CP 2008/94

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CHANCERY DIVISION

Between:

The Depositors Action Group
and
The Treasury
and
Joint Liquidators Provisionally
and
Kaupthing Singer and Friedlander (IOM) Limited

Judgment delivered by
His Honour Deputy Deemster Corlett
the 30th day of June 2009

Introduction

[1] There are before me various costs applications following on from the making of a compulsory Winding-Up Order in respect of Kaupthing Singer & Friedlander (Isle of Man) Limited (KSFIOM) on the 27th May 2009. KSFIOM was a licensed bank with depositors resident in the Isle of Man, the United Kingdom and around the world. It was placed into provisional liquidation on the 9th October 2008.

[2] The principal applications which I need to determine are those brought by Zygmund Sieczko, Sarah Chantrey and Tracey Spuyman, the Committee Members of the KSFIOM Depositors' Action Group (DAG) namely that Treasury should pay its costs in respect of the Scheme of Arrangement and the Winding-Up Petition, alternatively that those costs be borne jointly by the Treasury and KSFIOM. The real issue is not whether DAG's costs will be paid, but by whom they will be paid, and whether those costs will be limited in their temporal extent and in respect of certain elements thereof. There is also an application by the DAG that Treasury should pay the costs of the Joint Liquidators Provisional (JLPs) of both the Scheme of Arrangement and the Winding-Up Petition.

[3] There is also an application by the DAG that there be a "Bathampton Order" in respect of the JLP's costs.

[4] The hearing in respect of costs took place on 23rd June. Whilst I had in advance of the hearing the benefit of skeleton arguments from all relevant parties, it became apparent during the course of the hearing that there were differing interpretations of the leading case of Re Esal (Commodities) Limited[1985] BCLC 450. In addition, certain fresh matters were raised, particularly by the JLPs and in those circumstances I thought it prudent to reserve judgment in respect of a matter which is of some complexity. I bear in mind that it is always desirable to deal with matters of costs briefly but in the peculiar circumstances of this case, I regret that brevity may not always be possible.

Brief Chronology

[5] A brief chronology of the litigation is necessary. On the 9th October 2008 this Court appointed Michael Simpson as the sole Liquidator Provisional of KSFIOM. Peter Norman Spratt was appointed as a joint liquidator provisional on 22nd November 2008. The Winding-Up Petition was listed for the 25th October 2008 but was adjourned on the basis that certain "high level meetings" were taking place in order hopefully to resolve the future of the Company. Those governmental meetings did not produce any form of rescue package and the matter came back before the Court on the 27th November 2008 when, following representations made on behalf of the Treasury, the Winding-Up Petition was adjourned for the consideration of a proposed Scheme of Arrangement under section 152 of the Companies Act 1931.

[6] On several subsequent occasions the Winding-Up Petition was adjourned and eventually on 9th April 2009 an Order was made that creditors' meetings be convened to consider whether to approve the Scheme of Arrangement which had by then been formulated.

[7] On 19th May 2009, meetings of creditors were held which resulted in the Scheme failing to attain the requisite majorities, although only in respect of value. It is a fact that the majority of creditors by number did vote in favour of the Scheme. Inevitably, following the failure of the Scheme of Arrangement, a Winding-Up Order was made by the Court on the 27th May and questions of costs were adjourned for further consideration.

The Law

[8] The basic proposition in all civil litigation is that costs are in the discretion of the Court. (See section 53(1) of the High Court Act 1991). That discretion must, of course, be exercised judicially, taking into account any relevant authorities.

[9] It was agreed by all Counsel who addressed me on the 23rd June that I should take into account the authority of Re Esal (Commodities) Limited, which was a case where, as here, a winding-up petition was adjourned pending the consideration by the creditors and the court of a scheme of arrangement. While not binding on me, Re Esal is clearly a persuasive authority. However, varying interpretations of this authority were canvassed. In brief, Mr. Chambers QC, who appeared for the DAG, submitted that because the Scheme of Arrangement had failed, costs should in essence follow the event as would be normal in any civil litigation. In other words, since Treasury was a petitioner, had promoted and was the lead party in the Scheme of Arrangement, the primary liability to pay the costs of those who had successfully opposed the Scheme should rest with the Treasury. He submitted that the only unusual aspect of schemes of arrangement is that, on the basis of Esal, there should be only one set of costs paid out to the successful party. In this case that was not a particular consideration because in any event there was only one successful party and therefore only one set of costs had to be considered.

[10] Mr. Gough, who appeared for the Treasury, submitted that Esal was authority for the proposition that the usual costs order in these situations is that the costs of the opposing creditor should be paid out of the assets of the relevant company, as a pre-preferential item. He therefore submitted that DAG's costs should be paid out of the assets of KSFIOM.

[11] Mr. Caine, who appeared for the JLPs, submitted that the usual rule in civil litigation, namely that the loser pays, does not apply to schemes of arrangement or court windings up. He submitted that the only reason why the company in Esal was ordered to pay the opposing creditor's costs was because of swingeing criticisms of the conduct of the Company. This had not only led to a Bathampton Order being made in respect of the Company's costs but also an order that the Company should pay the opposing creditor's costs. In other words, Mr. Caine submitted that it would be necessary for me to find misconduct on the part of KSFIOM before I should order that the costs of DAG should be paid out of KSFIOM's assets.

[12] In Esal, the company was hopelessly insolvent and it was eventually agreed that a Scheme of Arrangement sanctioned by the Court would be necessary. At the same time as the Scheme was being considered, a Bank had presented a petition to wind up the company. The Scheme did in fact, unlike in this case, obtain the necessary statutory support from creditors but the whole Scheme collapsed because the provision of a large injection of funding into the new company was not forthcoming. Inevitably, a winding-up order was then made. Various costs applications were then made, which apparently necessitated five court days to argue and a lengthy judgment from Harman J, which appears to have taken some months to hand down.

[13] Of particular relevance to the matters before me is the fact that the Petitioner and other creditors who had supported the winding-up and opposed the Scheme of Arrangement sought an order that if the assets of the Company proved insufficient to meet their costs, they should be paid by three of the lead Banks who had proposed the Scheme and opposed the winding-up.

[14] It will be readily apparent that there are certain close similarities between the Esal case and the KSFIOM case. In both scenarios, those who supported the winding-up and opposed the Scheme of Arrangement seek costs from those who proposed the Scheme and opposed the winding-up.

[15] Harman J ordered that on the winding-up petition there should be one set of costs for the supporting creditors (payable out of Company's assets) and that on the Scheme of Arrangement the Company should pay the opposing creditors' costs. He also made a Bathampton Order in respect of the company's costs of the winding-up order and no other order as to costs in respect of the scheme (see page 464c).

[16] Of particular relevance is Harman J's analysis of the difference between winding-up petitions and schemes of arrangement as compared to other types of civil litigation (see pages 459a to d):-

> "*It must be remembered that a winding-up petition is not a normal lis between parties; nor is a scheme of arrangement petition. In neither of them does A beat B, or B beat A. A winding-up petition is presented by a creditor, and if the debt is undoubted must succeed if the debt has not been paid, unless good reason is shown to the contrary. Good reason is not that the company is trying its best or has suffered hardship or anything of that sort, it is that the remedy which is being sought is a class remedy; the petitioner has a right to the remedy as against the company but it is a remedy on behalf of the whole class whom that petitioner represents, being usually all the unsecured creditors of the company. The contest as to whether the remedy should be granted or not therefore turns on whether the remedy is appropriate for the class.*

It is because it is a class remedy, granted in the interests of the class as a whole and not in the interests of any individual, that the court must always be aware of the extreme need for economy in costs, because the remedy for the class is invoked by one of the class. Many, many of the class will not be represented before the court. The costs of invoking the remedy are pre-preferential; that is they come out of the assets before anything is available to the class. Thus, in a sense, the class suffers by the amount of costs incurred, and the court must remember that it is disposing of other people's money which, in broad terms, is trust money held by the liquidator for the benefit primarily of the class on behalf of whom the petition is brought. These moneys are not in any true sense any longer the company's moneys, and it is not a win by the creditor over the company so that the ordinary rule that the winner gets his costs is not so easily applicable."

[17] Harman J went on at page 461i to deal with the claim for costs as against the proponents of the scheme:-

" Thus, although I concur that criticisms advanced by the body of opposers, if I may so characterise them, were sound criticisms which were likely to have considerable effect on the court on considering approval of the scheme, yet they do not in my judgment come to such as to make the banks guilty of such frivolous and careless conduct in presenting the scheme as to make it right that the costs of opponents of the scheme should fall upon the banks. I cannot see that as between creditors who take different views it is right, save in the most exceptional cases, to say that one set of creditors should bear another set of creditors' costs of a proposed scheme of arrangement."

[18] Dealing with the Scheme of Arrangement, he said this (at page 463b to d):-

" So far as the scheme is concerned that is a scheme which has wholly failed. As it seems to me the proper order on that is that the creditors who opposed it, who are I think those creditors represented by Mr Moss, Mr Todd, Mr Brisby and Miss Arden, should have one set of costs between them for opposing the scheme. The scheme was brought, it has failed, and it seems to me right that the costs of those who oppose it should be paid. I hold that there is jurisdiction to include as pre-preferential costs in the winding-up petition the costs of the scheme. I say that because it is quite evident that at all times the scheme and the petition have been mirror images one of the other. The scheme was the only good reason why the class remedy should not be available to the creditors. The scheme was a scheme for the benefit, it was hoped, of the class. It has failed, some of the class did not want it, but in my judgment there is no reason why any order should be made other than that one set of costs representing the opposing creditors should be allowed."

[19] It seems to me that the following guidance may be distilled from the Esal case:-

1. For the reasons set out at page 459 of the judgment, there is a particular rule unique to litigation involving winding-up petitions and schemes of arrangement that there should, in general terms, be one set of costs for any successful group of creditors.

2. Those who present or promote a scheme of arrangement will not normally be subject to an adverse order for costs unless they have been guilty of "frivolous and

careless conduct" in presenting the scheme. I appreciate that what Harman J says about this at pages 461 and 462 of the judgment is predicated on the basis that one is looking at one group of creditors as opposed to another such group but it seems to me that this principle should be one of general application to those who promote or oppose a scheme, and should not be confined to a situation where there is a contest between one set of creditors and another. In passing I would note that Treasury is in fact a creditor of KSFIOM, although I accept that the Scheme Petition was not presented primarily on that basis, it being Treasury's position that it "has not sought to advance any commercial interest of its own" (see para. 6 of its skeleton argument).

3. Where a scheme of arrangement has wholly failed, it is normally right that the costs of those who oppose it should be paid. The usual order will be that those costs should be paid out of the assets of the company as pre-preferential costs, there being jurisdiction to include as pre-preferential costs in the winding-up petition the costs of the scheme. This is because, as Harman J states at page 463c, it is quite evident that in such cases the scheme and the petition will normally have been mirror images one of the other. As with winding-up petitions, only one set of costs representing the opposing creditors should be allowed, this being the rule peculiar to schemes and winding-up petitions.

[20] It seems to me that on a proper analysis of Esal, the undoubted misconduct of the company, through its servants and agents, was a matter which persuaded Harman J to make a Bathampton Order, namely one which postpones the recovery of the company's legal costs until after payment of the unsecured creditors. The effect of this in the vast majority of cases will be that the company's legal costs will remain unpaid (see re Bathampton Properties Ltd [1976] 1 WLR 168).

[21] It should be noted that in Esal the judge was quite critical of the promoters of the scheme. In particular, he observed that the promoters of the scheme had failed to consider the taxation implications of the scheme. As I have already noted, the judge said that there were "sound criticisms which were likely to have a considerable effect on the court on considering approval of the scheme". Despite this, the judge in Esal was unwilling to make any order against the promoters which would have the effect of making them pay the costs of those who had opposed the scheme. In Esal the scheme was formulated and all the running was done by Punjab National Bank (PNB), one of the lead banks. The scheme had flaws and failed. Yet no order was made against PNB.

Discussion

[22] There is no doubt in my mind that Treasury were the proponents and financiers of this Scheme. The JLPs were, broadly speaking, neutral until the Scheme Petition was filed and even then Mr. Simpson's support for the Scheme was a little guarded. He said that it was "on balance" that he would recommend the scheme to creditors. The Scheme failed, says Mr. Chambers, because it was not made sufficiently attractive by the Treasury. That may well be the case. However, as Mr. Caine reminded me forcefully during the course of submissions on the 23rd June, the fact is that a majority by number of the creditors of KSFIOM did in fact support the Scheme. 2760 votes were cast in favour of the Scheme, 1312 were cast against the Scheme. A 2-1 majority in favour (by number). In the Small Depositors' Class the Scheme was overwhelmingly approved by number and by value. Of course equally it is true that the requisite 75 per cent by value in two out of the three classes did not support the Scheme and thus it was bound to fail. Nevertheless, it is difficult

to see how it can really be claimed that this Scheme was devoid of any substantial support from the general body of KSFIOM's creditors.

[23] I further accept that Treasury were acting in what they perceived to be the best interests of all the creditors and indeed in the interests of the Isle of Man as a whole. Their perception of these matters may well have been misguided. There are those who subscribe to the view that the propounding of this Scheme of Arrangement has done far more harm to the Island's reputation as a financial centre than would have been the case had KSFIOM been allowed to go into liquidation in October or November of 2008, thus triggering the Depositors' Compensation Scheme and the well-trodden path of a compulsory liquidation. The prudence of Treasury's general approach to this whole issue is no doubt a matter to be considered by others in future. It is certainly not a matter for determination by this Court. However, I do not consider on the basis of the information available to this Court that it can be said that Treasury acted in a frivolous or careless way in presenting this Scheme to the creditors.

[24] Mr. Gough also points out that in this case the Court was persuaded to allow the Scheme to go forward to a vote by the creditors. As I observed in my judgment of 9th April 2009, this was not a "Savoy Hotel" type of case, namely one where a scheme was put before the Court which was incontrovertibly bound to fail. It undoubtedly had some prospect of success and accordingly I allowed the Scheme to go forward to a vote. As I have observed, the fact is that a very large number of creditors did in fact vote in favour of the Scheme.

[25] In accordance with Esal, I reiterate that I consider that the normal order which a court will make in the event of a scheme of arrangement failing is that the costs of those who successfully oppose the scheme will normally be paid out of the company's assets and not by the promoters of the scheme. It seems to me that promoters of a scheme will not be ordered to pay those costs unless there has been some element of serious default on their part in accordance with the guidelines given in Esal.

[26] Mr. Chambers makes a further fundamental point which is that as Treasury were one of the Joint Petitioners therefore they should pay the costs of a successful opposing party in the way one would expect if a petitioner loses a case.

[27] It is of course the case that Treasury was a Joint Petitioner in respect of the failed Scheme. I agree however with Mr. Gough that it did not need to be. Normally, schemes of arrangement are presented to the Court by a company or perhaps the liquidators of a company. While Treasury was undoubtedly the funder and instigator of the Scheme, it did not in fact need as a matter of law to be a petitioner. I do not consider that the fact that Treasury chose to be one of the Petitioners alters the position. In other words, I do not believe that the "normal rule" set out in Esal (where the company was the sole scheme petitioner) should be displaced by the fact that the promoter of the Scheme happens also to be one of the Petitioners. I also accept Mr. Gough's submission that, particularly in the current state of the law where there is no interim measure available akin to administration, it would not be appropriate to make costs orders too readily against the promoters of schemes of arrangement, since otherwise there will be a disincentive to look for alternatives to a liquidation.

[28] Furthermore, while I of course accept that in the normal course of civil litigation a petitioner whose petition fails will be ordered to pay the costs of those who have opposed

the petition, it cannot in my view be said that this is in any way "standard" or "usual" litigation. The Scheme of Arrangement and the Winding-Up Order have been brought to the Court against a background of quite exceptional circumstances and I believe it is indeed over-simplistic to treat this case as if it were a run-of-the-mill piece of civil litigation with the normal costs rules applying.

[29] Mr. Caine made a further interesting submission at the hearing on 23rd June. He pointed out that in the evidence submitted to the Court it had been stated that DAG has around 2,000 members. However, in purely numerical terms, only 1,312 votes were cast against the Scheme. It follows, submitted Mr. Caine, that a significant number of DAG's membership either voted for the Scheme or abstained. I agree with Mr. Caine that this is a further reason why this litigation cannot be regarded as "normal" or similar to a case where the Petitioner "loses" and the Respondent "wins". If these figures are to be believed, it is clear that the successful Respondent (i.e. DAG) did not, when it came to the vote, speak with one voice.

Conclusion as to DAG's Costs

[30] I have therefore come to the conclusion that DAG's costs should, in principle, be paid out of the assets of KSFIOM. I accept that there is a strong argument that this Order, which is that sought by Treasury, runs counter to Treasury's avowed claim during the course of this case that their sole motivation is to assist the general body of creditors and that such an Order will inevitably diminish the amount available to the general body of creditors. However, I believe I must take into account that it must surely be the case that DAG's costs will not be so significant as to make any material difference to the amount available for distribution to the general body of creditors. Unfortunately, I was provided with no information whatsoever as to the quantum of DAG's costs but I would find it incredible if those costs were so significant as to make any such material difference.

[31] Nevertheless, I do consider that the Order which I will make in relation to DAG's costs should not be unduly restrictive. It was submitted by Mr. Caine that I should restrict any pre-preferential costs orders to the costs of opposing the Scheme of Arrangement Petition dated 2nd April 2009 at the hearing on 9th April 2009 alone. He further submitted that any costs incurred by DAG in urging the Treasury to improve the terms of the Scheme so as to make it sufficiently attractive to creditors, organising and addressing meetings of DAG members to comment upon the benefits of the Scheme, and to report upon approaches to the Treasury to improve the terms of the Scheme, or to arrange for proxy votes to be held and voted upon at the Scheme meetings, should not be allowed.

[32] I do not accept that DAG's costs should be constrained in this way. My general impression throughout this case is that, while understandably DAG were seeking to improve the deal being offered to them by Treasury, their input into the Court's consideration of the Scheme was extremely valuable in testing the strengths and weaknesses of the Scheme and in particular their input into the difficult matter of the correct classes which should be demarcated in this particular case, was extremely valuable to all concerned, in particular the Court. It must be remembered that the Scheme documentation was a fiendishly complex piece of work. It would in my view be unfair to restrict the costs recoverable by DAG to those of and incidental to the Scheme hearing on the 9th April. It will of course be a matter for the costs assessor to determine whether any particular item of work falls properly within the terms of the Order which I am going to make in this case but, subject to any further

representations from Counsel as to precise wording, I intend to make an Order to the effect that the costs of DAG of and occasioned by the proposed Scheme of Arrangement should be paid out of the assets of KSFIOM as pre-preferential costs. Those costs would of course be assessed on the standard basis in default of agreement. I reiterate that it is not surprising that much time, effort and costs were expended on trying to penetrate the fearsomely complex wording of the Scheme and its Explanatory Statement in respect of which it seems perfectly fair that legal advice should have been taken, as well as dealing with issues such as the preservation of claims against third parties and the parental guarantee. I would add that I also see no need for the costs order to be limited in a temporal way. As Mr. Chambers points out, the Scheme was "in the air" for a considerable time, since around November 2008. It was however only in mid-February 2009 that the DAG could take an informed view of the merits of the Scheme from which date they opposed it. It seems to me that DAG's Scheme costs should therefore be properly claimable from 27th November 2008, when the idea of a Scheme was first ventilated in Court.

[33] Mr. Chambers said that the vast majority of DAG's costs were referable to the Scheme of Arrangement. It is, however, necessary for me to make a similar Order in relation to the relatively modest costs of the Winding-Up Petition. There is no doubt in my mind that, as in the Esal case, one was the mirror image of the other. The Scheme was promoted by Treasury and opposed by DAG. The winding-up was promoted largely by DAG and opposed by Treasury. The two were very closely inter-linked and as a matter of practicality, it might in fact be extremely difficult for a costs assessor to differentiate between work done in relation to the Winding-Up Petition and that done in relation to the Scheme. I have no doubt that various adjournments of the Winding-Up Petition were caused by the desire to promote the Scheme. I have already held that there was no misconduct in relation to the promotion of the Scheme and I therefore rule that the normal Order should apply in relation to winding-up petitions, namely that a successful supporting creditor in the position of DAG should have its costs paid out of the assets of the Company, as a pre-preferential debt, those costs to be assessed on the standard basis in default of agreement.

The Costs of the JLPs

[34] As to the application made by DAG, that the costs of the Liquidators Provisional in relation to the Scheme and the Winding-Up Petition should be paid by the Treasury, it follows that I am not prepared to make such an Order in circumstances where I have not made such an Order in favour of DAG. Furthermore, it would be most unusual, if not unprecedented, for me to make an Order in favour of a party who has not asked for such an Order. It is the case, as Mr. Caine made quite plain during the hearing on 23rd June, that his clients have instructed him not to make any such claim against Treasury. I have no doubt that the Liquidators Provisional have incurred very considerable costs which, if not reimbursed by the promoters of the unsuccessful Scheme, will inevitably lead to possibly a quite material diminution in the assets available for distribution. The Liquidators Provisional were of course specifically empowered by Court Orders of 29th January 2009 and 19th February 2009 to conduct such work, but this would not prevent them from seeking an Order that their costs thereof be paid otherwise than out of KSFIOM. Nevertheless, the Liquidators Provisional have made a firm decision that they will not seek an Order against Treasury for the reimbursement of those costs in whole or in part. In those circumstances I take the view that this must be a matter for the Liquidators Provisional and perhaps the creditors who may, as Mr. Chambers submitted, take the view that the Liquidators Provisional have acted in dereliction of duty in failing to pursue such an Order. I express no

view whatsoever as to whether this would be a reasonable course of action. Certainly so far as the JLPs are concerned, they do not seek a costs order against Treasury and consider that the Scheme Petition was properly brought. I do not consider that it would be a proper exercise of judicial discretion to make an Order against Treasury in those circumstances.

[35] The effect of my decision therefore is that the costs of the Liquidators Provisional of and incidental to the Scheme and the Winding-Up proceedings will be paid out of the assets of the Company in the usual way.

The Costs of the Company

[36] As to the costs of the Company in its role as Joint Petitioner in the Winding-Up Petition, as Mr. Clucas, who appeared for the Company, pointed out, there is in fact now no issue as to these. Those costs will be paid out of the assets of the Company in the usual way.

Bathampton Orders

[37] The issue of a Bathampton Order did not assume much significance at the hearing on 23rd June. As Mr. Chambers pointed out in his reply skeleton argument dated 19th June, the Bathampton jurisprudence only becomes relevant in relation to the liquidators' costs of the winding-up petition. However, given that the Liquidators now say that their costs of the Winding-Up Petition are "minimal", the debate about a Bathampton Order is "probably academic".

[38] I would however comment that it seems to me that it is unlikely that the Court needs to rely nowadays on the Bathampton line of authorities because it is now well-established that orders for costs against third parties (such as an alter ego of an insolvent company) are a more appropriate way of proceeding. Nevertheless, I must express the view that I do not consider in any event that there is any basis for the Court to make a Bathampton Order in this case. It seems to me that such an Order, the effect of which is to postpone payment of the Company's own costs until after the unsecured creditors are paid, would require me to find that there had been misconduct by the Provisional Liquidators or the Company and I find myself wholly unable to find any such misconduct. It is certainly a case far away from the facts of the Esal case. Similarly, I can see no basis for adopting the course which Harman J took in Esal, when he made no order as to the company's costs incurred in relation to the failed scheme. If I were to adopt this course, it would mean disallowing the liquidators' costs of the Scheme. In my view the JLPs have adopted a proper approach to the work which they have done in relation to the Scheme and there is no merit in DAG's suggestion that their costs be, in effect, disallowed.

Summary

[39] It seems to me therefore that the end result of my determinations is that there will be an Order that DAG's costs of and occasioned by the proposed Scheme of Arrangement and of and incidental to the Petition dated 9th October 2008 should be paid out of the assets of the Company as pre-preferential costs. In relation to both the Scheme and the Winding-Up Petition of 9th October 2008, I consider that DAG's costs should be paid as and from 27th November 2008 which was the first date on which the Winding-Up Petition was adjourned because of the formulation of the Scheme of Arrangement, in other words the first date at which the normal course of the winding-up proceedings was interrupted.

[40] The costs of the Joint Liquidators Provisional in relation to both the Scheme and the Winding-Up Petition will be paid out of the assets of the Company, again as pre-preferential costs. The costs of the Company as Joint Petitioner in the Winding-Up Petition should also be paid out of the assets of the Company in the same way.

Other Costs Issues

[41] I consider that there should be no Order as to the costs of the hearing on the 23rd June 2009 because, while it is right that DAG have failed in their primary submission that Treasury should pay its costs, I consider that their submissions were not without foundation and that they should not be penalised in costs. I understand also that DAG wish to pursue the question of the alleged wasted costs of the hearing on the 27th May 2009 when it was originally intended to deal with the question of costs. I agree with Mr. Gough that, on reflection, it would not have been right for the Court to deal with what have turned out to be complex issues of costs either on the 27th May or without the benefit of a later skeleton argument from the Treasury and indeed a supplemental skeleton from DAG. In those circumstances DAG's costs on the 27th May 2009 will also be ordered to be paid out of the assets of the Company rather than by the Treasury.

Postscript

[42] I wish to add one brief postscript to this judgment. During the course of his submissions, Mr. Gough commented that Treasury had been doing its best to work within the statutory framework of insolvency legislation in the Isle of Man. I remarked to him that the out-of-date legislation with which the Court and the parties have to work is of course the responsibility of the Treasury in that it is certainly my understanding that insolvency legislation is promoted and drafted by Treasury. It is self-evident that the Island's insolvency legislation (both corporate and personal) is in urgent need of review. This is not the first time that this issue has been raised and I very much hope that priority will be given to such a task in the near future. The Island's reputation as an international finance centre will only suffer if it is not.

[43] I would seek Counsel's assistance in the drawing up of a suitable Order.