thirdly, to some extent, it was arbitrary 22 as to how the application was heard, and which issues 23 were heard with which part. Your Lordship may have 24 noted from an earlier skeleton submitted by Wentworth 25 that at one stage they were submitting that issue 10</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 should actually be heard together with part A. In the 2 end that wasn't the consensus view and they didn't 3 ultimately oppose it being heard together with the rest 4 of the ISDA issues in part C. But the decision as to 5 how A, B and C were divided up was essentially regarded 6 as a matter of case management rather than anything 7 else. What would be the most efficient way of dealing 8 with the various issues raised in one composite 9 application? 10 The fourth point is that the SCG's role in the 11 proceedings was akin to that of a representative 12 respondent. That is certainly how they understood it. 13 The SCG's understanding of their role was made plain in 14 the skeleton argument for the part C hearing, and 15 repeated by me during the course of my oral submissions, 16 and at no stage did the Administrators or Wentworth 17 suggest that we misunderstood why we had been joined 18 before, as to what our role was. 19 My Lord, that is not just a matter of form. In our 20 submission, the SCG acted exactly as you would have 21 expected from a representative party keen to ensure that 22 the Administrators obtained the guidance that they 23 considered they needed and we set out various points in 24 this respect at paragraph 16 of our skeleton argument. 25 I wonder if I might just remind your Lordship of those</p> <p style="text-align: center;">Page 25</p>	<p>1 Administrators and the various additional contentions 2 made by them. 3 At no stage did the Administrators suggest that any 4 of the arguments that had been identified, and in 5 respect of which the SCG and others were making 6 submissions, were points on which they did not require 7 guidance. So at no stage were the SCG making 8 submissions in relation to something which, as it were, 9 it was their agenda to press, but not something the 10 Administrators required guidance in relation to. 11 The sixth point is if the Administrators were going 12 to obtain the guidance they needed, someone had to be 13 appointed, a respondent who would take an active role. 14 If the SCG had refused, someone else would have had to 15 have been appointed, if necessary on the basis of 16 a formal order for representation, and an order for 17 payment of that party's costs. The only alternative is 18 the Administrators would have had to run all of the 19 arguments themselves, not, in our respectful submission, 20 the most satisfactory way of proceeding and plainly not 21 one which the Administrators wanted. But if that course 22 had been adopted, then obviously, the costs of the 23 Administrators, as it were, standing in my place, would 24 have come out of the estate. 25 MR JUSTICE HILDYARD: Is that right, though? Where the</p> <p style="text-align: center;">Page 27</p>
<p>1 points? 2 MR JUSTICE HILDYARD: Yes. 3 MR DICKER: My Lord, 16.1, we worked to agree the answer to 4 certain of the issues. The Administrators were 5 (Inaudible) there was ultimately consensus as to the 6 correct approach to be adopted. We made submissions on 7 the remaining issues which, in the light of their own 8 broad position as creditors, were likely to benefit 9 unsecured creditors as a whole. None of the issues 10 concerned solely the members of the SCG. That's true as 11 much of the German law issues as any of the others. The 12 SCG sought to limit their submissions to points of law 13 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 16 advanced submissions on particular issues whether one or 17 more of them might have had a lesser interest in such 18 issues, and they limited their submissions to those 19 which were likely to be of general application for 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 24 of the administration order, nothing further. They also 25 responded to the various subissues identified by the</p> <p style="text-align: center;">Page 26</p>	<p>1 Administrators are having to, as it were, interpret the 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? 16 MR DICKER: Well, my Lord, we would say that's not, with 17 respect, the right way of looking at the proceedings. 18 The question of whether or not 8 per cent was 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</p> <p style="text-align: center;">Page 28</p>

<p>1 there's a variety of ways in which we can seek to 2 discharge our statutory duties by determining those 3 issues and distributing the surplus. And the way they 4 chose to deal with this was essentially to say to 5 creditors, including the SCG, "What are the points which 6 you think are reasonably arguable?" as well as 7 identifying points which they themselves consider might 8 be raised by a creditor, and then seek to have those 9 determined on the basis that that determination would 10 then hopefully, in practice, if not as a strict matter, 11 determine them for all creditors -- certainly make it 12 very difficult for anyone else to subsequently challenge 13 it. So one way of looking at this, if it's a more 14 helpful analogy, might be akin, essentially, to a test 15 case. Yes, the SCG was content to argue these points, 16 but they weren't arguing them simply because they were 17 asserting them and it was in their interests to do so. 18 Indeed, that's not, in fact, the way matters developed 19 previously. This hasn't sprung from a series of proof 20 of debts claiming 8 per cent which the creditors have 21 asserted and the Administrators have rejected, it's 22 arisen by the parties essentially looking at the ISDA 23 master agreement and trying to work out what claims 24 might be made, and seeking to have those determined. 25 I entirely accept your Lordship's point that where</p> <p style="text-align: center;">Page 29</p>	<p>1 I do find this puzzling -- is this seems to me a little 2 bit different from A and B and nevertheless different 3 from the RASCALS case. The RASCALS case, as I 4 understand it, centred on a proprietary claim by the 5 claimants which was particular to them and was therefore 6 in the nature of a straightforward adversarial claim. 7 Here, the matters being generated by reference to 8 issues, (a) because that is the fact, (b) because hidden 9 under the issues is the fact that whilst you assert your 10 claims, you are also in another pocket interested in the 11 same answer as, for example, Wentworth had, or Wentworth 12 are interested in the same answers you propose because 13 you have multiple interests. That is as I understand 14 it. 15 MR DICKER: My Lord, one needs to be quite careful when one 16 talks about assertion of claims. It is a point made by 17 Wentworth in their skeleton on more than one occasion. 18 These issues do not all flow out of one or more proofs 19 of debt. 20 MR JUSTICE HILDYARD: But that is a timing issue, isn't it? 21 It seems to me for the moment that that is more form 22 than substance. As a point of substance, there is 23 an argument not as to the statutory scheme but as to 24 what additional rights the ISDA forms confer. The 25 considered view of the Administrators, which seems to me</p> <p style="text-align: center;">Page 31</p>
<p>1 one's construing the statute itself, one may say that's 2 a paradigm case in which costs should be paid out of the 3 estate, just as it would be if you're construing the 4 terms of a trust or the terms of a will, but that's not 5 the only situation. It's not the only situation 6 referred to in Buxton and, indeed, it wasn't the 7 situation, if your Lordship will recall, in relation to 8 part B. Part B concerned contracts between the 9 Administrators and creditors. The issue between them 10 was whether or not, as Wentworth said, that was 11 a commercial deal in which creditors had given up 12 compromised claims to interest, damages akin to 13 interest, foreign currency claims, or not. 14 On one view, and this was a point made by Wentworth 15 to Mr Justice David Richards, that was adversarial 16 litigation, hostile litigation, of a perfectly normal 17 course. There had been a compromise agreement and the 18 creditors were disagreeing with what those with a 19 certain interest in the estate said the effect of that 20 agreement was. That wasn't a reason why the costs of 21 dealing with those issues should not be paid out of the 22 estate. We say there's no real difference in principle 23 between that and the issues arising in relation to 24 part C. 25 MR JUSTICE HILDYARD: The reason I asked the question --</p> <p style="text-align: center;">Page 30</p>	<p>1 wholly realistic, was that those claims, the super 2 claims, as I have called them, would be asserted. The 3 fact that they may not yet have been asserted in every 4 or any instance by way of proof of debt is neither here 5 nor there. 6 MR DICKER: Although the function of this part was actually 7 to determine what such claims would actually be 8 asserted. 9 MR JUSTICE HILDYARD: Yes. 10 MR DICKER: So in a sense one starts, perhaps slightly 11 unusually but plainly for very sensible reason, to try 12 and identify what arguable positions could be taken by 13 creditors to then try and work out whether or not those 14 positions, if taken, would be valid as a matter of law. 15 Then the Administrators invite proofs, et cetera, no 16 doubt claims, no doubt consistent with your Lordship's 17 judgment, on which they can then proceed. But this has 18 not, in the main, proceeded the other way around. 19 Just on RASCALS, your Lordship is actually right. 20 Just looking at it, if your Lordship has the judgment. 21 MR JUSTICE HILDYARD: In RASCALS? 22 MR DICKER: In RASCALS. 23 MR JUSTICE HILDYARD: Yes. 24 MR DICKER: Just looking at paragraph 4 of 25 Mr Justice Briggs' judgment, he says at the start of the</p> <p style="text-align: center;">Page 32</p>

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<p>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 6 is not quite how this application arose. This is not 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</p> <p style="text-align: center;">Page 33</p>	<p>1 for a person to be appointed as a representative is that 2 they do have the interest of the class, ie they would 3 have to be a creditor, and as a creditor, would have to 4 have an interest in the UK. 5 So the mere fact that the SCG have an interest in 6 the outcome is neither here nor there. All that 7 establishes is that they are an appropriate person to be 8 joined as a representative. What matters is they are 9 not just arguing, as it were, their own claim. They are 10 seeking to assist the Administrators, obtain guidance to 11 enable the Administrators to determine not merely their 12 own claim, if made, but any other claims as well on 13 a similar basis. 14 My Lord, we also say it would actually be, in our 15 submission, extremely unfair if the SCG were not granted 16 their costs out of the estate. That essentially is 17 simply a consequence of the submissions I have so far 18 made. If the purpose of this application was to obtain 19 guidance for the benefit not merely of the SCG but for 20 the benefit of all creditors, then if the SCG has to 21 bear Wentworth's costs, which is what Wentworth seeks, 22 and cannot recover its own costs out of the estate, then 23 essentially this exercise, which has ostensibly been 24 done for the benefit of creditors generally, has in fact 25 been conducted at the SCG's expense. My Lord, we say</p> <p style="text-align: center;">Page 35</p>
<p>1 a test case on the basis that there are however many 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 5 Administrators chose, was to try and identify the 6 arguments which could be made, determine them as 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 case -- 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</p> <p style="text-align: center;">Page 34</p>	<p>1 that outcome would be unfair. 2 I mentioned earlier that the various issues are not 3 issues in relation to which solely the SCG are 4 interested. For example, I am instructed even in 5 relation to the German law issues, the SCG holds only 6 about four out of 15 GMA claims. As your Lordship 7 I think mentioned a moment ago, Wentworth is itself one 8 of those creditors. Indeed, they appear to have ISDA 9 claims which dwarf the total claims which the SCG have 10 against LBIE. 11 The other point in this context is that 12 your Lordship shouldn't view the SCG as an entirely 13 homogeneous group. Necessarily, different members of 14 the SCG have slightly different interests. The German 15 law master agreement is one example of that. Regarding 16 them as essentially collectively equally interested in 17 all of the issues would also not be right. 18 My Lord, just to address two specific points made by 19 Wentworth, the first, which I think I have already dealt 20 with, is there are various references in the skeleton to 21 the SCG seeking to establish a right against LBIE or 22 asserting a claim that are hostile to the interests of 23 the LBIE estate. I have essentially dealt with this. 24 This is essentially how the application came into 25 existence, A, B or, indeed, part C. The importance, as</p> <p style="text-align: center;">Page 36</p>

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

<p>1 determine questions which have arisen in the 2 administration of the trusts. We say, with some slight 3 change in language, that exactly covers what is going on 4 in relation to part C. 5 MR JUSTICE HILDYARD: This is what I am puzzling about. Why 6 is that? Surely all C related to was a question of 7 construction on certain contracts to which the 8 Administrators were not really interested as 9 Administrators and were neutral accordingly. They set 10 up the circus, if you like, and you had a gladiatorial 11 combat. That was, I am sure, the origin of it and 12 I could see that that was the origin, but the true 13 dispute related to a fight, didn't it, for claims 14 adverse 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? 17 MR DICKER: My Lord, three points: one, that may be right, 18 but as I say, category one is not limited to cases 19 involving construction. It also covers any questions 20 arising in relation to the administration of the estate. 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</p> <p style="text-align: center;">Page 41</p>	<p>1 a statutory duty to distribute the assets in accordance 2 with the scheme. They have decided they can't do that 3 without guidance to answer questions affecting not 4 merely the SCG but other creditors. They make 5 an application seeking guidance. They need someone to 6 argue the other side. The SCG agrees to do so on the 7 basis that it is going to be a quasi representative. We 8 say that exactly falls within what Mr Justice Briggs 9 says there. We say, echoing him, such parties who do 10 participate in that way should not be unduly discouraged 11 by a recourse to the general rule where in the end the 12 issue is decided against them. 13 MR JUSTICE HILDYARD: But one has to remember, doesn't one, 14 that in the RASCALS case itself we went the other way -- 15 MR DICKER: But went the other way because -- 16 MR JUSTICE HILDYARD: -- notwithstanding the umbrella of the 17 administration. 18 MR DICKER: But that case was different because the issue 19 which was decided was an issue advanced by the claim 20 asserted by, and could only have been advanced and 21 asserted by, one counter party. 22 MR JUSTICE HILDYARD: Yes. 23 MR DICKER: It was, "I own these assets". It wasn't a case 24 in which a general issue had arisen as a question of law 25 which could affect multiple claimants against the</p> <p style="text-align: center;">Page 43</p>
<p>1 questions. 2 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. 5 MR JUSTICE HILDYARD: Yes. 6 MR DICKER: It's paragraph 11. I think it's quoted in my 7 learned friend's skeleton. It's worth just picking it 8 up. 9 MR JUSTICE HILDYARD: Yes. 10 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 due 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: The general rule being -- 23 MR DICKER: Cost follow the event. 24 MR JUSTICE HILDYARD: Costs follow the event, yes. 25 MR DICKER: So this was a case in which Administrators have</p> <p style="text-align: center;">Page 42</p>	<p>1 estate. So there was no way in which one could have 2 regarded the issue in RASCALS as in any way akin to 3 a test case in the normal sense. That is, we submit, 4 an important distinction with the present case. 5 MR JUSTICE HILDYARD: Mr Zacaroli will put me right on this, 6 but it does seem to me that the reason it's not 7 a RASCALS case is because, as you put it, there are here 8 multiple claimants with, as it were, cross interests. 9 It is, for example, as to part of its interest, in 10 Wentworth's interest that you should succeed. 11 MR DICKER: My Lord, and I was focusing, as it were -- 12 your Lordship's absolutely right, but there is obviously 13 a prior point, which I'm not sure your Lordship has. 14 But the points advanced by the SCG, to the extent 15 actually they do constitute claims by the SCG as opposed 16 to simply arguments they're making because they've been 17 identified as needing to be made, my Lord, those points 18 do not solely affect the SCG, not merely in the sense 19 there are others with interests to the obverse, but 20 rather because there are other creditors who, if it is 21 a good point, would no doubt wish to make a similar 22 claim. 23 MR JUSTICE HILDYARD: Well, that is so, but it is, to my way 24 of thinking, possibly wrong. To my way of thinking, 25 your strongest point may be that you were in part</p> <p style="text-align: center;">Page 44</p>

<p>1 litigating this, arguing, on a matter which, in respect 2 of some of their interests, Wentworth were breast high 3 with you and wanting you to win, if you like. 4 MR DICKER: So far as their own interests as creditors are 5 concerned, if one ignores, as it were, their collateral 6 interest as holders of subordinated debt -- 7 MR JUSTICE HILDYARD: Yes. 8 MR DICKER: -- which obviously motivated their stance and 9 their willingness to oppose, absolutely. In that sense, 10 looked at through the genuine interests of the general 11 body of creditors, the points we were arguing were as 12 much in their interests as us, even, one might say, more 13 so given the amount they had at stake. 14 MR JUSTICE HILDYARD: Exactly, and it's that, really, which 15 distinguishes this most clearly from RASCALS. 16 MR DICKER: Well, my Lord, I entirely accept it's one 17 important distinction. 18 MR JUSTICE HILDYARD: Yes. 19 MR DICKER: But another perhaps secondary point is simply 20 and obviously it's not just Wentworth who are in that 21 position. 22 MR JUSTICE HILDYARD: No, I understand that, but Wentworth 23 are the most arresting example of the point. 24 MR DICKER: Your Lordship's absolutely right about that. 25 MR JUSTICE HILDYARD: That, as it seems to me, is what has</p> <p style="text-align: center;">Page 45</p>	<p>1 MR JUSTICE HILDYARD: Yes, which is what Mr Justice David 2 Richards provided. 3 MR DICKER: That is what Mr Justice David Richards provided 4 and we would be entirely content with an order on 5 similar terms. 6 My Lord, unless I can help your Lordship at this 7 stage, those are my submissions in relation to costs. 8 MR JUSTICE HILDYARD: No, I am grateful. 9 Yes. 10 Application for costs by MR FOXTON 11 MR FOXTON: Your Lordship will know that we have sought 12 throughout to avoid repetition -- 13 MR JUSTICE HILDYARD: Yes. 14 MR FOXTON: -- of anything that Mr Dicker says, and I hope 15 I am not going to fall foul of that at this last stage. 16 We adopt all of the submissions that he has made. 17 It is, we say, a striking feature here that the 18 resolution of the issues before the court impact and, 19 had they gone the other way, would have benefited a far 20 larger group than those on whom Mr Zacaroli is seeking 21 to visit the bill, not least, in certain capacities, his 22 own clients. 23 Now, I suppose it would have been possible to sit on 24 the sidelines and write to the joint Administrators when 25 they were assembling their list of relevant points not</p> <p style="text-align: center;">Page 47</p>
<p>1 caused me the difficulty. It is necessarily this matter 2 had to be issue based because people had differing 3 interests on the very same issue and rather than them 4 weighing up whether it was slightly better than for them 5 to be on one side than the other, the Administrators 6 arranged matters so that the issue could be fought out 7 between two contestants who gave very valuable service. 8 I don't think anyone is going to say other than the 9 matter was extremely well argued and was of benefit to 10 everyone. That's not the issue. It's simply a question 11 of characterisation. 12 MR DICKER: In their capacity as creditors, we were arguing 13 points just as much in their interests as we were in 14 ours. 15 MR JUSTICE HILDYARD: Yes. 16 MR DICKER: It doesn't change because they have a collateral 17 interest. 18 MR JUSTICE HILDYARD: But I think that's the point that's 19 most bothered me, at any rate. Mr Zacaroli will show me 20 why I'm not to be in the least bit anxious about that. 21 MR DICKER: My Lord, I was just going to make one further 22 and small point. My learned friend Mr Bayfield said 23 that if the SCG are entitled to their costs, they should 24 be limited to the costs of instructing one firm of 25 solicitors.</p> <p style="text-align: center;">Page 46</p>	<p>1 yet being argued and said, "Why don't you argue these 2 points?" But that would have been, we submit, 3 unsatisfactory. If one looks at the joint 4 Administrators' position now, although one of 5 neutrality, I think it's not unfair to describe it as 6 one of benevolent neutrality so far as the claims on 7 behalf of the SCG and GSI for costs from the estate are 8 concerned. 9 Your Lordship will know that GSI became involved to 10 reflect the perspective of financial institutions. As 11 the hearing proceeded, we also reflected the perspective 12 of an original holder of Lehman's debt who had raised 13 equity in the aftermath of the Lehman's collapse. We 14 respectfully suggest that that last context was quite 15 close to one of the most difficult issues argued before 16 your Lordship. 17 Now, your Lordship may have seen that Mr Zacaroli in 18 his submissions refers in support of Wentworth's 19 position to leading counsel for GSI having hit the nail 20 on the head at the joinder hearing. From the very fact 21 that the nail was hit at all, your Lordship will know 22 that wasn't a reference to me, but to my predecessor, 23 Mr Howard. What is said is that, well, if you look at 24 Mr Howard's submissions, it recognised that a pound up 25 for Wentworth was a pound down for others, at least in</p> <p style="text-align: center;">Page 48</p>

<p>1 Wentworth's capacity as the holder of subordinated debt. 2 My Lord, if it matters, what was argued at that 3 hearing, the joint Administrators' position was to 4 support GSI becoming involved, but because, and I quote, 5 this was not "standard adversarial commercial litigation 6 but proceedings as to how to distribute assets being 7 administered by the court or by the court's officers", 8 terms were placed on GSI's participation that were 9 adhered to in terms of not running any additional points 10 that were already being run by the SCG. 11 My Lord, the final matter I would mention is this: 12 your Lordship knows we only participated on issues 11 to 13 14 and not on, for example, the assignment issues or the 14 German master agreement. If one gets into the fate of 15 subissues, there were aspects of the issues in which we 16 did participate that Wentworth did not succeed upon. It 17 did not succeed upon its lowest achievable rate 18 submission under issue 11. Certain of the issues under 19 issue 12 were common ground. GSI's case on issue 13 was 20 accepted at paragraph 189 of the judgment as to the date 21 at which you reached the relevant determination and part 22 of GSI's case on issue 14 was accepted at paragraph 106. 23 So our primary position is, of course, that put 24 forward by Mr Dicker for SCG. These were issues which 25 interested a much larger group and it was for the</p> <p style="text-align: center;">Page 49</p>	<p>1 SCG's submissions were concerned, they should be 2 entitled to such costs as they would have incurred had 3 they used one firm of solicitors, thereby eliminating 4 any duplication that may otherwise have taken place. 5 MR JUSTICE HILDYARD: Thank you very much. While I have you 6 on your feet, both of you can address this, and you may 7 not feel able or it right to reply categorically, but in 8 trust litigation at any rate, the rule on appeal might 9 be completely different. 10 MR DICKER: My Lord, and for our part, we would accept there 11 may well be differences. 12 MR JUSTICE HILDYARD: You are then ostensibly striving for 13 victory rather than clarification? 14 MR DICKER: Yes, and the point was made by Wentworth, again 15 I think before Mr Justice David Richards, one of the 16 points relied on at that stage was "Look, you can tell 17 it's hostile litigation because the SCG seek to appeal 18 some of the issues," and as I recall the response was 19 the same. The Administrators have obtained the guidance 20 that they want. To that extent, that point can no 21 longer be made, we accept, in the event of an appeal. 22 MR JUSTICE HILDYARD: Yes. 23 MR FOXTON: My Lord, we would share that analysis, the 24 answer has been given. If you're not happy with the 25 answer, I can see that different considerations might</p> <p style="text-align: center;">Page 51</p>
<p>1 benefit of all that particular creditors with relevant 2 perspectives argued them, but if one needs to go beyond 3 that, one has to look at the particular issues we have 4 participated in and success or failure in the subissues 5 that were raised under those issues. 6 My Lord, unless I can assist further. 7 MR JUSTICE HILDYARD: No, thank you very much. Do you 8 contest the application of the one solicitor rule which 9 was imposed on the previous occasion? 10 MR FOXTON: My Lord, as a one solicitor rule for the SCG, 11 no. I apprehend that your Lordship is asking me for the 12 purpose of -- 13 MR JUSTICE HILDYARD: How did it work, I think I'm getting 14 at. Did the rule really say that there should be only 15 one set of costs on one side of the argument? 16 MR DICKER: My Lord -- 17 MR FOXTON: We weren't there on the previous occasion. 18 MR DICKER: The issue arose because I am instructed by three 19 members of the SCG. 20 MR JUSTICE HILDYARD: I see. So it was only within your 21 camp that the rule applied? 22 MR DICKER: Yes. 23 MR JUSTICE HILDYARD: There was no one set of costs for one 24 side of the argument and one set for another? 25 MR DICKER: No, and the idea was simply that so far as the</p> <p style="text-align: center;">Page 50</p>	<p>1 arise. 2 MR JUSTICE HILDYARD: And it's no answer to as it were say, 3 "Right then, well let's put all the costs in the 4 appeal?" 5 MR FOXTON: My Lord, one has the fact that not all the 6 issues raised before your Lordship will be raised on 7 appeal in any event. 8 MR JUSTICE HILDYARD: No, but some percentage. Do you see 9 what I mean? The rationale of that would be you having 10 decided that you will, assuming, having got permission, 11 that you pursue it, the true tenor of your argument as 12 to whether it was for victory or clarification will 13 come -- is now clear on appeal, and may the better man 14 win, do you see what I mean? 15 MR FOXTON: I do, my Lord. There are difficulties, we would 16 submit, with the happenstance of whether an appeal takes 17 place influencing the costs burden at first instance, 18 not least that if your Lordship had refused permission 19 to appeal it would fall to you to make the costs order 20 now without knowing there would be an appeal or not. 21 MR JUSTICE HILDYARD: So it would be wrong? 22 MR FOXTON: It would be wrong in principle. We would say 23 your Lordship should look at the exercise before you and 24 make the appropriate costs order for that exercise, 25 regardless of whether there is an appeal and on what</p> <p style="text-align: center;">Page 52</p>

<p>1 issues.</p> <p>2 MR JUSTICE HILDYARD: So although we have taken them in that</p> <p>3 order, actually the proper order is to determine the</p> <p>4 costs and then to determine whether there should be</p> <p>5 an appeal from an entire result?</p> <p>6 MR FOXTON: I think in terms of the logical order, that may</p> <p>7 well be right.</p> <p>8 MR JUSTICE HILDYARD: Yes. Okay. How are the transcribers?</p> <p>9 Do you want a rest?</p> <p>10 THE SHORTHAND WRITER: Yes, please.</p> <p>11 MR JUSTICE HILDYARD: Five minutes.</p> <p>12 (3.26 pm)</p> <p>13 (A short break)</p> <p>14 (3.32 pm)</p> <p>15 Submissions by MR ZACAROLI</p> <p>16 MR ZACAROLI: My Lord, may I begin by making a preliminary</p> <p>17 point that insofar as my learned friends paint this as</p> <p>18 an extension of Waterfall IIA and IIB and the same order</p> <p>19 that should apply in relation to costs because it is in</p> <p>20 essence part of the same overall application, then they</p> <p>21 are wrong to do for a number of reasons.</p> <p>22 Mr Justice David Richards made it absolutely clear that</p> <p>23 he was saying nothing about the costs consequences of</p> <p>24 part C when giving judgment on parts A and B.</p> <p>25 Secondly, each application for costs has to be</p> <p style="text-align: center;">Page 53</p>	<p>1 raise questions of fact or not, but we would have had</p> <p>2 a very different argument about issue 10 if it had been</p> <p>3 stuck with parts A and B, because it is fundamentally</p> <p>4 different to everything else in part A and B.</p> <p>5 To come to that point, part A was fundamentally</p> <p>6 a question of construction of the statutory scheme.</p> <p>7 There were lots of add on issues that one might say</p> <p>8 might have stretched that point this way or the other,</p> <p>9 but the fundamental aspect of part A was the</p> <p>10 construction of the statutory scheme.</p> <p>11 The fundamental point about part B was that it was</p> <p>12 an application by the Administrators for directions in</p> <p>13 relation to their own conduct in the administration.</p> <p>14 That is, agreements they had entered into as</p> <p>15 Administrators with various parties. True, it raised</p> <p>16 questions of construction. It also raised questions of</p> <p>17 propriety in terms of ex parte James, whether they</p> <p>18 should be enforced, but that fundamentally involves the</p> <p>19 conduct of the administration by the Administrators.</p> <p>20 The other point to make about part B is our case on</p> <p>21 costs on parts A and B together was there should be no</p> <p>22 order for costs because we won in effect part A, lost</p> <p>23 part B. We were not interested in actually arguing</p> <p>24 particularly what part B was about, it was part A that</p> <p>25 mattered mostly, because that was where we had won. So</p> <p style="text-align: center;">Page 55</p>
<p>1 looked at on its merits, and we don't say for example</p> <p>2 that my Lord should make the same order here was as made</p> <p>3 in Rascals because it was made in Rascals. One gets</p> <p>4 very little assistance by applying general principles to</p> <p>5 the facts of other cases.</p> <p>6 Finally, the fact that part C is --</p> <p>7 MR JUSTICE HILDYARD: So I'm on my own?</p> <p>8 MR ZACAROLI: Yes.</p> <p>9 MR JUSTICE HILDYARD: But presumably informed by the other</p> <p>10 cases?</p> <p>11 MR ZACAROLI: Informed by the guidance from the cases,</p> <p>12 exactly, yes. But we don't say, as I say, that because</p> <p>13 Mr Justice Briggs found in the way did he in Rascals, it</p> <p>14 must follow.</p> <p>15 MR JUSTICE HILDYARD: No.</p> <p>16 MR ZACAROLI: Therefore it is not, we say, particularly</p> <p>17 fruitful to ask what the differences on the facts are</p> <p>18 between us and Rascals, although I will come to that in</p> <p>19 a moment if I may, there are answers to that. The fact</p> <p>20 that part C is part of a longer list of questions and</p> <p>21 that it's true that we did argue at one stage that issue</p> <p>22 10 could be decided in some other order with part A,</p> <p>23 that's completely irrelevant. Obviously we were not</p> <p>24 thinking at the time about the costs consequences of any</p> <p>25 of this, it was simply a question of which issues might</p> <p style="text-align: center;">Page 54</p>	<p>1 whatever the order on part B, we would have ended up</p> <p>2 picking up the tab, whether we paid costs on it, and</p> <p>3 therefore no order as to costs overall, or whether costs</p> <p>4 came out of the estate. Because of the view we take</p> <p>5 about our economic interest, either way, it was coming</p> <p>6 out of our pocket.</p> <p>7 So far as the law is concerned, we set out the</p> <p>8 general principles which were reviewed and restated by</p> <p>9 Mr Justice Briggs in the Rascals case. I can see my</p> <p>10 Lord's read that in some detail, I won't take you over</p> <p>11 that again, the relevant parts are in our skeleton as</p> <p>12 well.</p> <p>13 One other authority just worth looking at is the</p> <p>14 Westdock(?) case in the Court of Appeal. The reason</p> <p>15 I take to you this, my Lord, is for a passage which</p> <p>16 explains why it is sometimes appropriate to make a costs</p> <p>17 order out of the fund in favour of someone who is</p> <p>18 a representative of others, for that reason alone.</p> <p>19 Westdock actually appears twice, it's the same judgment,</p> <p>20 but in two different reports. I am looking at it in 2.1</p> <p>21 of the bundle, which is the BCC report.</p> <p>22 MR JUSTICE HILDYARD: Yes.</p> <p>23 MR ZACAROLI: The passage is on page 197. On the right hand</p> <p>24 column, just after halfway down, there is a sentence</p> <p>25 that begins "However", does my Lord have that? Just</p> <p style="text-align: center;">Page 56</p>

<p>1 below halfway, "However, there are many cases" in the 2 middle of the line. 197, right hand column. 3 MR JUSTICE HILDYARD: Yes. 4 MR ZACAROLI: Just below -- 5 MR JUSTICE HILDYARD: Yes, I have it. "In my judgment, the 6 proper approach?" 7 MR ZACAROLI: The next "however", sorry. Ten lines below. 8 MR JUSTICE HILDYARD: "However, there are many cases"? 9 MR ZACAROLI: Yes. Could my Lord just read from that to the 10 end of the second paragraph over the page, that's the 11 middle of the left hand column on the next page. 12 MR JUSTICE HILDYARD: Yes. (Pause) 13 Yes. 14 MR ZACAROLI: The point being sometimes in a formal 15 representative case you need to pay -- allow that party 16 funds out of the estate because no-one else has the 17 funds to argue it. Clearly not the case here, we're 18 arguing with very substantial parties arguing in their 19 own interests who could clearly afford to pay the costs. 20 My Lord, the overall question then is one of 21 substance. As a matter of substance, is the dispute 22 that my Lord was dealing with commercial hostile 23 litigation, or is it in substance an application for 24 directions essential to the operation of the statutory 25 scheme for the benefit of all the creditors of the</p> <p style="text-align: center;">Page 57</p>	<p>1 The second point we make is that these are claims 2 hostile to the interests of the estate, the LBIE estate. 3 The essence of it is that the SCG and GSI wish to assert 4 contractual claims to particularly high rates of 5 interest. My Lord's timing point is exactly right, with 6 respect, the fact that there have been no proofs yet, or 7 whatever it is you put in to claim statutory interest, 8 is irrelevant, we know that they are asserting the right 9 to make claims for high rates of interest. 10 If you turn that around, why was it necessary for 11 this application to be made at all? The only answer is 12 because claims to high rates of interest were asserted 13 by creditors, primarily the SCG. We have identified two 14 paragraphs in Mr Lomas's ninth witness statement that 15 make good that point. Has my Lord had a chance to look 16 at it or should I take you to it? 17 MR JUSTICE HILDYARD: Could you take me to it, I am so 18 sorry. 19 MR ZACAROLI: Bundle 2, tab 1A. At paragraph 44 on page 14 20 of the bundle, there is a heading, "Interest under 21 master agreements". This was a witness statement 22 relating to the whole of the Waterfall II application, 23 so there are various other aspects dealt with. At 24 paragraph 44 he begins to deal with interest under 25 master agreements, identifies what the issues are, and</p> <p style="text-align: center;">Page 59</p>
<p>1 administration? We say it's the former. 2 In our skeleton, we had identified seven points. If 3 I can just develop some of those in the order they there 4 appear. The first point is that these are claims -- 5 this is paragraph 10 of our skeleton -- the first point 6 is these are claims made under pre-administration 7 contracts that have nothing to do with any part of the 8 statutory scheme for insolvency. Exactly the same 9 claims could have been brought before LBIE's insolvency 10 as had been brought after. 11 Looking at both of the rationales referred to in the 12 Rascals case, there is no question of these proceedings 13 arising because of any fault on the part of LBIE, which 14 is one of the rationales for costs out of the fund, and 15 there is no question of construction of the statutory 16 scheme or the proper operation of the statutory scheme. 17 Nor can it be said that it is in the interests of 18 creditors as a whole that the issues be determined, save 19 in the sense that there is hostile piece of litigation 20 between some creditors asserting a high rate of interest 21 and everybody else with an interest in the estate who 22 would rather minimise those claims, that's always the 23 case when someone asserts a high claim against 24 an estate. But that's the only sense in which everyone 25 benefits from the answer to be these questions.</p> <p style="text-align: center;">Page 58</p>	<p>1 then at paragraph 47 on page 16, if my Lord could read 2 paragraph 47 and then paragraph 51. (Pause) 3 MR JUSTICE HILDYARD: Yes. 47 and 51? 4 MR ZACAROLI: Yes, indeed. The reason we are here is 5 because some creditors, primarily the SCG, who focussed 6 on this in particular, wanted to assert these sorts of 7 claims. 8 I put that deliberately as the issue arises between 9 the creditors asserting these claims, the SCG and GSI, 10 and the LBIE estate. Those are actually the two sides 11 of this coin. The reason Wentworth is here is because 12 Wentworth has recognised the economic reality that, as 13 holder of a subdebt and owner of the shares in LBIE, 14 it's in our interests to ensure that high claims are 15 rejected where it's proper to do so, because the surplus 16 after payment of such claims vests in us. We don't know 17 the precise numbers yet, it's true, but we have regarded 18 our economic interests as being aligned with those of 19 the shareholders, because we believe the surplus will 20 come to us. Turn that around, every pound that is paid 21 out to a creditor and interest over 8 per cent we regard 22 as potentially coming out of our pocket. That's the 23 economic reality as to why Wentworth is here. 24 But to answer my Lord's concern that Rascals is 25 different because there you didn't have this</p> <p style="text-align: center;">Page 60</p>

<p>1 cross-holding issue, that's with respect just to 2 misconstrue who this debate is actually between, it is 3 between creditors seeking to assert claims on the one 4 hand and the LBIE estate on the other. Wentworth is one 5 entity, it's a joint venture, but it's one entity for 6 these purpose. The fact that it also has ISDA claims 7 itself, and therefore if the SCG were to succeed, it may 8 be possible, we don't know, it may be possible for 9 Wentworth, some of those claims to be able to assert 10 interest based on the costs of equity or whatever else 11 the test turns out to be which are above 8 per cent, we 12 don't know because that process hasn't been gone 13 through, but that's irrelevant, with respect, because 14 the dispute is between them and the estate, we represent 15 the estate for this purpose in these proceedings, 16 because we have the economic interest to do so. 17 My Lord, that links to the next point, third in our 18 list in the skeleton. It's irrelevant that the SCG 19 holds very substantial claims and irrelevant also that 20 others hold ISDA agreements who might be able to take 21 advantage of a ruling in the SCG's favour. This is 22 where it's important to keep in mind two separate 23 points. The first is, as my learned friend put it, it's 24 unfair that the SCG should bear the costs in this case 25 because there will be other creditors in the same</p> <p style="text-align: center;">Page 61</p>	<p>1 proceedings, if the SCG lost that that case there is no 2 possible basis upon which it could say, "No, I don't 3 want to pay the costs of having lost." It makes no 4 difference, we say, merely because either its claim is 5 very large or there are a number of creditors in the 6 same position as the SCG who could have made the same 7 point. 8 One point the SCG make is that the questions the 9 court were being asked were in the way of general 10 guidance, not fact specific. We say that's true, but so 11 what? In essence these were preliminary issues, and 12 that's the way it was put at one of the earlier 13 directions hearings. These were preliminary issues that 14 would arise or may arise in a number of different 15 factual scenarios, but the mere fact something is being 16 argued as a preliminary issue doesn't take away from it 17 its fundamental nature as a piece of hostile litigation. 18 The fourth and fifth points in our skeleton I will 19 take together. The fourth point is that it is 20 irrelevant the surplus can't be distributed without the 21 issues being resolved, and the fifth one is the 22 Administrators' repeated mantra that they needed the 23 answers to these questions. In each case the 24 fundamental question is why, and the answer to that 25 question is it's not because the answers affected all</p> <p style="text-align: center;">Page 63</p>
<p>1 position as it who would have also succeeded, or 2 benefitted, from its success. 3 The two different things to keep in mind are first 4 of all costs out of the fund, because in relation to 5 that justify it. The second is a particular party who 6 runs a case asserts a claim which, if it were 7 successful, would happen to benefit others with similar 8 claims. That doesn't justify costs out of the fund. It 9 might do in an extreme case where otherwise the point 10 couldn't be argued by anyone, because no-one had the 11 funds to do so, the Westdock point, but that isn't our 12 case. In circumstances where the party running the 13 point can run it because it has the funds to do so, if 14 it thought that it was unfair that it alone was bearing 15 the costs burden, it is always open to it to go to 16 others who have similar claims to say, "Let's share the 17 costs here". The fact that Wentworth wouldn't play ball 18 is irrelevant, because as I explained Wentworth views 19 its economic position as being completely different. 20 My Lord, testing the point about there being 21 multiple claims in this way: if the SCG was alone in 22 saying, "We want to assert a rate of interest at 15 23 per cent based upon a particular construction of the 24 ISDA master agreement" and the Administrators had said, 25 "No, we disagree," there's an issue, there are court</p> <p style="text-align: center;">Page 62</p>	<p>1 the creditors and the Administrators needed to know the 2 answer to enable them to distribute the estate in 3 accordance with the statutory scheme, the answer is that 4 the claims were so large that until they were answered, 5 the Administrators couldn't safely distribute what was 6 there. That is never a reason to change the general 7 rule for costs which would otherwise apply. The mere 8 fact someone or a group of people assert a claim so 9 enormous that it holds up distribution is absolutely no 10 reason to depart from the usual costs order. 11 I will pass over our sixth point, it doesn't seem to 12 be being pursued. 13 The seventh point we make is that there is no doubt 14 that the SCG and GSI are acting in their own commercial 15 interests. Of course we don't say that that is a reason 16 where, if it was otherwise proper to order costs out of 17 the estate because of the nature of the proceedings, 18 that you should then not do so merely because the 19 representative party had the same interests as everyone 20 in the class, that could never be right, because you 21 have to have the same interests as the class to be 22 a representative. That's not our point. Our point is 23 in asking the question of what is the essential nature 24 of these proceedings, it is of great help to the court 25 to appreciate that these are claims being asserted by</p> <p style="text-align: center;">Page 64</p>

<p>1 people, entities, in whose commercial interests it is it 2 to maximise those claims. 3 Linked to that, the SCG say that someone else would 4 have had to have been here to argue these points if they 5 weren't. We say with respect to that it's simply not 6 so. This isn't an application like Waterfall IIA, where 7 the Administrators, there being an issue over how the 8 statutory scheme works, need an answer before they can 9 do anything. This is very different. It as not for the 10 Administrators to go out and look for or invite or argue 11 about whether claims could be made when no claims are 12 being asserted, it's for people who want to claim a high 13 rate of interest to make that assertion. If they don't, 14 the Administrators, as my Lord put in argument, can 15 perfectly well say, "We'll pay you 8 per cent because 16 that's what you're entitled to, if you want more it's 17 for you to do the running." So had the SCG not been 18 here, then it would have been up to somebody else, if 19 they wanted to do so, to come to court and argue the 20 point, knowing that in so doing they faced a costs risk. 21 If it wasn't the SCG, it was somebody else who would 22 face that costs risk. Everyone who wants to run a case 23 like that needs to consider whether it is worth the 24 costs risk of doing so. 25 Now so far as GSI is concerned, everything we have</p> <p style="text-align: center;">Page 65</p>	<p>1 excuse for departing from the usual costs order. 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? 8 MR ZACAROLI: For what, I'm sorry? 9 MR JUSTICE HILDYARD: For a more amorphous benefit, that is 10 to say for the benefit of the Administrators in dealing 11 not so much with SCG but some others who might come out 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 15 here, and that may justify if anything a small 16 departure -- but at the margins it's true the 17 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, 22 as it were, that simply wouldn't have happened, would 23 it? Each side would have put its case. For someone to 24 turn up and say, "Look, not in your case, but in some 25 other case I have in mind, can you just tell me what you</p> <p style="text-align: center;">Page 67</p>
<p>1 said applies with equal force to them, but we say there 2 is greater force in relation to GSI again, because it's 3 clear from the evidence that they adduced at the point 4 of joinder that their interest in these proceedings is 5 not limited to the fact that they have one ISDA master 6 agreement with LBIE of a substantial amount, I think 7 it's 100 million or so, but they also have many master 8 agreements in the market with counterparties, and they 9 relied on that fact to demonstrate they had a wider 10 interest in these proceedings than just their claim in 11 the estate. In other words, part of their purpose in 12 being here is so that for their general benefit in the 13 market they can get an answer which will be helpful to 14 them. As we say in the skeleton, it would be absurd if 15 the costs of failing to establish that right were then 16 levied on the creditors of LBIE. 17 The SCG say that they have cooperated throughout by 18 advocating a range of positions that were arguable, that 19 they cooperated in narrowing the issues. Again, my 20 Lord, the answer to this is so what? All the arguments 21 that they ran were designed to increase their prospects 22 of getting a high rate of interest. The fact that they 23 cooperated, as we did, in narrowing issues is no 24 different than you would expect in grown up commercial 25 litigation with sensible parties. It doesn't offer any</p> <p style="text-align: center;">Page 66</p>	<p>1 would argue?" That's a rather sort of different kettle 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 8 right, amorphously, in a sense that these are points 9 that are still uncertain, given the way that you have 10 asserted your claim. 11 MR JUSTICE HILDYARD: I took them to be raised for two 12 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 17 the potential position of others who are generally 18 interested in the result. 19 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</p> <p style="text-align: center;">Page 68</p>

<p>1 some independent party altogether, it's very hard to 2 draw that line here because we don't have the evidence 3 on that. So I would say it doesn't actually make any 4 difference, and ultimately these are at the margins 5 anyway, when you're looking at the substance of this, 6 the substance was that SCG and GSI were arguing for 7 a construction of the master agreement which would give 8 rise to very substantial claims for interest.</p> <p>9 MR JUSTICE HILDYARD: They are and they're not. They are in 10 the sense that they were details rather than at the 11 heart of things, and they were testing the result in 12 more minute terms. They're not in the sense that the 13 fact that they're asked, and everyone engages in the 14 business of thinking them up and then answering them 15 might shed some light on the true characteristic or 16 nature of the process, do you see what I mean?</p> <p>17 MR ZACAROLI: I see what my Lord 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</p> <p style="text-align: center;">Page 69</p>	<p>1 question, because if my Lord thinks it's otherwise right 2 to make an order at this stage of costs out of the 3 estate, the rationale for why you don't get the same 4 order in the Court of Appeal is based on different 5 reasoning.</p> <p>6 MR JUSTICE HILDYARD: It's no longer guidance, it's actually 7 striving for a win.</p> <p>8 MR ZACAROLI: Yes.</p> <p>9 MR JUSTICE HILDYARD: Yes. Do you go so far as to say that 10 unless the matter goes to a question in active issue 11 between the Administrators and the party or parties 12 concerned by reference to the conduct of the 13 administration or the Administrators' own conduct, or 14 relates to the statutory scheme and its application, and 15 not to some contract towards the scheme, that the 16 parties having enough money to pay for themselves, must 17 follow the usual rule of litigation?</p> <p>18 MR ZACAROLI: My Lord, it would be very dangerous to lay 19 down any absolute rule. This is a question of 20 discretion at the end of the day, and it's for my Lord 21 to decide what in substance this case is about. So I'm 22 not sure I would go so far as to say it would never be 23 appropriate, but the fact that the dispute is between 24 those with preexisting contracts seeking to assert 25 a particularly high claim against the estate is highly</p> <p style="text-align: center;">Page 71</p>
<p>1 claims of when they are later asserted by SCG and GSI, 2 and others, maybe, but nevertheless by them.</p> <p>3 My Lord, the last three points to make, I am not 4 suggesting there was improper duplication between GSI 5 and SCG, so that needn't concern my Lord.</p> <p>6 To deal with GSI's point that there were some points 7 that it won on, it's true, there were some points that 8 it won on, but in terms of costs and time and effort 9 spent on them, they are de minimis. If my Lord 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 dispute.</p> <p>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.</p> <p>19 My Lord, unless I can assist further, those are my 20 submissions.</p> <p>21 MR JUSTICE HILDYARD: And likewise the issue on appeal, you 22 say well at that point a fortiori it's then a stand up 23 battle and the winner is likely to --</p> <p>24 MR ZACAROLI: Yes, I don't dissent from my learned friend's 25 analysis of that, which is on appeal it's a different</p> <p style="text-align: center;">Page 70</p>	<p>1 relevant in determining what that substance is. I'm not 2 sure there is a case which goes so far as to allow costs 3 out of the fund in circumstances like this, where what 4 in essence is happening is an assertion of a claim 5 against the estate by a creditor arising out of 6 a pre-administration contract, but I wouldn't go so far 7 as to say it could never be appropriate.</p> <p>8 MR JUSTICE HILDYARD: Outside the context of simply 9 inability to fund, or some disproportion between the 10 amount at stake and the likely cost of pursuing the 11 point.</p> <p>12 MR ZACAROLI: Yes, it would be a rare case, I would have to 13 say, but I would be reluctant to lay down a general 14 proposition, a general rule in a case that is an area 15 which is essentially based on my Lord's discretion, 16 looking at this matter as a matter of substance.</p> <p>17 MR JUSTICE HILDYARD: So the sort of Buxton principles or 18 the Rascals principles are guidance, but there's no hard 19 and fast characterisation?</p> <p>20 MR ZACAROLI: It's been said on more than one occasion 21 against me that the Buxton principles are not closed, 22 and that must be right, but I can't think of an example, 23 it's not really for me to do so, but I can't think of 24 an example now of a case which would be within the 25 framework of costs out of the fund where there's hostile</p> <p style="text-align: center;">Page 72</p>

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

1 MR DICKER: My Lord, to some extent yes, but just going
2 through a couple of those points, my learned friend
3 relied on Westdock. Can I just take your Lordship to
4 it, because this is relevant to the point of the SCG as
5 one out of a number. It's at tab 2 of the bundle. Can
6 I just start by showing your Lordship paragraph 4 of the
7 headnote, what was held. Paragraph 4 says:
8 "This was hostile litigation between two ascertained
9 ...(Reading to the words)... classes of claimants, nor
10 any need for representation orders. Liquidators were
11 defending the interests of creditors."
12 Picking that point up, if your Lordship then goes on
13 to pages 197 and 198. 198, column 1, if my Lord reads
14 the paragraph after the paragraph my learned friend
15 asked your Lordship to stop at. It's the one in the
16 middle column starting:
17 "If that is the right approach, apart from one very
18 special factor in this case which ...(Reading to the
19 words)... in this case. The reason is I accept
20 Mr Moss's submission that this is in effect hostile
21 litigation between two ascertained claimants ...(Reading
22 to the words)... nor any need for any representation
23 order. It is in a sense a mere accident that the point
24 arises for decision under ...(Reading to the words)...
25 or in inter-pleader proceedings."

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1 Not the case here. There was repeated reference to
2 the respondent being quasi representatives for a reason.
3 That was in essence the role that the SCG were
4 fulfilling in part C just as much as in part A and part
5 B.
6 MR JUSTICE HILDYARD: I confess I have not read, other than
7 the bits in Westdock which you have each individually
8 taken me to, but this was an insolvent liquidation, was
9 it, where the liquidators were in a difficulty?
10 MR DICKER: It was a summons taken out by the company's
11 receiver. If your Lordship goes to 192.
12 MR JUSTICE HILDYARD: It was a receivership, right. But
13 they didn't have the money and the question was whether
14 they were going to have to pay themselves, and the
15 resolution was they wouldn't because the ECGD had taken
16 inconsistent stances?
17 MR DICKER: Yes, but the point I rely on at 197 is the
18 emphasis that this was essentially an issue between on
19 the one hand the liquidators and on the other hand the
20 ECGD, in other words the ECGD couldn't stand there and
21 say, "There are 99 other ECGDs behind us," it simply
22 wasn't that sort of case.
23 My Lord, the third point is this: we spent time
24 arguing points that we didn't even originally identify.
25 I have explained to your Lordship the way in which the

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1 questions were originally identified, essentially as
2 a cooperative process to try and identify what was
3 reasonably arguable, but as your Lordship knows, various
4 additional points were identified by the Administrators
5 in their position papers. Nine were identified shortly
6 before the part C hearing started. Those issues
7 identified by the Administrators we argued because we
8 thought it sensible to do so, as respondents joined in
9 a quasi representative capacity, to ensure the
10 Administrators would get the guidance they needed.
11 MR JUSTICE HILDYARD: Can I get into that, Mr Dicker, with
12 any precision? You may be right and it may be my
13 unworthy thought, perhaps that was the time to determine
14 as between you, before the result was known, that the
15 costs of all of you should have come out of the fund.
16 I don't know. But can I with any precision measure what
17 you might have said on your own but would not have said
18 if only on your own? It seems a difficult thing.
19 MR DICKER: What your Lordship can take into account is, the
20 essential question is, is this hostile litigation or
21 not? There are two ways in which can you can
22 conceivably look at it. There is the way my learned
23 friend seeks to characterise it as essentially the SCG
24 asserting claims against the Administrators, which the
25 Administrators then are effectively forced to have

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1 determined. We say that just doesn't reflect the
2 process, and one indication of that is the way the
3 Administrators identified issues which they then
4 expected us as respondents to argue.
5 MR JUSTICE HILDYARD: In ballpark terms, how much is
6 a successful appeal worth to you?
7 MR DICKER: I'm not even sure I know precisely what the
8 number is.
9 MR JUSTICE HILDYARD: The point I'm getting at is you're not
10 financially strapped or reluctant litigators. It's
11 happenstance, isn't it, that your litigation has taken
12 part under this umbrella, but the amounts involved mean
13 that if I said, "Well, they were only just being
14 friendly," people would look rather askance, wouldn't
15 they?
16 MR DICKER: My Lord, no, in my submission, not in the way
17 the application was brought, developed and pursued.
18 It's undoubtedly true that the SCG is interested in the
19 outcome. Nothing surprising in that. That's no doubt
20 why it was sensible to appoint them as respondent, as
21 quasi representatives. The precise amount, my Lord, I'm
22 not in a position to help you.
23 MR JUSTICE HILDYARD: No, I agree that it's impossible to
24 measure because you don't know quite how -- but I just
25 wondered whether it was tens or hundreds of millions.

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<p>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 6 German master agreement by only two out of three of the 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.</p> <p>14 My Lord, it does lead on to my fourth point, which 15 is this: my learned friend said if the SCG hadn't been 16 here, someone else would have had to have been here and 17 whoever had been here no doubt would have been 18 sufficiently funded, and if they weren't, it could have 19 gone round every other creditor and had a whip round. 20 My Lord, your Lordship ought to bear in mind that's not 21 necessarily so. Even if the SCG had advanced a claim, 22 what the Administrators could conceivably have done, 23 it's true, is rejected that claim if they had thought 24 there was nothing in it, and if they had thought the 25 appropriate course was to put the creditor to the</p> <p style="text-align: center;">Page 81</p>	<p>1 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 7 finished, and that it wasn't considered necessary to 8 make the application in advance.</p> <p>9 MR JUSTICE HILDYARD: I'm not sure that I follow that point 10 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 19 colour of your eyes, put in a proof or not," a proof 20 would have come in?</p> <p>21 MR DICKER: Yes, but that's not the way the Administrators 22 wanted to deal with things.</p> <p>23 MR JUSTICE HILDYARD: It's rude to ask it, but so what?</p> <p>24 MR DICKER: Because if this issue had arisen earlier, it 25 would have been open to creditors to say, "If the terms</p> <p style="text-align: center;">Page 83</p>
<p>1 position of deciding, "Do I want to bring proceedings to 2 seek to establish my claim or not, conscious no doubt 3 that if I do bring proceedings and lose, I may have to 4 pay the costs of them." That is not the approach the 5 Administrators took. Their approach was, these issues 6 having been raised, they need guidance to have them 7 determined, so they know how to distribute the assets in 8 accordance with their statutory duties.</p> <p>9 If that's right, if the SCG had said, "We're not 10 prepared to participate unless our costs are covered," 11 it may well that be other creditors would have taken the 12 same position. What then? The consequence would not 13 have been that the issues would effectively have 14 evaporated, they would have been there on the table, the 15 Administrators' position was they needed to have them 16 determined, otherwise they didn't know how to distribute 17 the surplus. If they distributed them ignoring such 18 claims, and they subsequently turned out to be good 19 ones, they would be in breach of statutory duty.</p> <p>20 So my learned friend is wrong. If this issue had 21 been of sufficient concern, it would have been open to 22 creditors to have said, "We're simply not prepared to 23 participate without some assurance in relation to our 24 costs." My learned friend said no application for 25 a prospective order was made in relation to costs.</p> <p style="text-align: center;">Page 82</p>	<p>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 11 ignored such claims and distributed the surplus 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 15 not they were pursued by litigation or not, it was 16 sufficient that a creditor said "Our view is" --</p> <p>17 MR JUSTICE HILDYARD: Is that not always the case in respect 18 of a large and not obviously hopeless case?</p> <p>19 MR DICKER: Well, my Lord, like my learned friend, I'm not 20 sure I would be prepared to say always the case.</p> <p>21 MR JUSTICE HILDYARD: No.</p> <p>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 24 capable of being brought by one creditor, then obviously 25 one of the features of this case no longer applies.</p> <p style="text-align: center;">Page 84</p>

<p>1 MR JUSTICE HILDYARD: Yes, no I understand that.</p> <p>2 MR DICKER: If one was talking about a claim which was</p> <p>3 identified and advanced by the creditor, then again one</p> <p>4 may have a slightly different situation. This is not</p> <p>5 that. If one goes back to category 1,</p> <p>6 Mr Justice Kekewich's judgment in Buxton, and reads it,</p> <p>7 this actually falls squarely within his description of</p> <p>8 category 1.</p> <p>9 MR JUSTICE HILDYARD: Does it?</p> <p>10 MR DICKER: Yes. My Lord, 414, the first full paragraph.</p> <p>11 "A large proportion of the summons ...(Reading to</p> <p>12 the words)... the applicants are trustees of a will or</p> <p>13 settlement."</p> <p>14 MR JUSTICE HILDYARD: Isn't that the point? This is nothing</p> <p>15 to do with the instrument of trust?</p> <p>16 MR DICKER: No, my Lord, that distinction is then drawn in</p> <p>17 the next few lines.</p> <p>18 "There are two things that the application may seek.</p> <p>19 One, they ask the court to construe the instrument of</p> <p>20 trust for their guidance, or else ask to have some</p> <p>21 question determined which has arisen in the</p> <p>22 administration of the trusts."</p> <p>23 MR JUSTICE HILDYARD: Yes, administration of the trusts, not</p> <p>24 the construction of agreements outside the trust.</p> <p>25 MR DICKER: Again, it depends how you look at it. From the</p> <p style="text-align: center;">Page 85</p>	<p>1 further.</p> <p>2 MR JUSTICE HILDYARD: Thank you. Yes.</p> <p>3 Further submissions by MR FOXTON</p> <p>4 MR FOXTON: My Lord, three very brief points. Mr Zacaroli</p> <p>5 made the point that GSI are wide users of the ISDA form</p> <p>6 and mentioned that matter when seeking to join in.</p> <p>7 Undoubtedly we are. I suspect we are not alone in that,</p> <p>8 even amongst those who sit before your Lordship in this</p> <p>9 court, but it was quite clear from the position papers</p> <p>10 that there were financial institutions other than GSI</p> <p>11 who had faced particular costs of funding issues post</p> <p>12 the credit crunch, and so the perspective that GSI</p> <p>13 represented was not purely a personal or individual</p> <p>14 perspective but a wider market perspective.</p> <p>15 My Lord, secondly, there was some suggestion that it</p> <p>16 would be possible to distinguish points raised by the</p> <p>17 Joint Administrators from those which were the subject</p> <p>18 of the adversarial litigation. That's simply not how</p> <p>19 the process worked here. It was the JAs who identified</p> <p>20 certain issues, they invited comments, the parties put</p> <p>21 forward position papers, and then they came in at the</p> <p>22 end to sweep up anything they felt had not been drawn</p> <p>23 out sufficiently by the early material. So the</p> <p>24 distinction that Mr Zacaroli is asking you to draw is</p> <p>25 not one that actually arises on the process adopted.</p> <p style="text-align: center;">Page 87</p>
<p>1 Administrators' perspective, this is a question which</p> <p>2 has arisen in relation to the administration of a trust.</p> <p>3 MR JUSTICE HILDYARD: That's an awfully broad category,</p> <p>4 because then it would always be within part 1 if it</p> <p>5 arose within the course of administration.</p> <p>6 MR DICKER: Which is why when it comes to later cases, they</p> <p>7 say that it's not always easy to distinguish between</p> <p>8 category 1 cases and category 3 or 4 cases.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR DICKER: But if one simply reads category 1, this is the</p> <p>11 Administrators coming to court, asking for directions in</p> <p>12 relation to a question of how they apply their statutory</p> <p>13 duty.</p> <p>14 MR JUSTICE HILDYARD: It may simply illustrate the</p> <p>15 difficulties of analogy with the trust, but I take your</p> <p>16 point, yes.</p> <p>17 MR DICKER: My Lord, my fifth and final point. If</p> <p>18 your Lordship were perchance against me on submissions</p> <p>19 I have so far made, what we do say is it would be</p> <p>20 particularly unfair for the SCG to have to pay</p> <p>21 Wentworth's costs. So if there is an intermediate</p> <p>22 position, in our submission it would be that the order</p> <p>23 should be each side should bear their own.</p> <p>24 MR JUSTICE HILDYARD: Right.</p> <p>25 MR DICKER: My Lord, unless I can help your Lordship</p> <p style="text-align: center;">Page 86</p>	<p>1 MR JUSTICE HILDYARD: I think Mr Dicker was wary -- and he</p> <p>2 may well have been right -- of inviting the court to</p> <p>3 opine on the amorphous or hypothetical issues, but there</p> <p>4 we are, yes. I ventured where experience may say I</p> <p>5 should not have, I don't know.</p> <p>6 MR FOXTON: My Lord, I certainly will not be braver than</p> <p>7 Mr Dicker was in that respect.</p> <p>8 The final point is this: GSI joined the party</p> <p>9 relatively late, by which stage a certain process and</p> <p>10 a certain way of proceeding had been set in stone. When</p> <p>11 the Joint Administrators indicated they would not oppose</p> <p>12 our joining, it was on particular terms as to how we</p> <p>13 should participate, and those terms were justified by</p> <p>14 Mr Trower on the basis that this was not standard</p> <p>15 adversarial commercial litigation, but proceedings as to</p> <p>16 how to distribute assets being administered by the</p> <p>17 court, and it would, we respectfully say, be a little</p> <p>18 unfair to turn around now and say the costs orders</p> <p>19 should be made on the basis that this was standard</p> <p>20 adversarial commercial litigation.</p> <p>21 MR JUSTICE HILDYARD: That was Mr Trower who said that?</p> <p>22 MR FOXTON: It was.</p> <p>23 MR JUSTICE HILDYARD: I don't think Mr Bayfield is saying</p> <p>24 that much different.</p> <p>25 MR FOXTON: No. My Lord, as I characterised earlier, we</p> <p style="text-align: center;">Page 88</p>

<p>1 understand their position to be one of benevolent 2 neutrality, and we are grateful for it. 3 MR JUSTICE HILDYARD: Yes. 4 Well, with a heavy heart, because it will mean 5 delay, I feel I must reserve this. I find it 6 a difficult matter, and also I am wary of not 7 distinguishing properly between the particular facts of 8 this case and any general propositions given the effect 9 that they may have, including in subsequent applications 10 in the Lehmans administration. So I want to think, 11 I want to have a chance to review the transcript and to 12 go through the authorities, albeit limited, which you 13 have cited to me. I apologise for that, I should like 14 to give an ex tempore judgment, but I just feel it would 15 be not the wisest course. 16 MR DICKER: My Lord, can I with some hesitation just raise 17 one matter. Hesitation simply because I am not sure 18 whether it has been discussed, or if it has, where the 19 parties have got to, and it simply concerns the timing 20 for skeleton arguments for the Court of Appeal. In the 21 usual way we will obviously be under quite a tight 22 timetable at a time of the year which is properly not 23 ideal, even though again in the usual way we would have 24 any appeal in the Court of Appeal probably some way off. 25 My Lord, I think I am right, and I will be corrected if</p> <p style="text-align: center;">Page 89</p>	<p>1 might conceivably be, but for the very reasons that 2 there was a division between 2A and B and C, it may well 3 be that there would not be much overall saving of time 4 for the Court of Appeal, I just do not know. 5 MR DICKER: I suspect little or none, and there may come 6 a stage at which the plethora of issues in front of the 7 Court of Appeal might make it more difficult for the 8 members of the Court of Appeal rather than easier. 9 MR JUSTICE HILDYARD: Yes. Has anyone made any inquiries of 10 the Civil Appeals Office as to how long you may have to 11 wait before you get on? I think without expedition it 12 is a year or so, is it not? 13 MR BAYFIELD: My Lord, that would certainly be our 14 expectation. The one silver lining perhaps to that is 15 that if supplemental issue 1A were to be decided in 16 York's favour, albeit the Administrators have taken the 17 contrary view, then that may dispose of part C in its 18 entirety, so there is some benefit in there being a gap 19 between the two. 20 MR JUSTICE HILDYARD: Right, so I should be thinking what I 21 should pray for. 22 I would prefer to complete the order other than 23 costs and simply have it on the stocks that -- I cannot 24 see why that is impossible, but you think it might be, 25 Mr Dicker?</p> <p style="text-align: center;">Page 91</p>
<p>1 I am wrong, that because your Lordship is reserving 2 judgment in relation to cost, your Lordship's order will 3 not be drawn up until your Lordship has delivered 4 judgment in relation to that, and if that is so, then 5 timing for skeleton arguments may run from there. I am 6 not raising this necessarily -- 7 MR JUSTICE HILDYARD: No, it is a good point. 8 MR DICKER: -- to have the issue decided now, but I just 9 wondered whether or not some thought should be given to 10 it by the parties and if necessary permission to 11 approach your Lordship, if necessary. 12 MR JUSTICE HILDYARD: I take it that there is no question of 13 the Court of Appeal finding time this April to extend 14 the hearing to 2C? 15 MR DICKER: I think the answer to that must be right, 16 without wishing to prejudge the views of the Court of 17 Appeal, they have so far as I understand requested 18 confirmation that any additional issues can be fitted 19 within the existing time frame. If that question is 20 asked in relation to part C then it seems to me only one 21 possible answer could be given, there is no prospect of 22 that whatsoever. 23 MR JUSTICE HILDYARD: Within the present timetable? 24 MR DICKER: Correct. 25 MR JUSTICE HILDYARD: But if they had a bit more time, it</p> <p style="text-align: center;">Page 90</p>	<p>1 MR DICKER: No, I am not suggesting that is necessarily 2 impossible. Your Lordship could formally adjourn the 3 issue in relation to costs and provide a separate order. 4 Thereafter my only concern in that situation would then 5 be that we would then be under a certain amount of 6 pressure if the normal timetable for production of 7 skeleton arguments had to be adhered to. 8 MR JUSTICE HILDYARD: The reason I ask that, and subject to 9 how strong the view taken on the other side is, in 10 a sense I would prefer to get the order done in order 11 that you should get in the queue and make some provision 12 for extension of time for skeletons if that is available 13 to me, than simply stop the clock and thereby stop you 14 making anything other than an enquiry as opposed to 15 an application before the Court of Appeal. That is my 16 thinking, just to put it on the table. 17 MR BAYFIELD: I think from the Administrators' perspective, 18 we would agree entirely with what my Lord has just said. 19 That would be the best course. 20 MR JUSTICE HILDYARD: So supposing, I cannot promise you 21 when I will get the judgment out, I am in the midst of 22 a very long judgment at the minute. I may be able to 23 get you a decision with reasons to come later, in which 24 case I will tell you what it is, but I just want you to 25 have the best chance of getting on early rather than</p> <p style="text-align: center;">Page 92</p>

<p>1 late, given that there are lots and lots of things which 2 may have to move forward eventually right up the tree, 3 I do not know. 4 MR DICKER: My Lord, my learned friend Mr Phillips draws my 5 attention to a book and a passage in the book with which 6 I should probably be more familiar. CPR 52, the 7 note 52.4.2, time starts to run on the date when the 8 judge below makes the decision. 9 MR JUSTICE HILDYARD: Ah, right, so it is running away. 10 MR DICKER: So it is probably running away already. 11 MR JUSTICE HILDYARD: You are quite right, I was being 12 silly. Because when, in fact, I took an application for 13 permission to appeal as before me when I formally handed 14 down judgment for that very reason. 15 MR DICKER: My Lord, the issue that may then arise is simply 16 whether or not the parties, whether or not one party 17 thinks it appropriate to apply for, or the parties are 18 happy to agree to an extension of time for any of the 19 relevant steps. Now that is obviously not a matter 20 before your Lordship presently. I mention it only 21 because as I say it seems to me it might be an issue, 22 but perhaps if we could come back to your Lordship if 23 necessary in relation to that, that may be the most 24 efficient way of dealing with it. 25 MR JUSTICE HILDYARD: Does anyone have any instant views on</p> <p style="text-align: center;">Page 93</p>	<p>1 MR JUSTICE HILDYARD: Yes, I do have that, but am I then 2 not -- 3 MR ZACAROLI: Those with access to this book, which -- 4 MR JUSTICE HILDYARD: Do you want another one? I have read 5 a similar book in the past. 6 MR ZACAROLI: No doubt so, my Lord. I do not think my Lord 7 has, but they can correct that if necessary. 8 MR JUSTICE HILDYARD: What I have in mind, I think that 9 running through it, I have read the declarations, I 10 should say that I assume that they mirror the questions 11 that were asked and you are satisfied that all have been 12 answered and you are agreed as to what the form of the 13 answer should take, that is point 1. 14 MR BAYFIELD: My Lord, that is right. 15 MR JUSTICE HILDYARD: So far as the order therefore is 16 concerned, it should deal with the declarations, the 17 permission to appeal given, and I would have thought 18 with regard to costs it can refer to the fact that the 19 issue of costs has been made subject to reserved 20 judgment. You will therefore have the starting gun 21 fired and it will then be a matter between you as to 22 what, subject to my ultimate say-so, the timing for the 23 appellant's notice should be. I think that it is 24 probably -- I mean you are all highly responsible and 25 experienced, try and work out a time which is</p> <p style="text-align: center;">Page 95</p>
<p>1 this? 2 MR ZACAROLI: My Lord, time has been running as my Lord 3 says, and it is extended until today because of the 4 order my Lord previously made. The issue I think so far 5 as my Lord is concerned is first of all to get the thing 6 running, I think we would endorse that as an approach, 7 so whatever order is made today ought to recognise that 8 there now being a permission to appeal, they should get 9 on with it so we can get our slot in the queue. The 10 second thing is, my Lord, I think has power to extend 11 time for appellant's notice, which is the critical 12 document. 13 MR JUSTICE HILDYARD: Yes. 14 MR ZACAROLI: Skeletons will be a matter for the Court of 15 Appeal I think as they are in the other matters going on 16 before the Court of Appeal. 17 MR JUSTICE HILDYARD: Is it not normally you have to put in 18 your skeleton argument within a certain time of the 19 appellant's notice now? 20 MR ZACAROLI: That is correct, but then the Court of Appeal 21 have been asked in relation to the supplemental issues 22 to extend that time and have done so. 23 MR JUSTICE HILDYARD: Do I have jurisdiction to extend time? 24 MR ZACAROLI: I know my Lord has the jurisdiction to extend 25 time for the appellant's notice.</p> <p style="text-align: center;">Page 94</p>	<p>1 appropriate and let me know what it is. If I can give 2 you the answer on costs, I shall, even if with judgment 3 later. Alternatively I shall adopt the cautious route 4 of simply keeping you waiting, but at least you will 5 have the ticket in to the further process, and the Court 6 of Appeal office will be able to see that they need not 7 say that the bundles are incomplete, because the only 8 matter that is presently subject to appeal will all have 9 been crystallised. Does that make sense? 10 MR BAYFIELD: My Lord, it does, yes. 11 MR JUSTICE HILDYARD: So shall I leave it to you to discuss 12 between you at this difficult time of year what 13 a sensible timing is, and then I think it is fair to 14 say, as Mr Justice David Richards said, the judgment was 15 actually handed down some three months ago now, and 16 therefore I would not expect a very long extension of 17 time, but if given the holiday season some extension of 18 time is agreeable, well and good, but it will be fairly 19 limited, I think. 20 MR FOXTON: My Lord, this may be overtechnical, but I wonder 21 if the answer is that one of us, and I am happy to do 22 it, makes the application for your Lordship to extend 23 time under 52.4.2A and your Lordship then adjourns the 24 determination of that application until we have all had 25 a chance to speak to each other, and come back to</p> <p style="text-align: center;">Page 96</p>

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.

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1 Thank you very much indeed for your help.
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