

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

No. 7942 of 2008

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL
(EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N

- (1) ANTONY VICTOR LOMAS
- (2) STEVEN ANTHONY PEARSON
- (3) PAUL DAVID COPLEY
- (4) RUSSELL DOWNS
- (5) JULIAN GUY PARR

(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS
INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

- and -

- (1) BURLINGTON LOAN MANAGEMENT LIMITED
- (2) CVI GVF (LUX) MASTER S.A.R.L.
- (3) HUTCHINSON INVESTORS, LLC
- (4) WENTWORTH SONS SUB-DEBT S.A.R.L.
- (5) YORK GLOBAL FINANCE BDH, LLC
- (6) GOLDMAN SACHS INTERNATIONAL

Respondents

SENIOR CREDITOR GROUP'S WRITTEN CLOSING:
GERMAN LAW

A. INTRODUCTION

1. These written closing submissions are filed on behalf of the Senior Creditor Group in respect of Questions 20 and 21.
2. The position of the Senior Creditor Group in relation to the English law issues which arise in the context of Questions 20 and 21 in relation to the “*rate applicable*” for the purpose of Rule 2.88 has already been addressed in the skeleton arguments at [3/9] and [3/11], and will be further addressed in oral closing submissions to the extent that it is necessary to do so. This written closing does not repeat the points made in those skeleton arguments.
3. These written closing submissions address the Senior Creditor Group’s position in respect of the underlying German law disputes relevant to Questions 20 and 21 having heard the evidence of Professor Mühlbert and Dr Fischer.
4. As the Court is aware, Questions 20 and 21 raise, in summary, issues of German law concerning:
 - (1) The basis on and time from which creditors are entitled under German law to compensation for delayed payment of a single compensation claim (the “**Single Compensation Claim**”), arising under Sections 7 – 9 of the German Master Agreement (the “**GMA**”) following an automatic termination of the agreement by reason of the administration application in respect of LIBIE.
 - (2) The nature and limitations imposed on any such claim as a matter of German law where there has been an assignment or transfer of the entitlement to a third party.
5. Considerable common ground between the experts is set out in their Joint Statement at [4/13]. In particular:

- (1) Sections 247, 280, 286 and 288 of the German Civil Code ("BGB") permit a creditor to claim compensation by way of damages for late payment of a debt.
- (2) Such compensation can be expressed as a rate which *"will be applied to the amount for which the debtor is in default"* (Fischer 1 [85]-[88] [4/8]; Mühlbert 3 [45] [4/11]) (a "Further Damages Interest Claim").
- (3) A Further Damages Interest Claim can only be asserted if the debtor has "defaulted" in its obligations towards the creditor within the meaning of section 286 of the BGB.
- (4) A default cannot take place unless and until the relevant obligation has fallen due.

6. Against the background of the experts' agreed position, the principal areas of dispute between the parties as regards German law following cross-examination of the experts are:

- (1) Whether the Single Compensation Claim fell due immediately on the automatic termination of the GMA (as the Senior Creditor Group contends) or whether the Single Compensation Claim only falls due once it has been calculated by the non-defaulting party (as Wentworth contends).
- (2) If the Single Compensation Claim fell due immediately on the automatic termination of the GMA, whether a default occurred in respect of all such sums when LBIE applied for an administration order on the basis that, on making the application, LBIE had *"seriously and definitively refused"* performance within the meaning of section 286(2) no.3 BGB.
- (3) Whether a proof of debt filed in LBIE's administration is capable of constituting a "warning notice" within the meaning of section 286(1) BGB.

- (4) Whether a transferee of a Single Compensation Claim can assert a Further Damages Interest Claim for the period after assignment for an amount greater than that which the transferor could have claimed.

7. In addition to these principal areas of dispute, there is also a subsidiary disagreement over what types of entities are entitled to rely on a facilitated standard of proof (also referred to as an “abstract calculation” (see, e.g. Mülbert 3 at [56] [4/11])) when making a Further Damages Interest Claim.

B. THE SENIOR CREDITOR GROUP'S POSITION

8. The Senior Creditor Group's position remains as set out at paragraphs 8-12 of its Skeleton Argument on German law issues [3/9]. In summary, it contends that, under German law:

- (1) LBIE's application for an administration order caused an automatic termination of the GMA and all underlying transactions.
- (2) On the true construction of the GMA, and in accordance with section 271 BGB, the Single Compensation Claim arising under Clause 9(1) became immediately due upon the occurrence of the automatic termination.
- (3) The particular facts and circumstances of LBIE's administration application constituted a “default” by virtue of a serious and definitive refusal of performance within the meaning of section 286(2) no.3 BGB.
- (4) As a consequence, GMA creditors became immediately entitled to make:
 - a. A minimum damages interest claim at a default rate of 5% above the basic rate of interest as published by the Deutsche Bundesbank, accruing on the principal amount of the unpaid debt: sections 247, 280, 286 and 288(1) of the BGB. This is payable irrespective of the actual loss suffered by the creditor; i.e. it is a statutory minimum rate of compensation; and

- b. A Further Damages Interest Claim for losses arising from delayed payment of an overdue debt where such losses exceed the default rate: sections 280, 286 and 288(4) of the BGB. Such damages require the creditor to prove the existence of actual loss caused by the late payment and may, where appropriate, be expressed as a rate accruing on the amount of the unpaid debt. Banks and other commercial investors (such as hedge funds) are entitled to rely on a facilitated standard of proof when calculating the Further Damages Interest Claim.
- (5) Alternatively, GMA creditors were entitled to make a minimum damages interest claim and/or a Further Damages Interest Claim upon filing a proof of debt in LBIF's administration in respect of the Single Compensation Claim. Such proofs of debt constitute a "warning notice" within the meaning of section 286(1) BGB and gave rise to a default on the part of LBIE.
- (6) Where a Single Compensation Claim has been assigned, the Damages Interest Claim is calculated by reference to the transferor's losses for the period prior to the transfer and by reference to the transferee's losses for the period post transfer. The transferee can assert a greater Damages Interest Claim for the period after assignment than the assignor could have claimed.

C. THE EXPERTS

- 9. The Court has heard evidence of German law from two experts, being Professor Peter Mülbert (on behalf of the SCG) and Dr Fischer (on behalf of Wentworth).
- 10. Both witnesses are eminently well-qualified to opine on matters of German law, and both sought to provide evidence to the best of their ability in order to assist the English court.

11. Both experts agreed that many of the issues were, however, ultimately ones of construction of the GMA, that there were no decisions of any German courts on point in relation to the principal matters in dispute and that, in many instances, they were left with passages from decided cases which were ambiguous at best or with the differing views of commentators. In those circumstances, the extent of the assistance provided by the experts was, necessarily, more limited than it might otherwise have been.
12. The views of Dr Fischer, as a former senior member of the judiciary, are plainly entitled to serious weight when the Court seeks to resolve the various matters in issue. The Senior Creditor Group would, however, observe that this is not a case that concerns a German insolvency process, and there were numerous occasions when Dr Fischer's undoubted expertise on German insolvency caused him to focus on an approach through the "spectacles" of German insolvency law.

D. WHEN DOES THE SINGLE COMPENSATION CLAIM FALL DUE?

Introduction

13. The Senior Creditor Group submits that the only sensible commercial construction of the GMA, consistent with its language and purpose, is that the Single Compensation Claim payable under Clause 9(1) falls due at the point of termination. In particular, there are no circumstances from which it can be said to be evident that the Single Compensation Claim is payable at any other time.
14. The parties agree that the GMA does not expressly stipulate the date on which the Single Compensation Claim falls due. In those circumstances, it is agreed that the issue is to be determined by reference to the terms of the GMA in the light of general rules and principles of German law [Day 7/p48 lines 1-4].
15. Professor Mülbart's clear view, as expressed both in his reports and in cross-examination, is that, since no time for payment has been specified under the GMA, it follows from section 271(1) BGB that the Single Compensation Claim fell due immediately and that there is nothing in the circumstances to indicate the contrary. This is consistent with the language and purpose of the GMA close-out provisions for the reasons explained below.
16. Dr Fischer initially contended in his reports that, since the GMA contains provisions for the calculation of the Single Compensation Claim, it was "*evident from the circumstances*" within the meaning of section 271(1) BGB that the obligation to pay the Single Compensation Claim could not be due before the calculation has been performed (see e.g. Fischer 3 para 30, 35-36 [4/11]).
17. However, in his oral evidence Dr Fischer appeared to accept (rightly) that:
 - (1) Once a contract is terminated because of unusual circumstances, the conditions provide that the party claiming damages can do this immediately and also the calculation can take place immediately; [Day 7/p.51 lines 17-22] (examination in chief).

(2) If the GMA is terminated by notice, interest would accrue on the Single Compensation Claim from the date that notice of termination was given [Day 7/p.95 lines 13-15 to p.96 line 8]. In other words, he accepted that, at least where the GMA is terminated by notice, the Single Compensation Claim became due immediately upon termination. Were that not the case, interest (or damages for late payment) would not be payable as a matter of German law, and he appeared to accept that that would be illogical.

(3) The position is the same in the event that the agreement is terminated automatically for insolvency, at least "*if the insolvent party has no counterclaim*" [Day 7/p.81 lines 1-6].

18. In re-examination, Dr Fischer sought to maintain his opinion that, at least where automatic termination on insolvency had occurred, then the due date did not occur until the mechanism provided for by Clause 9(2) (i.e. taking into account counterclaim) had operated [Day 8/p.53 line 12 to p.54 line 5]. As set out below, his reliance on Clause 9(2) in this regard is flawed.
19. If, as Dr Fischer appeared to accept, the need to perform that calculation does not prevent the Single Compensation Claim from becoming immediately due in a case of termination by notice, it must follow that the need to perform the calculation does not prevent the Single Compensation Claim from becoming immediately due in a case of automatic termination. There is no logical basis for distinguishing between a Single Compensation Claim arising on termination of the GMA by way of termination notice and a Single Compensation Claim arising on automatic termination of the GMA following an administration application, and Clause 9 does not distinguish between them. In either case, the Single Compensation Claim falls to be calculated in accordance with the same provisions of the GMA.
20. The suggestion that the Single Compensation Claim was not intended to become due on termination is inconsistent with the draftsman's general intention to provide for a close-out mechanism that is consistent with the German insolvency code, and does not make commercial sense.

21. The court should conclude that the Single Compensation Claim became due immediately following termination of the GMA.

Relevant principles of construction

22. The Experts agree on the approach to the interpretation of German law governed contracts (Joint Statement at para 3 [4/13]):

- (1) The interpretation of contracts is governed by the general principles set forth in sections 133-157 of the BGB.
- (2) The starting point of interpretation is the wording of the contract. The primary source for ascertaining the intentions of the parties is the words chosen in the contract ([Day 6/p.13 lines 6-9] and BGH decision of 2009 at [Auth 1/[30A], para 14A]).
- (3) Contracts have to be interpreted according to the requirements of good faith, considering common usage, the purpose of the contract and the circumstances in which the contract was entered into.
- (4) General terms and conditions shall be interpreted according to their objective meaning i.e. independently of the will of the contracting parties.

23. The experts also agree that section 271(1) BGB is relevant [Auth 2/83]. Section 271(1) provides:

“where no time for performance has been specified or is evident from the circumstances, the creditor may demand performance immediately”

24. Section 271 is a default rule, or gap filling provision, which operates to render a sum due immediately where there is no express or implied agreement, nor anything in the surrounding circumstances of the agreement, providing for a different time for when the debt is to become due [Day 6/ p.19 lines11-18].

25. The general rule of payments being treated as immediately due by virtue of Section 271 therefore applies absent agreement or specific circumstances which lead to a different conclusion.
26. Where damages are due for breach of contract or on termination for cause, there is an immediately due right to damages, even if they are not yet calculated (as accepted by Dr Fischer at Fischer 4 paras 8 and 9 [4/16/532]).
27. The relevant question, as framed by Dr Fischer, is therefore whether there are special features of the GMA that differ distinctly from other damages claims that proceed from contracts such that the Clause 9(1) payment is not due and payable immediately when it arises because of the termination of the contract [Fischer 4 at para 3 [4/16/531]].

The terms of the GMA

28. The German law authorities include various commentaries on the origin, structure and function of various provisions of the GMA: in particular, Zerey at [Auth 2/ 75]; Zenke/Dessau at [Auth 2/ 74]. The court is likely to find these commentaries helpful in providing an introduction to the GMA.
29. The purpose and scope of the GMA is described in Clause 1(1):

"In order to manage interest and exchange rate risks and other price risks arising within the scope of their business operations, the parties hereto intend to enter into financial derivatives transactions the object of which is:

- i. the exchange of amounts of money denominated in various currencies or amounts of money or calculated by reference to floating or fixed interest rates, exchange rates, price or any other calculation basis, including average values (indices) relating thereto, or*
- ii. the delivery or transfer of securities, other financial instruments or precious metals, or the performance of similar obligations.*

Financial derivatives transactions also include options, interest rate protection and similar transactions that require a party to render performance in advance, or a performance that is subject to a condition."

30. The terms and conditions of the GMA apply to each transaction that is entered into pursuant to the GMA (Clause 1(2)).
31. Payments and performance of underlying obligations in respect of any relevant transaction are governed by Clause 3. In particular:
- (1) Payments are to be made on the Due Date specified in the relevant Transaction (Clause 3(1)).
 - (2) If a party fails to make a payment in due time, interest accrues on the amount outstanding until payment. The rate of interest is equal to the interbank interest rate charged by prime banks to each other for call deposits at the place of payment and in the currency of the amount outstanding for each day on which such interest is to be charged (Clause 3(4)).
 - (3) The right to make further claims for damages, including a Further Damages Interest Claim, is expressly preserved (final sentence of Clause 3(4)).
32. Payment of interest is therefore a core feature of the GMA. The basic principle is if monies are not paid when they are due, they should carry interest.
33. Clause 7 addresses termination.
- (1) Termination may occur in the context of outstanding Transactions for "material reason". Clause 7(1) states that this includes "*circumstances where payment or other performance due has not been received, for whatever reason, by the party entitled thereto within five Banking Days after the party liable to pay or to perform has been notified of non-receipt of the payment or other non performance.*" Notice of non-receipt and notice of termination must be given in writing.
 - (2) Alternatively, termination may occur automatically (i.e. without notice) in the event of insolvency. Insolvency is said to occur where an

application is filed for the commencement of bankruptcy or other insolvency proceedings against the assets of a party and such party either has filed the application itself or is generally unable to pay its debts as they become due or is in any other situation which justifies the commencement of such proceedings (Clause 7(2)).

- (3) Whether termination is automatic or upon notice, the effect is the same pursuant to Clause 7(3): neither party is obliged to make any further payments pursuant to Clause 3(1) which would have become due on the same day or later. The relevant obligations are to be replaced by compensation claims in accordance with Clauses 8 and 9.

34. Clause 8 deals with claims for damages and compensation for benefits. It provides that:

- (1) The party giving notice or the solvent party (i.e. the non-defaulting party in the context of ISDA claims, defined here as the "Party Entitled to Damages") shall be entitled to damages (Clause 8(1)).
- (2) Those damages are determined on the basis of replacement transactions, to be effected without undue delay, which provide the Party Entitled to Damages with all payments and the performance of all other obligations to which it would have been entitled had the Agreement been properly performed. As to this:
 - (i) The party entitled to damages may, in fact, enter into contracts which are in its opinion, a suitable substitute; or
 - (ii) It may calculate damages on the basis of what it would need to pay for such replacement transactions "*at the time of giving notice or upon becoming aware of the insolvency, as the case may be*" (clause 8(1)).

35. Clause 9(1) deals with the final payment obligation. It provides that unpaid amounts (i.e. sums due under Clause 3, including interest) and any other

unperformed obligations, and the damages which are payable, shall be combined by the Party Entitled to Damages into a Single Compensation Claim denominated in Euro (i.e. the Single Compensation Claim). The Single Compensation Claim is ultimately a claim for damages calculated in accordance with a contractual formula.

36. Dr Fisher accepted in cross-examination that the effect of Clause 9(1) is to treat any claim and cross-claim as due and payable so as to permit a set-off or netting which extinguishes one against the other [Day 8/p.14 line 7 - p.15 line 3]. In effect, it treats both claim and cross-claim as due and payable, and effects payment of both through netting; [Day 8/p.14 line 14 -- p.15 line 2].
37. It is plain from the language used that it is the Party Entitled to Damages who will conduct the calculation required by Clause 9(1) of the GMA.
38. Although Dr Fischer seemed to suggest [Day 7 pages 58-59] that Clauses 7-9 provided for "co operation" between the parties (in particular, that "*the performance only becomes due after the cooperation of the other party*" [Day 7, page 58 lines 19-23]), there is no requirement for "co-operation" between the parties even in relation to the calculation of the single compensation claim. As with the ISDA agreements, the calculation provisions provide for calculations being conducted by a single party i.e. the Party Entitled to Damages, who is able to do so without reference to (and without the co-operation of) the other party. To the extent that Dr Fischer considered "co-operation" to be important to his analysis, that construction of Clause 9 was misplaced.
39. Nothing more is said in Clause 9(1) regarding when the Single Compensation Claim falls due. It is to be noted, however, that:
 - (1) There is no provision in the GMA dealing with interest payable on the Single Compensation Claim.
 - (2) The elements making up the Single Compensation Claim include all of the unpaid amounts and interest payable thereon in accordance with Clause 3.

- (3) If the Single Compensation Claim is not immediately due, it cannot entitle the creditor to compensation for delay in payment pursuant to the provisions of the BGB.

40. Clause 8(2) provides that if the Party Entitled to Damages (i.e. adopting ISDA language, the non-defaulting party) obtains an overall financial benefit from the termination of Transactions, it is required to pay a sum to the other party (the defaulting party), subject to the provisions of clause 9(2).

- (1) Pursuant to Clause 9(2), if the Single Compensation Claim is payable by the Party Entitled to Damages it is expressly stated to only become due and payable to the extent that such party does not have any counterclaims¹ against the defaulting party.

- (2) If there are counterclaims available to the Party Entitled to Damages, their value is to be deducted in order to calculate the portion of the compensation claim that is due and payable by the Party Entitled to Damages and, in so doing, such counterclaims are to be converted into Euros using the rate applicable on the day of computation, converted into damages claims if not monetary obligations and given a present value if not yet due and payable.

- (3) The compensation claim will only become due and payable by the Party Entitled to Damages as soon as and to the extent that it exceeds the aggregate amount of the Counterclaims.

41. Clause 9(2) therefore operates separately from Clause 9(1) and only in limited circumstances. Contrary to what appears to have been Dr Fischer's view (i.e. that

¹ During his cross-examination, Dr Fischer sought to suggest that Clause 9(2) was only concerned with claims arising from the GMA i.e. "claims for any legal reasons under any law which are within the scope of the GMA but not outside the GMA" [Day 7/p.71 lines 6-8]. This is clearly incorrect: the language of Clause 9(2) has no such limitation i.e. it is concerned with counterclaims which may arise "for any legal reason whatsoever". There is no linguistic or logical limitation imposed on such claims which restricts them to claims arising under the GMA. On the contrary, the netting of claims (and benefits) arising under the GMA, and of any unpaid amounts, are dealt with under Clauses 8 and 9(1). Clause 9(2) is only concerned with circumstances where the Party Entitled to Damages wishes to bring into account claims arising other than under the GMA (i.e. counterclaims).

the entirety of Clauses 7-9 constituted a "*united unified regulation*" [Day 7, page 80 line 8] which apply in every instance) Clause 9(2) only has any relevance where the Party Entitled to Damages (i.e. the non-defaulting party) is the paying party. If it is not (i.e. whenever the Party Entitled to Damages concludes that it has suffered damages and is entitled to receive the single compensation claim) Clause 9(2) has no role to play. In those circumstances, there is no need to perform the set-off envisaged by clause 9(2) and the due date of the Single Compensation Claim is not postponed.

42. It is to be further noted that:

- (1) No equivalent language to that used in Clause 9(2) regarding the timing of when the Single Compensation Claim becomes payable is used in Clause 9(1).
- (2) Even where Clause 9(2) does apply, it provides (in the final sentence) for the compensation claim to become due and payable "*as soon as...*" it exceeds the aggregate amount of Counterclaims; i.e. it is premised on the compensation claim becoming payable without delay once there is any money payable to the "defaulting" party in circumstances where the Party Entitled to Damages does not set-off the compensation claim against Counterclaims.

43. A construction of Clause 9(2) that provides for the postponement of the due date in particular circumstances for the benefit of the Party Entitled to Damages is consistent with Zerey (Tab 75) at para 54. In the context of when the claim becomes due to the defaulting party where there is a counterclaim held by the non-defaulting party (i.e. Clause 9(2)), the author comments:

"At the same time, the maturity of the compensation claim of the 'other party' is postponed."

44. In his reports, Dr Fischer sought to rely on the effect of Clause 9(2) to support his case. However, it became evident during his cross-examination that he had misunderstood the basic effect of Clause 9(2) since he assumed that it could

operate where the Single Compensation Claim is owed by the defaulting party to the non-defaulting party (i.e. to the Party Entitled to Damages) (see, in particular, the illustration provided by Dr Fischer at [Day 7/p.77 line 21 – p.78 line11]). In fact it is plain that Clause 9(2) is only engaged where the Single Compensation Claim calculated under Clause 9(1) is owed by the Party Entitled to Damages to the defaulting party².

Commerciality/circumstances for the purpose of Section 271 of the BGB

45. There are no circumstances applicable to the GMA which render it evident that the Single Compensation Claim is payable at any time other than immediately upon termination of the GMA in accordance with Clause 7, like any contractual damages claim.
46. There is, however, a very good reason why the Single Compensation Claim must be due immediately upon termination: namely that any other conclusion would fail to put the innocent party in the position that it would have been had the contract been performed, and will lead to there being a period in which no compensation for delayed payment (i.e. interest) is payable because the principle debt is not regarded as due.
47. In particular:
 - (1) Clause 9(1) gives rise to a Single Compensation Claim (which includes sums due under Clause 3(1) and the damages payable pursuant to Clause 8(1)).
 - (2) It is automatically triggered on the application for insolvency proceedings in order to adjust the contract to the particularities of German insolvency law.

² Dr Fischer initially did not accept that postponement only applies in the case of Clause 9(2) [Day 7/p.79 line 4 – p.80 line 6]. But did subsequently express the view that “if the insolvent party has no counterclaim, then the due date has occurred with the declaration of the insolvency” [Day 7/p.81 lines 4-6].

- (3) When termination occurs under Clause 7, outstanding sums payable under Clause 3 may have been carrying interest (see Clause 3(4)). But such an entitlement to interest on the underlying debt will stop as a consequence of the operations of Clauses 7-9 and the replacement of such sums by the Single Compensation Claim.
- (4) The aim of the close-out netting mechanism in Clause 9(1) is to make the Party Entitled to Damages whole in economic terms; i.e. to place the non-defaulting party in the same economic situation as it would have been in if the individual transactions had matured in the normal course. Dr Fischer accepted that this was the case [Day 7/p.84 lines 2 - 6]; [Day 7/p.91 lines 6 - 15]. In order to be consistent with that aim, the Single Compensation Claim must be capable of attracting interest from the date of termination.
- (5) For example, under Clause 8 the Party Entitled to Damages is entitled to calculate damages on the basis of what it would need to pay for such replacement transactions "*at the time of giving notice or upon becoming aware of the insolvency, as the case may be*". In other words, the calculation is required to be performed by reference to the position at the time of the giving of notice of termination (for example) and not by reference to the position as of the date of calculation if later. In those circumstances, it makes commercial sense for interest to be capable of arising from the date of termination (i.e. the date on which damages are valued) and not from some later date such as the date of calculation.

48. Furthermore:

- (1) Dr Fischer accepted that unpaid amounts under Clause 3 and any damages claim under Clause 8 (which are turned into the Single Compensation Claim) have to be treated in the same way as far as interest is concerned [Day 7/p.96 lines 3 - 25].

(2) He also accepted that sums can fall due under Clause 3(1) and accrue interest under Clause 3(4) before early termination, and that termination cannot have the effect of stopping interest running on that sum and for interest only to start running again after the calculation has been done under Clause 9(1) [Day 7/p.84 line 11 -- p.86 line 25].

(3) This led Dr Fischer ultimately to accept that, if the contract was terminated by notice under Clause 7(1), the Party Entitled to Damages would be entitled to interest from the date notice of termination was given and not merely from the date of calculation if later [Day 7/p.95 lines 8-15].

(4) It follows that the Single Compensation Claim falls immediately due upon termination.

49. On Wentworth's case, the time value of money during the period of calculation is lost, notwithstanding the fact that damages are calculated as of the termination date. Such a consequence is uncommercial, and inconsistent with the approach taken in the context of ISDA.

50. In this regard, efforts were made to downplay the relevance of the ISDA Master Agreement.

(1) Professor Mülbert accepted that his observations regarding the overall objective of the GMA was to replicate the ISDA Master agreement and closeout netting provisions were made at a general level rather than by reference to the detail of the provisions [Day 6/p.61 lines 10-18]; [Day 6/p.70]. He also accepted that there was less detail in the GMA regarding the consequences of termination than in the ISDA Master Agreement [Day 6/p.63 lines 1-2]. He maintained, however, that it would be surprising from the perspective of market participants if there was a wide deviation between the operation of the GMA and the ISDA Master Agreement [Day 6/p.63 line 21 -- p.64 line 3].

- (2) Although Mr Allison QC sought to explore particular differences between the two agreements [Day 6/p.64 line 4 – p.69 line 16], he missed the substance of Professor Mülbert's point (and that on which the SCG relies): that if the Single Compensation Claim is not due as from the point of termination, there is no ability to seek interest (or damages for delay under the provisions of the BGB) for the period between termination and completion and provision of the calculation of the Single Compensation Claim. That would be a material (and unjustifiable) commercial difference, since the ISDA Master Agreement provides for interest to be paid in the period between the occurrence of the Early Termination Date and the date on which the Section 6(e) amount becomes payable: see Section 9(h)(ii)(2) and limb (b) of the definition of Applicable Close-Out Rate in Section 14 of the 2002 ISDA Master Agreement.

51. There is no reason why the draftsman of the GMA would have wanted to ensure that the Single Compensation Claim did not fall due immediately on termination or to deprive the Party Entitled to Damages of interest to which it would otherwise have been entitled or to lead to a situation in which interest which was already running on a sum due under Clause 3(1) ceased accruing interest following termination unless and until the Single Compensation Claim had been calculated.

Consistency with German law generally: damages claims can fall due before they have been quantified

52. The only point of substance relied upon by Wentworth as a "circumstance" pointing to the debt falling due only at the point of calculation is one of alleged unfairness to the debtor i.e. it is unfair for the debt to become due prior to the debtor having been informed of the final amount payable.
53. The particular cases relied upon are addressed below. But the Court need only consider damages claims generally in English law, where the claim is regarded as due as from the point when the claim arose even if unquantified (and unquantifiable) absent subsequent determination by the Court. As Professor

Mülberr pointed out, the requirements of section 286 BGB will need to be satisfied in order for a creditor to be entitled to default interest damages and this will in most cases mean that the debtor is aware of its obligation to pay (even if not the precise quantum): [Day 6/p.41 lines 7-25].

54. Clause 7 of the GMA involves a termination for cause and, as Professor Mülberr explained at [4/15/p527], *“German courts and legal literature very broadly agree that upon an early termination of a contract for cause, a compensation claim in favour of the party exercising its termination right...becomes due and payable immediately upon termination”*. In cross-examination, Dr Fischer agreed with this statement adding that, following such a termination, there could also be a claim for performance rather than for damages [Day 7/p. 53 lines 6 – 17]³.

55. There can be little doubt that the claim arising pursuant to Clauses 7-9 of the GMA is a damages claim (or equivalent thereto) such that the general rule that the claim should be immediately due is applicable. In particular:

- (1) Clauses 7 to 9 of the GMA (in particular Clause 8) use the language of damages in order to identify what (in conjunction with any unpaid amounts) is payable following termination. The *“innocent”* or *“non-defaulting”* party is defined as the *“Party Entitled to Damages”*. What is payable under Clause 9 of the GMA is a *“compensation”* claim.
- (2) The debtor does not have to perform obligations not yet due. Indeed, the underlying obligations are extinguished and replaced with a single right to damages for the balance.
- (3) Clause 8 is not concerned with ensuring performance, but with ensuring that the creditor is placed in the same economic position as he would have been in had the contract been performed in accordance with the primary obligations accepted by the debtor. It does so by providing damages for the cost of getting someone else to perform

³ See too [Day 7/p. 51 lines 4 – 22].

those obligations, or identifying the damage suffered by reason of the debtor not performing.

- (4) Clause 9 provides a simplified mechanism for calculating the total net sum payable by reference to such damages and any unpaid amounts. It would be commercially unreal to regard Clause 9 as involving anything other than a claim for performance of the debtor's secondary obligations arising on termination for cause to make good the damage suffered.

56. The mere fact that a calculation needs to be performed to determine the extent of any compensation claim does not, of itself, mean that it is necessarily "evident from the circumstances" that the compensation claim falls due at a later date within the meaning of section 271 BGB. In other words, German law does not generally perceive it to be "unfair" or, as a consequence, impermissible for a debt to fall due before it has been calculated.
57. This is evident from two decisions, both of which Dr Fischer agreed were correctly decided.
58. The first is the BGH decision of 18.11.2008 [Auth 1/[29A]]. The case concerned a claim for damage to a vehicle. In that context, the court held (at [9]):

'The concept of the due date refers to the point of time when a creditor may demand performance... If the time for performance is not defined or is not apparent from the circumstances, then the creditor may demand immediate performance (Section 271(1) ...). If the injured party may demand restoration of a damaged object (Section 249(1) BGB) or the amount of money required to restore the object (para 249(2) sentence 1 BGB), then the due date is the same as the date when the damage to the legally protected interest occurs. The fact that the scope of the responsible party's liability can usually only be determined after some time has passed because a damage report need to be prepared or it is necessary to wait for an invoice from an accounts department of the repair shop, does not have an impact on this. As soon as the injured party has the information needed to assert his claim, he can in principle put the liable party or his liability insurer in default (Section 286 BGB) by making the claim due and may possibly enforce the consequences of the default (Sections 287 and 288 BGB). Even when the separate damage claims are disputed between the injured party and the liable party and the legal grounds may have to be clarified through potentially lengthy litigation, this does not change the due date of the damage claim, insofar as it (later) proves to be justified and also does not change the fact that the

liable party, if he is effectively put in default, must be liable for the damages resulting from the default and pay interest on the default." [emphasis added]

59. The decision clearly states that the due date is the same as the date when the damage to the legally protected interest occurred⁴. In other words, the court held that, if you have a damages claim, the need to quantify it does not prevent the claim from being immediately due irrespective of precisely how that rule was applied to the facts. In cross-examination Dr Fischer accepted this passage was, in principle, a correct statement of German law [Day 7/p.54 lines 5 - 11] and that the principle applies not only to tort cases, but also to contractual damages claims [Day 7/p.54 lines 15 - 17].
60. The second decision is the OLG decision of 23.11.11 [Auth 1/[39]]. The case concerned a claim for damages following termination of a contract for cause. The claimant made a claim for a prepayment sum and the customer challenged the amount. One of the grounds of challenge was that a calculation in respect of the repayment was to be made as at the repayment date, not as at the termination date on the basis that the relevant date for the sum becoming due was the repayment date, not termination date. Professor Mühlbert accepted that as a matter of German law this was a claim for damages for breach of contract [Day 6/p.57 lines 1-8]. The point remains, however, that the pre-payment claim was treated as due from a point well before that at which it was calculated (and before the lender had chosen which form of calculation to adopt).
61. In cross-examination, Dr Fischer agreed that the court concluded that the damages claim in respect of the prepayment compensation was due immediately [Day 7/p.55 lines 13-17] and that this was the case despite the fact that the claimant needed to calculate the amount of the prepayment [Day 7/p.55 lines 18-22]. He accepted that the case had been correctly decided [Day 7/p.56 line 3] and stated: *"In German prevailing opinion, such a damages claim can arise immediately with the prepayment before the actual due date"*⁵ [Day 7/p.55 lines 20-23].

⁴ This is the case irrespective of precisely how that rule was applied to the facts (which is unclear from paragraph 18 in light of the use of the phrase "at the latest").

⁵ The SCC understands Dr Fischer's reference to the "due date" as a reference to the due date for the loan.

62. Whilst it is obviously correct that the cases relied upon by Professor Mühlert (and those relied upon by Dr Fischer) are not contractual netting cases, the distinction that was sought to be drawn based on a breach of duty giving rise to an immediate claim and the operation of a termination and netting procedure is not sustainable [Day 6/p.52 line 5]. Termination under Clause 7 gives rise to a claim for damages either in favour of the Party Entitled to Damages pursuant to Clause 8. The Clause 8 damages claim is combined with any unpaid amounts due under Clause 3 to give rise to the Single Compensation Claim. But it is in substance a claim for contractual damages arising upon termination for cause, to which the general principle of German law should apply; i.e. the claim is due at the point upon which the damage is suffered (i.e. termination) even if this can only be shown or calculated at some later point.
63. The key circumstance referred to by Dr Fischer (see, for example, Fischer 3 [30] and [36]) is that it only becomes evident whether and in what amount a creditor is entitled to a compensation claim once the creditor has made a decision to calculate damages on the abstract basis or on the basis of replacement transactions and can state the consequent results. He therefore says that the compensation claim cannot therefore become due and payable before the creditor has carried out the "summarisation" required under Clause 9(1) of the GMA.
64. This is plainly not correct as a general proposition: damages claims can become due before a debtor knows how much he will have to pay.
65. The only authorities relied upon by Dr Fischer in this regard by way of analogy are:
- (1) At fnnt 3 to para 30 of Fischer 3, certain examples cited in *Ernst* where a debt only becomes due and payable following a specific act by a contracting party [Auth 1/ [45A]]. Some examples are obviously different, in particular where a duty to perform work under a work agreement cannot become due before the time required to produce the work has passed. Dr Fischer accepted that this example, though referred to in his report, "*was not important*" [Day 7/p.58 lines 4 5].

- (2) Dr Fischer sought to make more of the example of a tenant who can only demand repayment of its security deposit, following termination of the landlord/tenant relationship *"once the amount of the landlord's counterclaims have been determined i.e. once there is the opportunity to calculate them."* However:
- a. As Dr Fischer accepted in cross-examination, cases concerning the due date for the return of the deposit are very different from the contract constituted by the GMA [Day 7/p.58/lines 19-20].
 - b. Dr Fischer also accepted that the rationale for the decision in the deposit cases lies in the purpose of the deposit as security. In particular, he accepted that the deposit could not become due until the landlord had calculated his deductions because *"if the landlord had to return the deposit before he worked out whether or not he had any claims, he would lose his security"* [Day 7/p.60 lines 4-7]. He also confirmed that this was the rationale behind the specific landlord and tenant decisions he relies on (i.e. [Auth 3 3/{95}]) [Day 7/p.61 lines 2-12].
 - c. This accorded with the evidence of Professor Mühlert. It is the purpose of deposit which, in the context of the landlord and tenant cases, has led the Court to conclude that its repayment is not due until the landlord has quantified his claim [Day 6/p.26 line 4]; [Day 7/p.32 lines 8-16]. That sort of case is one example (in the context of landlord and tenant relationships) where the Court has said that the due date is delayed until after the calculation has occurred, but those fact specific interpretations cannot be generalised into a rule [Day 6/p.26 lines 18-23]; [Day 7/p.32 lines 17-24]. Ultimately, each case depends on its own facts, as Dr Fischer accepted [Day 7/p.57 lines 10-16].

66. During cross-examination of Professor Mühlert, a new and previously unidentified line was adopted, namely that the GMA was in the relevant respects equivalent to a bill or invoice case where the sum due was not due until the bill was rendered. In that regard, Professor Mühlert accepted that, generally, where a contract requires a bill or invoice to be presented then the amount may well be treated by the majority as not being due until the bill has been presented [Day 6/p.27 lines 1-9]. Professor Mühlert made it clear that there are many situations where no bill is required and the situation is different [Day 6/p.40 lines 1-5] and, in answer to a question from the Court, agreed that the correct position is that if the contract provides for payment without invoice, either expressly, implicitly or by the nature of the agreement, the person who owes the money must pay it without being reminded to do so [Day 6/p.40 lines 6-18]. That proposition is borne out by the authorities relied on by Professor Mühlert and referred to above.

67. Reliance by Wentworth on the new BGH decision of 19.12.1990 (i.e. the Landlord heating claim) [Auth 5 / [3]] (i.e. the Wentworth additional authorities) provides no particular assistance to Wentworth: it is simply an example of a case in which the circumstances of the agreement (for the purpose of section 271 BGB) were such as to indicate that the normal default rule did not apply, and that the claim should be treated as falling due only upon the issue of a bill.

(1) As the description of the facts makes clear, the issue in the case concerned a claim by a landlord for reimbursement of heating and hot water costs exceeding the monthly prepayments of the tenant. The claim was brought in April 1989 and, insofar as it related to the heating period for 1983/1984, was held to be subject to a limitation defence. The tenant had not been provided with a bill until 23 February 1988 and the issue for the court was whether the period of limitation began to run at the end of the year in which the billing periods ended or only at the end of the year in which the tenant received the bill.

(2) The conclusion reached was that the limitation period began running at the time when the tenant received the bill (see Reasons at III). The principal basis for the decision was that:

- a. The period of limitation of a claim begins running when the claim comes into being (section 198 of the BGB), which is taken to be the due date (III, paras 1 and 3).
- b. Where there is no agreement regarding the due date of any supplementary payment, and for the purpose of section 271 of the BGB, the circumstances of the agreement indicate that the claim is due upon issue of a verifiable bill because the tenant cannot ascertain and therefore cannot pay the amount owed without a bill (see III para 3(b)).
- c. It does not matter that the landlord (i.e. creditor) can influence the start of the limitation period on this basis by delaying issuing a bill, because the tenant has the ability to require the landlord to provide a bill within a reasonable period and to refuse to make further advance payment if no bill is sent within a reasonable period (see III para 3(c)(aa) and (bb)).

(3) The nature and terms of the particular agreement, in relation to a particular type of relationship (landlord and tenant) which is heavily regulated by German law (as III para 3(c) demonstrates), therefore led the court to conclude that the claim should not be regarded as being due until a bill was delivered. In that specific context, the Court placed weight on the inability of the debtor to know what it would have to pay prior to service of a bill. The facts can be distinguished from a damages scenario where it is clear that a damages claim exists but "only" the scope is unclear.

(4) Indeed, the court acknowledged the general rule (advanced by Professor Mülbert and accepted by Dr Fischer) that a claim for damages may be regarded as due at a point when damages which are not yet calculated or calculable (see III para 3(a)).

68. It is plainly correct that, in certain circumstances and in certain contexts, the German court has relied on the inability of the paying party to know the amount

of the claim as forming part of the relevant "circumstances" for the purposes of section 271 BGB. However, it is also the case that, as a general proposition, damages claims can become due before a debtor knows how much he will have to pay.

69. Ultimately, the question remains a simple one: as a matter of construction of the GMA as a whole, are the circumstances such that it is evident that the Single Compensation Claim should be regarded as due from the point of termination or only as and when the Party Entitled to Damages has conducted the calculations required by Clauses 8(1) and 9(1) and informed the other party of the outcome.
70. For the reasons set out above, the Senior Creditor Group maintains that the claim is clearly due as from the point of termination and there are no circumstances which suggest that any other time is evident.

E: DEFAULT

Introduction

71. The issues between the parties are whether:

(1) The particular facts and circumstances of LBIE's administration application constituted a "default" by virtue of a serious and definitive refusal of performance within the meaning of section 286(2) no.3 BGB.

(2) Alternatively, the filing of a proof of debt in LBIE's administration triggered a default on the basis that it complies with the requirements of a "warning notice" within the meaning of section 286(1) BGB.

72. Whether "default" for the purpose of Section 286 of the BGB has occurred in respect of any payment obligation of LBIE under the GMA before, as at or after the commencement of the administration is a question of fact, which will ultimately need to be determined on a case by case basis. However, the Senior Creditor Group contends that, based on the terms of LBIE's application for an administration order (and without prejudice to any further arguments which could be made on alternative grounds or evidence), the Court can be satisfied that default occurred on a generic basis applicable to all GMA creditors of LBIE.

73. There is no relevant case law on whether (or in what particular circumstances) a foreign insolvency proceeding, still less an application for an administration order could amount to a "*serious and definitive refusal*" within the meaning of section 286(2) no.3 BGB [Day 8/p.15 lines 10-13]. As such, whether or not LBIE's administration application constituted a "*serious and definitive refusal*" ultimately depends on the Court's assessment of the facts.

74. As to this:

- (1) Professor Mülbert's position (Mülbert 3 [103]) is that, from the perspective of creditors, LBIE's filing of an application for an administration order conveyed the message that LBIE would not pay its outstanding debts at the time of such filing or within a reasonable grace period. If that is a correct interpretation of the circumstances, in Professor Mülbert's view, *"that reading exactly corresponds with the well accepted interpretation of a 'serious and definitive refusal' within the meaning of [the relevant test]"*.
- (2) Dr Fischer's opinion (as set out in Fischer 3 [49]) is that *"an application for the institution of insolvency proceedings, filed with an insolvency court, is not sufficient, if only because it does not constitute a declaration to the individual party to the contract, and does not contain a statement referring to the intent to perform"*. However, as set out below, Dr Fischer accepted in cross examination that a declaration to the individual party to the contract is not necessary to establish a *"serious and definitive refusal"*. Whether or not the administration application amounted to an explicit or implicit intention not to perform is to be assessed on the facts. On this, for the reasons set out below, Professor Mülbert's position is to be preferred.

75. It is agreed that a proof of debt in German insolvency proceedings does not amount to a warning notice. It is also agreed that no default can occur with respect to the German insolvency estate following the commencement of German insolvency proceedings. This is due to the nature and effect of German insolvency proceedings including, in particular, the separation of the insolvent estate from the person of the debtor. Whether a proof of debt in an English administration is capable of constituting a warning notice ultimately turns on the policies and provisions of the English insolvency regime and the terms of the relevant proof of debt. Professor Mülbert's view is that, based on the differences between the two sets of proceedings, German authorities and commentary concerning whether a German proof of debt can amount to a warning notice do not apply (Mülbert 3 at [92]). Dr Fischer disagrees.

What is required for a "default"

76. The experts agree that a "default" must have occurred within the meaning of s. 286 BGB in order to make a damages interest claim (Joint Statement at para 19 [4/13]).
77. Section 286 BGB [Auth 2 /80(N)] specifies the requirements for a default.
78. Section 286(1) BGB provides that a default will occur where:
- (1) The debtor fails to perform when performance is due; and
 - (2) A warning notice (*Mahnung*) is provided by the creditor to the debtor requesting performance.
79. Section 286(2) BGB sets out circumstances in which a default will occur *without* the provision of a warning notice. In particular, section 286(2) para.3 provides that a default will occur where "*the debtor seriously and definitively refuses performance*".
80. As regards the timing of a default under section 286:
- (1) The experts agree that the default occurs upon the receipt of a warning notice (Mülbert 3 at [77]); or
 - (2) Upon the events occurring that give rise to one of the exceptions to the need for a warning notice.

The test for serious and definitive refusal (sec. 286(2) no.3)

81. The experts are agreed that there is no need for a warning notice if the debtor seriously and definitively refuses performance. The reason for this is that requiring the creditor to send a warning notice to the debtor who refuses to

perform would be a mere formality (Mülbert 3 at [100]; Fischer 3 at [48]; [Day 7/ p.98 lines 11-13]).

82. The experts agree that there are strict requirements for a serious and definitive refusal. The test for a serious and definitive refusal is also largely agreed:

- (1) A refusal under section 286(2) no. 3 can be explicit or implicit: Mülbert 3 [101] [Day 6/p.73 lines 23-24]; *Schwarze in Staudinger* at tab 70, para B94. Dr Fischer agreed, observing that “the conduct may, can constitute a definite refusal of performance. Whether this is the case depends on the individual case” [Day 7/p.99 lines 14-16 and 19-21];
- (2) A refusal under section 286(2) no.3 can be concluded from external circumstances: *Schwarze in Staudinger* at tab 70, para B94. Professor Mülbert emphasised that it sufficed if a debtor conducted himself in a way that could be understood to be a definitive refusal [Day 6/p.108 lines 9-13]. Dr Fischer agreed [Day 7/p.57 lines 10-16];
- (3) In order for a refusal to trigger section 286(2) no.3, it must constitute the debtor’s “last word”: Mülbert 3 [101] [Day 6/p.105 lines 1-9]; *Grüneberg in Palandt* tab 48(B) at (24c). The refusal cannot be just a negotiating stance on the part of the debtor; see Dr Fischer [Day 7/p.105 lines 13 – 17];
- (4) A refusal is serious and definitive if the debtor states, or conducts itself in a way where it can be implied, that it may be able to pay some time in the future but not at the time performance is due or within a reasonable grace period: Mülbert 3 [101]; *Schwarze in Staudinger* at tab 70 para B.96⁶;
- (5) A serious and definitive refusal can occur when, after or before the relevant claim falls due: Mülbert 3 [102]; [122] [124]; *Huber* at tab 51, p.450; *Lowisch and Feldmann in Staudinger* Rn 88 at tab 59A (“if...the

⁶ Wentworth did not seek to challenge Professor Mülbert on this point in cross examination.

refusal to perform took place prior to the maturity of the claim, default still does not take effect until the due date"); Dr Fischer agreed [Day 7/p.105 line 22 - p.106 line 13];

- (6) A refusal under section 286(3) no.3 requires neither a declaration of intent nor a quasi-declaration of intent. It does not require a declaration to creditors generally but requires a "real act" (Mülbert 3 [119]). In his third report Dr Fischer expressed the view that a refusal "normally" takes place by way of a declaration to the other party (Fischer 3 at [48]). However, in cross examination Dr Fischer agreed with Professor Mülbert and expressed the view that a serious and definitive refusal *"does not need a declaration of intent. It can also constitute a definitive refusal by a particular act"*: [Day 7/p.107 line 31 - p.105 line 4]⁷. Dr Fischer also agreed that conduct can constitute a definitive refusal of performance, depending on the individual case [Day 7/ p.99 lines 20-21].

83. Professor Mülbert and Dr Fischer were both cross-examined on the extent to which a serious and definitive refusal needs to be communicated to the creditor. As to this:

- (1) Professor Mülbert's view was that a serious and definitive refusal does not need to be communicated to the other party in order to become effective (although obviously the creditor will need to become aware of it at some point in order to rely on it) [Day 6/p.113 line 17-25; Day 7/p.34 lines 17-21] Professor Mülbert was clear in this regard and noted that it is sufficient *"if somebody had looked at the behaviour of the*

⁷ Later on in his cross-examination, Herr Fischer expressed the view that the word "refusal" *"constitutes a declaration of intent"* [Day 7/p.117 lines 16-19]. When asked about the inconsistency with his prior agreement that a serious and definitive refusal was a "real act" and did not require a declaration or a quasi-declaration of intent, Herr Fischer did not suggest that his previous answer had been incorrect. Instead, he stated that *"even in a real act, to be assessed as such from this act must be concluded an actual refusal"* [Day 7/ p.117 line 20 - p.118 line 1]. David Allison QC's suggestion that Herr Fischer had somehow earlier answered the "real act" point in a qualified manner [Day 7 / p.118 lines 2-4] was incorrect, as is apparent from the transcript.

debtor, it would have been obvious for him that the debtor would not perform"
[Day 6 / p.113 lines 17-25].

(2) Dr Fischer's view was less clear. He accepted (as set out above) that a serious and definitive refusal could be implied from external circumstances. He also accepted that conduct could amount to a serious and definitive refusal, depending on the circumstances. He did not suggest that the refusal needed to be communicated directly to the creditor but stated that the communication must be capable of being known by the creditor (i.e. not secret or private). In this regard, see:

- a. Day 7/p.99 lines 1-4: "*usually a definitive refusal is explained to the other party*" [emphasis added]
- b. Day 7/p.100 lines 1-5: "*The other party must be capable of being aware that the party in default is in default and is refusing to perform*" [emphasis added]
- c. Day 7/p.103 lines 9-12: "*The act does not have to be precisely, directly communicated to the other party but the act has to be done in such a way that the other party is made aware of it*" [emphasis added]
- d. Day 7/p.104 lines 18-20: "*it must be acknowledgeable, or recognisable without doubt by the parties that that has been the case*" [emphasis added]
- e. Day 7 /p.105 lines 6-12: Dr Fischer accepted that a generally available public statement would be sufficient, on the basis that the creditor would have been able to have knowledge of the statement:

"Q...A slightly different possibility. Assume that the debtor made a generally available public statement that he did not intend to perform.

*A. (Interpreted) Well, I think this is very theoretical but, if so, if I assume that if that statement has been made in public, that then the other party should also have **been able to have knowledge of it**" [emphasis added]*

84. Accordingly, whilst it is agreed that a serious and definitive refusal does not need to be directly communicated to the creditor, the difference between the experts is that:

(1) Professor Mülberr suggests that, at least where the conduct of the debtor is relied on, the existence of a serious and definitive refusal turns on the nature of the act performed and not on whether it is capable of being known by the creditor.

(2) Dr Fischer contends that the existence of a serious and definitive refusal turns on whether the communication is capable of coming to the attention of the creditor.

85. Professor Mülberr's position is to be preferred. The sense of his position was well illustrated by the example of a person who enters into a sales contract and who deliberately burns the goods [Day 6/ p.115 line 19 – p.116 line 4]. It chimes with common sense that such an act should constitute a serious and definitive refusal of performance, whether or not it is communicated directly to the creditor. By contrast, if Dr Fischer's view is accepted, a party who intends not to perform by, for example, deliberately destroying merchandise, could avoid the consequences of a serious and definitive refusal by keeping the event secret from the counterparty. But in any event, even if the existence of a serious and definitive refusal turns on whether the communication is capable of coming to the attention of the creditor, that test would be satisfied in the case of a statement which would become public.

86. In response to a question from the Court, Dr Fischer agreed with the proposition that, for an event to constitute a serious and definitive refusal, the event must be explicable exclusively by reference to a refusal to pay. That proposition does not

appear in Dr Fischer's reports and was not put to Professor Mülbert in cross-examination.

- (1) The precise interpretation of a party's conduct obviously depends on all the circumstances. For example, as illustrated by the discussion during cross-examination, the position may be different, for example, if the seller was drunk when he destroyed the goods, if the goods to be sold were fungible, and if the seller would be able to find a replacement within the time permitted for performance etc. If this is what Dr Fischer was seeking to convey, his view is unobjectionable.
- (2) If, however, the suggestion was that the *motive* of the non-performing party is somehow relevant to whether a particular act constitutes a serious and definitive refusal, this is not supported by any of the commentary or authorities. On the contrary, *Schwarze* [Auth 2/ 70] at B94 states that a serious and definitive refusal can occur where "*the debtor sells the merchandise to be delivered to a third party*" and notes that "*the BGH prefers to interpret the tenant's removal without undertaking the repairs for which he is obligated, at least where more major wear is evident, in a lease agreement as a final refusal to reform*". While the author correctly notes that the circumstances of the individual case are relevant, there is no suggestion that the issue turns on whether the seller's or the tenant's actions are *motivated* solely by a refusal to perform their respective obligations. If that were the test, one would expect it to be stated somewhere in the commentary. Such a test would also appear commercially nonsensical. On such a test a seller who deliberately sold unique goods to a third party, to obtain a better price, would still be able to assert that no serious and definitive refusal had occurred because "*I wish it had not come to this*". Such a test would also require investigation, in each case, of the debtor's motives underlying his statements or conduct.

Default before or upon the opening of insolvency proceedings

87. The experts are agreed that a default can occur in respect of a debt that is due and payable prior to the commencement of insolvency proceedings. It is agreed that such a default may occur by virtue of a warning notice or under any of the exceptions to the need for a warning notice, including a serious and definitive refusal of performance.
88. As set out above, the experts agree that conduct may constitute a definitive refusal to perform, depending on the facts of the individual case. The experts disagree over whether the facts relating to LBIE's administration application amounted to a serious and definitive refusal within the meaning of section 286(2) no.3. Whilst this is, ultimately, a question of fact for the Court to determine, the experts' views can be summarised as follows.

Professor Mülbert's Position

89. Professor Mülbert considers that such application "*conveys the message that LBIE would not pay its outstanding debts (including those such as the Single Compensation Claims that became due upon the presentation of the application) at the time of such filing or within a reasonable grace period*" and, as such, constitutes a "*serious and definitive refusal*" (Mülbert 3 at [103]).
90. Whether or not Professor Mülbert is correct ultimately turns on the Court's assessment of the facts.
91. In this regard:
- (1) The basis on which LBIE applied for and then entered administration is described in the first witness statement of Peter Sherratt [2/1/10], the Chief Legal Officer at the time that the application for administration was made (15 September 2008), and a director of LBIE.

(2) The application was made by the directors of LBIE (Sherratt 1 at para 1.2.1) on the basis that:

- a. LBIE was reliant upon receipt of cash from LBHI each day *"to enable it to make any payments"* (para 6.5) and required some US\$800 million in cash to settle payments contractually due to other financial institutions within the next 24 hrs (para 6.6);
- b. LBHI was no longer in a position to and will not provide any further cash to LBIE such that LBIE could not continue to trade (para 6.7);
- c. In light of such cash requirements over the next 24 hours, LBIE was unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 (paras 7.2 and 7.4);
- d. The purpose of the administration was to achieve a better realisation of LBIE's assets than would be achieved in a liquidation (para 8.1); it was not to try and ensure the survival of the company.

(3) As Dr Fischer accepted, making an application for an administration order for a company like LBIE is bound to have further consequences, including the closing out of certain contracts and an acceleration of liabilities. The reality is that once the application has been made, there is no turning back [Day 7/p.113 lines 1-16].

92. Against that background, the Court can be satisfied on the material currently before it that LBIE's application amounted to a serious and definitive refusal, at least in respect of contracts constituted by the GMA which is what matters for present purposes (and whatever may or may not have been the position in relation to other contracts) since:

- (1) Mr Sherratt was saying very clearly that LBIE would not be continuing to trade.

- (2) He was thereby making it clear that LBIE would not be performing its obligations in respect of contracts such as the GMA, which would instead terminate automatically as a result of the making of the application and potentially give rise to large claims for compensation for loss and damage which LBIE would not be able to satisfy.
- (3) The statements were not a negotiating stance. They were LBIE's final word on the matter. This is necessarily the case, given the consequences for an entity like LBIE of applying for an administration order.
- (4) The giving of a warning notice in such circumstances would have been a "mere formality".
- (5) The statements were made in a witness statement to court on an application and would inevitably become publicly known. Creditors were capable of having knowledge of it.
- (6) If Mr Sherratt had said all those things to an individual creditor, in the circumstances in which he said them, that would have amounted to a serious and definitive refusal.

93. In addition, Professor Mülbert (Mülbert 3 [105] – [108]) says that the fact that, as both experts agree, the early termination provisions in the GMA are valid and effective also demonstrates that LBIE's application for an administration amounted to a "*serious and definitive refusal*". In particular:

- (1) Both experts agree that automatic termination under clause 7(2) GMA was valid (see Fischer 1 [6]; [57]; Mülbert 3 [72]);
- (2) For that to be the case, automatic termination in the event of LBIE's administration application must have satisfied the essential conditions for termination of the contract under the 323 BGB: Mülbert 3 [72]; [Day 7/p.64 lines 4-25]; [Day 8 / p.1 line 23 - p.2 line 1]; [Day 8 / p.3 lines 7 - 10];

- (3) In Professor Mülbert's view LBIE's administration application did satisfy the essential conditions for termination of the contract under the BGB, since it constituted a "serious and definitive refusal" permitting termination under section 323(4) BGB (Mülbert 3 [117] – [118]);
- (4) The test for "serious and definitive refusal" under section 323(2) BGB has the same meaning as under section 286 BGB [Day 8 / p. 4 lines 20 - 23]. According to Professor Mülbert, it follows from this that LBIE's administration application also constituted a "serious and definitive refusal" within the meaning of section 286 BGB.

Dr Fischer's Position

94. In his third report at [49], Dr Fischer states that an application for institution of *German* insolvency proceedings is not sufficient to amount to a serious and definitive refusal.
95. The question of whether a *German* insolvency application constitutes a serious and definitive refusal has not been discussed in the case law or the literature; Dr Fischer [Day 8/ p.16 line 21 – p.17 line 3]. The only authority touching on the point is a decision of the Munich Court of Appeal [Auth 3/[98]]:
 - (1) In that case, the debtor was suffering only a temporary liquidity bottleneck which it was hoped would be cleared away and which would make the bankruptcy proceedings unnecessary [Day 8 / p.17 line 23 – p.18 line 2];
 - (2) There was no detailed discussion of the relevant point; and
 - (3) As Dr Fischer accepted in cross-examination, in that context, the court decided that *merely* opening the bankruptcy doesn't, on its own, amount to a serious and definitive refusal [Day 8 / p.17 lines 15 – 18].

96. It was clear from his cross-examination that Dr Fischer's view on whether a German insolvency application by itself amounts to a serious and definitive refusal was based on the particularities of the procedure and policies relating to a German insolvency application. In particular (see [Day 8 / p.10 line 24 – p.20 line 12]; Fischer 3 at [49]):

- (1) The fact that in German law, the application is procedural, only addressed to the court and does not constitute a declaration to the individual party to the contract.
- (2) The fact that an application for a German insolvency does not contain a statement referring to the intent to perform but expresses only a possibility (and not a certainty) that the debtor does not want to perform.
- (3) The fact that a German court would also have to consider, when deciding whether a petition in Germany amounts to a serious and definitive refusal, whether it would cut across the policy of the InsO, including section 103, which allows the insolvency administrator to perform contracts during the course of the insolvency [Day 8 / p.18 line 3 – p.19 line 12].

97. Professor Mühlbert takes a more nuanced view of the position in relation to a German insolvency application. Under German law, at least in the case of legal persons, there may be an obligation to file an insolvency petition, breach of which may constitute a criminal offence; see Dr Fischer [Day 8 / p.21 lines 12-21]. In Professor Mühlbert's view, whilst such a mandatory filing may not amount to a serious and definitive refusal under German law, depending on the facts and circumstances a voluntary filing would do so (Mühlbert 3 [104]).

98. But, whatever the position as a matter of procedure and policy of German insolvency law, Dr Fischer accepted that in order to determine whether the same reasoning adopted by him in the context of German insolvency proceedings applied to the facts of LBIF's administration application "*an examination should be made of foreign procedural law to ask whether the reasons according to German law for a*

serious and definitive refusal in...[an] insolvency application exists in the foreign law system"
[Day 8 / p.16 lines 6 – 12].

99. In this regard, it is plain that the arguments raised by Dr Fischer in the context of a German insolvency application do not, or do not necessarily, apply in the case of an English administration since:

- (1) Unlike a German insolvency application, an English administration application is not addressed solely to the court but, as in the case of LBIE's administration application, may include statements made in a witness statement which would inevitably become publicly known. As Dr Fischer accepted during the course of his cross-examination, a serious and definitive refusal does not require a declaration to be made to the individual party: [Day 7/p.103 lines 9-12];
- (2) While the German procedural rules might mean that a German insolvency application does not contain a statement referring to the intent to perform, whether statements made in a foreign insolvency proceeding amount to a serious and definitive refusal to perform ultimately depend on the facts applicable to the particular application. As to which, see Sherratt [2/1/10].
- (3) A refusal is serious and definitive if the debtor states, or conducts itself in a way where it can be implied, that it may be able to pay some time in the future but not at the time performance is due or within a reasonable grace period: Mülbart 3 [101]; *Schwarze in Staudinger* at tab 70 para B.96.

100. In his reports, Dr Fischer identified only two arguments in support of his view that the facts of LBIE's administration application in particular (as opposed to an application governed by the particularities of German procedure and policy) did not constitute a "serious and definitive refusal" (Fischer 3 [50] [52]);

(1) The Single Compensation Amount was not due at the date of LBIE's administration (Fischer 3 [50] – [51]). That is incorrect for the reasons given above.

(2) The institution of insolvency proceedings cannot constitute a refusal of performance if only because there is no act by the debtor (Fischer 3 at 52). However, whatever may have been the position in relation to a petition under German law, LBIE's administration application was an act by LBIE, acting through its directors (see IR 2.3(2): "*if the application is made by the directors, it shall state that it is so made under paragraph 12(1)(b); but from and after making it is to be treated for all purposes as the application of the company*").

101. In cross-examination Dr Fischer was asked about the circumstances of LBIE's administration application. In that context, Dr Fischer correctly accepted that, viewed objectively, Mr Sherratt's witness statement was saying that LBIE will not perform its obligations [Day 7/lines 13-19].

102. However, Dr Fischer sought to provide additional reasons, not mentioned in his reports, as to why in his view the circumstances of LBIE's administration application nevertheless did not amount to a serious and definitive refusal to perform. Those reasons were almost exclusively focussed on his interpretation of the *motive* for LBIE's refusal to perform:

(1) Day 7/p.114 lines 10-12: "*he only says that they cannot pay but not that they are not wanting to, or wishing to or have no intention to pay*";

(2) Day 7/p.115 lines 2-7: "*Taking account of what appears in the literature and in the case law for a definitive refusal to perform, which is subject to very strict conditions, it is not sufficient to say, 'I am not in a position, I cannot pay', one has to say, 'I do not wish to pay, I do not want to pay'*".

103. As to this:

(1) As stated above, there is no support in the commentary, authorities or in Dr Fischer's reports for the notion that the *motive* of the non-performing party is relevant to whether a particular act constitutes a serious and definitive refusal.

(2) The distinction Dr Fischer sought to draw between a statement to the effect that a debtor cannot pay and a statement to the effect that a debtor has no intention to pay is unsustainable. A debtor may have no intention to pay precisely because it cannot pay.

104. In any event, the experts agree that the question is whether the refusal to perform is the final word and that whether a particular form of conduct satisfies that condition is to be determined by the circumstances of the case.

105. For the reasons set out above, the facts and circumstances surrounding LBIE's administration application make it clear that LBIE was finally and conclusively stating that it would not perform its obligations in the ordinary course. Requiring creditors to submit a warning notice in those circumstances would have been an entirely empty formality.

Formal requirements for a warning notice

106. In the event that the Court is not satisfied that LBIE's application for administration, at least on the materials currently before the Court, amounted to a serious and definitive refusal in the required sense, the question arises as to whether a proof of debt filed in the LBIE administration could, depending on its terms, amount to a warning notice for the purpose of Section 286 BGB.

107. The experts are agreed as to the formal and substantive requirements for a warning notice (Joint Statement at 22 [4/13]):

(1) It is an unequivocal demand for payment of a sum due: Mülbart 3 [84] [4/11];

- (2) In general, the warning notice has to be submitted by the creditor to the debtor: Mülbart 3 [84];
- (3) It must be specific, not conditional, and definite and serious: Mülbart 3 [85];
- (4) It requires no special form. Neither the specification of a date for payment or its designation as a warning notice are obligatory: Mülbart 3 [85].

108. The experts are also agreed that a warning notice cannot be served after the principal debt has been repaid (Joint Statement at 25).

Default following opening of insolvency proceedings

109. The experts agree that the filing of a proof of debt in German insolvency proceedings cannot constitute the service of a warning notice under section 286 BGB.

110. The fact that no warning notice can have effect after the commencement of German insolvency proceedings is a consequence of the particularities of German insolvency law. In particular, as was accepted by Dr Fischer in cross examination, three features of German insolvency law support the general policy (referred to by Dr Fischer as the "*essential principle of German insolvency law*" [Day 8 / p.24 lines 13-16]) under the German insolvency code that creditors are not entitled to improve their position by serving a warning notice and thereby claiming interest after insolvency has started:

- (1) It would be contrary to the German law articulation of the policy of treating all creditors equally. That policy prevents a creditor from serving a warning notice when the insolvency proceedings have been started; Dr Fischer [Day 8 / p.22 lines 3 – 21].
- (2) German insolvency law makes a distinction, for certain purposes, between the insolvency estate (*Insolvenzmasse*) and the insolvent debtor as

person or entity. The debtor loses its power of disposition and the administrator “does not act as representative of the entity and is generally not empowered to receive declarations of intent...and quasi declarations of intent...on behalf of the debtor as an entity” (Mülbert 3 [91]). As the debtor has lost the power to dispose of his assets in a German insolvency, a warning notice cannot take effect; Dr Fischer [Day 8 / p.22 line 24 – p.23 line 9].

- (3) In order for a default to occur, a claim must not only be due and payable but it must also be “enforceable” (see Fischer 3 [41]). Dr Fischer’s view is that after German insolvency proceedings have started, claims are no longer enforceable because the creditor is not allowed to bring a claim against the debtor and must instead satisfy his claim against the assets in the estate; Dr Fischer [Day 8 / p.23 line 13 – p.24 line 3] (*cf* Professor Mülbert’s contrary view in the appendix to Freshfield’s letter of 23/10/15 at [4/15]).

111. Dr Fischer correctly accepts that “if there are material differences on those point between German and English insolvency law, a different assessment of the problem of default [during the course of insolvency] may be required” (Further Report [12] [4/16]). Such material differences exist, since:

- (1) Whilst the principle of *pari passu* distribution is a key feature of English administration proceedings, the policy underpinning the English collective regime does not mean that no new rights can be triggered during administration. It is well-established that notices triggering contractual entitlements can be served during the course of an administration: *Re Olympia & York Canary Wharf Ltd* [1993] BCC 154.
- (2) Nor is it the case that the policy of treating all creditors equally means that no rights to interest can be triggered during the period of the insolvency. This is because, under Rule 2.88(7) of the Insolvency Rules 1986, interest is only payable from any surplus remaining after the payment of the debts proved. The subordination of claims to interest by Rule 2.88 ensures that the collective regime is not disrupted where

the conditions for an interest claim (i.e. default) are satisfied post-insolvency.

- (3) In an English administration, there is no necessary distinction between the insolvency estate and the debtor as an entity of the kind that appears to exist in a German insolvency (Mülbert 3 [92])⁸ and, unlike in a German insolvency, an English administrator acts as an agent of the debtor: Insolvency Act 1986 Sch.B1 para.69. In his Further Report [13] – [14], Dr Fischer states that in a German insolvency “the disposition authority of the debtor passes to [the insolvency administrator] after the opening of the insolvency proceeding” and seeks to draw a parallel with the position of an English administrator by stating: “While the Administrator indeed acts as the representative or agent of the debtor, I understand the Summary of Administration that was made available to me to mean that the debtor may neither satisfy claims, nor conduct dispositions of the debtor’s assets without the consent of the Administrator”. However, the relevant distinction is between an insolvency proceeding in which the obligation no longer falls to be satisfied by the debtor (as is the case in a German insolvency proceeding, due to the separation of estates) and an insolvency proceeding in which the obligation continues to be satisfied by the debtor, albeit through the agency of administrators (as is the case in an English administration).
- (4) As to enforceability, Dr Fischer is wrong to suggest (Fischer 3 [40]) that the fact (a) that an English administration brings about a moratorium on proceedings against the debtor and (b) that creditors

⁸ This is the case notwithstanding the fact that for certain purposes and in certain contexts English corporate insolvency proceedings have been described as giving rise to a “statutory trust” in favour of creditors. The concept of a “statutory trust” is used in the context of English corporate insolvencies to convey an impression of the relationship between an insolvent company and its creditors. It is not intended to suggest that property is in fact held on trust by an insolvent company, still less by a third party insolvency practitioner, for the company’s creditors. See, in this regard, *Ayerst v C. & K. (Construction) Ltd* [1976] AC 167 per Lord Diplock at [180]: “All that was intended to be conveyed by the use of the expression “trust property” and “trust” in [previous judicial statements on the nature of the statutory trust] was that the effect of the statute was to give to the property of the company in liquidation that essential characteristic which distinguishes trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons”.

must file proofs of debt in accordance with English insolvency law, means that the effect of an English administration on the enforcement of creditors' claims is equivalent to a German insolvency process, since:

- a. There is no distinction between the insolvency estate and the debtor as an entity and, in an English administration, the administrator acts as an agent of the debtor.
- b. The English moratorium does not constitute a *legal defence* to a claim, in the sense required to render the claim "unenforceable" within the meaning of the German authorities referred to by Dr Fischer ([Auth 1 / [10]]; [Auth 1 / [13]]). It merely presents a procedural bar to bringing an action in respect of an otherwise enforceable right.

- (5) Whatever the position in a German insolvency process, a proof of debt in an Administration in England is made by "*a person claiming to be a creditor of the company and wishing to recover his debt in whole or part*". Rule 2.72(1) Insolvency Rules 1986. Even if submitted to the administrators, the proof satisfies the substantive requirements of a warning notice.

- 112. In light of the differences between an English administration and a German insolvency proceedings, Professor Mühlbert's view is to be preferred: the German authorities and commentary regarding a German proof of debt would not apply in the case of a proof of debt submitted in an English Administration so as to prevent a proof of debt from ever constituting a warning notice whatever its terms (see Mühlbert 3 at [92]).

F: ASSIGNMENT

Introduction

113. The experts agree that:

- (1) It is possible for a counterparty to assign rights to the Single Compensation Amount under the GMA.
- (2) The transferee may assert a claim to compensation for default damage under BGB section 288(4) which has already accrued to the transferor, if the terms of the assignment expressly or impliedly include such a claim (Joint Statement at [28] [4/13/363]).
- (3) For the period before the transfer, the only default damages claim that can be asserted is the default damages claim belonging to the transferor (Joint Statement at [29] and [30] [4/13/364]).
- (4) For the period after the transfer, the focus of any default damages claim is on the transferee and not the transferor (*"the reason and amount for the damage are guided by the person of the transferee"* (Joint Statement at [31] [4/13/364])).
- (5) The fact that the transferee was aware of the obligor's default at the date of the assignment, does not preclude the transferee from asserting the assigned claims (Joint Statement at [32] [4/13/365]).
- (6) The burden of proof for establishing any default damages claim lies with whoever asserts the claim (Joint Statement at [33] [4/13/366]).

The dispute

114. The relevant dispute between the experts is whether a transferee can claim a greater level of damages for the period after assignment than the transferor could

have claimed (Dr Fischer cross-examination at [Day 8/p.26 lines 3-5]). In particular:

- (1) Dr Fischer in Fischer 1 [96] – [100] [4/8/152] identifies the essential issue as being whether sections 404 [Auth 1/83V], 406 [Auth 1/83W], and 407(1) [Auth 1/83X] of the BGB express “*a generally applicable principle founded on freedom of contract, that the legal position of the debtor cannot be made worse by an assignment*” (Fischer 1 at [103] [4/8/153]).
- (2) Professor Mülbert says that sections 404, 406 and 407 BGB are not relevant, since they are concerned with preserving the debtor’s legal entitlements. There is no protection as regards the debtor in respect of some worsening factual position which occurs upon assignment (Professor Mülbert cross-examination at [Day 7/p.38 lines 1-8]).

115. The experts agree that:

- (1) There is no clear decision of the German Courts in which this issue has been resolved: it has been expressly left open by the BGH in its decision of 25 September 1991 [Auth 1/Tab 14] (Dr Fischer cross-examination at [Day 8/p.26 lines 12-23]);
- (2) The prevailing view in the commentaries on the effect of an assignment is that there is no cap or limit on the extent of the damages that the assignee can recover: Fischer 1 at para 101 [4/8/152] and Dr Fischer cross-examination at [Day 8/p.27 lines 1-4].

116. Dr Fischer also accepted in cross-examination that:

- (1) To the extent that he relies upon articles or commentaries which suggest a contrary view, such materials acknowledge that the prevailing view is as set out by Professor Mülbert [Day 8/p.44 lines 2-8];

- (2) It was possible that the BGH would agree with the prevailing view, and that he could not predict the way in which the BGH would determine the point [Day 8/p.43 lines 5 to 7].

Section 398

117. The starting point is section 398 BGB, which is the provision permitting assignment of claims [Auth 2/831]. Section 398 BGB provides:

"A claim may be transferred by the creditor to another person by contract with that person (assignment). When the contract is entered into, the new creditor steps into the shoes of the previous creditor."

118. There is nothing in the language of section 398 BGB which purports to restrict the rights of the transferee following the assignment. Dr Fischer accepted that section 398 did not directly address the disputed issue [Day 8/p.26 lines 9-11].
119. Although in re-examination, and in response to a question from the Court, Dr Fischer indicated that he relied on Section 398 as a secondary line of argument on the basis that the "stand in the shoes" principle assisted his argument [Day 8/p.56 line 22 to p.57 line 10], that is not the approach adopted in his expert evidence (see in particular paras 100-103 at [4/8/152-153]). Reliance was only placed on Section 398 sent 2 BGB in respect of an argument based on potential abuse (i.e. the original creditor and new creditor could conspire to arrange a transfer where greater claims could be made: see para 106 of Fischer 1 at [4/8/154]). None of the commentators appear to regard the maxim of "stand in the shoes" as indicating that the amount of damages recoverable by an assignee is capped. Reference to the metaphor does not take the analysis any further for at least three reasons:

- (1) First, if an assignee is treated as stepping into the shoes of the assignor, the question remains as to what "rights" the assignee is stepping into and whether they permit an assignee to assert a claim for increased damages (i.e. what is the size and fit of the shoes);

- (2) Second, Dr Fischer cannot be suggesting that the stand in the shoes metaphor entitles the assignee to exactly the same rights (no less and no more) than the assignor, precisely because it is common ground between the experts that the assignee cannot recover for the greater loss (if any) that an assignor would have suffered absent the transfer;
- (3) Third, as in the case of the English law arguments, there is no real risk of abuse: any claim by the assignee must be based on losses that it has actually suffered.

No limitation on the extent of the damages that an assignee may recover

120. Both experts agreed that it is the position of the transferee alone which is relevant when determining the damage suffered as a consequence of the default for the period after the assignment (see, for example, Dr Fischer cross-examination at [Day 8/p.25 lines 14-17; Day 26 lines 11-13]; Staudinger [Auth 1/[42] at para 82]; BGH decision of 2008 [Auth 1/[29] at [7] and [20a)]; BGH decision of 2006 [Auth 1/ 24 at [9]].
121. Professor Mühlert's evidence was that the correct position under German law followed as a consequence of this common position. He explained that the principle that the damages interest claim is calculated by reference to the transferee in the period after assignment holds true even if the debtor has to pay more as a result (Mühlert 3 [138] at [4/11/275]; Professor Mühlert cross-examination at [Day 7/p.38 lines 1-8]). This is because there is no limitation on the damages that the assignee can seek arising from the language of the BGB or any other relevant provisions. The same claim can be asserted by the assignee, although "*the point of reference for the determination of the damages changes upon assignment*" (see Professor Mühlert's re examination at [Day 7/p.40 lines 17-22]).
122. In that regard, Professor Mühlert explained that Sections 404, 406 and 407 BGB are intended to protect the debtor from having his *legal* position disadvantaged (i.e. availability of defences, rights of set off, steps taken before notice of the

⁹ The claim of the assignee remains rooted in the claim transferred [Day 6/p.176 lines 11-24].

assignment given etc.) as a consequence of the assignment and not his factual position¹⁰ (Professor Mülbart cross-examination, at [Day 6/p.163 line 9 to page 164 line 1]). They are concerned with the debtor's contractual and statutory position *vis-à-vis* the debtor (Mülbart 3 [139] - [140] at [4/11/275]). Insofar as damages are higher by referring to the person of the assignee, this represents a factual and not a legal disadvantage: Mülbart 3 at [140]; von Olshausen at Tab 72.

123. As Dr Fischer accepted, this is the prevailing view in the various articles and commentaries identified by the experts. Thus:

- (1) Staudinger [Auth 1/42 at [82]] states (excluding references):

"The assignee is entitled to all subsequent claims resulting from the claim, in particular those under section 280 et seq. The assignee can therefore...autonomously assert claims if the debtor is in default towards the assignee...The amount of the default damages is, in principle, calculated based on the person of the assignee". The principle applies even if the damages incurred by the new creditor are higher than those presumably incurred by the old creditor. The debtor, who must expect the assignment at any time, cannot reclaim protection of confidence with regard to a less beneficial development of damages. It is, however, imaginable that the new creditor, in certain cases, is subject to a duty to minimise damages in the form of an obligation to provide notice of potential of increase damages."

- (2) Gernhuber in Festschrift Raiser [Auth 2/[77]] states:

"Damages caused by delay that are first incurred after assignment of the debt, however, must be calculated by the assignee and refunded to him. After assignment of debt, he is the creditor whose rights have been offended, and for that reason he is the one who can demand compensation for his damages, however much higher they may be than the damages that the assignor might have suffered. The neighbouring idea of having to protect the debtor from enlarged liability as an analogy to sec 404 or even in logical development of the basic line of thought operating in the standard quickly turns out to be superficial. To be sure, the law wants to protect the debtor from encroachment on his legal position. Nevertheless,

¹⁰ This much is common ground with Dr Fischer, who referred at Fischer 1 para 104 [4/8/153] to Section 404 having been interpreted by the BGH as having the effect that the "legal position" of the debtor should not be made worse by a transfer of claims to a new creditor.

¹¹ In cross-examination, Dr Fischer noted when taken to this authority that it was always possible to assign a claim under German law unless there was a prohibition on assignment: [Day 8/p.28 lines 18-23].

it shows absolutely no tendency to guarantee the debtor the actual positions [i.e. to fix the exposure to damages] [with the consequence of] enabling him relatively indifferent behaviour in breach of contract"

Gernhuber goes on to state that:

"...the debtor is not wholly defenceless before new and obvious risks. Just as it is also incorrect to look for a protection in sec. 404 that safeguards the debtor from unexpected claims to compensation for damages...so it is correct also to apply sec. 254 II 1¹², i.e. a standard that benefits anyone who has to pay compensation for damages. The task of the assignee is to "alert the debtor to the risk of an extraordinarily high amount of damages that the debtor neither knew about nor had to know about" [note, a similar view is expressed at the end of the Staudinger passage, above]...No debtor can expect more protection for from a legal system that deems default to be an irregularity"

- (3) Hoffmann in "Assignment of the principal claim and default damages" (1994) at [Auth 2/[79]]¹³ adopts the same position, and answers the arguments made by Dr Fischer in favour of an alternative outcome based on freedom of contract (see below):

"II. Higher damages incurred by the Assignee in comparison to the Assignor

Here, the Debtor suddenly finds himself subject to a higher claim for compensation of default damages than would be the case if the claim had remained with the Assignor. Whether the debtor, with regard to the amount of damages, could rely on not being subject to further claims as a result of the default is undisputed. Here, the opinion that a deterioration in the position of the debtor is not permissible as a result of the assignment, is often represented. The argument is that the debtor has already become accustomed to the old creditor and, could not therefore expect an amount of default damages that does not exceed the amount substantiated in the person of the Assignor. In this respect, a fundamental concern is: Whether a debtor, who obstructs performance, can trust [i.e. has a legitimate expectation that] that the damages incurred because of him will not become more severe is extremely questionable. Such trust is generally foreign to the rules governing the compensation of damages...

¹² At [Auth 2/83I]. Section 254 BGB governs contributory negligence. It provides that liability for damages may be reduced "if the fault of the injured person is limited to failing to draw the attention of the debtor to the danger of unusually extensive damage, where the debtor neither was, nor ought to have been aware of the damages".

¹³ See also Schwentzer (1982) at [Auth 2/82], who addresses and rejects the views of Peters' relied upon by Dr Fischer.

But the recommended constructions, which would substantiate an interest of the debtor worth protecting are also not convincing. Thus it is maintained that, e.g. the generation of greater damages in the person of the Assignee is an inadequate consequence of default. This cannot be accepted. Even if the assignment were not executed, the debtor could not have relied on the default damages in the person of the original creditor remaining the same amount forever. The development of damages would also not have been a fixed, unchanging amount, even in the person of the Assignor. . . But also the assignment as such would have been foreseeable for an optimum observer, as demanded by adequacy. The same applies for a higher interest burden on the Assignee in comparison with the Assignor. The debtor cannot, therefore, be particularly surprised if he is presented with higher default damages in the person of the Assignee.

At times, an attempt is made to assist the debtor by way of an analogue application of sec 404, 406 et seq BGB¹⁴. This too shall be denied. The contractually non-compliant conduct of the debtor does not align well enough with the interests worth protecting which are taken into consideration by sec 404, 406 et seq. The protection orders defined in sec 404, 406 et seq. BGB pertain either to the debtor, who rightly [i.e. has a right to] refuses performance on the debt or offsets it in good faith. Therefore, in my opinion, the opposite is the case, namely, that the lawmakers only deem the debtor worthy of protection in the standardised cases, in which they apparently did not, however, wish to include a contractually non compliant conduct such as default [i.e. while rights that the debtor can properly assert against the assignor are protected as against the assignee, no protection is given to the debtor for the consequences of its own failure to pay]...

Therefore, one cannot get around basing the calculation of default damages on the Assignee. That this is not a purely formalistic assessment, is clear based on a comparison of the different interests of the participants...the old creditor can release the claim from his sphere of interest so the question of when the debtor fulfils the principal claim is no longer relevant to him. A delay in this respect no longer damages his assets. In contrast, it is decisive for the new creditor that he is compensated for the damages he incurred due to the default. This may put the debtor in a worse position than if the claim had remained with the Assignor...in exceptional cases, assisting the debtor by way of sec 254 para 2 sent. 1 BGB could be considered".

- (4) Müller in Prütting/Wegen/Weinreich [Auth 1/[63]] (cited in Fischer 1 at fnr 55 [4/8/153]), also concludes:

"Arrears damage is measured now in principle by the person of the assignee. This applies even if the damage for him is higher than for the assignor. However, a

¹⁴ Dr Fischer accepted when taken to this authority that the author was expressing the view that section 404 BGB and following indicate when the legislature thought the debtor was worthy of protection, which protection can go no further than the terms of those sections, and did not indicate any disagreement with the proposition [Day 8/p.33 lines 13-18].

harm reduction usually takes Section 254II into consideration when the transferee has failed to point to the possibility of an increased damage.”

124. Limited assistance can also be derived from the BGH decision of 2008 at [Auth 1/29]. Although the decision contains no consideration of whether the damages can be greater than those of the assignor, the judgment indicates that this could be the case since the court held at para 20(a):

“[20]a...the obligation to indemnify the defendant extends to all profits lost by the plaintiff over the subsequent period, because the latter, with effect from 1.6.1998, assumed by virtue of universal succession the position of creditor from the OHG and the extent of damages is now falls to him” [emphasis added]

The argument in favour of a cap on recoverable damages

125. Dr Fischer’s position is set out in paragraphs 96 – 106 of Fischer 1 [4/8/151]. As noted above, he accepts that the view that prevails in the more recent legal literature is inconsistent with his view. Nevertheless, Dr Fischer states that the Federal Court has tended to take a broad interpretation of sec 404 BGB, interpreting it as stating that the legal position of the debtor should not be made worse by a transfer of the claim to the new creditor (Fischer 1 [104] [4/8/153]). Fischer says that these decisions “*together with the general principle in German Civil law that contracts cannot be made that impose obligations on third parties*”, support the view that a change of creditor cannot entail greater obligations for the debtor, including in the sphere of damages, than there would have been to the original creditor. Sections 404, 406 and 407 are a manifestation of this principle” (Fischer 1 [105]).
126. Dr Fischer accepted that Sections 404, 406 and 407 do not in terms apply to this issue and that he was relying on a general principle that he sought to derive from those provisions i.e. that a transfer should not cause detriment to the debtor [Day 8/p.40 lines 9-13]. He also accepted that the commentary on these provisions indicated that they protected the legal interests of the debtor [Day 8/p.42 lines 2-4]. His theory is based on a more general principle that he seeks to derive from decisions regarding those sections of the BGB: Fischer 1 at para 104 [4/8/153].

¹⁵ Whatever the general principle may be, it does not apply here since the assignor / assignee contract does not impose any new obligations on the debtor.

127. However, none of the cases referred to by Dr Fischer addresses the question of whether a transferee can claim a greater level of damages for the period after assignment than the transferor could have claimed i.e. a factual consequence of the assignment. They all emphasise that the *legal* position of the defendant cannot be worsened as a consequence of the assignment but go no further than that (*cf* Mülbert 3 [139] - [140] [4/11/275]). This was accepted by Dr Fischer [Day 8/p.43 line 15 to p.44 line 1]. Thus, by way of example:

- (1) BGH decision of 28 November 1955 [Auth 1/1]: This case concerned whether rights of set off could be asserted by the debtor against the assignee. In that context, the court held (p.2 of the decision, numbered paragraph 2): *"the regulations of s.404, 406 BGB serve the purpose of not disadvantaging the debtor by the assignment of the claim, that is, not placing the debtor in a less favourable position with respect to the new creditor than it had occupied with respect to the old creditor"*
- (2) BGH decision of 26 June 1957 [Auth 1/2]. The claimant purchased a property which had been acquired from the seller (Dr G's) wife (Mrs H) in 1938. The purchase price paid by the plaintiff was secured by a mortgage. That claim was assigned to the defendant. Dr G's title was defective and Mrs H obtained an order requiring the claimant to return the property to her, upon payment of a sum (the "Return Amount"), and for the cancellation of the mortgage. The claimant claimed damages against Dr G's heirs and sought a declaration that the defendant (who was the assignor of the purchase price) had no claims against her in respect of the purchase price or the Return Amount. The case turned, in part, on the scope of s 404 and 406 BGB and whether the defendant assignee was, as regards its claim for the purchase price, bound by the plaintiff's defence based on defective title. The case had nothing to do whether a transferee can claim a greater level of damages for the period after assignment than the transferor.
- (3) BGH decision of 17 March 1975 [Auth 1/6]. The case concerned whether a debtor could refuse payment of a sum to an assignee in circumstances where it had a counterclaim against the former creditor. In

that context, the court held (at 126): “*sec 404 and sec 406 BGB want to prevent that the legal status of the debtor worsens due to a change in creditor*”.

- (4) BGH decision of 29 November 1984 [Auth 1/9]. The decision provides on the final page, 1st column, last paragraph: “*The statements of the court of appeal fail to consider the essential function of s.357 BGB, s.404 BGB as far as the legal position of the third party debtor is concerned. The legal position, which the third party debtor previously had towards its creditor, should not be affected by the security interest or change in the identity of the creditor*”. However, the case had nothing to do whether a transferee can claim a greater level of damages for the period after assignment than the transferor.
- (5) BGH 5 December 2003 [Auth 1/21]: This decision is, again, consistent with the distinction drawn by Professor Mühlbert between the legal position of the debtor, and the factual consequences of assignment on the assessment of a right to damages which has been assigned. The Claimant purchased residential property. The claim for the purchase price was assigned to the Defendant. A charge was subsequently registered against the property securing certain tax amounts owed by the seller of the property. The Claimant sought to rescind the contract for sale on the basis of a breach of a right to an unencumbered transfer and to prevent the Defendant from enforcing against the property. In that context, the court held (p.1602 at (b) that “*the pleading of non-performance of contract may also be cited against the Defendant as assignee. Sec. 404 BGB protects him only from objections, which had not yet arisen at the time of the assignment. However, this is not the case here...the appellate court’s opinion to the contrary had the curious consequence that non-performance by the seller could no longer be cited against the new creditor of the payment claim*”.
- (6) BGH 19 October 2005 [Auth 1/23]). The Claimant assignee claimed payment of rent arrears from the defendant. The landlord had accepted reduced payments of rent for a period of two years [25]. In this context, the court held [27] “*in accordance with sec. 404 BGB, the claimant as assignee must also suffer to be held responsible for this period of inactivity. Under sec 404 BGB the defendant may plead the objections with the claimant which had been established*

against the [landlord] by the time of the assignment of the claim. Sec 404 BGB has the purpose of preventing a deterioration of the defense options of the debtor in the wake of an assignment of the claim". Again, this is consistent with Professor Mülbert's opinion.

- (7) BGH decision of 11 May 2006 [Auth 1/25]. This case was put to Professor Mülbert. It concerned a partial assignment which was only disclosed to the debtor after he had made payment, and the question arose as to whether a right of appropriation could be exercised afterwards. Whilst it is correct that the court relied upon the principle of debtor protection to find that the debtor could rely on the right of appropriation, it is again an example of a legal right or defence (similar to taking subject to equities) being capable of being exercised by the debtor against the assignee. It is (as Professor Mülbert suggested) entirely consistent with his evidence [Day 6/p.173 lines 5-15]. The fact that the Court refers to the debtor not being placed in a worse position does not assist when the right that the debtor wanted to exercise was a substantive legal right or defence (as Professor Mülbert said at [Day 6/p.174/lines 10-24]).
- (8) BGH decision of 26 September 2009 [Auth 1/35]. This is referred to by Dr Fischer at Fischer 1 at [103] in direct support of his assertion that "*the debtor does not have to bear the detriment resulting from a greater loss incurred by the assignee*". However, it provides no such support:
 - a. The case relates to a policy of insurance covering fire damage. The claims under the contract were assigned. The determination of the amount of the fire loss was conducted between the assignor and the insurers. The assignor made false statements, and the insurers refused to pay the claim made by the assignee (in respect of the claims of the assignor that had been assigned) on the grounds of fraud.
 - b. As a matter of construction of the policy, it was held that the right to the coverage amount was not granted independent of the

restrictions imposed on the assignor (those require a particular standard and leading to voidness if breached). The assignee's rights "were only exercisable within the framework of these specifications." The Court then comments:

"This is the necessary consequence of the sentence that the situation of an Obligor must not be changed to the latter's disadvantage by the assignment of a right. The case here is not any different than in case of a claim being assigned from another mutual contract or a claim that is subject to a condition subsequent. ... It is irrelevant whether the facts affecting the existence of the assigned right have taken effect before or after the assignment. The changes that the obligation relationship suffers through actions or failures to act on the part of the Assignor in its role as Obligor must be borne by assignee exactly because the liability side is not affected by the change in Obligor: they are rooted in the original contract and represent an unavoidable weakening of the new Obligee's legal situation."

- c. It is clear, therefore, that the question in issue was not recovery of a greater amount of damage than the assignor: it was the ability to cover what had been payable to the assignor before the assignment, but which had been forfeited by reason of the assignor's fraud.

128. All of the cases referred to by Dr Fischer are susceptible to a similar analysis and, as noted above, although there is some academic commentary which supports his position¹⁶, it is not the prevailing view in German academic literature.

¹⁶ Dr Fischer refers to materials by authors such as Juncker (1995) [Auth 2/80] (which advances the argument that freedom of contract restricts the assignment from being disadvantageous to the debtor, and is adopted/developed by Dr Fischer at Fischer 1, paras 103-106 [4/8/153]); Peters (1977) at [Auth 2/81] (who expresses in substance the same view because "For claims that were only injured after assignment, however, nothing else can apply [i.e. the "person of the assignor must remain the final word"], as the time of assignment they already carried within themselves the "faculty" of conversion into a claim for damages in a certain amount – dependent precisely on the person of the assignor." Peter's view is commented on and rejected in Schwenger (1982) [Auth 2/82]).

129. The Senior Creditor Group submits that there is, on analysis, no basis for the extended protection that Dr Fischer seeks to identify and that Professor Mülbert's position should be preferred as being more consistent with the accepted principle that damages are to be assessed by reference to the loss suffered by the assignee.
130. Furthermore, when the distinction between the protection of the legal position of the debtor upon an assignment (i.e. the rights and defences which he may avail himself of), and the factual basis on which damages may be sought (which is agreed to be by reference to the assignee) was put to Dr Fischer, his response was that "*the question of how damages developed was not a question just - just a factual question but also a question of the type of investment that the transferee would have been - would have been made*" [Day 8/p.43 lines 1-7] or that "*this is not a question of fact but it is a question of the legal transactions*" [Day 8/p.36 lines 1-2].
131. With respect, this is not a distinction that withstands scrutiny:
- (1) The loss suffered by the assignee is necessarily a question of fact in any given case. The extent to which the loss is recoverable is a question to be determined by reference to the cause of action which has been assigned. But the transactions which would have been entered into, or the type of investment which would have been made, are factual issues. Consider, for example, a creditor who could establish that, during year 1, it would have generated a return of 10%/per annum and that, during year 2, this would have risen to 12%/per annum. The difference between the return is based on the relevant facts, and not on any distinction based on legal rights or "*transactions*."
 - (2) As the Court observed, any such approach gives rise to a difficult multiplicity of inquiry [Day 8/p.38 lines 8-12]. Dr Fischer appeared to accept that this would occur (i.e. consideration would need to be given both to the losses of the assignee and the theoretical losses of the assignor had no assignment taken place), but seemed to suggest that it was an adequate answer to this dilemma that it would be for the debtor to prove [Day 8/p.39 lines 17-21]. With respect, that seems a highly

unsatisfactory solution: again, by parallel with the English issues on this point, the ability of the debtor to lead evidence as to the theoretical losses of the assignor if no assignment had taken place is impracticable.

- (3) The implications of Dr Fischer's approach are particularly one sided: the debtor will obtain the benefit of any reduction in damages that arises from the assignment (i.e. because assignee's loss is less than that of the assignor) but will be protected against any potential increase. Dr Fischer appeared to accept that this was the case [Day 8/p.37 line 22 to p.38 line 7]. A principle of protecting the debtor from being disadvantaged, even assuming such a general principle existed, would not justify a rule which could only benefit him. There is no sensible reason why a debtor should always be liable only for the lower of the damages suffered by the assignor and the assignee.

132. Ultimately, the answer given by the authors relied upon by Professor Mölbert are persuasive as to why Dr Fischer's view should be rejected: in particular, freedom of contract, and sections 404, 406 and 407 provide no answer to a claim for damages by the assignee which is greater than the damages that the assignor could have sought because:

- (1) The debtor's protection is limited to its "legal position". No protection is provided in any statutory provision for the factual consequences of a failure to pay once a claim has been transferred.
- (2) Reliance on freedom of contract is circular, because it begs the question of what has been assigned and whether loss can be calculated by reference to the assignee.
- (3) In circumstances where it is clear (and common ground) under German law that the question of loss is to be assessed by reference to the position of the assignee, any limitation by reference to the theoretical position of the assignor if there had been no assignment is both counter-intuitive and impractical.

133. Nor is there any risk of double recovery in the case posited by the Court on Day 7 at the end of Professor Mülbert's examination; i.e. where there is an anticipated investment over a long period (i.e. 5 years for building a hotel), and then an intervening assignment. The assessment of loss cannot be based on inconsistent factual scenarios. If the position is considered absent assignment, it is logical that the creditor (the assignor) cannot assert mutually inconsistent uses for the monies in order to recover loss of profit. If an assignment occurs, the assignor's loss up until the point of assignment will have to be assessed. After assignment, reference has to be made to the position of the assignee. But the assignee cannot claim damages on a basis that is inconsistent with the factual basis upon which the assignor claimed damages for the earlier period, anymore than the assignor himself could have done so. If the assignment occurred after 3 years in respect of a 5 year long term investment by the assignor, the assignor will assess the loss of profit over years 1-3. The assignee's position (and what it would have done with the money had it been paid) will then have to be considered for the period after the assignment, by reference to the same stipulated factual situation. This, ultimately, appears to have been the position stated by Professor Mülbert [Day 7/p.42 line 20 to p.43 line 6].

G: ABSTRACT CALCULATION OF DAMAGES

Introduction

134. The experts agree that:

- (1) A Further Damages Interest Claim can include compensation for a lost investment opportunity: Joint Report [10];
- (2) Such damages are capable of being expressed as a rate (See e.g. Fischer 1 [86]; Mülberr 3 [37] – [44]); and
- (3) Where such damages are expressed as a rate, they accrue on the defaulted sum (see e.g. Mülberr 3 [45]; Fischer 1 [85] – [88]).

135. It is also agreed that, when it comes to calculating damages for late payment of a defaulted debt, banks are entitled to perform the calculation in the “abstract”. In other words, they are not required to demonstrate that non-payment has led to the frustration of a particular transaction. Instead, “*the bank can calculate its damages based on an average profit based on its overall business activities*”: [Auth 1 / [5] (at p.9)]; Fischer 1 [70]; Mülberr 3 [54] – [55].

136. The experts disagree on whether other investors, such as non-bank financial institutions and hedge funds can rely on the same abstract approach to damages (Mülberr 3 [56]; Fischer 1 [70]). It is agreed that there is no case specifically considering the position: [Day 8 / p.46 lines 5 – 9].

The Parties’ Position

137. Professor Mülberr’s view is that non-bank financial institutions and hedge funds are also entitled to rely on the so-called abstract approach to damages (Mülberr 3 at [56]). In this regard he refers to *Standinger* [Auth 1/59(b)]:

"If the creditor is a bank, it must be assumed that the sum of the funds intended for investment in its overall business, is reduced by the amounts that are paid late...What applies for banks also applies for other commercial capital investors such as investment companies and insurance companies that invest incoming sums unless they are required for ongoing business operations".

138. By contrast, in his expert report Dr Fischer asserts that the "*overwhelming opinion in legal literature*" is that commercial investors cannot are not entitled to rely on the abstract approach (Fischer 1 [70]). Dr Fischer refers to two authorities in this regard: *Grüneberg* [Auth 1/[48(c)]] and *Schmidt-Kessel* [Auth 2 / [68(b)]]. As to this:

- (1) As Dr Fischer accepted in cross-examination neither author in the cases cited by him specifically considered the position of non-bank financial institutions or hedge funds [Day 8 / p.51 lines 2 - 7].
- (2) *Standinger* is the only authority cited by the experts specifically considering whether other commercial capital investors are entitled to rely on the same abstract approach to damages as banks. It supports Professor Mülbert's view.
- (3) As noted by Dr Fischer in his report, the reason why a *bank* is entitled to rely on the abstract approach to damages is because "*it is assumed that a lending bank would have used the money withheld from it in the ordinary course of its business by entering into new loan agreements at the interest rates in question*": Fischer 1 [70]. In cross-examination, it was put to Dr Fischer that there is no logical basis for distinguishing between two entities, both of which always invest their surplus money, on the basis that one of them is called a "bank" and the other, which does exactly the same thing, is not [Day 8 / p.48 lines 5-9]. In answer, Dr Fischer did not suggest any logical basis for that distinction. Instead, he suggested that, in his view, no investors (including banks) should be entitled to rely on the abstract calculation [Day 8 / p.48 lines 10 – 22].
- (4) Absent any authority specifically supporting Dr Fischer's position and absent any rational explanation for distinguishing between different

types of entities which stand in materially the same position, Professor Mülbart's position should be preferred.

Robin Dicker QC

Richard Fisher

Henry Phillips

24 November 2015

South Square

Gray's Inn

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS
INTERNATIONAL (EUROPE) (IN
ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY
ACT 1986

WATERFALL II DIRECTIONS APPLICATION

SENIOR CREDITOR GROUP'S SKELETON

ARGUMENT

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