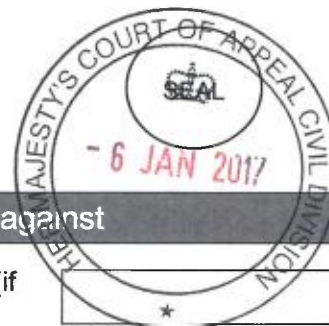


# Appellant's notice

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

For Court use only	
Appeal Court Ref. No.	2017/0043
Date filed	06 Jan 2017

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



## 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)

(1) Anthony 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))

Name(s) of the

☐

Defendant(s)

☒

Respondent(s)

(1) Burlington Loan Management Limited; (2) CVI GVF (Lux) Master S.À.R.L.; (3) Hutchinson Investors, LLC; (4) Wentworth Sons Sub-Debt S.À.R.L.; (5) York Global Finance BDH, LLC (6) Goldman Sachs International

Details of the party appealing ('The Appellant')

Name

York Global Finance BDH, LLC

Address (including postcode)

c/o Michelmores LLP  
12th Floor,  
6 New St Square,  
London,  
EC4A 3BF

Tel No. 0207 659 7674

Fax 0207 659 7661

E-mail Peter.sigler@michelmores.com

Details of the Respondent to the appeal

Name

Applicants 1 – 5, The Joint Administrators of Lehman Brothers International (Europe) (in administration)

Address (including postcode)

c/o Linklaters LLP,  
One Silk Street,  
London,  
EC2Y 8HQ  
Ref: 163511:0001 CHWR

Tel No. 020 7456 2000

Fax

E-mail Jared.oyston@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 Honourable 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?

12 December 2016

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

Michelmores LLP

The address (including postcode) of your legal representative

12th Floor,  
6 New St Square,  
London,  
EC4A 3BF

Tel No.	0207 659 7674
Fax	0207 659 7661
E-mail	Peter.sigler@michelmores.com
DX	DX 63 London Chancery Lane
Ref.	109072/1

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  
Ref: 163511:0001 CHWR

Tel No.	020 7456 2000
Fax	020 7456 2222
E-mail	Jared.oyston@linklaters.com
DX	DX 10 London City EC3
Ref.	163511:0001 CHWR

## 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

12 December 2016	n
Name of judge granting permission	
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

Supplemental issue 1(A), as set out at declaration (xxvii) at page 8 of the order of the Honourable Mr Justice Hildyard dated 12 December 2016 (the "Order").

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 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:-

That declaration (xxvii) of the Order appealed against be replaced with the following:  
(xxvii) The words "*the rate applicable to the debt apart from the administration*" in Rule 2.88(9) of the Rules do not include, in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the date of the commencement of LBIE's administration.

- ☐ 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:

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

In support of my application(s) in Section 9, I wish to rely upon the following reasons and evidence:

**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

Name of appellant's legal representative firm

Signed



position or office held

Appellant ('s legal representative)

(if signing on behalf of firm or company)

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
Appellant's Skeleton Argument	As per the attached letter

**Section 12** The notice of appeal must be signed here

Signed



Appellant('s legal representative)



# 1 SECTIONS 1 & 3 – DETAILS OF ADDITIONAL PARTIES

## 1.1 Second Respondent

Name:

Burlington Loan Management Limited
------------------------------------

Address (including postcode):

c/o Morrison & Foerster LLP, 1 Ropemaker St, London, EC2Y 9AW	Tel.	020 7920 4039
	Fax	
	E-mail	SVandeGraaff@mofo.com

Name and address (including postcode) of the firm of solicitors representing the respondent:

Morrison & Foerster LLP, 1 Ropemaker St, London, EC2Y 9AW	Tel.	020 7920 4039
	Fax	
	E-mail	SVandeGraaff@mofo.com
	DX	
	Ref.	Sonya Van de Graaff

## 1.2 Third Respondent

Name:

CVI GVF (Lux) Master S.à.r.l.
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Address (including postcode):

c/o Freshfields Bruckhaus Deringer LLP 65 Fleet Street London EC4Y 1HS Ref. Christopher Robinson	Tel.	020 7936 4000
	Fax	020 7832 7001
	E-mail	christopher.robinson@freshfields.com

Name and address (including postcode) of the firm of solicitors representing the respondent:

Freshfields Bruckhaus Deringer LLP 65 Fleet Street London EC4Y 1HS	Tel.	020 7936 4000
	Fax	020 7832 7001
	E-mail	christopher.robinson@freshfields.com
	DX	DX 23 Chancery Lane
	Ref.	Christopher Robinson

#### 1.4 Fourth Respondent

Name:

Hutchinson Investors LLC

Address (including postcode):

c/o Ropes & Gray International LLP  
60 Ludgate Hill  
London EC4M 7AW  
Ref. James Douglas

Tel.	020 3201 1628
Fax	020 3201 1501
E-mail	james.douglas@ropesgray.com

Name and address (including postcode) of the firm of solicitors representing the respondent:

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

Tel.	020 3201 1628
Fax	020 3201 1501
E-mail	james.douglas@ropesgray.com
DX	
Ref.	James Douglas

#### 1.5 Fifth Respondent

Name:

Wentworth Sons Sub-Debt S.à.r.l.

Address (including postcode):

c/o Kirkland and Ellis International LLP  
30 St Mary Axe  
London EC3A 8AF  
Ref. Partha Kar / Kon Asimacopoulos

Tel.	020 7469 2000
Fax	020 7469 2001
E-mail	pkar@kirkland.com

Name and address (including postcode) of the firm of solicitors representing the respondent:

Kirkland and Ellis International LLP  
30 St Mary Axe  
London EC3A 8AF

Tel.	020 7469 2000
Fax	020 7469 2001
E-mail	pkar@kirkland.com
DX	
Ref.	Partha Kar / Kon Asimacopoulos

1.6 **Sixth Respondent**

Name:

Goldman Sachs International

Address (including postcode):

c/o Cleary Gottlieb Steen & Hamilton LLP  
City Place House  
55 Basinghall Street  
London EC2V 5EH

Tel.	020 7614 2364
Fax	020 7600 1698
E-mail	jbrady@cgsh.com

Name and address (including postcode) of the firm of solicitors representing the respondent:

Cleary Gottlieb Steen & Hamilton LLP  
City Place House  
55 Basinghall Street  
London EC2V 5EH

Tel.	020 7614 2364
Fax	020 7600 1698
E-mail	jbrady@cgsh.com
DX	
Ref.	

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**  
**CHANCERY DIVISION**  
**COMPANIES COURT**  
**HILDYARD J**  
**[2016] EWHC 2417 (Ch)**

Appeal Ref: [            ]

**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) YORK GLOBAL FINANCE BDH LLC**

**Appellant**

**-and-**

**(1) ANTHONY 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))**

**(6) BURLINGTON LOAN MANAGEMENT LIMITED**  
**(7) CVI GVF (LUX) MASTER SÀRL**  
**(8) HUTCHINSON INVESTORS LLC**  
**(9) WENTWORTH SONS SUB-DEBT SÀRL**  
**(10) GOLDMAN SACHS INTERNATIONAL**

**Respondents**

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**GROUND OFS OF APPEAL**

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The Appellant, York Global Finance BDH LLC (“York”) appeals against the judgment of Hildyard J with the neutral citation [2016] EWHC 2417 (Ch) (the “**Judgment**”) and, in particular, against Declaration (xxvii) of the Judge’s order dated 12 December 2016 (the “**Order**”). Permission to appeal was granted by the Judge. The grounds of appeal are set out below.

1. By their application for directions dated 12 June 2014 (the “**Waterfall II Application**”), the Joint Administrators of Lehman Brothers International (Europe) (“**LBIE**”) sought directions from the Court as to the correct method of calculating



interest (“**Statutory Interest**”) under rule 2.88 of the Insolvency Rules 1986 (the “**Rules**”) and various related matters.

2. By order of the Court, the Waterfall II Application was divided into three tranches. Tranches A and B were heard by David Richards J (as he then was) and were the subject of two judgments dated 31 July 2015, as well as a further judgment dated 24 August 2016, all of which are also under appeal.
3. Following the main Tranche A hearing, a further supplemental issue (“**Supplemental Issue 1(A)**”) was identified, which arose out of the issue determined by paragraph (x) of David Richards J’s Order in relation to Tranche A (“**Issue 4**”). David Richards J directed that Supplemental Issue 1(A) be determined by Hildyard J along with the Tranche C issues.
4. Tranche C was subsequently heard by Hildyard J, and it is that Judgment (in particular, the part dealing with Supplemental Issue 1(A) – paras 453-529) which is the subject of the present appeal by York. The decision of Hildyard J in relation to Supplemental Issue 1(A) is related to the decision of David Richards J on Issue 4.

#### **Issue 4**

5. Issue 4 is:

*“Whether the words “the rate applicable to the debt apart from the administration” in Rule 2.88(9) of the Rules are apt to include (and, if so, in what circumstances) a foreign judgment rate of interest or other statutory rate.”*

6. In his judgment on Tranche A [2015] EWHC 2269 (Ch), David Richards J answered this issue in the negative in circumstances where the creditor had not in fact obtained a relevant foreign judgment as at the date of commencement of the administration (the “**Date of Administration**”), even if the creditor obtained a foreign judgment after the Date of Administration.
7. The essence of David Richards J’s reasoning was that the words “*the rate applicable to the debt apart from the administration*” in rule 2.88(9) of the Insolvency Rules 1986 (the “**Rules**”) cannot be read as including a hypothetical

rate of interest which would be applicable if the creditor took certain steps, but which was not in fact applicable at the Date of Administration because such steps had not in fact been taken by the creditor at that time. David Richards J held that the words “*should be given their obvious meaning of the rate in fact applicable to the debt*” (emphasis added): Tranche A judgment, para.177.

### **Supplemental Issue 1(A)**

8. Supplemental Issue 1(A) is:

*“Whether, and in what circumstances, the words ‘the rate applicable to the debt apart from the administration’ in Rule 2.88(9) of the Rules include, in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the Date of Administration”.*

9. Hildyard J answered this issue in the affirmative and held that the words “*the rate applicable to the debt apart from the administration*” in rule 2.88(9) of the Rules were capable of including a contractual rate of interest applicable to a close-out sum even where the close-out sum had not accrued as at the Date of Administration and where there was therefore no existing contractual entitlement to interest on any close-out sum at that time.

10. Hildyard J’s conclusion was wrong in law.

### **York’s Position**

11. In summary, York’s position is that:

(1) The words “*the rate applicable to the debt apart from the administration*” in rule 2.88(9) of the Rules do not include either:

- i. in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that began to accrue only after the close-out sum became due and payable due to action taken by the creditor after the Date of Administration; or

- ii. a foreign judgment rate of interest or other analogous statutory rate of interest applicable to a foreign judgment where the creditor had not in fact obtained a relevant foreign judgment at the Date of Administration.

(2) Alternatively, if Hildyard J was correct in his conclusion that, in the case of a close-out sum, a contractual rate of interest which only became applicable after the Date of Administration was a “*rate applicable to the debt apart from the administration*” then equally a foreign judgment rate of interest (or analogous statutory rate) capable of applying to the relevant debt is a “*rate applicable to the debt apart from the administration*” even where no relevant foreign judgment had in fact been obtained at the Date of Administration.

### **Grounds of Appeal**

- 12. The issue concerns the construction of the words “*the rate applicable to the debt apart from the administration*” in rule 2.88(9). As David Richards J held at para.115 of his Tranche B Judgment [2015] EWHC 2270 (Ch), that language “*directs attention to the contractual entitlement of the creditor if there were no administration*”.
- 13. On the ordinary meaning of the language, “*the rate applicable to the debt*” requires there to be a rate of interest already accruing on the relevant debt as at the Date of Administration.
- 14. In contrast, in the case of a claim for a close-out sum due under a contract (such as swaps governed by the ISDA Master Agreement), the contingent debt represented by the close-out sum will only ever become due and payable (and so potentially interest bearing) where a relevant default has occurred which leads to the application of the contractual machinery terminating the rights to payment and/or delivery under the open transaction or transactions and providing for a net close-out sum to be payable from one party to the other. Unless the terms applicable to the transaction provided for automatic early termination in the case of the relevant default, the determination of a net close-out sum will involve service of a notice by the non-defaulting party.

15. In the present case, as at the Date of Administration of LBIE, the relevant transactions remained open and the outstanding payment and delivery obligations under those transactions remained extant. The termination of those outstanding obligations only occurred subsequent to the Date of Administration and the entitlement to the relevant close-out sums only arose subsequent to the Date of Administration.
16. Accordingly, Hildyard J should have concluded that, as at the Date of Administration, the relevant creditors had no accrued entitlement to any close-out sums and no accrued entitlement to any interest on such sums, and that the contractual right to interest on such close-out sums was not therefore a rate applicable as at the Date of Administration.
17. Further or alternatively, the “*apart from the administration*” counter-factual requires consideration of the position as if there had been no administration. In particular:
  - (1) In circumstances where it is the administration of the debtor company which is the relevant default for the purposes of enabling the application of the contractual machinery providing for the establishment of a close-out sum, this requires consideration of the position as if there had been no such default.
  - (2) In the case of LBIE, ignoring the effect of its administration, there is no basis for assuming that there was any other default as at the Date of Administration which would have enabled the application of the contractual machinery terminating the payment and delivery obligations under the outstanding transactions and providing for a net close-out sum to fall due from one party to the other.
  - (3) Accordingly, for this reason the contractual rate of interest which applies to a close-out sum once it has fallen due cannot be said to be a “*rate applicable to the debt apart from the administration*”. There is no basis for considering that, absent the administration, there would have been any



default and thus any entitlement to determine a close-out sum or any right to contractual interest on any such sum.

18. Further or alternatively, if contrary to the above, a contractual entitlement to interest on a close-out sum which only arose after the Date of Administration is a “*rate applicable to the debt apart from the administration*” then equally a foreign judgment rate of interest (or analogous statutory rate) capable of applying to the relevant debt is a “*rate applicable to the debt apart from the administration*” even where no relevant foreign judgment had in fact been obtained at the Date of Administration. In both cases, the creditor has a contingent debt as at the Date of Administration that can only become interest bearing if some action is taken by the creditor on or after the Date of Administration, and there is no basis for drawing any distinction between the two scenarios based on an insolvency officeholder having to determine whether the “*source*” of such a right to interest can be said to arise pre or post the Date of Administration. It is much more likely that the legislature intended that a relatively simple determination is to be made that either (1) excludes all interest rates not already accruing on the relevant debt or (2) includes all interest rates capable of applying to the relevant debt.