Neutral Citation Number: [2018] EWHC 924 (Ch)

Case No: CR-2008-000012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 Rolls Building, Fetter Lane, London, EC4A 1NL
Date: 24/04/2018

Before:

THE HONORABLE MR JUSTICE HILDYARD

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Between :

(1) ANTHONY VICTOR LOMAS **Applicants**
(2) STEVENS ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR
(THE JOINT ADMINSTRATORS OF LEHAMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINSTRATION))

-and-

(1) BURLINGTON LOAN MANAGEMENT LIMITED **Respondents**
(2) CVI GVF (LUX) MASTER S.A.R.L
(3) HUTCHINSON INVESTORS,LLC
(4) WENTWORTH SONS SUB-DEBT S.A.R.L
(5) YORK GLOBAL FINANCE BDH,LLC
(6) GOLDMAN SACHS INTERNATIONAL

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Daniel Bayfield QC (instructed by **Linklaters LLP**) for the **Applicants (1)-(5)**
Robin Dicker QC and Henry Phillips (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Respondents (1)-(3)**
Antony Zacaroli QC, David Allison QC and Adam Al-Attar (instructed by **Kirkland & Ellis International LLP) for Respondent (4)**
Robert Amey (instructed by **Michelmores LLP) for Respondents (5)**
David Foxton QC, and Craig Morrison (instructed by **Cleary Gottlieb Steen & Hamilton LLP)** for **Respondent (6)**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Hildyard :

Subject matter of this judgment

1. This judgment deals with a question of costs in relation to the tranche of the Lehman *Waterfall* proceedings sometimes referred to as *Waterfall IIC*. *Waterfall IIC* concerned the construction and effect of various standardised pre-administration agreements (and especially two forms of ISDA Master Agreements) on creditors' entitlement to statutory interest. My main Judgment in *Waterfall IIC* is reported under the name *Lomas & Ors v Burlington Loan Management Ltd & Ors* [2016] EWHC 2417 (Ch).

Summary of the positions of the parties

2. In the event in *Waterfall IIC*, the arguments of the Fourth Respondent ("Wentworth") to the application brought by the Joint Administrators of Lehman Brothers International (Europe) (in Administration) ("LBIE") ("the Joint Administrators") prevailed on most of the many issues decided. Wentworth contends that it should be entitled to its costs consistently with the usual rule that a successful party is entitled to its costs from the unsuccessful party. Wentworth opposes the applications made by the First, Second and Third Respondents ("the Senior Creditor Group" or "the SCG") and the Sixth Respondent ("GSI") for their costs to be paid out of the LBIE administration estate, contending (put briefly) that the proceedings were no different in substance from ordinary adversarial litigation.

3. The SCG and GSI, on the other hand, contend (again put briefly) that it would be unfair to characterise the process instigated by the Joint Administrators as adversarial litigation. They submit that the issues in the *Waterfall IIC* proceedings, as also the issues in the earlier proceedings before David Richards J (as he then was) in *Waterfall IIA* [2015] EWHC 2269 (Ch) and *Waterfall IIB* [2015] EWHC 2270 (Ch), should properly be characterised as necessarily brought for resolution by the court to enable the Joint Administrators to proceed further with the administration of the estate, and as on that footing being within a category of cases where, as a general proposition, the costs of all respondents should be paid as expenses of the administration of LBIE. They submitted that of course there was a contest, and of course alternative solutions to the issues were advanced on an adversarial basis, but the origin and purpose was the assistance necessary to enable the Joint Administrators properly to administer the estate.

4. The Joint Administrators, whose costs all parties are agreed should be paid as an expense of the administration of LBIE, have indicated their formal neutrality, but in their skeleton argument on the issue have signalled that they agree with the characterisation contended for by the SCG and GSI and, subject to one caveat, with the order they propose. In circumstances where the SCG is comprised of various parties instructing different legal firms, the caveat is that the SCG's costs should be limited to "such costs as would have been incurred had the [SCG] retained one firm of solicitors only". (That wording having been approved in like circumstances in *Waterfall IIA* and *B.*)

5. These points have been comprehensively presented by Mr Daniel Bayfield QC (for the Joint Administrators), Mr Robin Dicker QC (leading Mr Henry Phillips) for the

SCG, Mr David Foxton QC (leading Mr Craig Morrison) for GSI and Mr Antony Zacaroli QC (leading Mr David Allison QC and Mr Adam Al-Attar) for Wentworth. I am indebted to them and their respective teams for their assistance. In deference to their arguments, the references to authority, and the no doubt considerable amounts at stake, I reserved my judgment. I should like to acknowledge at the outset my regrettable delay in providing it, for which I must sincerely apologise to all concerned.

Overall view

6. There is no doubt that the general rule that costs should follow the event is a starting point from which the court may depart having regard to all the relevant circumstances (and see *per* Briggs J as he then was in earlier proceedings in the administration of LBIE, namely *Pearson & Ors v Lehman Brothers Finance SA & Ors* [2010] EWHC 3044 (Ch) ("the RASCALS case") at paragraph [7]).

7. There is equally no doubt that, by analogy with developed practice in the context of litigation to resolve contested issues in a deceased's or insolvent's estate, where the proceedings have in effect been sponsored by the estate administrator, and the parties' involvement has in effect been as contributors to a necessary judicial inquiry (see again the RASCALS case at paragraph [8]), the court has been disposed to depart from the general 'costs follow the event' principle and allow costs as an expense in the relevant process of administration.

8. That disposition has been evident in the earlier *Waterfall* proceedings, where in every instance the court directed the payment of all parties' costs out of the administration estate, subject to percentage reductions where it perceived there had been unnecessary or excessive duplication or to confine costs to a single firm of solicitors for each party.

9. It is common ground, in these circumstances, that the question is ultimately one of discretion. However, it is plain that the exercise of discretion is to be guided according to the characterisation of the substance of the proceedings; though caution is in any event required, in that (*per* Henderson J, as he then was, in *Kostic v Chaplin & Ors* [2007] EWHC 2909 (Ch)):

> "…the courts are increasingly alert to the dangers of encouraging litigation, and discouraging settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party."

10. In the RASCALS case, Briggs J added further:

> "…although there are features of insolvency litigation which, by analogy with litigation about deceased's estates, may justify a departure from the general rule, the court should nonetheless approach any particular case for a departure with real caution, and litigants ought to expect to have to justify such a departure by reference to the facts about their alleged predicament, rather than merely by recourse to some supposed general principle."

11. So the discretion is to be exercised with caution, according to the circumstances and context of the particular case.

Proper characterisation of the Waterfall IIC proceedings: competing contentions

12. I start with the question of characterisation.

Form of the proceedings and the genesis and formulation of the contested issues

13. At least in point of form, the *Waterfall IIC* proceedings (as all the *Waterfall* proceedings) were brought by the Joint Administrators seeking the directions of the court on issues which they considered had to be judicially determined in order to enable them to move forward to the eventual distribution of the (very considerable) surplus in the LBIE administration estate.

14. Although not appointed formally as representative respondents, each of the Respondents was intended and called upon to advance arguments from the point of view not just of itself, but of all creditors having a like interest. A corresponding role was played in the previous *Waterfall* proceedings (where no formal representation orders were made, nor representatives appointed either). In all such proceedings, and these proceedings, the Joint Administrators have described, and apparently regarded, the relevant respondents as "quasi-representatives".

15. It is not disputed that in these and all the *Waterfall* proceedings, the creditors chosen as respondents worked iteratively with the Joint Administrators to develop and refine the issues to be determined, with a view to ensuring that as eventually formulated they (a) were framed in sufficiently general terms to enable the Joint Administrators to derive general guidance from their resolution; and (b) reflected a range of arguable positions advocated for (or identified as capable of being advocated for) by relevant creditors of LBIE, including, but not limited to, members of the Senior Creditor Group. In the event, and as recorded in my main Judgment at paragraph [148]ff., the Joint Administrators identified a further nine sub-questions shortly before the Part *C* hearing and invited the Respondents to address such issues, which they did.

16. As a further indication of the objective of resolution of issues in the interests of all creditors and the administration as a whole, the Joint Administrators filed and served two position papers identifying additional arguments that were not being pursued by any of the Respondents and making it clear that, if no Respondent advanced those arguments at trial, the Joint Administrators themselves would do so. In the event, the Joint Administrators were content that:

> "most of the arguments identified by the Administrators are being pursued by one or more of the Respondents and, in those circumstances, the Administrators are not currently intending to advance adversarial arguments from the stand point of any particular constituency".

17. To the same end of obtaining comprehensive guidance, the Joint Administrators, throughout the proceedings, also made available to all creditors the relevant court papers and submissions, and invited such creditors to consider whether there were any

further arguments that they wished to see raised, so as to ensure that they obtained the guidance they considered that they needed.

The SCG's conduct and contentions

18. As to their conduct of the proceedings, the SCG submitted in their Skeleton Argument, and I would accept in general terms, that they also worked to agree the answers to certain of the issues with the Joint Administrators where it appeared that there was, ultimately, consensus as to the correct approach to be adopted (e.g. Issues 14, 15, 16, 18 and 22 to 26), and 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.

19. Lastly, but of no less importance, the SCG drew my attention to evidence (in a Witness Statement by Mr Lomas, one of the Joint Administrators) that Wentworth holds £1.6 billion worth of ISDA claims alone, which materially exceeds the entire unsecured claims held by the members of the Senior Creditor Group. This, it was submitted, illustrated the essentially sponsored and representative nature of the proceedings with its participants playing roles which do not necessarily reflect their actual overall interests and served further to emphasise that the usual 'costs follows the event' order would not in truth reflect the economic realities and would be unfair and unjust. That would, it was submitted finally, be particularly so in circumstances where:

    (1) The *Waterfall II* proceedings were divided into three parts (*A*, *B* and *C*) solely for convenience and efficiency of determination. It has never been suggested by any of the parties that the decision on whether, or how, to divide the application reflected the fact that the different parts were of a different nature or deserved different treatment from the point of view of costs.

    (2) The court has determined, in the context of the hearings of *Waterfall II A* and *B*, and in the context of the supplemental issues arising out of those tranches, that the appropriate order was for the Respondents' costs to be paid as an expense of the administration.

    (3) The parties were embarking on essentially the same exercise in *Waterfall IIC*. In this regard, at the consequentials hearing for Parts *A* and *B*, Wentworth emphasised that Part *C* was part of "this single application" in order to support its failed application for costs.

GSI's conduct and contentions

20. For its part, GSI echoed and adopted these submissions, and emphasised as regards its own position that it had been joined after the initial application because of the perceived need for someone to represent the interests of financial institutions and to advance arguments relevant to the particular circumstances of financial institutions. This was particularly important in the context of the ISDA Master Agreement issues raised in *Waterfall IIC*, since financial institutions are the principal users of the ISDA Master Agreement form. The Joint Administrators had also made clear, in recommending GSI's joinder, that GSI was advancing arguments that other parties were not advancing, in particular in relation to the way in which financial institutions

are required to fund themselves (being a matter central to perhaps the most important issues in the *Waterfall IIC* proceedings).

21. GSI pointed out in addition both that it made every effort to avoid duplication and to confine its submissions to the particular position of financial institutions and that it was in the event successful on a number of issues on which it made distinct arguments, which I would accept. (It highlighted as examples the dispute under Issue 14 regarding the permissible bases of challenges to certification (paragraphs [195]-[208] of my main Judgment), on which GSI was the "principal opponent" of Wentworth (paragraph [199]), and the matters that can be taken into account in assessing the default rate, where my main Judgment "endorse[d] the position adumbrated on behalf of GSI" (paragraphs [183]-[189]).)

Wentworth's conduct and contentions

22. Against both the SCG and GSI, Wentworth (as previously I have foreshadowed) submitted that the Court should look beyond the form to the substance, and to the fact of the very considerable financial advantage sought by those parties in pursuing their arguments for an interest rate in excess even of the generous statutory rate of 8%. Wentworth contended that the true substance and the proper characterisation of the proceedings, notwithstanding their genesis and form, was as hostile commercial litigation in which the SCG/GSI sought to establish a right *against LBIE*, pursuant to pre-administration contracts with LBIE, to payment of interest at rates greater than 8% p.a.

23. Wentworth submitted that the position should be equated to that in the RASCALS case, where Briggs J held, at [24], that:

> "This was, in my judgment, litigation in which these respondents unsuccessfully advanced an adversarial case in the pursuit of a very large commercial objective, namely the obtaining of a proprietary interest in securities of enormous value."

24. More particularly, Wentworth emphasised the following features of these proceedings as placing it outside the category of cases which David Richards J had considered should ordinarily result in costs being paid out of the administration estate:

    (1) The case concerns the construction of pre-administration contracts between the SCG/GSI and LBIE: it has nothing to do with the interpretation of the statutory scheme and, in this respect, it differs from *Waterfall IIA*, in which the questions primarily concerned the interpretation of the statutory scheme relating to interest and non-provable claims.

    (2) The SCG/GSI asserted claims that are hostile to the interests of the LBIE estate, and all those interested in it apart from creditors in the position of the SCG/GSI. If they had succeeded, then the administration estate would have been diminished by the increased amount of their claims. Thus, for example, the claim that Default Rate (as defined in the relevant ISDA Master Agreements) should be construed by reference to the relevant payee's cost of equity, thus giving rise to excessive interest rates, and the claim that the

relevant payee is the assignee of rights under the ISDA Master Agreements, were claims which could have been made as much before, as after, LBIE's administration, illustrating that they had nothing to do with the proper administration of the insolvent estate.

(3) Third**,** it is irrelevant both that the SCG holds claims in a substantial aggregate amount, and that others might have a similar claim under the ISDA Master Agreement, if the SCG were to succeed: the existence of others in a similar position may have justified the SCG reaching an arrangement with others as to the sharing of the costs burden between them, but it does not provide any reason to depart from the basic principle that they advanced a case hostile to the interests of the estate and lost. Likewise, efficiency of representation does not carry an entitlement to costs. It merely raises the question of contribution as between the members of that class.

(4) Fourth, it is irrelevant that the Joint Administrators could not distribute the surplus without the issues being resolved. That will always be the case where a creditor asserts a claim so large that it would make a fundamental difference to distributions to other creditors. If it was otherwise appropriate to apply the usual costs rule, the fact that the distribution of the surplus is held up until the issue is resolved provides no reason for departing from it.

(5) Fifth, and similarly, it is irrelevant that – the hostile claim having been asserted – the Joint Administrators say that they need to have an answer to the point. This on analysis adds nothing to the contention that the surplus cannot be distributed without the question being answered. Accordingly, the SCG's characterisation of the proceedings as "giving assistance to the administrators" is a hollow assertion of form over substance. The questions resolved in Part *C* needed to be resolved only because the SCG, GSI and possibly other creditors chose to assert that on the true construction of the ISDA Master Agreement they could claim interest at rates in excess of 8%. It was not for the Joint Administrators to go to court to prove a negative – i.e. that creditors do not have such an entitlement.

(6) Sixth, the novelty and complexity of the arguments is irrelevant. Otherwise, the more outlandish and correspondingly difficult the assertion, the greater the chance of having costs paid from the estate when the argument fails. The reverse should be true.

(7) Seventh, both the SCG and GSI have throughout acted, quite properly, in pursuit of their own very substantial commercial objectives. The arguments advanced by the SCG and GSI were intended to produce double digit and in some cases over 20% rates of interest. Further in the case of GSI this is not just its interest in maximising recovery from the LBIE estate, but also its interest in maximising its claim to interest in the many ISDA Master Agreements it has entered into with countless other counterparties in the market. Wentworth depicted as "absurd" the suggestion that GSI could recover from the LBIE estate (to the detriment of those interested in it, including Wentworth) its costs of <u>failing</u> to establish the right to claim interest

based on its cost of equity, under its countless agreements with other counterparties in the market.

25. Wentworth urged the same result in respect of the (only) 15 claims against the LBIE estate (totalling approximately a (comparatively small) £311 million) in respect of the German Master Agreements ("GMA"). It pointed out that these claims under the GMA were only included in the *Waterfall IIC* proceedings at the instigation of the SCG, are believed by Wentworth (which makes no such claims) to be held directly or indirectly by the SCG, and constitute hostile claims by the SCG to establish, as against the LBIE estate, a right to interest under German law governed contracts at a rate significantly higher than 8%.

26. Wentworth concluded by submitting that neither the SCG nor GSI should be entitled to any costs out of the LBIE estate; and that instead, the usual costs rule should be applied. As to this, the SCG should be ordered to pay Wentworth's costs in respect of Issues 10, 11, 12, 13, 19, 20.1, 20.2 and 21, and GSI should be ordered to pay Wentworth's costs in respect of Issues 11 and 12.

My assessment and adjudication

27. These competing arguments, advanced by their respective proponents with admirable clarity and persuasiveness, have seemed to me to be nicely balanced. I confess that my initial inclination was towards the view that, at least as regards the ISDA Master Agreement issues, the same rule should follow in this part of the *Waterfall II* proceedings as in the others. But, especially having regard to the call for caution in the authorities that I have cited, and certain differences brought out by Wentworth between this Part and the other Parts of *Waterfall II*, I have found the matter more evenly balanced. Indeed, in the case of the GMA issues, I have concluded that the balance tips the other way. I deal separately therefore with that part of what I accept were presented as part of the *Waterfall IIC* menu of issues, but turn first to the issues contested concerning or arising in respect of the ISDA Master Agreements (that is, the disputed issues other than those relating to the GMA).

Adjudication of costs in relation to the ISDA Master Agreement issues

28. Of the points made by Wentworth four have particularly weighed with me. The first is its point that, unlike the position in Parts *A* and *B*, *Waterfall IIC* is concerned with issues of interpretation arising in respect of pre-administration contracts in a standardised form in very general use: whilst those issues of interpretation plainly have material effect as regards entitlements in the LBIE administration none is a systemic issue concerning the interpretation of the statutory scheme itself.

29. Secondly, it is undoubtedly the case, as much emphasised by Wentworth, that both the SCG and GSI were pursuing commercial interests of a very considerable monetary magnitude. To borrow the words used by Briggs J in the RASCALS case at paragraph [24], "these respondents advanced an adversarial case in pursuit of a very large commercial objective…". Moreover, that is so both in terms of potential gain in this administration, but also in terms of a potential advantage to them in the context of any other ISDA Master Agreements in respect of which the same question might well arise.

30. Thirdly, and as a corollary to both preceding points, Mr Zacaroli made the fair submission that it is not enough that the Joint Administrators have needed the questions, once raised, to be answered, without considering why the questions have been raised at all and whether they affect all or such a substantial body of creditors that the estate should, in fairness, bear the cost of their resolution. As Mr Zacaroli put in in his oral submissions:

> "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."

31. Fourth, and again as a corollary of the preceding points, the *Waterfall IIC* issues arose because the SCG and GSI were seeking a higher rate by reference to a personal (albeit largely standard form) contract by way of exception to the statutory scheme, which provides for an already generous rate of 8%. To quote once more from Mr Zacaroli's oral submissions:

> "…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 it would have been for somebody else, if they wanted to, to come to court and argue the point, knowing that in doing so they faced a costs risk…Everyone who wants to run a case like that needs to consider whether it is worth the costs risk of doing so."

32. These were all cogent points, well made. *Waterfall IIC* raised, on analysis, points of a rather different character than those adjudicated in the context of *Waterfall IIA* and *B*; and even in those parts, David Richards J acknowledged that there was "a certain amount to be said for both approaches". He also made it "absolutely clear" that what he had said on tranches *A* and *B* "does not necessarily carry over into tranche *C*…"

33. So far as relating to the ISDA Master Agreements, *Waterfall IIC* appears to be on the cusp between an adversarial proceeding where costs should follow the event in accordance with the usual rule, and a quasi-test case or trustee/office holder-sponsored directions hearing to assist them in the exercise of their duties, where the arguments are adversarial, but the process is otherwise broadly collaborative and conducted by parties as proponents of an identified general interest, which may not entirely conform with their own.

34. I have eventually concluded by a narrow margin that, truer to what I regard as its original conception, *Waterfall IIC*, so far as it concerned the interpretation and effect of the ISDA Master Agreements, should be characterised and treated for the purposes of the allocation of costs as a necessary application for directions to be given in the interest of the general body of creditors.

35. First, although I have borne much in mind the need for caution, and the obvious dangers of encouraging litigation by offering a "free ride", in the particular circumstances, I am in no doubt that in respect of all those issues addressed which

were not in the end agreed, the arguments advanced on all sides in relation to the ISDA Master Agreements were entirely reasonable and solidly maintainable: none was frivolous and all of them, once raised, required determination. I do not consider that the dangers identified by Henderson J in *Kostic v Chaplin & Ors [supra]* infect the present case or materially tell against the order I propose.

36. Secondly, I consider that the complexity of the issues relating to the ISDA Master Forms was such that dialectic argument informed by market experience and a specific perspective was required for their safe determination. As in *Waterfall IIA* (albeit in a rather different context), it would have been less than satisfactory for the Joint Administrators themselves to seek to argue all points on behalf of the estate. The three-cornered fight they sponsored was almost certainly, in my view, the most efficient and effective way of resolving the multitude of issues raised and the nine sub-issues that the Joint Administrators themselves asked to be addressed, except perhaps in relation to the GMA (and see as to that paragraphs [44] *et seq* below).

37. Thirdly, although the process was necessarily adversarial (that, after all, being the point of sponsoring it) I would readily accept that, as submitted by the SCG, the issues were formulated by agreement in general terms enabling as much guidance as possible to be given to the Joint Administrators. Thus, for example, the court was not asked to decide the Part *C* issues by reference to any particular set of facts specific to the individual respondents, nor was it provided with a series of actual certifications and asked to rule on whether they were rational, in good faith and binding in the particular case.

38. Furthermore, the Joint Administrators treated the process as the forum for the resolution, to the fullest extent possible, of all like claims; and it was demonstrated to me that they made available on the internet the relevant court papers and submissions to all creditors, and invited them to consider whether there were any further arguments that they wished to raise, so as to ensure that they obtained the guidance needed across as broad a constituency and variety of sub-issues as possible.

39. Fourthly, there has seemed to me to be force in the point that the allocation of roles for the purposes of arguing the collaboratively formulated issues was not based on identified net economic advantage. As noted previously, it appears that Wentworth holds some £1.6 billion worth of ISDA Master Agreement-based claims. What the net benefit/disadvantage is to the parties of succeeding in the role they played is by no means clear.

40. Fifthly, and perhaps as matter of general perception informed by my conduct of these proceedings from their inception, my overall sense is that to adopt the usual 'costs follow the event' principle in this case would not be consistent with the iterative genesis of the issues and the overall way in which their disputation was proposed, developed and conducted. Although it is an observation more in the nature of surmise, I suspect that it was not anticipated that the losing party would pay, even if perhaps no one could know for sure. I consider the Joint Administrators' stance as previously described tends to confirm this.

41. Finally, and in any event, in my judgment, overall fairness is best met by acceding to the SCG and GSI's application for costs to be paid out of the LBIE administration

estate, subject to one caveat or exception to be taken into account in determining the extent of the costs thus to be charged.

42. Accordingly, even though rather different in that the issues raised related to pre-administration contracts, I consider it appropriate to treat this part of *Waterfall IIC* as falling within the category of cases identified by David Richards J where the dispute was required to be clarified, was so most efficiently and comprehensively in the context of a process sponsored by the Joint Administrators, and has been of overall benefit to the administration estate. In such circumstances, I have concluded that the costs should come out of the estate, subject to the following caveat.

43. The caveat is this: I agree with the Joint Administrators that, as in previous *Waterfall II* proceedings, the estate should bear only one set of the SCG's costs even though in fact the members of the SCG may have been represented by a number of different firms. I would propose to adopt the same restriction as was ordered by David Richards J in the context of Parts *A* and *B*: that the SCG's costs should be limited to "such costs as would have been incurred had the [SCG] retained one firm of solicitors only".

Adjudication of costs in relation to the GMA issues

44. I turn to the question as to the costs of the issues in relation to the GMA. In this context, the contest was between the SCG and Wentworth. It was at the instance of the SCG that these claims were included for resolution in the context of *Waterfall IIC.* GSI played no part, and neither, this time, did the Joint Administrators, who did not submit a skeleton argument nor make any substantive oral submissions.

45. My understanding is that neither GSI nor Wentworth had any material claims against the LBIE estate based on the GMA. The extent of the SCG's interests in GMA claims is unclear. In its Skeleton Argument for the hearing on costs and other consequential matters, Wentworth stated its belief that the SCG is in effect the party which, directly or indirectly, holds all GMA claims. However, Mr Dicker (on behalf of the SCG) told me on instructions that "the SCG holds only about four out of 15 GMA claims". It was left unclear whether the SCG had any indirect interest in other GMA claims, but none of the other parties before me disclosed, still less asserted any.

46. Neither contestant sought to press the differences between the GMA issues and the ISDA Master Form issues; and, for example, Mr Zacaroli instead chose (no doubt because he sought the costs of both aspects) to submit that the "same analysis applies in relation to the…GMA."

47. However, I consider that there are differences sufficient to affect my overall characterisation of the claims. The differences also serve to emphasise my conclusion that on both aspects the balance is a marginal one, which has to be struck according to an overall characterisation involving a considerable element of discretionary judgment. In summary, whilst it is true that the GMA issues were contested in the context of an application for directions, and to that extent the contest was sponsored by the Joint Administrators, I consider that the GMA issues should be characterised as essentially a commercial claim by the SCG contrary to the interests of the LBIE administration estate, raised and conducted by the SCG for no identified benefit beyond its own.

48. The genesis, inclusion and development of the GMA issues appears to me to have been driven by the SCG. The identification and refinement (as well as amendment) of the GMA issues was not, as it seems to me, in response to a variety of anticipated claims (including by others), and the absence of input and involvement on the part of the Joint Administrators has struck me as illustrative of the overall character of the dispute. Although (as I have acknowledged) the extent of any indirect interests they may have are unclear, the SCG seemed to me in this context to be acting more as commercial litigants than representative proponents of an argument of interest and material significance to others in a like position to themselves. Thus, for example, and unlike the position in relation to the issues in respect of the ISDA Master Agreements, the Joint Administrators identified no particular sub-points or matters of general concern on which they sought the Court's guidance.

49. Further, as I stated in paragraph [416] of my main Judgment, on the principal (and to my mind determinative) issue, Issue 20(1), I considered the SCG's arguments "to be ingenious, but stretched". That seems to me to make louder the call for caution.

50. All in all, I have concluded that in the case of the GMA issues, the balance tips away from an analogy with trust proceedings to determine issues of general interest in the administration of the estate. In my view, even taking into account the possibility that there may have been an expectation that all Part *C* issues would be treated similarly (and indeed like Parts *A* and *B*) for the purposes of costs, there are no sufficient factors to displace the ordinary rule; this sub-part of *Waterfall IIC* should be characterised in the round as adversarial commercial litigation notwithstanding the form of the application; and the SCG, which notwithstanding any amorphous expectation must have known that there was nevertheless a costs risk, should pay costs accordingly.