

**IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN  
CIVIL DIVISION  
CHANCERY PROCEDURE**

**IN THE MATTER** of the Companies Acts 1931-1996

and

**IN THE MATTER** of the Companies (Winding-Up) Rules 1934

and

**IN THE MATTER** of Kaupthing Singer & Friedlander (Isle of Man) Limited (In Liquidation)

and

**IN THE MATTER** of the Application Notice of Michael Simpson as Liquidator of Kaupthing Singer & Friedlander (Isle of Man) Limited (in liquidation) dated 3 July 2018

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**SKELETON ARGUMENT OF MICHAEL SIMPSON AS LIQUIDATOR OF  
KAUPTHING SINGER & FRIEDLANDER (ISLE OF MAN) LIMITED (IN LIQUIDATION)  
IN RELATION TO THE PAYMENT OF INTEREST TO THE DCS**

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1. In this Skeleton Argument the following abbreviations will be used –

<b>“KSFIOM”</b>	Kaupthing Singer & Friedlander (Isle of Man) (In Liquidation)
<b>“The Liquidator”</b>	Michael Simpson as Liquidator of KSFIOM
<b>“the 2008 DCS Regulations”</b>	The Compensation of Depositors Regulations 2008 (SD No.826/08), as amended by the Compensation of Depositors (Amendment) Regulations 2009 (SD No.232/09)
<b>“The 2009 DCS Amendment Regulations”</b>	the Compensation of Depositors (Amendment) Regulations 2009 (SD No. 232/09)
<b>“DCS”</b>	The Depositors' Compensation Scheme brought into force by the 2008 DCS Regulations, as amended
<b>“Depositors”</b>	Creditors of KSFIOM who deposited monies with KSFIOM and were thereby entitled to claim in the DCS and the EPS (defined below)
<b>“FSA”</b>	The Isle of Man Financial Services Authority
<b>“the Scheme Manager”</b>	The Scheme Manager of the DCS (which is the FSA, pursuant to the provisions of Regulation 5(1) of the

2008 DCS Regulations and Article 4 of the Transfer of Sanctions (Isle of Man Financial Services Authority) Order 2015

<b>“Liability”</b>	KSFIOM’s liability to each Depositor for funds deposited with KSFIOM
<b>“EPS”</b>	Collectively, the Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment Scheme (GC1/09) and the Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment (No. 2) Scheme (GC4/09), set up by the Treasury of the Isle of Man Government
<b>“Statutory Interest”</b>	Interest due to be paid to the Depositors pursuant to Section 23(4) of the Bankruptcy Code 1892 (as applied by Section 248 of the Companies Act)

2. This Skeleton Argument is filed in support of the above Application of the Liquidator of KSFIOM, which seeks directions from this Honourable Court pursuant to Section 185(3) of the Companies Act 1931 as to whom the Liquidator shall pay Statutory Interest due to those unsecured creditors of KSFIOM who claimed in the DCS and/or EPS.
3. By Judgment and Order dated 16 June 2017 in this matter, His Honour Deemster Corlett gave directions as to the calculation of Statutory Interest payable to unsecured creditors of KSFIOM, pursuant to Section 23(4) of the Bankruptcy Code 1892, as applied to the liquidation of KSFIOM by provision of Section 248 of the Companies Act 1931.
4. A number of the creditors of KSFIOM, who were Depositors in KSFIOM and therefore entitled to claim in the DCS and/or EPS, assigned to the DCS and/or the EPS their right to prove in respect of KSFIOM’s Liability to them as Depositors.
5. In this regard, and for the avoidance of doubt, the Liquidator seeks the direction of this Honourable Court that by virtue of the provisions of the 2008 DCS Regulations he should pay to the Scheme Manager of the DCS all Statutory Interest due to those Depositors in KSFIOM who assigned to the DCS and/or the EPS their right to prove in the liquidation of KSFIOM, irrespective of whether –
  - 5.1 such Depositors filed proofs of debt in the liquidation of KSFIOM, which were admitted, before they claimed in the DCS and assigned to the DCS their rights to prove in the liquidation of KSFIOM;

- 5.2 such Depositors filed proofs of debt in the liquidation of KFIOM, which were admitted, before they claimed in the EPS and assigned a limited part of their right to prove in the liquidation of KSFIOM to the Treasury, which right was further assigned to the DCS by the operation of Regulation 16(3A) of the 2008 DCS Regulations, as amended, and such Depositors also claimed in the DCS;
- 5.3 such Depositors filed proofs of debt in the liquidation of KFIOM, which were admitted, before they claimed in the EPS and assigned a limited part of their right to prove in the liquidation of KSFIOM to the Treasury, which right was further assigned to the DCS by the operation of Regulation 16(3A) of the 2008 DCS Regulations, as amended, but such Depositors did not claim in the DCS;
- 5.4 such Depositors did not file a proof of debt in the liquidation of KSFIOM, but simply assigned to the DCS and/or the EPS their rights to prove in the liquidation of KSFIOM (although the Liquidator cannot pay Statutory Interest to a creditor who has not filed a proof of debt which has been admitted in any event, and this direction is sought only for the sake of completeness);
- 5.5 For the avoidance of any doubt, guidance is not sought in relation to insurance companies which claimed in the EPS, for whilst they were paid by the Treasury under the EPS, they were excluded from the assignment made by the Treasury to the DCS. (See the letter from the Treasury to the Liquidator dated 10 August 2009, a copy of which is produced as Exhibit "MS/2" to the Witness Statement of Michael Simpson dated 3 July 2018). The Treasury letter is headed "Re: Assignment of Depositors' Claims to the Isle of Man Treasury pursuant to the Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment Scheme and Early Payment (No 2) Scheme (together "the EPS 1 & 2"). The third paragraph of the Treasury letter makes it clear that:

"This letter only concerns claims against the Bank assigned to the Treasury by depositors by means of the standard form Memorandum of Assignment required as a condition of receiving payment under EPS 2, or those who signed both the Memoranda of Assignment for EPS 1 & EPS 2. This letter does not concern, and the request below does not include,

claims of Depositors who only signed the standard form Memorandum of Assignment for EPS 1 or the claims of insurance companies (or other entities) who signed a separate form of Memorandum of Assignment under EPS 2 (EPS 2 ICMOA)."

6. The basis upon which the directions set out above are sought is set out below -

#### Depositors Compensation Scheme

7. The 2008 DCS Regulations were drafted by the Treasury, pursuant to Section 25 of the Financial Services Act 2008, and came into operation on 9 October 2008, following their approval by Tynwald on the same date; (SD No. 826/08).
8. The 2008 DCS Regulations established a statutory scheme to compensate bank depositors in the Isle of Man, and Regulation 2 stated that the scheme is to be known for all purposes as "the Depositors' Compensation Scheme". For the avoidance of doubt, however, in this skeleton argument the Scheme will be referred to as "the DCS", since the Treasury also set-up the Early Payment Scheme (the EPS, as defined above).
9. The present statutory scheme to compensate bank depositors is governed by the Depositors' Compensation Scheme Regulations 2010 (SD No. 683/10), as amended ("**the 2010 Regulations**"). However, pursuant to regulation 21(2)(b) of the 2010 Regulations, the 2008 DCS Regulations (which were in force immediately before the 2010 Regulations came into operation), continue to apply for the purposes of the DCS Fund established following the default of KSFIOM. In this regard the Financial Services Commission (as it then was) made a determination of default by KSFIOM on 27 May 2009 (following the failure of an attempted Scheme of Arrangement on 19 May 2009), thereby triggering the creation of the DCS Fund in respect of KSFIOM. Accordingly, it can be seen that the 2008 DCS Regulations, as amended, apply in relation to the liquidation of KSFIOM. The Scheme Manager of the DCS is the Financial Services Authority, pursuant to the provisions of regulation 5(1) of the 2008 DCS Regulations and Article 4 of the Transfer of Functions (Isle of Man Financial Services Authority) Order 2015. It should be noted that references in the 2008 DCS Regulations to "liability" are references to KSFIOM's liability to its depositors for funds deposited with KSFIOM.

10. KSFIOM is a "participant" in the DCS, pursuant to Regulation 7(1) of the 2008 DCS Regulations.
11. Pursuant to Regulation 8 of the 2008 DCS Regulations, the Scheme Manager shall pay to a depositor a compensation sum in respect of that depositor's "eligible protected deposit liability". In this regard Regulation 9(1) states that; "An eligible protected deposit liability is the total liability of the participant to the depositor in respect of the principal and accrued interest on sterling and foreign currency deposits in the name of the depositor at the time of the default and made with an Isle of Man office of the participant".
12. Under Regulation 11; "... the amount of compensation payable under the Scheme in respect of an eligible protected deposit (in these Regulations referred to as "the Compensation Sum") shall be 100% of the amount of the eligible protected deposit subject to a maximum sum of £50,000.00 in respect of each eligible depositor".
13. Any Depositor in KSFIOM claiming under the DCS is required to effectively assign to the DCS his rights in respect of KSFIOM's liability to that Depositor, pursuant to Regulation 16(2) of the 2008 DCS Regulations which states that –

"Despite any other provision of these Regulations, the Scheme Manager shall not pay or determine to pay a compensation sum out of the Fund in respect of a liability unless the depositor has agreed that:

- (a) the depositor's existing rights in respect of that liability shall vest in the Scheme Manager;
- (b) the depositor will execute any document (including any declaration of trust) do any act or provide any assistance to the Scheme Manager to enable it to exercise those rights;
- (c) the depositor will pay to the Scheme Manager any amount which is received in respect of those rights, after deduction of any amount which under paragraph (4), the Scheme Manager would have been required to pay to the depositor; and

- (d) if relevant, any prospect of the depositor recovering in excess of the compensation sum payable under these Regulations will be in the hands of the Scheme Manager, who may compromise the claim”.
14. It can be seen, therefore, that before a Depositor can claim a Compensation Sum from the DCS, he must in effect, assign to the DCS his “existing rights” to prove in the liquidation of KSFIOM. Those rights will not include the right to liquidation dividends paid to the Depositor before he claimed in the DCS (as that right no longer exists) but will include that Depositor’s right to Statutory Interest on the whole of the amount of the admitted proof of debt in relation to that Depositor.
15. The fact that the Depositor must agree that all of his existing rights in respect of KSFIOM’s liability to him shall vest in the Scheme Manager of the DCS, in spite of the fact that the Compensation Sum to which he is entitled under the DCS is capped at £50,000 by Regulation 11 (above), is demonstrated by the provisions of Regulation 16(4) and 16(5), which state that -
16. Regulation 16(4) –
- “any amount received by the Scheme Manager by virtue of this regulation, up to a maximum amount in relation to each eligible protected deposit liability equal to the Retained Sum, shall be paid into the Fund. Any amount so received in relation to an eligible protected deposit liability which is in excess of any amount equal to the Retained Sum shall be paid to the depositor”.
17. Regulation 16(5) –
- “in paragraph (4) “Retained Sum” in relation to an eligible protected deposit liability means an amount equal to the aggregate of:
- (a) the amount of the compensation sum paid to the depositor in respect of the eligible protected deposit liability of the participant to the depositor; and
- (b) the cost of recovery of sums received by the Scheme Manager by virtue of this Regulation in respect of the eligible protected deposit liability of the participant to the depositor in question”.
18. It can be seen, therefore, that any amount received by the Scheme Manager of the DCS from KSFIOM (pursuant to an assignment by a Depositor of his rights in

respect of KSFIOM's liability to that Depositor) is paid by the Scheme Manager firstly into the Scheme Fund, up to the amount of the Retained Sum, and if there is any excess, it is paid by the Scheme Manager to the Depositor.

### The Early Payment Scheme

19. The Treasury set up the EPS to provide funds to Depositors in KSFIOM as a matter of urgency, provided that those Depositors granted a limited assignment to the Treasury of their right to prove in the liquidation of KSFIOM for the amount of any payment that they received from the EPS.

20. In this regard the Treasury set up two early payment schemes, as follows -

20.1 the Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment Scheme (GC1/09) ("EPS/1");

20.2 the Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment (No. 2) Scheme (GC4/09) ("EPS/2") which revoked EPS/1 and came into force on 17 February 2009, when it was approved by Tynwald.

21. The 2008 DCS Regulations were amended by the DCS 2009 Amendment Regulations (SD No.232/09) which came into force on the 13 March 2009 (after the date that the EPS/2 came into force, on 17 February 2009).

22. The 2009 DCS Amendment Regulations amended the 2008 DCS Regulations by introducing new regulations which governed the relationship between the EPS and the DCS. In this regard Regulation 2(2) of the 2008 Regulations was amended to introduce the following definition -

"Early Payment Schemes" means:

(a) the Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment Scheme (GC1/09); and

(b) the Kaupthing Singer & Friedlander (Isle of Man) Limited Early Payment (No. 2) Scheme (GC4/09)".

23. The 2009 DCS Amendment Regulations also introduced into the 2008 DCS Regulations a new regulation 10A and a new regulation 16(3A), to deal with the EPS. The new regulations 10A and 16(3A) need to be read in full for their complete effect, but it is submitted that the particularly relevant provisions are as follows –

Regulation 10A(3), which states that -

“If, and to the extent that, a depositor is entitled to compensation under these Regulations and has received an early payment, the Scheme Manager shall pay to the Treasury the compensation to which the depositor would otherwise be entitled, up to the full amount of the early payment made by the Treasury to that depositor.”

and

Regulation 16(3A), which states that –

“If the Scheme Manager makes a payment to the Treasury under regulation 10A(3) (“a reimbursement”), so much of any rights assigned to the Treasury under the Early Payment Schemes as equals the value of the reimbursement shall be automatically assigned to the Scheme Manager, and this regulation shall apply as if the relevant depositor had agreed **all** the matters in paragraph (2) in respect of those rights.” (Emphasis added)

24. The matters referred to in regulation 16(2) are set out at paragraph 13 (above), which should be read in conjunction with regulations 16(4) and 16(5), set out at paragraphs 16 and 17 (above).
25. With regard to the EPS, it is submitted that by the effect of Regulations 10A and 16(3A), any limited assignment by a Depositor in KSFIOM to the Treasury of his or her right to prove in the liquidation of KSFIOM, in return for an EPS payment, has been automatically assigned to the DCS Scheme Manager, who must reimburse the Treasury for the amount of the EPS payment from the DCS Fund.
26. It is further submitted that the terms of the automatic statutory assignment at Regulation 16(3A) mean that a Depositor who has claimed in the EPS has agreed that all of his existing rights in respect of KSFIOM's liability to him have vested in

the DCS Scheme Manager (pursuant to Regulation 16(2)(a) of the 2008 DCS Regulations).

27. In this regard it is submitted that there can be no other interpretation of Regulation 16(3A). If it was simply intended that the DCS Scheme Manager would be assigned the right to prove in the liquidation of KSFIOM for the fixed sum of £10,000 (or less) there would be no need to import the provisions of Regulation 16(2) into the assignment contained in Regulation 16(3A). (Indeed, the Treasury could simply have instructed the Liquidator to pay to the DCS any sums due to it, pursuant to the assignment granted to it by a claimant in the EPS, by way of a re-direction notice to this effect under Rule 96(7) of the Companies (Winding-Up) Rules 1934).
28. With regard to compensation sums paid to depositors by the DCS Scheme Manager under the DCS, the purpose of Regulation 16(2) is to ensure that the DCS is reimbursed as fully as possible for the amount of the Retained Sum out of the liquidation dividends due to the depositor concerned. This purpose is achieved by requiring the depositor to agree that all of his existing rights in the liability of the participating bank shall vest in the DCS Scheme Manager.
29. Regulation 16(2) must be read in conjunction with Regulation 16(4) (set out at paragraph 16 above), which states that any amount received by the DCS Scheme Manager from a participating bank must be paid by the Scheme Manager firstly into the Scheme Fund (up the amount of the Retained Sum) and thereafter, if there is an excess, to the depositor.
30. It is submitted that it was clearly the intention of Tynwald on 13 March 2009 when it approved the 2009 DCS Amendment Regulations, which introduced Regulation 16(3A), that the same course of action would apply when the DCS reimbursed the Treasury in respect of EPS payments. EPS/2 was approved by Tynwald on 17 February 2009
31. Although, upon an initial reading, it may be argued that because Regulation 16(3A) states that it "shall apply as if the relevant depositor had agreed all the matters in paragraph (2) in respect of those rights", such agreement by the depositor is limited to "so much of any rights assigned to the Treasury under the Early Payment Schemes", it is submitted that such an interpretation would be wrong.

32. It is submitted that if it had been Tynwald's intention that following a reimbursement of the Treasury by the DCS Scheme Manager in respect of an EPS payment the DCS would only receive the right to prove in the liquidation of KSFIOM for the amount of the reimbursement, then the assignment contained in Regulation 16(3A) would be sufficient, and there would be no purpose for the words "and this Regulation shall apply as if the relevant depositor had agreed all the matters in paragraph (2) in respect of those rights" at the end of Regulation 16(3A).

33. Further, it is submitted that the Memorandum of Assignment for the EPS ("the EPS Assignment") (a copy of which is produced as Exhibit "MS/1" to the Witness Statement of Michael Simpson dated 3 July 2018) envisaged that the same course of action would apply in relation to the EPS as applied in relation to the DCS (as discussed at paragraphs 18 and 32 above). In this regard the relevant paragraphs of the EPS Assignment state as follows:

"5.1 The Treasury without the consent of the Account Holder may transfer, assign or subrogate its rights, powers and obligations under this Assignment to any assignee or transferee ..."

"2.1 In consideration for the Advance, the Account Holder as legal owner assigns to the Treasury absolutely all of the Account Holder's title to, interest in and right to receive £10,000 (Ten Thousand Pounds Sterling) or, if less than £10,000 ... the amount of money equivalent to the Assignment Figure, which is owed to the Account Holder by the Bank and agrees that such amount will be paid to the Treasury **before any payment is made to the Account Holder by ... (i) the Bank ... (ii) the Liquidator of the Bank (if so appointed) (iii) the Scheme Manager (if so appointed) of the DCS**" [Emphasis added].

"2.2 In the event that there is an Assignment Figure Shortfall the Account Holder irrevocably agrees to assign to the Treasury absolutely all of the Account Holder's title to and interest in such further proportion of his Alternative Repayment Rights as would pass to the Treasury the right to payment of a sum equal to the Assignment Figure Shortfall.

This will take effect as an assignment of such proportion of the Alternative Repayment Rights as soon as the Alternative Payment Rights arise and to give effect to **this the Account Holder irrevocably agrees to instruct the**

Bank, or any liquidator, or **the DCS Scheme Administrator** ... as appropriate, and irrevocably authorises the Treasury to give such instruction on the Account Holder's behalf, to pay to the Treasury **before any payment is made to the Account Holder**, the amount of money equivalent to the Assignment Figure Shortfall, from any sums payable by them to the Account Holder pursuant to the Account Holder's Alternative Repayment Rights." [Emphasis added].

[With regard to the Depositors "Alternative Repayment Rights, as referred to in paragraph 2.2, these are defined in the Interpretation Section of the Application Form for EPS/2 as being "all of the Account Holders title to, interest in and right to receive, whenever arising, a payment in respect of his Bank Claim by all or any of (i) a Liquidation Dividend; (ii) a DCS payment; and/or (iii) a payment under a Scheme of Arrangement". The term "Bank Claim" is defined as meaning "the claim of any Account Holder against KSF for the credit balance in the Bank Account(s) of such Account Holder with KSFIOM but, for the avoidance of doubt, shall disregard any reduction due to the assignment, if any, to the Treasury under the KSFIOM Early Payment Scheme". The term "Bank Account(s)" is defined as meaning "all bank accounts with the Bank of which the Account Holder is registered as account holder".]

"3. Other undertakings by the Account Holder -

3.8 For the purposes of 3.6 and 3.7 above, the Account Holder irrevocably appoints the Treasury as the Account Holder's agent and attorney for the purposes of lodging the proof of debt in any liquidation of the Bank (and) making a claim under the DCS ... on behalf of such Account Holder."

3.9 In respect of any steps taken by the Treasury as above, **the Treasury shall ensure that requests are given** to the liquidators, **DCS Scheme Manager** ... (as applicable) **that any sums due from or received from such sources** (after payment to the Treasury of the sums due to the Treasury pursuant to the assignment herein) **be remitted to the Account Holder.**" [Emphasis added].

34. It is accepted that if a claimant in the EPS also claimed in the DCS, as many did, then all of the liquidation dividends due to that Depositor were paid to the DCS in any event, pursuant to the provision of Regulation 16(2) of the 2008 DCS Regulations. However, it is submitted that it would be irrational to treat a

Depositor who claimed only in the EPS in a different way, on the basis of an unreasonably narrow interpretation of Regulation 16(3A), since to do so would cause additional administrative burdens, with attendant increases in liquidation costs and the costs of administering the DCS.

35. Rather, it is submitted that it can be seen from the EPS Assignment that it was intended that all liquidation dividends would be paid to the DCS, who would firstly pay the Assignment Figure (£10,000 or less) to the Treasury and then pay any further sums to the Depositor.
36. It is further submitted that in construing the EPS Assignment the aim of the Court should be to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the EPS Assignment. See Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896 HL per Lord Hoffmann at pages 912 to 916.
37. Accordingly, it is submitted that if the "common sense principles" referred to by Lord Hoffmann in the West Brom case are applied when interpreting the EPS Assignment, it can be seen that it was always intended that if the DCS reimbursed the Treasury in respect of an EPS payment, then all liquidation dividends due to that Depositor would be received by the DCS, which would recover the amount of its reimbursement of the Treasury, and pay the excess to the Depositor.
38. Accordingly, if a purposive construction is given to Regulation 16(3A), then the correct interpretation of it must be that it was the intention of Tynwald that the same course of action would apply when the DCS reimbursed the Treasury in respect of an EPS payment as applied when the DCS paid a compensation sum to a Depositor.
39. With regard to interest, following the judgment of His Honour Deemster Corlett in this matter dated 16 June 2017, (at paragraph 58), it is further submitted that the Liquidator should pay Statutory Interest at 4% on the total amount of the proofs of debt filed by the DCS Scheme Manager in the liquidation of KSFIOM, to be calculated upon a diminishing basis, from 9 October 2008 until the date of the final distribution.

40. For the avoidance of any doubt, the position with regard to the insurance companies is as follows:

40.1 the Liquidator will pay Statutory Interest to the insurance companies in respect of their admitted proofs of debt;

40.2 insofar as EPS payments were made to insurance companies, in return for an assignment to the Treasury, the Liquidator will pay Statutory Interest to the Treasury in respect of its admitted proof of debt in the sum of £18,412,675.11 in respect of assignments made to it by the insurance companies (See exhibit MS/5 to the witness statement of Michael Simpson dated 3 July 2018;

40.3 pursuant to the order of His Honour Deemster Corlett dated 17 November 2015, in circumstances where an insurance company assigned its right to prove in the liquidation of KSFIOM to an underlying client who held a policy with the insurance company, the Liquidator should accept a proof of debt from the assignee in place of the proof of that insurance company. The said Order of Court contained an annexed schedule listing the insurance companies to whom the said Order applied. Where the Liquidator has accepted a proof of debt from an underlying client of one of the insurance companies listed in the said Schedule, the Liquidator will pay statutory interest to that underlying client.

Seth Caine  
3 July 2018