Neutral Citation Number: [2021] EWHC 2803 (Comm)

Case No: CL-2017-000323

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/10/2021

Before :

MR JUSTICE FOXTON

- -

Between :

(1) THE SERIOUS FRAUD OFFICE
(2) MR JOHN MILSON and MR DAVID STANDISH
(as joint Enforcement Receivers in respect of the realisable property of Gerald Martin Smith) **Applicants**

- and -

(1) LITIGATION CAPITAL LIMITED
& 45 others **Respondents**

- -

Daniel Saoul QC and Richard Hoyle (instructed by **Harcus Parker LLP**) as lead party for the Settlement Parties
Kennedy Talbot QC for the Serious Fraud Office
Simon Browne QC (instructed by **St Paul's Solicitors Limited**) for Nicholas Thomas and Roger Taylor
James Pickering QC and Samuel Hodge (instructed by **Spring Law Limited**) for Hotel Portfolio II UK Limited (in liquidation)
David Lord QC and Sebastian Kokelaar (instructed by **Richard Slade & Co**) for Phoenix Group Foundation and Minardi Investments Limited

Hearing dates: 30 September and 1 October 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Draft provided to the parties: 8 October 2021
Further submissions: 13, 14 and 15 October 2021
Further draft judgment provided to the parties: 19 October 2021

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THE HONOURABLE MR JUSTICE FOXTON

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 October 2021 at 10:00 am”

Mr Justice Foxton:

A INTRODUCTION

1. This judgment sets out my conclusions on the applications for costs arising from the Directed Trial Judgment, [2021] EWHC 1272 (Comm). This costs judgment adopts the definitions used in the Directed Trial Judgment. The issues I have to determine mirror the complexity of those which arose at trial, the complexities reflecting:

    i) The unusual nature of the proceedings: one in which the SFO sought to recover Dr Smith's realisable property in order to satisfy the confiscation order made against Dr Smith, and third parties sought to make good their claims to proprietary interests in various assets which had statutory priority over the SFO's entitlement.

    ii) The obscure and complex transaction history of the various assets which were the subject of the Directed Trial.

    iii) The fact that interests of the various parties in the action were aligned on some points but not others, and certain issues arose only between some of the parties to the trial, without engaging others.

    iv) The September 2019 Settlement Agreement between the Settlement Parties, which led parties who had previously pursued claims which were adverse to each other to adopt a common front in the proceedings.

    v) The fact that the Settlement Parties reached a settlement during the trial with two other groups of parties (the so-called LCL Parties and Mr Sodzawiczny).

2. Against this background, it is necessary to resolve certain issues of general principle, in order to establish the framework within which the various costs applications can then be considered.

B THE FRAMEWORK ISSUES

Should the Settlement Parties be treated as a single unit for costs purposes, or should the position of each Settlement Party be considered on an individual basis?

3. As I have mentioned, in September 2019 a group of the claimants who, up to that point, had advanced rivalrous claims to the assets in issue in the Directed Trial reached a Settlement Agreement, the effect of which was to share the proceeds of any recoveries they made in pre-determined proportions. Thereafter, while each Settlement Party retained its own solicitors, the case was advanced across a common front, through a single consolidated pleading in which the various claims of different Settlement Parties were advanced in the alternative, and essentially by a single counsel team.

4. In their initial costs submissions, the Settlement Parties asked the Court to treat them as a single litigating party for costs purposes throughout (thereby ignoring the fact that for a significant period they had incurred costs advancing claims against each other as well as against the non-settling parties). For their part, HPII, P&M and Messrs Thomas and Taylor argued that the Settlement Parties should be considered individually throughout (with the result, for example, that a claim arguably available to one

Settlement Party which was advanced to the Court only on a contingent basis, if a prior claim of some other party failed, would be treated for costs purposes as a wholly free-standing claim).

5. I have concluded that the appropriate course is to distinguish between the position of the Settlement Parties before and after the date of the Settlement Agreement. Before that date, the Settlement Parties were adversaries, actively advancing claims against each other as well as against the Non-Settlement Parties. It would not, in my view, be appropriate to treat – for example – the costs incurred by SFO and the Viscount litigating the dispute about the Jersey Properties in the period up to the Settlement Agreement (during which period they were active adversaries on this point) as costs which could be recovered against HPII, P&M or Messrs Thomas and Taylor. This is equally true of the costs of negotiating and concluding the Settlement Agreement itself, which only settled the disputes between the Settlement Parties inter se, and therefore represents a category of costs exclusively referrable to those claims. The principle that parties who reach settlements in continuing litigation should not be able to visit the entirety of the costs of their disputes inter se up to the point of settlement on those parties who carry on litigating derives some support from the decision of the Court of Appeal in Dufoo v Tolaini [2014] 6 Costs LR 1106, to which Mr Pickering QC referred me. While both the context in which the issue arose in that case, and the mechanism adopted to address it, differ from the position before me, the decision reflects the fact that such a settlement does not have the effect that costs which would otherwise have been recoverable from a number of defendants (with rights of contribution inter se) are thereafter to be paid in their entirety by those defendants who do not settle.

6. There is a further adjustment which needs to be made to the pre-Settlement Agreement costs, relating to Stewarts' costs over the period 30 September 2016 to 6 March 2017 ("the Pre-6 March 2017 Stewarts' Costs"). I am satisfied that during that period, Stewarts incurred costs exclusively referable to the freezing order which had been obtained by Phoenix. Those costs were incurred in different proceedings, in what was an essentially bilateral dispute between Stewarts and Phoenix, and in respect of which a partial costs order and payment of account have already been made. In these circumstances, I have concluded that the Pre-6 March 2017 Stewarts' Costs should be treated completely separately from the other costs. However, for the period after 6 March 2017, the claim concerning the £2m was one of the many issues within the Directed Trial scheme, and should be subject to the costs orders made in respect of the Directed Trial generally. The judgment which follows proceeds on that basis.

7. However, I am satisfied that for the period after the Settlement Agreement it is appropriate to treat the Settlement Parties as essentially a single litigating unit. By that stage, the claims were advanced across a common front, by a single team, on the basis that, if certain claims by some of the parties were established, it would not be necessary for the Court to consider the claims of others. Further, as lead claimant, Harbour bore the principal burden of advancing all of the claims, rather than each party pursuing its own claims.

8. The substance of the position was, therefore, akin to that which pertains where a single party advances alternative claims. I put to Mr Pickering QC for HPII in the course of argument the point that, if the Settlement Agreement had been structured to assign all the potential claims to a single Settlement Party, the proceeds to be distributed among the Settlement Parties in accordance with the terms of the Settlement Agreement, costs

would clearly fall to be assessed on the basis that a single party for costs purposes had advanced a series of alternative claims. He agreed but suggested that the difference here was that the individual Settlement Parties had separate solicitors. However, I do not accept that the fact that parties retained separate solicitors on the record, while instructing a joint counsel team and agreeing that Harbour's solicitors should play the lead role, changes the substance of the position. This is not to say, however, that the number of solicitors and counsel retained by the Settlement Parties collectively cannot be relevant on assessment. I am sure the costs judge will be astute to ensure that there was no unnecessary duplication, and that the costs incurred by the composite team were proportionate. In this regard, I should record that I reject the suggestion made by P&M that the involvement of the ERs was wholly duplicative of that of the SFO (for the reasons given by Mr Frith in his second witness statement, namely that the SFO and the ERs have separate and distinct roles). The issue of whether there was, in fact, unnecessary duplication in particular workstreams is a matter for detailed assessment.

9. Nor does it mean that any alternative cases advanced by the Settlement Parties which did not succeed are irrelevant. As is the position where a single party advances a number of alternative cases and succeeds on some but not others, the Court must consider whether the failure on one or more of the cases advanced is such as to require some form of adjustment, and if so what, to the general principle that costs follow the event.

10. That leaves the issue of how to address the costs incurred by the Settlement Parties during that period when they were running cases against each other. I have concluded that the appropriate course is to allocate an appropriate percentage of the Settlement Parties' combined costs in that period to the disputes inter se, which would not then be capable of being the subject of a costs order against any Non-Settlement Party. Like so many costs exercises, this is an inherently impressionistic exercise, in which it is not possible, save in the most general terms, to "show your workings". I have been provided with some guide points to assist me in the process.

11. The Settlement Parties estimated that the percentages of their individual costs referable to pre-Settlement Agreement costs of litigating against other Settlement Parties were as follows:

Harbour	16%
Stewarts	30-40%
The Viscount	15%
The SFO	25%
The ERs	30%

which amounts to about 25% of the total costs of those parties over that period. They invite me to make a similar assumption for the JLs. The evidence from Mr Campbell for the JLs was to the effect that some 20% of the JL's pre-Settlement agreement costs (excluding the costs of the Settlement Agreement itself) were incurred exclusively in dealing with the claims of the other Settlement Parties. In addition, focussing on the other Settlement Parties and not the JLs, they estimate that some 9% of their costs over that period were incurred in the negotiation of the Settlement Agreement.

12. That exercise – itself necessarily impressionistic – sought only to identify that element of the Settlement Parties' pre-Settlement Agreement costs which was *exclusively* referable to disputes inter se. However, in addition to that variable element of costs, there are fixed costs in most multi-party litigation which involve matters common to all the cases which a party is pursing.

13. HPII has carried out an analysis of various pre-Settlement Agreement elements of the litigation (interlocutory hearings, statements of case and disclosure), which it suggests shows the following:

    i) In the responsive statements of case (in which the parties engaged with the cases of the other parties), the Settlement Parties devoted between 40% and 60% of their documents to engaging with each other's cases.

    ii) Some 50% of documents were disclosed by the Settlement Parties.

14. For the purposes of arriving at an appropriate allocation, I have re-reviewed the various position papers and statements of case served in the period up to September 2019, and also the transcripts and orders. It is apparent that there were significant disputes between the Settlement Parties which mirrored many, but not all, of those disputes determined between the Settlement Parties and the Non-Settlement Parties at the Directed Trial: as to the effect of the Harbour IA, the beneficial ownership of the Arena and Non-Arena Companies and the Jersey Properties, the effect of the Hayes Settlement, and whether Stewarts were entitled to a lien and in what amount. Not all of the Settlement Parties raised all of these points. So far as the interim hearings are concerned, these were principally, but not exclusively, concerned with the management and progression of the case generally, rather than party-specific applications. Doing the best that I can, I have concluded that taking Harbour, the Viscount, Stewarts, the SFO and the ERs together, about 40% of their pre-Settlement Agreement costs are referrable to dealing with the cases of other Settlement Parties, which figure includes the share of common or "overhead" costs referable to those claims, and their costs of securing the Settlement Agreement itself.

15. While that assessment is necessarily somewhat broad-brush, it is consistent with the submissions made by the Settlement Parties when making a successful application to Moulder J to adjourn the Directed Trial to allow the Settlement Agreement to be finalised. Mr Akkouh submitted that "the Settlement Parties have hitherto been the most active parties in the litigation, represented by five leaders, five juniors when the Phase 1 directions were made" and had "taken substantial issue with the cases of one another". Mr Akkouh noted that there were 80 pages of responsive pleadings in which the Settlement Parties attacked each other's cases, and that some issues (of which he gave three examples) would fall away altogether as a result of the settlement. The overall effect, it was submitted, was that there had been "a very substantial streamlining". The SFO described the Settlement Agreement as "drastically reduc[ing]" the scope of the Directed Trial, and Stewarts referred to "substantial costs-savings.". Those submissions, which are consistent with my own review of the history of the case up to that point, found favour with Moulder J when acceding to the Settlement Parties' application to adjourn the trial.

The position of the JLs

16. The JLs are in a different position from the other Settlement Parties. The JLs were appointed to manage various of the companies, the beneficial ownership of which was claimed by the other parties to the Directed Trial. Their participation in the Directed Trial involved a number of elements:

    i) Claims advanced by the JLs to assets referred to by the JLs in the BVI sanctions proceedings as "the Proprietary Assets" and claims by Unicorn (one of the companies under the JLs' management) to the Connected Companies. The JLs faced competing claims from the other Settlement Parties and the Non-Settlement Parties to those assets. The competing claims as between the JLs and the other Settlement Parties were settled by the Settlement Agreement.

    ii) Claims in respect of payments which Dr Cochrane caused or permitted to be made from those companies in breach of fiduciary duty ("the Wrongful Payment claims"), which were (to a substantial extent) not adverse to those of any of the parties now active in the litigation but would inure to the benefit of those found to be ultimately entitled to the assets of those companies. However, the Settlement Parties claiming interests in the Arena Companies did advance the argument that these amounts should be treated as informal dividends, such that they did not represent the traceable proceeds of the relevant company's assets, but property which was subject to the Harbour Trust. I rejected that argument.

    iii) Claims in relation to the IUAs as the traceable proceeds of the Wrongful Payments. Those claims conflicted with the tracing claims of HPII and/or Mr Pelz to the same assets, some of which were resolved (in a manner adverse to HPII as a result of the failure of the bona fide purchaser defence and/or Mr Pelz) at the Directed Trial, and some of which remain to be determined.

    iv) Claims arising from the Hayes Settlement, which were settled as against the other Settlement Parties in the Settlement Agreement and abandoned against the Non-Settlement Parties in closing.

17. The JLs' costs of the Settlement Agreement, on the evidence before me, were £314,683.50, which were higher than those of any other Settlement Party.

18. Against this background, and taking into account the need to allocate fixed or overhead costs across the various categories of claim, I have concluded that:

    i) 40% of the JLs' costs before the Settlement Agreement are to be allocated to issues arising between the Settlement Parties inter se which were settled by the Settlement Agreement.

    ii) Having taken account of the claims between the Settlement Parties inter se at i) above, a further 50% of the JLs' costs before the Settlement Agreement are to be allocated to the claims to the Wrongful Payments and the disputed tracing claims to the IUAs. This represents my assessment of what proportion of the JLs' total costs are referable to these issues (together with associated overhead), and no determination by the costs judge as to whether particular costs were incurred on particular issues is required. I intend to reserve 40% of these costs (that is to say 40% of the JLs' total costs pre-Settlement Agreement) for the following reasons:

a) In relation to a number of the IUAs, there remain outstanding issues as between HPII, Mr Pelz and the JLs which have yet to be resolved.

b) In addition, to the extent that the JLs can be said to have incurred costs in establishing that the Wrongful Payments were made by the Arena Companies and represent traceable assets of those companies, I can see scope for argument (which I have not heard) as to how those costs should be treated, in the context of disputes between the Settlement and Non-Settlement Parties as to who is beneficially entitled to the assets of those companies.

The other 10% of that 50% are referrable to those IUA claims in which the JLs were opposed by HPII but succeeded.

iii) 10% to the issue of the Hayes' Settlement, for which the JLs are not entitled to any costs order.

iv) So far as the position after the Settlement Agreement is concerned, the position is as follows:

a) 83% of the JL's costs are to be allocated to the Wrongful Payment and disputed tracing (that is 83% of the JLs' total costs post the Settlement Agreement) of which 66% are reserved and 17% payable by HPII;

b) 17% of the JL's are referable to the Hayes Settlement, for which the JLs are not entitled to any costs order.

The position of the Non-Settlement Parties

19. The next framework issue is how the Court should treat the position of the Non-Settlement Parties. For this purpose, it is helpful to remember that there were a number of parties who participated at some point in the Directed Trial proceedings, but who are not Settlement Parties:

i) There are other parties with whom the Settlement Parties subsequently settled: the LCL Settlement Parties and Mr Sodzawiczny.

ii) There are those who actively participated in the Directed Trial itself: HPII, P&M, Messrs Thomas and Taylor and Mr Pelz.

iii) Finally, Mr Barton participated in the early management hearings of the litigation, without participating in the Directed Trial.

20. I will reserve all issues of costs so far as Mr Pelz and Mr Barton are concerned. That leaves the position of HPII, P&M and Messrs Thomas and Taylor.

21. This is not a case in which two unsuccessful parties ran essentially the same case, such that it is appropriate to make an order that they be jointly and severally liable for the successful party's costs. There were issues on which these parties' interests were aligned with each other (for example HPII and P&M on the Isle of Man Settlement, and both those parties and Messrs Thomas and Taylor on the Jersey law issue). But there were also significant issues where their interests were opposed to each other (for

example HPII and P&M on the claims to the IUAs, or Messrs Thomas and Taylor and both HPII and P&M on the scope of the trust created by the Harbour IA). Each of these parties can fairly say that they should not have to pay the costs incurred by the Settlement Parties in litigating issues against other parties which they did not participate in, or on which they supported the Settlement Parties' position.

22. So far as those parties with whom the Settlement Parties subsequently reached additional settlement agreements are concerned (i.e. the LCL Parties and Mr Sodzawiczny), the issue of principle is essentially the same as that which arose when considering the Settlement Parties' costs inter se, and I will adopt the same approach, for the reasons given in [5] above.

23. That leaves the issue of how to determine what liability for costs each of HPII, P&M and Messrs Thomas and Taylor should have. I do not believe that it would be useful or feasible to seek to make a series of individual costs orders as between the parties involved in any particular issue. That would necessitate an assessment exercise of fiendish complexity. The warnings against such a course which has frequently been given when considering what form issue-based costs orders should take as between a successful and an unsuccessful party (for example in Burchell v Bullard [2005] EWCA Civ 358, [2005] 3 Costs LR 507, [29]-[30] and Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Limited [2008] EWHC 2280 (TCC), [2009] 1 Costs LR 55, [72(iv)-(v)], and which is reflected in CPR 44.2(7)) applies equally in the present context. In reaching this conclusion I have also taken account of the submissions made by (in particular) HPII and P&M that, in their individual cases, there should be issue-based costs orders, and my conclusions on those issues, which are addressed at [43] and [52] below.

24. I am satisfied that it is appropriate to allocate to each of these parties their overall share of costs by way of a percentage allocation. That does not involve, as HPII and P&M assumed in their submissions, identifying for each of those parties what additional costs the issues unique to (or engaging) that party generated, and limiting the potential costs exposure of that party to those incremental costs. That ignores the significant common or overhead costs incurred in complex multi-party litigation, and the fact that parties have adopted arguments on which other parties made the running because they stood to benefit from that party's success.

25. In arriving at the appropriate percentage figures for the Non-Settlement Parties, it is necessary in my view to have regard, among other things, to the following:

    i) the period of time over which the relevant party was actively engaged in the litigation;

    ii) the financial and evidential significance of the issues the relevant party was engaged with; and

    iii) whether that party took a leading or supporting role on such issues (although adopting a point run by someone else is not generally a costs-neutral activity: risk and reward are usually litigation bedfellows).

26. Once again, I received very different estimates from the interested parties' advocates as to what percentage of the case best represented their clients' proportionate share

(and, by necessary extension, as to the proportionate share of others, with which their own share had to be consistent). It is also important to remember that the exercise is concerned with identifying what proportion of the *Settlement Parties'* costs related to which particular defendant, not what proportion of the time of all parties, including the Settlement Parties, was taken up by a particular party.

27. My conclusions, and commentary, are as follows (these figures reflecting not only work directly related to the issues with which these parties were concerned, but the associated overhead):

The LCL Settlement Parties	20%
LCL and various parties associated with Dr Smith raised a number of issues – including in relation to the so-called LCL Funding Agreement and the SFO's nominee case, and the IUAs. Dr Smith served 11 witness statements and gave substantial disclosure which would have to have been analysed and responded to. There were also documents served by the other LCL Settlement Parties setting out their own cases, and witness evidence. I accept that their active involvement grew over time (but so did the overall costs charge as case preparation became more intensive in and from 2020). However, based on my review of earlier transcripts, and my experience of the hearings I conducted, the LCL Parties were a significant presence at the various case management hearings. In addition, costs were incurred by the Settlement Parties in negotiating the LCL Settlement Agreement.	
Mr Pelz, Mr Barton and Mr Sodzawiczny	5%
Mr Barton played no role beyond the very early directions stages. Mr Sodzawiczny had all but dropped out of the case by the time the trial began, and Mr Pelz's role in the Directed Trial was very limited. However, there was significant disclosure from Mr Sodzawiczny, some from Mr Pelz, and written filings by them both (most particularly by Mr Pelz). As I have stated, the costs relating to Mr Barton and Mr Pelz are reserved.	
HPII	25% (plus 10% of the JLs' pre-Settlement Agreement costs and 17% of the JLs' post-Settlement Agreement costs)
The bona fide purchaser for value issue raised by HPII, and its claim to the IUAs, took significant time. HPII played a key role in challenging the Settlement Parties on various other issues – the effect of the IOM Settlement (which occupied a significant amount of time in cross-examination and on which HPII succeeded - I address the consequences of that below) and Jersey law. It also advanced an unsuccessful claim to the Non-Arena Companies,	

although that did not consume much time (I address the argument that this success was not of any economic value at [36] below), and up until the PTR, an attack on the Geneva Settlement under s.423 of the Insolvency Act 1986 which was abandoned at that point. Claims by two other companies making up the acronym OMH had previously been abandoned. Time was also spent in relation to matters arising from HPII's use of privileged material at trial. I do not accept HPII's argument that it was "very much a bit player". While I accept HPII came into the action later than some, it joined at a very early stage of proceedings, and I do not accept that its date of joining of itself provides a chronological cut-off for liability for such of the Settlement Parties' costs as are properly characterised as costs of and incidental to the Directed Trial. It is clear that HPII was itself heavily engaged in the issues which featured in the Directed Trial before April 2017, writing a 10-page letter to the SFO in December 2016, and a 163-page letter in April 2017. Had HPII succeeded, it would surely have been claiming the costs of at least parts of those exercises as its costs of the Directed Trial. Thereafter HPII was a significant presence at the various interlocutory hearings.	
P&M	22.5%
P&M ran arguments relating to the equitable assignment (which carried with it a series of alternative or subsidiary issues, as well as requiring the Court to consider the background and context of the Geneva Settlement) and as to the effect of the CJA 1988. They took the lead in opposing Stewarts' claim to the £2m as well as being the party principally concerned with the associated application to discharge the injunction. Together with HPII, they played a key role in challenging the IOM Settlement including through cross-examination (on which they largely succeeded – an issue which I consider below); challenging Stewarts' lien case (a case which failed as against P&M, albeit P&M's own failure on the equitable assignment point made that failure moot); and in responding to the various alternatives to Harbour and Stewarts' primary cases (Berkeley Applegate relief) on which they succeeded. P&M advanced a (late-emerging) claim to the Non-Arena Companies as part of a wider subrogation argument and adopted (without significant engagement) HPII's case on Jersey law. They also ran a series of contractual and some factual arguments intended to challenge the scope of the Harbour Trust and the SFO's nominee case. Costs were also incurred in addressing the Geneva Nominee issue - which arose, among others, between the Settlement Parties and P&M - until it was removed from the scope of the Directed Trial in the first week of the trial. That issue was reasonably raised, and could have proved significant depending on how other issues were resolved. There was some skirmishing initiated by P&M around the effect of the Settlement Agreement which made it necessary to look carefully at the BVI proceedings. My conclusion that, looking at the litigation overall, P&M were a significant player, rather than the "bit player" depicted in Mr Lord QC's submissions, derives some support from the £7.5m they spent on their own legal fees – a sum which exceeds Harbour's and Stewarts' fees combined. Finally, I reject the suggestion that Phoenix and Minardi should be treated separately for costs purposes. They are both (on their	

account) vehicles beneficially owned by Mr Stevens, who ran a common case through a single legal team throughout.	
Messrs Thomas and Taylor	12.5%
Messrs Thomas and Taylor raised pre and post-Settlement Agreement issues against the SFO (and succeeded on a key issue, which I address below) and pre- and post- Settlement Agreements against the Settlement Parties on Orb's entitlements under the Harbour Trust, Stewarts' fee and lien claims, the Jersey law issue, the SFO's nominee case and (in a very limited way) the £2m. In my view, a 12.5% figure fairly captures their level of participation across the Directed Trial process as a whole.	
Reserved tracing / IUA costs	15%
This reflects the costs of the Settlement Parties other than the JLs in relation to the Wrongful Payments tracing exercise and the associated costs of the IUA issues to the extent that those have survived to Phase 2, together with the applicable overhead.	

The framework position in summary

28. On the basis of the conclusions I have reached above, the framework within which the final costs determination falls to be made is as follows:

    i) The relevant costs of the Settlement Parties comprise:

        a) in respect of the period prior to the Settlement Agreement, 60% of the costs of the SFO, ERs, Harbour, Stewarts (less the pre-6 March 2017 Stewarts' Costs) and the Viscount;

        b) in respect of the period after the Settlement Agreement, 100% of the costs of the SFO, ERs, Harbour Stewarts and the Viscount; and

        c) for HPII only, 10% of the pre-Settlement Agreement costs of the JLs and 17% of the post-Settlement Agreement costs of the JLs.

    ii) The costs at i)a) and i)b) are to be treated as:

        a) 25% referable to HPII (together with 10% of the pre-Settlement Agreement costs of the JLs and 17% of the post-Settlement Agreement costs of the JLs);

        b) 22.5% referable to P&M; and

        c) 12.5% referable to Messrs Thomas and Taylor.

iii) 40% of the costs of the pre-Settlement Agreement costs of the JLs, 66% of the post-Settlement Agreement costs of the JLs, 15% of the costs of the other Settlement Parties as referred to at i) and b) above, 15% of HPII's costs (as to both of which see [57] below) and any costs relating to Mr Pelz and Mr Barton are reserved.

C THE GENERAL PRINCIPLES

29. There was no significant dispute as to the general principles relevant to liability for costs, which is not, perhaps, surprising because there is something in them for everyone. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (CPR r.44.2(2)), but the Court may make a different order having regard to all the circumstances. First instance judges have been warned against departing too readily from the starting point that the successful party gets its costs (Fox v Foundation Piling Ltd [2011] EWCA Civ 790, [2011] 6 Costs LR 961, [62],), although I accept that such orders are not to be described as exceptional.

30. Further:

i) There is no automatic rule that the costs of a successful party will be reduced because it lost on some issues, and it has been noted that in complex litigation, it is a rare party who succeeds on every point it argues (see e.g., Travellers' Casualty and Surety Co of Canada v Sun Life Assurance [2006] EWHC 2885 (Comm), [12] and F&C Alternative Investments (Holdings) Ltd v Barthelemy [2011] EWHC 2807 (Ch), [2012] Bus LR 891, [16]-[21],).

ii) There are various factors which are likely to weigh in the balance when determining whether to make such an order, although these are inevitably matters of weight rather than independently determinative considerations. The more significant and self-contained the issue on which the successful party has lost, the more likely it is that some downwards costs adjustment for that failure is appropriate. Failure on an argument which was simply an alternative route to the same substantive relief as that obtained may provide a less compelling case for a downwards adjustment than (for example) a party who seeks to recover some further relief and fails. The unreasonableness of taking the unsuccessful point is also a relevant consideration, but that does not mean that an adjustment to the costs order to reflect the successful party's failure is only appropriate if it has acted unreasonably in relation to the points on which it lost. Similarly, the character of the point - for example an unsuccessful claim in fraud – may also weigh in favour of a reduced costs award to the successful party.

iii) Where an issue-based (or, perhaps more accurately in the present context, issue-influenced) costs order is appropriate, a judge should hesitate before making an order by reference to the costs of the specific issue, as opposed to a proportionate reduction in the successful party's costs: see [23].

iv) In those cases in which it is appropriate to depart from the general rule, a further issue arises as to whether the court should stop at depriving the successful party of part of its costs or go further and make the successful party pay part of the costs of the other party (R (Viridor Waste Management Ltd and ors) v Revenue and Customs Commissioners [2016] EWHC 2502 (Admin), [2016] 5 Costs LR

965, [7]). This will only be appropriate in a suitably exceptional case and is to be regarded as far from routine (ibid, [19] and Summit Property Ltd v Pitmans [2001] EWCA Civ 2020, [17]).

v) While I was referred to no authority on this issue, it is frequently the case that a party raises an alternative case which the Court does not need to decide (and does not decide) because of the way in which other issues are determined. In those circumstances, unless the decision to pursue the alternative argument was unreasonable, the fact that there has been no decision on the merits of the point will not preclude the successful party from recovering those costs.

31. As between the Settlement Parties and both HPII and P&M, there can be no doubt that the Settlement Parties are the successful party, and neither HPII nor P&M challenged that overall characterisation. In particular:

i) HPII's claim to the Arena Companies was abandoned during the Directed Trial and its claim to the IOM Settlement Cash failed on the bona fide purchaser for value issue (with knock-on impacts on its claim to certain IUAs). Its claim to the Jersey Properties failed as a matter of Jersey law. Its claim to the Non-Arena Companies (albeit the subject of limited argument) also failed. It abandoned its attack on the Geneva Settlement under s.423 of the Insolvency Act 1986 after the PTR. Its claim to the IUAs failed in a number of significant respects, but in other respects survived to the Phase 2 trial.

ii) P&M's claim that, under the LICSA, Phoenix was the equitable assignee of any distributions made by the Arena Companies failed, as did their challenge to the Harbour Trust, their opposition to the SFO's claims to the Non-Arena Companies (advanced both as a matter of statutory construction, by reference to the terms of various settlement agreements and on the facts), their contention that Stewarts were not entitled to the £2m which Phoenix had frozen and their own (very late) claim against the assets of the Non-Arena Companies.

32. The position of Messrs Thomas & Taylor requires a little more consideration:

i) Harbour, the Viscount and Stewarts succeeded on the issues arising as between themselves and Messrs Thomas and Taylor. It was always inherent in Harbour and the Viscount's claims (*qua* Orb) that Messrs Thomas and Taylor would receive such amount, if any, as was available for distribution at the relevant stage of the Harbour waterfall. Messrs Thomas & Taylor's proprietary claim was also always inherent in Stewarts' claim (for a lien over any proprietary claim which Messrs Thomas and Taylor had).

ii) The issues which did arise as between those three parties and Messrs Thomas and Taylor were all issues on which Messrs Thomas and Taylor failed. This included the argument that the share of Orb (represented by the Viscount) should be reduced to reflect misappropriated assets, the argument that the Jersey Properties did not form part of Dr Cochrane's estate; the attack on Stewarts' fees and entitlement to a lien (although, largely as a result of issues raised by the Court, Stewarts reduced the size of their lien claim) and (somewhat surprisingly) on Stewarts' claim to the £2m.

iii) Messrs Thomas and Taylor do not seek any costs order against HPII or P&M (something Mr Browne QC and Mr Crossley confirmed during the hearing).

33. Messrs Thomas & Taylor submit that the SFO opposed their claim to a proprietary interest, and that as a result they have had to prove that claim. Having done so, they submit that – as against the SFO – they are the successful party, and that the SFO should be required to pay all of their costs (which are said to amount to £2.7m). For its part, the SFO submits that it made it clear at the Directed Trial that its claims were subject to any prior rights.

34. In considering this argument, it is necessary briefly to consider the history of the action in a little more detail:

i) The origin of these proceedings was a restraint order obtained by the SFO on 20 May 2005 and amended on 23 May 2016, intended to prevent the dissipation of assets which the SFO contended represented the Realisable Property of Dr Smith.

ii) When it became apparent that there were rival claimants to the property which the SFO sought to recover, the SFO issued an application on 26 June 2017 which provided the framework within which the rival claims to that property were to be determined. It is clear that Messrs Thomas and Taylor were among those asserting such an interest.

iii) The SFO's initial position was to contend that all the property in issue in the Directed Trial was Dr Smith's Realisable Property (e.g., in their Statement of Claim of 25 October 2017). At one point, Messrs Thomas and Taylor indicated their acceptance of the SFO's claim, and said that the claim ranked "equal but not in priority" to their claim (Messrs Thomas & Taylor's position paper of 31 January 2018).

iv) However, in a short document which I have not seen, but which was filed before June 2018, Messrs Thomas & Taylor made it clear that they were challenging the SFO's entitlement. That appears from the terms of the SFO's reply filed in June 2018, criticising Messrs Thomas & Taylor for only filing a one-and-a-half-page document which it was said did not comply with Popplewell J's order, but stating nonetheless that the SFO understood that Messrs Thomas and Taylor had denied the SFO's case in general terms. The SFO concluded:

> "In the foregoing premises, the Applicants rely upon the contents of their Statement of Case, deny any facts asserted by Mr Thomas and Mr Taylor (to the extent that any are asserted) give rise to any proprietary interest held by either of them in the Shares or Jersey Properties, and reserve the right to apply to strike out the Statement of Case of Mr Thomas and Mr Taylor ….".

v) The SFO's position with regard to Messrs Thomas and Taylor at this point can be deduced from its case against Harbour (which was equally dependent on the Harbour IA establishing a trust over the Relevant Property). The SFO advanced various construction points as to why it was said the Harbour IA had not created an effective trust, and otherwise put Harbour to proof.

vi) Messrs Thomas & Taylor served a further pleading on 28 February 2019. Moulder J ordered them to meet any additional costs incurred as a result of the service of this document, which was only necessary because Messrs Thomas and Taylor had not done what they were required to do by Popplewell J. It is apparent from that document that Messrs Thomas and Taylor were at that point not only asserting their claims in opposition to those of the SFO but also (i) resisting claims of LCL, Dr Cochrane and those claiming priority over the Harbour Trust (such as HPII and P&M); (ii) resisting the Viscount's claims to the Jersey Properties; (iii) seeking to reduce Orb's share under the Harbour Trust and (iv) advancing a case which was inconsistent with the SFO's claim to the Non-Arena Companies.

35. From the date of the Settlement Agreement, the SFO cannot be said to have been challenging Messrs Thomas and Taylor's claim under the Harbour Trust. The common position of the Settlement Parties prioritised the claims of Harbour and the Viscount *qua* Orb under the Harbour Trust and of Stewarts (which, as I have said, necessarily pre-supposed the validity of such rights as Messrs Thomas and Taylor enjoyed under the Harbour IA), with the claim of the SFO only being advanced if and to the extent the Harbour Trust did not apply and the lien claim failed.

36. However, there remained issues between Messrs Thomas and Taylor and the Settlement Parties, which I have set out above, and on which Messrs Thomas and Taylor failed at trial. In addition, Messrs Thomas and Taylor challenged the SFO's ultimately successful claim to the Non-Arena Companies. There is a dispute between the parties, which it would take a trial of its own to resolve, as to the ultimate economic value of that recovery (as there is as to the ultimate economic value of Messrs Thomas and Taylor's entitlement under the Harbour Trust). However, the Non-Arena Companies were regarded as at least having a sufficient possibility of value for numerous parties to advance competing claims to them to the end of the Directed Trial. All of these issues took up time at the Directed Trial and, as I have set out above, I have estimated that 12.5% of the Settlement Parties' costs are referrable to issues as between the Settlement Parties and Messrs Thomas and Taylor and the associated "overhead".

37. In addition, Messrs Thomas and Taylor continued to challenge parts of the case of the LCL Parties, HPII and P&M, and played a prominent role in relation to the claims of the LCL Parties until they were discontinued.

38. Messrs Thomas and Taylor also raise certain criticisms of the SFO's conduct which they say are relevant to the incidence of costs.

i) They criticise the SFO for advancing a case on the Safekeeping Agreement in its original statement of case, which it dropped after judgment in the Directed Trial. However, the Safekeeping Agreement never formed part of the Directed Trial, and the claim was only dropped once the Settlement Parties' success at the Directed Trial had rendered the point academic.

ii) They criticise the SFO for not calling evidence at the Directed Trial in support of the nominee case. There is nothing in that criticism, for the reasons I gave at [48] of the Directed Trial Judgment. Nor can the SFO, in the period after the Settlement Agreement, be criticised for advancing an *alternative* nominee case which was (as alternative cases very often are) inconsistent with the Settlement Parties' primary case. In respect of the period before the Settlement Agreement,

there was considerable uncertainty as to the position (given the propensity of the primary actors to be less than transparent in many aspects of their business dealings) and against that background the SFO's decision to maintain its wider case cannot be said to be unreasonable.

iii) They say that the SFO made insufficient attempts to settle with them (prompting the response that Messrs Thomas and Taylor have ended up in a worse position than if they had accepted the settlement offer the Settlement Parties made to them). However, it is impossible to evaluate those competing submissions, and there was no attempt to take me through the underlying material. I have concluded that there was no sufficiently clear conduct by either party in relation to settlement to impact on the appropriate costs order.

39. Against this background, I accept Messrs Thomas and Taylor's case that before the Settlement Agreement, the SFO was not simply advancing a claim as a "residuary legatee" so far as Messrs Thomas and Taylor were concerned, or simply putting Messrs Thomas and Taylor to proof, but positively challenging their entitlement (albeit Messrs Thomas and Taylor had delayed in setting out their own case). That ought to give rise to a "costs credit" in Messrs Thomas and Taylor's favour. However, there were also matters in issue as between the SFO and Messrs Thomas and Taylor (the Non-Arena Companies) or the other Settlement Parties (the claims against Orb or the Viscount *qua* Dr Cochrane) on which Messrs Thomas and Taylor failed at trial (and which ought to give rise to a "costs debit" for Messrs Thomas and Taylor as against the Settlement Parties).

40. I have concluded that the appropriate order to make as between the Settlement Parties and Messrs Thomas and Taylor, to reflect the overall position, is for there to be no order in favour of either party in respect of the period before the Settlement Agreement, and an order limited to requiring Messrs Thomas and Taylor to pay to 10% of the Settlement Parties' costs for the period after the Settlement Agreement.

D THE POSITION AS BETWEEN THE SETTLEMENT PARTIES AND EACH SURVIVING DEFENDANT

The Settlement Parties and P&M

41. P&M submit that those Settlement Parties who claim entitlements premised on recoveries in relation to the Orb Proceedings lost on their primary case, which is that relevant rights were acquired by and through the IOM Settlement. It is suggested that:

i) no costs should be recovered until the point when the relevant Settlement Party first pleaded reliance on the Geneva Settlement; and

ii) the issues which arose as to the status and immediate effect of the IOM Settlement were so significant and the costs of them so substantial, that the Court should exceptionally make no costs order against P&M (the IOM Settlement failure being sufficient to outweigh any success).

42. For their part, the Settlement Parties contend that:

i) the IOM Settlement did not consume as much time and costs as P&M contend;

ii) it represented an alternative route to the same outcome which the Settlement Parties achieved in any event;

iii) much of the ground raised by the IOM Settlement would have had to have been traversed in any event;

iv) they acted reasonably in, in effect, requiring the other parties to make good their contention that the IOM Settlement involved a fraudulent breach of trust by Messrs Cooper and McNally in which Dr Smith was complicit, given the seriousness of these allegations; and

v) given their overall success against P&M, no reduction in any costs order in their favour would be appropriate.

43. I have concluded that the IOM Settlement issue was a sufficiently significant and discrete issue, and one which generated a sufficiently significant level of costs, that some reduction to the costs order made in favour of the Settlement Parties to reflect their failure on that issue is appropriate. This aspect of the Settlement Parties' case involved significant time in opening, cross-examination and closing. It is not necessary, in order to reach that conclusion, to find that it was unreasonable for the Settlement Parties to take the point, but I reject the argument that they had no practical alternative to doing so. It would have been perfectly possible, without making a positive case that the IOM Settlement involved a fraudulent breach of trust, to have advanced a case on a basis which accepted that the Harbour Trust was not effective until the Geneva Settlement.

44. However, I do not accept the suggestion that the effect of the Settlement Parties' failure on the IOM Settlement issue is such as to neutralise any costs recovery on their part. That would be to pay insufficient regard to their status as overall victors, particularly in circumstances in which the IOM Settlement was simply an alternative route to exactly the same recovery which was achieved by other means, rather than a failed attempt to obtain additional or different relief. That also answers the suggestion that no costs should be recovered until Harbour first pleaded reliance on the Geneva Settlement. In addition, I accept the argument that, to some extent, it was necessary to cover the ground of the IOM Settlement in any event. The transfer of the legal estates effected by the IOM Settlement remained a legally significant event in the Settlement Parties' successful claim, and the various unsuccessful arguments raised by P&M to defeat that element (both legal, as to the construction of the Harbour IA, and factual, as to the circumstances in which Dr Cochrane and SMA received transfers under the IOM Settlement) would, I am sure, have been run even if the Settlement Parties had accepted that no trust interest could effectively be asserted prior to the Geneva Settlement. For these reasons, I also reject the suggestion that the issues between the Settlement Parties and P&M would only have taken 2-3 days to resolve if the Settlement Parties had accepted that the Geneva Settlement was an essential element in their claim. Nonetheless, I accept that some percentage reduction in the costs order in the Settlement Parties' favour is appropriate to reflect its failure on the IOM Settlement point.

45. The other issue which P&M raise is the number of alternative cases which the Settlement Parties ran and on which they did not succeed. A number of these do not merit any reduction: for example, those which were responsive to P&M's unsuccessful claim that Phoenix was an equitable assignee under the LICSA (clean hands, adjustment

of the order of priority etc). However, Stewarts' lien claim against P&M, if P&M had succeeded in establishing any proprietary recovery, was (in my view) misconceived, and did take some time to resolve. The various Berkeley Applegate or similar claims against P&M were also an unnecessary distraction. Finally, an adjustment is appropriate to reflect P&M's costs of the JL's abandoned Hayes Settlement claim.

46. A further issue arises as to the costs of the £2m and the injunction proceedings commenced by Phoenix in relation to it. The costs in issue are:

    i) The Pre-6 March 2017 Stewarts' Costs, which have already been the subject of a costs order to the extent of 25% of the costs of Stewarts' application of 9 January 2017.

    ii) Stewarts also contend that a proportion of their recovery in the action as a whole against P&M after this date should be allocated to this issue. They have estimated 25%, but P&M suggest that the appropriate figure is significantly less. These issues generated appreciable time in opening, during Mr Upson's cross-examination and in closing, and must carry their share of the accompanying overhead. I am satisfied that a figure of 15% of *Stewarts'* costs from 6 March 2017 onwards are fairly attributable to the £2m.

47. P&M contend that Stewarts ultimately only prevailed on the basis of a case which surfaced late (that it was a bona fide purchaser for value), having failed on various alternative cases, and with its principal case for discharging the freezing order (non-disclosure linked to the Geneva Nominee Issue) not having to be determined.

48. I have concluded that some small reduction to Stewarts' costs relating to the £2m is appropriate to reflect the issues on which it failed (LCL's entitlement to the £2m and that Radix UK had declared a dividend), but not in respect of issues which it was not necessary to decide. The reduction should be a small one, because, in practical terms, Stewarts obtained everything it was seeking on this issue. The reduction, in respect of the Pre-6 March 2017 Stewart Costs will be 10%. In relation to the subsequent costs, I have decided to reflect this issue in my overall allocation.

49. Putting the Pre-6 March 2017 Stewarts' costs aside, I have decided that the various issues raised by P&M, to the extent I have found they have merit, are appropriately reflected in a way which is consistent with the Settlement Parties' status as the clearly successful party as against P&M, by awarding the Settlement Parties' 70% of the costs which would otherwise have been payable. In order to determine what part of that costs order should be reflected in the order to be drawn up in the proceedings commenced by Phoenix in which the £2m was frozen:

    i) The total costs recovery made in favour of the Settlement Parties other than the JLs should be allocated across the SFO, ERs, Harbour, Stewarts and the Viscount's costs on a pro rata basis.

    ii) 15% of Stewarts' costs should be carved out of the costs order in the Directed Trial and included in the costs order relating to Phoenix's freezing order application.

iii) The costs order in the freezing order application should also reflect the order I have made in relation to 90% of the Pre-6 March 2017 Stewarts' Costs, after carving out those costs which have already been the subject of Popplewell J's order of 6 March 2017.

50. To summarise the position for those tasked with drafting the order:

i) The Pre-6 March 2017 Stewarts' Costs are to be deducted (and are dealt with separately at iii).

ii) Having done that, the SFO, ERs, Harbour, Viscount and Stewarts are entitled against P&M to 70% of 22.5% (i.e. 15.75%) of:

a) 60% of their pre-Settlement Agreement costs; and

b) their post-Settlement Agreement costs.

iii) Stewarts are entitled against P&M to 90% of the Pre-6 March 2017 Stewarts' Costs (25% of the costs awarded to Stewarts by Popplewell J's order of 6 March 2017 to be deducted before the 10% reduction is applied).

iv) The costs in iii) and 15% of Stewarts' share of the costs in ii) are payable by P&M pursuant to the costs order made in the freezing order proceedings.

v) The remaining 85% of Stewarts costs in ii) are payable pursuant to the costs order in the Directed Trial.

The Settlement Parties and HPII

51. HPII accepts that some of the Settlement Parties are entitled to a net costs order, but argues that there should be no costs order in favour of others. In all cases, HPII argues for a significant reduction in the Settlement Parties' recovery.

52. The first, and most significant, ground relied upon relates to the case pursued by the Settlement Parties that the Harbour Trust was immediately constituted free of competing priority by the IOM Settlement. I have already given my reasons (at [43]) for concluding that this was a sufficiently significant, discrete and substantial issue to merit a reduction in the Settlement Parties' costs recovery, but I consider the amount of the reduction must be tempered by the following: (i) HPII's success on that issue took them nowhere; (ii) the IOM Settlement remained a legally significant element in the (retrospective) constitution of the Harbour Trust; and (iii) the Settlement Parties' clear success as against HPII in relation to the Relevant Property (save for some of the IUAs, in respect of which I have reserved the Settlement Parties' costs). Further, HPII's (failed) bona fide purchaser for value case in relation to the IOM Settlement Cash itself involved consideration of the events surrounding the IOM Settlement. For that reason, the reduction which falls to be made as against HPII by reason of the Settlement Parties' failure in relation to the IOM Settlement issue is less than for P&M.

53. HPII also argue that it succeeded on one part of the bona fide purchaser test. However, I do not accept that success on such a sub-issue (which formed part of an issue which HPII lost overall on the facts and on the legal arguments it raised) justifies any further costs reduction. I accept Stewarts' lien claim against any HPII recovery failed, and that

this does merit a downwards adjustment, although HPII played a limited role on this issue.

54. Taking everything into account, I have decided that the Settlement Parties' costs recovery from HPII should be reduced by 20% to allow for its failure on the IOM Settlement and the Stewarts' lien claim.

55. Finally, the Settlement Parties argue that any costs payable by HPII should be assessed on an indemnity basis. I did not call on HPII to respond to this application, which I reject. Such an order is appropriate where (and to the extent that) the circumstances of the case are such as to take the case, or some part of it, "outside the norm" (Excelsior Commercial & Industrial Holdings Inc. v Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879). In this case, the Settlement Parties suggest that HPII's case continually shifted over the course of the proceedings and that HPII conducted its case on a basis which sought to keep as many balls in the air for as long as possible. I accept that HPII's case shifted, and that it sought to maintain the widest possible front for as long as possible. However, in the particular circumstances of this case, I do not accept that this involved conduct out of the norm. HPII and its advisers had very limited visibility as to the contemporaneous events which gave rise to the dispute. The case itself had a very large number of moving parts which generated a significant number of permutations by way of possible outcomes. The case also involved very significant demands on HPII's litigation resources. In these circumstances, while it can be said that HPII took some time to come to terms with certain structural limitations in its case, and to identify its core issues, I do not believe its conduct can be said to fall outside the norm of complex litigation of this type. So far as the other matters raised are concerned:

    i) The attempt to re-open the Privilege Application has already been the subject of a prior order, with no reservation as to costs.

    ii) In my view, there was nothing improper in HPII's case as to Stewarts' involvement in the IOM Settlement, although, for the reasons I gave in the Directed Trial judgment, I did not uphold HPII's complaints.

    iii) The issues which arose in relation to the use of material provided by Mr Campbell at trial involved a misjudgement in the pressure of the moment. However, this was a very small incident in a very long and complex piece of litigation.

56. To summarise the position:

    i) the SFO, ERs, Harbour, Viscount and Stewarts are entitled against HPII to 80% of 25% (so 20%) of:

        a) 60% of their pre-Settlement Agreement costs (the Pre-6 March 2017 Stewarts' Costs to be deducted from this figure before the 40% reduction is applied); and

        b) their post-Settlement Agreement costs; and

    ii) the JLs are entitled to 10% of their pre-Settlement Agreement costs and 17% of their post-Settlement Agreement costs against HPII.

57. I have reserved 40% of the JL's pre-Settlement Agreement costs, 66% of the JLs' post-Settlement Agreement costs and 15% of the costs of the other Settlement Parties as set out in [28 i)(a) and (b)]] above (which reflect costs incurred in respect of downstream tracing exercise and the associated costs of the IUA issues to the extent that those have survived to Phase 2 together with the applicable overhead). I am similarly going to reserve 15% of HPII's costs to Phase 2 of the litigation, to reflect the outstanding issues as to the IUAs.

The Settlement Parties and Messrs Thomas and Taylor

58. I have dealt with this above. In summary:

    i) There is no order as to the costs of the Settlement Parties as against Messrs Thomas and Taylor in respect of the period prior to the Settlement Agreement.

    ii) The SFO, ERs, Harbour, the Viscount and Stewarts are entitled to recover 10% of their post-Settlement Agreement costs from Messrs Thomas and Taylor. No reduction from the 10% to reflect failure on particular issues is required.

Previously reserved costs

59. A number of previous court orders reserved issues of costs. These were summarised in Mr Zoubir's sixth witness statement. These should be treated as costs of the proceedings.

E PAYMENTS ON ACCOUNT

60. CPR r.44.2(8) requires the court to order a payment on account unless there is a good reason for not doing so. In this case, there is no good reason. The Non-Settlement Parties only opposed payments on account because they suggested that the Settlement Parties were not entitled to costs orders in their favour at all, or in the case of HPII (in writing, but not orally), because the Settlement Parties' costs information did not allow for the issue-based costs order which HPII argued was required (which argument I rejected).

61. As is noted in the commentary in *Civil Procedure* 2021 Vol. 1, 44.2.12, in arriving at a reasonable sum, the court will often estimate the likely recovery on a detailed assessment, subject to an appropriate margin to allow for any errors in estimation. That is the approach I have adopted here.

62. Information provided by Harcus Parker for the Settlement Parties at the request of the Court reveals that the Settlement Parties, excluding the JLs, incurred costs of some £9.6m before the Settlement Agreement, and some £6m afterwards.

63. There are potential issues as to duplication between the work of lawyers acting for different Settlement Parties, and as to the recoverability of at least some of Ogier's costs for the Viscount. For these reasons, I have concluded that it is appropriate to take a 55% figure for payment on account purposes.

64. On this basis:

i) P&M must make a payment on account of costs to the Settlement Parties of £1,037,000.

This takes the pre-Settlement Costs of £9.8m (which reflects a deduction of 15% of Stewarts' costs of the freezing injunction which are dealt with separately). 60% of that figure is £5.88m. 15.75% of that figure is £926,000. The post-Settlement Agreement costs are £6.1m. 15.75% of £6.1m is £960,000. These total £1,886,000. The POA is 55% of that figure.

ii) P&M must make a further payment on account to Stewarts in the freezing order proceedings of £240,000.

This takes the Pre-6 March 2017 Stewarts' Costs of £577,000 and deducts 25% of the £370,000 which was the subject of the order of Popplewell J on 6 March 2017 to arrive at £484,500. 90% of this figure is £436,000. The POA is 55% of that figure.

iii) HPII must make a payment on account to the Settlement Parties of £1,557,000.

This takes the pre-Setlement Costs of £9.8m. 60% of that figure is £.5.88m. 20% of that figure is £1,176,000. The post Settlement Agreement costs are £6.1m. 20% of that is £1.22m. These total £2.396m. 10% of the JLs' pre-Settlement Agreement costs are £205,000. 17% of the JLs' post-Settlement Agreement costs are £231,000 which produces a total of £2.832m. The POA is 55% of that figure.

iv) Messrs Thomas and Taylor must make a payment on account to the Settlement Parties of £335,000.

This takes the post-Settlement Agreement costs of £6.1m. 10% of that figure is £610,000. The POA is 55% of that figure.

65. For P&M and HPII, payment is to be made within 21 days. So far as Messrs Thomas and Taylor are concerned:

i) They have asked for 18 months, to allow time for any distribution to them under the Harbour Trust to be take place.

ii) They have also stated that they are unable to meet the costs order without the benefit of any such distributions, and would be made bankrupt. Both are subject to continuing IVAs: Mr Taylor's ending in June 2022 and Mr Thomas' ending in October 2022.

iii) The Settlement Parties challenge the assertion that Messrs Thomas and Taylor stand to receive any substantial benefit from the Harbour Trust, and also suggest that Messrs Thomas and Taylor have not given a full and frank account of their financial position.

66. I am not satisfied that Messrs Thomas and Taylor's apparent lack of present means to satisfy an interim payment order is a good reason not to make one (any more than it would be a good reason not to make a costs order for detailed assessment). The issues raised by Messrs Thomas and Taylor *may* (and I am reaching no decision in this respect) be relevant to what steps should be made to enforce the order, including as to whether

a stay of execution is appropriate. In these circumstances, I am going to allow 42 days for payment in their case, not because I anticipate their status will change during that period, but to allow time for any enforcement-related application to be considered and prepared.

67. Interest will run on costs which the Settlement Parties have already paid from the date of such payment at 2% over base rate until 4 months from the date of this order, and at the Judgments Act 1838 rate thereafter.