

Serial number: CP2008/94

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

CHANCERY DIVISION

Date of proceedings: 9 April 2009

Before:

HIS HONOUR DEPUTY DEEMSTER CORLETT

PETITION OF KAUPTHING SINGER & FRIEDLANDER

**PROCEEDINGS**

Transcribed by FTR Transcripts  
Groves Cottage  
Trollaby Lane  
Union Mills IM4 4AP  
(Telephone 07624 461182)  
(Registered at the Isle of Man Companies Registry No. 018469B)

1 COMMENCEMENT OF CD, 9 April 2009

2 DC: Good morning everyone. This is the matter of Kaupthing Singer &  
3 Friedlander (Isle of Man) Limited, there are two Petitions before the Court.  
4 The first is the joint petition of Kaupthing Singer & Friedlander (Isle of Man)  
5 Limited and the Financial Supervision Commission, that's the winding up  
6 petition. And the other is the petition of Kaupthing Singer & Friedlander (Isle  
7 of Man) Limited and the Treasury, which is the scheme of arrangement  
8 petition. So perhaps if I could take appearances first of all.

9 MR ATTORNEY: It may be appropriate if I make the first appearance Sir. I  
10 appear may it please Your Honour on behalf of the Treasury with my learned  
11 friend Mr Gough as I have done in previous appearances Your Honour. But  
12 on this occasion Your Honour we will be ably assisted by Mr Richard Hacker  
13 of Counsel, leading Counsel, to whom a temporary Advocates Licence has  
14 been granted under Section 17 of the Advocates Act.

15 DEPUTY DEEMSTER: Yes thank you Mr Attorney.

16 MR ATTORNEY: Your Honour if I could also say that my learned friend Mr Caine  
17 who has appeared for the company will also be led in the proceedings today by  
18 Mr Hacker.

19 DEPUTY DEEMSTER: I see, thank you very much indeed. So Mr Caine, yes,  
20 you're appearing for

21 MR CAINE: Indeed Sir.

22 DEPUTY DEEMSTER: for the joint provisional liquidators.

23 MR CAINE: Yes Sir.

24 MR WILD: Your Honour I'm for the Commission, the other joint petitioner in the  
25 winding up proceedings.

26 DEPUTY DEEMSTER: Yes, thank you Mr Wild.

1 MR WILD: Thank you Your Honour.

2 DEPUTY DEEMSTER: A lady with her hand up there at the back, I've no idea why.

3 MEMBER OF PUBLIC: Your Worship, may I speak up, some of us are old age  
4 pensioners including me and I cannot hear a word, I see you've got  
5 loudspeakers is it possible to turn those on so that we can hear?

6 DEPUTY DEEMSTER: No we don't actually have loudspeakers but I shall speak as  
7 loudly as I can.

8 MEMBER OF PUBLIC: Thank you so much and I would respectfully ask the  
9 barristers to do the same, thank you.

10 DEPUTY DEEMSTER: Fine okay. So Mr Caine. Now Mr Halsall.

11 MR HALSALL: Yes Your Honour. I appear on behalf of Mr [Siesgo], Miss Santry  
12 and Miss Voyman. With me today Mr Dominic Chambers QC who was  
13 licensed yesterday and if I could indicate Sir that we are replacing Mr John  
14 Wright who filed a motion over the weekend seeking his release. If I could  
15 also indicate that Mr Wright had hoped to appear today with Mr Keith Hughes  
16 but unfortunately Mr Wright is ill and I understand that Mr Hughes would like  
17 to address the Court himself.

18 DEPUTY DEEMSTER: Yes.

19 MR HALSALL: Which I believe he has done before.

20 DEPUTY DEEMSTER: He has indeed. Mr Hughes is here is he?

21 MR HUGHES: Yes.

22 DEPUTY DEEMSTER: Yes, right Mr Hughes, thank you very much we'll come to  
23 you later.

24 MR HALSALL: If I could also indicate on his behalf Sir that I understand Mr  
25 Hughes has a flight this afternoon and if at all possible he would like to  
26 address the Court before lunch if that is convenient to you Sir.

1 DEPUTY DEEMSTER: Fine, thank you Mr Halsall.

2 MR HALSALL: Thank you.

3 DEPUTY DEEMSTER: Now I think we've dealt with the front bench have we? Yes.  
4 Right Mr Halsall. Mr Morris.

5 MR MORRIS: Yes Your Honour I appear for CMI Insurance Company Limited,  
6 Norwich Union International Limited, AXA Isle of Man Limited, Royal  
7 Skandia Life Assurance Limited, Prudential International Assurance Limited,  
8 Friends Provident International Limited and Legal & General Island Limited,  
9 the same parties as at the previous Court Sir.

10 DEPUTY DEEMSTER: Thank you Mr Morris. Mr Carter.

11 MR CARTER: Thank you Your Honour. I appear for Creg-ny-baa Holdings  
12 Limited, Cassidy Creek Limited, Ballios Limited, the Trustees of the Graylow  
13 Trust, Honeybee Limited, Gingerbread Limited, Trustee of the Marsh Trusts  
14 and Stradbrook Limited who are the same parties I was given leave to appear  
15 for at the last Court.

16 DEPUTY DEEMSTER: Thank you Mr Carter. Miss Holt.

17 MISS HOLT: Thank you Your Honour. I appear for Gavin Break and Katy John.

18 DEPUTY DEEMSTER: Thank you very much indeed. Mr Webb.

19 MR WEBB: If it pleases Your Honour I appear for Falcon Ridge Holdings Limited  
20 and Ricochet ARL Limited who are the same parties as I appeared for  
21 previously.

22 DEPUTY DEEMSTER: Thank you very much Mr Webb. Mr Wannenburgh.

23 MR WANNENBURGH: Canada Life International Limited Sir.

24 DEPUTY DEEMSTER: That's right, Mr Mahr previously appeared but that's fine.  
25 Yes, and that concludes all the appearances by Advocates I think does it.  
26 Now, there are other parties who did enter a formal notice of appearance and I

1 have a list of those as at the 19<sup>th</sup> of February. I think Mr Clucas prepared a list  
2 previously, so if I could just go through that list so I can make sure that I'm  
3 calling everyone who's formally given notice of their desire to appear. Martin  
4 Lew and PRC Mortgages Limited – any appearance by them? No. Kaupthing  
5 Bank HF, no. Martin Dawes, Medallion Capital Corporation, Norman Roper  
6 and Mary Roper, I've had a notification that they will not be able to attend so  
7 that deals with them. Mr Hughes we've already dealt with. I think that deals  
8 with everyone who was given formal notice of their desire to appear, although  
9 in accordance with my previous practice I will allow individual depositors to  
10 make representations on the petitions if they wish to after I've heard from the  
11 lawyers. So Mr Attorney, there are two petitions before the Court, presumably  
12 you would wish these to be addressed in the order of, presumably the scheme  
13 petition first?

14 MR ATTORNEY: The scheme first, indeed Sir yes, thank you. And I would invite  
15 Mr Hacker to address you on that petition first of all Sir.

16 DEPUTY DEEMSTER: Thank you very much indeed.

17 MR HACKER: May it please Your Honour, as Your Honour has already indicated  
18 there are two petitions before the Court. Your Honour in our submission the  
19 two are in a sense the mirror image of each other, I will return to this, but if  
20 the meetings are convened as the petition seeks we would suggest to Your  
21 Honour that it must follow automatically that the petition will be adjourned,  
22 and therefore the

23 DEPUTY DEEMSTER: I think there's a little bit of difficulty at the back there

24 MEMBER OF THE PUBLIC: We can't hear.

25 DEPUTY DEEMSTER: maybe if you could just speak up a little bit Mr Hacker.

26 MR HACKER: Well if nobody minds me shouting I will try and speak up. Your  
27 Honour I was indicating that the two petitions are effectively a mirror image,  
28 the one of the other and therefore with Your Honour's leave I would propose  
29 to deal effectively with the two taken together, to the extent that the issues to

1           which they give rise overlap with one another. Can I say something about the  
2           timing because I know that timing is a contentious issue in this matter?

3   DEPUTY DEEMSTER:   Well it's a matter that needs to be given anxious  
4           consideration.

5   MR HACKER:   Yes I was at the moment addressing the question of the preparation  
6           of the documents.

7   DEPUTY DEEMSTER: I see.

8   MR HACKER:   And people's access to the documents as opposed to timing in  
9           relation to the returns to depositors. As Your Honour was aware I think on the  
10          last occasion, the Treasury has been advised by Herbert Smith in London and  
11          the scheme that has been prepared is the product of a great deal of work both  
12          on the part of Herbert Smith advising the Treasury and of Lovells, another  
13          leading London firm, advising the provisional liquidators. The preparation of  
14          a scheme, although many schemes share many common features, is a  
15          necessarily and always a very time consuming process, and whilst it might  
16          have been preferable that the scheme were available further ahead of the  
17          hearing than it was, it was necessarily given the nature of the preparation  
18          which was required, something which was never going to be available very  
19          much before and we will submit to Your Honour that certainly creditors have  
20          had a sufficient opportunity to consider it.

21   The explanatory statement which came late in the day adds little save for some  
22          worked numerical examples to the information already contained in the  
23          scheme document itself. I would ask Your Honour to bear in mind, and this is  
24          something that again I'm going to revert to, that in the ordinary course neither  
25          document is something which would be available to creditors at the time when  
26          the application to convene the scheme meetings is made.

27   DEPUTY DEEMSTER:   So you're saying that the proper procedure in the Isle of  
28          Man is to deal with matters really on an ex parte basis.

29   MR HACKER:   Yes. What I would say to Your Honour is this, in the Common Law

1 jurisdictions which have adopted the English company legislation, the general  
2 practice has been to follow the 1934 Practice Direction, save where the Court  
3 has made a conscious and deliberate decision generally by promulgating a  
4 practice direction, to adopt a different procedure. And the reason for that can  
5 be seen quite simply when one looks at the more recent practice direction and  
6 if Your Honour has our bundle of authorities.

7 DEPUTY DEEMSTER: Yes.

8 MR HACKER: The modern English practice as quoted in the Practice Statement in  
9 2002, which is set out in the Practice Statement necessarily requires that notice  
10 of application is given to creditors, Your Honour finds that in paragraphs 4  
11 and onwards. And therefore if a different practice is to be adopted, in other  
12 words what I will call the modern practice is to be adopted, that has to be as a  
13 result of a conscious decision taken by the Court prior to the application being  
14 made. Now Your Honour I would not, I would not propose to embark upon a  
15 discussion as to which is the preferable practice, there are pros and cons of  
16 both practices and Your Honour I hope, if he's had an opportunity to look at  
17 Lord Millett's Judgment in the *UDL case*, will have seen the, what I would  
18 call the contra arguments for the modern practice very clearly set out.

19 DEPUTY DEEMSTER: Yes, yes.

20 MR HACKER: Not least and very significantly in our submission particularly in this  
21 case, that the issue of classes may be entirely hypothetical.

22 DEPUTY DEEMSTER: Well if no approval is given then the whole thing is  
23 hypothetical.

24 MR HACKER: Well, or indeed if there is an overwhelming vote in favour by all the  
25 creditors who vote.

26 DEPUTY DEEMSTER: Yes.

27 MR HACKER: Time will tell, time may tell whether or not it is a relevant  
28 consideration, but certainly Your Honour we have proceeded on the basis that

1 the, what I would call the old practice applies.

2 DEPUTY DEEMSTER: I see.

3 MR HACKER: As I understand it there are creditors represented before Your Honour  
4 who will wish to submit to him that the scheme meetings should not be  
5 convened, so we seem to be in a sense in a hybrid situation. The application is  
6 ex parte, technically they should not be heard, I certainly will not be  
7 suggesting to Your Honour that they shouldn't be heard, and to the extent that  
8 they have anything relevant, and relevant to the issues which arise on the  
9 convening application, I shan't be suggesting that Your Honour shouldn't  
10 have regard to what they say. But, I will caveat that by saying that what they  
11 say has to be relevant to those issues, not some other different issues. But  
12 again I will revert to that.

13 DEPUTY DEEMSTER: From what you say, I was going to suggest is in fact a  
14 hybrid situation, it's an ex parte application on notice as it were.

15 MR HACKER: On notice, yes. But that doesn't and I'd like to emphasise this, that  
16 doesn't alter the nature of the application or the issues which should fall to be  
17 considered on the application. Just because somebody is permitted to appear  
18 doesn't give them carte blanche to raise different issues which in our  
19 submission possibly should be raised at a different stage at the sanction  
20 hearing. Now I don't know what my learned friend is going to say so I'm not  
21 going to pre-empt that argument, but we will be submitting to Your Honour  
22 that, I will be making submissions to Your Honour as to the function of the  
23 Court in the context of this application and the considerations to which the  
24 Court should have regard when determining whether or not to convene the  
25 meetings. And I will submit as a natural follow on from that that Your  
26 Honour should not have regard to other extraneous considerations when  
27 considering those issues.

28 Your Honour I certainly do not intend to recount the history which has led the various  
29 parties before the Court today to the Court, that history is well known to Your  
30 Honour probably better known to him than it is to me. My Lord, Your Honour

1 nor do I intend to jog back to the evidence filed in the winding up proceedings  
2 before the scheme was formulated, much of which at least in terms of that  
3 filed by the opponents of the scheme is premised on suppositions or  
4 expectations of how the scheme might work which bear no relation to the  
5 scheme actually being promoted. As to the procedure Your Honour, I think  
6 we have already dealt with the fact that there are technically two separate  
7 applications, but they are effectively linked and that Your Honour is dealing  
8 with the, with what is effectively in this case a hybrid procedure in relation to  
9 the scheme application.

10 Now I indicated to Your Honour that the submissions which those creditors who  
11 appear in relation to the scheme application should be entitled to make should  
12 be limited to those issues which actually fall to be considered, and I'm going  
13 to indicate to your Lordship, to Your Honour what those issues are. As to the  
14 adjournment of the petition, I want to say very little, whilst conventionally it is  
15 suggested that a creditor with an unpaid debt due from an insolvent company  
16 is entitled to a winding up order *ex debito justitiae*, in reality the Court has a  
17 discretion and broadly speaking an unfettered discretion, as to how it will deal  
18 with a petition and as to the circumstances in which it will adjourn the  
19 petition. Your Honour was on a previous hearing taken to the Judgment of Mr  
20 Justice Newberger as he then was in *Demoglass*, in our bundle of authorities  
21 and in our skeleton argument which I hope Your Honour has had the  
22 opportunity of reviewing.

23 DEPUTY DEEMSTER: Yes.

24 MR HACKER: We set out what we conceive to be the principles in relation to the  
25 adjournment of the petition, and we submit to Your Honour that if Your  
26 Honour thinks this is an appropriate case in which to allow the scheme to go  
27 forward, it must follow as a matter of course that the petition will be  
28 adjourned. The two procedures are mutually exclusive and the only issue  
29 before the Court, in our submission in relation to adjournment, is whether or  
30 not creditors should or should not have the opportunity of considering the  
31 scheme. And in relation to the adjournment really in my submission there is

1 nothing more to be said.

2 DEPUTY DEEMSTER: Well yes a great deal of the arguments about adjourning  
3 have been rehearsed, certainly at the last hearing if not the hearing before the  
4 last, so unless something radical has changed, unless there have been  
5 significant changes in what is being proposed, really we've as I see it anyway,  
6 certainly I'll hear submissions on it but as I see it we've really gone through  
7 all that stage.

8 MR HACKER: Yes. I'm much obliged. So the real issue at, the real issue so far as  
9 today's hearing is concerned is as I've indicated, whether or not the Court  
10 should allow the scheme to be put before the creditors at one or more  
11 meetings. In our submission on that application the issue before the Court is  
12 an extremely narrow one. Should the scheme as it is proposed be put to a vote  
13 of the general body of the company's creditors and if so, are the mechanics  
14 proposed by the liquidators provisional and the Treasury appropriate to ensure  
15 that the scheme proposal is brought to the attention of creditors, and whether  
16 the mechanics of the meeting are appropriate to allow creditors sensibly to  
17 meet with a view to considering the scheme. Your Honour it cannot in our  
18 submission be emphasised sufficiently that it is no part of the Court's function  
19 on the present hearing to listen to arguments on, still less form a view, as to  
20 supposed deficiencies in the scheme or arguments as to how the scheme could  
21 be improved from the perspective of one or other interest group. Still less in  
22 our submission should the Court at this initial stage consider whether or not  
23 the scheme is fair or unfair to one or other of those interest groups. That is an  
24 issue which the English and other Common Law authorities have clearly  
25 reserved to the sanction hearing once the creditors have, if they do, voting in  
26 favour of the scheme. Only in the most extreme case as, for example, in the  
27 *Savoy Hotels case* to which Your Honour was referred at an earlier hearing  
28 which I haven't put in our bundle of authorities, in which the evidence  
29 demonstrated that the meetings were bound to reject the scheme. Only in that  
30 type of extreme case where the evidence incontrovertibly demonstrates that  
31 the scheme proposal is doomed will the Court, in our submission, refuse to  
32 convene scheme meetings where a scheme is proposed bona fide and on its

1 face the scheme appears to satisfy the requirements of the statute, ie that it is a  
2 compromise or arrangement between the company and its creditors.

3 If Your Honour were to apply the practice as adopted in England the Court would  
4 certainly not at this stage seek to have any detailed understanding of the terms  
5 of the scheme, and it would most assuredly not embark upon a contested  
6 analysis of the degree of creditor support which the scheme might achieve. In  
7 our submission what is material to the present application and what in our  
8 submission should guide the Court as to its decision, is the evidence before it.  
9 And in relation to that Your Honour has two relevant pieces of evidence in our  
10 submission, the first the two affidavits of Mr Moss QC about whom I think I  
11 need say no more having regard to Your Honour's observations at the last  
12 hearing, which show that the scheme is in many respects a quite conventional  
13 scheme that is clearly from a legal perspective a perfectly normal and  
14 therefore reasonable scheme. Mr Moss does not of course seek to address the  
15 commercial aspects of the scheme, but those aspects are considered in the  
16 second relevant material piece of evidence which is the first affidavit of Mr  
17 Simpson, one of the joint liquidators provisional, sworn in support of the  
18 scheme petition. Mr Simpson of course is one of the Court's own officers and  
19 therefore the Court, in our submission, will pay close regard to any evidence  
20 which he puts before the Court and to any views which he expresses in  
21 relation to the scheme. And if I can ask Your Honour to take that affidavit, I  
22 think was sworn on the 2<sup>nd</sup> of April.

23 DEPUTY DEEMSTER: Yes. 2<sup>nd</sup> of April it is yes.

24 MR HACKER: The first affidavit I think on the 2<sup>nd</sup> of April, and if Your Honour  
25 would go to paragraph 14 of that affidavit.

26 DEPUTY DEEMSTER: Yes.

27 MR HACKER: If, I'm not going to read extensively from the documents but for the  
28 benefit of those in Court I think it's perhaps helpful if I do read this.

29 DEPUTY DEEMSTER: Yes, well particularly this because this sets out in summary

1 form as you say what the perceived benefits are in respect of the scheme.

2 MR HACKER: So what Mr Simpson, one of the liquidators provisional, says is “I  
3 believe that the proposed scheme if it comes into effect and is implemented in  
4 accordance with its terms could provide the following benefits to scheme  
5 creditors that would not be available in a liquidation of the company. (a)  
6 Certainty as to the provision of lump sum payments to protected scheme  
7 creditors within a set time frame equivalent to the amounts they would have  
8 received under the DCS” the Deposit Compensation Scheme “had it been  
9 triggered. (b) Quicker payments of dividends to all scheme creditors of up to  
10 60% of their scheme claim after which point the timing and amounts of  
11 dividend payments to scheme creditors will be the same as in a liquidation of  
12 the company. (c) The subordination of the Treasury’s claim against the  
13 company in an amount of at least £2.8million. (d) A benefit to scheme  
14 creditors if the total dividend paid to scheme creditors is less than 60%. This  
15 is because in that event the payments that would otherwise have been made to  
16 the Treasury to reimburse its top up funding will be available to all other  
17 scheme creditors in priority to the Treasury. For these reasons and based on  
18 the information currently available to me, the provisional liquidators would  
19 on balance recommend that scheme creditors should vote in favour of the  
20 scheme.”

21 That evidence setting out as it does identifiable benefits which could flow to creditors  
22 if the scheme is implemented, and containing a recommendation from the  
23 officers appointed by the Court to deal with the provisional liquidation of the  
24 company, that creditors should vote in favour of the scheme is, in our  
25 submission, compelling evidence that this is a case in which the Court should  
26 reject any endeavour by opponents of the scheme to impose their wishes on  
27 the general body of creditors, but rather should allow the general body of  
28 creditors to make its own decision having due regard to the competing  
29 arguments in favour of and against the scheme. And the joint liquidators  
30 provisional endorsement of the scheme appears also in the explanatory  
31 statement, and if I could ask Your Honour to turn that up, that is exhibited to  
32 Mr Simpson’s second affidavit in the scheme proceedings, at numbered

1 paragraph 10.1. If Your Honour were to convene the meetings as we seek  
2 what the creditors will receive is this explanatory statement which contains in  
3 it at paragraph 1 a statement of the provisional liquidators' belief that the  
4 scheme if it comes into effect and is implemented in accordance with its terms,  
5 should be in the best interests of the general body of creditors of the company.

6 Your Honour I do not propose to take you through the scheme because it's precise  
7 terms are not, in our submission, a matter of concern to the Court upon the  
8 present application. But Your Honour having regard to the level of public  
9 interest in the matter it would perhaps be of assistance if I took Your Honour  
10 to the summary of the proposal.

11 DEPUTY DEEMSTER: Yes.

12 MR HACKER: Which appears some half dozen or so pages earlier on in the  
13 explanatory statement. And before I read that, can I indicate to Your Honour  
14 more generally that this is a distribution scheme, it is concerned with  
15 distributing the assets of the company to those entitled to them in accordance  
16 with the rules that would apply in a liquidation subject to limited  
17 modifications intended to streamline the distribution process, and subject to a  
18 top up by Treasury for the benefit of the creditors and it contains also a  
19 deferral and subordination of certain rights which Treasury would have in a  
20 liquidation of the company for the benefit, as we submit, of the creditors.

21 DEPUTY DEEMSTER: Yes in that case that's the whole body of creditors isn't it?

22 MR HACKER: Yes.

23 DEPUTY DEEMSTER: Not just the protected.

24 MR HACKER: Not just the protected creditors no.

25 DEPUTY DEEMSTER: No.

26 MR HACKER: And picking up the summary of the proposal below the italics, "*the*  
27 *main objectives of the proposed scheme are to enable the liabilities of the*  
28 *company to be ascertained with certainty, to ensure that a moratorium similar*

1 to the moratorium which would be created if the company was liquidated is  
2 established, thereby ensuring that all creditors claims are dealt with in  
3 accordance with the terms of the scheme, and to ensure that all of the assets of  
4 the company can be distributed to all of the creditors of the company in a  
5 similar manner to that which would apply if the company was placed into  
6 liquidation, albeit more quickly than may have been possible in a liquidation.  
7 The Isle of Man Treasury has agreed to join into the scheme and be bound by  
8 its terms, pursuant to the terms of the scheme will provide funding to enable  
9 top up payments to be made to protected depositor. A protected depositor is  
10 any person with a deposit with the company who would be entitled to receive  
11 payment under the Financial Services Act 2008, Compensation of Depositors  
12 Regulations 2008. The top up payments made by the Treasury will ensure that  
13 by the second anniversary of the scheme becoming effective, each protected  
14 depositor will receive an amount which is at least equal to the amount which  
15 that protected depositor would have received pursuant to the DCS Regulations  
16 had the company been placed into liquidation on the 9<sup>th</sup> of April, and  
17 subordinate its pre-winding up petition unsecured claim against the company  
18 of approximately £2,800,00 which” unquestionably in our submission I add in  
19 parenthesis “must be a benefit” it’s beyond argument that that is a benefit to  
20 all creditors unless the final dividend is 100p in the £1. “The key features of  
21 the scheme are the provisional liquidation will continue throughout the term  
22 of the scheme, the provisional liquidators will also act as the scheme  
23 supervisor. The provisional liquidators will continue to collect in and realise  
24 the assets of the company, they will also retain their power to bring claims  
25 against third parties. The scheme supervisor will be responsible for  
26 distributing the assets of the company to its creditors, to the extent that there  
27 are claims which can only be pursued by a liquidator of the company then the  
28 scheme provides that the provisional liquidators may apply to the Court to  
29 place the company into liquidation. Prior to doing so the provisional  
30 liquidators must consult with the creditors committee and the Treasury and  
31 must demonstrate that a”

32 DEPUTY DEEMSTER: A typographical error there I think.

1 MR HACKER: Yes, typographical, I think it's not the only one. "*and the Treasury*  
2 *and must demonstrate that a liquidation is likely to increase the value of assets*  
3 *which may be available for distribution. If the company is liquidated for this*  
4 *purpose the scheme will continue and any assets realised by the liquidator will*  
5 *be distributed in accordance with the scheme. As would be the case if the*  
6 *company was placed into liquidation, all of the assets of the company will be*  
7 *realised and converted into cash and distributed to all of the unsecured*  
8 *creditors of the company on a pari passu basis.*" And may I add there in  
9 parenthesis that the assets of the company include claims which the company  
10 may have against those associated with the company before it entered into  
11 liquidation, because I know that's a subject of great anxiety to many  
12 depositors. So the objective is that the company will assert any claims which  
13 it has acting by the joint liquidators provisional, those claims will be pursued  
14 to the extent that the advice is that they should be pursued, and any  
15 realisations will go into the scheme for distribution amongst the creditors as  
16 they would on a liquidation.

17 DEPUTY DEEMSTER: And presumably the Court directions can be obtained if  
18 that's felt appropriate.

19 MR HACKER: Of course.

20 DEPUTY DEEMSTER: In the case of doubt.

21 MR HACKER: Yes. As officers of the Court of course the joint liquidators  
22 provisional will remain accountable to the Court for their acts and indeed  
23 creditors will have the remedies which the Companies Act provides where  
24 they are dissatisfied with, or aggrieved by, any decision of those officers of the  
25 Court. *Top up payments - top up payments will be provided by the Treasury in*  
26 *three instalments with the first instalment falling due for payment between 90*  
27 *and 100 days after the scheme becomes effective, the second payment will fall*  
28 *due for payment on the first anniversary of the scheme becoming effective, and*  
29 *the final instalment will fall due for payment on the second anniversary of the*  
30 *scheme becoming effective. Top up payments will be applied for the benefit of*  
31 *protected depositors being any scheme creditor who would have benefited*

1        *from the payment as a result of the operation of the DCS regulations, the top*  
2        *up payments will ensure that every protected depositor receives an amount*  
3        *equal to the lesser of its claim against the company and £50,000 in the case of*  
4        *a protected depositor who is an individual, and £20,000 in any other case.*  
5        *The intention is that each scheme creditor will as a minimum receive the same*  
6        *amount that it would have received had the company been placed into*  
7        *liquidation and had compensation been paid under the Isle of Man Depositor*  
8        *Compensation Scheme which is operated in accordance with the DCS*  
9        *Regulations.*

10      *Any creditor who receives a top up payment will assign its protected scheme claim to*  
11      *the Treasury, creditors who have assigned their protected scheme claim to the*  
12      *Treasury will continue to be paid on their scheme claims as the result of the*  
13      *operation of irrevocable payment directions from the Treasury to the scheme*  
14      *supervisors, provided always that no creditor will be entitled to receive*  
15      *payment in excess of the full amount of its scheme claim. Because protected*  
16      *depositors will be entitled to receive both pari passu distributions from the*  
17      *assets of the company and top up payments, any protected depositor who is an*  
18      *individual will be paid in full if the entire amount of his or her claim is*  
19      *£50,000 or less, and any other protected depositor will be paid in full if its*  
20      *claim is £20,000 or less. This would also be the case had the company been*  
21      *liquidated and payment been made under the DCS Regulations. And the top*  
22      *up payment mechanism also benefits other scheme creditors as the Treasury*  
23      *will agree, in accordance with the scheme, to defer its right to receive*  
24      *payment of the claims assigned to it as a result of the making of the top up*  
25      *payments until such time as all scheme creditors have received a distribution*  
26      *of 60pence in the pound on their scheme claims.*

27      *The Treasury will receive no payment under the scheme until all scheme creditors*  
28      *have been paid at least 60pence in the pound on the amount of their scheme*  
29      *claims. This deferment of the Treasury's right to receive payment seeks to*  
30      *provide that all other scheme creditors have the opportunity to receive*  
31      *payment more quickly and in larger amounts than would otherwise have been*  
32      *the case. The key benefits of the scheme are considered to be, all creditors*

1           *will receive an amount equal to the amount they would have received had the*  
2           *company been placed into liquidation. There will be certainty as to the timing*  
3           *of the first three distributions in the first two years after the commencement of*  
4           *the scheme, and under the DCS Regulations protected depositors would be*  
5           *paid pari passu, by contrast under the scheme protected depositors who are*  
6           *individuals with claims of £20,000 or less will be paid in full at the time of the*  
7           *first distribution which is to be made within 100 days of the scheme becoming*  
8           *effective. Protected depositors who are individuals with claims of £35,000 or*  
9           *less will be paid in full at the time of the second distribution date, on or before*  
10          *the first anniversary of the scheme becoming effective, and those protected*  
11          *depositors who are individuals with claims of £50,000 or less will have*  
12          *certainty that their claims will be repaid in full on or before the second*  
13          *anniversary of the scheme becoming effective. If the total distribution paid to*  
14          *scheme creditors is less than 60% scheme creditors will benefit, this is*  
15          *because the payments that would otherwise have been made to the Treasury if*  
16          *top up payments rank pari passu with other scheme claims would be available*  
17          *for other scheme creditors.*

18        *To become effective the scheme requires the approval of the requisite majority of each*  
19          *class of creditors. Two classes of creditor will be entitled to vote at the*  
20          *meetings convened to approve the scheme. The first class will be made up of*  
21          *creditors who are protected depositors and they will be entitled to vote an*  
22          *amount equal to the value of their protected deposits. And the second class*  
23          *will be made up of unsecured creditors and they will be entitled to vote an*  
24          *amount equal to the value of all unsecured claims other than claims relating*  
25          *to eligible protected deposits.”*

26        That is the summary of the scheme and its benefits.

27        DEPUTY DEEMSTER: And then it makes clear in block capitals or block letters “if  
28           the scheme arrangement is not approved at the relevant meetings then the  
29           company will be placed into liquidation.”

30        MR HACKER: Yes, I should have said that. And perhaps I could ask Your Honour  
31           to look, I want to make it clear that I’m not here to sell the scheme either to

1 the Court or to the creditors, we want to give the Court as clear an  
2 understanding as we can as simply, in as simple a way as one can do it, of the  
3 benefits of the scheme and those are perhaps best shown by going to page 17  
4 of the explanatory statement, page numbered 17. Now it appears that there is  
5 a small typographical error which has been corrected and I wonder if I can  
6 hand up a slightly revised, what I'm going to show Your Honour has not  
7 changed.

8 DEPUTY DEEMSTER: Thank you. I think it looks quite a lot of people have this  
9 document in Court. I think that's right isn't it? Quite a lot of people have  
10 these drafts and so on.

11 MR HACKER: Yes, it was circulated last night I understand to noticed parties.

12 DEPUTY DEEMSTER: I see.

13 MR HACKER: What I want to show Your Honour simply is that at pages 17 and  
14 following are a series of, I think they're known in the trade as worked  
15 examples, which show the outcome in a liquidation.

16 DEPUTY DEEMSTER: Sorry to interrupt you Mr Hacker, do we have many spare  
17 copies of this document?

18 MR HACKER: Yes I think we do.

19 DEPUTY DEEMSTER: It's just I'm not entirely clear whether people are able to see  
20 it.

21 MR HACKER: Yes.

22 DEPUTY DEEMSTER: It may just, because they are graphs they're quite helpful  
23 maybe to people who are

24 MR HACKER: Yes.

25 DEPUTY DEEMSTER: If they could be distributed if possible yes to have people  
26 who haven't got it.

1 MR HACKER: Shall I sit down for a moment?

2 DEPUTY DEEMSTER: People will have to share obviously to some extent at least  
3 they'll be able to see what is proposed in a graphic form. Have we got any for  
4 this side of the room? Thank you very much. Perhaps if we have a few more  
5 made it may be helpful.

6 MR HACKER: Yes I'm sure we can. They are slightly easier to follow in colour  
7 than in black and white but I think we're all working, labouring under the  
8 same

9 DEPUTY DEEMSTER: Yes, I noticed that, yes it is, it's not the clearest in black and  
10 white but there we are.

11 MR HACKER: No, I think the point that's being made is really so clearly made that  
12 it doesn't matter. Now in each of these sets of graphs shows the position of a,  
13 taking the first three for example, of a, the first three represent the position of  
14 a scheme creditor with a £25,000 protected scheme claim and of course the  
15 way in which they will receive payment depends on the realisations outside  
16 the scheme that the liquidators provisional are able to achieve. So three  
17 different scenarios are shown. A high asset realisation, a medium asset  
18 realisation and a low asset realisation, and what can be seen is that the lower  
19 of the two lines, the one with more breaks in it and little arrowheads, is the  
20 position in a liquidation and that shows the percentage of the claim that would  
21 be received in the left hand column as against the stage in the distribution  
22 process when that percentage would be received. And what one sees very  
23 clearly, and it really doesn't admit in our submission of any contrary  
24 argument, is that in the scheme, the higher of the two lines, a larger percentage  
25 will be received more quickly. And that is the position in a high, medium or  
26 low asset realisation scenario.

27 And the position going to the next three charts is exactly the same in relation to a  
28 scheme creditor with a £35,000 protected scheme claim. Again, whether high,  
29 medium or low asset realisation because of the top up payment being made by  
30 Treasury, and the fact the Treasury is deferring its right to receive a dividend

1 in respect of that top up payment, creditors are being paid more quickly.

2 Then we turn for the next three graphs, this is the top of page 20, those pages they're  
3 not numbered in the version which everybody has, but there is a page which at  
4 the top says, "*For a scheme creditor with a £65,000 protected scheme claim*"  
5 and again one can see, and obviously as the size of the claim increases, the  
6 benefits reduce, there's no issue about that but there are still benefits because a  
7 higher percentage distribution more quickly can still be seen for a creditor  
8 with a £65,000 protected scheme claim.

9 And then on the next page an example is given in relation to a larger creditor, a  
10 creditor with a £200,000 protected scheme claim, and it can be seen that  
11 depending on the level of realisations the benefits are not as great as in relation  
12 to those with a smaller claim, but there are still benefits in terms of timing and  
13 in the context of a low asset realisation scenario at the bottom of the page,  
14 there is an overall benefit in terms of a higher distribution. And that is  
15 because of the Treasury deferral of its right to receive any dividends until all  
16 creditors have received 60p in the pound. And obviously in a low realisation  
17 scenario that deferral is more valuable to the general body of creditors than in  
18 a higher realisation scenario.

19 Now as I've indicated to Your Honour, I don't regard it as any part of my brief on this  
20 application to sell the scheme. The liquidators provisional as officers of the  
21 Court have indicated very clearly that this is a scheme which creditors could  
22 vote in favour of, their recommendation is that they should vote in favour of it  
23 and its implicit in that, that it is something which they can properly be asked to  
24 vote in favour of. And the objective of showing Your Honour those figures  
25 was really to demonstrate graphically and as simply as possible without going  
26 through the complexities and interstices of the scheme, why that is.

27 DEPUTY DEEMSTER: Yes thank you.

28 MR HACKER: And from our perspective and in our submission, no more need be  
29 nor should be said about the terms of the scheme. It is in our submission one  
30 which it is plainly proper to put to the creditors and this is what we invite the

1 Court to permit by convening the meetings which we seek in the petition. In  
2 making that submission we also ask Your Honour to have in mind and give  
3 full weight to the fourth affidavit of Mr Bell sworn in I think the scheme  
4 proceedings, it probably ought to be his first affidavit, but anyway the affidavit  
5 sworn very recently, 2<sup>nd</sup> of April and if Your Honour would turn that affidavit  
6 up. I will read to Your Honour what Mr Bell says at paragraph 6, Mr Bell of  
7 course the Minister of Treasury. *“I would like to emphasise that I consider the*  
8 *proposals contained within the scheme together with the payments already*  
9 *made under the early payment scheme to represent the Treasury’s best offer to*  
10 *assist those affected by the company’s difficulties. In the event that the scheme*  
11 *is not approved in its current form by scheme creditors and sanctioned by this*  
12 *Honourable Court the Treasury will seek the immediate winding up of the*  
13 *company.”* So your honour to the extent that those who oppose the scheme  
14 consider that there is more to be had from the Treasury by doing so, Mr Bell’s  
15 affidavit shows that they are wrong. This is the Treasury’s offer, it could have  
16 made a different offer. It could have subordinated its claims only when 70p in  
17 the pound was paid, or 100p in the pound, but that is a decision which the  
18 Treasury has made based on the figures and that is its decision. There is no  
19 other offer available to depositors or creditors from the Treasury, this  
20 represents the only offer and if it is an offer that is rejected the company will  
21 be wound up and matters will take their natural course. As to the question of  
22 classes.

23 DEPUTY DEEMSTER: Yes.

24 MR HACKER: It would be my submission that that is not a matter which Your  
25 Honour should concern himself with today. You are dealing with a hybrid  
26 process but even under the hybrid process if one goes back to, even under the  
27 modern process, the current practice in England, if one goes back to the  
28 Practices Statement, it’s made very clear in paragraph 7 of the Practice  
29 Statement, it’s at tab 2 of our authorities bundle. It’s made very clear in  
30 paragraph 7 that even on the modern practice creditors will have the  
31 opportunity to raise class issues at the sanction hearing, the third stage.

1 DEPUTY DEEMSTER: I see, that's dealt with at the final stage is it? I had the  
2 impression that there might be

3 MR HACKER: No, no.

4 DEPUTY DEEMSTER: an intermediate hearing.

5 MR HACKER: The present way in which it's dealt with in England is it would, class  
6 issues would be dealt with at this stage.

7 DEPUTY DEEMSTER: Yes, yes.

8 MR HACKER: Then there are the meetings then there is the third stage, what the  
9 Practice Direction provides, Practice Statement provides is that creditors who  
10 perhaps for one reason or another have not had the opportunity to make  
11 submissions in relation to classes at the first stage, at this stage, will still be  
12 able to come back to the Court. So the Court, even on the modern practice,  
13 the Court has a residual discretion to consider class issues.

14 DEPUTY DEEMSTER: And we deal with that at the final sanction hearing.

15 MR HACKER: Deal with that at the final sanction hearing.

16 DEPUTY DEEMSTER: Right I see.

17 MR HACKER: If there is some good reason why creditors, having received notice of  
18 the first hearing, didn't turn up to raise their objections at the first hearing, it's  
19 a failsafe catch all.

20 DEPUTY DEEMSTER: Yes. I see. So what this says is "*Directions for the*  
21 *resolution of creditor issues may include orders giving anyone affected by a*  
22 *meetings order*" which is what's happening today.

23 MR HACKER: Which is this order.

24 DEPUTY DEEMSTER: "*a limited time in which to apply to vary or discharge that*  
25 *order with the creditors meetings to take place in default of any such*  
26 *application within the time prescribed.*"

1 MR HACKER: Yes.

2 DEPUTY DEEMSTER: Doesn't that pre-suppose there's going to be, so shall I give  
3 the creditors 14 days or something to apply and then there'll be another  
4 hearing?

5 MR HACKER: No, no.

6 DEPUTY DEEMSTER: Before we get to the meetings?

7 MR HACKER: I think what

8 DEPUTY DEEMSTER: If I were acting under the modern procedure.

9 MR HACKER: Yes, well under the modern procedure what Your Honour would do  
10 be, Your Honour would want to be satisfied that in accordance with the earlier  
11 paragraphs of the Practice Direction, creditors had been proper notice of the  
12 hearing before Your Honour today, that they had been given notice of the  
13 hearing, that they had seen probably the scheme document and that they  
14 understood, or had the ability to understand, what the class issues might be. It  
15 might be that in a particular circumstance the Court was no creditors turned up  
16 but the Court was concerned about the class issues and decided that it would  
17 give creditors perhaps a second opportunity by effectively making the order,  
18 what would be an order nisi in giving creditors the opportunity to come back  
19 and challenge it. Or if it was concerned perhaps that not enough creditors had  
20 received notice. There are a variety of situations, that would not be the normal  
21 order that the Court would make, that would be an unusual order for the Court  
22 to make. Under the modern practice the Court would look at classes, decide  
23 on classes but leave open the possibility for good reason of creditors coming  
24 back at the final stage to complain about the classes.

25 DEPUTY DEEMSTER: The final stage, right.

26 MR HACKER: But in our submission this procedure, the procedure contemplated by  
27 this modern practice statement, requires that the whole procedure has been  
28 launched on a different basis which is that it's inter partes. And that is not

1           how this application has been launched, it was launched in accordance with  
2           what we certainly understood to be the general practice in this Court, and  
3           therefore there has been no formal notification to creditors of this hearing and  
4           there may or may not be creditors who have class issues. All I want to say  
5           about class issues, classes, is that Your Honour has the affidavit of Mr Moss  
6           who explained, I hope clearly in his first affidavit, the relevant considerations  
7           and indicated why on the basis of his then understanding of how the scheme  
8           was intended to operate, this was a two class scheme and who has  
9           subsequently in his second affidavit, having both contributed to the drafting of  
10          the scheme and therefore obviously reviewed its contents, confirms his  
11          previous evidence as to the composition of classes. And I really don't want to  
12          say anything more about classes than that. If there is a serious challenge to the  
13          classes, and I don't know whether there is, there has been at some stage a  
14          suggestion that perhaps there should be a third class. If there is some serious  
15          challenge to the classes, perhaps I can deal in reply with how Your Honour  
16          should approach a resolution of any such issue.

17   DEPUTY DEEMSTER: Yes.

18   MR HACKER: But it would certainly be our submission that the former practice, the  
19          benefits of which as I've already indicated are clearly set out in Lord Millett's  
20          Judgment in *UDL*, is one which it's entirely sensible to follow. It is after all  
21          the practice that was followed in England for almost 70 years, it's not an  
22          illogical, irrational.

23   DEPUTY DEEMSTER: Well it does have strong arguments in favour as Lord Millett  
24          says.

25   MR HACKER: It does yes.

26   DEPUTY DEEMSTER: So although we're describing it as a hybrid it's, it is really a  
27          1934 type procedure that we're adopting here.

28   MR HACKER: It is, in terms of classes it is.

29   DEPUTY DEEMSTER: In terms of classes.

1 MR HACKER: It's hybrid really only in the sense that there are creditors who want  
2 to make submissions about whether the meetings should be held, I was  
3 perhaps, a slight difference of emphasis as to what it is that's hybrid about it.  
4 It's hybrid in the sense that it's not exactly ex parte.

5 DEPUTY DEEMSTER: No I see.

6 MR HACKER: But in terms of classes we would suggest that Your Honour,  
7 particularly given the way in which the proceedings have developed, should  
8 follow the long accepted practice.

9 DEPUTY DEEMSTER: I see, thank you.

10 MR HACKER: And the only other matters which I think I need to address Your  
11 Honour on are dealt with in Mr Simpson's first affidavit at paragraphs 9 to 13.  
12 These are in truth the only issues which the Court generally considers in the  
13 context of an application of this nature, and those are in Mr Simpson's first  
14 affidavit paragraphs 9 to 13, those are the mechanics for giving notice of the  
15 meetings and for the conduct of the meetings. That is actually the issue with  
16 which the Court is concerned on a convening application in practice. It's,  
17 these applications insofar as dealt with in London would probably be dealt  
18 with in 15 minutes in front of a registrar. They are, even in the context of a  
19 complicated scheme, I only say that to indicate to Your Honour how narrow  
20 the issues are that properly arise, I'm not in any sense saying Your Honour  
21 should not take all the time he needs to deal with it. It's simply to indicate that  
22 the issues which actually properly arise on a convening application are very,  
23 very narrow.

24 DEPUTY DEEMSTER: Yes.

25 MR HACKER: And what are there sought are, what are I think pretty much, or I  
26 would submit are pretty much standard directions, Your Honour has attached  
27 to the affidavit a schedule setting out the geographical distribution of the  
28 company's depositors. Your Honour sees that they are in a range of  
29 jurisdictions.

1 DEPUTY DEEMSTER: I think there was some suggestion at one stage there would  
2 be meetings held all over the place, all over the world.

3 MR HACKER: I don't think that's been pursued, probably quite sensibly.

4 DEPUTY DEEMSTER: Yes.

5 MR HACKER: It's a very difficult procedure to embark upon, and in one view it's  
6 not the correct way to have a meeting unless all the meetings are in fact linked  
7 as the objective is to have everybody having the opportunity to, as it's put in  
8 the case, to consult with one another. It involves a process of consultation,  
9 discussion, debate.

10 DEPUTY DEEMSTER: Not realistic in the context of the geographical spread but  
11 there we are.

12 MR HACKER: Well, but again that is very often the case.

13 DEPUTY DEEMSTER: Yes.

14 MR HACKER: Your Honour has the range of jurisdictions in which depositors are  
15 resident. What the evidence doesn't say but perhaps I can say and I hope it's  
16 not controversial, is that advertising, the process of advertisement is a very  
17 expensive process and therefore generally attempts are made to limit the  
18 number of publications meetings are advertised. It would be very unusual to  
19 have, for example, an advertisement in a newspaper in every relevant  
20 jurisdiction, that would be an extremely expensive process, not least because  
21 the advertisements would probably have to be translated and it would lead to  
22 delay and, so what is proposed is that the creditors receive by post a copy of  
23 the scheme and the explanatory statement, a notice and a proxy voting form  
24 save where there is a hold mail account in relation to which the document will  
25 be sent by e-mail or fax. And that there be advertisements in a range of  
26 newspapers and the documents will also be placed on the company's website  
27 which is something to which the depositors have had and continue to have  
28 recourse in obtaining information about the proceedings. And what Mr  
29 Simpson says that in his belief "*the proposed directions should ensure that*

1           *reasonable notice of the meetings have been given to all scheme creditors.*  
2           *Details of the way in which the meetings will be conducted will be set out in*  
3           *the explanatory statement, scheme creditors will be entitled to attend and vote*  
4           *at the meetings either in person or by proxy. It is proposed the meetings will*  
5           *be held concurrently on the 19<sup>th</sup> of May in Douglas and a report on the*  
6           *outcome of the meetings will be provided within five working days. If*  
7           *resolutions of the scheme creditors agreeing to the scheme are passed in*  
8           *accordance with Section 152(2) then the Court will be asked to sanction the*  
9           *scheme on a date to be fixed.”* I understand through discussions with the  
10          Court a date of the 28<sup>th</sup> of May may have been identified as a

11       DEPUTY DEEMSTER: I think that may have been canvassed, yes. It would  
12          certainly be that week anyway, yes.

13       MR HACKER: So that would be the intention.

14       DEPUTY DEEMSTER: That was what was indicated in the original indicative  
15          timescale that was put to the Court some weeks or months ago, but that would  
16          be the week where the sanction hearing would take place.

17       MR HACKER: So to the extent that anybody wants to work out how the timetable  
18          will progress from then onwards if the scheme is approved, they can assume  
19          that if the scheme is allowed to go forward, if the meetings take place and the  
20          votes are favourable, that the application will be dealt with during that week.

21       DEPUTY DEEMSTER: Yes.

22       MR HACKER: And the 90 and 100 days and so on will follow from the date of that  
23          hearing.

24       DEPUTY DEEMSTER: Yes.

25       MR HACKER: Your Honour I probably should show you but I'm not going to  
26          because I don't think I can make any helpful comments on them, the proxy  
27          forms and such like which are something that registrars in London become  
28          very exercised about. They've been prepared by those with great expertise.

1 DEPUTY DEEMSTER: I'm sure they're

2 MR HACKER: I'm not sure I can

3 DEPUTY DEEMSTER: No, no. I haven't looked at them in any great detail I have  
4 to say but I'm sure they're acceptable.

5 MR HACKER: That's part of what the application's about. And unless I can assist  
6 Your Honour that really is all I want to say.

7 DEPUTY DEEMSTER: Thank you very much Mr Hacker. Shall I take matters, yes,  
8 Mr Chambers.

9 MR CHAMBERS: Your Honour thank you. Your Honour I represent three members  
10 of the Depositors Action Group which is a fairly broad church of claimants but  
11 they do have claims in excess of £100million. The Action Group objects to  
12 the scheme on the following grounds each of which I propose to develop in  
13 turn. First the proposed scheme provides no material benefit or advantage to  
14 the creditors as a whole, and in particular any advantages which there may  
15 have been when the scheme was first promulgated have evaporated. Secondly  
16 there are positive disadvantages to those who have an entitlement under the  
17 DCS, so far as the SoA is concerned, the scheme of arrangement as compared  
18 with a liquidation. In this regard all depositors with deposits of £50,000 or  
19 under will be so disadvantaged and they comprise 71% of all depositors. My  
20 learned friend Mr Hacker showed Your Honour the graph, we say there is a  
21 fundamental error in that graph which I will come to later, but in essence what  
22 it is is that the DCS entitlement has been misrepresented in that graph.  
23 Thirdly, I will submit that if the scheme of arrangement is to go to a vote it  
24 only makes provision for two classes of creditors when it should make  
25 provision, we say, for three classes of creditors. So in due course what I'll be  
26 submitting is that your Lordship, that Your Honour forgive me, should  
27 dismiss the petition so far as the scheme is concerned and grant an immediate  
28 winding up order.

29 Your Honour before I come to develop those submissions I just want to say something

1 about the approach which we would respectfully invite Your Honour to adopt  
2 for the purposes of today's hearing. Basing himself on the 1934 Practice  
3 Direction my learned friend Mr Hacker says that Your Honour's role is very  
4 limited, he says that really the sole issue is whether something should go  
5 forward to the creditors and really one doesn't do no more than that, in  
6 particular one doesn't consider classes. We submit that is the wrong approach  
7 and it's too narrow a view of the Court's role and that Your Honour is  
8 permitted to, and indeed should, approach the issue today from a much wider  
9 perspective.

10 The starting point we would suggest is not the petition for permission to call  
11 meetings, but the winding up petition. Now the 1934 Practice Note has  
12 nothing to do with the winding up petition. The principles applicable to the  
13 exercise of the Court's discretion so far as the winding up petition are  
14 concerned, have been helpfully summarised by my learned friend in his  
15 second skeleton argument. And the question before Your Honour is whether  
16 or not the winding up petition should be further adjourned or whether the  
17 company should be wound up today. The authorities cited by Mr Hacker  
18 make it clear that Your Honour has the broadest of discretions when it comes  
19 to that question. And we submit that Your Honour cannot be restricted to the  
20 very limited enquiries suggested by Mr Hacker.

21 And so in our submission for the purposes of exercising this broad discretion Your  
22 Honour needs to consider the scheme of arrangement qualitatively, in  
23 particular we submit that Your Honour needs to consider whether the scheme  
24 of arrangement provides a sufficiently tangible advantage to the body of  
25 creditors as a whole, such as to justify not making a winding up order today.  
26 And in order to make that assessment Your Honour needs to consider on the  
27 evidence as presented, whether in truth the scheme of arrangement really does  
28 provide tangible advantages for the creditors over and above a liquidation.  
29 This was indeed the approach adopted by Your Honour on previous occasions  
30 and we would respectfully submit that Your Honour was quite right in that  
31 approach and we'd invite Your Honour to adopt the same approach today.  
32 And our primary submission is that there are no tangible advantage and that

1           there are positive disadvantages for those 50,000 and under depositors.

2       So Your Honour what I'm now going to do is to consider what advantages there are,  
3           if any, in relation to the proposed scheme over a straightforward liquidation  
4           combined with DCS payouts.

5       DEPUTY DEEMSTER: This is something which was ventilated at some length at  
6           the last hearing.

7       MR CHAMBERS: Your Honour yes it was but what has happened we say, there  
8           have been various changes in the interim and there is one matter in particular  
9           in relation to the timing, which wasn't taken before Your Honour on the last  
10          occasion, and that's my detrimental point which I'm going to come to.

11      DEPUTY DEEMSTER: So we really need to focus on whether there's been any  
12          changes in the proposal since last time.

13      MR CHAMBERS: Your Honour yes. That is one issue.

14      DEPUTY DEEMSTER: Yes.

15      MR CHAMBERS: The starting point is it is clear that the proposed scheme of  
16          arrangement is not going to make any more money available to any of the  
17          creditors over and above that which they would be able to recover in a  
18          liquidation. Now Mr Simpson deals with this in his affidavit of the 28<sup>th</sup> of  
19          January 2009 which I'm going to ask Your Honour to have a look at. It's  
20          actually his fourth affidavit, although it's marked second affidavit, but it's the  
21          one of the 28<sup>th</sup> of January 2009.

22      DEPUTY DEEMSTER: Yes. Sorry, you say it's the second affidavit.

23      MR CHAMBERS: Well it's titled Second Affidavit, but it's in fact the fourth but the  
24          key thing is the date of the 28<sup>th</sup> of January.

25      DEPUTY DEEMSTER: From memory I know the one you mean, it's the one that  
26          was before the Court at the last hearing, sworn very shortly before the last  
27          hearing.

1 MR CHAMBERS: No, that was what I'm going to call the fifth affidavit which is  
2 marked I think the fourth affidavit.

3 DEPUTY DEEMSTER: I've got one of the 18<sup>th</sup> of February 2009 is that the one?

4 MR CHAMBERS: That's number five, I'm looking at number four, 28<sup>th</sup> of January.

5 DEPUTY DEEMSTER: January oh right, going back quite some time. Right okay.  
6 It will be in this bundle that Mr Gough has produced will it? Tab 30. Right I  
7 have it.

8 MR CHAMBERS: Paragraph 8 Your Honour. And what Mr Simpson does in this  
9 paragraph is he sets out what he considers at that stage to be the potential  
10 advantages of the scheme of arrangement, and the reason I'm showing Your  
11 Honour this is to show what changes have happened since, this is Mr  
12 Simpson's first statement of what he considered the advantages to be. And he  
13 says in sub-paragraph 1 that "*the scheme may provide all creditors with a*  
14 *quicker initial return either in respect of DCS claimants through the timing of*  
15 *top up fundings or in respect of creditors with full or partial claims outside the*  
16 *DCS through the Treasury agreeing to subrogate their claim until all other*  
17 *creditors have received a dividend of 60%.*" Now Your Honour that is a  
18 timing point which I'm going to come back to, there's no additional money  
19 there.

20 Sub-paragraph 2 "*If the ultimate dividend to creditors in the liquidation of the*  
21 *company proved to be less than 60% then the scheme provider would provide*  
22 *a better return to those creditors who have full or partial claims outside the*  
23 *DCS given that the Treasury will forego its right to prove in the scheme in*  
24 *respect of its top up funding until all other creditors have reached a return of*  
25 *60%.*" That is potentially additional money for creditors who have full or  
26 partial claims outside the DCS but crucially only if the ultimate dividend to  
27 creditors in a liquidation proved to be less than 60%. So I ask rhetorically  
28 what are the chances of the ultimate dividend being less than 60% and we  
29 submit that it is highly unlikely that the ultimate dividend will be less than  
30 60% for the following three reasons. First, the 60% figure is a figure which

1 has been picked by the Treasury and it refuses to move on that figure. The  
2 reason it refuses to move on that figure is because it is comfortable the  
3 ultimate dividend will be 60%, and so it's money won't be used to pay outside  
4 the DCS creditors.

5 MR HACKER: Your Honour I hesitate to interrupt my learned friend's submissions  
6 but he says that by way of submission, there is no evidence before the Court to  
7 suggest that.

8 MR CHAMBERS: I'm just coming to the evidence if I may. That was my first  
9 reason, secondly Mr Simpson himself seems pretty confident, or at least  
10 hopeful, that the ultimate dividend will exceed 60% and Your Honour sees  
11 that in the final sentence of sub-paragraph 2, Mr Simpson says "*Nevertheless I*  
12 *am hopeful that the ultimate dividend to creditors in the liquidation of the*  
13 *company would be in excess of 60%.*"

14 And the third matter is the explanatory statement which we have received, and the  
15 explanatory statement says that there are three realisation scenarios, high,  
16 medium and low. The low scenario is based, as we understand it, on an  
17 ultimate dividend which is not less than 60p, 60%. And could I just take Your  
18 Honour to the relevant part of the explanatory notes to make that good. If  
19 Your Honour looks at the explanatory notes, explanatory statement at page 16,  
20 Your Honour will see at paragraph 23.4 which is describing the low case  
21 scenario. In the low case scenario it has been estimated that the dividend will  
22 not reach above 60% and the Treasury will not thus recover any of the top up  
23 payments made. So as we understand it, what's being said is it will not reach  
24 above 60%. So we submit so far as this potential new money is concerned, the  
25 real likelihood is it's not going to be there because the dividend will be in  
26 excess of 60%.

27 Then if we go back to Mr Simpson's affidavit that we were just looking at, in sub-  
28 paragraph 3 of paragraph 8 he then talks about there being only one office  
29 holder carrying out the claims management process and he doesn't anticipate  
30 this would lead to a large saving in cost. So there's no additional money there.  
31 So the conclusion we reach so far, we submit, is that there will be no

1 additional recoveries of money in the scheme of arrangement as compared  
2 with the liquidation. And indeed Mr Alex, Mr Lovett forgive me, of Alex  
3 Partners in London who I think is the architect of this scheme of arrangement,  
4 accepts as we understand it, that there will be no additional money and I'm  
5 going to ask Your Honour just to have a quick look at his third affidavit which  
6 I'm afraid again is another January affidavit, 26<sup>th</sup> of January.

7 DEPUTY DEEMSTER: Where will I find that?

8 MR CHAMBERS: Lovett 3.

9 MR CAINE: Tab 24 Sir.

10 DEPUTY DEEMSTER: Thank you very much indeed. Yes.

11 MR CHAMBERS: In paragraph 24 of that affidavit Mr Lovett says "*It is anticipated*  
12 *that the depositors can expect the same final recovery under either the*  
13 *liquidation DCS or the proposed scheme of arrangement.*" Your Honour just  
14 going back to Mr Simpson's affidavit, the one we were just looking at, in  
15 paragraph 10 of that affidavit Mr Simpson confirms that the amounts realised  
16 in respect of the company's assets will be the same whether they're carried out  
17 under a liquidation or a scheme of arrangement. So there we have no  
18 advantage so far as the scheme of arrangement is concerned.

19 Your Honour I now want to turn to consider the timing point made by Mr Simpson in  
20 paragraph 8.1 of his affidavit, because this is really where things have changed  
21 and very dramatically.

22 DEPUTY DEEMSTER: Which affidavit is this now?

23 MR CHAMBERS: This is Mr Simpson's affidavit of January, paragraph 8.1 tab 30.  
24 Now in sub-paragraph 1 Mr Simpson makes two timing points, first of all he  
25 says the scheme of arrangement may provide all creditors with a quicker initial  
26 return either in respect of DCS claimants through the timing of top up funding,  
27 or in respect of creditors with full or partial claims outside the DCS. Now I'm  
28 going to deal with both of those points but it's the first point which is by far

1 the most important, because this is where we submit 71% of all depositors are  
2 positively disadvantaged by the scheme of arrangement.

3 Our submission is that the flow of funds to the DCA claimants is considerably slower  
4 under the scheme of arrangement than it would be under a straight liquidation.  
5 So the first thing I want to do is to look at the flow of funds under the scheme  
6 of arrangement. Now as we understand it the timetable of the scheme of  
7 arrangement is as follows: creditors meeting on the 19<sup>th</sup> of May and then two  
8 things have to happen before the scheme can become effective. First there has  
9 to be the sanctions hearing which we now learn is going to be hopefully in the  
10 week of the 28<sup>th</sup> of May, and secondly there has to be recognition of the  
11 scheme by the English Court, that is the second contingency. I won't ask  
12 Your Honour to turn it up but paragraph 7 of the scheme says it cannot  
13 become effective until the English Court recognises the moratorium. No  
14 estimate has been given as to how long that will take but for these purposes  
15 let's assume it's two weeks. So if we work on the basis that the effective date  
16 under the scheme will be the 15<sup>th</sup> of June, the first distribution date occurs 90  
17 to 100 days after the effective date, that takes us to the 23<sup>rd</sup> of September.

18 DEPUTY DEEMSTER: 23<sup>rd</sup> September.

19 MR CHAMBERS: 23<sup>rd</sup> September this year, then we have the second distribution  
20 date which is a year after the effective date, so that's 15<sup>th</sup> of June 2010 and  
21 then we have a third distribution date a year later which is 15<sup>th</sup> June 2011.  
22 Now the top up funding provided under the scheme of arrangement is intended  
23 to replace the depositors DCS entitlements, and under the scheme of  
24 arrangement top up funding is provided as follows: the first distribution date  
25 23<sup>rd</sup> September 2009, £20,000 out of the £50,000 DCS limit – that represents  
26 40%. The second distribution date June 2010, £35,000 out of the £50,000  
27 limit – that is 70%. And then finally the third distribution date which is June  
28 2011, £50,000 out of the £50,000 so that's 100%. Under a liquidation  
29 scenario however, the DCS entitlements we submit will be paid much more  
30 quickly and in much greater amounts. Now we know this to be the case  
31 because Mr Simpson very properly asked the Financial Supervision

1 Commission, the FSC, what DCS payments it expected to make and when if  
2 there was a liquidation. And the information which was provided by the FSC  
3 is exhibited to Mr Simpson's fifth affidavit, that's the one that was before  
4 Your Honour on the last occasion.

5 DEPUTY DEEMSTER: Is that the one, that's one headed third affidavit.

6 MR CHAMBERS: That is the one confusingly headed third affidavit but it is in fact  
7 his fifth. And attached to that affidavit as an exhibit is first of all a letter from  
8 Mr Simpson to the FSC asking his various questions about DCS entitlements.  
9 We have the FSC's response dated 16<sup>th</sup> of February 2009 which I'm going to  
10 take Your Honour through in a moment because it contains some important  
11 points, but for the point I'm currently on, which is DCS payments, one has to  
12 look at the attachment to the letter and if your Lordship, if Your Honour could  
13 go to a page headed Payment Profile in that bundle of attachments. And it  
14 looks like this, it says Payment Profile and has a table on it.

15 DEPUTY DEEMSTER: Payment Profile, yes.

16 MR CHAMBERS: Now what this is, is the DCS' estimate of the amount of money it  
17 will pay out under the DCS should it be triggered by an immediate liquidation.  
18 And the total amount of DCS claims, in other words all those depositors who  
19 have a DCS entitlement is £210million, we see that a few pages back where it  
20 says outcomes/claims. Now so far as the Payment Profile is concerned, what  
21 it says is that "*This profile assumes that the scheme manager takes a prudent  
22 view that a proportion of the funds available for the payment of compensation  
23 must be retained until 23<sup>rd</sup> October in the event of a default.*" That is a  
24 reference to the fact that there was some talk that there may be further bank  
25 defaults and therefore they may be called on the DCS, I'm going to address  
26 Your Honour specifically on that in a moment.

27 DEPUTY DEEMSTER: Yes, I have to say all this was dealt with to a large extent at  
28 the last hearing. We went through all this and

29 MR CHAMBERS: Your Honour yes, may, if I can just take, get to where I'm going.

1 DEPUTY DEEMSTER: Yes certainly.

2 MR CHAMBERS: To show Your Honour what it actually looks like in practice.

3 What we have is on the 31<sup>st</sup> of May 2009 we have a total amount available for  
4 payment of 75 million, and that is 36%, that is 36% of the DCS entitlement.  
5 By the 30<sup>th</sup> of October 2009 a further 66 million will become available which  
6 is 31%, so by 30<sup>th</sup> October 2009 67% of the DCS entitlement will have been  
7 paid out. And in the next column we have 31<sup>st</sup> of May 2010 where a further  
8 32 million will be paid out, that's a further 15% which takes us up to 82% and  
9 31<sup>st</sup> December 2010 we have a final 37 million paid, which is 18%, that takes  
10 you up to the full 100%. Now what we submit this shows is that under the  
11 scheme of arrangement top up payments the first payment is 23<sup>rd</sup> September  
12 2009, 40% of DCS entitlements, whereas under a liquidation the first payment  
13 will be, we say, July 2009 because in this table it's referred to as May 2009,  
14 what Mr Simpson says is that the DCS payments can be made within three  
15 months of a liquidation. His affidavit was sworn in February and therefore he  
16 says three months later is May, that's when it can be done.

17 So assuming we use Mr Simpson's figure which he has put forward and certainly no-  
18 one has said is not possible, that takes us to July. So we would submit three  
19 months from now, 9<sup>th</sup> of July, Mr Simpson should be able to distribute 75  
20 million which is 36% of DCS entitlements. Then by 31<sup>st</sup> of October, that date  
21 will stay the same, a further 66 which takes us up to 67% and that is by 31<sup>st</sup> of  
22 October this year. And that's where the error in Mr Hacker's graph comes in  
23 because they have thought the 67% comes in 2010 but I'll take Your Honour  
24 to that in a moment.

25 Then we have going back to the scheme of arrangement 15<sup>th</sup> of June 2010 it goes up  
26 to 70%, 31<sup>st</sup> of May 2010 under a liquidation we're on 82%, then under the  
27 scheme of arrangement 15<sup>th</sup> of June 2011 we reach 100% but under a  
28 liquidation we reach 100% on 31<sup>st</sup> December 2010. Now I have prepared  
29 overnight rather hastily a table showing what I have just said, it may be  
30 helpful.

31 DEPUTY DEEMSTER: Yes.

1 MR CHAMBERS: I can hand up a copy to Your Honour and distribute. So just to  
2 take Your Honour through this what we have done is to compare the two  
3 schemes side by side and when the DCS entitlement would be paid. So we  
4 have scheme of arrangement top up payments and that is of course the  
5 substitute for the DCS entitlement. First payment 23<sup>rd</sup> September 40%,  
6 compared with the liquidation we get 9<sup>th</sup> of July 36%. By 31<sup>st</sup> of October it  
7 goes up to 67%. Back to the scheme of arrangement 15<sup>th</sup> of June 70%, 31<sup>st</sup> of  
8 May under a liquidation 82%, and then the 100% figure is reached before  
9 under a liquidation it's December, it's six months later in the scheme of  
10 arrangement.

11 DEPUTY DEEMSTER: Yes, if those could be distributed, if we have enough copies  
12 that would be very helpful, thank you.

13 MR CHAMBERS: So what we would suggest, and this is accepted in the evidence in  
14 the sense that this evidence has not been challenged it's been put forward by  
15 Mr Simpson, it's been put forward by the FCS, that is what it is. That is a  
16 direct comparison and Your Honour what we are looking at are claims by 71%  
17 of all depositors.

18 DEPUTY DEEMSTER: So you say that 71% of depositors will be detrimentally  
19 affected because they will get their money later.

20 MR CHAMBERS: Yes.

21 DEPUTY DEEMSTER: In simple terms.

22 MR CHAMBERS: There is more to it than that. This is just the first part of the point,  
23 there are more very considerable detrimental points. In terms of the initial  
24 distribution to creditors we see from this table that I've just handed out that  
25 payment will be made more quickly, and it's Mr Simpson's affidavit this one  
26 we're on now in paragraph 8, where he says that he can make these  
27 distributions within three months. So I should just take Your Honour to that,  
28 if we look at Mr Simpson paragraph 8 he is there summarising what is in the  
29 letter from the FSC and after the italics, the bit quoting from the letter he says

1           *“On this basis it appears to me”*

2   DEPUTY DEEMSTER: Sorry I’m not quite sure which affidavit you’re referring to  
3           now, this is not the one

4   MR CHAMBERS: This is affidavit five marked three.

5   DEPUTY DEEMSTER: Right. Yes, sorry, that’s right he summarises doesn’t he?

6   MR CHAMBERS: He summarises.

7   DEPUTY DEEMSTER: And in fact I quote this

8   MR CHAMBERS: And this was something picked up by Your Honour on the last  
9           occasion.

10   DEPUTY DEEMSTER: I quote this in the Judgment. Right.

11   MR CHAMBERS: And Mr Simpson is there saying in effect that he can do the first  
12           distribution in three months and he says 31<sup>st</sup> of May, that’s why I’ve said 9<sup>th</sup> of  
13           July, three months.

14   DEPUTY DEEMSTER: I think I commented in the Judgment that the point about  
15           timing did in fact, bearing in mind Mr Simpson’s affidavit, look a little bit  
16           marginal.

17   MR CHAMBERS: Yes but at that stage Your Honour the point that was being taken  
18           was just in relation to the first distribution. This table that I’ve handed up to  
19           Your Honour now, shows that it’s not just the first distribution it goes across  
20           the whole scheme. So under a liquidation if Your Honour was to make a  
21           winding up order today the claimants would receive a big chunk of money we  
22           would say on the 9<sup>th</sup> of July, that being the 75 million from the Payment  
23           Profile table. And by the end of October they will have received 67% of their  
24           DCS entitlement, by the end of October this year on the figures put forward by  
25           Mr Simpson and the FSC. This is of course of huge importance to depositors  
26           who are small, who make up the 71% of all creditors.

1 And just dealing very quickly with my learned friend Mr Hacker's table, which is the  
2 explanatory notes. If one takes his 25,000 graph if Your Honour has that on  
3 page 17.

4 DEPUTY DEEMSTER: Yes.

5 MR CHAMBERS: It's the EPS, I'm looking at it in the column at the high asset  
6 realisation, high asset realisation the EPS column is the early payment scheme,  
7 there's an assumption there that the creditor has claimed and received  
8 £10,000. Div 1, the date of Div 1 is September 2009, that's the date of the  
9 23<sup>rd</sup> of September, that would be the date of Div 1. Div 2 would be June 2010  
10 and Div 3 would be June 2011, and that's all we're concerned with, Div 1, Div  
11 2, Div 3.

12 DEPUTY DEEMSTER: After that it's the same.

13 MR CHAMBERS: After that it's the same. But Your Honour the point I'm on is  
14 when will they get their full DCS entitlement? So that I only need to go to  
15 two years effectively.

16 DEPUTY DEEMSTER: Do you say that that broken line there should

17 MR CHAMBERS: It should be higher.

18 DEPUTY DEEMSTER: Is in the wrong place.

19 MR CHAMBERS: Yes it is, it should be higher because

20 DEPUTY DEEMSTER: It should be higher than the other line.

21 MR CHAMBERS: Sorry?

22 DEPUTY DEEMSTER: Higher than the other line in fact, is that right?

23 MR CHAMBERS: Well the broken line which is at the moment at the bottom, which  
24 is supposed to show that he gets less under the DCS, should actually be  
25 equivalent to or above the broken line. And the reason for that is because if  
26 you look in the column headed "Cumulative Payments made in Liquidation",

1           we have EPS 10,000, this is on the graph.

2   DEPUTY DEEMSTER: The graph, oh this graph, right.

3   MR CHAMBERS: This graph, I'm just trying to explain to Your Honour why this  
4           graph is wrong.

5   DEPUTY DEEMSTER: Yes.

6   MR CHAMBERS: Cumulative payments made in the liquidation, EPS 10,000.

7   DEPUTY DEEMSTER: Yes.

8   MR CHAMBERS: Then next column, Div 1 10,000, that is correct. Sorry, that is  
9           incorrect, because Div 1 is September 2009 and what he's saying is that at that  
10          date under the DCS the depositor will only have received, will not have  
11          received anything. That is wrong because in fact he will have received in  
12          October 67%, and one can see the 67% figure under Div 2, 16,750, that is the  
13          reference to 67%. What they have done is they've put in Div 2 what they  
14          should have put in Div 1. That figure of 16,750 should be in Div 1.

15   DEPUTY DEEMSTER: I see.

16   MR CHAMBERS: And that mistake is replicated throughout this document. So in  
17          fact what one would do is inverse that graph so our submission the only place  
18          for that graph is the bin. Unfortunately we haven't been able to do a graph of  
19          our own in the time available, that's where it is.

20   DEPUTY DEEMSTER: So it looks as though the creditors are going to reject this  
21          scheme then forthwith.

22   MR CHAMBERS: Well yes, the question for your honour we would submit

23   DEPUTY DEEMSTER: When it comes to a vote.

24   MR CHAMBERS: is whether this should go to a vote at all. And the only way we  
25          suggest this should go to a vote is if Your Honour thinks there is something in  
26          this over and above a liquidation which is going to be of benefit to the

1 creditors as a whole, or a very substantial majority of the creditors.

2 DEPUTY DEEMSTER: Well it was summed to the Court really on the basis of  
3 security really, at the last hearing I was told really that what it came down to  
4 was the fact that there were potential problems with the DCS if there were  
5 further failures.

6 MR CHAMBERS: I'm going to come to that.

7 DEPUTY DEEMSTER: That was what tipped the balance I think.

8 MR CHAMBERS: Your Honour I'm going to come to that and I'm going to make  
9 some very forceful submissions about that. Can I come to it in just a moment  
10 because it will. Now apart from that timing problem that the Treasury has,  
11 there's a different matter which we need to consider and I'm going to ask  
12 Your Honour to take up the Payment Profile again, this one from the FCS.

13 DEPUTY DEEMSTER: Yes. Now I'm afraid because we're not working from a  
14 proper bundle I'm afraid things are getting a little bit disorganised over here.  
15 This is the

16 MR CHAMBERS: This is the attachment to the FCS letter of the 16<sup>th</sup> of February  
17 2009.

18 DEPUTY DEEMSTER: Right.

19 MR CHAMBERS: Payment Profile and this is my basis for saying what the DCS  
20 payments will be.

21 DEPUTY DEEMSTER: Yes. okay. So I'm looking at the Payment Profile yes, thank  
22 you.

23 MR CHAMBERS: Now what this Payment Profile shows is 31<sup>st</sup> of May and 13<sup>th</sup> of  
24 October is a total of 141 million being received, that is a total of 75 million  
25 and 66 million, and you will see the source of that funding is set out, and the  
26 source top up columns Your Honour will see under 31<sup>st</sup> of May it's 35 million,  
27 13<sup>th</sup> of October is 35 million. That is a total of 70 million and that is 70

1 million provided by the Treasury under the DCS Regulations which in fact  
2 commit the Treasury to put in 150 million. Now this matter is dealt with

3 DEPUTY DEEMSTER: That is

4 MR CHAMBERS: By the FSC in its letter.

5 DEPUTY DEEMSTER: Well the Regulations themselves say that don't they?

6 MR CHAMBERS: Yes Your Honour absolutely correct, the Regulations until the  
7 23<sup>rd</sup> of October this year commit the Treasury to put in 150 million. Now I'm  
8 just going to explain to Your Honour for the moment what's happened is that  
9 70 million of this has been earmarked for the Kaupthing depositors. And we  
10 see that in this Payment Profile and it is explained in the FSC letter. So I'm  
11 going to ask Your Honour to go to the body of the FSC letter itself of the 16<sup>th</sup>  
12 of February paragraph 1. Does Your Honour have that?

13 DEPUTY DEEMSTER: Yes got that thank you.

14 MR CHAMBERS: Right, what the FSC says is this "*In the event a winding up order*  
15 *is made before 31<sup>st</sup> March the scheme manager would be in a position to levy*  
16 *approximately 9.6 million for both financial year 2008/2009 and 10 in the sum*  
17 *of 19 million arising from bank levies."* Your Honour just stopping there,  
18 Your Honour sees the bank levies in the column above source top up, it says  
19 source levy 9 and 10.

20 DEPUTY DEEMSTER: Yes.

21 MR CHAMBERS: That's the bank levies. Of course we've missed the bank levy for  
22 last year, that was on the 31<sup>st</sup> of March this year it had passed, but the  
23 Treasury has very helpfully committed itself to paying that. So the Treasury  
24 are now going to pay that if there's a liquidation. If we then go on to the  
25 letter, it says "*The second source of income stems from Treasury funding*  
26 *pursuant to DCS Regulation 12A(1) which on present information available*  
27 *we believe should be somewhere in the region of between 70 million and 92*  
28 *million. For the purposes of this response we are adopting the lower figure of*

1           70 million.” So just stopping there, what’s being said is, someone has said  
2           you can have between 70 and 92 million and the FSC said okay that’s great,  
3           but for prudence sake we’ll take it at 70 million. And Your Honour sees that  
4           figure of 70 million in the Payment Profile, the two 35s.

5   DEPUTY DEEMSTER: Yes.

6   MR CHAMBERS: Yes?

7   DEPUTY DEEMSTER: Yes.

8   MR CHAMBERS: Now, it is not clear to us why only 70 million of the 150 million  
9           is available, in principle we suggest the entire 150 million should be available  
10          and it seems the only reason it’s not is because 80 million is being kept in case  
11          of another bank failure. And we see the reference to that 80 million in the  
12          next paragraph of this letter where the FSC says in the final sentence on that  
13          page one, *“In the event there was a further default then there is a possibility*  
14          *that sums in excess of 80 million”* and that’s referred to as the remaining sums  
15          from the 150 million Treasury payment. But that for some reason hasn’t been  
16          earmarked for the Kaupthing, and it seems to be they are concerned for  
17          possibly another bank failure. And I’m going to address Your Honour on the  
18          likelihood and effect importantly of a further bank failure, but let us for  
19          present purposes assume that there is no bank failure between now and the  
20          23<sup>rd</sup> of October. The reason I take the 23<sup>rd</sup> of October is because that is when  
21          the 150 million is withdrawn, or it’s the so-called sunset clause. But just  
22          assume for these purposes that there is no bank failure, on the assumption that  
23          there is no further bank failure between now and 23<sup>rd</sup> of October there will be  
24          a further 80 million available which the FSC can call on the Treasury to pay  
25          and which the DCS can then distribute to protected creditors.

26   DEPUTY DEEMSTER: What is the obligation of the Treasury under the  
27          Government Regulation?

28   MR CHAMBERS: Your Honour I’m coming to that.

29   DEPUTY DEEMSTER: Yes.

1 MR CHAMBERS: Because the FSC address this question, if Your Honour will bear  
2 with me.

3 DEPUTY DEEMSTER: Yes, yes.

4 MR CHAMBERS: I know there is some dispute about this but I'm just asking your  
5 Lordship, Your Honour at the moment hypothetically to consider first of all,  
6 that there's no bank failure and this 80 million is potentially available.

7 DEPUTY DEEMSTER: Yes.

8 MR CHAMBERS: If it is potentially available then we could add that figure to the  
9 figures of 75 million and 66 million here, so instead of 141 million as at 13<sup>th</sup>  
10 of October 2009, the figure would actually be 221 million.

11 DEPUTY DEEMSTER: Now where should that, that goes on the Payment Profile  
12 does it?

13 MR CHAMBERS: On the Payment Profile, at the moment what is assumed, what is  
14 stated is by 13<sup>th</sup> of October there will be repayments of 141 million.

15 DEPUTY DEEMSTER: Yes.

16 MR CHAMBERS: I am saying assuming no bank failures and assuming this 80  
17 million can be made available to these depositors it will be made available by  
18 the end of October, so the figure would be 221 million. That would be enough  
19 to pay every single protected depositor their DCS entitlement in full. Now I  
20 appreciate

21 DEPUTY DEEMSTER: By the?

22 MR CHAMBERS: October this year.

23 DEPUTY DEEMSTER: By October this year.

24 MR CHAMBERS: That every single DCS creditor with savings up to £50,000 would  
25 be paid in full by this October. Now I have made two assumptions, one there  
26 will be no bank defaults and two, this money will be available to be used.

1 DEPUTY DEEMSTER: Yes.

2 MR CHAMBERS: The FSC have said that they are concerned about this 80 million  
3 and they're going to go for directions to the Court to decide what should  
4 happen about this 80 million. And Your Honour will see that from the FSC's  
5 letter, if Your Honour goes to paragraph numbered 4 of the DSC, of the FSC  
6 response, they're actually dealing with a slightly different question here but  
7 they are making reference to the fact that they're going to apply to the Court  
8 for directions. It's, could I just ask Your Honour to read to himself sub-  
9 paragraph 1 which deals with Treasury funding and the last sentence of sub-  
10 paragraph 1.

11 DEPUTY DEEMSTER: Sorry, what's the question that's being asked so we're clear.

12 MR CHAMBERS: Yes, the question that's being asked is on page 2 of Mr Simpson's  
13 letter and he's asking if there's any material difference in respect of the  
14 funding available for eligible deposit holders under the DCS with claims of  
15 less than 20,000 as compared with those with claims between 20,000 and  
16 50,000. So that's the argument, because some, the argument apparently is this  
17 150 million is only available for claims between 20 and 50,000, and this is  
18 what the FSC is addressing here. And what they are addressing in paragraph 4  
19 of this letter in sub-paragraph 3 they say *"In conclusion this issue may be*  
20 *resolved having taken further specialist legal advice or alternatively Court*  
21 *directions pursuant to Regulation 16B or alternatively a further amendment to*  
22 *the Regulations. It is intended to resolve this matter whilst the claims process*  
23 *is under way so as not to give rise to delay."* So if there is a liquidation today  
24 we will certainly be pushing for the FSC to apply to Court for immediate  
25 directions about this 80 million, and we will be asking the Court to say,  
26 assuming no bank failure between now and October, that 80 million is  
27 available in full to the depositors.

28 Now the reason I'm saying this and the reason why it's so important is because if the  
29 creditors sign up to this scheme of arrangement that opportunity will be lost,  
30 because under the scheme of arrangement they have to give up their rights to  
31 DCS, so they will have no opportunity at all effectively to get this 80 million

1           that is sitting there that the Treasury put up at the time.

2   DEPUTY DEEMSTER: Yes, if they vote in favour of the scheme then that's right.

3   MR CHAMBERS: If they vote in favour of the scheme, what I'm addressing your  
4        Lordship on, is trying to identify first whether there are any advantages to the  
5        scheme, and secondly demonstrating there are positive disadvantages such that  
6        this is not a scheme which is proper to go forward to creditors to vote on, that  
7        is the point I'm on. And that's why class becomes so important when I get  
8        there.

9   DEPUTY DEEMSTER: Yes.

10   MR CHAMBERS: Because it may be possible for these little creditors to be  
11        outvoted. But that is a slightly different issue, now

12   DEPUTY DEEMSTER: I just wanted to have a quick look at Regulation 12A of the  
13        DCS.

14   MR CHAMBERS: Yes.

15   DEPUTY DEEMSTER: Yes 12A says that "*Where a default has occurred the*  
16        *Treasury shall pay to the scheme manager such sum as appears to it to*  
17        *represent the total of the amount ... payable in respect of each exceeds*  
18        *£20,000, the total sum provided under paragraph 1 in respect of all defaults*  
19        *shall not exceed 150 million.*" Right.

20   MR CHAMBERS: Now what the FSC have said in paragraph 4 of their letter is there  
21        are differing interpretations to that and what they're going to do is go to Court  
22        and get it resolved. That is what they propose to do, or that's what we'll  
23        encourage them to do, and assuming they do and assuming the Court says yes,  
24        that 80 million is available then all these depositors will be paid off this  
25        October. As I said, that right would be lost if the scheme of arrangement is  
26        signed up to.

27   So Your Honour that brings me to the possibility of other banks failing and the effect  
28        that would have on DCS payouts. As I understand this issue was referred to at

1 the last hearing under the heading of certainty and it did appear to strike  
2 somewhat of a chord with Your Honour.

3 DEPUTY DEEMSTER: Yes.

4 MR CHAMBERS: And as I understand it what is said is that payments under the  
5 DCS might not be certain if there was a subsequent bank collapse in the Isle of  
6 Man.

7 DEPUTY DEEMSTER: Yes.

8 MR CHAMBERS: Now I make the following four submissions about that. First,  
9 there is no evidence at all of any likelihood or possibility of a further bank  
10 collapse. It is at this stage

11 DEPUTY DEEMSTER: It would be a very strange thing wouldn't it if there were  
12 evidence of that before the Court.

13 MR CHAMBERS: It is at this stage Your Honour pure speculation.

14 DEPUTY DEEMSTER: It is, of course it is.

15 MR CHAMBERS: It is speculation, and we would say perhaps even scaremongering.  
16 Secondly we suggest that there is no appreciable risk of a further bank  
17 collapse in the foreseeable future for this reason, as we understand it there are  
18 only about 30 deposit taking banks on the Island who could claim under these  
19 Regulations, and the vast majority are owned by UK, Spanish or other very  
20 large international banking groups and they have the backing of various  
21 Governments and they are, we suggest, very safe. But assume just for a  
22 moment that there was a subsequent bank collapse, this is my third point,  
23 assume there was a subsequent bank collapse, there is the cushion of 80  
24 million earmarked for the DCS which is the 80 million I've just referred to.  
25 That sum of £80million would have to be exhausted in its entirety under the  
26 DCS before it could have any impact at all on the DCS payments currently  
27 scheduled to be made under, in relation to Kaupthing. We say the 80 million,  
28 if it's available in October, is for us and if there is a bank collapse between

1 now and October that 80 million is available for others for that bank, so we  
2 say that is a very large cushion and therefore a subsequent bank collapse  
3 should have no effect on payouts under the DCS.

4 And then fourth, my fourth point and perhaps the most powerful one, is that we  
5 submit that it is both politically and economically inconceivable that the  
6 Treasury and the Government would permit the DCS to default on its promise  
7 to investors that £50,000 of their deposits were guaranteed to be safe if  
8 invested in the Isle of Man. When Mr Bell the Treasury Minister moved the  
9 amendment to the Regulations in the Tynwald on the 23<sup>rd</sup> of October of last  
10 year, he said specifically in the context of the Treasury's guarantee of 150  
11 million under these Regulations that it was necessary and that it was necessary  
12 in order to give, and I quote, "*increased confidence to our local and*  
13 *international investors*". That is what he said specifically in relation to that  
14 150 million, and with respect we say he was absolutely right, he was  
15 absolutely right because the DCS is a big draw for investors to the Isle of Man.  
16 The banks actively trade on it and they actively promote it, and we suggest it  
17 would be nothing short of a political and economic catastrophe for the  
18 Government of the Isle of Man to be seen to default on its DCS obligations.  
19 The Government, we suggest, simply could not let that happen. And I do  
20 observe although there has been some talk of this uncertainty issue in the  
21 evidence, most notably from Mr Lovett of Alex Partners who is sitting  
22 comfortably in London, that there is no mention of this uncertainty issue by  
23 Mr Bell himself who has given three or four affidavits so far to this Court and  
24 not once does he say, uncertainty is a problem. And we say quite rightly too.  
25 So we would suggest that there is nothing at all in this question of subsequent  
26 bank failure so far as the effect on the DCS is concerned and payouts to our  
27 clients.

28 So just to sum up on the issue of scheme of arrangement or liquidation, so far as DCS  
29 entitlements are concerned, under a straight liquidation the Treasury would be  
30 obliged to commit at least 70 million to the DCS, we say it should in fact be  
31 150 and that may well turn out to be the case, but at the moment it's 70. And  
32 that the proper course is for depositors to claim under the DCS because after

1 all that is precisely what the DCS was designed for.

2 DEPUTY DEEMSTER: Yes.

3 MR CHAMBERS: The scheme of arrangement we submit is nothing more than an  
4 attempt by the Treasury to try to get out of its DCS funding obligations by  
5 proposing an alternative to the DCS. Now the difficulty with that alternative  
6 is that it provides no positive advantages to the DCS entitlement, on the  
7 contrary is highly disadvantageous for the reasons I've outlined.

8 DEPUTY DEEMSTER: What happens if the Court rejects the application that the  
9 FSC may or may not make in relation to Regulation 12A? This is the 80  
10 thousand, 80 million sorry

11 MR CHAMBERS: 80 million.

12 DEPUTY DEEMSTER: is earmarked purely for depositors under 20,000?

13 MR CHAMBERS: Yes, as we understand it the Treasury would be obliged to pay the  
14 full 150 million if called on because dividends will have been received by  
15 creditors from the bank in the liquidation, and so many creditors may start  
16 getting towards 10, 15 or 20p in the pound. Once they hit 20p in the pound  
17 that's when that 150 million kicks in, we say it kicks in in the whole event, we  
18 say it kicks in all the time. But by the time it's time to kick in, it is likely to  
19 kick in because there will have been dividends received in the liquidation. But  
20 the point of the 80 million is, there are two points to the 80 million. One, it  
21 isn't in the reckoning at all so far, in all the figures I've shown your Lordship  
22 the 80 million is not there.

23 DEPUTY DEEMSTER: That's right.

24 MR CHAMBERS: Two, it acts as a cushion if there is a subsequent bank failure  
25 which we say is most unlikely. And three, if there is no subsequent bank  
26 failure there is a chance that we can get that 80 million, we may not succeed  
27 but there is a chance and that chance is thrown away by the scheme of  
28 arrangement. So that's the importance of the 80 million.

1 Now I now want to come to paragraph 14 of Mr Simpson's affidavit sworn for the  
2 petition to call meetings where he sets out the advantages so called of the  
3 scheme of arrangement, and I just want to go through them in turn to see  
4 where we now are. Right the first one, 14(a) Mr Simpson says "*certainty as to*  
5 *the provision of lump sum payments to protected scheme creditors within a set*  
6 *timeframe.*" So the first point he takes certainty and I've just dealt with that  
7 point. Secondly he says a set time, we suggest that is a misrepresentation, not  
8 intentional, but we say okay it is a set time but it is a much slower time and  
9 that is the table I handed up to Your Honour this morning. Then in (b) he says  
10 "*quicker payments of dividends to all scheme creditors of up to 60% of their*  
11 *scheme claim*", now this appears although it's not very clearly put here, this  
12 appears to be we think a reference back to the point he made in his previous  
13 affidavit, his so-called fifth affidavit which is called his third affidavit and I  
14 just need Your Honour to look at that so we can see exactly what he's talking  
15 about.

16 DEPUTY DEEMSTER: Right.

17 MR CHAMBERS: If Your Honour could take Mr Simpson's fifth affidavit which  
18 was before Your Honour on the last occasion and go to paragraph 10(a), we  
19 think this is the point that Mr Simpson is on.

20 DEPUTY DEEMSTER: That is in divider?

21 MR CHAMBERS: 39.

22 DEPUTY DEEMSTER: This is the third affidavit, it's stated to be the third.

23 MR CHAMBERS: It's called third, actually fifth, let's call it third.

24 DEPUTY DEEMSTER: Sorry, the paragraph I'm looking at is?

25 MR CHAMBERS: Paragraph 10(a).

26 DEPUTY DEEMSTER: 10(a), yes right.

27 MR CHAMBERS: Here he says "*As indicated in my second affidavit*" which is

1 actually his fourth affidavit “*the subrogation of the top up funding until all*  
2 *other creditors have received a dividend of at least 60% appears to provide a*  
3 *benefit to creditors with full or partial claims outside the DCS.*” So we think  
4 that’s the point he means when he’s looking, when we’re looking at 14(b) of  
5 the recent one.

6 DEPUTY DEEMSTER: Yes.

7 MR CHAMBERS: Now this point only relates to creditors outside the DCS and so it  
8 applies to the higher value depositors not the 71% depositors with deposits of  
9 less than 50,000, that’s the first point to make about this supposed advantage.  
10 It has a, what we would submit, is a narrow application to higher value  
11 depositors and has nothing to do with 71% of depositors who will of necessity  
12 have been paid off by that time. Secondly it is a timing point only, there is no  
13 extra money here, it is simply accelerated receipt. Thirdly Mr Simpson is  
14 unable to quantify it anywhere, there’s no indication of how much this is  
15 worth, it’s simply, we would suggest not talking a major advantage. But  
16 insofar as there is an advantage to this select group of creditors we suggest it is  
17 likely to be neutered by the Treasury’s right to 100% of receipts once the 60%  
18 ultimate dividend threshold has been reached. Your Honour may recall that in  
19 the scheme the way distributions are worked out is that once the ultimate  
20 dividend reaches 60% the Treasury is entitled to recover all of the money it  
21 has paid out. and our best estimate is that the Treasury will recoup 100% of all  
22 monies between 60p in the pound and 80p in the pound. So we would suggest  
23 that the so-called advantage that Mr Simpson identifies here is outweighed by  
24 the Treasury’s claw back from 60p in the pound.

25 And finally on this we would suggest that any advantage that there may be is  
26 completely overshadowed by the 71% of depositors that I’ve referred to  
27 previously. So that Your Honour deals with paragraph 14(b) of Mr Simpson,  
28 we now go on to paragraph 14(c) which was heralded by my learned friend Mr  
29 Hacker, the subordination of the Treasury’s claim against the company in an  
30 amount of at least 2.8million. Well, this is a reference to something which  
31 was referred to in Your Honour’s Judgment at the last hearing, if Your Honour

1 has the Judgment from the last hearing in paragraph 14 of that Judgment.

2 DEPUTY DEEMSTER: I think Mr Caine might be able to help us here.

3 MR CAINE: Tab 53 Sir.

4 DEPUTY DEEMSTER: 53. Paragraph?

5 MR CHAMBERS: Paragraph 14. In paragraph 14 Your Honour was dealing with the  
6 so-called certainty point and then in the final sentence of paragraph 14 Your  
7 Honour says "*I'm also informed that the scheme being propounded by the*  
8 *Treasury would in fact produce a small additional financial benefit to the*  
9 *depositors as 1.2 pence in the pound but nevertheless that's a benefit which*  
10 *should not be discounted in any way, shape or form.*" Now that figure of 1.2  
11 pence in the pound was based on a figure which had been put forward by Mr  
12 Bell in his third affidavit of the 12<sup>th</sup> of February where he said that the  
13 Treasury claims were £10.7million, and that's where the figure of 1.2 pence in  
14 the pound came from. That figure of 10.7 million was incorrect and the  
15 correct figure is actually as Mr Simpson has now got it at 2.8 million. And the  
16 2.8 million equates to just over a third of a penny in the pound, so we've come  
17 down from 1.2p in the pound to a third of a penny in the pound, and we would  
18 suggest that that is just de minimis in the context of what we have just been  
19 debating for the last hour in terms of advantages and disadvantages. We  
20 would suggest although that may be a tiny advantage it is so tiny that it could  
21 not possibly shift the balance, we would suggest, that this scheme is not  
22 sufficiently better than a liquidation. It is not liquidation plus, it is liquidation  
23 minus, minus.

24 Then finally we have Mr Simpson in 14(d), his last supposed benefit is a benefit to  
25 scheme creditors if the total dividend paid to the scheme is less than 60%.  
26 Well Your Honour I've dealt with that, that was the point where we say the  
27 reality is the dividend is going to exceed 60% and therefore that is not really  
28 an advantage at all.

29 So for those reasons we would suggest that the proper course for Your Honour to take

1 is to conclude that this scheme should not go to creditors because there is no  
2 advantage to creditors, there are positive disadvantages to the really important  
3 creditors, and we would invite Your Honour to make a winding up order today  
4 so that we can start getting payments under the DCS for these creditors very  
5 early. My learned friend Mr Hacker said his scheme of arrangement is a  
6 distribution scheme, yes it is a distribution scheme but vastly inferior we say  
7 to what would be obtainable on a liquidation and DCS. And we calculate that  
8 if Your Honour was to make a winding up order today the first payments  
9 could be made in July and the second payment in October, in accordance with  
10 the Payment Profile in the FSC's evidence.

11 Your Honour I now was proposing to move on to the question of creditors and classes  
12 of creditors should Your Honour decide that this scheme should go ahead and  
13 be put to the vote.

14 DEPUTY DEEMSTER: Yes.

15 MR CHAMBERS: And what I want to do first of all is to deal with the question of  
16 approach first of all, and then deal with what we say should happen so far as  
17 classes of creditors are concerned, and this is important because it will impact  
18 on the scheme of arrangement itself.

19 Now what my learned friend says is that Your Honour shouldn't really or is not  
20 entitled to consider classes of creditors at this hearing, is the substance of his  
21 submission. He says, I don't mind if you do but don't take it into account.  
22 Now the submission is made on the basis of the 1934 Practice Note. Now the  
23 starting point must be that the 1934 Practice Note does not of course apply in  
24 the Isle of Man.

25 DEPUTY DEEMSTER: Well it's difficult to know what applies in the Isle of Man  
26 because we've not had this issue determined judicially before.

27 MR CHAMBERS: Your Honour yes, what I'm hoping to be able to demonstrate to  
28 Your Honour is that in circumstances such as this the correct course for Your  
29 Honour is to consider creditors classes and I want to do so by reference to one

1 of my learned friend's authorities, which is the *Hawke Insurance case*. *Re*  
2 *Hawke Insurance*. And that is in my learned friend's bundle of authorities.  
3 Tab 4 thank you.

4 DEPUTY DEEMSTER: Thank you very much yes.

5 MR CHAMBERS: And I'm going to take your Lordship to the Court of Appeal's  
6 Judgment, Lord Justice Chadwick at paragraphs 18 to 20, and the reason I'm  
7 doing so is because in this case Lord Justice Chadwick said he didn't like the  
8 then practice in England under the 34 Practice Note, and in his Judgment he  
9 made some helpful observations about what could happen. At that stage he  
10 was constrained by the Practice Note so had to live with it, but interestingly  
11 made some helpful remarks which we submit may be of guidance to Your  
12 Honour. If we start at paragraph 18 of the Judgment, this is page 512.

13 DEPUTY DEEMSTER: Yes.

14 MR CHAMBERS: Lord Justice Chadwick says "*It might be thought that the*  
15 *structure of the statutory provisions required the Court to consider at the first*  
16 *stage when deciding whether or not to order a meeting or meetings to be*  
17 *summoned, whether the scheme proposed was a single compromise or*  
18 *arrangement with all the creditors with whom it was to be made, or was on a*  
19 *true analysis two or more linked compromises or arrangements with creditors*  
20 *whose rights put them in several and distinct classes. That has not been the*  
21 *practice in the Companies Court, the practice which has been adopted so far*  
22 *as I'm aware for the past 65 years is set out in a practice note issued by Mr*  
23 *Justice Eave*" and he sets out the relevant bit. Paragraph 19 "*The effect of that*  
24 *practice as it seems to me is that the fact that the Court has made an order*  
25 *under Section 425 for a meeting or meetings to be held is not to be taken to*  
26 *imply that the Court has addressed its mind at all to the question whether*  
27 *those are the meetings which the scheme proposed actually requires before*  
28 *sanction can be given under Section 425. The question whether or not those*  
29 *were the meetings which the scheme actually required is left to be decided at*  
30 *the third stage by which time a wrong decision by the applicant at the outset*  
31 *will have led to a considerable waste of time and expense*" And just stopping

1           there Your Honour, the reason he says that is because if you get to stage 3, the  
2           sanctions hearing, and it is decided that you've got the class of creditors  
3           wrong, the Court then has no jurisdiction to sanction.

4   DEPUTY DEEMSTER: No jurisdiction.

5   MR CHAMBERS: Even if it wanted to it couldn't.

6   DEPUTY DEEMSTER: Yes.

7   MR CHAMBERS: Then in paragraph 20 what Lord Justice Chadwick says "*It may*  
8           *be that that is inevitable, it may be thought impracticable to give notice to all*  
9           *scheme creditors of the application at the first stage or to have a hearing at*  
10           *the first stage at which dissentient creditors might put forward their views. It*  
11           *is not clear to me why that should be so.*" So he's saying, why shouldn't they  
12           if they want to come along and talk to me and tell me why the classes should  
13           be changed, let's do it at stage one. But Lord Justice Chadwick effectively  
14           said I can't because of this practice note which the following year was  
15           changed as a direct result, but Lord Justice Chadwick was saying effectively, it  
16           can be done at stage one. And the reality now is that we are here, there are a  
17           substantial body of creditors here at the stage one who want to make  
18           submissions to Your Honour about classes of creditors and we submit, not  
19           only should those submissions be made but we would invite Your Honour to  
20           take account and make a ruling on the issue.

21   As I indicated it is possible if the matter is left over until the sanction stage and it  
22           turns out, let us assume the Treasury is wrong and the meeting goes ahead  
23           with two classes of creditors and that we are right and there should have been  
24           three classes, I'll come to the three classes in a moment. But just assume  
25           that's right, then the Court cannot sanction the scheme because it's got no  
26           jurisdiction, we would suggest this would lead to a huge waste of time and  
27           costs and it would put us all back to square one. And that cannot be in  
28           anyone's interests. Now having said that, it may be that whoever loses on this  
29           class composition issue whether it be now at stage one or at stage three, may  
30           decide to appeal the Court's decision which as I understand it can be done of

1 right. Now in that event there are likely to be real difficulties insofar as the  
2 timing of the implementation of the scheme of arrangement is concerned. Any  
3 appeal may serve to delay the scheme very significantly, for example, if a  
4 disgruntled creditor who is not before the Court today came to the Court at  
5 stage three and said I have a quarrel with the way the meetings went ahead,  
6 there should have been four classes or five, there is some scope that  
7 disgruntled could put a real spanner in the works so far as implementing the  
8 scheme of arrangement is concerned because it may be difficult to implement  
9 the scheme of arrangement while an appeal is on foot, the basis of which is the  
10 Court had no jurisdiction to sanction the scheme. It may also make  
11 recognition in England very difficult if there is an appeal on foot on the basis  
12 this scheme should never have been sanctioned.

13 DEPUTY DEEMSTER: I think someone suggested in one of the skeletons that to  
14 adhere to the modern practice might make recognition easier.

15 MR CHAMBERS: Yes, I haven't gone into the question or looked at the question, if  
16 a disgruntled creditor at stage three decides to appeal any decision Your  
17 Honour made, what effect that would have. All I'm saying is it could very  
18 well have a detrimental effect first on whether the Supervisors decide to put in  
19 the scheme, to go ahead with it, and secondly on any recognition in England.

20 Now our submission is that the Treasury has got it wrong so far as classes of creditors  
21 are concerned. If we're right about that we submit it's best to get the point  
22 decided now so that the scheme of arrangement, if it is to be put to creditors at  
23 all, the correct classes can vote. In other words we say there should be three,  
24 if we're right there should be three classes not two. If we're wrong about  
25 classes, again it's best to get it dealt with now because hopefully that will  
26 deter any creditor at stage three from trying to take the same point which Your  
27 Honour has already ruled on. So we say there are compelling reasons why the  
28 matter should be dealt with today. Now when it comes to classes could I ask  
29 Your Honour to take Mr Hacker's skeleton on this, this is the easiest way to  
30 deal with this.

31 DEPUTY DEEMSTER: There are two skeletons aren't there?

1 MR CHAMBERS: Yes the longer one.

2 DEPUTY DEEMSTER: The longer one, yes.

3 MR CHAMBERS: The longer one, and could I invite Your Honour to go to  
4 paragraph 55, in paragraph 54 Mr Hacker said it's not necessary nor  
5 appropriate for the Court to address any issues concerning composition today,  
6 then at 55 this is a paragraph we agree with and accept. *"If the Court*  
7 *considers it appropriate to consider issues concerning the composition at the*  
8 *present hearing, the test as to whether more than one meeting of creditors is*  
9 *necessary is whether the rights of the creditors are so dissimilar as to make it*  
10 *impossible for them to consult together with a view to their common interest."*  
11 And we accept that is correct. We also accept that paragraph 56 is correct,  
12 *"it's not necessary the rights be identical merely that they be not so dissimilar*  
13 *as to prevent consultation together in the common interest."* And also we  
14 accept importantly that paragraph 58 is correct where my learned friend says  
15 *"Where a scheme is proposed as an alternative to an insolvency procedure the*  
16 *correct approach is to consider the rights which are to be released or varied*  
17 *under the scheme as the rights which creditors would have in the insolvency."*

18 However we do not accept that the first sentence of paragraph 59 fully sets out the  
19 position. What my learned friend there says, *"It is important to note that the*  
20 *test is based on similarity of legal rights against the company and not on other*  
21 *interests."* Now yes we accept the test is based on similarity of legal rights  
22 against the company and we accept and not on other interests, but the interests  
23 there referred to by my learned friend Mr Hacker are the creditors private or  
24 extraneous interests. So for example, in paragraph 59 he goes on to say that,  
25 third party guarantors. We accept that is correct, that is plainly a private or  
26 extraneous interest which has nothing to do with the creditors' rights against  
27 the company, we accept that. But if on the other hand the creditors' interests  
28 are derived from the creditors. legal claim against the company, then these  
29 interests do fall to be taken into account. So on the one hand we have Mr  
30 Hacker saying private extraneous interests don't take into account, we agree.  
31 But we say if those interests are derived from the creditors legal claim then

1           they must be taken into account.

2   DEPUTY DEEMSTER: The creditors claim against the company?

3   MR CHAMBERS: Yes. Now, let me just make the submission good by authority  
4           then explain to your Lordship, to Your Honour how it works here. If one  
5           looks at paragraph 57 of Mr Hackett's skeleton he sets out Lord Millett in  
6           *UDL Holdings* and it's sub-paragraph 3 that I would ask Your Honour to look  
7           at. Lord Millett there says "*The test is based on similarity or dissimilarity of*  
8           *legal rights against the company not on similarity or dissimilarity of interests*  
9           *not derived from such legal rights.*" Now what Lord Millett is saying there  
10          we suggest is that private interests are irrelevant but interests which are  
11          derived from the creditors' legal rights against the company are to be treated  
12          in the same category as legal rights against the company. So if your legal right  
13          is derived, if your interest is derived from the legal right you have against the  
14          company then it is to be classified or categorised as being a right against the  
15          company for these purposes.

16       So we would suggest that you are within the test either if you have a legal right  
17       against the company or if you have interests derived from such legal rights.  
18       Now for the purposes of the present case, the depositors' rights in the DCS are  
19       derived directly from the depositors' legal rights against the company. Now  
20       the depositors' legal right against the company is the debt the company owes  
21       the depositor. It is that legal right which gives the depositor an entitlement on  
22       a winding up to DCS payments under the DCS Regulations, that is Regulation  
23       8(1)A, Regulation 8(1)A says in order to be able to claim you have to be a  
24       depositor of a failed bank. Therefore,

25   DEPUTY DEEMSTER: You say that's not an extraneous matter it's derived directly  
26          from the right against the company.

27   MR CHAMBERS: Exactly, we would, what we are submitting is that is a right  
28          against the company, the right against the company is the debt as a result of  
29          that right you have a right to claim under the DCS. Therefore we say it is a  
30          right derived from the claim against the company and so falls within Lord

1 Millett's test. We would suggest that the right under the DCS is not an  
2 extraneous or private right, it is plainly a right derived from claims against the  
3 company. It therefore follows that we do not accept what Mr Hacker says in  
4 63.2 of his skeleton. If Your Honour would go to 63.2, what Mr Hacker says  
5 is in relation to the rights which scheme creditors would have on a liquidation  
6 of the company to "*the right to compensation under the DCS however is not a*  
7 *right against the company such as to be taken into account for the purposes of*  
8 *formulating classes.*" We do not accept that, in fact that is a direct quotation  
9 from Mr Moss. Mr Hacker has put that in as a result of what Mr Moss said in  
10 paragraph 39 of his first affidavit, it therefore follows that we don't agree with  
11 Mr Moss either.

12 Your Honour moving on, the Treasury does accept in paragraph 65 of Mr Hacker's  
13 skeleton that "*so far as rights under the scheme are concerned*" this is under  
14 the scheme as opposed to rights in the liquidation, he does accept that creditors  
15 do fall within two groups. And in paragraph 66 he accepts that "*the rights are*  
16 *so different that the two groups cannot consult together in their common*  
17 *interest.*" And that is why the Treasury have accepted that there must be two  
18 meetings.

19 DEPUTY DEEMSTER: Well he says it's debatable but he says to be prudent.

20 MR CHAMBERS: He says it's debatable but the Treasury are saying you have to  
21 have two meetings, therefore we take that as an acceptance that the debate has  
22 been resolved against him. Now the result is we suggest that the Treasury has  
23 accepted there are two different classes of creditors for the purposes of the test  
24 in *Hawke*, and that their interests are so different that they cannot consult  
25 together in their common interest. Now, where we differ from the Treasury is  
26 the Treasury say this results in two classes for creditors, we say it results in  
27 three. I have three classes, class one – non-protected depositors, those are  
28 creditors who have no rights at all to DCS payments.

29 DEPUTY DEEMSTER: An example being an internal creditor

30 MR CHAMBERS: A trade creditor.

1 DEPUTY DEEMSTER: Or a trade creditor yes.

2 MR CHAMBERS: Class two – depositors who have a right to DCS payments and  
3 their whole claim falls entirely within the relevant DCS limit. So that’s  
4 depositors who’ve got a right to DCS payments but their whole claims falls  
5 entirely within the relevant limit, I’m going to refer to those for convenience  
6 as basic DCS claimants. And then category three, or class three – is depositors  
7 who have a right to DCS payments and the value of their claim exceeds the  
8 relevant DCS limit, and for convenience I’m going to call those large DCS  
9 claimants. Now class one, non-protected depositors, we’re all agreed on.

10 DEPUTY DEEMSTER: That’s not contentious, that’s right.

11 MR CHAMBERS: Class two, basic DCS claimants, we are all agreed on although the  
12 Treasury want to lump into class two the large DCS creditors from class three.  
13 But just concentrating on class two for a moment, the basic DCS claimants,  
14 there is a clear difference between the interests of the basic DCS claimants in  
15 class two and the non-protected depositors in class one. And that’s why  
16 separate meetings are needed. Then we come to class three, the large DCS  
17 claimants, now the large DCS claimants have a foot in both camps, they have  
18 a foot in both class one and they have a foot in class two. Now they have a  
19 foot in class two to the extent of their maximum DCS entitlement. They have  
20 a foot in class one to the extent that their claim exceeds the maximum DCS  
21 entitlement.

22 DEPUTY DEEMSTER: Right, so you say yes they’ve got a foot in

23 MR CHAMBERS: Both camps. Because they have a claim up to the value of their  
24 DCS claim they’re in class, they’ve got an interest or a foot in class two. And  
25 the value of their claim which exceeds the DCS limit is class one, it’s nothing  
26 to do with DCS. So just stepping back and considering the position logically,  
27 the parties were agreed that there is a difference in interests between class one  
28 and class two, so it must necessarily follow we say, that the large DCS  
29 claimants in class three who have a foot in both camps have two competing  
30 interests to balance. They have their DCS entitlement interest to balance and

1           their non-DCS interest to balance.

2   Now in our submission you cannot put the large DCS claimants into class one because  
3       then their class two interests are not protected and you can't put them into  
4       class two because their class one interests are not protected. So the only  
5       solution we submit is to put them in a class of their own, in this way they can  
6       wrestle internally with their competing interests and vote accordingly. And  
7       perhaps I can just illustrate that by a couple of examples. Put another way,  
8       large DCS claimants may well have different interests to basic DCS claimants,  
9       this possibility is recognised by Mr Simpson in paragraph 10(a) his fifth  
10      affidavit. Your Honour may recall that in that affidavit and in that paragraph,  
11      we looked at it earlier, Mr Simpson made reference to the fact that persons  
12      outside of the DCS may benefit because the Treasury is deferring its claim for  
13      60%. That is a reference to a large DCS claimant. Now just assume that that,  
14      what Mr Simpson says, is a sufficient carrot to persuade large DCS claimants  
15      to vote for the scheme. So we have a large DCS claimant who votes for the  
16      scheme because he likes that idea, assume that the basic DS claimants are  
17      worse off under the scheme and that the basic DS, DCS claimants say I'm  
18      going to vote against the scheme because I don't like it. The vote may well be  
19      carried by the large DCS claimants to the prejudice of the basic DCS  
20      claimants if they're all lumped in the same class, they have very different  
21      interests. And this perhaps is best illustrated if one looks at large DCS  
22      claimants who may not want to make a claim under the DCS at all, now there  
23      are very large DCS claimants, I think the figure may be in excess of 170,000  
24      who will not want to make a claim under the DCS at all because the size of  
25      their deposits are so large that their pari passu dividend distributed in the  
26      liquidation will exceed the relevant DCS limit. And this category of large  
27      DCS claimant is specifically recognised by Mr Moss in his second affidavit,  
28      and perhaps I could just ask Your Honour to look at Mr Moss' second  
29      affidavit, that was the one that came in recently, where Mr Moss identifies this  
30      class.

31   DEPUTY DEEMSTER: Paragraph 10?

1 MR CHAMBERS: Paragraph 10. What Mr Moss there says is *“I understand it’s*  
2 *been suggested that there may be further classes of scheme creditors in*  
3 *respect of (1) protected depositors who would be entitled to a top up payment*  
4 *but who would never claim the top up payment because the pari passu*  
5 *distribution will exceed the 20,000 cap”* etc. And then he goes on at  
6 paragraph 11 to say in his view it doesn’t make a difference. He says it doesn’t  
7 give matters to class issues, he says *“As I explained in my first affidavit the*  
8 *established test is whether the rights of the creditors are so dissimilar to make*  
9 *it impossible”* and then he goes on about what he said. And he goes on in 12,  
10 13 and 14 but as we submitted earlier we consider Mr Moss had applied the  
11 wrong test anyway, or had misunderstood the test. Equally, where he says  
12 here that large DCS claimants do not deserve a class of their own we submit  
13 equally he is wrong.

14 Now in our submission if one is postulating a situation where large DCS claimants  
15 have been lumped in with what I call basic DCS claimants, and the large DCS  
16 claimant has no interest in the scheme at all because he’s got such a large  
17 deposit it’s completely irrelevant to him, we say it would be wholly wrong for  
18 such a large DCS claimant to be lumped in with basic DCS claimants because  
19 their interests are so obviously different. Therefore, we suggest that the  
20 correct course is to have three classes in the way I’ve identified, and that  
21 brings us back to the debate which we had a little while ago about whether  
22 Your Honour should consider matters such as this at this stage or at stage  
23 three. If there is something in this point, which we submit there is, and this  
24 scheme goes ahead with only two meetings, there could be serious  
25 implications for whether the scheme is correct, has correctly gone ahead,  
26 that’s why I would invite Your Honour to deal with this point today so it  
27 doesn’t rear its ugly head as it were at stage three. That is of course if Your  
28 Honour is persuaded that this scheme should go to creditors at all, and Your  
29 Honour has my submissions on that which is in the exercise of discretion,  
30 there is nothing in this that is worth putting to creditors because it is so  
31 dreadful.

32 DEPUTY DEEMSTER: Yes.

1 MR CHAMBERS: So Your Honour unless I can help you further, that is it.

2 DEPUTY DEEMSTER: Yes, no that's very helpful indeed, thank you very much  
3 indeed. I wonder whether this might be a time to take a break unless there are  
4 very strong views to the contrary I think this might be a convenient time to  
5 break for lunch. If we resume at quarter to two.

6 MR ATTORNEY: Your Honour I think there was Mr Hughes who wanted to catch a

7 DEPUTY DEEMSTER: Oh that's true yes, thank you very much indeed for  
8 reminding me.

9 MR ATTORNEY: He wants to have his say.

10 DEPUTY DEEMSTER: Yes Mr Hughes, I'm most grateful to you. Yes Mr Hughes,  
11 yes we ought to hear from you now. Thank you very much indeed.

12 MR HUGHES: Your Honour I'd like to note that clause 29.1, explanatory statement  
13 indicates that the calculation for [unclear]

14 DEPUTY DEEMSTER: Sorry, 29 point? The clause was 29 point? Point one.

15 MR HUGHES: indicates the calculation for sell offs [unclear] the company by  
16 depositors would be [unclear] registration of the scheme has been made with  
17 the FSC in England has recognised the effectiveness of the moratorium. I  
18 have been assured that this reference in clause 29.1 of the explanatory  
19 statement in effect has inadvertently [unclear] with the scheme document  
20 which referenced that the sell offs would be [unclear] today's date [unclear]  
21 that inconsistency I gather is going to be corrected but I would just like to put  
22 it to [unclear]. Thank you.

23 DEPUTY DEEMSTER: Thank you very much. Is that right?

24 MR ATTORNEY: Mr Hughes has made that point to us and it is accepted, it is a  
25 typographical error.

26 DEPUTY DEEMSTER: Yes. Right.

1 MR ATTORNEY: Yes we accept the point and the explanatory statement will be  
2 corrected.

3 DEPUTY DEEMSTER: Good. Well thank you very much, we'll adjourn now to  
4 1.45.

5 USHER: Stand please.

6 Short adjournment

7 DEPUTY DEEMSTER: I understand Mrs, or Miss Bartlett wishes to speak now  
8 because she's having to leave shortly. Yes.

9 MS BARTLETT: Your Honour is it possible to speak briefly since I've got to go to  
10 the airport at three o'clock?

11 DEPUTY DEEMSTER: Of course it is yes, certainly.

12 MS BARTLETT: Very, very much appreciated. I first of all want to say I've never  
13 been in this position before in my life so [unclear] emotional. I'm a depositor,  
14 worked all my life, I left school at the age of 14 and I worked and I've just  
15 turned 70, and this money is my pension, my life's work. What I wanted to  
16 say [unclear], I've studied this scheme of arrangement in detail [unclear] and I  
17 found this latest copy of the scheme of arrangements really doesn't offer us  
18 any more than liquidation and I'm aghast finding this after six months of hard  
19 work, on the contrary this scheme looks to me, and I've taken some advice,  
20 worse than the one we had in January and I implore you, implore you, implore  
21 you to put the company sadly into liquidation today because I'm 70, there are  
22 people who are older and we haven't got that much time to wait for our  
23 money, in fact we need it to live on. So that's my point. What I also wanted  
24 to say is according to the Treasury Select Committee Report on page 57  
25 [unclear] also said that Kaupthing Singer & Friedlander Isle of Man does not  
26 have to stand in line, because the Government stepped in we will get our  
27 money back much quicker than we think and so that's worth bearing in mind,  
28 that there's actually quite a lot of money out there to be shared out from my  
29 understanding and from the report I've read over the time. So liquidation

1 certainly looks for the depositors, and I'm one over 50,000 and I realise I'm  
2 going to be disadvantaged for a while but I'm thinking for everybody that this  
3 is by far a better scheme, what I'm saying is let's get on with it, let's get it  
4 behind us and then let's move forward in our future. I certainly want to enjoy  
5 a few more years of my life's labour basically. Yes, that's really what I want  
6 to say, let's look to the quickest possible way to get to the end of the disaster,  
7 it's a disaster for all. Thank you so much Your Honour for giving me that  
8 moment to just say what I wanted to say.

9 DEPUTY DEEMSTER: Thank you very much and I hope you enjoy a safe journey  
10 home. Thank you very much and I've made a careful note of what you said.  
11 Thank you. Now, we've heard from Mr Hacker, Mr Chambers, Mr Wild.

12 MR WILD: I think it's probably me Your Honour.

13 DEPUTY DEEMSTER: Yes, bear with me a moment while I just shift this box here.  
14 Thank you very much.

15 MR WILD: Thank you. Your Honour is aware that the Commission is the second of  
16 two joint petitioners in the winding up petition and has as been indicated on  
17 previous occasions we've appeared before Your Honour the company  
18 obviously still remains in a position where it's unable to pay its debts and that  
19 position is uncontroversial. It's also I think uncontroversial that to obtain an  
20 adjournment those seeking it have to persuade Your Honour the proper  
21 reasons to adjourn, and in considering those reasons as Your Honour's already  
22 indicated in previous Judgments, the *Demoglass case* is quite helpful in setting  
23 out some guidelines in relation to Your Honour's unfettered, or largely  
24 unfettered, discretion. In relation to the aspect of the adjournment it's the  
25 Commission's position that it is not a creditor and therefore it's not necessary  
26 or appropriate to make representations in regard to whether there should or  
27 shouldn't be an adjournment. It would be, it is a matter for Your Honour to  
28 consider having heard the representations from those seeking the adjournment  
29 and then the views of the creditors. So essentially that's the position of the  
30 Commission. There are, however, one or two points which have arisen during  
31 the course of the submissions this morning which potentially the Commission

1           may be able to help Your Honour on.

2   DEPUTY DEEMSTER: Yes.

3   MR WILD: I think the first point probably flows from my learned friend Mr  
4           Chambers' submissions where he read from the Commission's letter which  
5           was responding to questions from the liquidator provisional. And in our  
6           submission his analysis on the fine detail is incorrect on a technical point but  
7           whether that detracts from his overall submissions is obviously a matter for  
8           Your Honour, but on the technical ground we would say that he has that point  
9           wrong. And to make that good Your Honour perhaps we could first start with  
10          the Regulations themselves. And the point stems from the £150million  
11          funding from Treasury and that, as Your Honour has already briefly looked at,  
12          stems from Regulation 12A(1). Since the last hearing there have been  
13          amendments to the Compensation Scheme, Your Honour hopefully has a  
14          Keeling Schedule of the latest version, but I should say that

15   DEPUTY DEEMSTER: No I haven't got the most recent one. I've got the one as at

16   MR WILD: The beginning of 12A(1) should

17   DEPUTY DEEMSTER: That's the one I looked at the last hearing has it changed  
18          since then?

19   MR WILD: Right, the beginning of 12A(1) should now read "*if before the 23<sup>rd</sup> of*  
20          *October 2009 the participant is declared to have committed an act of default*".

21   DEPUTY DEEMSTER: I haven't got that no.

22   MR WILD: I don't think it matters, it certainly doesn't matter for the purposes of the  
23          submission I'm going to make but there is a Keeling Schedule of that, and that  
24          stems from amendments that were made on the 17<sup>th</sup> of March 2009.

25   DEPUTY DEEMSTER: Well I haven't got it I'm afraid, do you have a spare copy?

26   MR WILD: I'm sure one can be, I can hand my copy up Your Honour. Perhaps as  
27          I've indicated it doesn't make any difference to the submissions I'm about to

1           make and once I've made them if I can hand that up to Your Honour for  
2           copies to be made.

3   DEPUTY DEEMSTER: Yes okay, fine yes.

4   MR WILD: And I'll simply, I'll simply read the relevant section out Your Honour.

5   DEPUTY DEEMSTER: Yes.

6   MR WILD: So 12A(1) now reads, "*If before the 23<sup>rd</sup> of October 2009 the participant*  
7           *is declared to have committed an act of default the Treasury shall pay to the*  
8           *scheme manager such sum as appears to it to represent the total of the amount*  
9           *by which the compensation payable in respect of each depositor exceeds*  
10          *£20,000.*" And as I say it doesn't, the change at the beginning of that sentence  
11          has no material difference to this point. So the Treasury funding effectively  
12          stems from what we would say is a mathematical calculation on the amount of  
13          compensation payable in respect of each depositor above 20,000, and what in  
14          essence that means is, it is limited to individuals because it's only individuals,  
15          human beings who have any ability to claim above the 20,000 level. If Your  
16          Honour remembers from the scheme, the 50,000 level is for individuals, the  
17          20,000 level is effectively for everyone else who is entitled to claim. So the  
18          calculation is, those individuals who have deposits above £20,000 and on the  
19          analysis that the Commission have undertaken and from the information we've  
20          received from K.S.F. that has led us to the figures of 70 to 92 million which  
21          were referred to in our letter. And I'll take, perhaps it's sensible to take Your  
22          Honour to that letter with that in mind, I think it's at tab 39 of your bundle. So  
23          the first

24   DEPUTY DEEMSTER: This is Mr Simpson's affidavit of

25   MR WILD: Mr Simpson's third affidavit.

26   DEPUTY DEEMSTER: 18<sup>th</sup> February 2009.

27   MR WILD: Yes Your Honour. And exhibited to that affidavit is a letter which Mr  
28          Simpson wrote to the Chief Executive of the Commission of the 11<sup>th</sup> of

1 February and in that he asked a number of questions which appear at bullet  
2 points on the second page. And the fourth bullet point asks the question "*In*  
3 *your view is there any material difference in respect of the funding available*  
4 *both in relation to quantum and timing for eligible deposit holders eligible*  
5 *under the DCS with claims of less than 20,000 as compared to those with*  
6 *claims between 20 and 50.*"

7 DEPUTY DEEMSTER: Right.

8 MR WILD: And the answer to that Your Honour you'll find at the next exhibit, and if  
9 you look on the third page, point 4, which is referable to that bullet point.

10 DEPUTY DEEMSTER: Yes.

11 MR WILD: Sets out the answer. The answer is essentially, I can read it again, I did  
12 take Your Honour to it on the last occasion but the answer is essentially that  
13 there is a, there are issues arising out of how the money that comes in from  
14 Treasury is then paid out under the Depositors Compensation Scheme. So it's  
15 not a question of Your Honour the Commission holding back 80 million as  
16 was suggested, the Commission will receive a certain amount of money based  
17 on that calculation from Treasury and we are estimating it is between 70 and  
18 92 million. For the purposes of

19 DEPUTY DEEMSTER: Sorry, and that's based on the assumption that 12A is  
20 designed to compensate people between, 20 and 50?

21 MR WILD: No Your Honour. Sorry Your Honour no, that is based, if Your Honour  
22 looks at the first page of the letter perhaps that's a better place to start. The  
23 second paragraph of point 1, "*the question as to whether the DCS might*  
24 *actually pay the compensation to eligible depositor holders is somewhat*  
25 *dependent upon the impact of Treasury funding clause 12A. If it is assumed*  
26 *that Treasury paid the scheme manager the 70 million which is the lower*  
27 *estimate amount within say one month of the date of activation, the scheme*"  
28 and then I go on to read from that. In that case Your Honour the 70 million is  
29 the lower region which was the basis, the figure that had been taken in

1 previous analysis of the lower level of monies that would come in under that  
2 calculation. So it's £70million worth of money in the £20-50,000 bracket. So  
3 that would be the calculation that Treasury would be asked to undertake and  
4 they would pay, on best estimate, between 70 and 92 million because there is  
5 that amount of money held within K.S.F. for individuals in accounts with  
6 greater than £20,000 in, so it's a rather tortuous way of explaining it.

7 DEPUTY DEEMSTER: As usual with these regulations.

8 MR WILD: Yes.

9 DEPUTY DEEMSTER: And there's reference to a Court application isn't there?

10 MR WILD: I'll come on to that in a minute but I think the important point for Your  
11 Honour is to try and explain where the figure of the 70 to 92 comes from, and  
12 it is those creditors who have money in their bank account in excess of  
13 £20,000. So if there is somebody with £50,000 in his bank account, Treasury  
14 would pay a sum to the scheme manager of £30,000 and that calculation is  
15 undertaken for every single depositor.

16 DEPUTY DEEMSTER: Right.

17 MR WILD: Does Your Honour want me to take you back to the Rules again?

18 DEPUTY DEEMSTER: Well I think you were trying to show why Mr Chambers had  
19 it got wrong.

20 MR WILD: Well Mr Chambers was indicating that we'd chosen the figure of 70 to  
21 92 million on the basis we were effectively holding back £80million in case of  
22 another default.

23 DEPUTY DEEMSTER: Well it's Treasury holding it back isn't it?

24 MR WILD: Or Treasury yes.

25 DEPUTY DEEMSTER: Treasury really.

26 MR WILD: Treasury or

1 DEPUTY DEEMSTER: The point that Mr Chambers is making I think is that the  
2 Regulations anticipate the Treasury could put into the pot £150million.

3 MR WILD: Yes and what they've indicated Your Honour is

4 DEPUTY DEEMSTER: And the calculations put before the Court have assumed that  
5 Treasury would go no more, pay no more than £70million or was it  
6 £80million, I can't remember. Anyway, it's only about half of what they  
7 could possibly pay in, that's the simple point isn't it?

8 MR WILD: Yes, and where we are indicating that is incorrect is on an analysis of  
9 12A(1) is that the money that Treasury put into the Depositors Compensation  
10 Scheme is not 150million it is as I've previously indicated, an amount which  
11 appears to it to represent the total of the amount by which the compensation  
12 payable in respect of each depositor exceeds £20,000. So if a depositor has  
13 £50,000 the Treasury would put in £30,000 for that depositor, if a depositor  
14 has £10,000 in Treasury don't put anything in. The money, the funding for  
15 that effectively comes from the banks.

16 DEPUTY DEEMSTER: So what if they've got £100,000 in?

17 MR WILD: Then the Treasury will put in £30,000 again because the maximum is  
18 £50,000 compensation.

19 DEPUTY DEEMSTER: Yes fine.

20 MR WILD: So on our analysis Your Honour the point isn't that the Treasury or the  
21 scheme manager or anyone else is reserving money back in case of another  
22 default, the point is on our calculations the scheme manager anticipates that it  
23 would receive in the region of 70 to 92 million based upon the profile of the  
24 creditors who have money in K.S.F.

25 And the question Your Honour of actually making representations to the Court is a  
26 different point and I'll try and explain that, as again it is slightly technical but I  
27 think it's important that Your Honour this. The question in terms of making  
28 representations to the Court if, for example, £70million is paid into the

1 Depositors Compensation Scheme it has been paid in for those creditors who  
2 have 20 to 50,000 or more in their account. The question then is raised,  
3 should that money be paid out to them, should it be paid out to everyone  
4 which would include non-individuals, or should it just be paid out to  
5 individuals. And it is indicated that that is perhaps open to interpretation and  
6 therefore it may be a matter which would be drawn to Your Honour's attention  
7 by way of a reference under Section 16B. But that is a separate, a completely  
8 separate point and as we indicate in the letter that matter is intended to be  
9 resolved sooner rather than later, ie if the Depositor Compensation Scheme  
10 was activated we would be coming to Your Honour, or potentially I suppose  
11 the other option is that element is resolved by way of regulatory change. But  
12 either way the scheme manager would look to try and solve that problem or  
13 that interpretation issue sooner rather than later.

14 So as I indicated Your Honour that is a completely separate point, it's not directions  
15 as to what to do with the rest of the money, because the rest of the money  
16 doesn't arise under the Scheme Regs. Under the Scheme Regs there is a fixed  
17 amount of money coming in by reference to a calculation which is estimated,  
18 as I indicated, based on known deposits with K.S.F.

19 DEPUTY DEEMSTER: Just so I'm absolutely clear, it's the bracket between 20 and  
20 50.

21 MR WILD: Yes, who in reality only, would only actually have reference to  
22 individual people because they're the only people who'd be entitled to above  
23 £20,000.

24 DEPUTY DEEMSTER: That Payment Profile that is also annexed to that  
25 correspondence, I may have missed what Mr Chambers said on this but you  
26 may be able to help me, the reference to a loan, is that

27 MR WILD: The reference to a loan, if Your Honour looks at the assumptions at the  
28 beginning.

29 DEPUTY DEEMSTER: Table 25.

1 MR WILD: So there's an assumptions, funding assumption on the fourth bullet point  
2 there is loan funding available up to level of support available to scheme of  
3 arrangement. So we've said on the basis of an assumption that if there's a  
4 loan coming into the scheme it would be a loan coming in under the DCS. It  
5 is only an assumption.

6 DEPUTY DEEMSTER: That's from the Treasury is it?

7 MR WILD: Yes. So the scheme manager is entitled to ask for a loan and when  
8 we've been asked the question as to how the DCS would operate we've  
9 answered it by saying we've taken a certain amount of assumptions, because  
10 clearly in any analysis one needs to make some assumptions on what may or  
11 may not happen, and we've used the same loan funding assumption as under  
12 the scheme of arrangement, we can't say that that is necessarily going to be  
13 the case but we've, to try and compare as far as we can with like with like,  
14 we've made that same assumption and that's what's indicated in the

15 DEPUTY DEEMSTER: So does this not assume that Treasury are paying 70 million  
16 top up plus 25 million loan?

17 MR WILD: The outcome on funding Your Honour which is I think the page you're  
18 looking at, obviously the dates are now wrong.

19 DEPUTY DEEMSTER: Payment Profile I'm looking at.

20 MR WILD: Because the 31<sup>st</sup> of May would be slipped back.

21 DEPUTY DEEMSTER: Yes.

22 MR WILD: The assumption is there would be a dividend coming in from the  
23 liquidator, that's the 31 million.

24 DEPUTY DEEMSTER: Yes.

25 MR WILD: There would be a Government top up which is the 70 million figure that  
26 I've just indicated.

1 DEPUTY DEEMSTER: Yes.

2 MR WILD: And then there would be £90million worth of levies, that has changed  
3 slightly in that it would now be 9.6 million of levies for this financial year and  
4 the Treasury's undertaking to cover last year's financial year. If Your Honour  
5 remembers on the last occasion we went over a financial year, so it probably  
6 technically would be that half would be coming from Treasury as indicated at  
7 the last hearing. That then adds up to the 121 million.

8 DEPUTY DEEMSTER: And the loan is what sorry?

9 MR WILD: The loan comes in on the next occasion which is the 21 million loan  
10 which marries the loan which is assumed or is agreed under the scheme of  
11 arrangement certainly at that time, and I'm not, I don't think that has changed.  
12 So we've used effectively so far as we were able the same assumptions that  
13 were used when, or the same requirements if Your Honour will, when the  
14 scheme was being proposed, certainly two months ago. These figures are  
15 obviously relevant to, are now historic.

16 DEPUTY DEEMSTER: Right Mr Wild. Anything else you want to add there before  
17 I move on to some more of the creditors?

18 MR WILD: I think the only other comment just as a matter of form is that there've  
19 been a number of graphs have been submitted and more information submitted  
20 today by my learned friend Mr Chambers, and we're not in a position to  
21 comment or analyse those one way or the other.

22 DEPUTY DEEMSTER: It's been the history of this matter throughout that  
23 information has been produced very late in all cases.

24 MR WILD: Really just an indication we're not in a position to really do too much  
25 with that but no doubt that can be addressed by others.

26 DEPUTY DEEMSTER: Yes thank you very much indeed.

27 MR WILD: Is there any other issue that?

1 DEPUTY DEEMSTER: I don't think so at the moment Mr Wild. I'll come back to  
2 you if we you're your further assistance. Shall we take Mr Morris next?

3 MR MORRIS: Thank you Your Honour. I will be brief. You will recall that at the  
4 outset I indicated that I represented seven of the life companies, in relation to  
5 one of the life companies, namely Friends Provident International Limited, I  
6 have no instructions in relation to the issues before the Court today so I'm  
7 sorry about that. But in relation to the remainder, the remaining six of the life  
8 companies, my instructions are that they are in favour of an order providing  
9 for the scheme meetings to proceed in the manner proposed by the joint  
10 petitioners, that's the joint petition of the liquidators provisional and Treasury,  
11 provided that the proposed timetables are strictly adhered to. And it therefore  
12 follows that those clients are also in favour of a further adjournment of the  
13 winding up petition until those meetings have taken place. And it is as simple  
14 as that on behalf of my clients Sir.

15 DEPUTY DEEMSTER: And you agree with Treasury's analysis of the class issue do  
16 you? Anything you want to say about that?

17 MR MORRIS: I understand there may have been an alteration of position on that and  
18 I'm waiting to hear what Mr Hacker says, but at the moment we are aligning  
19 ourselves with the view of the Treasury, whether it be within two classes or  
20 three classes, I understand there may have been a change but I'm not certain.

21 DEPUTY DEEMSTER: Right. Mr Carter.

22 MR CARTER: Obligated Your Honour. I'm taking a leaf out of my learned friend Mr  
23 Morris' book and be very brief as well Sir. The two matters I'd wish to raise,  
24 first of all is my learned friend Mr Chambers indicated he would like to have  
25 the matters appertaining to classes and things dealt with today if Your Honour  
26 is minded to go down the route of the scheme of arrangement, and for the  
27 reasons that Mr Chambers set out I would concur with that. I think it would  
28 be wholly undesirable to come back in the future to find that when Your  
29 Honour reconsiders matters it's not going to work, and I think it's everyone's  
30 interests if that can be resolved today Sir, I think that would be a great time

1 saver if Your Honour is minded to go down that route.

2 In other respects Your Honour my second point is that I would support the  
3 submissions of my learned friend Mr Hacker and Treasury, the clients I  
4 represent are in favour of the scheme of arrangement, we've been over the  
5 ground in some detail today but having heard all the matters nothing's  
6 changed our view. We would support the scheme Sir. Unless I can be of any  
7 further assistance.

8 DEPUTY DEEMSTER: Thank you very much indeed. Miss Holt.

9 MISS HOLT: Thank you Your Honour. I also will be very brief. My clients wholly  
10 support the submissions made by the Treasury today and indeed support the  
11 idea of a scheme of arrangement. Insofar as the classes issues was concerned  
12 I understood that that matter was going to be re-visited later on this afternoon.  
13 It's not something that will sway my clients in any particular way so insofar as  
14 that's concerned we still adopt the submissions made by the Treasury.

15 DEPUTY DEEMSTER: Thank you very much. Mr Webb.

16 MR WEBB: Our clients' position is one that they've raised certain points with  
17 Gough & Co and with Cains, and subject to the satisfactory resolving of those  
18 their position really is one that it's a matter for Your Honour whether or not  
19 you allow the scheme to proceed or not.

20 DEPUTY DEEMSTER: Thank you Mr Webb. Mr Wannenburg.

21 MR WANNENBURGH: Yes thank you Sir. Canada Life is in favour of the  
22 submissions of the Treasury, it therefore supports the proposed scheme of  
23 arrangement and again it follows that it too is in favour of adjourning the  
24 winding up petition Sir.

25 DEPUTY DEEMSTER: Thank you very much. Mr Caine I should ask you shouldn't  
26 I, sorry.

27 MR CAINE: I have nothing to add to the submissions of my learned friend Mr  
28 Hacker Sir.

1 DEPUTY DEEMSTER: Thank you very much indeed. Now I think I should  
2 probably hear from the members of the public or at least depositors anyway as  
3 I think that concludes the submissions from the advocates, although obviously  
4 I need to hear from Mr Hacker in reply. But now, there are a great many  
5 people here in Court who I see are all depositors, would you wish to make  
6 some submissions on the matter before the Court? If you could just identify  
7 yourselves please and just confirm you are a depositor.

8 MR WAKEN: Thank you Your Honour. Yes, my name is Peter Waken and I'm a  
9 large depositor in the Kaupthing Bank. Your Honour my grandmother once  
10 told me that banking was a great big confidence trick and I hope today that I  
11 wasn't tricked into having confidence in what's here before the Court. We  
12 have been debating, let's be clear about this, whether or not the Depositors  
13 Compensation Scheme offers certainty here in my view. And the scheme of  
14 arrangement suddenly becomes very attractive because it offers some greater  
15 certainty, perhaps some timing advantages for certain class of depositors. I  
16 have to say as a depositor on behalf depositors I find it a very trivial issue to  
17 be in front of us, I understand the legal implications of what I'm saying that  
18 when you invest in a bank and the bank is saying your money is safe and  
19 secure because we are backed by the Depositors Compensation Scheme,  
20 nobody who puts their money into a bank would expect this kind of discussion  
21 to be going on as to how their money is going to be paid back. It is  
22 fundamental to the investment we took, supported also by the bank guarantee  
23 as you know by the parent company, and I'd just like to say that I think it's not  
24 doing the Island any good to be debating at this level. I really do think that the  
25 reputation of the Isle of Man, which historically has been horrific, it's got very  
26 high ratings, this [unclear] risk of going down this very, very narrow path  
27 Your Honour. The world class best practice standard that all depositors  
28 [unclear], I know it's not the purpose of the Court today to debate terms of the  
29 scheme of arrangement but I understand the 60p threshold but I would Your  
30 Honour like it to be on record that from the depositors point of view it is still a  
31 second class response to a very difficult situation. A world class response, the  
32 best practice response would have been very different and whatever the course

1 of today we still will remain very disappointed. There are no winners coming  
2 out of this today whatever the decision you make Sir, thank you.

3 DEPUTY DEEMSTER: Thank you very much indeed. Now is there anyone else on  
4 this side of the room who'd like to speak? If I move maybe to the unfortunate  
5 people in the dock, no shame in that at all on this occasion anyway. Who  
6 would like to speak? Yes, if you could just tell me who you are and just  
7 confirm you are a depositor.

8 MR KNOTT: Peter Knott.

9 DEPUTY DEEMSTER: Peter?

10 MR KNOTT: Peter Knott.

11 DEPUTY DEEMSTER: Thank you Mr Knott.

12 MR KNOTT: My life savings are in this bank also and it seems to me that what I'm  
13 being asked to do is to walk away with just over half of my savings and I'm  
14 even being asked to make a vote on this, the Depositors Compensation  
15 Scheme or the scheme of arrangement and neither of these two are going to  
16 satisfy [unclear] in my situation. So I'd just like to put it on record that my  
17 life savings were put into this bank, actually they were put into the Derbyshire  
18 and the Derbyshire [unclear] account here. And then we've got this mess  
19 arising, so all this conversation right now is going to probably make two or  
20 three thousand depositors be without a substantial amount of their savings.

21 DEPUTY DEEMSTER: Thank you very much Mr Knott. Anyone else at the back of  
22 the room there? No. Right, if I turn to this side of the room here, is there  
23 anyone who would like to speak or make any representations to me? No.  
24 Thank you very much indeed, unless, yes we have another gentleman there.

25 MR BELL: I wasn't going to say anything because last night we had a get together  
26 coming from the UK.

27 DEPUTY DEEMSTER: Just tell me who you are sorry, your name.

1 MR BELL: Sorry Alan Bell a depositor.

2 DEPUTY DEEMSTER: Yes thank you.

3 MR BELL: Very much in the same boat as my colleagues here, my friends, our life  
4 savings have gone into the bank here, both our business and our personal  
5 savings have gone. We're sitting here debating which way we're going to go,  
6 what was said here I agree with 100% and that is that that's what we're  
7 looking for back 100%, this is, whatever decision comes out today is certainly  
8 not going to satisfy us. What's concerning to me is that in the run up to this  
9 hearing there's new pieces of information coming through that change our  
10 thoughts on which way we want to go. We listen to the experts down here  
11 showing us graphs which are incorrect. You know it's very, very  
12 disappointing that (a) we're pushed into this situation, and the timeframe, six  
13 months is too long but we're still not ready I don't think to offer us the proper  
14 result. And there should be a third option and that is how we're going to get  
15 us 100% back. The Treasury Select Committee in London has said that in  
16 their report that the Isle of Man Government and themselves should get  
17 together to resolve this crisis, that statement was made a few days ago so no  
18 action's been taken on those words. There should be time to have those  
19 meetings to get us 100% back not debate whether we're getting 60%, and if  
20 it's going to be two months quicker than the other scheme, that's really not in  
21 the process for us. So

22 DEPUTY DEEMSTER: So you think the matter should be resolved politically and  
23 that time should be given by the Court to allow that to happen, is that what  
24 you're saying?

25 MR BELL: Sorry?

26 DEPUTY DEEMSTER: You think that the Court should adjourn matters to enable  
27 talks to take place on a political level?

28 MR BELL: I think it should adjourn to put a scheme together, a proposal together, to  
29 get us 100% back.

1 DEPUTY DEEMSTER: Yes.

2 MR BELL: Thank you.

3 DEPUTY DEEMSTER: Thank you very much Mr Bell. Yes.

4 MR ROBERTS: I'm Stuart Roberts.

5 DEPUTY DEEMSTER: Mr Roberts, thank you very much.

6 MR ROBERTS: I've taken a reasonably active role on the Island in the Depositors  
7 Action Group in understanding this scheme of arrangement and what it would  
8 mean for each individual depositor as opposed to liquidation and the DCS, and  
9 I attended a meeting with [unclear] we were given the figures of the scheme of  
10 arrangement and then [unclear] try and understand in my own mind, I would  
11 consider myself to have a reasonably keen mathematical mind and I thought I  
12 would understand entirely the scheme of arrangement so I could then propose  
13 to the members whether I felt it was beneficial or detrimental to depositors as  
14 a whole. All the way through the calculations and the working out in the  
15 meetings the point was always given that at 60% of return, 60% of the money  
16 that the Treasury Committee [unclear] would also be returned and at that point  
17 they would effectively start handing out to the depositors looking at the  
18 possibility of a 40% or 40 pence in the pound loss. And then I find out to my  
19 astonishment yesterday having read the scheme document they've changed  
20 their stance about this issue, we now get 60% and they intend to pay all  
21 [unclear] so I just find it amazing that they're prepared to write a scheme  
22 which means myself and everybody [unclear] they're not prepared to leave  
23 anything in the scheme or suffer any loss [unclear] so they've changed the  
24 goal post at the very last minute. The scheme document makes it very  
25 difficult [unclear] and they've not been honest in purveying that to the  
26 [unclear].

27 DEPUTY DEEMSTER: I see. Maybe the Treasury representatives can make a  
28 comment about that in a moment. Yes.

29 MR WAKEN: Sorry, Peter Waken again Your Honour.

1 DEPUTY DEEMSTER: Yes indeed.

2 MR WAKEN: Just one very small point.

3 DEPUTY DEEMSTER: Yes.

4 MR WAKEN: I've heard obviously the positions of the learned Counsel for many of  
5 the other depositors affected by this. I would ask the open question whether  
6 the decision to support the scheme of arrangement was taken prior to the  
7 hearing of the evidence this morning presented by [unclear] on behalf of the  
8 depositors. It seems to me that if all I'm seeing was the affidavits and the  
9 explanatory statement then the balance of advantage was [unclear]. ...scheme  
10 of arrangement that new evidence coming it seems to me makes them a very  
11 big change [unclear], had that evidence been presented to the live companies  
12 and other depositors and creditors [unclear].

13 DEPUTY DEEMSTER: Thank you very much indeed. Yes well unless there's any  
14 other representations from the gallery I will now I think turn to Mr Hacker if I  
15 may to respond to what's been said.

16 MR HACKER: Your Honour I'm obliged. Can I start with class issues and remind  
17 Your Honour of an observation which is set out in *Hawke* in the *Hawke*  
18 *Judgment*. I don't think Your Honour needs to turn it up I was just going to  
19 read it, there is there a citation from an early edition of Buckley and the  
20 Companies Acts in which it is said that "*Class of creditors – it is a formidable*  
21 *difficulty to say what constitutes a class of creditors within this section.*"  
22 That has remained the position notwithstanding the many expositions at the  
23 highest judicial level as to how one should or should not determine classes.

24 DEPUTY DEEMSTER: It's as difficult issue, yes.

25 MR HACKER: Yes. And the Treasury and the company to the extent it is promoting  
26 the scheme are anxious that it should not in any way appear that there is an  
27 attempt to steamroller or bulldoze the small depositors, it is for their benefit  
28 ultimately that this scheme is being proposed. And with that in mind the  
29 promoters of the scheme, the Treasury and the company, are content to

1 reformulate the scheme so that it comprises the three classes indicated by my  
2 learned friend.

3 DEPUTY DEEMSTER: There would be three scheme meetings.

4 MR HACKER: There would be three scheme meetings, it might perhaps have been  
5 helpful if the reasoning underlying the three class position had been provided  
6 to us in advance and we might perhaps have been able to save some of the  
7 argument.

8 DEPUTY DEEMSTER: Yes.

9 MR HACKER: There is certainly in my submission scope for a legitimate difference  
10 of view as to the composition of the classes, there are arguments in favour of  
11 more than three classes in fact if one takes my learned friend's logic to its  
12 ultimate conclusion. There are a range of classes that one could envisage but  
13 the authorities are as clear that there must be enough, that there should not be  
14 too many classes as they are that there should be enough classes. It's seen as  
15 much of an evil to sub-divide down as it is to try and lump people together  
16 who don't have a common interest.

17 DEPUTY DEEMSTER: Well it certainly seemed to me for what it's worth that the  
18 argument that Mr Chambers put forward that the, what he called the large  
19 DCS claimants should have, be in a class of their own, that seemed to have a  
20 lot of attraction to me I must say.

21 MR HACKER: It certainly has, it has an attraction that, there is scope for a  
22 competing view and indeed that is the view which Mr Moss has expressed,  
23 notwithstanding the fact that it was known that there was an argument that  
24 there should be three classes. He has clearly expressed the view that he thinks  
25 it's right that the scheme proceed with two classes. But what, what the  
26 Treasury and the company are concerned about is first of all that the scheme  
27 should be, in a sense transparent and seen to be fair and that there should not  
28 be any residual concern that they are hiding behind the technicalities in order  
29 to try and impose their will on the creditors. And secondly, and of equal

1           significance, that this matter should not be held up by appeals in relation to  
2           issues which are capable of resolution, and this is one such issue.

3   DEPUTY DEEMSTER: That's, I think that's very helpful.

4   MR HACKER: So the scheme will be amended, I'm going to look at those around  
5           me, I'm going to say that it should not delay matters, I cannot see why it  
6           should delay matters, it's a relatively, famous last words, a relatively simple  
7           drafting exercise.

8   DEPUTY DEEMSTER: Well one would think so. Yes.

9   MR HACKER: Those in London may not thank me for saying this on the eve of  
10          Easter.

11   DEPUTY DEEMSTER: Easter weekend coming up.

12   MR HACKER: Easter weekend but that's what they're all paid for so.

13   DEPUTY DEEMSTER: Yes.

14   MR HACKER: No doubt they will get on and deal with it. So that should not lead, in  
15          our submission, to any delay.

16   DEPUTY DEEMSTER: No.

17   MR HACKER: And hopefully we can put class issues behind us and the threat or  
18          implied threat of an appeal in relation to that if we maintain the two. As to the  
19          scheme and its advantages and disadvantages, my learned friend began his  
20          submissions to Your Honour by saying that there was no advantage because  
21          there is no more money in the scheme than there is in a liquidation, the relied  
22          on evidence in Mr Simpson's affidavit. Now what my learned friend there  
23          ignored, although he sought thereafter to minimise it when he did refer to it, is  
24          the fact that the Treasury is deferring, is subordinating, not deferring,  
25          subordinating its pre-liquidation claim until all creditors have been paid in full.  
26          Now that may be a small sum

1 DEPUTY DEEMSTER: Point 3pence.

2 MR HACKER: Yes, but if you had £10million deposited with the bank that would be  
3 worth something to you. It highlights only that different creditors have  
4 different interests. But even for the smallest creditor who is, who has a claim  
5 greater than his, greater than his protected claim, it will be a benefit. Now  
6 whether it's sufficient of a benefit to outweigh any perceived disadvantages of  
7 the scheme is a matter for the creditors in our submission, not a matter for the  
8 Court. And therefore the submission that my learned friend has made is  
9 factually wrong. Then he dealt with the timing issues and he showed Your  
10 Honour his own comparative timetable of the projected outcome of the  
11 liquidations.

12 Now one of the difficulties in this case is that the numbers on which people are basing  
13 their calculations are not fixed, they do move with time, and it is our  
14 understanding that in his liquidation DCS payments analysis my learned friend  
15 or his clients have assumed that the protected liabilities, or the DCS claims,  
16 are £210million which is a figure that certainly has appeared in the evidence.  
17 In fact, the most recent estimate of DCS claims is that they are £250million  
18 and the calculations – my learned friend asks if there's any evidence of that.  
19 There isn't any evidence but I can tell Your Honour that the calculations as  
20 they appear in the explanatory statement are based on that £250million figure.  
21 There is no evidence because we had no advance warning of the points that  
22 were going to be taken against us. If we had advance warning we could  
23 obviously have dealt with the issue in evidence. That's the first point. So his  
24 percentages require some adjustment.

25 More significantly perhaps, the left hand column where it refers to percentages is, in  
26 our submission, necessarily misleading because what is being compared here  
27 is apples and pears. The liquidation DCS scheme involves pari passu  
28 distributions to creditors, each creditor will only receive the same percentage  
29 of his claim as every other creditor. Whereas the top up scheme is structured  
30 differently and this is perceived to be one of its attractions to a certain group  
31 of those with protected claims, namely that it is offering lump sums at

1 particular points. Therefore it is, in our submission, I don't know what the 40,  
2 70 and 100% actually refer to, whether it's the number of people who are  
3 going to be paid out, percentage of claims that are going to be paid out on  
4 average, or exactly what that's meant to represent. But the fact of the matter is  
5 that in the proposed scheme some and particularly the smaller creditors will be  
6 paid out more quickly than those even with larger protected claims, and that's  
7 because rather than being a pari passu scheme, it's a lump sum scheme. It's  
8 structured, it's deliberately structured so it does offer advantages to some  
9 creditors. And what we say is that in those circumstances it simply cannot be  
10 said that taking the creditors as a whole, the protected creditors as a whole, the  
11 scheme is bound to fail. There are some creditors for whom this scheme will  
12 be very attractive.

13 DEPUTY DEEMSTER: The, so we're going to have three scheme meetings, if the  
14 small depositors if you like, who are going to be in one class, take Mr  
15 Chambers points they're going to vote against aren't they?

16 MR HACKER: Well no not all of them, no because his points are not correct.

17 DEPUTY DEEMSTER: You think the point is not correct yes.

18 MR HACKER: The point is not correct.

19 DEPUTY DEEMSTER: Just so I'm quite clear on this, yes. Obviously each are  
20 inter-dependent on the other aren't they, I mean we can't have one class, the  
21 whole scheme is inter-dependent.

22 MR HACKER: No, the whole, all the meetings have to vote in favour.

23 DEPUTY DEEMSTER: Of course they do.

24 MR HACKER: But what Mr Chambers is effectively saying is that all the protected  
25 creditors are in the same position.

26 DEPUTY DEEMSTER: Yes.

27 MR HACKER: And the answer is they're not all in the same position because their

1 claims are of different amounts with the consequence that some will get paid  
2 out more quickly under the scheme than others. So it is not possible to say  
3 that this scheme is bound not to be sufficiently attractive to the creditors, to  
4 the DCS creditors and that therefore it's not, we're not in the *Savoy Hotels*  
5 type situation.

6 DEPUTY DEEMSTER: You mention actually, sorry to interrupt you Mr Hacker, that  
7 you'd, the *Savoy Hotels case* had been referred to me previously, it hasn't  
8 actually.

9 MR HACKER: Has it not?

10 DEPUTY DEEMSTER: I've seen it referred to but I don't actually have a copy of the  
11 case.

12 MR HACKER: Sorry I don't have it with me because I thought.

13 DEPUTY DEEMSTER: Fine, well I can

14 MR HACKER: I will certainly make sure, I'll certainly make sure it's available. I'm  
15 sorry, I thought, perhaps I

16 DEPUTY DEEMSTER: It wasn't actually referred to me previously but

17 MR HACKER: Certainly there's a reference to it somewhere.

18 DEPUTY DEEMSTER: I am to some extent familiar with it.

19 MR HACKER: It may be, I'm think it was referred to in Mr Moss' affidavit I'm  
20 sorry. Yes, yes it was, it's referred to in Mr Moss' first affidavit. We will  
21 ensure

22 DEPUTY DEEMSTER: But you say this is not a *Savoy Hotels case*.

23 MR HACKER: This is not a *Savoy Hotels case* because there the evidence was  
24 incontrovertibly given the number of people who were shareholders, there was  
25 a reconstruction, the number of shareholders who were opposed to the scheme  
26 that it couldn't succeed. And this is not that case, this is not a case where self-

1 evidently every protected depositor is going to vote against the scheme. The  
2 whole purpose of the meeting is to identify whether taking the general body of  
3 creditors and having regard to the statutory majorities which have to be  
4 achieved, it is something that the creditors want. And all that Treasury and the  
5 company are seeking today is that the creditors have the opportunity to give  
6 the matter that consideration. As to the £80million, the £150million.

7 DEPUTY DEEMSTER: Yes.

8 MR HACKER: I hope my learned friend Mr Wild has explained the position, again  
9 my learned friend's submission, my learned friend Mr Chambers' submission,  
10 proceeds on a misconception as to what that, how that funding is intended to  
11 be made available. It is a fund that is there but it can only be called on to the  
12 extent that it is required having regard to the creditor profile in the company.

13 DEPUTY DEEMSTER: Yes.

14 MR HACKER: And that gives you the 70 to 92 million.

15 DEPUTY DEEMSTER: Yes.

16 MR HACKER: So this is, and as my learned friend Mr Wild also explained the  
17 purpose of the potential application to the Court is not to see whether any  
18 more money can be extracted from the Treasury, but to see how the money  
19 which is paid by the Treasury should be divided up amongst those entitled to  
20 claim under the scheme. So there is no, there is no litigation there waiting to  
21 be triggered when the company goes into liquidation which could produce  
22 another £80million to go into the pot. And I don't know whether, again  
23 whether my learned friend's figures, his liquidation DCS payment outcome  
24 percentages are dependent on that 80 million being in the pot, if they are they  
25 are even further awry.

26 MR CHAMBERS: They're not.

27 MR HACKER: They're not, they're not. In any event that is in our submission a  
28 non-point. As far as the advantages identified by Mr Simpson in his affidavit

1 are concerned, the four advantages which my learned friend went through.

2 DEPUTY DEEMSTER: Yes.

3 MR HACKER: And sought to rubbish, the first point is, has already been dealt with.

4 The second

5 DEPUTY DEEMSTER: What, certainty?

6 MR HACKER: Certainty, certainty yes.

7 DEPUTY DEEMSTER: That's what I'm, paragraph 14(a) is the

8 MR HACKER: I'm so sorry, certainty. Now my learned friend made various  
9 submissions to Your Honour which really came down to saying that politically  
10 and economically at the end of the day the Treasury couldn't allow the DCS to  
11 go into default and therefore everything would come out alright for the  
12 depositors at the end of the day, therefore there was certainty.

13 DEPUTY DEEMSTER: If there were another collapse.

14 MR HACKER: If there were another collapse.

15 DEPUTY DEEMSTER: A bank collapse yes.

16 MR HACKER: Yes. Now, I would submit that it's not appropriate for the parties  
17 before Your Honour or the Court indeed itself to speculate on how matters  
18 might turn out in the event of any number of unforeseen or unforeseeable  
19 eventualities. The fact is that the scheme offers a bird in the hand, the DCS  
20 does not. And however imponderable or difficult to assess the qualitative  
21 value that that advantage is, it is an advantage and it can't simply in our  
22 submission be ignored.

23 The second advantage is the deferral of the Treasury's right to claim any part of the  
24 fund available under the scheme until all creditors have received 60% of their  
25 claims. And as to that, as evidenced by one of the representations made by  
26 one of the depositors this afternoon, there is a fundamental misconception

1 about the way in which the scheme operates. The scheme has not changed in  
2 the way that is suggested, the scheme will pay the Treasury once other  
3 creditors have received 60p in the pound, a catch up dividend.

4 DEPUTY DEEMSTER: Sorry can I just pick that up.

5 MR HACKER: Yes.

6 DEPUTY DEEMSTER: The scheme will pay the Treasury

7 MR HACKER: Once other creditors have received 60p in the pound, it will pay the  
8 Treasury a dividend, a catch up dividend equal to that 60p and the Treasury  
9 will thereafter rank alongside the other creditors in respect of pari passu  
10 distributions under the scheme. There is no question of the Treasury seeking  
11 to resile from the position which it previously adopted and in our submission  
12 when the scheme is properly understood, that is not what the scheme seeks to  
13 do.

14 DEPUTY DEEMSTER: So you say there's been no change since the last hearing on  
15 that issue.

16 MR HACKER: There has been no change, that is a valuable benefit to scheme  
17 creditors, or those at least with larger claims and the suggestion that the estate  
18 was bound to achieve realisations in excess of 60p in the pound is not borne  
19 out by the evidence, what the liquidators provisional say is that they hope that  
20 there will be realisations of more than 60p in the pound. That depends on  
21 many variables and therefore unless it were to be suggested, which I hope  
22 nobody is suggesting, that this application should be adjourned to see how the  
23 provisional liquidation develops, it is something which the creditors will have  
24 to take their own view on as to whether or not it gives them a potential benefit  
25 or not. I want to make it clear that the, that there is no change in Treasury's  
26 position, it is standing by what it told Your Honour at earlier hearings and the  
27 scheme reflects its commitment to take no more than its fair share at the stage  
28 when it becomes entitled to a share.

29 And all that really, I think I've already dealt with the other points which my learned

1 friend made, he would say that the subordination of the Treasury's pre-  
2 liquidation claim is de minimis, well as I submitted to Your Honour it depends  
3 where you're coming from. For some people it's de minimis for others it's  
4 not. And finally, and I've already dealt with this, the suggestion that there is  
5 bound to be more than 60% and therefore the deferral of the dividend is in  
6 itself of no value.

7 DEPUTY DEEMSTER: As regards your graphs.

8 MR HACKER: Yes, our graphs.

9 DEPUTY DEEMSTER: You say that these

10 MR HACKER: There is a, I can explain to Your Honour what has happened and they  
11 do require some adjustment, although in the time that we have had available to  
12 consider the point, again not having had the chance to consider it before. We  
13 believe as I understand the position, that it is not unless the whole £150million  
14 was available from the Treasury that one would ever get to a position where  
15 the lines became inverted, save possibly for a very brief period at a particular  
16 point in time for creditors with a particular amount. But what has happened,  
17 what has happened is, that in, the sums which would become payable in  
18 October of this year under the DCS have been put into the second dividend  
19 which under the scheme is not payable until May of next year. And that  
20 perhaps is an inaccuracy in the way that the table has been prepared, and  
21 actually probably what there should be is a dividend 1(a) between the dividend  
22 1 and dividend 2 columns, which would show money being distributed in a  
23 liquidation but not in a scheme, because there is no dividend intended to be  
24 paid at that point in time in the scheme. And that will raise, in some cases  
25 slightly and in some cases more significantly, the bottom line at a particular  
26 point in time. But almost without exception it will never lead to a position  
27 where the profile of payments under the scheme does not produce a better,  
28 quicker return for creditors than in a liquidation scenario.

29 And I've already cautioned Your Honour against simply taking at face value the  
30 figures that are shown in my learned friend's own timetable of the way the

1 payments will work. First of all because the percentages for liquidation DCS  
2 payments are based on a, and it's no criticism it's just a fact, they are based on  
3 an erroneous assumption as to what the DCS claims would be. And secondly  
4 the left hand column does not reflect the position of all DCS creditors, it  
5 necessarily can't reflect of all because they are in different positions. And my  
6 learned friend concluded his submissions by saying that this proposed scheme  
7 should not go to the creditors because there were positive disadvantages to the  
8 really important creditors.

9 Now first of all we take issue with the proposition that there are positive  
10 disadvantages. And secondly, whilst I think everybody has very considerable  
11 sympathy for the smaller depositors and individuals, businesses who have  
12 deposits with the bank, the fact is that there are no really important creditors  
13 when the Court is exercising its winding up jurisdiction. In a winding up all  
14 creditors are entitled to be treated *pari passu*, they all have the same rights and  
15 the whole scheme of the legislation is such that the creditor with a £10million  
16 claim is entitled to enjoy the same rights and receive the same consideration  
17 from the Court as a creditor with a £500 claim. And it is that jurisdiction that  
18 Your Honour is exercising when he is considering whether or not to grant an  
19 adjournment of the petition, because the petition is seeking to bring into play a  
20 class remedy, a remedy on behalf of the class of the general body of creditors  
21 all of whom are entitled to equal treatment. So whatever sympathy the Court  
22 may have to the plight of those who have spoken very eloquently and in a very  
23 restrained manner, the fact is that they are no more entitled to be treated fairly  
24 by the Court than any other creditors.

25 And the position in terms of the adjournment has to be viewed from the perspective of  
26 the general body of creditors. And the question is, is this scheme one which  
27 can properly go forward to the general body of creditors. Your Lordship has  
28 heard support from a number of creditors, a number of substantial creditors,  
29 my learned friend speaks for three creditors. If he has technical objections to  
30 the scheme of course it doesn't matter how many people he speaks for, but in  
31 terms of a plea to the Court that his clients are not being treated fairly, he is  
32 only speaking on behalf of three creditors.

1 DEPUTY DEEMSTER: Well, in reality they are the committee of another group  
2 aren't they?

3 MR HACKER: They are the committee of an unidentifiable, I don't know about, an  
4 unidentified group. In any event there are 10,800 creditors, depositors,  
5 creditors, and I don't think that my learned friend could claim to be speaking  
6 on behalf of a substantial proportion, such a substantial proportion of that  
7 group, he could speak collectively on their behalf. And indeed the  
8 submissions which you've heard from other Counsel appearing for other  
9 creditors demonstrate that this is not the case because it is equally, it is as  
10 evident that there is creditor support for the scheme, as there is creditor  
11 opposition. And all we seek to do, before Your Honour I'm now going to sit  
12 down, is to ask Your Honour to allow the scheme to move forward to the next  
13 logical stage which is to allow the creditors to have their say.

14 DEPUTY DEEMSTER: Thank you very much Mr Hacker.

15 MR CHAMBERS: Your Honour conscious of the fact I don't have a right of reply  
16 might I just make one observation because my learned friend Mr Hacker said  
17 he didn't understand where the percentages on the left hand side came from.

18 DEPUTY DEEMSTER: Yes by all means.

19 MR CHAMBERS: Would it be helpful for Your Honour if I just explained that  
20 again.

21 DEPUTY DEEMSTER: Yes certainly.

22 MR CHAMBERS: Your Honour if Your Honour would look at the scheme itself, and  
23 this is the easiest way to demonstrate it. Page 28 of the scheme.

24 DEPUTY DEEMSTER: The actual scheme.

25 MR CHAMBERS: The actual scheme.

26 DEPUTY DEEMSTER: Right, page sorry, 20?

1 MR CHAMBERS: Page 28 paragraph 17.2, 3, 4 and 5. That is dealing with top up  
2 payments. And the top up payments are the equivalent of the DCS  
3 entitlement. And what 17.3 says on the first distribution date a protected  
4 depositor will get its protected scheme claim or 20,000. So that's the first  
5 tranche, and it's the lower of the two. And 20,000 is 40% of 50,000, 50,000  
6 being the maximum. On the second distribution date it is 35,000 and that is  
7 70% of the 50,000 and he gets the lower of it.

8 DEPUTY DEEMSTER: Sorry I'm just looking at my note of this because, you had  
9 gone through this I think.

10 MR CHAMBERS: Yes but it's just that my learned friend didn't quite understand it  
11 and I wanted to make sure.

12 DEPUTY DEEMSTER: Sorry yes, on 23<sup>rd</sup> September 20% out of 50,000. Sorry,  
13 20,000 out of 50,000.

14 MR CHAMBERS: Yes, 20,000 out of 50,000.

15 DEPUTY DEEMSTER: Yes.

16 MR CHAMBERS: 40%, and then 70% is the 17.4 that's 35,000.

17 DEPUTY DEEMSTER: Yes.

18 MR CHAMBERS: And then 17.5 is 100,000, now that is the maximum payment  
19 allowed under the scheme.

20 DEPUTY DEEMSTER: Right, the percentages seem straightforward.

21 MR CHAMBERS: The percentages, it's just that my learned friend said he didn't  
22 understand where they came from.

23 DEPUTY DEEMSTER: Right I see.

24 MR CHAMBERS: And the graph I hope now demonstrates to him that his point,  
25 when he said different depositors are in a different position is wrong simply  
26 because this chart just deals with the depositors up to £50,000 and no more,

1           their maximum entitlement is in 17 so they can't go above these percentages.  
2           But on the DCS they can.

3   MR HACKER: No, with respect to my learned friend I think he, there is a  
4           misunderstanding here. This payment, what is referred to here is the top up  
5           payment. So what creditors will receive is a distribution, a pari passu  
6           distribution in the scheme as they would in a liquidation, and they are then  
7           entitled to have their claims topped up.

8   MR CHAMBERS: To a maximum of.

9   MR HACKER: To a maximum of, the top up is to a maximum of the amount of its  
10           protected scheme claim or £20,000.

11   MR CHAMBERS: Whichever is the lower.

12   MR HACKER: Whichever is the lower, but that's the top up. That isn't the payment,  
13           that isn't the outcome. What this as I understand, yes, well then to the extent  
14           that this purports only to refer to the top up payments, yes I see. Then it is not  
15           even comparing apples with pears, it's comparing apples and blocks of cheese.  
16           What the, what creditors are concerned to identify is what they will receive,  
17           not how it's made up, whether it's a top up payment, whether it's a DCS  
18           payment, whether it's a dividend, and what the scheme is entitled to ensure is  
19           that alongside the dividends, the pari passu dividends, there is a payment made  
20           that is not pari passu, the top up payment is not pari passu, it is capped. It's  
21           capped obviously at the amount of the protected claim, nobody's going to get  
22           more from the top up payment than they were entitled to under the protected  
23           claim but it is not capped as a percentage of their claim, it is capped at a  
24           figure. And therefore some creditors, the effect is that some creditors, the  
25           smallest, this is what the graphs show, some creditors, the smallest creditors  
26           will very quickly be paid out in full. And that won't happen under the DCS  
27           scheme because everybody can only, under the DCS mechanism, because  
28           everybody can only get a pari passu distribution and therefore the smaller  
29           creditors are slowed down, smaller depositors are slowed down in their ability  
30           to receive the benefit of the DCS payments by the larger creditors. And that

1 doesn't happen in this lump sum top up mechanism. That's the whole point of  
2 the scheme, the scheme is not intended simply to replicate the liquidation DCS  
3 scenario without any change, it's intended to produce what is perceived to be,  
4 rightly or wrongly, a benefit to the protected creditors taken as a whole.

5 And it's very difficult because the scheme is complicated, it is difficult to understand  
6 but unfortunately it is an attempt to do what the DCS Regulations also have,  
7 perhaps have perhaps haven't achieved which is

8 DEPUTY DEEMSTER: Well then they are not exactly a model of clarity in this  
9 circumstance.

10 MR HACKER: Exactly but it is very difficult to set out a structure of this sort which  
11 works precisely but is explained simply. And certainly it is the intention of  
12 the provisional liquidators jointly and those advising the Treasury to  
13 communicate with creditors, there has been an on-going process of  
14 communication with creditors and certainly between now and the meetings  
15 they will be available, they will be available to explain to the best they're able,  
16 the complexities of the scheme. But if the scheme is understood in the way in  
17 which it's intended to work there are plainly benefits there for certain, at least  
18 certain and we would suggest all, of the creditors who would be entitled to  
19 prove in a liquidation and that's the basis on which ask Your Honour to allow  
20 the scheme to go forward.

21 DEPUTY DEEMSTER: Thank you very much indeed. Now it is three o'clock, I  
22 need time to reflect on the very detailed submissions I've received particularly  
23 from Mr Chambers. Obviously I had advance warning largely what Mr  
24 Hacker was going to say but I'd no advance warning for, I'm not criticising  
25 you in any way on that, but a lot of what he has said is important and needs me  
26 to reflect on it. It's also I think desirable I give a decision today, clearly I  
27 think that would be beneficial to all concerned, I think obviously ideally I  
28 would like the benefit of spending some considerable time looking at this  
29 complex matter. But I think I ought to try and give a decision this afternoon.  
30 Would it be convenient if I adjourn to say half past four? There may be  
31 people who wish to get planes, I perhaps could do it a little bit earlier than that

1           if I possibly can but it may be, the Judgment may lose something in its  
2           coherence but you will be wishing to depart no doubt.

3   MR HACKER: I think Mr Chambers and I are both in the same position. We would  
4           very much like if we are able to catch the 5.30 flight.

5   DEPUTY DEEMSTER: Yes.

6   MR HACKER: I don't know, it is of course a matter entirely for Your Honour  
7           whether he would consider giving a decision but with reasons to be given  
8           later.

9   DEPUTY DEEMSTER: Yes, well that may be a prudent way of proceeding. Even so  
10          I do need time to reflect.

11   MR HACKER: Yes, yes of course, of course.

12   DEPUTY DEEMSTER: Well if I say I'll come back at 4.00 then and give a brief  
13          decision and then with reasons to follow. I'm sorry for the delay ladies and  
14          gentlemen, I think you'll appreciate I do need some time to think about these  
15          matters, they're not straightforward.

16   MR CHAMBERS: Your Honour may I just apologise for having no skeleton, it is  
17          only a function of the fact we received a torrent of paper from the Treasury in  
18          the last few days we just did not have time to do it. So I do apologise if this  
19          caused Your Honour any inconvenience.

20   DEPUTY DEEMSTER: Well that is another reason why I do need some time just to  
21          reflect on the submissions that have been made. So I will endeavour to give a  
22          decision at four o'clock and the Clerk will let you know when I'm actually  
23          ready. Thank you very much indeed.

24   USHER: Stand please.

25   Short adjournment

26   DEPUTY DEEMSTER:       [Judgment given]