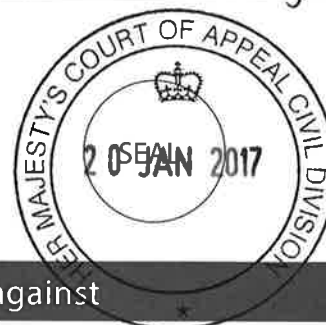


Appellant's notice

(All appeals except small claims track appeals and appeals to the Family Division of the High Court)

Notes for guidance are available which will help you complete this form. Please read them carefully before you complete each section.

For Court use only	
Appeal Court Ref. No.	2017/0153
Date filed	20 th January 2017



Section 1 Details of the claim or case you are appealing against

Claim or Case no. 7942 of 2008 Fee Account no. (if applicable)

Help with Fees - Ref no. (if applicable) H W F - - - - -

Name(s) of the ☐ Claimant(s) ☒ Applicant(s) ☐ Petitioner(s)

Anthony Victor Lomas; Steven Anthony Pearson; Paul David Copley; Russell Downs; Julian Guy Parr (Joint Administrators of Lehman Brothers International (Europe) (In Administration))

Name(s) of the ☐ Defendant(s) ☒ Respondent(s)

Burlington Loan Management Ltd; CVI GVF (Lux) Master SARL; Hutchinson Investors LLC; Wentworth Sons Sub-Debt SARL; York Global Finance BDH, LLC; Goldman Sachs International

Details of the party appealing ('The Appellant')

Name

Burlington Loan Management Ltd, CVI GVF (Lux) Master SARL, Hutchinson Investors LLC ('Senior Creditor Group')

Address (including postcode)

Ropes & Gray International LLP
60 Ludgate Hill
London EC4M 7AW
FAO: James Douglas
(Lead solicitors for the Senior Creditor Group)

Tel No.	+44 20 3201 1628
Fax	+44 20 3201 1758
E-mail	james.douglas@ropesgray.com

Details of the Respondent to the appeal

Name

The Joint Administrators of Lehman Brothers International (Europe) (In Administration)

Address (including postcode)

Linklaters LLP
One Silk Street
London EC2Y 8HQ
FAO: Tony Bugg / Euan Clarke / Jared Oyston

Tel No.	+44 20 7456 2000
Fax	+44 20 7456 3482
E-mail	tony.bugg@linklaters.com

Details of additional parties (if any) are attached

☒ Yes ☐ No

Section 2 Details of the appeal

From which court is the appeal being brought?

- ☐ The County Court at
- ☐ The Family Court at
- ☒ High Court
- ☐ Queen's Bench Division
- ☒ Chancery Division
- ☐ Family Division
- ☐ Other (please specify)

What is the name of the Judge whose decision you want to appeal?

The Hon Mr Justice Hildyard

What is the status of the Judge whose decision you want to appeal?

- ☐ District Judge or Deputy ☐ Circuit Judge or Recorder ☐ Tribunal Judge
- ☐ Master or Deputy ☒ High Court Judge or Deputy ☐ Justice(s) of the Peace

What is the date of the decision you wish to appeal against?

5 October 2016

12 December

Is the decision you wish to appeal a previous appeal decision? ☐ Yes ☒ No

Section 3 Legal representation

Are you legally represented?

☒ Yes ☐ No

If Yes, is your legal representative (please tick as appropriate)

- ☒ a solicitor
- ☐ direct access counsel instructed to conduct litigation on your behalf
- ☐ direct access counsel instructed to represent you at hearings only

Name of your legal representative

Ropes & Gray International LLP (Lead solicitors for the Senior Creditor Group)

The address (including postcode) of your legal representative

Ropes & Gray International LLP
60 Ludgate Hill
London EC4M 7AW

Tel No.	+44 20 3201 1628
Fax	+44 20 3201 1758
E-mail	james.douglas@ropesgray.com
DX	
Ref.	James Douglas

Are you, the Appellant, in receipt of a Civil Legal Aid Certificate?

☐ Yes ☒ No

Is the respondent legally represented?

☒ Yes ☐ No

If 'Yes', please give details of the respondent's legal representative below

Name and address (including postcode) of the respondent's legal representative

Linklaters LLP
One Silk Street
London EC2Y 8HQ

Tel No.	+44 20 7456 2000
Fax	+44 20 7456 3482
E-mail	tony.bugg@linklaters.com
DX	DX 10, Chancery Lane
Ref.	Tony Bugg / Euan Clarke / Jared Oyston

Section 4 Permission to appeal

Do you need permission to appeal?

☐ Yes ☒ No

Has permission to appeal been granted?

☒ **Yes** (Complete Box A)

☐ **No** (Complete Box B)

Box A

Date of order granting permission

12 December 2016

Name of Judge granting permission

The Hon Mr Justice Hildyard

Box B

I

the Appellant('s legal representative) seek permission to appeal.

If permission to appeal has been granted **in part** by the lower court, do you seek permission to appeal in respect of the grounds refused by the lower court?

☐ Yes ☐ No

Section 5 Other information required for the appeal

Please set out the order (or part of the order) you wish to appeal against

The Senior Creditor Group wishes to appeal against declarations: (i) to (iv), (vi), (viii) to (xiv) and (xxii) set out in the order of The Hon Mr Justice Hildyard dated 12 December 2016.

In addition, Burlington Loan Management Limited and Hutchinson Investors LLC (but not CVI GVF (Lux) Master S.a.r.l) wish to appeal against declarations: (xxiii) to (xxv) set out in the order of The Hon Mr Justice Hildyard dated 12 December 2016.

Have you lodged this notice with the court in time?

(There are different types of appeal - see Guidance Notes N161A)

☒ Yes ☐ No

If '**No**' you must also complete
Part B of Section 9 and Section 10

Section 6 Grounds of appeal

Please state, in numbered paragraphs, **on a separate sheet** attached to this notice and entitled 'Grounds of Appeal' (also in the top right hand corner add your claim or case number and full name), why you are saying that the Judge who made the order you are appealing was wrong.

☒ I confirm that the grounds of appeal are attached to this notice.

Section 7 Arguments in support of grounds for appeal

- ☐ I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' are set out **on a separate sheet** and attached to this notice.

OR (in the case of appeals other than to the Court of Appeal)

- ☐ I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' will follow within 14 days of filing this Appellant's Notice. A skeleton argument should only be filed if appropriate, in accordance with CPR Practice Direction 52B, paragraph 8.3.

Section 8 What are you asking the Appeal Court to do?

I am asking the appeal court to:-
(please tick the appropriate box)

- ☐ set aside the order which I am appealing
- ☒ vary the order which I am appealing and substitute the following order. Set out in the following space the order you are asking for:-

An order setting aside declarations: (i) to (iv), (vi), (viii) to (xiv) and (xxii) to (xxv) set out in the order of The Hon Mr Justice Hildyard dated 12 December 2016, and granting in their place the declarations set out in the attached continuation sheet.

- ☐ order a new trial

Section 9 Other applications

Complete this section **only** if you are making any additional applications.

Part A

- ☐ I apply for a stay of execution. (You must set out in Section 10 your reasons for seeking a stay of execution and evidence in support of your application.)

Part B

- ☐ I apply for an extension of time for filing my appeal notice. (You must set out in Section 10 the reasons for the delay and what steps you have taken since the decision you are appealing.)

Part C

- ☒ I apply for an order that:

The appellants' skeleton arguments should be filed on or before Friday 12 May 2017 and the respondents' skeleton arguments should be filed on or before Friday 28 July 2017 or at such later dates to be determined by the Court of Appeal.

(You must set out in Section 10 your reasons and your evidence in support of your application.)

Section 10 Evidence in support

In support of my application(s) in Section 9, I wish to rely upon the following reasons and evidence:
Please see the attached letter setting out the Senior Creditor Group's reasons in support of its application.

Statement of Truth – This must be completed in support of the evidence in Section 10
I believe (The appellant believes) that the facts stated in this section are true.

Full name James Douglas

Name of appellant's legal representative firm Ropes & Gray International LLP

signed



Appellant ('s legal representative)

position or office held

Partner

(if signing on behalf of firm or company)

Section 11 Supporting documents

To support your appeal you should file with this notice all relevant documents listed below. To show which documents you are filing, please tick the appropriate boxes.

If you do not have a document that you intend to use to support your appeal complete the box over the page.

In the County Court or High Court:

- ☐ three copies of the appellant's notice for the appeal court and three copies of the grounds of appeal;
- ☐ one additional copy of the appellant's notice and grounds of appeal for each of the respondents;
- ☐ one copy of the sealed (stamped by the court) order being appealed;
- ☐ a copy of any order giving or refusing permission to appeal; together with a copy of the judge's reasons for allowing or refusing permission to appeal; and
- ☐ a copy of the Civil Legal Aid Agency Certificate (if legally represented).

In the Court of Appeal:

- ☒ three copies of the appellant's notice and three copies of the grounds of appeal on a separate sheet attached to each appellant's notice;
- ☒ one additional copy of the appellant's notice and one copy of the grounds of appeal for each of the respondents;
- ☒ one copy of the sealed (stamped by the court) order or tribunal determination being appealed;
- ☒ a copy of any order giving or refusing permission to appeal together with a copy of the judge's reasons for allowing or refusing permission to appeal;
- ☐ one copy of any witness statement or affidavit in support of any application included in the appellant's notice;
- ☐ where the decision of the lower court was itself made on appeal, a copy of the first order, the reasons given by the judge who made it and the appellant's notice of appeal against that order;
- ☐ in a claim for judicial review or a statutory appeal a copy of the original decision which was the subject of the application to the lower court;
- ☐ one copy of the skeleton arguments in support of the appeal or application for permission to appeal;
- ☒ a copy of the approved transcript of judgment; and
- ☐ a copy of the Civil Legal Aid Certificate (if applicable)

Reasons why you have not supplied a document and date when you expect it to be available:-

Title of document and reason not supplied	Date when it will be supplied
Skeleton argument - please see the attached letter.	To be determined subject to an order by the Court of Appeal.

Section 12 The notice of appeal must be signed here

Signed  Appellant('s legal representative)

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

THE HONOURABLE MR JUSTICE HILDYARD
(CLAIM 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

APPELLANT'S NOTICE

Continuation Sheet

**SECTION 1: DETAILS OF THE CLAIM OR CASE YOU ARE
APPEALING AGAINST**

DETAILS OF ADDITIONAL PARTIES

Details of the party appealing (the ‘Appellant’):

(1) Burlington Loan Management Limited	Morrison Foerster LLP 1 Ropemaker St, London EC2Y 9AW T +44 20 7920 4000 F +44 20 7496 8500 E SVandeGraaff@mofo.com Reference: Sonya Van De Graaff
(2) CVI GVF (LUX) Master SARL	Freshfields Bruckhaus Deringer LLP 65 Fleet Street, London EC4Y 1HS T +44 20 7936 4000 F +44 20 7108 5781 E christopher.robinson@freshfields.com Reference: Christopher Robinson
(3) Hutchinson Investors, LLC	Ropes & Gray International LLP 60 Ludgate Hill, London EC4M 7AW T +44 20 3201 1628 F +44 20 3201 1758 E james.douglas@ropesgray.com Reference: James Douglas

Together, the parties above comprise the ‘Senior Creditor Group’. Ropes & Gray International LLP acts as the lead firm of solicitors for the Senior Creditor Group.

Details of the Respondents to the appeal:

Wentworth Sons Sub-Debt S.A.R.L.	<p>Kirkland & Ellis International LLP</p> <p>30 St Mary Axe</p> <p>London EC3A 8AF</p> <p>T +44 (0) 20 7469 2000</p> <p>E kon.asimacopoulos@kirkland.com</p> <p>Reference: Partha Kar and Kon Asimacopoulos</p>
York Global Finance BDH, LLC	<p>Michelmores LLP</p> <p>48 Chancery Lane</p> <p>London WC2A 1JF</p> <p>T +44 (0) 207 659 7680</p> <p>F +44 (0) 20 7659 7661</p> <p>E charles.maunder@michelmores.com</p> <p>Reference: Charles Maunder</p>
Goldman Sachs International	<p>Cleary Gottlieb Steen & Hamilton LLP</p> <p>City Place House, 55 Basinghall Street</p> <p>London EC2V 5EH</p> <p>T +44 20 7614 2324</p> <p>F +44 20 7600 1698</p> <p>E yjkang@cgsh.com</p> <p>Reference: Yi-Jun Kang</p>

SECTION 3: LEGAL REPRESENTATION

DETAILS OF ADDITIONAL PARTIES

Details of the party appealing (the 'Appellant'):

(1) Burlington Loan Management Limited	Morrison Foerster LLP 1 Ropemaker St, London EC2Y 9AW T +44 20 7920 4000 F +44 20 7496 8500 E SVandeGraaff@mof.com Reference: Sonya Van De Graaff
(2) CVI GVF (LUX) Master S.A.R.L.	Freshfields Bruckhaus Deringer LLP 65 Fleet Street, London EC4Y 1HS T +44 20 7936 4000 F +44 20 7108 5781 E christopher.robinson@freshfields.com Reference: Christopher Robinson
(3) Hutchinson Investors, LLC	Ropes & Gray International LLP 60 Ludgate Hill, London EC4M 7AW T +44 20 3201 1628 F +44 20 3201 1758 E james.douglas@ropesgray.com Reference: James Douglas

Details of the parties responding:

Wentworth Sons Sub-Debt S.A.R.L.	Kirkland & Ellis International LLP 30 St Mary Axe London EC3A 8AF T +44 (0) 20 7469 2000 E kon.asimacopoulos@kirkland.com Reference: Partha Kar and Kon Asimacopoulos
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York Global Finance BDH, LLC	Michelmores LLP 48 Chancery Lane London WC2A 1JF T 44 (0) 207 659 7680 F+4-4 (0) 20 7659 7661 E charles.maunder@michelmores.com Reference: Charles Maunder
Goldman Sachs International	Cleary Gottlieb Steen & Hamilton LLP City Place House, 55 Basinghall Street London EC2V 5EH T +44 20 7614 2324 F +44 20 7600 1698 E yjkang@cgsh.com Reference: Yi-Jun Kang

SECTION 5: OTHER INFORMATION REQUIRED FOR THE APPEAL

Details of the parts of the order being appealed:

“Issue 10 (paragraph 10 of the Application Notice)”

- (i) On the true construction of the term “Default Rate” as it appears in the ISDA Master Agreement, the term “relevant payee” refers only to LBIE’s contractual counterparty and does not extend to a third party to whom LBIE’s counterparty has transferred (by assignment or otherwise) its rights under the ISDA Master Agreement.

Issue 11 (paragraph 11 of the Application Notice)

- (ii) The expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” in the ISDA Master Agreement is the cost which the relevant payee is or would be required to pay in borrowing the relevant amount under a loan transaction, whether an actual cost where the relevant payee does in fact enter into a loan or a hypothetical cost where it does not do so.
- (iii) The expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” in the ISDA Master Agreement does not include any cost of equity funding.
- (iv) The expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” in the ISDA Master Agreement does not include costs or financial consequences to the relevant payee of carrying a defaulted LBIE receivable on its balance sheet.
- (vi) The relevant “cost” must involve the incurring of an obligation (whether actual or hypothetical) to pay a sum of money. It does not include any form of financial detriment.
- (viii) A “cost” is not incurred if any payment obligation, or the amount of any payment obligation, is itself discretionary.

- (ix) The obligation (whether actual or hypothetical) to pay a sum of money must be incurred in obtaining the funding and as part of the bargain entered into to obtain such funding in order for it to be a relevant “cost”.
- (x) The relevant “cost” must be the cost of funding the relevant amount to address the cash shortfall caused by non-payment. It does not include the cost of funding some other amount for other or wider purposes.
- (xi) The relevant “cost” does not include any professional or arrangement fees incurred by the relevant payee, save for such fees paid to a lender as part of the price of borrowing the relevant amount.
- (xii) In order to constitute a relevant “cost”, a rate of borrowing must not exceed that which the borrower knows to be or which could be available to it in the circumstances pertaining to its business, having regard to the permitted object of the actual or hypothetical borrowing (to cover the relevant amount).

Issue 12 (paragraph 12 of the Application Notice)

- (xiii) For the purpose of establishing the “cost (*without proof or evidence of any actual cost*) to the relevant payee (*as certified by it*) if it were to fund or of funding the relevant amount”, which cost is a cost of borrowing, such borrowing should be assumed to have recourse to the relevant payee’s unencumbered assets generally and not solely to its claim against LBIE.
- (xiv) The certifiable cost is the price which the relevant payee has paid, or would have to pay, to a counterparty to a transaction to borrow a sum equivalent to the relevant amount taking into account all relevant circumstances, and is not the weighted average cost on all its borrowings.

Issue 19 (paragraph 19 of the Application Notice)

(xxii) Declarations (i) to (xxi) above apply whether the underlying ISDA Master Agreement is governed by New York or English law.

Issue 20.1 (paragraph 20.1 of the Application Notice)

(xxiii) A creditor under a German Master Agreement for any sum which is payable pursuant to clauses 7 to 9 thereof (the “GMA Close-Out Amount”) is not entitled, following LBIE’s administration, to make a “damages interest claim” within the meaning of section 288(4) of the German Civil Code.

Issue 20.2 (paragraph 20.2 of the Application Notice)

(xxiv) If (contrary to declaration (xxiii) above) a “damages interest claim” in respect of a GMA Close-Out Amount were permissible following LBIE’s administration, any interest or damages (howsoever described) payable on the GMA Close-Out Amount pursuant to the German Civil Code would not constitute a “*rate apart from the administration*” for the purpose of Rule 2.88(9) of the Insolvency Rules 1986 (the “Rules”).

Issue 21 (paragraph 21 of the Application Notice)

(xxv) If (contrary to declarations (xxiii) and (xxiv) above) a “damages interest claim” in respect of the GMA Close-Out Amount could be made following LBIE’s administration and such a claim would constitute a “*rate apart from the administration*” for the purpose of Rule 2.88(9):

- a. in circumstances where the relevant claim under the German Master Agreement had been transferred (by assignment or otherwise) to a third party after the commencement of LBIE’s administration, the damages interest claim which could be asserted by the transferor, and not the transferee, is relevant for the purposes of Rule 2.88(9);
- b. if (contrary to declaration (xxv)(a) above) the damages interest claim that could be asserted by the transferee is relevant for the purposes of Rule

2.88(9), where the relevant claim under the German Master Agreement has been acquired by a third party, there is no cap or limitation on the amount of further damage that an assignee can claim; and

- c. as a matter of German civil procedure, the assessment of damages is in the discretion of the Court. The obligee bears the burden of proof and must establish both the causal connection for the damage and its amount on the balance of probabilities. In calculating damages for the late payment of a defaulted debt, banks are entitled to perform the calculation in the abstract by a simplified method of quantification; however, other investors, such as non-bank financial institutions and hedge funds, may not rely on such simplified method of quantification.”

SECTION 8: WHAT ARE YOU ASKING THE COURT OF APPEAL TO DO?

Details of the proposed order

Issue 10 (paragraph 10 of the Application Notice)

- (i) On the true construction of the term “Default Rate” as it appears in the ISDA Master Agreement, the term “relevant payee” refers to whichever entity or person was or is entitled to receive payment of the Early Termination Amount (or the “*relevant amount*”) from LBIE from time to time and to the period of such entitlement.

Issue 11 (paragraph 11 of the Application Notice)

- (ii) Subject to the relevant payee’s obligation to certify its cost of funding in good faith and rationally, the expression “*cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” is capable of including the actual or asserted cost to the relevant payee of raising money to fund the relevant amount by whatever means and may include shareholder funding as well as, or in the alternative to, borrowing or other forms of funding.
- (iii) Subject to the relevant payee’s obligation to certify its cost of funding in good faith and rationally, the determination of the costs referred to above may take into account the cost of any fees paid or charges incurred as a necessary requirement to raise the funding to fund the relevant amount.

Issue 12 (paragraph 12 of the Application Notice)

- (iv) Depending on the facts and circumstances, it may be rational and in good faith for a relevant payee to determine its cost of funding by reference to any of the bases identified in paragraph 12 of the Application Notice.

Issue 19 (paragraph 19 of the Application Notice)

- (v) Declarations (i) to (v) above apply whether the underlying ISDA Master Agreement is governed by New York or English law.

Issue 20.1 (paragraph 20.1 of the Application Notice)

- (vi) Depending on the facts and circumstances, a creditor under the GMA for any sum which is payable pursuant to clauses 7 to 9 thereof (the “**GMA Close-Out Amount**”) may be entitled, following LBIE’s administration, to make a “damages interest claim” within the meaning of section 288(4) of the German Civil Code.

Issue 20.2 (paragraph 20.2 of the Application Notice)

- (vii) A “damages interest claim” in respect of a GMA Close-Out Amount payable pursuant to the German Civil Code constitutes a “*rate apart from the administration*” for the purpose of Rule 2.88(9) of the Insolvency Rules 1986 (the “Rules”).

Issue 21 (paragraph 21 of the Application Notice)

- (viii) In circumstances where the relevant claim under the German Master Agreement had been transferred (by assignment or otherwise) to a third party after the commencement of LBIE’s administration, the “*damages interest claim*” which could be asserted by the transferee would constitute the basis for the rate applicable to the debt apart from the administration for the purposes of Rule 2.88(9) of the Rules.

GROUND OFS OF APPEAL

1. The Senior Creditor Group appeals with the permission of the Judge against thirteen of the declarations in the order made by Mr Justice Hildyard on 12 December 2016 (the “**Order**”), reflecting parts of his judgment dated 5 October 2016 (the “**Judgment**”) concerning the construction and effect of the 1992 and 2002 forms of the ISDA Master Agreement (the “**Master Agreements**”).
2. In addition, Burlington Loan Management Limited and Hutchinson Investors LLC (but not CVI GVF (Lux) Master S.a.r.l) also appeal with the permission of the Judge against three declarations made in the Order concerning the German Master Agreement for Financial Derivative Transactions (the “**GMA**”).

THE MASTER AGREEMENTS

Declarations (ii), (iii), (iv), (vi), (viii), (ix), (x), (xi) and (xii)

3. These declarations concern the meaning of the expression “*cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” in the definition of “Default Rate” in the Master Agreements.
4. The learned Judge erred in law in holding that the expression “*cost...to the relevant payee...if it were to fund or of funding*” refers only to the cost which the relevant payee is or would be required to pay in borrowing the relevant amount under a loan transaction (Judgment [147]) and, as a consequence, was wrong to make declarations (ii),(iii),(vi),(viii),(ix),(ix) and (xii) (reflecting that conclusion).
5. The learned Judge should have held that, subject to the relevant payee’s obligation to certify its cost of funding in good faith and rationally, the expression “*cost (without proof or evidence of actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount*” is capable of including the actual or asserted cost to the relevant payee of raising money to fund the relevant amount by whatever means and may include shareholder funding as well as, or in the alternative to, borrowing or other forms of funding. Further, the learned Judge should have held that the “cost” of such funding may include the cost of any fees paid or charges incurred as a necessary

requirement to raise the funding to fund the relevant amount. In failing to do so, the learned Judge erred in particular in the following respects:

- (1) The learned Judge was wrong to construe the phrase “cost of funding” narrowly as meaning “interest payable on borrowing”. In doing so, the learned Judge failed to give due or sufficient weight to the natural or ordinary meaning of the words used. The natural meaning of “to fund” and “funding” is raising a sum of money. The natural meaning of “cost”, in that context, includes all costs borne, or which would have been borne, by the relevant payee as a consequence of funding the relevant amount. Nothing in these words connotes a particular method of raising money or a particular source of costs.
- (2) In construing the Default Rate definition, the learned Judge failed to give due or sufficient weight to the commercial rationale of the Default Rate provision. He also failed to have due or sufficient regard to the fact that the Master Agreements are drafted in a way which is designed to ensure that their provisions are appropriate and relevant in a range of different circumstances. A consequence of the learned Judge’s construction is that, for a number of users of the Master Agreements and in a number of circumstances, there is no sensible commercial rationale for the method of compensation for late payment provided for by the Default Rate. For example:
 - (a) There is no sensible commercial rationale for requiring a relevant payee that has, in fact, bona fide and rationally chosen to fund the relevant amount though raising equity to certify the cost it would have incurred had it borrowed the relevant amount (see Judgment [163]). Such a cost does not reflect the cost that the relevant payee incurred in putting itself in the position it would have been in, had it been paid when due.
 - (b) There is no sensible commercial rationale for the Default Rate to require compensation for late payment to be assessed by reference to a cost which the relevant payee did not incur, or could or would not

have incurred, as opposed to one which it actually or would have incurred.

(c) There is no sensible commercial rationale for requiring a relevant payee that cannot borrow at all (whether for reasons of creditworthiness, capital adequacy ratios or loan covenant restrictions or any other reason) to certify the cost that it would have incurred had it borrowed the relevant amount. Such a cost does not reflect the cost that the relevant payee would have incurred in putting itself in the position it would have been in, had it been paid when due.

(3) The learned Judge was wrong to approach the construction of the Default Rate provision on the basis or assumption that, since it is ultimately concerned with providing a rate of interest, it does so by reference to a cost which itself is in the nature of interest (Judgment [119], [142]). There is no reason, whether as a matter of construction or as a matter of commercial sense, to read the Default Rate provision as though it only encompasses “costs” which are already in the nature of interest. The Default Rate provision operates by deriving a rate of interest from a cost of funding. Such a rate can be derived irrespective of whether the relevant cost is itself in the nature of interest. The learned Judge was wrong to conclude otherwise.

(4) The learned Judge wrongly concluded that the effect of the daily compounding provisions under sections 6(d)(ii) of the 1992 Master Agreement and section 9(h)(iii) of the 2002 Master Agreement supported his conclusion that “cost of funding” means “interest payable on borrowing”. In this regard, the learned Judge wrongly construed the daily compounding provisions by concluding that they required the “cost” of the relevant payee’s funding to be subject to daily compounding (Judgment [120]-[122]). In fact, under the Default Rate provision, a “*rate equal to*” the relevant payee’s cost of funding provides the measure of the rate of interest payable. That rate of interest, and not the relevant payee’s “cost of funding”, is then compounded daily pursuant to the compounding provisions.

- (5) The learned Judge wrongly concluded that the cost of equity is “*not actual*” (Judgment [138]). Such a conclusion is inconsistent with the Judge’s own recognition that equity funding has a cost (Judgment [142]) and fails to have due or sufficient regard to the fact that the cost of equity funding is a measurable cost, recognised as such and used as an important parameter by (among others) financial institutions, corporations and investment funds, all of which commonly are parties to ISDAs.
 - (6) Having recognised that, in the context of the definition of “Loss” in the 1992 form of the Master Agreement, “cost of funding” encompasses the cost of equity funding (Judgment [146]), the learned Judge ought to have construed the same words in the same way in the context of the definition of the Default Rate. In this regard, the learned Judge was wrong to attribute different meanings to the same phrase in different parts of the Master Agreements.
6. Subject to the relevant payee’s obligation to certify its cost of funding in good faith and rationally, the determination of the costs referred to above may take into account the consequences for the relevant payee of carrying a defaulted LBIE receivable on its balance sheet, as where (for example) the relevant payee’s cost of borrowing or cost of shareholder funding is increased as a consequence of having a LBIE receivable on its balance sheet. The learned Judge erred to the extent that he held otherwise at paragraph 147 of the Judgment and, as a consequence, declaration (iv) is wrong to the extent that it reflects that error.
7. A party that funds the relevant amount or would have funded the relevant amount from the proceeds of a larger fund-raising transaction may apportion part of that transaction to the relevant amount, and certify the cost of that funding on a pro-rata (or other rational) basis, for the purposes of establishing its “*cost...of funding*” under the definition of Default Rate. The learned Judge erred to the extent that he held otherwise at paragraph 154 of the Judgment and, as a consequence, declaration (x) is wrong to the extent that it reflects that error.

Declarations (xiii) and (xiv)

8. By these declarations, the learned Judge further defined the meaning of the expression “*cost...to the relevant payee...if it were to fund or of funding the relevant amount*” on the assumption that the phrase refers only to the cost which the relevant payee is or would be required to pay in borrowing the relevant amount under a loan transaction.
9. In making declarations (xiii) and (xiv) the learned Judge erred in law to the extent that those declarations are inconsistent with paragraphs 3 to 6 of these Grounds of Appeal.

Declaration (i)

10. The learned Judge erred in law in holding that, on the true construction of the term “Default Rate” as it appears in the ISDA Master Agreement, the term “relevant payee” refers only to LBIE’s contractual counterparty and does not extend to a third party to whom LBIE’s counterparty has transferred (by assignment or otherwise) its rights under the ISDA Master Agreement.
11. The learned Judge should have held that, on the true construction of the term “Default Rate”, the “relevant payee” refers to whichever entity or person was or is entitled to receive payment of the Early Termination Amount (or “relevant amount”) from LBIE from time to time and to the period of such entitlement. In failing to do so, the learned Judge erred in particular in the following respects:
 - (1) The learned Judge failed to give due or sufficient weight to the natural or ordinary meaning of the phrase “relevant payee”.
 - (2) The learned Judge failed to pay due or sufficient regard to the fact that the definition of Default Rate refers to the cost “*to the relevant payee*” and not to a, or the relevant, “*party*”.
 - (3) The learned Judge failed to pay due or sufficient regard to the fact that the word “*party*” is used elsewhere in the Master Agreements (such as in the

definition of Termination Rate) where the draftsman intends to refer to the contractual counterparty.

- (4) The learned Judge failed properly to construe the meaning of “*relevant payee*” within the scheme of the Master Agreements as a whole, and in light of the purpose of the interest provisions:
 - (a) Where there has been a transfer of rights under Section 7(b) of the Master Agreements, the Early Termination Amount is payable to the assignee and not the original contracting party. In such circumstances, it does not make sense for the Default Rate to continue to provide compensation by reference to the original counterparty’s cost of funding since, in those circumstances, it is the transferee and not the transferor who is now being deprived of timely receipt of the monies due.
 - (b) There is no good commercial reason for the Default Rate to provide compensation by requiring an assignee to certify the original counterparty’s cost of funding potentially in respect of a period of years after the original counterparty has disposed of its interest in the relevant amount and in circumstances where the real cost of the Defaulting Party’s continued failure to pay is now being borne by the assignee.

Declaration (xxii)

- 12. By this declaration, the learned Judge held that declarations (i) to (xxi) of the Order apply whether the underlying ISDA Master Agreement is governed by New York or English law.
- 13. In making declaration (xxii), the learned Judge erred in law to the extent that he held that declarations (i)-(iv), (vi) and (viii) – (xiv) of the Order reflected the true meaning and effect of the New York law governed ISDA Master Agreements. Paragraphs 3 to 11 of these Grounds of Appeal are repeated.

THE GMA

14. Declarations (xxiii), (xxiv) and (xxv) concern the rights of creditors with claims against LBIE under the GMA.
15. The learned Judge held that a creditor under the GMA for any sum which is payable pursuant to clauses 7 to 9 thereof (the “GMA Close-Out Amount”) is not entitled, following LBIE’s administration, to make a “damages interest claim” within the meaning of section 288(4) of the German Civil Code (declaration xxiii). In reaching that conclusion, the learned Judge erred in fact and law:
 - (1) The learned Judge’s decision was premised on his conclusion that, as a matter of German law, a “default” within the meaning of section 286 of the German Civil Code was not capable of being triggered following the commencement of LBIE’s administration (Judgment [358]).
 - (2) In reaching that conclusion, the learned Judge relied on the view expressed by Judge Fischer regarding the similarities between a German insolvency proceeding and an English administration. The view expressed by Judge Fischer was based on comparing a German insolvency proceeding with a distributing administration. However, even if such an analogy were appropriate, LBIE’s administration did not become a distributing administration until December 2009.
 - (3) As a consequence, the learned Judge’s conclusion that, as a matter of German law, a “default” could not be triggered at any time after the commencement of LBIE’s administration, drew upon features of an English administration regime that did not apply to LBIE’s administration for over a year after its commencement.
 - (4) In light of this, the learned Judge ought to have concluded that whether or not the conditions for a “default” have been satisfied in relation to any particular creditor in the period after the commencement of LBIE’s administration but before it became a distributing administration was a question of fact which ought to be determined on a case by case basis.

16. As regards declarations (xxiv) and (xxv), these reflect the learned Judge's conclusions over the scope and effect of Rule 2.88(9) of the Insolvency Rules 1986 (the "Rules"). In construing the scope and effect of Rule 2.88(9) in the context of a damages interest claim payable on the GMA Close-Out Amount, the learned Judge relied on the conclusions of David Richards J (as he then was) regarding the scope and effect of Rule 2.88(9) in Waterfall IIA [2016] Bus L.R.17. He was wrong to do so in circumstances where the particular issue under consideration by David Richards J was different from the issue before the learned Judge. Further, and in any event, the conclusions of David Richards J regarding the scope and effect of Rule 2.88(9) are subject to a pending appeal.

ROBIN DICKER QC

RICHARD FISHER

HENRY PHILLIPS

20 January 2017

South Square

Gray's Inn