Neutral Citation Number: [2015] EWHC 566 (Comm)

Case No: 2010 FOLIO 1517

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

7 Rolls Building
Fetter Lane, EC4A 1NL

Date: 03/02/2015

Before :

LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

EXCALIBUR VENTURES LLC

Claimant

- and -

(1) TEXAS KEYSTONE INC.
(2) GULF KEYSTONE PETROLEUM LIMITED
(3) GULF KEYSTONE PETROLEUM INTERNATIONAL LIMITED
(4) GULF KEYSTONE PETROLEUM (UK) LIMITED

Defendants

AND BETWEEN: -

(1) TEXAS KEYSTONE INC.
(2) GULF KEYSTONE PETROLEUM LIMITED
(3) GULF KEYSTONE PETROLEUM INTERNATIONAL LIMITED
(4) GULF KEYSTONE PETROLEUM (UK) LIMITED

Costs Claimants

- and-

(1) PSARI HOLDINGS LIMITED
(2) MR ANDONIS LEMOS
(3) BLACKROBE CAPITAL PARTNERS LLC
(4) BLACKROBE AEO I INVESTORS LLC
(5) PLATINUM PARTNERS VALUE ARBITRAGE FUND LP
(6) HAMILTON CAPITAL LLC
(7) JH FUNDING LLC
(8) HURON CAPITAL LLC
(9) PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP

Costs Defendants

- -
- -

MR R ESCHWEGE (instructed by **Memery Crystal LLP**) for the **first, second, third and fourth Costs Claimants**.
MR J WARDELL QC and MR R CARPENTER (instructed by **Withers LLP**) for the **first and second Costs Defendants**
MR I CROXFORD QC and MR N MEDCROFT (instructed by **Orrick, Herrington & Sutcliffe (Europe) LLP**) for the **fifth to eighth Costs Defendants**

Hearing dates: 3rd February 2015

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Lord Justice Christopher Clarke:

1. I now have to determine the order to be made following my judgment of 23 October 2014 in respect of the section 51 costs applications. I propose to do so by reference to the draft order prepared by the costs claimants.

2. Paragraphs 1 to 6 are agreed with the qualification, which I approve, of the addition of the word "collectively" before "liable to pay". In the case of each of these paragraphs the last sentence with its definition of different costs liabilities should be omitted.

3. In respect of paragraph 7, which deals with interest on the costs of the action, the rate of 1.5 per cent from the date of payment of the relevant invoices is agreed to be appropriate until the judgment rate kicks in but there is a dispute as to when that date should be. Whenever it is, the order should provide that interest should run at the rate prescribed pursuant to the Judgment Act 1838 rather than 8 per cent in case there are any changes in the prescribed rate, however unlikely that is to be.

4. The important question is whether the Judgment Act rate should start any earlier than 23 October 2014. Excalibur became liable for interest at that rate from 13 December 2013. It does not, however, follow that the funders should pay interest at that rate from then. I am told that there is no reported case which has considered the question of the appropriate interest rate date for interest under the Judgment Act in relation to funders.

5. The costs claimants submit that the funders should follow the fortunes of Excalibur in this respect as in others. Excalibur has not paid and will not be paying the 8 per cent rate due from then. It is only right, they say, that Excalibur should make up what they characterise as the shortfall in the costs claimants' recovery from Excalibur - otherwise, they submit, the funders will receive an undeserved windfall.

6. I do not accept this characterisation. Eight per cent is very significantly above current commercial rates. Although the rate prescribed under the Act is not prescribed by way of penalty, in circumstances where the commercial rate taken is 1.5 per cent, its commercial character is penal. The "shortfall" in question lies in the inability of the Costs Claimants to recover the considerable excess over any commercial rate that 8 per cent represents. So far as the funders are concerned, a refusal to award interest at that rate from 13 December 2013 would only be a "windfall" in the sense that it would avoid what is in practical effect a penal charge.

7. The 8 per cent rate is something of an anomaly. It is prescribed by regulation but it has remained at that rate for a long time despite changes in current interest rates. In principle it is difficult to justify other than by treating it as an inducement to paying parties to agree costs or to proceed swiftly to an assessment. In that context a number of judges have regarded it as unjust that the 8 per cent rate should begin the moment that a judgment for costs has been given. In *Colour Quest Limited v Total Downstream (UK) Limited* [2009] EWHC 823, David Steel J regarded it as unjust for interest to accrue at that rate immediately after the costs order was made. Such an order if complied with could be said to represent a very sizeable windfall for the receiving party. He postponed the accrual of that rate for six months. In *London Tara Hotel v Kensington Close Hotel* [2011] EWHC 28, Roth

J postponed the start of the judgment rate for four months in a case where the costs were large and there might be real issues of proportionality and reasonableness on taxation. He took account of the fact that application of a higher rate could serve as an incentive to proceed with the taxation or reach agreement on costs. In *SCB v Ceylon Petroleum Corporation* [2011] EWHC 2094, Hamblen J adopted a similar period. By contrast, in *Schlumbereger Holdings Limited v Electromagnetic GO Services* [2009] EWH 733, and *Cranway Limited v Playtech Limited* [2009] EWHC 823, Mann J and Lewison J, as he then was, declined to take this approach.

8. I was at one time attracted to the idea that I should order the 8 per cent rate to begin not at 13 December 2013 but some four to six months later in line with the authorities to which I have referred. However, all the cases to which I have referred were cases where the question was whether the accrual of the 8 per cent rate should be postponed until a date after the costs judgment, not as here whether it should be brought back to before then.

9. The default date for the application of the 8 per cent rate is the date of my judgment in October 2014. I have, however, a discretion to order interest to run from an earlier date if I think it just so to do. I do not think that it would be. I regard it as inappropriate to backdate the commencement date of the 8 per cent rate to a date before any order was made against the funders to pay costs or as to the scale on which they should do so.

10. The Costs Claimants say that the funders took a gamble on whether they would be ordered to pay costs and if so on what scale. Having lost the bet, they should make good the shortfall. If they had provided the security that I had ordered to be provided, the matter could have proceeded to assessment and by now the costs would either have been assessed or agreed. As to that, the funders were not bound to provide further funds. They were entitled to challenge their liability, or the scale of their liability, to pay costs and did so on grounds which, although I have rejected them, were not unreasonably put forward; and they have never come under any obligation to pay any costs until my order of October 2014. They could, of course, always have agreed a figure but until any assessment began they would have had difficulty in deciding what figure to offer. Further, any participation on their part in such assessment would have been, and may still be, problematic in that it is Clifford Chance that has access to most of the information and documentation from the Excalibur side relevant to costs. Given what has happened in the litigation, their willingness to assist the funders must be in doubt.

11. In the circumstances and despite the clarity of the additional submissions of Mr Eschwege this morning for which I am grateful, I propose to order that interest should be payable at the Judgments Act rate from the date of my judgment in October 2014.

12. Paragraph 8 deals with apportionment between the costs defendants and I shall address that in a moment.

13. Paragraph 9 deals with interim payment on account of costs and interest. I am of the view that there should be an interim payment on account of a percentage of the costs and interest. In my view, for the reasons set out below, the appropriate percentage is 80 per cent. The figures will have to be reworked to take account of

the date from which I have decided that interest under the Judgments Act rate shall accrue.

14. CPR 44.2(a) provides that the court, "*will order*" a paying party "*to pay a reasonable sum on account of costs unless there is good reason not to do so".* This was and is the rule in place from April 2013 replacing the former rule that the court "*may order an amount to be paid on account before costs are assessed*". Under the new rule there is thus a presumption that a payment will be made, subject to an exception, and a specific criterion as to amount.

15. There is some authority which refers to the criterion of "*irreducible minimum*", e.g. *Beach v Smirnov* [2007] EWHC, 3499 or similar expressions. Several of the cases were decided before the rule changed. In *Mars UK Limited v Teknowledge Limited* [2000] SFR 138, Jacob J, as he then was, said that, "*a payment of some lesser amount, which he will almost certainly collect" was a closer approximation to justice than saying that you need time to work out the total of the costs*".

16. In *Blakemore v Cummins* [2010] 1 WLR, 983 Elias LJ, giving the judgment of the Court of Appeal, accepted that in determining whether or not to make any order it was important to consider that a party should not be kept out of money which will almost certainly be demonstrated to be due longer than was necessary. That case was, however, connected with what was described as the "*first issue*" whether or not any order should be made and not, "*the second issue*", i.e. quantum. It was also decided when the previous rule was in force. Lord Justice Elias referred in the context of the first issue to the discretion under the rule as a "*wide one*". He did not lay down that the "*irreducible minimum*" test must be applied to the second issue.

17. In *United Airline Inc v United Airways Limited*, 2011 EWHC 2411, Vos J, as he then, was decided in a judgment *ex tempore* in this respect, that what he had to determine, "*is not the irreducible minimum that is likely to be awarded but a reasonable estimate of what is likely to be awarded*." In the course of argument at the end of the application for summary judgment he had referred to a case which, as he thought, went further than *Mars*. Counsel, apparently misreading a paragraph of CPR 44.3.12 of the then current *White Book*, suggested that the case was *Dyson Appliances Limited v Hoover Limited* [2001] EWCA 1440 (which it was not). The *White Book* has cited *Beach v Smirnov* as authority (which it was – see paragraph 11) for the proposition that "*justice requires that a sum of costs be paid provided there can be a reasonable assessment of the sum that is going to be likely to be awarded*".

18. In paragraph 13 of *Beach v Smirnov* the judge then said that it seemed to him that there was "*at least an irreducible minimum of costs which I am going to be ordered (sic) to be paid – a sum which is very likely to be exceeded by the order following detailed assessment.*" That sum satisfied the former criterion but was not put forward as the criterion itself. Dyson was, as the White Book rightly stated, distinguished in Beach v Smirnov in relation to the issue of whether costs on account should be ordered at all.

19. *United Airline* was followed by Warren J in *Gollole v Pryke* Chancery Division, unreported, 29 November 2011. *Gollole* has also been followed in *Kellie v Wheatley & Lloyd Architects Limited* [2014] EWHC 2886, *Football Association*

Premier League Limited v Berry [2014] EWHC, 726, and *Mehjoo v Harben & Barker* [2013] EWHC 1669.

20. In *VTB Bank v Skurikhin* [2014] EWHC 3522, Simon J referred to *Mars UK* and to the change in the rules, (although his citation of the new rule was that it provided for a payment to be made on account of costs unless there was good reason not to do so, i.e. he did not refer to the words "*a reasonable sum*") and awarded an amount which he thought reflected an irreducible amount of what would be recovered. *United Airline* does not appear to have been cited.

21. In *Hospira UK Ltd v Genentech Inc* [2014] EWHC 1688, Birss J held that it was clear:

> "*that the principles applicable to the assessment of a payment on account are and remain since they were first set out by Jacob J as he then was in the Mars v Teknowledge case. The task of the court is to ensure that it finds the irreducible minimum, which would be recovered*".

In *Rovi Solutions Corporation v Virgin Media Limited* [2014] EWHC 2449, Mann J took into account the test in *Mars UK* and regarded an irreducible minimum as the test. In *Teva UK v Leo Pharma* [2014] EWHC 3522, Birss J strove to find "*a fair irreducible minimum*" and said that it would be useful for the figure to be "*not too much below*" the likely level of a detailed assessment.

22. I do not, with respect, agree with the formulation by Birss J of the task of the court in *Hospira*. It is clear that the question, at any rate now, is what is a "*reasonable sum on account of costs*". It may be that in any given case the only amount that it is reasonable to award is the irreducible minimum. I do not, however, accept that that means that "*irreducible minimum*" is the test. That would be to introduce a criterion (a) for which the rules do not provide' (b) which is not the same as the criterion for which they do provide; and (c) which has potential drawbacks of its own, not least because it begs the question whether it means those costs which could not realistically be challenged as to item or amount or some more generous test. On one approach it admits of every objection to costs, which cannot be treated as fanciful.

23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.

24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.

25. I regard 80 per cent of the sum claimed as a reasonable figure to take in this case. This was litigation on a gargantuan scale which justifiably required a lot of work and where I have awarded costs on an indemnity scale. As I have said before, I do not, for the reasons given in my judgment of 19 February 2013, regard the Texas and Gulf counsel teams – about which Excalibur made particular complaint – as excessive for litigation of this size. I am also conscious of the very large amount of labour which must have been generated by the manner in which Excalibur and its solicitors chose to conduct the litigation both before and after the trial began. Nothing causes me to depart from the figure of 85 per cent of the amount claimed, which on the security for costs application in December 2013 I regarded as a reasonable assumption as to what the costs claimants could expect to recover by way of indemnity costs. As I say in paragraph 90 of my judgment, the 15 per cent deduction itself was intended to deal with the reduction that the costs judge might have made from the 100 per cent figure.

26. I reached my conclusion not by the mere assumption of a figure but on the basis of evidence of independent costs draftsmen as to the level of costs to be expected on an assessment on an indemnity basis. I am certainly not going to change my view on account of the evidence of Mr Andrew Neale put before Popplewell J at the security for costs hearing in March 2012 and described by him as "*inappropriate in its scope … intemperate in its terms and … in a number of respects unrealistic in its content*", such that he ordered Excalibur to pay the Costs Claimants' indemnity costs in respect of it.

27. Nor am I encouraged to do so in circumstances where the full extent of Excalibur's own costs is not apparent to me. Given that the funders have provided at least £ 14.25 million and that Clifford Chance were applying a 40 per cent discount, Excalibur's costs would appear to be over £ 20 million compared with Gulf and Texas's costs of both £ 16.5 and £ 10.5 million respectively. I accept that it is possible that the costs on both sides are unreasonable such that Excalibur's costs are no guide to what is an objective question. But a comparison between the costs of both sides is often informative.

28. I take a figure of 80 per cent to allow for the possibility that the 85 per cent estimate is erroneous. I agree with Birss J on the appropriateness of taking a figure which is not too much below the estimate. I also bear in mind that there is unlikely to be any difficulty in recovering from the costs claimants in the event that 80 per cent represents an overpayment. Per contra, the attitude taken by the Platinum funders, who have never confirmed that they will pay any amount that the court may order, and one of whom has taken no part in the proceedings, does not inspire complete confidence that they will do so. The same goes in relation to Blackrobe in relation to whom an additional consideration, to which I refer hereafter, applies.

29. Paragraph 10 of the draft order relates to the costs of the application as against the Blackrobe costs defendants, i.e. the third and fourth costs defendants. These costs are minimal, £ 8,101.50 in all. I agree that they should be dealt with separately as provided for in paragraph 10 of the draft, such that the Blackrobe costs defendants must pay the relevant costs assessed on the standard scale and I shall assess them summarily.

30. Paragraph 11 deals with the substantial balance of the costs of the applications. In respect of these I agree that, on essentially pragmatic grounds, the Psari/Lemos

and the Platinum funders should each be liable for a particular percentage. The exercise of attributing particular costs to particular Costs Defendants would be a very difficult and unsatisfactory one.

31. As to the percentage, the time spent at the hearing in relation to each set of Costs Defendants by Mr Waller QC for the Costs Claimants was almost equal in terms of pages of transcript. That is some measure of the extent of their respective contribution to the incurring of costs. The applications against all the Costs Defendants raised issues that were common (e.g. whether any funder should be ordered to pay on an indemnity scale in the absence of personal misconduct of the action), as well as issues that were not common (e.g. the substantial factual issues in relation to the Psari/Lemos involvement and the separate points taken by the Platinum funders in relation to the Arkan cap, the corporate veil and timing).

32. Looking at the matter as a whole, I regard the fair split as 50 per cent to each group. I therefore agree with the order as proposed and in particular the 50:50 split as between Psari/Lemos on the one hand and the fifth to eighth Costs Defendants. I also agree that costs should be assessed on the standard basis.

33. I do not think that such an order should exclude costs specific to PPCO. It would be difficult to distinguish those costs and artificial to do so in circumstances where PPCO fulfils the Treasury function for the Platinum group and operates out of the same office as the other Platinum funders. Nor do I accept the Psari/Lemos solution which would, if accepted, make them liable to the Costs Claimants for 50 per cent of the total costs, such 50% being said to represent the costs of the common issues, with the Platinum funders remaining liable to the Costs Claimants for the remaining 50 per cent of the total costs, and with the 50 per cent of the total representing common issues shared as between Psari/Lemos and the Platinum funders. I would not regard a net 25 per cent of the whole as representing the Psari funders' fair share.

34. I should record that the Platinum funders are content for me to adopt paragraphs 10 and 11.

35. As to paragraph 12, the costs of the directions hearing dated 9 May 2014, which were reserved, should, subject to a qualification, follow the costs orders in paragraph 11. Psari/Lemos contend that there should be no order as to the costs of and occasioned by the defendant's application dated 1 May 2004 for disclosure. I agree with that. The application was not in fact pursued at the hearing insofar as it related to the Psari funders. It followed protracted correspondence in which wide-ranging requests for disclosure had been made, not all of which were justified. I am not persuaded that there was any real need for the defendants, if they had acted in a proportionate manner, to make an application in order to secure such disclosure as they did.

36. The Platinum funders raise a similar objection in relation to the disclosure ordered against them. I do not, however, intend to make the same exception in their case since the Platinum funders sought to resist disclosure of the documents that in fact revealed the true funding arrangements, saying as late as 5 May 2014 that there were no agreements relating to these proceedings between PPCO and Hamilton or PPVA and Huron when PPVA and Hamilton must have known of the Hamilton, JH and Huron operating agreements revealed by Mr Werblowski in his witness statement of 23 May 2014.

37. I also decline to exclude the costs of the joinder applications in circumstances where Orrick said it had no instructions to act for JH, Huron and PPCO despite putting in a statement from Mr Simony on 5 May.

38. Paragraph 13 relates to the applications by the first and second and the fifth and sixth costs defendants in March 2014 to extend time for the service of evidence. I agree that these orders – which provided for an extension of time, which was seven days longer than the costs claimants had been prepared to accept, but subject to the order being a final order in the sense that unless the deadline was complied with no further evidence would be allowed, which the costs defendants had resisted – are orders in respect of which the costs should follow the event.

39. Paragraph 14 deals with interim payments on account in relation to the Section 51 costs. I agree that 60 per cent represents a reasonable sum on account of the costs of the interim payments application. I am not persuaded that the 100 per cent figures put forward are, as the Platinum funders assert, excessive and disproportionate such that a greater reduction should be ordered. The Costs Claimants must have been put to considerable expense in attempting to extract a full account of the Platinum funding and to discover the economic reality of what was going on and the insurance arrangements.

40. I also remind myself that it was the Platinum funders who denied that they were liable to the Costs Claimants at all, who denied in some cases that they funded Excalibur and who resisted an order on the footing that the Costs Claimants could have obtained a wasted costs order against Clifford Chance.

41. Paragraph 15 deals with permission to serve out and I agree that the order as sought should be made.

Permission to appeal

42. I now turn to the question of permission to appeal. Both sets of funders seek permission to appeal. There are, as it seems to me, two basic points which merit permission to appeal. The first is whether I was wrong to order the funders to pay indemnity costs in circumstances where they did not themselves conduct the litigation, were not personally guilty of discreditable conduct and received confident advice from Mr Panayides of Clifford Chance and, to a lesser extent, others. These are essentially the first and second grounds drafted by Mr Croxford. The second is whether the Arkan cap should include sums provided by way of security for costs, which is ground four of Mr Croxford's grounds.

43. Whilst there are considerable difficulties that I foresee for the appellants, I am, with some hesitation, persuaded that there is a chance of success that can properly be described as "realistic". Perhaps more importantly these issues are of wider importance than the confines of this case. They relate to the litigation funding industry as a whole and involve questions of considerable public interest as to the applicable principles. On that basis there seems to me what can properly be regarded as a compelling case for an appeal.

44. I considered excluding grounds two and three and five and six of the Platinum funders; but I have come to the conclusion that they are (a) limited in scope and (b) sufficiently bound up with the issues in relation to which I regard it as appropriate to give permission as would make it inappropriate to refuse

permission in respect of those grounds even though I have considerable doubts about them in the way that they are before me.

Apportionment

45. I turn now to the question of apportionment. At the conclusion of my judgment I tentatively suggested that the Costs Defendants should share their respective liabilities to the Costs Claimants in proportion to the respective amounts found due from them in accordance with the order proposed in paragraph 161 of my judgment, which forms annex 1 to this judgment.

46. There was, perhaps, an ambiguity in the way in which I expressed myself, namely as to whether the respective amounts were the amounts before or after the limitation for which the proviso in paragraph 161 provided.

47. The Psari funders in their original skeleton argument agreed with my suggested approach on the footing that the amounts from which the respective proportions were to be derived were the total costs liability without regard to the limiting proviso.

48. The total costs liability of the funders prior to the application of the limiting proviso will of course depend on the results of a detailed assessment. On the basis of the 100 per cent figures put forward by the Costs Claimants, the total costs liability and the total funding of the respective funders is as follows.

Funder(s)	**Total Costs Liability**	**Total Funding**
Psari Funders	£ 27,049,330	£ 13,750,000
Hamilton/PPCO	£ 20,049,363	£ 7,000,000
Blackrobe Funders	£ 20,049,363	£ 4,000,000
Huron/PPVA	£ 9,634,686	£ 6,000,000
JH	£ 806,228	£ 1,000,000

49. The Psari funders submit that the Costs Defendants should bear the shortfall in proportion that the total costs liabilities of each funding group bear to the total costs liability. That produces, they say, the following percentages.

Psari Funders	35%
Hamilton/PPCO	26%
Blackrobe Funders	26%
Huron/PPVA	12%
JH	1%

50. That approach seems to be open to two objections. The first is that, although the Hamilton/PPCO and Blackrobe funders are all liable for costs incurred from 30 March 2012, which total £ 20,049,363, their total costs' liability between them for the period from 30 March 2002 is taken as twice that amount since each of Hamilton/PPCO and Blackrobe funders is said to be responsible for 26 per cent of the costs. The second is that a percentage calculated in this way takes no account of the comparative amount of total funding of the different funding units. The method of calculation would mean that if there had been another funder who contributed £ 1 million at the same time as the Psari funders made their initial contribution, he would have the same liability as them.

51. The fifth to eighth costs defendants express themselves content with the approach suggested by me in principle subject to certain qualifications, the most important of which is that account must somehow be taken of the total amount of funding provided by each funder. Their solution is to apportion liability for the assessed costs incurred by the four defendants identified in paragraph 161 of my judgment in proportion to the amount the funders contributed to the proceedings as a whole.

52. They take the amounts contributed by each funder as follows.

Funder	**Amounts provided by respective funders (Judgment [44] [45]) (£ m)**
Psari/Lemos	14 (rounded up from 13.75 for convenience)
Hamilton/PPCO	7
Blackrobe	4
Huron/PPVA	6
JH	1
Total	**32**

53. In relation to each period the liability should, they submit, then be apportioned in the following way:

> "*10. … the answer is to apportion liability for the assessed costs incurred by the Defendants in the four periods identified in [161] in proportion to the amount the funders (insofar as they were on the scene at the material time) contributed to the proceedings as a whole. More particularly:*
>
> *10.1 In relation to Period 1 (from day 1 to 30 March 2012), since Psari/Lemos was the only funder on the scene, Psari/Lemos will be liable for all of the costs incurred in this period.*
>
> *10.2 In relation to Period 2, the funders on the scene were Psari/Lemos, Hamilton/PPCO and Blackrobe. Liability for the costs incurred in this period is to be shared between these three funders in proportion to the amounts they contributed towards the litigation, namely:*
>
> - *Psari/Lemos: 14/25 (£25m being the aggregate costs at that date)*
> - *Hamilton/PPCO: 7/25*
> - *Blackrobe : 4/25*
>
> *10.3 In relation to Period 3, the funders on the scene were joined by Huron/PPVA. Liability for the costs incurred in this period is to be shared between the four funders in the following proportions:*
>
> - *Psari/Lemos: 14/31 (£31m being the aggregate costs at that date)*
> - *Hamilton/PPCO: 7/31*
> - *Blackrobe: 4/31*
> - *Huron/PPVA: 6/31*

10.4 In relation to Period 4, the funders on the scene were joined by JH. Liability for the costs incurred is to be shared between the 5 funders in the following proportions:

- *Psari/Lemos: 14/32*
- *Hamilton/PPCO: 4/32*
- *Blackrobe: 7/32*
- *Huron/PPVA: 6/32*
- *JH: 1/32* "

54. In relation to the various periods and using the Costs Claimants' figures, the result would be as follows:

Period/ Costs (£m)	**Pre 30/3/12 (6,999,966)**	**30/3 -4/10/12 (10,414,677)**	**5/10/12-7/3/13 (8,828,458)**	**8/3/13 – end (806,228)**	**Total (27.1)**
Psari	6.99	5.83	3.99	0.35	17.16 **(63%)**
Hamilton/PPCO	0	2.92	1.99	0.18	5.09 **(19%)**
Blackrobe	0	1.67	1.14	0.10	2.97 **(11%)**
Huron/PPVA	0	0	1.71	0.15	1.86 **(7%)**
JH	0	0	0	0.02	0.02 **(>1%)**

55. The Psari funders submit that this approach would be manifestly unfair. Although they contributed 43 per cent of the funding, they end up paying 63 per cent of the shortfall whereas the Platinum funders, who contributed 44 per cent of the funding pay 26 per cent, i.e. 19 plus 7 per cent of the shortfall.

56. The flaw in the methodology the Psari funders submit, is that the full amount of the funding provided by each Costs Defendant is taken into account when apportioning costs in respect of each period so that for the Psari funders the initial funding makes them liable for 100 per cent of the costs of the initial period and is then counted against them in respect of each subsequent period.

57. The potentially absurd result, they submit, of that approach is shown in paragraphs 9 and 10 of their reply submissions which are as follows:

> "*9. A further hypothetical example demonstrates the effect of this double counting even more clearly. Suppose that there are four funders. Each successively provides one tranche of funds. The first funder provides £ 5m, the second £ 10m, the third £ 15m and the fourth £ 20m. Each funder is liable to contribute to the costs incurred from when it funded and the costs in each of the four periods are £ 1m. On the Platinum Funders' approach, funder 1 will be liable for the whole of the costs in period 1. In period 2, funders 1 and 2 will be liable for 5/15 and 10/15 respectively. In period 3, funders 1, 2 and 3 will be liable for 5/30, 10/30 and 15/30 respectively. In period 4, funders 1, 2, 3 and 4 will be liable for 5/50, 10/50, 15/50 and 20/50 respectively. The result is as follows:*

	Period 1	*Period 2*	*Period 3*	*Period 4*	*Total*	*% share*
Funder 1	*£ 1,000,000*	*£ 333,333*	*£ 166,667*	*£ 100,000*	*£ 1,600,000*	*40%*
Funder 2		*£ 666,667*	*£ 333,333*	*£ 200,000*	*£ 1,200,000*	*30%*
Funder 3			*£ 500,000*	*£ 300,000*	*£ 800,000*	*20%*
Funder 4				*£ 400,000*	*£ 400,000*	*10%*

10. As a result, the funder who provided 10% of the funding bears 40% of the costs and the funder who provided 40% of the funding bears 10% of the costs."

58. The Platinum funders' riposte to this is to say that the Psari funders' solution ignores or takes no sufficient account of the causative effect of the Psari funders' initial contribution, which remained a cause of the defendants incurring costs throughout all the succeeding periods. I do not find this point persuasive. True it is that the Psari funders do not say that their funding ceased to have a causative effect at any time. Since they provided funding in each period they could scarcely do so. More importantly the question that I have to decide is as to apportionment between those who between them caused costs to be incurred. To this exercise the fact that Psari's initial contribution was and remained causative is of limited significance. In any event, the causative potency of an early contribution is overshadowed by later ones.

59. The solution, as it seems to me, is to take the Platinum funders' method but to apportion in each period according to the amount of the funding provided in that period. This has the following results: (a) it would not render any funder liable in respect of any costs incurred before he provided the funds; (b) it takes account of the periods over which his funding operated, and (c) it also takes account of the amount of his funding without doing so more than once. It also produces a very similar result to that derived from taking the percentages that the figures in the proviso to paragraph 161 of the judgment bear to the total of those figures - not surprisingly since those figures are the total funding figures - which were the figures to which my original suggestion related.

60. The result using the defendants' 100 per cent figures is shown in the appendix to the Psari funders' outline skeleton argument which is set out in annex 2 hereto. That appendix may need some minor alteration since it provides for JH to have a zero per cent share of the costs when in fact it has a very small percentage share of costs. The reason for the zero per cent is due to the rounding of the percentage figures.

61. On the prompting of Mr Medcroft, Mr Croxford submitted that the fallacy in the Psari/Lemos approach as set out in their appendix can be illustrated by assuming that Psari/Lemos had contributed all its funds in the first period. It would then end up having contributed half the funds but bearing no more than one-third of the liability. Whilst I see the force of that, (a) this is not this case, and (b) it makes a somewhat unrealistic assumption that the amount of funding provided to the person funded is about twice the amount of costs incurred by the defendants in respect of the same period. The example is not sufficient to persuade me to jettison the Psari model as set out in the appendix. Nor does the point satisfactorily address the bizarre anomalies identified in paragraph 9 of the Psari/Lemos reply skeleton argument.

62. I propose, therefore, to apportion the costs in the manner suggested in that reply skeleton argument. That will, of course, require some care in drawing up the order since the result is easier to describe by reference to an example than it is to formulate in words. I suggest that any order should incorporate the appendix as an illustration of how the apportionment would work if the assessed cost figures were the same as the figures claimed by the costs claimants. It will, however, as I have said, require some fine tuning to deal with the position of JH.

63. The order will also need to provide for what is to happen in the event that one of the funders is unable to pay his contribution. There has been some suggestion that Blackrobe is already in that position although I have no evidence in relation to that. I do not accept the Platinum funders' submission that in the event of a failure by one of the funders to pay his contribution the loss must lie where it falls. If funders combined to fund litigation such as this, it is in my view only just that if one of them is unable to shoulder his liabilities they should, as between themselves, make up the shortfall in the appropriate proportions regardless of who sought or introduced any further funders at any particular stage. Thus, in the event that Blackrobe defaults, the remaining funders should, as between themselves, bear Blackrobe's shortfall in the ratio that their percentage figures bear to the total of such figures other than that for Blackrobe. Thus, if Blackrobe cannot pay, the remaining percentages are, using the current version of the appendix and ignoring JH, 40 plus 23 plus 21, equals 84. Psari would bear 40/84 and the Platinum funders between them 44/84.Those figures, as I say, ignore JH for which a percentage figure, even if very low, would be needed.

64. The order should also, as it seems to me, reserve liberty to apply in relation to the question which may arise as to whether and to what extent any funder is in default with the result that the remaining funders' obligation to contribute to the shortfall *inter se* arises. It would be unsatisfactory to require the commencement of some new action to deal with that contingency if it arises.

65. The order as drawn up must also include an extension of time for the filing of an appeal notice.

66. I should like to express my gratitude to all counsel for the quality of their written and oral submissions.

ANNEX 1

161. Accordingly the order that I propose to make is as follows:

i) Mr Lemos and Psari shall be jointly and severally liable to pay to (a) Texas and (b) the Gulf Defendants respectively their costs of and occasioned by the action, such costs to be assessed on the indemnity basis if not agreed;

ii) Hamilton, PPCO, Blackrobe and Blackrobe Capital shall be jointly and severally liable to pay to (a) Texas and (b) the Gulf Defendants respectively their costs of and occasioned by the action, such costs to be assessed on the indemnity basis if not agreed, insofar as those costs have been incurred on or after 30 March 2012;

iii) Huron and PPVA shall be jointly and severally liable to pay to (a) Texas and (b) the Gulf Defendants respectively their costs of and occasioned by the action, such costs to be assessed on the indemnity basis if not agreed, insofar as those costs have been incurred on or after 5 October 2012; and

iv) JH shall be liable to pay to (a) Texas and (b) the Gulf Defendants respectively their costs of and occasioned by the action, such costs to be assessed on the indemnity basis if not agreed, insofar as those costs have been incurred on or after 8 March 2013.

Provided that the amount due to the Defendants pursuant to this order shall not exceed the following amounts in respect of the following persons:

a) Psari/Mr Lemos	£ 13.75 million
b) Hamilton/PPCO	£ 7 million
c) Blackrobe/Blackrobe Capital	£ 4 million
d) Huron/PPVA	£ 6 million
e) JH/PPCO	£ 1 million
	£ 31.75 million

ANNEX 2

APPENDIX

			Psari		Blackrobe		Hamilton/PPCO		Huron/PPVA		JH	
From	To	Costs	Funding	Share of Costs	Funding	Share of Costs	Funding	Share of Costs	Funding	Share of Costs	Funding	Share of Costs
Start	29/03/2012	£6,999,966	£6,250,000	£6,999,966								
30/03/2012	05/10/2012	£10,414,677	£3,000,000	£2,499,522	£3,000,000	£2,499,522	£6,500,000	£5,415,632				
05/10/2012	08/03/2013	£8,828,458	£500,000	£882,846	£1,000,000	£1,765,692	£500,000	£882,846	£3,000,000	£5,297,075		
08/03/2013	End	£806,228	£4,000,000	£403,114					£3,000,000	£302,336	£1,000,000	£100,779
			£13,750,000	**£10,785,448**	**£4,000,000**	**£4,265,214**	**£7,000,000**	**£6,298,478**	**£6,000,000**	**£5,599,410**	**£1,000,000**	**£100,779**
				40%		**16%**		**23%**		**21%**		**0%**