Monday, 12 December 2016

(2.00 pm)

MR JUSTICE HILDYARD: Yes.

Housekeeping

MR BAYFIELD: My Lord, good afternoon. This hearing has been convened to deal with matters consequential upon my Lord's judgment on Waterfall II part C. The representation today mirrors that with a couple of casualties that appeared before your Lordship at the trial, save that Mr Rivett is here in place of Mr Smith and Mr Amey for York. My Lord, the matters for this afternoon fall into three categories: firstly the declarations to be made to reflect your Lordship's judgment; secondly applications for permission to appeal; and thirdly costs.

Turning to the declarations, as your Lordship knows, the parties have agreed the form of the declarations and they are encapsulated in the draft order behind tab 3 of the bundle. They are of course subject to my Lord, but they are agreed as between the parties and we hope they properly reflect your Lordship's judgment.

The second aspect for today is permission to appeal. My Lord has three applications for permission. The Senior Creditor Group seeks permission to appeal against your Lordship's decisions on issues 10, 11, 12, 19, 20

and 21, and the corresponding declarations are listed in the SCG's skeleton argument at paragraph 23. GSI seeks permission to appeal against your Lordship's decision on issue 11 and certain consequential aspects of issue 12, and the corresponding declarations that they appeal against are listed in paragraph 4 of their skeleton argument. Finally, York seeks permission to appeal against your Lordship's decision on supplemental issue 1A, which results in the declaration at paragraph 27 of the draft order.

The Administrators don't intend to make any submissions on those applications, which are primarily a matter for my Lord, and they make no applications for permission to appeal themselves. My Lord, without prejudging whether or not permission to appeal should be granted on supplemental appeal 1A, I thought it might be helpful to let my Lord know where we have got to in terms of listing the appeals of the part A and B judgments.

MR JUSTICE HILDYARD: April.

MR BAYFIELD: My Lord, that's right. It's 3 or 4 April as the start date with a time estimate of six days. We now have directions from the Court of Appeal that the supplemental issues which were determined by Lord Justice David Richards will come on to be heard at

the same time as the part A and B appeals. It is unclear whether the time estimate is being extended to accommodate those appeals or not, but as matters stand those appeals will come on in April as well.

The Court of Appeal has also been told that all of the parties to the Waterfall proceedings consider that if your Lordship grants permission to appeal against supplemental issue 1A, it will be convenient for that to come on at the same time as the A and B appeals and the other supplementary issue appeals in April. In relation to that, there is now a timetable directed by Lord Justice Lewison in terms of skeleton arguments for the supplemental issues, with the appellant's skeletons due by 21 January and the respondents' by 28 March, which, if my Lord does give permission to appeal on supplemental issue 1A, would seem to work for that issue as well.

So there is every chance that if my Lord grants permission to appeal on 1A, that that can catch up with the other supplementary issues and the A and B appeals, which of course would be convenient, given that as my Lord reflected in the judgment at paragraph 454, supplemental issue 1A derives from issue 4 which was part of part A of the proceedings.

My Lord, the final matter is costs. As to that, it

is common ground that the Administrators' costs of part C and supplemental issue 1A should be paid as an expense of the administration. (Inaudible) of supplemental issue 1A should be paid as an expense. The only area of dispute in relation to costs is as to the respondents' costs of part C. Wentworth seeks cost orders against the SCG and GSI and the SCG and GSI resist those orders and invite my Lord to make an order that their costs be paid as an expense of the administration.

The Administrators have made a number of observations about costs in our skeleton argument, but subject to that and one qualification, we take a neutral position. The one qualification is this: if and to the extent that my Lord orders that the SCG's costs be paid as an expense of the administration, then we seek that they should be restricted to the costs that would have been incurred had the SCG returned one firm of solicitors only, and that reflects the costs order that was made in the SCG's favour on parts A and B of Waterfall II in circumstances in which they have retained more than one firm of solicitors.

My Lord, there is only one further matter I just wanted to mention before I sit down, and that is that Mr Rivett has asked me to ask my Lord whether if it is convenient to my Lord that he and his team can be

released once York's costs on supplemental issue 1A and once the question of permission to appeal against the 1A declaration has been determined, in circumstances in which the most meaty issue for this afternoon is the costs issue between on the one hand Wentworth and on the other the SCG and GSI, in relation to which York has no interest.

Unless I can assist my Lord further, that is all I wanted to say for the Administrators for the time being.

MR JUSTICE HILDYARD: Yes. And consistently with that last request, is it best that I hear from Mr Rivett and see where we get to on that, and then turn to the others?

MR BAYFIELD: My Lord, that would certainly make sense from his perspective.

MR JUSTICE HILDYARD: Yes. Is anyone wildly opposed to that?

Mr Rivett.

Application for permission to appeal by MR RIVETT

MR RIVETT: I am grateful, my Lord. My Lord, as my learned friend Mr Bayfield has pointed out, there are only two issues which are consequential and relevant so far as York is concerned. The first is on the question of permission to appeal and the second on costs. I don't know if your Lordship has a preference of the order in

which I deal with those.

MR JUSTICE HILDYARD: You take your course.

MR RIVETT: Then perhaps it's best to deal with permission first. As foreshadowed in Mr Amey's skeleton argument, York seeks permission to appeal declaration 27 of the draft order, which relates to your Lordship's finding on supplemental issue 1A. In my submission, the threshold test for permission to appeal is easily met on that issue. First, it is an entirely novel point of law on which there is no previous authority, and on which an appellate court might, with respect, reasonably take a different view from your Lordship.

Secondly, as your Lordship noted at paragraph 454 of your judgment, it is also a point which derives from an issue dealt with by Mr Justice David Richards, as he then was. It was issue 4 on part A. Mr Justice David Richards gave permission to appeal on that issue, and in my submission it would be entirely artificial for that issue to be the subject of an appeal, but not this one.

Thirdly, in reaching your conclusion, your Lordship drew support from Mr Justice David Richards's determination of issues 6 to 8. Issue 7, which concerns contingent debts, is itself the subject of an appeal by Wentworth, also due to be heard in April, and so for the same reason as my submission on issue 4, it would be

artificial for that issue to be the subject of an appeal but not this one.

My Lord, in those circumstances I submit it is appropriate for permission to appeal to be granted on this issue also. Your Lordship has of course heard detailed argument on the underlying issue, and it is not the purpose of this application to reargue any of those points, and so I don't propose to do so. In those circumstances, my Lord, I ask for permission.

MR JUSTICE HILDYARD: Yes. Do you want to deal with costs?

Application for costs by MR RIVETT

MR RIVETT: Yes, my Lord. As my learned friend Mr Bayfield pointed out, it is common ground, I believe, that our costs should be paid as an expense of the administration. Such an order is consistent with the order made by Lord Justice David Richards on the other supplemental issues. It is also consistent with the costs orders he made on parts A and B. There, looking at the matter overall, he considered -- I am quoting here from the transcript, and unless your Lordship requires me to do so I shan't take you to it -- there Mr Justice David Richards said:

"Having looked at the matter overall, this case will naturally fit into the category of a case where the Administrators have been required to come to court in

order to resolve issues of law which need to be determined before they can proceed further with the administration of the estate."

Your Lordship is doubtless familiar with the authorities referred to in footnote 1 of Mr Amey's skeleton argument, which established in such circumstances, the costs of all parties are usually paid as expenses of the administration. I expect your Lordship will be taken to those authorities in greater detail later, but certainly adopting those authorities, Mr Justice David Richards did order that the costs be paid as expenses of the administration. Admittedly, the judge there made it clear that his decision on costs did not necessarily carry over into part C. However, of course, supplemental issue 1A was of course, consequential to the judgment on part A and so the judge's approach to costs on part A, in my submission, applies equally here. His Lordship also limited York's recovery to 30 per cent of its costs in that trial, but that was on the basis that its submissions, I understand, were duplicative of those made by another party. As your Lordship is aware, that isn't the position here and no such limitation is, therefore, appropriate. Mr Amey's set out further reasons as to why York's costs should be paid as

an expense of the administration in his skeleton and unless it would assist, I don't propose to repeat those submissions.
MR JUSTICE HILDYARD: Can you show me where Mr Justice David Richards, as he then was, dealt with the question of duplication and the consequent reduction to 30 per cent?
MR RIVETT: Yes, my Lord, it is in the transcript of the consequential matters at that hearing. I don't actually have the underlying hearing bundles, but I understand --
MR JUSTICE HILDYARD: No, it was supplied to me, with many thanks, separately. It is 9 October, is it?
MR RIVETT: That's correct, yes, and the discussion begins on page 100.
MR JUSTICE HILDYARD: Yes.
MR RIVETT: And then Mr Justice David Richards' ruling begins on page 109 at line 10, finishing at line 20 on page 110. It is a relatively short section, so perhaps your Lordship would like to read it to yourself.
(Pause)
MR JUSTICE HILDYARD: I see, so do I have it right, the judge thought that there had been a measure of duplication, he wanted to give York its costs out of the estate in respect of issues 7 and 8, and as a matter of rough and ready justice, he thought 30 per cent of the overall costs would fit the ticket?

MR RIVETT: That's my understanding, yes, my Lord, and that's obviously different from the present application, the present issue, when York dealt with the issues itself. That's reflected in your own judgment at paragraph 469. My Lord, I should also point out that Lord Justice David Richards, as he had become by then, made no such deduction in respect of York's costs in respect of the supplemental issues, the other supplementary issues.
MR JUSTICE HILDYARD: And those who were concerned are also seeking their costs out of the estate and no-one has put forward any objection to this proposal; is that right?
MR RIVETT: That's my understanding, yes, my Lord.
MR JUSTICE HILDYARD: So you say this may -- and this is a matter for later in the afternoon, whether it does -- may differ from the other matters in (Inaudible) proceedings determined or those part of the proceedings determined by Mr Justice David Richards, but also that the matters in issue were matters arising in respect of the statutory scheme?
MR RIVETT: That's correct, my Lord.
MR JUSTICE HILDYARD: Yes. Well, in deference to your request to be released and to quell your enthusiasm for the rest of the afternoon, does anyone have any other points that they feel I should take into account on

this, if they participated in supplemental issue 1A? No?

Ruling on appeal

MR JUSTICE HILDYARD: Well I propose to give permission to appeal. It seems to me that as the matter was developed, its connections with matters previously before Mr Justice David Richards became clear.
I consider it appropriate, therefore, on both grounds, that is to say, that it is an issue upon which different minds could reasonably differ and therefore there must be a realistic prospect on appeal. And second, that on the alternative ground, it seems to me that there are other good reasons for the matter coming on to be determined with the other matters to which it was, in a sense, appended, and I take into account in that context, the fact that the Court of Appeal appears to have indicated that they would be able to accommodate this matter as part of their dealing with 2A and B, and therefore it seems that it would be most efficient to enable that course as soon as possible. I assume that, therefore, the directions, which I have not seen but which Mr Bayfield alluded to, given prophetically by Lord Justice Lewison, will enable the matter then to be dealt with; is that right?
MR RIVETT: I believe there may be an issue over the

appellant's notice, I suspect the appellant's notice which is currently in issue, does not include this point because obviously permission hadn't been granted or sought, and so it may well be that an appellant's notice needs to be filed, but the same directions in respect of skeleton arguments, I assume, could apply.
MR JUSTICE HILDYARD: Yes, I'm afraid I haven't looked at Lord Justice Lewison's --
MR BAYFIELD: My Lord may have slightly overstated what the Court of Appeal has said. What the Court of Appeal has done is made a direction that the other supplemental issues catch up with the A and B appeals. As I said, the parties, on a common ground basis, have suggested to the Court of Appeal that if permission is granted on 1A, that that should catch up too. Because that's, at the moment, a hypothetical, the Court of Appeal hasn't uttered in relation to that, but from the parties' perspective, an additional time estimate of one day was given, for all of the supplementary issues to be determined. We now know that the Court of Appeal is taking the other ones. Nothing has been said by the court in relation to the time estimate in that regard, but I think the reality is, if no extra time is made available, everyone will just have to do their best to ensure that everything is dealt with within the time

allowed, and if supplemental issue 1A is appealed against, the appeal notice will have to be filed in time for it to fit in with the timetable for skeleton arguments, which doesn't appear to give rise to any problem. Because the appellant's skeletons on the other supplementary issues are required by the end of January and in fact, that is a date that falls after the skeleton argument on supplemental issue 1A would have to be filed in the ordinary course. So what I would envisage happening is once the appeal notice has been filed, or perhaps in advance of that, Linklaters writing to the Civil Appeals Office to say that permission to appeal has been granted and to seek confirmation from the Court of Appeal that 1A can be dealt with at the same time as the other supplementary issues, and I would assume, suggesting that the timetable for skeleton arguments that has been set down for the other supplemental issues, should apply equally to 1A.

MR JUSTICE HILDYARD: Thank you, I am so sorry to have misunderstood. I had misunderstood. But is it the view of you all, and in particular York, that within the time which the Civil Appeals Office has permitted, that this matter could be dealt with so far as the parties are concerned, within the same timetable?

MR BAYFIELD: Well, the Court of Appeal has been written to

by Linklaters on 29 November 2016, a letter expressed to have been one that has been agreed with the solicitors to the other parties to the appeals, all of whom are copied in and including Michelmores, who are York's solicitors, saying:

"The parties note also that Mr Justice Hildyard recently gave judgment on an issue closely related to the appeals. A consequential hearing in relation to that judgment is listed to take place before Mr Justice Hildyard on 12 December 2016. In the event that Mr Justice Hildyard were to grant permission to appeal that decision, the parties agree that it would be desirable for such appeal also to be heard at the April hearing which the parties envisage could be achieved without any further extension to the April hearing."

So that is something that was expressed to the Civil Appeals Office on behalf of all of the parties. It would be very disappointing if anyone's position had changed since then and there is certainly no indication that anyone's position has changed.

MR JUSTICE HILDYARD: And that remains so from your point of view, Mr Rivett --

MR RIVETT: It does, my Lord, yes.

MR JUSTICE HILDYARD: -- having taken instructions on it?

MR RIVETT: It does yes, my Lord.

MR JUSTICE HILDYARD: Well, obviously, it will be a matter for the Court of Appeal to direct when it should come on, but if all parties are agreed that within the existing timetable, they will have finished their arguments, then I dare say that will greatly assist the Court of Appeal make a decision accordingly. So far as the appeal notice is concerned, when can you get it in?

MR RIVETT: Six January, if possible, my Lord. Obviously, it comes at a somewhat inconvenient time of year, and so 6 January would be the preferable date.

MR JUSTICE HILDYARD: Is that going to cause any problems to anybody?

MR BAYFIELD: We're content with that, my Lord.

MR JUSTICE HILDYARD: That will give you time for any respondent's notice or whatever it is you may wish to put in?

MR BAYFIELD: That's right, I think it will be for my learned friend to file a skeleton argument, either together with the appeal notice or within 14 days thereafter which as currently stands, will be before the date for the skeletons for the other supplementary issues.

MR JUSTICE HILDYARD: Remind me when they're coming in?

MR BAYFIELD: 31 January.

MR JUSTICE HILDYARD: Is that exchange or is that one round?

MR BAYFIELD: No, no, that's the appellant's skeletons for the respondents in February.

MR JUSTICE HILDYARD: Right.

MR BAYFIELD: So I think it does work.

MR JUSTICE HILDYARD: Yes. And it works without my requiring them to hand over their skeleton argument at the time, of the grounds?

MR BAYFIELD: It does.

MR JUSTICE HILDYARD: Yes.

Well Mr Rivett, having regard to the time of year and given that there's no reason that has been suggested to me for putting you on an accelerated track compared to the rest, I am content that you should have until 6 January for your notice, and that then you must abide, if so directed, by the Court of Appeal, obviously, with the relevant exchange dates for service of your skeleton argument.

MR RIVETT: I am grateful, my Lord.

Ruling on costs

MR JUSTICE HILDYARD: And then on the matter of costs, it seems to me that this may be slightly different in aspect to the other matters of costs which I have to deal with, and that especially as no-one objects and everyone involved was seeking their own costs out of the estate and it refers to a matter as to the statutory

scheme, it is not inappropriate that you should have the costs out of the estate or whatever the magic wording is.
MR BAYFIELD: My Lord, thank you.
MR RIVETT: I am grateful, my Lord.
MR JUSTICE HILDYARD: So you may leave if you can bear to.
MR RIVETT: That is very kind, my Lord.
MR JUSTICE HILDYARD: Yes.
Right, Mr Dicker, is it you next?
MR DICKER: My Lord, it probably is. I also have two applications, costs and permission to appeal. I don't know in which order your Lordship would prefer to hear them.
MR JUSTICE HILDYARD: Well I think the position on permission to appeal is that, broadly speaking, the Administrators are neutral and so I think Mr Zacaroli's skeleton suggests that he didn't know whether or not you would be seeking to appeal, it hasn't been supplemented since, and I sense that there's no active opposition to it, nor any assistance to the court as to any grounds on which it should simply say no. Is that right?
MR ZACAROLI: That's right, my Lord.
MR JUSTICE HILDYARD: Yes.
These issues are tricky, and different minds could reach different conclusions. They are important, and as

regards the ISDA claims, they prospectively involve a great many people, not only those interested in the Lehmans administration, but more generally in the market. Therefore it seems to me that there would be every good reason for giving permission to appeal, in respect of the issues that you have identified, and I give you permission accordingly.
MR DICKER: My Lord, I am grateful to your Lordship. Just so your Lordship knows, I think Mr Foxton, on behalf of Goldman Sachs, identified at least one other declaration, I think in respect of issue 12, that we haven't included on our list.
MR JUSTICE HILDYARD: Oh, I thought you had, right. I'm sure it's right. I just went through --
MR DICKER: I think there were two differences between us so far as issue 11 and 12 were concerned. We included declaration 4, which is the costs of funding does not include costs or financial consequences to the relevant --
MR JUSTICE HILDYARD: Yes, you are right. Form 5. Five, you don't appeal, and neither does he. Four, you appeal and he does not.
MR DICKER: In relation to issue 11, your Lordship is right. We seek permission in respect of declaration 4 and as I understand it, he does not.

MR JUSTICE HILDYARD: And 11 and 12, you do and he does not.
MR DICKER: Yes, and then in relation to issue 12, I think the difference between us is in relation to declaration 15, Goldman Sachs have included this and we haven't. My Lord, if your Lordship's content to give permission to each of us in respect of the ones we do appeal, then obviously it would follow that both declarations will be before the Court of Appeal, and we certainly wouldn't oppose that. My Lord, I think that was the only additional point I needed to make. Obviously, there are other declarations in respect of which we seek permission which Goldman don't, for example, issue 10, declaration 22, in relation to (Inaudible) and your Lordship has observed the three declarations in relation to the German master agreement as well.
MR JUSTICE HILDYARD: Yes. What you're proposing requires me, I think, just to touch base, to see what it is that GSI say are the differences between you.
MR FOXTON: My Lord, in terms of the one addition, which was declaration 15, it just seemed to us that if the debt versus equity issue, if I may so term it, was before the Court of Appeal, we would really be traversing the ground covered by issue 15, when examining what cost of funding might mean. In those circumstances, it was

appropriate that it would be live before the court. It is certainly not the heart of the appeal. We see that as being much more the question about whether cost of funding extends to cost of equity funding, but we took a fairly broad view of what might be consequential declarations following on from that primary issue.
MR JUSTICE HILDYARD: Right. Any others?
MR FOXTON: My Lord, I think that is the only one of ours that is additional. In terms of SCG points where we have not sought permission, we are certainly not resistant to any application on their part, we have simply not yet, ourselves, reached a considered view, beyond those we have identified.
MR JUSTICE HILDYARD: Should I not take you at your word as to what parts of the appeal you wish to be engaged in and give you permission, according to your considered view now?
MR FOXTON: My Lord, I am happy to be taken at my word, because those are the issues, as it were, we think really matter to us, but we are otherwise neutral in terms of the SCG position.
MR JUSTICE HILDYARD: Yes. Does anyone have any submissions to make, especially with regard to 15? Mr Zacaroli in particular, do you?
MR ZACAROLI: My Lord, I don't.

MR JUSTICE HILDYARD: No. Do you think that this will arise, really, in the course of argument, as a matter of fact before the Court of Appeal? Have you been able to estimate that?
MR FOXTON: My Lord, I think it is fair to say it's in there at the moment in the spirit of just in case rather than as being a point which we think will definitely be live, but one can see, when analysing the consequences of a debt or equity analysis of cost of funding, the question about what the cost of equity involves may be live before the court, not least given some of the issues the SCG are raising or weighted average cost of capital and so forth.
MR JUSTICE HILDYARD: Yes. So you think it could be artificial, as it were, to have made a stand on this particular subparagraph?
MR FOXTON: My Lord, I suspect it will be something that will be ground that is covered, whether permission to appeal is given on this particular declaration or not, and that was the spirit in which we sought to include potentially consequential issues from a more generous perspective at this stage.
MR JUSTICE HILDYARD: And does it flow from that that I would not be visiting on the Court of Appeal, in reality, any substantial or material additional time?

MR FOXTON: My Lord, I think it does, and I suspect that this is simply an extremely minor addition to the course of argument that is going to be before the court on the central issue upon which your Lordship very fairly recognised in the judgment, was one which caused you to think carefully about both positions.
MR JUSTICE HILDYARD: Well, Mr Dicker, I take it, Mr Bayfield, the Administrators are, as they have been in the past, neutral in this regard, and they simply leave it to the court, not least because at the trial, they were neutral as well. I think Mr Trower took on the role of being the various day's compère for the proceedings in front of me. Mr Dicker, as far as you are concerned --
MR DICKER: My Lord, we wouldn't oppose Goldman Sachs being given permission to appeal and for our part, we can't envisage it will involve the Court of Appeal having any more work than that which will arise on the appeal in any event.
MR JUSTICE HILDYARD: Well recognising it is my responsibility to try and clear out some matters which aren't severally worthy or appropriate to be appealed, nevertheless, I think in the circumstances, the division would be more artful than necessary and therefore I propose to give permission to appeal to each of you on

the points you wish to appeal, leaving it to the Court of Appeal to determine whether either or both of you should have a go at it, and I think I had best leave it at that, permission to you each.
MR DICKER: My Lord, I am grateful. The second issue, obviously, was costs.
MR JUSTICE HILDYARD: Yes. That is a more difficult matter, as far as I am concerned, and one on which I do need your assistance.

Application for costs by MR DICKER

MR DICKER: Then I will proceed accordingly. My Lord, as your Lordship knows, we seek an order for payment of the SCG's costs out of the estate --
MR JUSTICE HILDYARD: Yes.
MR DICKER: -- and wouldn't oppose a similar order in relation to any of the other respondents --
MR JUSTICE HILDYARD: No.
MR DICKER: -- should they wish to make it. My Lord, before delving into the detail, your Lordship should know the Administrators don't oppose such an order. If they had thought it inappropriate, no doubt they would have said so, and your Lordship has seen what is said in their skeleton argument. My Lord, the arguments before your Lordship are essentially the same arguments as were before Mr Justice David Richards in relation to parts A

and B, and much of the ground that I am going to travel is ground which he had to travel before reaching his decision. We say, essentially, there is no material difference between parts A and B on the one hand and part C on the other.

My Lord, can I start just by emphasising six principal points. The first is that the application was issued by the Administrators to obtain guidance that they considered that they needed. The second is it sought answers to various general questions which the Administrators and the respondents had identified as reflecting arguable positions. The initial questions were identified and formulated by the parties together, and as your Lordship knows, it didn't stop there. The Administrators identified further possible arguments in their position paper, and as your Lordship referred to in the judgment, identified another nine subquestions shortly before the part C hearing started, which they invited the respondents to address and which they did address.

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

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

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

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

points?

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, 16.1, we worked to agree the answer to certain of the issues. The Administrators were (Inaudible) there was ultimately consensus as to the correct approach to be adopted. We made submissions on the remaining issues which, in the light of their own broad position as creditors, were likely to benefit unsecured creditors as a whole. None of the issues concerned solely the members of the SCG. That's true as much of the German law issues as any of the others. The SCG sought to limit their submissions to points of law which were in the interests of unsecured creditors generally rather than sought to rely on facts likely to be of relevance solely to one or more of them. They advanced submissions on particular issues whether one or more of them might have had a lesser interest in such issues, and they limited their submissions to those which were likely to be of general application for creditors. Your Lordship may recall the point that is made in subparagraph 5 there in relation to serious and definitive refusal. The only point that was taken was, essentially, the general one, the effect of the making of the administration order, nothing further. They also responded to the various subissues identified by the

Administrators and the various additional contentions made by them.

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

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

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

Administrators are having to, as it were, interpret the meaning or application of parts of the scheme, if you like, then it is quite so that unless they are bold enough to make the decisions themselves, they will have to go to court and if they go to court, they will need contrary argument for it to make any real sense, and everything flows from that. But in the case of the ISDA forms, there is a basic position under the insolvency rules, and then there is a sort of super claim under the ISDA forms, you either choose to assert them or you don't. If you had decided not to go for more than 8 per cent, the Administrators could have just said "Well okay, you get your 8 per cent and that's it." There's no difficulty under the statutory scheme, is there?

MR DICKER: Well, my Lord, we would say that's not, with respect, the right way of looking at the proceedings. The question of whether or not 8 per cent was a permissible rate, obviously wasn't something that was solely within the control of the SCG. It was also a claim which could have been advanced by other creditors, and the way in which the proceedings developed was the Administrators essentially said there are a number of issues potentially affecting either all creditors or a substantial number of creditors, and

there's a variety of ways in which we can seek to discharge our statutory duties by determining those issues and distributing the surplus. And the way they chose to deal with this was essentially to say to creditors, including the SCG, "What are the points which you think are reasonably arguable?" as well as identifying points which they themselves consider might be raised by a creditor, and then seek to have those determined on the basis that that determination would then hopefully, in practice, if not as a strict matter, determine them for all creditors -- certainly make it very difficult for anyone else to subsequently challenge it. So one way of looking at this, if it's a more helpful analogy, might be akin, essentially, to a test case. Yes, the SCG was content to argue these points, but they weren't arguing them simply because they were asserting them and it was in their interests to do so. Indeed, that's not, in fact, the way matters developed previously. This hasn't sprung from a series of proof of debts claiming 8 per cent which the creditors have asserted and the Administrators have rejected, it's arisen by the parties essentially looking at the ISDA master agreement and trying to work out what claims might be made, and seeking to have those determined.

I entirely accept your Lordship's point that where

one's construing the statute itself, one may say that's a paradigm case in which costs should be paid out of the estate, just as it would be if you're construing the terms of a trust or the terms of a will, but that's not the only situation. It's not the only situation referred to in Buxton and, indeed, it wasn't the situation, if your Lordship will recall, in relation to part B. Part B concerned contracts between the Administrators and creditors. The issue between them was whether or not, as Wentworth said, that was a commercial deal in which creditors had given up compromised claims to interest, damages akin to interest, foreign currency claims, or not.

On one view, and this was a point made by Wentworth to Mr Justice David Richards, that was adversarial litigation, hostile litigation, of a perfectly normal course. There had been a compromise agreement and the creditors were disagreeing with what those with a certain interest in the estate said the effect of that agreement was. That wasn't a reason why the costs of dealing with those issues should not be paid out of the estate. We say there's no real difference in principle between that and the issues arising in relation to part C.

MR JUSTICE HILDYARD: The reason I asked the question --

I do find this puzzling -- is this seems to me a little bit different from A and B and nevertheless different from the RASCALS case. The RASCALS case, as I understand it, centred on a proprietary claim by the claimants which was particular to them and was therefore in the nature of a straightforward adversarial claim. Here, the matters being generated by reference to issues, (a) because that is the fact, (b) because hidden under the issues is the fact that whilst you assert your claims, you are also in another pocket interested in the same answer as, for example, Wentworth had, or Wentworth are interested in the same answers you propose because you have multiple interests. That is as I understand it.

MR DICKER: My Lord, one needs to be quite careful when one talks about assertion of claims. It is a point made by Wentworth in their skeleton on more than one occasion. These issues do not all flow out of one or more proofs of debt.

MR JUSTICE HILDYARD: But that is a timing issue, isn't it? It seems to me for the moment that that is more form than substance. As a point of substance, there is an argument not as to the statutory scheme but as to what additional rights the ISDA forms confer. The considered view of the Administrators, which seems to me

wholly realistic, was that those claims, the super claims, as I have called them, would be asserted. The fact that they may not yet have been asserted in every or any instance by way of proof of debt is neither here nor there.

MR DICKER: Although the function of this part was actually to determine what such claims would actually be asserted.

MR JUSTICE HILDYARD: Yes.

MR DICKER: So in a sense one starts, perhaps slightly unusually but plainly for very sensible reason, to try and identify what arguable positions could be taken by creditors to then try and work out whether or not those positions, if taken, would be valid as a matter of law. Then the Administrators invite proofs, et cetera, no doubt claims, no doubt consistent with your Lordship's judgment, on which they can then proceed. But this has not, in the main, proceeded the other way around.

Just on RASCALS, your Lordship is actually right. Just looking at it, if your Lordship has the judgment.

MR JUSTICE HILDYARD: In RASCALS?

MR DICKER: In RASCALS.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Just looking at paragraph 4 of Mr Justice Briggs' judgment, he says at the start of the

second sentence:
"In favour of what I would call the commercial litigation analysis of the ...(Reading to the words)... each respondent replied that it did."
I have dealt with that point, essentially to say it is not quite how this application arose. This is not a case in which the SCG has asserted each of the claims in a question of the parties identifying arguments which creditors could make.
But my Lord, it's the second point that's also important:
"Secondly, the dispute lies entirely between LBIE and a specific affiliate. In relation to each ...(Reading to the words)... requiring representation."
So this was necessarily hostile litigation in the sense that you had an outsider who was seeking to extract securities which would otherwise be distributed to the general body of creditors in the LBIE estate on the one hand and the Administrators of LBIE on the other seeking to retain those securities. So RASCALS did not involve determination of an issue for convenience on the basis of hearing argument from one creditor, which issue might affect a whole series of creditors.
My Lord, we do say that's an important distinction. I mention one way of looking at this is in the sense as

a test case on the basis that there are however many creditors who may wish to advance similar claims. One way of dealing with that would be to have litigation against some or all of them. Another way, the way the Administrators chose, was to try and identify the arguments which could be made, determine them as a matter of law and then deal with the proofs accordingly.
Now, one point that is made by Wentworth is well, the SCG are creditors and they are interested, therefore, in the outcome of the proceedings. The short answer to that is that does not prevent an order for payment of the costs out of the estate from being appropriate. If your Lordship wanted authority to that effect, there is a paragraph in the Singapore Airlines case --
MR JUSTICE HILDYARD: Yes, you quote this in 17 of your skeleton.
MR DICKER: Yes. My Lord, actually, in our submission, the point is actually nonsense. Of course the SCG are creditors. Who else were you going to join as a respondent to argue these points if it was not a creditor? In fact, you can make the point more strongly. If you were going to have formal representation orders, one of the normal requirements

for a person to be appointed as a representative is that they do have the interest of the class, ie they would have to be a creditor, and as a creditor, would have to have an interest in the UK.
So the mere fact that the SCG have an interest in the outcome is neither here nor there. All that establishes is that they are an appropriate person to be joined as a representative. What matters is they are not just arguing, as it were, their own claim. They are seeking to assist the Administrators, obtain guidance to enable the Administrators to determine not merely their own claim, if made, but any other claims as well on a similar basis.
My Lord, we also say it would actually be, in our submission, extremely unfair if the SCG were not granted their costs out of the estate. That essentially is simply a consequence of the submissions I have so far made. If the purpose of this application was to obtain guidance for the benefit not merely of the SCG but for the benefit of all creditors, then if the SCG has to bear Wentworth's costs, which is what Wentworth seeks, and cannot recover its own costs out of the estate, then essentially this exercise, which has ostensibly been done for the benefit of creditors generally, has in fact been conducted at the SCG's expense. My Lord, we say

that outcome would be unfair.
I mentioned earlier that the various issues are not issues in relation to which solely the SCG are interested. For example, I am instructed even in relation to the German law issues, the SCG holds only about four out of 15 GMA claims. As your Lordship I think mentioned a moment ago, Wentworth is itself one of those creditors. Indeed, they appear to have ISDA claims which dwarf the total claims which the SCG have against LBIE.
The other point in this context is that your Lordship shouldn't view the SCG as an entirely homogeneous group. Necessarily, different members of the SCG have slightly different interests. The German law master agreement is one example of that. Regarding them as essentially collectively equally interested in all of the issues would also not be right.
My Lord, just to address two specific points made by Wentworth, the first, which I think I have already dealt with, is there are various references in the skeleton to the SCG seeking to establish a right against LBIE or asserting a claim that are hostile to the interests of the LBIE estate. I have essentially dealt with this. This is essentially how the application came into existence, A, B or, indeed, part C. The importance, as

I said, of the application, including part C, was to give the Administrators a framework which they could then apply when considering claims made by creditors.

My Lord, the second point is that Wentworth suggest the SCG should have tried to reach an agreement to share costs with other creditors in the same position. That is their skeleton at paragraph 12.3.

My Lord, an identical submission was in fact made by Wentworth to Mr Justice David Richards. It is in their skeleton argument in the bundle at tab 4A, paragraph 95. We make the same response in relation to it. Essentially, the argument is absurd. No doubt a request to Wentworth for a contribution to the SCG's costs for dealing with these issues would have met with a predictable response on their part. The short point is someone needed to be joined as a respondent to deal with these issues. The Administrators identified the SCG. They were happy to do so. They made it plain the basis on which they understood that they were participating.

My Lord, we do finally refer your Lordship to the four points which the Administrators make in their skeleton argument. We are conscious that for obvious reasons with the parties involved, the Administrators weren't ever going to feel able to go further than this,

but your Lordship should note, we say, the points made in paragraph 10 of their skeleton.

This is how they characterised the proceedings. At 10.1 there are two applications made for the purposes of obtaining directions on a range of issues that the Administrators required to have determined, so echoing one of the points I made to your Lordship. Secondly:

"On such an application, it will often be the case that the appropriate costs order is that the costs of all parties should be paid out of the estate."

Just dropping to the bottom of the page:

"There are, of course, cases where although not formally appointed as representative respondents, the parties to an application such as this operate as quasi representative. Here the respondents were not appointed ...(Reading to the words)... in effect on behalf of those classes and the Administrators are content to act on directions given by the court on this basis."

So again, echoing a point I made, the SCG did act as quasi representatives on the part C application.

Thirdly, they consider the roles undertaken by the respondents have been of real assistance to the court.

Fourthly, they note, as I did, that it's obviously true that the respondents have each chosen to take part because of their particular economic interests. My

Lord, as I say, that would necessarily be the position in relation to any respondent appointed to assist the Administrators with a task they were keen to achieve.

So in short, we submit the answer in this case should be the same as it was for part A and B, and as I say, hardly surprising given the application was essentially divided up in the way it was for case management reasons, not because anyone thought there was some fundamental difference in the nature of the various parts of the application.

MR JUSTICE HILDYARD: But there is a substantial difference, isn't there? I fully understand that the actual division between A, B and C was to some extent happenstance, but actually C simply dealt with the ISDA masters and the GMA. It was split off because it wasn't anything to do with the statutory scheme, although it would, of course, affect the statutory distribution.

MR DICKER: Your Lordship is right. Two points: first of all, in that respect, not so different, we say, from part B. Your Lordship won't be aware, but at one stage there was the possibility of oral evidence in part B as well, cross-examination of one of the Administrators.

MR JUSTICE HILDYARD: Right.

MR DICKER: In the end, that didn't prove necessary, but there was the potential for contested evidence necessary

to ascertain the background within which the issues in relation to part B agreements could be decided.

My Lord, the other point is I again entirely accept that a case in which one is construing the statutory scheme, the terms of a trust and the terms of an order is a paradigm case, but the relevant categories are not limited to those cases. Can I just remind your Lordship just of one passage from Buxton, which your Lordship has in the bundle at tab 1.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, it's page 414. Mr Justice Kekewich is dealing with category 1 in the first full paragraph. He says:

"In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate."

So it doesn't limit it. It has never been limited to cases dealing solely with construction of the relevant instrument. It also covers applications to

determine questions which have arisen in the administration of the trusts. We say, with some slight change in language, that exactly covers what is going on in relation to part C.
MR JUSTICE HILDYARD: This is what I am puzzling about. Why is that? Surely all C related to was a question of construction on certain contracts to which the Administrators were not really interested as Administrators and were neutral accordingly. They set up the circus, if you like, and you had a gladiatorial combat. That was, I am sure, the origin of it and I could see that that was the origin, but the true dispute related to a fight, didn't it, for claims adverse to the estate in that sense and no part of the construction of any of the underlying documents which regulated the conduct of the administration?
MR DICKER: My Lord, three points: one, that may be right, but as I say, category one is not limited to cases involving construction. It also covers any questions arising in relation to the administration of the estate.
Two, your Lordship says the Administrators are disinterested. In our respectful submission, they are not. They have a statutory duty to distribute the assets in accordance with the statutory scheme. It happens that they can't do that without resolving these

questions.
My Lord, just picking up a point Mr Justice Briggs made in the RASCALS case, if your Lordship wouldn't mind going back to that at tab 6.
MR JUSTICE HILDYARD: Yes.
MR DICKER: It's paragraph 11. I think it's quoted in my learned friend's skeleton. It's worth just picking it up.
MR JUSTICE HILDYARD: Yes.
MR DICKER: So RASCALS, tab 6, paragraph 11. It's the last five or six lines, when Mr Justice Briggs says "secondly". Does your Lordship have that?
MR JUSTICE HILDYARD: Yes.
MR DICKER: "There is an undoubted public interest in the due administration of the assets of an insolvent's estate ...(Reading to the words)... code [which is the point I have just made] and parties who are joined in proceedings make necessary for that purpose we say that is this case] should not be discouraged by an unthinking recourse to the general rule where in the end the issue is decided --"
MR JUSTICE HILDYARD: The general rule being --
MR DICKER: Cost follow the event.
MR JUSTICE HILDYARD: Costs follow the event, yes.
MR DICKER: So this was a case in which Administrators have

a statutory duty to distribute the assets in accordance with the scheme. They have decided they can't do that without guidance to answer questions affecting not merely the SCG but other creditors. They make an application seeking guidance. They need someone to argue the other side. The SCG agrees to do so on the basis that it is going to be a quasi representative. We say that exactly falls within what Mr Justice Briggs says there. We say, echoing him, such parties who do participate in that way should not be unduly discouraged by a recourse to the general rule where in the end the issue is decided against them.
MR JUSTICE HILDYARD: But one has to remember, doesn't one, that in the RASCALS case itself we went the other way --
MR DICKER: But went the other way because --
MR JUSTICE HILDYARD: -- notwithstanding the umbrella of the administration.
MR DICKER: But that case was different because the issue which was decided was an issue advanced by the claim asserted by, and could only have been advanced and asserted by, one counter party.
MR JUSTICE HILDYARD: Yes.
MR DICKER: It was, "I own these assets". It wasn't a case in which a general issue had arisen as a question of law which could affect multiple claimants against the

estate. So there was no way in which one could have regarded the issue in RASCALS as in any way akin to a test case in the normal sense. That is, we submit, an important distinction with the present case.
MR JUSTICE HILDYARD: Mr Zacaroli will put me right on this, but it does seem to me that the reason it's not a RASCALS case is because, as you put it, there are here multiple claimants with, as it were, cross interests. It is, for example, as to part of its interest, in Wentworth's interest that you should succeed.
MR DICKER: My Lord, and I was focusing, as it were -- your Lordship's absolutely right, but there is obviously a prior point, which I'm not sure your Lordship has. But the points advanced by the SCG, to the extent actually they do constitute claims by the SCG as opposed to simply arguments they're making because they've been identified as needing to be made, my Lord, those points do not solely affect the SCG, not merely in the sense there are others with interests to the obverse, but rather because there are other creditors who, if it is a good point, would no doubt wish to make a similar claim.
MR JUSTICE HILDYARD: Well, that is so, but it is, to my way of thinking, possibly wrong. To my way of thinking, your strongest point may be that you were in part

litigating this, arguing, on a matter which, in respect of some of their interests, Wentworth were breast high with you and wanting you to win, if you like.
MR DICKER: So far as their own interests as creditors are concerned, if one ignores, as it were, their collateral interest as holders of subordinated debt --
MR JUSTICE HILDYARD: Yes.
MR DICKER: -- which obviously motivated their stance and their willingness to oppose, absolutely. In that sense, looked at through the genuine interests of the general body of creditors, the points we were arguing were as much in their interests as us, even, one might say, more so given the amount they had at stake.
MR JUSTICE HILDYARD: Exactly, and it's that, really, which distinguishes this most clearly from RASCALS.
MR DICKER: Well, my Lord, I entirely accept it's one important distinction.
MR JUSTICE HILDYARD: Yes.
MR DICKER: But another perhaps secondary point is simply and obviously it's not just Wentworth who are in that position.
MR JUSTICE HILDYARD: No, I understand that, but Wentworth are the most arresting example of the point.
MR DICKER: Your Lordship's absolutely right about that.
MR JUSTICE HILDYARD: That, as it seems to me, is what has

caused me the difficulty. It is necessarily this matter had to be issue based because people had differing interests on the very same issue and rather than them weighing up whether it was slightly better than for them to be on one side than the other, the Administrators arranged matters so that the issue could be fought out between two contestants who gave very valuable service. I don't think anyone is going to say other than the matter was extremely well argued and was of benefit to everyone. That's not the issue. It's simply a question of characterisation.
MR DICKER: In their capacity as creditors, we were arguing points just as much in their interests as we were in ours.
MR JUSTICE HILDYARD: Yes.
MR DICKER: It doesn't change because they have a collateral interest.
MR JUSTICE HILDYARD: But I think that's the point that's most bothered me, at any rate. Mr Zacaroli will show me why I'm not to be in the least bit anxious about that.
MR DICKER: My Lord, I was just going to make one further and small point. My learned friend Mr Bayfield said that if the SCG are entitled to their costs, they should be limited to the costs of instructing one firm of solicitors.

MR JUSTICE HILDYARD: Yes, which is what Mr Justice David Richards provided.
MR DICKER: That is what Mr Justice David Richards provided and we would be entirely content with an order on similar terms.
My Lord, unless I can help your Lordship at this stage, those are my submissions in relation to costs.
MR JUSTICE HILDYARD: No, I am grateful.
Yes.
Application for costs by MR FOXTON
MR FOXTON: Your Lordship will know that we have sought throughout to avoid repetition --
MR JUSTICE HILDYARD: Yes.
MR FOXTON: -- of anything that Mr Dicker says, and I hope I am not going to fall foul of that at this last stage. We adopt all of the submissions that he has made.
It is, we say, a striking feature here that the resolution of the issues before the court impact and, had they gone the other way, would have benefited a far larger group than those on whom Mr Zacaroli is seeking to visit the bill, not least, in certain capacities, his own clients.
Now, I suppose it would have been possible to sit on the sidelines and write to the joint Administrators when they were assembling their list of relevant points not

yet being argued and said, "Why don't you argue these points?" But that would have been, we submit, unsatisfactory. If one looks at the joint Administrators' position now, although one of neutrality, I think it's not unfair to describe it as one of benevolent neutrality so far as the claims on behalf of the SCG and GSI for costs from the estate are concerned.
Your Lordship will know that GSI became involved to reflect the perspective of financial institutions. As the hearing proceeded, we also reflected the perspective of an original holder of Lehman's debt who had raised equity in the aftermath of the Lehman's collapse. We respectfully suggest that that last context was quite close to one of the most difficult issues argued before your Lordship.
Now, your Lordship may have seen that Mr Zacaroli in his submissions refers in support of Wentworth's position to leading counsel for GSI having hit the nail on the head at the joinder hearing. From the very fact that the nail was hit at all, your Lordship will know that wasn't a reference to me, but to my predecessor, Mr Howard. What is said is that, well, if you look at Mr Howard's submissions, it recognised that a pound up for Wentworth was a pound down for others, at least in

Wentworth's capacity as the holder of subordinated debt.
My Lord, if it matters, what was argued at that hearing, the joint Administrators' position was to support GSI becoming involved, but because, and I quote, this was not "standard adversarial commercial litigation but proceedings as to how to distribute assets being administered by the court or by the court's officers", terms were placed on GSI's participation that were adhered to in terms of not running any additional points that were already being run by the SCG.
My Lord, the final matter I would mention is this: your Lordship knows we only participated on issues 11 to 14 and not on, for example, the assignment issues or the German master agreement. If one gets into the fate of subissues, there were aspects of the issues in which we did participate that Wentworth did not succeed upon. It did not succeed upon its lowest achievable rate submission under issue 11. Certain of the issues under issue 12 were common ground. GSI's case on issue 13 was accepted at paragraph 189 of the judgment as to the date at which you reached the relevant determination and part of GSI's case on issue 14 was accepted at paragraph 106.
So our primary position is, of course, that put forward by Mr Dicker for SCG. These were issues which interested a much larger group and it was for the

benefit of all that particular creditors with relevant perspectives argued them, but if one needs to go beyond that, one has to look at the particular issues we have participated in and success or failure in the subissues that were raised under those issues.
My Lord, unless I can assist further.
MR JUSTICE HILDYARD: No, thank you very much. Do you contest the application of the one solicitor rule which was imposed on the previous occasion?
MR FOXTON: My Lord, as a one solicitor rule for the SCG, no. I apprehend that your Lordship is asking me for the purpose of --
MR JUSTICE HILDYARD: How did it work, I think I'm getting at. Did the rule really say that there should be only one set of costs on one side of the argument?
MR DICKER: My Lord --
MR FOXTON: We weren't there on the previous occasion.
MR DICKER: The issue arose because I am instructed by three members of the SCG.
MR JUSTICE HILDYARD: I see. So it was only within your camp that the rule applied?
MR DICKER: Yes.
MR JUSTICE HILDYARD: There was no one set of costs for one side of the argument and one set for another?
MR DICKER: No, and the idea was simply that so far as the

SCG's submissions were concerned, they should be entitled to such costs as they would have incurred had they used one firm of solicitors, thereby eliminating any duplication that may otherwise have taken place.
MR JUSTICE HILDYARD: Thank you very much. While I have you on your feet, both of you can address this, and you may not feel able or it right to reply categorically, but in trust litigation at any rate, the rule on appeal might be completely different.
MR DICKER: My Lord, and for our part, we would accept there may well be differences.
MR JUSTICE HILDYARD: You are then ostensibly striving for victory rather than clarification?
MR DICKER: Yes, and the point was made by Wentworth, again I think before Mr Justice David Richards, one of the points relied on at that stage was "Look, you can tell it's hostile litigation because the SCG seek to appeal some of the issues," and as I recall the response was the same. The Administrators have obtained the guidance that they want. To that extent, that point can no longer be made, we accept, in the event of an appeal.
MR JUSTICE HILDYARD: Yes.
MR FOXTON: My Lord, we would share that analysis, the answer has been given. If you're not happy with the answer, I can see that different considerations might

arise.
MR JUSTICE HILDYARD: And it's no answer to as it were say, "Right then, well let's put all the costs in the appeal"?
MR FOXTON: My Lord, one has the fact that not all the issues raised before your Lordship will be raised on appeal in any event.
MR JUSTICE HILDYARD: No, but some percentage. Do you see what I mean? The rationale of that would be you having decided that you will, assuming, having got permission, that you pursue it, the true tenor of your argument as to whether it was for victory or clarification will come -- is now clear on appeal, and may the better man win, do you see what I mean?
MR FOXTON: I do, my Lord. There are difficulties, we would submit, with the happenstance of whether an appeal takes place influencing the costs burden at first instance, not least that if your Lordship had refused permission to appeal it would fall to you to make the costs order now without knowing there would be an appeal or not.
MR JUSTICE HILDYARD: So it would be wrong?
MR FOXTON: It would be wrong in principle. We would say your Lordship should look at the exercise before you and make the appropriate costs order for that exercise, regardless of whether there is an appeal and on what

issues.
MR JUSTICE HILDYARD: So although we have taken them in that order, actually the proper order is to determine the costs and then to determine whether there should be an appeal from an entire result?
MR FOXTON: I think in terms of the logical order, that may well be right.
MR JUSTICE HILDYARD: Yes. Okay. How are the transcribers? Do you want a rest?
THE SHORTHAND WRITER: Yes, please.
MR JUSTICE HILDYARD: Five minutes.
(3.26 pm)
(A short break)
(3.32 pm)
Submissions by MR ZACAROLI
MR ZACAROLI: My Lord, may I begin by making a preliminary point that insofar as my learned friends paint this as an extension of Waterfall IIA and IIB and the same order that should apply in relation to costs because it is in essence part of the same overall application, then they are wrong to do for a number of reasons.
Mr Justice David Richards made it absolutely clear that he was saying nothing about the costs consequences of part C when giving judgment on parts A and B.
Secondly, each application for costs has to be

looked at on its merits, and we don't say for example that my Lord should make the same order here was as made in Rascals because it was made in Rascals. One gets very little assistance by applying general principles to the facts of other cases.
Finally, the fact that part C is --
MR JUSTICE HILDYARD: So I'm on my own?
MR ZACAROLI: Yes.
MR JUSTICE HILDYARD: But presumably informed by the other cases?
MR ZACAROLI: Informed by the guidance from the cases, exactly, yes. But we don't say, as I say, that because Mr Justice Briggs found in the way did he in Rascals, it must follow.
MR JUSTICE HILDYARD: No.
MR ZACAROLI: Therefore it is not, we say, particularly fruitful to ask what the differences on the facts are between us and Rascals, although I will come to that in a moment if I may, there are answers to that. The fact that part C is part of a longer list of questions and that it's true that we did argue at one stage that issue 10 could be decided in some other order with part A, that's completely irrelevant. Obviously we were not thinking at the time about the costs consequences of any of this, it was simply a question of which issues might

raise questions of fact or not, but we would have had a very different argument about issue 10 if it had been stuck with parts A and B, because it is fundamentally different to everything else in part A and B.
To come to that point, part A was fundamentally a question of construction of the statutory scheme. There were lots of add on issues that one might say might have stretched that point this way or the other, but the fundamental aspect of part A was the construction of the statutory scheme.
The fundamental point about part B was that it was an application by the Administrators for directions in relation to their own conduct in the administration. That is, agreements they had entered into as Administrators with various parties. True, it raised questions of construction. It also raised questions of propriety in terms of ex parte James, whether they should be enforced, but that fundamentally involves the conduct of the administration by the Administrators.
The other point to make about part B is our case on costs on parts A and B together was there should be no order for costs because we won in effect part A, lost part B. We were not interested in actually arguing particularly what part B was about, it was part A that mattered mostly, because that was where we had won. So

whatever the order on part B, we would have ended up picking up the tab, whether we paid costs on it, and therefore no order as to costs overall, or whether costs came out of the estate. Because of the view we take about our economic interest, either way, it was coming out of our pocket.
So far as the law is concerned, we set out the general principles which were reviewed and restated by Mr Justice Briggs in the Rascals case. I can see my Lord's read that in some detail, I won't take you over that again, the relevant parts are in our skeleton as well.
One other authority just worth looking at is the Westdock(?) case in the Court of Appeal. The reason I take to you this, my Lord, is for a passage which explains why it is sometimes appropriate to make a costs order out of the fund in favour of someone who is a representative of others, for that reason alone. Westdock actually appears twice, it's the same judgment, but in two different reports. I am looking at it in 2.1 of the bundle, which is the BCC report.
MR JUSTICE HILDYARD: Yes.
MR ZACAROLI: The passage is on page 197. On the right hand column, just after halfway down, there is a sentence that begins "However", does my Lord have that? Just

below halfway, "However, there are many cases" in the middle of the line. 197, right hand column.
MR JUSTICE HILDYARD: Yes.
MR ZACAROLI: Just below --
MR JUSTICE HILDYARD: Yes, I have it. "In my judgment, the proper approach"?
MR ZACAROLI: The next "however", sorry. Ten lines below.
MR JUSTICE HILDYARD: "However, there are many cases"?
MR ZACAROLI: Yes. Could my Lord just read from that to the end of the second paragraph over the page, that's the middle of the left hand column on the next page.
MR JUSTICE HILDYARD: Yes. (Pause)
Yes.
MR ZACAROLI: The point being sometimes in a formal representative case you need to pay -- allow that party funds out of the estate because no-one else has the funds to argue it. Clearly not the case here, we're arguing with very substantial parties arguing in their own interests who could clearly afford to pay the costs.
My Lord, the overall question then is one of substance. As a matter of substance, is the dispute that my Lord was dealing with commercial hostile litigation, or is it in substance an application for directions essential to the operation of the statutory scheme for the benefit of all the creditors of the

administration? We say it's the former.
In our skeleton, we had identified seven points. If I can just develop some of those in the order they there appear. The first point is that these are claims -- this is paragraph 10 of our skeleton -- the first point is these are claims made under pre-administration contracts that have nothing to do with any part of the statutory scheme for insolvency. Exactly the same claims could have been brought before LBIE's insolvency as had been brought after.
Looking at both of the rationales referred to in the Rascals case, there is no question of these proceedings arising because of any fault on the part of LBIE, which is one of the rationales for costs out of the fund, and there is no question of construction of the statutory scheme or the proper operation of the statutory scheme. Nor can it be said that it is in the interests of creditors as a whole that the issues be determined, save in the sense that there is hostile piece of litigation between some creditors asserting a high rate of interest and everybody else with an interest in the estate who would rather minimise those claims, that's always the case when someone asserts a high claim against an estate. But that's the only sense in which everyone benefits from the answer to be these questions.

The second point we make is that these are claims hostile to the interests of the estate, the LBIE estate. The essence of it is that the SCG and GSI wish to assert contractual claims to particularly high rates of interest. My Lord's timing point is exactly right, with respect, the fact that there have been no proofs yet, or whatever it is you put in to claim statutory interest, is irrelevant, we know that they are asserting the right to make claims for high rates of interest.
If you turn that around, why was it necessary for this application to be made at all? The only answer is because claims to high rates of interest were asserted by creditors, primarily the SCG. We have identified two paragraphs in Mr Lomas's ninth witness statement that make good that point. Has my Lord had a chance to look at it or should I take you to it?
MR JUSTICE HILDYARD: Could you take me to it, I am so sorry.
MR ZACAROLI: Bundle 2, tab 1A. At paragraph 44 on page 14 of the bundle, there is a heading, "Interest under master agreements". This was a witness statement relating to the whole of the Waterfall II application, so there are various other aspects dealt with. At paragraph 44 he begins to deal with interest under master agreements, identifies what the issues are, and

then at paragraph 47 on page 16, if my Lord could read paragraph 47 and then paragraph 51. (Pause)
MR JUSTICE HILDYARD: Yes. 47 and 51?
MR ZACAROLI: Yes, indeed. The reason we are here is because some creditors, primarily the SCG, who focussed on this in particular, wanted to assert these sorts of claims.
I put that deliberately as the issue arises between the creditors asserting these claims, the SCG and GSI, and the LBIE estate. Those are actually the two sides of this coin. The reason Wentworth is here is because Wentworth has recognised the economic reality that, as holder of a subdebt and owner of the shares in LBIE, it's in our interests to ensure that high claims are rejected where it's proper to do so, because the surplus after payment of such claims vests in us. We don't know the precise numbers yet, it's true, but we have regarded our economic interests as being aligned with those of the shareholders, because we believe the surplus will come to us. Turn that around, every pound that is paid out to a creditor and interest over 8 per cent we regard as potentially coming out of our pocket. That's the economic reality as to why Wentworth is here.
But to answer my Lord's concern that Rascals is different because there you didn't have this

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

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

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

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

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

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

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

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

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

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

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

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

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

Now so far as GSI is concerned, everything we have

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

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

excuse for departing from the usual costs order.

MR JUSTICE HILDYARD: In the case of the various examples which were posited on behalf of the Administrators, there was, as it were, a diversion into a number of possibilities which might or might not affect the SCG, but which was fought at and discussed, really, for a more amorphous benefit, would you accept that?

MR ZACAROLI: For what, I'm sorry?

MR JUSTICE HILDYARD: For a more amorphous benefit, that is to say for the benefit of the Administrators in dealing not so much with SCG but some others who might come out of the woodwork?

MR ZACAROLI: It is true that the Administrators raise at the margins -- and this is getting into the margins here, and that may justify if anything a small departure -- but at the margins it's true the Administrators sought to clarify various points that arose out of the way the claims were asserted, but in essence those arose out of the fact these claims were being asserted.

MR JUSTICE HILDYARD: It did, but in commercial litigation, as it were, that simply wouldn't have happened, would it? Each side would have put its case. For someone to turn up and say, "Look, not in your case, but in some other case I have in mind, can you just tell me what you

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

MR ZACAROLI: Yes, it's not entirely clear that that was -- well, there's certainly no evidence that I can recall that that was being put on the basis that there are other creditors who have in fact raised this or that point. They were points that arose, perhaps my Lord is right, amorphously, in a sense that these are points that are still uncertain, given the way that you have asserted your claim.

MR JUSTICE HILDYARD: I took them to be raised for two reasons. One was as a stress test against the result, but the other was after some concerted thought they were what emerged as to the issues which might arise, as I put it, amorphously, that is to say not by reference to the particular position of SCG but by reference to the potential position of others who are generally interested in the result.

MR ZACAROLI: Well, given that they were amorphous, we don't know that they wouldn't have arisen in a claim asserted by the SCG or one of their constituent members in due course. So one can't draw a clear distinction between those issues which were amorphous in the sense that they may arise when one gets to the fact specific examples raised by the SCG, and those which might be raised by

some independent party altogether, it's very hard to draw that line here because we don't have the evidence on that. So I would say it doesn't actually make any difference, and ultimately these are at the margins anyway, when you're looking at the substance of this, the substance was that SCG and GSI were arguing for a construction of the master agreement which would give rise to very substantial claims for interest.

MR JUSTICE HILDYARD: They are and they're not. They are in the sense that they were details rather than at the heart of things, and they were testing the result in more minute terms. They're not in the sense that the fact that they're asked, and everyone engages in the business of thinking them up and then answering them might shed some light on the true characteristic or nature of the process, do you see what I mean?

MR ZACAROLI: I see what my Lord says, but in my submission that would be for the tail to wag the dog here, because the fundamental issue here was the creditors asserting high rates of interest, and one doesn't lose sight of that merely because in the course of that, around the edges of the construction argument, some other questions get raised which either, as my Lord says, need to be tested, or in themselves need to be determined in order to have a clear picture of how you will deal with the

claims of when they are later asserted by SCG and GSI, and others, maybe, but nevertheless by them.

My Lord, the last three points to make, I am not suggesting there was improper duplication between GSI and SCG, so that needn't concern my Lord.

To deal with GSI's point that there were some points that it won on, it's true, there were some points that it won on, but in terms of costs and time and effort spent on them, they are de minimis. If my Lord thinks that we should cut off a small proportion of our costs, so be it, but it is really at the edges then when one is comparing the time, cost and effort that went into the main dispute.

Finally, if my Lord is against us, just for the sake of form, if the order is that costs are payable out of the estate, Wentworth would seek the same order as everyone else on that, but obviously we would rather that that wasn't the case.

My Lord, unless I can assist further, those are my submissions.

MR JUSTICE HILDYARD: And likewise the issue on appeal, you say well at that point a fortiori it's then a stand up battle and the winner is likely to --

MR ZACAROLI: Yes, I don't dissent from my learned friend's analysis of that, which is on appeal it's a different

question, because if my Lord thinks it's otherwise right to make an order at this stage of costs out of the estate, the rationale for why you don't get the same order in the Court of Appeal is based on different reasoning.

MR JUSTICE HILDYARD: It's no longer guidance, it's actually striving for a win.

MR ZACAROLI: Yes.

MR JUSTICE HILDYARD: Yes. Do you go so far as to say that unless the matter goes to a question in active issue between the Administrators and the party or parties concerned by reference to the conduct of the administration or the Administrators' own conduct, or relates to the statutory scheme and its application, and not to some contract towards the scheme, that the parties having enough money to pay for themselves, must follow the usual rule of litigation?

MR ZACAROLI: My Lord, it would be very dangerous to lay down any absolute rule. This is a question of discretion at the end of the day, and it's for my Lord to decide what in substance this case is about. So I'm not sure I would go so far as to say it would never be appropriate, but the fact that the dispute is between those with preexisting contracts seeking to assert a particularly high claim against the estate is highly

relevant in determining what that substance is. I'm not sure there is a case which goes so far as to allow costs out of the fund in circumstances like this, where what in essence is happening is an assertion of a claim against the estate by a creditor arising out of a pre-administration contract, but I wouldn't go so far as to say it could never be appropriate.

MR JUSTICE HILDYARD: Outside the context of simply inability to fund, or some disproportion between the amount at stake and the likely cost of pursuing the point.

MR ZACAROLI: Yes, it would be a rare case, I would have to say, but I would be reluctant to lay down a general proposition, a general rule in a case that is an area which is essentially based on my Lord's discretion, looking at this matter as a matter of substance.

MR JUSTICE HILDYARD: So the sort of Buxton principles or the Rascals principles are guidance, but there's no hard and fast characterisation?

MR ZACAROLI: It's been said on more than one occasion against me that the Buxton principles are not closed, and that must be right, but I can't think of an example, it's not really for me to do so, but I can't think of an example now of a case which would be within the framework of costs out of the fund where there's hostile

litigation.
MR JUSTICE HILDYARD: And to the cooling point, what I mean is I think it was Lord Justice Henderson, was it, as he now is, was concerned that one of the factors to take into account is less by adopting excessively rigid, follow the event rules, you might discourage people from assisting in the disposition of matters which are very difficult when they can afford to do so? Was it Zitek(?)?
MR ZACAROLI: It is Mr Justice Henderson, I recall his point being you should be wary of allowing costs --
MR JUSTICE HILDYARD: Of departing from --
MR ZACAROLI: Yes, for that reason. That's a very good point no doubt. I can't suggest that in this case people have been incentivised to make arguments they otherwise wouldn't have made had they known they were paying the costs at the outset, they always knew they were on risk of costs anyway because the point hadn't been determined beforehand. So I can't say that is particularly pertinent point on the facts of this case, but it is a good point more generally, which is why the court should be careful about departing from the general rule, as Mr Justice Briggs himself said in Rascals.
MR JUSTICE HILDYARD: Rascals is much a plainer case, isn't it? This is quite a long way from Rascals.

MR ZACAROLI: The way that this is different, I've dealt with the cross-holding issue which as I say shouldn't really concern my Lord. The other way it is different is because Rascals was a proprietary claim asserted against the estate.
MR JUSTICE HILDYARD: They wished to hoick something out of the estate.
MR ZACAROLI: Yes. In one sense this is a clearer case for hostile litigation, because it's parties seeking to assert claims against the estate based on their contracts, and that's what happens at the proof stage all the time, the parties assert in terms of provable debt, they assert a claim, they assert it at a high rate, it will be rejected, there will be an appeal, the party that loses that appeal would then pay the costs. It would be impossible to suggest the estate should somehow bear the costs of successfully fighting off inflated claims. If that's so at the proof stage, there's absolutely no difference in principle between the proof stage and the claims for asserting interest.
MR JUSTICE HILDYARD: And you say the same applies if the Administrators have adopted the sensible precaution of not allowing it to go to the proof stage in a variety of occasions, but have identified an issue which should deal with all proofs of that kind?

MR ZACAROLI: Yes, it's a preliminary issue in each of those cases.
MR JUSTICE HILDYARD: Yes.
Mr Dicker.
Further submissions by MR DICKER
MR DICKER: My Lord, five points by way of reply. The first point is this: my learned friend said this application was not in the interests of the creditors as a whole. I have already made the point that your Lordship can regard the SCG as if it was one out of however many creditors with a similar interest, but there is a wider point here. The Administrators issued the application no doubt because they thought this was the efficient way of enabling them to conduct their statutory duties and distribute the surplus. An alternative route may have been to have a litigation essentially with each creditor in respect of their respective proofs based on whatever claims they wished to advance. What we understand to be the position is the Administrators did not think that was likely to provide a quick, efficient or cost efficient way of dealing with things. They considered the best approach was to identify and to resolve the legal framework which they could then apply to the various claims made by creditors. So in that sense, this application was entirely in the interests of

everyone, indeed in the interests of all the stakeholders, including subordinated creditors like Wentworth and shareholders, to the extent that it provided a quicker means, and hopefully a cheaper means, ultimately, of resolving the issues.
MR JUSTICE HILDYARD: Cheaper overall, you mean? From the point of view of all the interested creditors?
MR DICKER: Yes. I mean plainly this has not been a cheap process, but one could imagine what sort of process might have been involved if issues affecting creditors had essentially had to be resolved on a purely bilateral basis dealing with issues as and when they happened to be raised by particular creditors. For whatever reason, the Administrators plainly did not think that was the appropriate course and they no doubt thought this was a better, more efficient way of dealing with things, and in that sense, in the interests of all the stakeholders, certainly not just the SCG or indeed those who have similar positions.
MR JUSTICE HILDYARD: What makes this in a way a strange case compared to some others is that SCG have not taken on a battle which they were not vitally interested in, they have not incurred costs which they can't afford, nor have those costs exceeded what they might ordinarily have expected to pay in fighting their own battle.

MR DICKER: My Lord, to some extent yes, but just going through a couple of those points, my learned friend relied on Westdock. Can I just take your Lordship to it, because this is relevant to the point of the SCG as one out of a number. It's at tab 2 of the bundle. Can I just start by showing your Lordship paragraph 4 of the headnote, what was held. Paragraph 4 says:

"This was hostile litigation between two ascertained ...(Reading to the words)... classes of claimants, nor any need for representation orders. Liquidators were defending the interests of creditors."

Picking that point up, if your Lordship then goes on to pages 197 and 198. 198, column 1, if my Lord reads the paragraph after the paragraph my learned friend asked your Lordship to stop at. It's the one in the middle column starting:

"If that is the right approach, apart from one very special factor in this case which ...(Reading to the words)... in this case. The reason is I accept Mr Moss's submission that this is in effect hostile litigation between two ascertained claimants ...(Reading to the words)... nor any need for any representation order. It is in a sense a mere accident that the point arises for decision under ...(Reading to the words)... or in inter-pleader proceedings."

Not the case here. There was repeated reference to the respondent being quasi representatives for a reason. That was in essence the role that the SCG were fulfilling in part C just as much as in part A and part B.

MR JUSTICE HILDYARD: I confess I have not read, other than the bits in Westdock which you have each individually taken me to, but this was an insolvent liquidation, was it, where the liquidators were in a difficulty?

MR DICKER: It was a summons taken out by the company's receiver. If your Lordship goes to 192.

MR JUSTICE HILDYARD: It was a receivership, right. But they didn't have the money and the question was whether they were going to have to pay themselves, and the resolution was they wouldn't because the ECGD had taken inconsistent stances?

MR DICKER: Yes, but the point I rely on at 197 is the emphasis that this was essentially an issue between on the one hand the liquidators and on the other hand the ECGD, in other words the ECGD couldn't stand there and say, "There are 99 other ECGDs behind us," it simply wasn't that sort of case.

My Lord, the third point is this: we spent time arguing points that we didn't even originally identify. I have explained to your Lordship the way in which the

questions were originally identified, essentially as a cooperative process to try and identify what was reasonably arguable, but as your Lordship knows, various additional points were identified by the Administrators in their position papers. Nine were identified shortly before the part C hearing started. Those issues identified by the Administrators we argued because we thought it sensible to do so, as respondents joined in a quasi representative capacity, to ensure the Administrators would get the guidance they needed.

MR JUSTICE HILDYARD: Can I get into that, Mr Dicker, with any precision? You may be right and it may be my unworthy thought, perhaps that was the time to determine as between you, before the result was known, that the costs of all of you should have come out of the fund. I don't know. But can I with any precision measure what you might have said on your own but would not have said if only on your own? It seems a difficult thing.

MR DICKER: What your Lordship can take into account is, the essential question is, is this hostile litigation or not? There are two ways in which can you can conceivably look at it. There is the way my learned friend seeks to characterise it as essentially the SCG asserting claims against the Administrators, which the Administrators then are effectively forced to have

determined. We say that just doesn't reflect the process, and one indication of that is the way the Administrators identified issues which they then expected us as respondents to argue.

MR JUSTICE HILDYARD: In ballpark terms, how much is a successful appeal worth to you?

MR DICKER: I'm not even sure I know precisely what the number is.

MR JUSTICE HILDYARD: The point I'm getting at is you're not financially strapped or reluctant litigators. It's happenstance, isn't it, that your litigation has taken part under this umbrella, but the amounts involved mean that if I said, "Well, they were only just being friendly," people would look rather askance, wouldn't they?

MR DICKER: My Lord, no, in my submission, not in the way the application was brought, developed and pursued. It's undoubtedly true that the SCG is interested in the outcome. Nothing surprising in that. That's no doubt why it was sensible to appoint them as respondent, as quasi representatives. The precise amount, my Lord, I'm not in a position to help you.

MR JUSTICE HILDYARD: No, I agree that it's impossible to measure because you don't know quite how -- but I just wondered whether it was tens or hundreds of millions.

MR DICKER: My Lord, I think what I can say is it may well differ actually between the various members of the SCG depending on what issue one is talking about. For example, your Lordship will have noted that permission is sought in relation to an appeal in respect of the German master agreement by only two out of three of the funds instructing me. The third one as I understand it has either no or no material exposure in relation to the German master agreement. Nevertheless, for the purposes of the part C application, it had been joined as a respondent and was happy collectively with the SCG to argue that point, and no doubt similar distinctions can be made in relation to other issues.

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

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

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

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

Obviously one of the difficulties in making such an application is that it's essentially proleptic, it operates regardless of what may subsequently turn out to be the position, and your Lordship shouldn't be surprised if it was thought that the appropriate stage at which to make such an application was after it had finished, and that it wasn't considered necessary to make the application in advance.

MR JUSTICE HILDYARD: I'm not sure that I follow that point completely. I can understand the timing and the structural point, it would have been beneficial to the Administrators to find a way of resolving the matter, and beneficial for them to have the matter adjudicated as between two contesting parties and not themselves, which is what happened. But beyond that, is there any point? I mean, there's no realistic way in which you wouldn't have pursued the issue, is there? And if they had adopted the other way of saying, "We'll wait for the colour of your eyes, put in a proof or not," a proof would have come in?

MR DICKER: Yes, but that's not the way the Administrators wanted to deal with things.

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

MR DICKER: Because if this issue had arisen earlier, it would have been open to creditors to say, "If the terms

of the deal are that we have to turn up and argue whatever points you think you need guidance on, whether they're actually in our commercial interests or not, and we have to potentially pay for the privilege of doing so, then we're not prepared to participate on that basis. You need to make provision as to our costs, or find someone else who's happy to do it." My learned friend said that would have been absolutely fine, because in that situation no claims would have been asserted, the Administrators could effectively have ignored such claims and distributed the surplus accordingly. We say not so, they indicated quite clearly they were not prepared to do so. These were issues which they needed to have determined. Whether or not they were pursued by litigation or not, it was sufficient that a creditor said "Our view is" --

MR JUSTICE HILDYARD: Is that not always the case in respect of a large and not obviously hopeless case?

MR DICKER: Well, my Lord, like my learned friend, I'm not sure I would be prepared to say always the case.

MR JUSTICE HILDYARD: No.

MR DICKER: And it may depend on the -- in fact if you have a situation in which one's only talking about a claim capable of being brought by one creditor, then obviously one of the features of this case no longer applies.

MR JUSTICE HILDYARD: Yes, no I understand that.
MR DICKER: If one was talking about a claim which was identified and advanced by the creditor, then again one may have a slightly different situation. This is not that. If one goes back to category 1, Mr Justice Kekewich's judgment in Buxton, and reads it, this actually falls squarely within his description of category 1.
MR JUSTICE HILDYARD: Does it?
MR DICKER: Yes. My Lord, 414, the first full paragraph.
"A large proportion of the summons ...(Reading to the words)... the applicants are trustees of a will or settlement."
MR JUSTICE HILDYARD: Isn't that the point? This is nothing to do with the instrument of trust?
MR DICKER: No, my Lord, that distinction is then drawn in the next few lines.
"There are two things that the application may seek. One, they ask the court to construe the instrument of trust for their guidance, or else ask to have some question determined which has arisen in the administration of the trusts."
MR JUSTICE HILDYARD: Yes, administration of the trusts, not the construction of agreements outside the trust.
MR DICKER: Again, it depends how you look at it. From the

Administrators' perspective, this is a question which has arisen in relation to the administration of a trust.
MR JUSTICE HILDYARD: That's an awfully broad category, because then it would always be within part 1 if it arose within the course of administration.
MR DICKER: Which is why when it comes to later cases, they say that it's not always easy to distinguish between category 1 cases and category 3 or 4 cases.
MR JUSTICE HILDYARD: Yes.
MR DICKER: But if one simply reads category 1, this is the Administrators coming to court, asking for directions in relation to a question of how they apply their statutory duty.
MR JUSTICE HILDYARD: It may simply illustrate the difficulties of analogy with the trust, but I take your point, yes.
MR DICKER: My Lord, my fifth and final point. If your Lordship were perchance against me on submissions I have so far made, what we do say is it would be particularly unfair for the SCG to have to pay Wentworth's costs. So if there is an intermediate position, in our submission it would be that the order should be each side should bear their own.
MR JUSTICE HILDYARD: Right.
MR DICKER: My Lord, unless I can help your Lordship

further.
MR JUSTICE HILDYARD: Thank you. Yes.
Further submissions by MR FOXTON
MR FOXTON: My Lord, three very brief points. Mr Zacaroli made the point that GSI are wide users of the ISDA form and mentioned that matter when seeking to join in. Undoubtedly we are. I suspect we are not alone in that, even amongst those who sit before your Lordship in this court, but it was quite clear from the position papers that there were financial institutions other than GSI who had faced particular costs of funding issues post the credit crunch, and so the perspective that GSI represented was not purely a personal or individual perspective but a wider market perspective.
My Lord, secondly, there was some suggestion that it would be possible to distinguish points raised by the Joint Administrators from those which were the subject of the adversarial litigation. That's simply not how the process worked here. It was the JAs who identified certain issues, they invited comments, the parties put forward position papers, and then they came in at the end to sweep up anything they felt had not been drawn out sufficiently by the early material. So the distinction that Mr Zacaroli is asking you to draw is not one that actually arises on the process adopted.

MR JUSTICE HILDYARD: I think Mr Dicker was wary -- and he may well have been right -- of inviting the court to opine on the amorphous or hypothetical issues, but there we are, yes. I ventured where experience may say I should not have, I don't know.
MR FOXTON: My Lord, I certainly will not be braver than Mr Dicker was in that respect.
The final point is this: GSI joined the party relatively late, by which stage a certain process and a certain way of proceeding had been set in stone. When the Joint Administrators indicated they would not oppose our joining, it was on particular terms as to how we should participate, and those terms were justified by Mr Trower on the basis that this was not standard adversarial commercial litigation, but proceedings as to how to distribute assets being administered by the court, and it would, we respectfully say, be a little unfair to turn around now and say the costs orders should be made on the basis that this was standard adversarial commercial litigation.
MR JUSTICE HILDYARD: That was Mr Trower who said that?
MR FOXTON: It was.
MR JUSTICE HILDYARD: I don't think Mr Bayfield is saying that much different.
MR FOXTON: No. My Lord, as I characterised earlier, we

understand their position to be one of benevolent neutrality, and we are grateful for it.
MR JUSTICE HILDYARD: Yes.
Well, with a heavy heart, because it will mean delay, I feel I must reserve this. I find it a difficult matter, and also I am wary of not distinguishing properly between the particular facts of this case and any general propositions given the effect that they may have, including in subsequent applications in the Lehmans administration. So I want to think, I want to have a chance to review the transcript and to go through the authorities, albeit limited, which you have cited to me. I apologise for that, I should like to give an ex tempore judgment, but I just feel it would be not the wisest course.
MR DICKER: My Lord, can I with some hesitation just raise one matter. Hesitation simply because I am not sure whether it has been discussed, or if it has, where the parties have got to, and it simply concerns the timing for skeleton arguments for the Court of Appeal. In the usual way we will obviously be under quite a tight timetable at a time of the year which is properly not ideal, even though again in the usual way we would have any appeal in the Court of Appeal probably some way off. My Lord, I think I am right, and I will be corrected if

I am wrong, that because your Lordship is reserving judgment in relation to cost, your Lordship's order will not be drawn up until your Lordship has delivered judgment in relation to that, and if that is so, then timing for skeleton arguments may run from there. I am not raising this necessarily --
MR JUSTICE HILDYARD: No, it is a good point.
MR DICKER: -- to have the issue decided now, but I just wondered whether or not some thought should be given to it by the parties and if necessary permission to approach your Lordship, if necessary.
MR JUSTICE HILDYARD: I take it that there is no question of the Court of Appeal finding time this April to extend the hearing to 2C?
MR DICKER: I think the answer to that must be right, without wishing to prejudge the views of the Court of Appeal, they have so far as I understand requested confirmation that any additional issues can be fitted within the existing time frame. If that question is asked in relation to part C then it seems to me only one possible answer could be given, there is no prospect of that whatsoever.
MR JUSTICE HILDYARD: Within the present timetable?
MR DICKER: Correct.
MR JUSTICE HILDYARD: But if they had a bit more time, it

might conceivably be, but for the very reasons that there was a division between 2A and B and C, it may well be that there would not be much overall saving of time for the Court of Appeal, I just do not know.
MR DICKER: I suspect little or none, and there may come a stage at which the plethora of issues in front of the Court of Appeal might make it more difficult for the members of the Court of Appeal rather than easier.
MR JUSTICE HILDYARD: Yes. Has anyone made any inquiries of the Civil Appeals Office as to how long you may have to wait before you get on? I think without expedition it is a year or so, is it not?
MR BAYFIELD: My Lord, that would certainly be our expectation. The one silver lining perhaps to that is that if supplemental issue 1A were to be decided in York's favour, albeit the Administrators have taken the contrary view, then that may depose of part C in its entirety, so there is some benefit in there being a gap between the two.
MR JUSTICE HILDYARD: Right, so I should be thinking what I should pray for.
I would prefer to complete the order other than costs and simply have it on the stocks that -- I cannot see why that is impossible, but you think it might be, Mr Dicker?

MR DICKER: No, I am not suggesting that is necessarily impossible. Your Lordship could formally adjourn the issue in relation to costs and provide a separate order. Thereafter my only concern in that situation would then be that we would then be under a certain amount of pressure if the normal timetable for production of skeleton arguments had to be adhered to.
MR JUSTICE HILDYARD: The reason I ask that, and subject to how strong the view taken on the other side is, in a sense I would prefer to get the order done in order that you should get in the queue and make some provision for extension of time for skeletons if that is available to me, than simply stop the clock and thereby stop you making anything other than an enquiry as opposed to an application before the Court of Appeal. That is my thinking, just to put it on the table.
MR BAYFIELD: I think from the Administrators' perspective, we would agree entirely with what my Lord has just said. That would be the best course.
MR JUSTICE HILDYARD: So supposing, I cannot promise you when I will get the judgment out, I am in the midst of a very long judgment at the minute. I may be able to get you a decision with reasons to come later, in which case I will tell you what it is, but I just want you to have the best chance of getting on early rather than

late, given that there are lots and lots of things which may have to move forward eventually right up the tree, I do not know.
MR DICKER: My Lord, my learned friend Mr Phillips draws my attention to a book and a passage in the book with which I should probably be more familiar. CPR 52, the note 52.4.2, time starts to run on the date when the judge below makes the decision.
MR JUSTICE HILDYARD: Ah, right, so it is running away.
MR DICKER: So it is probably running away already.
MR JUSTICE HILDYARD: You are quite right, I was being silly. Because when, in fact, I took an application for permission to appeal as before me when I formally handed down judgment for that very reason.
MR DICKER: My Lord, the issue that may then arise is simply whether or not the parties, whether or not one party thinks it appropriate to apply for, or the parties are happy to agree to an extension of time for any of the relevant steps. Now that is obviously not a matter before your Lordship presently. I mention it only because as I say it seems to me it might be an issue, but perhaps if we could come back to your Lordship if necessary in relation to that, that may be the most efficient way of dealing with it.
MR JUSTICE HILDYARD: Does anyone have any instant views on

this?
MR ZACAROLI: My Lord, time has been running as my Lord says, and it is extended until today because of the order my Lord previously made. The issue I think so far as my Lord is concerned is first of all to get the thing running, I think we would endorse that as an approach, so whatever order is made today ought to recognise that there now being a permission to appeal, they should get on with it so we can get our slot in the queue. The second thing is, my Lord, I think has power to extend time for appellant's notice, which is the critical document.
MR JUSTICE HILDYARD: Yes.
MR ZACAROLI: Skeletons will be a matter for the Court of Appeal I think as they are in the other matters going on before the Court of Appeal.
MR JUSTICE HILDYARD: Is it not normally you have to put in your skeleton argument within a certain time of the appellant's notice now?
MR ZACAROLI: That is correct, but then the Court of Appeal have been asked in relation to the supplemental issues to extend that time and have done so.
MR JUSTICE HILDYARD: Do I have jurisdiction to extend time?
MR ZACAROLI: I know my Lord has the jurisdiction to extend time for the appellant's notice.

MR JUSTICE HILDYARD: Yes, I do have that, but am I then not --
MR ZACAROLI: Those with access to this book, which --
MR JUSTICE HILDYARD: Do you want another one? I have read a similar book in the past.
MR ZACAROLI: No doubt so, my Lord. I do not think my Lord has, but they can correct that if necessary.
MR JUSTICE HILDYARD: What I have in mind, I think that running through it, I have read the declarations, I should say that I assume that they mirror the questions that were asked and you are satisfied that all have been answered and you are agreed as to what the form of the answer should take, that is point 1.
MR BAYFIELD: My Lord, that is right.
MR JUSTICE HILDYARD: So far as the order therefore is concerned, it should deal with the declarations, the permission to appeal given, and I would have thought with regard to costs it can refer to the fact that the issue of costs has been made subject to reserved judgment. You will therefore have the starting gun fired and it will then be a matter between you as to what, subject to my ultimate say-so, the timing for the appellant's notice should be. I think that it is probably -- I mean you are all highly responsible and experienced, try and work out a time which is

appropriate and let me know what it is. If I can give you the answer on costs, I shall, even if with judgment later. Alternatively I shall adopt the cautious route of simply keeping you waiting, but at least you will have the ticket in to the further process, and the Court of Appeal office will be able to see that they need not say that the bundles are incomplete, because the only matter that is presently subject to appeal will all have been crystallised. Does that make sense?
MR BAYFIELD: My Lord, it does, yes.
MR JUSTICE HILDYARD: So shall I leave it to you to discuss between you at this difficult time of year what a sensible timing is, and then I think it is fair to say, as Mr Justice David Richards said, the judgment was actually handed down some three months ago now, and therefore I would not expect a very long extension of time, but if given the holiday season some extension of time is agreeable, well and good, but it will be fairly limited, I think.
MR FOXTON: My Lord, this may be overtechnical, but I wonder if the answer is that one of us, and I am happy to do it, makes the application for your Lordship to extend time under 52.4.2A and your Lordship then adjourns the determination of that application until we have all had a chance to speak to each other, and come back to

your Lordship.
MR JUSTICE HILDYARD: If that is required, whatever may be the best machinery. But I am not looking, I am afraid, for very long for the extension of time, for the reasons I have sought to outline.
MR BAYFIELD: My Lord, what I had in mind certainly was that we would produce an amended draft of this order, making provision for the Administrators' costs, making provision for the costs in relation to issue 1A, saying save as aforesaid, the issue of costs be reserved, granting permission to appeal in relation to the declarations against which permission to appeal was sought, and having a paragraph dealing with the extension of time but not completing the date, whilst we all have a chat and then hopefully submitting that to my Lord later this week with the date filled in if it can be agreed, and if it cannot be agreed, with letters being written to my Lord explaining what the respective positions of the parties are.
MR JUSTICE HILDYARD: Sounds sensible. Done.
MR BAYFIELD: And we are content with the indication that any extension should be relatively brief.
MR JUSTICE HILDYARD: Yes. Excellent. Well I am so sorry not to give you the answer now, but I dare say there are quite a lot of costs riding on this.

Thank you very much indeed for your help.
(4.37 pm)
(The hearing concluded)