IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN CP 2008/94
CHANCERY DIVISION

IN THE MATTER OF KAUPTHING SINGER & FRIEDLANDER
(ISLE OF MAN) LIMITED ("KSFIOM")

REPLY SKELETON ARGUMENT ON BEHALF OF THE DEPOSITORS ACTION GROUP ("DAG") FOR THE HEARING ON 23 JUNE 2009

Introduction

1. This skeleton argument is supplemental to DAG's skeleton argument dated 26 May 2009 ("DAG's original skeleton") and responds to the material points made in (1) the Treasury's skeleton argument dated 4 June 2009 ("the Treasury's skeleton"), (2) the Joint Liquidators' skeleton argument dated 15 June 2009 ("the Liquidators' skeleton") and (3) KSFIOM's skeleton argument dated 11 June 2009 ("the Company's skeleton").
2. In this skeleton argument DAG deals first with the costs position in relation to the Scheme of Arrangement ("the SoA") and secondly with the costs position in relation to the Winding Up Petition. The costs of and associated with the SoA constitute by far the greatest amount of the total costs in issue.
3. For these purposes, DAG notes that the Treasury accepts DAG's argument (in paragraph 8 of DAG's original skeleton) that the costs of the SoA Petition and of the Winding Up Petition should be considered together "since they are in effect two sides of the same coin" (paragraph 31 of the Treasury's skeleton).[1]

[1] This issue is not dealt with in the Liquidators' skeleton or in the Company's skeleton and DAG therefore assumes that they accept the proposition.

Scheme of Arrangement Costs

Introduction

4. As noted in paragraphs 17 and 18 of DAG's original skeleton, DAG's primary position is that the SoA costs should be borne exclusively by the Treasury as the party who was the driving force in promoting the SoA and as a party who formally petitioned the Court for the SoA. In the alternative, both the Treasury and the Liquidators[2] (as Joint Petitioners) should pay the costs of and occasioned by the SoA since they petitioned the Court for the SoA and the SoA wholly failed (to use the words of Harman J in *Esal*). DAG's position has not changed in this regard.

5. The Treasury's response to DAG's claim for SoA costs is dealt with in paragraphs 32-36 of the Treasury's skeleton. In summary the Treasury says in those paragraphs:-

   (1) DAG's costs should be paid from the Company's assets[3].

   (2) DAG's costs should not be paid by the Treasury because the Treasury has not been guilty of "frivolous and careless" conduct.[4]

   (3) The Treasury should not pay the Liquidators' costs of the SoA.[5]

6. These points are dealt with in paragraphs 12 - 30 below.

7. The Liquidators' response to DAG's claim for SoA costs is dealt with in only two paragraphs of the Liquidators' skeleton, namely in paragraphs 9 and 10. In summary the Liquidators say in those paragraphs:-

   (1) DAG did not formally oppose the SoA until the hearing on 9 April 2009.

   (2) Any "pre-preferential" costs orders made in respect of creditors who opposed the SoA[6] should be limited to the costs of opposing the SoA Petition at the hearing on 9 April 2009.

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[2] For the avoidance of doubt, it is and never has been DAG's case that the Company (as opposed to the Liquidators) should pay the costs of the SoA. This was made clear to Counsel at the hearing on 27 May.
[3] Paragraph 32, first sentence.
[4] Paragraph 32 final sentence and paragraphs 33-35
[5] Paragraph 36

(3) Any costs incurred by DAG in (i) urging the Treasury to improve on the terms of the SoA, (ii) organizing and addressing meetings of DAG members to comment on the SoA, (iii) reporting on approaches to the Treasury to improve the terms of the SoA and (iv) arranging for proxy votes to be held and voted upon at the Scheme Meetings, should not be allowed.

8. These points are dealt with in paragraphs 12 – 32 below.

9. It appears from paragraph 10 of the Liquidators' skeleton that they accept that DAG's SoA costs are "pre-preferential" costs which should come out of the assets of the Company.

10. What is most surprising about the Liquidators' skeleton is that they not say anywhere that this costs burden should be shared with the Treasury as Joint Petitioner under the SoA. This is a most surprising omission[7] because, if contrary to DAG's primary submission the costs should not be borne by the Treasury alone, they should be borne jointly by the Treasury and the Liquidators[8] as Joint Petitioners who presented a SoA which has failed. In other words, the costs burden should not fall exclusively on the Liquidators (and so be paid out of the assets of the Company). The Liquidators are therefore invited to confirm prior to the hearing that, in the event that the Court is not minded to order the Treasury to bear DAG's costs exclusively, they accept that DAG's costs should be borne jointly with the Treasury.

11. The Company's skeleton does not deal with the SoA costs because DAG makes no claim against the Company (as opposed to the Liquidators) in respect of the SoA costs.

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[6] DAG was the only creditor who opposed the SoA (see paragraph 12 of DAG's original skeleton). This appears to be accepted by all parties.

[7] If the Liquidators' position really is that the Treasury should not (jointly) pay the costs this would, DAG submits, be a breach of the Liquidators' duties to preserve the assets of the Company for the creditors as a whole. Indeed, DAG is surprised that the Liquidators have not sought to claim their own costs from the Treasury on the basis of the facts and matters set out in paragraphs 15 and 16 of DAG's original skeleton

[8] In the sense of being paid out of the assets of the Company as pre-preferential costs

DAG's opposition to the SoA

12. It is factually incorrect for the Treasury[9] and the Liquidators[10] to say that DAG did not oppose the SoA until 9 April 2009.

13. The true chronology of relevant events is as follows:-

(1) **27 November 2008:** The winding up Petition was adjourned by the Court until 29 January 2009 in order to enable the Treasury to propose a scheme or arrangement. As at 28 November there were no proposals at all[11], merely the promise that something would be devised. Accordingly at this stage there was no scheme for the DAG to oppose.

(2) **29 January 2009:** The winding up Petition was adjourned by the Court to 19 February 2009. At this stage there was before the Court what can only be described as key elements of a "potential"[12] scheme of arrangement which the Treasury and Alix Partners were working on but which was still manifestly incomplete.[13] The Treasury requested an adjournment for 60 days to work on the proposals further. This adjournment was objected to by DAG.[14] DAG requested clarification of the incomplete scheme within 21 days.[15]

(3) **19 February 2009:** The winding up Petition was adjourned by the Court to 9 April 2009. At this stage the Treasury provided some answers to the questions in relation to the proposed scheme which had been raised by the Court.[16] At this stage there was still no complete scheme of arrangement before the Court[17] and the Treasury needed yet more time. However, DAG had seen enough and Mr Wright, on behalf of DAG, swore his Third

[9] Paragraph 11 of the Treasury's skeleton
[10] Paragraph 9 of the Liquidators' skeleton
[11] Paragraph 5 of Mr Lovett's affidavit dated 25 November in support says "*The Treasury has appointed Alix Partners particularly to investigate alternative options to a traditional liquidation"*
[12] The word used by Mr Lovett in paragraph 15 of his Third Affidavit dated 26 January 2009
[13] See exhibit "DCL 1" to Mr Lovett's Third Affidavit dated 26 January 2009
[14] See paragraph 4 of the affidavit of John Wright dated 28 January 2009 sworn for DAG
[15] See paragraph 9 of Mr Wright's affidavit dated 28 January 2009
[16] See paragraph 9 of Mr Lovett's Fourth Affidavit dated 13 February 2009
[17] There was only a document entitled "Proposed Scheme of Arrangement Summary of the Purpose of the Scheme and Key Provisions" dated 12 February 2009 and exhibited to Mr Lovett's Fourth Affidavit dated 13 February 2009

affidavit dated 18 February 2009 in which he made DAG's opposition to the proposed scheme of arrangement very clear. In that affidavit Mr Wright stated (amongst other things) as follows:-

(a) The proposals remained "sketchy and incomplete".[18]

(b) The Treasury had not made out a case that the proposals were of significant advantage to creditors and indeed DAG's view was that there were real disadvantages for creditors under the proposed scheme.[19]

(c) In paragraph 13 of his Third Affidavit dated 18 February 2009 Mr Wright concluded on behalf of DAG as follows:-

"*In these circumstances* ***my clients believe that the Company should be placed in liquidation immediately*** *so that there is an early resolution of the manner in which they will recover their monies*." (emphasis added).

(4) It therefore follows that, once the proposed scheme had reached sufficient maturity so that its advantages and disadvantages could start to be assessed properly (in February 2009), DAG voiced its objection to the scheme and demanded an immediate liquidation. However the Treasury was successful in persuading the Court that a further adjournment should be granted (to 9 April) so as to enable the proposed scheme to be developed further. In such circumstances DAG, not unnaturally, fought very hard for the terms of the proposed scheme to be improved as much as possible. This involved significant correspondence between DAG's lawyers (Edwin Coe) and the Liquidators and the Treasury.

(5) **2 April 2009:** The Treasury and the Company issued their Joint Petition under section 152(1) of the Companies Act 1931 in respect of the SoA.

[18] Paragraph 3

[19] See paragraph 4. The disadvantages are listed at length in paragraphs 10 and 11 of Mr Wright's affidavit

This was the first occasion on which the full and complete SoA, and the accompanying Explanatory Notes, were produced[20].

(6) **9 April 2009:** DAG opposed the SoA on the basis that it provided no advantages for creditors and considerable disadvantages. DAG sought (again) the immediate winding up of the Company (see paragraphs 6 and 7 of DAG's original skeleton). The Court however ordered that the SoA should be put to the vote. DAG was however successful in arguing that there should be 3 classes of creditors rather than only the 2 classes promoted by the Treasury.

(7) **After 9 April 2009:** Given the fact that the Treasury had successfully persuaded the Court on 9 April that the SoA should be put to the vote DAG, not surprisingly, continued to lobby the Treasury to improve the terms of the Scheme and it also spent considerable sums of money obtaining legal advice from Edwin Coe in connection with the Scheme, in particular as regards the true meaning and effect of many of the provisions which were unclear,[21] and also in connection with the voting on the SoA and related matters.

(8) **27 May 2009:** Winding up order was made. DAG sought its costs (see DAG's original skeleton argument). DAG's costs application was adjourned to 23 June with the costs of the adjournment reserved.

14. DAG has never supported the SoA in any of its many incarnations. This is simply because the Treasury never came up with a scheme which in the view of DAG and its legal advisers conferred any material advantage over a traditional liquidation. The SoA was voted down by 2 out of the 3 classes of creditors. The reason it was voted down was because the SoA did not confer sufficient benefits to creditors over and above a traditional liquidation. Had it done the SoA would have been approved (and the DAG would have supported

[20] In fact the Explanatory Notes were not produced until 8 April, the day before the hearing

[21] The Court will recall at the hearing on 9 April the dispute about the graphs and what they showed. That dispute continued after 9 April. As another example, clause 18.5 of the SoA (half a page of A4) was virtually impenetrable in its drafting and, after numerous questions from DAG, required an explanation which took up nearly 3 pages of the Explanatory Notes (see para. 33 of the explanatory Notes).

it). The fact that the SoA was not sufficiently attractive to creditors was because the Treasury did not make it sufficiently attractive.

15. DAG has from the outset been against delay: its constant theme throughout has been that creditors should be paid out as soon as possible. As a result of the Treasury's promotion of the failed SoA the liquidation of the Company was delayed from October 2008 until 27 May 2009. During this period DAG expended considerable legal costs dealing with all aspects of the SoA. These costs would never have been incurred but for the Treasury's insistence that the winding up petition be repeatedly adjourned and the Treasury's irrepressible promotion of the SoA, all in the face of the opposition of DAG.

16. In these circumstances, and as submitted in DAG's original skeleton, it is only fair and just that the Treasury should pay DAG's costs of and occasioned by the SoA in accordance with the principles in *Esal*. These are all the costs incurred by DAG in connection with the SoA - including those of its English solicitors Edwin Coe[22] - from November 2008 to date, including the reserved costs of the hearing on 27 May 2009.

<u>The Treasury has misinterpreted *Esal:* there is no requirement for frivolous or careless conduct on the part of the Treasury</u>

17. In paragraphs 33 – 35 of its skeleton the Treasury argues that it should not have to bear DAG's SoA costs. The Treasury does so solely in reliance on *Esal*. However, the Treasury has misinterpreted *Esal*.

18. In *Esal* the banks who proposed and supported the scheme of arrangement were one set of creditors of Esal. Another set of creditors of Esal opposed the scheme. The creditors who successfully opposed the scheme sought their costs from the creditors who had promoted the scheme. Harman J rejected that application on the basis that it was inappropriate (save in exceptional circumstances) for one set of creditors (the supporters) to bear the costs of another set of creditors (the opposers) in respect of a failed scheme of

[22] In this regard the Treasury was advised by Herbert Smith and the Liquidators similarly were advised by London solicitors

arrangement (page 461i – page 462a). Harman J accordingly rejected the notion that one set of creditors with a particular set of commercial interests should pay the costs of another set of creditors with differing commercial interests.

19. However, the present case is entirely different from *Esal*. This is not a case where one set of creditors of a company who opposed the scheme (DAG) are seeking their costs from another set of creditors of a company who supported the scheme. This is because the Treasury is not for these purposes a creditor of the Company. On its own admission the Treasury is avowedly not a creditor of the Company for the purposes of the SoA. In paragraph 6 of its skeleton the Treasury says: "*In participating in the present proceedings, the Treasury has not sought to advance any commercial interest of its own.*" This therefore distinguishes the present case from what Harman J said in *Esal* about one set of creditors paying the costs of another set of creditors. Accordingly, if the Court orders the Treasury to pay DAG's costs it will not be ordering one creditor to pay the costs of another creditor. Rather, it will in the usual way be ordering a petitioner who brings a petition and loses it to pay the costs of the successful respondent.

20. The other distinguishing feature of the present case from *Esal* is that in *Esal* the creditor banks who promoted the scheme were not petitioners for the scheme of arrangement. The petitioner for the scheme of arrangement in *Esal* was the company alone (see page 455a). However, in the present case, the Treasury was a joint petitioner with the Liquidators in respect of the SoA. In these circumstances the usual rule in *Esal* (page 463b-d) applies, namely that petitioners who present a petition for a failed scheme must pay the costs of the creditors who opposed the scheme.

21. For the reasons set out in paragraphs 15 – 17 of DAG's original skeleton DAG submits that the Treasury should alone bear the costs of the SoA.

22. Even if the Treasury had not been a joint petitioner with the Liquidators, DAG would still have sought an order that the Treasury pay DAG's costs. In this regard DAG would have relied upon section 53(1) of the *High Court Act 1991*

(which is in the same terms as section 51 of the *Supreme Court Act 1981* in the UK) and *Aiden Shiping Co Ltd. v Interbulk* [1986] AC 965 (tab 7 of the Treasury's authorities). However, since the Treasury is a joint petitioner there is no need for DAG to resort to the *Aiden Shipping* jurisdiction.

23. If the Court is not minded to order the Treasury to bear the SoA costs alone, DAG's fall back submission is that the Treasury and the Liquidators should jointly bear DAG's costs of the SoA.

24. However, it would be manifestly unfair and unjust for the SOA costs to be paid out of the assets of the Company alone (which is seemingly what the Treasury is arguing). This is because it was the Treasury who actively promoted the SoA for its own reasons. It would therefore be wrong in principle for such costs to come out of the Company's assets with no contribution to such costs from the Treasury when it was the Treasury who was responsible for initiating and promoting the failed SoA.

<u>The Treasury should pay the Liquidators' costs of the SoA</u>

25. In paragraphs 20 – 22 of its original skeleton DAG submitted why the Treasury should pay the Liquidators' costs of the SoA.

26. In response the Treasury has merely said in its skeleton[23], without giving any reason, that DAG's submission is "outlandish" and "startling".

27. Since the Treasury has not given a reasoned explanation for its opposition to DAG's submissions, DAG invites the Court to order the Treasury to pay the Liquidators' costs for the reasons set out in paragraphs 20 – 22 of DAG's original skeleton.

28. In this regard the position as regards the Early Payment Scheme ("the EPS") for depositors affords a useful illustration as to why it would be right, fair and just for the Treasury to pay the Liquidators' costs of the SoA. Significant sums have been spent by the Liquidators in dealing with applications from depositors under the EPS and in providing relevant information to the Treasury in connection with the EPS. The only reason that the EPS came into

[23] Paragraph 36

existence at all was to satisfy the criticisms of depositors who were waiting for their payments under the Depositors Compensation Scheme ("the DCS"). The only reason that payments were not made under the DCS was because the DCS had not been activated. The only reason the DCS had not been activated was because no winding up order had been made. The only reason no winding up order was made was because the Treasury had successfully adjourned the winding up petition from time to time so as to be able to promote its SoA.

29. Accordingly, had the winding up order been made when it should have been (October 2008) there would have been no need for the EPS at all, and so no need for the Liquidators to spend any sums in connection with the EPS, because the DCS would have paid out soon after the making up of the winding up order.[24] Therefore, the EPS, and so the costs associated with the EPS, could have been avoided altogether had the DCS been triggered in October 2008 as it would have been had the Treasury not intervened. In such circumstances it is submitted that the Liquidators (in other words the Company) should not have to bear these costs. These costs should properly be borne by the Treasury since it was the Treasury which caused these costs to be incurred.

30. In the event that the Treasury does not pay the Liquidators' costs of the SoA, it is submitted that there should be no order as to the Liquidators' costs of the SoA. This is in line with the decision of Harman J in *Esal* where at page 463G-H he made no order as to the company's costs incurred in and about the preparation of the failed scheme of arrangement which had been promoted by the company.

Elements of DAG's costs of the SoA

31. In paragraph 10 of the Liquidators' skeleton the Liquidators say that the following costs of DAG should be disallowed: costs incurred by DAG in (i)

[24] In this regard the DCS was triggered on 27 May 2009 and it is hoped by the DCS that all creditors will receive their DCS entitlements in full within the next 3 months: see www.dcs.im/dcs/dcs.nsf/FAQs

urging the Treasury to improve on the terms of the SoA, (ii) organizing and addressing meetings of DAG members to comment on the SoA, (iii) reporting on approaches to the Treasury to improve the terms of the SoA and (iv) arranging for proxy votes to be held and voted upon at the Scheme Meetings.

32. However, such costs are clearly costs of and occasioned by the SoA: they should therefore be paid in the usual way. In particular, and without prejudice to the above, once the Court acceded to the Treasury's application to adjourn the winding up petition and put the SoA to the vote it was inevitable that DAG would incur significant legal costs in dealing with each of the matters identified in the Liquidators' skeleton. Such costs were entirely foreseeable and were necessarily and reasonably incurred. They plainly form part of the costs of and occasioned by the SoA and there is no reason to exclude such costs or to limit the costs to the hearing of 9 April.

Miscellaneous

33. In paragraphs 7 – 10 of its skeleton argument, the Treasury refers to the fact that the Court determined that the Scheme was a proper one to be put to creditors. This has no bearing on the Treasury's liability for the costs of the SoA. In *Esal* the scheme was put to the vote and the appropriate majority of creditors voted in favour the scheme (page 455a-b). The scheme in *Esal* subsequently failed because the financiers of the scheme did not put up the funds and so the petition to sanction the scheme was dismissed by the court (page 457f-h). In the present case the creditors did not even approve the SoA, so the failure in the present case was even more of a failure than the failure of the scheme in *Esal*.

34. In paragraph 11 of its skeleton argument the Treasury makes reference to paragraphs 6 and 7 of DAG's original skeleton where DAG submitted that the Treasury "should suffer the consequences". As is clear from paragraph 7 of DAG's original skeleton, this is no more than a reference to the fact that the Treasury, as promoter of the failed SoA, must suffer the consequence of an adverse costs order in accordance with the principles in *Esal*. Contrary to

what the Treasury says in paragraph 11 of its skeleton argument, it is not a question of casting around to see who should be "blamed" – an adverse costs order against the Treasury follows under normal *Esal* principles.

35. In paragraph 11 of its skeleton the Treasury says "*DAG has never been against the Scheme in principle but rather engaged in a commercial bargaining exercise along the way to see how much they could get out of any Scheme.*" This is wholly incorrect for the reasons set out in paragraphs 13 - 15 above. DAG has always opposed the SoA because it never offered enough. When the Court permitted the continuation of the Treasury's promotion of the Scheme (by acceding to the Treasury's applications for the adjournment of the winding up petition) the DAG naturally did all it could to try to improve its terms along the way. As noted in paragraphs 13(3) and (4) above, as soon as it became apparent (in February 2009 when sufficient details in relation to the SoA first became available) that the Scheme did not offer any advantage to the creditors, DAG opposed the SoA.

36. In paragraph 13 of its skeleton argument, the Treasury refers to the "significant legal and other costs" it has incurred in connection with the SoA and says that it will bear these costs itself. The Treasury goes on to say that this is an "important point" to bear in mind in any debate about the incidence of costs. The fact that the Treasury has incurred significant costs in relation to its failed Scheme is, with respect, completely irrelevant to the question whether the Treasury should pay DAG's costs of the SoA. First, under *Esal* principles those who support a failed scheme of arrangement are not entitled to their costs of the failed scheme from the company's assets (page 463d-h). The Treasury rightly has not claimed any such costs because it knows it could not get them. Secondly, the Treasury's position is no different to any other litigant who has spent money bringing a petition which has failed. Just because the petitioner has had to incur his own significant costs in bringing his failed petition does not mean that he is somehow absolved from paying the successful respondent's costs.

The costs of the Winding Up Petition

Introduction

37. Although the responding parties have devoted many pages of their skeletons to the costs of the winding up petition, it would appear that these costs are in fact relatively small.

38. As regards the Company the costs would appear to be modest – see paragraph 5 of the Company's skeleton. They involve the costs of preparing the petition and supporting evidence and then the various adjournments of the winding up petition. As regards the adjournments the Company's stance was neutral[25] and so the costs will not be large.

39. As regards the Liquidators' costs, the Liquidators say that their costs of the winding up petition are "minimal"[26].

40. The Treasury is not of course claiming costs in respect of the winding up petition.

41. As regards DAG's costs, these are likely to be relatively modest if the majority of costs which have been incurred are treated as being the costs of and occasioned by the SoA. This will be the case if DAG's winding up costs are confined to costs which relate solely (a) to the adjournments of the winding up petition and (b) to DAG's support for the winding up petition and if such costs do not relate to any matter connected with the SoA. Although it is probably ultimately a matter for the costs assessor, DAG submits that the vast majority of the costs incurred relate to the SoA and not to the winding up petition. Accordingly, most of DAG's costs are likely to be SoA costs rather than winding up petition costs.

The Company's costs of the Winding Up Petition

42. In paragraph 7 of the Company's skeleton it is submitted that the Company should be granted the usual order on a successful winding up petition, namely

[25] See the second half of paragraph 6 of the Company's skeleton
[26] See Paragraph 8(1) of the Liquidators' skeleton

that the costs of the petitioner (the Company) be paid from the assets of the company as a pre-preferential debt. The DAG does not oppose, and has never opposed, such an order in respect of the Company's costs of the winding up petition.

43. Paragraph 33 of DAG's original skeleton seeks a Bathampton Order in relation to the Liquidators and not to the Company.[27] Bathampton orders are dealt with further in paragraphs 51 – 54 below.

44. Accordingly, DAG does not oppose the usual costs order on a winding up order so far as the Company is concerned. For the reasons set out in the second half of paragraph 6 of the Company's skeleton, such costs are not likely to be large.

DAG's costs of the Winding Up Petition as a supporting creditor

45. DAG seeks its costs of the winding up Petition as a supporting creditor (see paragraphs 23 – 27 of DAG's original skeleton). DAG's primary case is that such costs should be paid by the Treasury[28]. DAG's alternative case is that they should be paid out of the Company's assets in the usual way[29].

46. Both the Treasury[30] and the Liquidators[31] accept that, as supporting creditor, DAG is entitled to its costs of the winding up petition.

47. However, they both say[32] that such costs should come out of the assets of the Company as a pre-preferential debt and should not be paid by the Treasury.

48. The Company's skeleton does not deal with DAG's costs as supporting creditor, and it is therefore to be assumed that the Company accepts that DAG is entitled to its costs as supporting creditor.

49. As regards whether the Treasury should pay these costs (instead of these costs coming out of the assets of the Company as a pre-preferential debt) DAG repeats what it has said above and in paragraph 29 of its original skeleton that

[27] This was made clear to Counsel at the hearing on 27 May
[28] Paragraph 29 of DAG's original skeleton
[29] Paragraph 30 of DAG's original skeleton
[30] Paragraph 17 of the Treasury's skeleton
[31] Paragraph 7 of the Liquidators' skeleton
[32] *Ibid.*

such costs should be paid by the Treasury because it was the Treasury who actively promoted the SoA and persuaded the Liquidators to adopt the SoA (which the Liquidators were only prepared to do "on balance").

50. The Treasury's response[33] to DAG's claim merely repeats the reliance on the fact that in *Esal* Harman J did not order the banks who promoted the failed scheme to pay the costs of those creditors who had supported the winding up petition. But Harman J made his decision on the basis[34] that it would be wrong, save in exceptional circumstances, for one creditor to pay the costs of another creditor. However in the present case, as explained in paragraphs 17 – 19 above, the Treasury is not a creditor of the Company for these purposes and so this part of the reasoning in *Esal* does not apply. Just as the Treasury should pay DAG's SoA costs, so the Treasury should pay DAG's winding up petition costs. This is particularly so if there is any dispute about what is a cost of the SoA and what is a cost of the winding up petition.

<u>The Liquidators' costs of the winding up petition</u>

51. This is where DAG's submissions in respect of a Bathampton Order become relevant. However, given that the Liquidators now say that their costs of the winding up Petition are "minimal"[35] the debate about a Bathampton Order is probably academic.

52. DAG accordingly merely repeats what is said on this topic at paragraphs 33 and 34 of its original skeleton.

53. Nevertheless, and contrary to what the Treasury[36] says in paragraph 25 of its skeleton (adopted by the Company in paragraph 9(3) of its skeleton) and repeated by the Liquidators at paragraphs 8(5) and (6) of their skeleton, Bathampton Orders are still regularly made in England notwithstanding what Hoffman J said in *Re A Company (No. 004055 of 1991)* [1991] 1 WLR 1003

[33] Paragraphs 19 and 20 of the Treasury's skeleton
[34] Page 462h: the reference to "*I have already given my reasons …"* is a reference back to the reasoning at pages 461i – 462a
[35] Paragraph 8(1) of the Liquidators' skeleton
[36] DAG does not understand why the Treasury has made any submissions about Bathampton Order since the Treasury is not affected by DAG's claims for a Bathampton Order

(Treasury's authorities, tab 6). A good illustration of this is the Court of Appeal decision of *Re Aurum Marketing Ltd.* [2000] BCLC 645 (Treasury's authorities tab 5). In that case the Court of Appeal imposed a Bathampton order (see the last paragraph of Mummery LJ's judgment on page 41 of the bundle of authorities). The first instance judge (Jules Sher QC) in *Re Aurum Marketing Ltd.* [1999] 2BCLC 498 at 504F-G (attached to this skeleton) had refused to make a Bathampton order on the basis that, after what Hoffmann J had said in *Re A Company,* Bathampton orders were no longer appropriate. However, as noted above, the Court of Appeal proceeded to make a Bathampton order and so concluded that the view taken by the first instance judge was incorrect.

54. Accordingly, Hoffman J's approach in *Re A Company* has not been followed and Bathampton orders remain appropriate under English law and practice. DAG invites the Court to make one in this case in respect of the Liquidators' costs of the winding up petition (although, as noted above, since the relevant costs are minimal the matter is largely academic).

DOMINIC CHAMBERS QC

19 June 2009