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Case Nos: HC13F01247
HC13D01192
HC13C03047

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2014

Before :

THE HONOURABLE MR JUSTICE HILDYARD

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Between :

MR JOHN GREENWOOD and others	**Claimants**
- and -	
(1) MR FREDERICK GOODWIN **(2) SIR THOMAS MCKILLOP** **(3) JOHN CAMERON** **(4) GUY WHITTAKER** **(5) THE ROYAL BANK OF SCOTLAND GROUP PLC**	**Defendants**
- and -	
TRUSTEES OF THE MINEWORKERS' PENSION SCHEME LIMITED and others	**Claimants**
-and-	
THE ROYAL BANK OF SCOTLAND GROUP PLC	**Defendant**

THE RBS RIGHTS ISSUE LITIGATION

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Philip Marshall QC, Thomas Raphael and **Luke Pearce** (instructed by **Bird & Bird LLP**) for the **BB Action Group**
Andrew Onslow QC and **Adam Kramer** (instructed by **Stewarts Law LLP**) for the **SL Group**
Michael Lazarus (instructed by **Leon Kaye Solicitors**) for the **LK Group**
Richard Snowden QC and **Alex Barden** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **QE Group**
Jonathan Gaisman QC and **James McClelland** (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 4, 5 & 19 December 2013

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Judgment

The Hon. Mr Justice Hildyard :

1. At the conclusion of the third CMC in this matter, the hearing of which ranged over three days (on 4, 5 and 19 December 2013), I gave an *ex tempore* summary of my views on the arguments advanced to me on the important question as to how costs are to be shared in this action, which is the subject of a Group Litigation Order ("GLO") made by me and approved by the Chancellor (as is required by the Rules). I indicated that I would confirm and elaborate these views in a reserved judgment, in which I would also address various other matters raised in the course of that CMC, including measures to ensure (as far as practical) that the issues which are the subject of the GLO are adjudicated as between all persons interested. This is that judgment.

2. It may assist an understanding of the questions in issue (and my answers to them) for me first briefly to outline the context in which they have arisen.

3. The actions before the Court, and those which it is anticipated may be issued, all of which are subject to a GLO, concern a Rights Issue of shares in the Royal Bank of Scotland ("RBS") which was taken up between 15 May 2008 and 6 June 2008 ("the Rights Issue").

4. The Rights Issue price was 200p. The rump placement price announced on 9 June 2008 for the shares not taken up in the Rights Issue was 230p. In October 2008, and in the wake of the financial crisis presaged in this country by the earlier collapse of Northern Rock plc and triggered globally by the failure of Lehman Brothers, RBS failed and required emergency public support. By 3 November 2009 it had effectively been nationalised with 84% of its shares owned by the UK Government.

5. The RBS share price has deteriorated very considerably. Many of those who had subscribed for shares pursuant to the Rights Issue have suffered losses amounting to most of the value of their investment in the Rights Issue shares.

6. By the various actions, shareholders seek recovery of their investment losses on the grounds that the prospectus for the Rights Issue was not accurate or complete.

7. They seek to invoke statutory remedies against RBS under section 90 of the Financial Services and Markets Act 2000 ("FSMA"); and some also, further or in the alternative, seek or may seek recovery against certain of the key RBS directors responsible for that prospectus.

8. The profile of the shareholder claimants (actual and potential) is very varied.

9. There are a considerable number of shareholders who each made relatively small investments in comparison to the value of the Rights Issue (though in many if not most cases, no doubt, their investment represented a considerable proportion of their savings). Around 20,000 such shareholders, so far, have gathered together in Action Groups (see below).

10. Over 170 institutional investors subscribed for very considerable amounts in the Rights Issue. Their losses are enormous. Some of them have already formed an Action Group (again, see below); and others may follow suit, either joining an existing suitable Action Group or forming another one.

11. The total value of the potential claims runs into billions.

12. Two Action Groups have already commenced and another appears to be at the point of commencing proceedings. Another has indicated a likely intention to sue, although to some extent remains inchoate. Other claimants or action groups may emerge.

13. The two Action Groups which have already issued proceedings are:

    (1) John Greenwood and the RBoS Shareholders Action Group Limited, with around 12,000 retail and around 100 corporate, institutional and charitable members, represented by Bird & Bird LLP (the "BB Action Group"/"BB Claimants"); and

    (2) The Trustees of the Mineworkers' Pension Scheme Limited, together with a further 77 or more institutional investors, represented by Stewarts Law LLP (the "SL Group"/"SL Claimants").

14. Not all the members of these two Action Groups have (yet) actually issued proceedings. In the case of the BB Action Group, I should note, with concern, that I have been provided with substantially fluctuating figures as to the value of claims issued. Thus, in the fifth witness statement of Mr Steven Baker of Bird & Bird LLP (dated 22 November 2013) I was told that *"the losses suffered by the members of the BB Action Group who have actually issued proceedings so far would equate to approximately £900 million ([on] BB Action Group's pleaded measure), and the total acquisition value of those claimants' shares is £1.25 billion."* These were the figures Mr Marshall QC invited me to rely on at the Third CMC.

15. In his seventh witness statement, dated 20 January 2014, Mr Steven Baker corrected these figures to £392 million (in place of £900 million) and approximately £490 million (in place of £1.125 billion) respectively. The explanation (and excuse) for these startling differences given by Mr Baker is that there was a mistake made in differentiating between members of the Group and actual Claimants, and thus in calculating the value of aggregate claims. This mistake is regrettable in itself, especially in the wake of earlier inaccuracies in statements made by the BB Action Group or on its behalf as to the availability of ATE cover. I shall expect a greater degree of care and accuracy in the future. For present purposes, however, what the explanation given does illustrate is that, at least in the case of the BB Action Group, there is a considerable difference between the total number of members and the number of members who have become parties to the proceedings.

16. A further two groups of potential claimants have appeared before me as interested persons (and with my express permission) both at the third CMC and the previous two CMCs:

    (1) A shareholder group of some 8,200 members, represented by Leon Kaye Solicitors (the "LK Group"); and

    (2) A small group of large investors, represented by Quinn, Emanuel, Urquhart & Sullivan LLP (the "QE Group").

17. At these hearings, Counsel has appeared for each of the above groups and made submissions.

18. At the first CMC (on 30 July 2013) I concluded that, subject to the approval of the Chancellor and further argument as to the effect, a GLO would be appropriate. After further argument (especially in relation to the effect on GLOs of the Court of Appeal's decision in *Taylor v Nugent Care Society* [2004] 1 WLR 1129), at the second CMC on 17 September 2013 I confirmed my view, subject again to the Chancellor's approval. That approval was given in December 2013. The GLO was finally sealed on 18 December 2013.

19. The following main common issues will require to be decided:

    (1) Whether RBS made misleading disclosures in its prospectus and/or omitted material information and whether a supplemental prospectus should have been issued;

    (2) Whether the Claimants suffered loss and issues of causation; and

    (3) Whether the Defendants (or at least RBS) have a defence under FSMA Schedule 10.

20. Put very summarily, the principal intentions and effect of the GLO are as follows:

    (1) all claims in respect of loss in consequence of investment in the RBS Rights Issue must be entered in a Group Register which I have directed to be maintained by Bird & Bird;

    (2) Claimants and potential claimants may proceed in whichever group they choose, or in a new group or on their own; but they must be registered in the first instance (though they may apply to be removed) and they will be subject to the management of the GLO court and more specifically by me as the designated Judge for these purposes, acting together (where appropriate) with Master Marsh;

    (3) the Court may invite co-operation between various groups, and it may restrict (using its case management powers) the submissions to be made by each on issues common to them; but a GLO has not the effect of a consolidation and (though a single solicitor will be appointed to manage the GLO Register) does not preclude claimants having separate representation;

    (4) so far as possible, all claims will be managed to achieve a single resolution of all common issues: and the GLO Court can (and I would be minded to) require all claimants, whether adjudicated within the GLO or outside it, to agree to be bound by those resolutions of common issues as a condition of pursuing any claim outside the GLO;

    (5) a particular consequence and perceived advantage of a GLO is that it opens the way to orders for cost sharing, without which many smaller investors would in all probability be prevented from pursuing a claim (since the exposure would so enormously outweigh any potential recovery).

21. Before turning to the competing arguments as to whether costs sharing orders should be made, and on what terms, it may assist in bringing home the importance of the issue for me to paint in quite the level of costs that is envisaged. I should say immediately that this is based on estimates only, and not any precise budget: whether formal and precise budgets should be ordered is an issue also raised and to which I must return.

22. In September 2013 the Defendants estimated that their costs would be £41.8 million. The BB Action Group estimated £10–12 million. The SL Group estimated £8.5 million. (I should note that I am told that the two claimant group estimates are based on assumptions which mean they are not cumulative.) The LK and QE Groups will add to all this. How are these costs to be shared? That is the primary question I need to answer.

23. That primary question must be sub-divided:

(1) one sub-issue is how the potential liability of all claimants for the Defendants' common costs is to be borne/shared: this is the question of "adverse costs allocation";

(2) a second sub-issue is how costs of the Claimants should be borne/shared: this is the question as to "Claimants' costs sharing";

(3) a third sub-issue is how costs incurred are actually to be paid: this is the question of "actual payment";

(4) a fourth sub-issue, given the need for certainty of exposure for people deciding whether or not to litigate, is whether, and if so in what circumstances, any directions or orders in respect of the above matters should be capable of being reviewed and altered or revoked: that may be referred to as the question of "reviewability".

Adverse costs allocation

24. The general rule or default position, where the court has made a GLO, is that:

(1) "*any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs*": CPR 46.6(3);

(2) where a 'group litigant' is the paying party, "*he will, in addition to any costs he is liable to pay to the receiving party, be liable for –*

a) the individual costs of his claim; and

b) an equal proportion, together with all the other group litigants, of the common costs": CPR 46.6(4).

25. CPR 46.6(2) provides definitions of these phrases:

a) 'individual costs' means costs incurred in relation to an individual claim on the group register

b) 'common costs' means –

i) costs incurred in relation to the GLO issues;

ii) individual costs incurred in a claim while it is proceeding as a test claim; and

iii) costs incurred by the lead solicitor in administering the group litigation; and

c) 'group litigant' means a claimant or defendant, as the case may be, whose claim is entered on the group register.

26. These default and general rules are the starting point: but the Court of Appeal has (albeit in a different context of a multiplicity of claims for industrial injury) encouraged the devising and development of new procedures and techniques adapted to the circumstances of particular group litigation: see *Horrocks v Ford Motor Company Ltd*, The Times February 15, 1990, and White Book (2013) at 48.6A.2 (page 1542).

27. As suggested by Sir Thomas Bingham MR in *Ward v Guinness Mahon Plc* [1996] 1 WLR 894 at 900G-H, the court has considerable latitude and the broad question is: what, in the particular situation, does fairness demand, having regard to the objectives of the procedure for a GLO, the nature of the claim, and the positions of the claimants?

28. Where there is, as there is in this case, a very considerable disparity between the values of the claims of different parties, if they are all unsuccessful the default rule is unlikely to meet the requirement of fairness. It is not fair or equitable that an institutional investor with millions, in some cases hundreds of millions, at stake should pay an equal contribution as an individual claimant with claims in the hundreds, or even hundreds of thousands. Adoption of the default rule would tend to negate a primary purpose of GLOs.

29. None of those represented before me, on either side of the dispute, actively contended that the default rule is appropriate in this case. The two competing alternative measures for sharing of any potential liability for the Defendants' common costs were as follows:

(1) several liability for each Claimant in proportion to acquisition cost (as proposed by the LK Group and supported by the SL Group, with some sideline support also from the Defendants); or

(2) several liability for an equal share for each lead Claimant Group, so that (in other words) the adverse costs would be split equally per Claimant Group, with all members of that group then being divided equally or as stipulated by agreement within that group (as proposed by the BB Action Group).

30. As may be obvious, the BB Action Group's proposal for adverse costs to be split equally between claimant groups is advantageous to groups with numerically the most members: and the BB Action Group has (so far, at least) accumulated the most

members. The extent of each Claimant's exposure to adverse costs per £1,000 of subscription cost (and therefore, the risk borne per £1,000 of potential reward) would depend on the aggregate subscription cost of the members of the group of which that Claimant was a member. The estimated result (as at December 2013) would be that BB Action Group members would be exposed to Defendants' costs at roughly one eighth the rate per £1,000 invested of SL Group members.

31. The BB Action Group submits that this advantage is legitimate and principled on the following bases:

(1) that where there are different claimant groups, the unit by reference to which equal sharing should be addressed is the group, and not each individual within that group: it is said that the individual members are no longer individual litigants in substance – their will and action is expressed in a single (group) unit;

(2) in a case where (as here, it maintains) litigation is being conducted by what it terms 'Lead Litigating Groups', who are each conducting an equal share of the litigation, then each Group is causing an equal share of the common costs to be incurred by the Defendants, and should assume a corresponding share of the risk of adverse costs;

(3) each group has what it terms a "sufficient interest in litigation" independently of any other Claimants, and each such group should be treated as a unit;

(4) there are "strong practical reasons in favour of an equal allocation per group. It would mean, in particular, that the SL Group's adverse costs cover of £12.25m was fully utilized, thereby enabling effective utilisation of the resources of the three potential Lead Litigating Groups";

(5) equal apportionment per group has the benefit of simplicity and certainty.

32. The LK Group and the SL Group reject these contentions. The gist of their submissions, taken together, appears to me to be as follows:

(1) that the BB Action Group proposal is unfair and unjustified, having no legal or other precedent nor anything else to recommend them;

(2) that the proposal is born of self-interest, and also (and more particularly) a panic response to a difficulty which has arisen for the BB Action Group in obtaining the adverse cost cover that it represented to prospective members it had or had arranged, and its desire to lay off part of the risk onto (in effect) the SL Group's adverse cost cover (which is already in place);

(3) that the proposal produces an unfair mismatch between risk and potential reward: under it, the BB Action Group and the SL Group would take (say) £30 million adverse cost risk but in return for prospective recoveries of around 92.3% and 8.7% respectively of the compensation claimed;

(4) that the proposal subverts the underlying theme of equality, and would also expose other potential claimant groups with a retail investor only membership (such as the LK Group) to risk hugely disproportionate to recovery;

(5) that the proposal is based on a unit (the group) which is an irrelevant unit for adverse costs purposes, and is not in any case a separate legal person against whom costs could be enforced;

(6) that the proposal creates perverse incentives for all non-BB group members to join the BB Action Group (to obtain lower adverse costs risk in proportion to the size of the claim than anyone who joins or issues in a smaller group);

(7) that the central premise advanced by the BB Action Group, to the effect that adverse costs risk should reflect each Group's responsibility for the active conduct and control of the litigation, (as I put it, "he who wishes to call the tune must pay the piper") breaks down in its application to what it terms 'Follower Groups' which it so describes because they will be late arrivals with lesser or minimal input into litigation decisions: the BB Action Group's logic would suggest those Follower Groups should bear no adverse costs exposure but that is not at all what BB Action Group has in mind.

33. In my judgment, the fairest solution as regards adverse costs liability is that proposed by the LK Group and supported by the SL Group: that is also the solution that seems to me to result in the least departure from the starting point in the Rules, which reflects equality. As it seems to me:

(1) there is neither logic nor fairness in taking as the relevant unit each Claimant Group: the Court should not easily or usually depart from the starting point (and legal fact) that proceedings are brought by individuals and legal entities (such as bodies corporate) and not by groups (which are self-assembled agglomerations without other legal standing), and that each individual or entity should bear a fair share of the risk in seeking its own reward;

(2) the discrepancy to which I have referred in paragraphs 14 and 15 above between the total number of members in the BB Action Group and the number of those members who are parties to issued claims further undermines the logic and fairness of what the BB Action Group proposes;

(3) whilst for the reasons I have already adumbrated, the starting point of equality of risk for every litigant must, where there is such a disparity in the value of claims, yield to some fairer relationship between risk and reward, the objective should be a fair alignment of risk and reward by reference to the position of each claimant, the group they have chosen to join being of little, if any, legal or logical relevance;

(4) further, the Court should seldom allocate liability to a 'unit' against which no enforcement process can lie: risk should be personal, and personally enforceable;

(5) I have taken into account, and indeed when the matter of costs sharing was first ventilated in July 2013 was much swayed by, the dangers of any

allocation which in effect enables persons to litigate at minimal risk individually (which is the mathematical result in the case of persons with small claims, however measured): I have concluded that the advantages outweigh the risk, and it is after all to enable claims where the reward hugely outweighs the risk that the rules have provided for several liability in the context of GLOs. Further, and as Mr Lazarus on behalf of the LK Group stressed, the effect of cost sharing is that even those with large claims face a comparatively small costs exposure: the risk is very much diluted for all.

(6) any weighting or other allocation by reference to the extent of control exercised by the paying party or 'unit' is likely to be (and in my judgment in this case is) too difficult a task: personal responsibility is the better and fairer approach.

34. A further question to be considered, if adverse cost liability is to be imposed on each Claimant, is how the value of each claim is to be measured: that is also relevant to the next sub-issue as to the allocation of Claimants' own common costs. Two principal candidates were discussed:

a) pro-rating by the acquisition cost of each Claimant's shares (most of which had the same subscription price of 200p, although some were subscribed at 230p); or

b) pro-rating by the amount of compensation claimed or recovered.

35. The LK Group and the SL Group propose (a), primarily on grounds of practicality, given the obvious difficulties of precise quantification on any other basis. The other candidate was (b), given (as the BB Action Group pointed out primarily as part of its argument that neither (a) nor (b) was satisfactory) that there may be considerable variations as to actual loss, according to whether, when and for what price a subscriber sold its shares (taking loss as subscription price less sale proceeds).

36. In my judgment, (a) is the most practical result and should be adopted, even though (b) more closely matches the underlying rationale of pro-rating. In summary, my reasons are:

(1) potential reward may in some cases not be easy to measure, and indeed in most cases may depend on which amongst many possible measures is eventually preferred and selected: the objective should be to select a measure that can be applied across the board without material unfairness;

(2) the evidence so far available is thin, but does not suggest support for the hypothetical example suggested by the BB Action Group to illustrate unfairness in solution (b) (which was to contrast a claimant who sold at 180p with one who sold at 40p): so far as the evidence goes, the average loss across all BB members, calculated as subscription cost less sale proceeds, is 80% of the amounts subscribed;

(3) further, on the basis of the SL Group's preferred measure of loss, of subscription cost less true value at the date of acquisition, there is no difference between the damages claimed per share as between different

claimants, except in the case of subscribers who paid a 15% premium to acquire shares in a post Rights Issue Placement;

(4) no measurement is fixed and appropriate in every case: there is much to be said for a pragmatic approach: in this case, the measure of subscription price is a fair proxy as an 'across the board' measure of potential reward.

37. That deals with the basis of liability for adverse costs. It remains only in that context for me to confirm, for the avoidance of doubt, that the basis of liability for adverse costs should, in my judgment, apply to all claimants, whether existing or in the future (subject only to the provision for variation, as to which see below).

Claimants' own common costs

38. The next sub-issue is how (a) the Claimants' own common costs and (b) the Lead Solicitor's costs are to be shared.

39. As to (a) above, in this context, the SL Group and the BB Action Group, which are the only two groups some of whose members have instituted proceedings, have already reached an agreement (subject to the consent of the Court). Put broadly, the agreement is that each such Group (each being a 'Lead Litigating Group', playing and wishing to continue to play an active role in the conduct of the litigation) will bear its own costs of conducting the litigation, on the basis that such conduct and control will be shared approximately equally.

40. The SL Group has rationalised and promoted this as fair in the particular circumstances, given especially that

i) the majority of issues (including the substantive issue of liability) are common to all Claimants (actual and prospective) and are unlikely to be decided by way of test claims (such as to impose particular costs on the test Group Claimants);

ii) both the SL Group and the BB Action Group are already quite far advanced in the litigation and have chosen their own legal teams and made fee arrangements with them; and

iii) it is administratively simpler for each group to bear its own costs, since it reduces or simplifies the process for exchanges of schedules of costs for allocation between the two groups.

41. I am content to approve those arrangements as they are agreed between the SL Group and the BB Action Group. The question therefore becomes what are to be the arrangements as regards other groups, whether they are additional active participants or groups labelled by SL Group and the BB Action Group as 'Follower Groups', such as the LK Group.

42. In that regard, the LK Group has confirmed that it accepts that each Claimant should bear several liability for Claimant common costs, pro-rata to each Claimant's subscription cost of the shares acquired in the Rights Issue or subsequent placement. As Mr Lazarus put it in his oral submissions [T/S 4/12/2013 p27]:

> *"…if we are right about proportionate sharing of defendants' side costs then we say it follows, as night follows day, that the same proportionate approach should apply to claimants' side common costs."*

43. Thus, subject to the agreements already made, the SL, LK and BB Action Groups all are agreed that, in principle, all present and future claimants should be under the same common costs liability, and that such liability should be several and proportionate to the subscription cost. The only potential claimants represented before me who did not agree with this was the QE Group.

44. All are content, as I understand it, that the relatively minor costs of the Lead Solicitor in discharging that function shall be shared between all Claimants on the same proportionate basis, subject to any inter-group arrangements that have been or may be made.

The QE Group's proposals: the question of future claimants

45. The QE Group is presently little more than 'virtual': its membership is uncertain and undisclosed. I have allowed this inchoate body to be represented before me at the three CMCs so far held, on the assurance that it is comprised of at least some major prospective claimants with a real interest in the claims the subject of the GLO.

46. Through Mr Richard Snowden QC, the QE Group floated a proposal ("the QE Proposal", which was presented as intended to *"open a debate"*) that Claimants who are not members of any Lead Group, but who (a) register (as they must) on the GLO register; and (b) recognise (as also they must, subject to any contrary and special order of the Court) that their claims would be under the GLO regime and procedural umbrella, and they will be bound by any decisions in relation to GLO issues, should be able to choose to have their claims "parked", and not actively to progress their claims; and that whilst "parked" (or subject to a formal stay) such claimants should not be liable to contribute to Claimants' common costs, or incur liability for adverse costs.

47. The QE proposal, put shortly, would enable claimants to avoid any costs liability for litigation being conducted by others by waiting on the sidelines to see whether the case has been won or lost. It has the obvious attractions of a permitted bet on the 2.30 race at 4 o'clock.

48. Although Mr Snowden sought to corral the LK Group (the constitution of which is more established, but none of whose members has yet instituted proceedings) to his cause, even they declined the invitation. I agree with the SL Group and the BB Action Group that it is not, in itself, a realistic proposal.

49. But (as I accept it was at least in part intended to do) it has proved useful in focusing more thought as to the position of claimants who have not yet instituted proceedings, but who may actively be considering it, whether as part of the QE Group, or the LK Group (or, indeed, some further group presently unnamed).

50. Although the Defendants preferred to defer the issue, the BB Action Group (with some reservations), the SL Group (with enthusiasm) and the LK Group (with more

hesitation) all addressed the QE proposal and pressed me to indicate my (at least) provisional views in this regard, to provide guidance for potential claimants, and (subject to special circumstances not presently in contemplation) uniformity of treatment for all under the GLO umbrella.

51. Rather than rehearse their arguments I think it more helpful to adumbrate my provisional views, which reflect them, as follows:

(1) one of the principal objectives of a GLO being to corral all claims with a view to the economic adjudication of common issues and the avoidance of separate trials (and the likelihood of expensive duplication and the risk of inconsistent decisions), directions should be fashioned to encourage all claimants to co-operate together, pool resources and bring forward all their arguments at once;

(2) although the court cannot order a Claimant to join one or other group, and cannot prevent Claimants seeking to litigate outside the GLO framework after the cut off date imposed by the GLO but before the expiry of any applicable limitation period (see *Taylor v Nugent Care Society* [2004] 1 WLR 1129 at paras 15 and 16), the court should minimise any comparative advantage of doing so;

(3) it is not consistent with these objectives, nor is it fair, to provide for privileged 'observer status' without risk in respect of adverse costs nor contribution to claimants' common costs: and, furthermore, to provide for such status would tend (a) to subvert the public policy behind limitations periods (since it might encourage claimants to issue to avoid any bar, and then sit on their hands) and (b) to destabilise the orderly assembly of groups (since it could lead to everyone jockeying to let someone else take the costs risk);

(4) costs-sharing is a fundamental feature and advantage of a GLO: subject to special circumstances, or any special arrangements agreed between group members *inter se* as to sharing within that group: all claimants (whether active or passive, stayed or not) should be subject to the same regime of common costs liability as regards both adverse and own costs, including those incurred prior to issue of their own proceedings;

(5) especially given that in this case there is only a couple of months between (a) the GLO cut off date presently in place and (b) the end of the likely limitation period, prospective claimants who have not yet issued should not suppose that the option of a stay will be available: it is more likely that case management directions will be given to require 'stragglers' to catch up, rather than be permitted to place late bets on earlier races;

(6) 'stragglers' must also accept the consequences of their reduced involvement in the decisions as to the shape and progress of the litigation: this is likely to include being required to adopt particulars of claim already served on behalf of the members of active groups, with only such variations as the Court expressly permits, and with possible repercussions in costs.

"Pay as You Go"

52. A further issue raised by the LK Group was that of funding of common costs: liability being one thing, and a cash call another. The LK Group submits that its members should not be required to make actual payments to the Lead Litigation Groups on account of Claimants' common costs during the course of the litigation: actual payment should be deferred until the end of the dispute and final quantification of the amounts due. The SL and BB Action Groups contend that this would constitute 'free riding', and urge "Pay as You Go."

53. The LK Group's position, in summary, is that they would be unfairly disadvantaged by "Pay as You Go" in circumstances where:

    a) by reason of its smaller membership and the aggregate value of its claims (measured by the proxy of subscription amounts) Mr Kaye of Leon Kaye has calculated that (on the basis of a total of some 8,000 members at the calculation date in December 2013 with aggregate subscriptions of some £49 million) LK Group members will already be liable to contribute more per £1,000 subscribed to their own costs than any other group;

    b) this has been exacerbated by the fact that the BB Action Group refused to admit small claimants before 31 October 2013 leaving the LK Group to keep the small claimant flag flying despite administrative costs disproportionate to value of aggregate claims;

    c) the collection of contributions would add disproportionate cost.

54. The SL and BB Action Groups reject this and contend (in summary):

    a) the cash contributions required will be relatively small in amount, but are significant in point of principle;

    b) it would be unfair for the LK Group to obtain free credit from the Lead Groups during the course of the litigation;

    c) it should be for the LK Group to take the steps necessary to ensure contributions are paid: it would be impractical to expect the Lead Groups to do so;

    d) the fairest approach would be for the LK Group to be sent, and to pay, a bill at regular intervals (for example, every month or quarter): and once established the system should not be unduly onerous or expensive.

55. Subject as follows, I agree in substance with the SL and BB Action Groups' position, for the reasons they give: there is no fair basis for any substantial departure from "Pay as You Go".

56. However, I welcome the fact that it was recognised by the Lead Groups during the course of the hearing on 19 December 2013 that the implementation of "Pay as You Go" should be deferred for the present, and not become active until (i) the shape of the various groups and the number of litigants in each is better known and (ii) more

detailed adumbration of the process of what I might term 'call and collection' has been worked out.

Variations to the Order

57. Other directions calculated to achieve the objectives of the GLO may well be required; and the adumbration provided above is necessarily subject to the emergence of special circumstances not presently envisaged or focused upon, as I have already indicated. But the message that all claims will be subject to substantially the same directions, time limits, burdens and risks as to costs, and that there is little or no advantage to potential claimants of adopting a policy of 'wait and see' now that the cut-off date, and a time bar, is so close at hand, is most unlikely to change.

58. There is often a balance to be struck between the conflicting objectives of certainty and flexibility. The BB Action Group favours flexibility and contends that the orders made now should simply be "subject to further order". The SL Group and the LK Group favour more certainty, as being necessary so that parties contemplating joining a group and/or commencing proceedings should be able to measure with greater certainty their exposure.

59. The SL Group and the LK Group suggest adoption by analogy of the balance struck by the Rules Committee in CPR 3.19(7) in relation to cost capping orders, which is that once a cost capping order has been made, no variation to it will be permitted unless

> *"(a) there has been a material and substantial change of circumstances since the date when the order was made; or*
>
> *(b) there is some other compelling reason why a variation should be made."*

60. The analogy is not perfect: there are more variables in the present context. However, I think it is a reasonable template for present purposes, because it reflects the overriding need for potential claimants to know where they stand unless circumstances materially and substantially change. I propose to adopt it.

GLO cut-off date

61. As noted in passing above, the short time period in this particular case between (a) the GLO's present cut-off date and (b) the likely limitation expiry date invites the question whether (as the SL Group advocate) the two should now be aligned, or the separation retained (as the BB Action Group continue to maintain).

62. When the cut-off date was fixed, it was intended to provide (a) an incentive to parties to issue well before the limitation date and (b) a balance between adequate notification of the GLO and some sense of urgency. It was also intended to indicate the last date at which it was feasible to expect late joiners to catch up.

63. At the time, it was expected that the GLO would be ordered and publicised in summer 2013. As it is, the GLO was finally approved and sealed in December 2013: and a

number of issues have had to be addressed and canvassed (including those covered in this judgment) to bring more understanding of its effects.

64. Its utility and benefits are now questionable; and it does have the negative effect of perpetuating the problem which could arise as to what is to be done about proceedings issued after the cut-off date but within the limitation period, which though soluble (by case management) could prove an unnecessary distraction.

65. At the end of the Third CMC, on 19 December 2013, I indicated that I was minded to abandon the cut-off date as being, in the particular circumstances, of little or no utility; but I invited written submissions if any person represented considered that this would cause difficulty or the loss of some positive advantage beyond those identified above. Then, in a draft of this judgment circulated for corrections, I suggested that it might instead be beneficial to replace the present cut-off date with one aligned to the limitation date.

66. This suggestion, and my previous invitation, prompted an email discussion between the parties, who could not agree as to which would be best of three options, but helpfully put forward three options for my further consideration. These are (a) a cut-off date of 6 June 2014 (six years after the latest time for acceptance and payment by those subscribing under the Rights Issue); (b) an order that the cut-off date simply be set aside; and (c) a cut-off date of 15 May 2014 (the earliest date on which the Defendants would contend that a relevant limitation expiry date falls). The disagreement between the parties reflects the difficulty of establishing for all purposes and in all cases when the limitation period will expire, and the reality that there could be multiple dates that are claimant-specific.

67. These options have competing merits, although I consider the choice ultimately to be between (a) (a cut-off date of 6 June 2014), which is the option favoured by the Defendants and (b) (no cut-off date), which is that favoured by the SL Group, and is not objected to by the BB Action Group. The third option, (c) (a cut-off date of 15 May 2014), although favoured most by the BB Action Group, seems to me the least attractive, since it would leave scope for claims to be brought outside the GLO cut-off but yet within an obvious potential limitation period.

68. On balance, I have concluded that the slight advantage of specifying a cut-off date is outweighed by the risk that potential claimants may be misled into thinking that all proceedings before that date will be safe from any limitation bar, which may not necessarily be so. Although wording stating this not to be the case would, of course, minimise that risk, the warning might not be heeded in the glare of the headline date; and further, there is, to my mind, an inherent contradiction in specifying a cut-off date which may post-date a limitation bar. In such circumstances, I confirm that I consider the cut-off date should be set aside. But I emphasise that this is not to be taken as an invitation or excuse to delay. I still expect to apply case management directions across the board: ‘stragglers’ will simply have to catch up, and the longer they delay their decision the more hurried and hectic will be the task, and the more the litigation will be shaped, at their shared expense, without their input.

Future participation by non-parties

69. That leads on to a question which was also raised before me as to whether I should continue to permit participation by persons or groups (such as the QE Group, and indeed, as far as I know the LK Group) who are not, or none of whose members is, an existing claimant.

70. In the first three CMCs, as will already be apparent, I did permit such participation, chiefly on the bases that it seemed to me that (a) although anonymous they were representatives of persons interested and (b) the shape of the proceedings was better determined with initial input from all those interested.

71. The BB Action Group, in particular, has objected to a continuation of this approach. It has asked for an order that as from 15 January 2014 the QE Group and the LK Group shall no longer be entitled to be heard in these proceedings unless (a) they shall have issued proceedings or (b) they shall have issued an application seeking relief in the name of identified clients.

72. I am broadly in sympathy with the view that, although the contours and boundaries of the case are still not fixed, the time, if not already come is fast approaching, when it would be right to allow case management to be influenced only by persons who are identified as and are parties to the litigation, rather than by interested spectators, however large their potential claims.

73. However, as indicated in my provisional *ex tempore* judgment on 19 December 2013, I do not propose to make an order now expressly excluding non-parties from being heard, since there may yet be matters that touch and concern interested persons even though they have not yet issued and on which I consider it right they be heard.

74. That said, I would hope and expect that the issue will disappear because those interested recognise that there is disadvantage in delay; and those still uncertain and who have not issued will (as I put it previously) have to overcome the hurdle of my likely disapproval (especially if the members of a group remain unidentified and thus anonymous). Put another way, by way of emphasis, I would not expect to hear from either the LK Group or the QE Group at the next CMC unless identified members have by then issued proceedings under the umbrella of the GLO.

Cost budgeting

75. I turn last but not least to the issue of cost budgeting, as to which the principal protagonists are the BB Action Group (which urges that it be directed) and the Defendants (who oppose any formal budgeting exercise as premature, unrealistic and presently unachievable in any useful timescale).

76. The BB Action Group's application, in its original manifestation, was for the Defendants to be ordered to produce a full budget in the form of Precedent H as appended to the Practice Direction on Costs Management (PD 3E).

77. The exchange of formal budgets is, of course, automatically required by CPR 3.13 in many cases (unless the court otherwise orders): but the automatic arrangements do not presently apply to cases before the Admiralty and Commercial Courts (irrespective of

the value of the claims in issue) or in higher value Chancery Division claims (in excess of £2 million, soon to be raised to £10 million). The Defendants thus depicted the BB Action Group's application as requiring a departure from a *prima facie* position and the making of an exceptional order.

78. This is in many ways an exceptional case; and a budgeting exercise modelled on Precedent H may well become appropriate, as perhaps may cost capping.

79. However, the detailed evidence provided by the Defendants as to the difficulties they would presently face in preparing a formal budget seemed to me persuasive; and the conclusion that the exercise simply could not be done seemed to me difficult to dislodge at this stage.

80. After I had provisionally expressed that view in the course of the first part of the hearing of the Third CMC over the course of 4 and 5 December 2013, the BB Action Group adjusted their application to seek a more limited order and a more informal process designed to meet what I suggested might be a worthwhile objective of *"trying to find a process which gradually enables us to achieve some more focussed assessment of costs."*

81. The order sought by the BB Action Group was that the Defendants should by 31 January 2014 provide

    a) accurate figures of costs expended to date;

    b) an updated version of the existing estimate for costs going forward, split up to address (i) a trial on liability only and confined to claims under FSMA sections 87A and 90; and (ii) a full trial, in each case identifying also (aa) assumptions as to length of trial; (bb) the number of witnesses envisaged and (cc) the categories of expert evidence anticipated, with reasons;

    and that "otherwise" the costs budget application should be adjourned.

82. Mr Jonathan Gaisman QC, on behalf of the Defendants, dismissed all this as a "cross breed" with doubtful parentage, based in neither principle nor precedent, and premature.

83. Perhaps predictably, I indicated in the course of the hearing, and confirm now, that I favour a middle course, all with the objective of gradually increasing the definition required in the recording of past and the budgeting of prospective costs, and in the meantime providing some information to actual and prospective claimants what the aggregate adverse costs are likely to be, so that each group may better assess what after the event insurance they will require. I also think that reciprocity is appropriate, and that all parties should exchange suitable information.

84. To that end, I directed that the parties should exchange (a) (by 31 January 2014) a composite statement of the costs actually incurred in these proceedings up to and including 31 December 2013, which can then be updated when appropriate in accordance with future directions and (b) (by 31 March 2014) a list indicating the areas of expert evidence which they presently consider is likely to be required and the

number of experts they present, together with an estimate of the likely costs, as part of updated estimated budgets.

85. I also directed the parties to address in writing (whether by letter or position paper, as appropriate) the merits and potential parameters of a split trial, with Claimants to provide this by 7 February 2014, and the Defendants to respond within 21 days thereafter.

86. I do think the BB Action Group's application was and is premature; I propose to dismiss it, but without prejudice to the right of the BB Action Group (or indeed any other parties) to make a fresh application once the exercise would be of more utility and there is sufficient time for its completion.

Causation and Quantum

87. A further issue briefly ventilated at the Third CMC was whether the Defendants should be required to plead a response at this stage to the Claimants' cases on causation and quantum. There was insufficient time for full argument at the hearing, and it was agreed that the issue should be addressed more fully in written submissions.

88. There has been an exchange of written submissions accordingly. This took place over the course of December and January, comprising (a) a note on behalf of the BB Action Group dated 21 December 2013 ("BB's Note"), (b) submissions on behalf of the SL Group dated 3 January 2013 ("SL's Quantum Submissions"), (c) submissions on behalf of the Defendants ("The Defendants' Quantum Submissions"), (d) and (e) Reply Notes on behalf of the BB Action Group ("BB's Reply") and the SL Group ("SL's Reply"), both dated 20 January 2014.

89. The BB Action Group and the SL Group submit that the Defendants should now be directed to plead to causation and loss, as they would ordinarily be required to do by the CPR.

90. In the Defendants' Quantum Submissions Mr Gaisman QC has set out a number of reasons why the Defendants submit that no such direction should be made. The main points he makes can I think be summarised as follows:

(1) the starting point must be my order of 17 September 2013 ("the September Order" made after the Second CMC) which originally (in its paragraph 28) excused the Defendants from the task, but required them to provide details in writing of certain issues relevant to causation and loss adumbrated in paragraph 29 of that order;

(2) the rationale of those directions (which Mr Gaisman maintains have been complied with so far as they imposed an obligation on the Defendants) still holds good, and in any event only a material change of circumstances would justify departure from them at this stage;

(3) the appropriate next stage is not for the Defendants to be required to plead to causation and loss, but for the parties to address in correspondence, by letter or

position paper as appropriate, the merits and potential parameters of a split trial;

(4) that process will provide all that is necessary to determine whether (and if so on what bases) there should be a split trial: requiring a pleading from the Defendants would not assist, and (since the Defendants have not yet instructed experts or fully assessed the position) would *"simply engender an uninformative non-admission";*

(5) only after a determination whether there should be an order for a split trial, and indeed only if such an order is not made, should the Defendants be required to plead to causation and loss.

91. The BB Action Group, with whom the SL Group substantially agrees on this topic at least, rejects each element of the Defendant's Quantum Submissions. Again summarising (and thus perhaps not capturing every nuance) it is submitted on their behalf that:

(1) the rationale for excusing the Defendants from pleading to causation and loss in the directions made in the September Order was (contrary to the Defendants' submission) that it would not be fair or efficient for the Defendants to have to plead to those issues in two parts, one in reply to the Claimants' general case on quantum and causation and then again secondly to any more specific case advanced in the context of the then proposed test claims: it was a temporary suspension only directed in the expectation of test cases on the issues in question;

(2) that rationale no longer applies: now that it has been agreed (as I should perhaps earlier have recorded it has) that the question whether there is any need for test claims should be deferred pending determination of whether to split the trial, there is no good reason why the usual rule requiring the Defendants to plead to all matters should not be applicable;

(3) the provisions of paragraph 29 of the September Order (see paragraph 90(1) above) was not a *quid pro quo* for any long term displacement of pleading on causation and quantum, but simply a short term expedient to assist in clarifying subsequent debate on the issue of test cases: further, the Defendants have not, or not sufficiently, addressed the last part of that paragraph 29;

(4) the landscape has thus fundamentally changed, constituting a substantial change of circumstances if that is to be a test in these circumstances;

(5) requiring the Defendants to plead now to causation and loss will assist in (a) focusing the mind of the Defendants on issues of quantum, flushing out any positive case to be asserted and thus alerting the claimants and the court to areas of dispute and difficulty; (b) assessing the question of a split trial and especially in determining the potentially complex questions as to what the boundaries between one part of the trial and another should be;

(6) more generally, the Defendants' contention that their pleading, if required, may be too general to be useful should be discounted: the Defendants should be held to the usual obligations in that regard.

92. Having weighed these arguments carefully I have concluded that the Defendants should now be required to plead to causation and loss. In summary:

(1) Although I accept that the fact and rationale of the September Order is the starting point, I am persuaded that the landscape has changed and that in any event the rationale is no longer compelling enough to warrant the delay in identifying the factual and legal issues in play that continued adherence to it would involve;

(2) There is a distinction between interlocutory case management directions of this kind, which can be and should be reviewed as the case changes and develops, and orders for such things as costs sharing, which are likely to be relied on by persons in making personal financial assessments;

(3) time will tell what assistance it provides: but I do not think I should assume that the exercise would be futile, and indeed I think it more likely than not that it should, if carefully done, assist, especially in bringing greater definition to, or at least revelation of, the true areas in contention;

(4) that is particularly so in weighing the merits of splitting the trial and in determining what the boundaries of each trial should be, a question likely to be of some complexity.

93. In point of timing, I consider that six weeks from the date of the circulation of this judgment in draft should suffice. If the Defendants contend otherwise, a single page explaining why before formal hand-down should suffice for me to determine the issue; the claimants may respond if they consider it necessary, within two days, and on a single sheet.

Miscellaneous matters

94. It will already be apparent from the discussion above that the provisions relating to test claimants at paragraphs 22 to 25 and 29(b) of my Order of 17 September 2013 should be suspended until further order, to be reactivated according to whether and on what basis a split trial is ordered, or if circumstances warrant that.

95. I have been persuaded that the deadline for service of the Claimants' Replies should be 11 April 2014; but that is expressly subject to further order of the court.

96. I was also persuaded that the Fourth CMC, which had been listed to take place between 20 and 22 January 2014 should be adjourned until after service of the Reply. This was agreed by all parties, and seems to me sensible; but any party should have liberty to apply to restore the Fourth CMC at an earlier date if that is required.

97. I would propose, unless the parties advise me otherwise, to consider further the question whether or not to direct a split trial, and if so on what terms, at the Fourth CMC.

98. The parties' time estimate for the Fourth CMC is two days: I require this to be reviewed and confirmed by all parties, with an agreed agenda and time estimates for each item on the agenda, as soon as possible (and not more than three days) after the service of the Reply.

99. The parties have already drafted a form of Order to be completed according to this Judgment: I would invite Counsel to revise and complete the draft accordingly, so that, if agreed, the order can be directed to be sealed when this judgment is handed down, and if not agreed, the points in dispute can be resolved at that time.

100. Lastly, there is a disagreement between the Defendants and the BB Action Group as to whether the issue between them as to the costs of the 'budgeting application' should be determined on paper or at a short oral hearing. The BB Action Group submit that no oral hearing is necessary, and such a hearing would occasion delay, especially if other groups or claimants might wish to be represented. The Defendants ask that there be an oral hearing after handing down of this judgment. I consider that the Defendants (who seek their costs) and the BB Action Group (which opposes any order against it) should (within four days of receipt of the draft of this judgment) exchange written submissions (which I would expect to be short) and provide copies to all other groups who attended the relevant hearing, inviting them to state whether they wish to make any further submissions (given common liability for adverse costs). My clerk should be supplied with the written submissions and the responses from other groups and persons. I will determine then whether I consider an oral hearing to be justified; but my present inclination is to permit such a hearing, limited to 30 minutes, with time allocation to be agreed between the contestants.